



Republic of Namibia



THE LAW REFORM AND DEVELOPMENT
COMMISSION OF NAMIBIA
AT 25

A QUARTER CENTURY OF SOCIAL CARPENTRY

Dunia P. Zongwe and Yvonne Dausab
(Editors)

Reviewing, Reforming and Developing Namibia's Legal landscape.

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A QUARTER CENTURY OF SOCIAL CARPENTRY

Edited by

Dunia P Zongwe

and

Yvonne Dausab



Republic of Namibia

**Ministry of Justice
Law Reform and Development Commission**

LRDC - 25 Years Anniversary

P/Bag 13302
Windhoek, Namibia

ISBN: 978-99945-0-099-4

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CHAIRPERSONS OF THE LAW REFORM AND DEVELOPMENT COMMISSION



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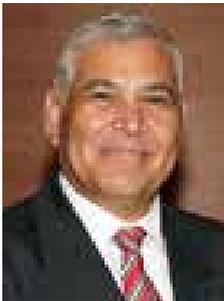
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About the Contributors

As the Chairperson of the LRDC, Ms Dausab is entrusted with the overall management of the Commission's various projects and she is, by virtue of her office, a member of the Cabinet Committee on Legislation. Her mandate also consists of building and maintaining relationships with a cross-section of key stakeholders, including the Office of the President of the Republic, the Minister of Justice, the Office of the Ombudsman, members of Parliament, the University of Namibia (and its Faculty of Law), and the private sector.

Ms Dausab has received accolades for both her many achievements and her active engagement with the legal and wider community. In recognition of her outstanding work in the field of human rights, the Law Society of Namibia awarded Ms Dausab the 2012 Human Rights Excellence Award. For her work in education and training, she was declared country winner for the 2015 Africa's Most Influential Women in Business and Government through the South Africa-based CEO Holdings.

Well known for her great oratory skills, Ms Dausab is a regular feature on national television where she addresses Namibians on matters pertaining to law, justice, human rights, socio-economic and disability rights. Moreover, Ms Dausab served and still serves on several boards, most notable of which are the Board for Legal Education, EBank Limited, the Namibia Qualifications Authority, and the Desert Soul Health and Development Communication.

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At the Ministry of Justice, he serves on the Inter-Ministerial Committee on Human Rights and International Humanitarian Law (IMC). In the same Ministry, he has assisted in drafting and/or compiling the following national human rights reports: Convention Against Torture (CAT); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Social, Economic and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the African Charter on Human and Peoples Rights (ACHPR) as well as the Universal Periodic Review (UPR).

Mr. Harris also works as a Part-Time Lecturer in the Faculty of Law at the UNAM. His academic interests include development of African languages, indigenous people's rights, environmental law and justice, law of the sea, international politics and human rights. He has presented papers on human and linguistic rights at several conferences in Namibia and several of his works have been published in several journals and selected proceedings, notably the National Commission on Research Science and Technology (NCRST).

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In addition, she was awarded a certificate for best second year law student, best in criminal law and best in contract law. Outside the academic realm, Michelle served as the Law Faculty Representative in her third year and, in her final year, as the Speaker of Parliament in the Student Representative Council. She is an avid believer in the potential for growth and development in Africa has, and intends to be a significant contributor to this end.

On the strength of her law background, Michelle is currently working in the legal department of a renowned construction company overseeing legal matters which consists of managing construction contracts and dispute avoidance.

Ms. Munyanduki continues to monitor advances on sustainable mining in Namibia and follows trends in international best practices. She intends to make a serious contribution to the mining discourse in terms of best practices and sustainability.

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He recently graduated from the University of Namibia with a LLB (Honours) degree and is currently enrolled as a Candidate Legal Practitioner at the Justice Training Centre doing his attachment at Engling, Stritter & Partners. His research on the solidarity tax aims to make a significant contribution to the scholarship on wealth taxes.

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She received several awards, such as best overall student, best firm award (gold) and the Ubuntu award for the UNAM Legal Aid Clinic class of 2015. Her career path has been progressing and legal training has allowed her to build a sound knowledge of the legal environment specifically in collateral and companies at large. The exposure that she has been granted through her current position has allowed her to be open minded when encountering collateral state of affairs. A native speaker of Afrikaans, Wallace-McNab also fluently speaks and writes English.

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Ms Weyulu holds a B.Juris and LL.B from the University of Namibia as well as an LLM (*cum laude*) in international trade, business and investment law from the University of the Western Cape. At the Directorate of Law Reform, she is tasked to spearhead the review of the Insolvency Act 24 of 1936 and to make proposals for the creation of security rights over movable assets in Namibia. Ms Weyulu also represents the Law Reform and Development Commission at the annual Insol Africa roundtables and at the working group sessions of the United Nations Commission on International Trade Law on matters that pertain to insolvency. Ms Weyulu has published papers that deal with insolvency law and cross-border insolvency issues in Namibia. Her notable publication is entitled “The Reform of Namibia’s Cross-Border Insolvency Framework” and published by the United Nations Commission on International Trade Law at its 50th Congress.

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He has received several merit scholarships and awards, such as the Human Sciences Research Council (HSRC, South Africa) Certificate of Excellence for Best Presenter (2nd Runner Up) in 2016, the Cornell Institute for African Development fellowship in 2007, and the Law Society of Namibia Prize for Best LL.B. Student in 2007. He was also offered a foreign clerkship at the South African Constitutional Court in 2007.

Zongwe was educated at the University of Namibia, Université de Montréal and Cornell University, where he earned his master's and doctoral degrees in law.

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CHAPTER 1 INTRODUCTION

by

Dunia P Zongwe and Yvonne Dausab

The Jubilee of Law Reform

In celebration of the 25th (Jubilee) anniversary of the Law Reform and Development Commission of Namibia (LRDC), a number of scholars, both budding and experienced, gathered to think through questions that warrant legal and legislative intervention in Namibia. But more importantly, this platform afforded a golden opportunity to reflect on the role of the LRDC as a catalyst for legislative review, reform and development that will ultimately effect change for the benefit of the people. This is something we did through different contributions highlighting various aspects of the law reform and development agenda. In fact, some contributions have provided much needed scope for the LRDC to intervene in areas that require attention but that we did not think about.

This book boasts a rich variety of topics but invariably, given the current socio-economic climate in the country, the balance tipped in favor of business and economic facets of Namibian law. This broad focus is important as the collision between the law and economics has not seen sufficient light in the Namibian literature landscape. It is our fervent hope that this will be a growing trend in the Namibian legal scholarship. Although legal publications are on the increase, books on business or commercial law are scarce. Works like this one aim at encouraging more publications and research on business law that assists in the betterment of the living conditions of all members of our society in Namibia.

Chapter outline

For convenience, we have divided the topics covered in this book in five sections:

- Part I: Transformation and Social Justice
- Part II: Land and Urban Planning
- Part III: Business and Intellectual Property
- Part IV: Finance
- Part V: Mines and Energy

In the first section, issues relating to transformation and social justice set the tone to reaffirm our commitment to issues that affect the ordinary person. The LRDC Chairperson **Yvonne Dausab** (Chapter 2) starts the ball rolling by thinking back to the LRDC's last 25 years while offering a glimpse into how the institution she leads can contribute to effective legislative, policy and institutional reform. More specifically, she ponders on how the LRDC can contribute towards supporting the key pillars of the Harambee Prosperity Plan (HPP) and the National Development Plan 5 to enhance social justice.

Wilhelmina N. Shakela (Chapter 3) reflects on the transformation of the judiciary in Namibia. She zooms in on information technology (IT). In particular, she reflects on how IT can transform – and has transformed – the judiciary. Shakela pleads that, if the constitutional promise of “justice for all” is to be fulfilled, judicial reform efforts must extend beyond speedier justice to the inadequacies of the system. In that regard, IT can play a pivotal function in providing transparency, thereby shedding light on the processes and even irregularities of the judiciary.

Timothy R. Olivier (Chapter 4) touches on sensitive and topical twin issues in the country: the huge income disparity and the ‘solidarity tax’. Namibia’s middle-income status hides one of the world’s highest inequality rates, though it has been decreasing over the years since Independence. The Government has initiated a number of measures to tackle this problem, notably the solidarity tax, which is aimed at evening out huge income inequalities. For Olivier, the key to bridging the income inequality gap lies in the design of fiscal and economic strategies, especially a “hybrid” of universal and targeted delivery of public services.

Shanyanana & Zongwe (Chapter 5) speaks to the participation of women in leadership positions in Namibia. They propose a model for understanding and evaluating women’s participation in leadership in the public sector. While they applaud initiatives such as the 50/50 gender representation adopted in Namibia, they point out that there is still long way to go before the country can at last claim victory in the battle for the meaningful participation of women in public affairs. As part of the solution, they put forth *OmUuntu*, an African philosophy that draws on *Ubuntu* and, most importantly, circumvent the shortcoming of *Ubuntu* in promoting the liberal individualism needed for women’s emancipation.

The first part concludes with something that all Namibians should particularly be concerned about and that is the promotion and protection of rights of persons

with disabilities. **Dausab & Pinkoski** (Chapter 6) take a critical look at a recent decision by the Supreme Court where the court attempted to apply the equality jurisprudence as set out in *Muller* without a proper ventilation of substantive versus formal equality as it pertains to disability rights.

The second section of the book comprises chapters concerning land and urban planning. **Tjirera & Harris** (Chapter 7) demonstrate, in elegant prose, how the colonial design of the urban landscape continues to shape urban affairs in Namibia, notably in preserving socio-economic inequalities. One fascinating fact emerging from their contribution is that, contrary to what most people think, Namibia's capital city Windhoek is legally... not a city.

Joe Lewis's chapter (Chapter 8) deals with the delivery of land to the urban poor. Deploying hard facts and data, Lewis suggests a number of reforms that could be adopted to improve the delivery of land to the urban poor. He urges policy makers to apply their mind to the deficiencies of the current land administration system in Namibia. Particularly, he recommends the reform of the Flexible Land Tenure Act to provide for direct upgrading from landhold to freehold, thus bypassing the existing township establishment procedure that costs so much to low-income residents in Namibia.

The book's third part addresses business and intellectual property. **Cislé S. Jacobs** (Chapter 9) sets the scene for this part with an overview of the legal, institutional and policy framework for the intellectual property in Namibia.

In Chapter 10, **Phillip M. Balhao** talks about intellectual property as it relates to patents. He carries out a comparative study between the patentability requirements in South Africa and in Namibia. This sort of studies comes at the right time given that questions of intellectual property have been given an institutional framework with the fresh establishment of the Business and Intellectual Property Authority (BIPA).

Marvin Awarab (Chapter 11) explores the King III corporate-governance principles and their application to municipalities. Though Awarab's work focuses on the South African situation, he considers the lessons and the applicability of the King III principles with a view to contextualizing them for possible use in Namibia.

When corporations owe more than they own, they go bankrupt. This is what Victoria Weyulu and Chisom Okafor tell us in the next two chapters, which deal

with insolvency. In chapter 12, **Victoria Weyulu** retraces the review of Namibia's main insolvency statute, the Insolvency Act. She spells out the significance of insolvency for the Namibian businesses. Furthermore, she explains that, to bring our old insolvency up to date, the government needs to intervene in four critical areas, namely the insolvency profession, cross-border insolvency, the insolvency of trusts, and set-off provisions.

Chisom Okafor's contribution (Chapter 13) seamlessly flows in a similar vein, except that her unique angle is the insolvency of small and medium enterprises (SMEs). She notes that SMEs are characterized by a special fragility, in part due to their size and limited access to credit. Okafor's main finding is that the current insolvency law regime is inadequate to address the specific problems that SMEs are grappling with in Namibia.

The section that discusses financial issues starts with the piece by **Wallace-McNab & Zongwe**. The duo argues, in Chapter 14, for the adoption of an umbrella legislation to govern matters relating to collateral. They emphasize the role that collateral plays in lending, credit expansion, finance and the economy as a whole. They present the major challenges faced by the country's financial system in regulating collateral and what it means for the ordinary borrower and consumer.

Iyaloo Hamulungu (Chapter 15) assesses Namibia's financial sector and its vulnerability to cybercrimes. Cybercrimes have become a plague, and Namibia has not been spared since cybercrimes know no borders. Hamulungu identifies weaknesses in the country's current legal framework for combating cybercrimes, especially as they affect banking institutions and transactions. She then proposes a series of reforms to strengthen Namibia's legal arsenal against cybercrimes in the banking sector.

Dunia P. Zongwe (Chapter 16) delves into the practical implications of an emerging critical trend in the field of foreign investments. Countries such as South Africa, Namibia, and the Bolivarian states have adopted new investment legislation and measures that challenge conventional wisdom in foreign direct investment. He basically submits that these heavier obligations and measures are going to lead to the under-supply of capital and will undermine the very sustainable-development goals that inspired them in the first place.

Johannes Uusiku (Chapter 17) also canvasses questions relating to foreign investments. Specifically, he engages in the evaluation of Chinese investments in Namibia. He singles out major pros and major cons before coming to a conclusion as to whether, on balance, Namibia benefits from its economic exchanges with the Asian economic giant.

The final section of the book includes studies on mines and energy. **Michelle Munyanduki** (Chapter 18) looks into ways and means of ensuring that Namibia's mining sector satisfies the requirements of sustainable development. She uses the mining firm Rössing as a case study. Partly based on interviews, her chapter observes that corporate social responsibility (CSR) suffers from lack of coordination, strict implementation and monitoring. Hence, the necessity of aligning extractive activities with the demands of sustainable development.

Ileka, Zongwe & Reuther (Chapter 19) examine the problem or the problematic nature of rural electrification by means of hybrid mini-grids. They use Gam and Tsumkwe in the Otjozondjupa region of Namibia as case studies. They find that the management and operation of the mini-grids in those two locations leave much to be desired. They accordingly search for an efficient and durable ownership model that would create the right incentives for the management and operation of the mini-grids.

Acknowledgements

We thank the following persons for their assistance beyond measure in the editing of this book. We owe a deep debt of gratitude to Cislé Jacobs, Vendjihonga Katjaimo and Mr Robert Xamseb for their superb editorial assistance. The same heartfelt thanks go to Chisom Okafor, who provided indispensable administrative support. We also acknowledge the contribution of Leezola R. Green, who took the time to read a few chapters and check footnotes for uniformity. A special word of thanks goes to our intern at the LRDC, Mr Kevin Pinkoski, who edited both numerous chapters and the final draft.

We remain responsible for surviving errors or shortcomings, if any, in this book.

PART I

**TRANSFORMATION AND
SOCIAL JUSTICE**

CHAPTER 2

THE LAW REFORM AND DEVELOPMENT COMMISSION: ITS ROLE AND PLACE IN A CONTINUOUSLY CHANGING SOCIETY

by
Yvonne Dausab

I was 16 years old and living in Katutura in Windhoek when the law that created the Law Reform and Development Commission was passed and its office established. Though still a teenager, I could tell that changing the laws and transforming people's minds would be as long and hard as a poor Black woman trying to settle in a post-apartheid environment.

The meaning and role of law in society are inseparably linked to the review and reform process of law. Law reform is to the health of any legal system what servicing and maintenance are to the durability of a motor vehicle. If you deprive it of law reform, the legal system will eventually break down. It is within the binary of this reality that we should locate the role of the Law Reform and Development Commission (hereinafter the 'Commission' or 'LRDC').

In this chapter, I celebrate 25 years of the Commission. The Law Reform and Development Commission Act 29 of 1991 and the offices of the LRDC embody the position of Chief Justice Berker in the Supreme Court decision of *Attorney General in re Corporal Punishment*.¹ In that case, the learned judge affirmed that the law must become transformative:

[I]n the case of Namibia the former colonial rulers, namely the Government of the Republic of South Africa, during their administration of our country embraced certain ideologies, values and social conventions which were totally unacceptable to the Namibian people, and indeed to the rest of the world. It is therefore inevitable that on independence these ideologies, values and conventions would be discarded by the people and the government of a free and independent Namibia in the light of their experiences under the colonial rule.

It was therefore important that the institutions required to foster an environment conducive to the critical review of the implementation of the law be established.

¹ *Ex parte: Attorney General, in re Corporal Punishment by Organs of State* (SA 14/90) [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991).

1 The key question

As part of these reflections that mark our silver jubilee, one is invariably tempted to ask what our role should be 25 years down the line. Should we maintain the *status quo* or chart new paths? The answer to this question relies on deep insights into law reform more generally and the law reform process specifically. This is no easy task given that the literature on law reform is typically “pragmatic, instrumental and atheoretical”.² In other words, the theory of law reform hates abstract theorizing. For example, the word used to describe the key objects of the Commission suggests a very practical approach to law reform³.

2 The Commission’s historical role

In 1990, Namibians rose from a mandate territory deeply and sharply divided along racial lines. The ugly years of apartheid had left their mark. Apartheid was premised on a policy, legislative and institutional framework that was intrinsically discriminatory. Its effect, scope and application were deeply invasive – a policy designed to polarize Namibians according to the colour of their skin and whose effects we continue to experience 27 years into independence.

Just like the apartheid system used the law to define and divide us, so we should use the same tool to undo the definitions and divisions inherited from that segregationist policy. The text of the new constitution was laced with affirmations that spoke boldly of an independent Namibia that needed to rid itself of the atrocities of the past⁴. The new political dispensation was conscious that it needed to set up a body with the special mission to ensure that the laws on the statute books of Namibia would live up to the language, intent and ethos of a constitutional democracy. This meant prioritizing the principles of constitutionalism, the rule of law, respect for human rights⁵ and collective responsibility. Whether or not we have achieved this mandate sufficiently remains a debate for a different platform.

² Susan M Armstrong, ‘Evaluating Law Reform’ (2006). 10 *The Western Sidney University Law Review*, 157-158.

³ In section 6 the objects are prefixed with words such as ‘repeal, consolidate, codify, integrate, harmonise, enact’, requiring active work on the part of the Commission.

⁴ Preamble of Namibian Constitution: “Whereas we the people of Namibia have finally emerged victorious in our struggle against colonialism, racism and apartheid are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle...”

⁵ Preamble of the Namibian Constitution. “Whereas the rights have for so long been denied to the people of Namibia and whereas we the people of Namibia have finally emerged victorious in our struggle against colonialism, racism and apartheid”.

⁶ Samuel K Amoo and Isabella Skeffers, ‘The Rule of Law in Namibia’ in Nico Horn & Anton Bösl *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia 2009) 17, 20.

The body created to carry out that mission was the Law Reform and Development Commission. The fact that the Commission was established a year after Namibia gained Independence is telling. To be sure, the provisions of the Law Reform and Development Commission Act (the ‘Act’) came into operation 15 July 1992.⁷ The work of the LRDC was happening against the backdrop of independence while the country was putting certain governance structures and systems in place that would negotiate a smooth transition⁸ from a country reeling from the severe traumas of a society creased by racial lines to a country endowed with a responsible government ready to ‘take care of the welfare of its people and move to an environment that caters for the collective good of the nation’⁹.

3 Law, reform and development

One could argue that the new government had an acute awareness that, given our historical context, legal reform and development had to be institutionalised. Indeed, the notions of law, reform, and development are central to a thorough understanding of the LRDC. To start with, the part played by the law in society is sacrosanct:

The law surrounds us. It affects the food we eat, the water we drink, and the air we breathe. It travels with us. It defines our relationship with the people with whom we live, work, and share space. It affects our homes and schools, our offices and stores. The law touches every aspect of our lives and even our deaths¹⁰

When asked to spell out our role as a law reform and development agency, the difficulty is whether, in addition to all the other institutions that are agents¹¹ of legislative and policy reform such as the judiciary and the legislator, there is still a role to play for the LRDC. Also it makes you really question why you reform and for who? Talking to a Commissioner from the Zanzibar Law Review Commission, I was wondering whether their commission could initiate law reform or whether their focus is only on reviewing existing laws without the option of initiating laws.

⁷ Proclamation No 21 of 1992, Commencement of the Law Reform and Development Commission Act, No 29 of 1991.

⁸ Hage G Geingob, *State Formation in Namibia: Promoting Democracy and Good Governance* submitted in accordance with the requirements for the degree of Doctor of Philosophy (University of Leeds 2004) 165 ([However, the occasion of handing over instruments of power to the new government provided for its own procedural, diplomatic and security challenges.)

⁹ L Hangula, Governance in Namibia and the international environment in Hinz *et al*, ‘*The constitution at work, 10 years of Namibian nationhood*’, (UNISA 2002) 66. (No responsible government can operate on an *ad hoc* basis. It needs normative instruments, or policies to guide its work and make it effective).

¹⁰ M H Roffer; *The Law Book: From Hammurabi to the ICC, 250 milestones in the history of law* (Sterling NY 2015) 7.

¹¹ L I Amadhila, Making a Difference’ *Reforming Legislation* (UNAM Press 2012.) 144-146.

Judges and legislatures may argue that, given that the LRDC is not a law maker, it probably does not have the mandate to initiate laws out of its own accord or without the public suggesting such reform and change, because, after all, the people are the intended beneficiaries of any law reform process. These are the debates that rage in one's head as one reflects on what our role should be.

This question is particularly apt because, in many instances, law reform as a concept remains fluid. In the wider sense it is considered as proposals of change to the law, more particularly, change that is beneficial. But, in a narrower sense, it could simply refer to the processes¹² that we have set out for ourselves in order to bring change to the text of the law¹³. But for the LRDC, over the years, law reform meant repairing the damage and healing the wounds of the past, at least on the statute books; and forging ahead with the law as an instrument for economic transformation and social carpentry.

4 Changes at the Commission

The Law Reform and Development Commission Act has since been amended twice¹⁴ to respond to the changing requirements of continuing law review and reform work in the country. The amendments focused on the composition of the Commission and adjustments to the core mandate to make the Commission more effective.

The core mandate of the Commission is set out in section 6 of the Act and is to undertake research in connection with and to examine all branches of the Namibian law and to make recommendations for reform and development of the said law. The activities of the Commission, in terms of the enabling legislation, include:

- (1) the repeal of obsolete or unnecessary enactments;
- (2) the consolidation or the codification of any branch of the law or introduction of other measures aimed at making the law more readily accessible;

¹² Under our Operations Manual for Law Reform, which sets out the work of the Secretariat (Law Reform Directorate), the process is (1) project identification, (2) preparation of issue paper, (3) discussion (4), public workshop (5), comparative work and report, and (6) draft law and submission of report and law to the Minister of Justice. The researchers with guidance from the Commission undertake in-depth social-legal research, consult the public, and prepare reports and draft laws.

¹³ B Opeskin and D Weisbrot, *The Promise of Law Reform* (Federation Press 2005) 3.

¹⁴ Law Reform and Development Amendment Act 4 of 1995 (GG 1036) and the Law Reform and Development Act 2 of 2004 (GG3238), respectively.

- (3) the integration or harmonization of the customary law with the common and statutory law;
- (4) new or more effective procedures for the administration of the law and the dispensing of justice; and
- (5) the enactment of laws to enhance respect for human rights enshrined in the Namibian Constitution or to ensure compliance with international legal obligations.

Since 1991, the Commission has undergone significant changes, both structurally and substantively as an institution. For instance, until about 11 years ago, the position of the Chairperson was not full-time¹⁵, and so the work of the Commission was undertaken by eminent persons¹⁶ that held the position part-time and those that were not Commissioners served on s 10(1) working committees sharing their expertise in various areas. The Commissioners were often human rights and political activists that gave their time generously and provided much-needed insights as to which laws required immediate reforms.

5 The current work of the Commission

The nature and content of the laws that make up both the earliest and most notable work of the Commission is a fair reflection of this carefully considered approach to governance in general but more specifically to designing healthy policy, legal and institutional arrangements that meet the needs of a nation emerging from colonialism, racism and apartheid.

The passing of the Married Persons Equality Act 1 of 1996,¹⁷ the Combating of Domestic Violence Act 4 of 2003¹⁸, the Combating of Rape Act 8 of 2000¹⁹, the

¹⁵ Under section 3(3) (a), the Chairperson of the Commission holds office and performs his or her functions under this Act in a full-time capacity. Moreover, section 3(3) (b) forbids the Chairperson from holding, or engaging in, any other remunerative or occupation while serving on the Commission.

¹⁶ Over the years the LRDC was graced with eminent personalities such as: the late Mr Justice Levy, Supreme Court Judge, Dave Smuts, Special Advisor to the Minister of Poverty Eradication and Social Welfare, Ms Bience Gawanas, Special Advisor to the Minister of Labour, Industrial Relations and Employment Creation, Mrs Vicki ya Toivo, Mrs Dianne Hubbard, Legal Assistance Centre, Mr Andreas Vaatz, Adv H Ruppel, (AG at the time), late JP Kauraihe, late FJ Kozonguizi (Ombudsman at the time), Mr John Walters, current Ombudsman to mention a few.

¹⁷ LRDC 1: Aspects of Family Law: The Abolition of Marital Power and Equalisation of Rights between Spouses.

¹⁸ LRDC 7: Violence Against and Abuse of Women and Children Project: Formal Addresses made at the National Hearing-May 1997; LRDC 8: Violence Against and Abuse of Women and Children Project: Verbatim Discussions held at the National Hearing- May 1997; LRDC 9: Domestic Violence Case reported to the Namibian Police- Case Characteristics and Police Responses; LRDC 10: Report on Domestic Violence.

¹⁹ LRDC 4: Report on the Law Pertaining to Rape.

Maintenance Act 9 of 2003²⁰ are all notable successes. The issues resolved through these pieces of legislation drive the point that Namibia was a nation that needed to answer the loud calls of its people - particularly those who were disproportionately hurt by the effects of the apartheid regime. Issues of women rights, equality, access to employment opportunities and equal access to education were at the forefront of the debates that in part informed the programme of the LRDC at its inception.

Over the years, the LRDC published over 30 reports.²¹ In the eyes of some in the public, this may seem too few for a commission that has been in existence for a quarter century. In fact, mathematically, this productivity level translates into one report per year. But if one takes into account the various processes that the LRDC has to undergo to make sure that its reports and work are imbued with credibility, rigor, quality and utility, worth mentioning in judgments and academic writings, then producing one or, at most, two reports with attendant draft laws is not bad²². The bigger question is, of course, given that we are not law makers and we only act in an advisory capacity to the Minister of Justice and the Attorney General, should we do more to see more of our reports presented to Parliament, more laws passed, and more lives changed as a result? The debate whether law reform agencies should play a more active role in the post-report submission process has been ongoing among various agencies across the world²³. Under section 9(3) of the LRDC Act, the Minister of Justice is under an obligation, once a report is submitted, to present it to the National Assembly. The relationship that the Commission, in particular the Chairperson, has with the Minister is therefore very important. It is a catalyst for effective reform.

We are happy to state that, of the 25 reports and draft laws, at least 10 of them have led to the enactment of various laws. Apart from the ones mentioned above, the project on Rape also led to the promulgation of the Combating of Immoral Practices Amendment Act 7 of 2000 while the Electoral Laws Reform

²⁰ LRDC 5: Report on Maintenance.

²¹ Some examples of our reports produced over the past 25 years pertain to: LRDC 3: Customary Law and the Constitution, LRDC 6: Report on Small Claims Courts; LRDC 13: Report on Divorce; LRDC 14: Report on Public Gatherings; LRDC 18:

Further Report on Rape; LRDC 19: Electoral Law Reform Project: Revision and Reform of the Namibian Electoral Act 24 of 1992; LRDC 21: Urgent and Targeted Report on Fisheries; LRDC 24: Working Paper on Issues Related to the Criminal Procedure Act 25 of 2004; LRDC 25: Report on the Repeal of Obsolete Laws Project; LRDC 27: *Locus Standi*-Discussion Paper; LRDC 29: Consumer Protection Discussion Paper; LRDC 30: Discussion Paper on the Transformation of the Polytechnic of Namibia into the Namibia University of Science and Technology; LRDC 32: Discussion Paper on Issues Relating to the Insolvency Act 24 of 1936.

²² See T Namiseb, LRDC Operations Manual, p ii. "Law Reform is a slow and in-depth process which includes legal and socio-legal research, consultations, conducting surveys, workshops and drafting reports and draft bills. There are distinct stages in the research process which must be followed by researchers in order to ensure quality products."

²³ See Opeskin & Weisbrot, pp 228-229(Achieving the Result).

Projects produced the third amendment to the Namibian Constitution²⁴ and the Electoral Act 5 of 2014. And, since the new commission took office in August 2015, there has been an attempt to have three pieces of legislation pass into law.²⁵

The current Commission members for the period 3 August 2015 to 3 August 2018 consist of Mrs Felicity Owoses-Goagoseb(Legislative Drafting), John Walters(Ombudsman), Ms Lineekela Usebiu (UNAM Faculty of Law), Mrs Adrie van der Merwe (Law Society of Namibia), Mr Unanisa Hengari (Namibia Law Association), Mr Dennis Khama and Silas Shakumu (section 3(1) (f) appointments)

6 The future mandate of the Commission

My vision of the future work of the Commission rests on four pillars:²⁶ (1) laws developed in line with the values and principles set out in the Namibian Constitution; (2) laws responsive to the changing needs of the Namibian people; (3) laws in compliance with our international obligations, and (4) meaningful public consultations. These pillars are anchored on (1) reform that contributes to the improvement of socio-economic conditions, (2) engagement on issues of public concern such as road safety, (3) active and fruitful collaboration with stakeholders on various issues affecting their industries and beneficiaries, and (4) tackling the situation of persons with disabilities and supporting activities set out in the Harambee Prosperity Plan and National Development Plans through transformative law reform.

Before I flesh out my vision of the Commission's future mandate, I would like to pause and reflect on why the LRDC has had success. First, it is important to acknowledge our relationship with foreign law reform commissions, such as the Association of Law Reform Agencies in East and Southern Africa (ALRAESA) and the Commonwealth Association of Law Reform Agencies (CALRAS). More generally, law reform agencies in Africa have shown a clear willingness to be part of the various perspectives we have on law making and the role of an independent judiciary.

²⁴ Namibian Constitution Third Amendment Act 8 of 2014.

²⁵ LRDC 34: Report on the Domestication of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; LRDC 35: Report on the Uniform Default Matrimonial Property Consequences of Certain Civil Marriages (Repeal of Native Administration Proclamation 15 of 1928), LRDC 36: Report on Divorce.

²⁶ There is currently a proposal for an amendment to the LRDC Act to reflect these pillars as objects of the Commission- see proposed draft Amendment bill 2017.

It has also been an important learning curve for us, as we continue to be part of the collective debates on the need for continued responsiveness of law reform agencies.

Second, is our increasing need to interact with our contingent of academics and social scientists and incorporate their views and findings into our review and reform processes. This is particularly important as these issues affect us as a nation. It is thought-provoking and leads us, as a law reform agency, to reflect on whether we are actually doing what we set ourselves to do as activists, lawyers, judges, academics, researchers, policy makers and law reformers. It is these close relationships, and their development, that will shape the future of the work of the Law Reform and Development Commission. Section 10 of the Act makes provision for working committees. This provides scope for members of the public and particularly those in academia and various industries to participate and share their expertise with the Commission.²⁷

Third, is all our connections in Namibia. It is a recognition of the important work any law reform agency does to forge strong connections within the country. It is a sign of acceptance that law is authoritative, justified and legitimate, and that our recommendations are valued by our country. Specifically, it has been asserted that people have accepted the authority of the law and therefore have a duty to comply with what the law demands even in the face of disagreement and uneasiness²⁸. The law actually dictates to us what counts and what does not. Some scholars may argue differently, but for the purposes of this book, I want to make the proposition that we accept law as the authority that is rooted in principles of justice, fairness and reasonableness²⁹. It is the authority that we accept in a

²⁷ See remarks by Yvonne Dausab, Chairperson LRDC at gala dinner of Southern African Law Teachers Conference, 20/1/2017, Swakopmund, Namibia (I acutely understand the relationship that a reform agency such as ours should have with law teachers in particular and academia in general. It has become trite practice that all policy and legislative reform should be informed by research and data. So much so that we are constantly reminded of the need for evidence based reform).

²⁸ MH Roffer, *The Law Book* (Sterling, New York 2015) 26. The trial of Socrates: He stood accused of 'impiety', failing to recognize the Athenian gods, introducing new deities, corrupting the youth, and endangering the state". He was found guilty and sentenced to... "death but offered the alternative of exile, which he rejected, not wanting to live a life other than what he had chosen". He acknowledged there were "ways of escaping death, if a man is willing to say and do anything" But for him, the issue was "not to avoid death, but to avoid unrighteousness". It is clear that "his last act was obedience to the laws of the state that governed him despite his disagreement with them".

²⁹ Samuel K Amoo, *An Introduction to Namibian law: Materials and Cases* (Macmillan Education Namibia 2008) 1 (...law may simply be defined as that body of rules and regulations(or norms) that govern and regulate the conduct and behavior of the individual in the society for the preservation of order in the society). Also see F Du Bois, *Wille's principles of South African Law* (Juta & Co, Claremont, 2007) 4-6 (The law claims therefore that people have the duty to comply with this demand, a duty to act on the basis of legal stipulations simply because they are legal).

constitutional democracy. Because of a supreme constitution based on the rule of law³⁰, we have no choice but to willingly succumb to developing, reviewing and reforming laws in a manner that is constitutionally sound and acceptable and that “mirrors and reflects the society of which it is part”³¹.

Every year, the legal profession gets an opportunity to reflect on their successes, challenges and lessons learned for improvement. That platform is the High Court’s annual flagship event called the “Opening of the Legal Year.” In 2016, whilst he was almost a year in office, the President of the Republic of Namibia, Dr Hage Geingob said the following when he was talking about the role of law and lawyers:

The role of law must change if not already. Contributing to socio- economic development cannot only be a purview for political, economic and social scientists. Law that has the backing of a much acclaimed constitution, like ours, must be transformative. The people of this country must come to lawyers not only to seek justice for individual matters but must come to lawyers to change the landscape of their socio-economic conditions.

This is how we should see the future role of the Commission. Dedication to changing the situation of our people with disabilities, by making the text of the law stronger for better protection, introducing a project on assessing whether existing laws on development are sufficient to enhance the socio-economic landscape in the country, or consolidating the enforcement mechanisms in various existing laws on road safety, to name but a few. So the statement by the President re-affirms the LRDC’s key object of developing the law and making it accessible in a manner that is transformative.

The Commission must understand its historical context but must be sensitive to a post-democratic dispensation in which the state finds itself at a crossroad of consolidating political freedom whilst seeking avenues for economic emancipation of its people. The New Equitable Economic Empowerment Bill (NEEEF) is an attempt to address the glaring inequalities our society grapples with, in the face of a mixed economy³² skewed and primarily anchored in capitalism. Elsewhere, scholars argue that law reform agencies must remain non-partisan and non-political in order to be seen as credible and independent.

³⁰ Horn & Bösl *Human Rights and the Rule of Law*(Macmillan Namibia, 2008) 9, Chief Justice, Shivute said: “It is, however, uncontroversial that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and transparent government”

³¹ L B Curzon, *Basic Law* (M& E handbooks1978) 4.

³² Article 98 established principles of economic order and states: ‘ the economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. Also see J S Amupanda ‘Constitutional Principles of “Mixed Economy” and the Triumph of Neo Liberalism in Namibia’ in N Horn and M O Hinz. *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* (KAS Namibia 2017) 183-188.

But this should never be at the expense of raising fundamental issues of discontent, through the public consultation process that law reform agencies are well endowed with and well known for. The true ambition of law reform is to find opportunities to examine citizens' assumptions about what they expect of their law, engage in dialogues about where and why their expectations may be unrealistic, and involve them in the mammoth task of building a more just society.³³ This consultative process is what sets us apart from the various agencies of change in the country.

³³ Roderick A. Macdonald, 'Law Reform for Dummies (3rd Edition)' (2014) 51 Osgoode Hall Law Journal 859.

CHAPTER 3

TRANSFORMING THE JUDICIARY: THE ADOPTION OF E-JUSTICE IN NAMIBIA

by
Wilhelmina N Shakela

“No significant institution has been left untouched by modern technology - with the possible exception of the courts.... Now all that is changing.... (Yet) there is much to be done.”¹

1 Introduction

At the core of the Namibian judiciary’s mandate is to enhance access to justice and efficiently dispense justice. A variety of solutions have been adopted by the judiciary, both technological and managerial, in order to meet the aforementioned mandate. The judiciary has pursued a variety of information and communications technology (ICT) approaches, the most recent being the implementation of the e-Justice system in the Namibian High Court Main Division.

This chapter seeks to determine whether ICT innovations adopted contribute in any manner to the achievement of the judiciary’s mandate of access and efficiency. In the end, it answers this question in the affirmative. Therefore, this chapter also explores the extent to which different information technology techniques implemented by the judiciary contributed to fulfilling its mandate.

In the following lines, this chapter will briefly lay a foundation for the problem that led to the study – that Namibia, like most countries, is dealing with a backlog in its courts. In addition, it will endeavour to determine whether or not there is a link between the current court structure and judicial backlogs. The chapter will explain the ICT revolution in the Namibian judiciary and how their functionalities have assisted in reducing backlogs.

¹ Brian Forst, “Overburdened courts and underutilized information technology: a modern prescription for a chronic disorder” (1984) *Judicature* Volume 68 Number 1 June - July.

2 Background

“The public expects a judicial process that is affordable, transparent, accessible, fair, impartial and easy to understand; and one that dispenses justice reasonably speedily.”

Around the world judiciaries are faced with new problems.² The Namibian judiciary is no exception, as the demand for court decisions has considerably increased due to a multiplicity of factors. These include, in no small measure, a combination of new legislation coming on the statute books as the nation grapples with the needs of a developing nation and the necessity to keep pace with the challenges thrown up by increasingly sophisticated and globalised criminal behaviour.³

These factors have inevitably led to the increased workload for Namibian courts. The unavoidable result of this is case backlog. The detrimental effect of this phenomenon is that it increases a general belief amongst the public that justice is not speedily dispensed in Namibia. All that is in itself an impediment to real access to justice in the country. This situation necessitated the adoption of mechanisms aimed at judicial reform in order to facilitate the achievement of the Namibian Judicial mandate.

As Chief Justice Peter Shivute stated,⁴

“we need to be flexible in our approach and develop a strong vision to take bold forward-looking initiatives that are needed to bring real benefits to our people at the judicial level. It is my firm conviction that judicial reform is the way to go and there can be no going back on this resolve.”

² Reiling Dory, *Technology for Justice: How Information Technology can support Judicial Reform* (Netherlands: Leiden University Press 2009) 15.

³ Hon. Justice Petrus Damaseb, ‘Promoting Access to Justice in the High Court of Namibia: The Case for Judicial Case Management’ First Report. This is a Report in respect of the Judge President’s Familiarization tour undertaken on 02 – 16 May 2010. (2010) <<http://www.superiorcourts.org.na/high%5Cdocs%5Cfamiliarization%20tour%20%20to%2014%20may%202010%20for%20website%20publicatio.pdf>>.

⁴ Hon. Mr Justice Petrus Damaseb, E. P. T, ‘Report on the Stakeholders Conference: Promoting Access to Justice in the High Court of Namibia: The Case for Judicial Case Management’ (2010) <www.ejustice.moj.nam>

The judiciary has endeavoured to engineer a framework that meets the expectations of its diverse population. It is against this backdrop that the judiciary adopted the e-Justice system. E-justice is the use of Internet technology in handling various administrative procedures during the administration of justice. It provides a host of possibilities throughout the legal process, including lobbying through to the provision of remote authoritative legal information.⁵ A variety of IT functionalities have long been used in court for different purposes. ICT opens up a myriad of opportunities; however, these must be legitimized by the law.

There is a clear consensus about the important impact of technology on the accessibility, operations, budgeting, and management of legal systems.⁶ The primary purpose of this chapter is to explore the role and impact of ICT in case management and judicial administration. The study aims to show all stakeholders that implementing the e-justice system is the key to streamlining and expediting justice. In addition, improved administration of justice means better compliance with the ideals of the human rights conventions.⁷

This chapter will argue that the adoption of the electronic justice system is a justifiable governmental expense. The e-Justice system optimises efficiency in the case management. The consequences of this will in turn reduce case backlogs, thereby facilitating access to justice, reducing the cost of justice, and offer new sources of services and better revenues.

It should be noted that the e-Justice system is still at infancy stage, therefore it might not be possible to get the diagnostic statistics necessary to determine performativity of the system. In the meantime, we must examine the system operations in order to be able to tell if the system has a chance of delivering.

Dory Reiling insists that improving the understanding of how information technology works can improve the administration of justice. In turn, this can resolve the major problems judiciaries face and is a deserving undertaking. He also found that it has profoundly changed the way large parts of humanity interact and communicate.

⁵ Andreas Neocleous, 'E-Justice' (2011) <<https://www.neocleous.com/publications/download/e-justice-pdf.pdf>> accessed on 29 September 2016.

⁶ Richard Zorza and Donald J Horowitz Zorza, 'The Washington State Access to Justice Technology Principles: A Perspective for Justice System Professionals' (2006) *The Justice System Journal*, Vol 27. No. 3 Technology & Courts <<http://www.jstor.org/stable/27977301>> last accessed on 09 December 2015

⁷ Dory Reiling, 'Doing Justice with Information Technology' (2006) *Information & Communications. Technology Law* Vol. 15, No. 2. 190 – 200.

IT has increased accuracy. It has made information infinitely more available. It has facilitated communication across the globe. It is attractive because it implies the promise of things becoming better and easier. He found that IT can support improving the problems of delay, access and integrity in courts and judiciaries.⁸

IT can indeed be used to enhance efficiency, access, timeliness, transparency and accountability, helping the judiciaries to provide adequate services.⁹ Implementing e-justice is important because it will enable the government to connect all Namibian courts electronically, to exchange information about cases.¹⁰ But still, data must be fairly and lawfully processed for limited purposes. Data should be processed in accordance with individuals' rights¹¹

While a significant amount of academic and policy studies have been carried out on how to best evaluate public sector projects, there has not been any detailed focus on the judiciary system as a stand-alone topic, with specific focus on Namibia. 3 What are court backlogs?

A backlog may be defined as those cases pending that exceed (i.e., are older than) the time goals applicable to that category of case.¹² Before turning to the focus of this chapter, let us briefly examine the backlog problem.

⁸ Reiling Dory, *Technology for Justice: How Information Technology can support Judicial Reform* (Netherlands: Leiden University Press 2009) 16.

⁹ Pere Fabra i Abat, Agustí Cerrillo i Martínez Abat, *E-Justice: Using Information Communication Technologies in the Court System* (Spain: IGI Global 2008).

¹⁰ Barry Walsh, 'E-Justice Projects – Distinguishing Myths from Realities' (2011) <www.iijusticia.org/docs/Barry.pdf> accessed 23 May 2016

¹¹ Subhash Bhatnagar, *Unlocking E-Government Potential* (New Delhi, India: Sage Publications 2009) 106.

One rainy evening, in the suburbs of the high class Kleine Kuppe in the Namibian capital, Mr. Shadipamwe and Mrs. Ndapeya were drinking tea in front of their veranda. Suddenly, Mr. Salam came into their house. Mr. Salam was the previous lover of Mrs. Ndapeya. Without any warning, he shot Mr. Shadipamwe, Mr. Shadipamwe died on the spot. After that, Mrs. Ndapeya submitted a case to the Police station. Time passed, but the case never made it to the courts of the land. After 10 years Mrs. Ndapeya died in a road accident and her case file was closed. Mrs. Ndapeya was unable to get the justice from the court because the court is already dealing with so many cases. This is a simplified manifestation of judicial case backlog.¹³

Backlog means an accumulation of tasks and cases to be handled. It is things piling up without getting done. Delay is what court users experience when their cases do not get handled in a reasonable amount of time; the courts experience backlog when they do not process cases at the same rate as they are filed.¹⁴ Although delay is in some instance unavoidable, courts can improve by being in control and embedding in procedures rules and modern case-management practices.

It has been suggested that there is a saturation point beyond which a judge cannot handle additional cases.¹⁵ To that end, the Namibian Magistrate Commission constructed a number of magistrates' courts in various magisterial districts.¹⁶

No degree of substantive law improvement — even world 'best practice' substantive law — will bring the rule of law to a country without effective enforcement.¹⁷

¹² New Zealand Ministry of Foreign Affairs and Trade prepared by Jennifer Ehmann *Pacific Judicial Development Programme: Reducing Backlog and Delay Toolkit* <<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/PJDP-Time-Standards-Toolkit.pdf> April 2015> 8.

¹³ 'Supreme Judiciary and The Backlog of Cases' <<http://www.lawteacher.net/free-law-essays/constitutional-law/supreme-judiciary-and-the-backlog-of-cases-constitutional-law-essay.php>> accessed on 20 August 2016. The names of the parties have been changed to a local language.

¹⁴ Reiling Dory, *Technology for Justice: How Information Technology can support Judicial Reform* (Netherlands: Leiden University Press 2009) 86.

¹⁵ Maria Dakolias 'Court Performance Around the World: A Comparative Perspective' (2014) *Yale Human Rights and Development Law Journal* Volume 2 (Issue no. 1) 102.

¹⁶ Roland Routh 'More magistrates to be appointed' *New Era* (Windhoek, February 11, 2015).

A reasonable time to resolve disputes is indeed one of the fundamental principles enshrined in Article 12 of the Namibian Constitution. The reasonable-time clause means that each judiciary should have timely case-processing – an objective that has to be pursued through the development of tools, policies, procedures, and actions by decision makers, court personnel, lawyers, and parties.¹⁸

A widespread challenge that the Namibian judiciary faces in the Namibian legal system is the delay in the conclusion of both civil and criminal trials, largely attributed to saturated court rolls. The slow pace at which the justice system is working is not only undermining trust in the system, but also taking a toll on the people who expect the courts to deliver justice to them. It inevitably affects the public perception of the courts and causes citizens to lose trust if they see a court is functioning too slowly or unpredictably. This loss of public trust has obvious significant consequences, such as unrest in the community if disputes remain unresolved because the public may perceive the courts as blocking and impeding justice.¹⁹

Courts are expected and obliged to deal with cases in a reasonable time and to conduct a fair trial in those cases that proceed to hearing. These obligations apply to the pre-trial and trial stages and up to the delivery of the final written judgement.²⁰

Additionally, prompt legal certainty is required for an economy to prosper.²¹ Currently, Namibia is ranked 101st in the ease of doing business, it is ranked 103rd for enforcing contracts and 97th for resolving insolvency globally.²² These rankings illustrate the contribution that the legal sector makes to the overall national competitiveness of our country.

Delay in the ability of the court to resolve business disputes can, therefore, have a negative impact on the degree to which business people are prepared to invest and carry out business. This is recognized in the World Bank Doing Business rankings,

¹⁷ Kenneth Dam 'The Judiciary and Economic Development' (2006) John M. Olin Law & Economics working paper no. 287 (2D series) <<http://www.law.uchicago.edu/Lawecon/index.html>> accessed on 08 October 2016.

¹⁸ Philip Langbroek, Matthew Kleiman 'Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe, Two Comparative Inquiries: Lot 3: Analysis of Backlog Reduction Programmes and Case Weighting Systems' Final Report (Regional Cooperation Council 2016) 17. The document was prepared and developed in cooperation between Regional Cooperation Council and European Centre for Dispute Resolution (ECDR).

¹⁹ Kenneth Dam 'The Judiciary and Economic Development' (2006) John M. Olin Law & Economics working paper no. 287 (2D series) <<http://www.law.uchicago.edu/Lawecon/index.html>> accessed on 08 October 2016.

²⁰ New Zealand Ministry of Foreign Affairs and Trade prepared by Jennifer Ehmann *Pacific Judicial Development Programme: Reducing Backlog and Delay Toolkit* <<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/PJDP-Time-Standards-Toolkit.pdf> April 2015> 1.

²¹ World Bank Group 'Doing Business: Measuring Regulations' <<http://www.doingbusiness.org/data/exploreeconomies/namibia>> accessed on 11 October 2016.

²² *ibid.*

which measure the ease of doing business in regulatory environments globally, including Namibia.

Two out of ten indicators in the World Bank Doing Business rankings relate to the time it takes court to resolve contractual disputes and insolvency matters. Inconsistencies in decision-making, along with courts being saddled with large case backlogs, contribute to the erosion of individual and property rights, stifling private sector growth, and, in some cases, even violating human rights.

In addition, the excessive length of judicial proceedings causes additional costs for litigants, witnesses, and victims, as well as for defendants, who have the right to have prompt decisions on the charges against them. Excessive length impedes proper access to justice, in particular for the weaker parties, while it gives an unfair advantage to the stronger or wealthier party, which can better support long proceedings and therefore can force a settlement or the abandonment of legal action by the opposing party.²³

The costs of long of judicial proceedings are also very high for the administration of justice and thus for the taxpayers. The inefficient use of resources, which is quite often one of the causes of the backlog, and hence the possibility of seeking state compensation for the excessive length of the court proceedings are additional costs that would be much better invested in improving the functioning of the court.²⁴

Judicial backlogs bar the reconciliation of all the requirements contributing to a fair trial, with a careful balance between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and a concern for prompt justice.

²³ Philip Langbroek, Matthew Kleiman 'Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe, Two Comparative Inquiries: Lot 3: Analysis of Backlog Reduction Programmes and Case Weighting Systems' Final Report (Regional Cooperation Council 2016) 8. The document was prepared and developed in cooperation between Regional Cooperation Council and European Centre for Dispute Resolution (ECDR).

²⁴ *ibid.*, 8-9.

It is for the aforementioned reasons that most judiciaries have undertaken initiatives aimed at redressing inherent weaknesses in their judicial systems, which include backlog of cases. Among such initiatives are institutional reforms and re-structuring.²⁵

3 The relevant Namibian court structure and court backlogs

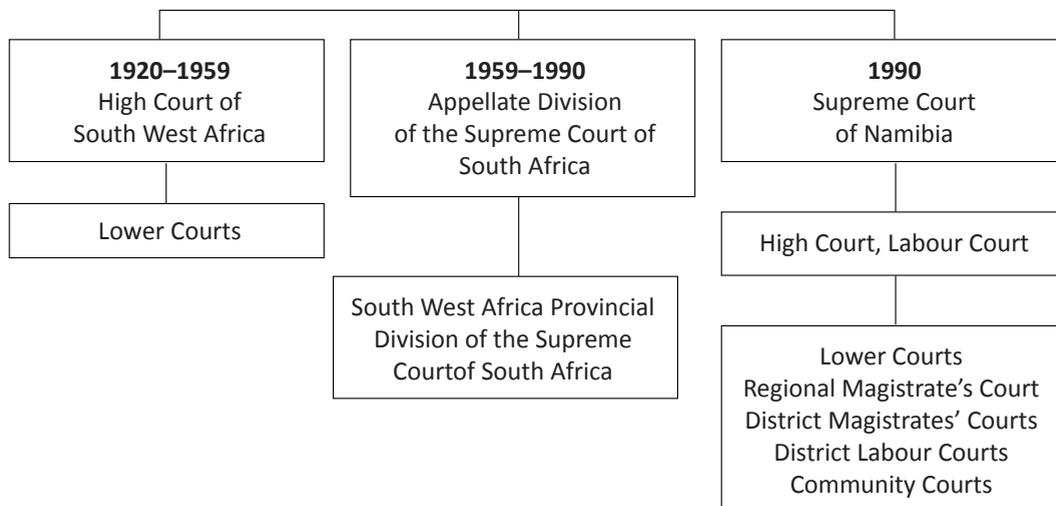
It is crucial that overviews of the judicial-system components relevant to this study are discussed. Namibia, like all civilised societies, has a structured judicial system that ensures that justice prevails.

The weaknesses of the judicial structure that contribute to the judicial backlog phenomenon need to be clearly understood before proceeding. Backlogs exist in all types of courts, at all stages in the court process, and at all levels of the judicial system.

It is important to note that the courts mentioned herein have limited competencies. Furthermore, Namibia does not have several specialised courts to deal with specific issues like a permanently sitting competition tribunal. The administration of justice is therefore in most cases limited to the court structures mentioned below.

²⁵ The Hon Shivute, P. Report on The Stakeholders Conference Promoting Access to Justice in the High Court of Namibia: The Case for Judicial Case Management, held at Midgard country estate, 8-9 October 2010 2nd Report High Court of Namibia, Final report Midgard 2010

Article 78 of the Constitution refers to the judicial power in Namibia, which is comprised of the Supreme Court, the High Court, and the lower courts (see diagram²⁶ below):



The Supreme Court is the highest national forum of appeal.²⁷ A matter cannot be directly taken to the Supreme Court without exhausting lower court remedies, i.e., courts of first instance. The Supreme court is usually the court of last resort, and, as such, presumably does not per se particularly experience judicial backlog, not directly anyway.

The High Court is a superior court of record and its jurisdiction is provided for by both the Constitution and the High Court Act. The High Court consists of the Judge-President and as many judges appointed by the President of the Republic on the recommendation of the independent Judicial Service Commission (JSC).²⁸ There are currently 12 sitting judges of the High Court.

²⁶ The diagram above was adapted from Samuel K Amoo, The structure of the Namibian judicial system and its relevance for an independent judiciary. (2008) <www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/amoo.pdf> accessed on 22 June 2016.

²⁷ Constitution of the Republic of Namibia Act 1990, article 79(2) of the Namibian Constitution read in with the Supreme Court Act 15 of 1990, section 14(1) Appellate jurisdiction of Supreme Court.

²⁸ Constitution of the Republic of Namibia Act 1990, article 80(2).

The High Court also exercises admiralty jurisdiction and, when hearing labour matters, it does so as the Labour Court.²⁹ The financial jurisdiction of the High Court is limited in terms of minimum amounts of money in matters of first instance, but there is no ceiling as to the amount that can be brought in front of the court.³⁰

In terms of Article 78 of the Constitution, the lower Courts form part of the judiciary. The bulk of the judiciary's work also takes place in the lower courts. There are 32 permanent courts and more than 30 periodical courts in Namibia.³¹

The Namibian court system retains Roman-Dutch elements inherited from South Africa, along with elements of the African traditional (community) court system.³² Traditional courts (or community courts) are society-focused courts that apply a customary problem-solving approach to local disputes, crimes and safety concerns.

These courts are recognized under section 2 and established under section 4 of the Community Courts Act,³³ paying cognizance of the fact that this Act is still in the process of establishment by the Ministry of Justice.³⁴

Despite the fact that the recognition and establishment of community courts have been provided in the Act, they are yet to be formalized. Traditional courts still form an important part of the administration of justice in Namibia.

As aforementioned, lower courts shoulder the heaviest burden of judicial backlogs in Namibia. Logically, first instance courts have a tendency to be more congested than higher level courts. Namibia only has two High Courts, hence, presumably majority of the people in the Northern parts of the country institute claims in the much more accessible lower courts. It is doubtless that such a situation leads to clogs within the justice system at lower courts and inevitable delay.

Although delays are in some instances unavoidable, courts can improve by being in control and embedding in procedures, rules and modern day case management practices. It has been suggested that there is a saturation point beyond which

²⁹ High Court Report. 30 June 2012. Volume 1, Issue 1 (2012) <<http://www.ejustice.moj.na>> accessed on 04 October 2016.

³⁰ Oliver Ruppel & Lotta Ambunda, *The Justice Sector and the Rule of Law in Namibia* (Namibia Institute for Democracy Human Rights and Documentation Centre 2010).

³¹ The Ministry of Justice Annual Report 2006 – 2007 <www.justice.gov.na/just/publications/annual_report_06_07.pdf> accessed on 10 October 2016.

³² Lotta N Ambunda and Willard T Mugadza (eds), 'Children's Rights in Namibia' *The protection of children's rights in Namibia: Law and policy*, (Windhoek: Konrad Adenauer Stiftung 2009).

³³ Community Courts Act 10 of 2003

³⁴ Although in force, the Act has not yet been implemented. See Manfred O Hinz 'Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice' (2008) <http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/hinz.pdf> accessed 23 May 23, 2017.

a judge cannot handle additional cases.³⁵ To that end, the Namibian Magistrate Commission controls the number of magistrates in each magisterial district.³⁶

Long term solutions are not the most pressing when it comes to addressing the current backlogs, but those short-term solutions should be a priority especially in view of the acute shortage of courtrooms and personnel to effectively dispense justice. Judge Elton Hoff once proposed that the Criminal Procedure Act be amended to deal with traffic offences. He said that the amendment will have the effect that an offender may pay an admission of guilt fine at the clerk of the court hence the need to appear before a magistrate will be eradicated, freeing up more time to deal with serious cases.³⁷

5 The ICT revolution within the Namibian judiciary

In this contemporary world, the use of ICT is one of the key elements that significantly improves the administration of justice³⁸, reduces judicial backlogs and enhances access to justice.

The early debut of information technology systems was perceptibly computerised. Computers are a natural partner to a well-constructed court management system because they operate only on given instructions and perform functions according to those instructions routinely. They form the basis for a rational organizational structure providing a degree of efficiency which cannot be attained by manual operations.³⁹

From the observations and interactions the author has had with the Namibian judiciary, the court administrators and personnel make use of very basic information technology in the court for their daily activities.

³⁵ Maria Dakolias 'Court Performance Around the World: A Comparative Perspective' (2014) Yale Human Rights and Development Law Journal Volume 2 (Issue no. 1) 102.

³⁶ Roland Routh 'More magistrates to be appointed' *New Era* (Windhoek, February 11, 2015).

³⁷ *ibid.*

³⁸ Marco Velicogna, 'Justice Systems and ICT: What can be learned from Europe?' (2005) *Utrecht Law Review*, Volume 3, (Issue no.1) 129.

³⁹ Wesley LaBar, 'The Modernization of Court functions: A Review of Court Management and Computer Technology', 106 <http://www.heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/rutcomt5§ion=9> accessed on 04 October 2016.

In the High Court and the Supreme Court, each word said during the proceedings is recorded on a transcription machine. After the court session, a transcription company outsourced by the Directorate types up the record and makes it available to the litigants and the public, at a cost.

All Supreme Court judgments are transcribed, but High Court cases are only printed if they are in the public interest.⁴⁰ The rest are typed at the request of any interested party.⁴¹ In any event, the Superior Courts judgements are made available online via the e-Justice website.

Before the implementation of the e-Justice system, all civil processes were made only on paper, this remains so for criminal processes which are only made on paper. For example, in a civil action, a party must type and hand deliver summons to court for issuance by the Registrar.

Thereafter, the Deputy Sherriff of that particular court then ensures delivery of copies of issued summonses to affected parties by hand. There is very little statistical data depicting the revolution of information technology in the Namibian courts.

6 The adoption of e-Justice in the Namibian High Court

In the performance agreement entered into between the Government of the Republic of Namibia, on one side, and the Ministry of Justice (MoJ), on the other side, the Ministry has, as part of its core mandate, undertaken to improve service delivery.⁴² This is one of its core objectives, constituting 35% according to the Minister's Annual Performance Agreement Matrix.⁴³

Furthermore, one may ask, why would the judiciary want to move forward with ICT whilst their business is law and adjudication? The answer is inline with the goals of the Harambee Prosperity Plan (HPP). The inclusion of ICT as an integrated

⁴⁰ Please take note that this was only done before the implementation of the e-Justice system.

⁴¹ John Nakuta and Faith Chipepera, 'The Justice Sector & the Rule of Law in Namibia: Management, Personnel and Access', 14 <www.nid.org.na/images/pdf/democracy/Framework_Namibian_Justice_Sector.pdf> accessed on 02 February 2016.

⁴² Performance agreement entered into between the Government of the Republic of Namibia on the one part, and the Ministry of Justice <http://www.opm.gov.na/documents/108506/152317/Justice+PA+2016-17_final.pdf/8b466821-67f7-4d03-99bf-9c61626d7817> last accessed on 09 October 2016. Page 3 The Performance Agreement will run for the twelve months coinciding with the financial year i.e. 1st April 2016 to the 31st March 2017 and Quarterly Progress reports on performance of the ministry will be prepared for submission to, and discussion with, H.E. the President, through the Rt. Hon. Prime Minister.

⁴³ *ibid*, 5. See FORM 1: Minister's Annual Performance Agreement Matrix (1st April - 31st March of every Financial Year) of the Performance Agreement.

part of the judiciary's daily business will definitely improve effective governance, economic advancement and social justice, which are all four major pillars of the HPP.⁴⁴

In that uniquely Namibian context, the judiciary has incorporated information technology mechanisms in the judicial branch of government, temporarily, specifically to the Namibian higher courts and limited to civil litigation.

The Namibian Ministry of Justice identified a leading global e-Government solutions provider (Crimson Logic) to develop and implement an e-Judiciary system (electronic judiciary) for the Supreme Court and High Courts in Windhoek and Oshakati.

E-Justice is used to support processes related to case administration, document production, and court management. Findings of empirical research carried out in the United States, in particular, have shown that the critical factors of development of a successful backlog reduction programme include monitoring of cases by an information system.⁴⁵ This is exactly what e-Justice does.

7 Overview of e-Justice system: process and service provision



A simplified version of our e-Justice system⁴⁶

⁴⁴ Harambee Prosperity Plan, 2016/17 - 2019/20. Namibian Government's Action Plan towards Prosperity for All.

⁴⁵ Philip Langbroek, Matthew Kleiman 'Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe, Two Comparative Inquiries: Lot 3: Analysis of Backlog Reduction Programmes and Case Weighting Systems' () Final Report. (Regional Cooperation Council 2016) 9. The document was prepared and developed in cooperation between Regional Cooperation Council and European Centre for Dispute Resolution (ECDR).

⁴⁶ Marco Velicogna, 'e-Justice developments in Europe from CEPEJ data and in-depth case studies' (2014) CEPEJ-GT-EVAL 26th meeting Strasbourg, 20 – 21 November 2014. <https://www.coe.int/t/DGHL/.../CEPEJ/Source/GT_EVAL_20_21_Nov_2014_MF> accessed on 26 August 2016.

The Namibian e-Justice system is a web-based platform (www.ejustice.moj.na) that leverages content management systems and dynamic electronic form (e-form) technology. It offers law firms and court users a single access point for commencement and active management of case files throughout the litigation process. Front-end users can input information directly into e-forms, which can then be harnessed to auto-populate other court documents.⁴⁷

The Namibian e-Justice system also provides functionalities and related services that streamline the litigation process, thereby helping to improve efficiency and enhance access to justice. The courts' calendaring process can be managed and streamlined to allow court officers to better set up current calendars. Hearing information such as outcomes can be captured and tracked for statistical reports.⁴⁸

The poignant features that distinguish the Namibian system from other e-Justice initiatives, are e-filing, courtroom recording systems, public information websites and electronic notification systems. These features are valuable as they help to collect case data and the presentation of data in a form that may be used intelligently by judges and court administrators to improve case management generally.⁴⁹

Databases naturally produce data, usually in the form of case statistics that reveal trends and patterns. In turn, trends revealed in statistics can be used by judges to make strategic decisions for better use of judicial resources and time.

Courts can use computerized systems to convert caseload data into caseload intelligence. Caseload statistics can reveal to a court the precise age of its pending caseload along with very detailed data about the characteristics of cases that suffer from delay, including data about how cases can be most effectively disposed of.⁵⁰

⁴⁷ Namibia e-Justice User Guide for Service Bureau. Volume 1 (20 May 2016) 5 <www.ejustice.moj.na> . A brief overview has been provided in all user manuals that have been developed for the Namibia e-Justice system.

⁴⁸ *ibid.*, 5.

⁴⁹ Barry Walsh, 'E-Justice Projects – Distinguishing Myths from Realities' (2011) <www.iijusticia.org/docs/Barry.pdf> accessed 23 May 2016.

⁵⁰ *ibid.*

An ICT system cannot in itself reduce backlogs. Artificial intelligence (AI) is complemented by human intervention, without which it would not be in existence to begin with. The value of the discovery about caseloads of the court is that it offers useful intelligence about the possible solutions to that particular case backlog problem. A court that has a case information management database must use it strategically to enable it to reduce judicial backlog.

8 Concluding remarks

Judicial reform efforts must go beyond achieving the speedier delivery of justice and work towards tackling other inadequacies of the system if “access to justice for all” is to become a reality.⁵¹

Indeed, it has been proven that incorporating information technology in court processes improves overall efficiency and functionality of the judiciary as an institution. As a matter of fact, even the so called ‘traditional’ methods already implemented are further strengthened by IT. Judicial case management operates much smoothly with e-Justice. In Namibia, the system is still at infancy, and as such no statistical data has been released yet. In the event that the data had been made available, it would not be feasible to come up with performativity statistics. We must therefore patiently wait and see if the envisaged results will come into fruition.

“No significant institution has been left untouched by modern technology- with the possible exception of the courts.... Now all that is changing.... (Yet) there is much to be done.”⁵²

⁵¹ Rebecca Schild ‘The Role of ICT in Judicial Reform- An Exploration’ <<http://cis-india.org/internet-governance/blog/what-will-be-the-role-of-ict-in-indias-judicial-reform-process>> accessed on 20 October 2016.

⁵² Brian Forst, “Overburdened courts and underutilized information technology: a modern prescription for a chronic disorder” (1984) *Judicature* Volume 68, Number 1 June - July.

CHAPTER 4

A STUDY ON BRIDGING THE INEQUALITY GAP IN NAMIBIA

by
Timothy R Olivier

1 Introduction

Redistribution of wealth and income is an age-old predicament which endeavours to transfer wealth and income from one person to another by employing social methods such as taxation, charity, welfare, public services, land reform, monetary policies, and more.¹ The concept of redistribution is rooted in the theory of distributive justice, which denotes the moral value of redistribution and the moral assessment of individual or collective choices in the context of how they affect redistribution.² In this chapter, the concept of ‘distributive justice’ is understood as a normative principle which determines how wealth should be distributed amongst taxpayers according to the principle of equality.³ The primary purpose of redistribution of wealth is to ensure that the wealth of a country is shared fairly amongst the population. The most common way in which wealth is distributed is by means of wealth tax, which very basically is “a tax [levied] on personal property and financial assets above a particular level”.⁴

Solidarity taxes are a new and trending topic of discussion in Namibia since October 2015, when the Head of State, President Dr. Hage Geingob, announced that it will be introduced as part of the Namibian tax regime.⁵ However, the concept of wealth tax is not new -- it has been introduced in a number of countries. Most of the countries where it has been implemented are more developed than Namibia. Namibia must determine if the introduction of a wealth tax would either be beneficial to the economy by being a catalyst for the objectives promoted by Vision 2030 (‘V2030’) or be detrimental to the country’s economy by scaring away investors because of fears of being over-taxed and making less profit.

¹ Christian Barry, ‘Redistribution’ (2011) <<http://plato.stanford.edu/entries/redistribution/>> accessed 27 June 2016.

² *ibid.*

³ Joao Sergio Ribeiro, *Distributive Justice Through Taxation: European Perspective* (Braga: Minho University 2006) 80.

⁴ Edward Wolff, ‘Time for a Wealth Tax?’ (1996) <<http://bostonreview.net/edward-wolff-wealth-tax>> accessed on 29 June 2016.

⁵ GRN to introduce solidarity tax (2015) <<https://www.newera.com.na/2015/10/27/grn-introduce-solidarity-tax/>> last accessed on 22 June 2016.

Namibia has been burdened with economic inequality since Independence in 1990 – a consequence of the apartheid administration. Nonetheless, the new democratic government has not been reluctant to seek how to build an effective bridge to reform the distribution of wealth in Namibia; even though improvements have been made, inequality in terms of wealth and income distribution still remain a problem. The purpose of this chapter is to discuss the causes of inequality, to investigate the relationship between distributive concerns and the law and to propose a fiscal solution or alternative solution for the Namibian inequality predicament.

The central question throughout this chapter is: *What is the ideal wealth tax or alternative fiscal solution for a developing country like Namibia to ensure that the wealth of the country is distributed fairly amongst the general population?*

To answer this question, the content of this chapter is divided into four parts. The first part addresses a brief discussion depicting the issue of wealth segregation, followed by an inquiry into the general causes of economic inequality, and ending with a focus on the causes of economic inequality in Namibia. The relationship between law and distributive concerns is discussed in the second section. In the third part of this chapter, a solution to the economic inequality in Namibia is proposed. The fourth and final part of this chapter wraps up this chapter by proposing to decrease the level of inequality by improving the education sector, imposing higher taxes on those individuals with a bigger taxing capacity and generating more revenue from the mining sector.

2 Background

The Namibian Government is making efforts to bridge the inequality gap by introducing a wealth tax in the form of a solidarity tax. This would make it compulsory for people earning above a certain amount to make a contribution towards a fund allocated for poverty eradication. On top of this, wealth redistribution will be further encouraged by luring the private sector to include workers as shareholders and subsequently redistribute more of the income downward, as opposed to

upward, which is the case when the bulk of the shares are held by a minority.⁶ This is proposed by the New Economic Equitable Empowerment Framework ('NEEEF'), which is a policy attempting to indigenize the Namibian economy.

Furthermore, the Ministry of Poverty Eradication is looking at solutions such as the Basic Income Grant (BIG) to reduce poverty, though the President does not endorse it fully. The Minister is of the opinion that "poverty is not just about income" but that a holistic approach should be adopted.⁷

Minister of Finance Calle Schlettwein made it clear that the solidarity tax is not a tax base-broadening measure, but rather a means of redistribution by which economic inequalities will be reduced. Even though Namibia has made some progress in reducing the levels of economic inequality, the concentration of wealth is still in the hands of a few and, thus, Schlettwein believes that a solidarity tax would be appropriate to redistribute the wealth.⁸ This might be the Government's endeavour to fulfil the provisions of Article 95 to promote welfare of the people. The Chief Executive Officer of the Namibia Chamber of Commerce and Industry (NCCI), Tarah Shaanika, believes that wider consultation is needed before the introduction of the new tax and that other programmes for poverty alleviation should be looked at. Shaanika cautions that the Government should be very cautious of their plans to eradicate poverty as they might place a heavier burden on an already over-taxed society. He believes that Government should uproot the cause of poverty and not just tackle the symptoms of it -- merely taking from A and giving to B would not extinguish poverty.⁹ This, rather than solving the problem, creates a lazy society, because people will expect the Government to intervene by giving handouts.¹⁰

⁶ GRN to introduce solidarity tax (2015) <<https://www.newera.com.na/2015/10/27/grn-introduce-solidarity-tax/>> accessed on 20 July 2016.

⁷ *ibid.*

⁸ Solidarity Tax to help reduce income inequality (2016) <<https://www.newera.com.na/2016/02/26/solidarity-tax-reduce-income-inequality/>> accessed 22 July 2016.

⁹ Roadwin Chirara 'NCCI Slams Solidarity Tax' (2015) <<http://www.observer.com.na/business/-5343ncci-slamssolidarity-tax>> accessed on 20 July 2016.

¹⁰ *ibid.*

3 Economic inequality

Before venturing into this discussion, it is important to first define what economic inequality is. Economic inequality refers to the degree to which income is distributed in a disproportionate manner among a population.¹¹ The comprehension of what the general livelihood in a specific country is – for example, to know what number of its citizens are poor – does not start with the knowledge of what the country's per capita income is; the number, however, of poor people in a country and the normal quality of life, to a large extent, depends on how fairly income is distributed.¹²

The distribution of a country's income is almost always of critical concern in political and economic debates. Development policymakers are concerned not only with economic growth but also with the fair distribution of the proceeds of that growth. Incomes are less fairly distributed in developing and transitional countries than in developed countries. These great gaps of economic inequality seem to be persistent and frequently increase over time at the early stages of industrialisation and decrease as development progresses.¹³ The question that arises is, what causes these great gaps of inequality?

3.1 Causes and consequences of economic inequality

The causes of economic inequality can be categorised into two groups: the endogenous causes and the exogenous causes.

a) Endogenous Causes

Endogenous causes are individual-specific causes that are best described as a set of conditions or characteristics inherent to a person which can hypothetically determine their income as the product of influencing their relative advantages either in the form of higher productivity or by inborn abilities which make them comparatively more market-valuable and socially competitive.

¹¹ Income Inequality <<http://inequality.org/income-inequality/>> accessed on 18 August 2016.

¹² World Bank, 'Income Inequality' <http://www.worldbank.org/depweb/beyond/beyondco/beg_05.pdf> accessed on the 18 August 2016.

¹³ Michael W Kusnic and Julie Da Vanzo, *Income Inequality and the Definition of Income: The case of Malaysia* (Malaysia: The Rand Corporation 2016) 1.

The most rudimentary causes are the congenital abilities, such as intelligence, personality, and charisma. Even physical attributes such as strength and skills are some of the most essential causes which distinguish an individual from others.¹⁴ Another group of endogenous causes of income and wealth inequalities include the various types of preferences amid individuals which can potentiate or undermine any physical or intellectual attributes. These preferences are affected by social and cultural values due to the fact that they are, generally, created as the result of a collective inertia, resultant of customs, traditions, peculiarities and other variables such as history and geography, which can determine a person's attitude toward certain preferences such as work, education, risk aversion, or even decisions over leisure and income preferences. The primary foundation behind this argument is that every person, regardless of their inborn abilities, make different choices and follow different paths, which subsequently influence their income level and which distinguish them from one another.¹⁵

One of the biggest causes of inequality is an individual's gender and race, even in contemporary societies. The income gap between men and women is more evident when analysing the differences in wage income. What is more, women are more likely to take into consideration other factors apart from money when job hunting, for instance, they may not be willing to travel or relocate.¹⁶

When the racial element is included, the gap signified by different levels of income and wealth is torn wider. Generally, due to oppression globally, Black people suffered at the hands of Whites and in most cases their property has been illegally confiscated and deposited to Whites. Thus, the effects of these injustice still bear consequences on a given economy.

¹⁴ Jorge A. Charles-Coll. 'Understanding Income Inequality: Concept, Causes and Measurement' (2011) Vol. 1 No 3, 18.
¹⁵ *ibid.*

¹⁶ Warren Farrell, 'Are Women Earning More Than Men?' (2006) <http://www.forbes.com/2006/05/12/women-wage-gap-cx_wf_0512earningmore.html> accessed 20 October 2016. The reasons for the inequality between males and females, many agree, are the results of an extensive set of possibilities, including, the differences in education and its effects on efficiency, hours assigned to work, professional/ business decisions, motherhood and maternity leave, etc.

b) Exogenous Causes

Exogenous causes consist of land, education, and access to the labour market. First, the uneven distribution of land is still one of the central causes of inequality.¹⁷ The effects of this can be traced back in history to every corner of the globe and the history of every country. The best examples of this are medieval feudalism in Western Europe¹⁸ and, more recently, the colonisation of African countries by Europeans.

Education is one of the most influential factors of the future income level for an individual. In this sense, the prevailing educational policies and the variations in access to education in a country can potentially influence the levels of inequality. Should the supply of experienced workers be scarce enough not to meet the current demand, salaries will rise even further. In addition to that, the non-skilled population who do not have access to education would drive wages to even lower levels than what it currently is, and thus further expanding the gap between the incomes of the educated and uneducated population.¹⁹

Access to the labour market can influence income inequality in a number of ways, namely immigration, collective bargaining, the evolution of technology for skilled workers and the demand for skilled labour, which all have an effect on income and wealth inequalities in one way or another.²⁰

3.2 Effect of income inequality

Income inequality can indicate benefits. Increasing levels of economic inequality are very frequently associated with economic growth.²¹ An example of this is the 1979–1984 period in the People’s Republic of China, where the Chinese gross domestic product (GDP) grew rapidly and increased from 5.3% in 1979 to more

¹⁷ E H P Frankema, ‘The Colonial Origins of Inequality: The Causes and Consequences of Land Distribution’ (Groningen: University of Groningen 2006) 1.

¹⁸ Medieval Life – Feudalism (2014) <http://www.historyonthenet.com/medieval_life/feudalism.htm> accessed on 20 August 2016.

¹⁹ See Jorge A. Charles-Coll, *op. cit* 19.

²⁰ *ibid*, 20.

²¹ Nicholas Birdsong, ‘*The Consequences of Economic Inequality*’ (2015) <http://sevenpillarsinstitute.org/case-studies/consequences-economic-inequality#_ftnref66> accessed on 22 August 2016.

than 15% in 1984. In the following years, the development rate fluctuated, but Chinese economy has generally preserved one of the highest rates of development globally since the 1980s.²² Economic inequality in China has simultaneously increased noticeably.

However, the flip-side of the coin is that the drawbacks associated with economic inequality outweigh the benefits coupled with it. Inequality represses growth as, logically, a high level of economic inequality would mean a high level of poverty.²³ An enlargement of the inequality gap inclines to increase the rate of rent-seeking and greedy market activities that hamper economic growth.²⁴ Studies have shown that income and wealth inequality relates to an increase in crime.²⁵

Inevitably, there is a correlation between education and poverty. Research reveals that countries with a high degree of economic equality and a reasonably small low-income group are likely to have a considerably greater part of the population educated.²⁶ In a community where the economic scales are imbalanced, the average degree of education dampens while the quantity of educated elites increases.²⁷

3.3 Economic inequality in Namibia

On the eve of Independence, Namibia was plagued with unequal distribution of wealth and income. The distribution of wealth amongst the citizens and the degree of access to services and resources was a clear indication of this inequality. Namibia's per capita income per annum was \$1200USD – an exaggeratedly high number which disguised the tremendously skewed nature of income distribution. In 1991, World Bank statistics revealed that, at Independence, roughly two thirds of the nation were submerged in poverty.²⁸ This entanglement of the mostly Black population was a product of an orderly system of labour manipulation.

²² China GDP: how it has changed since 1980' (2012) <<https://www.theguardian.com/news/datablog/2012/mar/23/china-gdp-since-1980>> accessed on 22 August 2016.

²³ See Nicholas Birdsong *op. cit.*

²⁴ Erik Thorbecke and Chutatong Charumilind, 'Economic Inequality and Its Socioeconomic Impact' (2002) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.625.7392&rep=rep1&type=pdf>> accessed on 22 August 2016

²⁵ Researchers on this issue have advanced several possible explanations for the inequality-crime nexus. To begin with, underprivileged members of a society may be more probable to suffer from resentment and hostility as a product of their financial position or competition to get a job or access to resources, resulting in a greater propensity for criminal behavior.

²⁶ See Erik Thorbecke & Chutatong Charumilind, *op. cit.*, 1488.

²⁷ *ibid.*

²⁸ See World Bank *op. cit.*, 8.

Black people were prohibited from climbing corporate ladder, thus not earning larger salaries. By contrast, nearly the entire White work force had secured permanent employment as professionals, managers, and business people in agriculture and other high paying jobs.²⁹

One of the immediate actions taken by the Namibian Government was to improve the provisions of basic social services such as education and health care, with the prospects of ending the apartheid discrimination and redressing some of the colonial injustices. The Government did this by adopting a constitutional order which embodies a Bill of Rights which incorporates the right to education and makes primary school compulsory.³⁰ More recently, the Government made education free at both primary and secondary school levels, thus making education accessible to everyone. Another mechanism employed was the reforming of the labour legislation to create and establish a more diverse, accessible, equal and just working environment.

Numerous schemes have been implemented by the Government to broaden the country's manufacturing base and to target unemployment, the accompaniment of unequal distribution of wealth and income. The Government has recognized the small and medium enterprises (SME) and informal sectors as the pivotal sectors of job creation. However, these sectors face numerous structural issues and are thus categorized by low-value output.³¹

Furthermore, as part of its plan to narrow the gap between rich and poor, the Government introduced the Export Processing Zones Act in 1995³² with the hopes of making Namibia globally more competitive and to cultivate a favourable investment environment. This was implemented with the hopes that it would attract foreign investors and subsequently create more job opportunities.

²⁹ Herbert Jauch, Lucy Edwards & Braam Cupido, 'A Rich Country with Poor People: Inequality in Namibia' (Windhoek: Labour Resource and Research Institute 2009), 13.

³⁰ *ibid.*, 22.

³¹ *ibid.*

³² No. 9 of 1995. The Act aims to provide for the establishment, development and management of export processing zones in Namibia, and to provide for matters incidental thereto.

However, in contrast to its vision, towards the end of 1999 after an evaluation, it was found that the export-processing zones (EPZs) yielded little fruits, in that it created few jobs even though a lot of money was invested in promoting the policy and developing the requisite infrastructure with public funds. An example of an EPZ failure is the notorious Ramatex case.

In the Namibian context, class formations are a speed bump in the road to ironing out inequalities. The reliance of pre-Independence Namibia on the South African economy had sharply restricted the progression of an indigenous capitalist class. Amongst other things, the capitalist class managed to establish themselves in high-end power positions to constitute an emergent capitalist fringe. This was in blatant contrast to the Black working community, who were placed in the mining and fishing towns in jobs of semi-skilled and unskilled levels, thus at the bottom of the corporate hierarchy. An insignificant number of Namibians were hired in professional positions.³³ This is a clear indication of the enormous income inequality that existed in Namibia.

Gender boundaries are also an aggravating factor. Women were given a status inferior to that of men during pre-colonial times. After Independence, regardless of the new constitutional disposition,³⁴ women were still treated as subordinate to men; it was thus almost impossible for them to secure jobs equal to that of men regardless of their qualifications. Where job opportunities were available for Black women, it was usually as domestic workers or menial employment as cleaners in companies.³⁵

At the dawn of the new era, the economy of Namibia was basically an extraction-based economy, with agrarian features. The backbone of the economy in respect of exports and earnings was the mining industry, controlled by international and South African corporations. The mineral resources were merely extracted and transported directly to the production plants in the West, without making any endeavours to benefit the Namibian economy and subsequently the Namibian populace.³⁶

³³ See Nicholas Birdsong *op. cit.*

³⁴ See the Namibian Constitution, Article 10.

³⁵ Dianne Hubbard and Colette Solomon, 'The Women's Movement in Namibia: History, Constraints and Potential' (1994) <<http://www.lac.org.na/projects/grap/Pdf/article95facesfeminism.pdf>> accessed 20 October 2016.

³⁶ See Herbert Jauch *et al, op. cit.*, 19. A product of the land deprivation of the Black majority during the expatriate times was that at Independence 73 percent of farmland were owned by the White minority; in distinction to the Black majority who owned the other 27 percent.

Even in the fishing and agricultural industries, Western and South African companies were dominating, leaving little to no room for Namibians to get fair access to the economy.³⁷

According to Sparks and Green, the manufacturing base of the country at Independence was underdeveloped, contributed an insignificant share to the GDP, and employed approximately 9,000 workers, which accounted for roughly 5% of the working class. Most – if not all – factories were located in urban areas and were small in scale. Apart from this, most manufacturing firms were owned by Whites.³⁸

4 The relationship between law and distributive concerns

This section links the causes and impact of economic inequality discussed in the previous section to the Namibian context by looking at some of the most pertinent distributive concerns central to Namibia, as reported by the National Planning Commission. This section then delves into laws and policies implemented to alleviate the burden of inequality.

4.1 Distributive concerns in Namibia

a) Poverty

Poverty has been one of the biggest speed humps on the road to development for Namibia since Independence. It has many elements, including income, expenditure, low human development, social exclusion, relative deprivation, vulnerability, etc. Proper policies, strategies and plans have been formulated. However, supplementary resources are needed to productively and conclusively reduce poverty.³⁹

³⁷ See Herbert Jauch et al, *op. cit.*, 20.

³⁸ Donald L. Sparks, and December Green, *Namibia: the nation after independence* (Boulder: Westview Press 1992), 60.

³⁹ National Planning Commission, 'An analysis of the Economic Challenges of Namibia and How Donor Community should Assist' (2007) <<http://micconference.org/wp-content/uploads/2013/02/EconomicChallengesofNamibia.pdf>> accessed: 12 September 2016.

b) *Inadequate economic growth*

Normally, it is accepted that economic growth benefits the poor and that expeditious and sustained economic progression is crucial for poverty reduction. Ever since 1990, the Namibian economy has experienced satisfactory growth (with an average of 4.1% annually) with stable macro-economic conditions. Nonetheless the growth has not been fast enough to significantly reduce the degree of poverty.⁴⁰

c) *High level of unemployment*

Approximately two thirds of the unemployed are in the most productive age group of 16-45 years. Over 50% of the working force is unskilled with partially or no educated at all. As a result of the (small) quantity of the population and the fact that the population is spread out over a large area, the majority of the working class is reliant on subsistence agriculture. Specifically, about 30% of the working force depends on agriculture, which contributed less than 5% to the country's GDP, compared to the 2% employment by the mining sector, which accounts for 11% of the GDP. Therefore, there is a significant disparity between the sectorial shares of employment and their respective contributions to the GDP.⁴¹

d) *Inadequate capacity*

The limited capacity for service delivery is one of the primary impediments that stifle economic growth and development in developing countries, Namibia included. To strengthen the service delivery capacity is a dynamic process, as the ratio of demand for services continue to increase with economic and social development. Thus, capacity produced at a certain point in time cannot be expected to remain applicable permanently, unless the perceptions, systems and personnel continue to progress. The most imperative capacity-strengthening areas include not only those at the macro level to formulate and manage strategies and plans, including budgeting and financial management; but also, those at the intermediate and grass-root levels to implement, monitor and report on performance of development operations.⁴²

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

e) Gender equality and women's empowerment

The low degree of gender equality and women's empowerment in Namibia presents a number of challenges to the country. Ever since Independence, substantial advancements in promoting gender equality in the rights and opportunities towards empowering women have been made. In spite of all the progress made thus far, two issues *vis-à-vis* gender remain a challenge for Namibia. First, the disproportionate representation of women at the economic and business executive levels. Secondly, "the cultural and social attitudes and the persisting perceptions on the traditional roles of women in society."⁴³

f) International and regional trade

Namibia is a trade-dependent country, thus import and export of goods and services account for the bulk of the country's GDP. There is a close nexus between the Namibian economy and its neighbouring countries, more specifically South Africa. Given the fact that international trade is a central aspect of the economy of Namibia, the future and growth of the economy is dependent on the enlargement of the trade scope, which should gradually reduce its dependency on foreign aid. Currently, raw materials account for approximately 85% of Namibia's exports, while consumption goods account for a large share of its imports. Thus, the country's trade account has not yielded much fruits. The Government has made several attempts to alter the structure of trade by increasing the share of higher domestic value-added goods in the exports and decreasing the share of consumption goods with respect to the imports.⁴⁴

4.2 Tax law

Tax is a "pecuniary burden laid upon individuals or property owners to support the government".⁴⁵ Tax is imposed with the objective of aiding the government in the development of a variety of projects.⁴⁶ The prerogative to introduce and levy taxes are generally reserved to the government of a sovereign state.⁴⁷

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Wage Indicator, 'The Tax System in Namibia' (2016) <<http://www.mywage.com/main/labour-law/labour-law-namibia/the-tax-system-in-namibia>> accessed on 20 August 2016.

⁴⁶ *ibid.*

⁴⁷ Baron Jean M J van Houtte and Charles E McLure. 'Tax Law' (2016) <<https://www.britannica.com/topic/tax-law>> accessed on the 25 August 2016.

In Namibia, tax law is governed by the Income Tax Act of 1981,⁴⁸ which is the primary source of tax. It declares in its preamble that its aim is “to consolidate and amend the law relating to the taxation of income and provide for incidental matters”.⁴⁹ The Act, as its name suggests, provides primarily for tax on income.

a) Wealth tax

A wealth tax is s “a general tax imposed on all net wealth, irrespective of whether the wealth was derived from savings, labour or entrepreneurship. It is an annual imposed tax and is not dependent on the flow of cash, transfer of ownership or an economic transaction”.⁵⁰

In general, there are two types of wealth tax. The first type is imposed from time to time or yearly (net wealth taxes), and the second is imposed on a transfer of wealth (transfer taxes). The latter is enforced more frequently than the former.⁵¹ Wealth transfer taxes can also be viewed as complementary to an income tax. Income tax on its own does not tax wealth; but rather, in most income tax systems, gifts and bequests are not taxed as income to the recipient. Presuming that gifts and bequests are not included in the income tax base, a separate wealth transfer tax can serve as a surrogate to such inclusion.⁵²

Wealth taxes are usually applied at graduated rates. The appropriate tariffs for net wealth taxes may be determined by the wealth of the taxpayer alone or could include an accumulation of the wealth of a particular family.⁵³

⁴⁸ No. 24 of 1981.

⁴⁹ See the Income Tax Act 24 of 1981.

⁵⁰ Linda Papp, ‘The Feasibility of the Introduction of Additional Wealth Taxes in South Africa: An African Perspective’ (Pretoria: University of Pretoria 2012), 6.

⁵¹ *ibid*, 12.

⁵² Rebecca S. Rudnick and Richard K. Gordon, ‘Taxation of Wealth’ (1996) <<https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch10.pdf>> accessed on 25 August 2016.

⁵³ *ibid*.

b) What is the rationale for wealth taxes?

The levying of wealth taxes, because of the measure of a person's taxation capacity, is not the only justification for the enforcement of a wealth tax. The concentration of the bulk of a country's wealth in the pockets of a few could have several unfortunate political and social side-effects. To the degree that such concentrations of wealth can be condensed through wealth taxation, the side-effects can be relieved.⁵⁴

The Government may be influenced by the wealth of rich taxpayers either through legal or illegal means, which would result in the government enacting laws and regulations aimed at protecting the interests of the propertied elite.⁵⁵ Furthermore, it could be perceived as an insult to democracy that a minor group of people can exercise a disproportionate degree of authority.⁵⁶

Developing countries can generally cope without a wealth tax and without suffering any severe consequences on its economy. Wealth taxes, unlike income taxes and value-added taxes, are not indispensable for the economy. A modification of the income tax system can frequently bring in more revenue from the elite few who hold the best part of a country's wealth. All necessary factors should be taken into account before a wealth tax is imposed and attention should be given to develop the tax so that it applies in an equal and fair manner. Furthermore, a reasonable time frame should be allocated for the drafting of the legislation for the tax to be effective.⁵⁷

c) What is the relationship between distributive concerns and tax law?

Earlier in this chapter, it was stated that normally taxes are imposed to aid the government in raising revenue to sustain, maintain and develop the country. Thus, tax law directly it can be employed to improve on these distributive concerns. Namibia has a progressive income tax, which means the higher a taxpayer's salary, the more taxes he or she pays. Also, the income tax is imposed on everyone --the

⁵⁴ *ibid.*

⁵⁵ Franklin D. Roosevelt, 'Message to Congress on Tax Revision' (1935) <<http://www.presidency.ucsb.edu/ws/?pid=15088>> last accessed on 20 October 2016.

⁵⁶ Rudnick & Gordon, *op. cit.*

⁵⁷ *ibid.*

wealthy and the working class. Thus, it would not be fair to increase the tax rates to tackle these distributive (and inequality) concerns. However, a different form of tax could address this problem: wealth taxes.

5 Solutions to economic inequality

5.1 Possible solutions

Every economy strives to balance the scales of income and wealth distribution in one way or another. In fact, various social and economic policies have demonstrated their influence on decreasing different proportions of inequality.⁵⁸ Practice has taught us that there are fundamentals that underlie successful actions to diminish social and economic inequalities.⁵⁹ These elements will be discussed in the following paragraphs.

a) *Universalism in the provision of social services*

Guaranteeing that public funds will be made available for the provision of basic services such as access to housing, water, sanitation, electricity, health care, and education is important in the reduction of poverty and the promotion of equality of opportunity.⁶⁰ Universal provision is more economical than targeted delivery for the reason that high levels of administrative capacity is necessary for means-testing, that the transaction costs of targeted measures are high, and that there is a risk of political capture by the cream of the economic crop or the wealthy regions and its political influence on social separation.⁶¹

Targeting specific groups has frequently been suggested by multilateral financial institutions and donors as a way of achieving social objectives without a significant rise in social spending. Although more narrow-targeted interferences improve the conditions facing some disadvantaged groups, advances made through targeted interventions only are not as effective without broad-based coverage.⁶²

⁵⁸ United Nations, 'Inequality matters: Report on the World Situation 2013' (2013) (New York: United Nations Publication), 100.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² Timothy Besley and Ravi Kanbur, 'The Principle of Targeting' (1990) <<http://documents.worldbank.org/curated/en/212811468739258336/pdf/multi0page.pdf>> accessed on 10 October 2016.

In reality, social policies are not entirely based on purely universal or purely targeted approaches. Some methods or processes are universal whereas others are directed to specific groups that may be difficult to reach through universal measures. Ultimately, either form of spending may be justified depending on a country's circumstances.

b) *Reducing social segregation and intergenerational drawbacks*

Marginalised and disadvantaged groups in a given society bear the burden of inequality. Moreover, they fall behind in the general population with regards of welfare and they are often faced with inequality of opportunity, which limits their access to social amenities -- even those that are provided on a universal basis. Legislators and policymakers should have the objective of removing obstacles to these marginalised groups' full social and economic participation.⁶³ In many instances, this can be overcome by taking the services or opportunities to the marginalised groups. This could be done by awareness-raising and outreach campaigns. This might comprise expansion and decentralisation services and activities to these remote areas. Investment in the development of infrastructure may also form part of those services to underserved communities.⁶⁴ Attention must be given to social groups and their rates of involvement in social and economic life will not only improve the extent and efficiency of universal social policies, but they will also address inequalities where they overlap most, aiding in the reduction of their long-term intergenerational impacts.⁶⁵

c) *Investing in education and strengthening labour-market institutions*

Investing more in education and making sure that macroeconomic strategies support employment creation is vital to plummeting inequalities: "[T]hese policies have played a central role in the rapid industrialisation cases of recent decades".⁶⁶ Labour market organisations are crucial in regulating income inequalities, including labour unions, employment protection, minimum wages, unemployment benefits and regulations with respect to employment termination.

⁶³ See United Nations, *op. cit.*, 101.

⁶⁴ *ibid* 102. Some countries have initiated a mix of policies and programmes including the sensitisation and enhancement of training for teachers and educational officers, upgraded infrastructure, eradicated school fees, free textbooks for students from underprivileged households, and providing useful incentives to households.

⁶⁵ *ibid* 103.

⁶⁶ *ibid* 104.

Increasing the minimum wage and ensuring its effective implementation forms another noteworthy strategy for the improvement of income distribution.⁶⁷ However, minimum wages are generally fixed in nominal terms and do not automatically change/increase when there is inflation and thus with inflation the minimum wage becomes worth less.⁶⁸ Nonetheless, minimum wages can be implemented with an annual increase by a certain percentage in order to circumvent the effect of the minimum wages becoming worth less due to inflation.

d) Fiscal and economic strategies to reduce inequality

Fiscal policies have the potential to decrease inequality levels by employing progressive income tax methods coupled with highly redistributive social transfers targeting education and health spending, as well as public child and senior citizens welfare.⁶⁹

In countries such as Namibia, South Africa, Botswana and the Democratic Republic of the Congo, where the mining of natural resources significantly contributes to state coffers, there are frequently substantial opportunities for changing the distribution of the rents from such resources in favour of the public national treasury. Naturally, the influence of these methods on the level of inequality varies from country to country depending on the particular country's circumstances, social structures, the level of social spending, etc.

5.2 Proposed solutions

Economic inequality remains a pertinent issue in Namibia after more than 25 years of independence. Nevertheless, the country is in a position to decrease the levels of economic inequality as "Namibia is endowed with significant human and natural resources that can be used to advance structural economic transformation."⁷⁰ The Namibian economy has not attained a "degree of diversification and value addition" required to afford permanent and sustainable growth.⁷¹

⁶⁷ Ministry of Labour, Employment and Social Security of the Government of Argentina, 'Work and employment in the Bicentenary: Changes in employment and social protection dynamics for an extended inclusion, 2003-10' (2010) <http://www.trabajo.gov.ar/downloads/bicentenario/trabajoybicentenario_eng.pdf> accessed 20 October 2016.

⁶⁸ Cooper R and John A A, *Theory and Applications of Economics*, (2012) <<https://2012books.lardbucket.org/books/theory-and-applications-of-economics/s15-02-the-effects-of-a-minimum-wage.html>> accessed 20 May 2017.

⁶⁹ See United Nations, *op. cit.*, 106.

⁷⁰ The Office of the President, *Harambee Prosperity Plan: Namibian Government's Action Plan Towards Prosperity for All* (Windhoek: The Office of the President 2016) 28.

⁷¹ *ibid.*

The dependence on the primary sector of the economy and the fact that raw materials mined are exported for processing (taking away possible job opportunities, instead of creating jobs) results in the Namibian economy being susceptible to external shocks.⁷²

Investing in education and increasing job opportunities seem to be the most apparent solution to this problem. Ever since Independence in 1990, there has been a great deal of investments in the education sector, even more so as annually it receives the lion's share of the national budget. The NDP 4 lays out a detailed plan on how the education system can be improved. The plan on implementing early childhood development services is a brilliant idea. A further recommendation is that experts from the developed world should be consulted to design and guide the process for the first few years whilst training locals to take over once the experts' period has expired. Moreover, these experts should be used to design and improve the education sector so as to ensure that Namibia is well on its way to having an education system that is on par with international standards.

Drastically improving the education sector within the next five years (coupled with the recent free primary and secondary school regulations) will not only balance the scales of inequality of education that has prevailed for a number of years, but it will also alleviate the distributive concern relating to FDI highlighted earlier on. One of the reasons why Namibia (even though there is a considerable amount of FDI) is an unfavourable destination for potential foreign investors is because it is seemingly difficult to conduct business in the country due to the lack of trained workforce.

a) *Universal policies and targeted development*

Seeing that access to public services is a distributive concern, it would be advisable that Namibia creates a hybrid between universal and targeted-delivery policies. Universalism is more economical and would thus be more viable in reaching and catering for the needs of disadvantaged communities in urban areas, coupled with targeted delivery to rural communities where there are limited to no municipal services. In addition, this should guarantee that public funds are available for the provision of basic services such as housing, water, electricity, etc. Furthermore,

⁷² *ibid.*

because marginalised and disadvantaged groups generally fall behind in the general population *vis-à-vis* inequality of opportunity and access to social amenities, legislators and policymakers could eliminate these impediments by assessing the challenges of the specific communities and creating tailored solutions to their specific needs, as opposed to a one-size-fits-all solution. The language barrier may be broken down by getting an expert to train the locals in their language to do a particular job, thereby creating jobs and narrowing the rich-poor gap. This will not only ensure that these marginalised groups get trained but also that their respective communities get developed on their strengths in order for them to maintain and further develop their respective communities.

b) Formulation of fiscal and economic strategies

Fiscal policies and regulations and economic strategies are probably the most direct manner to reduce income inequality. For the reason that Namibia already has a very progressive tax system, it will be too much of a burden on the working class to increase the tax rate. Thus, the introduction of a wealth tax seems more feasible in this instance. On the face of it, it probably does not seem like the working class is taxed more inevitably, and accordingly it appears as it produces the same result as increasing the current income tax rates. However, it is a better solution as income taxes are normally based on the amount of income an individual makes annually and in a sense, affects the middle- and lower-income classes' more/most as they are dependent on that income. The wealthy,⁷³ however, earn proportionally less income, and are thus subjected to paying less income taxes. By introducing a tax on wealth, more of the tax burden would be devolved to the elite who have a higher overall net worth.⁷⁴

Seeing that Namibia has a source-based tax system,⁷⁵ it would be advisable to create a wealth tax system that is residency-based so as to avoid capital flight, as wealthy individuals might be prone to move their assets to a country with no wealth tax.

⁷³ Wealth, and subsequently power, is inclined to be concentrated in the hands of a few. This concentration of power could be perceived as a threat to democracy. Directing the levying of taxes on this small yet powerful group of individuals with the most wealth could create more equality by lowering the amount of wealth concentrated in their hands, while raising more money for State revenue.

⁷⁴ What are the advantages and disadvantages of wealth tax? (2015) <<http://community.cakart.in/15671/what-are-the-advantages-and-disadvantages-of-a-wealth-tax>> accessed 23 September 2016.

⁷⁵ Income Tax Act, section 1.

In terms of the argument that it might be discrimination on the basis of economic status, it is appropriate to mention the case of *City Council of Pretoria v Walker*,⁷⁶ where the court held, with reference to the *Hugo*⁷⁷ case, that:

To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.⁷⁸

Imposing a wealth tax would be a great solution to the inequality problem Namibia is facing as it would increase state revenue, which can be used for the sustainable development of the country. The proposed wealth tax for Namibia could also be imposed for a set time frame, for instance, five years; or until a certain goal is reached, for example, the level of inequality has dropped significantly. A wealth tax, coupled with an increase in the progressive tax rates of upper income levels, would further decrease economic inequality.

Imposing a wealth tax will surely lighten the burden of inequality resting on the Government's shoulders. Additionally, if executed right, it will most probably be a catalyst for the fulfilment of the long-term aims of V2030.

c) *Increasing fiscal influx from the mining sector (value addition)*

Currently, most of the mining operations in Namibia is primarily extraction-based. Despite the fact it contributes 25% of the country's income and accounts for approximately 19 000 jobs,⁷⁹ more money could still be generated from the mining industry for the development of the country. One of the methods that can be employed is that of neighbouring Botswana, where diamonds are not only mined but also refined and sold on the international market -- value addition.

⁷⁶ *City Council of Pretoria v Walker* (CCT8/97) ZACC 1 1998 (2) SA 363.

⁷⁷ *The President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), at para 41 and 47.

⁷⁸ *City Council of Pretoria v Walker*, para 37.

⁷⁹ BDO Namibia, 'Mining in Namibia' (2016) <<http://www.bdo.com.na/en-gb/industries/natural-resources/mining-in-namibia>> accessed 23 September 2016.

The Namibian economy could borrow this idea by refining raw minerals mined in the country and then trading them on the international market. By doing this, not only does Namibia create more jobs, thus diminishing the unemployment figures, but also ensures industrialization at a faster pace and increases the fiscal influx from the mining sector.

Moreover, currently there is no legislation on social corporate responsibility, and mining companies in Namibia only comply with social corporate responsibility to conform to international standards and maintain the good reputation of their respective companies on the international market. However, legislation should be promulgated to ensure that mining companies for as long as they operate in the country assist in developing the towns they are situated in by, for example, building hospitals, schools, infrastructure etc., to facilitate and guarantee that Namibia attains its long-term development goals embodied in V2030.

6 Conclusion

At the beginning of this chapter, it was said that the purpose of this research is to address the legal impediments and to look at the broader issue by searching for a proper, tailored solution for the Namibian distribution of wealth and income. The most important legal impediment recognised was that of discrimination against the wealthy on the basis of their economic status as they would be the ones required to pay wealth taxes. However, this is not so. As in the Walker case discussed above, it was pointed out that this form of discrimination amounts to fair discrimination as their taxation capacity is higher than that of the middle and lower classes who live from pay-cheque to pay-cheque.

The solution suggested was advancing the education system and increased employment opportunities to ensure that everyone is offered the same educational and employment opportunities; ensuring that all people in the isolated as well as rural areas and urban areas have access to basic amenities through a hybrid of universal and targeted delivery; the design of fiscal and economic strategies to build an effective bridge to overcome the economic inequality gap; all of those, coupled with an increase in the fiscal influx from the mining sector, would further decrease inequality in Namibia and ultimately achieving the goals embodied in V2030 and the other ancillary development goals.

CHAPTER 5

FROM CHEERLEADERS TO TEAM LEADERS: EMPLOYING *OMUUNTU* FOR WOMEN'S MEANINGFUL PARTICIPATION IN LEADERSHIP IN NAMIBIA

by

Rachel Ndinelao Shanyanana and Dunia P Zongwe

1 Introduction

In its 2016 report *Global Gender Gap Index*, the Swiss-based World Economic Forum ranked Namibia 14th in the world in terms of gender gap. In that enviable position, Namibia is ahead of nations such as South Africa (15th), France (17th), the United Kingdom (20th), Canada (35th), and the United States of America (45th).¹ In Africa, only Rwanda (5th) and Burundi (12th) did better.² This is a remarkable achievement, and Namibia has every reason to be proud of its achievement towards closing the gender gap.

However, Namibia should not rest on its laurels just yet, for these statistics – if not read properly – may overshadow certain truths about women's relative position in Namibia and other top-scoring nations. The World Economic Forum (WEF) itself acknowledges that its gender gap index only measures how close a country is to gender equality; it does not measure women's empowerment.

True, there has – in recent times – been a dramatic surge in women representation at the highest level in Namibian public institutions. The appointment of women in managerial positions during the latest restructuring of the country's main university, the University of Namibia, is one case in point. True, the 50/50 gender policy embraced by the ruling party SWAPO³ in 2013 has largely contributed to the substantial representation of women in Parliament and electoral politics. But it is false to assume that, with increasing numbers of women in leadership, their voice in decision-making is correspondingly louder. This is a fundamental dilemma faced by a number of democratic yet male-dominated societies, including Namibia.

¹ World Economic Forum, *Global Gender Gap Index*, (2016) <<http://reports.weforum.org/global-gender-gap-report-2016/rankings/>> accessed 22 June 2017.

² *ibid.*

³ SWAPO stands for South West Africa People's Organization.

In interrogating this dilemma, we propose a four-stage model for understanding the degrees of women's participation in leadership positions in Namibia and build an African theory of human(e)ness (*OmUuntu*) as a major solution to the challenges of women's deliberative participation. Although our proposition is primarily aimed at the Namibian context, it can work just as effectively in other social environments.

In this chapter, we articulate and appraise the argument that *OmUuntu* denotes interdependence and human dignity in a way that recognizes the potential of women's participation in leadership. *OmUuntu* is the marriage between *Uuntu/Ubuntu's* insistence on community and the liberalism-individualism necessitated by human dignity. *OmUuntu* marks an individual member of the society who possesses *Uuntu/Ubuntu*. Crucially, it implies that both women and men participate in the community and that their dignity is valued towards national development. The argument is that a re-imagined *Uuntu/Ubuntu* in the form of *OmUuntu* offers the potential to transform Namibia's public institutions in relation to women's leadership roles.

We divided this chapter in four sections. In the first section, we discuss the lack of women's participation in leadership (positions) in Namibia in spite of the 50/50 gender policy in electoral politics. Then, we propose a four-stage model to understand what substantive participation – as opposed to formal participation – entails. This four-stage model shows why the 50% female representation in electoral politics, though praiseworthy, is far from accomplishing the goals and ideals of substantive participation. The crux of this chapter is reached when we put forth a theory of human(e)ness (*OmUuntu*) that builds on the communitarian values of *Uuntu/Ubuntu* while remedying its limitations, especially its lack of individualism, which is essential for women's actual emancipation. Last but not least, we argue for the harmonisation of *Omuntu* (the community) with *Uuntu* (the individual), an *OmUuntu* approach, as a viable, pragmatic solution to the limitations of *Uuntu/Ubuntu* and as a remedy to the lack of women's substantive participation in the upper echelons of the public sphere.

2 Women's participation in leadership (positions) in Namibia

2.1 Formal versus substantive participation: interrogating the dilemma

There is a world of difference between the formal and substantive participation of women in decision-making. While the number of women in leadership positions (i.e., formal participation) may have increased, their impact on the outcome of decisions (i.e., substantive participation) has not significantly increased.

Numerous African scholars clearly point out that consistent under-representation of women in leadership positions, despite the various policy reforms and political efforts of the last four decades.⁴ Most women in such situations suffer multiple prejudices. Firstly, because of their increased numbers in decision-making positions, most people assume that these women effectively participate in decision-making and, as a result, any claims to the contrary are given short shrift or dismissed as hysterical, especially if you make those claims in front of a person who had a quick reading of publications such as the WEF report. Secondly, most women still submit to their African traditional ideology and cultural belief of being silent and passively visible. This is because of the perception that men ought to speak on behalf of women while women are mere cheerleaders and passive bystanders who should enthusiastically clap hands for men's contributions to decision-making and policy development.

Many societies have grown sophisticated in the ways they maintain patriarchal structures while promoting a semblance of gender sensitivity, balance and inclusiveness. Specifically, in many countries, women are gradually being promoted and appointed at senior management level and leadership positions, but their participation is only numerical, not substantive. In those cases, the promotion of women in the public sphere has been reduced to an exercise in counting how many skirts move or sit around in (board) meetings. Assié-Lumumba notes that the gender policies and programmes in Africa, which sometimes report impressive quantitative achievements, endorse high structural inequalities with regard to gender. In her view, the achievement of gender equality

⁴ J C Kwesiga, *Women's access to higher education in Africa: Uganda's experience*. (Kampala, Uganda: Fountain Publishers 2002); Okeke, P. Higher education for Africa's women: Partners with or cheerleaders for men? In P. T. Zeleza & A. Olukoshi (Eds.). *African universities in the twenty-first century: Knowledge and society* (Dakar: CODESRIA 2004) 480-492; Assié-Lumumba, N, *Empowerment of women in higher education in Africa: The role and mission of research*. A paper commissioned by the UNESCO Forum on Higher Education, Research and Knowledge (2006) No. 11, ED.06/Africa/2; Mama, A. (Ed.) *Setting an agenda for gender and women's studies in Nigeria* (Tamaza Publishing Company 1996).

should not be measured by simple statistics, particularly in terms of the number of policies and programs designed. Rather, the real indicators of substantive equality are in terms of the actual improvements in chances for women to increase their consciousness and have more of their informed participation in all decisions and knowledge production.⁵

As long as the removal of gender gaps in African countries remains only cosmetic and mostly political rhetoric, and despite the many gender policies and programmes instituted to empower women, politics and decision-making will remain a male domain.

We focus on the public sector and the political scene, which have “always been a man’s world”,⁶ due to the country’s promotion of democratic values and the prevalence of male dominance in that sector. We also decided to confine ourselves to women in leadership positions in government and state-owned enterprises as evidence of their participation is readily available, compared to evidence of women’s participation in the private sector and the non-governmental sector.

2.2 Participation, decision-making and the public-private space division

a) Participation

According to the World Bank, “[p]articipation is a process through which stakeholders influence and share control over development initiatives, and the decisions and resources which affect them”.⁷ Cohen & Uphoff expand this definition:⁸ participation is possible under many conditions and is desirable to achieve development goals. They introduced three types and dimensions of participation:⁹

- (a) What kind of participation is under consideration? (Is it participation in decision-making, participation in implementation, participation in benefits (or harmful consequences), or participation in evaluation?);
- (b) Who is participating in it? (Local residents, men, women, youths, local leaders, government personnel, or foreign personnel); and

⁵ *ibid.*

⁶ Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 1989).

⁷ The World Bank, *The World Bank Participation Sourcebook* (Washington DC: The World Bank, 1994) 1, World Bank, <<http://www.worldbank.org/wbi/sourcebook/sb0100.htm>>.

⁸ J M Cohen and N T Uphoff, “Participation’s Place in Rural Development: Seeking Clarity through Specificity,” (2008) 11 *World Development* 213.

⁹ *ibid* 214.

- (c) How is participation occurring? (Basis of participation, form of participation, extent of participation, and effect of participation).

The aspect of participation that is of interest to this chapter is the participation of women in decision-making processes regarding public matters through policy development and matters of public interest in different democratic engagements such as the Parliament in Namibia. To this end, wherever ‘participation’ is used in this chapter, it means – unless the context requires otherwise – participation of women in decision-makings and policy development as well as democratic engagements.

b) Participation in decision-making

In terms of participation in decision-making, Anderson states that “a decision is the choice of an alternative from among a series of competing alternatives.”¹⁰ It is a choice made in response to certain needs, problems or desired objectives.¹¹ Decision-making, on the other hand, is the act of selecting from an array of possible actions that are proposed or have been proposed in response to given challenges. In this chapter, decision-making means taking part in, being invited to take part in, being present at meetings or other fora where decisions are made.

c) The public-private divide

The superiority assigned to one space over the other, usually the male space over female, breeds inequality and therefore constitutes a danger to sustainable human development.¹² Boyd¹³ contends that women are socialized into the ‘private’ sphere, which consists of what she considers ‘domestic’ responsibilities: the home, the family and sexuality.¹⁴ Men are responsible for the public sphere, such as working outside the home, public affairs and economic decision-making.

¹⁰ James E Anderson, *Public policy making* (New York: Praeger Publishing, 1975) 58.

¹¹ Augustine O. Ikelegbe, *Public policy analysis: Concepts, issues and cases*. (Lagos, Nigeria: Imprint Services 2015) 4.

¹² George, *Engendering corporate social responsibility* 93.

¹³ A Boyd, “Truth is a virus; Meme war-fare and the billionaires for Bush (or Gore),” in S. Duncombe, ed. *Cultural resistance reader* (New York: Verso 2002).

¹⁴ See R N Shanyanana, *Examining the potential of an ethics of care for inclusion of women in African higher educational discourses* (Unpublished PhD dissertation) (Stellenbosch University, Stellenbosch South Africa 2014) and R N Shanyanana, and M. Cross, Active participation in Namibia’s democratic education: challenges for the girl child (2014) 20:2 *Southern African Review of Education*, 26-40.

2.3 The road the world has travelled so far

After decades of discrimination and marginalization, many countries across the globe, including Namibia and South Africa, have moved towards the greater participation of women in the public sphere and other areas that were previously treated as men's exclusive preserve. To mitigate these forms of marginalization and exclusions, different strategies were formulated, at both international and local levels.

At the international level, some of the protocols, legislations and declarations featured the Universal Declaration of Human Rights. Article 1 of the Declaration states that "all human beings are born free and equal". The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires state parties to take all appropriate measures to change the social and cultural outlook of the roles of women in society.¹⁵ CEDAW therefore seeks measures such as coming up with effective legislation, policy and other proactive measures outside the domain of law.

There has also been the declaration of some decades as international decades for women. These were followed up with world conferences on women, the most profound being the fourth held in Beijing, China in 1995. The international decades for women and the various world women conferences called for governments worldwide to create a gender sensitive systems to ensure full and equal participation of women in making policies and decisions. In particular, the Beijing Platform for Action's (BPA) mission statement asserts that equality between women and men is not only a matter of human rights and a condition for social justice, but that it is also a condition for people-centred sustainable development."¹⁶ The conference thus encouraged the adoption of affirmative action as a state policy.

Regional bodies, such as the African Union (AU), and African states have legal and policy documents aimed at gender balancing. The AU has written the Solemn Declaration on Gender Equality in Africa, which reaffirms the principle of gender equality as enshrined in Article 4(1) of the Constitutive Act of the African Union. Under Chapter 7, member states commit "to actively promote the implementation

¹⁵ Article 5(a) of CEDAW (Convention to Eliminate all Forms of Discrimination against Women) (1979) United Nations. <http://www.un.org/womenwatch/daw.cedaw/text/econvention.htm> accessed on August 20, 2012.

¹⁶ Beijing Platform for Action's (BPA), 1995, Section 1.

of legislation to guarantee women's land, property and inheritance rights, including the right to housing." Also from the AU is the African Charter on Human and People's Rights (ACHPR), which obliges member states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of women...."¹⁷

The New Partnership for African Development (NEPAD) recognises the need for the achievement of gender equality in the implementation of its programmes. The AU formulated gender policies aimed at catering for the gendered needs of all. The argument has been that, since women constitute the biggest percentage of the world population, their participation as equal members of the society may plausibly contribute to the development and wellbeing of each society, Namibia included.

Various studies maintained that providing women with equal access to productive resources substantially reduces poverty and fosters positive conditions for sustainable development.¹⁸ Smee and Woodroffe¹⁹ also argued that, to eradicate poverty and enhance the empowerment of the most marginalized and excluded people in society, the improvement of gender equality is imperative. According to them, priority should be given to the poorest and marginalized girls and women in the society. In their landmark study of gender and development, Boserup & Kanji²⁰ stressed that development practices entrenched and deepened unequal gender relations, further marginalizing women by excluding them from industrialization and technological "advances".

Thus, the situation of women in most parts of the world have relatively improved, but it would be naïve to believe that women are no longer on the receiving end of discrimination, prejudice and patriarchy. Women are still subjected to multiple and aggravated forms of discrimination. In the particular context of Africa, women suffer from intersecting forms of discrimination: discrimination for being women, for being black, and for being usually poor. Women's unique vulnerability is not confined to sex, race, and class. Women are also vulnerable in matters such as health. The majority of victims of the HIV/AIDS pandemic are women, so are the majority of victims of the Ebola virus. Those factors converge to create a sociological environment in which women are particularly vulnerable.

¹⁷ African Charter on Human and Peoples' Rights, Article 18.

¹⁸ See A Eftimie, K Heller, and J Strongman, *Gender Dimensions of the Extractive Industries*. (Washington DC: World Bank, 2009) and Sylvanus I. Ebohon, "Feminizing development: The political Sociology of female tokenism in the Nigerian project," (2012) 11 *African and Asian Studies* 410-443.

¹⁹ Sharon Smee, and Jessica Woodroffe. "Achieving gender equality and women's empowerment in the post-2015 framework" (2013) The Gender and Development Network <<http://www.gadnetwork.org.uk>>.

²⁰ Ester Boserup and Nazneen Kanji. *Woman's role in economic development*. Earthscan, 2007.

2.4 Women at the top

Women can take up any leadership position, from chief executive officer, vice chancellor, assistant, to directors, to chief legal advisor, to chairperson of boards of directors, to government ministers, to President of the Republic. What is striking is that, despite the countless initiatives to bring women on board, arenas of power remain dominated by males. While the world is rightly rejoicing at the achievements of the likes of Angela Merkel, Thuli Madonsela, Theresa May, Saara Kuukongelwa, Sheryl Sandberg, and Hillary Clinton, these figures are minorities in most nations.

Assié-Lumumba²¹ claims that the persistent structural gender inequality is one of the most counterproductive and self-destructive traditions. She connects lack of women's participation in leadership positions in Africa to societal norms and constraints, policy priorities, and contradictions between the officially stated pursuit of development agendas and the actual denial of women of the possibility participate fully in these agendas.

To contextualise this subtle problem, we proceed to explore the participation of women in leadership positions in the specific context of Namibia.

2.5 The situation in Namibia

In very few places, male dominance is more visible than in employment data. The Namibia Statistics Agency indicates in its 2014 *Labour Force Survey* that there were slightly less women (342,331) than men (343,320) in the workforce²² and that the monthly median wages was 7,315 N\$ for men and 6,125 N\$ for women.²³ The wage differences between women and men are very systematic, as systematic as the whiplashes of a slave master on his poor servant's back. Those are the realities that a light reading of the WEF report obscures.

While the increasing numbers of women high positions in Namibia is something to be celebrated, caution and vigilance are called for as it appears that the pace of women's promotion to managerial-level positions is "slow".²⁴ Namibian Prime Minister Saara Kuukongelwa referred to the 2014 *Labour Force Survey*, which said

²¹ N Assié-Lumumba, *op. cit.*

²² Namibia Statistics Agency, *The Namibia Labour Force Survey 2014 Report* (Namibia Statistics Agency 2015) 7.

²³ *ibid* 10.

²⁴ '42% Women in Top Jobs' *The Namibian* 8 March 2013.

that only 42% of women were in managerial positions and that, in the private sector, only 40% in top positions are women, while in 2011, women made up 38% of appointments at management level in the public sector.²⁵

Furthermore, many of these women in positions of power are actually not allowed to weigh in decisions of cardinal importance. In Namibia, voices have been raised to complain that women in leadership positions are mere cheerleaders and do not meaningfully take part and shape decisions made at the highest levels of government, business, and society. As a direct consequence, many activists are now calling for transformation of society in the face of what they see as sophisticated window-dressing.

3 Women at the negotiating table: a four-stage model

To understand where Namibia or any other nation stands in terms of women's participation, we devised a four-stage model. It is important to note that, though presented as such, the model is not necessarily a linear process. Our model envisions four stages to women's maximum participation in decision-making in the public sphere. These stages can be metaphorically expressed as follows:

1. giving women an invitation card,
2. giving them a chair at the negotiating table,
3. giving them a microphone, and
4. giving them an opportunity to set an agenda.

This is, nonetheless, not enough to ensure women's substantive and meaningful participation in leadership. Indeed, the real question is not whether women are sitting at the negotiating table; it is rather what they *do and are allowed to do*.

²⁵ *ibid.*

3.1 The invitation card

The *first stage* in our model consists in inviting women at the negotiating table. The chief objective of this stage is to *welcome women's presence* in the higher sphere of public power. In constitutional law terms, this stage manifests through provisions on equality between the sexes. In Namibia, this stage was realized in March 1990, when the newly adopted Constitution provided in Article 10 that:²⁶

- (1) All persons shall be equal before the law
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status.

Most constitutions in Africa²⁷ and elsewhere on the planet have similar provisions. Women's presence in leadership is reinforced by constitutional provisions protecting the right to participate in the nation's public affairs. As Article 17(1) of the Namibian Constitution provides:

All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and; subject to such qualifications prescribed by law as are necessary in a democratic society to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

However, constitutional provisions prohibiting discrimination based on sex and protecting participation rights do not guarantee that women will be involved in the most important questions and decisions facing the country, just like inviting people at a party is no guarantee that they will attend it. More is needed to accomplish meaningful participation.

3.2 The seat at the negotiating table

At the *second stage*, policy makers pull out a chair for women. The goal of such initiatives is to *secure women's attendance*. This is the stage at which Namibia

²⁶ Emphasis added.

²⁷ For example, article 24 of the Constitution of the Republic of Côte d'Ivoire (2000); article 25 of the Constitution of the Federal Democratic Republic of Ethiopia (1995), article 8 of the Constitution of Guinea (2010), article 24 of the Constitution of the Republic of Guinea-Bissau (1984), article 27(4) of the Constitution of Kenya (2010), article 19 of the Constitution of Lesotho (1993), article 11(e) of the Constitution of the Republic of Mozambique (2004), and article 9 of the Constitution of the Republic of South Africa (1996).

currently stands. The difference between this stage and the first one is that it ensures that women will attend the high-stakes deliberations in the public sphere. By contrast, the first stage merely removes formal barriers to the full and equal participation of women in such deliberations or negotiations.

In constitutional law terms, the second stage is translated by provisions that guarantee that women enjoy a certain quota or other benefits based on a specified formula. SWAPO's 50/50 gender policy is a great example of such provisions. In 2013, at an extraordinary congress, the ruling party the South West Africa Peoples' Organisation (SWAPO) amended its constitution to implement a 50/50 representation in all party structures.²⁸

Perhaps, the best example of these initiatives in Africa is the "fundamental principle" in the Rwandan Constitution that reserves 30% of posts in decision-making organs to women:²⁹

The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof:

1...

2...

3...

4 building a state governed by the rule of law, a pluralistic democratic government, equality of all Rwandans and between women and men reflected by *ensuring that women are granted at least thirty per cent of posts in decision making organs.*

The relative strength of these arrangements is that it ensures the physical presence of women when decisions are made. This is a positive development because women or any other under-represented social groups are more likely to make a substantial contributions to decisional content and processes when they are physically present. To be sure, no meaningful participation of women is possible without a sufficient *number* of women physically present at the negotiating table and the different sites of power. Plus, electing more women can spark women's interest in politics.³⁰ Nevertheless, mere presence at the table does not mean that women have a voice, apart from echoing, cheering or cheerleading.

²⁸ 'Victory for SWAPO Women,' *The Namibian* 24 June 2013.

²⁹ Article 9(4) of the Constitution of the Republic of Rwanda (2003). Emphasis added.

³⁰ See M Thomas, "Barriers to Women's Political Participation in Canada," (2013) 64 *University of New Brunswick Law Journal* 232.

3.3 The microphone

The *third stage* takes place when policy makers give women a microphone. This practice helps women to voice, without interruption or interference, their positions during the decision-making process. A 2012 study by Brigham Young University and Princeton revealed that, in conference meetings, men talk more often than women, taking up to 75% of the conversation.³¹ Other studies found that it is not uncommon for women to get talked over, interrupted or shut down when they speak; or chided when they speak out.

This stage presupposes a program of education,³² training, and empowerment – a program that features human rights education, positive (or affirmative) discrimination, advocacy, policy, and women’s space in the global context. In organisational practice, requires management to encourage female managers to voice their positions on matters before them. If plans to increase women’s deliberative participation in leadership do not include this stage, there will not be any guarantee against the possibility that women may be present, but they might as well not have been there, since there is no guarantee that women have a voice at the table.

3.4 The agenda

The fourth and *final stage* consists in giving women an opportunity to set the agenda. This process aims to enable women to *influence* decision-making by empowering them to set or change the agenda. The importance of this stage cannot be overemphasised because it constitutes the ultimate goal of our model and of women’s empowerment. This is what is likely to take Namibia where towers Iceland, the first country in the WEF’s pecking order.

³¹ Christopher F Karpowitz and others, “Gender Inequality in Deliberative Participation” (2012) 106 American Political Science Review 533.

³² See M Thomas, “Barriers to Women’s Political Participation in Canada” (2013) 64 University of New Brunswick Law Journal 230ff.

In organisational practice, it would require managers to entrust one or more female members of their board of directors or management teams with setting the agenda. More specifically, at this stage, policy makers should require that the minutes contain a section summarizing the views of the female members of the board and management team(s). They should also impose the obligation on boards and management to reflect in their written decisions the views of their female members; and, if the final decision does not reflect or contradicts those views partially or entirely, written reasons for the departure or contradiction must be provided.

Our model can be summarized as follows:

Stages	Actions	Meaning	Objectives
1	Give an invite	Welcoming women in decision-making	Encouraging women's <i>presence</i>
2	Give a chair	Inviting women to sit at the negotiation table and decision-making structures	Securing women's <i>attendance</i>
3	Give a microphone	Requiring boards and management to ask one or more female members to voice views on particular issues for decision	Amplifying women's (<i>voice</i>) <i>resonance</i>
4	Give the agenda	Entrusting one or more female members of boards and management to set the agenda of meetings before key decisions are made so that women can influence the outcomes of those decisions.	Ensuring women's <i>influence</i>

4 An African liberal-communitarian theory of human(e)ness: *OmUuntu*

Our model gives a sense of direction and accomplishment. But it would be naïve to expect that, in a patriarchal society and simply on the basis of measures mentioned in stages above, corporate boards in both public and private sectors would positively require that they always ask female members what their thoughts are on a particular issue. The meaningful deliberative participation of women in decision-making institutions demand much more from policy makers.

4.1 Transformation

Transformation has been on the agenda long before Namibia's Independence on March 21st, 1990. Thus, on February 9th, 1990, one month before Independence, the Namibian government adopted the Constitution³³— a fundamental legal document that would serve as a framework for the transformation of the Namibian people and as a building block for democratic civic education. The transformational goals were to prepare citizens to know their basic human rights, and fundamental freedoms, and to teach them to respect the rights of others, irrespective of status, gender and ethnicity.

On the meaning of transformation, Harvey and Knight³⁴ define transformation as “a form of change from one change to another”. To them, democratic education also has a critical role to play in bringing transformation through the conceptual ability and self-awareness of citizens (including women); and it enables them to become active participants in educational and societal matters. Importantly, transformation is an ambitious government plan that requires the cooperation of various sections of society and departments in government. In policy and legal terms, transformation requires that society moves from formalism in social relations to a substantive understanding of change and equality.

³³ Act No.1 of 1990.

³⁴ L Harvey, and P T Knight, *Transforming higher education*. (Buckingham: SRHE & Open University Press 1996) 10-11.

In contemplating and planning transformation, policy makers have to be open to a variety of perspectives, initiatives and ideas. In Namibia, questions of social equity have been approached with such initiatives as the Harambee Prosperity Plan, the food bank, the proposed solidarity tax, the basic income grant (BIG), etc. With specific reference to gender equality, the Namibian government has adopted policies and laws such as the Married Persons Equality Act³⁵; the Affirmative Action (Employment) Act,³⁶ the Combatting of Domestic Violence Act,³⁷ to mention but a few.

4.2 Human(e)ness in Africa: The root and the concept

Of the initiatives undertaken to close the gender gap, what the government has not tried so far is the philosophy of *Uuntu/Ubuntu*. This is surprising given the fact that *Uuntu/Ubuntu* has deep roots in African, including Namibian, traditional culture. And the *OmUuntu* approach we prescribe in this chapter subsumes *Uuntu/Ubuntu*.

The root of the term *Ubuntu* is *ntu/nhu* or man, and similar terms are found in other African languages, such as *nit* in Wolof, *nti* in Egyptian, and *neddo* in Peul. The designation of a people by a generic term meaning 'man' is evident throughout Black Africa, starting with Egypt.³⁸ We would add that *omunhu/ntu* (a person) and *ounhu/ntu* (humaneness) is the equivalent term in the Namibian Oshiwambo (Oshimbadja) language.³⁹

The concept of *Ubuntu* is used in several Bantu languages, for example, Zulu, Xhosa and Ndebele. *Botho* is the equivalent term in Sotho, and *hunhu* in Shona, which then presupposes that *Ubuntu* manifests an African philosophical way of life, in terms of which each person is regarded as a human being who may engage in all processes of knowledge.⁴⁰ *Ubuntu* corresponds to 'umundu' in Kikuyu, Kenya; 'umuntu' in Kimeru, Kenya; 'bumuntu' in kiSukuma and kiHaya, Tanzania; 'vumuntu' in shiTsonga and shiTswa, Mozambique; 'bomoto' in Bobangi, Democratic Republic of Congo; and 'gimuntu' in kiKongo, the Democratic Republic of Congo; and in giKwese, Angola.⁴¹

³⁵ Act No. 1 of 1996.

³⁶ Act No. 29 of 1998.

³⁷ Act No. 4 of 2003.

³⁸ See C A Diop, *The African origin of civilization: Myth and reality*. (Chicago, Illinois: Lawrence Hill Books 1974) 198.

³⁹ See R N Shanyanana, *Examining the potential of an ethics of care for inclusion of women in African higher educational discourses* (Unpublished PhD dissertation) (Stellenbosch University Stellenbosch South Africa 2014) 47.

⁴⁰ Clever Mapaure, 'Reinvigorating African Values for SADC: The Relevance of Traditional African Philosophy of Law in a Globalizing World of Competing Perspectives,' (2011) 7 SADC Law Journal 149, 160.

⁴¹ See for example N M Kamwangamalu, *Ubuntu in South Africa: A sociological perspective to a pan-African concept*. (1999) 13 (1) Critical Arts 1-26.

Uuntu/Ubuntu therefore enjoys a great deal of legitimacy and, for that reason, it is poised to be effective as it is unlikely to meet much resistance from the population. To justify the potentialities of African philosophy of *Ubuntu*, Assié-Lumumba⁴², advocates for the consideration of an indigenous knowledge system, particularly the notion of human dignity, which is constituted in *Uuntu/Ubuntu*.

a) Meaning(s) of Uuntu/Ubuntu

Uuntu/Ubuntu is translated by the idea of *Uuntu* in the Namibian Ovambo language. We use the two words '*Uuntu*' and '*Ubuntu*' interchangeably.

Ubuntu/Uuntu does not hold a single definitive meaning, but this chapter will employ an understanding of the philosophy that emphasizes 'humaneness'. Metz notes that there are three aspects of *Uuntu/Ubuntu* (hereinafter '*Uuntu*') that are levelled to argue that *Uuntu* does not offer a solid basis for a public morality, namely that the notion of *Uuntu* is vague; that it does not adequately acknowledge the value of individual freedom; and that it serves better traditional, small-scale communities than modern, industrial societies.⁴³ In this section, we unpack the meaning of *Uuntu* and the other two criticisms of *Uuntu* later in this chapter. This exercise is necessary as *OmUuntu*, our approach, subsumes *Ubuntu/Uuntu*.

The English translation of the word '*Uuntu*' is relatively straightforward: *Uuntu* refers to humanity, to being human. Beyond this simple translation, though, several different meanings can be accorded to it, and this is how the problem begins. Judge Yvonne Mokgoro noted the difficulty of translating in English *Ubuntu*, an African concept:

[d]efining an African notion in a foreign language [i.e. English] and from an abstract, as opposed to a concrete approach, defies the very essence of the African world-view.⁴⁴

⁴² N Assié-Lumumba, ed. *Women and higher education in Africa: Reconceptualizing gender-based human capabilities and upgrading human rights to knowledge*. (Cornell University, NY: CEPARRED 2007) 474-476.

⁴³ Thaddeus Metz, '*Ubuntu as a Moral Theory and Human Rights in South Africa*' (2011) 11 *African Human Rights Law Journal* 523.

⁴⁴ Yvonne Mokgoro '*Ubuntu and the law in South Africa*' (1998) 4 *Buffalo Human Rights Law Review* 15.

Uuntu has been interpreted to mean a number of things. It can refer to humanity, to being human; it can refer to the common humanity of all people in this world; it can refer to compassion in the face of human suffering; it can refer to generosity. In this chapter, we take the word '*Uuntu*' to mean both 'human-ness' and 'humaneness', thus human(e)ness.

b) Uuntu as African philosophy

Doubts exist over the status of *Uuntu* as a philosophy or simply a worldview. Van Marle & Cornell⁴⁵ noted that, for many people, *Uuntu* is not a philosophy. To counter this, Zongwe observed that *Ubuntu*, insofar as it embodies ideals of equality, has benefited from a systematic, consistent and coherent formulation to such an extent that *Uuntu* qualifies as a philosophy, properly so-called.⁴⁶ For the purpose of this chapter, it is clear that *Uuntu* is a philosophy, as it includes a complex meaning associated with the being of a person.

For Ramose, *Uuntu* could be perceived in terms of three maxims:

The first maxim means that to be human is to affirm one's humanity by recognizing the humanity of others and, on that basis, establish respectful human relations with them ... the second maxim means that if and when one is faced with a decisive choice between wealth and the preservation of the life of another human being, then one should opt for the preservation of life.⁴⁷

The third maxim is a "principle deeply embedded in traditional African political philosophy", which says "that the king owed his status, including all the powers associated with it, to the will of the people under him".⁴⁸ This implies that the concept of *Uuntu* is a personified way of life – a word with no English equivalent.

The first designation means "a person is a person through other persons", which is the meaning of the Zulu maxim, "*umuntu ngumuntu ngabantu*".⁴⁹

⁴⁵ See Drucilla Cornell and Karin van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195, 196 (observing that South African courts do not regard *Ubuntu* as a philosophy).

⁴⁶ Dunia P Zongwe, 'The Articulation of an African Philosophy of Equality as Legacy of the South African Constitution' (2016) 31 *Southern African Public Law* 32.

⁴⁷ M B Ramose, "The Philosophy of Ubuntu and Ubuntu as a Philosophy," in P. H. Coetzee and A P J Roux eds. *The African Philosophy Reader* (2nd ed.) (New York/London: Routledge 2002) 230–238.

⁴⁸ *ibid* 324-325.

⁴⁹ M B Ramose, *African Philosophy Through Ubuntu*. (Harare: Mond Publishers 1999) 49.

This maxim shows how the being of an African person is not only embedded in the community, but in the universe as a whole. This is articulated mainly in the prefix *ubu-* of the word *Ubuntu*, which refers to the universe as being enfolded, containing everything. The stem *-ntu* means the process of life as the unfolding of the universe by concrete manifestations in different forms and modes of being. This process includes the emergence of the speaking and knowing human being.⁵⁰ As such, this being is called *umuntu* or, in the Northern Sotho language, *motho* – one who is able by common endeavours to articulate the experience and knowledge of what *ubu* is. Thus, *-ntu* stands for the epistemological side of “being”. This is the wider horizon, in which the inter-subjective aspects of *Uuntu* should be seen. Mutual recognition and respect in the different inter-subjective relations are parts of the universe-unfolding process, which encompasses everything in the speaking and knowing of human beings. *Uuntu* as a philosophical concept is associated with the being of a person, which is determined by his or her association with other persons in inter-subjective community.

Ramose underlines the one-ness and wholeness of this ongoing establishment of community. One can surmise that the oneness of African philosophy is perceivable in the plurality of its voices, and that no voice should be disregarded in the whole community of engagement.⁵¹ In particular, the notion of *Uuntu* underlies the communalism by which the African community is characterised. For Ramose, the meaning of *Uuntu* indicates that there is an elevated judgment of the community in African thought and practice, which is greater than that of the individual, but that does not take place at the expense of overlooking the individuality of the person.

The point is that the underlying principle of *Uuntu* emphasises a community in which every member is included and in which each of their voices is heard. Although there might be some disagreement between members, each member could depend on other members of the community for sustenance and support. Wiredu⁵² explains that, since African philosophy is a form of analytical inquiry, *Uuntu* should aim at reformulating and shaping the current African polity on the basis of consensus, negotiation and reconciliation.

⁵⁰ Ramose (2002) *op.cit.*, 325.

⁵¹ *ibid.*

⁵² Wiredu (1996). *op.cit.*

c) *Interdependence*

Uuntu denotes togetherness, community, compassion, and interdependence. We turn to the latter as it is particularly pertinent to the discussion at hand.

A grammatical understanding of ‘interdependence’ would in essence, if not in so many words, refer to a situation where one person or thing is dependent on another and, vice versa, that other person or thing is dependent on that one person or thing.⁵³ Of course, interdependence can also refer to a group of persons or things that are dependent on one another and among themselves. This interdependence is expressed in the *Uuntu* maxim that ‘a person is a person through other persons’. A person is a person in the community, and his or her individuality is exercised through others in that community. This attests to a culture of mutual relations, of caring for one another and sharing with one another. The notion is not only expressed in African languages; it is also practised by talking to one another in dialogue. One therefore could infer that *Uuntu* clearly exhibits an opportunity for inclusion, that is, one in which everyone (women and men) is included in deliberation.⁵⁴

Furthermore, Tutu underscores the significance of *Uuntu* as inclusion:

*[Uuntu] speaks to the very essence of being human [...] It also means that my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life [...] I am human because I belong, I participate, and I share. A person with [Uuntu] is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, treated as if they were less than who they are.*⁵⁵

The citation above implies that *Uuntu* as a way of life is unique to African thought and practices, which implies that African policy makers cannot be dismissive of the concept, specifically as it regards the inclusion of women. The concept of “I belong, I participate and I share” could be said to underscore what it means to cultivate an inclusive environment.

⁵³ See also Oxford Dictionary, sv ‘interdependence’.

⁵⁴ See also Clarence I. Tshoose, ‘The Emerging Role of the Constitutional Value of *Ubuntu* for Informal Social Security in South Africa’, (2009) 3 African Journal of Legal Studies 12, 19.

⁵⁵ D Tutu, *No Future Without Forgiveness*. (New York: Image 1999) 34-35.

Why is interdependence relevant to *Uuntu* and, most importantly, to the participation of women in leadership positions in Namibia? The meanings and values of *Uuntu* cannot be realized if they exclude the idea of interdependence of people and among people. The phrase “a person is a person through other people” assumes that, when some people are excluded and mistreated, others should act to address the problem. In other words, when women, for instance, are humiliated or oppressed, they are regarded inhumanely, and this points to the absence of *Uuntu* in the practice. Waghid and Smeyers⁵⁶ affirm that, with the embodiment and practice of *Uuntu*, everyone’s (including women’s) voice and experience would be listened to and respected. This simply means that no one should be excluded, as women and men ought to co-exist as equal persons.

In the leading case of *S v Makwanyane*, Judge Pius Langa stated:⁵⁷

[*Ubuntu*] is a culture, which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of.

The recognition of people’s interdependence reinforces the proposition that women’s participation in the spheres of influence must go beyond mere formalism and head-counting to a deeper and substantive understanding of participation.

Another reason why interdependence speaks to *Uuntu* is because both relate to the community. It is difficult to imagine how *Uuntu* can exist outside the idea of a community. *Uuntu* envisions the individual as “embedded in a community”.⁵⁸ In that sense, *Uuntu* is communitarian as it views “the individual moral agent as necessarily embedded in a network of relationships.”⁵⁹ *Uuntu* is the antithesis of “unfettered individualism” and “economic liberalism”.⁶⁰ Similarly, it is difficult to imagine a community that would exist and be sustainable without some degree of interdependence.

⁵⁶ Y Waghid, and P Smeyers, *Knowing Ubuntu is a matter of acting with care* (2012) <www.weraonline.org/uploadedfiles/meetings_and_events/2012> accessed on December 10, 2012.

⁵⁷ *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

⁵⁸ T W Bennett, ‘Ubuntu: An African Equity’ (2011) 11 Potchefstroom Electronic Law Journal 29, 48.

⁵⁹ Anthony O. Oyowe, ‘Strange Bedfellows: Rethinking *Ubuntu* and Human Rights in South Africa’ (2013) 13 African Human Rights Law Journal 103, 105.

⁶⁰ Tshoose, *op. cit.*, 19.

4.3 The limitations of *Uuntu*

Uuntu and tradition in general can work against women's empowerment. Effectively, certain elements of *Uuntu* contain and reflect patriarchal and paternalist attitudes towards women such that the proposition that *Uuntu* could be used to empower women in leadership positions may sound disingenuous to some scholars and observers. Moreover, as Oyowe observes,⁶¹ *Uuntu* places a heavier emphasis on community than on the individual such that propositions to the contrary undermine the very notion of a communitarian *Uuntu*. He says that, with communitarianism, community ranks higher other alternatives in any hierarchical ordering of values.⁶²

The other challenge is that, even if we accept that interdependence is subsumed under the idea of *Uuntu* and community, different people have different understandings of what interdependence is or should be. This is a challenge because some members of society may advocate interdependence and simultaneously claim that women's role is restricted to the private sphere.

Nevertheless, one's concern about the practice of *Uuntu* in relation to women's exclusion seems to bring the potentiality of the concept into disrepute. Acknowledging the inclusion of all participants (women and men) as equal members in leadership positions in Namibia is one way of showing respect. To include is to respect people's dignity, not only because they are women or men, but because they are human beings.

5 OmUuntu

5.1 What is *OmUuntu*, African human(e)ness?

The traditional conception of *Uuntu* is not promising and may not bring sufficient transformation to Namibia. This is the case because the traditional perspective perpetuates further silencing and relegation. On the other hand, an exploration of liberal theorists' demand for individual autonomous and capabilities for women's meaningful contributions in leadership positions hold an unfulfilled developmental potential for Namibia.

⁶¹ Oyowe, *op. cit.*

⁶² *ibid* 105.

Because of its shortcomings, especially its inherent difficulty to reconcile communitarian values and individual liberal values, *Uuntu* needs reform and reframing. The present understanding and current practice of *Uuntu* do not promote women's full participation.

We propose the philosophy of *OmUuntu*, which is combination of *Uuntu/Ubuntu* (humaneness) and *Botho/Omuntu*, which is the singular (or should we say 'individual') form of *Ubuntu*. That combination is contracted in the word *OmUuntu* (i.e., *Omuntu + Ubuntu*).

5.2 The *OmUuntu* approach

OmUuntu is intimately linked to the philosophy of liberal communitarianism. This philosophy resolves the tension between the community values of *Uuntu* and the liberal forces of individualism. It allows the possibility that *Uuntu* can at the same time underscore community and encourage the achievements and individuality of women, as members of the community.

Our proposition is, more precisely, that, if every member of society can agree that women are human beings in each and every way the same as men, then it must not be difficult to conclude that women should in each and every way be able to do what men do. If that concession is granted, then the argument that women should be given an equal say in decision-making is easily accepted.

This conception of human(e)ness also feeds on Namibia's history and sociology in the sense that, during the contract labour system under South African occupation and during the liberation struggle, women evolved a considerable individuality.⁶³ Women would take care of the household while men were kept away by forced labour or the struggle. This conception, nonetheless, differs from the Western liberal notion of autonomy, which is individualist. Instead, it is an understanding of individuality in the service of community development.

The second logical step is to reach a consensus on the fact that community through *OmUuntu* entails interdependence. If such consensus is reached, it is much easier to arrive at the conclusion that, because *OmUuntu* emphasizes community and interdependence and because interdependence is not possible without also depending on women to make decisions on the most burning questions, women should – and must – be actively engaged in decision-making at the highest level, and not simply sit around the table as cheerleaders, ornaments or figure heads.

⁶³ See also Ndeutala Hishongwa, *The Contract Labour System and its Effects on Family and Social Life in Namibia: A Historical Perspective* (Windhoek: Gamsberg Macmillan, 1992).

Is this proposition going to look justified in the eyes of most, if not all, members of society? How are we to reconcile conceivably diverging understandings of interdependence? Not all Africans espouse all the values wrapped by *Uuntu*. The justifiability of our proposition relies on the widespread legitimacy of *Uuntu*, as an incarnation of African traditional values. Bennett says that *Ubuntu* is a meta-norm, similar to equity in English law.⁶⁴ Its flexibility and the possibility of achieving justice on a case-by-case basis are some of the strengths of equity.⁶⁵ Thus, *Uuntu*, like equity, can provide principles and values; and, in the particular case of *Uuntu*, the meta-norm can provide principles and values that are distinctively African.⁶⁶ We submit that *OmUuntu* cannot only provide such principles and values; above all, it offers the basis for the argument that women should be able to meaningfully participate in decision-making in executive boardrooms.

5.3 The role of education in instilling *OmUuntu* and complementing the law

If the acceptability of *OmUuntu* is used as a criterion for the justifiability of our proposition, the difficulty is that scholars, readers and other stakeholders are likely to accept our argument *in part* only. They will admit that the community and interdependence aspects of the argument but many will reject its equal-say dimensions. That gap needs to be bridged. And the only way to bridge that gap is through education, whether formal or informal, and legislative reform. Indeed, education, including legal education, must be infused with the values of *OmUuntu*, as this infusion will ensure that future leaders and lawyers will become responsible agents of social change and women empowerment.⁶⁷

The role of the law is, in this regard, pivotal. The law can, among other things, focus society's attention on the participation of women in leadership positions. As Bassler and Jones remarked, one of the functions of the law is to bring attention to matters that would have otherwise be seen as private.⁶⁸ Nevertheless, the ability of the law to empower vulnerable and disadvantaged members of society

⁶⁴ Bennett, *op. cit.*, 51. See also T W Bennett, 'An African Doctrine of Equity in South African Public Law', (2011) 57 Loyola Law Review 709.

⁶⁵ Bennett, *op. cit.* 52.

⁶⁶ *ibid.*

⁶⁷ See also Radley Enrico, 'Educating South African Legal Practitioners: Combining Transformative Legal Education With *Ubuntu*' (2016) 13 US-China Law Review 817.

⁶⁸ Lee Ann Bassler and Melinda Jones, 'Fostering Inclusive Societal Values Through Law' (2002) 10 International Journal of Child Rights 371, 372.

should not be exaggerated.⁶⁹ That is why education is important in effecting the social transformation needed for actual and meaningful participation of women in decision-making. Furthermore, according to Waghid and Smeyers⁷⁰ educational institutions on the African continent ought to become concerned especially with cultivating *OmUuntu* as respect for persons in terms of which everyone – women, men and others – deliberate freely in a humane and communally engaging manner. This implies that these educational institutions need to be concerned with creating democratic and responsible citizens and future leaders who are attuned to the humane practice of *OmUuntu*. More importantly, through its commitment to educating people for humanity, postcolonial universities would accomplish their mission of nurturing citizens in an inclusive, respected and valued environment.

6 Conclusion and recommendations

We noted through our four-stage model that initiatives such as the 50/50 gender policy, though commendable, were far from the ideal substantive and meaningful women’s participation in the public sphere. We also noted that the government was yet to formally consider the values of *Uuntu* in their quest for a more just society. This a serious omission – or mistake – because *Uuntu*, unlike the other initiatives, has its roots in African traditional cultures. It is likely to be more acceptable and more effective than the other endeavours.

At the same time, *Uuntu* – because of its particular emphasis on community and communitarian values – can work to stifle initiatives aimed at elevating women to leadership positions. That is why we proposed *OmUuntu* – an African philosophy that reconciles the communitarian values of *Uuntu* with the liberal individualism required for women to engage meaningfully in decision-making in the public sphere. Specifically, we put forth the philosophy of *OmUuntu* and the argument that the values and ideals of *OmUuntu* denote human dignity and the other-regarding notion of interdependence between human beings, which in turn imply that women should be given an equal say as men in decision-making. Otherwise, the dignity of women as human beings will be violated.

⁶⁹ *ibid.*

⁷⁰ Waghid and Smeyers *op.cit.*, 6.

Affording women the opportunity to be included would unlock their cognitive and intellectual ability to express themselves freely within an enabling environment, and justify democratic practices in Namibia. Women represent a largely untapped human resource. They can bring fresh perspectives to decision-making, they tend to favour harmonious dispute resolution and disfavour confrontation, among other qualities. In terms of leadership, women are characterized as “nurturing, relational, non-hierarchical, attuned to the ideas and feelings of others, communicative and communal”.⁷¹ There is thus a compelling economic argument for the inclusion and participation of women in the public sphere. Igbokwe argues that women are indispensable for nation-building and that, if afforded the opportunity to participate in the general governance structure, the national economy can surmount some of the developmental challenges it grapples with.⁷² Good governance has thus always been associated with the greater representation of women at all levels of government.⁷³

The meaningful participation of women in decision-making institutions demands much more from policy makers than offering a seat at the negotiating table. With our model firmly kept in mind, members of boards in both public and private sectors could act the way they would have liked themselves to be treated had they been in women’s shoes.

⁷¹ Swanee Hunt, Rina Amiri and Guy Edmunds, ‘Women Waging Peace: Lessons in Leadership’ (2000) 24 *The Fletcher Forum of Foreign Affairs* 61, 62.

⁷² J O Igboke, “Women Participation in Leadership Positions: Beacon of Social Change in Nigeria” (2013) 4 *International Journal of Advanced Legal Studies and Governance* 64.

⁷³ *ibid.*

CHAPTER 6

VISSER V MINISTER OF FINANCE: A MISSED OPPORTUNITY TO CLARIFY THE EQUALITY PROVISION WITHIN A NAMIBIAN DISABILITY RIGHTS PARADIGM

by
Yvonne Dausab and Kevin Pinkoski

1 Introduction

The constitution is a bridge from the old dispensation of oppression to one of inclusiveness. The pre-constitutional boundaries can no longer determine the rule for interpretation and courts should not be tied up by common law rules or judgments that have no relevance for the constitutional dispensation. Botha points to the fact that the constitution is a clean break with the past. There is no way that the concept of legal rules from apartheid era with its solid boundaries should be forced into the present dispensation only to prevent transformative constitutionalism.¹

In order to ensure that constitutional interpretation is accorded the value it deserves within a post-apartheid constitutional democracy, it cannot be treated like any other legal instrument. Interpreting a constitution is not just about answering a legal question. It is also about delineating the boundaries the constitution sets between the role of the executive, the legislature and the judiciary². Therefore there has to be a difference. That difference lies in the hermeneutic tools and methods used to interpret an ordinary statute and those used to make a determination that is potentially life-changing when a constitution is interpreted and applied -- unless one wants to maintain a culture of 'austerity of tabulated legalism'³.

¹ Nico Horn, *Interpreting the Interpreters* (The Namibian Constitution in Courts) (KAS Windhoek Namibia 2017) 272.

² Mathew //Gowaseb *The Quotable Nujoma: Wisdom of the First President*, (Legacy Publications, 2005), 77 "What I consider to be the greatest danger to our democracy is a situation whereby citizens, because of disillusionment, cease to communicate with the Judiciary and Government as a whole, thereby showing their loss of confidence in their institution" Statement on aspect relating to the administration of justice in Namibia, December 1995.

³ *Government of the Republic of Namibia v Cultura* 2000 and Another 1993 NR 328 (SC) at 340 "A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic of the nation, in the articulation of the values bonding its people and in disciplining its Government..."

It is true that in a legal history primarily anchored on positivism (the law as it is and not as how it ought to be) and to a limited extent on natural law, the role of the court is ostensibly clear but also invariably limited⁴, in other words, the court is confined to interpreting the law whilst the legislature makes the law⁵. But it need not be so. Because Nujoma aptly proffers:

Logically the independence of the judiciary cannot be absolute and not all criticism could possibly be construed to be interference in the independence of the Judiciary. That independence, he says, like that of an individual has to be enjoyed and exercised within the four corners of the law and in harmony with other rights and freedoms that our constitution confers in others.

This is not an attempt to question the independence of the judiciary. Far from it. It is rather a reminder that the apex court, respectfully, owes a higher duty to continuously clarify the law and interpret the constitution in a manner that it reaffirms the social justice agenda we all ought to drive as a nation⁶.

The Supreme Court of Namibia decision in *Alfred Mew Visser v Minister of Finance & 3 Others*: SA 89/ 2014 (the 'Visser' decision) is therefore an interrogation of the key questions the court should have considered. Eighteen years after the *Müller v President of the Republic of Namibia and Another*⁷ decision ('Müller decision'), the court did not take the opportunity to present a fresh and necessary look at the equality provision within the context of a disability rights paradigm. This is significant for two reasons: (1) disability is not a prohibited ground under article 10(2) and reading it into the social status ground requires clarification or a declaration that

⁴ Justice Z M Yacoob, 'Reflections of a Retired Judge' in O Vilhena *et al* 'Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa' (PULP 2013) 614 "The point is made in the introduction of this book how limited the role of the court is in effecting transformation and achieving the order contemplated by our constitution. I think it is important to elaborate on how very limited and sometimes irrelevant court decisions are to the achievement of real social transformation".

⁵ *Government of the Republic of Bophuthatswana v Segale* 1990(1) SA 434(BA) in Kruger & Currin 1994. *Interpreting a Bill of Rights*, 118. Galgut AJA, "What appears from all the above authorities is clear. The task of the Courts is to ascertain from the words of the statute in the context thereof what the intention of the legislature is. If the wording of the statute is clear and unambiguous they state what that intention is. It is not for the courts to invent fancied ambiguities and usurp the functions of the legislature".

⁶ Edwin Cameron, *Justice a Personal Account* (Tafelberg, 2014), 282, "There is a fifth reason why we can feel some measure of sober confidence. This lies in the fundamental structure and values of the Constitution. These are democracy, equality, a separation of power between independent institutions and a commitment to social justice. The Constitution is a social democratic document.

⁷ 1999 NR 190 SC.

would create scope for persons with disabilities to approach courts confidently should their rights be violated and (2) equality under the Muller decision requires expansion in terms of looking at a different set of facts (the Muller decision was about gender⁸ equality) to clarify the meanings of discrimination as it pertains to disability. Specifically to clarify whether differentiation that leads to unjust and unfair treatment but is rationally connected to a legitimate purpose amounts to unfair discrimination. The court needed to develop a nuanced understanding of our constitutional principles – the relationship between equality and disability is one such principle that has yet to be explained by our courts so that there is sequential correction of the law, should such change be warranted.

The Supreme Court has missed an excellent opportunity to clarify where disability fits into the equality equation of the Namibian Constitution. This question is developed along broad strokes that covers a multitude of legal theory, constitutional interpretation and rights conundrums. First, this chapter will briefly sets out facts that led to the *Visser* decision and the legal question that the court was seized with. This will also include a fleeting reference to the principal statute that was the subject of the proceedings, albeit not in much detail. Then second, this chapter locates the debate within the binary of the limiting approach of strict legal interpretation and the need for a more contextually relevant value-based approach. Third, it explains the understanding of the equality provision under the Namibian Constitution and related case law. The fourth part is a reflection on disability rights and Namibia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Last but not least, the chapter critically looks at how the court should have considered the equality provision to enhance social justice for persons with disabilities and puts forth the reasons for the argument that the Supreme Court in *Visser* let a unique chance to develop Namibia's equality jurisprudence in relation to disability rights pass it by despite the flawed premise on which the case was argued.

⁸ Dianne Hubbard, 'Ideas about Equality: Gender, Sexuality and the Law in S La Font and D Hubbard. *Unravelling Taboos: Gender and Sexuality in Namibia* (LAC 2007), 87.

2 Brief summary of the facts

Alfred Mew Visser ('Mr Visser') suffered a visual impairment as a result of a motor vehicle accident. He sued the Motor Vehicle Accident Fund (MVAF), the Minister of Finance and three others for damages in the amount of nine million Namibian dollars. The MVAF's liability flows from their statutory obligation to provide financial assistance to victims of motor vehicle accidents⁹. It is common cause that Mr Visser was injured in a motor vehicle accident and that he was not negligent in causing the accident¹⁰ and qualifies as a claimant for purposes of the Act. The Minister of Finance, as the line ministry, made a regulation that capped the total amount that a victim can claim from the MVAF following an accident. This is a policy consideration. Mr Visser questioned this policy decision using what one would consider a wrong avenue, namely that the Minister acted *ultra vires* when in fact it is an established fact that principal statutes often sanction a particular Minister to make regulations in order to operationalise the text of the principal statute. For purposes of this chapter, this matter will not be taken any further, although the court, respectfully, spent an unwarranted amount of time ventilating this issue during the proceedings.

The second part of the inquiry – and the focus of this chapter – relates to whether or not, when the Minister made the decision to cap the amounts, not specifically considering the impact of this decision on persons with disabilities amounts to discrimination as envisaged under the Muller test and whether this differentiation is justified even if rationally connected to a legitimate purpose.

With regard to the scope of the chapter and its limitations, questions of constitutional interpretation and the hermeneutic philosophy that surrounds it are not easy. Since the adoption of an all-inclusive constitution in 1990 and the subsequent steady growth of a corpus of case law involving and interpreting the constitution, these questions abound because the courts have also not developed a consistent and perhaps even slightly uniform approach to interpreting the

⁹ Motor Vehicle Accident Fund Act, No 10 of 2007. Under s 2 the MVA fund is established to 'fairly and reasonably provide assistance and benefits to a person who is injured in a motor vehicle accident.'

¹⁰ Road Traffic and Transport Act No 22 of 1999. See s 80 (reckless or negligent driving), also see para 1 of appeal judgment "The said German national's negligence was the sole cause of the collision".

constitution¹¹. Scholars have not had an easy task explaining what constitutional interpretation should look like and what factors should be considered in deciding a nation's value system and aspirations¹². The intention of this chapter, like many others before it, is not to provide a definitive answer but to interrogate whether in this particular instance the Supreme Court, with its final binding authority¹³ should have attempted to, at the very least, ventilate the issues pertaining to disability rights and the equality provision, without simply resorting to applying the test set out in the *Muller* decision, that is clearly, and shouldn't be blindly followed without the consideration of the facts set out therein and the matter the court had to consider. Time constraints also does not allow for an in-depth consideration of a theoretical underpinning that supports a particular interpretive theory, but *Amoo*¹⁴, *Mundia* and *Horn* to name a few, have started interrogating this question quite neatly elsewhere.

Instead the purposive approach suggested in earlier cases of the Namibian courts and the much talked about transformative constitutionalism will be referred to explain the type of judges and courts would, even if only notionally support the ideals of a constitution that was meant to change the lives of our people¹⁵. Further attempts to provide additional scope for interpreting the equality provision in particular but more generally to encourage the bench to be a bit more pro-active in the development of our legal theory and constitutional jurisprudence although limited is the primary focus of this chapter.

¹¹ *S v Acheson* 1991 (1) NR(HC); *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, 1991 (3) SA 76 NM 178(SC); *Government of the Republic of Namibia v Cultura* 2000 and *Another* 1993 NR 328 (SC); *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC); *Government of the Republic of Namibia v Mwilima and all Other accused*, 2002 NR 235 (SC);

¹² Kenneth F Mundia, 'Constructive Interpretation of the Namibian Constitution: Transposing Dworkin to Namibia's constitutional jurisprudence' 73-90. Nico Horn, 'Transformative Constitutionalism: A Post- Modern approach to Constitutional Adjudication in Namibia' in Nico Horn and Manfred O Hinz. 'Beyond a Quarter Century of Constitutional Democracy' (KAS Namibia 2017) 241-263. J Kruger, 'Towards a new interpretive theory' in Kruger and Currin. *Interpreting a Bill of Rights* (Juta &Co 1994) 103-129 and Hon GJC Strydom 'A Bill of Rights and 'Value Judgements' v Positivism: the Namibian Experience', 94-102.

¹³ Article 81 of the Constitution provides that 'a decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted. *Id*, Nico Horn (2017) 'the course of legal thought in Namibia is determined by decisions of the Supreme Court'. 279.

¹⁴ S Amoo 'The Relevance of comparative jurisprudence in the Namibian legal system in N Horn & MO Hinz *Beyond a Quarter Century of Constitutional Democracy*, (KAS, 2017), 195-210.

¹⁵ Foreword to Third Constitutional Amendment, Hage G Geingob, PM, 'Over time, we will further enhance governance by ensuring that the institutions established under the Namibian constitution effectively execute their functions and powers to ensure that all person under it enjoy fair and equal treatment. In so doing we will ensure that everyone can enjoy the peace and prosperity in Namibia and that no one will feel left out.' Also see Mathew //Gowaseb, *the Quotable Hifikepunye Pohamba: Wisdom of Namibia's Second President* (Legacy Publications 2015), 119 'The fight for our nationhood and freedom was motivated by the belief that all human beings are equal, with inalienable rights to freedom and dignity'.

In a constitutional democracy, with an independent judiciary starved of sufficient development of a uniform and consistent guide to constitutional interpretation, answering this question in a more elaborate and perhaps even comparative fashion should have been the court's pre-occupation. Regrettably, this was not to be.

3 The Act and attendant regulations

The MVAF is part of state responsibility to subsidise the impact of continued and increasing road carnage in the country¹⁶. It was no longer possible to simply have accident related claims be strictly left as a of part civil law under the rubric of delict. The fund was accordingly established to "provide assistance and benefits to persons injured in motor vehicle accidents and to dependents of persons killed in such accidents and to provide for matters incidental thereto."¹⁷ The intention here is not to discuss the full scope of the statute but simply to highlight the relevant provisions that were the subject of the proceedings in the Supreme Court. More generally, to point out that the definitional sections adequately defines the meaning of "injury", "claimant"; "life enhancement assistance" "rehabilitation"; and "motor vehicle accident"; and were not in dispute but could have been considered in determining whether or not Mr Visser was making a reasonable requests to have his claim placed outside the rubric of the capped amounts. Particularly the provisions on aspects on life enhancement assistance and rehabilitation¹⁸ would have fell squarely within the 'needs' bracket of Mr Visser. In other words, his claim covered those issues associated with life enhancement such as possible adjustment to his home environment, care giving, transport and artificial aids. In addition, there are reasonable safeguards within the internal process of the fund, to consider appeals from members of the public should they not be satisfied with an award or particular assistance¹⁹. The inquiry at the Supreme Court did not question the sufficiency or not of those safeguards leaving members of the fund guessing whether or not they could be entitled to more. This enquiry would have been beneficial for making a determination on the question that this court was seized to address.

¹⁶ NRSC 2016 *Study on the use of alcohol and its effects on road users in Namibia: Transport Management Issues*. "Namibia has a high prevalence of Road Traffic Accidents (RTAs) relative ot its small and sparsely distributed population. The causes are often speeding or reckless driving, or general non-obesrvance of traffic rules", 3.

¹⁷ See long title of the Act.

¹⁸ "This includes the restoration of bodily function, any treatment or program, scheme, training...intended to restore physical, mental, emotional and behavioural health and function and restore all forms of infirmity of mind and body..."

¹⁹ MVA Act, section 25(8).

As is with any statute that has resource implications the principal Act, has a number of conditions, limitations and exclusions²⁰. More specifically, there is provision that the ‘liability of the Fund *may not exceed*’ certain limits provided for and reflected in the ancillary regulations (for our purpose the regulatory framework as set out in the judgment is sufficient for our discussion in this chapter). Again, for purposes of this chapter, the mathematical equation of what should have been an appropriate award for Mr Visser is beyond the scope of this chapter, the focus is instead on the principle of how the court should have dealt with the detrimental effect of a “one size fits all” approach to issues of varying circumstances.

In this regard it is safe to state that the general language in the text of the law, as it pertains to the award and assistance, is that it is not cast in stone. There is provision for flexibility it would seem. As part of its assessment and adjudication this is something the court could have considered in making a determination whether the differential treatment of persons with disabilities amounted to unfair and unjust discrimination. The court should have interrogated the funds rules and procedures and their appeal and review processes in respect of the awards and benefits²¹.

The other observation in respect of this statute is the glaring absence of any specific provisions that addresses disability rights issues. This is particularly telling given that increasingly Namibians are disabled as a result motor vehicle accidents. For example there is provision in the regulations that provides for instances when a person injured may not be able to complete a form. There is allowance for assistance made in respect of (1) for minors (guardian can assist), and (2) in case of a person where a curator has been appointed. There is no other category in terms of which Mr Visser would be catered for, although in practice he probably received adequate assistance to complete the process. This is a minor point but it makes the bigger point that the text of the law may be inherently lukewarm in the assistance of persons with disabilities. Again, the issue is not to question the adequacy or not of the law, because its inadequacies would ordinarily be cured

²⁰ *ibid*, section 24(1).

²¹ *ibid*, sections 24-26.

by a constitutional finding of a violation of constitutional rights, which makes any amendment or modification of the principal legislation sequential on that score. Generally, the statute has made adequate provision addressing issues pertaining to the management of assistance to victims of motor vehicle accidents but the question remains whether it takes account of the different characteristics of each of the claimants and this question begs an answer within the parameters of the equality provision.

4 The dilemma of a strict legal interpretation versus constitutional interpretation

When an aggrieved person approaches a competent court to seek relief for what she believes to be a violation of her constitutionally protected right, the question should not simply rest on what would, in the ordinary course of events, be a determination of a legal question to provide a legal remedy. Constitutional matters invariably locate themselves in the realm of public interest and public impact, and therefore should be treated with caution and care.

Ordinary statutory or common law interpretation²² is guided by a set of rules largely to ensure consistency in their findings²³. Chief among them, the literal approach, which focuses on the text of the law; the famous golden rule, which provides scope for consideration of other factors other than the language of the text; and finally the mischief rule²⁴, which is probably also the reason why there is reluctance to broaden the scope of factors and variables that are likely to affect the outcome of a particular court decision²⁵.

²² D Hubbard 'Infusions of the Constitution into the Common Law in Horn & Hinz, 211. "The Courts have always had the power and duty to develop the common law, even in the pre-Constitutional era. This is part of what allows the law to remain dynamic and relevant to contemporary society, while still providing a reasonable level of predictability and certainty."

²³ G E Devenish, 'Interpretation of Statutes' (Juta & Co 1992) 25-52 'There are pertinent reasons for the courts to articulate and apply consistently a jurisprudentially sound interpretive theory, and there are several of those theories, but without an articulated *modus operandi*, courts arrive at inconsistent conclusions. A sound jurisprudential theory enhances predictability. Of the diverse theories, the following are seminal aspects of interpretation: nature and functions of language; relevance and intention of the legislature; role of the judiciary and extent of judicial discretion and time frame within which statutes should operate'

²⁴ Samuel K Amoo, *An Introduction to Namibian Law: Materials and Cases* (Macmillan Education, Namibia 2008) 291-299.

²⁵ F Bennion 'Understanding Common Law Legislation: Drafting and Interpretation' (Oxford, 2001)80 'What the court does (or should do) is take an overall view, weigh all the relevant interpretive factors, and then arrive at a balanced conclusion'.

The mischief rule relates to the question of the legislative intent. In other words, what defect or problem did the law maker intended to fix or remedy when they made the law, and does the interpretation applied still bear out that intent? Justice Yacoob²⁶, suggest the following when it comes to interpreting the constitution:

“Ideally, we should not in constitutional adjudication and in the interpretation of the constitution, in particular, be governed by a determination of the intention of the makers of the constitution. He further says, in the first place it is difficult to know what the intention of the makers of the constitution was. The same words often mean different things to different people. The result is that is not inconceivable that the hundreds of constitution makers voted for the constitutional clause in question and thought these words meant different things and intended different outcomes. Moreover, a harking back to original intent means that the constitution is stuck to the values that were prevalent at the time it was made. ...Many of us therefore now speak of the purpose of the constitution. We regard the constitution as a living document and a dynamic instrument into which a court should breathe more life. The original intent thesis contributes to rendering the constitution a static document. We would therefore prefer a context driven interpretation of our constitution. This further complicates the process of judging in a constitutional democracy.

Any rule that narrowly only focusses on legislative intent regardless of the organic nature of a constitution, is severely limiting and is likely to lead to an outcome that is likely to be unjust, unfair and unreasonable, and invariably not beneficial²⁷.

Apart from the set of rules that are applied during the interpretation of a statute there is also the existence of presumptions about the text of the law, the most pertinent being that the legislature intended to make law that is valid and effective.²⁸ This basically means that the text and language are the guiding post. Any interpretation that falls outside the scope of the preferred meaning is against the intent of the legislature and should, at least in theory, not be allowed. The other common law legal principles at play are the doctrine of *stare decisis* and judicial precedent, which arguably are also limiting and do not provide adequate scope for judicial activism and latitude.

²⁶ *ibid* Vilhena, 610.

²⁷ *S v Acheson* 1991 NR 1 (HC) per Mahomed AJ at 9 J “The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian constitution of 1990”

²⁸ In the United States, this presumption is expressed by two separate presumptions, namely the presumption of validity and the presumption against ineffectiveness. See A Scalia and B A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).

In the *Visser* decision, the application of these principles were not even visible in the *ratio decidendi* that ordinarily provides the reader and the parties to the proceedings with some justification why the court has taken the decision it has. Understanding how these rules apply and when they ought to be applied is important for locating the case for a more nuanced approach to constitutional interpretation²⁹. Diescho suggest the following when he says:

All these legal mechanisms are intended to safeguard fundamental human rights, freedoms and liberties, without rendering the government ineffective in its task of determining and implementing policy that serves to forward the welfare of all Namibian citizens³⁰.

The court not even venturing into testing the fairness and justness of the policy decision, in a manner that it can justify its own decision flies in the face of what governments have been put in place to do, namely serve the interest of the society they serve³¹.

Constitutions, the world over³², have been hailed as setting out the parameters for human rights protection. This is usually evident through a catalogue titled the bill of rights, often entrenched in any law seen as a constitution.³³ The South African Constitution has a much wider scope of bill of rights that include a justiciable set of socio-economic rights.³⁴ This Namibia fell shy of those rights, as the majority and probably the most important set of socio-economic rights are only provided for

²⁹ *S v Acheson* above, 10 A “The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a “mirror reflecting the national soul’ the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining government. The spirit and the tenor of the constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion”.

³⁰ Diescho, 67.

³¹ *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 Nm SC at 186 H “ The court in assessing the extent of the limitations to rights and freedoms, must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values”

³² J Diescho “The Namibian constitution in Perspective, (Gamsberg Macmillan, 1994), xiii, “the process that led to the adoption of what Namibians have come to call the “Mother of Laws” has been ahiled throughout the world as the most democratic exercise in the history of Africa”.

³³ G J Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta & Co 1995) Kenwyn, foreword ‘ the people of Namibia have responded to these expectations by adopting a constitution of extraordinary eloquence and vigour in the articulation of progressive jurisprudential values and in the creation of constitutional structures to give force and effect to those values.’ Ismail Mahomed, C J Namibia.

³⁴ The Constitution of the Republic of South Africa, Act 108 of 1996: Housing(s 26), Health Care, Food, water and social security(s 27), Education(s 29).

as principles of state policy³⁵, suggesting their non-binding nature³⁶. This despite the fact that scholars have argued, quite convincingly too, that using the rules of interpretation, particularly, those that are purposive and anchored on the interdependent and interrelated nature of human rights, these rights can become enforceable.³⁷ In fact, the language in article 144 and the importation of all international instruments into the body of Namibian domestic law, once ratified, technically nullify any argument against the justiciability of socio-economic rights and makes these right binding and enforceable.³⁸

The question is no longer whether constitutions should be interpreted differently, but whether courts should continue to develop an approach that can provide legal certainty in this sphere and that judges are more perceptive of their role³⁹. Namibian jurisprudence has been inconsistent, although in a recent judgment⁴⁰ the SC arrived at a decision in respect of adultery (albeit unsolicited) by adopting a value-judgment approach. The following text is instructive and was part of an effort to answer the question whether the delict of adultery is sustainable in law; although not entirely related to the factual inquiry of this chapter, it does support the importance of value judgments:

This court has likewise made it clear that public policy and the legal convictions of the community are informed by our constitutional values and norms. An examination of the origin of the action and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy. That examination also demonstrates that the action has also lost its social and moral substratum and is no longer sustainable.

Despite the existence of a number of Supreme Court decisions, notable of which are *S v Acheson, Ex Parte Attorney-General: In re Corporal Punishment by Organs of State, Government of the Republic of Namibia v Mwilima* and *Government of the Republic of Namibia v Cultura 2000 and Another*, where the courts considered

³⁵ Article 95- Promotion of the Welfare of the People.

³⁶ Article 101- 'The principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The courts are entitled to have regard to the said principles in interpreting any laws based on them'.

³⁷ J Nakuta, 'The justiciability of social, economic and cultural rights in Namibia and the role of NGOs' in N Horn & A Bösl, *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia 2008) 97-100.

³⁸ Namibia formally acceded to the 1966 UN Covenant on Economic, Social and Cultural Rights on 28 November 1994, making it part of our domestic law.

³⁹ F Bennion *op cit*, 82 "the interpreter needs to be aware of the juridical nature of what is being interpreted and to construe accordingly"

⁴⁰ *JS and LC, RM (SA 77/2014)* (19 August 2016).

comparative jurisprudence, and took a more broad, liberal, purposive and value oriented approaches,⁴¹ the Supreme Court in the *Visser* decision did none of that to reach a decision that, at the very least, would have been considered well-reasoned and perhaps justified in its outcome. The principle of a reasoned judgment provide some comfort to the parties that even if an outcome did not favour them reason for the decision is sufficiently clear to provide scope for acceptance and that justice has been served.

In the preceding parts of this chapter, it is shown that the SC in the *Visser* decision failed to rise to the occasion and show that substantive equality is necessary in order to meet equality as it is presented in Art 8 and Art. 10 of the Namibian Constitution. Regardless of the legal outcome of cases, the Namibian Supreme Court must be able to develop the complexities of equality without being influenced by the policy considerations or limited State resources established in Art. 95 of the Namibian Constitution. Policy considerations can influence the final decision of cases, but the Supreme Court needs to use every opportunity it has to develop the jurisprudence on equality, regardless of the outcome of cases.

5 Understanding the equality provision

5.1 Defining equality

Authors agree that defining equality as a concept is not always an easy task,⁴² and yet it is used on a daily basis in a variety of contexts.⁴³ In fact, it is an onerous responsibility placed on those that venture into trying to clarify its meaning.⁴⁴ Still, it is also the most celebrated and important provision in both domestic constitutions and international instruments. Typically, equality is anchored on 'equality before

⁴¹ D Hubbard, Ideas about Equality, 87 'There is only a small body of jurisprudence on gender equality in Namibia. However, the decided cases have on the most controversial issues, given a surprising amount of weight to "public opinion" as a source of values to guide the constitution'. Also see *Cultura 2000* "the constitution must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and achievements of the ideals and aspirations of the nations in the articulation of the values bonding its people and disciplining its government" –As quoted in *Mapaure*, 38.

⁴² *Holmaat* (2004) 2 fn 3, in *Mapaure*, 32 '... there are as many definitions of equality as the number of people who have tried to define them'.

⁴³ Dunia P Zongwe, 'The Articulation of an African Philosophy of Equality as Legacy of the South African Constitution' (2016) 31 *Southern African Public Law* 32, 34 in fn 7 quoted therein "It is a 'chameleon idea, used everyday in a myriad of social contexts: racial equality, sex equality, economic (in) equality, equality of opportunity, ...so on".

⁴⁴ Dunia P Zongwe, *op.cit.*, 32-53: 'Equality the Runaway Concept', 34.

the law, which arguably encapsulates the formal (black letter of the law scenario) and the substantive portion, which suggests you are likely to find a remedy for your problem if it has a basis in law.

The second part of the equality provision is based on non-discrimination.⁴⁵ Although not mutually exclusive, it can also be read disjunctively to benefit the victim of a discrimination. Often equality and non-discrimination are read with Affirmative action provision, to show justification for fair discrimination. The post-apartheid introduction of AA was important. PWDs are designated group for purposes of the Act⁴⁶ and have enjoyed significant coverage but whether those lofty promises of the statute have actually improve their situation is questionable⁴⁷ although the assessment of that aspect is beyond the scope of this chapter. The fact that disability is not listed⁴⁸ as a prohibited ground for purposes of the non-discrimination provision exacerbates the enquiry into what a nuanced understanding of equality within a disability right framework should look like.

5.2 Equality under the Namibian Constitution

Owing to the submission made by the party's counsel, the Supreme Court narrowed in on articles 8 and 10. Article 8 establishes 'respect for human dignity' and Art. 10 'equality and freedom from discrimination'. Specifically, Art. 8(1) provides that the dignity of all person shall be inviolable. In addition, Art. 8(1)(b) reads as follows: 'No person shall be subject to torture, cruel, inhuman and degrading treatment and punishment'.

⁴⁵ Clever Mapaure, 'A corollary is sandwiched between equality and non-discrimination'. 31.

⁴⁶ Affirmative Action (Employment) Act (No. 29 of 1998) Section 18(1) (c). Also see article 10 and 23 of the Namibian Constitution.

⁴⁷ See Outcome of Namibia's Periodic State Report Review on the following Treaties/Convention for 2016, 8, on Persons with disabilities: the Committee is concerned that a child with disabilities are disadvantaged in access to education and that very few persons with disabilities are engaged in gainful employment, as a result of lack of enabling policies as well as of resources. The Committee is also concerned that barriers to accessibility of persons with disabilities have not been eliminated. And among others the Committee recommends: "Allocate the necessary resources for ensuring accessibility and availability of public goods and services and for the provision of reasonable accommodation to persons with disabilities, in law and in practice."

⁴⁸ *Id*, the committee notes with concern that the state party's constitution prohibits discrimination based on a limited number of grounds and recommends that state party expands the grounds of discrimination prohibited by the constitution to include among others...disability and to adopt comprehensive anti-discrimination legislation, which prohibits both direct and indirect discrimination and provides for the possibility of temporary special measures and remedies for victims..."

Article 10 reads:

1. All persons shall be equal before the law.
2. No persons may be discriminated against on grounds of... social status.

There is often an inextricable link between the human dignity provision, and the equality and non-discrimination provisions. Arguably because discrimination or differential treatment that is unjust and unfair is likely to affect the dignity of a person.⁴⁹

However, neither article 8 or article 10 provide a nuanced understanding of what is meant by equality. The Supreme Court adhered to an understanding of equality that primarily evaluates formal equality. For example “as is evident from the caps in place and the regulations, the caps apply across the board. No distinction is made between claimants at all. In fact, all claimants are in the same position when it comes to the capping of their claims and are thus equal before the law”⁵⁰. This is probably the problem when it comes to treating people who are differently situated similarly. Clearly, this fails to take into account the individual needs of persons with disabilities to lead equal lives⁵¹. In the *Chairperson of the Immigration Control v Frank* decision, the fact that the committee did not consider the sexual orientation of Ms Frank was precisely the problem. It should have been the fact that she is lesbian and does not have the benefit like her heterosexual counterpart that should have been one of the primary consideration in making a determination in her favour⁵².

⁴⁹ ibid, 45 ‘The core enquiry of equality adjudication is not the impact of the challenged act or legislation as such rather it is the impact of those acts on the dignity and self-worth of the complainants or other people aggrieved by the acts’.

⁵⁰ See para 22 of judgement.

⁵¹ ibid, J E Lord, ‘formal equality can occur when laws or policies call for different groups of persons to be treated the same, perhaps by prohibiting discrimination against a group (on basis of social status). Although such an approach seems logical and certainly has an important role to play, it is not enough by itself to ensure that persons with disabilities or other groups can enjoy true equality. Additional steps may need to be taken in order to account for the different circumstances that persons with disabilities face and the address the artificial barriers to their inclusion that have been created by society.’

⁵² Nico Horn, ‘Interpreting the Interpreters’, 225. ‘The Board denied that the homosexuality of Frank played any role in its decision. Her sexual preference was a private matter’.

Jurisprudence has established that equality in the Namibian Constitution primarily means equality before the law. This is the result of the decision in *Müller v President of the Republic of Namibia* where the court determined that equality does not mean “absolute equality,” but “equality between persons equally placed.”⁵³ This decision reaffirmed that decisions of the courts lean towards formal equality because often substantive equality also has resource implication but that it is necessary to treat individuals differently in order to achieve equality in society.⁵⁴ The Supreme Court has not clarified if equality means treating all individuals the same, or treating some individuals differently in order to place all individuals equally in end result. As Mapaire posits, the ‘notion of equal treatment does not take into account the fact that equal application of the rules to unequal groups or individuals can have unequal results’. This formal approach to equality, he continues “supports the view that a person’s individual (-Mr Visser-) or physical characteristics should be seen as irrelevant in determining whether they have the right to some social benefit or gain”⁵⁵.

5.3 Equality test under *Müller*

The legacy of *Müller v President of the Republic of Namibia* is that Namibian courts have distinguished between “differentiation” and “discrimination”.⁵⁶ Discrimination has an element of unjust or unfair treatment.⁵⁷ Differentiation is not unfair discrimination provided that it has a rational connection to a legitimate purpose.⁵⁸ Differentiation therefore allows for the courts to permit discrimination in circumstances that have a legitimate purpose that is connected to public in *Müller*, in order to show that different treatment of disabled peoples is not differentiation, but rather, discrimination.

It is clear that the test set out in this case is restrictive and does not expand equality in a manner that it takes into account human differences. A consistent application of this test amputates the opportunity created by reading disability into the

⁵³ *Müller v President of the Republic of Namibia* 1999 NR 190 (SC).

⁵⁴ Clever Mapaire, “Decoding the Right to Equality: A scrutiny of judiciary perspicacity over 20 years of Namibia’s existence” (2010) *Namibian Law Journal* Vol.2 Iss.2 34.

⁵⁵ *ibid*, 33.

⁵⁶ Dianne Hubbard, “Ideas about Equality: Gender, Sexuality and the Law” *Unravelling Taboos: Gender and Sexuality in Namibia* edited by Suzanne Lafont and Dianne Hubbard (Windhoek: Legal Assistance Centre 2007) 87.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

social status ground (although I am not convinced this is the best avenue) or to create scope for disability non-discrimination. This means that the test should be anchored on the exclusionary nature of an interpretation that does not see that not acknowledging difference is likely to lead to an unfair result, purely on the basis of a persons' disability.

5.4 Equality in Canada

Drawing inspiration from either international law or other jurisdictions on matters that affect us and to compare notes on how they have dealt with similar matters even if it only has persuasive value is important. The Canadian experience in clarifying the equality provisions in their own Charter is therefore quite useful. The Canadian Supreme Court has developed the jurisprudence necessary to apply substantive equality. Equality in Canada relies on the Canadian Charter of Rights and Freedoms, where section 15 (1) states:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁵⁹

Section 15 (2) allows for an amelioration of previously disadvantaged groups.⁶⁰ Formal equality, or equality before the law, was rejected in *Andrews v. British Columbia Law Society*, which rejected the premise that equality meant “individuals equally situated.”⁶¹ Consequently, in the case *Law v. Canada* and later clarified in *R v. Kapp*, the Supreme Court of Canada established the following guidelines: does the law impose a disadvantage on the claimant compared to other groups; is the disadvantage based on a listed or analogous ground? The guidelines flexibly allow for the consideration of a loss of human dignity in the previous two questions.⁶² The intention of the test is to allow for equality to be measured between the disadvantage of the claimant, and to source that disadvantage in either the grounds

⁵⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁶⁰ *ibid.*

⁶¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁶² *R. v. Kapp*, 2008 SCC 41; see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

listed in the Charter or similar analogous grounds. All courts are consequently bound by the application of these guidelines. In a case like *Visser*, the Canadian Supreme Court would determine if the MVA Fund imposed a disadvantage on Mr Visser that would not be apparent to other groups, and if the discrimination was based on a listed ground – here, disability. But it is worth noting that the Supreme Court of Canada has, as an active judiciary, created guidelines to allow for other grounds to be analogized based on the grounds listed in Section 15 (1).

This developed jurisprudence shows the potential of an active court that develops and nuances constitutional terms such as what is meant by equality. Considering these guidelines in the determination of the *Visser* decision may have assisted the Supreme Court in establishing that reasonable accommodation within the confines of the CRPD could be the basis for equality. In other words, not providing reasonable accommodation could lead to discrimination on the basis of a person’s disability. The intention here is to provide scope for the court to link reasonable accommodation as a vehicle towards meaningful equality, the type of equality that will lead to equal results. Instead the court did not even attempt to read disability into social status in order to provide some relief on that score. The court, very dismissively, indicated that “there was no differentiation between or discrimination against equally positioned persons and hence it was not necessary to decide whether disability could be said to fall within “social status⁶³’as used in article 10(2). The constitutional challenges thus failed”⁶⁴. Respectfully the court clearly did not apply their mind to the very basic fact that there is a difference between a person that has a visual impairment and those without. At the very least, in their consideration, this should have meant something, not to exclude or discriminate but to acknowledge and accommodate human difference. Respectfully, this is a failure, and an unfortunate hallmark of an inactive judiciary disinterested in developing the nuances of our Constitution.

⁶³ *Infra*, para 26, ‘there is not positive obligation on the state to do more than this even if the disability amounts to a social status’. Without such obligation they are, like all other affected persons, only entitled to equal treatment which, as indicated above, is what the Act and the Regulations provide for’.

⁶⁴ Alfred Mew Visser, para 22.

6 Visser and disability: the consequences of the Constitution

Disability is defined as “a physical, mental or sensory impairment that alone, or in combination with social or environmental barriers, affects the ability of the person concerned to take part in education, vocational, or recreational activities.”⁶⁵ It is further defined as the “loss or limitation of opportunities to take part in the normal life of the community on equal level with others due to physical or social barriers.”⁶⁶ In Namibia, disability has not been listed as a prohibited ground of discrimination in Article 10 of the Constitution. Thus, there is little space for the Supreme Court to recognize or adequately discuss the situation of disability in relation to equality. The restricted space for such recognition results from the statement in *Muller* that the list of prohibited grounds in the Namibian Constitution is not open-ended.⁶⁷

Disability has a clear consequence on an individual’s ability to participate in society; it has a detrimental effect on his social status, economic opportunity, and personal prosperity. The statistics are clear: 17.7% of urban disabled persons do not attend school, 82.3% of rural disabled persons do not attend school, 42.5% of disabled persons work in agriculture and fisheries, with 14.6% in elementary occupations.⁶⁸ Seventy percent of disabled persons live in homes without a mortgage and only 2.9% of disabled persons have access to the Internet.⁶⁹ Specific to *Visser*, the highest proportion of disabled persons with no formal education are the blind.⁷⁰ These statistics are cautious in making assertions, but the reality is clear – being a person with a disability in Namibia is a limit on the potential of an individual to achieve equal success and prosperity.

Mr Visser suffered a disability as a result of the accident: he is blind in both eyes; he has a physical impairment that will affect his ability to take part in educational, vocational, and recreational activities. He will be unable to continue his normal life; he will be forced to learn a new system of reading; he will be limited in his work opportunities; and he will be capable of only participating in certain recreational activities. His entire life will clearly change as a result of the accident. He is destined to be, as Art 10(2) of the Constitution explains, in a “social status” limited by his disability.

⁶⁵ The National Disability Council Act (No.26 of 2004).

⁶⁶ The National Policy on Disability (1997).

⁶⁷ *Muller*.16 of the original court judgment.

⁶⁸ Namibia 2011 Census: Disability Report.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

Article 8 and 10 of the Namibian Constitution ensure a conducive environment to the full and equal participation for all its citizens in society, including men, women and children with disabilities. But, as was previously alluded to, because neither Art. 8 nor Art. 10 provide a comprehensive definition of what is implied by equality, the court is required to give such an interpretation. The *Visser* case is a clear example of a wasted opportunity to give a more nuanced explanation of what is meant by equality, a missed opportunity that will be detrimental to people with disabilities – one of Namibia’s most vulnerable populations.

The legacy of the *Müller* decision has a clear effect on the *Visser* case, as it allows the court to justify that the applied caps for compensation only differentiate, not discriminate between injured persons. The decision not to provide an increase in compensation is justified as a policy decision to “cater for wider number of claimants [rather] than have the Fund depleted by a relatively small number of big claims.”⁷¹ This decision is said to be “clearly rational and justified from a policy making perspective.”⁷² This is problematic because it allows the Minister of Finance to justify discrimination by labelling them as reasonably justifiable differentiations based on public policy and public opinion. In the *Visser* case, this means the denial of increased compensation for individual circumstances of disability, in order to keep the Motor Vehicle Accidents Fund Act solvent.

7 Emphasizing state resources over equality

Article 95 establishes the promotion of the welfare of the people. Art. 95 states that “[t]he State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: (g) enactment of legislation to ensure that the unemployed, the incapacitated, the indigent, and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the state.

⁷¹ *Alfred Mew Visser v Minister of Finance & 3 Others*: SA 89/ 2014 paragraph 10.

⁷² *ibid*, para 12.

Article 101 qualifies the application of the principles in article 95 and 101 states that “[t]he principles of state policy contains in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to said principles in interpreting any laws based on them”

The relationship between articles 95 and 101 is that the Courts are not required to limit the principles of equality due to regard to the resources of the state. The Courts must give regard to both the resources of the state and the principals of equality for legislation. That is to say, the decision of legal cases can be influenced only by questions of state resources, the Supreme Court must balance all principles. Furthermore, Art.101 does not prevent the court from using cases to develop jurisprudence on equality, while allowing the case decision to fall in favour of state resources and capability.

The lack of discussion on equality and disability rights in the *Visser decision* may have been influenced by the reality of Art. 95, that the Motor Vehicle Accidents Fund Act can only be used with regard to the resources of the state. The *Visser* decision establishes that the Motor Vehicle Accidents Fund Act “simply could not cater for full compensation of the claimants”. It was a policy decision of [the Minister of Finance] to rather cater for a wider number of claimants than have the Fund depleted by a relatively small number of big claims... In short, the fund did not have unlimited resources and a decision had to be taken how the available funds would be allocated.”⁷³ Here, the Court appears to be approving an interpretation of Art. 95 and Art. 101 that emphasizes the limit to state resources. But by emphasizing that limit, the Court fails to develop any of the necessary jurisprudence on equality for persons with disabilities.

Regardless of the decision in *Visser*, the Supreme Court should have seized the opportunity to elaborate on the meaning of equality and its relationship to disability. A court should take into account policy considerations in its decision, but it cannot be limited by those policy considerations. Furthermore, as this case shows us, policy considerations should not limit the opportunity to develop useful jurisprudence on undefined matters. Respectfully, this is not the behaviour of an independent and active judiciary: a necessary element in any functioning democracy.

⁷³ *ibid* para 10.

The decision to emphasize state resources over developing the jurisprudence on equality runs directly against the decision in *The Government Namibia v. Mwilima*: SA 29/2001, a case that establishes that the clause in Art. 95 of the Constitution “with due regard to the resources of the state” cannot be used as a justification to limit the Fundamental Human Rights and Freedoms established in Chapter 3 of the Constitution and Art. 12 specifying the right to a fair trial.⁷⁴ The case serves as a useful analogy as to how the court should treat the Fundamental Human Rights and Freedoms. In *Mwilima*, the Court is determining if accused individuals have a right to legal aid if the provision of legal aid may be financially onerous on the state. In this case, the Court emphasizes the entire context of the case is key to determining if legal aid should be provided, that the fact that it is the state charging individuals, with a limited access to evidence, limited language abilities, and the seriousness of the crimes outweighed any possibility to limit access to legal aid.⁷⁵ The factors in each case are unique, and not every case will an absence of legal representation result a guarantee to legal aid.⁷⁶

The *Mwilima* case draws two important analogies for the *Visser* Case. First, in terms of addressing the financial inability of the state to justify limits on Chapter 3 of the Constitution, the Court must not be forced to make a decision because of the resources of the state. This can inform the decision, but it cannot limit the decision. If the decision is limited completely by the resources of the state, then the Supreme Court loses its ability to independently evaluate the constitutionality of laws. Second, the *Mwilima* case shows that the Supreme Court can develop a nuanced and context specific analysis of a case that does not necessarily bind all future decision. In the *Mwilima* case, the court explains how the context of each request for legal aid is important, and that in this case, the context justifies the provision of legal aid. In other cases, such a provision may not be justified.

This second point is key to a functioning judiciary – the Supreme Court needs to recognize when it has opportunities to develop, clarify, and perfect principles in the Namibian Constitution. This is why *Visser* is a missed opportunity. The Supreme Court neglected to recognize that it had an opportunity to develop a more nuanced understanding of equality in relation to persons with disabilities.

⁷⁴ The Government Namibia v. Mwilima: SA 29/2001, 34.

⁷⁵ *ibid*, 37.

⁷⁶ *ibid*, 34.

The Supreme Court would not have had to provide an overarching rule for all cases, nor change its decision in this case, rather, the Court would be establishing the necessary jurisprudence required to develop a more complete understanding of Chapter 3: Fundamental Human Rights and Freedoms of the Namibian Constitution. The decision missed this opportunity, an opportunity to help make Namibia a more equal society for all.

8 Formal equality: equality as applied by the Supreme Court

Formal equality is established only by equality before the law.⁷⁷ This is rule equality that applies blind rules to every situation, no matter what social differences may be involved.⁷⁸ Formal equality eliminates all distinctions between individuals:⁷⁹

Formal equality is blind to entrenched structural inequality. It ignores actual social and economic disparities between people and constructions standards that appear to be neutral, which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Reliance on formal equality may therefore exacerbate inequality.”⁸⁰

As the following section will address, formal equality was detrimentally applied in the *Visser* case.

In *Visser*, the court employs a view of equality before the law, as all claimants are held to the same limits of compensation, regardless of their individual characteristics or the consequences of an accident. In this case, Visser’s disability can only be taken into account provided it falls under the limits of the caps established in section 10(2) of the Motor Vehicle Accidents Fund Act, and it cannot be adjusted to take into account the particular needs of certain claims. Visser would, as a consequence of his disability require an increase in compensation under 1(c) , future medical expenses, 1(f) future loss of earnings, 1(g) future loss of support and, 1(i) general damages.⁸¹ But the court, in its understanding of equality only as formal equality

⁷⁷ Aristotle. *3 Ethica Nicomachea (Nicomachean Ethics)*. Translated by W Ross; edited by J L Ackrill and J O Urmson (Oxford: Oxford University Press 1980) 112–117,1131a–1131b.

⁷⁸ Dianne Hubbard, “Ideas about Equality: Gender, Sexuality and the Law” *Unravelling Taboos: Gender and Sexuality in Namibia* edited by Suzanne Lafont and Dianne Hubbard (Windhoek: Legal Assistance Centre, 2007) 91.

⁷⁹ *ibid.*

⁸⁰ P De Vos “Equality for All? A Critical Analysis of Equality Jurisprudence of the Constitutional Court” (2000) 63: 62 *Tydskrif vir Hedendags Romeinse Hollandse Reg*, 68.

⁸¹ Motor Vehicle Accidents Fund Act, No. 4 of 2001 (1).

before the law, as the Minister of Finance is limited by these categories in his calculation of damages.⁸² This calculation employs the same legal equality to all, the same formal equality before the law, and thus the court can resolve that “No distinction is made between claimants at all” since “all claimants are in the same position when it comes to the capping of their claims and are thus equal before the law.”⁸³ The court employs a definition of formal equality that only considers equality before the law itself. No differentiation is made between individuals and their needs.

Formal equality could, however, provide the means to address the necessary compensation required to ensure equality for disabled individuals. Since, to establish formal equality, the court adheres to “equality before the law,” it is the actual law itself that would have to change.⁸⁴ The Motor Vehicle Accidents Fund would have to be amended to provide for a recalculation of damages for disability, for injuries that cannot be recovered from and that require an individual to live their life in an ultimately different way. This would either require a new head of damages, or an expanded understanding of 1(c), future medical expenses, 1(f) future loss of earnings, 1(g) future loss of support and, 1(i) general damages.⁸⁵ In this way, the court could still employ formal equality before the law, but the law itself would have to be expanded to provide for the necessary compensation to an individual who has been affected to a new “social status” (as Art. 10 (2) of the constitution establishes) as a result of an accident.

⁸² *Alfred Mew Visser v Minister of Finance & 3 Others*: SA 89/ 2014 paragraph 15.

⁸³ *ibid*, para 22.

⁸⁴ *ibid*.

⁸⁵ Motor Vehicle Accidents Fund Act *op. cit*.

9 Substantive equality – Absent from the decision

Substantive equality is established by adapting the laws to individual needs so that all individuals can equally participate in society.⁸⁶ Substantive equality considers the effects of laws on individuals, assuming that, in some cases, more legal intervention is required to insure equal participation in society.⁸⁷ It applies an examination of laws in their contexts, “to see what approaches will best advance meaningful equality in real life”⁸⁸ It requires that courts “examine the actual economic and social and political conditions of a group and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”⁸⁹ As the following section will address, an application of substantive equality would allow the Supreme Court to create true equality, especially for persons with disabilities.

In the *Visser* decision, substantive equality would imply that, because Visser has been placed in a different social status as a result of the disability incurred in the accident, the court could employ a definition of equality that allows for increased compensation. While the court establishes that the Motor Vehicle Fund ensures that “equally positioned persons are treated equally”⁹⁰, it fails to consider that some individuals will require more support in order to be treated equally. The reality is, as substantive equality reminds us, that the results of an accident do not leave all individuals “equal”, and that some, especially those with long term disabilities, will require more compensation. If the court had chosen to establish substantive equality as a part of the Constitution’s definition of equality, the court would allow for the law to be adapted to Visser’s specific case.

Furthermore, the court would establish the necessary precedent to employ substantive equality when necessary to ensure that the law can be adapted to provide what is needed for any individual to achieve equality. This is the missed opportunity of the Supreme Court, they failed to recognize the reality that equality

⁸⁶ In L Hewkin, ed.. *The International Bill of Rights: The Covenant of Civil and Political Rights* (New York: Columbia University Press) 252.

⁸⁷ *ibid.*

⁸⁸ Hubbard, *op. cit.*

⁸⁹ De Vos *op. cit.*

⁹⁰ *Alfred Mew Visser v Minister of Finance & 3 Others*: SA 89/ 2014 paragraph 27.

before the law does not ensure that the law has equal effects on all individuals. Consequently, in order for the law to allow that all individuals can achieve equality as a result of the law, a substantive understanding of equality should be employed. Equality before the law does not mean that the law affects each individual equally. Here, the Supreme Court has failed to provide for a more nuanced, and more just understanding of equality that takes into account an individual's unique needs.

10 Counter argument - the Minister was justified in his decision

The counter argument is that the Minister of Finance was justified in his decision to limit the levels of compensation according to the law. But even this argument fails to recognize the inadequacy of Art. 10 of the Constitution in protecting the rights of persons with disabilities. The Minister could justify his decision according to the rational connection within public interest, but the failure lies on the Supreme Court.⁹¹ Art. 10 provides no provision to include disability in Equality and Freedom from Discrimination. Consequently, Visser must rely on Art. 10(2) "social status". Regardless of if the Minister can justify his decision, the Supreme Court of Namibia missed a clear opportunity to show that disability is a protected ground from discrimination. The Supreme Court needs to play an active role in developing jurisprudence that elaborates and explains the complexities of equality, especially in areas that are not directly covered in the Constitution of Namibia.

11 Namibia's obligations under the CRPD

11.1 Overall tenets of the Convention

Namibia has ratified⁹² the Convention. This is a comprehensive instrument on rights of persons with disabilities. It covers a wide range of general principles⁹³ and obligations⁹⁴ that enjoins state parties to take policy, legislative and institutional measures in order to enhance social justice for persons with disabilities. More

⁹¹ *Müller v President of the Republic of Namibia* 1999 NR 190 (SC).

⁹² Namibia signed and ratified the CRPD and its optional Protocol on 4 December 2007. See R Ntinda (2013) 1 African Disability Rights Yearbook, 262.

⁹³ CRPD article 3 (principles for our purposes are: a. respect for inherent dignity, individual autonomy, make choices and independence of the persons, b. non-discrimination, c. full and effective participation and inclusion in society, d. respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, e. equality of opportunity, f. accessibility, etc.).

⁹⁴ *ibid*, article 4 (obligations that are likely to trigger law reform in the areas of policy, legislative, administrative and other measures).

generally and under the rubric of defining disability and providing for reasonable accommodation, the protection of rights of persons with disabilities is clearly set out in the convention. More specifically, the equality and freedom from discrimination address the concerns raised in the Visser decision, particularly on the aspect of substantive equality. As is with any definitional conception of meaning attached to phrases and words, defining disability is complex⁹⁵. Conceptually, the definition in the CRPD is adequately comprehensive to provide for all conceivable instances of disability.

Under article 5, the CRPD establishes equality and non-discrimination and provides:

State parties:

recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. Shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. In order to promote equality and eliminate discrimination, shall take appropriate steps to ensure that reasonable accommodation is provided. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 144⁹⁶ of the Namibian Constitution states that, once Namibia has ratified an international instrument, it becomes part of the domestic legal arrangements⁹⁷. Currently, the national legislative framework is outdated and not in conformity with the norms and standards set out in the CRPD. Both the legislative and policy instruments are in urgent need of reform. This suggests that the more favourable provisions of the CRPD, which legally bind Namibia, should be considered when the courts need to make a decision regarding matters pertaining to the rights of persons with disabilities. Regrettably, the SC did not activate the option to consider either decisions in similar jurisdictions or considerations of international best practices in this area and this left the reasons for the decision particularly wanting.

⁹⁵ *ibid*, preamble: e. 'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairment and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

⁹⁶ 'unless otherwise provided by this constitution or act of parliament, the general rules of public international law and international agreements binding on Namibia under this constitution shall form part of the law of Namibia'

⁹⁷ Yvonne Dausab, 'International law vis-a-vis municipal law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective in Anton Bösl, Nico Horn and Andre du Pisani, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decade* (Macmillan Education Namibia, Windhoek 2010) 261- 285.

The equality and non-discrimination enjoys significant airtime in the CRPD. First, it is set out as a core principle in article 3. This means, all other matters that involve considerations of disability rights must be anchored on this principle. Second, there is a substantive provision on equality and non-discrimination. Given our historical context, of oppression this is a right that should enjoy superior significance in the development of our legal theory and jurisprudence. Understanding the equality and non-discrimination provision is situated in a binary that protects equality by prohibiting discrimination in law and fact and to take measures that will address the inherent disadvantages and discrimination in society suffered as result of person's disability⁹⁸. Equality should therefore not be seen in isolation from the reality of the person seeking that relief.

11.2 Discrimination on the basis of disability

In Africa, exclusion, prejudice and discrimination remain common experiences for millions of people with disabilities.⁹⁹

Sadly, the situation of persons with disabilities, in Namibia is no different. With no express prohibited ground in the non-discrimination provision, persons with disabilities scramble for an understanding that reads disability rights on the basis of social status. Perceptually, this still leaves persons with disabilities subject to a social interpretation of what that means. It is true that the shift from a medical model, historically, that looked at PWDs as a medical problem that needs fixing¹⁰⁰ to a social model that focuses on the social and physical environment¹⁰¹ is more favourable. In other words, that it is not about the condition of the person but how the social and physical environment is arranged around them. How people view others difference can have a negative connotation. First, it lacks appreciation that

⁹⁸ J E Lord *et al*, *Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities*(University of Minnesota Human Rights Center, Minneapolis 2012) 3-15.

⁹⁹ I Grobbelaar-du Plessis and T van Reenen, (2011) *Aspects of Disability Law in Africa*, Foreword, viii.

¹⁰⁰ *ibid*, at xxxiii 'the medical model prescribes that disability must be cured or managed with the assistance of medical practitioners and rehabilitation specialists'.

¹⁰¹ *ibid*.

difference or disability does not mean inability but second, and more importantly, that whilst law is neutral and treats everyone the same, difference must be acknowledged to ensure equity¹⁰². In law and fact differential treatment is not always discrimination. The question is whether or not it is fair and just. In the *Visser* decision is whether the ostensible capping disproportionately at a disadvantage. In this regard, the CRPD makes provision for reasonable accommodation under article 2:

Means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

This is a reactive duty placed on the state. It requires taking active steps, but also requires the court to interrogate whether or not the state has the resources to undertake the burden. Without a consideration and examination of the applicable international instruments and Namibia's obligations under it, there is not much consideration that can be given to the reasonable accommodation. But the question would have been whether or accommodating Mr Visser the state would have been expected to carry an undue or disproportionate burden that was unreasonable and unfair. The *Mwilima* judgment should have been instructive in this regard.

The Committee on the Rights of Persons with Disabilities have also expressed themselves in a matter before the committee, *H.M v Sweden*.¹⁰³ Ms HM was a Swedish national born in 1978. She had chronic connective tissue disorder or Ehlers-Danlos Syndrome (EDS). It led to a number of medical conditions of her joints, muscles leading to inability to stand or walk for 8 years and for the last two years before the matter was considered by the committee she was completely

¹⁰² Lord *op. cit.* 4 "We are all equally entitled to human rights simply because we are human and the qualities that makes us unique and different do not make us superior or inferior in regard to rights. When put in practice, the principle of equality therefore requires every individual and the societies in which they live to value and accommodate human difference, including difference based on disability."

¹⁰³ United Nations CRPD/ C/7/D/3/2011, views adopted by the committee at its 7th session 16-27 April 2012.

bedridden. In order to improve her quality of life, HM need hydrotherapy pool. The installation of which required extensive structural adjustments at her residence. The local authorities and the various administrative courts, all declined her request to build this facility on the basis “that it goes against building permission regulations and therefore could not be allowed’ and that Planning and Building Act was applied equally to all, whether the person has a disability or not, and that the Act contains no clauses that would indirectly lead to discrimination against persons with disabilities” She filed a communication with the committee complaining that the state party violated a number of provisions of the CRPD, notable of which was article 5 (equality and non-discrimination).

Discrimination on the basis of disability is aptly set out in article 2 of the CRPD that states “it includes all forms of discrimination, including denial of reasonable accommodation” and para 3 of the same article provides for ‘discrimination on the basis of disability, meaning any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field. The committee also looked at a number of other rights that affected the complainant’s health condition: right to health (article 25); habilitation and rehabilitation (article 26) and having considered all the information presented by the author and the state party made the following finding:

The committee notes that the State Party, when rejecting the author’s/complainant’s application for a building permit, did not address the specific circumstances of her case and her particular disability related needs. The committee therefore considers that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author’s access as a person with a disability, to the health care and rehabilitation required for her specific health condition. The committee concludes that there was a violation of a number of key rights of author under the CRPD.

The decision of the committee in explaining the kinds of consideration domestic institutions should consider is quite useful. It clearly does pit formal equality versus substantive equality. It is not enough for the SC to simply dismissively state that “Insofar as the damages exceed the cap, they are entitled to the cap and insofar as it does not they are entitled to compensation equal to their damages. There is no positive obligation on the State to do more than this even if the disability amounts to a social status (an issue the court did not delve into, and provide some legal clarity on how it should be interpreted for future reference). Without such obligation they are, like all other affected persons, only entitled to equal treatment which as indicated above, is what the Act and Regulations provide for.

This is clearly a very restrictive interpretation of a document that is intended to be a “mirror reflecting our soul”. The statute and its ancillary regulation ought to be interpreted in tandem with the provisions of the constitution and not in isolation, which seems to have been the case in the Visser decision. A complete emphasis on the policy direction of the government and no due regard for Mr Visser and his unique circumstances as a person with a visual impairment. This seems like what Kruger calls a ‘stereotyped common law approach’ where courts are generally reluctant to interfere in the so called “matters of policy”¹⁰⁴. This kind of approach to interpretation in general and constitutional interpretation in particular makes a mockery of the role of the courts and its adjudicators. It dilutes the transformative nature of our constitution and respectfully reduces our judges to the proverbial robots. This cannot be the intention of having a functionally and notionally independent judiciary. Again, we are inclined to extensively quote, Justice Yacoob, given his very refreshing insights:

Judges universally have always almost always been required to be independent and impartial and to judge without fear, favour or prejudice. There is a tendency to equate or confuse independence and impartiality with concepts of absolute objectivity, neutrality and isolation. So it is thought in some circles that judges should continue to live in their so-called ivory towers, must strive to be absolutely objective and must be neutral umpires in the judging process. We must all understand that the notion that any human being can ever be absolutely objective is an impossibility, a myth to be dispelled at the earliest

¹⁰⁴ J Kruger, ‘Towards a New Interpretive Theory’ in Kruger and Currin, (1994) ‘Interpreting a Bill of Rights’, 116, fn 84, quote from *Builders Ltd v Union Government* 1928 AD 46 at 56 “where the court formulated the reluctance of courts interfering in policy- ‘ But if the provisions of the law are clear, we as a Court, are not concerned with the propriety of the legislation or policy of the Legislature, our duty is to administer and interpret it as we find it.”

opportunity, we are all, judges or not, vulnerable human beings at our core and we have a subjective side to us that cannot be denied. Subjectivity in the judging process is not only inevitable, it is also positive and good. Judging is not a mechanical process and in most cases, our judgements are about human beings and have an impact on human beings either directly or indirectly...judicial isolation is not necessarily consistent with good judging.

12 Conclusion

The Namibian Constitution ought to be provided with content to be transformative. Despite what is primarily a limited role it plays, only courts can do that, provide substance to the form. The supreme and binding nature of the apex court suggests that it uses opportunities when the terrain is new, to chart a new course. The disability rights debate is one such chance. Equality for persons with disability takes on a very different profile under international law. The CRPD has set the norms and standards that countries are expected to reciprocate at the domestic level. The principle of reasonable accommodation makes compliance both complex and easy. This is so because state parties are simply reminded of obligations they already have in respect of all their citizens including those with disabilities. Namibians, especially Namibia's most vulnerable population, must again wait for the Supreme Court to develop a nuanced understanding of equality that goes beyond formal equality to include substantive equality, thus allowing for new prohibitions on discrimination to be included in Art. 10 (2). It is, as Art. 10 (1) reminds us, that "all persons shall be equal before the law" – so why stop short of protecting our vulnerable populations?

The Supreme Court should be in a position where it is capable of providing the necessary jurisprudence to clarify and develop our Constitution. The Supreme Court cannot be limited by state resources or policy in its decisions, it must be capable of balancing these limitations with the necessity of equality. One has to agree with Judge Trengove when he says: "I look forward to the day that we can say, without reservation, that both our law makers and our courts are totally committed to the worth and dignity of all human beings."¹⁰⁵

¹⁰⁵ Hugh Corder, *Democracy and the Judiciary* (IDASA, 1987), 133.

PART II

LAND AND URBAN PLANNING

CHAPTER 7

APPARITION(S) OF THE PAST: INSTANTIATIONS OF PLANNING LAWS IN NAMIBIA

by

Ellison Tjirera and Christian Harris

1 Introduction

While the inner workings of the Planning Department at the City of Windhoek and other major urban centres in the country are not readily fathomable, spatial instantiations seem to suggest that colonial planning laws have continued uninterrupted. An exercise in reflection is long overdue to shine light through urban planning's fog in Namibia, using Windhoek as a case study. For Windhoek has come to pass as a quintessential 'laboratory' for segregationist spatial reproduction, and there is no gainsaying that it is a divided city. We deliberately use the word 'laboratory' to assert that human beings have the power to shape space and are, for this fact, in a position to manipulate space for better or worse. It follows that the question is and has been: 'how to unlearn the colonial cultures of planning'? Asked differently, 'how do we decolonise planning and unlearn spatial privilege?' It has been suggested recently that urban spatial evolution is a whirlwind whose power reduces urban planners to mere bystanders.¹

By taking the latter suggestion seriously, we delve into an exercise in deconstruction by deploying some framing questions as analytical devices to debunk the assumption that urban planning laws are in and of themselves an ungraspable omnipotent force. What forces are at play in perpetuating the apartheid spatial planning legacy? Who should disrupt the segregationist spatial planning debris that came to bear on Windhoek's urban cityscape? To be sure, what has been happening after 1990 is a reproduction of residential apartheid, pockets of residential social mobility notwithstanding. Issues raised by professionals such as architects and town planners with regards to the reproduction of urban planning laws are not new. These professionals' complicity in spatial reproduction – or impasse – is what should be exposed and taken seriously.

¹ Cf. Advertorial 'Open Letter about the Status of Our Urban Settlements' *New Era* January 16, 2016.

2 Contextualisation of planning laws in urban Namibia

Unarguably, an understanding of city life in the absence of the legal architecture would be an incomplete picture of the forces at play. A number of activities such as residential zoning, policing and trading are mostly done within parameters of some legal provisions within urban settings. The extent to which colonial legal codes are spatially instantiated in territories that were conquered – particularly in colonial capitals – cannot be underestimated. In this view, Saho observes that “colonial officials brought with them not only ideas about how Africans could be ruled, but also practices of how African spaces were to be planned and managed”.² Although some legal provisions have been repealed or amended, their signatures are not always completely evacuated from space while others remain intact for reasons that boggle the mind. In spite of this imbroglio, delving into disparate legal provisions governing city life becomes particularly important as city dwellers invariably find ways of rendering the city outside and parallel to the confines of legal provisions. In other words, it is virtually always inevitable that the porosity of legal provisions allows for a percolation of practices that challenge structures on which laws are made in the interminable shaping of relations in the city. This resonates with Simone’s exposition that “no form of regulation can keep the city ‘in line’,³ for in a multitude of ways, city denizens find avenues through which they refuse to be tamed by legal provisions. Nonetheless, if what the city is about cannot be reduced to its materiality of concrete blocks, steel, glass and corrugated iron, tarmac and dusty pathways – but also include human bodies that traverse the cityscape – Simone’s submission becomes inadequate insofar as particular forms of ‘regulations keep the city in line’.

The laws that came to bear on Windhoek’s urban landscape can be traced back to discriminatory practices of organising social life that developed in the 1890s based on the social hierarchy of a German provincial town.⁴ From its very inception, the district of Windhoek has been a conflict-ridden territory situated – with its surrounding farms – in an area cleared by frontier battles during the late 1800s.⁵

² Saho (2013) ‘Making the City and Shaping Legal Landscapes’.

³ Simone, ‘City Life from Jakarta to Dakar: Movements at the Crossroads’ (2010) 3.

⁴ H Bley, ‘South West Africa under German Rule’ (1971 [1968]) 77.

⁵ *ibid.* See Schinz (1891) 129. W Hartmann, ‘Sexual Encounters and their Implications on an Open and Closing Frontier: Central Namibia from the 1840s to 1905’ (Unpublished DPhil Dissertation) (Columbia University 2002) 169 and A Heywood, B Lau, ‘Three Views into the Past of Windhoek’ (1993) 8. See also I Goldblatt, ‘History of South West Africa from the Beginning of the Nineteenth Century’ (1971) 111-112.

Its history before 1890 is best known in relation to the community of Oorlam Afrikaners, who abandoned it in the face of Ovaherero resurgence, only to re-emerge in the early 1890s with the advent of German colonialism proper.⁶

This antagonism over Windhoek provided a fertile ground for Germans to assert their authority over warring groups and to act as a buffer between the Ovaherero from the north and the Oorlam Afrikaners from the south.⁷

In many respects, laws that shaped Windhoek in its formative years as a colonial capital are informed by imperatives of a 'settler city'. The first steps in White settlement had been taken in the time of Curt von François, when it was considered settlers would only be safe near the Windhoek fort.⁸ As Wellington wrote:

A settlement syndicate for South West Africa whose objective was to encourage and assist Germans who were willing to settle in the new colony emerged in early 1892 in Berlin. Later known as the Settlement Company, this syndicate facilitated the arrival of the first party of settlers from Germany, who were duly settled in the upper part of Klein Windhoek, a mile or two south-east of the Windhoek fort'.⁹

The settler community's continued and expanded occupation of Klein Windhoek was given backing by codified legal instruments that decisively marked the actual German rule in German South West Africa (GSWA) – which was more pronounced in Windhoek, coming into force in 1907.¹⁰ Preparations of Native Regulations were started in 1905 with the main purpose of expropriating both tribal lands and tribal cattle.¹¹ This began barely a year into the War of National Resistance (1904-1907); therefore, preparation of regulations in a war period was a display of bravado with which occupying troops waged the war, suggesting that the defeat of Native resistance was to be a formality preceding a more expansive colonial settlers' regime.

⁶ Hartmann *op. cit.* 169.

⁷ Cf. Bravenboer (2004) 15; Bley (1971) 99-119; Schinz (1891) 129.

⁸ J H Wellington, 'SWA and its Human Issues' (1967).

⁹ *ibid.*, 188-189.

¹⁰ J Zollmann, 'Communicating Colonial Order' (2011).

¹¹ Bley *op. cit.*

The most important of these regulations – and one which came to haunt Windhoek 106 years after the end of the colonial project – was the “order of the Governor of SWA pertaining to measures for the control of natives”.¹² This decree created, for the first time, legal discrimination by asserting the distinction between ‘Whites’ and ‘Natives’ with regards to such issues as land rights, Native registration and carrying of identity cards.¹³ As most White colonisers – in settler colonies – had an intention of dwelling permanently upon lands forcibly taken from native population, laws that came to have an effect of *enframing*¹⁴ on a number of African cities, such as the Native regulations in Windhoek, were enacted. Myers deploys *enframing* – drawing on David Simon and Robert Young – to account for the lingering influence of colonialism in shaping space against the backdrop of violent ways in which colonial practices were inscribed physically on territories subjected to colonial control.¹⁵ The War of National Resistance was the context in which enforced segregation on the basis of race came about.¹⁶ With the introduction of Native regulations, the year 1907 marks the inception of what became the foundation on which the segregated colonial city was shaped. Even though this colonial segregated city did not in and of itself provide an impetus for the graduation of Windhoek into a quintessential apartheid city during the South African colonial dominion, it provided a fertile ground for taking segregation to a much deeper level, with attendant enduring spatial reconfigurations, as Marion Wallace intimates.¹⁷

3 Colonial planning and urban materiality

Insofar as planning law is concerned with the regulation of land use, contemporary Windhoek is – like many other colonial cities in the world – a creature of colonial pieces of legislation that have shaped the materiality of the built environment. The built environment has in turn moulded a multitude of urban experiences. As far as the capital of Namibia is concerned, the urban fabric was shaped by the social and racial segregation set up by the German colonial authorities at the end of the 19th Century and by the policy of apartheid institutionalised as from 1948 by the South

¹² ibid, 172.

¹³ ibid.

¹⁴ G Myers, ‘Verandas of Power: Colonialism and Space in Urban Africa’ (2003) 7- 11.

¹⁵ ibid, 7-8.

¹⁶ J B Gewald, (2009).

¹⁷ Cf. M Wallace, ‘A History of Namibia: From the Beginning to 1990’ (2011).

African Government.¹⁸ Similar to many South African cities, Windhoek is trapped in a quagmire where “laws designed to implement urban plans of apartheid remain stubbornly in place”.¹⁹ But the notorious Group Areas Act of 1950 was neither implemented nor applicable to Namibia, but probably there was no need for it as Heinrich Vedder’s utterances in 1957 seem to suggest:

Our Government in South West Africa has been the depository of a fine heritage. From the very beginning the German Government carried out that which has unfortunately not yet been attained in South Africa – namely, apartheid²⁰

With regards to urban planning, there are some laws that should have been repealed but are still on statute books and continue to have purchase in contemporary Windhoek as well as other major urban centres in Namibia. Consider as an example the Townships and Division of Land Ordinance, No. 11 of 1963, a piece of legislation dealing with the regulation of land-use planning. Essentially, this ordinance provides for the division of urban landscape in zones. These zones are then regulated and controlled in terms of uses or combination of uses, the degree of permissible development, and the nature of development. Another one is the Town Planning Ordinance, No. 18 of 1954, which amongst others deal with the use of public spaces, erecting structures on municipal land and making alterations to buildings on municipal land. The abovementioned two pieces of legislation – which are essentially the most important ones in terms of urban planning – have been criticised as being outmoded and containing cumbersome procedures.²¹ To be sure, Namibia’s current planning system is a remnant of South African administration whose primary driver was race.²² An overhaul of planning law in Namibia is indeed long overdue and talks have gathered steam such that the Urban and Regional Planning Bill is slated to come before parliament for the 2016/2017 session.

¹⁸ E Peyroux, ‘Urban Growth and Housing Policies in Windhoek: The Gradual Change of a Post-Apartheid Town’ (2001) 288.

¹⁹ S Berrisford, ‘Unravelling Apartheid Spatial Planning Legislation in South Africa’ (2011) 22 *Urban Forum*, 247–263. See also Peyroux *op. cit.*, 287–291.

²⁰ K Dierks, ‘Chronology of Namibian History. From Pre-historical Times to Independent Namibia’, (2002) 211. Heinrich Vedder was a prominent member of the Rhenish Missionary Society and he uttered these words when he accepted the position of senator in South Africa’s Senate in charge of Native affairs in SWA in August 1950.

²¹ *Planning Law in Namibia*, . 3.

²² *ibid.*

There is a lot that needs changing on the scene of planning law in Namibia. And while one cannot be completely in the know with regards to the inner workings of the Planning Department at the City of Windhoek and other major urban centres in the country, an open letter which appeared in one of the dailies²³ demands that we pause and ponder a bit. It is startlingly bizarre that officials from the City of Windhoek Planning Department are talking about apartheid spatial planning legacy in a manner that casts them as outsiders. While taking seriously the observation made in the advertorial which at one level raises or reawakens a debate around what has been happening over the past two decades and a half, there is also a need to deconstruct some assumptions underpinning this advertorial. What forces are at play in perpetuating the apartheid spatial planning legacy? Who should disrupt the segregationist spatial planning debris that came to bear on Windhoek's urban cityscape? Issues raised by architects and town planners in the advertorial are necessarily not new. Lack of spatial transformation has been around for some time, with town planners and related professionals being complicit in what Crankshaw and Parnell call a 'spatial impasse'.²⁴ Arguably, "because of significant waves of urbanisation in recent decades, urban growth is accelerating and continues to be propelled in terms of these dominant urban constructs that maintain and increase the historic fragmentation and separation of communities due to lateral suburban growth planned at low densities".²⁵ Suffice it is to ask that: planned and maintained by whom? The cardinal question then becomes 'how to unlearn the colonial cultures of planning'? Or put bluntly, how do we rid planning off its colonial vestiges and unlearn privilege? On what borders on the bizarre is that there are discriminatory laws that are still applied, such as the Squatter Proclamation, AG 21 of 1985. This Proclamation provides for the removal of persons unlawfully present on land or in buildings and for the demolition of structures which are unlawfully erected. Over the last 10 years or so, this proclamation has been used to deracinate a number of informal dwellers from the city of Windhoek. Another legal instrument used against vagabonds is the Vagrancy Proclamation, No. 25 of 1920. In its legal phraseology, this proclamation is aimed at suppressing trespassing, idleness and vagrancy.

²³ 'Open Letter about the Status of our Urban Settlements and the way Forward' *New Era* 11 January 2016, 16.

²⁴ S Parnell, O Crankshaw, 'Urban Exclusion and the (false) Assumptions of Spatial Policy Reform in South Africa' (2009), In K Koonings, and D Kruijt, eds. 'Mega-cities: The Politics of Urban Exclusion and Violence in the Global South' (Zed Books: London 2009) 153-169.

²⁵ *ibid.*

Inhabitants of cities can appropriate the same laws in different ways. And not least, different cities can be governed by different laws, and this can tell us a whole lot about the character of the city or its spatial identity, as it were. Some laws continue to hold sway long after they were repealed, suggesting that space has a proclivity of refusing to forget. Seen in its plurality, the city appropriates the law in its genesis and embodiment.²⁶ ‘Settler cities’²⁷ such as Windhoek also invited particular legal instruments that came to bear on the urban fabric, and this too has an influence on how we can account for contemporary urban social forms. Put differently, “a phenomenology of the contemporary city demands an understanding of its legal edifices, just as an understanding of law demands a thorough observation of its urban traces”.²⁸ This is because the urban condition or crisis in its different manifestations is variously interlaced with legal pre-existences, impositions, misapplications and inabilities.²⁹ Law’s obsession with naming, categorising and organising is revealed in the city’s working order, both socially and spatially.³⁰ It is in the city where law’s presence is magnified to a penetrating extent through a multitude of legal moments, such as planning restrictions, environmental regulations, zoning, social control, restricted access areas, hoods in shopping malls, power architecture and landscaping, etc.³¹ Rakodi observes that the deployment of planning as an instrument of social control was demonstrated most starkly in settler economies of countries such as Zimbabwe, South Africa and Namibia.³² And we are talking about a history of more than 100 years of constant shaping and moulding in the case of Namibia in general, and particularly its colonial capital Windhoek. With regards to colonial urban-planning model’s imposition on urban Africa, Coquery-Vidrovitch makes a case that Africans found themselves dispossessed of part of their universe and had to invent novel strategies for survival in the city by combining old and new.³³ Arguably, before the end of the colonial era, Africans, who accounted for the majority of the urban population, reinvented their cities.³⁴ This submission does not enable us to account for the extent to which the city in turn reinvents urban population, for it overplays the agency of Africans in cities shortly before the end of colonial rule.

²⁶ A Philippopoulos-Mihalopoulos, ‘Introduction: In the Lawscape’, In A Philippopoulos-Mihalopoulos, ed. *Law and the City* (2007) 1-20.

²⁷ See J Belich, ‘Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939’ (Oxford University Press: Oxford 2009).

²⁸ *Law and the City*, (2007) 3.

²⁹ *ibid.*, 2.

³⁰ *ibid.*, 8.

³¹ *ibid.*, 9.

³² C Rakodi, ‘Order and Disorder in African Cities: Governance, Politics, and Urban Land Development Processes’ (2002) 50 – own emphasis in italics.

³³ C Coquery-Vidrovitch, ‘The History of African Cities South of the Sahara: From the Origins to Colonization’ Trans. Baker, M. (Markus Wiener Publishers: NY 2005) 325.

³⁴ *ibid.*

Post-colonial urban spatial (re)configurations reveal that space has an indomitable capacity to refuse oblivion, such that spatial laws of years gone by continue to resurface in various ways on the urban landscape. Therefore, the argument that “it is not the city that makes the African but *it is* the African who makes the city”³⁵ tells us part of the story but does not stand up to contemporary urban concatenations whose make-up is old and new, colonial and post-colonial, structure and agency, man and environment.

The foregoing invites a number of questions: What kind of laws did Windhoek appropriate in its genesis or which laws appropriated Windhoek? What do these laws show us about Windhoek today? One of the laws that continue to reanimate the vortex of an apartheid city in contemporary Windhoek is the ‘Squatters Proclamation’ of 1985, a legal instrument used to remove illegally constructed buildings or structures.³⁶ The deployment of this legal instrument reproduces land-rights regime introduced through the Natives’ regulations in the early 1900s during German rule. Equally, it resonates with the Natives (Urban Areas) Proclamation of 1951, which preceded and gave impetus to the 10th December 1959 massacre and attendant forceful removal in Old Location (present-day Hochland Park, adjacent to Windhoek’s city centre). But it appears that there has been what seems like a ‘nostalgic return’ as far as contemporary Hochland Park’s racial composition is concerned. This is not to imply that some of the current Black residents of Hochland Park were the same ones forcefully removed from the then ‘Old Location’ in 1959, although one cannot rule out this possibility.

4 Legal status of the City – Does it matter?

*“Cities have something more than simply ‘largeness’”.*³⁷

Apart from giving cities their legal status, local government law dictates whether or not cities can conduct their own affairs without interference or only with express sanction from the state legislature.³⁸ Indeed, local government law specifies which services will be provided locally and which will be provided by others.³⁹ This is so

³⁵ *ibid.* – own emphasis in italics.

³⁶ AG 21/1986 S <<http://www.lac.org.na/namlex/Housing.pdf>> accessed April 4, 2016.

³⁷ S Pile, ‘What is a City?’ in D Massey, J Allen, and S Pile, eds. *City Worlds* (Routledge: London 1999) 5-49. See in particular 6.

³⁸ G.E Frug, D.J Barron, ‘City Bound: How States Stifle Urban Innovation’ (2008) 3.

³⁹ *ibid.*

despite the fact that, as we will discuss later, a city status is to some extent defined by the unwritten popular imagination of the city dwellers rather than by the law. We nevertheless emphasize that popular imagination is not enforceable by the state or its executive, legislative and judicial organs. While it is a fact that popular imagination almost always assumed that Windhoek was a city, the agents of the state machinery cannot *knowingly* enforce popular imagination. This holds true even if virtually everybody in the country assumed that Windhoek was a city and only a handful of legal experts knew about the actual status of the city.

Windhoek gained municipal status in 1909 before being proclaimed a city in 1965.⁴⁰ The veracity of the latter is suspect, as supporting proclamation(s) and/or ordinance(s) proved elusive. Archival evidence in fact only shows that Windhoek was granted a town status in 1965. Under the chairmanship of Wentzel C. du Plessis⁴¹, the Executive Committee Meeting of South West Africa Administration resolved on October 14, 1965, that Windhoek be classified as a town October 18, 1965.⁴² This decision was confirmed by W.C. du Plessis on October 20, 1965.⁴³ Yet Sam Davis, who was the Mayor of Windhoek from 1965 to 1966, went on to record in the Mayor's Minutes of 1966 that the most important event for 1965 was "the award of city status to Windhoek by W.C. du Plessis acting on the decision of Executive Committee supported by the Prime Minister of South Africa and the Deputy Minister for South West Africa Affairs".⁴⁴ Davis further professed pride in the feat of "having been the last Mayor of the Town of Windhoek and the first Mayor of the City of Windhoek".⁴⁵ To solidify this narrative, Sam Davis went on to publish an article in the SWA Annual⁴⁶ of 1966 under the heading 'Windhoek Gains City Status

⁴⁰ Bravenboer (2004).

⁴¹ Administrator of South West Africa, 1963-1968.

⁴² NAN, LUK, 1/3/3, Minute 853. Minutes of the Executive Committee of South West Africa Administration (14 October 1965).

⁴³ *ibid.* See Appendix A for minutes of resolutions taken by the Executive Committee of South West Africa Administration in October 1965. In particular, see Minute 853 of the proceedings.

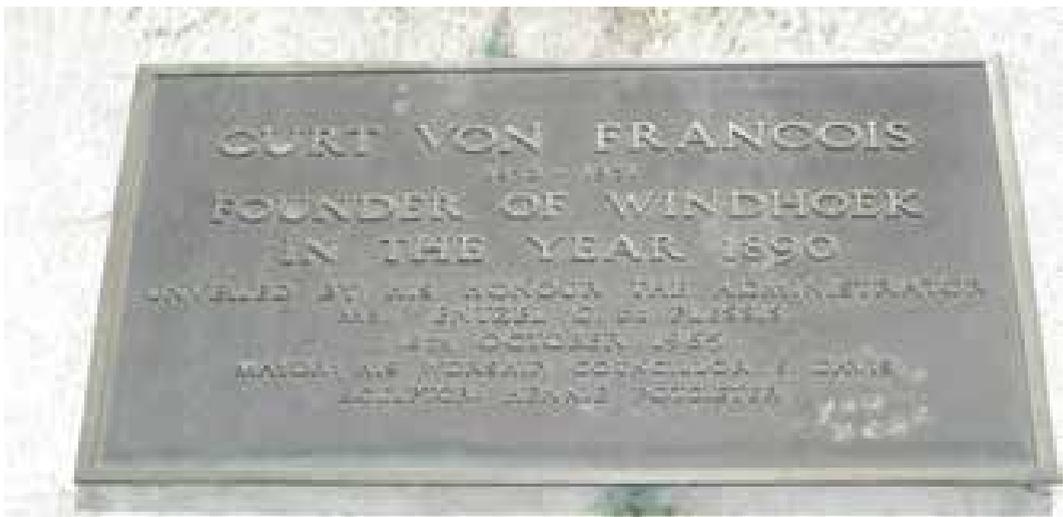
⁴⁴ NAN, Windhoek Municipality Section, 1/3/3 – Mayor's Minutes for the Mayoral Year ended (10 March 1966) 2.

⁴⁵ *ibid.*, 14.

⁴⁶ Edited by Sam Davis, SWA Annual was a popular / propaganda magazine published annually since 1944.

on 75th Birthday'. In light of the above, it appears that the legal myth concerning the status of Windhoek 'city' has provenance in Davis' machinations as an official in the municipality and in publishing circles of the time, for he was also a freelance journalist and director of SWA Publications (Pty) Ltd.⁴⁷ The plaque accompanying Kurt von François statue – part of the settler historiography that erroneously credits von François as having established Windhoek⁴⁸ – bears the name S. Davis (see photo No. 1). Davis' manoeuvres suggest that he had a particular obsession, if not fantasy, of leaving an indelible mark on Windhoek's urban landscape, using his position of power and privilege. His profile in the 48th edition of *Who's Who of Southern Africa* states that he was a "pioneer in planned townships in Windhoek, having opened up two in 1957".⁴⁹ This time frame connects him in one way or another with the forceful removal of Black inhabitants from the vicinity of the city centre to the north-western parts of Windhoek.

Photo No. 1 – Plaque for Curt von François Statue



⁴⁷ Cf. *Who's Who of Southern Africa*, 48th ed (1964) 925-926.

⁴⁸ Chief among those who have been peddling what seems to be a historical inaccuracy include Davis (1966; 1965); Mossolow (1976; 1972); and recently Bravenboer (2004).

⁴⁹ *Who's Who of Southern Africa op. cit.*

The question of Windhoek's legal status as a 'city' came to the fore recently when one of the Namibian newspapers – The Namibian -- carried a story on September 16, 2013, quoting the then Minister of Regional and Local Government, Charles Namoloh, with a heading 'Windhoek is Not a City'.⁵⁰ The Minister was backed by a Windhoek-based lawyer, Etuna Josua, who confirmed that the term 'city' does not exist in Namibian laws. Josua maintained that "at some stage, legal classification lose relevance and gets overtaking by events. Windhoek is a city and for a lot of people what is written in the law, the classifications and the technicalities are just not relevant".⁵¹ What is needed then is simply amending the law to catch up with 'facts' on the ground. In terms of Local Authorities Act of 1992, Windhoek is simply classified as 'Part 1 Municipality' alongside the coastal urban centre of Swakopmund.⁵² Other classifications – in order of hierarchy – include 'Municipality Part 2'; 'towns'; and 'villages'.⁵³

The article 'Windhoek is Not a City' elicited some remonstrations that in a way supports Josua's submission that what is written in the law is not always relevant nor meaningful. Below are some of the reactions as they appeared in an online version of *The Namibian* of September 16, 2013:

"Old policies/acts need to be amended. This need to be corrected ASAP. City of Windhoek just sounds great".

"Windhoek is acceptably known and recognized as a city and it will remain in the hearts of the people, although the law says otherwise".

"That is so confusing, if then Windhoek is not a city. But how to be called the cleanest city Africa, if it is not a city?"

"So the Windhoek city police is an illegal entity or what does this mean?"

"I don't know why you have got time to waste, who discovered this now after 23 years of Independence...now who is responsible for that mess?"

⁵⁰ S Immanuel, 'Windhoek is Not a City – Namoloh' *The Namibian* (16 September 2013)

⁵¹ Interview with Etuna Josua (19.01.15), Windhoek.

⁵² See Local Authorities Act (No. 23 of 1992), Section 3, Schedule 1.

⁵³ *ibid*, Schedules 1-3.

“Oh shame to hear this surprising news, Honourable Namoloh let’s make it very fast and change where we can and call it a city officially cause Windhoek is our capital city.”

“So we don’t have a capital city [...] let’s turn Windhoek municipality or whatever is called into a city honourable minister.

“What is the fuss about? Windhoek is a City and no two-ways about it. The only city in Namibia for that matter and the cleanest city in Africa. Whatever people are saying about it, these are just polemics!”

What the above views reveal is that we can indeed analytically speak of and about Windhoek as a city, the strictures of legalistic definition notwithstanding. As Park noted,

The city is not merely a physical mechanism and an artificial construction – it is a state of mind, a body of customs and traditions, and of organised attitudes and sentiments that inhere in these customs and are transmitted with this tradition.⁵⁴

Even though Windhoek is not a city legally speaking, an unwritten law which proclaimed Windhoek a city exists at the level of affective habitation housed in moving bodies of ordinary Windhoekers and Namibians.

5 Reconstitution of colonial municipal police

The Windhoek City Police is principally established in terms of the Police Act of 1990 and the Regulations for Municipal Police Services, as provided for by Section 42(c) of the principal Act.⁵⁵ In 2004, the Windhoek Municipal Police Service Regulations was promulgated before the Municipal Police became functional in 2005. The Municipal Police has four main functions: crime prevention, law enforcement, traffic policing, and enforcement of by-laws in the City of Windhoek’s area of jurisdiction⁵⁶. It has full policing powers, except the power to investigate, and it is the only one of its kind in the country. Other municipalities comparable to Windhoek in terms of legal classification (i.e., Swakopmund and Walvis Bay) are not served by a municipal police.

⁵⁴ R E Park, ‘The City: Suggestions for the Investigation of Human Behaviour in the Urban Environment’ (1967 [1925]) 1.

⁵⁵ Cf. Police Act (No. 19 of 1990); Regulations for Municipal Police Services GG 2833, GN 184.

⁵⁶ Crime prevention, law enforcement, traffic policing, and enforcement of by-laws in the City of Windhoek’s area of jurisdiction. The City Police has full policing powers except the power to investigate.

Since its inception in 2005, the City Police has been presented as something of a novelty in the arsenal of law enforcement and the criminal justice system. City Police officials maintain that the force is one of its kind⁵⁷ while Nakuta, in a recent publication on the criminal justice system in Namibia, claims that “municipal police agencies are relatively recent phenomenon in Namibia”.⁵⁸ Historical works debunk the latter assertion – at least in the case of Windhoek – as references to municipal police straddles the German and South Africa’s colonial occupation of Namibia.⁵⁹ Nakuta further claims that municipal police agencies “have been established in Windhoek and Walvis Bay”.⁶⁰ The former was indeed established in 2004, but available information suggests that no municipal police was established for the latter.⁶¹ The late celebrated Namibian musician, Jackson Kaujeua, writes about joining the municipal police in Windhoek before Namibia’s Independence in his autobiography:

A week before the second extension of my permit I joined the municipal police at the insistence of my father. That is the easiest way to obtain residential permit and eventually to secure a house (...).⁶²

Similarly, John Ya Otto makes reference to municipal police in his eye-witness account of events that preceded the Old Location Massacre of 1959 in Windhoek.⁶³ On his part, Pendleton argues that African movements into and out of Windhoek and within Namibia were controlled by Windhoek municipal police as well as the South African police.⁶⁴ The foregoing suggests that the municipal police is not as novel as being asserted. Instead, it is a reincarnation of the colonial municipal police, straddling the German and South African colonial rule. This reproduction of a particular apparatus responsible for the legitimate use of force in an urban setting has implications for the continuity of peculiar spatial relations supported by legal codes and regulations.

⁵⁷ Focus Group Discussion (henceforth ‘FGD’) with City Police Officials, 27.07.2015.

⁵⁸ John Nakuta, assisted by V Cloete, *‘The Criminal Justice System’* The Justice Sector and Rule of Law in Namibia Series (NID & HRDC: Windhoek 2011) 12.

⁵⁹ Cf. Bley 1971; Goldblatt; Kaujeua 1994; Ya Otto 1982. 1971

⁶⁰ John Nakuta, assisted by V Cloete, *‘The Criminal Justice System’* The Justice Sector and Rule of Law in Namibia Series (NID & HRDC: Windhoek 2011) 12.

⁶¹ Cf. Sibeene, *The Namibian* (2 March 2007) Telephonic query with the Municipality of Walvis Bay, (September 7 2015).

⁶² J Kaujeua, ‘Tears over the Deserts’ (1994) 91.

⁶³ John Ya Otto, ‘Battlefront Namibia’, *‘Windhoek Massacre’* Ch. 3 (1982) 34-54.

⁶⁴ W C Pendleton, *‘Katutura: A Place Where We Do Not Stay’* (San Diego State University Press: California 1974) 47.

6 The ghost of apartheid laws manifesting itself in contemporary Windhoek?

As alluded to earlier, the existence of apartheid-era legislation and policies continues to haunt the inhabitants of modern-day Windhoek. Apartheid-era laws are somehow indirectly or directly blamed for the critical housing shortages and the skyrocketing housing prices in the city. Global surveys indicate that Windhoek is among the most expensive cities in the world. According to the Numbeo Living Expenses Index, the city is the 21st most expensive in the world out of 4 462 cities.⁶⁵ Whether apartheid-era laws still in existence today are solely to blame for the current challenges afflicting the city of Windhoek in terms of service delivery is open to debate. Alleged corrupt practices among city officials have always been cited by many city dwellers as the major contributing factor to the dire socio-economic conditions affecting the inhabitants of the city.

As observed by one Windhoek resident:

The consequences of housing red-lining in Namibian towns and cities based on race and income are that people who are not of European descent (who constitute the 99% of those left out of the housing market because of their skin colour and low income) have been forced to reside in poverty-stricken neighbourhoods, where crime and violence are widespread, which has led to fragmented families and a lack of access to educational, economical, health institutions and other opportunities.⁶⁶

7 Government interventions to arrest the dire socio-economic conditions afflicting major towns and cities

In response to public outcry over the ever-increasing cost of living and unaffordable housing in most of the country's major urban areas (Windhoek being the epicenter), the government implemented/proposed several interventions, most of whom have produced mixed results.

⁶⁵ Theresia Tjihenua, 'Windhoek 7th most expensive city in Africa'. *The Namibian* 11 December 2014; Cf. Chamwe Kaira, 'Nam has second highest housing price increase'. *The Namibian* 30 September 2016.

⁶⁶ M T Kolokwe, 'Separation by Race and Income' *The Namibian* 14 October 2016.

7.1 The Targeted Intervention Program for Employment and Economic Growth (TIPEEG)

The Targeted Intervention Program for Employment and Economic Growth (TIPEEG) is a three-year program, starting with the 2011/12 fiscal year. Its main aim is to address the high unemployment rate while also supporting strategic high-growth sectors.⁶⁷ The program has three key distinguishing features. First, the program focuses on selected economic sectors and public works where it is believed to be possible to create more employment opportunities. It is in these sectors where the Government will make more investment than it has been the case before. Second, the program is designed in such a manner as to ensure a speedy implementation while upholding at the same time the principle of value for money.⁶⁸ Third, the program is underpinned by a strong and effective monitoring and evaluation mechanism in order to ensure that quick corrective measures are introduced where necessary. In this regard, the highest level of accountability is vested in the Cabinet to ensure effective implementation.⁶⁹

However, the implementation of TIPEEG was mired in controversy, stemming from massive irregularities in the entire tendering processes of some of its key infrastructural development projects, such as housing. TIPEEG is now considered among the government's significant failures since Independence.

7.2 Mass Housing

Being an election year and pursuant to pressure from members of the public regarding the unaffordability of houses in urban areas, the Government of Namibia, with support from the then President Hifikepunye Pohamba, launched in 2014 its ambitious Mass Housing Scheme, which is aimed at providing sufficient housing in the various towns and regions of Namibia until the year 2030. Like the TIPEEG, the said scheme has also been marred by alleged corrupt practices involving the politically connected and contractors. This project was to become President Pohamba's enduring legacy after he stepped down in 2015.⁷⁰

⁶⁷ Targeted Intervention Program for Employment and Economic Growth (TIPEEG). <[http://www.mcanamibia.org/files/files/178_Targeted%20Intervention%20Program%20for%20Employement%20and%20Economic%20Growth%20\(TIPEEG\)%20-%20National%20Planning%20Commission,%202011.pdf](http://www.mcanamibia.org/files/files/178_Targeted%20Intervention%20Program%20for%20Employement%20and%20Economic%20Growth%20(TIPEEG)%20-%20National%20Planning%20Commission,%202011.pdf)>.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Shinovene Immanuel, 'Shrinking Pohamba's housing dream' *The Namibian* 13 August 2015; Cf. Staff Reporter, 'Mass housing project stopped due to corruption, says Mumbala'. *New Era* 31 July 2015.

7.3 Harambee Prosperity Plan

The Harambee Prosperity Plan (HPP) is a targeted action plan to accelerate development in clearly defined priority areas, which lay the basis for attaining prosperity in Namibia. The Plan does not replace but complements the long-term goal of the National Development Plans (NDPs) and Vision 2030.⁷¹ The HPP introduces an element of flexibility in the Namibian planning system by fast-tracking development in areas where progress is insufficient. It also incorporates new development opportunities and aims to address challenges that have emerged after the formulation of NDPs.⁷²

As part of the HPP, the food bank was launched to alleviate hunger among the poorest communities in the country. The project has started in Windhoek and will expand to the rest of the country in due course. To sum up, the provision of food to the most vulnerable is a short-term intervention to those households mostly at risk of hunger poverty. This is in line with Government's Harambee Prosperity Plan Goal 7, which targets zero deaths due to hunger.⁷³

8 Conclusion

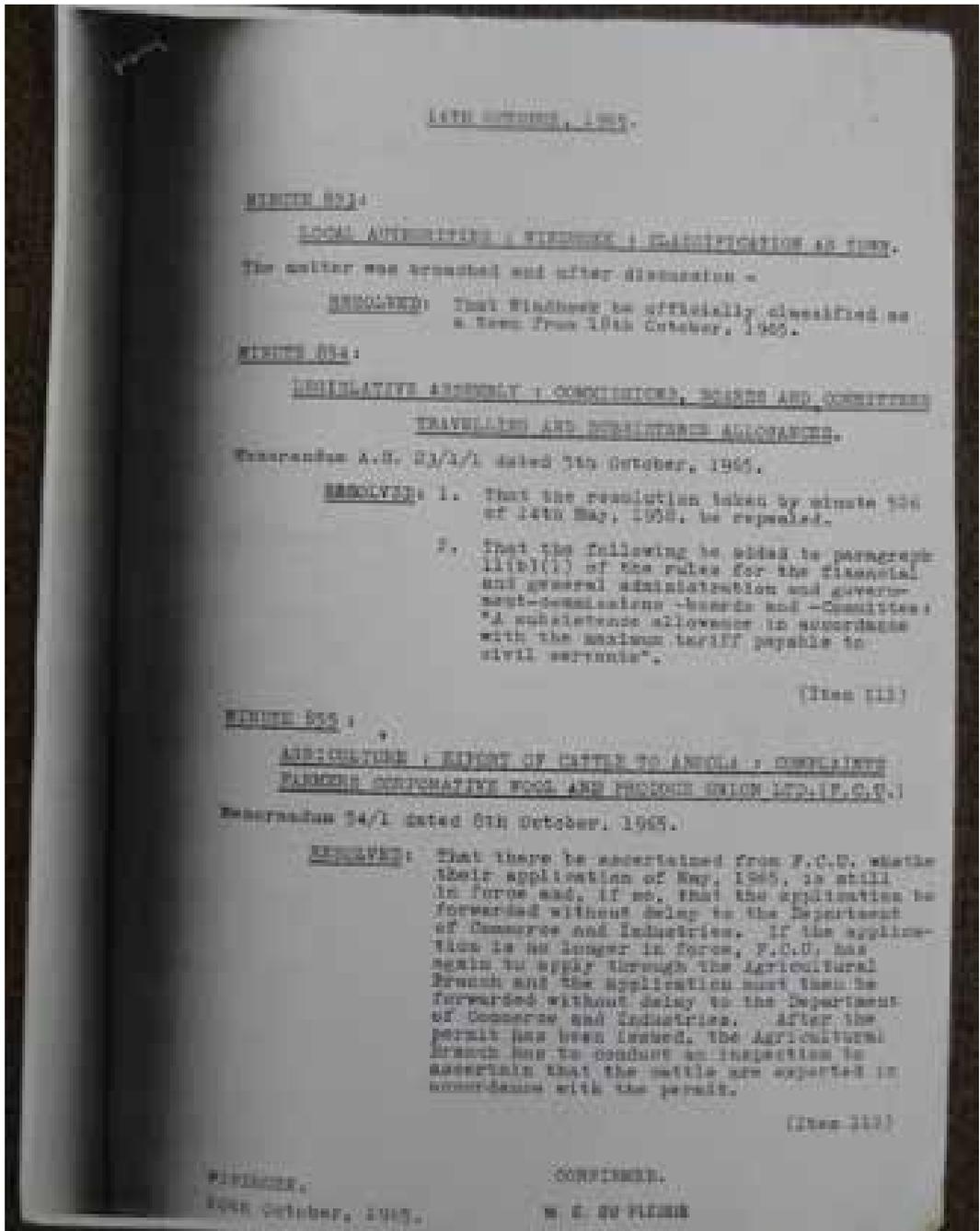
Taking as a premise that repealing or amending laws that govern various aspects of city life does not necessarily lead to the reordering and reconfiguration of urban space, this chapter sought to demonstrate how Windhoek has evolved in the realm of law. By paying attention to how legal debris from the German colonial occupation period continues to shape urban space, it can safely be argued that legal codes and regulations possess an afterlife more powerful than we are willing to concede. With regards to the legal status of Windhoek as a 'city', we traced the provenance of what can be called the legal myth to Sam Davis, the Mayor of Windhoek for the period 1965-1966, who appears to have twisted a resolution of the Executive Committee of South West Africa by flagrantly confusing the word 'town' for 'city'. We then made a case that the municipal police is for all intents and purposes a reincarnation of colonial municipal police, and not a novelty as municipal officials and some writers maintain.

⁷¹ The Harambee Prosperity Plan [HPP]. <<http://www.gov.na/documents/10181/264466/HPP+page+70-71.pdf/bc958f46-8f06-4c48-9307-773f242c9338>>.

⁷² *ibid.*

⁷³ 'Food bank kicks off.' *The Economist* 21 July 2016.

Appendix A: Minutes of the Executive Committee 1965



CHAPTER 8

LAW REFORM FOR IMPROVED DELIVERY OF LAND TO THE URBAN POOR

by
Joe Lewis

1 Introduction

The current formal land tenure system in Namibia is unable to effectively deal with the huge backlog in the formalisation of informal settlements, most of which are in the rural areas of Namibia. The system is generally considered too slow and expensive for this purpose, and is also perceived as only benefiting the rich, while being inaccessible and too expensive for the poor.¹

The Namibian cadastre is centralised in Windhoek, with the Deeds Office, Surveyor General's Office (SGO), as well as most town planners, land surveyors and conveyancers being based in Windhoek. Consequently, even if rural informal settlements are formalised to freehold, these communities will still be deprived of certain cadastral services, as they do not have access to cadastral information and the services of the land professionals based in Windhoek.²

Even in Windhoek, less than half of the residents benefit from the formal land tenure system. Approximately 27 000 families (87 000 people, which is about 27% of the city population) live in informal settlements without security of tenure³.

¹ S F Christensen, and P D Høygaard, *Report on a Flexible Land Tenure System for Namibia*, Report prepared for the Ministry of Lands, Resettlement and Rehabilitation, Windhoek, Namibia (1997); C Fourie, 'Capacity building for Sub-Saharan Africa: Towards a more relevant approach, Capacity building in land administration for the developing world, ITC, Enschede' (2000); W Odendaal, *The SADC Land and Agrarian Reform Initiative: The case of Namibia. African Institute of Agrarian Studies*' Issue 111 of NEPRU Working Paper (2006); Paul Van Asperen, 'Land Registration from a Legal Pluralistic Perspective: A Case Study of Oshakati – Namibia' (2009); Local Cases in African Land Law. (In Home, Robert) (Pretoria, South Africa: Pretoria University Law Press 2011) 97-116; W Werner, *Land reform and poverty alleviation: Experiences from Namibia*' (2001) Windhoek: Namibia Economic Policy Research Unit, NEPRU Working Paper No.78.

² W De Vries, and J Lewis, 'Are Urban Land Tenure Regulations in Namibia the Solution or the Problem?' Land Use Policy 26 (2009) 1116-1127.

Moreover, the majority of the low-income residents who do have freehold ownership do not have access to the economic benefits of freehold. Most of them cannot engaged in mortgage financing (due to lack of secure income and collateral), as well as other land development options like subdivision, consolidation and rezoning (mainly due to the cost and complexity of the land administration system). Also, low-income residents do not have access to basic cadastral information and services. For example, a boundary dispute can only be resolved by appointment of a professional land surveyor and/or lawyers, which is beyond the financial means of most low-income residents.⁴

The situation in the rest of the country is even worse than in Windhoek, with about 135 000 families⁵ living in informal settlements, and the majority of freehold land owners not having access to cadastral information and services.⁶

To address these issues, Namibia's government has developed the Flexible Land Tenure System, enacted by the Flexible Land Tenure Act⁷. The Flexible Land Tenure System (FLTS) is set to become a parallel land registration system alongside the current formal systems, and it aims to simplify and decentralise the registration of urban land for the poor.

The development of a land tenure system beneficial to the poor in Namibia is commendable, but it is questionable whether the proposed FLTS will indeed speed up the delivery of land to the urban poor, and whether it will be significantly cheaper than the current system. Of more concern, however, is the fact that the implementation of such system could adversely affect economic development and poverty reduction. For example, the formalisation of all informal settlements into landhold schemes might trap the urban poor in an inferior land tenure system, without an option for individuals to advance to freehold, which is generally considered a better land tenure option.

The aim of this chapter is to provide a brief overview of the FLTA and compare the FLTS with the current freehold system, in terms of cost, efficiency and effectiveness of land delivery to the urban poor. This exercise will be carried out by analysing

³ City of Windhoek Residents Profile estimate, which is based on 2011 National Census data (Central Bureau of Statistics).

⁴ W De Vries, and J Lewis, *op. cit.*

⁵ ±540 000 people, or about 25% of the population.

⁶ W De Vries, and J Lewis, *op. cit.*

⁷ Flexible Land Tenure Act (No.4 of 2012).

two case studies. The chapter also proposes alternative ideas for urban cadastral reform, being an amendment to the current freehold system, which could be implemented in parallel with the proposed FLTS.

2 Overview of Namibia's urban freehold system

Namibia's urban land administration system is regulated by a number of policies, acts and regulations. According to the Deeds Registries Act of 1937, all land in Namibia must be surveyed before it can be registered. Any transactions resulting in change of ownership of land, including long leases and servitudes, must first be surveyed by a professional land surveyor, approved by the Surveyor General (SG), and then registered in the Deeds Office. The registration can only be done by registered conveyancers. Cadastral surveying is regulated by the Land Survey Act⁸, which is based on the old (South African) Land Survey Act of 1927.

Before land can be surveyed, an elaborate process of approval is required, involving the use of professional consultants (generally town planners) and a series of intermediate approvals by various individuals and committees. Most planning procedures are based on the Townships and Division of Land Ordinance, Ordinance No. 11 of 1963, and to a certain extent the Town Planning Ordinance No. 60 of 1954.⁹

To formalise an informal settlement, the following steps are normally required:

- The National Housing Policy prohibits the creation of erven smaller than 300m², unless written permission for this has been obtained from the Minister of Urban and Rural Development. Since most informal settlements have a density of higher than 300m² per plot, the Minister's consent will usually be required, before proceeding with the formalisation process, if any of the proposed new erven will be smaller than 300m².

⁸ Land Survey Act No. 33 of 1993.

⁹ W De Vries, and J Lewis, *op. cit.*

- The next step would be to do a township layout design (done by a professional town planner), which must be submitted for statutory consent to the relevant local authority, the Namibian Planning Advisory Board (NAMPAB)¹⁰, and the Townships Board¹¹.
- After Townships Board approval, the land must be surveyed by a professional land surveyor. A township survey can be done in as little as two months, but approval of the general plan by the Surveyor General (SG), will typically take about six months.
- Once the general plan has been approved, the township must be proclaimed in the Government Gazette.

The whole town planning process (local authority, NAMPAB and Townships Board approval) normally takes at least two years to complete. Adding another ten to twelve months for surveying, approval by the SG, and township proclamation, the total process for township establishment typically takes at least three years, before the individual erven can be registered in the Deeds Office (by a professional conveyancer).

Any subsequent amendment of boundaries, such as subdivision, consolidation, and correction of encroachments, require similar procedures. The process to subdivide and sell a portion of an erf, for example, would typically take two or more years to complete, and cost more than N\$30 000.

These delays result in millions of dollars in direct losses to property developers, and often prevent them from carrying out certain development projects. This state of affairs not only hampers the delivery of urban land to all sectors of society, but it also impedes economic development and job creation in general.

¹⁰ NAMPAB comprises mainly Permanent Secretaries from relevant ministries, and the NAMPAB secretariat (town planners from the Ministry of Urban and Rural Development). They need to approve 'Need & Desirability' of a township, before it can be approved by Townships Board.

¹¹ The Townships Board comprises members from the Ministry of Urban and Rural Development (MURD), the National Railways (TransNamib), the Deeds Office, the Surveyor General's Office (SGO), and a representative of ALAN (Association of Local Authorities of Namibia); W De Vries, and J Lewis, *op. cit.*

3 Overview of the proposed flexible land tenure system

- The objectives of the proposed Flexible Land Tenure System (FLTS), according to Section 2 of the Flexible Land Tenure Act (FLTA), are:
- to create alternative forms of land title that are simple and cheaper to administer than existing forms of land title,
- to provide security of title for persons living in informal settlements or who are provided with low-income housing, and
- to empower the persons concerned economically by means of these rights.

The FLTS proposes to have several Land Rights Offices (LROs) close to communities. These will presumably speed up the delivery of land and bring cadastral services closer to the people. The LROs will typically be staffed with registration and surveying officers, who will not only register starter and landhold titles, but will also assist the community with queries and disputes regarding land ownership. The system provides for three types of ownership: starter title, landhold title and freehold title. The idea is that a group of households can commence with starter title (presumably provided by Government), and upgrade to landhold and freehold whenever they wish (but at their own cost).¹²

According to Sections 14 and 15 of the FLTA, a starter or landhold title scheme may be upgraded (to landhold or freehold title, respectively) if at least 75% of the members agree to such upgrade.

If the relevant authority approves an application to upgrade a starter title scheme to landhold title, those right holders who did not agree to the upgrade must be given starter title rights in some other similar scheme.¹³ The relevant authority may then sell those plots left in the scheme for its own account at such price as it thinks fit.¹⁴

¹² The registration and upgrading procedures in terms of the FLTA are summarised in Annexure 1.

¹³ Flexible Land Tenure Act, s 14.2.

¹⁴ *ibid*, s 14.3.

Similarly, the relevant authority may approve an application to upgrade from landhold to freehold, if at least 75% of the landhold title holders agree to such upgrade. The relevant authority may then pay fair compensation to the holders of rights that did not agree with the upgrading.¹⁵

There will therefore be a substantial risk for certain starter and landhold title owners to lose their properties upon upgrading of their schemes to a higher level title. The right holders who did not agree to the upgrade (which could be up to 25% of the scheme) could essentially be expropriated, which defeats one of the main objectives of the FLTA: providing secure tenure to the poor. They will not necessarily be compensated for the improvements on the property, which poses a major risk for the plot owner and mortgage holder. This will be a disincentive for investing in and improving starter and landhold title plots, which could have an adverse effect on long-term socio-economic development and poverty reduction. The main advantage of the proposed FLTS is the social benefits resulting from communities obtaining ownership of the land they live on, in a (presumably) quicker, easier and cheaper way than the current freehold system. The social benefits of 'group title' (similar to starter title) have been demonstrated with various Savings Group projects implemented throughout the country during the past decade. The system has already benefited thousands of families in Namibia, who obtained group ownership of blocks of land mainly with the help of the Shack Dwellers Association of Namibia and the Namibia Housing Action Group (NHAG). NHAG would typically help a community (Savings Group) to purchase a block of land, where after a layout plan is drafted. The 'township layout' is normally planned with the help of the community, and drafted by NHAG. The layout design is typically done under the supervision of an architect or town planner, approved by the local authority, and then informally demarcated by the community themselves, assisted by NHAG.¹⁶

This group ownership of a block of land and the 'informal' demarcation of the individual plots, often have immediate social benefits, including the following:¹⁷

- The 'township' layouts are without exception a considerable improvement in terms of safety (e.g. proper access roads in case of fires) and delivery of

¹⁵ *ibid*, s 15.4.

¹⁶ W De Vries, and J Lewis, *op. cit.*

¹⁷ *ibid*.

services (e.g. water, sewerage, storm water and refuse removal), compared to the random layouts caused by informal settling.

- Security of tenure of a geographically defined and demarcated plot enables plot owners to invest in their properties, without the fear of eviction. Immediately after surveying, the improvement in terms of fences, gardens and housing structures typically become visible.
- The process is community driven, which has definite social benefits compared to individual freehold ownership. The sense of community in these schemes, and the management and constitutions of the schemes, facilitate development of infrastructure and services: Communities take responsibility for the development of their Savings Group scheme, instead of just relying on Government to provide services and infrastructure. Other benefits like improved social conditions and security could also be expected under these conditions.

Ironically, one of the main weaknesses of the Flexible Land Tenure System is that it is not flexible. For example, the Act does not provide for basic land development transactions like subdivision and consolidation, the amendment of boundaries between plots, or any other amendments to the plot and street layout of a scheme. Moreover, although the proposed system legally provides for upgrading to freehold ownership, this is unlikely to ever happen. The Act states that at least 75% of a community must agree to the upgrading, and it would therefore not be possible for an individual to improve his or her title from landhold to freehold. In most cases, the whole community would not be able to upgrade to freehold, due to the high cost of formal township establishment. It is more likely that certain (more prosperous) individuals would want to subdivide from the block erf, to obtain freehold ownership of their individual plots (e.g. to allow more freedom in terms of development and financing of their properties). In most cases these changes will not be possible, as individuals will not be able to upgrade to freehold unless the whole landhold scheme is converted to freehold.¹⁸

¹⁸ *ibid.*

A parallel land tenure system will therefore be implemented for the poor, giving them complete security of tenure (although up to 25% of plot owners in a scheme could be expropriated for not agreeing to a title upgrade), but restricting them in terms of development of their properties, and with no possibility for individuals to upgrade to freehold.¹⁹

4 Case study 1: Kahemu informal settlement, Rundu

4.1 Background

Kahemu was formalised during the period 2005-2011 into six township extensions of 250-300 erven each, resulting in about 1 700 new freehold erven being created. Formal township establishment procedures were followed, but certain procedures were amended. For instance, surveying and planning were done in parallel, and SGO approval was expedited. Town planning and surveying fees were also not standard: The fees were slightly discounted to fit the budget of the project.

For comparative purposes, the formalisation of Kahemu was considered as a typical case, but using 2011 professional fees, and realistic (typical) estimations of process durations, rather than the actual data from the Kahemu project (Lux Development Project NAM/343).

The case study was used to answer the following questions:

- What is the estimated cost and duration for direct freehold formalisation (township establishment) of an informal settlement like Kahemu?
- What would the estimated cost and duration be if such informal settlement was first formalised to starter title, then landhold title, and eventually freehold title?

¹⁹ *ibid.*

4.2 Conclusions from the Kahemu case study

The details of the cost analysis can be seen in Annexures 2-5. From these it can be concluded that the FLTS will not significantly speed up the delivery of land to the poor and that the eventual cost for the whole process from starter to freehold title will be almost 75% more than direct freehold formalisation.

The results of the case study can be summarized as follows:

- For direct freehold formalisation (township establishment), the total cost is about N\$6 370 per erf, and the process will take about four years. This cost is typically paid by Government.
- For the proposed FLTS, the cost (for Government) of delivering landhold title to the community, will be about N\$1 158 per erf, and the process will also take about four years.
- To upgrade a landhold scheme to freehold, will cost the community an additional ±N\$9 900 per plot, and will take at least another 3-4 years. The total cost to get to freehold under the FLTS will therefore be about N\$11 058/ erf, which is almost 75% more than the cost of direct freehold formalisation.
- There is a huge economy-of-scale benefit in large-scale formalisation, as carried out in Kahemu, compared to phased formalisation as proposed under the FLTS. For direct freehold formalisation of 1 700 erven, the cost will be around N\$10.8 million (about N\$6 370 per erf). To formalise the same number of plots under landhold schemes (of about 50 plots per scheme) will cost Government about N\$2 million (N\$1 158 per erf), but to upgrade these 1 700 landhold plots to freehold, will cost the community a further N\$16.8 million (about N\$9 900 per erf). Moreover, the whole process will take at least double the time of conventional township establishment. The striking cost difference is mainly due to the fact that for large-scale township establishment, township extensions of up to 300 erven per extension are typically created; while for the FLTS, it is proposed that starter and landhold schemes of not bigger than 50 plots per scheme be created. Consequently, for an informal settlement of 1 700 plots, 34 landhold schemes of about 50 plots each will have to be upgraded to freehold. For direct freehold formalisation, the same number of erven can be created as six township

extensions of about 250-300 erven each, which will be far cheaper than the creation of 34 township extensions of 50 erven each (the cost per erf is much lower when creating a township of 300 erven, compared to subdividing a landhold scheme of 50 erven).

- The professional fees as a percentage of total cost for the whole process of township establishment, including freehold registration of erven, are about 26%, 28% and 35%, for land surveyors, town planners and conveyancers, respectively. Although land surveyors have the highest cost (in terms of equipment and material) they earn the least, while conveyancers earn about 7-9% more than the other professions, while (probably) having the lowest costs.

Formalisation to freehold will have considerable benefits compared to the proposed starter or landhold title of the FLTS, especially with regard to economic development and poverty reduction. For example, the FLTS does not provide for land development options like subdivision, consolidation, and amendment of landhold plans, and it is therefore unlikely to provide the same opportunities in terms of general development and financing of individual plots, compared to freehold. Without these land development options, secure land tenure will have limited benefits in terms of economic development, which will essentially defeat the main objectives of urban land reform, being socio-economic development, poverty reduction, and equity (i.e., providing the same systems and opportunities to all classes of society).

The freehold system provides a proven legal framework for land ownership and development, and is generally considered a pre-requisite for economic growth and development (De Soto, 2001; Johnson, 1972). The development of parallel land tenure systems for the poor (whether urban, rural or communal, as typically implemented in many developing countries) has generally been less

effective in promoting economic development, compared to an efficient, uniform and integrated freehold system for all classes of society (as in most developed countries) (Johnson, 1972).²⁰ Although more research is required to establish the potential economic impact of the FLTS on the poor, it would be risky to formalise all informal settlements in Namibia as landhold schemes, only to realise later that this formalisation had an adverse effect on economic development and poverty reduction.

On the other hand, the development of group savings schemes and a local Land Rights Office in Rundu, as proposed under the FLTS, would have had substantial benefits to the local authority and communities. For example, without a Land Rights Office, a land surveyor has to be contracted from Windhoek each time there is uncertainty or disputes over erf beacons. In most cases, this will be unaffordable, for both the local authority and the community. With a Land Rights Office in Rundu, the community would have access to basic cadastral services, for example ownership information and transactions, settling of disputes, and relocation of boundary beacons. Moreover, the participatory approach to development and management of group savings schemes has definite benefits, compared to individual freehold erven, as mentioned in Section 2 above.

5 Case study 2: ‘Dibasin group savings scheme’, Windhoek

5.1 Background and Challenges²¹

The ‘Dibasin Homeless Committee’ was founded by a group of homeless people who decided to form a savings group, acquire land from the municipality, and construct their own houses and services.²² They acquired three adjacent erven from the Windhoek municipality,²³ and informally subdivided them into 50 individual plots.²⁴ They received a loan from the Windhoek municipality through the ‘Build Together Programme’, managed to build their own houses, and fully service the land by themselves with limited assistance from the municipality.

²⁰ Johnson, E G Omotunde, ‘*Economic Analysis, The Legal Framework and Land Tenure Systems*’ (1972) Vol.15 No.1 Journal of Law and Economics 259-276.

²¹ Susan-Marie Lewis, ‘*The Role Project Definition Plays in the Success of the Mass Housing Programme in Namibia – a Critical Analysis*’ (2016) Unpublished report (MBA thesis).

²² ‘Dibasin’ means ‘doing something for yourself’, in Damara-Nama.

²³ Erven 3214, 3215 and 3217, Goreangab Extension 3.

²⁴ See Figure 1 below; Erf 3217 is a street, so only Erven 3214 and 3215 were subdivided into 25 plots each, with an average size of 223m² per plot.

The three erven are registered in the Deeds Office in the name of the 'Dibasin Homeless Committee of Katutura'. The 50 households therefore do not have individual ownership of their respective plots and houses. The lack of individual ownership has significant implications, including:

- Security of tenure on the individual plots is not guaranteed. The plots have never been formally surveyed and registered in the Deeds Office, which could result in boundary and ownership disputes.
- Transfer (change of ownership) of individual houses must be done in terms of the constitution of the Association (the 'Dibasin Homeless Committee of Katutura'), and cannot be registered in the Deeds Office. Transfer can only occur with the permission of the Association and at a price as agreed by the Association.
- Individuals cannot borrow money or register mortgages against their properties, and the houses can therefore only be sold for cash.
- The plots cannot be subdivided, consolidated or rezoned.
- The group members are jointly responsible to the municipality for taxes and the cost of services. If a member cannot pay, he/she may be evicted from the group.

All members of the scheme are keen to obtain freehold title, i.e., individual title deeds on their plots, but this has proven to be a considerable challenge. The following are required for freehold subdivision of the scheme:

- Application to the Minister of Urban and Rural Development (MURD) for consent to create erven smaller than 300m². The Windhoek municipality has helped the Dibasin group to obtain this consent from the Minister, but the process took more than three years.
- Statutory consent (town planning approval) for the subdivision of the scheme into 50 erven and streets: The process will take at least three years to complete, and will cost around N\$275 000 in town planning fees.
- Subdivision: The 50 erven and streets need to be surveyed by a professional land surveyor, who will draft and lodge a general plan and survey records for approval by the Surveyor General. This will cost at least N\$100 000.

- Freehold registration of individual erven: Once the general plan has been approved by the Surveyor General, a professional conveyancer must register the 50 individual title deeds in the Deeds Office. The total cost for the registration of individual title deeds is will be about N\$235 000 (conveyancing fees).

5.2 Conclusions from the Dibasin case study

The Dibasin case is similar to a starter title scheme and can be used to compare alternative upgrading scenarios for such a scheme. The next step would be to upgrade the group title to a landhold scheme, or to directly subdivide it into 50 freehold erven. The main implications of these scenarios (group title, starter title, landhold title, and freehold title) are as follows:

- Plots 16 and 17 encroach onto the street (Erf 3217), as can be seen in Figure 1 below (the encroachments are depicted by 'A' and 'B'). If the plots were registered under a starter or landhold title scheme (on Erf 3215), it would be impossible in terms of the FLTA to amend the boundaries of Plots 16 and 17 to resolve the encroachment. If this was a freehold township, the encroachment could be rectified by amendment of the erf boundaries: Portions A and B will be subdivided from Erf 3217, and consolidated with Portion 17 and 16, respectively.
- If any of the plot owners wish to amend their erf boundaries (e.g. to extend a plot or sell a portion to a neighbour, or consolidate two plots), or if the roads have to be widened or amended in future, he or she will not be able to do it under the FLTS. In a freehold township, any such boundary amendments could be rectified through standard subdivision and consolidation procedures.

- In terms of Sections 9(9) and 9(10) of the FLTA, no juristic person may hold any starter title right, and no natural person may hold more than one starter title right or acquire a starter title right, if he or she is the owner of any immovable property in Namibia. This condition might be restrictive for business development in low-income areas and can also be considered discriminatory against the poor, and even contrary to Article 16 of Namibia's Constitution.
- Banks will be more likely to mortgage freehold properties, compared to starter or landhold title. For example, if 75% of landhold right holders agree with an upgrading to freehold, "the relevant authority may pay fair compensation to the holders of right that do not agree with upgrading, and may sell the plots that would have been allocated to the persons who were compensated, for its own account".²⁵ Bondholders on such properties (i.e., plots of owners who do not want to upgrade to freehold) will be exposed to an additional risk, which might make financing of these properties less attractive.
- If the 50 erven are registered as a landhold scheme, and the whole community decides later that they want to upgrade to freehold, it will cost them at least N\$600 000²⁶ and take several years to subdivide the scheme into freehold erven.

²⁵ In terms of Section 15(4) and 15(5) of the FLTA.

²⁶ 2011 professional fees for town planners, land surveyors and conveyancers, for subdivision and registration of 50 erven.

Figure 1: Layout plan for Dibasin Savings Group, Goreangab Ext.3. Note: Boundaries of the two block erven and street erf are indicated by thick lines (Source: City of Windhoek)



6 Opportunities for law reform to improve land delivery to the poor

The Flexible Land Tenure System alone will not significantly speed up land delivery to the poor and might only result in additional obstacles (at substantial cost) to providing freehold land to the urban poor. The real problem lies with the formal land administration system, which is in dire need of reform. There are currently several opportunities for addressing this problem through the following ongoing law reform initiatives:

- The new Urban and Regional Planning Bill is in an advanced stage of development, and is scheduled to be tabled in Parliament during 2017²⁷.
- The Namibian Council for Professional Land Surveyors, Technical Surveyors and Surveyor Technicians (SURCON), is currently reviewing the 'SURCON' Act²⁸ and regulations. The main aim of the proposed amendments is to

²⁷ <<http://www.parliament.na/phocadownload/bills/2016/bills20162017.pdf>> accessed on 28 September 2016.

facilitate access to the survey profession by more Namibians and contribute to improved delivery of land and cadastral services to the poor.

- The new Deeds Registries Act²⁹ was promulgated in December 2015³⁰ and will presumably be implemented within the next year or two.
- The regulations of the Flexible Land Tenure Act,³¹ are currently being developed, for implementation (presumably) in the near future.

Also ongoing, is the review of the blueprint for the *Mass Housing Project*³² and the development of the *Massive Urban Land Servicing Project (MULSP)*. The MULSP was announced following a meeting between Government and the Affirmative Repositioning (AR) movement in July 2015. Substantial resources and political commitment have been pledged towards this project, and it is expected to be a major driving force for land delivery to the urban poor.

The above law reform initiatives create an opportunity for addressing the weaknesses of Namibia's freehold system, in support of Government's mass housing and land servicing projects. The following are some proposals in this regard.

6.1 Town Planning and Statutory Approval for Formalisation of Informal Settlements

The planning and statutory approval for subdivisions and township establishment is currently the biggest bottleneck in the land delivery process. Obtaining statutory approval for subdivisions typically takes at least two years. In South Africa, the same consent can be obtained in about three months. In some countries, e.g. the Netherlands, a land portion can be subdivided, sold and registered in less than a month. In South Africa only the local authority's approval is required for a new township subdivision, whereas in Namibia it has to be approved by the local authority, Namibia Planning Advisory Board (NAMPAB), and the Townships Board.

²⁸ Professional Land Surveyors', Technical Surveyors' and Survey Technician Act, 1993 (Act 32 of 1993).

²⁹ Act No.14 of 2015.

³⁰ Government Notice 313: Promulgation of Deeds Registries Act, (No. 14 of 2015).

³¹ 2012.

³² Tender for 'Revision of the Blueprint and Development of a Strategy to Guide the Implementation for the Mass Housing Development Program' *The Namibian* 22 Augu2016.

Under the FLTS, these same procedures (taking up to two years) will be required for the planning and subdivision of block erven. Starter title schemes can only be registered once these block erven have been approved, surveyed and registered. For formal (freehold) township establishment, the process of planning, approving and surveying of block erven, is generally done in parallel with the creation of the township itself (i.e., the block erven and the individual township erven can often be created during the same application and surveying process). The creation of freehold erven under formal township establishment will therefore not take significantly longer than the creation of a landhold scheme, as the latter process will typically only commence after the formal block erven have been created. It is therefore unlikely that the proposed FLTS will speed up the delivery of land to the poor, unless the delays (e.g. with local authority, Townships Board and NAMPAB approval) in the formal land delivery process are first addressed.

In terms of the Flexible Land Tenure Act, township layouts for landhold schemes can be approved by the local authority, without the need for further Townships Board or NAMPAB approval. Tens of thousands of new plots will therefore (presumably) be created under the proposed FLTS, without approval of the layouts by the Townships Board or NAMPAB. Once these 'townships' have been registered under landhold title, they will have the same legal status in terms of tenure security and permanency as freehold erven. If these landhold schemes can be established without approval by Townships Board and NAMPAB, it can surely also be done for freehold formalisation of townships. That is, if the Namibian government decides to do away with the need for Townships Board and NAMPAB approval for township layouts under the FLTS, they can just as well exempt informal settlements from approval by Townships Board and NAMPAB under the freehold system as well. Minor amendments to existing town planning legislation will be required for this, but the positive impact on cost and efficiency of urban land delivery will be significant.

The above procedures are based mainly on the Town Planning Ordinance of 1954, the Townships and Division of Lands Ordinance of 1963, and subsequent amendments of these ordinances. The legislation is currently being reviewed and will be consolidated under the new Urban and Regional Planning Act.

The draft Urban and Regional Planning (URP) Bill appears to be a major improvement on existing town planning legislation, especially with regard to simple subdivision, consolidation and rezoning applications. Approval of such applications will be delegated to ‘authorized planning authorities’, which are essentially local authorities with town planners and approved structure plans. The statutory approval for block subdivisions, which will be required for starter or landhold title schemes, will therefore be significantly sped up. The Bill also provides for the Townships Board and NAMPAB to be replaced with an ‘Urban and Regional Planning Board’, which will presumably speed up the statutory approval process for township establishment. Instead of first applying to NAMPAB for ‘Need and Desirability’, and then to Townships Board for layout approval, the applications will be combined into one application to the Urban and Regional Planning Board. However, the Bill misses the opportunity to really speed up mass land delivery to the poor. For example, it only provides for informal settlements on *rural* land, which have been declared ‘feasible’ in terms of Section 11 of the FLTA, to be exempted from certain sections of the URP Bill. Applications for establishment of new urban areas (townships), or extension of existing townships, on *urban* land (including informal settlements) will have to be approved by the Urban and Regional Planning Board. This is a minor improvement on the current system – instead of going to the local authority, NAMPAB and then Townships Board, the latter two applications can now be combined into one (to the URP Board).

The Bill does not address the issue of upgrading landhold schemes to freehold townships. A landhold scheme, which has been planned, surveyed and registered in terms of the FLTA, will still have to go through the whole process of township establishment in terms of Section 15 of the FLTA before it can be upgraded to freehold. Amending the URP Bill and regulations to exempt landhold schemes from this lengthy and expensive process will have a huge impact on the viability of the FLTA and will significantly expedite delivery of freehold land tenure to the urban poor.

An even better solution would be to exempt all informal settlements from certain township establishment procedures. For example, in South Africa, the Less Formal Township Establishment Act³³ allows the ‘Administrator’ (Minister, in the case of Namibia) to exempt informal settlements from any restrictive conditions, servitudes, and acts, which “may have a dilatory effect on the development of designated land or the settlement of persons on designated land”. A relevant excerpt from this Act is provided in Annexure 6. If such provision can be incorporated into the new URP Bill, it could radically speed up the formalisation of informal settlements, while at the same time addressing a major weakness of the FLTA: Landhold schemes can be upgraded to freehold without having to repeat the whole township establishment process.

6.2 Land Surveying

As a first step towards formalising informal settlements, block erven need to be surveyed by professional land surveyors. This survey will also be required under the proposed FLTS. As part of the block survey, the land surveyor can establish sufficient reference marks around the block to facilitate future surveying inside the block. The block erf can then be transferred to a group of people, as proposed by the FLTS, but not necessarily as a ‘starter title scheme’. The planning, surveying and registration of the individual plots can follow afterwards, by either private or Government employed planners, surveyors and registration officers (as proposed under the FLTS, but resulting in freehold rather than landhold title). The participatory development of group savings schemes will thus be maintained while advancing to freehold in a far more efficient and cost-effective way, compared to the FLTS.

The above can be implemented with immediate effect, without the need for any legislative changes in terms of land surveying, as long as the general plans are signed by professional land surveyors and the necessary statutory approval for township establishment has been obtained. This can be expedited by a minor amendment to the new URP Bill, as proposed in Section 6.1 above. Minor amendments to survey procedures and standards could also be considered to speed up and reduce the cost of these surveys.

³³ Less Formal Township Establishment Act No. 113 of 1991.

An even better long-term solution would be to allow registered technical surveyors, with slightly lower qualifications than professional land surveyors to perform certain types of cadastral surveys, under prescribed conditions. Currently, any type of cadastral surveying may only be performed by registered professional land surveyors³⁴. However, once sufficient reference marks and the new block beacons are available, the surveying of the individual plots and drafting of general plans become a fairly routine procedure, which can be done by a 'lower' category of surveyor (similar to the land measurers proposed under the FLTS) rather than professional land surveyors. These surveyors can be Government employed (as proposed for the FLTS), or private surveyors.

It is proposed that the regulations of the Professional Land Surveyors', Technical Surveyors' and Survey Technicians' Act³⁵ be amended as follows:

- Surveyors with a 3-year bachelor degree (NQF Level 7) in Surveying/ Geomatics should be allowed to complete their survey articles, trial survey and law examination, for registration as technical surveyors.
- Technical surveyors should be allowed to perform the following types of cadastral surveys:
 - Township surveys within block erven, subject to the following conditions:
 - (i) The block erf
 - must be within an informal settlement area declared as such ('designated area') in terms of the Urban and Regional Planning Act (amended as proposed in Section 6.1 above); or
 - must have been approved for establishment of a landhold title scheme in terms of Sections 11 and 13 of the Flexible Land Tenure Act, 2012; and
 - (i) The block erf must have been surveyed by a professional land surveyor, on the latest national coordinate system, and must be covered or surrounded by at least three suitably positioned reference marks, on the same coordinate system, to allow for connection of such township survey to the latest coordinate system.

³⁴ In terms of the Professional Land Surveyors', Technical Surveyors' and Survey Technicians' Act (No. 32 of 1993).

³⁵ Act 32 of 1993.

- Technical surveyors should also be allowed to survey, replace and indicate individual beacons, and perform subdivisions and consolidation of erven, within certain block erven, subject to (i) and (ii) above.

The Namibian government could appoint technical surveyors at all major local and/or regional authorities. This will cost about the same as appointing land measurers at the proposed local right offices, but will be more effective. The main benefits of these proposals will be as follows:

- Professionally surveyed freehold townships, which will provide all the benefits of the freehold system to the poor, but in a more efficient and cost effective way than the proposed FLTS.
- The availability of a local cadastral surveyor, who can assist the local and regional authorities and communities with cadastral services, including surveying and mapping of informal settlements, basic town planning, provision and management of cadastral information, relocation of beacons and settling of boundary disputes.

6.3 Land Registration

The conveyancing procedures for first time registration of erven from a general plan, surveyed as proposed in Section 6.2 above, will be relatively simple, compared to more complicated transfers for which professional conveyancers are required. The formal registration of the new erven can therefore be done by registration officers, as proposed under the FLTS (but resulting in freehold, instead of starter or landhold title). Section 9(1)(a) of the new Deeds Registries Act, 2015, allows the registered owner of land to prepare deeds or certificates of title for registration in the Deeds Office. In most cases, informal settlements will be situated on land owned by the local or regional authority. The first time registration of these new erven can therefore (presumably) be done by the local authority (by land registration officers, for example).

7 Conclusion and recommendations

The main conclusions from the two case studies can be summarised as follows:

- To implement the FLTS, all informal settlements will first have to be subdivided into block erven. The process of creating these block erven will take several years (as long as it would to subdivide them into proper townships). To first subdivide an informal settlement into block erven, register these block erven as starter title schemes, then as landhold schemes, and eventually freehold, will take much longer and cost far more than direct township establishment.
- In terms of the FLTA, formal township establishment procedures must be followed to upgrade a landhold scheme to freehold. Thus, after a landhold scheme has been registered, the community will have to pay town planners, land surveyors and conveyancers to upgrade to freehold. For a small landhold scheme of 50 plots, it will cost the members at least N\$600 000 and take several years to upgrade to freehold erven.
- The most likely long-term scenario, if the FLTS is fully implemented, is that most low-income plots formalised under this system will be held perpetually under landhold title. This might have an adverse effect on long-term economic development and poverty reduction, as landhold title has significant limitations compared to freehold.
- The National Housing Policy prescribes a minimum allowable erf size of 300m². This will be a major obstacle for urban land delivery and implementation of the Mass Housing Programme. For example, the current informal settlement density in Windhoek is about 150m²-200m². If only erf sizes of minimum 300m² are allowed, additional land to relocate about 35% of the households will have to be found before these informal settlements could be formalised.
- Mass upgrading of land tenure (similar to what was done in the Kahemu case study) significantly speeds up land tenure delivery and makes it a lot cheaper ('economy of scale'). The planning, surveying, and servicing cost for such mass formalisation projects will be much lower (per erf) than ad-hoc formalisation (e.g. upgrading small landhold blocks to freehold, one at a time).

- The FLTA does not provide for subdivision, consolidation or adjustment of plot or street boundaries. The geometry and size of landhold plots, as well as road alignment and boundaries in these schemes, will therefore be fixed forever. This may severely restrict the development of such schemes and could also result in serious land administration problems in future (with regard to dealing with encroachments or road widenings, for example).

It is questionable whether the Flexible Land Tenure System will significantly accelerate the delivery of land to the poor, and whether it will indeed achieve the aims of a pro-poor land tenure system. It might in fact even burden the poor with an inferior land tenure system, thereby becoming an obstacle rather than an instrument for poverty reduction and economic development.

The formal land tenure system, on the other hand, is in urgent need of reform. It does not only hamper land delivery to the poor, it is also prohibitively slow and expensive for all other classes of society, including property developers and Namibia's government.

It is recommended that the real problems with Namibia's land administration system be addressed, before implementing a parallel system for the poor. Implementation of the Flexible Land Tenure System will inevitably attract attention and resources away from the real problem, being legislative, professional and institutional reform of the freehold system.

In summary, the following are recommended:

- The deficiencies of the current formal land administration system should be addressed as a matter of urgency. The development of the new Urban and Regional Planning Bill, Deeds Registries Act, Flexible Land Tenure Regulations, and the current review of land survey related regulations, should be approached in a holistic manner aimed at improving land delivery and administration in general, with specific focus on the needs of the urban poor. The aim should be to make the system accessible and beneficial to all classes of society, thereby eliminating the need for a parallel system for the poor.

- Legislative, professional and institutional reform of the formal land administration system should take cognisance of the benefits of the proposed Flexible Land Tenure System, and should combine the strengths of both systems, while resolving the problems with the freehold system.
- The Flexible Land Tenure Act or the Urban and Rural Planning Bill should be amended to provide for direct upgrading from landhold to freehold, without the need for elaborate (and expensive) township establishment procedures.
- The FLTS could be used to establish land right offices and register starter title schemes, but these starter title schemes should then be upgraded directly to freehold through amended township establishment procedures, rather than landhold.

Annexure 1

Procedures for establishing and upgrading starter- or land hold title schemes

Preliminary steps before establishment of starter title or land hold title scheme:

- 1) **Application for establishment of starter- or land hold title scheme:** Relevant authority may on its own motion, or on application by the owner of a piece of land or one or more persons who reside on a piece of land, consider the establishment of a starter title scheme or a land hold title scheme on that land. The relevant authority may require the owner of the block erf (if not the relevant authority), or the association of the group of people occupying the block erf, or the individual occupiers of the block erf, to pay a specified amount to it. This money must be used for the purpose of covering the whole or part of the cost incurred by the relevant authority for the establishment of the scheme concerned.
- 2) **Survey and registration of block erf:** Before the establishment of a starter- or land hold title scheme is considered, the land concerned must be subdivided or consolidated in such a manner that the scheme concerned would be situated on one portion of land registered as such in the Deeds Registry (registration of block erf). Any mortgage, usufruct, fidei commissum or similar right on that piece of land must be cancelled.

For Land Hold Title Schemes:

- 3) **Land hold survey and preparation of land hold plan:** Before the establishment of a land hold title scheme **may be considered**, the plots must be surveyed and mapped in the prescribed manner.
- 4) **Compilation and submission of list of persons with whom contract have been concluded for registration of land hold title:** The persons who have requested the approval of the establishment of a land hold title scheme, must prepare a list of persons with whom contracts have been concluded for the transfer of plots on the establishment of the scheme together with the number of the plot that must be so transferred and if such person is not the relevant authority, submit that list to the relevant authority.

Feasibility study and approval of scheme by relevant authority (starter- or land hold title scheme):

- 5) Before the establishment of a starter title scheme or a land hold title scheme is considered, the relevant authority must cause a feasibility study to be conducted in order to investigate the feasibility and desirability of creating a starter title scheme or a land hold title scheme on the piece of land concerned.
- 6) If the relevant authority is satisfied about desirability of the scheme, they must cause a notice to be published in a newspaper, informing about the intention to establish the starter or land hold title scheme, and inviting any person to provide information relevant to this.
- 7) After above procedures have been followed, the relevant authority may approve the establishment of starter title or land hold title scheme.
- 8) The relevant authority must send a notice to Registrar and Registrar of Deeds, informing that the scheme has been approved.
3. The notice may contain conditions about establishment of scheme.
4. For a starter title scheme, the notice must include a list of heads of all households that resided on the block erf concerned when the desirability of the establishment of the scheme was investigated.
- 9) Registrar of Deeds must make an endorsement on the title deed of the block erf.

Opening of starter title or land hold title register (Registration of scheme)

- 10) **Opening of Registers and Registration of Individual Rights:** When the registrar receives notice of approval of the scheme from the relevant authority, he must open a register for the scheme and enter all relevant particulars in the register (starter- or land hold title register).
 - For starter title schemes, the registrar must then conduct an investigation to determine which persons must be registered as the initial holders of starter- or land hold title rights in the scheme concerned. The persons who are entitled to be registered are the heads of households that resided on the block erf when the investigation of the desirability of the establishment of the scheme was commenced.
 - For land hold title schemes, the list mentioned in (4) above will apply as first time land hold title holders.

- 11) **Issue of starter- or land hold title certificates:** The registrar must then issue a document prepared in the prescribed manner and containing the prescribed information to every person who is registered as the initial holder of starter or land hold title right in the scheme concerned.

Upgrading from starter title to land hold title:

- 12) If at least 75% of holders of rights of starter title scheme agrees to upgrade, they may apply to the relevant authority for such upgrade.
- 13) If the relevant authority approves the application, those right holders who did not agree to the upgrade, must be given similar plots in some other similar scheme. The relevant authority may then sell those plots left in the scheme for its own account at such price as it thinks fit.
- 14) The relevant authority may require every holder of rights who agreed and applied for the upgrade, to pay a sum of money to them.

Upgrading from starter title or land hold title to freehold title:

- 15) Application for upgrade to freehold can only be done if the scheme is situated within the area of an approved township.
- 16) The block erf must be surveyed and subdivided in accordance with the applicable laws relating to the surveying and subdivision of land in Namibia (i.e. formal township establishment procedures are required).
- 17) Upgrading to freehold can only happen if all right holders in the scheme agree to it. If 75% of the holders of rights in the scheme agree with the upgrading, the relevant authority may pay fair compensation to the holders of right that do not agree with the upgrading. The relevant authority may then sell the erven that would have been allocated to these persons for its own account.
- 18) The cost for the upgrading to freehold must be borne by the holders of rights in the scheme concerned.

Annexure 2

Direct freehold formalisation (township establishment) of an informal settlement of about 1 700 Erven (±400m² per erf)

GANTT Chart:

FORMAL TOWNSHIP ESTABLISHMENT (FREEHOLD)	Cost	Time (months)	YEARS			
			YEAR 1	YEAR 2	YEAR 3	YEAR 4
LAYOUT DESIGN & APPLICATIONS						
- Prepare Layout & Applications	N\$ 2 000 000	4	■			
- Municipal Approval		4		■		
- NAMMIS Approval		4		■		
- Advertise for Comments (Township Board)		5		■		
- Township Board (TB) Approval	N\$ 37 120	5		■		
- Obtain TB Certificate		7		■		
SURVEY (Submittal & Approval)	N\$ 2 820 450	9		■		
- Approval of Survey by Survey General	N\$ 40 400	9		■		
REGISTRATION						
- Provision Township & Cases TB Register		8			■	
- Charge registration & Transfer Contracts		8			■	
- Prepare & Lodge Title Deeds	N\$ 3 750 000	9				■
- Deal Registration & Registration Officer	N\$ 2 100 000	9				■
TOTAL FOR TOWNSHIP ESTABLISHMENT	N\$ 60 820 410	48	N\$10 370 per erf			

TOWNSHIP ESTABLISHMENT (FREEHOLD)	Cost	Time (months)	YEARS					
			YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5	YEAR 6
LAYOUT DESIGN & APPLICATIONS								
- Prepare Layout & Applications	N\$ 2 000 000	4				■		
- Municipal Approval		4				■		
- NAMMIS Approval		4				■		
- Advertise for Comments/Comments		5				■		
- Township Board (TB) Approval	N\$ 30 000	5				■		
- Obtain TB Certificate		7				■		
SURVEY	N\$ 2 820 450	9					■	
- Approval of Survey by Survey General	N\$ 40 000	9					■	
REGISTRATION								
- Prepare and Lodge Title Deeds	N\$ 3 750 000	9						■
- Approval and Registration Officer	N\$ 1 350 000	9						■
TOTAL FOR TOWNSHIP ESTABLISHMENT (Township establishment)	N\$ 10 820 410	48	N\$ 6 350 per erf					
TOTAL TOWNSHIP ESTABLISHMENT (FREEHOLD)	N\$ 71 640 820	96	N\$ 41 720 per erf					

(Costs are for formalisation of about 1 700 plots through direct freehold, with provision for a small percentage of plots to be provided to the community/development trust)

Cost Breakdown:

ACTIVITY	Cost (payable to)				TIME (Months)	
	Town Planner	Land Surveyor	Conveyancer	Government	Activity	Cumulative
LAYOUT DESIGN & APPLICATIONS						
- Prepare layout and applications	N\$ 2 000 000				4	4
- Local Authority Approval					4	8
- NAMFRA (Need & Desirability) Approval					4	12
- Advertise for Objections/Comments (TI)					2	14
- Townships Board (TB) Approval				N\$ 87 500	6	17
- Obtain TB Certificate					2	19
SURVEY (Block erven & townships/GPs)		N\$ 2 814 459			6	25
- Approval of GPs by Surveyor General (SG)				N\$ 45 408	6	31
REGISTRATION						
- Open Township Register (Deeds Office)					1	32
- Proclamation of Township (MRLCHRD)					2	34
- ¹ Adjudication & 'Sale' of erven					6	40
- ² Prepare and lodge Title Deeds			N\$ 3 753 200		5	45
- ³ Approval and Registration (Deeds Office)				N\$ 1 194 200	6	48
TOTAL:	N\$ 2 000 000	N\$ 2 814 459	N\$ 3 753 200	N\$ 1 276 708	48	
Cost distribution	28%	26%	35%	11%		
TOTAL FREEHOLD COST	N\$ 10 828 411	or		N\$ 6 370	per erf	
¹ Sale of individual erven is similar (in cost and time) to registration of starter title at FLS. Process could start earlier, e.g. after TB approval. ² Continuous process that could take several years. ³ Stamp duty of NAMFRA payable to the Ministry of Finance, and Examination Fee of N\$100/erf payable to the Deeds Office.						

Annexure 3

Formalisation to Landhold Title and subsequent upgrading to Freehold Title (as proposed under the Flexible Land Tenure System): Case study of 1 700 plots of ±400m²/plot, formalised into 34 Landhold Schemes of about 50 plots/scheme

GANTT Charts:

Cost Breakdown:

PROPOSED FLEXIBLE LAND TENURE SYSTEM (34 Block erven of ±50 plots/block, ±1ha/block erf, total of ±1700 plots)						
ACTIVITY	Cost (payable to)				TIME (Months)	
	Town Planner	Land Surveyor	Conveyancer	Government	Activity	Cumulative
CREATION AND REGISTRATION OF BLOCK DIVISION (±1600 erven of ±40 plots/block, ±1ha/block erf)						
LAYOUT DESIGN & APPLICATIONS FOR BLOCK ERVEN						
- Prepare layout (of block erven) and applications	N\$ 161 000				2	2
- Municipal Approval					4	6
- Townships Board (TB) Approval				N\$ 500	6	9
- Obtain TB Certificate					2	11
SURVEY (Block erven)		N\$ 162 500			3	14
- Approval of diagrams by Surveyor General (SG)				N\$ 4 000	6	18
REGISTRATION						
- Sale of Block Erven to Savings Groups					2	20
- Prepare and lodge Title Deeds (Group Title)			N\$ 85 000		2	22
- Approval and Registration (Deeds Office)				N\$ 2 8 800	2	24
TOTAL:	N\$ 161 000	N\$ 162 500	N\$ 85 000	N\$ 29 800	24	
Cost distribution	57%	57%	10%	7%		
TOTAL COST TO CREATE FREEHOLD BLOCK ERVEN	N\$ 458 234	or		N\$ 12 888	per block erf	
				N\$ 258	per plot	

Law Reform for Improved Delivery of Land to the Urban Poor

ACTIVITY	Cost (payable to)				TIME (Months)	
	Town Planner	Land Surveyor	Conveyancer	Government	Activity	Cumulative
REGISTRATION OF STARTER TITLE (for 14 Schemes, or 1198 plots)						
- Feasibility Study				N\$ 1 000 000		21
- Registration of individual starter titles					6	27
* Assume that feasibility studies are outsourced, or included in a tender scheme. This will take at least 3 months, but could be done in parallel with earlier activities						
* Similar (in cost & time) to initial 'bulk' / owner registration process, processing freehold registration of individual owners						
REGISTRATION OF LANDHOLD TITLE (for 14 Schemes, or 1198 plots)						
- Landhold survey and drafting of landhold plans					6	33
- Registration of landhold title				N\$ 510 000	6	41
* Assume that layout planning is done by local authority.						
* Assume that a cost recovery fee of N\$100/plot will be payable for landhold registration. This includes cost of survey and registration (cost of LPO)						
TOTAL (block driven, starter- and landhold title):	N\$ 161 000	N\$ 161 500	N\$ 85 000	N\$ 1 510 000	41	
Cost distribution	32%	26%	14%	28%		
TOTAL COST FOR LANDHOLD TITLE (including creation of block driven)	N\$ 1 668 234	or		N\$ 1 150	per plot	
	Total times			41	months	

ACTIVITY	Cost (payable to)				TIME (Months)	
	Town Planner	Land Surveyor	Conveyancer	Government	Activity	Cumulative
UPGRADING TO FREEHOLD (for 14 new Township Definitions, 1198 owners)						
* (in a couple of years, if all starter or landhold title holders agree and they run an office) - they can decide to upgrade to freehold						
LAYOUT DESIGN & APPLICATIONS						
- Prepare layout and applications	N\$ 7 652 500				2	43
- Municipal Approval					3	46
- NAMRAB (Plan & Designability) Approval					4	50
- Advertise for Objections/Comments					3	53
- Township Board (TB) Approval				N\$ 51 000	3	56
- Obtain TB Certificate					3	59
SURVEY (newship/STP)		N\$ 4 082 517			6	65
- Approval of OIPs by Surveyor General (30)				N\$ 91 200	6	69
REGISTRATION						
- Prepare and lodge Title Deeds			N\$ 3 750 200		5	74
- Approval and Registration (Deeds Office)				N\$ 1 194 200	3	77
TOTAL (from landhold to freehold)	N\$ 7 652 500	N\$ 4 082 517	N\$ 3 750 200	N\$ 1 956 400	69	
Cost distribution	40%	24%	22%	14%		
TOTAL COST TO UPGRADE TO FREEHOLD (payable by community)	N\$ 16 834 257	or		N\$ 8 908	per plot	
	Total times			69	months	

Annexure 4

Professional fees (estimate) for direct freehold formalisation of an informal settlement of ±1 700 erven (based on the case study of Kahemu Informal Settlement, but using 2011 professional fees)

	1A	1B	1C	1D	1E	1F	TOTAL	
Formalising information fee: General Plan No.	0,200	0,200	0,200	0,200	0,200	0,200	1,200	
SO. OF. EXEMPT	200	200	200	200	200	200	1,200	
- functional	1	1	1	1	1	1	6	
- Business	1	0	1	0	0	0	2	
- industrial	0	0	0	0	0	0	0	
- Residential	200	200	200	200	200	200	1,200	
- Ag. Serv. Residential	0,000m ²	0,000						
BLOCK FEE	0,000	0,000	0,000	0,000	0,000	0,000	0,000	
Block Fee Cost (per erf)	0,000	0,000	0,000	0,000	0,000	0,000	0,000	
TOWN PLANNING FEES (R)								
- 0,000 of Application	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Township Layout Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Application Fees	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Other expenses	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- 0,000 (Town Planner fees) per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- 0,000 (Town Planner fees) per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
<i>For details, turn pages 1, 2 for applications for Local Authority, SUMMARY and Formulation Report</i>								
- Township Board Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
TOWN PLANNING FEES per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
ENGINEERING COSTS								
<i>For an average erf size of 400-600m²</i>								
- Surveyor's Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Surveyor's expenses	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- AGO Examination Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
Total per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
<i>For an average erf size of 300-400m²</i>								
- Surveyor's Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Surveyor's expenses	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- AGO Examination Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
Total per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
REGISTRATION/CONVEYANCING								
- Open Township Register (through Registrar of Deeds, no cost)								
- Proclamation of Township (done by informants, no cost)								
Registration of Individual Erves:								
- Conveyancer's Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Stamp Duty	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
- Deeds Examination Fee	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
Total per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
SOCIAL COSTS for an av. Erf size of 400-600m ²								
- 0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
Total per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
SOCIAL COSTS for an av. Erf size of 300-400m ²								
- 0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%
Total per erf	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0%

To formalise (to market) all 120 000 informal plots in Namibia, will cost approximately N\$800 million.

Surveying cost of block erven:

- If the block survey is carried out as part of a township survey, the survey cost for the block erf will be about N\$10500.
- If one block only is surveyed (e.g. creation of a block erf for group title) survey logistical expenses of about N\$20 000 have to be added, so the cost will be about N\$30500 per block erf.
- If 6 block erven are created at the same time, (e.g. for 6 savings groups) the total block survey cost will be \pm N\$60 000.
- For the FLTS, it is envisaged not to have more than 50 plots per block erf, so 34 new block erven of about 3ha each will have to be created. The surveying cost of this will amount to \pm N\$175 000 (\pm N\$5150/block erf, or N\$102 per plot on the block erf).

Annexure 5

Professional Fees (estimate) to upgrade one landhold scheme of 50 plots to freehold

NO. OF ERVEN PER BLOCK:	50			
Av. Size (Residential)	450m ²			
Block Erf Size (Ha):	±3ha			
TOWN PLANNING FEES (R)		(% of Total)		
Township Layout Fee:	N\$ 40 250	8%		
² Application Fees:	N\$ 161 000	33%		
Other expenses	N\$ 25 000	5%		
TOTAL (Town Planner Fees)	N\$ 226 250			
per erf:	N\$ 4 525	46%		
<i>(¹ Includes town planner's fee for applications to Local Authority, NAMPA@ and Townships Board)</i>				
Townships Board Fee	N\$ 1 500	0.3%		
TOTAL PLANNING FEES:	N\$ 227 750			
per erf:	N\$ 4 555	46%	(Percentage of total cost)	
²SURVEYING COST (R)				
<i>For an average erf size of 401-600m²:</i>				
-Surveyor's Fee	N\$ 85 733	17%		
Surveyor's expenses	N\$ 34 331	6.9%		
-SGO Examination Fee	N\$ 1 800	0.4%		
Total:	N\$ 121 863			
per erf:	N\$ 2 437	25%	(Percentage of total cost)	
<i>For an average erf size of 301 - 400 m²:</i>				
-Surveyor's Fee	N\$ 78 315			
Surveyor's expenses	N\$ 34 331			
-SGO Examination Fee	N\$ 1 800			
Total:	N\$ 114 446			
per erf:	N\$ 2 289			

REGISTRATION/CONVEYANCING				
-Conveyancer's Fee	N\$	110 000	22%	
-Stamp Duty	N\$	20 000	4%	
-Deeds Examination Fee	N\$	15 000	3%	
	N\$	145 000		
per erf:	N\$	2 900	29%	(Percentage of total cost)
TOTAL COST, for an av. Erf				
size of 401-600m ²	N\$	494 613		
	N\$	9 892	per erf	
TOTAL COST, for an av. Erf				
size of 301-400m ²	N\$	487 196		
	N\$	9 744	per erf	
To upgrade 120 000 landhold plots to freehold, will cost approximately N\$1.18 billion (additional to the initial cost for starter- and landhold title registration)				
The cost for landhold survey and registration of 120 000 plots, will be about N\$35-40million.				

Annexure 6

Excerpt from the 'Less Formal Township Establishment Act'³⁶

2 **Making available of land by the state for purposes of this chapter**

1. *The Administrator³⁷ may make available State land that is controlled by him or land that has been acquired by him by means of purchasing, expropriation or in any other manner, or is in the process of being acquired, for designation under section 3.*
2. *A local authority or any other person may make available land of which he is the owner or which is in the process of being transferred to him, for designation under section 3.*

³⁶ Act No.113 of 1991, Republic of South Africa.

³⁷ To be replaced by 'Minister', for application in Namibia.

3. *The provisions of sections 6 to 23 inclusive of the Expropriation Act, 1975 (Act 63 of 1975), shall apply mutatis mutandis to the expropriation of land under subsection (1), and in such application a reference in the said sections of that Act to-*
 - a. *'Minister' shall be construed as a reference to the Administrator concerned; and*
 - b. *'section 2' shall be construed as a reference to subsection (1).*

3 Designation of land for less formal settlement

- (1) *When the Administrator is satisfied that in any area persons have an urgent need to obtain land on which to settle in a less formal manner, he may, by notice in the Official Gazette, and on the conditions mentioned in the notice, designate-*
 - a. *land made available by him under section 2 (1); or*
 - b. *land made available by a local authority or any other person under section 2 (2), as land for less formal settlement: Provided that if such land falls within the area of jurisdiction of a local authority and is made available in terms of section 2 by a person other than that local authority, the Administrator shall not designate such land under this subsection unless-*
 - i. *he has given notice in writing to the local authority of his intention so to designate such land; and*
 - ii. *a period of at least 21 days has expired from the date of such notice.*
- (2) *Notwithstanding anything to the contrary contained in any law, the Administrator may, in a notice referred to in subsection (1), suspend-*
 - (a) any servitude registered against the title of the designated land which, in his opinion, is not being utilized beneficially or, with a view to the use of the land for less formal settlement, will no longer be capable of beneficial utilization; and**

(b) any other restrictive condition thus registered or otherwise operative in respect of the land, if he is of the opinion that such a servitude or condition is inconsistent with, or undesirable in relation to, the use, occupation, development or subdivision of the land, or that the cancellation of the servitude or condition in accordance with formal procedures will unnecessarily delay the opening of a township register in respect of that land.

(3) *The Administrator may, at any time prior to the commencement of settlement in terms of section 8, amend or withdraw a notice referred to in subsection (1): Provided that-*

(a) a condition under subsection (1) which binds a local authority or person referred to in paragraph (b) of that subsection may, with the concurrence of the local authority or person, be amended or suspended also after settlement in terms of section 8 has commenced;

(b) the suspension of a servitude or restrictive condition under subsection (2) may be lifted either before or after the commencement of such settlement.

(4) *Subsection (2) shall not be construed as authorizing the suspension of any registered right to minerals.*

(5) The provisions of-

(a) sections 9, 9A and 11 of the Advertising on Roads and Ribbon Development Act, 1940 (Act 21 of 1940);

(b) any law on physical planning;

(c) section 12 of the National Roads Act, 1971 (Act 54 of 1971);

(d) the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977);

- (e) laws relating to the establishment of townships and town planning;***
- (f) laws relating to the standards and requirements with which buildings shall comply;***
- (g) laws requiring the approval of an authority for the subdivision of land;***
- (h) any other law which, in the opinion of the Administrator , may have a dilatory effect on the development of designated land or the settlement of persons on designated land and which he mentions by notice in the Official Gazette, shall, subject to subsection (6), not apply in respect of designated land.***

PART III

BUSINESS AND INTELLECTUAL PROPERTY

CHAPTER 9

THE INTELLECTUAL PROPERTY REGIME IN NAMIBIA: AN OVERVIEW OF THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORK

by
Cislé S Jacobs

1 Introduction

In our current knowledge-based society, combining rapid technological developments and the increasingly important role intellectual property (IP) plays in economic growth, affording the appropriate legal protection to IP rights is pressing. The archaic IP laws which Namibia inherited from its colonial masters are neither appropriate nor accommodating for the current technological and economic landscape of Namibia. Furthermore, IP protection cannot occur in isolation: it necessitates cooperation between law, relevant administrative authorities and policy. Full cooperation will ensure an efficient and equitable IP system which helps Namibia to realise the catalytic potential of IP in economic development and cultural enrichment.

The Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (TRIPS Agreement) establishes a broad set of minimum international standards which are binding on all members of the World Trade Organization (WTO), including Namibia.¹ The TRIPS Agreement sets these standards by requiring that the substantive obligations under the main conventions of the World Intellectual Property Organization (WIPO), such as the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) in their most

¹ Namibia has been a WTO member since 1 January 1995. J H Reichman, "The Know – How Gap in the TRIPS Agreement: Why Software Has Fared Badly, and What Are the Solutions." (1995) Vol 17. (7) 763 *Hastings Communication and Entertainment Law Journals*, 765. See also Article 9 – 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

recent versions, must be complied with by member states.² As this chapter shows, there are a few inconsistencies between Namibian IP law and some international standards established by these treaties.

It is against this backdrop that this chapter provides an overview of the IP landscape in Namibia. It deals specifically with the legal, institutional and policy frameworks for IP in Namibia. The chapter provides a brief description of IP law in general before it delves into the IP regime in Namibia. First, the chapter explores the different forms of IP rights. The discussion is, however, limited to copyright, trademarks and patents. Second, it provides a brief overview of the IP administrative institutions in Namibia, with particular reference to the Business and Intellectual Property Authority (BIPA) and the Ministry of Information and Communication Technology (MICT). Finally, the chapter explains the policy framework in respect of IP in Namibia. This chapter shows that moving towards the modernization of Namibian IP law without a guiding policy, while also suffering from capacity-building constraints in the form of human-capital limitations and lack of institutional coordination, can hold back Namibia in its ultimate goal of fostering economic and social development.

2 What is intellectual property law?

IP is a broad term used to describe legal rights which result from creations of the mind: inventions in technological, industrial and scientific fields; literary and artistic works; brands, symbols, names and images in commerce; and industrial designs.³ IP is divided into two categories: industrial property and copyright. Industrial property includes trademarks, industrial designs, patent inventions, and geographical indications.⁴ Whereas, copyright covers a broad spectrum of works such as literary works (books and dramatic plays), films, musical works, artistic works, broadcasting (radio and television programs), computer software (computer programs) and performance of performing artists.⁵

² Art 2.1 of the TRIPS Agreement.

³ WIPO. 2008. *Intellectual Property Handbook: Law, Policy and Use*. Geneva: WIPO Publications No.489, 3.

⁴ WIPO. *What Is Intellectual Property?* Geneva: WIPO Publication No. 450(E), 2.

⁵ *ibid.*

The protection of IP can be understood in two interdependent forms. First, the statutory protection provides moral and economic rights to creators to benefit from their work or investment in a creation.⁶ Second, this legal protection of IP promotes creativity, innovative activity, dissemination and public access to material which would contribute to socio-economic development of the country.⁷

There are also other forms of IP such as plant breeders' rights, trade secrets and potentially traditional knowledge. Over the past decades the protection traditional knowledge (TK) became a contentious discussion the world over. The contention arose as a result of dissensus on the possible means to protect TK. Some academics advocate for using existing IP rights to protect TK. Their argument is that different forms of TK can be fit into existing IP rights by modifying certain aspects of the current IP rights.⁸ In contrast, the opponents of protecting TK through IP rights based their argument on the essential incompatibility between the concepts of Western IP rights and the practices and cultures of local and indigenous communities.⁹

TK is the cultural heritage and IP of local and indigenous communities.¹⁰ TK encompasses three separate yet related areas: TK in the strict sense is technical know-how, practices, skills, and innovations related to biodiversity, agriculture or medicine; TK can be traditional cultural expressions of folklore, for example music, art, designs, symbols and performances; and TK associates with genetic resources of actual or potential value found in plants, animals and micro-organisms.¹¹ There is currently no law protecting or regulating TK in Namibia, however, the Access to Genetic Resources and Associated Traditional Knowledge Draft Bill, 2014 is proposed to regulate access to genetic resources and associated TK and all matters incidental thereto.

⁶ WIPO. 2008. *op. cit.*

⁷ WIPO. *What Is Intellectual Property? op. cit.*, 3.

⁸ Correa Carlos, "Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge" (Geneva: The Quaker United Nations Office 2001) 10.

⁹ *ibid.*

¹⁰ T Greiber *et al* (eds), "An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing" (2012) 83 *IUCN Environmental Policy and Law Paper* 54.

¹¹ WIPO. 2016. "Traditional Knowledge and Intellectual Property: Background Brief No. 1". http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf accessed on 28 May 2017.

3 The current IP legal framework

3.1 Copyright

Copyright is a bundle of property rights arising out of the creation of a work. The creator (the author) of such a work is vested with exclusive rights by the Copyright and Neighbouring Rights Protection Act, 1994 (No. 6 of 1994) (Copyright Act). Although authorship is an essential starting point to determine the copyright ownership of a work, the owner may not necessarily be the author.¹² Even so, the premise of copyright law is to safeguard owners from exploitation of their original works.¹³ It ensures that copyright owners receive a portion from any profits and prestige flowing from their original works.¹⁴ Unauthorised third parties use deprive owners of their exclusive rights when these third parties exploit a work. Consequently, in Namibia the reproduction, adaptation or carrying out of any act, in respect of the work, exclusively vested in the owner without his/her express authorisation constitutes copyright infringement.¹⁵ This protection subsists during the life of the author and for a period of 50 years from the end of the year in which the author dies.¹⁶

Nonetheless, before a work is protected under copyright, it is necessary to fulfil the requirements for subsistence under section 2 of the Copyright Act. In essence, copyright only subsists in *original eligible works* that are *reduced to material form*.¹⁷ As it was suggested in *Waylite Diary CC V First National Bank Ltd*,¹⁸ it is difficult to discuss what amounts to a “work” by excluding originality, since without a sufficient degree of “originality” a work will not be eligible for copyright protection. The work seeking protection must fall within the nine categories of works listed under section 2(1) (a-i) of the Copyright Act: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions, and computer programs. Section 1 of the Copyright Act defines each of the aforementioned categories of work and the many modes in which they may materialise. The question which arises is whether the work relied upon falls within one of these categories.

¹² Section 27 of the Copyright Act.

¹³ J M Cavendish and K Pool, *Handbook of Copyright in British Publishing Practice* 3rd ed. (London: Cassell 1993) 2.

¹⁴ *ibid.*

¹⁵ The Copyright Act, Section 29 (1).

¹⁶ *ibid.*, Section 6.

¹⁷ *ibid.*, Section 2(1) & (2).

¹⁸ 1995 (1) SA 645 (A), at 538.

After it has been determined if the work falls within one of the protected categories, the next inquiry is whether the work is original. This requirement is arguably the most important for copyright subsistence. There is no definition of ‘original’ in the Copyright Act, and the requirement of originality has not yet been interpreted in Namibian courts. However, in terms of section 2(4) of the Copyright Act, a work may be original and, thus, eligible for copyright even when the making of the work, or the doing of an act in relation to the work, constituted an infringement on another work insofar as it is original to the owner. For example, A wrote the lyrics of a song which was later recorded and released, and B wrote the lyrics to a song that is identical or similar to that of A without having had access to A’s lyrics, in that case copyright will subsist in B’s work even though it is infringing on A’s work because B’s work is original from him. The meaning of originality in this context is explained in the classic statement of Peterson J. in *University of London Press Ltd v University Tutorial Press Ltd*:¹⁹

The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought..... Originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

Accordingly, a work need not be unique or novel as long as it is a product of the author’s exercise of skill and judgment.²⁰ In *Haupt v Brewers Marketing Intelligence (Pty) Ltd.*, the South African Supreme Court pointed out that “the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise”.²¹ Simply put, while a novel or even creative work can fall squarely within the definition of original, neither novelty nor creativity is necessary to make a work original.

Furthermore, copyright protects the manifestation of an idea in material form, not the idea itself, as provided for in the TRIPS Agreement.²² As such, you will not be able to legally stop someone else from copying or reproducing your idea. For

¹⁹ [1916] 2 Ch. 601 at 608. *Appleton v Harnischfeger Corporation* 1995 (2) SA 247 (A) at 262.

²⁰ *Haupt v Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA) 35-37.

²¹ [2006] SCA 39 (RSA) 35-37.

²² Article 9.2 of the TRIPS Agreement.

example, if X has an idea of a novel plot, that idea, while still in his/her head, or communicated to someone else via speech, will not be a copyright work until it is reduced to material form, i.e., written down, in which case copyright can subsist.

In Namibia, copyright protection arises automatically on a work eligible for copyright at the time of creation, provided the requirements of subsistence are complied with, as registration is not required under the Copyright Act. That is the *de jure* position. It is true that the issue of subsistence of copyright in a work may then only arise when infringement thereof occurs. However, the *de facto* position in Namibia is that copyright registration for artistic, literary, musical, audio-visual, and dramatic works is a long-standing practice.²³ In this instance, copyright subsistence requirements must be met for a successful application.

Upon approval, the author is vested with the abovementioned exclusive rights. However, sections 15 to 24 of the Copyright Act curtail the copyrights owner's monopoly to exploit his/her work exclusively. These sections specify circumstances under which third parties may use copyright-protected works without prior permission.²⁴ These exceptions and limitations are otherwise known as fair dealing. In Namibia, it is not infringement if other persons use copyright works for the purposes of research or private study; or personal or private use; criticism or review; or reporting on current events; or in a newspaper, magazine or similar periodical; or broadcasting or in a cinematograph film.²⁵ The inclusion of other exceptions such as use of copyright work for educational purposes, parody, and user-generated content is encouraged and recommended not only for constitutional reasons but to keep up with the perpetual changes in digital technology.

Some scholars have argued that fair dealing is a defence in copyright law as the act of infringement has been committed which is then exempted.²⁶ On the other hand, others have taken a human rights perspective which views fair dealing as a right of third parties enabling them public access to copyright works.²⁷ The purpose of this chapter is not to expound on these arguments, it should, however, be noted that

²³ Ministry of Information and Communication Technology, 'Application for Registration of a Copyright Work' FORM NO. CR 1.

²⁴ The Copyright Act, Sections 15 – 24.

²⁵ The Copyright Act, Section 15 (1).

²⁶ H Klopper T Pistorius, *et al. Law of Intellectual Property in South Africa*, (Cape Town: LexisNexis 2011) 211.

²⁷ E S Nwauche, "The Public Interest in Namibian Copyright Law". (2009) Vol 1 (1) *Namibian Law Journal*, 68.

the fair-dealing provisions strike a balance between the public's right to access copyright works and the private economic rights of copyright owners. Fair dealing, thus, encapsulates popular intellectual property jurisprudence from which both arguments derive legitimacy.

3.2 Trademarks

In an increasingly globalized economy, trademarks are becoming more important in distinguishing one company's goods and/or services from those of other traders.²⁸ Trademarks are signs or symbols placed on, or used in relation to, one trader's goods or services to distinguish them from similar goods or services of other traders.²⁹ The IP Act repealed the Trade Marks Act of 1973.³⁰ However, it is not operational as the regulations to be adopted under the Act are yet to be promulgated. Thus, trademarks registration is still regulated by the Trade Marks Act; but the IP Act will also be referred to in this overview.³¹

Trademark protection arises both out of statutory law and common law. As such, trademark rights are enforceable against a third party, whether registered or not.³² If a trademark is registered, the provisions of the Trade Marks Act relating to trademark infringement are applied for their enforcement. If, however, the trademark is not registered the law of passing off is applicable.³³

Application for a trademark does not mean automatic registration of the trademark. Thus, the starting questions for any discussion into trademark law is three-folded: first is the trademark a mark within the definition provided under section 1 of the Trade Marks Act? Second, is the mark inherently capable of distinguishing the goods or services of a trader in respect of which protection is sought or has it become capable of distinguishing by reason of prior use? Third, does the trademark fall within the specific grounds under which registration is refused due to lack of intrinsic registrability?

²⁸ L Escoffier, and A Jin, *To Scent, or Not To Scent, That Is The Question: A Comparative Analysis of Olfactory Trademarks in The EU and US as Good Brand Opportunities for Smes*. 2011 <http://www.wipo.int/export/sites/www/sme/en/newsletter/2011/attachments/olfactive_trademarks.doc> accessed 18 March 2015, 1.

²⁹ T Hart, L Fazzani, and S Clark, *Intellectual Property Law*, 5th ed. (Basingstoke, UK: Palgrave Macmillan 2009) 79. No. 48 of 1973.

³⁰ Hereinafter referred to as the Trade Mark Act.

³¹ M Reimers, and M Van Der Merwe, "Trade Marks". In Owen Dean and Alison Dyer *Introduction to Intellectual Property Law*, (Cape Town: Oxford University Press 2014) 79.

³² *ibid.*

A mark is defined to include “a device, brand, heading, label, name, signature, word, letter, numeral or any combination thereof or a container for goods”.³⁴ ‘Device’ is further defined as “any visual representation or illustration capable of being reproduced upon a surface, whether by printing, embossing or by any other means”.³⁵ The corresponding provision in the IP Act is essentially the same, but it removes and adds on the list of what could be considered as a mark. Section 131 of the IP Act defines ‘mark’ as “any sign capable of being represented visually, including a device, name, signature, word, letter, numeral, figurative element, shape, colour or container for goods, or any combination of such signs”. The IP Act essentially defines a mark as a sign, and that is a slight change from the Trade Marks Act. However, the essential feature of the definition from both Acts is that the mark must be capable of ‘visual representation’.

There is no definition of “visual,” or “visually,” in either Act; hence the ordinary dictionary meaning should be ascribed to them. The *Concise Oxford English Dictionary* defines “visual” as “relating to seeing or sight”.³⁶ The word “visually”, adverb of the adjective “visual”, means “in a way that relates to seeing or sight”.³⁷ The word ‘visually’ then suggest that the manner in which the mark is represented must be able to be seen.

Once it is established that the mark qualifies as “capable of being represented visually”, it becomes necessary to establish whether it qualifies as a trademark. A trademark is defined as:

... other than a certification or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing those goods or services from the same kind of goods or services connected in the course of trade with any other person.³⁸

This definition requires that the mark is being used or is proposed to be used; and that it must be in relation to the goods or services for which it is registered, with the object of distinguishing them from the same kind of goods or services which are connected in the course of trade with another.³⁹

³⁴ The Trade Marks Act, Section 1 (viii).

³⁵ *ibid*, Section 1 (v).

³⁶ *Concise Oxford English Dictionary*. 2011. 12th ed. New York: Oxford University Press.

³⁷ *ibid*.

³⁸ Section 1 (xx)(b) of the Trade Mark and section 131 of the IP Act.

³⁹ Reimer *op. cit.*, 97.

The next enquiry is whether the trademark is distinctive inherently or through use. This is a requirement stemming out of both the Trade Marks Act and the IP Act.⁴⁰ It follows that a trademark must be distinctive as result of its inherent qualities or characteristics, or it must become distinctive through use over time.⁴¹ Invented words are usually inherently distinctive, for instance, Reebok or Adidas. Some marks may not be inherently distinctive but due to extensive use and/or popularity they may become registrable trademarks in terms of prior use.⁴² In this case, the application for registration of a trademark must be accompanied by evidence of the prior use to prove that it had become distinctive through use.⁴³ This evidence is typically submitted on affidavit, by or on behalf of the applicant.⁴⁴

There are, however, instances under which some trademarks cannot be registered regardless of prior use. This is so because some words are descriptive and non-distinctive.⁴⁵ The distinguishing function of a trademark cannot merely be a description of the type of product; it should differentiate the trader's product or service from the same kind of product or service of another trader.⁴⁶ Non-distinctive trademarks may be accepted and registered on condition that the applicant's rights are limited with respect to a certain part of the mark. This is known as disclaimer of rights,⁴⁷ which means that, as a condition of acceptance, the registrar of Industrial Property may limit the rights of the applicant by calling on it to disclaim exclusive rights to such non-distinctive element of the mark.⁴⁸ After a mark has passed the test of distinctiveness, it still needs to be assessed against the provisions of unregistrable marks of sections 14-17 of the Trade Marks Act⁴⁹ before it can be registered.

⁴⁰ Section 12 of the Trade Mark Act and section 134(2) of the IP Act.

⁴¹ Reimer *op. cit.*, 104.

⁴² *ibid.*

⁴³ *ibid.*, 105.

⁴⁴ *ibid.*

⁴⁵ *Estee Lauder Cosmetics Ltd v Registrar of Trade Marks* 1993 (3) SA 43 (T).

⁴⁶ *Beecham Group plc v Triomed (Pty) Ltd* [2002] 4 ALL SA 193 (SCA); 2003 (3) SA 639 (SCA); [2003] FSR 475.

⁴⁷ Section 18 of the Trade Mark Act and section 136 of the IP Act.

⁴⁸ Reimer *op. cit.*, 90.

⁴⁹ The corresponding provision for the IP Act is section 137. A mark is not registrable and cannot be validly registered if:

- a) [I]t is not capable of distinguishing; or
- b) it indicates of kind, quality, quantity, value, characteristics, or geographical i.e. top quality.
- c) its use is likely to deceive or cause confusion, be contrary to law, be *contra bonos mores* or likely to give offence to any class of persons;
- d) it is sign/indication customary in current language or trade;
- e) it contains a seal or national flags or any indication of State patronage;
- f) it is identical or confusingly similar to an already registered trade mark by another applicant in respect of similar goods/services.

In addition to that, the Trade Marks Act is non-compliant with the TRIPS Agreement provision on well-known marks.⁵⁰ For example, McDonalds is well-known. Section 138 of the IP Act goes beyond the provisions of the Trade Marks Act and protects well-known trademarks. Accordingly, in terms of this section a trademark application will be refused registration if it constitutes, or the essentials thereof constitute, a reproduction, imitation or translation of a well-known trademark which is entitled to protection under the Paris Convention; or if the use or intended use of the mark is for goods or services identical or similar to those of the well-known trademark.⁵¹ Registration of a trademark which is identical with or confusingly similar to a well-known trademark registered in Namibia is prohibited if such registration will cause economic harm, despite the absence of deception or confusion, to the owner of the well-known mark.⁵² This is known as third-party rights and, therefore, subject to opposition by third parties.

Once the trademark application is accepted by the Industrial Property Office and a preliminary notice of acceptance is published in the Government Gazette to advertise the trademark, the opposition period of two (2) months begins.⁵³ Any third party may object to the registration of a mark within the manner prescribed in the Trade Marks Act. However, when this period passes without any opposition, the examiner will grant the protection by issuing a registration certificate.⁵⁴ The duration of the trademark is ten years but may be renewed from time to time.⁵⁵

3.3 Patents

The law of patents is a creature of statute which provides protection for inventions as opposed to discoveries.⁵⁶ These inventions must further meet the requirements of novelty (new); involve an inventive step (non-obvious) and be industrially applicable.⁵⁷ The patentee is required to fully disclose the invention in exchange for exclusive rights.⁵⁸

⁵⁰ Article 16.2 of the TRIPS Agreement.

⁵¹ The IP Act, Section 138 (1)(a).

⁵² *ibid*, Section 138 (1)(b).

⁵³ The Trade Mark Act, Section 26.

⁵⁴ *ibid*, Section 37(2).

⁵⁵ *ibid*, Section 47.

⁵⁶ The IP Act, Section 17.

⁵⁷ *ibid*, Section 13.

⁵⁸ *ibid*, Section 42(a).

This monopoly right prevents others from exploiting the invention for a fixed period.⁵⁹ The intention is to enable third party exploitation of the patented invention once the protection period lapses.⁶⁰ It is important to note here that the protection period for patents is 14 years in the terms of the Patent, Designs and Trademark Act, 1916 (No. 9 of 1916).⁶¹ This is inconsistent with the minimum duration of protection required under the TRIPS Agreement.⁶² However, the IP Act correctly provides 20 years for patent protection.⁶³

A patent is territorial in nature in that patent protection will only apply in Namibia where the patent was applied for and granted.⁶⁴ If the applicant wants protection in other territories; he/she will need to file patent applications in the chosen territories. The patent applicant must be the rightful owner of the invention. The right to a patent ordinarily belongs to the inventor⁶⁵ but it can also be vested in an assignee, the person who commissioned the work or the inventor's employer if the invention was made in the course and scope of employment.⁶⁶

Dissimilar to copyright, patent protection extends to the embodiments of ideas.⁶⁷ This is because an invention is defined as "an idea of an inventor in the form of new knowledge of a technical nature".⁶⁸ Patent protection is, thus, available to inventions whether products or processes in all fields of technology provided the aforementioned threshold for patentability such as novelty, non-obviousness and industrial applicability are fulfilled.⁶⁹

⁵⁹ *ibid*, Section 45. See also T Grant, "Patents". in Owen Dean and Alison Dyer (eds) *Introduction to Intellectual Property Law* (Cape Town: Oxford University Press 2014) 239.

⁶⁰ *ibid*.

⁶¹ The Patent, Design and Trademark Act, Section 38(1).

⁶² The TRIPS Agreement, Article 33.

⁶³ The IP Act, Section 42(a).

⁶⁴ The Patent Cooperation Treaty, 1990. The PCT is a system in place to facilitate applicants seeking patent protection internationally for their inventions.

⁶⁵ The IP Act, Section 19(1).

⁶⁶ *ibid*, Section 21(1).

⁶⁷ D E Einhorn, "Copyright and Patent Protection For Computer Software: Are They Mutually Exclusive?" (1990) *The Journal of Law and Technology*, 266-267. <http://ipmall.info/hosted_resources/IDEA/p265.Einhorn.pdf> accessed on 09 May 2017.

⁶⁸ The IP Act, Section 12(1).

⁶⁹ *ibid*, Section 13.

4 The institutional framework in Namibia

4.1 BIPA

The Business and Intellectual Property Authority (BIPA) is a juristic person established by section 3(1) of the Business and Intellectual Property Act of 2016.⁷⁰ The BIPA is the designated administrative authority for the regulation and registration of business and IP.⁷¹ To manage, control and supervise the affairs of BIPA, the Minister of Industrialisation, Trade and SME Development (hereinafter ‘Minister’) is required to constitute a board.⁷² This board must at least consist of seven members, three of which must be selected by the Minister while the other four may apply for appointment or be nominated through a newspaper advertisement inviting such applications and/or nominations.⁷³ The requirement is that board members must have appropriate and relevant expertise and experience in one or more of the following fields: commerce, law, finance, business, economics and intellectual property.⁷⁴

The Minister is further empowered to appoint from the existing members of the board a chairperson and a deputy chairperson of the board.⁷⁵ The Chief Executive Officer (CEO) is an *ex officio* member of the board – although he/she has no voting rights.⁷⁶ The CEO is the registrar of BIPA for purposes of the IP Act and the Copyright Act.⁷⁷ Everyday management and administration of BIPA, supervising and disciplining of staff members are amongst the many responsibilities of the CEO.⁷⁸

The current CEO of BIPA, Mr. Tilenga Andima, although not formally educated in IP, is the only member of the board with substantial experience in the field.⁷⁹ This is detrimental for two reasons. First, half of BIPA’s mandate is to administer IP and,

⁷⁰ No. 8 of 2016. Hereinafter referred to as the BIPA Act.

⁷¹ The BIPA Act. Section 3(2)(a).

⁷² *ibid*, Section 7(a).

⁷³ *ibid*, Sections 8(1) and (2) (a).

⁷⁴ *ibid*, Section 8(1).

⁷⁵ *ibid*, Section 8(4).

⁷⁶ *ibid*, Section 8(5).

⁷⁷ *ibid*, Section 16(2)(a).

⁷⁸ *ibid*, Section 16(6)(a).

⁷⁹ BIPA, *BIPA Board*. <<http://www.bipa.gov.na/business-categories/about-bipa/talinge-andima/>> accessed on 09 May 2017. This page provides brief descriptions of the qualifications, expertise, and experience of all the members of the board.

thus, demands thorough and substantial understanding of the subject. Second, the CEO with experience in IP has no voting power. The question that arises is whether the CEO's involvement in the board has an impact on management, regulation and decision-making powers of the board with regard to IP. And if so, what is the extent of such impact? In addition, the *Intellectual Property Audit Report of Namibia* published in 2016 ('IP Audit Report') revealed that the staff at BIPA and the MICT are not adequately trained in IP and require in-depth training, including postgraduate level education, to enable them to effectively discharge the responsibilities that are entrusted to them by BIPA.⁸⁰

Furthermore, the board is endowed with a wide array of functions and powers conferred on BIPA by virtue of section 7(b) of the BIPA Act and other applicable legislation.⁸¹ The key functions and powers of the board are to administer registration of business and IP; coordinate with various offices involved in the registration of business and IP; implement, enforce and promote compliance with the BIPA Act and all applicable legislation, i.e., the Copyright Act and the IP Act; and consult and liaise with communities, organisations and institutions in respect of business and IP.⁸² It was clear in the *IP Audit Report* that different stakeholders from key governmental and private bodies operating in such economic sectors as trade, health, agriculture, industry, science and technology reported that there is no effective coordination and exchange of information with the aforementioned bodies.⁸³ It is imperative that BIPA actively and effectively coordinate with key players for the proper development and implementation of IP law in Namibia.

4.2 MICT

The Ministry of Information and Communication Technology (MICT) is the regulating body for the Copyright Act of Namibia.⁸⁴ The Copyright Office is a department of the MICT and is not a part of BIPA. It would seem practical that the task to administer copyright should be assigned to BIPA, an agency specialising in IP.

⁸⁰ Mengistie (2016) 23.

⁸¹ The BIPA Act, Section 7(b) & (c).

⁸² *ibid*, Section 5 and section 14.

⁸³ Mengistie *op. cit.*, 15.

⁸⁴ Section 1 of the Copyright Act defines Minister as the "Minister of Information and Broadcasting". By virtue of this definition the Ministry of Information and Communications Technology is thus, the relevant body since broadcasting is not part of the Ministerial title.

However, there is some logic to this separation, as IP is divided into two categories, industrial property and copyright, which are different in nature with different mandates. As such, the Copyright Office is responsible for the administration, the registration and granting of copyright protection to authors of works.⁸⁵ This is achieved through implementation and enforcement of the Copyright Act. BIPA reports that MICT is in advanced stages of amending the Copyright Act to adjust it to new developments, i.e., parody and user-generated content, in technology.⁸⁶ In addition to the Copyright Office and BIPA, the Copyright Act establishes collecting societies for copyright owners which are organisations or associations formed for the sole purpose of promoting and protecting the interests of owners of copyright, licensees and performers.⁸⁷ Collecting societies must be recognised by the Minister. There are currently two main collecting societies recognised in Namibia,⁸⁸ namely the Namibian Society of Composers and Authors of Music (NASCAM) and the Namibia Reproduction Rights Organisation (NAMRRO).⁸⁹

The NASCAM is only responsible for the economic rights of copyright owners of musical works.⁹⁰ Part of their responsibilities is to administer the granting of licences, either exclusive or non-exclusive, for the utilisation of musical works, and the collection and distribution of all royalties received from local radio broadcasters and television stations.⁹¹ The NAMPRO, on the other hand, is responsible for the economic rights of copyright owners of literary, artistic and dramatic works.⁹²

5 IP policy in Namibia

There is currently no national IP policy framework in Namibia. The Namibian Industrial Policy of 2012 aimed at achieving the goals of Vision 2030 serves as a guide on Namibia's approach towards industrial policy over the next two decades. However, the only reference to IP in this policy is how access by small and medium enterprises to IP protection can be improved.⁹³ This is a step forward in the right direction, however, small it may be.

⁸⁵ BIPA *Copyright*. <<http://www.bipa.gov.na/intellectual-property/copyright/>> accessed on 09 May 2017.

⁸⁶ *ibid.*

⁸⁷ The Copyright Act, Section 55.

⁸⁸ *ibid.*, Section 56.

⁸⁹ BIPA *Copyright*. <<http://www.bipa.gov.na/intellectual-property/copyright/>> accessed on 09 May 2017.

⁹⁰ *ibid.*

⁹¹ *ibid.* see also Mengistie *op. cit.*, 22.

⁹² BIPA *Copyright*. <<http://www.bipa.gov.na/intellectualproperty/copyright/>> accessed on 09 May 2017.

⁹³ The Ministry of Trade and Industry. *Namibian industrial Policy of 2012*, 12.

Two additional draft policies; the National Art Culture and Heritage Policy of 2015 and the National Research Policy, could potentially encourage and/or endorse local inventive and innovative activities to stimulate the transfer, acquisition and adaptation of technology.⁹⁴ IP can provide effective support to the goals and strategies of all policies mentioned above but little effort is made to incorporate IP in addressing policy issues in a way that ensures meaningful use of IP as a means to attaining policy development objectives.⁹⁵

The absence of national policies in the IP sectors of Namibia means that the government is acting aimlessly without ideological coherence in this particularly field where such policies are missing. This means the Namibian government lacks guidance and strategy in IP. The 2016 *IP Audit Report* recommended that Namibia take active steps to articulate IP policy which must provide guidance on matters of integration of IP in the national and sectoral development policies.⁹⁶ Furthermore, a policy is necessary to guide and develop various aspects of IP, namely, the generation, exploitation, promotion and support of local inventive and innovative activities; the prevention of the loss of TK; and active participation in bilateral, regional and international initiatives involving the generation, protection and commercialisation of IP.⁹⁷

⁹⁴ Mengistie *op. cit.*, 14.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*, 15.

6 Conclusion

The Namibian IP system contains laws that are out-dated and inconsistent with minimum international standards flowing from obligations under the TRIPS Agreement. The Copyright Act provides extensive protection for most works; however, since 1994 no amendments had been made to address the challenges relating to the latest developments in technology and the needs of the people. Access to educational material and the upsurge in artistic endeavours such parody and user-generated content require that the fair-dealing provisions be amended. Furthermore, the non-compliance of patent and trademark laws with the TRIPS Agreement can only be fixed by expediting the enactment of regulations to implement the IP Act which has repealed the Trade Marks Act of 1973 and the Patents, Designs, Trade Marks and Copyright Act of 1916. There are concerns that BIPA needs more staff qualified and experienced with regard to IP to ensure the proper administration and implementation of IP laws.⁹⁸ A clear disconnect exist between IP laws and the administrative bodies; this is further aggravated by a lack of IP policy framework which is supposed to guide BIPA and MICT in enforcing and implementing IP laws.

⁹⁸ *ibid*, 23.

CHAPTER 10

PATENTABLE SUBJECT MATTER IN NAMIBIA: A COMPARATIVE ANALYSIS OF THE REQUIREMENTS FOR PATENTABILITY

by
Phillip M Balhao

1 Introduction

In *Gemfarm Investments (Pty) Ltd v. Trans Hex Group Ltd and Another* (the ‘*Gemfarm Investments*’ case), Maritz J stated:

[This action concerns] the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. ... it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments...¹

The enactment referred to is the Patents, Designs, Trade Marks and Copyright Act 1916 (‘the 1916 Act’), which is still partially in force in Namibia. The Patents, Designs, Trade Marks and Copyright Proclamation 1923, also still in force in Namibia,² expressly provides for the applicability of the 1916 Act to South West Africa.³ The application of some portions of the 1916 Act is also confirmed in the *Gemfarm Investments* case.⁴ The 1916 Act will, however, soon be repealed by the Industrial Property Act 2012 (‘the 2012 Act’). The Business and Intellectual Property Authority Act 2016 (‘the 2016 Act’) was recently passed. Section 4 and 5 of the 2016 Act establishes a regulatory body that will be responsible for the administration of the 2012 Act, amongst other legislation.

* This chapter contains extracts from a research report submitted to Stellenbosch University for obtaining the degree Magister Legum (Intellectual Property).

¹ *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd and Another (P I 445/2005) [2009] NAHC 24 (7 April 2009)*, 2009 2 NR 477 (HC) [1].

² Anonymous. ‘Intellectual Property’ (Legal Assistance Centre, 19 September 2014) <<http://www.lac.org.na/namlex/Intellec.pdf>>; Furthermore, Article 25(1) (b) as well as Article 140(1) of the Constitution of the Republic of Namibia make provision that the law enforce immediately before independence [of Namibia] will remain enforce until repealed or declared unconstitutional.

³ *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd and Another (P I 445/2005) [2009] NAHC 24 (7 April 2009)*, 2009 2 NR 477 (HC) [15], [26].

⁴ *ibid.*

The 1916 Act was the first legislation to be promulgated in the Union of South Africa.⁵ It was strongly rooted in English law. The first English legislation was introduced in the Cape Province and later made its way to the other three provinces. The English law replaced the existing laws of each province.⁶ The 1916 Act was later replaced in South Africa by the Patents Act 1952 ('PA 1952'), which in turn was replaced by the Patents Act 1978 ('PA 1978').

Patent law emerged as an incentive to encourage creation of new and innovative inventions.⁷ Inventors are given exclusive rights to the commercial use of their inventions for a specified period of time subject to the invention being disclosed to the public at the end of the specified period. After the protection period lapse, the public may commercially utilise the particular invention. Generally, this purpose of patent law has remained unchanged throughout different legislative regimes. Since the emergence of patent law society evolved demanding change in policy as well.⁸

The requirements for patentability have changed over the years; evidence of the changes in South Africa is represented in the 1916, 1952 and the presently in force 1978 Act. The 2012 Act itself has introduced principles and concepts not previously known in Namibian patent law. As a result of the time gap in patent legislation in Namibia between the 1916 and the 2012 Acts, a void has been created in respect of the context of the 2012 Act, the meaning of its provisions, and what its provisions entail. At the heart of patent law are the requirements of patentability and is therefore very significant. This chapter addresses two questions. Firstly, and to a lesser degree, what is the meaning of the requirements of patentability as provided for in the 2012 Act?⁹ Secondly, what do the requirements of patentability in terms of the 2012 Act entail?

⁵ Hennie Klopper, Tana Pistorius, Brian Rutherford, Lee-Ann Tong, Pieter van der Spuy, and Andries van der Merwe (eds), *Law of Intellectual Property in South Africa* (LexisNexis 2011) 268; Adams and Adams, *Practitioner's Guide to Intellectual Property Law* (LexisNexis 2011) 63.

⁶ The Cape passed the Cape Act 1860; Natal passed the Natal Law 1870; Transvaal passed Transvaal Proclamation 1902.

⁷ Hennie Klopper, Tana Pistorius, Brian Rutherford, Lee-Ann Tong, Pieter van der Spuy, and Andries van der Merwe (eds), *Law of Intellectual Property in South Africa* (LexisNexis 2011) 268.

⁸ The description of the current Namibian patent law by Maritz J above aptly summarise the consequences for failing to accommodate change, namely law that is "outdated, vague and patently inadequate" *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd and Another (P I 445/2005) [2009] NAHC 24 (7 April 2009)*, 2009 2 NR 477 (HC) [1].

⁹ Chronologically it is appropriate to first deal with this question despite the fact that this will not constitute the main enquiry.

This chapter seeks to comparatively analyse the 2012 Act with regard to the requirements of patentability for two main reasons. The first reason is to place the 2012 Act in perspective of another legal system. This in itself is important in order to determine the compatibility of the two legal frameworks for comparison. Furthermore, it is to establish a foundation for making arguments in respect to the 2012 Act. Secondly the comparative analysis is done to seek a better understanding of the 2012 Act in respect of the purpose of its provisions as well as the content of its provisions. In this chapter the legal framework in South Africa is used for comparison due to the fact that the current legal framework applicable in Namibia historically emanate from South Africa.¹⁰ For purposes of this chapter only the South African framework is used for purpose of the comparison. This does not imply that the South African Legal framework is ideal or correct; it is however a suitable model for an initial analysis due to the historic context between the legal systems.

The chapter firstly analyses the current position of the law in South Africa contained in the 1978 Act. Consideration is also given to the principles of the 1952 Act and the 1916 Act where relevant. Secondly, the full exposition of the South African law is compared to the 2012 Act to determine if there are models of interpretation which are compatible so as to be adopted in Namibia. To the extent that the South African law is not compatible with the 2012 Act, suggestions are made as to the correct legal position in Namibia.

2 South Africa: the Patents Act, 1978

The 1978 Act, as amended, is the current legislation regulating patents in South Africa. It repealed all previous patent laws.¹¹ The 1978 Act operates in conjunction with the Patent Regulations 1978. The 1978 Act provides for patentable subject matter extensively in section 25. This provision, as has been alluded to, deviates from previous legislation on this topic to varying degrees. Noticeably, the current Act adopted a more positive attitude towards the scope of patentable inventions, but also created express exclusions on certain types of inventions.

¹⁰ The current legislation in Namibia is the Patents, Designs, Trade Marks and Copyright Act 1916 which was passed in South Africa, but which were made applicable to Namibia, n 4.

¹¹ Patents Act 1978, s 95 read with the schedule to the Act.

2.1 General requirements for patentability

The general patentability requirements are set out section 25(1) of the 1978 Act, vis-à-vis novelty, inventiveness and industrial application. A patent may be granted for any inventions that meet these requirements. The general requirements are recognised as the extrinsic requirements from the 1952 Act. In terms of the 1952 Act, an invention had to be new, useful, not obvious, and applicable industrially.¹² The distinctive requirement of usefulness has been done away with, but is perhaps still incorporated in the requirement of industrial application. The requirement that an invention must be new is contained in novelty, and the requirement that it must not be obvious in inventiveness. The remainder of section 25 can be divided into two broad segments. The one category elaborates on the general requirements and the other on subject-matter excluded from patentability. The excluded matter, unlike the 1952 Act, determines the scope of patentable matter in terms of intrinsic exclusions referred to herein as negative requirements. In contrast, intrinsic requirements were categorised in four groups of inventions capable of protection in the 1952 Act. These groups included processes, machines, manufacturing or compositions of matter, or any new and useful improvement thereof.¹³ Both segments are analysed below starting with an exposition of the general requirements, followed by excluded subject matter.

2.2 Extrinsic requirements or general requirements

a) Novelty

The requirement of novelty is the longest standing requirement and it is found in earlier legislation. It is also the least changed requirement in terms of change over the legislative regimes. The novelty requirement is characterised by both the 1978 Act as well as case law.

An invention is deemed new or novel if it does not form part of the state of the art immediately before the priority date of that invention.¹⁴ Two aspects need discussion regarding novelty. First, what is 'state of the art'? Secondly, what is 'priority date'?

¹² Patents Act 1952, s 1(vi).

¹³ *ibid*, s1(vi).

¹⁴ Patents Act 1978, s 25(5).

Priority in an application can be claimed in three manners. Firstly, priority can be claimed from an earlier application disclosing the same subject matter with a provisional specification in an application with a complete specification.¹⁵ Priority can also be claimed in an application with a complete specification, but where no priority was claimed before.¹⁶ Thirdly, priority can be claimed in a convention application.¹⁷ The significance of claiming priority is that an invention disclosed in an application for which priority is claimed becomes part of the prior art.¹⁸ An invention, substantially the same as the invention for which priority is claimed, will therefore no longer meet the requirement of novelty after the priority date.

Matter that comprises the state of the art is provided for in section 25 of the 1978 Act. Included in the prior art are any product or process, or information relating to either of these.¹⁹ For any matter to be included in the state of the art, it must have been made available to the public, irrespective of whether it was done inside or outside the Republic (of South Africa).²⁰ In the case of *McCauley Corporation Ltd v Brikor Precast (Pty) Ltd*, the court stated:

As to what is meant by this expression will depend on the facts of each particular case. If an invention is involved in a highly technical subject the word “public” must mean something more than the ordinary man on the street and I think it means those persons to whom the specification is addressed. Similarly the question whether the material is “available to the public” would appear to cover the concept that it is available to public anywhere in the world.²¹

Disclosure of matter can be by oral or written descriptions, or by use of the matter in any way. Inventions used secretly and on a commercial scale is deemed to form part of the state of the art.²² Matter disclosed in a patent application that is open for public inspection also forms part of the state of the art, provided certain conditions are met. The use of a substance or composition can be protected even

¹⁵ Patents Act 1978, s 31(a).

¹⁶ *ibid*, s 31(b).

¹⁷ *ibid*, s 31(c).

¹⁸ *ibid*, s 25(7).

¹⁹ *ibid*, s 25(6).

²⁰ *ibid*, s 25(6).

²¹ *McCauley Corporation Ltd v Brikor Precast (Pty) Ltd* 1989 BP 314 (CP) [333B - 335A].

²² Patents Act 1978, s 25(8).

if such substance or composition forms part of the state of the art, provided that such use does not form part of the state of the art.²³ It thus follows that a patent can be granted for second medical use of a known substance.

b) Anticipation (application of novelty requirement)

An invention does not meet the requirement of novelty if it had been anticipated by a previous invention or disclosure. Novelty under the 1952 was applied very strictly to the extent that disclosure of subject matter after the application for a patent was filed, but on the day of filling the application, anticipated the invention for which protection is sought.²⁴

Novelty of an invention is determined by the claims of the patent, and not its specification.²⁵ To determine whether an invention is novel, its claims must be construed and compared to the full specification of another invention or the entirety of any other disclosures.²⁶ The claims must be properly construed to extract the so-called pith and marrow of the invention.²⁷ For the anticipated material to be novelty-destroying, it must contain the same or substantially the same matter. “Substantially the same” means practically the same. In the case of *Veasey v. Denver Rock Drill and Machinery Co Ltd.*, it was stated that “substantially the same” means the same “for the purpose of practical utility.”²⁸ If, from the comparison, there is a small yet a real difference between a proposed invention and a single prior invention, there is no anticipation of the proposed invention.²⁹ The requirement of novelty is an absolute one. The anticipation of an invention, including all its essential parameters, will prevent the invention from being patentable. The strictness of the requirement is necessitated by the need to uphold a strong patent system. This is especially important in light of the criticism claiming that the South African patent system permits weak patents to be registered.³⁰

²³ *ibid*, s 25(9).

²⁴ Patents Act 1952, s 1(ix).

²⁵ *Gentiruco v Firestone* 1972 1 SA 591 (A) [646-648].

²⁶ *ibid*.

²⁷ *The Standard Bank of SA v 3MFuture Africa* [2013] ZASCA 157.

²⁸ *Veasey v Denver Rock Drill and Machinery Co Ltd* 1930 AD 243.

²⁹ *Gentiruco v Firestone* 1972 1 SA 591 (A) [646-648].

³⁰ South Africa Draft National Policy on Intellectual Property 2013, published in South Africa Government Gazette No. 36816, Notice 918 of 2013.

There is, however, one exception to be noted. The 1978 Act makes allowances for the disclosure of an invention if such disclosure was not made by the its proprietor or without the proprietor's consent and if all measures necessary were taken to protect the invention involved.³¹ The 1978 Act further excuses the working of an invention for the purpose of technical trails or experiments.³²

c) Inventive step

This requirement demands that an invention must involve an inventive step to be patentable. An invention involves an inventive step if such step is not obvious to a person skilled in the art.³³ In contrast, obviousness or lack of inventiveness, according to the 1952 Act, was determined by reference to the existing common knowledge in the art at the date of filing an application.³⁴ An invention in terms of the 1952 Act did not involve an inventive step if such invention was obvious, having regard to the common knowledge at the relevant time. Common knowledge was understood as "the information which at the date of the patent in question is common knowledge in the art or science to which the alleged invention relates so as to be known to duly qualified persons engaged in that art or science".³⁵

In determining inventiveness, regard must be given to matter forming part of the state of the art immediately before the priority date of the invention for which protection is sought. 'State of the art' is similar to that of novelty, but do not include matter referred to in sections 25(7) and (8) of the 1978 Act.³⁶ Two aspects are highlighted by this requirement, namely obviousness and the person skilled in the art. The need to address these issues is put forward in the case of *Roman Roller CC and Another v. Speedmark Holdings (Pty) Ltd* as follows:

³¹ Patents Act 1978, s 26(a).

³² *ibid*, s 26(b).

³³ *ibid*, s 25(10).

³⁴ Patents Act 1952, s 23(1)(d).

³⁵ *Transvaal and Orange Free State Chamber of Mines v Hukki* 1964 BP 1 (T).

³⁶ Sections 25(7) and 25(8) provide:

(7) The state of the art shall also comprise matter contained in an application, open to public inspection, for a patent, notwithstanding that that application was lodged at the patent office and became open to public inspection on or after the priority date of the relevant invention, if— (a) that matter was contained in that application both as lodged and as open to public inspection; and (b) the priority date of that matter is earlier than that of the invention. [Sub-s. (7) substituted by s. 31 (b) of Act No. 38 of 1997.]

(8) An invention used secretly and on a commercial scale within the Republic shall also be deemed to form part of the state of the art for the purposes of subsection (5).

[I]n order to apply these provisions to a particular case it is necessary to determine what the art or science to which the patent relates is, [and] who the person skilled in the art is...³⁷

d) Obviousness

The term 'obvious' is said to be a much-used word and, as a result, there is no need to go beyond its ordinary or primary dictionary meaning.³⁸ 'Obvious' is defined as something that is "[e]asily perceived or understood; clear, self-evident, or apparent."³⁹ Measuring inventiveness against obviousness is a sufficient method to identify only the inventions that truly encompass a step forward in the relevant art. To carry out something that is obvious for a man skilled in the art does not require any ingenuity and, therefore, does not merit protection.⁴⁰ An invention that follows the normal course of the art, but is a huge leap in its field may, however, qualify as protectable subject matter.⁴¹ In difficult cases, factors such as the time spent to create and the commercial success of an invention may indicate that it is inventive.⁴²

In order to determine whether an invention is inventive according to the 1978 Act, the courts have developed a test that examines the inventive step claimed to have been taken by an invention. This approach was first adopted in the *Gentiruco v Firestone* case.⁴³ In this case, the test considers what was common knowledge at the time to determine inventiveness. The test has subsequently been elaborated on in the case of *Ensign-Bickford (South Africa) (Pty) Ltd and Others v. AECL Explosives and Chemicals Ltd* (the '*Ensign-Bickford*' case).⁴⁴ The test has since become the preferred method to establish inventiveness. It answers the following questions:⁴⁵

What is the inventive step said to be involved in the patent in suit?

1. What was, at the priority date, the state of the art (as statutorily defined) relevant to that step?

³⁷ *Roman Roller CC and Another v Speedmark Holdings (Pty) Ltd* 1996 1 SA 405 (A) [413].

³⁸ *Northpark Trading v Ausplow* [2008] ZASCA 46 [13].

³⁹ Oxford University Press, *Oxford Dictionaries Language Matters* (Definition of obvious in English, 2014) <<http://www.oxforddictionaries.com/definition/english/obvious>> accessed 19 September 2014.

⁴⁰ *Veasey v Denver Rock Drill and Machinery Co Ltd* 1930 AD 243 271 [282].

⁴¹ Hennie Klopper, *et al. op. cit.* 286-287.

⁴² *ibid.*, 287.

⁴³ *Gentiruco v Firestone* 1972 1 SA 591 (A).

⁴⁴ *Ensign-Bickford (South Africa) (Pty) Ltd and Others v AECL Explosives and Chemicals Ltd* 1999 1 SA 70 (SCA).

⁴⁵ *ibid.*, 80.

2. In what respect does the step go beyond, or differ from, that state of the art?
3. Having regard to such development or difference, would the taking of the step be obvious to the skilled man?

Although these questions are aimed to ease the job of the courts, the courts have repeatedly warned themselves against the armchair critic rule. This rule suggests that: “[W]hat with hindsight seems plain and obvious, often was not so seen at the time.”⁴⁶ It must be borne in mind that novelty and inventiveness, although closely related, are not one and the same concept. Any suggestions or decisions that hold this view must be disregarded.⁴⁷

e) Person skilled in the art

Reference to a person skilled in the art implies that a person must have a certain degree of educational background. It is true that the courts allow themselves to be guided by expert evidence, particularly so where the court needs to be educated in the technology involved in the particular art.⁴⁸ This is done by bearing in mind that the court has been known to note that expert witnesses’ views should not supersede the judge’s decision-making.⁴⁹ Who a person skilled in the art is will depend on the facts of each particular case. A person skilled in the art must be aware, as claimed, of the features of the art that a worker ought to be acquainted with, relating to the particular subject matter.⁵⁰ A person skilled in the art must also be adequately qualified to understand the state of the art.⁵¹

In the case of *Gallagher Group Ltd and Another v. IO Tech Manufacturing (Pty) Ltd and Others*,⁵² the evidence of a witness was challenged on the ground that he was not an expert in the art to which the invention related.⁵³ The court held that the

⁴⁶ *Windsurfing International Inc v Tabur Marine (Great Britain Ltd)* [1985] RPC 59 [72].

⁴⁷ *Gentiruco v Firestone* 1972 1 SA 591 (A).

⁴⁸ Northpark Trading Case 2008] ZASCA 46 [13].

⁴⁹ *Bromine Compounds Ltd v Buckman Laboratories (Pty) Ltd* 2006 BIP 25 (CP).

⁵⁰ Hennie Klopper, *et al. op. cit.*, 284, n 43.

⁵¹ *ibid.*

⁵² *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd* 2012 BIP 1 (CP).

⁵³ *ibid.*, 26-30.

witness did not need to be an expert to operate the said invention. Furthermore, it was held, the witness attended a training course hosted by the party challenging the patent, during which he received training concerning the operation of the invention. The court further found that the lack of knowledge by the witness did not render him unable to work or understand the invention.

f) Industrial application

This requirement is very similar to the one in the 1952 Act: to be patentable, an invention must be used or be applicable in trade or industry. Provision is made in the current Act for agricultural application of an invention as well. The terms 'trade', 'industry' and 'agriculture' are not defined. Collectively, these terms create the general idea of the purpose of the requirement, i.e., to allow only inventions that are capable of being commercialised to be patented. This corresponds to the opinions of contemporary commentators that intellectual property protection is mainly, if not solely, given from an economic perspective, including incentive arguments.⁵⁴

A method of treatment, whether on an animal or human body, is deemed not to be capable of being applied in trade, industry or agriculture.⁵⁵ Methods of treatment include surgery, therapy or diagnostics practiced on animals or humans. This deeming provision does not include or prevent substance from being patentable subject matter when it is used or applied in a method of treatment.⁵⁶

2.3 Subject matter excluded from patentability

As mentioned earlier, the current Act adopted a different definition for an invention than the 1952 Act. The 1952 Act had a positive description and made provision for classes of inventions that can be patentable subject matter. In the 1978 Act, however, a negative description of inventions that cannot be patented is provided. In other words, the 1978 Act does not define what is patentable, but rather what is not. The effect of this is that the scope of patentable subject matter has increased, at least theoretically.

⁵⁴ Hennie Klopper, *et al. op. cit.*, 144; Adams & Adams, *op. cit.* 9-10.

⁵⁵ Patents Act 1978, s 25(11).

⁵⁶ *ibid*, s 25(12).

The 1978 Act has a general exclusionary provision regarding patentable subject matter. These exclusions do not relate to the invention itself, but focus on how the invention can or would be used. The provision aims to exclude inventions whose use is objectionable. These exclusions are provided for in section 25(2) of the 1978 Act and are deemed not to be inventions for purposes of the Act. A discovery is excluded from patentability.⁵⁷ A discovery is suggested to be “the finding out or bringing to light of that which was previously unknown.”⁵⁸ An example of this is when someone finds that an effect that was not previously known can be produced by a machine, and does nothing more.⁵⁹

A scientific theory is excluded from being patentable subject matter.⁶⁰ A scientific theory is a logical explanation for the existence or occurrence of a scientific observation.⁶¹ An example of this is an explanation of why different metals have different characteristics. Mathematical methods are also excluded.⁶² An example of a mathematical method is a short form of division or a formula used to calculate an unknown numerical variant.

Works aesthetic in nature are also excluded from being patentable.⁶³ These works are described as being appreciated for the gratification they cause in the human and which are perceived by the senses.⁶⁴ Works that are excluded include literary, dramatic, musical, artistic work as well as a program for a computer. These works are generally classified as copyright eligible works under section 2(1) of the Copyright Act.⁶⁵ The presentation of information is also excluded.⁶⁶ Presenting information relates to making information available in a manner that allows a person to perceive it with his senses.

Several activities that require the intervention of human intellect are excluded from patentability.⁶⁷ Included in the activities is a scheme, rule or method for performing a mental act, playing a game or doing business.

Inventions that, if publicised or exploited, will encourage offensive or immoral

⁵⁷ *ibid*, s 25(2)(a).

⁵⁸ Hennie Klopper, *et al*, *op. cit.*, 274.

⁵⁹ *Marine Construction and Design Co V Hansen's Marine Equipment (Pty) Ltd 1972 2 SA 181 (A) [196]*.

⁶⁰ Patents Act 1978, s 25(2)(b).

⁶¹ Hennie Klopper, *et al*, *op. cit.*

⁶² Patents Act 1978, s 25(2)(c).

⁶³ *ibid*, s 25(2)(d).

⁶⁴ Hennie Klopper, *et al*, *op. cit.*

⁶⁵ Copyright Act 1978.

⁶⁶ Patents Act 1978, s 25(2)(g).

⁶⁷ *ibid*, s 25(2)(e).

behaviour are excluded in terms of the general provision.⁶⁸ ‘Immoral and offensive behaviour’ is not defined. A good indication of such behaviour is conduct that is sanctioned by law, for instance, crimes. The provision also excludes animals, plants or biological processes for the production of animals or plants that is not microbiological. This provision should not be regarded as a requirement of patentable subject matter, but rather as a restriction on the right to protection. The reason for this provision is to exclude matter from patentability which is contrary to the good morals of society although such inventions would meet the general purpose of patent law, innovative creations. Computer programs, as such, are excluded from patentability.⁶⁹

3 Namibia: the Industrial Property Act, 2012

3.1 General requirements for patentability

Patentable subject matter is provided for in sections 13 to 18 of the 2012 Act. The sections can be divided into general requirements for patentability and exclusions from patentability. The general requirements for patentability are provided for in section 13 of the 2012 Act and characterised by sections 14 to 16. The general requirements are novelty, inventiveness and industrial application. These are recognised as the extrinsic requirements from the 1978 Act.

Before turning to each individual requirement, there are two points that can be made with regard to section 13. This section provides that patents are available for inventions whether they claim a product or a process. These qualifications in respect of the general enabling provisions are not provided for in the 1978 Act.⁷⁰ The purpose of the reference in the section to products and processes is unclear. The inclusion of the qualification, from a very critical perspective, implies that there is a restraint on patentable subject matter despite the liberal language used otherwise in the 2012 Act. This highly critical view may be supported by the definition of the term ‘exploit’, which only refer to products and processes in respect of

⁶⁸ *ibid*, s 25(4)(a).

⁶⁹ *ibid*, s 25(2)(f) read with s 25(3).

⁷⁰ *ibid*, s 25.

patented inventions.⁷¹ Reference is, however, made to machines and apparatuses in a subsequent section.⁷² Section 13 also provides that patents are available for inventions in all fields of technology. The terms ‘products’ and ‘processes’ are wide in nature and must be interpreted in the context of the liberal language used generally. An example of liberal language is reference to ‘any invention’ in section 13. It is submitted that these qualifications must be seen as emphasising classes of inventions which are patentable, and not as restricting patentable inventions to these classes only.

Another point is that the term invention is defined in the 2012 Act, unlike the 1978 Act, which does not define an invention.⁷³ An invention is defined as an idea in the form of new knowledge and of a technical nature.⁷⁴ This definition is important to interpret the requirements of patentability, particularly the exclusion from patentability.

a) Novelty

For an invention to be new, it must not have been anticipated by prior art.⁷⁵ This is on par with the requirement under the 1978 Act. The 2012 Act defines anticipation formally as “forming part of or disclosed by prior art.”⁷⁶ This definition is also in line with what anticipation is considered to be in the 1978 Act. Prior art, as defined by the 2012 Act, means art at a date preceding the date on which application is made for an invention or a date preceding the date on which priority is claimed in an application for an invention.⁷⁷ The 2012 Act define priority date as: “the date of the earlier application or applications that serves or serve as the basis for the right of priority provided for in the Paris Convention and claimed in a convention application.”⁷⁸ The right to claim priority in an earlier application, including national and international, is provided for in section 29 of the 2012 Act.

⁷¹ Industrial Property Act 2012, s 12(1).

⁷² *ibid*, s 17(1)(k).

⁷³ The Patents Act 1978 merely refers to an invention as an invention for which a patent may be granted in respect of s 25.

⁷⁴ Industrial Property Act 2012, s 12(1).

⁷⁵ *ibid*, s 14(1).

⁷⁶ *ibid*, s 12(1).

⁷⁷ *ibid*, s 12(1).

⁷⁸ *ibid*, s 1.

Prior art is further defined in the 2012 Act as any matter disclosed to the public, anywhere in the world, whether by publication, oral pronouncements or use in any way.⁷⁹ Matter disclosed in a patent application also forms part of the state of the art. Matter disclosed in a patent application that has been lodged and is open for public inspection, where the priority date of such matter precedes the date of the patent application, is also included in the art.⁸⁰ To this extent, the definition of art corresponds to the description of art in the 1978 Act. The 2012 Act further provides that knowledge developed by or in possession of local or indigenous people and which came about before the priority date of a particular invention will also form part of the state of the art. The 1978 Act does not make reference to indigenous knowledge. Publication of an invention to the public as a consequence of the acts of an applicant or his predecessor in title, or an unauthorised disclosure, six months before the application or priority date of such invention may not be taken into account for considering novelty.⁸¹ This is commonly known as a grace period. A disclosure as a result of an abuse of the applicant or his predecessor in title is also not considered as novelty-destroying.⁸² These excused disclosures are also provided for in the 1978 Act.

b) Inventiveness

An invention includes an inventive step when, considering the prior art and novelty, it is not obvious to a man skilled in the art.⁸³ Obviousness is therefore the benchmark for the inventiveness requirement like with the 1978 Act. One particular difference is that inventiveness according to the 2012 Act ought to be considered with regard to technicality, which is expressly included in the definition of an invention. Hence it will be necessary for an invention to take make a technical advancement to meet the inventiveness requirement. Technicality is, however, not defined.

⁷⁹ *ibid*, s 12(1).

⁸⁰ *ibid*, s 14(3)(a) and s 14(3)(b).

⁸¹ *ibid*, s 14(2)(a).

⁸² *ibid*, s 14(2)(b).

⁸³ *ibid*, s 15(1).

An invention will be obvious to a man skilled in the art if the prior art provides motivation to attempt creating an invention or when the method of making a product is disclosed in prior art.⁸⁴ This characterisation of obviousness is linguistically different from all the other jurisdictions that mainly refer to the standard of obviousness. The description of obviousness is, however, substantively similar to the 1978 Act, as developed by further authority.⁸⁵ Provision is also made for the consideration of obviousness, having regard to a single piece or mosaic of pieces of prior art disclosing knowledge relevant to a particular invention.⁸⁶ Although this is also possible under the 1978 Act, it is not expressly provided for.

c) Industrial application

An invention is applicable in industry when it can be made or used in any industry.⁸⁷ Firstly, this requirement implies that an invention must be capable of reproduction and must have a real use in an industry. The combination of these factors supports the general view that, for an invention to be patentable, it must be susceptible to utility.⁸⁸ The reference to any industry gives the provision a wide scope and, therefore, covers various industries.

The 2012 Act, unlike the 1978 Act, does not contain deeming provisions that deem certain type of inventions not to be capable of industrial applications. In the 1978 Act, these deeming provisions, for instance, deem that the methods of treatment of the human or animal body shall not be capable of industrial application. The 2012 Act made such provisions part of matter excluded from patentability, as will be shown below.

The 2012 Act defines the term 'exploit'. Although not used in the provision for industrial application, this can give an indication as to the manner in which an invention can be used to be patentable. In respect of a product, exploit means, *inter alia*, making, importing, disposing of, offering to dispose of an invention or stocking an invention to dispose of it.⁸⁹

⁸⁴ *ibid*, s 15(2).

⁸⁵ See for instance how inventiveness has been developed in terms of the Patents Act 1978.

⁸⁶ Industrial Property Act 2012, s 15(2).

⁸⁷ *ibid*, s 16.

⁸⁸ *Integrated Mining Systems (Pty) Ltd v Chamber of Mines South Africa* 1974 BP 281 (CP).

⁸⁹ *ibid*, s 12(1).

3.2 Exclusions from patentability

The 2012 Act provides that an invention whose use is against morality or public order is excluded from patentability.⁹⁰ The 1978 Act has a similar provision, but refers to offensive and immoral behaviour. The 2012 Act does not define ‘public order’ or ‘morality’, but provides considerations to take into account when establishing their presence. The protection of human, animal or plant life or health should be considered.⁹¹ The avoidance of serious harm to the environment is a further consideration.⁹² The 2012 Act provides that an invention will not be excluded from patentability merely because its use is prohibited by law.⁹³

The 2012 Act makes provision for a variety of specific matter or categories of matter that is excluded from patentability.⁹⁴ The model of the provision differs from the 1978 Act. The difference is brought about by the fact that the 2012 Act provides that certain matter is excluded from patentability whereas the 1978 Act uses deeming provisions. For instance, certain matter will not be deemed to be inventions for purposes of the 1978 Act whereas in Namibia the same matter is expressly excluded from patentability.⁹⁵ Another example in the 1978 Act is the provisions that deem certain matter not to be industrially applicable.⁹⁶ The significance of the difference between inventions deemed not to be such and inventions excluded from patentability is that the former does not impact on the requirements of patentability whereas the latter goes to the root of the requirements for patentability. Subject matter which does not conform to the purpose of patent law is excluded from patentability. The subject matter deemed not to be inventions in the 1978 Act conform to the purpose of patent law, but is not protected for good reason.

For convenience, the specific exclusions can be divided into two categories. The one category covers matter deemed not to be inventions in the 1978 Act, and the other category covers all the remaining matter excluded from patentability.

⁹⁰ *ibid*, s 18(1).

⁹¹ *ibid* 2012, s 18(2)(a).

⁹² *ibid*, s 18(2)(b).

⁹³ *ibid*, s 18(1).

⁹⁴ *ibid*, s 17.

⁹⁵ Patents Act 1978, s 25(2).

⁹⁶ *ibid*, s 25(11).

The following is a list of matter excluded from patentability under the 2012 Act: Discoveries; scientific theories; mathematical methods; aesthetic works;⁹⁷ schemes, rules or methods of doing business and playing games; performing mental acts; programs for computers;⁹⁸ and presentations of information. These exclusions are almost identical, in substance and language, to the matter deemed not to be inventions under the 1978 Act.

3.3 Other matters excluded

The treatment of humans or animals by diagnostic, therapeutic or surgical methods is excluded from patentability in terms of the 2012 Act.⁹⁹ Under the 1978 Act, these methods are deemed not to be inventions and/or excused from patentability. The 2012 Act further excludes plants, animals and biological processes for producing animals or plant, except for micro-organisms and microbiological processes.¹⁰⁰ The 1978 Act also provides that a patent shall not be granted for such matter. The 2012 Act excludes from patentability the human body or any of its elements, in whole and in part.¹⁰¹ Natural living beings and biological materials are similarly excluded, even when isolated from nature or purified, and include genomes and germplasms.¹⁰² The 1978 Act does not make provision for the last two exclusions. Under the 2012 Act, the general position is that a new use for a known substance is excluded from patentability.¹⁰³ The only exception to this position is when a new use of a known substance solves a technical problem for which there was no equivalent solution.¹⁰⁴ The following must be regarded as substances:

[S]alts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, enantiomers, complexes, combinations, compositions, formulations, dosage forms, admixtures and other derivatives of known substances...¹⁰⁵

⁹⁷ Industrial Property Act 2012, s 17(1)(a) to 17(1)(e).

⁹⁸ The Industrial Property Act 2012 uses the spelling programmes. Program is used for consistency.

⁹⁹ Industrial Property Act 2012, sn 17(1)(f).

¹⁰⁰ *ibid*, s 17(1)(g).

¹⁰¹ *ibid*, s 17(1)(h).

¹⁰² *ibid*, s 17(1)(i).

¹⁰³ *ibid*, s 17(1)(j).

¹⁰⁴ *ibid*, s 17(1)(j).

¹⁰⁵ *ibid*, s 17(2).

In terms of the 2012 Act the new use of a known process, machine or apparatus is also excluded from patentability, unless such process results in a new product or involves one new reactant.¹⁰⁶ The 1978 Act does not have a similar provision. In conclusion, the 2012 Act did not reinvent patent protection. The 2012 Act drew substantially from the 1978 Act, but made changes in selected areas, which arguably, are generally discussion points for reforming patent law to meet its overriding purpose.

4 Conclusion and suggestions

The comparison between the 2012 and the 1978 Act showed that there are several similarities between the respective pieces of legislation. It is therefore possible to make certain suggestions with regard to the 2012 Act, particularly regarding its interpretation and the precautions that can be taken. Hereunder follows a summary of suggestions in respect of each of the sections dealing with the general requirements.

4.1 Patentability requirements

a) Novelty: section 14

There is a large degree of similarity in respect of the requirement of novelty in the 2012 Act and the 1978 Act. Three observations and suggestions can be made. Firstly, it can be pointed out that the judicial application of novelty in South Africa appears to be well established. The procedure used to determine novelty, namely comparing the essential components of the claim in a patent application with that of disclosed matter, could be adopted in terms of the 2012 Act. Besides being established, this process has proven to stand the test of time. As already stated, this procedure was already laid out under the 1952 Act, and is still the preferred approach to date.¹⁰⁷

¹⁰⁶ *ibid*, s 17(1)(k).

¹⁰⁷ The procedure is set out in *Gentiruco v Firestone* 1972 1 SA 591 (A) [646-648].

Secondly, the 2012 Act makes reference to mosaic disclosures with regard to inventiveness, but it is silent in terms of novelty. The approach adopted under the 1978 Act – that a mosaic of disclosing material cannot be used to determine novelty – could be adopted under the 2012 Act as well. The rule against mosaic with reference to the determination of novelty is also found in several other countries.

Thirdly, the 2012 Act makes reference to indigenous knowledge in respect of prior art. Admirable as this particular reference might be, it poses certain challenges. Indigenous knowledge is not always easily ascertainable. Furthermore, indigenous knowledge in many countries is not recorded nor published. In determining novelty, it could thus be very difficult, if not impossible, to have regard to indigenous knowledge. Indigenous knowledge must be seen in a universal context, due to the nature of patentability requirements. This in itself is problematic given that the recognition, appreciation and determination of indigenous knowledge in one country may vastly differ from another country. Despite these challenges, it is important to respect indigenous knowledge and give recognition to it by having regard to it in examining novelty. The contemporary approach may require new thinking and will most likely demand compromises to be made.

b) *Inventiveness: section 15*

Three suggestions or observations can be made with regard to inventiveness. Firstly, good guidelines are provided within the 2012 Act to interpret inventiveness. For instance, the provision providing that an invention will be obvious when the prior art motivates its experimenting or testing give perspective to the requirement of inventiveness. As a result of this inherent perspective less dependency from other jurisdictions is required to construe this requirement.

This however does not mean that no assistance can be provided by other jurisdictions. There is a fair amount of similarity between the 2012 Act and the 1978 Act. Even when guided by another legal system a unique approach has to be developed under the 2012 Act to accommodate the requirement of technical nature imbedded in the definition of an invention. The definition of an invention

demands that an inventive step must make a technical advancement in the relevant art. The questions in the *Ensign-Bickford* case can be a good basis to develop an approach. From a procedural perspective the first two questions in the enquiry establishing novelty can be disregarded when determining inventiveness. The latter two questions aiming to establish the actual inventiveness with regard to a particular invention can be adopted, i.e. (1) what the step forward entails and (2) how does the step taken differ from the state of the art. From this basis, further questions or tests can be developed to incorporate technicality. A possible enquiry might be: What technical progress is made by the step taken. Factors like education, the nature of a problem solved and the means by which the problem is solved could be considered to determine technicality.

Thirdly, novelty and inventiveness are not the same concepts. Though these concepts may overlap as stated above, the 2012 Act clearly makes provision for these to be independent of one another. A novel invention is therefore not necessarily inventive. This is particularly true for the 2012 Act which has an element of technicality. In practice these concepts can be easily confused. Caution should be taken when assessing both requirements. A person assessing these concepts, particularly inventiveness, should refrain from being an arm chair critic. The often stated view that what today appears obvious was not so at the time ought to be kept in mind under the 2012 Act.

c) *Industrial application: section 16*

There are two observations that can be made in respect of industrial applicability. The first is that the 2012 Act once again has good inherent perspectives to interpret industrial applicability. By defining the term 'exploit', the 2012 Act provides a good indication of what could amount to industrial application. Secondly, the provision relating to industrial application is very broad, allowing the judiciary to develop it. Due to their wide scope, agricultural applications can be included in this provision.

4.2 Interpreting the exclusions in the 2012 Act

Specific exclusions: section 19

It has been explained above that the 2012 Act provides for excluded matter in a blanket approach, whereas the 1978 Act has a more purposive approach to excluding matter by using deeming provisions. It is more purposive due to the mechanisms used in different scenarios to exclude certain matters. All the matters in respect of each mechanism can therefore be accounted for theoretically. E.g. matter deemed not to be inventions are against morality. Or matter is excluded because it is more like with the 1978 Act.

Because the 2012 Act only has a unified provision, all the exclusions cannot be explained by a single underlining explanation. As a result it will be practically impossible to adopt a single approach. All the exclusions will require a unique approach. To overcome this problem it is suggested that all the matters excluded in terms of the same theoretical underpinnings should be categorised into one group. Practically this can be achieved by creating subsections where every subsection represents a different classification of exclusions.

It was noted above that the exclusion with regard to intrinsic requirements in the 2012 Act is identical to the exclusions in the 1978 Act. It is however not possible to seek possible interpretations of the exclusions under the 1978 Act or make any general observations in respect of the 2012 Act. This is because the exclusionary provisions have not yet been interpreted in South Africa. It will serve no use to make any inferences from the little speculation that exists around the provision in the 1978 Act.

CHAPTER 11

CORPORATE GOVERNANCE AND MUNICIPALITIES: ARE THE KING III PRINCIPLES EXPORTABLE TO LOCAL GOVERNMENT IN NAMIBIA?

by
Marvin R Awarab

1 Introduction

Corporate governance is currently a crucial yet controversial topic that Namibia is trying to redefine and implement to support the achievement of the country's development goals. At the present time, Namibia is facing economic challenges and, therefore, it is important that, as a society, Namibians understand the underlying principles of corporate governance and ensure that at all levels of government these corporate governance principles are effectively implemented. Hence, effective implementation of the corporate governance principles, also referred to King III principles, will assist the country as a whole to meet some of its Vision 2030 developmental goals. This chapter is written from a South African perspective, considering the fact that King III principles on corporate governance evolved firstly in South Africa and now apply in different parts of the world. Notably, it is important to revisit and see how effective is its implementation in its country of origin, South Africa, and how well it may work in other parts of the world, Namibia in particular.

Namibia has been independent for the past 27 years and yet the country faces a high unemployment rate, a lack of entrepreneurial infrastructure and corruption. Notably, corruption is seen by many as a social evil, and it has a negative effect on the development of the country as it hampers effective leadership and proficient service delivery.

Good corporate governance is essential for any entity because, through it, the long-term sustainable performance of a company may be enhanced; it may contribute to the economic growth and value creation, not only for the public or

private entity, but also for the country as a whole.¹ The Municipal Systems Act² and the Municipal Finance Management Act³ are the two most important pieces of national legislation on local government in South Africa. In the Namibian context, the Constitution is the supreme law. It states that local government shall have a Council which will be responsible for the implementation of lawful resolutions of the Council. Local Authority includes all municipalities, communities, and village councils and constituted by Acts of Parliament.⁴ Pursuant to this constitutional imperative, the law that regulates the function and duties of local authorities is provided in the Local Authorities Act, 1992 (No.23 of 1992). An argument can be raised that, if there is already a law regulating local government, why is there any need to make King III applicable to local government? King III is a non-legislative tool used to govern entities, and it is expected to bring about positive results for the local government if properly applied.⁵

In view of the current problems in Namibia pertaining effective leadership and proper service delivery, this chapter seek to assess the importance and applicability of King III principles to municipalities in Namibia. The aim of this is to promote good governance and the local authority level, which in turn may lead to proper service delivery and meet Namibia's socio-economic development goals. As an example, it could seem important to appoint audit committees and audit financial documents to promote transparency within the council and the auditing results may be used to assist in planning more effectively for the future, thereby facilitating effective decision-making and preventing corruption.

¹ Improving Corporate governance and Shareholder engagement Association of British insurers: Association of British Insurers <<https://www.ivi s.co.uk/media/5929/ABI-Report-Improving-Corporate-Governance-and-Shareholder-Engagement.pdf> at .3>.

² Act 32 of 2000.

³ Act 56 of 2003.

⁴ Article 102 (3), (4).

⁵ Lindie Engelbrecht 'Implementing King III Aligned to the issues and principles ' IODSA.

The first question that this chapter seeks to address is how can the application of King III principles to local government enhance effective leadership? In other word, the question which forms the basis of this is whether the implementation of King III principles can help improve the governance and service delivery by local authorities. In addition, this chapter seeks to identify and address the issues relating to remuneration of executives of State-Owned enterprises.

2 King III principles and local government

2.1 The application of the principles

In 2009, the South African King Committee authorised and published the third report on corporate governance commonly referred to as King III. King III replaced the King I and King II reports on corporate governance. King III consists of the King Report on corporate governance for South Africa, the King Code of Governance Principles for South Africa and the Practice Notes aimed at providing guidance in implementing the Code.⁶ King III principles apply to all private and public entities, including all government sectors, irrespective of the manner and form of the incorporation.⁷ King III principles operate on an ‘apply or explain’ basis; in terms of this approach, the entity is required to consider the applicability of the principles to their own situation, with the opportunity to explain to their stakeholders why they have chosen a different approach.⁸ The purpose of the apply-or-explain aspect of corporate governance is to give more flexibility to the application of the principles and give entities more liberty in determining whether it’ is in its best interest to apply a particular principle.⁹ The over-arching objective of King III principles to the corporate structures, be it public or private structures, is to improve the quality of governance and leadership which the organizations are giving to their businesses and clients.¹⁰

⁶ Bowman Gilfillan Attorneys “QUICK GUIDE TO CORPORATE GOVERNANCE AND KING III” <<http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf>> last accessed on 19 April 2017.

⁷ L Muller, ‘Annual Report-sustainability report-integrated report? What does King say?’ (2011) *IMFO: Official Journal of the Institute of Municipal Finance*, 24.

⁸ Rudolph du Plessis, ‘Quick Guide to Corporate Governance and King III’ <<http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf>>.

⁹ L Muller, ‘*op. cit.*’, 26.

¹⁰ Bowman Gilfillan Attorneys ‘Quick Guide to Corporate Governance and King III’ <<http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Corporate-Governance-King-3.pdf>> last accessed on 19 April 2017.

Loosely defined, corporate governance refers to the manner in which an organisation is managed and governed to bring about a beneficial result in the interest the organisation and its clients. In relation to municipalities, it is imperative that municipalities comply with corporate governance principles in order to achieve the objectives of business soundness, effective service delivery and sustainability.

2.2 Council and councillors

In South Africa, the Municipal Systems Act, 2003 establishes the councils of municipal entities.¹¹ These councils have the following responsibilities; they are tasked with the duty to oversee and approve the budget before submitting it to the Mayor, to provide effective and coherent corporate governance, and to ensure compliance with the relevant laws.¹² In terms of section 30 of the Municipal Systems Act, the executive Mayor or executive council has the duty to implement, evaluate and monitor the integrated development plan (IDP). In Namibia, the Namibian Constitution, in particular Articles 102 and Article 111, makes provision for the establishment of Local Authorities. Pursuant to this constitutional imperative, the Local Authorities Act 23 of 1992 establishes the Local Authority Councils. Councils are equivalent to the board of directors, as required by the King III principles. Thus, their functions are similar to those of the board. Therefore, as bearers of public office, municipal councillors are expected to observe and obey corporate governance principles as discussed below.

2.3 Corporate citizenship and ethical leadership

The first principle of corporate governance as contained in King III is ethical leadership and corporate citizenship. Ethics and values are important in the area of leadership. Ethical leadership comprises of basic decision-making and the ability to determine the short-term strategies within the municipality.¹³ Ethics, leadership and governance make up a major part of business management, public administration and organisational behaviour, be it in the private or public sphere.¹⁴

¹¹ Municipal entities Governance challenges: Public Sector Working Group: Discussion Paper 1 PWC and Institute of directors of South Africa 6 <www.iodsa.co.za/resource/collection/879CAE6C-7B90-4983-28ECBCE196F/Discussion_Paper_Municipal_entities_Governance_challenges_IOD_2003.pdf>

¹² *ibid.*

¹³ N Wilkinson, and K Plant, 'A framework for the development of an organisational governance maturity model: a tool for internal auditors' (2012) *South African Journal of Accountability and Auditing Research* 26.

¹⁴ H Botha, 'Corporate Governance, leadership and ethics: interrelated trio' (2009) *Management Today* 55.

In order for the leadership of the municipality to be effective, it is imperative that there is an ethical foundation; therefore, it is the duty of a council to demonstrate transparency, accountability, fairness and honesty in its daily management of the organisation.¹⁵ Municipal councillors should be held accountable and liable for each and every decision that they take so as to ensure that ethical decisions are made whilst the interests of the municipality prevail.¹⁶ At the end of the day, the municipal council is the focal point and guardian of good governance, and it must therefore play a dynamic role in the policy development process, making sure that long-term strategies are in line with the needs and expectations of the stakeholders holistically.¹⁷

In the 21st century, it is important to have ethical leadership and good governance put in place as this will help the organisation to be considered and recognised as successful in the eyes of various stakeholders.¹⁸ Therefore, the process of managing the ethics of the municipality requires that each individual councillor and the council collectively strive to build and sustain an ethical corporate culture, as reflected in the selection and reward system.¹⁹

3 Accountability

3.1 Audit committees

In order to heed towards ethical leadership it is essential that audit committees are put in place employ the functions aimed at ensuring ethical leadership. In terms of King III, there is a recommendation that every entity must have an audit committee and that this committee should comprise of independent, non-executive members, with the chairperson not being a member of the council.²⁰ This recommendation is in line with what is stated in section 166 of the Municipal Finance Management Act, 2003²¹ to the effect that every municipality should have

¹⁵ Bowman Gilfillan Attorneys, 'Quick Guide to Corporate Governance and King III' <<http://services.bowman.co.za/Brochures/OnlineServices/CorporateGovernance/Coporate-Governance-King-3.pdf>> 3.

¹⁶ Local government and King III Public sector Working Group Position Paper <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE/PSWG_Position_Paper_2_Local_Government.pdf> 6.

¹⁷ *ibid.*

¹⁸ H Botha, 'Corporate Governance, leadership and ethics: interrelated trio' (2009) *Management Today* 55.

¹⁹ Local government and King III Public Sector Working Group Position Paper <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/879CAE6C-7B90F5-A983-28AECBCE196F/PSWG_Position_Paper_2_Local_Government.pdf> 10.

²⁰ *ibid.*, 7.

²¹ Act 56 of 2003.

an audit committee and that the majority of audit committee members should not be employees of the municipality.²² Furthermore, the audit committee is tasked with overseeing integrated reporting in terms of King III.²³ Another important responsibility of the audit committee is to oversee fraud risks and information technology (IT) risks as these are directly linked to the financial reporting which includes reporting to the council on the efficacy thereof.²⁴ It is important that the committee as a whole has sufficient expertise and qualifications and that it meets at least twice a year to fulfil its mandate.²⁵ The audit committee plays a crucial role within the overall governance structure of an entity. It is therefore necessary for the audit committee to be independent to ensure its integrity in terms of internal financial controls as well as integrated reporting.²⁶ The audit committee may not review the value or excellence of the process relating to external audit as all matters relating to external audit is normally carried out under the auspices of the Auditor-General.²⁷

3.2 Internal audit

It is prudent that the financial documents of the municipal councils be audited by external auditors to ensure the accuracy and credibility of the figures and information presented. However, it is also important to have in-house auditing of information before such information can be send out of external auditing. It is the duty of the internal audit to assess the effectiveness of risk management and provide accurate information to address and eliminate the issues of corruption, fraud, and unethical behaviour. ²⁸ The internal audit of the municipality is accountable to the audit committee, the accounting officer as well as the overall public accounts committee of the municipality.²⁹ Accountability, as one of the features of good governance, may result in effective leadership within the municipality.

²² Local Government and King III Public Sector Working Group Position Paper 2 <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_2_Local_Government.pdf> 7.

²³ T A Mawongo 'A Critical Analysis of the Applicability of the King III in the Local Government Sphere-A Case of the Buffalo City Metropolitan Municipality in the Eastern Cape from 2009-2011' <<http://ufh.netd.ac.za/bitstream/10353/551/1/Mawongathesis.pdf>> 32.

²⁴ Corporate governance and King III KPMG, 2.

²⁵ Institute of Directors Southern Africa: King Code for Governance For South Africa (2009) 31.

²⁶ F H I Cassim *et al* 'Contemporary Company Law' 2nd ed (2012) 490.

²⁷ T A Mawonga, 'Critical Analysis of the Applicability of the King III in the Local Government Sphere-A Case of the Buffalo City Metropolitan Municipality in the Eastern Cape from 2009-2011' <<http://ufh.netd.ac.za/bitstream/10353/551/1/Mawongathesis>> 33.

²⁸ F H I Cassim, *et al* 'Contemporary Company Law' 2nd ed (2012) 494.

²⁹ Local Government and King III Public Sector Working Group Position Paper 2 <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_2_Local_Government.pdf> 7.

Internal auditing is not limited to the financial aspects of an entity; King III requires an internal audit to focus on operational, financial, sustainability and compliance risk in order to ensure that effective control has been employed over all the important areas within the entity ensuring effective leadership at the end of the day.³⁰

Ultimately, it is required that both the audit committee and the internal audit provide sound and appropriate advice to the municipal manager as well as the council so that they can be able to minimise possible risk.³¹

4 The governance of risk

4.1 A crucial part of King III

Risk governance is one of the important principles of King III. It aims at promoting good corporate governance within any organisation -- municipal councils included. Hence risk management is the practice of recognizing and, measuring risk, and taking steps to reduce risk to an acceptable level.³²

The management of risk remains a crucial part of King III. It gives guidance on how it should be accomplished, stressing that the management of an organisation is responsible for risk management design, implementation and monitoring of risk management plan.³³ The accounting officer has the responsibility to maintain efficient and transparent systems that regulate risk within local government.³⁴ The local government legislation does not require the municipalities to establish a risk management policy; however, if it decides to establish such, it must first be approved by the council.³⁵ Risk management policies should be developed by municipalities in terms of which they have to ascertain both the risk and the extent to which the municipality is tolerant of the specific kind of risk.³⁶

³⁰ L Engelbrecht, 'Implementing King III: Aligned to the issues and Principles' 30.

³¹ Local Government and King III: Public Sector Working Group Position Paper 2, *op. cit.*, 8.

³² Risk Management Approach and Plan <<http://www.mitre.org/publications/systems-engineering-guide/acquisition-system-engineering/risk-management/risk-management-approach-and-plan>>.

³³ Corporate Governance and King 3 KPMG.

³⁴ Local government and King III Public Sector Working Group Position Paper 2, *op. cit.*, 8.

³⁵ *ibid.*

³⁶ T A Mawonga, *op. cit.*, 34.

The council should ensure that the municipality maintains an effective management plan and that risk assessment is done regularly, with operational risks being part of the management plan.³⁷ Furthermore, the management of the municipality must implement the outcomes of the risk-based auditing through the recommendations made by the audit committee; where the management decides to depart from such recommendations, these must be brought to the attention of the municipal council.³⁸ Taking a risk-based approach and performing risk assessment on a regular basis will assist municipalities to determine the efficacy of the controls in managing the risk which may be brought about by the strategic direction that the municipality decided to adopt.³⁹ Thus, if municipalities develop and implement proper risk governance policies as outlined in King III report, they will be able to take efficient decisions resulting in effective leadership.

4.2 Information technology

Implementing proper risks governance policies will require municipal councillors to look into the use of information technology within their municipalities. In our modern era, it is virtually impossible to deliver effective services to the public without the use of information technology (IT) as it is fundamental in growing and sustaining a business, thus being a central aspect of the overall governance of an entity.⁴⁰ Therefore, the proper management of IT resources will assist the municipality to achieve its sound objectives which may be to provide effective and efficient services to the public.⁴¹

In order for IT to be effective in a municipality, it is recommended that entities should understand and manage the risks, advantages, limitations and drawbacks of IT; IT should be treated as an integral part of the company's risk management.⁴² The use of IT may not always be sound for any institution as it may pose challenges, such as unauthorised use and disruption. Through the use of IT, private and confidential information may be accessed by outsiders placing the municipal operations at risk. For that reason, it is important for councils to take reasonable

³⁷ Local Government and King III: Public Sector Working Group Position Paper 2, *op. cit.*, 8.

³⁸ T A Mawonga, *op. cit.*, 34.

³⁹ King Code of Governance for South Africa 2009 Institute of Directors Southern Africa, 14.

⁴⁰ F H I Cassim, *et al* 'Contemporary Company Law' 2nd ed (2012) 492.

⁴¹ *ibid.*

⁴² *ibid.*, 493.

and prudent steps with regard to IT governance, if they wish to make use of IT in its daily operations.⁴³ The council is required to monitor and assess the potential investment as well as the expenditure that are likely to be incurred through the use of IT.⁴⁴ IT governance is therefore be structured in a manner aimed at achieving the objectives of a particular organisation to ensure effective leadership. Therefore, in the setting of the local government, the council is responsible for IT governance. The municipality on other hand is accountable for IT governance. It is the duty of the municipality to ensure that IT systems are operating properly and are aligned with the objectives set by the council for performance.⁴⁵

5 Complying with laws in the sphere of local government

In terms of King III principles it is expected that each organisation that implements the principles ensures that it complies with the laws and codes that governs their organisation. Thus, the municipal councils of Namibia should comply with the constitutional provisions as well as the Local Authorities Act and any other code of conduct which may be relevant to the management and operation of its activities. Without guiding laws and regulations no organisation can function effectively and provide efficient services to its client. Hence it is vital importance that municipal councils observe the laws put in place with the aim of ensuring the smooth running of its operations. In terms of complying with laws and codes, whether binding or non-binding, King III requires that compliance should take the form of internal part of risk management function.⁴⁶ Compliance must be encouraged through education and training.⁴⁷ In accordance with sections 60 and 131 of the Municipal Finance Management Act 2003, the municipal manager and the mayor, collectively, are responsible for taking the lead in ensuring compliance with the necessary laws and codes.⁴⁸

⁴³ King Code of Governance for South Africa 2009 Institute of Directors Southern Africa, 15.

⁴⁴ T A Mawonga, *op. cit.*, 34.

⁴⁵ Local government and King III: Public Sector working Group Position Paper, *op. cit.*, 8.

⁴⁶ Corporate Governance and King III KPMG <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/07/Corporate-Governance-and-King-III.pdf> last accessed on 29 may 2017.

⁴⁷ F H I Cassim, *et al, op. cit.*, 493.

⁴⁸ T A Mawonga, *op. cit.*, 35.

6 Stakeholder relationships and local government

The various laws and regulations put in place as discussed above are to ensure that the municipality not only operates effectively but also to enhance the stakeholder relationships.

The point of departure in assessing the issue of stakeholder relationships is that those in management of an entity are required to take into account the economic, social and environmental factors when managing such an entity.⁴⁹ There have been debates about how the entity should be managed and to what extent the shareholders should impact or influence the management of an entity. Various approaches have been developed in this regard, including the enlightened shareholder approach and the pluralistic approach. The enlightened shareholder approach requires that the management to have regard to the long-term interests of the shareholders and that the shareholders' interests supersede the interests of all the other stakeholders.⁵⁰ The pluralistic approach, on the other hand, holds that the shareholders' interests do not have primacy and that the interest of all stakeholders must also be considered.⁵¹

The King III report adopted the stakeholder-inclusive approach to corporate governance, which requires that the legitimate interests and expectations of all the stakeholders should be taken into account when making decisions, provided that the best interest of the entity must prevail at all times.⁵² The two requirements that must be satisfied when determining legitimacy of the interest or expectation includes the validity and justifiability of the interest or expectation, bearing in mind legal, ethical or moral considerations.⁵³ Those who are responsible for the administration and management of the municipality should develop and preserve a system that ensures that the community is satisfied with the municipal services; it is, therefore, important that policies and performance indicators be monitored on a regular basis.⁵⁴

⁴⁹ F H I Cassim, *et al*, *op. cit.*, 495.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ T A Mawonga, *op. cit.*, 36.

In order to ensure the sustainability in an entity such as a municipality, it is imperative that all role-players adopt an approach that is inclusive of and responsible to all stakeholders, that contributes to social and economic development within the community. This demonstrates the highest levels of disciplined leadership.⁵⁵ Municipalities must therefore seek participation from the members of the communities before taking certain decisions, especially those decisions that might have a direct impact on the members of the community.⁵⁶ A municipality will best achieve its goals of effective leadership and efficient service delivery if all the stakeholders, including the community, are involved in its operational processes; and this will require the councillors to work towards gaining trust and maintaining confidence with its stakeholders.⁵⁷ Mostly, as a result of political aspirations, the councillors tend to over-promise and under-perform with regard to service delivery, and this may lead to lack of trust and reduced confidence. Accordingly, councillors must be careful not to make promises to the community which they cannot keep, as this will put them in a bad light with the community.⁵⁸

7 Alternative dispute resolution

The new area that was introduced in King III relates to alternative dispute resolution system, which is seen as a good corporate governance constituent.⁵⁹ In any entity, including a municipality, alternative dispute resolution is important as a mechanism that can be used to resolve disputes in an inexpensive and speedy manner, and hence it may offer opportunities to preserve stakeholder relationships, which may otherwise be lost should other mechanisms of solving disputes be used.⁶⁰ The council or the management of a company must use the best possible method of solving disputes, ensuring that the outcome is in the best interest of the municipality.⁶¹ Accordingly, mediation is preferred over conciliation or adjudication as a most suitable method of solving a dispute as it is inexpensive and may assist in preserving the relationship of the parties.⁶² The King III Report

⁵⁵ State-owned enterprises: Governance responsibility and accountability, Public Sector Working Group Position Paper 3 <www.iodsa.co.za>.

⁵⁶ Local government and King III: Public Sector Working Group Position Paper 2, *op. cit.*, 9.

⁵⁷ Bowman Gilfillan Attorneys *op. cit.*, 8.

⁵⁸ Local government and King III: Public Sector Working Group Position Paper, *op. cit.*, 9

⁵⁹ F H I Cassim. *et al*, *op. cit.*, 501.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

outlines various factors to be taken into consideration before deciding on a suitable method of solving a particular dispute. This includes time constraints, business relationships, confidentiality and the rights and interests of the parties to the dispute.⁶³

8 Sustainability disclosure and integrated reporting

Municipalities have the responsibility to meet the full range of the community's needs. It is therefore important for municipalities to have a long-term strategy to consider sustainability and achieve it.⁶⁴

The council and senior management must understand and analyse the key drivers of municipality, and this would require the council to determine which sustainability areas are most vital and how sustainability in those areas will have an influence on their relationships with customers as well as on their overall level of effectiveness.⁶⁵ It is not possible to achieve sustainability through a one-off decision. It is an on-going process. This process requires a set of values, behaviour and attitudes facilitating the management of economic, social and environmental assets at the disposal of the society in a manner that meets the needs of the present generation without compromising the capacity of future generations to meet their own needs.⁶⁶ Apart from understanding the notion behind the concept of sustainable development, it is necessary to develop an effective mechanism for translating strategies into the day-to-day operations of the institution.⁶⁷ Although the council and management may be responsible for overseeing the sustainability policy and plan, all departments within the municipality have to ensure the effective and continuous implementation of such a sustainability plan.⁶⁸

Sustainability is inseparable from the notion of integrated reporting, which lies at the heart of King III Code. In 2008, the Companies Act was introduced, which marked a move towards integrated reporting for the King III Code. This is aimed to unify both the financial and non-financial performance into strategy, processes, and reporting.⁶⁹ The notion behind integrated reporting advocates a culture of sustainability; this sustainability culture will guarantee the principle of substance

⁶³ *ibid.*, 502.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*, 14.

⁶⁷ *ibid.*

⁶⁸ *ibid.*, 15.

⁶⁹ Interview Summary Report Compiled by Jess Schlschenk.

over form; at the end the day, the information disclosed will be accurate and relevant, and it can be used to compare with past performance while still being used for future planning.⁷⁰

It is furthermore the aim of integrated reporting to account to the stakeholders on the strategy, performance and activities of the organisation in a manner that enables the stakeholders to assess the ability of the organisation to create and sustain value over the short, medium and long-term.⁷¹

According to King III, there are certain aspects that must be included in terms of integrated reporting, and these include the statutory requirements regarding annual financial statements, explanations on the key risks that would limit the prospects for future value creation, and a record of how the organisation has affected the community.⁷²

The main question that may be asked is: How can one implement an effective integrated reporting system to achieve the desired results of effective leadership within local government? There are various factors that are worth considering prior to and during integrated reporting. Firstly, one must look at the scope and boundary of the report, consider the circumstances under which the organisation or entity operates, identify the strategies of the organisation; analyse the past performance of the organisation, and, finally, look at the aspects of remuneration and leadership.⁷³ Once the organisation has identified and determined these key features of an integrated report, it will be able to draft a comprehensive integrated report followed by proper implementation to ensure effective leadership. Effective leadership can be said to be the central element of corporate governance. Thus, effective leadership will ensure that municipalities are able to meet today's needs without compromising their ability to meet future needs. An integrated report must be prepared annually, reflecting on sustainability and financial performance and with particular emphasis on substance rather than form.⁷⁴ King III does not prescribe a specific form which the integrated report has to take on, and hence the report will be considered sufficient as long as it contains the required information, such as the financial statements prepared annually, environmental issues, sustainability, remuneration, ethics and corporate citizenship, to name but a few examples of required information.⁷⁵

⁷⁰ L Muller, 'Annual Report-sustainability report-integrated report? What does King say?' *IMFO: Official Journal of the Institute of Municipal Finance*, 25.

⁷¹ *ibid.*, 24.

⁷² *ibid.*

⁷³ *ibid.*, 25.

⁷⁴ L Engelbrecht, 'Implementing King III' *IODSA* 30.

Ultimately, sustainability disclosure and reporting must be viewed as a vital aspect in terms of municipality structures. This is because sustainability disclosure and reporting if correctly implemented may help municipalities to take steps to ponder on actions before executing such. This may result in positive stakeholder perceptions, good reputation and sound financial results.⁷⁶ The preparation of integrated reports not only increases stakeholders' confidence and trust by giving them an idea of the operations being conducted within the municipality and what the future holds, but it may also improve the management of risk.⁷⁷ In addition, through integrated reporting, the municipality may reap positive results internally, as it may evaluate its governance and ethics, leading to effective leadership.⁷⁸ The *status quo* in relation to local government is that municipal audit committees do not carry out integrated reporting.⁷⁹ The Municipal Finance Management Act prescribes annual reporting by municipality, but this provision does not include integrated reporting as required by King III; as such, sustainability disclosure on financial and non-financial aspects are left out.⁸⁰ Failure to carry out integrated reporting may have detrimental effects, not only on the financial aspects of the municipality, but on the overall leadership and governance of the local government as well.

9 Remuneration of state-owned enterprises

Namibia has promulgated the Public Office-Bearers (Remuneration and Benefits) Commission Act, Act No 3 of 2005. The primary purpose of this Act, as stipulated in its preamble, is to establish Public Office-Bearers (Remuneration and Benefits) Commission. The duty of this commission is to provide for the determination of remuneration and benefits of public office-bearers by the President and to provide for incidental matters.

⁷⁵ Integrated Report Practice notes Institute of Directors for South Africa, Published June 2014 <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/24CB4885-33FA-4D34-BB84-E559E336FF4E/Integrated_report.pdf>.

⁷⁶ Local Government and King III Public Sector Working Group: Position Paper 2 <http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_2_Local_Government.pdf> 9.

⁷⁷ King Code of Governance and King II for South Africa 2009, 12.

⁷⁸ *ibid.*

⁷⁹ Local Government and King III Public Sector Working Group: Position Paper 2, *op. cit.*, 7

⁸⁰ *ibid.*, 10.

The remuneration of executive management of State-owned enterprises (SOE's) has been a matter of debate for the past few months in Namibia. It is alleged that the SOE's overpay their executives and there is no correlation between the salary and service delivery. It would be plausible and efficient to review the performance of top leadership of municipalities and based their employment security on their job performance. One of the other concerns raised is that the government spends money on suspended CEO's within the public sector including municipality CE's which money could have been used for other developmental projects. Namibian Media has reported that the suspended chief executive officer (CEO) of Omaruru Municipality reportedly ranked closed to N\$ 1.9 million in salary payments and allowances since suspended on full pay in December 2013.⁸¹ In the same article it was stated that President Hage Geingob has in the past expressed concerned over the large amounts of money government spends on suspended managing directors and CEO's, most of whom tend to be on suspension for years on end.

In South Africa, King III follows a performance-related approach when it comes to the remuneration of executives; in terms of this approach, the executives receive a basic salary and additional benefits which are dependent on their performance.⁸² It has been argued that the bonuses paid that over to the executive officers should be based on the yearly performance of executives, considering the companies objectives and the shareholders long-term values.⁸³ Hence the directors are rewarded for good performance and the underlying notion behind rewarding directors for good performance is to promote effective leadership. This will therefore call on the public office bearers to work hard and ensure that they provide good and quality services to their clients as they know that the payment of bonus is the direct result of performance.

⁸¹ *New Era Newspaper* 7 October 2016 <www.newera.com.na/2016/10/07/suspended-ceo-costs-omaruru-almost-n2-million/> last accessed on 29 May 2017.

⁸² S M Luiz, 'An appropriate regime for the remuneration of executive' (2006) Vol 39 *Comparative and International Law Journal of Southern Africa*, 85.

9.1 Fair and responsible remuneration

It is imperative that the remuneration provided to an executive be adequate, not only to attract but also to retain and encourage executives of the standard that the board requires.⁸⁴ It is, however, noteworthy that remuneration of directors should be made on a fair and responsible basis.⁸⁵

Fair and responsible remuneration entails that there must be a link between the entity's strategic goals, the individual performance of the director, and the policy set to govern the remuneration of the directors.⁸⁶ There must be a balance between the fixed salary and the additional pay or bonuses of an executive director so as to provide a flexible bonus scheme.⁸⁷ It is desirable that the remuneration committee review the incentive schemes to prevent unjust enrichment from the share incentive schemes.⁸⁸ King III encourages to a larger extent the payment of bonuses, retirement benefits and severance to the executive directors of an entity.⁸⁹ The share-based incentives are limited to the executive directors; thus the chairman as well as the non-executive directors are not entitled to receive the share-based incentives.⁹⁰

9.2 Disclosure of remuneration

It is important to provide the shareholders and the public with the information regarding the performance and remuneration of executives as well as details about the board's remuneration policy in a remuneration report.⁹¹ Apart from disclosing the remuneration of the directors, there is also the need to disclose the remuneration of the three highest paid executives who do not fall in the category of directors.⁹² The link between performance, and remuneration, and the disclosure of both performance and remuneration is vital for the proper assessment of the effectiveness of remuneration. It is therefore essential for the shareholders of the

⁸⁴ *ibid.*

⁸⁵ F H I Cassim, *et al, op. cit.*, 487.

⁸⁶ Corporate Governance and King III KPMG Corporate Governance and King III KPMG, *op. cit.*

⁸⁷ F H I Cassim, *et al, op. cit.*, 488.

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ Gerald Seegers, 'King III Homes in a share-based Remuneration' <http://reference.sabinet.co.za/web/access/electronic_journals/taxtalk_n18_a5.pdf> 8.

⁹¹ S M Luiz, *op. cit.*, 39 66.

⁹² *ibid.*

institution as it may provide them with the necessary information. This will put them in a position to be able to assess the company's affairs and make important decisions such as choosing to remove some members during elections or to sell their shares in the company and thus leave the company.⁹³

The King III report recommends that remuneration committees be established and that independent non-executive directors serve on such committees to ensure an appropriate system for executives' remuneration.⁹⁴ The board of directors has a final on executive remuneration but it is suggested and more advisable that the remuneration committee makes suggestions to the board on remuneration and, more particularly, specifies the remuneration packages to be paid to an executive director at a particular point in time.⁹⁵

9.3 Shareholders' approval

As per the King III Code, the shareholders of a company, whether public or private, have to approve the remuneration policy of such a company; this therefore means that the executive directors will be accountable to shareholders.⁹⁶ Accordingly, it is recommended that the remuneration policy of a company should be tabled for shareholders' approval and, although non-binding, this must take place annually at the general meeting.⁹⁷ Even though it is non-binding, the shareholders vote may influence the executives' remuneration. In the long run, the directors will perform their duties efficiently because they know that they are accountable to shareholders and that they will receive additional income apart from their salary depending on their performance.

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ H E Schltz, and A Smit 'Executive remuneration and Company Performance for South African Companies listed on the Alternative Exchange (AltX) (2012) South African Business Review.

⁹⁷ Gerald Seegers, 'King III Homes in share-based Remuneration' <http://reference.sabinet.co.za/webx/access/electronic_journals/taxtalk_n18_a5.pdf> 8.

10 Conclusion

Private and public entities, whether global or local, are threatened by financial crises, irresponsible use of resources, and corruption scandals -- Namibia is not an exception.⁹⁸ Therefore, to alleviate financial crises and prevent corruption in Namibia, it is imperative that municipalities put in place good and proper corporate governance structures that will promote effective leadership, efficiency, transparency and accountability. In the end, this will lead to effective use of resources and proper allocation of funds putting the country in sound financial result. Effective leadership is of paramount importance as it ensures that the municipals councils provide proper and efficient services to its clients.

⁹⁸ State-owned enterprises: Governance responsibility and accountability Public Sector Working Group: Position Paper 3 <www.iodsa.co.za> 6.

CHAPTER 12

A CRITICAL REVIEW OF NAMIBIAN INSOLVENCY LAW

by
Victoria Weyulu

“It has been said that insolvency and bankruptcy laws are the poor-laws of the middle classes...that unless the insolvency laws be reformed, the vices of idleness, extravagance, and dishonesty encouraged by them, will destroy the middle classes.”

Houston Browne, J & Ogbourne, WW.

1 Introduction

It is a widely acknowledged fact that an effective insolvency law facilitates the availability of credit and enables private sector development.¹ This is especially true for small and medium enterprises (SMEs) which rely on access to capital for the growth, expansion and diversification of their businesses.² To explain this, imagine the following scenario:³

Magano is a sole proprietor from Rundu who sells a variety of vegetables and fruits at the Tandaveka Open Market in order to earn a living. Her income from selling vegetables and fruits has helped her to put her three children through school, and to pay her monthly rental in Kehemu. However, due to the recent good rainfall in Rundu, Magano has a real opportunity to grow her business and to employ an additional number of community members to assist with the increasing sales. Magano approaches the local commercial banks in Rundu for a loan, only to be turned down because she does not own any immovable property as collateral for the credit that she seeks. She is then forced to approach an alternative credit-lending facility such as Tate Mike’s Cash Loan, which is very popular

¹ M Falke, *Insolvency Law Reform in Transition Economies* (2003) Doctoral thesis: Humboldt-Universität zu Berlin.

² H Jauch, *The Role of SMEs in Employment Creation and Economic Growth: Lessons from Other Countries* 2010 <vivaworkers.org/wp-content/uploads/2013/02/SMEs-and-Development-2010.pdf> last accessed on 12 July 2017.

³ This scenario is adopted from M Dubovec and C Kambili, ‘A Guide to the Personal Property Security Act: The Case of Malawi’ 2015 <ssrn.com/abstract=2614009> last accessed on 12 July 2017 and modified for the Namibian context.

for advancing credit at hefty interest rates. Instead of advancing the loan, however, Tate Mike just finished reading the latest copy of the World Bank's *Doing Business Report* in Namibia and is worried that, should Magano become insolvent, the possibility of repaying his loan will amount only to 34.4 cents in the dollar and that the entire process will take an average of two and half years to finalise! Tate Mike explains these worrisome figures to Magano and, in light of NAMFISA's prohibition on the retention of ATM cards and pins by microlenders, also makes it clear that his business cannot assist Magano, as he will have no security for this loan. Magano is frustrated at the inability to secure a loan for her business and continues to dream of the impossibility of growing her business to a chain of stores resembling the size of *Fruit 'n Veg*.

The above example illustrates several significant considerations. First, it demonstrates the relevance of insolvency law in promoting access to credit, which in turn, drives economic activity and growth. Secondly, it illustrates that an inadequate insolvency law may result in higher prices of credit and, concurrently, in decreased economic activity as SMEs are not able to secure credit at affordable interest rates, or at all. Finally, it shows that the predictable rules for equitable distribution of investments in insolvency laws enhance investor confidence, which again translates to the availability of capital.⁴

In Namibia, the Insolvency Act, 1936⁵ (1936 Insolvency Act) is considered to be the principal insolvency statute and details the measures to be adopted when a debtor has insufficient assets to settle creditors' claims.⁶ This 1936 Insolvency Act is inherited from the colonial administration of the Union of South Africa over what was then known as South West Africa, before Independence on 21 March 1990.⁷

⁴ Falke (2003) 54. Falke argues that 'the confidence of lenders and other creditors in the legal system of the debtor is a main criterion which influences the willingness to extend credit and the terms and conditions of the credit. Thereby, the prevailing insolvency law plays a major role since it governs the relation between the parties in the ultimate case of the debtor's inability to repay outstanding debt'.

⁵ Act No. 24 of 1936 (as amended).

⁶ The Insolvency Act, 1936 does not define the meaning of 'insolvency'. A Smith, R Sharrock, K Van Der Linde, *Hockly's Insolvency Law* 8th ed (Cape Town: Juta Publishers 2006) state that a person or company is considered to be insolvent when his or her liabilities, fairly estimated, exceed his or her assets, fairly valued. However, a debtor is not treated as an insolvent for legal purposes until a court grants a final or provisional insolvency order.

⁷ Article 140(1) of the Namibian Constitution retains all laws which were in force immediately before the date of Independence until they are repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent Court.

Generally, the 1936 Insolvency Act permits any person or his or her creditors to apply to the High Court for an order to declare the estate of such a person insolvent.⁸ There are certain requirements under sections 4, 6, 9 and 12 of the 1936 Insolvency Act that this person or his or her creditors must prove in order to obtain a successful order declaring the former's insolvency.⁹ Once this order is granted, insolvency proceedings are commenced against this person, who is now formerly called the debtor or the insolvent.¹⁰ The 1936 Insolvency Act then sets out the procedure in terms of which the assets of that person are handed over to the Master of the High Court and thereafter to a trustee after his appointment by that insolvent's creditors.¹¹ This trustee is required to sell those assets and to use the proceeds from the sale of these assets to pay creditors in a manner that is prescribed by the 1936 Insolvency Act.¹² Once all of the creditors' claims are paid, the debtor may apply for rehabilitation.¹³ Rehabilitation is a legal process that relieves the insolvent of the legal implications of being insolvent and placed in a legal position of someone who is or was not declared insolvent.¹⁴ Although Namibia and South Africa share close similarities in their respective insolvency legislation, significant developments have taken place since the promulgation of the 1936 Insolvency Act by the South African administration. Chief of these developments is the Insolvency Amendment Act, 1995 that revises sections 35 and 46 of the 1936 Insolvency Act and the draft Insolvency Bill proposed by the South African

⁸ This order is called a sequestration order and is defined in section 1 of the 1936 Insolvency Act as "any order of court whereby an estate is sequestrated and includes a provisional order, when it has been set aside". The purpose of this order is explained in *Walker v Syfret NO* 1911 AD 141 at 166 as follows:

"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

⁹ Sections 6(1), 10(c), 12(1)(c) of the Insolvency Act, 1936 all require, for example, the need to show that sequestration will be to the advantage of creditors. The meaning and challenges with this requirement have been adequately discussed in J S Kanamugire, "The Requirement of Advantage to Creditors in South African Insolvency Law – a Critical Appraisal" (2013) Vol, 4 No. 13 *Mediterranean Journal of Social Sciences*, 19 -36.

¹⁰ Section 1 of the 1936 Insolvency Act defines a 'debtor' as a natural person, a partnership or partners of a partnership. However, it is accepted that because the provisions of the 1936 Insolvency Act may also be applied to companies and close corporations that are unable to pay their debts, this definition is wide enough to include juristic persons too.

¹¹ See the effects of sequestration in sections 20 and 21 of the 1936 Insolvency Act.

¹² The ranking of creditor's claims is set out in sections 95 to 103 of the 1936 Insolvency Act.

¹³ Sections 124 to 130 of the 1936 Insolvency Act.

¹⁴ Section 129 of the 1936 Insolvency Act states that "The effect is that of bringing an end to your sequestration and of discharging (writing off) all your debts which were due, or of which the cause of which had arisen before the sequestration, and which did not arise out of fraud on your part and to further relieve you of every disability resulting from the sequestration."

Law Reform Commission (SALRC) in 2000.¹⁵ Firstly, sections 35 and 46 of the 1936 Insolvency Act form the basis of a proposal submitted to the Law Reform and Development Commission (Commission) and are discussed later on in this chapter. Finally, the SALRC draft Insolvency Bill considers, amongst other issues, the role of the Master of the High Court in the administration of insolvent estates; the registration and regulation of trustees and liquidators; the introduction of notices, records and money transfers by electronic means as well as the development of business rescue and cross-border insolvency provisions in South Africa.

Notwithstanding the fact that Namibia's insolvency law has been in force for over 70 years, there has been no substantial review to the 1936 Insolvency Act, apart from the amendments of 2005, that speaks to some of the relevant issues raised and addressed in the South African Insolvency Amendment Act, 1995 or the draft Insolvency Bill by the SALRC.¹⁶

It is in light of the above considerations that the Commission began to review the 1936 Insolvency Act in order to align our laws with the developments taking place not only in South Africa, but in the rest of the world where many Namibian individuals, like Magano in the scenario above, and companies alike, conduct businesses.

The purpose of this chapter therefore is to critically examine Namibia's 1936 Insolvency Act with a view to raising some awareness about the importance of the issues considered by the Commission in the review process.

¹⁵ No. 32 of 1995 (as amended by the Judicial Matters Second Amendment Act, (No. 55 of 2003). The draft Insolvency Bill is available in the South African Law Commission Report on the Review of the Law on Insolvency Project 63 (February 2000).

¹⁶ The Insolvency Amendment Act, 2005 (Act No. 12 of 2005). The object of the Insolvency Amendment Act, 2005 is provided for in the long title to that Act. However, it is accepted that this Amendment Act did not substantially change the 1936 Insolvency Act or consider any of the developments that have taken place in South Africa.

2 Background: the review process

The Commission began to review the 1936 Insolvency Act in 2013 following a proposal by the Bank of Namibia to consider the amendment of sections 35 and 46 of the 1936 Insolvency Act.¹⁷ Apart from those sections, there was a need to undertake a holistic review of the 1936 Insolvency Act in order to determine the efficacy of provisions that have been in force for over 70 years, taking into account the legal developments discussed above.

The Commission is a statutory body established in terms of section 2 of the Law Reform and Development Commission Act, 1991.¹⁸ It is required, in terms of this Act, to undertake research and to examine all branches of Namibian law in order to make recommendations for their reform and development.¹⁹ Where the reform of Namibia's insolvency law is concerned, the Commission is particularly mandated by section 6(dA) to enact laws that enhance respect for human rights as enshrined in the Namibian Constitution and/or *to ensure compliance with international legal obligations*.²⁰

Where the development of insolvency law is particularly concerned, ensuring compliance with legal obligations requires the alignment of Namibian law to best international standards that will enable the country to enhance economic development so as to improve the standard of living for many Namibians like Magano in the scenario above.

To this end, the Commission has identified a number of best international standards that are evidenced through global institutions such as the World Bank, the International Monetary Fund (IMF) and the United Nations Commission on

¹⁷ The Bank of Namibia submitted a proposal to amend sections 35 and 46 of the Insolvency Act in October 2012. The Commission officially accepted this proposal as a project in 2013.

¹⁸ No. 29 of 1991 (as amended).

¹⁹ Section 6 of the Law Reform and Development Commission Act, 1991 (as amended).

²⁰ Emphasis added. No. 24 of 1936 (as amended). Emphasis added. Section 6 (dA) of the Law Reform and Development Commission Act, 1991 (as amended) states that the objects of the Commission under section 6 also includes "the enactment of laws to enhance respect for human rights as enshrined in the Namibian Constitution or to ensure compliance with international legal obligations".

International Trade Law (UNCITRAL), to which Namibia is a member.²¹ Generally, these institutions maintain that insolvency laws should provide measures for the following:

- (a) the effective integration with a country's broader legal and commercial systems;
- (b) a transparent and predictable insolvency law;
- (c) preventing the improper use of the insolvency system, for instance, through the regulation of the insolvency profession;
- (d) preventing the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments and allowing a moratorium or stay at the earliest possible time in every country where the debtor has assets;
- (e) the equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- (f) the recognition of existing creditor rights and establishment of clear rules for the ranking of priority claims;
- (g) the establishment of a framework for cross-border insolvencies with a clear and speedy process for obtaining recognition of foreign insolvency representatives and of foreign insolvency proceedings;
- (h) the protection and maximising of the value of the debtor's property for the benefit of all interested parties and the economy in general; and
- (i) striking a balance between liquidation and reorganization.

²¹ World Bank (2001) *Principles and Guidelines for Effective Insolvency and Creditor Rights System* <www.worldbank.org/ifa/ipg_eng.pdf> last accessed on 10 October 2014, United Nations Commission on International Trade Law. 2004. *Legislative Guide on Insolvency Law* <www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> last accessed on 04 April 2014 and the International Monetary Fund (1999) *Orderly & Effective Insolvency Procedures Key Issues*. <www.imf.org/external/pubs/ft/orderly/> last accessed 10 October 2014.

In order to determine compliance of our insolvency laws to the above standards, the Commission conducted several targeted stakeholder consultations throughout 2013 and on 13 March 2015 published and disseminated the Discussion Paper on Issues Relating to the Insolvency Act, 1936.²² The Discussion Paper outlined the following key issues that were raised during the consultations:²³

- (a) whether or not Namibia should adopt a uniform statute to regulate the insolvency of natural and juristic persons;
- (b) whether or not Namibia should abolish the requirement for possession over movable property in the event of insolvency in order to enable notarial bondholders to become secured creditors in the event where possession is not possible;²⁴
- (c) whether or not Namibia should establish a registry that records and provides notice to creditors of any security created over movable property;²⁵ whether or not Namibia should review the provisions dealing with the ability of a natural person to repay debts in terms of section 74 of the Magistrates Courts Act, 1944 (Act No. 32 of 1944);
- (d) whether or not Namibia should regulate credit bureau institutions in Namibia;²⁶
- (e) whether or not Namibia needs to develop standards to protect consumer rights in Namibia;²⁷
- (f) whether or not there is a need to legally enforce set-off provisions in master agreements upon insolvency;²⁸

²² Law Reform and Development Commission Discussion Paper 32. *Discussion Paper on Issues Relating to the Insolvency Act, 1936*. (February 2015).

²³ The Discussion Paper is accompanied by the World Bank 'Report on the Observance of Standards and Codes' (ROSC). The ROSC is an assessment of Namibia's observance of the standards recognized internationally as benchmarks of good practices. Some of these standards are captured later in this chapter.

²⁴ The Commission decided that this matter should form a separate issue for consideration.

²⁵ *ibid.*

²⁶ The Credit Bureau Regulations were published in the Government Gazette of 31 July 2014 in terms of section 59 read together with section 3 of the Bank of Namibia Act, 1997 (No. 15 of 1997).

²⁷ This issue is being addressed in the Consumer Protection project of the Commission in conjunction with the Ministry of Trade, Industrialization and SME Development.

²⁸ This issue deals essentially with the revision of sections 35 and 46 of the 1936 Insolvency Act.

- (g) whether or not Namibia should consider developing provisions to regulate cross-border insolvency issues in Namibia;²⁹
- (h) whether or not there is a need introduce business-rescue provisions and/or to amend key provisions of judicial management to make it more effective;
- (i) whether or not there is a need for Namibia to regulate the insolvency profession in Namibia; and
- (j) whether or not there is a need to regulate the insolvency of trusts in Namibia.

The issues raised in the Discussion Paper point to the complex interplay between the 1936 Insolvency and other laws such as the Companies Act, 2004 (Act No. 28 of 2004), the Close Corporations Act, 1988 (Act No. 26 of 1988), the Banking Institutions Act, 1998 (Act No. 15 of 1998), the Magistrates Courts Act, 1944 (Act No. 32 of 1944), and even the Payment Systems Management Act, 2003 (Act No. 18 of 2003). In fact, some provisions of the 1936 Insolvency Act are applicable to the winding-up of companies and close corporations that are unable to pay their debts.³⁰ Nevertheless, it is common cause that some of these statutes, such as the 1998 Banking Institutions Act and the 2003 Payment Systems Act deal with concepts that are not limited to law and require an in-depth understanding of the country's financial infrastructure.

Indeed, this reality reflects then some of the challenges confronting a holistic review of the country's insolvency legal framework: Is it practicable to address all of these issues concurrently? The Commission is finding that this is not a realistic goal given their present term of only three years.³¹ In the result, it decided to limit

²⁹ This issue was discussed at length in V Weyulu, *The Reform of Namibia's Cross-Border Insolvency Framework* LLM thesis (University of the Western Cape 2015)

³⁰ See sections 344 and 422 of the Companies Act, 2004 (Act No. 28 of 2004) and sections 66, 72 and 82 of the Close Corporations Act, 1988 (Act No. 26 of 1988).

³¹ Section 4(1) of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991) (as amended).

the focus of the project to address only those issues directly stemming from the wording of the 1936 Insolvency Act. Those issues are:

- (a) the regulation of the insolvency profession in Namibia;
- (b) the development of a clear framework for the insolvency of trusts;
- (c) the development of provisions to deal with cross-border insolvency issues in Namibia; and
- (d) the legal enforcement of set-off provisions in master agreements in the event of insolvency;

Stakeholders were invited to submit written input on these issues before or on 17 June 2016 and the first draft of the Insolvency Bill was developed in October 2016.³²

The next part of this chapter discusses these issues at some length.

3 The issues for consideration

3.1 The legal enforceability of set-off provisions in master agreements

In its current form, section 35 of the 1936 Insolvency Act states that where a seller is declared insolvent after the sale of property, but before the transfer thereof, then the property will vest in the trustee of the insolvent estate. The purchaser who has already paid the purchase price before the seller's insolvency, has no real right in the property, and becomes only a concurrent creditor in the insolvent estate of the seller.³³

Sections 35A and 35B of the 1995 Insolvency Amendment Act introduce an exception to this power of the trustee to enforce or abandon a contract contract for the sale of property.³⁴ The exception is created, firstly, for agreements entered

³² The Insolvency Draft Bill is still a confidential document and will be availed to stakeholders in due course. For any further information pertaining to the Insolvency Draft Bill, stakeholders are encouraged to contact the author.

³³ See also the South African case of *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC) that deals with section 35 of the 1936 Insolvency Act.

³⁴ No. 32 of 1995.

into by market participants on an exchange³⁵ and, finally, by parties to a master agreement for over-the counter (OTC) derivatives transactions.³⁶

The master agreement referred to in section 35B is a standard document published by the International Swaps and Derivatives Association (ISDA) that is commonly used by two parties to govern the terms and conditions dealing with OTC derivatives transactions.³⁷ Section 5 of the master agreement enables one party to unilaterally terminate the agreement early if an ‘Event of Default’ or ‘Termination Event’ occurs in respect of the other party. One such common event is where the other party is declared insolvent.³⁸

Once the agreement is terminated (as a result of the insolvency of the other party, for example), then section 6 of the master agreement sets out the procedure to calculate a ‘net’ payment upon the early termination of a derivative transaction. The calculation of this ‘net’ payment upon early termination of a derivative transaction is commonly referred to as close-out netting, which is a form of set-off that allows parties to set-off amounts owed reciprocally on the insolvency of one of the parties.³⁹

The effect of section 35B, then, is to legally enforce the provisions of the master agreement upon insolvency in such a way that the trustee no longer has the power to decide whether to enforce or abandon contracts dealing with OTC derivatives transactions. In this way, the party terminating the agreement is no longer a concurrent creditor, as he or she is paid from the insolvent estate before all creditors can be paid.⁴⁰

³⁵ Section 35A of the South African Insolvency Act, 1936.

³⁶ Section 35B of the South African Insolvency Act, 1936 in S James, *The Law of Derivatives* (New York: Informa Law from Routledge 2009) 2 – 3. (defines a derivatives transaction as “a bilateral contract or payments exchange whose value is derived, as its name implies, from the value of an underlying rate or index. Today, derivatives transactions cover a broad range of ‘underlyings’ – exchange rates, commodities, equities and other indices)

³⁷ This agreement is commonly referred to as the “ISDA Master Agreement”. For purposes of this chapter, however, it is shortened to just the “master agreement”. There are several versions of this master agreement. The 2002 version that is used in this chapter is available on the International Swaps Derivatives Association (2002) *Master Agreement* <www2.isda.org> last accessed on 12 June 2017, for a fee.

³⁸ Section 5(a)(vii) of the master agreement.

³⁹ V R Johnson, “International Financial Law: The Case Against Close-Out Netting” (2015) Vol. No. 33 (Issue 2) *Boston University International Law Journal*, 395 – 420. Johnson correctly argues that when legally enforceable, ‘close-out netting puts certain fortunate creditors into a position of super-priority far preferable to the position of most creditors of a bankrupt estate’. Be that as it may, Johnson still argues that if legally enforceable, close-out netting is an efficient process that reduces systemic risk, which could otherwise lead to failure of the financial system.

⁴⁰ The legal enforcement of the master agreement, in so far as it makes provision for the ‘netting’ of monies owed by the parties, might therefore conflict with the *pari passu* principle.

In the same way, the effect of the amended section 46 of the South African 1936 Insolvency Act is to allow set-off between an exchange or a market participant as defined in section 35A and between any other party under an agreement defined in section 35B.

Besides the provisions of the 1995 Insolvency Amendment Act, ISDA developed the Model Netting Act, which provides a template legislation that can be adopted by jurisdictions where close-out netting does not work effectively.⁴¹ This Model Netting Act has so far been adopted by only one African country in 2009 (i.e., Mauritius).⁴²

Given the limited precedents (particularly within the African context) and the lack of definitive guidance on OTC derivatives transactions, the challenge for the Commission lies in correctly identifying all the parties to OTC derivatives transactions or even those parties on an exchange in a Namibian context.⁴³ Another challenge for the Commission lies in weighing the interests of one creditor, on the one hand (i.e., the financial institution), against the interests of the *concursum creditorum*,⁴⁴ on the other hand.

Although provisions similar to the South African 1936 Insolvency Act have been introduced by the Commission in the first draft of the Insolvency Bill, the Commission is still considering whether or not the adoption of the Model Netting Act might be a suitable legal framework to enforce set-off provisions not only in master agreements but also in agreements entered into by market participants on an exchange.

⁴¹ Although there are several versions of this Model Netting Act, this chapter makes use of the latest version, the 2006 Model Netting Act, that can be accessed at www.isda.org/docproj/pdf/Model-Netting-Act101007.pdf last accessed on 15 June 2017.

⁴² See sections 338 to 365 of the Mauritius Insolvency Act, 2009 (Act No. 3 of 2009).

⁴³ Department: National Treasury 'Regulating Over-the-Counter Derivatives Markets in South Africa' 2013 [www.treasury.gov.za/otc/Regulating%20over-the-counter%20\(OTC\)%20derivates%20markets%20in%20South%20Africa.pdf](http://www.treasury.gov.za/otc/Regulating%20over-the-counter%20(OTC)%20derivates%20markets%20in%20South%20Africa.pdf) last accessed 12 June 2017. The Department of National Treasury argues that section 35(a) of the South African 1936 Insolvency Act limits the protection afforded to only domestically established market infrastructures that include an exchange, central securities depository and a clearing house.

⁴⁴ The meaning of a *concursum creditorum* was explained in *Walker v Syfret NO 1911 AD 141* taking into account the rights of the creditors as a group over the rights of individual creditors.

3.2 The regulation of the insolvency profession

The 1936 Insolvency Act does not set out any specific regulations in terms of which trustees are appointed. The 1936 Insolvency Act only makes provision for the appointment of a provisional trustee by the Master of the High Court and, thereafter, for the appointment of a final trustee at the first meeting of creditors who have proved their claims against the insolvent estate.⁴⁵ If the creditors do not elect a trustee, then the Master of the High Court is empowered to appoint a trustee.⁴⁶

Apart from the provisions of section 55 of the 1936 Insolvency Act that guide the Master of the High Court with the appointment of trustees generally, there are no other criteria upon which such appointments should be made.⁴⁷ Under the present system of appointing provisional trustees, the Master of the High Court requires only a declaration that either a legal practitioner or a practicing accountant is prepared to serve; has the necessary infrastructure at their disposal to properly attend to the duties of a trustee; and, finally, that they are in a position to lodge security to the Master's satisfaction.

Regrettably, the Commission has learned from the consultations conducted throughout 2013 that there are some ethical issues which challenge the insolvency profession in Namibia.⁴⁸ The above requirements may therefore leave the door open to the perception of a conflict of interest and unaccountability, as many of the appointed trustees are legal practitioners and accountants who are subject to discipline by different professional bodies.

The Commission has proposed the establishment of an Insolvency Commission to supervise the licensing of insolvency practitioners in Namibia. Unlike the South African Restructuring and Insolvency Practitioners Association (SARIPA), this Insolvency Commission is envisaged to be an agency within the Public Service and would replace the functions of the Master of the High Court in so far as the appointment and supervision of provisional and final trustees are concerned.⁴⁹

⁴⁵ Sections 18, 40 and 54(1) of the Insolvency Act, 1936.

⁴⁶ Section 54(5) of the Insolvency Act, 1936.

⁴⁷ No. 24 of 1936.

⁴⁸ Law Reform and Development Commission Discussion Paper 32. *Discussion Paper on Issues Relating to the Insolvency Act, 1936*. (February 2015), 32.

⁴⁹ SARIPA is a non-profit organisation that was formed in 1986 to achieve professionalism in the insolvency profession in South Africa.

Inadvertently, the requirements listed above for the appointment of provisional trustees may be done away with, as much emphasis would then be placed on professional bodies to maintain and enforce rules that enable their members to serve as insolvency practitioners.

Although the Commission recognises the importance of regulating the appointment of trustees, a balance must be drawn “between stringent requirements that lead to the appointment of highly qualified persons, but which may significantly restrict the pool of professionals considered to be appropriately qualified and to add to the costs of the proceedings, and requirements that are too low to guarantee the quality of the service required”.⁵⁰

It goes without saying therefore that the proposals by the Commission in this respect should be guided by practical realities confronting the Namibian environment. Discussions are still underway about the continued role of the Master of the High Court in the administration of insolvent estates.

In addition to the regulation of the insolvency profession, an institutional infrastructure will be required to facilitate the monitoring and registration of these professionals. Whether it means establishing an independent body like the Commission proposes in the draft insolvency Bill or by capacitating the Office of the Master which already has this mandate is ultimately the question. Provisions for the regulation of this profession have been developed by countries such as Kenya, Malawi and recently Zimbabwe in their insolvency laws that have been repealed in the last few years.

3.3 Cross-border insolvency provisions

Cross-border insolvency occurs when a debtor in one country becomes the subject of insolvency proceedings in another country where he or she has assets and liabilities. Ultimately, several challenges confront the courts in all these jurisdictions regarding the manner in which this debtor’s property should be collected and for whose benefit it should be distributed.

⁵⁰ United Nations Commission on International Trade Law ‘Legislative Guide on Insolvency Law’ 2004 <www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> last accessed on 04 April 2014.

The 1936 Insolvency Act does not contain any provisions addressing cross-border insolvency issues.⁵¹ The Namibian High Court applies principles of Roman-Dutch common law in order to recognize foreign insolvency representatives and foreign insolvency proceedings in Namibia. The problems of applying these principles to resolve cross-border insolvency disputes are well documented.⁵²

First, the Namibian High Court has the absolute discretion to grant or refuse an application for the recognition of a foreign insolvency representative.⁵³ This inevitably means that the requirements and conditions for the recognition of foreign insolvency representatives and even of foreign insolvency proceedings change over time. The other problem is that these common-law principles are unable to ensure certainty in the equal treatment of creditors across national lines. It is crucial for any cross-border insolvency legislation to improve the expectations of creditors about the outcome of cross-border insolvency proceedings. Tate Mike would not even consider lending to Magano if he were highly uncertain about the outcome of probable insolvency proceedings.

In the result, there is a need for an improved cross-border insolvency legal framework as the uncertainty caused by the above-mentioned problems affects the ability of foreign insolvency representatives as well as that of foreign creditors to access Namibian courts.

⁵¹ No. 24 of 1936.

⁵² See for example D Ailola, "Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention" (1999) 31 (1) *Comparative and International Law Journal of Southern Africa*, 54 – 71. In that article, Ailola argues that although South African courts traditionally recognise foreign trustees on the basis of comity and convenience, there is no certainty nor consistency to date as these requirements continue to change over time.

The same argument applies to Namibia because in addition to the considerations of comity and convenience, Namibian courts have shown in *Bekker NO v Kotze and Others* 1994 NR 345 that they will recognise foreign insolvency representatives only where a debtor is domiciled within the jurisdiction of the foreign court in which the sequestration order was granted or where the debtor has submitted to the jurisdiction of that court. In R H Zulman, "Cross-Border Insolvency in South African Law" (2009) 21 (5) *South African Mercantile Law Journal*, 804 – 817. Zulman argues that this list continues to expand in size as new factors are continuously considered by the courts. See also the United Nations Commission on International Trade Law (1997) *Model Law on Cross-Border Insolvency and Guide to Enactment*. <www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> last accessed on 3 October 2017 which states on page 21 that 'approaches based purely on the doctrine of comity ... do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law.'

⁵³ *Oliver NO v Insolvent Estate D Lidchi* 1998 NR 31.

The Commission recommends the adoption of the UNCITRAL Model Law as the basis needed to develop clear and predictable rules to effectively deal with the various aspects of cross-insolvencies in Namibia.⁵⁴

3.4 The insolvency of trusts

There are no Namibian cases dealing with the insolvency of trusts. This issue however, was considered in the South African decision of *Magnum Financial Holdings v Summerly NO* which held that a trust fell within the definition of a 'debtor' as set out in terms of section 2 of the 1936 Insolvency Act.⁵⁵ The effect of this holding is that in the event of a trust's insolvency, the appropriate remedy is to apply for the sequestration of the trustees' estates in accordance with the procedure set out in the 1936 Insolvency Act.⁵⁶

Whether this holding has the same consequences for Namibian trusts is yet to be tested by our courts. In the absence of such a clarification in Namibia, several stakeholders have called for the liquidation of trusts to take place in terms of the provisions of the Companies Act, 2004.⁵⁷ These stakeholders argue that trusts are increasingly becoming commercial entities that are now conducting businesses in the same manner as many companies and close corporations. Following this argument, the requirement to prove that the sequestration of a trust will be to the advantage of creditors in terms of the 1936 Insolvency Act may be a too cumbersome test for trusts to pass, particularly where the trust in question does not own any assets to benefit all its creditors.⁵⁸

⁵⁴ United Nations Commission on International Trade Law (1997) *Model Law on Cross-Border Insolvency and Guide to Enactment* <www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> last accessed on 3 October 2017. The Model Law is based on four key principles, namely access, recognition, relief and cooperation and coordination. The impact of these principles, if adopted in Namibia, are discussed generally in V Weyulu, *The Reform of Namibia's Cross-Border Insolvency Legal Framework* (2017) <www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary-papers.html> last accessed on 19 June 2017 and comprehensively in V Weyulu, *The Reform of Namibia's Cross-Border Insolvency Framework* LLM thesis (University of the Western Cape 2015).

⁵⁵ 1984 (1) SA 160 WLD.

⁵⁶ Trusts are registered in terms of the Trust Moneys Protection Act (No. 34 of 1934) and have no legal personality because they are, simply, arrangements that allow people to hold assets (without owning them) for the benefit of the trust beneficiaries.

⁵⁷ Act No. 28 of 2004.

⁵⁸ See fn 9 above.

The Commission was not satisfied that the requirement to prove advantage to creditors was too cumbersome and that it warranted a liquidation procedure for trusts in terms of the Companies Act, 2004. This is because, unlike a company or a close corporation, both a trust and a partnership have no separate legal personality and are therefore not juristic persons which can be liquidated in terms of the Companies Act, 2004 or the Close Corporations Act, 1988.⁵⁹ Nonetheless, it noted the importance of clarifying the insolvency procedure that must be applicable to trusts and to clear up any ambiguity about the application of the sequestration procedure, and proposed that the definition of a 'debtor' in the Insolvency Draft Bill include a trust that is registered in terms of the Trust Moneys Protection Act, 1934.⁶⁰ In addition to this definition, an elaborate provision was developed to deal with the manner in which the application for the sequestration of a trust must be made and the separation of trust property from the estate of its separate trustees.⁶¹

4 Conclusion: the way forward

The purpose of the chapter was to critically examine the 1936 Insolvency Act in order to raise some awareness about the importance of the issues raised by the Commission in this review process.

Generally, the chapter discussed the overall significance of insolvency laws and outlined the insolvency process in terms of the 1936 Insolvency Act. It also considered the mandate of the Commission in the review of the 1936 Insolvency Act. Specifically, the chapter furthermore discussed the importance of issues that are being considered by the Commission in this manner:

⁵⁹ C Visser, J T Pretorius, R Sharrock and M Van Jaarsveld, *Gibson South African Mercantile & Company Law*, 8th ed (Pretoria: Juta & Company Ltd 2003) 247. See also the South African case of *Melville v Busane and Another* 2012 (1) SA 233 (ECP) where the Eastern Cape High Court held that Companies Act (No. 71 of 2008) cannot be applied to wind-up or liquidate a trust.

⁶⁰ Act No. 34 of 1934.

⁶¹ It is important here to note the dictum expressed by Cameron JA in the South African case of *Land and Agricultural Bank of South Africa v Parker & Others* 2005 (2) SA 77 (SCA). In this case, Justice Cameron highlighted the use and abuse of trust forms as business dealings and the erroneous assumption that a trust has legal personality.

Firstly, Namibia may need to consider the enforcement of financial contracts in the event of insolvency. In order to do this, the Commission is proposing the amendments made to section 35 in South Africa and the adoption of the Model Netting Act as a suitable legal framework to enforce set-off provisions not only in master agreements but also in agreements entered into by market participants on an exchange. The absence of a clear policy framework directing the enforcement of close-out netting provisions means increased credit and systemic risk for financial institutions and for participants in financial transactions perhaps to the detriment of Namibia's domestic financial market.⁶²

Secondly, the discussion of the key issues for consideration also illustrates that Namibia needs to be able to regulate and monitor insolvency professionals who are tasked to administer the insolvency processes in order to ensure that the objectives of the law are met and that there is no perception of partiality where the involvement and payment of creditors are concerned. The Commission is recommending in this regard, the establishment of an Insolvency Commission to supervise the licensing and conduct of insolvency practitioners in Namibia.

In the same way, Namibia also needs to consider the introduction of cross-border insolvency provisions. The need for clear and predictable rules cannot be overstated: both local and international investors need this information to calculate the risks in order to determine the price and interests of lending and establishing businesses here in Namibia. If Namibian courts continue to apply principles of Roman-Dutch common law to address issues presented in cross-border insolvencies, then Namibia may risk losing her investor confidence in the insolvency process that is provided by the 1936 Insolvency Act, which in turn, will result in decreased investment opportunities from neighbours beyond our borders.

Finally, the discussion of the insolvency of trusts reflects that there is a need to clarify the applicable provisions to trusts in the event of insolvency. Including trusts and setting out the provisions that will apply in the event of an insolvent trusts will eliminate any uncertainty that is currently perpetuated by the definition of a

⁶² Johnson, V.R (2015) 114.

‘debtor’ in section 1 of the 1936 Insolvency Act. If this ambiguity is left to persist, then many people may spend substantial financial resources to launch cases with the High Court of Namibia for clarification, only to be advised that the provisions of the 1936 Insolvency Act apply.

By discussing the importance of these issues as well as the proposed solutions to address them, the chapter highlights that there is some room for improvement and development, taking into consideration the best international standards discussed above. Of course, it is true that statistics provided by the Master of the High Court show that only 26 legal entities were liquidated and only four (4) insolvent estates of natural persons were sequestrated during 2012, however, it would be erroneous to wait for insolvencies to become commonplace before measures are put in place to ensure that Namibia legally enforces financial contracts in the event of insolvency; regulates the insolvency profession; provides a framework for cross-border insolvencies and clarifies the insolvency of trusts.

Nevertheless, consultations continue and stakeholders are invited to participate in this review process and to provide comments or any input on the issues discussed above. This exercise by the Commission could undoubtedly, enable people such as Magano and Tate Mike to be more certain about insolvency proceedings in order to be in a position to facilitate increased lending and access to credit.

CHAPTER 13

THE REVIVAL OF SMALL AND MEDIUM ENTERPRISES IN NAMIBIA THROUGH AN EFFECTIVE INSOLVENCY LAW REGIME

by
Chisom Okafor

1 Introduction

1.1 The Namibian insolvency legal framework

The Insolvency Act, 1936 (Act No. 24 of 1936) is the principal insolvency statute in Namibia. It regulates the sequestration of individual and partnership estates (which is often termed ‘personal insolvency’). The winding-up of legal entities (which is termed ‘corporate insolvency’) is regulated by the Companies Act, 2004 (Act No. 28 of 2004) and the Close Corporations Act, 1988 (Act No. 26 of 1988).

Even though legal entities are regulated by the 2004 Companies Act and the 1988 Close Corporations Act, provisions of the Insolvency Act are also applied to companies or close corporations that are unable to pay their debts. According to a World Bank report on the Observance of Standards and Codes (ROSC), Namibia’s insolvency regime suffers from the same complexities that characterize the original South African model, in that the provisions applicable to insolvency proceedings are dispersed across different statutes that are also from distinct time periods.¹

One is therefore forced to consult principles of common law, precedent, and various pieces of legislation to get a comprehensive picture of the relevant insolvency structures in place in Namibia. As a final point, the ROSC recommends that “an effort should be made to coordinate the different pieces of legislation”.² Legislative attempts to rectify the problematic state of the current insolvency regime were made and reflected in the Insolvency Amendment Act, 2005 (Act No. 12 of 2005).³

¹ ROSC P 3. The Namibia Insolvency and Creditor/Debtor Regimes (ICR) Report on the Observance of Standards and Codes (ROSC) is an initiative established by the World Bank to assess the insolvency regime of countries against international standards of best practice such as the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes as well as recommendations of the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law, in order to guide law reform for those countries

² *ibid*, 36.

³ The Insolvency Amendment Act (No. 12 of 2005) amends the Insolvency Act, 1936 by inserting and deleting certain definitions and references to laws that are not applicable in Namibia. Furthermore, the Insolvency Amendment

However, as this chapter shows, the current insolvency regime is insufficient to address the pertinent issues that may affect ordinary businesses such as small and medium enterprises (SMEs). Despite their significant contributions to the socio-economic development of the country, Namibian small and medium sized entities have the lowest survival rates in the world, resulting in high rates of business failure and job losses created by these entities.⁴ The current insolvency regime does not provide the necessary provisions to either support business survival or encourage entrepreneur engagement.

Therefore, this chapter aims to introduce a legal mechanism through an insolvency law framework that could potentially minimize the rate of business failure among SMEs, thus restoring them to profitability while also creating the provisions necessary to encourage entrepreneurs to invest in SMEs.

This chapter will justify this argument by first explaining how insolvency is defined in Namibia. Secondly, this chapter will explain the importance of SMEs in Namibia and the cause of their low survival rates. As a developing market, SMEs present an opportunity to benefit individual entrepreneurs and the individuals they employ. Thirdly, this chapter will explain what an ideal insolvency framework would look like. This chapter will argue for the creation of an insolvency commission in order to oversee each case. Finally, this chapter will address how both judicial management and business rescue proceedings can be employed in order to support SMEs. Insolvency law in Namibia needs to both reflect international best practices and the unique needs of the Namibian economy.

Act, 2005 abolishes the requirement that certain notices be published in newspapers; it provides for the prescription of certain forms, amounts, fees and tariffs by the Minister by regulation; it adjusts certain provisions to be compatible with the Namibian Constitution and other laws of Namibia; it increases certain amounts specified in the Insolvency Act, 19336; it deletes certain provisions which are no longer applicable; it provides for certain notices to be given by registered post; it provides for the termination of an employee's contract of service in accordance with the Labour Act, 2007; it provides for the convening of a special meeting of creditors for the purpose of interrogating an insolvent; it provides that when a trustee disputes a claim, the trustee is required to furnish the claimant with reasons; it provides that the High Court of Namibia may on application authorize the appointment of a person as trustee who is disqualified on certain grounds; it provides for the deletion of the qualification that the Master of the High Court of Namibia need not give the actual reason for declining to confirm the election of a trustee; it requires an insolvent to give notice of the intention to apply for rehabilitation to all known creditors and to specify the assets of the insolvent estate; it abolishes the requirement that an insolvent must keep proper records in Dutch or German; it extends the Minister's power to make regulations; it substitutes certain expressions and repeals the Schedules to the Insolvency Act, 1936.

⁴ M C Maphiri, *Business rescue In south Africa and its practical applications to SMEs* (2015) https://open.uct.ac.za/bitstream/item/22571/thesis_law_2015_maphiri_mikovhe_comfort.pdf?sequence=1 (accessed 5 June 2017).

1.2 Insolvency as a key concept

The Insolvency Act does not define the term “insolvency”. However, in the case of *Venter v Volskas Ltd*,⁵ the test for insolvency is whether the debtor’s liabilities, fairly estimated, exceed his assets, fairly valued.

The balance sheet test is usually employed to determine whether the debtor’s liabilities exceed his assets.⁶ The process of insolvency involves asset liquidations whereby a company is closed down by converting all the assets into cash value to be distributed, sold off to the creditors and the shareholders of the company.⁷

Tests for insolvency

One of the grounds upon which a company in Namibia may be liquidated is when a company is unable to pay its debts.⁸ In terms of section 350(1) of the Companies Act 28 of 2004, a company is deemed unable to pay its debts in three instances. First, if a creditor with a claim of at least N\$100 against the company has demanded payment of the claim (if due) and the company fails to satisfy the claim within 15 days.⁹

Secondly, if any process issued on a judgment or court order in favour of a creditor is returned by the deputy sheriff or messenger with a note that no sufficient disposable property or no disposable property has been found to satisfy the judgment or order.¹⁰ Finally, a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts. In order to prove that a company is unable to pay its debts, it may be proved that the company’s liabilities exceed the company’s assets (i.e the company is factually insolvent) or that the company is unable to pay its debt as they become due in the normal course of business (i.e. the company is commercially insolvent).¹¹

⁵ 1973 3 SA 175 (T) 179.

⁶ CJ Nagal 2006. Commercial Law 3 ed Lexis Nexis: Durban. 403.

⁷ B H Hwang, No End in Sight: Why Insolvency Regimes Matter for Small Business Growth (2014) <<http://blogs.worldbank.org/psd/comment/reply/13324>> last accessed 2 June 2017.

⁸ LexAfrica Guide to Insolvency and Business Restructuring in Africa 2016/2017, 59.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*, 59.

2 The relevance of SMEs in Namibia

Currently, SMEs are defined according to two criteria: the number of employees and annual turnover.¹² SMEs are categorized as follows:

No of Employees		(Annual Turnover (NAD
Micro	1-10	Up to N\$300,000
Small	11-30	Up to N\$3,000,000
Medium	31-100	Up to N\$10,000,000

SMEs contribute significantly to the transition of agricultural-led economies to industrial ones by furnishing plain opportunities for processing activities, which can generate sustainable source of revenue and enhance the development process.¹³ SMEs shore up the expansion of systemic productive capability, which helps to absorb productive resources at all levels of the economy and add to the formation of flexible economic systems in which small and large firms are interlinked.¹⁴

Such linkages are crucial for the attraction of foreign investment. In light of this, the integration of SMEs into the national economy and the participation of SMEs in key value and supply chains of major national industries will have a knock-on effect on many larger and more formal businesses, and hence benefit the Namibian economy as a whole.¹⁵

The innovation and creativity aspect also form the basis for most of the SMEs across the world despite their low success rate. However, business failure in itself should not bar the entrepreneur from carrying on business activities in any other more viable field of operation.¹⁶

¹² Ministry of Trade and Industry, NATIONAL POLICY ON MICRO, SMALL AND MEDIUM ENTERPRISES IN NAMIBIA (2015) <<http://www.mti.gov.na/downloads/MSME%20policy%20final.pdf>> last accessed 2 June 2017. 11.

¹³ Kongolo M. 2010. Job creation versus job shedding and the role of SMEs in economic development <https://pdfs.semanticscholar.org/2f3c/bb1901c90a434dc36df0d7ebaf5beec6f3f4.pdf> (accessed 5 June 2017).

¹⁴ Kongolo M. 2010. Job 2010 creation versus job shedding and the role of SMEs in economic development <<https://pdfs.semanticscholar.org/2f3c/bb1901c90a434dc36df0d7ebaf5beec6f3f4.pdf> > last accessed 5 June 2017.

¹⁵ Ministry of Trade and Industry 2015. NATIONAL POLICY ON MICRO, SMALL AND MEDIUM ENTERPRISES IN NAMIBIA <<http://www.mti.gov.na/downloads/MSME%20policy%20final.pdf>> last accessed 5 June 2017. 12.

¹⁶ India Institute of Corporate Affairs, SMEs & Existing Insolvency Regime: An Introduction. <http://www.iica.in/images/confdetailpaper/Country_Papers.pdf> last accessed 19 June 2017. 40.

Continued entrepreneur endeavors can be facilitated by an efficient insolvency regime which allows the SMEs to close down their business quickly and efficiently. Insolvency procedures help entrepreneurs close down unfeasible businesses and start up new ones.¹⁷ This ensures that the human and economic resources of a country are constantly rechanneled to efficient use, thereby increasing the overall productivity of the economy.¹⁸ This also provides entrepreneurs with the incentive to put their innovation and creative ideas into practice.

However, as previously stated above, despite its role in fostering economic growth, SMEs have the lowest survival rates in the world and Namibia is no exception. The poor performance of Namibian SMEs may be as a result of the following inherent attributes of these entities: Firstly, SMEs are typically financed through private family wealth or through bank loans; they do not have the capacity to obtain financing by issuing share capital to the general public like larger entities.¹⁹

Secondly, SMEs are often undercapitalized entities; they do not have adequate immovable and valuable movable property to offer as security to financial institutions when in need of financing.²⁰ However, there is currently a proposal by the Law reform and Development Commission to introduce a security over movable property regime that will assist entities such as SMEs in securing quicker access to credit.

Finally, there is no major separation between ownership and control in SMEs. The managers of the company are in most cases the majority and controlling share shareholders of the company, and they have all the voting rights and often make company decisions out of their own discretion with no special resolutions, which leads to an abuse of power by the manager of SMEs.²¹ The above mentioned features of SMEs potentially lead to the high failure rates of SMEs in Namibia.

Therefore, such legislative reform is crucial not only to improve SMEs access to credit but to also allow insolvency of small businesses to be dealt with in a comprehensive manner that enables revival or rescue before liquidation and winding up of the business.²²

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ D Milman, *Governance of Distressed Firms: Corporations, Globalisation and the Law* (2013) 35.

²⁰ *ibid.*

²¹ *ibid.*, 35.

²² *ibid.*

3 Designing an insolvency framework for SMEs

According to the ROSC, despite the importance of SMEs for emerging markets, relatively little has been done in Namibia on the lack of effective alternative measures available to enterprises that are unable to pay their debts or to meet their obligations, apart from the provision of liquidation proceedings. Furthermore, the UNCITRAL Working Group V (Insolvency Law) of which Namibia is a participant provides that the mechanisms provided by the UNCITRAL Legislative Guide are not sufficient to address all of the needs of SMEs in light of the significant impact that SMEs have on the economy and on economic development.²³ Namibia needs an insolvency framework that benefits SMEs by addressing two issues: the cost effectiveness of insolvency processes and the time required for efficient insolvency. The cost of an insolvency proceeding should be properly managed due to the low value of the assets that most of the SMEs possess and the limited number of stakeholders involved.²⁴ This requires a commission to regulate insolvency practitioners and a legal framework to limit the occurrence of fraudulent insolvency practices.²⁵

In order to better support SMEs and the transfer of capital, it is recommended that Namibia's insolvency law provides for the establishment of an insolvency commission. An insolvency commission or regulatory body may consist of a panel of professionals, for example, auditors, lawyers, business consultants, etc. The commission should appoint a business rescue practitioner with experience in an SME environment and fix an amount of remuneration in the case of insolvency of SMEs, by taking into consideration the size of the entity.

The created commission would also be responsible for identifying cases where insolvency is just a farce, intended to defraud the creditors and other stakeholders. A legal framework should specifically provide for deterring, detecting and punishing such fraudulent practices.²⁶

²³ The working group considered the mechanisms suitable for the insolvency of micro, small and medium-sized enterprises (MSMEs) at its 45th session held from 21 – 25 April 2014, New York. This document can be accessed from the United Nations Commission on International Trade Law, (UNCITRAL) Mechanisms suitable for the Insolvency of Micro, Small and Medium-sized Enterprises, <http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html> last accessed 6 June 2017.

²⁴ India Institute of Corporate Affairs, SMEs & Existing Insolvency Regime: An Introduction *op. cit.*

²⁵ *ibid.*

²⁶ *ibid.*

In light of the above, the development of an effective insolvency system in Namibia bears the potential for enhancing access to and availability of credit, increasing returns to creditors, preserving jobs, and fostering economic growth.²⁷ In addition, it will help save viable businesses, and allows failed businesses to exit the market efficiently and effectively, returning their assets to productive use.²⁸

4 Business revival: judicial management

Section 433 of the Namibian 2004 Companies Act introduces a special debt relief procedure called judicial management, which is a temporary court-supervised rescue plan that provides an alternative to liquidation and winding-up of a company.

The purpose of judicial management is to enable a failing company to restructure its business operations thus providing an alternative to liquidation.²⁹ Companies play a significant role in an economy and their demise affects not only creditors but also different groups of people that have a working relationship with the company.³⁰ These include employees, suppliers, shareholders and other stakeholders. The legislature recognised the need to save this relationship as far as possible. They attempted to do so by amongst other things, providing for judicial management.³¹ Under section 433 (1) of the 2004 Companies Act, a company can approach the court for a judicial management order when it is unable to pay its debts, unable to meet its obligations, and has not become or is prevented from becoming a successful concern by reason of mismanagement or for any other cause. Furthermore, a company is required to show that there is a reasonable probability that it would be able to pay its debts. The court also has a discretion to grant the order if it is just and equitable to do so.³²

²⁷ B H Hwang, No End in Sight: Why Insolvency Regimes Matter for Small Business Growth (2014) [Document1<http://blogs.worldbank.org/psd/comment/reply/13324>](http://blogs.worldbank.org/psd/comment/reply/13324) last accessed 2 June 2017.

²⁸ *ibid.*

²⁹ F I Ofwono Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law (2014) https://open.uct.ac.za/bitstream/item/13287/thesis_law_2014_ofwono_fi.pdf?sequence=1 last accessed 7 June 2017.

³⁰ A Loubser, 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 SA Merc LJ 137 at 137.

³¹ *ibid.*

³² Companies Act 2004 section 433 (1) (b).

The persons entitled to apply to court for the judicial management order are the company itself, one or more of the creditors (including contingent and prospective), one or more of the members of the company, the Master in the case of a company being wound up voluntarily and a provisional judicial manager if a final order was being sought.³³ If on application for a winding up order it appeared to the court that, if the company were placed under judicial management, the grounds for its winding up may be removed *and* the company would become a successful concern *and* it was just and equitable to do so, an order for judicial management could be made.³⁴

The benefit of judicial management is that it provides a breathing space to companies on the brink of collapse in order to allow them to reorganise their affairs. It tries to achieve this by providing for a moratorium against creditors, divesting the control of the company from previous management who assumedly had run it to the ground, and by providing for the appointment of a judicial manager to turn the company around.³⁵

Shortcomings of judicial management

Judicial management is not designed to facilitate SME corporate rescue because it is a procedure that relies heavily on court processes and is targeted more towards larger public and private companies.³⁶ This creates a problem for SMEs due to the costs associated with approaching the courts.³⁷ When a corporate entity is facing financial troubles, the last thing on the mind of the management is to spend more money, which in any case is limited.³⁸

In addition, the requirement that there must be a reasonable probability that the company will become a successful concern poses a heavy burden of proof on the applicant.³⁹ Judicial management would have been more favourable for an applicant had the requirement been 'a reasonable possibility' as this would have required a lesser burden of proof.⁴⁰

³³ *ibid*, section 351 (1).

³⁴ *ibid*, section 433(3).

³⁵ F I Ofwono, Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law (2014) <https://open.uct.ac.za/bitstream/item/13287/thesis_law_2014_ofwono_fi.pdf?sequence=1> last accessed 7 June 2017.

³⁶ Section 20 and 21 of the 2004 Companies Act.

³⁷ H Rajak and J Henning, 'Business Rescue for South Africa' (1999) 116 SALJ 262, 268.

³⁸ *ibid*.

³⁹ D A Burdette, 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1) (2004) 16 SA Merc LJ 241, 249.

⁴⁰ *ibid*.

Section 433 (1) (a) of the Companies Act requires that the company ‘must not be able to pay its debts’ before a judicial management order could be granted. The implication is that the company must be insolvent or on the brink of insolvency. This is counter-productive to the overall, aim of judicial management i.e. rescuing the business and greatly undermines the process, because at such time it might be too late to turn the business around.⁴¹

In the case of *Tenowitz v Tenny Investments (Pty) Ltd 1979 2 SA 680*, judicial management was held to be an extraordinary measure and not a primary option in terms of debt relief or business rescue. In light of this, creditors of a company that were unable to receive payment for their outstanding debts had the right to liquidate the company and therefore disregard judicial management altogether.⁴² Even if judicial management exists as an alternative to the liquidation or winding-up of a company, stringent requirements as discussed above must be met before a court will grant an order for the company’s judicial management. This was evident in the case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd 2001 (2) SA 727* where the court found that a judicial management order cannot be easily granted, as judicial management is an extraordinary remedy and had to be treated by the courts as such.⁴³

According to the ROSC, the judicial management process is not in line with emerging markets and international best practices when it comes to corporate restructuring. The Namibian procedure does not follow these standards as it was highly regulated, inaccessible and hardly used by companies which were in financial difficulty.⁴⁴

It therefore becomes essential that Namibia have legislation that is successful in delivering ‘escape routes’ from such ‘commercial deaths’, that is, escape routes aimed at rescuing a financially distressed company from its decline towards liquidation.⁴⁵

⁴¹ P Kloppers, ‘Judicial management reform – steps to initiate a business rescue’ (2004) 13 SA Merc LJ 358, 375.

⁴² 1979 2 SA 680 (E).

⁴³ 2001 (2) SA 727 (C).

⁴⁴ ROSC, 9.

⁴⁵ C Jijana, Investigating the Nature, Purpose and Effectiveness of Business Rescue in South Africa: Chapter 6 Of Companies Act 71 Of 2008 As Amended (2016) <[http://www.singaporeanjbem.com/pdfs/SG_VOL_4_\(11\)/2.pdf](http://www.singaporeanjbem.com/pdfs/SG_VOL_4_(11)/2.pdf)> last accessed 5 June 2017.

5 Business rescue proceedings

5.1 The South African position

The business rescue procedure was introduced by the new South African Companies Act, 2008 (Act No. 71 of 2008) in replacement of the judicial management procedure. Business rescue is akin to the administration process in the U.K and the Chapter 11 bankruptcy code in the United States.⁴⁶

Business rescue proceedings are largely self-administered by the company, under independent supervision within the constraints set out in Chapter 6 of the 2008 Companies Act and subject to court intervention at any time on application by any of its stakeholders. The 2008 Companies Act defines this process as a proceeding to facilitate the rehabilitation of a company that is financially distressed.⁴⁷ Partnerships and cooperatives which fall within the commercial scales of SMEs are not included for the purpose of business rescue, as the 2008 Companies Act excludes such business entities.⁴⁸

A company is financially distressed if at any specific time either “it is unlikely that the company will be able to pay all of its debts as they fall due and payable within the ensuing six months”, or it is likely that the company will become insolvent within the next six months.⁴⁹

In a bid to make business rescue a more viable option to financially distressed companies, these proceedings highlight important aspects that differentiate business rescue from judicial management. The South African legislature simplified the commencement process in the following manner:

The process is initiated by an application to court by affected persons⁵⁰ and the other is through a resolution by the board of the company.⁵¹ The latter makes it possible for the company itself to decide when to start the procedure. This makes

⁴⁶ M C Maphiri, Business rescue In south Africa and its practical to SMEs (2015) <https://open.uct.ac.za/bitstream/item/22571/thesis_law_2015_maphiri_mikovhe_comfort.pdf?sequence=1>last accessed 6 June 2017.

⁴⁷ P Delpont, The New Companies Act Manual, including close corporation and partnership (Student edition, LexisNexis 2011) 141.

⁴⁸ Companies Act 2008.

⁴⁹ M C Maphiri, *op. cit.*

⁵⁰ Companies Act 2008 s 131.

⁵¹ *ibid*, s 129.

sense as it is the company that is in the best position (as opposed to the court under judicial management) to decide when this action should be taken. By allowing the board to initiate business rescue procedure, the legislature has reduced the role of the court which in turn has reduced the costs associated with corporate rescue and presumably made it more accessible to small companies.⁵²

In addition, under business rescue, an appointed business rescue practitioner is required to make a formal plan for the rescue of the business.⁵³ The Act requires the plan to have three sections i.e. a background, proposals and assumptions and conditions.⁵⁴ The plan must be presented to creditors and other stake-holders for consideration and contain all information reasonably required to facilitate affected persons in deciding whether or not to adopt it.⁵⁵

The plan ensures that at the least, the appointed business rescue practitioner is performing his role by attempting to achieve the goals of business rescue. It is also a mechanism used in monitoring his progress. The absence of the requirement for a formal business rescue plan was often cited as one of the shortfalls of judicial management.⁵⁶

One of the consequences of a business rescue order is the moratorium.⁵⁷ Unlike judicial management, the moratorium is an automatic order and it does not rely on the courts' exercise of discretion. This means that all legal proceedings against the company are halted, thereby providing the necessary breathing space to the company to organize its affairs and possibly save the company.⁵⁸ The moratorium is vital to the success of a business rescue.

In light of the above, the introduction of business rescue proceedings has brought South Africa in line with the global international trend of restructuring companies which are in financial distress. Therefore, given that the judicial management procedure is considered very costly, not very effective and almost entirely untested

⁵² G Mutsa, 'The development of business rescue in South African law' LLM Dissertation (University of Pretoria 2011) <<http://repository.up.ac.za/bitstream/handle/2263/27867/dissertation.pdf?sequence=1>> last accessed 22 June 2017.

⁵³ Companies Act 2008 section 150.

⁵⁴ *ibid*, section 150(2).

⁵⁵ *ibid*, section 133.

⁵⁶ A Loubser, 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 SA Merc LJ, 44.

⁵⁷ Companies Act 2008 s133.

⁵⁸ F I Ofwono Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law (2014) <https://open.uct.ac.za/bitstream/item/13287/thesis_law_2014_ofwono_fi.pdf?sequence=1> last accessed 7 June 2017.

in practice,⁵⁹ business rescue options may have to find their place in Namibia as the primary option to rehabilitate legal entities that are unable to pay their debts or meet their obligations.

5.2 Application of business rescue proceedings for Namibian SMEs

Due to their size, SMEs in Namibia require a much simpler, cost effective business rescue procedure, in order to support companies in danger of financial distress, prior to actual financial distress and one which does not rely heavily on court process and the appointment of highly remunerated administrating professionals.⁶⁰ Business rescue will provide SMEs in financial distress with the opportunity to reorganise themselves by appointing an independent business rescue practitioner, preferably with experience in SME management and who will assist them to come up with useful and efficient turnaround strategies that will improve their survival rates and enable them to function efficiently as a going concern.⁶¹ Furthermore, the appointment of a business rescue practitioner achieves one of the main business rescue objectives, which is to assist an entity such as an SME in financial distress with the opportunity to continue to exist in a solvent basis by providing reorganization services.⁶² In the event this objective cannot be attained, the business rescue practitioner will forthwith assist the SME to obtain a better return for the company's creditors and shareholders, than would have been the case if the SME were to be liquidated immediately.⁶³

It can also be argued that when initiating business rescue proceedings for SMEs, speed becomes a matter of life and death for such corporate entities. However, Namibia should be cautious in similarly adopting the six month requirement stated in the South African Companies Act, as this places a practical difficulty for SMEs in financial distress. If an SME is at present unable to pay its debts it becomes highly unlikely that the SME will be able to do so within the reasonably ensuing six- months.⁶⁴

⁵⁹ ROSC 3.

⁶⁰ M C Maphiri, Business rescue In south Africa and its practical to SMEs (2015) <https://open.uct.ac.za/bitstream/item/22571/thesis_law_2015_maphiri_mikovhe_comfort.pdf?sequence=1>lastaccessed 5 June 2017.

⁶¹ E Mahembe, 'Literature Review on Small and Medium Enterprises Access to Credit and Support in South Africa Prepared for National Credit Regulator (NCR) (December, 2011) 1 <http://www.ncr.org.za/pdfs/Literature%20Review%20on%20SME%20Access%20to%20Credit%20in%20South%20Africa_Final%20Report_NCR_Dec%202011.pdf> last accessed 3 July 2017.

⁶² 'Solvent basis' refers to a position in which the company will have sufficient capacity to pay its debts.

⁶³ H Klopper and R Bradstreet, 'averting liquidations with business rescue: Does a section 155 compromise place the bar too high?' (2014) 3 Stell LR 553.

⁶⁴ M C Maphiri, *op. cit.*

SMEs should be allowed to make an application for business rescue at any sign of financial distress that has the possibility of affecting the company's operations as a going concern. This should warrant the immediate application of business rescue whether financial or economical, such as provisional cash-flow problems, possibly caused by peripheral factors such as an earthquake, a factory fire, the failure of an important supplier, political unrest, or employee strikes.⁶⁵ If the SME waits until it proves that it is actually insolvent and unable to pay its debts, the chances of rescuing it successfully will be significantly weakened.

Therefore, in adopting a Namibian business rescue procedure similar to that of South Africa, it is proposed that the type companies listed in the 2004 Companies Act be amended to include SMEs, the proposed definition of financial distress be broadened to include circumstances in which a company can indicate its own financial distress and the time period of six months should be reserved for large companies with higher survival rates. This would also be in line with the recommendations made by Rajak and Henning, in which they envisioned a much lighter approach to business rescue for small companies.⁶⁶

Finally, a moratorium or legal freeze on any legal proceedings against the SME in financial distress would benefit the SME because the company will not immediately become liquidated. For example, the plant machinery belonging to the company that is attached by the sheriff for the purpose of sale by way of public auction will be spared.

⁶⁵ *ibid.*

⁶⁶ H Rajak and J Henning, 'Business rescue for South Africa' (1999) 116 SALJ 268.

6 Conclusion

In light of the above, it is evident that insolvency law serves the economy of a country; therefore Namibia needs a precise policy and regulatory reform of its insolvency laws. This will turn Namibian entrepreneurs and SMEs into effective instruments for the enhancement of economic growth and employment in Namibia.

In addition, given that the judicial management procedure is considered very costly and ineffective, particularly for SMEs, it is recommended that adopting the business rescue route with the establishment of an insolvency Commission, should be utilized in Namibia as the primary option to rehabilitate legal entities and restore them to profitability.

The development of business rescue provisions in Namibia's insolvency regime needs to reflect both an awareness of modern international principles, as well as an innovative application of these principles to its own unique needs and socio-economic realities. This would empower companies and individuals to recognize their own financial weakness and apply for support prior to insolvency.

PART IV

FINANCE

CHAPTER 14

COLLATERAL IN NAMIBIA: A PLEA FOR UMBRELLA REGULATION

by

Athalia Wallace-McNab and Dunia P Zongwe

1 Introduction

Codification is, as legal scholar Catherine Skinner writes, the “principal tool for law reform”.¹ The potential and limitations of codification within the Anglo-American legal tradition reflect the quality and scope of law reform activities in common law jurisdictions,² a reality that is present in Namibia. Codification does, however, not equate with law reform since not all codifications result in law reform.

Many of the benefits of comprehensive legislation, or what we call ‘umbrella regulation’ in this chapter, relate to the debate that raged in the 18th century after the jurist Jeremy Bentham proposed the codification of English law. Bentham was convinced that “justice, order, certainty, and simple procedure could be implanted permanently into any legal system through the adoption of a comprehensive but concise legal code”.³ This is not to say that calls for codification of law or some of its branches are obsolete;⁴ it is very much a modern concern.⁵

Unlike Bentham, we do not advocate the wholesale codification of collateral in Namibian law; we argue for comprehensive legislation in the field of law covering collateral as secured in credit transactions. Specifically, we argue for the comprehensive regulation of collateral *in the form of an authoritative restatement* of common-law rules and the scattered statutory rules regarding collateral. Accordingly, insofar as the arguments for and against codification refer to the codification of entire legal systems, they do not apply to our thinking and advocacy in favour of the regulation of collateral in Namibia.

¹ Catherine Skinner, ‘Codification and the Common Law’ (2006) 11 *European Journal of Law Reform* 225, 226.

² *ibid.*

³ Dean Alfange Jr, ‘Jeremy Bentham and the Codification of Law’ (1969) 55 *Cornell Law Review* 61.

⁴ See for example Iain Stewart, ‘*Mors Codicis*: End of the Age of Codification’ (2012) 27 *Tulane European and Civil Law Forum* 17 (considering the question as to whether the age of legal codes may be passing because of the emergence of new technologies).

⁵ See Catherine Skinner, *op. cit.*

Collateral is very complex, undefined, not well-known, and mostly hidden under the shadow of other laws. In lending agreements, collateral is a borrower's pledge of specific property⁶ or asset to a lender to secure repayment of a loan.⁷ The complexity of collateral reduces the availability of credit in the economy, as financial institutions mostly depend on immovable property as collateral. In Namibia, immovable property is limited, hence it limits the availability of credit to borrowers. This chapter seeks to look at what loopholes and bottlenecks are present in the regulation of collateral and what benefits it brings to have firm legislation in place to govern collateral in financial sectors. The basic question concerns the best way to shape laws on collateral and remove obstacles to the free flow of credit in the economy.

Credit markets provide essential support for individuals and businesses to be successful in virtually all countries. Without financial support in the form of credit to individuals and businesses, monetary capital growth in the country is limited. Financial institutions, especially the commercial banks, play a vital role in economic development. Khan⁸ asserts that the banking system serves as key agent, together with entrepreneurs, in the growth and development of the economy of a country.

We ordered topics in this contribution as follows. In the first section, we reflect on the role of collateral in finance and the overall economy. The second section reviews current issues regarding the regulation of collateral in Namibia. The third section is the heart of this contribution: It evaluates the country's current regulation of collateral and pleads for the regulation of collateral in Namibia through the adoption of a comprehensive legislation in the form of restatement of the existing rules on collateral. For the sake of realism, the reasoning that drives this plea includes consideration of the relative merits and demerits of umbrella legislation. As Swain said, "only by being realistic about what codification can and cannot do and the costs involved, can reform of any sort be achieved".⁹

⁶ Joan F. Garrett, 'Banks and Their Customers' Dobbs Ferry, (NY: Oceana Publications 1995) 99.

⁷ O'Sullivan, Arthur Sheffrin, M Steven Economics: Principles in Action (Upper Saddle River, New Jersey 07458: Pearson Prentice Hall 2003).513.

⁸ A Khan, "Role of Commercial Banks in Economic Development" (23 April 2012) <ahsankhaneco.blogspot.com/.../role-of-commercial-banks-in-economic.html> last accessed on the 21 January 2017.

⁹ Warren Swain, 'Codification of Contract Law: Some Lessons From History' 31 (2012) 39 University of Queensland Law Journal, 43.

2 Collateral and finance

2.1 What is collateral?

The financial marketplace has developed in different dimensions, through different practice and different legislation. The financial sector has two main hearts, the credit segment and collateral segment. In particular, collateral progressed through different rules.

Collateral is security given in return for financial support in the form of credit.¹⁰ It is an asset that serves as security against what is called ‘counterparty risk’,¹¹ that is, the risk that the borrower of credit will default on his or her promise to repay the credit granted. The borrower is thereby giving up a right over their assets through acquiring financial assistance. Should there be a default in payment from the side of the borrower, the lender can seize or otherwise use the assets given by the borrower to recover its loan losses. In the event of default, collateral is used to support the principal debt settlement as well as the interest acquired on the debt. The collateral should be both safe and liquid to such an extent that it is in certain circumstances regarded as ‘cash’.¹²

Secured lending can be supported by marketable collateral. In determining the marketable collateral value, consideration of reduction in the value of the collateral as well as “human worth”,¹³ that is, the strong or good position a person holds in society, should be kept in mind.

¹⁰ See Black’s Law Dictionary, 8th ed. (2004) which defines ‘collateral’ as “[p]roperty pledged as security against a debt”.

¹¹ Ronald V. Anderson and Karin Jõeveer, *The Economics of Collateral* (London School of Economics and Political Science and others, 2014) 2.

¹² *ibid.*

¹³ Rashmi Dyal-Chand, ‘Human Worth as Collateral’ (2006-2007) 38 Rutgers Law Journal 793.

Dyal-Chand enumerates essential requirements for collateral. (He cautions that his list is not exhaustive) For an asset to qualify as collateral:

1. the asset must be fixed in the sense of being quantifiable by the lender;
2. it must be meaningful to the borrower;
3. it must be capable of elimination, i.e., the lender must be able to take something meaningful away from the borrower;
4. it must be capable of appreciating in value; and
5. it must be capable of repossession or transfer.¹⁴

There are several types of collateral, but the difficulty is that there is no secure law for collateral in Namibia that you can rely upon. Examples of collateral types include cessions, pledges, mortgage bonds, maritime bonds, notarial bonds, right to leasehold and registration of leasehold bonds. Collateral principles or laws can be found under private law and public law. Collateralizable assets may be movable or immovable, tangible or intangible, such as intellectual property rights. One creative scholar went as far as contending that “human worth” can be collateralized.¹⁵

Collateral laws tend to be biased towards collateralization of movable assets as opposed to immovable assets.¹⁶ Movable assets are mostly regulated by the Credit Agreements Act,¹⁷ but the Act does not state firmly what collateral should be in place to secure your debt or credit. Immovable property is regulated by the Deeds Registries Act,¹⁸ but the Act does not state the procedure to register collateral when rights over immovable property are given to a credit grantor. There are no clear procedures regarding the rights you are allowed to give up or rights that the other parties are allowed to acquire.

¹⁴ *ibid*, 793, 797-799.

¹⁵ *ibid*, 793.

¹⁶ Charles W. Calomiris and others, 'How Collateral Laws Shape Lending and Sectoral Activity,' Graduate School of Business, Columbia University, 1 (2006) <<https://www0.gsb.columbia.edu/faculty/mlarrain/papers/CLLS.pdf>> accessed 17 April 2017.

¹⁷ Act No. 75 of 1980.

¹⁸ Act No. 47 of 1937.

2.2 The importance of collateral in finance and the economy

Why do lenders and credit markets generally require collateral? They demand collateral because it enables them to collect payment of debt through foreclosure or repossession.¹⁹ Lenders also request collateral because it induces borrowers to behave prudently and repay their debt or loan “voluntarily”.²⁰ Importantly, collateral dramatically decreases the costs incurred by lenders in monitoring the borrower’s behaviour and her use of the asset she pledged against the loan.²¹ In short, collateral makes lending much cheaper for both the lender and the borrower.

In addition to the financial sector, collateral arrangements can reinforce the economy as a whole. It is, nonetheless, more accurate to say that collateral affects the overall economy through financial institutions. If collateral is secured and supported by legislation, the costs of managing the risk of default that financial institutions shoulder are lower. When collateral is secured and supported by legislation, the interest rate of the financial assistance is lower, due to the fact that the risk is lower. Conversely, should the risk be high, the interest rate will also need to be higher to weigh out the risk and be able to support any loss that might occur.

For income, both businesses and individuals mostly rely on credit. This source of funding is provided through substituting financial need with debt and entering into an agreement with a financial institution. In order to obtain loans, businesses and individuals need to avail collateral. Financial institutions require collateral to substitute the debt agreement entered into between the two parties.

Collateral also impacts the economy in that it affects sectors of any size. What is more, whenever the government wants to obtain financial support from abroad in the form of credit, such sovereign debt should be supported by collateral. In order for the government to give collateral, its internal law on collateral should be firmly in place. In other words, the absence of legislation has negative consequences for a country’s economy.

¹⁹ Rashmi Dyal-Chand, ‘Human Worth as Collateral’ (2006-2007) 38 Rutgers Law Journal 793, 796.

²⁰ *ibid*, 793, 796-797.

²¹ *ibid*, 793, 797.

In light of the benefits outlined above, it is easy to see why collateral plays a first-rate role in the flourishing of the national economy. Financial institutions and credit markets are more or less large in any country and traditionally rely on secured lending. In order to have a successful credit market, your collateral should be regulated by laws and governance. Currently, the available collateral laws are immobilized under a myriad of statutes.

3 Current issues regarding the regulation of collateral in Namibia

3.1 The issues

a) *Uncodified nature of the applicable law*

The problematic of collateral in Namibia has many facets. First and foremost, most of the field covering collateral is *uncodified*. Collateral is not clearly regulated under one umbrella, but weaved into other laws; hence, difficulties arise in regulating lending transactions involving collateral.

b) *Lesser clarity*

As a direct consequence of their largely uncodified nature, the legal rules on collateral are *not as clear* as they would have been had they been codified. Should collateral be governed by a clear ‘Collateral Act’, it will allow businesses and individuals easier access to sources of funding.

c) *No uniformity and coordination*

Another consequence of this situation is the legal regime governing collateral in Namibia is *not uniform*. Procedures of ceding collateral to another party are unregulated and not supported by statutory laws. Each financial institution has its own procedure for how it will acquire collateral from individuals or business entities. For instance, there is not a set process or format to ensure that guarantees are in place correctly. Even if international regulations on guarantees exist, these regulations have not been incorporated into Namibian laws.

It is advisable that procedures be documented so all financial institutions follow one regulated procedure when acquiring collateral. Procedures should include value of lending supported by the collateral that is allowed to be given up by individuals and business entities.

Another point that can create problems for collateral is that there is no institutional coordination where collateral is concerned. There are two regulatory bodies and two sets of regulations, at the moment in Namibia. Bank of Namibia, which regulates financial institutions; and the Namibia Financial Institutions Supervisory Authority (NAMFISA), which regulates non-banking lending activities such as cash loans, unit trusts, insurance, among other things. Hence, if movable collateral is surrendered to your cash loan, which falls under NAMFISA, then your collateral is not traceable for financial institutions which are regulated by the Bank of Namibia.

d) *Dispersion of legal rules*

In Namibia, the laws supporting the various types of collateral spread all over in different regulations and common laws whereas there should be one umbrella covering all collateral types and procedures. The legal rules on collateral are not contained in one document but a maze of formal sources and non-legal instruments.

e) *The law is less understandable*

First, the predominantly uncodified nature of the law, then the lack of clarity, uniformity, and unified source. These factors all combine to make the law on collateral less understandable. This issue goes much deeper than the fuzziness of the law relating to collateral. In fact, the body of rules governing collateral is not regarded as separate and distinct branch of law, nor it is conceived as a distinct knowledge field. It is simply subsumed under the various branches of law where debt is secured by one or another form of collateral. Unlike the situation in the United States, there is practically no separate field of 'secured transactions' in Namibian law. All the challenges explained above conspire and seriously restrict access to credit.

3.2. Market failure

As we just alluded to, the principal effect of the issues mentioned above is that *credit is less available and accessible* than it would otherwise be. The unreformed state of the law on collateral limits the use of assets to be given as collateral. It limits the credit ability of common, ordinary borrowers. When collateral is regulated, it will improve activities in the credit market by allowing more people to have access to credit. This will have a positive effect on the economy. On top of enabling financial assistance from the World Bank, legislation governing collateral can increase access to finance, especially for small firms, and lead to better terms for loan contracts. Many argue that firms are excluded from formal credit markets because they lack assets that can serve as collateral. In fact, firms generally have a wide array of productive assets that could secure a loan, but the legal framework prevents this. Reforming collateral laws can unlock “dead capital”.²²

Another outcome of the collateral-related issues is that government, businesses, and consumers *fall back on guarantees and suretyships* when they cannot find collateral to secure loans, which are inadequate as tools for the regulation of collateral. Guarantees and suretyships are two different concepts, though they are used interchangeably in South African law as well as in practice in Namibia.

A guarantee is a document that you give to another party to secure their rights over a certain business transactions; it means any signed undertaking, however named or described, providing for payment on presentation of a complying demand.²³ The client (applicant) must apply to a financial institution (the guarantor) to issue a guarantee on his/its behalf in favour of a certain beneficiary. The bank issues demand guarantees in line with the latest *International Chamber of Commerce ('ICC') Uniform Rules for Demand Guarantees (URDG) 2010*.

The deed of suretyship is basically a right over assets are given away on behalf of someone else in favour of a third party. A deed of suretyship is a contract where the surety promises the creditor that if the debtor does not perform in terms of his contractual obligations, then he, the surety, will do so. Suretyship is a link between the surety's assets and the other person's debt, should there be a failure of fulfilling debt obligations in favour of a third party, the credit grantor. Clearly, a distinction should be made between a guarantee and a deed of suretyship since these two concepts are vaguely used currently.

²² M Safavian, H Fleisig and J Steinbuks. “Unlocking Dead Capital.” *Public Policy for the Private Sector* (Washington: Grammarians, Inc, 2006). This Article is also available on line: <<http://rru.worldbank.org/PublicPolicyJournal>>.

²³ *International Chamber of Commerce ('ICC') Uniform Rules for Demand Guarantees (URDG) 2010, Article 2.*

People sign two types of suretyships: limited and unlimited. Often, they sign unlimited suretyships without knowing their consequences. Most people are not made aware of the fact that, in unlimited suretyships, they are at risk of losing all their assets for the debts of another. Limited suretyships only specify the amount and not the transaction. Should the client not cancel the suretyship, it can stand for any other debt within that amount. People are unaware of those specific clauses; they put up their assets as collateral through the suretyship, a collateral that is at risk continuously. Such negative consequences can be avoided if suretyships are regulated by unified rules and procedures.

Last but not least, the lack of codification of collateral in Namibia entails *low consumer protection*. The value of collateral is not governed currently. Namibia only has a few financial institutions operating; should Namibia allow more banks to open, this could cause consumers or business entities to give up all their rights over assets that are held, and the situation could soon become uncontrollable.

Determinations under the Banking Institutions Act, 1998²⁴ lays down that the debt should be well-secured by the net realisable value of collateral security.²⁵ Yet the Act does not provide for the determination of the collateral's value. An individual granted financial assistance for the value of N\$10,000.00 and has collateral of life assurance in the value of N\$20,000.00 this right is ceded to the financial institution to support the loan, which bears double the collateral value of the exposure. Whereas another individual is given financial assistance for the value of N\$5 million but only a covering mortgage bond is required for the same value of the loan. Therefore, there is inconsistency for the amount given and the collateral acquired or ceded. Should you cede your right over a covering mortgage bond, a percentage amount is requested for the bond to be registered whereas if you cede your life assurance, it would be through a revenue stamp to the value of N\$5 Namibian dollars. This is another problem not addressed by regulations.

Currently, your status, or "human worth"²⁶, plays a big role when collateral is requested by a financial institution. Should you be well-known in the country, you would not need to provide as much collateral as an ordinary person. For an

²⁴ Act No. 2 of 1998.

²⁵ Determinations under the Banking Institutions Act, 1998 (Act No.2 Of 1998): Asset Classification, Suspension of Interest and Provisioning, published, as a general notice No. 278 in the Government Gazette No. 3078 of 30 October 2003, held in clause 4.2 (d).

²⁶ Rashmi Dyal-Chand, 'Human Worth as Collateral' (2006-2007) 38 Rutgers Law Journal 793.

ordinary person, borrowing is harder because he or she would be required to give up all his or her assets as collateral. Through the reforming of the legal system that governs collateral, regulations can protect individuals, financial institutions, the credit market, the economy of Namibia at large.

The combination of insufficient credit access and decreased consumer protection reflect a certain type of market failure hence, the necessity of regulation.

3.3 The necessity of regulation

The main reason for regulation arises where the market fails to provide a good that is in demand. This is case, credit is the demanded good. It is, more precisely, because the present operation of the market does not adequately address the scarcity of credit that state intervention is needed in the form of a coherent and systematic set of principles and rules on collateral. The other rationale of state intervention is the inefficiency of the existing rules on collateral – a point we address in the next section of this chapter.

4 Weighing the case for umbrella legislation

In the field of finance and commerce, it is imperative that rules be efficient and avoid waste. Efficiency is an accepted criterion in the area of law and economics to evaluate effectiveness. ‘Efficiency’ describes the “fitness of a means to a given end”. It is an approach that seeks to minimize costs and maximize benefits.²⁷ However, like Coleman correctly writes, ‘efficient’ is not a synonym for ‘cheap’.²⁸ In actual fact, inexpensive outcomes may be inefficient if cost savings are offset by productivity loss.²⁹ Nevertheless, a crucial point is that, even if it may be difficult to identify efficiency in practice, decreasing the costs of information is more likely than not to lead to practical efficiency.³⁰ An umbrella law is most likely to lower costs of accessing information on collateral and the rules governing it.

²⁷ Timothy Sandefur, ‘Does the State Create the Market – And Should it Pursue Efficiency?’ (2010) 33 *Harvard Journal of Law and Public Policy* 779, 799.

²⁸ Brooke D Coleman, ‘The Efficiency Norm’ (2015) 56 *Boston College Law Review* 1777.

²⁹ Brooke D Coleman, ‘The Efficiency Norm’ (2015) 56 *Boston College Law Review* 1777.

³⁰ See Ronald J Gilson and Reinier Kraakman, ‘Market Efficiency After the Financial Crisis: It’s Still a Matter of Information Costs’ (2014) 100 *Virginia Law Review* 313.

Garoupa & Morriss made two general observations pertinent to our research. First, ascertaining the applicable legal rules governing a transaction, such as lending, is a cost for those wishing to enter into that transaction; on the other hand, having multiple authoritative sources entail both costs and benefits.³¹ In adapting Garoupa & Morriss's framework, we determine that an umbrella legislation on collateral will affect the following costs:³²

1. the cost of identifying and applying efficient legal rules;
2. the system's ability to restrain rent-seeking in rule formulation and application;
3. the cost of adapting the rules to changing circumstances;
4. the transaction costs for the parties seeking to learn the law;
5. the ease of contracting around rules; and
6. the cost of transitioning from the current system to an umbrella legislation.

Applied to the current regulation of collateral in Namibia, the criterion of efficiency reveals a number of shortcomings. The overarching inefficiency is the sheer complexity of rules regulating collateral, which results from the lack of collateral-specific legislation. This crucial flaw has damaging implications. One of these is the waste of resources occasioned by the complexity of rules.

If we apply the costs identified above, the current regulation of collateral in Namibia is inefficient because it is hard for parties in lending transaction to ascertain and apply collateral rules. However, the current system has the advantage of making it easy for those parties to contract around collateral rules, especially those that they may consider particularly cumbersome. All things considered, however, we find that the costs of accessing of legal information, i.e., information on the rules governing collateral, far exceed the ease with which parties may go around (inefficient) rules.

³¹ Nuno Garoupa and Andrew P Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements' (2012) *University of Illinois Law Review* 1443, 1479.

³² Nuno Garoupa and Andrew P Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements' (2012) *University of Illinois Law Review* 1443, 1493.

4.1 Our argument

We therefore advocate for the adoption of an umbrella legislation – a codification in the form of a restatement of the law relating to collateral. By ‘codification’, it is meant the thorough restatement, with a “high degree of thematic organization” of an area of law.³³ Such legislation would make regulation of collateral both rational and cost-effective. It would reduce the high costs of implementing collateral-related rules. It would lead to better consumer protection and provide a backbone for the credit market.

4.2 Should we regulate collateral comprehensively?

a) *The whys*

The recommended umbrella legislation has several advantages. The first major advantage is that the proposed umbrella legislation will structure and organize the field of law relating to collateral. A second advantage, and related to the previous one, is that, by rationally organizing the field, the umbrella legislation will increase understanding of collateral and its regulation. This educational function that a comprehensive legislation on collateral would play is an element that should not be neglected. Codification makes law much more understandable and more accessible to the general public.³⁴ Clarity and accessibility in law have been highlighted in so many decisions by the European Court of Human Rights that codification has been said to be a human right.³⁵ In particular, the codifications of the late Victorian era were meant to bring about greater clarity and accessibility by turning the common law into legislative form.³⁶

Third, umbrella legislation would bring down the costs of accessing information on collateral rules. This is important because the ability of people to access legal resources at a low cost is one of the distinctive characteristics of successful economies.³⁷ The scattering of legal rules in a myriad of sources, often only available

³³ Iain Stewart, ‘*Mors Codicis*: End of the Age of Codification’ (2012) 27 *Tulane European and Civil Law Forum* 17 at 19.

³⁴ Warren Swain, ‘Codification of Contract Law: Some Lessons From History’ 31 (2012) *University of Queensland Law Journal* 39, 44.

³⁵ Eva Steiner, ‘Codification in England: The Need to Move From an Ideological to a Functional Approach – A Bridge Too Far’ (2004) 25 *Statute Law Review* 209.

³⁶ See Roderick J Wood, ‘The Codification of Commercial Law’ (2016) 79 *Saskatchewan Law Review* 179.

³⁷ Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (1989) 151-152.

to specialists, restricts access and increases the costs of legal information.³⁸ Thus, umbrella legislation would reduce the time that legal practitioners “trawl through a large body of authority”.³⁹

Fourth, an umbrella code would produce certainty and reduce confusion by reducing the law to a well-organized, clearly stated body of principles that would eliminate inconsistencies and contradictions.⁴⁰ In that sense, umbrella regulation enhance the rule of law⁴¹ and ensure uniformity.⁴²

Moreover, the importance of having umbrella law for all collateral types and procedures includes the fact that value can be determined more effectively in the form of loan-to-value-ratio. The umbrella law would strike a balance between the loan amount and the value of the collateral to secure the principal debt and interest.

Crucially, umbrella regulation for collateral would allow greater access to credit. This outcome is accomplished through the enactment of law on collateral-secured transactions that contains relevant provisions on the regulating of credit-granting financial institutions. Umbrella legislation will also allow interest rates to decrease because your collateral is secured through legislation; hence expenses incurred in risk management are lower. By improving the financial position of institutions through regulations, the umbrella collateral law will mainly get the banks to feel more at ease when granting loans.

Though collateral is essential for the economic health of any country, legislation on collateral in Namibia cannot be the same as in other countries as each country has a different configuration. The umbrella legislation we are pleading for must contain a number of key provisions. First and by definition, it will have to be *comprehensive*. (Note, however, that by ‘comprehensive’ we do not mean to say

³⁸ See Nuno Garoupa and Andrew P Morriss, ‘The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements’ (2012) *University of Illinois Law Review* 1443, 1477.

³⁹ Warren Swain, ‘Codification of Contract Law: Some Lessons From History’ 31 (2012) *University of Queensland Law Journal* 39, 43-44.

⁴⁰ See Nuno Garoupa and Andrew P Morriss, ‘The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements’ (2012) *University of Illinois Law Review* 1443, 1478.

⁴¹ Catherine Skinner, ‘Codification and the Common Law’ (2006) 11 *European Journal of Law Reform* 225, 227.

⁴² Roderick J Wood, ‘The Codification of Commercial Law’ (2016) 79 *Saskatchewan Law Review* 179, 180.

that the Namibian Parliament should pass a wordy or voluminous Collateral Act) Second, whether comprehensive and narrow, that legislation must specify *what* may be collateralized and *how*.

The legislation will not replace the existing legal regime on collateral but would rather supplement the existing principles and rules. This should assist parties who are seeking to extend or obtain credit.

b) The why-nots

Despite its advantages, umbrella legislation and codification in general are not without challenges. First, umbrella legislation would create more problems of interpretation.⁴³ For instance, interpretation based on codified regulation would tend to focus more on the letter of the law than its spirit.⁴⁴ Furthermore, such comprehensive legislation would operate at a very high level of generality, overlooking all the necessary details to sufficiently specify the law and thus giving rise to uncertainty.⁴⁵

Another disadvantage is the observation that the process of codification is vulnerable to the state's self-interest and often to competing interests of stakeholders lobbying for the adoption of a given statute or code.⁴⁶ This common phenomenon is sometimes singled out as an instance of 'state capture'.

It must be also said that the alternatives to umbrella legislation in the form of restatement include simplification, reform, or simply the *status quo*. A restatement has the benefit of being familiar in substance, if not in form.⁴⁷ Maintaining the *status quo* relates to a system of legal rules regulating collateral scattered over a multitude of sources and a heavy reliance on common law. Some scholars may wish to preserve the *status quo* because such a situation displays a higher degree of flexibility than comprehensive legislation.

⁴³ See Nuno Garoupa and Andrew P Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements' (2012) *University of Illinois Law Review* 1443, 1481.

⁴⁴ Jean Galbraith, 'Custom, Codification, and the Verdict of History' (2011) *160 University of Pennsylvania Law Review* 349.

⁴⁵ See Nuno Garoupa and Andrew P Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements' (2012) *University of Illinois Law Review* 1443, 1482-1483.

⁴⁶ See Timothy L. Meyer, 'Codifying Custom' (2012) *160 University of Pennsylvania Law Review* 995 at 998. See also Jean Galbraith, 'Custom, Codification, and the Verdict of History' (2011) *160 University of Pennsylvania Law Review* 349 at 350; Vanessa M Johnson, 'Codification of the *Lex Mercatoria*: Friend or Foe?' (2015) *21 Law and Business Review of the Americas* 151 at 164ff (arguing that the codification of the *lex mercatoria* is likely to lead to the politicisation of the *lex mercatoria*).

⁴⁷ Warren Swain, 'Codification of Contract Law: Some Lessons From History' 31 (2012) *University of Queensland Law Journal* 39, 43.

On balance, nonetheless, improvements in clarity, substance and uniformity as well as the strengthening of legal certainty outweigh disadvantages associated with codification.⁴⁸ This is the case notwithstanding the practical problems attending the effective codification of law such as challenges affecting legislation (for instance, codes) requiring the setting up of a drafting committee consisting of several people with sometimes conflicting drafting and substantive philosophies.⁴⁹

5 Conclusion

Collateral “laws” are mostly found in common law. However, in view of the importance of collateral in the financial sector, we argue that collateral should rather be governed through legislation provisions.

Legislation that provides for the types of collateral, estimated value and procedure has a great impact on economic growth. Collateral supports free-flowing credit markets, reducing potential losses that lenders might otherwise be confronted with from borrowers’ defaults. Collateral over immovable property, such as a house, is accepted and practiced frequently. Unlike immovable assets, when putting up movable assets as collateral, careful consideration should be taken because the value of the asset decreases quickly (as it is not fixed) and because of the absence of supporting legislation.

Ideally, legislation on collateral should govern the types of collateral, registration and procedures of such collateral, the fact the prior written agreements must be entered into, the rights that may be ceded, the value attached to those rights (which should justify the credit exposure of an individual or business entity), and the enforcement of collateral. Above all, both parties’ rights should equally be protected through the legislation, namely the borrower (who provides collateral) and the lender (who receives collateral). A decision should be made whether collateral will continue to be transferred through stamp duties or through registration, subjected to the value of the credit exposure justified by the collateral. Legislation should also include penalty provisions in the event that the borrower gives false information and should the lender not follow the correct procedures.

Umbrella legislation will go a long way in resolving the problems related to the clarity, uniformity, coherence, and readability of legal rules on collateral. In short, umbrella legislation will ease the flow of credit in Namibia.

48 See Jean Galbraith, ‘Custom, Codification, and the Verdict of History’ (2011) 160 *University of Pennsylvania Law Review* 349.

49 See Warren Swain, ‘Codification of Contract Law: Some Lessons From History’ 31 (2012) *University of Queensland Law Journal* 39, 49ff.

CHAPTER 15

ONLINE ROBBERIES AND PRIVACY RIGHTS: AN APPRAISAL OF THE NAMIBIAN BANKING SECTOR AND ITS VULNERABILITY TO CYBERCRIMES

by
Iyaloo Hamulungu

1 Introduction

Digital information is rapidly becoming one of the 21st century's most valuable assets.¹ The world seems suddenly to have woken up to the fact that digital technology is a mixed blessing.² It is a mixed blessing because, despite its benefits, it may put one at the risk of illegal access to personal data, amongst other problems. Cyber space is regarded as the meeting place for criminal groups.³ Using the Internet, criminals can commit crimes easily because it is fast and anonymous.

Most people use the Internet everyday to obtain information on the weather, latest sport scores, job offers, local news, and other exciting information.⁴ Businesses make use of the Internet to deliver services to their customers. The banking industry is one sector that is using the Internet to offer its customers value-added services and convenience.⁵

The primary focus of this research is the effectiveness of cyber security laws in the Namibian banking sector – an area of research currently absent in the academic literature. Due to this, it is necessary to review the existing literature on cyber security in Africa and other jurisdictions. The literature available covers the effectiveness of cyber security laws in the Namibian banking sector and the challenges that are faced or may be faced in the fight against cybercrime.

¹ Dana Van der Merwe, 'A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda' (2014) 17 Potchefstroom Electronic Law Journal 298, 296.

² *ibid*, 296.

³ Fawzia Cassim, 'Addressing the growing spectre of cybercrime in Africa: evaluating measures adopted by South Africa and other regional role players' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 123.

⁴ Zachary B. Omariba, Nelson B. Masese and Gregory Wanyembi 'Security and Privacy of Electronic Banking' (2012) 9 *International Journal of Computer Science Issues* 432.

⁵ *ibid*, 432.

Scholarship provides insight into the complexity of cyber security. Cassim notes the growing recognition that cybercrime is thriving on the African continent because of a lack of information technology (IT) knowledge by the public and the absence of suitable legal frameworks to deal with cybercrime at national and regional levels.⁶ In addition, Van der Merwe suggested that the problematic relationship between information and the law is because of the rapidly changing nature of the technological infrastructure of the information and the inherent conservatism of the law.⁷ Cassim holds the same position by acknowledging that the face of cybercrime has changed recently as a result of new Internet environments, organised cybercrime groups, and new 'smart' viruses.⁸

There is a need to mitigate the problem of cybercrimes in the banking sector.⁹ The Internet provides extremely effective tools and mechanisms for individuals and groups who seek to conduct unlawful activity. With the Internet comes the ability to commit crimes inexpensively, quickly, and across any geographical space.¹⁰ Hence, the necessity of regulating electronic communications as the increased global connectivity presents a new threat or risk of elevated rates of cybercrime.

Namibia has neither a computer emergency response team (CERT) nor an agency that can liaise between the government and the private sector. A cyber-tribunal or court more specialised in overseeing the prosecution of financial Internet crimes must be introduced.¹¹

The challenges faced in the fight against cybercrime can be categorised as institutional or technical.¹² These challenges are institutional and technical because of the lack of institutions in Namibia such as CERT and organisations similar to the South African Banking Risk Information Centre (SABRIC). Cassim avers that law and policy often fail to keep pace with technological change.¹³ These challenges may

⁶ Fawzia Cassim, (2011) *op. cit.*

⁷ Dana Van der Merwe, 'A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda' (2014) 17 Potchefstroom Electronic Law Journal 298, 300.

⁸ Fawzia Cassim, (2011)*op. cit.* 123, 124.

⁹ A Raghavan and Latha Parthiban 'The Effect of cybercrime on a bank's finances' (2014) 2 International Journal of Current Research and Academic Review 173, 174

¹⁰ Yee Fen Lim *Cyberspace Law* (Oxford University Press 2002) 246.

¹¹ Fawzia Cassim, 'Addressing the challenges posed by cybercrime: A South African perspective' (2010) 5 Journal of International Law and Technology 118.

¹² Macko Gercke, M 'Understanding cybercrime: phenomena, challenges and legal response' (2012) International Telecommunications Union <<http://www.itu.int/ITU-D/cyb/cybersecurity/legislation.html>> accessed 08 August 2016.

¹³ Fawzia Cassim, (2011) *op. cit.* 123, 130.

be faced on the national level as well as on an international level. Kundi correctly points out that developing countries face difficulties in implementing cyber regulations.¹⁴ This is because it is not easy in cyber space to define and determine the political borders and culprits.¹⁵ Namibia is a developing country and faces these challenges. Over the last 50 years, numerous solutions have been developed and implemented at the regional and international levels.¹⁶ However, cyber security remains a challenge due to the evolving nature of technical development and the changing methods by which cybercrimes are committed.¹⁷

Lastly, Namibia needs to address the issue of cyber security in its banking sector. To do that, the laws in place should be adequate and efficient to ensure that cybercrimes in the banking sector are prosecuted in order to deter further cybercrimes.

2 A Namibian perspective

Data protection is one of the essential fundamental rights and has to be protected. The right to privacy is guaranteed in article 13 (1) of the Namibian Constitution.¹⁸ Article 128 of the Namibian Constitution provides for the establishment of a central bank in Namibia.¹⁹ The Bank of Namibia is the central bank in Namibia. The banking industry in Namibia is made up of four commercial banks (First National Bank Namibia Limited, Standard Bank Namibia Limited, Ned Bank Namibia Limited, Bank Windhoek Namibia Limited, and one micro-finance bank, Fides Bank Namibia Limited).²⁰ These banks are the primary mobilizers of funds for the public and the main sources of financing, which support business operations and economic activities in Namibia.²¹

¹⁴ Ghulam Muhammad Kundi 'Digital Revolution, Cyber-Crimes and Cyber Legislation: A challenge to governments in developing countries' (2014) 4 Journal of Information Engineering and Applications 61, 64.

¹⁵ Macko Gercke, M 'Understanding cybercrime: phenomena, challenges and legal response' (2012) International Telecommunications Union <<http://www.itu.int/ITU-D/cyb/cybersecurity/legislation.html>> accessed 08 August 2016.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Article 13 of the Namibian Constitution provides that no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedom of others.

¹⁹ Article 128 provides that there shall be established by Act of Parliament a central bank of the Republic of Namibia which shall serve as the State's principal instrument to control the money supply, the currency and the institution of finance, and to perform all other functions ordinarily performed by a central bank.

²⁰ Bank of Namibia <<https://www.bon.com.na/Bank/Banking-Supervision/The-Banking-System-in-Namibia.aspx>> accessed 12 July 2016.

²¹ *ibid.*

There are a number of legislations enacted that are regulating the banking sector in Namibia. Apart from those laws, the Electronic Communications and Transactions Bill will also be considered.

2.1 Bank of Namibia Act 15 of 1997

The Bank of Namibia Act 8 of 1990 was amended by the Bank of Namibia Act 15 of 1997. In terms of section 2, the Bank of Namibia is to continue as the central bank of Namibia.²²

According to Section 3(a) of the Bank of Namibia Act, the Bank of Namibia is tasked with the power to promote and maintain a sound monetary, credit and financial system in Namibia and sustain the liquidity, solvency and functioning of that system. The Bank of Namibia Act does not contain provisions pertaining to the protection of bank clients who make use of online banking.²³

2.2 Banking Institution Act 2 of 1998

The objectives of the Banking Institution Act are to consolidate and amend the laws relating to banking institutions; to provide for the authorisation of a person to conduct business as a banking institution, and for the control, supervision and regulation of banking institutions; to protect the interests of persons making deposits with banking institutions.²⁴ The Banking Supervision Department of Bank of Namibia is tasked with the implementation of the Banking Institution Act. The Act contains no provisions pertaining to the protection of consumer information in the banking industry.

²² Bank of Namibia Act 15 of 1997.

²³ *ibid.*

²⁴ Banking Institution Act 2 of 1998.

2.3 Financial Intelligence Act 13 of 2012

In its preamble, it is stated that the Financial Intelligence Act provides for the establishment of the Financial Intelligence Centre (FIC) as the national centre for financial intelligence. The FIC is responsible for collecting, requesting, receiving and analysing suspicious transaction reports and suspicious activity reports which may relate to possible money laundering or the financing of terrorism.

Money laundering does not necessarily fall within the scope of this study as it does involve the illegal interception of private information with the object of stealing money from another person's account. It is merely an act which, as defined in section 1(a), (iii) of the Financial Intelligence Act (FIA):

conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;...

2.4 Communications Act 8 of 2009

Namibia has promulgated the Communications Act which provides for the regulation of telecommunications services and networks.²⁵ The Act also provides for the establishment of an independent Communications Regulatory Authority of Namibia. However, this legislation cannot be reconciled with financial crimes in the banking sector. The Act contains no reference to cybercrimes in the banking sector and as such falls outside the scope of this study.²⁶

2.5 Electronic Transactions and Communications Bill (2011)

The Bill, inter alia, addresses the regulation of electronic transactions, communications and information systems management, promotes the use and development of electronic transactions, and provides for incidental matters.²⁷ The Bill is yet to be enacted.

²⁵ Communications Act 8 of 2009.

²⁶ *ibid.*

²⁷ Fawzia Cassim, 'Addressing the growing spectre of cybercrime in Africa: evaluating measures adopted by South Africa and other regional role players' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 123, 133.

2.6 Computer emergency response teams

According to the International Telecommunications Union (ITU) report on Namibia's cyber wellness profile, Namibia does not have an officially recognised computer emergency response team (CERT).²⁸ CERTs are teams of experts tasked with the responsibility to deal with cyber security incidents. There is no cybercrime unit to deal with cybercrime offences or to respond to cybercrime incidents.²⁹ CERTs are not only major entities in charge of detecting and investigating cybercrime incidents at the national level, but they are also key participants in actions to enhance cybercrime cooperation at the international level.³⁰

Apart from the general provisions in the Namibian constitution in article 13 for the protection of privacy, there appears to be no specific protection of bank clients in the Bank of Namibia Act. The Financial Intelligence Act only makes provision for the prevention of financial crimes in terms of suspicious activities. It thus falls outside the scope of the protection of privacy as it relates to online banking.

3 Comparative study of selected jurisdictions

The criterion that will be used in the comparative study of the selected jurisdictions will be efficiency and effectiveness. This criterion has been informed by the law and economics school of thought. Efficiency in this context implies that law is seen as a tool for wealth maximising in society.³¹ The efficiency of laws explains why they are promulgated.³² The following definition of efficiency is offered: "Efficiency means exploiting economic resources in such a way that value – human satisfaction as measured by aggregate willingness to pay for goods and services – is maximized."³³ Effectiveness refers to whether the existing legal framework is adequate enough to create deterrence through prosecution and whether the sanctions in place are able to bring about the desired effect. The law and economics school of thought holds the view that law is and should be used to achieve efficiency, understood as wealth-maximising.³⁴ In this context, having a legal framework that ensures safety

²⁸ International Telecommunications Union: Cyber wellness Profile Namibia <<http://www.itu.int/en/ITU-D/Cybersecurity/Pages/default.aspx>> accessed 08 August 2016.

²⁹ *ibid.*

³⁰ Macko Gercke, M 'Understanding cybercrime: phenomena, challenges and legal response' (2012) International Telecommunications Union <<http://www.itu.int/ITU-D/cyb/cybersecurity/legislation.html>> accessed 08 August 2016.

³¹ Susan Dimock 'Law and Economics: Law as Efficiency' in Susan Dimock (ed.), *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman 2007)

³² *ibid.*, 69-70.

³³ Stephen Margolis 'Two Definitions of Efficiency in Law and Economics' (1987) 16 *The Journal of Legal Studies*, 471.

³⁴ Susan Dimock *op. cit.*

for online banking creates benefits for the banks such as a larger customer base, and increased capital. In contrast, the cost of having an inefficient and ineffective regulatory framework for banks means that banking institutions would spend more resources on damage control after a cyber attack on their system. This section is devoted to a discussion of legislation in other jurisdictions, such as South Africa, India and Uganda. The reason for looking at other jurisdictions is to discover how other countries have dealt with this issue of cybercrime and what legislations or mechanisms they may have employed to tackle cybercrime.

Firstly, South Africa has been selected for this comparative study because of its numerous ties with Namibia. South African shares a historical past with Namibia and, as such, much legislations in Namibia was inherited from the South African colonial administration. Furthermore, there are also economic ties between the two countries; the Namibian dollar is pegged to the South African Rand.³⁵

Secondly, India has been chosen for this comparative study because it is a fast developing country and its IT industry is more advanced than that of Namibia. Moreover, India is known for the vibrancy of its ICT sector. By looking at the Indian jurisdiction and legislation, there may be lessons that Namibia can draw from.

Lastly, Uganda has been selected for this study because it is necessary for the research to examine how East African countries have dealt with the discourse of cybercrime. Uganda is part of the East African Community (EAC) and, therefore, is partly responsible for the United Nations Conference on Trade and Development's Draft EAC Framework for Cyberlaws (Phase I).³⁶ The legal framework provides for electronic transactions, electronic signatures and authentication, computer crime, consumer protection as well as data protection and privacy.³⁷

3.1 South Africa

In short, the legal framework in South Africa is made up of the Constitution, the Electronic Communications and Transactions Act 25 of 2002, the Protection of Personal Information Act 4 of 2013, and the Cyber Security Policy Framework. There are also institutions such as the South African Banking Risk Information Centre, which is responsible for monitoring the banking sector.

³⁵ Bank of Namibia Act 15 of 1997, s 26.

³⁶ Dana Van der Merwe, 'A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda' (2014) 17 Potchefstroom Electronic Law Journal 298, 311.

³⁷ *ibid*, 312.

a) Constitution of the Republic of South Africa, 1996

The South African Constitution ('Constitution') is relevant because it asserts the right to privacy. Privacy relates to cybercrimes because most cybercrimes that are committed involve the unlawful interception of confidential information. The right to privacy is provided for in section 14 of the South African Constitution.³⁸ The right to privacy, however, is subject to the limitation clause in section 36 of the Constitution.³⁹ The cyber inspectors created by the Electronic Communications and Transactions Act may impinge on this right. These cyber inspectors have the right to enter any premises if necessary in carrying out their investigations.⁴⁰

b) The Electronic Communications and Transactions Act 25 of 2002

The Electronic Communications and Transactions (ECT) Act deals with cybercrime in detail in sections 85-89.⁴¹ The ECT Act makes the unlawful access and interception of data a criminal offence by section 86(1) as well as the interference with data in section 86(2). The ECT only addresses cybercrime in general, it does not address cybercrime in the South African banking sector. Denial-of-service (DoS) attacks are criminalised in sections 86(1) to 86(4) of the ECT.⁴²

The focus of the South African ECT is to protect data.⁴³ The Act has also created 'cyber-inspectors' authorised to enter premises to obtain information regarding cybercrime (in terms of section 82(1)) that may impact on an investigation into cybercrime.⁴⁴ Sections 53, 54 and 55 of the ECT Act grant the Minister of Communications extensive powers to design measures to avert cyber-attacks.⁴⁵

³⁸ Section 14 provides: Everyone has the right to privacy, which includes the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed

³⁹ Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right;

⁴⁰ Fawzia Cassim, (2010) *op cit.* 118,119.

⁴¹ Electronic Communications and Transactions Act 25 of 2002

⁴² Fawzia Cassim 'Addressing the spectre of cyber terrorism: A comparative perspective' (2012) 15 Potchefstroom Electronic Law Journal 536, 397.

⁴³ Fawzia Cassim, (2010) *op cit.* 118, 119.

⁴⁴ Fawzia Cassim, (2011) *op cit.* 123, 129.

⁴⁵ Mzukisi Niven Njotini 'Protecting Critical Databases – Towards a Risk Based Assessment of Critical Information Infrastructures (CIIS) In South Africa' (2013) 16 Potchefstroom Electronic Law Journal 450, 463.

Cassim notes that the South African banking sector and software security companies have expressed concern about the increase in phishing schemes.⁴⁶ Phishing is a scam calculated to steal valuable information by sending out fake e-mails, or spam, written to appear as if they have been sent by banks or other reputable organisations with the intent of luring the recipient into revealing sensitive information such as account identification and so many others.⁴⁷ It thus involves the online theft of Internet users' identities.⁴⁸ In a recent case, suspected cyber hackers stole R 5.5 million from the bank account of the Mpumalanga Education Department, presumably with inside help.⁴⁹

c) Protection of Personal Information Act 4 of 2013

The Protection of Personal Information Act 4 of 2013 ('POPI') was promulgated with the aim of protecting personal information processed by public and private bodies. The Act promotes the protection of personal information processed by private and public bodies and provides for the protection of the rights of persons regarding unsolicited electronic communications.⁵⁰ The Act also provides for the introduction of certain conditions so as to establish minimum requirements for the processing of personal information and regulates the flow of personal information across the borders of South Africa.⁵¹ POPI allows for fines of up to R10 million or imprisonment of up to 10 years if companies do not respect personal information and handle it with the utmost care and responsibility.⁵²

d) South African Banking Risk Information Centre

The South African Banking Risk Information Centre (SABRIC) was established in 2002 as a wholly owned subsidiary of the Banking Association. SABRIC provides the banking sector with crime risk information management services and facilitates inter-bank initiatives to reduce the risk of organised bank-related crime through effective public-private partnerships.⁵³ There is a willingness on the part of the Minister of Police to collaborate with the IT and the banking industry in a combined effort to curb cybercrime.⁵⁴

⁴⁶ Fawzia Cassim, (2011) *op cit.* 123, 130.

⁴⁷ Nick Nykodym, Lisa Kahle-Piasecki, Sonny Ariss and Tracey A. Toussaint 'Cybercrime and Business: How to not get caught by the online phisherman' (2010) 5 *Journal of International Commercial Law and Technology* 252.

⁴⁸ Fawzia Cassim, (2011) *op cit.* 123, 130.

⁴⁹ *ibid.*, 130.

⁵⁰ Fawzia Cassim, 'Protecting personal information in the era of identity theft: just how safe is our personal information from identity thieves?' (2015) 8 *Potchefstroom Electronic Law Journal* 69, 78.

⁵¹ *ibid.*, 78.

⁵² *ibid.*, 80.

⁵³ Fawzia Cassim, (2010) *op cit.* 118, 121.

⁵⁴ *ibid.*, 119.

e) The cyber security policy framework

The Cabinet of South Africa passed the Cyber Security Policy Framework on 11 March 2012.⁵⁵ It promotes cyber security online; coordinates government actions on cyber security and ensures cooperation between the government, the private sector and civil society in addressing cyber threats. It further aims to examine areas of responsibility for government departments and tasks the State Security Agency with overall accountability for the development and implementation of cyber security measures.⁵⁶ To further illustrate South Africa's commitment to curb cybercrime, it is necessary to point out that South Africa is part of the SADC, which has issued a Draft Model Law on Crime and Cybercrime.⁵⁷

3.2 India

a) The Constitution

The right to privacy has not been defined as a fundamental right under the Constitution of India.⁵⁸ It is not provided for explicitly in the Indian Constitution. The right to privacy is inferred from the provision in Article 21 of the Constitution of India, which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.⁵⁹

b) Cybercrimes and Information Technology Act

Cyber legislation in India consists of the Cybercrimes and Information Technology (IT) Act, which was introduced on the 9th June 2000 and came into force on 17th October 2000.⁶⁰ It was promulgated to address cybercrime.⁶¹ The main purpose of the Act is to provide legal recognition to electronic commerce and to facilitate the filing of electronic records with the Government.⁶² This legislation does not define cybercrime.⁶³

⁵⁵ Fawzia Cassim, (2015) *op. cit.* 69, 77.

⁵⁶ *ibid.*, 77.

⁵⁷ Dana Van der Merwe, 'A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda' (2014) 17 Potchefstroom Electronic Law Journal 298, 303.

⁵⁸ Chinmaya Kumar Mohapatra and Nanda Hiranmaya 'Right of Privacy: Issues and Challenges (2015) 4 Indian Journal of Research 127.

⁵⁹ *ibid.* 1.

⁶⁰ Atul Bamrara 'The Challenge of Cyber Crime in India: The Role of Government' (2012) 3 Pakistan Journal of Criminology 127, 132.

⁶¹ Prabhashi Dalei and Tannya Brahme 'Cyber Crime and Cyber Law in India: An Analysis' (2013) 2 International Journal of Humanities and Applied Sciences 106.

⁶² *ibid.*, 108.

⁶³ *ibid.*, p. 106.

The Information Technology Act deals with hacking, tampering with computer source documents, publishing of information which is obscene in electronic form, and e-mail spoofing.⁶⁴ Spoofing, in general, is a fraudulent or malicious practice in which communication is sent from an unknown source disguised as a source known to the receiver.⁶⁵ The IT Act provides legal recognition of digital signatures and a legal framework for e-governance, offences, penalties, adjudication and investigation of cybercrime.⁶⁶ However, this piece of legislation has been amended by Information Technology Amendment Act of 2008.⁶⁷

The IT Act of 2000 penalises cyber contraventions (section 43, a-h) and cyber offences (sections 65 to 74). Section 66 makes hacking an offence. Section 66 provides for a penalty of imprisonment for a term which may extend to three years or for a fine, which may extend to five lakh rupees or with both.⁶⁸ In section 70, unauthorised access to protected systems is criminalised.⁶⁹ Section 70 further provides for a penalty of imprisonment for a term which may extend to ten years and for a fine.⁷⁰

c) National Policy on Information Technology 2012

In September 2012, the Union Cabinet of India approved the National Policy on Information Technology. The Policy aims to leverage information and communications technology (ICT) to address the country's economic and developmental challenges.⁷¹

d) Computer emergency response team

CERT is a well-equipped organisation of the Department of Information Technology, which is located in the Ministry of Communications and Information Technology. It has been established with the purpose of securing cyber space countrywide.⁷²

⁶⁴ Atul Bamrara 'The Challenge of Cyber Crime in India: The Role of Government' (2012) 3 Pakistan Journal of Criminology 127, 132.

⁶⁵ <<https://www.techopedia.com/definition/5398/spoofing>> accessed 12 May 2017.

⁶⁶ Fawzia Cassim 'Formulating specialised legislation to address the growing spectre of cybercrime: a comparative study' (2009) 12 Potchefstroom Electronic Law Journal 37, 52.

⁶⁷ Fawzia Cassim 'Addressing the spectre of cyber terrorism: A comparative perspective' (2012) 15 Potchefstroom Electronic Law Journal 536, 393.

⁶⁸ Information Technology Act 2000, s 66.

⁶⁹ *ibid*, s 70.

⁷⁰ *ibid*.

⁷¹ Prabhashi Dalei and Tannya Brahme 'Cyber Crime and Cyber Law in India: An Analysis' (2013) 2 International Journal of Humanities and Applied Sciences 106,108.

⁷² Atul Bamrara 'The Challenge of Cyber Crime in India: The Role of Government' (2012) 3 Pakistan Journal of Criminology 127, 133

CERT-In provides incident prevention and response services as well as security quality management services.⁷³ CERT-In plays an overarching role. In the sense that it interacts with other sectors to advise them in matters related to cyber security.⁷⁴

3.3 Uganda

Uganda forms part of the East African Community (EAC) Cyber laws Framework.⁷⁵ The Framework focuses on privacy and recognises the “critical importance of data protection and privacy”.⁷⁶

a) *The Constitution of Uganda*

Most cybercrimes involve the violation of privacy such as identity theft, hacking and phishing scams. The right to privacy is affirmed in the Constitution of Uganda in section 27.⁷⁷

b) *Electronic Transactions Act, the Electronic Signatures Act and the Computer Misuse Act*

Uganda has recently passed the Computer Misuse Act 2 of 2011, the Electronic Signatures Act 7 of 2011 and the Electronic Commerce Act 8 of 2011. The aim of these cyber laws is to improve the security of electronic transactions and devices. Companies and individuals involved in cybercrime face tough penalties in terms of these new laws: Companies may be deregistered in the sense that they lose their legal personality and cease to exist as companies and individuals may face three years in prison if they are charged with transgressing the law.⁷⁸

⁷³ *ibid*, 131.

⁷⁴ *ibid*, 132.

⁷⁵ Dana Van der Merwe, ‘A comparative overview of the (sometimes uneasy) relationship between digital information and certain legal fields in South Africa and Uganda’ (2014) 17 Potchefstroom Electronic Law Journal 298, 304.

⁷⁶ *ibid*, 304.

⁷⁷ Section 27 of the Constitution, reads “No person shall be subjected with the interference of the privacy of his home, correspondence, communications or other property.”

⁷⁸ Atul Bamrara, ‘The Challenge of Cyber Crime in India: The Role of Government’ (2012) 3 Pakistan Journal of Criminology 127, 136

c) **National Information Technology Authority of Uganda**

According to a report by the ITU, Uganda has two national CIRTs CERT-UG operating under the National Information Technology Authority of Uganda (NITA-U) and ugCERT operating under the Uganda Communications Commission.⁷⁹ Furthermore, Uganda has an officially recognised national cyber security strategy since 2011, and NITA has also developed a National Information Security Framework.⁸⁰

Despite the various legislations that South Africa has in place, the banking industry in South Africa is still prone to cyber-attacks. Recent attacks on bank clients have left many questioning the safety of online banking. Organisations such as SABRIC are encouraged in the fight against cybercrime in the banking industry. The Cyber Security Policy Framework in South Africa shows that the government is committed in tackling the issue of cybercrime. It is necessary to note that South Africa has not established a CERT. In India, the statute that deals with cybercrime is the Cybercrimes and Information Technology Act of 2000, which has been amended by the 2008 Act. Besides that, India has a Computer Emergency Response Team. Although Uganda is a developing country, it has in place legislations that are quite promising. Besides, the National Information Technology Authority of Uganda two national CIRTs CERT-UG.⁸¹

4 Conclusion

Namibia has enacted the Bank of Namibia Act and is currently in the process of enacting the Electronic Communications and Transactions Act.⁸² The Bank of Namibia Act, however, has not incorporated any provisions relating to how the financial sector in Namibia should deal with economic crimes where private financial information obtained illegally is used. The Namibian Financial Sector Strategy for 2011-2021 identifies that although the financial sector is sound and well-functioning, there is a lack of consumer protection.⁸³ In order to address these weaknesses in consumer protection, initiatives and policy should be put in place by the government in collaboration with the private sector.⁸⁴ As alluded earlier, the fight against cybercrime in the banking sector cannot be fought by either the

⁷⁹ Cyberwellness profile uganda. <https://www.itu.int/en/ITUDE/Cybersecurity/Documents/Country_Profiles/Uganda.pdf> accessed October 10, 2016.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Fawzia Cassim, (2011) *op. cit.* 123, 133.

⁸³ Namibia Financial Sector Strategy 2011-2021, 5.

⁸⁴ A Raghavan and Latha Parthiban 'The Effect of cybercrime on a bank's finances' (2014) 2 International Journal of Current Research and Academic Review 173, 174.

private sector or the government alone. The two entities must work together and come up with comprehensive approaches and integrated strategies to solve this problem.

SABRIC in South Africa is responsible for providing the banking sector in South Africa with crime risk information.⁸⁵ Namibia does not have such a body apart from the Bank of Namibia.

By looking at other jurisdiction, it becomes clear that an effective legal framework is in place. South Africa has enacted statutes such as the Electronic Communications and Transactions Act. Apart from that, India⁸⁶ and Uganda both have officially recognised CERTs in place.⁸⁷

To ensure an effective legislative response, it is essential to compare the national legislations with the international instruments such as the Convention on Cybercrime to assess whether the legal measures in place are on par with international standards of best practices. International perspectives in this regard provide us with a preview of how other countries are handling the challenges that can be associated with financial cybercrime. In order to warrant global standards in both developed and developing countries, capacity building is necessary.⁸⁸ Namibia is a developing country and still needs to learn from other countries to shape its strategic instruments to provide protection and prevention. This comparative study has shown that Namibia has an ineffective and inefficient legal framework on cyber security.

⁸⁵ Fawzia Cassim, (2010) *op. cit.* 118, 121.

⁸⁵ *ibid*, 119.

⁸⁶ Atul Bamrara, 'The Challenge of Cyber Crime in India: The Role of Government' (2012) 3 *Pakistan Journal of Criminology* 127, 133.

⁸⁷ Cyberwellness profile Uganda. <https://www.itu.int/en/ITU-D/Cybersecurity/Documents/Country_Profiles/Uganda.pdf> accessed October 10, 2016.

⁸⁸ Macko Gercke, 'Understanding cybercrime: phenomena, challenges and legal response' (2012) *International Telecommunications Union* <<http://www.itu.int/ITU-D/cyb/cybersecurity/legislation.html>> accessed 08 August 2016.

5 Recommendations

The findings of this research have been that, while Namibia has a number of statutes regulating the banking industry, these statutes fall short in addressing cyber security in the Namibian banking sector. The following recommendations could help remedy the situation.

First, the Bank of Namibia Act needs to address the issue of cyber security in more detail. The legal framework which Namibia has in place is insufficient to deal with cybercrimes in the banking industry. The Bank of Namibia Act 15 of 1997 need not only address banks in general but its mandate needs to be expanded, in that it should incorporate safety and security in online transactions. In order for this to be achieved successfully, the Bank of Namibia Act should be amended so that it can introduce a minimum standard of practice to which all banks in Namibia should comply regarding the protection of personal information from cyber criminals.⁸⁹

Second, all the stakeholders should be consulted in order to guarantee information sharing. The start of a solution to mitigate and prevent cyber attacks requires a collaborative, proactive relationship premised on information sharing between the government and private sector.⁹⁰ It is, therefore, a collective consensus of banks and regulators to make policies and adopt measures in order to protect banking platforms from cyber threats.⁹¹

Third, Namibia should adopt and follow guidelines provided by the African Union (AU) Convention on Cyber Security and Personal Data Protection as well as the Council of Europe Budapest Convention on Cybercrime. The Electronic Communication and Transaction (ECT) Bill should be approved and signed into law because it is long overdue;- crime waits for no one. The longer it takes to detect, mitigate, and fully resolve a cyber attack, the more costly it becomes.⁹²

⁸⁹ Nick Nykodym, Lisa Kahle-Piasecki, Sonny Ariss and Tracey A. Toussaint 'Cybercrime and Business: How to not get caught by the online phisher' (2010) 5 *Journal of International Commercial Law and Technology* 252.

⁹⁰ Ariana Johnson, 'Cybersecurity for Financial Institutions: The Integral Role of Information Sharing in Cyber Attack Mitigation' (North Carolina Banking Institute, HighBeam Research 2016) <<https://www.highbeam.com>> accessed 11 October 2016.

⁹¹ A Raghavan and Latha Parthiban, 'The Effect of cybercrime on a bank's finances' (2014) 2 *International Journal of Current Research and Academic Review* 174.

⁹² Ariana Johnson, 'Cybersecurity for Financial Institutions: The Integral Role of Information Sharing in Cyber Attack Mitigation' (North Carolina Banking Institute, HighBeam Research 2016) <<https://www.highbeam.com>> accessed 11 October 2016.

The ECT Bill could also include some provisions related to economic cybercrime, and not just cybercrime in general. Economic cybercrime should carry more sanctions than any other form of cybercrime. Sanctions such as payment of penalty fees and long imprisonment terms would be effective in deterring the commission of economic cybercrime. Heavy sanctions are needed because of the seriousness of these crimes.

Fourth, the Namibian government should support capacity building and address current gaps in capacity. It has been asserted that many African states lack the technical expertise to draft and enforce cyber security laws.⁹³ The AU has recognised these challenges and tasked the New Partnership for Africa's Development (NEPAD) with developing and implementing a capacity-building project that closes the capacity gaps.⁹⁴ Education is an important platform for training and developing a future cybercrime workforce such as CERT and CIRT⁹⁵. Nykodym *et al* express the view that organisations should also make awareness a necessary part of employee training and development.⁹⁶

In order to create awareness among bank clients who utilise online banking sectors, initiatives such as campaigns and workshops should be in place with the aim of educating end-users on how to surf on the Internet as well as to identify scams and so on. Financial institutions must continue to strengthen their cyber security infrastructure by investing resources in gathering, analysing, and sharing cyber threat intelligence data to better understand the evolving nature of complex security risks.⁹⁷

⁹³ Eric Tamarkin, 'The AU's cybercrime response a positive start, but substantial challenges ahead' (2015) 73 Institute for Security Studies Policy Brief 1, 4.

⁹⁴ *ibid*, 5.

⁹⁵ *ibid*, 5.

⁹⁶ Nick Nykodym, Lisa Kahle-Piasecki, Sonny Ariss and Tracey A. Toussaint 'Cybercrime and Business: How to not get caught by the online phisher' (2010) 5 *Journal of International Commercial Law and Technology* 252, 256.

⁹⁷ Ariana Johnson 'Cybersecurity for Financial Institutions: The Integral Role of Information Sharing in Cyber Attack Mitigation' (North Carolina Banking Institute, HighBeam Research 2016) <<https://www.highbeam.com>> accessed 11 October 2016.

CHAPTER 16

PLAYING HARD TO GET IN A SEA OF MANY FISH: THE PRACTICAL IMPLICATIONS OF SADDLING FOREIGN INVESTORS WITH HOST-COUNTRY DEVELOPMENT

by

Dunia P Zongwe

Is it at all feasible for a country to burden foreign investors with heavier obligations and at the same time remain attractive to those investors? Put in a mundane way, can a good-looking woman afford to make huge demands on a man and expect to get his undivided attention in return? You may reply that it all depends on the man in question -- his circumstances and his personality. After all, some men are extravagant and others are masochists, you may also think.

In this piece, I am going to argue that it mostly depends on how many (big) fish you find in the sea. I use the metaphor ‘many fish in the sea’ to explain and provide insights into an economic mechanism involved when saddling foreign investors with heavy obligations to actively take part in the development of the host country. Although they are foisted on foreign investors in the name of sustainable development, these heavy obligations are problematic and, most importantly, do not have the intended effects. While innovative approaches have managed to lure foreign investors into playing a significant and active part in the economic development of host countries,¹ the key challenge is not so much the idea or the motivations behind; it is the *manner* in which it is carried through.

Since 2002, several nations, developed and developing alike, have started to revisit their approach to foreign direct investments (FDIs) and laid down stricter requirements for foreign investments.² Some countries have gone as far as denouncing the Convention on the Settlement of Investment Disputes Between

¹ See, for instance, the resource-for-infrastructure investment contracts. Dunia Zongwe, ‘The Competitive Edges of China’s Resource-for-Infrastructure Investment Contracts in Africa’ (2010) 2 Peking University Journal of Legal Studies 227.

² See United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (United Nations 2012); Romulo Brillo, ‘Living Without Investment Treaties: The Brazilian Approach to Investment Policy Making and Dispute Settlement’ in Laurence Boule and others (eds), *International Economic Law and African Development* (Siber Ink 2014) 172ff.

States and Nationals of Other States (ICSID Convention), others, like Namibia and South Africa, have indicated their intention to no longer include investor-state arbitration in future international investment agreements (IIAs) to which they become parties.

In Africa, this critical movement has culminated in the drafting of the Pan-African Investment Code (PAIC),³ which lays a special emphasis on sustainable development in investment matters.⁴ South Africa, Australia, Russia and the 'Bolivarian' countries from Latin America are part of this movement. And, with the promulgation of its new investment law,⁵ Namibia too seems to have joined this movement towards the revision of the current foreign-investment legal regime.

To answer the question I have asked from the outset, I divided this chapter in four sections. In the first section, I outline the 'attractions of foreign investors'. In the next section, I present in some detail the new and heavier obligations of foreign investors. I show that, in essence, these new obligations boil down to asking foreign investors to actively participate in the development of host countries. The third part of the chapter, the crux of the entire chapter, explores the practical implications of placing such heavy burdens on the shoulders of foreign investors. The fourth and final substantive section raises a fundamental question regarding the line separating appropriate regulation and efficient contracting.

1 Attractions of foreign investors

Foreign investments entail, unsurprisingly, certain costs for both investing corporations and the recipient countries. Foreign corporations face a variety of political risks while host states incur considerable transactions costs, including high search costs. In addition, host countries must negotiate a trade-off between the search for foreign capital and the regulation of the economy for development. Speaking of the South African situation, which has some echoes in Namibia, Bosman aptly put this 'unavoidable trade-off' as follows:⁶

³ Draft Pan-African Investment Code (2016) <<http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1>> accessed 23 November 2016.

⁴ *ibid*, art 1.

⁵ Namibia Investment Promotion Act, No. 9 of 2016.

⁶ Karen Bosman, 'South Africa: Trading International Investment for Policy Space' (2016) Stellenbosch Economic Working Papers 04/16, 38-39.

It is inescapable that there are severe historic wrongs that need to be addressed... There are however also certain realities that exist in the international investment regime. An unavoidable trade-off exists between a certain level of sovereign regulation and foreign investment protection...

Seen from a different vantage point, the question relates to which party should carry most of the burden of development in the host country: the host state or the foreign investor? If the host state places the brunt of that burden on foreign investors by imposing heavy obligations on them, it risks alienating them; if the host state removes virtually all restrictions on foreign investments, then it will have to shoulder alone the onerous responsibility to foster sustainable development in the host country.

1.1 The value of foreign investments

Foreign direct investments (FDIs) are one of the most sought-after economic resources in the world. Policymakers generally believe that FDI is more conducive to long-term growth and development than other forms of capital inflows.⁷ This perception is mostly based on the idea that FDI brings foreign technology and management skills, which can then be adapted by the host countries in other contexts.⁸ Second, it is based on the idea that FDI creates or helps create jobs in the host country. Third, that perception is also based on the fact that developed economies and rapidly growing economies tend to absorb considerably more foreign investments. Moreover, capital inflows have been found to have the greatest impact on the level of domestic investment in host countries.⁹ Consequently, host countries, especially those wishing to embark on a path to rapid economic growth, usually do their utmost to draw as much foreign investments as possible.

1.2 The (limited) role of law

To bring in foreign capital, one of the first things host countries do is to set up an appropriate policy and legal framework. The question then arises: *Do investment laws succeed in attracting FDIs?* There is both a simple and a more complicated answer to this question. The simple answer to this question is 'no'. The factors that attract FDIs vary from country to country, from developed countries to developing

⁷ James P Walsh and Jianyan, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach' (2010) International Monetary Fund Working Paper 10/187, 3 <<https://www.imf.org/external/pubs/ft/wp/2010/wp10187.pdf>> accessed 24 November 2016.

⁸ *ibid.*

⁹ Yoel Hecht and others (eds), 'Interactions Between Capital Inflows and Domestic Investment: Israel and Developing Economies' (2004) 2 Israel Economic Review 1.

countries, advanced economies to emerging markets. Firms investing in developing countries employ a different balance of considerations than those employed while investing in developed countries. For instance, investing in a developed country often means that there will be greater macro-economic stability and a better educated workforce. Investing in a developing country does not mean that there will be macroeconomic instability in the host state, but simply that the stability of the host country's economy cannot be taken for granted.

But the situation is more complicated, and it is not accurate to say that the law does not have any effect on capital inflows. On the one hand, some have observed that the law – and investment laws in particular – has a marginal effect on capital inflows, especially in Africa.¹⁰ According to this view, investment flows and most of international economic relations are not dictated by the law, but by developments in areas other than in the law itself, such as economics, politics, and technology.¹¹

On the other hand, it would be self-contradictory to claim that the law does not have any effect on capital inflows and to argue at the same time that laws burdening foreign investors with host-country development will decrease capital inflows. This would be pure contradiction. In fact, there is a nuance, and that nuance is to say that the law has definitely an effect on FDI and capital inflows, but it is not the leading cause or the decisive factor in attracting FDIs and capital inflows. The law does impose costs on economic actors and it may – as I argue here – impose excessive or disproportionate costs, which is why it matters a lot to examine or measure the impact of laws on the economy and business transactions.

1.3 Drivers of foreign investments

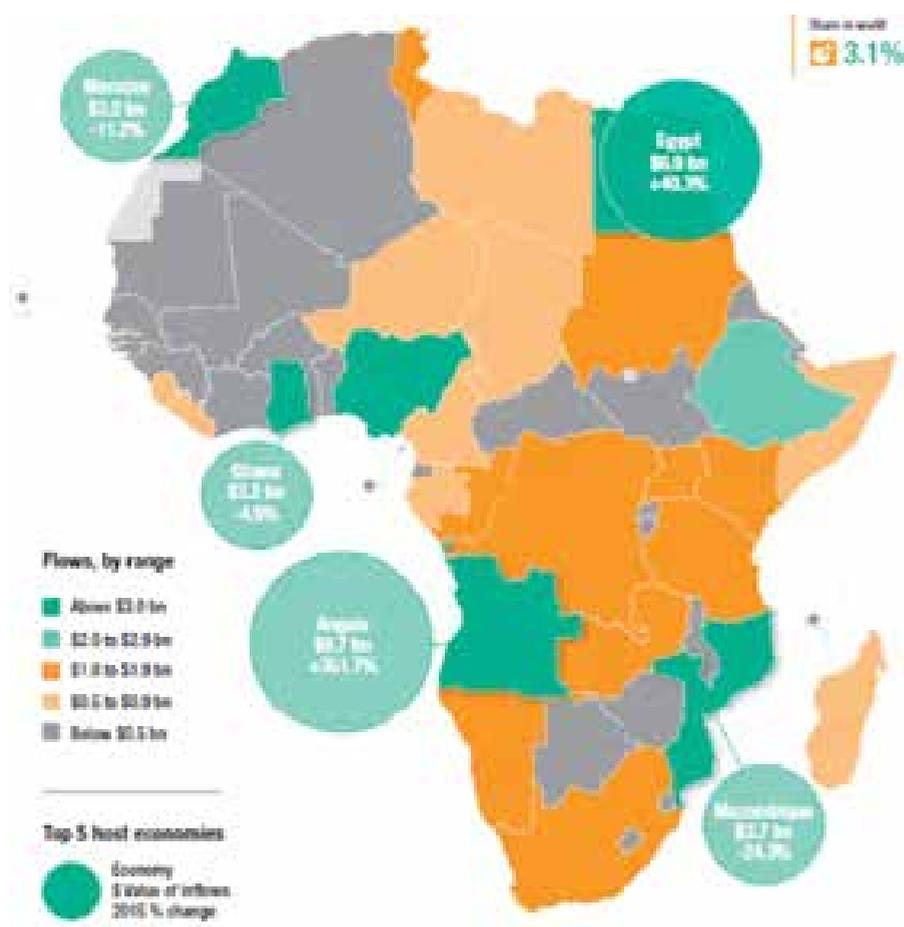
A good illustration of the observation that the law is not the determining factor of capital inflows is the varying levels of foreign direct investments on the African continent in 2015. As can be seen from Figure 1 below, the countries on the continent that attracted the most FDIs last year are resource-rich countries, not the countries with the best investment laws or the most hospitable investment climate. And, although African countries have signed many more bilateral investment treaties (BITs), they hardly receive 4% of the world's investment flows.¹²

¹⁰ Offah A Obale, 'The Role of International Economic Law in Africa (June 2008) Society of International Economic Law (SIEL) Inaugural Conference, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148778> accessed 24 November 2016.

¹¹ Laurence Boulle and others (eds), *International Economic Law and African Development* (Siber Ink 2014) 6; Issouf Soumaré and others, 'Comparative Study of the Characteristics of FDI from Developed Countries versus China in Africa' (2016) *Transnational Corporations Review*.

¹² See United Nations Conference on Trade and Development, *op. cit.*, 38.

Figure 1: FDI inflows to Africa (2015)



Source: United Nations Conference on Trade and Development, World Investment Report 2016 (2016)

Two factors best explain the current situation in Africa in terms of foreign investments, namely the price of commodities in world markets (which has sharply dropped over the past few years) and the return of investor confidence to North Africa. These factors explain, first, why most investment flows to Africa are concentrated in the extractive sectors and, second, why Egypt and Morocco are among the top five FDI recipients on the continent, the others being Angola, Mozambique and Ghana.

2 Obligations of foreign investors

2.1 The critical movement towards foreign investments

Another way of showing that the law serves merely a backup role in attracting capital inflows is the fact that FDI to the continent has decreased despite the new generation of investments laws adopted by several countries since 2002. Investment flows to Africa decreased from 58 billion in 2014 to 54 billion US dollars in 2015.¹³ Africa's share of global FDI is also decreasing. In 2015, that share decreased by 7.2%: It was 3.1%; in 2014, 4.6%; and in 2013, 3.7%.¹⁴

In recent years, South Africa (2015), Australia (2015), Russia, the 'Bolivarian states' of Latin America, Indonesia, and Namibia (2016) have passed new investment laws that changed their approach to foreign investments. Some countries have pulled out of the ICSID Convention, others, like Namibia and South Africa, have excluded international investor-state arbitration in future IIAs in favor of local dispute resolution.

Namibia's position is not as clear-cut, at any rate not as clear-cut as South Africa's, which has gone far in revisiting its approach to foreign investments. Namibia's stance seems more prudent, less unorthodox such that it is not certain whether Namibia can be accurately depicted as belonging to that critical movement towards foreign investments. There seems to be only two related aspects of Namibia's approach that may be thorny, namely the exclusion of *international* investor-state arbitration¹⁵ and the compulsory recourse to local courts.¹⁶

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Namibia Investment Promotion Act, s 28.

¹⁶ *ibid.*, s 28(4).

Unlike Namibia, the position of South Africa may look radical as South Africa has affirmed a robust right to regulate,¹⁷ including the right to impose measures aimed at advancing previously disadvantaged South Africans.¹⁸ Similarly, South Africa is also among the few countries where foreign investors are granted no preferential treatment.¹⁹

2.2 The new and heavier obligations

What these countries mostly have in common is the fact that they have imposed new obligations on foreign investors. This is the case of the Pan-African Investment Code (PAIC)²⁰ as well as the Namibian and South African investment laws. In the Namibia Investment Promotion Act, some of those obligations are subtle, not expressly framed as obligations, but they nonetheless have the same effect or impact. Those subtle obligations would usually take the form of a provision calling on foreign investors to respect national laws,²¹ and another provision in the national laws would in turn require the compulsory recourse to local courts,²² for instance. Though not expressly couched as an obligation to use local courts, the effect of such related provisions is to impose on the foreign investors an obligation to use local courts and exclude international arbitration.

What are these new and heavier obligations? Let us take the PAIC as it appears to be radical, if not the most radical, in its imposition of new obligations. If a host country ratifies the PAIC and the PAIC enters into operation, investors in that host country will – among other obligations – have to:

- (1) contribute to the economic, social and environmental progress with a view to achieving sustainable development of host states;²³
- (2) ensure the equitable treatment of all shareholders;²⁴
- (3) adhere to socio-political obligations;²⁵

¹⁷ Protection of Investment Act, No. 22 of 2015 (SA Investment Act), s 4(b) (providing that one of the purposes of the Protection of Investment Act is “to affirm the Republic’s right to regulate investments in the public interest”).

¹⁸ SA Investment Act, s 12(1)(a).

¹⁹ See SA Investment Act, ss 5 (application of the Act) and 8 (national treatment), especially s 8(4).

²⁰ Draft Pan-African Investment Code.

²¹ Namibia Investment Promotion Act, s 18(1).

²² *ibid*, s 28(4).

²³ Draft Pan-African Investment Code, s 22(3).

²⁴ *ibid*, s 19(3)(a).

²⁵ *ibid*, s 20.

- (4) encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises;²⁶
- (5) ensure that timely and accurate disclosure is made on all material matters regarding a corporation;²⁷
- (6) refrain from exploiting and using local natural resources to the detriment of the rights and interests of the host state;²⁸
- (7) ensure equitable sharing of wealth incurred from investments;²⁹ and
- (8) protect the environment, while performing their activities, and take reasonable steps to restore it where their activities damage the environment.³

These new obligations sound good, they sound like the right thing to do. So what is wrong with these new obligations?

2.3 The problem with the new obligations

Some of the new obligations hurt the core of international investment law. If I were to sum up investment law, I would say that investment law seeks to internationalize the investment contract. What these new obligations do is to put the investment contract under the jurisdiction of national courts and domestic legal systems. I can therefore frame the central problem as follows: *international investment law seeks to internationalize the investment contract whereas these new obligations actively localize the contract*. This clash between national standards and international minimum standards dates back to the mid-19th century. Around that time, the Argentinian jurist Carlos Calvo contended, on the basis of the economic sovereignty of nations, that foreign nationals who establish themselves in a host country must have the same level of protection as nationals of the host state.³¹

²⁶ ibid s 19(3)(b).

²⁷ ibid, s 19(3)(c).

²⁸ ibid, s 23(1).

²⁹ ibid, s 24(e).

³⁰ ibid, s 37(3).

³¹ Emmanuel T Laryea, 'Rules for Entrenching Economic Dominance by Developed Countries: Examples in International Trade and Investment Laws' in Emmanuel T Laryea and others (eds), *International Economic Law: Voices of Africa* (Siber Ink 2012) 96ff.

International investment law protects property rights against risks at global, country, industry and firm levels. It protects property rights by internationalizing investment contract by means of general contractual terms and a number of investment-specific devices.

The protective devices include stabilization, choice-of-law, arbitration, and bilateral investment treaties (BITs). Stabilization clauses say that, should the host state decide to change the laws after the foreign investor has started its business in the host state, then those changes will not affect the foreign investment in question but only future foreign investments and investors. The essence of a stabilization clause is the stripping of a host state's freedom to alter the foreign investor's rights by changing its municipal law.³² The power of ICSID tribunals to order injunctive relief or specific performance in certain instances³³ reinforces stabilization clauses and weakens the host state's legislative sovereignty.³⁴

Choice-of-law clauses enable the parties to an investment contract to choose the law of a third-party country to apply to the case. These clauses exclude from the investment contract the application of the domestic law of the host state and subject the contract to some external standards.³⁵ For example, an investment contract between a Canadian firm and a Namibian state-owned enterprise may stipulate that the law of England will apply to the contract. However, unlike stabilization clauses, choice-of-law clauses do not have the intended effect of subjecting the investment contract to a higher legal system: The best it can do is to make that other legal system equal to the host state's law.³⁶ That is the reason why countless investment contracts provide for the application of the host state's rules that are consistent with international law.³⁷

Arbitration clauses typically provide that, if a dispute arises between a foreign investor and a host state, the dispute should be referred to international arbitration, usually to the International Center for the Settlement of Investment Disputes (ICSID) in Washington, DC, in the United States of America (US).

³² M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) 281ff.

³³ Cases where the tribunal affirmed its power to award injunctive relief include *Goetz v Burundi*, Sentence, ICSID Case No ARB/95/3, 10 February 1999; *Enron Corp v Argentina*, Decision on Jurisdiction, 14 January 2004, ICSID Case No ARB/01/3; *Micula v Romania*, Decision on Jurisdiction and Admissibility; ICSID Case No ARB/05/20, 24 September 2008.

³⁴ Ankita Ritwik, 'Tobacco Packaging Arbitration and the State's Ability to Legislate' (2013) 54 *Harvard International Law Journal* 523, 531ff.

³⁵ Sornarajah, *op. cit.*, 281.

³⁶ *ibid.*, 284-285.

³⁷ For example, *Kaiser Bauxite Company v Government of Jamaica* (ICSID Case No ARB/74/3), Arbitral Tribunal Decision on Jurisdiction and Competence of 5 July 1975, 1 ICSID Rep. 296, 301 (1993); *Texaco Overseas Petroleum Company (TOPCO) v Libyan Arab Republic*, Preliminary Award, 53 ILR 389, 404 (1979).

BITs ensure a certain level of protection that can be enforced through international investor-state dispute resolution outside of the domestic legal system of the host state. Some research indicates that the more BITs a developing state enters into, the more foreign investments it receives,³⁸ but the evidence is far from conclusive. Foreign investors resort to BITs because they are often skeptical about the quality of institutions and the enforceability of the law in host countries.³⁹

What these protective devices all have in common is the fact that they take the investment contract out of the jurisdiction of the courts of the host state. The rationale behind these protective clauses is the prevention of parochialism – the tendency of judges in local jurisdictions to subconsciously or knowingly favor local actors and groups of which they are members.⁴⁰ The emerging critical movement towards FDI approaches this sort of devices in a different way. In some cases, it eliminates them totally. Thus, South Africa’s stronger right to regulate in its new investment law dilutes stabilization clauses to the extent that South Africa will from now on be able to impose new obligations on already established foreign investors, and those investors will not be able to brandish stabilization clauses to avoid those obligations. In such cases, the stabilization clause is rendered totally ineffective.

Table 1: Effect of the new obligations on standard investment clauses

Clauses	Diluted or eliminated by
Stabilization	Stronger sovereign right to regulate economy
Choice-of-law	Compulsory application of host-state’s law
Arbitration	Compulsory recourse to local courts
BIT	Phasing-out of BITs

The provisions in the new investment laws that require that the law applicable to a foreign investment contract is the law of the host state annihilates choice-of-law clauses. They do so by making it impossible for the parties in an investment contract to choose any other national law as the law applicable to the contract. In a similar spirit, the compulsory recourse to local courts in the new investment

³⁸ Eric Neumayer and Laura Spess, ‘Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?’ (2005) 33 *World Development* 1567.

³⁹ *ibid.*

⁴⁰ Elizabeth Trujillo, ‘Shifting Paradigms of Parochialism: Lessons for International Trade Law’ (2007) 3 *Journal of International Law and International Relations* 41, 43ff.

laws waters down arbitration clauses. They undermine international arbitration by prohibiting the parties to a foreign investment contract from providing that, in the case of a dispute, the dispute should be referred to arbitration in another country or at ICSID. Lastly, by doing away with BITs, a host country deprive investors of the (characteristically higher) level protection provided for in BITs.

This is how the new obligations hurt the core of international investment law and why they have adverse practical implications.

3 Practical implications

3.1 The under-supply of capital

The major practical implication of these obligations is the under-supply of foreign capital, if not capital flight. Shortcomings in capital inflows should be cause for concern for developing countries, including African nations. Several projects that are crucial from a developmental perspective, such as the extractive industries, energy and infrastructure, are capital-intensive, i.e., they require huge injections of capital, which most host states in the developing world are in dire need of.

New obligations will increase the cost of doing business in the host countries imposing them. Except for FDI in strategic resources, FDI will decrease in most if not all sectors. Indeed, the most disturbing implication of these new obligations is that the host countries applying them will end up trailing behind in terms of economic development.

If history is anything to go by, the states executing these revisionist investment policies may regret it. After several states in Latin America and Africa heeded Calvo's doctrine of applying national standards, private capital flows decreased and eventually led to economic difficulties in those states.⁴¹ Later on, in order to reverse the scarcity of private capital flows, the states in question changed tack and decided to woo foreign investors yet again.⁴² With the emerging, revamped version of the Calvo doctrine, is history going to repeat itself?

⁴¹ Laryea, *op. cit.*, 99.

⁴² *ibid.*

3.2 Further implications

Save for agriculture,⁴³ FDI in the primary sector (petroleum and mining) does not create a lot of jobs. In this day and age, a large part of employment – just like most of global trade – is generated by trade in services.⁴⁴ This is also the case in Namibia, where services account for more than 60% of the economy.⁴⁵ Like research in South Africa has demonstrated, textile, catering and accommodation services, and furniture are among the most labor-intensive economic sectors.⁴⁶ In other words, services and manufacturing have a much greater potential to create employment for people of working age.

The potential of a sector to create jobs should guide policy makers' decisions on which sectors of the economy to prioritize.⁴⁷

That FDI in Africa is heavily concentrated in the primary sector (minerals and hydrocarbons) is not good news. It says something about the quality of investment. Although foreign investments in the extractive sectors are always welcome insofar as they bring in revenue and foreign exchange earnings for the host state, which it can redeploy in other sectors of the host economy, foreign investments in the primary sector are not likely to create enough jobs. Investments in the services trade will do a much better job in creating the desired levels of employment. Unfortunately, it is often much easier for developing countries to invest in the development of extractive sectors than it is for them to invest in sectors like infrastructure⁴⁸ and

⁴³ Michael N Humavindu and Jesper Stage, 'Key Sectors of the Namibian Economy' (2013) 2 *Journal of Economic Structures* 1.

⁴⁴ United Nations Conference on Trade and Development, *Services: New Frontier for Sustainable Development: Exploiting the Potential of the Trade in Services for Development* (United Nations 2014) 1 (stating that the services sector accounted for 65.6% of global gross domestic product and 44.1% of employment in 2011); World Trade Organization, *Measuring Trade in Services* (World Trade Organization 2010) 8 (showing that the services sector account for more than half of the employment in many countries, including the United States).

⁴⁵ Central Intelligence Agency, 'The World Factbook: Namibia' (10 November 2016) <<https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>> accessed 22 November 2016 (indicating that services account for 65.1% of the Namibia's gross domestic product in 2015).

⁴⁶ Fiona Tregenna, 'Sectoral Labor-Intensivity in South Africa' National Economic Development and Labour Council (NEDLAC) Research Paper (2010) <http://new.nedlac.org.za/wp-content/uploads/2014/10/labour_intensity_report_2010.pdf> accessed 21 November 2016.

⁴⁷ Fiona Tregenna, 'Sectoral Labor-Intensivity in South Africa' National Economic Development and Labour Council (NEDLAC) Research Paper 2010, ii <http://new.nedlac.org.za/wp-content/uploads/2014/10/labour_intensity_report_2010.pdf> accessed 21 November 2016.

⁴⁸ Organisation for Economic Co-operation and Development, *Fostering Investment in Infrastructure: Lessons Learned From OECD Investment Policy Reviews* (Organisation for Economic Co-operation and Development 2015) 5 (stating that developing countries failed to seize opportunities to invest in infrastructure, often due to a lack of enabling environment for such investments).

education,⁴⁹ which call for longer time horizons, greater strategic thinking and more resources. It is the host state's investments in such areas that attract the kind of investments that will make a big difference with reference to employment. The catch is that many developing countries badly need enabling legal frameworks for investments in infrastructure⁵⁰ and often lack institutions of higher learning capable of producing graduates with the required level and type of skills.⁵¹

3.3 The South African example

It is time to pause for a teachable moment and look at the situation in South Africa. The background to South Africa's adoption of a new investment law features the desire to modernize its laws and the experience it had with FDIs when it comes to black economic empowerment (BEE) schemes.⁵² A fundamental departure from the country's attitude towards foreign investment, the new investment law, the Protection of Investment Act,⁵³ is the product of South Africa's multi-year review of its investment policy.⁵⁴

The Protection of Investment Act (hereinafter 'SA Investment Act') also represents the South African government's response to legal challenges of its BEE policies by foreign investors. A number of foreign investors in the granite mining sector took South Africa to court in 2007 because of South Africa's BEE schemes.⁵⁵ Those investors successfully argued that South Africa's BEE policy violates its obligations under BITs.⁵⁶ In the end, South Africa was forced to settle the matter in 2010 for an undisclosed amount.⁵⁷

The South African government was not pleased with these developments, seeing BITs as obstacles to the redress of the social and economic effects

⁴⁹ Olivier Cattaneo and others (eds), *International Trade in Services: New Trends and Opportunities for Developing Countries* (The World Bank 2010) 20ff (stating that most service sectors are knowledge intensive and may require rethinking of education policies).

⁵⁰ Organisation for Economic Co-operation and Development, *op. cit.*, 5.

⁵¹ Cattaneo and others (eds), *op. cit.*, 21.

⁵² For more information on the litigation that led to South Africa's review of its BIT policy, see Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review 167. Act 22 of 2015.

⁵⁴ Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* (Republic of South Africa 2009). See also Thomas R Snider, 'South Africa Adopts New Investment Law Following Phase Out of BITs' (2016) Practical Law 1.

⁵⁵ For instance, *Piero Foresti, Laura de Carli & Others v Republic of South Africa* ICSID Case No ARB(AF)/07/01 (investors successfully challenged South Africa's BEE policy, as provided for in South Africa's Mineral and Petroleum Resources Development Act).

⁵⁶ See also Department of Trade and Industry, *op. cit.*

⁵⁷ See Duncan Green, 'Why Is the EU Threatening to Cut Investment in South Africa?' (*Oxfam*, 19 July 2013) <<https://oxfamblogs.org/fp2p/why-is-the-eu-threatening-to-cut-investment-in-south-africa/>> accessed 22 November 2016.

of apartheid. In response, the South African government tabled in 2013 an investment bill that embodied a robust right to regulate,⁵⁸ the phasing-out of the 21 BITs the country entered into since 1994⁵⁹ and the compulsory recourse to national courts.⁶⁰ The purpose of the Act is to “protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors”.⁶¹

This new investment bill led to heated debate in parliament and strong reaction from the business community. In Parliament, the opposition complained that, with this new legislation, South Africa is sending the wrong signals to the world. As one member of the opposition said, this legislation is “no welcoming invitation to the world”.⁶²

This is a big neon sign, on the shop front window of South Africa that screams: ‘Closed for business’.

In the South African business community, both the European Chamber of Commerce and the US Chamber of Commerce complained about the new bill. In particular, the Executive Director of the American Chamber of Commerce in South Africa, Carol O’Brien, warned the South African government that the enactment of such legislation will scare away foreign investors.⁶³ The EU Commissioner for Trade, Karel De Gucht, said that the EU was “not amused” by the bill, which would negatively impact EU investments by offering “a standard of protection inferior to the [phased-out BITs].”⁶⁴ As the EU Ambassador to South Africa observed:⁶⁵

With South Africa reportedly attracting less than half of the FDI of comparably sized economies, eroding the existing protections that foreign investors enjoy in the country should be carefully, and financially assessed.

⁵⁸ SA Investment Act, s 12.

⁵⁹ *ibid*; Schlemmer, *op. cit.*, 169.

⁶⁰ SA Investment Act, s 13.

⁶¹ *ibid*, s 4(a).

⁶² Gaye Davis, ‘SA’s New Investment Legislation Slips Under the Radar’ (2016) Eyewitness News <<http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law>> accessed 22 November 2016.

⁶³ *ibid*.

⁶⁴ As quoted by the South African Institute of Race Relations, ‘Full Submissions: Promotion and Protection of Investment Bill of 2015 – 25 August 2015’ (2015) <<http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/full-submission-promotion-and-protection-of-investment-bill-of-2015-2013-25-august-2015-1>> accessed 22 November 2016.

⁶⁵ As reported by Bosman, *op. cit.*, 35.

It was hoped that the concerns of the business community would be taken into account; as it turned out, the South African government forged ahead with its investment law and brushed off recommendations from the majority of submissions from business, industry and political opposition parties.⁶⁶ On 13 December 2015, the President promulgated the new investment law. The Act came into operation in 2016.

The results for South Africa in terms of net inflows of foreign investments have been disastrous. As shown in Figure 2 and Table 2, foreign investments started to decline from 2014, one year after the new investment bill was tabled in Parliament. And since 2014, foreign investments have been tumbling in South Africa for three consecutive years to such an extent that in 2015 investment levels in Angola dramatically surpassed South Africa's, which reached levels comparable to those of its economically much smaller neighbor Namibia. By contrast, Namibia has enjoyed a relatively steady stream of foreign investments.

There is a plausible explanation for the falling investment rates in South Africa. The EU Chamber of Commerce informed the South African government in 2015 that, because of the controversial new investment law, European investors were not ploughing money into South Africa or are now looking elsewhere on the continent.⁶⁷ Tellingly, the EU reportedly accounts for 88% of investment stock in South Africa.⁶⁸

The falling rates of net investment inflows in South Africa are neither normal nor cyclical, as they are remarkably below the average rate in Sub-Saharan Africa (see Figure 3 below). On closer scrutiny, although foreign investments in South Africa have on the surface been fluctuating over the years, a comprehensive view of the country's performance reveals that foreign investments flows have been following a clearly declining trend since 2009, which may point to deeper structural flaws.

⁶⁶ 'Protection of Investment Bill Finally Passed' (2015) ParlyReportSA <<http://parlyreportsa.co.za/trade-industry/protection-of-investment-bill-finally-passed/>> accessed 22 November 2016.

⁶⁷ Gaye Davis, 'Investment Bill to Blame for EU's Lack of Investment in SA' (2015) Eyewitness News <<http://ewn.co.za/2015/09/09/Investment-Bill-to-blame-for-EUs-lack-of-investment-in-SA>> accessed 22 November 2016.

⁶⁸ Green, *op. cit.*

Figure 2: Comparison of net FDI between South Africa, Namibia and Angola (2005-2015)



Source: Information collected from the World Bank’s database (2016)

Table 2: Comparison of net FDI between South Africa, Namibia and Angola (2005-2015)

Country	2005 (USD million)	2015 (USD million)
South Africa	6,522,999.18	1,576,170.03
Namibia	292,758.63	1,068,298.17
Angola	-1,583,858.95	6,880,540.07

Source: Information collected from the World Bank’s database (2016)

Figure 3: Comparison of net FDI between South Africa and Africa (2005-2015)



Source: Information collected from the World Bank's database (2016)

4 Regulation or contracting

4.1 Foreign investments versus sovereign regulation

The South African scenario has valuable lessons for Namibia and other developing countries. It shows first how ‘BITs bite’⁶⁹ by, for example, sharply curtailing host states’ ability to legislate and regulate.⁷⁰ It shows how investment law favors multinational corporations and how it insulates their investment from democratic and political pressures protected in the constitution,⁷¹ such as pressures or demands for greater representation of Blacks in business. This lesson resonates with the Namibian version of BEE, the New Equitable Economic Empowerment Framework (NEEEF),⁷² which runs the risk of undergoing the same fate as South Africa’s BEE schemes in litigation brought up by existing foreign investors.

In a fundamental sense, the South African case study illustrates the broken promises of BITs and foreign investment in general. In defiance of its lofty goals of facilitating investment flows and promoting economic prosperity,⁷³ foreign investment has in practice been very harsh and costly, especially for developing countries.⁷⁴ The South African scenario also teaches that host states often have very little latitude in regulating foreign investments and leaves with the uneasy feeling that host states are selling their soil as well their soul to foreign investors. This observation – that FDI may be at odds with the necessity to properly regulate foreign investment and the national economy – does not only affect developing countries, as the tobacco packaging case against Australia demonstrates.⁷⁵

⁶⁹ Xavier Carim, ‘Lessons from South Africa’s BITs Review’ (2013) Columbia FDI Perspectives; Mary Hallward-Dreimeier, ‘Do Bilateral Investment Treaties Attract FDI? Only a Bit... And They Could Bite’ in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (Oxford University Press 2009).

⁷⁰ Ankita Ritwik, ‘Tobacco Packaging Arbitration and the State’s Ability to Legislate’ (2013) 54 *Harvard International Law Journal* 523, 531.

⁷¹ David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press 2008) 3.

⁷² National Equitable Economic Empowerment, National Assembly Bill (2015).

⁷³ Kenneth J Vandeveld, ‘Economics of Bilateral Investment Treaties’ (2000) 41 *Harvard International Law Journal* 469, 471.

⁷⁴ For instance, *Vivendi v Argentina* (ICSID Case No ARB/03/19).

⁷⁵ *Philip Morris Asia Ltd v Australia*, UNCITRAL, PCA Case No. 2012-12, Written Notification of Claim (27 June 2011).

That said, the reaction of the South African government against the hidden costs of BITs is excessive. The analysis of the binding constraints of foreign investment law does not have to be approached and expressed in Manichean terms. Host countries are not exactly torn between foreign investments and sovereign regulation. It is true that market discipline requires that host states be careful about the ways it intervenes in the economy, but it is more accurate to say that host states are confronted with a balancing act rather than a false dilemma between foreign investments and regulation, or between foreign investment and sustainable development.

The real challenge is for host states to strike the right balance between attracting FDI and regulating the economy for the purpose of sustainable development. In the case of South Africa, it is obvious that the host government has chosen to lean heavily on the side of regulating the economy at the expense of investment friendliness,⁷⁶ but Namibia must not go that way because such a hardline position comes at a great cost to both capital inflows to the country and, ironically, the very sustainable development objectives they are pursuing. Namibia must strive to be, as it were, a funambulist and find the right balance.

4.2 The economic mechanism at work

The obligations contained in the latest investment laws and which reflect the critical attitude towards international investment law are going to have one major implication: the under-supply of capital. To understand the economic mechanism involved here, one has to look at the laws of demand and supply. Three forces are at play: the market, the bargaining, and the contract. If the market conditions, that is, supply and demand, are not favorable, they are going to have an adverse impact on the host countries, resulting in a weaker bargaining position. That relatively weaker bargaining position will be borne out in the terms of the contract.

⁷⁶ See also Bosman, *op. cit.*, 38-39.

⁷⁷ See Brillo, *op. cit.*

⁷⁸ See Johan den Hertog, 'General Theories of Regulation' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics: Volume III The Regulation of Contracts* (Edward Elgar 2000).

The trouble with these new obligations is that they do not reflect market conditions. Supply and demand determine the bargaining-power relations between foreign investors and host states, which are characterized by unequal exchange. This unequal exchange frames the terms of the optimal investment contract. This also helps explain the dangers of South Africa's no-preferential, one-size-fits-all treatment. If a host country competes with many others with similar attractions, it stands a better chance of winning the desired investments by offering more than the others. And if the others are already offering foreign investors preferential treatment vis-à-vis local investors, the host state applying the no-preferential treatment will be outcompeted.

The heavier obligations contained in the new investment laws artificially alter the terms of the investment contract, but such alterations are inefficient and ineffective to the extent that they will not change the market conditions nor the bargaining strength of the host states. On the contrary, by stipulating artificially more restrictive terms, these new obligations will decrease foreign investments in the host countries. This is perhaps best illustrated by the phrase that there are many fish in the sea. It is a buyer's or investor's market. If host countries play hard to get, foreign investors are most likely to set their sights on some other countries.

The other serious concern with these new obligations is that countries with different profiles are imposing the same obligations while they do not have the same attractiveness and bargaining power. If Brazil managed to get away with its hostility towards BITs,⁷⁷ this does not mean that South Africa will also be capable of this rare feat, and this is because these two economies boast markedly different competitiveness.

Applied to the capital inflows in developing countries, the mechanism described above means that, if demand for primary commodities declines, as is the case right now, host countries will be in a much weaker position to extract the most favorable contract terms from foreign investors. As a result, to attract foreign investments, those host countries will have to make several concessions to foreign investors.

4.3 Regulating versus contracting

In the final analysis, it has to be asked whether it was at all necessary to legislate and regulate so many aspects of foreign investments and whether, all things considered, host countries would not have been better off leaving some of these issues to private contracting between the parties involved. This question is pertinent because much of the thinking about regulation posits that regulation becomes necessary to correct market failures.⁷⁸ With this new wave of investment laws, no such failures have been identified, yet host countries decided to regulate, thereby adding to the proliferation of legal rules that local and foreign investors have to grapple with. This situation reveals a misperception by host states that more regulations are needed to maintain control over the development agenda and ensure economic development.

5 Conclusion

My recommendation is thus that these investment laws may have to be revisited in the respects specified in this chapter, and host countries will have to think twice, three times, four times, five times before adopting the PAIC. Host states should not confuse modernizing and revolutionizing investment laws. The idea here is not to revolutionize, but to modernize investment laws.

What I recommend is not for host countries to do nothing, but to do things better by embracing a balanced – and, most importantly, rationally calculated – approach to foreign investments. And, with regard to foreign investors, the idea is not to incense them, but to incentivize them. Just like host countries can play hard to get, foreign investors know that there are many fish in the sea. So to the question as to whether a host country can afford to behave like a bluefin tuna in a little pond when it is in fact surrounded by many fish in a sea, the answer is that very few investors will pay attention to her, if they notice her at all.

CHAPTER 17

THE LAW AND CHINESE INVESTMENTS: AN IN-DEPTH ANALYSIS OF THE LAW AND PRACTICES OF CHINESE INVESTMENTS IN NAMIBIA

by
Johannes Uusiku

1 Introduction

Such headlines are common in Namibia's local newspapers: "*Chinese investment: Problem or solution?*";¹ "*President's Chinese friend investigated for fraud*";² "*Chinese investment in Namibia rakes in about US\$4,6 billion a year*";³ "*China vows to further invest in Namibian education*";⁴ "*Chinese investments in Namibia expected to multiply – Xin reveals*";⁵ "*China/ Namibia relationship strong despite negative media*".⁶ The above headlines indicate that the recent increase of Chinese investments in Namibia has generated considerable, rich and interesting debates among many commentators, such as politicians, journalists, and economists. The said investment has been met with both plaudits and criticisms. It has created both hope and uncertainty about the true intentions of China in Namibia and the implications which China's investments will have on the country's economy.⁷

Recent statistics released by the Chinese Embassy in Windhoek indicate that China's investments in Namibia since Independence have surpassed the N\$ 60 billion mark, making it one of the highest by any single trading partner to date.

Statistics further indicate that, currently, Namibia houses approximately 40 Chinese registered companies that are generating a revenue of about US\$ 4,6 billion per annum and employing more than 6,000 Namibians. It has also been reported that, from 1990 to 2015, China financed many major projects in Namibia than any other country.⁸

¹ Johannes Uusiku, 'Chinese investment: Problem or solution' *The Namibian Newspaper* 05 April 2017.

² 'President's Chinese friend investigated for fraud' *The Namibian Newspaper* 26 December 2016.

³ 'Chinese investment in Namibia rakes in about US\$4,6 billion a year' *The Namibian Newspaper* 16 March 2015.

⁴ 'China vows to further invest in Namibian education' *The Namibian New Era* 13 March 2016.

⁵ 'Chinese investments in Namibia expected to multiply – Xin reveals' *The Namibian New Era*.

⁶ 'China/ Namibia relationship strong despite negative media' *The Namibian New ERA* 3 March 2017.

⁷ A Niikondo, and Coetzee, J. *Perceptions on the impact of Chinese businesses in Namibia: A case study of the retail and construction sector in Windhoek* (2009). <<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd>> last accessed on 21 September 2016.

⁸ 'Chinese investment exceeds N\$60 billion mark' *The Namibian New Era Newspaper*, 10 March 2016.

Research indicates that Chinese enterprises are violating Namibian laws much more than the foreign corporations of any other country operating in Namibia. Furthermore, there has been an increase in negative reporting associated with Chinese investments in Namibia, ranging from labour and investment practices, environmental exploitation and tax evasion, among many other issues.⁹

It is against this background that this chapter will provide a critical analysis of the law and practices related to Chinese investments in Namibia. This chapter will provide an overview of the post and pre-independence cooperation and investment arrangements between China and Namibia. Second, this chapter will attempt to unlock the rationale behind the increase of Chinese investment in Namibia. Third, this chapter will further analyse whether Chinese investors are accorded adequate support and protection by the Government of the Republic of Namibia (GRN). Lastly, this chapter will discuss specific shortcomings and benefits brought about by the investments in question before coming to a contextualised conclusion with brief recommendations.

2 Namibia cooperation and investment arrangements with China

2.1 Pre-Independence

Namibia and China have longstanding investment and cooperation arrangements which existed before Namibia attained its independence on 21 March 1990. However, it is important to point out that, prior to Independence, the cooperation arrangements that existed did not relate to investments in Namibia. The cooperation arrangements that existed then primarily involved China's support to Namibia during the liberation struggle for independence.

China has historically had policies and mechanisms in place for supporting socialist movements and governments in Africa since the late 1950s. Namibia, then South West Africa (SWA), was no exception to those policies. The relationship first commenced when the then Maoist Government of China extended aid to the South West African Nation Union (SWANU) movement in the fight for independence from the South African colonial regime.

⁹ Mapaire. Clever, *Chinese Investments in Zimbabwe and Namibia: A Comparative Legal Analysis*(Centre for Chinese Studies, Stellenbosch University 2014)

This type of support to SWANU continued until the late 1960s, and later to the South West African People's Organization (SWAPO) until Independence.

2.2 Post-Independence

The official relations between the People's Republic of China (PRC) and the newly independent Namibia began on 21 March 1990 with the cementing of diplomatic ties between the two nations. Since then, the two nations continued to enjoy good cooperation relations in many fields, including trade and investment.

The diplomatic relations between the two nations involve economic and political ideas and the sharing of platforms through the relevant line ministries of the two countries. Most notably, various investment and trade bilateral agreements have been established between the two countries on a political level that mutually benefit the two countries. For example, China and Namibia signed a Reciprocal Investment and Protection Agreement on August 2005, paving the way for Chinese corporations to enter the Namibian market. This Agreement removed some of the barriers that previously deterred Chinese investors from setting up establishments in Namibia. The Agreement outlines various obligations which Chinese investors in Namibia need while at the same time guaranteeing them security and certainty of the fact that they will not be accorded less favourable treatment compared to their Namibian counterparts.

3 The rationale behind the increase of Chinese investments in Namibia

At the time of writing, there was not sufficient literature or concrete data elaborating the rationale behind the recent increase of Chinese investment in Namibia. It is against this background that, in attempting to unlock the rationale behind the increase of Chinese investments in Namibia, persuasive direction will be taken from the literature outlining factors relevant to the increase of Chinese investments on the African continent by contextualising and crafting them to fit a Namibian context.

Some writers observe that the strong relationship that Namibia had with the Chinese Communist Party in the years before Namibia attained its independence has become the “ideological” basis for the increase of Chinese investments in Namibia.

China increased its volume of investment after the liberalisation of the then limping Namibian economy by way of large loan, grants and commerce, which resulted in the two nations becoming diplomatically closely connected.¹⁰

The Reciprocal Investment and Protection Agreement signed by Namibia and China in August 2005 also contributed to the increase of Chinese investments in Namibia, as it paved the way for Chinese companies and corporations to enter the Namibian market easily.¹¹

Sherbourne contends that the increase of Chinese investments in Namibia can also be justified by the fact that China needs natural resources to fuel its growing economy.¹² He maintains that, as the Chinese economy continues to grow; its leadership has started to recognise the increasing need of natural resources to sustain its economic growth.¹³ Since Namibia is rich in natural resources and politically stable, it is a suitable investment destination and market by many Chinese investors. This has been confirmed by Wenjie Chen, an economist in the African Department of the International Monetary Fund (IMF), who maintained that there is a clear positive pattern *vis-à-vis* Chinese investments and resource-rich African countries. Chen states that data indicate that more Chinese deals are going to resource-rich countries and that Namibia is among the top 20 resource-rich countries on the African continent in which China is interested in investing.¹⁴

¹⁰ Dobler, Gregor., *Chinese shops and the formation of a Chinese expatriate community in Namibia* (2009). 199 *The China Quarterly*, 707-727.

¹¹ Vincent P. de Ruiters, 'China in Africa? The Namibian Example' (2012) <http://www.atlcom.nl/upload/Vincent_P_de_Ruiter_-_China_in_Africa_The_Namibian_Example.pdf> last accessed on 22 September 2016.

¹² Robin Sherbourne, 'China's growing presence in Namibia' in Le Pere, Garth (ed.). *China in Africa: Mercantilist predator, or partner in development?* (Midrand/Johannesburg: Institute for Global Dialogue/The South African Institute of International Affairs 2007).

¹³ *ibid.*

¹⁴ Wharton Executive Education, 'China's Investments in Africa: What's the Real Story?' <<http://knowledge.wharton.upenn.edu/article/chinas-investments-in-africa-whats-the-real-story/>> last accessed on 22 September 2016.

4 Protection and support of Chinese investment in Namibia

One of the most frequently debated issues relates to whether the Government of the Republic of Namibia (GRN) adequately supports and protects Chinese investors operating in Namibia. Chinese investments in Namibia fall within the rubric of foreign investment.

Foreign investment in Namibia is accorded protection by, *inter alia*, the Namibian Constitution¹⁵, the Namibia Investment Promotion Act 2016¹⁶ and the Competition Act 2003.¹⁷

The Namibia Investment Promotion Act 2016 provides for the promotion and protection of foreign investments. It calls for equal treatment of foreign investors with their Namibian counterparts. The Act provides that all foreign investors who have received a certificate of status investment (CSI) are entitled to “just compensation without undue delay and in freely convertible currency” if a decision is undertaken by the government to expropriate any of their properties. The protection of foreign investors’ properties is further accorded in Article 16 of the Namibia constitution.¹⁸

The Competition Act 2003 also accords protection to foreign investors’ rights and interests. This Act establishes the legal framework to safeguard and promote competition in the Namibian market. The Government of Namibia, under the terms of the Act, has designed a legal and regulatory framework that attempts to safeguard competition while boosting prospects for Namibian businesses as well as recognizing the role of foreign investment.

The Government of the Republic of Namibia offers much needed support to both existing and potential foreign investors through the Namibian Investment Centre (NIC) under the Ministry of Industrialization and SME Development. The NIC is the official foreign investment facilitation and promotion office. The

¹⁵ The Namibian Constitution Act 1 of 1990.

¹⁶ Act 9 of 2016.

¹⁷ Act 2 of 2003.

¹⁸ Article 16 (2) provides that: The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

NIC is generally considered as the first point of contact for prospective foreign investors in Namibia. It offers continuous comprehensive services and support to prospective foreign investors until they commence their operations in Namibia. The NIC provides information packages and much needed advice to (prospective) foreign investors on viable investment opportunities that exist in Namibia. The NIC is also tasked with the mandate of granting assistance to foreign investors by reducing bureaucratic red tape and facilitating the obtaining of work permits by coordinating work with government ministries as well as regulatory bodies.¹⁹

Taking shape from the above discussion, the answer to the question of whether Chinese investments are adequately supported and protected by the Namibian Government and its foreign investment-related law is affirmative. This is evident by the fact that the trend of Chinese investments in Namibia is ever increasing yearly. If the Namibian Government and its foreign investment-related law did not sufficiently protect or support the rights and interests of Chinese investors sufficiently, their presence in Namibia could have declined, which is not the case.

5 Shortcomings of Chinese investment in Namibia

As stated in the introduction of this chapter, the increase of Chinese investments in Namibia has been received with both plaudits and criticisms. This section will discuss some of the shortcomings of Chinese investment in Namibia.

5.1 Investment practices

a) Competition

Issues related to competition are the most talked about as far as Chinese investments in Namibia are concerned. However, although there are critics about the investment practices of Chinese investors that hinder fair competition advocated in the Competition Act 2003, the issue boils down to the inability of the government to strictly enforce competition laws.

Negative perception has emerged that most Chinese operators – regardless of whether they are big, medium and small – pose a threat to infant local industries.

¹⁹ U.S Department of State: Investment Climate Statement (June 2014) <<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source>> last accessed on 22 September 2016.

There are strong allegations that most products²⁰ sold by Chinese enterprises are produced using cheap labour or that they are excessively subsidized. Therefore, Chinese products can be sold cheaply, and thus outcompeting similar or like products sold by their Namibian local counterparts. This practice has led to the closure of some Namibian retailers because of the fierce competition resulting in loss of income and job losses.

The threat posed to local industries and businesses in Namibia by their Chinese counterparts is a reality and not just speculations. Research conducted by the Ministry of Trade and Industry in 2010 indicated and confirmed that the actions of Chinese investors have led to the closure of many local small and medium enterprises (SMEs).²¹ The closure of some SMEs led to many Namibians losing their jobs, at the same time increasing the unemployment rate, which is already skyrocketing.

Based on the above discussion, I believe Chinese investors are not solely to be blamed for the shortcomings connected to competition practices in Namibia. It would be fair and accurate to state that the Namibian laws in place to curb unfair competition contain many loopholes, and there is further a lack of enforcement mechanisms of the law and poor policing of policies.

b) Tax evasion and banking issues

According to Weidlich,²² some Chinese investors in Namibia are evading tax,²³ and making use of the money saved from such tax evasion for further investments in Namibia. An example is the recent ongoing alleged N\$ 3,5 billion customs fraud case in which several Chinese owning businesses in Namibia are implicated.²⁴

Again, Chinese investors are not solely to be blamed, as an investigation conducted in 2011 indicates that there are speculations that the Government is giving tax exemptions to Chinese enterprises that are involved in joint ventures with Namibian enterprises.²⁵

²⁰ Mostly textile products.

²¹ Jauch, Herbert, and Sakaria, Iipumbu, *Chinese investments in Namibia: a labour perspective*. (Labour Resource and Research Institute 2009).

²² B Weidlich, 'Chinese businesses 'kill' Namibian retail outlets' (2008) *The Namibian Newspaper* 21 October 2008.

²³ Evading tax in this context is the illegal evasion of taxes by Chinese enterprises. It often entails that this enterprise intentionally misrepresents the true state of their financial affairs to the Receiver of Inland Revenue, to reduce their tax liability. This mostly involves declaring less profits or income than the amounts actually earned.

²⁴ 'Bail granted in N\$3,5b customs fraud case'. *The Namibian Newspaper*. 25 January 2017 <[http://www.namibian.com.na/160488/archive-read/Bail-granted-in-N\\$35b-customs-fraud-case](http://www.namibian.com.na/160488/archive-read/Bail-granted-in-N$35b-customs-fraud-case)> last accessed on 14 March 2017.

²⁵ Andrew Niikondo, . and Johan. Coetzee, *Perceptions on the impact of Chinese businesses in Namibia: A case study of the retail and construction sector in Windhoek* (Windhoek: Friedrich-EbertStiftung 2012).

Further reports indicate that only a small percentage of Chinese investors operating in Namibia bank their money with local banks. Most of them keep their cash in their homes or business premises, making them easy targets of armed robbers. The rationale behind this practice by Chinese investors is, however, still not well established.

As done with other shortcomings discussed above, the weakness of the Namibian legal framework can as well be looked at. The Banking Institutions Act 1998²⁶ does not impose any obligation on foreign investors to bank the money they have generated through their investment operations in Namibia with local banks, unlike other jurisdiction such as Zimbabwe. This is another loophole which exists in Namibian law and which is subject to abuse by Chinese investors in Namibia.

Consequently, the Immigration Control Act 1993²⁷ contains no specific provision that obliges any person living Namibia to declare the amount of cash money they are leaving the country with. Because of this *lacuna* that exist in Namibian law, Chinese investors in Namibia keep as much money as they want and leave the country with it. The only law that comes close to putting an end to this practice by Chinese operators is the Namibian financial regulations, which state that, when a person is travelling out of Namibia, she or he may be asked to declare the amount of cash money he is taking out by an authorized officer. The fault in this regulation is that, if the said authorized officer does not ask, Chinese investors can freely take cash out of the country without violating any law.

5.2 Environmental exploitation

Environmental exploitation is also one of the notable issues worth discussing when considering shortcomings in the legal and practical aspects of Chinese investments in Namibia.²⁸ Some Chinese investors operating in Namibia who are granted mineral prospecting and exploration licences are reportedly conducting exploration operations in the coastal parts of the country without rehabilitating the prospecting sites.²⁹

²⁶ Act 2 of 1998.

²⁷ Act 7 of 1993.

²⁸ Robin Sherbourne, *Comrades and Capitalists: The growing presence of China in the Namibian economy and its possible economic and political implications*. (Windhoek: Friedrich-Ebert-Stiftung. 2005).

²⁹ D Heita. 'China's Investments Offer Little Value' *The Namibian New Era Newspaper* 26 March 2009.

In furtherance of the above, there are also concerns of illegal activities by Chinese operators in the coastal town of Namibia that have been reported which involve dumping of waste materials from their business operation into the coastal waters. Such practice severely affects the tourism industry of Namibia, which is one of the main sources of the government revenue.³⁰

Although Namibia has enacted laws, specifically the Environmental Management Act in 2007,³¹ that provide for strict rules that need to be observed by foreign and local investors when it comes to business activities that have a negative environmental impact, there seems to be a lack of enforcement of the law.

5.3 Technology and skills transfer

There are several concerns expressed by many actors of the Namibia economy regarding technology and skills transfer by Chinese investors in Namibia. The negative reports indicate that the so-called Chinese investors bring very little, if any, technology and skills transfer, and neither do they play a major role in the upbringing of Namibia's value addition and manufacturing base.

Many Chinese investors, especially those in the manufacturing and construction industry, are bringing in their own workers from outside the country rather than employing Namibians citizens.³²

To curve this shortcoming, section 26 of the newly promulgated Namibia Investment Promotion Act 2016³³ provides that investors must ensure that Namibians are trained to acquire relevant skills and that investors must train Namibians to fill the positions occupied by foreign personnel on a one-to-one apprenticeship basis, unless otherwise agreed.

It is worth noting that this specific law is still new, and we are yet to see the outcome of its implementation.

³⁰ M Barnard, 'A taste for soup threatens sharks' *The Namibian Newspaper* 22 April 2004.

³¹ Act 7 of 2007

³² Mapaire. Clever, () *Chinese Investments in Zimbabwe and Namibia: A Comparative Legal Analysis*. (Centre for Chinese Studies, Stellenbosch University 2014).

³³ Act 9 of 2016.

5.4 Violations of labour laws

The way Chinese business operators in Namibia deals with their employees has been met with heavy criticism. It is being alleged that most Chinese investors are not abiding to the labour laws of Namibia, specifically the Labour Act 2007.³⁴ It appears that Namibian labour authorities are also not sufficiently monitoring the labour standards prevailing in most Chinese companies.

The violations of Namibian labour laws by most Chinese business operators occur where most workers are denied the basic working conditions embodied under Chapter 3 of the Labour Act 2007. It is being reported that most Chinese business operators, especially in the construction industry, compel workers to work more hours than permitted under the Act without extra pay.³⁵

According to Sinn and Eisenman, in addition to most Chinese companies compelling their workers to work excessive hours, they are further violating the law by paying wages that are way below the required minimum wage standard set by the Act.³⁶

Smith³⁷ writes that, in the Namibian mining sector, although dominated by European and Americans companies, there is also a number Chinese companies where most workers are exposed to appalling and dangerous working environments with no protective clothing, which is in violation of Part B of the Labour Act 2007. There are also reports that most workers employed by Chinese companies in Namibia are employed as casual workers, working without employment contracts, thus denied of benefits and their rights under the Labour Act of 2007.

Considering the above, the Namibian labour laws are clear, but the government seems to be very soft and reluctant on how it deals with Chinese investors violating these laws.³⁸ It is therefore clear that Chinese investors in Namibia should not solely be blamed and criticized in this regard; the Namibian government should equally be held accountable for this as there is lack of control measures in place and poor policing.

³⁴ Act 11 of 2007.

³⁵ The Labour Act of 2007, provide that an employer should not permit an employee to work more than 45 hours a week.

³⁶ David Shinn,. and Joshua Eisenman, . *China and Africa: A Century of Engagement*. (Pennsylvania: University of Pennsylvania Press 2012) 335.

³⁷ D Smith. 'China poised to pour \$10bn into Zimbabwe's ailing economy' *The Guardian*, 1 February 2011.

³⁸ Hauch Jauch,. "Chinese investments in Africa: Twenty-first century colonialism" (2011). Vol. 20, No. 2 *The New Labour Forum*, 48-55.

6 Benefits of Chinese investment in Namibia

It is an undeniable fact that the Namibian economy has benefited tremendously from Chinese investments. The economy would not have been at the current state of development without the assistance of Chinese investors in collaboration with their government. This section will now discuss some of the benefits of Chinese investments to Namibia.

6.1 Infrastructural development and aid

Namibia has benefited, and continues to significantly benefit, from Chinese investments when it comes to infrastructural development and aid from its Chinese counterparts. From 1990 to date, Chinese investors have provided a variety of infrastructural assistance to Namibia. This includes the construction of various projects, ranging from roads, low-cost houses, schools, health facilities (specifically, clinics in rural areas), boreholes, and a tannery. Chinese investors in collaboration with their Chinese government further provided laboratory equipment to the University of Namibia (UNAM) and donated tractors, precision machine, broadcasting and criminal investigation equipment, and computers to various players in various sectors of the Namibian economy.³⁹

Chinese investors, in collaboration with their government, have provided and continues to provide aid relief food to drought-stricken communities, especially in the northern regions of Namibia.

The investment agreements between the Namibian government and China came with a corresponding benefit of financial assistance to Namibia from China in a form of grants, interest free and subsidised loans, which are then used to pursue and achieve important economic policies by Namibia.

³⁹ John Odada, China-Africa economic relations: The case of Namibia (2008), <<http://dspace.africaportal.org/jspui/bitstream/123456789/32046/1/Namibia-China.pdf?1>> last accessed on 28 September 2016.

6.2 Employment creation

Namibia currently has an alarming and skyrocketing unemployment rate, which is estimated at 30% of the population. Chinese investment in the Namibia plays a major role in reducing this embarrassing figure by creating employment opportunities. This is because the increment of Chinese investments in Namibia comes with a corresponding employment-creation effect.⁴⁰ The recent statistic recently released by the Chinese Embassy in Windhoek indicates that Namibia currently houses approximately 40 Chinese companies that are employing more than 6,000 Namibians.⁴¹ This is a significant achievement for which Chinese business operators in Namibia need to be applauded.⁴²

6.3 The Chinese retailers – pro-poor

Niikondo and Coetzee maintain that there are public perceptions in Namibia that the Chinese retailers are pro-poor. This is because they sell similar or like products at a more affordable price than their Namibian local counterparts. This benefits many poor Namibian citizens that mostly live in rural towns.⁴³

However, it is also important to mention that some writers, such as Dobler, reject this perception that Chinese retailers are pro-poor, and that they sell affordable products to the poor. He contends that the public fail to grasp and understand the middle of indirect costs involved, saying that products sold by Chinese retailers are not durable; therefore, people spent a lot of money commuting between the same shops going to buy the same product. He concludes by stating that Chinese products are not cheap and affordable because of the indirect costs involved.

7 Why is the Namibian Government soft on enforcing the law *vis-à-vis* Chinese investors?

The earlier sections of this chapter indicated that there is lack of enforcement of the existing law by the Namibian Government in relation to Chinese investors

⁴⁰ Khodeir Aliaa, 'The impact of Chinese direct investments on employment in Africa' (2016) Vol. 9 Iss: 2 *Journal of Chinese Economic and Foreign Trade Studies*, .86 – 101.

⁴¹ 'Chinese investment exceeds N\$60 billion mark' *The Namibian New Era Newspaper* 10 March 2016.

⁴² Johannes Uusiku, 'Chinese investment: Problem or Solution?' *The Namibian Newspaper* 16 April 2016.

⁴³ Andrew., Niikondo, and Johan Coetzee., 'Perceptions on the impact of Chinese businesses in Namibia: A case study of the retail and construction sector in Windhoek' (2009) <<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=>> last accessed on 28 September 2016.

operating in Namibia. That triggered an interesting question as to why the Government is soft on enforcing the law when it comes to Chinese investors. From the onset, it is important to state that the lack of enforcement of the law is not just linked to Chinese investors alone, but to all foreign investors operating in Namibia and their local counter parts.

Some scholars, such as Shane, maintain that a country that have laws that impose heavy burdens on foreign investors, and which are strictly enforced, tends to attract fewer foreign investors. To put this in perspective, since Chinese investments have a record of positively contributing to the economy of the country, it is safe to conclude that one of the reasons for the lack of enforcement of the law is due to the fact that the government do not want to scare away potential Chinese investors.⁴⁵

Secondly, some international commentators maintain that most developing countries do not have sufficient qualified personnel and financial resources to facilitate adequate inspection operations and ensure compliance with the law. Another relevant factor is corruption and bribery. There are allegations that some government officials entrusted with the duties to ensure compliance with the law by Chinese investors are bribed by the investors in question to avoid penalties for non-compliance with the law.⁴⁶

In my opinion, among the three possible explanations mentioned above as to why the Namibian government is soft in enforcing the law, the lack of resources is the most relevant. My contention is based on the fact that strict and proper enforcement of the law requires both capital and human resources. Reports indicate that the law enforcement agencies within the relevant line ministries such as the Ministry of Environment and the Ministry of Trade, have limited funds at their disposal to ensure regular supervision and inspection on how Chinese investors in Namibia are conducting their business operations.

Lack of funds/resources was evident in the Budget Statement presented by Calle Schlettwein, the Minister of Finance on the 25 February 2016 in Parliament, where

⁴⁴ Gregor Dobler, 'From Scotch whisky to Chinese sneakers: international commodity flows and new trade networks in Oshikango, Namibia' (2008). Volume 199 *The China Quarterly*, 707-727.

⁴⁵ S Shane, 'The effect of national culture on the choice between licensing and direct foreign investment.' (1994) 15.8 *Strategic management journal*, 627-642.

⁴⁶ Clever Mapaura. () *Chinese Investments in Zimbabwe and Namibia: A Comparative Legal Analysis* (Centre for Chinese Studies, Stellenbosch University 2014).

he reiterated that the Namibian economy has never been in such a precarious situation and thus it needs to cut down on its expenditures.⁴⁷ This means that the depth or the extent of this financial crisis is unprecedented. Since strict and proper enforcement of the law requires financial resources, it is against this background that I believe that lack of resources is the leading explanation among all for the poor and soft enforcement of the law by the Namibian Government. However, besides the lack of resources as leading explanation for the Namibian government's soft enforcement of the law, I believe other factors should not be disregarded.

8 Conclusion and recommendations

This chapter highlighted that the investment and cooperation arrangements between the two republics existed before Namibia obtained its independence from the then South African colonial regime, and before the Cultural Revolution in China. The two countries continued to enjoy a close relationship even after Namibia attained its independence through the strengthening of their diplomatic ties. Chinese investments in Namibia are adequately protected by the law and Chinese investors are afforded enough support through the NIC.

This chapter further discussed some of the factors that led to the increase of Chinese investments in Namibia. The past relationship Namibia had with China before Independence is the ideological basis of the increase in Chinese investments in Namibia after Independence. Some commentators link the increase of Chinese investments to the fact that Namibia is rich in natural resources that China needs to fuel and sustain its growing economy. This position has been confirmed by several economists at the IMF.

The signing of bilateral investment agreements between China and Namibia is also reported to have paved the way for Chinese cooperation and Chinese investments in Namibia.

⁴⁷ Budget Statement Presented by Calle Schlettwein, MP Minister of Finance <www.mof.gov.na> last accessed on 25 February 2016.

This chapter confirmed the fact that the increase of Chinese investments in Namibia is being received with both criticism and plaudits. Research and reports indicate that Chinese investors violate Namibian laws more than any other foreign investors in Namibia. There are also many negative reports on their investment and labour practices, as well as skills and technology transfer, among many others detrimental effects. However, there are opinions that Chinese business operators are not (solely) to blame as they use loopholes provided by the (ineffective) regulation; and, secondly, because there is a lack of policing by the Namibian authorities. On the other hand, Namibia is a big beneficiary of Chinese investments. The benefits range from infrastructural development, aid and, most importantly, employment creation. This chapter finds that the Namibian Government is soft in enforcing the law in relation to Chinese investors due to the lack of financial resources.

Considering the above, I recommend that Chinese investment deals and agreements should be made more transparent to avoid unfounded fear, perceptions and suspicions, and to easily identify illegal or negative practices when necessary. I further recommend that Chinese investors must study the Namibian laws related to investment operations to ensure that their business operations and practices are not contrary to the law. Namibia should further revise the laws that relates to foreign investment to fill up the loopholes that exist and that authorities should also strictly enforce these laws. I believe and trust that the above recommendations will allow space for the realisation of mutual benefits for both the Namibian economy as whole and the Chinese investors.

PART V
MINES AND ENERGY

CHAPTER 18

ALIGNING THE MINING SECTOR WITH SUSTAINABLE DEVELOPMENT: A FOCUS ON URANIUM MINING AT RÖSSING

by
Michelle R Munyanduki

“A country cannot operate on policy and guidelines lacking legal enforceability.”

Michelle Munyanduki

1 Introduction

This chapter evaluates how Namibia deals with the social and environmental aspects of sustainable development, with a particular focus on the corporate social responsibility (CSR) and rehabilitation in the uranium mining industry. Considering the broad nature of these aspects of sustainable development, this chapter will attempt to narrow down the content by focusing on the Rössing uranium mining case study. The central question is: To what extent is the current status of the mining industry aligned with the sustainable development? I must point out that, as the main purpose of this chapter is to evaluate, the criterion of evaluation is therefore the degree of ‘alignment with sustainable development’. To satisfy this criterion, I submit that three elements need to be satisfied: There should be a clear law; this law must further be a binding law; accompanied by a monitoring system to ensure compliance with the law.

Before evaluation, the first port of call is for one to gain an appreciation of the significance of mining in general by reflecting on the statistics. Currently, 50% of exports and 11.9% of gross national income (GNI) are derived from the mining industry, and in 2014 government received N\$3.76 billion in taxes and royalties alone.¹ Hence, it is no exaggeration to assert that mining is the backbone of the Namibian economy. Apart from its notable revenue contribution, the industry employs about 8,835 permanent, 716 temporary and 9,423 contract employees.²

¹ Chamber of Mines Namibia Annual Report 2015, p7.

² *ibid.*

Even so, it is submitted that, through CSR, communities have benefited to the extent of dependency from mining activities.

In light of the above, it is thus no surprise that, in Namibia, mining is discussed by government more in line with its economic contribution or benefits. As such, matters relating to the economic aspects of mining are clearly outlined in the Minerals Act;³ for instance, the Act reserves its entire Part 16 to financial matters, dealing directly with issues of royalty payments, penalties, security for payment and proof of payments. Unfortunately, the social and environmental aspects of mining, which inform sustainable development, attracts less attention.⁴ This position is evident in the mining legal framework.

At this juncture, I must highlight that Article 100, read with Article 95(i) of the Constitution, has the effect that the state, being the owner of minerals, has a mandate to utilize resources in a sustainable manner for benefit of all Namibians.⁵ From a social perspective, the larger percentage of people for which the states holds these minerals benefit scantily from revenue derived from mining.⁶ Moreover, the environmental aspect of mining is inadequately regulated, with the effect that matters such as rehabilitation are self-regulated. Unfortunately, to a large degree, this is because Namibia lacks adequate monitoring tools, which is attributed to limited human capital. This renders the policy of self-regulation ineffective.

Sustainable development, generally understood, means “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁷ The International Council on Mines and Minerals (ICMM) explains more precisely that, in the mining and metals sector, investments should be financially profitable, technically appropriate, environmentally sound and socially responsible.⁸ It is submitted that the law plays a significant role in attaining sustainable development. For how else can a state develop sustainably without setting out clear-cut obligations and boundaries in an economically centred industry as mining? Further outlook identifies that the law regulating

³ No. 33 of 1992. Sections 114-120.

⁴ United Nations. Sustainable Development Goals (2016) <www.un.org> last accessed on 15 August 2016.

⁵ The Constitution of Namibia 1 of 1990.

⁶ Namibia has a Gini coefficient of 61.3.

⁷ World Commission on Environment and Development's (the Brundtland Commission) report *Our Common Future* (Oxford: Oxford University Press, 1987).

⁸ International Council on Mining and Metals.

mining activities must address the social and environmental issues with as much clarity and gravity as it does the economic issues (such as royalties and taxes) for the purpose of sustainable development.

2 Uranium mining and the society: corporate social responsibility

It must be understood from the onset that government does not require companies to contribute towards CSR in its legal framework.⁹ Although CSR programs have sometimes been viewed as part of a company's public relations strategy, they are now increasingly recognized as a serious effort to deliver sustainable benefits and to improve the well-being of people and communities in which miners operate.¹⁰

While the Environmental Management Act¹¹ indicates that the Namibian people should benefit from the exploitation of resources in their areas, the Act does not elaborate on what this actually means. Nevertheless, to fill this vacuum on interpretation, the Act refers to international best practices as guiding principles. But one needs to understand that even international best practices are merely advice to the state, and not the company.

On the other hand, the Namibian Uranium Association (NUA), as the mother body of the uranium industry, accepts international guidelines as designed by the World Uranium Association (WUA) to guide the industry. As such, the World Uranium Association Policy Document (WUAPD) is the first point of reference in the uranium industry with regards to CSR.¹² Under this document, the Principles of Uranium Stewardship¹³ indicate that companies should contribute to the social and economic development in the areas they operate in. The same message of involvement in the development of the communities is conveyed by the International Council of Mining and Metals (ICMM) in their Sustainable Development Principles.¹⁴ Yet, these are guidelines and are thus not legally binding no matter the extent of detail displayed. As a result, no legal obligation on the mining companies can ensue from them.

⁹ Z Alberto, 28 September 2016. CSRR in the mining sector. (M. Munyanduki, Interviewer)

¹⁰ Principles of Uranium Stewardship,

¹¹ Section 3.

¹² Namibia Uranium Institute.

¹³ Principle 4.

¹⁴ Principle 9.

In light of this, currently in the uranium industry CSR is carried out on a self-regulatory basis.¹⁵ This means that companies formulate their own strategies to contribute to the social and economic development. Generally, the Chamber of Mines report indicates that this is mostly carried out through donations to community projects, training programmes and bursary awards.¹⁶ Conversely, what is reported are activities that the companies have voluntarily decided to report, and there is no verification of the accuracy of these reports.

3 Rössing CSR as a case study

For want of time and space, this chapter does not go in depth with all the Rössing contributions towards CSR, but identifies a few necessary contributions to substantiate arguments herein. On CSR, Rössing gives a detailed account in its annual reports, going beyond what is done by its counterparts. In principle, Rössing asserts that its CSR is “not a philanthropic endeavour but a core business interest aimed at maintaining sustainable and mutually beneficial relationships” with stakeholders.¹⁷ From as early as 1978, Rössing established a foundation run by a board of trustees to further its CSR.¹⁸ Also, it is a member of the Erongo Development Fund (EDF). The latter is an independent and financially prudent organisation involved in community development projects.¹⁹ Through these channels and at times directly through the company, Rössing executes its CSR.

In 2015, Rössing contributed N\$18 million (approximately 1% of its turnover that year, i.e., N\$ 1,841 billion) through the company directly or the foundation as part of their CSR.²⁰ This covers financial support towards various initiatives in art, culture, agriculture, education and the environment.²¹ Their annual reports give a comprehensive account of their CSR.

¹⁵ Minerals Policy 2002 5.3.

¹⁶ Chamber of Mines of Namibia Annual Report 2015

¹⁷ Rössing Limited. *Rössing Uranium Limited Report to Stakeholder 2015*. (2016) <www.rossing.com> last accessed 14 August 2016, 32.

¹⁸ Rössing Limited.

¹⁹ Namibian Uranium Institute. ‘Namibia Uranium Institute Annual report 2014/2015’ 16 (2016) <www.namibianuranium.org.na> last accessed 14 August 2016.

²⁰ *ibid.*.

²¹ *ibid.*, 59.

From as early as 1990, Rössing partnered with the Ministry of Education, Arts and Culture.²² This partnership led to the establishment of the Mathematics, Science and English centres in Gobabis, Swakopmund and Windhoek. They were designed to address the issue of poor performance in these subjects among local students. To support this initiative, the centres include libraries which are at the disposal of the communities. Even so, Rössing has scholarship, apprenticeship and part-time study opportunities for the locals. It is clear that their contribution to education in the community cannot be overemphasised. Their contribution was likewise extended to the Orphans and Vulnerable Children's centre in 2015. Through the company's employee volunteer programme, Rössing employees painted the centre.

4 Evaluation of the sustainability CSR

To this end, although done on an ad hoc basis, it is imperative to highlight that Rössing sets the standard in the uranium industry of what it means to be a good corporate citizen, as far as Namibia is concerned. It somewhat represents a general understanding of what could generally be understood as the fulfilment of CSR according to international best practice in the Namibian context.

However, an in-depth analysis underlines the importance of an increased alignment of the current state of affairs with sustainable social and economic development. Thus, one must enquire, as regulated by international guidelines and implemented through self-regulation, how sustainable current CSR is. These questions must be understood in light of the aim of CSR, which is to benefit the communities in which the corporates operate. The questions that arise at this point of the discussion are: What contributions from the corporate world benefit the communities in the long term and in what manner can CSR be executed to ensure sustainability?

At this interval, a few issues can be identified. Firstly, CSR, is executed on an ad hoc basis. This incredibly reduces the certainty of corporate contribution as part of their CSR. As the government policy requires self-regulation, the matter of CSR is left in the hands of the corporates to contribute what they – from a 'subjective' point of view – deem necessary for the community's social and economic development.

²² Rössing Limited. 'Rössing Uranium Limited Report to Stakeholder 2015' (2016)<www.rossing.com> last accessed 14 August 2016. 33-43.

This diverts the duty of government to the corporates – a phenomenon that can become problematic in holding the companies accountable.²³ It is of no compensation that the earlier mentioned guiding policy documents are riddled with ambiguity.

Furthermore, Rössing decides who to partner with in pursuance of this mandate. As a result, while companies such as Rössing are active, some essentially take a back seat. In essence, there is an evident lack of uniformity in the implementation of this duty. This can be attributed, first, to the fact the government, while allowing self-regulation, has vague rules guiding CSR. What is more, for the reason that the law does not place emphasis on this duty, so do the corporations. The World Nuclear Association (WNA) guidelines referred to above fail to highlight the importance of CSR but also do not define what contribution to the social and economic development actually involves. The Chamber of Mines Uranium Association has the responsibility to ensure that companies self-regulate, but the fact that it is funded by the mining industry adds a flaw to the system of regulating the industry. Moreover, the absence of sanctions for non-compliance or a clear disincentive to the CSR mandate renders the exercise ineffective. For example, Rössing report to its stakeholders indicates that in the years 2011-2013 no funds were distributed through the Rössing Foundation.²⁴ For this reason, companies perform their CSR as and when it is convenient.

However, above all of these issues, it must be acknowledged that the custodian is the state. International best practices are handed to the state, and therefore it is for the state to ensure that they add legal enforceability to those practices.²⁵ Given the broad nature of international best practices, it is the duty of the state to ensure that mechanisms are in place to ensure that the necessary contribution is made. This is because not all mining companies have the same corporate values as Rössing in implementing their CSR. These companies will essentially need to be forced to contribute to their communities, but above all they will need a clear set of binding standards for effective contributions.

²³ M Majer, The Practice of Mining Companies in Building Relationships with Local Communities in the Context of CSR Formula (2013) Volume 12, Issue 3 *Journal of Sustainable Mining*, 2013, .38–47.

²⁴ Rössing Limited. 'Rössing Uranium Limited Report to Stakeholder 2015' (2016) <www.rossing.com> last accessed 14 August 2016, 59.

²⁵ D Brand, and C Heyns, *Socio-economic Rights in South Africa*. (Pretoria: Pretoria University Press 2005) 13.

4.1 Uranium mining and the environment: rehabilitation

On the environmental end of mining, progressively, mining companies are making efforts to reduce the environmental impact of mining and minimize the footprint of their activities throughout the mining cycle, including working to restore ecosystems post-mining.²⁶ According to international standards, uranium mining must be conducted with due consideration for the environment for the purposes of sustainable development.²⁷ However, in practice, attaining a balance between the need to protect the environment and to gain economically from exploitation activity is no easy task.

This said, the term ‘rehabilitation’ refers to those steps taken to repair the environment from damage and includes decommissioning as well as ecological restoration.²⁸ Before it can issue mining licenses, the Ministry of Mines and Energy requires an environmental clearance certificate.²⁹ This certificate in turn requires that, in cases where damage to the environment cannot be avoided, rehabilitation plans must be in place.

In Namibia, there is no clear legal obligation to rehabilitate a mine. However, as it is mentioned in the Environmental Management Plan, the company is legally bound to the plan it lays out. Be that as it may, the Minimum Standards for Rehabilitation and Exploration Sites, as established by the NUA, explains that the rationale for rehabilitation is “to reduce visual impact, prevent pollution and assist disturbed areas to reintegrate with the ecosystem”.³⁰ Intrinsically, there is a general duty to rehabilitate and a duty to report any damage to the environment.³¹ Unfortunately, these standards are to a large extent too general to ensure adequate rehabilitation and environmental protection, especially under the current self-regulatory framework.³² Again, for the reason that they constitute guidelines and are not embodied in a legally binding document makes it difficult for the state to enforce.

Firstly, the Minerals Act stipulates that, in addition to providing an environmental impact assessment (EIA), the company must provide an EMP setting out the steps

²⁶ A Burke, *Eleven Steps to rehabilitation in the Succulent Karoo and Namib Desert* (Environmental Science and Namibia Nature Foundation. Oranjemund & Windhoek 2007) .24.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Minerals Act.

³⁰ Minimum Standards for Rehabilitation and Exploration Sites, 2014.

³¹ *ibid.*

³² *ibid.*, 3.

to be taken in order to revive the environment from the ensued damage.³³ The Act precisely instructs the mining companies to take necessary steps to remediate the environment.³⁴ However, the vague wording makes its utility to the industry minimal. In section 130, the companies are directed to employ *continuous* rehabilitation to control the effects of exploitation activity. The term ‘continuous’ in this context implies, therefore, that the law does not expect an operator to only rehabilitate at the end of the activities, but rather to engage in a constant exercise of repair of any harm done. However, the lack of detail and specification of the manner in which this is to be done renders the issues of rehabilitation ineffective.

That said, the Mining Policy insists on compliance with the international guidelines on rehabilitation.³⁵ It states that:

Government will ensure compliance during rehabilitation with national policies and guidelines and where appropriate and applicable with global best practice and with relevant stakeholders to investigate the established financial mechanisms for environmental rehabilitation and aftercare.³⁵

To this end, Minimum Standards, as established by NUA, guide the uranium industry on the issue of rehabilitation. These precisely follow the international standards, as established by the WNA, but go a step further by creating an adapted version that precisely matched the Namibian context. These standards, again, are said to represent the most practical interpretation of current knowledge based on experiences of practitioners and scientists.³⁷

Furthermore, on the crucial matter of funding for rehabilitation, the Chamber of Mines Code of Conduct deals with rehabilitation to a greater extent than the Act.³⁸ It directs that, attached to the environmental clearance certificate, must be a financial guarantee in the form of an independently managed financial instrument to cover the costs of any likely impact on the environment attributed to exploitation activities.³⁹ While the Chamber is the mother body

³³ Minerals Act 33 of 1992 Section 50 f (i) and (ii).

³⁴ *ibid*, section 54(3).

³⁵ Section 5.3.

³⁶ Minerals Policy 2002 Section 5 (3)

³⁷ Namibian Uranium Institute. *Minimum Standards for Rehabilitation and Exploration Sites* (2014) <www.namibianuranium.org.na> last accessed 23 August 2016.

³⁸ No.7 of 2007.

³⁹ Section 5.2.

of mining, it is not an institution established by an Act of Parliament, but rather a *voluntary association*; as such their code is not legally binding. In fact, the code appeals to the Chamber's members to comply, which should not be the case for an issue so crucial to the protection of the environment.⁴⁰

4.2 Rössing rehabilitation

From an environmental perspective, Rössing retained its ISO 14001 certification in 2015.⁴¹ This is a standard which seeks to minimize environmental impacts from mining and encourage compliance with existing environmental law and policy through formal audits by external institutions.⁴² Uniquely, it has an ongoing rehabilitation project on erosion protection and sediment retention structure.⁴³

TRössing reports that it projects to end operations in 2025.⁴⁴ To this end, the company has put in place a rehabilitation plan for the closure phase. Important to note at this point is the fact that the open pit measures 3km by 1.5 km and is 390m deep. However, Rössing has clearly displayed no intention of refill this pit. Thus, in 2025, it will remain as a mining void. Nonetheless, there are plans to cover the tailing storage facility with waste rock to prevent dust emissions and storm water erosion. Further, tailing seepage continues to be recovered, but (as opposed to reusing it for mining) it is allowed to evaporate. Furthermore, there are plans to demolish and remove the entire infrastructure and decontaminate it before it is sold to third parties.

From its report, Rössing displays an affirmative stance in its rehabilitation compliance plans. What makes its position more concrete is that, adding to its closure plan, is a supporting financial guarantee to fund the execution of the rehabilitation plan, as found in the Rössing Environmental Rehabilitation Fund.⁴⁵ Although there is no legal obligation, the proactive stance to reserve funds for rehabilitation reconciles with the Chamber of Mines Code of Conduct discussed above, but attributed to the company policy which has allowed the company to retain its ISO14001 certificate. In addition, the corporate legal counsel for Rössing explains that their fund is managed independently, thereby reducing the risk of

⁴⁰ Chamber of mines Code of Conduct, 2010, introduction section.

⁴¹ Chamber of Mines. Annual Review.p45

⁴² N A Renkhoff,.. Evaluation of Nuclear Legislation: The issue of rehabilitation of Uranium mining sites in Namibia. (2015) 22 *EJOLT report*,18.

⁴³ *ibid*, 59.

⁴⁴ Rössing Limited. *Rössing Uranium Limited Report to Stakeholder 2015*. (2016) <www.rossing.com> last accessed 14 August 2016, 45-53.

⁴⁵ *ibid*, 53.

absorbing funds during financial difficulties.⁴⁶ To put this into perspective, the closure plan is estimated to cost N\$1.4 billion, to date a balance of N\$505 million stands.⁴⁷ This means that a deficit of N\$895 million remains standing. Assuming all things constant, the mine is to halt operations in 2025, meaning that an additional 10 years remain to assure the closure plan is fully funded. In essence, N\$89 million per year will need to be injected into the fund until 2025 for the closure plan to be fully realized.

4.3 Evaluation of the sustainability of rehabilitation

In light of the above, it can be submitted that a gap in the law on the issue of rehabilitation of mines is a major concern hindering sustainable development. Presently, there is no binding and clear law on the matter. Although it can be argued that the implication of a binding law on CSR could render the economy unattractive to potential investors, what matters more than the investor is the protection of the environment from which the minerals are sourced. What is important to understand is that rehabilitation is self-regulated but even in the absence of a binding law, it can also be implied. To put this clearly, one needs to be cognizant of the Minerals Act,⁴⁸ which states that the mining company shall:

exercise any right granted to him or her in terms of the provisions of this Act reasonably and in such manner that the rights and interests of the owner of any land to which such license relates are not adversely affected.⁴⁹

Clearly, by the use of the word ‘shall’, the section lays out a mandatory legal provision.⁵⁰ Although vague in the text, the rights and interests related to the owner in the mining context can be interpreted as the rights and interests of the Erongo community to a sustainable environment. Thus, while it is inadequate to merely have a rehabilitation plan; significantly, an omission to execute an *effective* rehabilitation plan is in fact a violation of this section.⁵¹ To clarify what effective rehabilitation means, it is paramount to refer back to its purpose as mentioned above. The basic philosophy of an effective rehabilitation is to reduce visual impact, prevent pollution and assist disturbed areas to reintegrate with the ecosystem.⁵²

⁴⁶ Z Alberto, 28 September 2016. *Rehabilitation at Rössing Mine*. (M. Munyanduki, Interviewer).

⁴⁷ Rössing Limited, 53.

⁴⁸ No. 33 of 1992.

⁴⁹ Section 50 1 (a).

⁵⁰ C Botha, (). *Statutory Interpretation: An Introduction for Students* (3rd ed) (Cape Town: Juta & Co, Ltd 2005).

⁵¹ To a good environment.

These three elements are what in principle any so-called rehabilitation plan should aim to achieve; and, by so doing, a plan should be directed towards those three elements.

As mentioned and acknowledged earlier, sustainable mining is no easy task. Rössing's rehabilitation plan, though in place, has protracted shortcomings in meeting the purpose of rehabilitation and being effective. Although it plans to remove infrastructure and decontaminate equipment before it is sold off, Rössing intends to leave its 3km by 1.5 km and 390m deep open pit as a void mine.⁵³ This essentially means that by 2025 upon closure, the Erongo region would have been robbed of an area of 3km by 1.5 km and 390m of land. But then again, this is no ordinary plain land as it is situated in the Namib Desert where the Dorob and Namib Naukluft national parks are located. The Namib Desert is the centre of tourism in Namibia. Therefore, leaving the open pit will to a larger extent negate the aim to reduce the visual impact of the mining operation.

Above all, the major issue is that, as the holder of the right to a sustainable environment, the state unfortunately allows mining companies to self-regulate. There are bodies such as the Sustainable Development Committee established by the NUA to ensure that uranium mining is done in an environmentally friendly manner (among other aims). However, their lack of capacity to execute their duty is not necessarily because of their apparent bias,⁵⁴ but more because the Committee members are reported to lack the additional expertise in environmental law.⁵⁵

It is appreciated that the government took measures in 2011 to address the environmental concerns in the Erongo Region through a Strategic Environmental Assessment. This was followed by a detailed Strategic Environmental Management Plan (SEMP) which endeavours to advise on the way forward in aligning uranium mining activities with sustainable development. However, considering the free-market economic policies endorsed by the World Bank and the International Monetary Fund,⁵⁶ and that are followed by the state, concerns are raised in relation to the degree of responsibility the latter expects from companies that are simply 'doing business'. It can be argued that a state primarily driven by short-term

⁵² HERSS standards.

⁵³ Rössing Limited. 'Rössing Uranium Limited Report to Stakeholder 2015' (2016) <www.rossing.com> last accessed 14 August 2016,

⁵⁴ The Chairperson of the committee is a representative of uranium mine located in Bannerman's Etango project (considered to be a sensitive area. And the former legal advisors were corporate lawyers working for uranium companies.

⁵⁵ N A Renkhoff, 2015, 32.

⁵⁶ World Bank. 2009. Namibia – Country Brief. Washington D.C.

economic gain and short-sighted on the consequences of uranium mining would reasonably believe that resource-seeking investors that strive to cut on costs of production will actually invest in rehabilitation.

As mentioned earlier, the Chamber of Mines Code of Conduct,⁵⁷ requires an environmental rehabilitation financial guarantee to fund rehabilitation plans. In accordance with this, Rössing details its financial guarantee in its stakeholders report. However, it omits to report to the Chamber of Mines on the status of this funding. By implication, this indicates that, in practice, there is no obligation to report to the state on the financial standing of the rehabilitation financial guarantee. As such, this compromises any guarantee of rehabilitation and ultimately puts the environment at risk. The corporate legal advisor for Rössing states that the obligation to fund rehabilitation should be insisted on from the beginning of operation as this will allow investors to make informed long-term financial decision.⁵⁸

To these issues, the deputy director of environmental assessment states that there are plans to amend the Environmental Management Act so that all players (new and old) of the mining industry are obliged to plan and fund rehabilitation.⁵⁹ In contrast, Rössing legal counsel cautions that the introduction of a subsequent law requiring mines to provide funds for rehabilitation may be problematic.⁶⁰ This is because at later stages, closure in particular, mining operations will not be making a profit to fund such programmes.⁶¹

5 Conclusion

This chapter has dealt extensively with the issues concerning sustainability in the mining industry, with a particular focus on uranium mining as practiced by Rössing Limited. The state seeks to achieve sustainable development in the mining industry, but this chapter has shown that its current framework to a lesser extent effectively ensures that mining activities are environmentally sound and socially responsible. Essentially, sustainable development, in an industry so economically driven as mining, is nearly impossible in the absence of a clear law that is binding

⁵⁷ Section 4.3(c).

⁵⁸ Z Alberto, 28 September 2016. *Rehabilitation at Rössing Mine*. (M. Munyanduki, Interviewer).

⁵⁹ M Saima, 28 September 2016. *Rehabilitation of Mines*. (M. Munyanduki, Interviewer).

⁶⁰ Z Alberto.

⁶¹ *ibid.*

and an effective monitoring system to ensure compliance. While it may be easy to cast blame on the industry players, the role of government in encouraging positive sustainable practices should not be overlooked.

Sustainable development, whether defined precisely, in the mining context or in general terms, stands on three essential elements, the social, environmental and economic. Although self-regulating on the issues of CSR and rehabilitation, this chapter finds that Rössing to a larger extent reflects sustainable practices in mining. While their practices are not necessarily the ideal, their positive action towards sustainable practices is appreciated and credited to the company's policy as opposed to the current legal framework on CSR.

Nonetheless, what is apparent in this chapter are the lack of a monitoring tool, and the lack of coordinated effort in the case of CSR. On the other hand, the lack of monitoring, adequate reporting, and the legal requirement to guarantee that funds are reserved, are highlighted as the major issues of concern on rehabilitation. Under these circumstances, therefore, there is a greater need to align the uranium mining industry with sustainable development on the social and environmental aspects. The chapter also finds that, while there are guidelines uniquely developed for Namibia, the lack of legal enforceability render their utility to the industry minimal.

It is for the Namibian government, however, to align its mining law with sustainable development to ensure that other players of the industry, including Rössing, are clear on the accepted standards. It goes without saying that a country cannot operate on policy and guidelines lacking legal enforceability, but should be regulated by the rule of law as stated in Article 1 of the Constitution.

CHAPTER 19

RURAL ELECTRIFICATION WITH HYBRID MINI-GRIDS: FINDING AN EFFICIENT AND DURABLE OWNERSHIP MODEL

by

Helvi Iлека, Dunia P Zongwe and Kevin Reuther

1 Introduction

Namibia hosts two of the largest hybrid solar off-grid electricity systems in Africa. Both systems, however, while technically sound, are plagued by a host of problems related to operations, management, and decision-making that threaten their sustainability, especially the notable lack of a national renewable energy policy, a co-ordinating agency, codes of practice, and proper maintenance. While it is widely agreed that access to modern energy services is a necessary element of sustainable development, the key challenge is that in many nations the absence of a clear and workable plan for the sustainable operation and maintenance of energy systems has led to disastrous outcomes. Namibia is no exception.

This chapter delves into different models and speaks for an efficient and durable ownership structure as an answer to the question of off-grid electrification. It employs traditional legal research methodology along with observations and interviews to assess whether alternative legal ownership models might lead to more efficient and durable mini-grid systems. We explain the history of the development of the mini-grid projects in Namibia and report on the current conditions and shortcomings of the existing off-grid systems, zooming in on the experience at Tsumkwe and Gam in the Otjozondjupa region. A review of Namibian law on ownership structures is provided and four general options for system ownership are described, including private corporate ownership, public corporate ownership, private public partnerships, and community ownership. We conclude that a public-private partnership or private ownership model that brings to bear the private sector's profit incentive would result in a more efficient and durable mini-grids.

2 Mini-grids bring clean, renewable electricity to remote communities

In sparsely populated countries like Namibia, the “mini-grid” is an electrification model that has the potential to bring electricity to communities that are far removed from the national electricity grid. A “mini-grid,” as we use the term here, is a power system that includes a generation source, along with distribution and metering equipment, that services multiple households and businesses. While smaller systems owned by an individual business, facility or family may also serve the same function, our focus is on systems that require broader co-ordination and larger investment than individual systems.

Many original mini-grid systems consisted of a diesel generator with associated distribution lines. More recently, mini-grid systems have incorporated renewable energy, especially solar. The systems reviewed in this chapter are “hybrid” mini-grid systems comprised of photovoltaic (PV) solar panels, inverters, batteries, back-up diesel generators, distribution lines and customer meters.

2.1 Why mini-grids are important to Namibia

Namibia is home to approximately 2.5 million people spread across an arid landscape covering 825,418 square kilometres – it is one of the most sparsely populated countries in the world.¹ While migration to urban areas is common in Namibia, as elsewhere in the developing world, rural households continue to outnumber those who live in cities. According to the 2011 census, 57% of Namibian households live in rural areas.² Of those, 70% are not connected to the electricity grid.³ (Thirty percent of urban households likewise are not grid-connected.)⁴

¹ Ministry of Environment and Tourism. National Climate Change Strategy and Action Plan 2013-2020, 15.

² Namibia 2011 Population and Housing Census Indicators <<http://cms.my.na/assets/documents/p19dmlj9sm1rs138h7vb5c2aa91.pdf>>.

³ Regional Electricity Regulators Association of Southern Africa, Supportive Framework conditions for mini-grids employing renewable and hybrid generation in the SADC Region: Namibia Case Study Gap analysis and National Action Plan (January 2014) #.

⁴ *ibid.*

The goal of bringing electricity to rural households is clearly articulated in Namibia's guiding energy policy.⁵ In 1997, an estimated 8% of rural households had access to electricity, and the policy adopted a goal of having 25% of rural households electrified by 2010. Importantly, the 1998 White Paper on Energy Policy emphasized the use of renewable energy systems to supply remote communities with electricity: "Renewable energy systems, in conjunction with enhanced supply of petroleum fuels, will substitute grid electrification in areas where it is not viable to extend the national grid."⁶

The focus on renewable energy to supply rural households is reiterated in the government's recent Harambee Prosperity Plan, which seeks to increase the rate of rural electrification from 34% in 2015 to 50% in 2020.

2.2 Benefits of rural electrification

The rapid decline in the price of renewable energy technologies, especially solar, opens a new and significant opportunity for increased penetration of energy services to off-grid communities. The benefits of electricity, and especially electricity from renewable energy sources, are many.

There is a large body of literature on the benefits (or potential benefits) of rural electrification in developing countries.⁸ Electricity has been associated with improvements in health care, education, economic development, indoor air quality, and poverty reduction. While the literature, especially that based on individual case studies, shows mixed results in measuring improvements, "[p]otential positive impacts of rural electrification on development seem to be accepted by consensus in scientific literature."⁹ Indeed, it is widely agreed that access to modern energy services is a necessary element of sustainable development.

⁵ Ministry of Mines and Energy. *Energy Policy Goals*. 1998. ¶ 3.1.4.2.

⁶ *ibid.*

⁷ Government of the Republic of Namibia, *Harambee Prosperity Plan*, 49 <<http://www.gov.na/documents/10181/264466/HPP+page+70-71.pdf/bc958f46-8f06-4c48-9307-773f242c9338>>.

⁸ See, e.g., sources cited in Cook, Paul. "Rural Electrification and Rural Development" in S Bhattacharyya (ed.), *Rural Electrification Through Decentralised Off-grid Systems in Developing Countries*, Green Energy and Technology, DOI: 10.1007/978-1-4471-4673-5_2, Springer-Verlag London 2013.

⁹ Maximo Torero, "The Impact of Rural Electrification: Challenges and Ways Forward" (November 24th 2014) Paper prepared for the 11th Conference AFD PROPARGO/EUDN: Energy for Development. International Food Policy Research Institute.

A 1999 study funded by the Namibia Ministry of Mines and Energy and the government of Germany reviewed the benefits of rural electrification in Namibia. The authors recommended continued prioritising of rural electrification based on health care, education and small business development benefits.¹⁰

Off-grid electrification can provide the power for lights, computers, copiers, tools, refrigeration etc. – all important foundational elements for building successful education, health care, and small business systems. Likewise, 24-hour electricity improves quality of life and safety in remote areas. Structured properly, a mini-grid system will itself result in job creation and economic activity.

The environmental benefits of relying on renewables for mini-grids that bring electricity to rural communities rather than solely on fossil fuels are significant. These benefits are both local and global.

At the most local level, clean electricity can help to improve air quality – both indoor and outdoor. When an LED bulb substitutes for a candle, not only is visibility improved but so is indoor air quality. Likewise, when power from the sun substitutes for a diesel generator, combustion emissions are offset. According to the World Health Organization, the health benefits of improved air quality include reduction in diseases from stroke, heart diseases, lung cancer, and both chronic and acute respiratory diseases, including asthma.¹¹

In addition to an improvement of the air quality, there are other local environmental benefits of substituting renewables for fossil fuel generation. On a recent study trip to a community that receives intermittent power from a diesel generator, two of us (i.e., Iлека and Reuther) observed significant fuel oil spillage at the site of the generator – contamination that over time can have damaging water-quality impacts on the shallow aquifer from which the community gets its drinking water. In addition, the generator, situated just behind the school, was observed to be very loud and at odds with the otherwise serene rural village.

Using renewables to extend electrification in rural areas also, of course, has important global environmental benefits. The urgent need to reduce greenhouse gas emissions is in tension with the equally urgent need to alleviate poverty and

¹⁰ Bronwyn James *et al.* *Socio-Economic Impacts of Rural Electrification in Namibia: Report 2: The impact of electrification on rural health care facilities, education and small businesses* (GTZ, MME, UCT 1999).

¹¹ WHO “Ambient (Outdoor) Air Quality and Health” (March 2014) <<http://www.who.int/mediacentre/factsheets/fs313/en/>>.

promote development, in part by bringing electricity to those who now have none. A properly functioning solar mini-grid addresses both concerns by supplying nearly carbon-free electricity.

Namibia has committed to a significant number of greenhouse gas mitigation efforts. In its September 2015 Intended Nationally Determined Contributions submitted to the United Nations (UN) Framework Convention on Climate Change, Namibia sets as its goal to reduce greenhouse gas emissions by 89% – as compared to business-as-usual – by 2030. While much of that is expected to result from sequestration related to forestry and agricultural practices, the country also makes a significant commitment to promoting renewable energy, stating that renewables in electricity production will increase from 33% to 70% in this timeframe.¹²

2.3 Hybrid mini-grids are an opportunity for growth with mitigated emissions

The important role hybrid mini-grid systems can play in Namibia’s future is evident in that they have been identified as a “Nationally Appropriate Mitigation Action” (NAMA). NAMAs are policy instruments that developing countries can use to reach their development goals while contributing to greenhouse gas mitigation efforts. They were introduced in 2007 at the UN Framework Convention on Climate Change, at the 13th session of the Conference of the Parties (COP 13) in Bali.¹³

The NAMA framework contemplates both “domestic” and “supported” NAMAs, i.e., “domestic” policies that developing countries will promote and invest in on their own in pursuit of their intended nationally determined contributions; and “supported” projects that require the financial assistance of developed countries. The NAMA program hosts a registry on which developing countries may post approved NAMAs that can be selected for support by other countries. Namibia’s identification of hybrid mini-grid electrification systems as a NAMA is significant in that it represents a specific policy that the country can pursue to attain its commitments under the UN climate framework, and also has the potential to garner or elicit significant financial support from developed countries, who have pledged to raise \$100 billion for mitigation and adaptation efforts by 2020.¹⁴

¹² Republic of Namibia. Intended Nationally Determined Contributions (INDC) of The Republic of Namibia to the United Nations Framework Convention on Climate Change. (September 2015).

¹³ Sharma, Sudhir, *et al.*, Understanding the Concept of Nationally Appropriate Mitigation Action, UNEP 2013.

¹⁴ *ibid.* See also Lachlan Cameron, Natalie Harms, eds., NAMAs and INDCs: Interactions and Opportunities, ECN Ecofys 2015.

3 Namibia's experience with mini-grids: Tsumkwe and Gam

Namibia today has three functioning “mini-grids”: one owned and operated privately by the non-profit Desert Research Foundation of Namibia (DRFN) in Gobabeb; and two that provide electricity to homes and businesses in the remote villages of Tsumkwe and Gam. Notably, Tsumkwe, Namibia's largest off-grid settlement, was envisioned as a pilot project that could be replicated in other areas in Namibia and southern Africa.¹⁵

It is important to understand the historical context that led to the development of these power plants. The experiences and challenges facing these power systems underlie our analysis as we consider alternative ownership and operational models for future mini-grid systems.

As mentioned above, the White Paper on Energy Policy of 1998 recognized the importance of renewable energy and energy efficiency in Namibia's socio-economic development as providing ‘sustainability’ and ‘security of supply’ by virtue of diversification and the use of locally available resources. The White Paper also identifies and categorises challenges to renewable energy development in Namibia as institutional and developmental. To address the challenges the government set a number of strategic objectives, including several relevant for the promotion of renewables in rural electrification:

- *Government will ensure that institutional and planning frameworks treat renewable energy on an equal footing with other forms of energy when assessing their financial, economic and social costs and benefits.*
- *Government will facilitate adequate financing schemes for renewable energy applications, and will encourage government agencies, investors and users to make decisions based on the life-cycle costs of alternative energy options.*
- *Government will promote the use of economically viable renewable technologies, as a complement to grid electrification, to improve energy provision to rural areas.*
- *Government will ensure that funds made available for rural electrification will be allocated between grid and off-grid energy supply options, on the basis of their relative social and economic costs and benefits.¹⁶*

¹⁵ (European Commission, 2006).

¹⁶ White Paper at 45 – 47.

Since the launch of the Policy Paper in 1998, a number of initiatives and renewable energy programmes have been set in motion in partnership with various local and international groups.

In 2000, the country adopted the initial Rural Electricity Distribution Master Plan (REDMP), which is updated every five years. This Plan is focused primarily on rural electrification through grid extension, prioritising government buildings, especially schools. The Plan acknowledges, however, that several localities in remote parts of the country are disproportionately costly to electrify through the grid. The 2010 Rural Electricity Distribution Master Plan identifies, therefore, several communities for off-grid electrification:

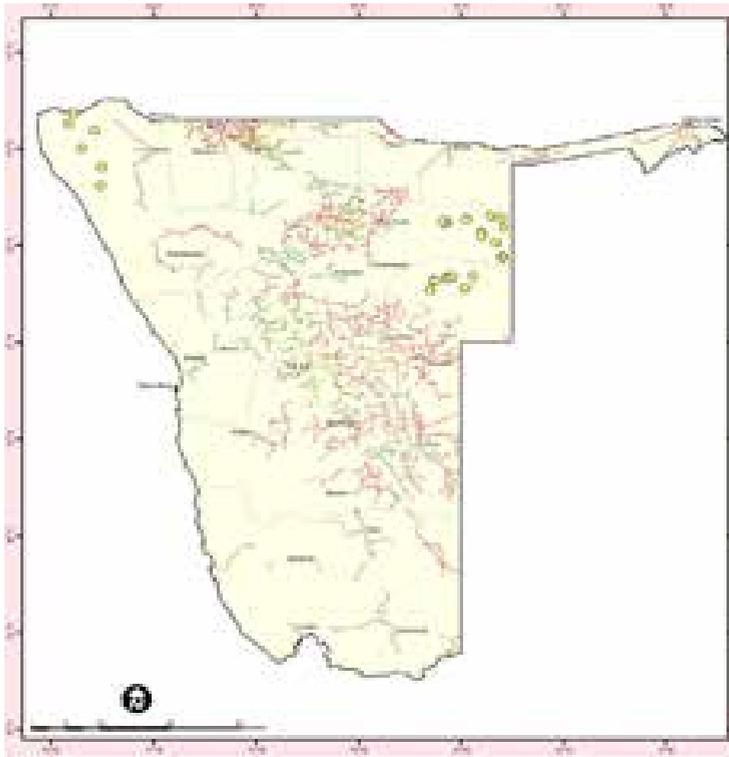


Figure 1: Existing distribution networks and location of identified Off-Grid Localities (marked as yellow dots)¹⁷

¹⁷ Rural Electricity Distribution Master Plan for Namibia 2010, XIII <<http://www.mme.gov.na/energy/pdf/National/REDMP%20National%20Overview%20&%20Methodology%20-%20Part%201.pdf>>.

The Rural Electricity Distribution Master Plan is supplemented by the January 2007 Off-Grid Master Plan for Namibia. The Off-Grid Plan takes a three-pronged approach to rural electrification, focusing on (1) the establishment of “energy shops,” businesses accessible to off-grid residents that supply energy solar and other energy services; (2) financing through the creation of a “solar revolving fund”; and (3) establishment of solar-hybrid mini-grid systems.¹⁸

Tsumkwe and Gam are among the communities identified for electrification through off-grid hybrid mini-grid power systems.

3.1 The hybrid mini-grid at Tsumkwe

The settlement of Tsumkwe is located at the centre of the Tsumkwe Constituency in the Otjozondjupa Region in northeastern Namibia. The settlement is 735 km from Windhoek and 304 km from Grootfontein, the closest major city. The route from Grootfontein to Tsumkwe is 60 km of paved road, followed by 254 km of loose gravel and sand. The Tsumkwe settlement serves as a supply outpost, providing basic goods and refuelling services to the surrounding 37 villages within the constituency, and to travellers passing through on their way to or from Grootfontein.

According to the 2001 Namibia Population and Housing Census report, approximately 9,000 people live in the Tsumkwe Constituency and an estimated 3,800 live within the Tsumkwe settlement (National Planning Commission, 2001). Tsumkwe is a diverse settlement and home to members of the San, Kavango, Herero, Damara>Nama, Owambo, and Zambezi ethnic groups. Some of the largest employers in Tsumkwe are government organizations, including the Ministry of Regional and Local Government, and the ministry responsible for housing. This ministry, or “Local Government” as it is called by residents, serves as the settlement’s administrative authority. Several other ministries, which have offices in Tsumkwe include: Ministry of Agriculture, Ministry of Water & Forestry, Ministry of Environment & Tourism, and Ministry of Gender Equality & Child Welfare. Tsumkwe has both primary and secondary schools as well as a clinic.

¹⁸ Off-Grid Energisation Master Plan for Namibia. January 2007 <http://www.mme.gov.na/files/publications/541_off-grid-masterplan.pdf>.

The electrical infrastructure of Tsumkwe dates to pre-Independence. The South African government established Tsumkwe as a military post during South Africa's control of Namibia. The South Africans had two diesel generators that were used to generate electricity. When Namibia became an independent nation in 1990, the Namibian government funded the construction of a school, a clinic, and a police station for the members of the Tsumkwe community. Tsumkwe continued to use the two generators left behind by the South African Government as its primary source of electricity.

The Otjozondjupa Regional Council (OTRC) assumed political control of Tsumkwe after the establishment of the Regional Government of Namibia in 2003. The Regional Council poorly maintained, managed, and operated the electricity production system. Severe pollution issues remain in the buildings and property that housed the generators due to multiple diesel spills and through general neglect of the environment. Power was unreliable and the high cost of fuel limited generator operation for 10 to 14 hours per day. At times, the generators would not operate for days because the Regional Council would forget to pay for diesel and have it then shipped to Tsumkwe. When there was fuel available, the generators only provided electricity to residents from 5:00 AM to 1:00 PM and from 5:00 PM to 10:00 PM.

The interruption in power supply throughout the day made it difficult for residents to complete work or to utilise any electrical appliances. In addition to the poor electrical service, residents of Tsumkwe could not afford a cost-reflective tariff, which would have amounted to approximately N\$ 6.00 per kWh. Thus, the Regional Council had to heavily subsidise the tariff, requiring residents to pay an end-user tariff of only N\$ 1.00 per kWh and institutions to pay N\$ 1.90 per kWh. This made the electricity much more affordable for many of the impoverished Tsumkwe residents; however, the subsidised tariff resulted in an annual deficit of N\$ 1.2 million to the Regional Council. Moreover, very few residents paid their electricity bills, resulting in a credit meter outstanding debt of N\$ 6.2 million by 2010.

NamPower investigated the cost of connecting Tsumkwe to the national grid system, but found that a national grid connection would cost more than N\$ 150 million. The OTRC had no choice but to continue paying the subsidy for diesel.

In 2005, the Councillor of Tsumkwe Constituency announced on radio that electricity supplied by diesel for 10 to 14 hours a day was hindering development and compromising the health of communities, and he called for the improvement of the electricity situation to create jobs in his constituency. In response, Namibia Renewable Energy Project (NAMREP) commissioned a small team of experts consisting of DRFN and Solar Age of Namibia to evaluate the current energy situation at Tsumkwe and to assess whether a hybrid mini-grid energy supply system using solar energy would be a feasible long-term electrification approach for Tsumkwe. The DRFN had introduced the previous year such a solar hybrid system at its Gobabeb Research Centre.

After the observation trip, the DRFN prepared a proposal to the European Commission for funding of the mini-grid, which was approved. The specific project objective, as outlined in the project proposal, was to introduce a solar-diesel hybrid electricity system and energy-efficient methods in Tsumkwe.

The European Commission supplied 75% of the funds to cover capital expenses and DRFN involved the utility NamPower (14%) and the Regional Council (11%) for co-financing. The total budget was N\$ 30.8 million.

The system aims to provide 24-hour, uninterrupted electricity to the Tsumkwe settlement. It consists of four main components: (1) a 202 kW (peak) solar PV generator with 918 panels; (2) a 180kW 3-phase inverter/charger installation which consists of 36 single units combined; (3) a lead-acid battery bank with a nominal capacity of 1.93 MWh (C10); and (4) two- diesel generator sets of 150kVA equal to 300 kVA and 350 kVA power. Tsumkwe uses some 2 MWh of energy within a period of 24 hours.

Prior to the establishment of the hybrid mini-grid, the Regional Council was spending N\$120,000 on diesel every month. With the installation of solar panels, the expectation was to minimize this expense.

Upon completion of the project, ownership was transferred to the Regional Council, the same entity that had managed (though not very successfully) the diesel generation regime that preceded the mini-grid.

3.2 The hybrid mini-grid at Gam

The settlement of Gam is located 112 km southeast of Tsumkwe settlement, in close proximity to the western border of Botswana. It is the second largest off-grid settlement after Tsumkwe within the Tsumkwe constituency in Otjozondjupa region. The settlement is 416 km to Grootfontein.

Originally, Gam had been occupied by a small number of San people, since it has one of the few permanent sources of water in the region. After independence, between 1993 and 1996, the Government of Namibia re-settled and repatriated about 3000 (mainly Herero) people – about 423 families – who had fled the country to Botswana due to the 1904 genocide. A survey, conducted in Gam in November 2012 as part of the preparations for the mini-grid, found a population of about 1632 people with less than 5% San and more than 95% Ovaherero. The livelihood of the area is split between cattle farming and government employment via the various ministries such as the Ministry of Agriculture, Water and Forestry; a police station; secondary and primary schools; and a clinic.

Before the installation of the mini-grid, two generators, (i.e., 15KVA and 40kVA diesel generators) poorly maintained by the Ministry of Works, Transport and Communication, supplied power to the clinic, to a police station, and to school and teachers' houses. Seventy-two percent of household used wood for cooking, 14% used liquefied petroleum gas (LPG) and the rest cooked with electricity and paraffin. Forty-eight percent used paraffin lamps for lighting, 40% used candles, and about 5% used solar lanterns.

Because Gam falls under the Otjozondjupa Region and is one of the furthest settlements from Grootfontein, when the diesel fuel supply ran out, it was the last settlement to receive delivery, often going weeks without electricity at a time before the next delivery. Because of unreliable power supply, the clinic had a solar system used as a back-up, though it was also poorly maintained. For example, the mortuary had not been functioning for years. What is more, the generator which supplied power to the school had been out of order for more than two years.

In 2012, the Gam Development Organisation (GDO) wrote a letter to the Minister of Mines and Energy through the Regional Council requesting to be electrified.

In the letter, the GDO highlighted that since the community repatriated from Botswana and settled at present-day Gam in the early 1990s, no major development had taken place, which they attributed to the lack of electricity in the settlement. Their main contention was that the education, health and agriculture sectors had not been functioning properly, thus leading to a low pass rate of grade 8 and 10, decomposing corpses, spoilt meat and lack of refrigerators for animal medicine. The absence of development was further compounded by the lack of investment into banking, postal and fuel services.

The Namibian Government, through the Ministry of Mines and Energy, conducted a survey of the energy situation in Gam and concluded that the settlement was appropriate for an off-grid solar hybrid power plant similar to one in Tsumkwe. A tender was issued to a local company, Hopsol, to design and construct the hybrid solar-diesel power plant, which was commissioned in November 2014.

The system aims to provide 24-hour, uninterrupted electricity to the Gam settlement. It consists of four main components: (1) a 292 kW (peak) solar PV generator with 2016 panels; (2) a 180kW 3-phase inverter/charger installation which consists of 36 single units combined; (3) a lead-acid battery bank with a nominal capacity of 2.6 MWh (C10); and (4) two-diesel generator, 400kVA of which is used as a standby generator. Gam currently uses some 10,000 kWh of energy within a period of 24 hours, which is realised through 11 kV three-phase mini-grid, divided in two priorities (essential loads and non-essential loads).

Upon completion of the project the Ministry of Mines and Energy handed over the project to the Regional Council, who started collecting revenues from consumers. Operation and maintenance are conducted by the Department of Works residing at Tsumkwe Settlement.

3.3 Challenges for the Tsumkwe and Gam mini-grids

The Tsumkwe and Gam mini-grids are facing some significant challenges. The systems are designed to generate maximum electricity from the solar panels, to ensure cycling of the batteries in a way that promotes their efficiency and longevity, and to produce reliable 24/7 electricity for the communities that they serve. Unfortunately, the on-the-ground reality is that these systems are not being operated as designed. While they are able to provide electricity, the reliability and the durability of these systems is questionable.

In a recent study trip to Tsumkwe and Gam, we discovered several problems with the operation and maintenance of these mini-grid systems. For example, in Tsumkwe, there are three generators – two new generators with fully computerized automation to turn on and off as the batteries cycle, and one old generator which requires manual operation and was intended as a stand-by for emergencies and outages. Each of the generators has a run-time service and maintenance schedule, which is intended to ensure continued efficient and safe operation of the generator. Timely service and maintenance have not, however, been provided for any of the three generators. The automated generators are programmed not to run when service is required, but the government employees reset the program when the running time is reached without maintaining them. Even simple things such as changing the oil have not been done.

Furthermore, the generators are not being operated as designed. It was observed that the two automated generators are generally not being used and, instead, the older generator is being manually run, generally between 05.00 – 08.00 a.m. (Start/Stop) and 07.00 – 11.30 p.m. (Start/Stop). It was even indicated to us that the government employees prefer running the manual generator so that they can claim overtime.



The older generator, which has been running as main generator, is leaking significant amounts of oil. In addition, the exhaust pipe is broken and wrapped only with some binding materials.

It is clear that the generators are in need of significant attention. When they fail, the entire system will fail.

While a monitoring system (Sunny Portal) was installed on the Tsumkwe system during construction, it has never been functional. As a consequence, there are no data available to evaluate how efficiently the system is functioning, or even how much diesel is being used to generate electricity. Meanwhile, the Regional Council reports that it is spending more on diesel for this system than the total revenue received from consumers.

The solar panels are, likewise, not being optimally maintained. The power plants at Tsumkwe and Gam are both located on dry, dusty roads and during a recent visit the panels were covered with thick layers of dirt. No consistent schedule for washing the panels is in place; and there is no water source at the Gam plant, making the cleaning of the panels a difficult and time-consuming task.

The Gam and Tsumkwe power plants are also experiencing problems on the consumer end. In Gam, for example, 10 households that were provided connections and meters over two years ago are still without electricity because their meters have not been programmed. Also in Gam, an accident resulted in a downed wire in late 2015. By June 2016, the safety hazard had been eliminated, but homes disconnected from the accident remained without electricity.

The hybrid mini-grid systems require consumers to be aware of and to limit the electricity they draw from the system. When originally installed, meters were programmed to limit the number of amps any one user could draw. More recently, the meters have not been programmed, and several customers are over-using electricity in a way that is stressing the systems.

Some consumers are also engaging in activities that threaten the viability of these mini-grid systems. It is alleged that some consumers are by-passing their meters, allowing for the consumption of higher amps than the system design intends. Illegal by-passes also allow for consumption without paying. One employee reported that when he has attempted to fine such customers, the Regional Council agreed to waive the fines.

There appears to be a lack of planning, in general, for the future. It is clear that the Tsumkwe system must be enlarged to meet the community demand. So far, new batteries have been installed which will allow for an increased solar array, but no additional panels have been installed. There is only one employee who has any technical knowledge about these power plants and he is about to retire, with no apparent succession plan in place. (That employee is a resident of Tsumkwe. In Gam, some 100 km away, there is no one with technical know-how about the plant.)

The 1999 assessment of the impacts of rural electrification in Namibia concluded that “as a matter of urgency” Namibia should develop a maintenance support program for the off-grid systems it had already invested in, noting that there is insufficient capacity among the employees of the institutions the systems are designed to benefit to maintain the systems.¹⁹ Nearly two decades later, we write to address the same problem.

This experience is not unique. Indeed, others have made the point very clearly that building energy systems without a plan in place for operation and maintenance over the long term is ultimately a waste of resources: “The key lesson acquired from energy activities over the past two decades is that simply building new facilities does not deliver lasting benefits for the poor. Indeed, projects that end with the construction phase inevitably fall into disrepair and ultimately disuse.”²⁰

¹⁹ James, 19, 32, 50.

²⁰ Yacob Mulugetta, *et al.*, *Energy for Rural Livelihoods: A Framework for Sustainable Decision Making*. (2005) (333.79091724ENE), 95-99.

A World Bank report similarly concluded that “[p]erhaps the greatest weakness of PV programs to date has been the serious underestimate of the need for adequate repair and maintenance systems. Major emphasis in program planning must therefore be given to establishing sustainable repair and maintenance services.”²¹

3.4 Analysis of the challenges

The Tsumkwe and Gam min-grids are technically sound. Yet the problems described above will worsen, making the systems unsustainable over time. These problems are, at root, not with the technology, but rather with the social-political situation currently governing off-grid electricity in Namibia. The fundamental problem is that the owner of these systems – the regional government – lacks the capacity to operate a power plant and has no direct financial incentive to ensure that the systems run efficiently. While there is sometimes pressure on the regional government to make sure the lights stay on, that pressure can lead to political rather than rational, economic decisions. What appears to be missing from the picture is the incentive for efficiency that typically results from a profit motive. These power plants are not being operated as a business with an incentive to make rational investments in efficient operation, maintenance and longevity in order to receive maximum value from the mini-grid asset.

Moreover, these off-grid power plants are being operated in somewhat of a regulatory vacuum. The 2007 Electricity Act²² establishes the authority of the Electricity Control Board (ECB) to regulate the “provision, use and consumption of electricity in Namibia.”²³ The Act sets out standards and general rules for issuing licenses for generation and distribution, and prohibits the generation and distribution of electricity absent a license. But nothing in the Act appears to be targeted at off-grid power plants. Nor has the ECB established specific rules or regulations to provide for off-grid power generation and distribution in the form of a mini-grid like those at Tsumkwe and Gam.

Currently, the Tsumkwe plant is operated pursuant to a license granted by the ECB, but the Gam plant is being operated without a license. Regulators report that several attempts have been made to have the regional government apply for a license but the application has yet to be received. The ECB has approved the

²¹ UNDP/World Bank, *ESMAP. Photovoltaic Applications in Rural Areas of the Developing World* (2000), 65.

²² Act No. 4 of 2007.

²³ *ibid*, 3(1)(a).

tariffs being charged at Tsumkwe based on an application and has approved the Gam tariffs provisionally pending the license being granted. The ECB has not taken an active role in providing oversight to the mini-grid operators. So, for example, the homes disconnected from the power line accident in Gam in December 2015 remain disconnected from the system with no consequence to the system operator.

4 Identification of alternative ownership structures

In this chapter, we seek to identify alternative ownership and management structures that may be better suited to facilitate the successful expansion of hybrid mini-grid systems throughout rural Namibia (and elsewhere). To that end, we had to settle on criteria for identifying which ownership models would offer more suitable alternatives.

Several publications have documented the challenges involved with small-scale utility projects. For example, in a 2005 publication on delivery of energy service projects to the rural poor, the authors identify several institutional limitations that hinder success. They include fragmented and overlapping responsibilities, lack of clear direction and vision, deficit of trained staff at all levels, particularly at decentralized bodies, lack of transparency (outside/national actors bringing service to communities rather than being demand-based), inadequate operational and maintenance services, bureaucratic control that inhibits effective management, and lack of financial resources.²⁴ These are, of course, the same types of problems that threaten the viability of the projects in Tsumkwe and Gam.

Also of interest is Teodoro Sanches's recounting of over a decade of experience working on small-scale off-grid systems in Peru.²⁵ Sanches found similar problems with state-owned, state-managed systems – a lack of accountability and clear roles in management hindered sustainability. In addition, “the lack of local capacity to manage the [off-grid electricity] schemes efficiently is one of the most important barriers to success.”²⁶

As a result, his NGO developed a management model that was piloted and then successfully implemented at several off-grid locations. The objective of the model is “efficient management” of the plant and services, based on “entrepreneurial

²⁴ Yacob Mulugetta, *et al*, *Energy for Rural Livelihoods: A Framework for Sustainable Decision Making*. (2005) (333.79091724ENE), 95-99.

²⁵ Sanches, Teodoro. *Electricity Services in Remote Rural Communities: The Small Enterprise Model*. (2006) (333.7932091734 SAN).

²⁶ *ibid*, 13.

management,” which the author claims is generally foreign in rural areas. It aims to establish financial management “free from interference of political interests” in which the project is seen as a business or service. Moreover, the model seeks to establish a “culture of paying for electricity services” albeit in a fair way (based on use). The objective is to cover at least costs of operation and maintenance through receipts.

A recent study of water supply systems in Ghana evaluated different ownership and management models, both existing and emerging. In that study, the authors compared the management structures based on the level of service provided, consumer costs, the financial sustainability, and strengths and weaknesses of the “institutional arrangements.”²⁷ Similarly, in a review of a delegated management model for water supply in Kenya, the authors evaluated the arrangement based on affordability, level of service, profitability for private operators, and financial sustainability.²⁸

Taking the lessons from these studies into account and considering the specific question we sought to answer, we concluded that two main criteria and several sub-criteria would guide our identification of alternative ownership and management structures for off-grid systems in Namibia. The main criteria we apply are *economic efficiency* and *durability*; in other words, *will this ownership and management structure ensure efficient operation of the system? And will this ownership and management structure ensure that the system and service is maintained into the future?*

Our focus on efficiency and durability captures the evaluative criteria used in other analyses. A management structure that has incentives for efficient operation of a hybrid mini-grid system will achieve both more affordability for end-users and financial sustainability for the system itself. (Efficiently running the system means generating the maximum amount of power from the free, renewable fuel source, such that an efficient system also yields benefits for the environment.) An efficient and durable system also must attend to long-term system investments and maintenance. Efficiency and durability further require that the responsible

²⁷ Adank, Mareike, Benedict Tuffuor. *Management models for the provision of small town and peri-urban water services in Ghana*. TPP Synthesis Report, WASH Resource Centre Network Ghana, 2013.

²⁸ Business models for delegated management of local water services: Experience from Naivasha, Kenya. WSUP, February 2011.

entity have appropriate skill and capacity. Finally, an efficient and durable model will allow for local buy-in. One finds in the literature on successful development initiatives a near-universal emphasis on local buy-in – an important element that is also demonstrated by the experiences in Tsumkwe and Gam, and, therefore, our assessment takes into account the degree to which the various models allow for local community involvement in planning, decision-making or operational control.

In sum, we seek to identify ownership structures that will promote economic efficiency and durability, considering the degree to which they (1) incentivize cost containment, (2) incentivize system maintenance, (3) incentivize long-term planning and investment, (4) ensure appropriate skill and capacity, and (5) provide for local community involvement.

At this point, we also note that hybrid mini-grid systems – regardless of the ownership and management structure adopted – will require subsidies. Just as remote electricity users could not be expected to pay the entire cost of grid extensions, tariffs alone cannot be expected to cover the capital, operating and maintenance costs of mini-grid systems in remote Namibian villages. As noted above, however, the significant commitments of the Namibian government to bring electricity to rural villages along with the commitments of developed countries to support development efforts that involve greenhouse gas mitigation mean that resources should be available to subsidise hybrid mini-grids, especially if an efficient and durable business model is implemented. The subsidy/tariff structure will no doubt influence which of the identified models are, in reality, feasible. But that question is beyond the scope of our current inquiry.

4.1 Alternative ownership and management models

a) The notion of ownership in Namibian legal and business practice

Addressing the shortcomings with mini-grids identified above calls for the search of an appropriate ownership structure. Any person planning to start and run a business must make a decision as to the form that business will assume. That decision is fundamental and far-reaching as the continued viability of the business partly depends on it.

In Namibian law, there are at least six forms of ownership structures. These are the sole proprietorships, partnerships, close corporations, companies, trusts and parastatals. In determining which ownership structure to adopt, the entrepreneur

takes into account the extent of his liability; the ability to attract financing; the level of complexity of administering the business; the requirements, if any, to register the business; and other formalities, among other things.

In a sole proprietorship, only one individual acts as the owner of the business. In a partnership, a minimum of two and a maximum of 20 partners own the business. In both, the sole proprietorship and the partnership, the owners characteristically constitute the management of the business. Close corporations may be owned by one, but not more than 10, members.

In the case of a company, the number of owners or, more precisely, 'shareholders' varies depending on the nature of the business. If the enterprise is a public company, the minimum number of shareholders is seven. If, on the other hand, the enterprise is a private company, the minimum number is one. In both cases, no upper limit exists as to the number of members. With business trusts, one or more persons can own the enterprise. Lastly, parastatals are distinctive in that the only or most important shareholder is the state.

b) Types of possible alternative ownership and management structures

For the purposes of this study, we divided the different forms of ownership structures in four categories, namely private ownership, government ownership, public-private ownership and collective ownership. Sole proprietorships, agencies, partnerships, close corporations, companies, and trusts may be conveniently put under the private ownership rubric. State institutions and parastatals are forms of government ownership. Concessions fall under public-private partnerships (PPP). Lastly, community trusts and cooperatives are instances of collective ownership.

4.2 Private ownership

The sole proprietorship - The sole proprietorship is the most accessible business form in the sense that it is the easiest and cheapest way for an entrepreneur to organize his business. It is the easiest to set up, administer and dissolve.²⁹ The management of a sole proprietorship is very simple. In fact, with this business form, there is no clear separation between ownership and management. The majority of taxi drivers, hairdressers, and street vendors in Namibia are organized as sole traders.

²⁹ See Gregory L. Prescott and Ellen K. Madden, *Forms of Business Ownership*, 25 Commercial Lending Rev. 27 (2010).

The agency – No entrepreneur can perform all the tasks needed for the proper administration of his business. He needs to delegate some of these tasks. Actually, even large organizations cannot operate without effective delegation of responsibilities. Similarly, the various business forms (sole proprietorships, partnerships, close corporations, companies and business trusts) can hardly function if the business owner is stopped from delegating some of his powers and/or obligations. As Rasmusen remarked, agency is one of the main themes of corporate law.³⁰

In commercial law, agency or representation is the conclusion of a juristic act (typically, a contract) by one person, with the necessary authority to do so, for and on behalf of another in such a manner that rights and obligations are obtained for the other.³¹ Agency occurs where the owner of a business, for example a sole proprietor, relies on the services of a person he has mandated to act on his behalf. The party who gives the instructions is called ‘principal’ and the one who takes those instructions is called ‘agent’. The set of instructions given by the principal constitute the ‘mandate’, which the agent must execute.

The agent stands in a fiduciary relationship towards the principal. He has the legal obligation to act honestly and in good faith. The agent breaches this fiduciary when he makes secret profits, if there is a conflict of interest, if he abuses confidential information and if he delegates the authority granted to him without authorization.³²

Agencies end when the agent fulfils his mandate. They can also be discharged by any other means recognized by contract law, such as novation, delegation or cession, supervening impossibility.³³

The partnerships – A partnership is a legal relationship arising from an agreement between no less than two persons, and normally no more than 20 persons, to carry on business jointly. Partnerships come into being when the prospective partners enter into an agreement to that effect. Thus, both partnerships and agencies have a contractual basis. A partnership comes about where parties agree to share

³⁰ Eric Bennett Rasmusen, ‘Agency Law and Contract Formation’ (May 26, 2003) Harvard Law and Economics Discussion Paper No. 323.

³¹ M A Fouché (ed.), *Legal Principles of Contracts and Commercial Law* 246 (8th ed. 2015). See also JTR Gibson, *South African Mercantile and Company Law* 236 (8th ed. 2003); W J Hosten *et al.*, *Introduction to South African Law and Legal Theory* 429 (2nd ed.) (1980).

³² *ibid.*, 254-255.

³³ See R H Christie, *The Law of Contract* (4th ed.) (2001) 505.

profits and losses, and undertake to bring money, labour or property into their joint business, whose object must be to make a profit for the benefit of all parties.³⁴ The partnership is one of the oldest form of business organizations in South Africa, from which Namibia inherited much of its modern laws. The partnership has influenced and served as a “fertile breeding ground for the development of the main principles of entrepreneurial law.”³⁵ Partnership law has contributed principles such as the duty of good faith.

Partners owe to one another the duty to observe the utmost good faith. This standard is higher than the contract-law obligation to act in good faith. The duty to observe the utmost good faith is special and comparable to the relationship between brothers.³⁶ A breach of the duty would entitle the other aggrieved partners to cancel their agreement.³⁷

Partnerships are terminated when they dissolve. Dissolution occurs where one of the partners dies, becomes insolvent, or leaves the partnership, to mention but a few instances. Furthermore, since they are governed by contractual agreements, partnerships may end in any way a normal contract does.

The close corporation – The Close Corporation Act, 26 of 1988, provides the legal framework for close corporations in Namibia. One fundamental distinction of the close corporation is the fact that the close corporation is endowed with separate legal personality. From that perspective, the close corporation is different from all the business forms presented earlier. The separate legal personality of a close corporation implies that, as a general principle, members of that corporation are not personally liable for the debts of the corporation.

To come into existence, close corporations have to be registered with the Registrar of Close Corporations at the Ministry of Industrialization, Trade and SME Development. In other words, close corporations must be incorporated. If a prospective corporation is not registered, it will not enjoy separate legal personality. Internally, a close corporation functions like a partnership insofar as members of a close corporation stand in a close relationship towards one another.³⁸ A close corporation ceases to exist when the Registrar of Close Corporations deregisters it in terms of the Act.³⁹

³⁴ *Behrenbeck v Voigts* (I 746/2014) [2015] NAHCMD 72 (23 March 2015) paras. 9-10.

³⁵ M L Benade *et al.*, *Entrepreneurial Law* 11 (4th ed.) (2008).

³⁶ *Purdon v Muller* 1961 (2) SA 211 (A).

³⁷ M L Benade *et al.*, *op.cit.* 30.

³⁸ *ibid.*, 324.

³⁹ Close Corporation Act, 26 of 1988, art. 26. See also *Nationwide Detectives and Professional Practitioners CC v Ondangwa Town Council* 2009 (1) NR 308 (SC) ,

Companies – In Namibia, companies are regulated by the Companies Act, 28 of 2004. The Act does not really define a ‘company’.⁴⁰ Instead, it generally describes a ‘company’ as a business entity incorporated in terms of Chapter 4 of the Act.

The company is the ideal structure for large and complex organizations. Another advantage of a company is its greater ability to attract finance. The benefits of incorporation and the regulated structure of companies, in terms of which the contributors of capital are not saddled with management, explain why the public company with a share capital is the most efficient means of mobilizing capital from the investing public.⁴¹

Like close corporations, companies are juristic or legal persons and have thus a personality separate from that of the owners and managers of the companies. Legal personality means, first, that companies and close corporations have perpetual succession. In other words, their continued legal existence is not affected by any change of membership.⁴² Legal personality also means that the company can acquire rights and obligations in its own right. Furthermore, it means that the risk carried by the owners of the business (i.e. shareholders) extends only to the amount of their investment in the business as capital. They therefore do not carry the risk that their personal assets will be sequestered to satisfy the company’s debts.

In general, the directors of companies are not personally liable for the contractual obligations of the companies they manage. As is the case with close corporations, deregistration is necessary for the dissolution of companies.

The business trust – A business trust is formed to carry out business for the benefit of a third party. Namibian law distinguishes between testamentary and business trusts. Business trusts become the appropriate business form when one person (the founder) wishes to entrust another with the administration of some of his assets for the benefit of a third person. In practice, however, the same person is both the founder and the beneficiary.

Contrary to a testamentary trust, the business trust is created for the purposes of making a profit. The core idea of a trust is the separation of ownership (or control) from enjoyment.⁴³ Given that this section is interested with business structures, it only deals with business trusts.

⁴⁰ See Companies Act, 28 of 2004, art. 1, sv ‘company’.

⁴¹ M L Benade *et al.*, *op.cit.* 56-57.

⁴² *ibid.*, 56.

⁴³ *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA). This holding was quoted with approval by the High Court of Namibia in *Ellis and Others NNO v Noabeb* 2015 (2) NR 325 (HC) §23.

Business trusts are administered by a trustee. Like a partner, the trustee is a fiduciary, meaning that the law imposes on him duties to act in good faith. Though the business trust is not a legal person, the position of a trustee is unique. He is both the owner of the trust assets in his capacity as a trustee and the owner of his personal assets in his personal capacity.

The business trust is not a legal person, but the trustee does not incur personality liability for the debts of the business trust. Therefore, the personal assets of the trustee may not be liquidated in order to satisfy claims by creditors against the assets of the business trust.

a) *Private ownership of mini-grids*

Private ownership, regardless of the form it takes on, provides a profit incentive that could support more efficiency and durability in the management of mini-grids. The private ownership model scores fairly high on most of the considerations identified above. Because a private owner entity typically either has a personal incentive or a fiduciary duty to maximize profit from the business, it has a significant incentive to contain costs, provide for system maintenance, and engage in long-term planning and investment in order to secure its assets. With regard to appropriate skill and capacity, the private owner is again likely, because of the profit incentive and fiduciary duty, to ensure that employees with appropriate skills are either hired or contracted. On the final consideration, local community involvement, the private ownership model could flounder. There is nothing inherent in private ownership that would require or necessarily lead to the private entity taking steps to engage the local community. That said, however, the owners of private energy companies interviewed for this study identified community buy-in as a necessary element of a successful project. One owner recommended the establishment of a forum for community input as well as dispute resolution, suggesting a recognition that the success of the business depends on community involvement.

Private ownership could also have some limitations. For one thing, those interviewed for this chapter expressed little interest in having to deal with end-users. They generally viewed their areas of competence as in the design, construction, operation and maintenance of the technical systems and seemed, at least initially, averse to venturing into the collection of revenue from end-users. In addition, it is unclear how failure of the company (e.g., bankruptcy) would be handled when dealing with a public service such as electricity.

4.3 Government ownership

One universal form of ownership is government ownership. The state fully owns several types of organizations, for example, ministries, departments, schools, etc. The Office of the Ombudsman, the Anti-Corruption Commission, the Communications Regulatory Authority of Namibia, and the Namibian Competition Commission are all manifestations of government ownership.

Parastatals, technically known as ‘state-owned enterprises’ (SOEs), are business structures formed by the state, usually by dint of an enabling statute.⁴⁴ The parastatal has been defined (1) as a corporate body established under any Act of Parliament other than the Companies Act, and (2) as a company in which the government controls the composition of the board of directors and controls more than 50% of the votes and the issued shares.⁴⁵

Today, the Namibian SOE sector comprises 72 parastatals. Many utility corporations, such as NamPower and NamWater, are state-owned enterprises. In principle, they are endowed with legal personality such that the directors of those institutions are not personally liable for the parastatals’ debts. The internal relations of parastatals as well as their relations with third parties are regulated by the Act of Parliament that establishes the parastatals in question. The Act may also specify how parastatals are dissolved.

b) Government ownership of mini-grids

The experiences in Tsumkwe and Gam indicate that Government’s direct ownership and operation of small off-grid power stations is problematic. The regional government which took ownership of these plants is not operating them as a business. The government is not operating the plants efficiently, or as they are designed, and has not invested in the badly needed maintenance and upkeep of the plants. Moreover, there appears to be a lack of long-term planning and investment in the future. While considerable community outreach was conducted during the construction of the mini-grids in Tsumkwe and Gam, the regional government has not established a forum for ongoing community input into operation of the

⁴⁴ For instance, regional electricity distributors have been created by the Electricity Act of 2000, NamWater has been created by the Namibian Water Corporation Act of 1997, NamPort by the Namibian Ports Authority Act of 1994, and the Namibia Airports Company by the Airports Company Act of 1998.

⁴⁵ Daniel Motinga, ‘More Openness Plus Accountability: The Missing Calculus of Financial Sustainability Within Namibian Parastatals’ (Feb. 2004), Institute for Public Policy Research, Briefing Paper No. 30.

systems and, based on anecdotal evidence, is perceived as unresponsive. The seat of regional government is in Otjiwarango, about 500 km distant from Tsumkwe and even further from Gam. In general, direct government ownership and operation of these mini-grids is not an efficient and durable model.

An alternative to direct government ownership that could bring private-business principles to management of the mini-grids is the state-owned enterprise. In Namibia, NamPower, the parastatal utility, or the regional electricity distributors (REDs) – entities organized under the Companies Act whose shareholders include local authorities and NamPower – could be good candidates. While owned by government (or government entities) NamPower and the REDs operate as corporate business entities in the private market. As such, they share a profit incentive which should provide an incentive to contain costs, invest in system maintenance, and engage in long-term planning and investment in order to secure an asset. With regard to skill and capacity, both NamPower and the REDs, with their primary business being the generation and delivery of electricity, are considerably better suited than the regional government. In addition, they have experience working with end-users, collecting revenues and resolving disputes. With local authorities as one of the shareholders in the REDs, it could be assumed that REDs could be responsive to local community concerns and interested in local community engagement.

At the same time, having government entities be the majority shareholders in these entities means that they are less independent than privately owned companies and more susceptible to political rather than business decision-making. Historically, these business entities tend to suffer from state or political interference. This interference has the potential to create the wrong incentives and has often resulted in the poor performance of most state-owned enterprises and their eventual bailing-out. Parastatals suffer from the utter lack of timely reporting, monitoring, scrutiny and enforcement of basic corporate governance principles.⁴⁶ As a consequence, the SOEs, with a few exceptions, have put a growing fiscal burden on the shoulders of Namibian taxpayers.⁴⁷

⁴⁶ Daniel Motinga, *op.cit.*

⁴⁷ Robin Sherbourne, *Guide to the Namibian Economy 2013/14*, 380 (2012).

4.4 Public-private partnerships

Public private-partnerships (PPPs) refer to arrangement where responsibilities are shared between the private and government sectors. There are many different types of PPPs because each PPP tends to be tailored to the specific situation it addressed. Nevertheless, broadly, there are two types of PPP: institutional and contractual. An institutional PPP involves the co-ownership (public and private) of an asset; contractual involves the private party entering into a term-bound contract to provide some or all of the services normally expected of the owner.

The concession contract form is commonly resorted to in foreign investment law and practice. Since the early 1990s, public agencies in developing countries have widely used concession agreements in PPP arrangements to finance infrastructure works and performance-based contracts to maintain those works. Concessions of public infrastructure to private corporations must be distinguished from concessions of natural resources to private investors, both of which have a long and rich history in developing countries.

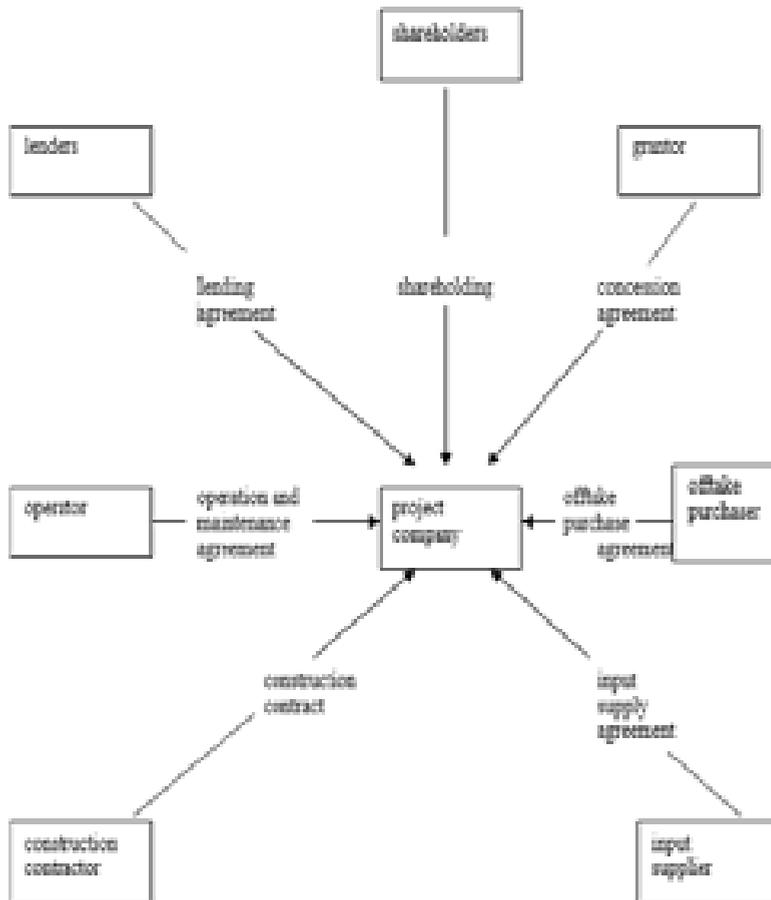
In the 1990s, many countries in Africa introduced concessions after the failed attempts to commercialize railway businesses while retaining ownership of the railways. Concessions are a type of PPP in which the state retains the ownership of a public infrastructure while a private investor is allowed not only to design and build, but also to operate and maintain, and – in some cases – finance the infrastructure and the rolling stock,⁴⁸ as is the case with railways in many African nations. Concessions are the primary contract between host governments and project companies, and form the contractual basis on which other contracts are entered into.⁴⁹ Put another way, concession agreements are the backbone of PPP arrangement and sit at the centre of the PPP structure, as shown in the Figure below.⁵⁰

⁴⁸ Jacques Cook, *Modern Enhancements for PPP Concession Agreements*, (2008) 28-FALL Construction Law, 24.

⁴⁹ Katharine C Baragona, 'Project Finance' (2004).18 *Transnat'l Law*, 139, 145

⁵⁰ See Jeffrey Delmon, *Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risk* 251 (Kluwer Law International 2009).

Figure 2: PPP project structure



Source: J. Demon, *Private sector investment in infrastructure* (2009) 251.

Concessions of public infrastructure to private entities have in common the assumption of risks by private entities whose investments will be repaid with tolls (i.e. user charges), government availability payments, shadow tolls or a combination of tolls and subsidies.⁵¹

⁵¹ Jacques Cook, *op.cit.* 24.

PPPs and mini-grids

The concession model described above has the advantage of bringing private business profit incentives and management principles to a project while maintaining a sense of collective, public ownership of shared resources and public services. This model, it appears, could be an efficient and durable model for managing mini-grids in rural Namibia. With an appropriate concession contract, the private operator essentially has the incentives of an owner – i.e., the contract should provide an incentive to contain costs, invest in system maintenance, and engage in long-term planning and investment in order to secure the asset. The company receiving the concession will have had to demonstrate sufficient skill and capacity to successfully implement its terms. Community involvement can also become a part of the performance criteria under the terms of the concession. Moreover, as noted above mini-grids in rural Namibia will require subsidies. The concession model may make it easier to implement government subsidies because they could become part of the concession contract. In addition, while the concession model does not promote private investment in off-grid electrification, it would be compatible with foreign-donor investment (e.g., through the NAMA program) with the donor supplying funds to government for the initial capital investment which would then be turned over to private entities for operation through a concession contract. With the necessary adjustments, the delegated management model could be of tremendous use for Namibian policy makers. It has already been successfully employed in Naivasha, Kenya.⁵²

On the downside, concessions are fragile as parties have to address changing political and economic circumstances and complex engineering and financial issues.⁵³ Modern concessions employ financial models to manage uncertainty and political risks flexibly. In terms of these financial models, the parties regularly update the concession agreement to reflect variations in political and economic parameters and to quantify the impact of these variations on a project company.

⁵² See Water & Sanitation for the Urban Poor (WSUP), *Business Models for Delegated Management of Local Water Services: Experience from Naivasha (Kenya)* (Feb. 2011), WSUP Topic Brief #2.

⁵³ *ibid.*, 26.

4.5 Collective ownership

Community trusts and cooperatives are the two major forms of collective ownership in Namibia. Community trusts are often used for community projects. Thus, environmental conservancies are community trusts. Cooperatives, on the other hand, are employed in the agricultural sector.

Although community trusts are widely resorted to in creating environmental conservancies, the legal framework for community trusts is not as certain as those of other types of ownership structures. Apart from that shortcoming, community trusts appear to be suitable for the sustainable operation of mini-grids in rural areas.

The clear advantage of collective ownership is that the value of the asset is retained in the community and local community engagement is much more likely because it is the local community that owns the facility. This model suffers from certain limitations, however, chief among them is the lack of capacity within isolated rural communities to manage the construction and operation of a complex system such as a mini-grid. Typically, residents of these communities do not have the technical or business skills and experience necessary for successful implementation of a power system. Moreover, while the collective ownership model should provide incentives for efficiency, cost containment and long-term planning, cooperative ownership structures are also susceptible to political and social pressures when making decisions. In some respects, the collective ownership model is similar to government ownership and could, depending on the community, be subject to the same limitations that ail systems owned and operated by the government.

4.6 Summary of analysis

In sum, we conclude that an appropriately structured PPP is most likely to meet all the criteria we consider in identifying an efficient and durable model of mini-grid ownership. The PPP combines the profit incentives of actors from the private sector with the ability to establish, through contract terms or co-ownership arrangement, a meaningful role for the local community. The private ownership model is also likely to result in efficiency and durability. Private owners have every incentive to ensure the most efficient operation of the system and investment in maintenance that will sustain their asset. There is some question, however, to what degree the private sector is able to engage with and be responsive to local concerns.

Moreover, the private ownership model likely means that profit and revenue from the system will, in most part, leave the community. “Private” ownership can include those entities in which the government is the sole or majority shareholder, such as the regional electricity distributors (REDs) in Namibia. In our view, most of the same benefits of having private owners are inherent in having a RED own and operate a mini-grid. However, we note that such state-owned companies have historically been subject to outside political influence and interference. Finally, while the community ownership model provides the great benefit of involving the community itself in seizing control of the services that will be provided and solving its own problems, the model is least likely to result in efficient and durable operation of a mini-grid because of the lack of capacity among the communities targeted for mini-grid electrification.

	Private	Parastatal	Public-Private Partnership	Collective
Incentivize cost containment	GOOD	GOOD	GOOD	FAIR
Incentivize system maintenance	GOOD	GOOD	GOOD	FAIR
Long-term planning and investment	GOOD	GOOD	GOOD	FAIR
Skill and capacity	GOOD	GOOD	GOOD	POOR
Local community involvement	FAIR	FAIR	GOOD	GOOD

5 Conclusion

Existing hybrid solar mini-grids provide vital electricity services to remote villages in rural Namibia. These systems, while technically sound, are not being sustainably managed. They are not being operated as designed or maintained resulting in inefficient system operation, high costs, and the need for expensive investments in early replacement of batteries and, possibly, new generators. We conclude that these problems are primarily the result of the ad hoc ownership by local government entities that resulted after the systems were constructed.

In this chapter, we have identified and evaluated several alternative ownership models. We conclude that public-private partnerships and private sector ownership models in which the private business's profit incentive is brought to bear on operation and maintenance of the mini-grid will result in more efficiency and durability.

