



GOVERNMENT OF LAWS AND NOT OF MEN

A report by the Ombudsman on a complaint lodged by Hon. McHenry Venaani; Leader of the Official Opposition and President of the Popular Democratic Movement, alleging that the Former Vice President, lodged at a Government Villa without any legal instrument backing such arrangement.

2 SEPTEMBER 2019

1. Introduction

- 1.1 It must be said from the outset that the Ombudsman is accountable to Parliament and has no competency to investigate Parliament. This report is not an attempt to investigate Parliament but rather a discussion of the law and how it impacts on the complaint.
- 1.2 The complaint has its origin in the National Assembly and to better understand the complaint, the Ombudsman requested a copy of the Hansard which was provided to him. A careful reading of the Hansard¹ reveals that the complaint raises the issue of legality.
- 1.3 Legality, if literally taken would simply mean that an act that complies with the existing law is by definition legal and therefore, lawful.

2. The Complaint

- 2.1 As said earlier the complaint has its origin in the National Assembly where Hon. Venaani on 14 March 2019 raised three questions and answers were provided by the Hon. Andjamba, Minister of Presidential Affairs. I find it necessary to quote the relevant parts from the Hansard in order to get a full picture of the complaint.

¹Hansard; 14 March 2019; Response to questions by Hon. Venaani: Hon. Andjamba

2.2 The first question was on whether there is a Bill regulating the benefits of the Presidency and whether it is true that the former Vice-President is given lodging in the Government house located in Eros.

I must state, Honourable Speaker, that there is indeed a Draft Bill that is aimed at regulating the retirement benefits of former Presidents and former Vice-Presidents. It is also true that the former Vice-President is temporarily accommodated in a Government house.

2.3 In the second question, Honourable Venaani wants to know which Bill empowers the retired Vice-Presidents to live in a Government property.

Honourable Speaker, as we all know, the Office of the Vice-President was introduced by the Third Amendment of the Namibian Constitution and was filled immediately as required by the Namibian Constitution when the third President of our Republic assumed office.

You may recall that it was the case that, even though Dr Nickey Iyambo had assumed his responsibilities as Vice-President, the salary and conditions of service of the Vice President were not articulated in Law for some time; hence the administration went about to ensure that the appropriate conditions of service were crafted. Eventually, this august House passed legislation that regularised matters.

Once again, upon the retirement of the former Vice-President Dr Nicky Iyambo, we found ourselves in the same position – the Law is yet to be laid before the National Assembly for approval.

Honourable Speaker, for some time, since I became a Member of this august House, I picked up where my predecessor left off. We have been consulting with the Prime Minister as Head of Administration and other Ministerial Colleagues, and have crafted two distinct Bills. One will deal exclusively with the Presidents and Former Presidents and the other will deal with Vice-Presidents and Former Vice-Presidents separately.

In the interim, arrangements were made as contained in one of the Bills, with specific regard to the upkeep and security of the Former Vice-President, pending the finalisation of the Bill and passage by the National Assembly.

2.4 **The third and last question was on how much rental fees is being paid on the property by the current tenant and Honourable Venaani requested me to provide proof of payment.**

Honourable Speaker, as mentioned earlier, the current arrangement represents temporary arrangements by the Office while Government is working on the finalisation of the Bills that would define and give effect to benefits for former Vice-Presidents.

We will get ample time to debate the merits for the proposals contained in the Bills when I present them here for adoption. It is what we determine upon in this House which will be the basis for any dispensation that we offer to the current and future Vice-Presidents.

3. **Government's Response**

3.1 On enquiries of the Ombudsman government responded, *inter alia* as follows:

*"The Bill dealing with Vice-Presidents and former Vice-Presidents Remuneration and Benefits will regularize the conditions of service of the first former Vice-President and future former Vice-Presidents which will be a different regime from what is availed and provided for Presidents and former Presidents. Regrettably, when the first Vice-President assumed office, legislation was not contemporaneous with his appointment and only ensued months later, once we were able to complete the law-making process, regrettably the situation is the same for the first former Vice-President when he left office. All arrangements that were made for him, and are being made for his widow, were done in the absence of a legal framework and only by executive direction. The Bill on Vice-Presidents and former Vice-Presidents Remuneration and Benefits will regularize these arrangements **ex post facto**.*

With regard to the specific issue of rent; no rent is anticipated from the Vice-President and no rent was anticipated from the former Vice-President and as such none was paid and none will be paid in that regard”.

4. Legal Principles, the Constitution and the Law

4.1 The Rule of Law

In its very opening sentence, the Namibian Constitution states that the Republic of Namibia is founded upon the principles of democracy, the rule of law and justice for all.²

4.1.1 What does this rule of law means? In simple terms the expression, *rule of law* means no more than that government business must be conduct according to law, not arbitrarily. This means that every act of government or its officials must have a valid foundation in law and that in acting, the government or authority must not exceed its powers or act without constitutional or statutory authority.³

4.1.2 Thus, the exercise of any power of state or government must be traceable to an applicable law and procedure.

4.1.3 The state is itself subject to law.

4.1.4 As noted by Leon AJA: ⁴

“In a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes.... There are structural limitations and

²Article 2(1)

³ Pharmaceutical MNFRS of S.A: In Re Exparte President of the RSA 2000(2) SA 674(CC) at 708 para.85

⁴Ex Parte: Attorney-General In Re: Constitutional Relationship Between Attorney-General and the Prosecutor-General (SA 7/93) [1995] NASC 1 (13 July 1995);

procedural guarantees that limits the exercise of State power. It means in a single phrase immortalized in 1656 by James Harrington in *The Commonwealth of Oceana* “a government of law and not of men”

4.2 **The Constitution: Regulation of public power**

4.2.1 **Separation of power**

- Most importantly is the separation of powers between the legislature, the executive and judiciary which determines who may exercise power in particular spheres.
- Section 1(6) of the Constitution lays the foundation for the control of public power and the rule of law acts as a constraint upon the exercise of all powers.
- Section 1 (6) provides: “*The Constitution shall be the Supreme Law of Namibia*” Consistent with this, Article 63 of the Constitution provides that in the exercise of its legislative power, the National Assembly shall be subject to the Constitution. The same applies to all Ministers, who are individually accountable to Parliament for the administration of their own Ministries.⁵
- The exercise of all public power must comply with the Constitution which is the supreme law of the country and the doctrine of legality which is part of that law.⁶

4.2.2 **The Executive**

- The Constitution does not only vest “*all power in the people of Namibia*”⁷ but also sets out the powers and duties of the executive. The Cabinet which is

⁵ Article 41 of the Namibian Constitution

⁶ Ibid: *Pharmaceutical MNFRS of SA* : In Re Exparte President of the R.S.A; at p 687 para 20

vested with the executive power comprises of the President, the Prime Minister, Deputy Prime Minister and other ministers appointed by the President.⁸ With the exception of the President all members of the Cabinet are members of Parliament. Ministers are accountable to Parliament for the administration of their ministries.⁹

- The executive has no power independent from the Constitution or an Act of Parliament.
- One of the duties of Cabinet which is most relevant for this discussion is: *“to initiate bills for submission to the National Assembly”*.¹⁰

4.2.3 **The National Assembly**

- In terms of Article 44 of the Constitution, the legislative power of the Republic of Namibia, vests in the National Assembly whose principal function is to make and repeal laws *“for the peace, order and good government of the country and in the best interest of its people”* ¹¹ The power is exercised by passing law subject to confirmation by the National Council and assent by the President ¹²
- The National Assembly has the plenary powers of legislation and is not permitted to abdicate or to transfer to others, the essential legislative functions with which it is vested. However, there is nothing in Article 63 or any other part of the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. This is implicit in the power to make laws and necessary for effective law making. But there is a difference between delegating authority to make subordinate legislation within a framework of a statute under which the delegation is

⁷Article 1(2)

⁸ Article 35 (1)

⁹ Article 41

¹⁰Article 40 (b)

¹¹Article 63(1)

¹²Article 44

made, and assigning plenary legislative power to another body.¹³ In fact the Constitution allows other bodies to make such by-laws or regulations as may be determined by Act of Parliament.¹⁴

4.2.4 **The Law**

The Interpretation Act, 1957 (Act 33 of 1957) defines 'law' as follows:

“law means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law”

4.2.4.1 **Executive Directives**

Executive directives or acts or executive rule-making are not law. These internal directives and policies of government differ from statutes and regulations in that they are not published and are unknown to the public. These directives may be binding only on government officials. The difference between an Act of Parliament and executive directives or executive rule-making, is the absence of a parent statute in the latter. Legislation is the subject of a detailed rigorous process and executive directives or executive rule-making does not undergo the rigours of law making.¹⁵

4.2.4.2 **Peremptory and Directory Provisions**

- The Constitution provides that the Vice-President shall be subject to the conditions of service, remuneration as may be provided by Act of Parliament¹⁶ (my emphasis).

¹³Executive Council, Western Cape Legislature v President of the RSA 1995 (4) SA 877 cc at p 899 para 51

¹⁴Article 108(d) and Article 111(5)

¹⁵President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 at p44-45 para. 101 and 103

¹⁶Article 28(2) (A) (e)

- The use of the word “*may*” indicates a discretion and can be interpreted as being directory.
- In terms of Article 40(b) of the Constitution “*members of Cabinet shall have the function to initiate bills for submission to the National Assembly*” (my emphasis).
- The use of the word “*shall*” is a strong indication that the provision is peremptory and not directory.

4.2.4.3 **The Deeming Clause**

- The general rule that legislation should only apply to the future, is reflected in the common law presumption that the legislature intends to regulate future matters only and not the past; it means that legislation should not have a retro-effect. But there are always exceptions to rules.
- Some legislation use a deeming clause; the legislation is deemed to have commence on a date prior to promulgation.¹⁷ The exception to the rule against retrospectively is where the legislature intends to bestow benefits or where vested rights are not affected by a retrospective operation.¹⁸ The reason for the presumption is to avoid unfair and unjust results.

5. **Discussion of the law and the facts**

- The Former Vice-President assumed office on 21 March 2015 and the Act of Parliament which regulates his conditions of service and remuneration came into operation on 21 June 2016; 15 months after the Former Vice-President took office.

¹⁷ See e.g: Presidential Emoluments and Pension Act, No 17 of 1990, promulgated on 3 November 1990 and deemed to have come into operation on 21 March 1990 (Act is now repealed)

¹⁸ Kruger v President Insurance Co. Ltd 1994 (2) SA 495 (D+CLD) at p 503 para. G-H

- This means that the Former Vice-President assumed office in the absence of a legal framework regulating his conditions of service and remuneration. Government made provision for his conditions of service and remuneration by executive directives. Executive directives do not have the force of law.
- Where the Constitution uses the permissive word “*may*”, it provides the Executive with a discretion, either to initiate a bill setting out the conditions of service and remuneration of the Former Vice-President or provide for it by executive directives or such other means that are expedient. The Executive chose executive directives and that did not make the ensuing acts or action null and void.
- Can it be said that in the absence of legislation it was unfair and unjust or illegal to remunerate the Former Vice-President while he was in office? Certainly not.
Fortunately certainty was brought with the promulgation of the Act in June 2016 which regulates the conditions of service and remuneration of the Former Vice-President and future Vice-Presidents.
- Can it be said that in the absence of legislation that it was illegal and therefore unlawful to pay a pension gratuity and a monthly pension to the Former Vice-President after retirement or paid his surviving spouse a monthly pension after the death of the Former Vice President? In the same breath, can it be said that in the absence of legislation that it was illegal and therefore unlawful to provide the Former Vice-President with free lodging at a government villa after retirement? Government’s response to these questions is that everything was provided for by executive directives and will be regularised in legislation which will apply retrospectively.
- I am of the view that it was fair and just to provide the Former Vice President with free lodging at a government villa and retirement benefits in the absence of legislation. To judge whether it was fair and just one has to

compare the position of the Former Vice-President to that of similar or related positions. In the Namibian context, one can only compare his position with that of the Former Presidents. ¹⁹

6. Conclusion

- Parliament enjoys exclusive jurisdiction over the making of legislation; the Executive has a constitutional duty to initiate bills for submission to Parliament. In a constitutional democracy under the rule of law, executive acts or directives should never replace legislation otherwise the separation between Legislature and Executive will disappear and we will have a “*Government of men and not of Laws*”.
- There is no prescribed form for executive directives or acts; they are unknown to the public, not published and therefore not accessible to the public; after all they are not vigorously debated and have no force of law and should be used only in very exceptional circumstances.
- In the absence of clear statutory words imposing a legally enforceable duty on the Legislature to make legislation within a particular time frame, it is out of the hands of the Ombudsman to recommend or the courts to compel Parliament to do what lies solely in its mandate.(my emphasis)

Finding:

The law and legal principles favour the government and I find that the government’s conduct or actions were not illegal and therefore not unlawful, in the absence of a legal framework.

J R WALTERS
OMBUDSMAN

¹⁹See: Former President’ Pension and Other Benefit Act, no 18 of 2004