

# EFFECTIVE MEASURES TO PREVENT AND COMBAT CORRUPTION AND TO ENCOURAGE COOPERATION BETWEEN THE PUBLIC AND PRIVATE SECTORS

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## I. INTRODUCTION

Namibia's anti-corruption legislation dates back prior to its independence in 1990 and Namibia has put in place legal measures to fight corruption. The Prevention of Corruption Ordinance, 1928 (Ordinance No. 2 of 1928), was enacted to better prevent corruption and it came into force on 12 June 1928. The Prevention of Corruption Ordinance, 1928, was enforced by the Police. In addition, the Namibian Parliament thought it fit to pass the Ombudsman Act, 1990 (Act No. 7 of 1990), that established the Ombudsman and empowered the Ombudsman to, among others, investigate corruption.

The Namibian Constitution provided for the establishment of the Anti-Corruption Commission under Article 94 A and the Prevention of Corruption Ordinance, 1928 was repealed by the Anti-Corruption Act, 2003 (Act No. 8 of 2003), that was promulgated and signed by the President in 2003 and became operative on 15 April 2005.

The Anti-Corruption Commission (hereafter referred as the ACC) is an Agency in the Public Service of Namibia as contemplated in the Public Service Act 13 of 1995. The ACC is headed by a Director who is assisted by a Deputy Director. Both the Director and Deputy Director are nominated by President and appointed by the National Assembly. Both the Director and Deputy Director have experience of legal practice as attorneys.

The ACC is an independent and impartial body, an agency within the Public Service as outlined in the Public Service Act of 1995. The Anti-Corruption Act gives the power to investigate corruption, combat and prevent corruption. The Director appoints investigating officers, staff of Public Education and Corruption Prevention and other Administrative and Auxiliary staff. The Anti-Corruption Act 8 of 2003 provides for the administrative and legislative measures to prevent and combat corruption.

In its fight against corruption the Commission embraces a three-pronged approach of law enforcement, prevention and public education. Our success in the fight against corruption is dependent on high ethical standards being maintained in all dealings and the reporting of corruption to the Commission whenever it occurs. The investigative power is vested in the Investigation and Prosecution Directorate while Public Education and Corruption Prevention are vested in the Public Education and Corruption Prevention Directorate. The Anti-Corruption Act gives the power to investigate corruption, combat and prevent corruption.

## II. INVESTIGATION

The Commission receives allegations of corruption orally or in writing from whistle-blowers whether in public sector or private sector. Some whistle-blowers prefer to report anonymously or give an indication that their identities should be protected or may be disclosed. The information is normally provided via telephone, e-mail, in writing or in person to the Commission. On its part the Commission must analyse the allegation to determine if reasonable grounds exist to investigate the matter, and if it cannot, the matter will be referred to the relevant authorities such as the police, other government ministries, and stakeholders.

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The Commission may also initiate investigations. (Anti-Corruption Act, section 18). The Commission after analysing the matter may also decline to investigate if it is satisfied that the matter does not have substance, or not fall within its mandate, however referrals are made in such cases as well. The Commission may also initiate an investigation on its own motion as mentioned earlier (Anti-Corruption Act no. 8 of 2003, section 18), therefore it is not only reactive, but proactive as well.

Investigative powers are provided such as the power to arrest any person with or without a warrant who is suspected of having committed or is about to commit an offence under the Act. The person arrested must be taken to the police station to be dealt with in accordance with the Criminal Procedure Act. There are also powers to enter and search premises with a warrant and powers to seize proceeds of corruption. The investigating officers do not have the power to serve summons on person to appear before court either as witnesses or suspects, the power to take finger prints of suspects and the power to formally charge suspects before they appear in court. These are all done by the Namibian Police in accordance with Criminal Procedure Act, Act 51 of 1977.

### **III. PROSECUTION**

The prosecution power of corruption cases is vested in the Prosecutor-General. Once the Commission has concluded an investigation into alleged corruption, it forwards the case files to the Prosecutor-General to analyse the information and to decide if prosecution is warranted or not. In such matters where the Prosecutor General decides to prosecute, the case file will be send back to the Commission with instructions to bring the accused before court by giving them summons which are in actual fact served on accused by the Police. In the contrary the Prosecutor-General shall decline to prosecute if there is no sufficient evidence to prosecute the matter.

### **IV. ADJUDICATION**

The adjudication of corruption matters are dealt with by the Lower Courts and High Court of Namibia. The High Court deals with the interpretation and application of the Anti-Corruption Act and also hears matters on the constitutionality of any sections of the Act. The definition of corruption is not so simple because it can take on many forms; however corruption is defined as the abuse of public office for private gain, it may also be defined as wrongdoing by those in position of trust, therefore a simplified definition of corruption is; Offering or acceptance of an advantage as an inducement or reward for doing or not doing an act which amounts to abuse of one's official position whether in public or a private body.

Gratification as defined in the Act refers to money or any gifts, loans, fees, rewards, commissions, valuable security or property or interest in property of any description, whether movable or immovable; any office, dignity, employment, contract of employment, release, discharge or liquidation of any loan, obligation or other liability, whether whole or in part; any forbearance to demand any money or money's worth or valuables thing; any right or privilege which is received in the performance of official duty. There is also a need for workshops on intensifying the understanding, application and the interpretation of the Act by the courts.

### **V. CONFISCATION OF THE PROCEEDS OF CORRUPTION**

The Anti-Corruption Act does not make provisions for the confiscation of the proceeds of corruption, but this is done under the Prevention of Organised Crime Act no 29 of 2004 section 32 (Confiscation Order). The aim is to remove the proceeds so that the offender does not benefit from unlawfully acquired proceeds. It serves as a deterrent to the offender and members of the society that corruption does not pay at all.

### **VI. PREVENTATIVE MEASURES AGAINST CORRUPTION**

Corruption is a threat to good governance, peace, political stability and socio-economic development. It is also a threat to any positive progress, success, nation building, unity and national prosperity therefore the Anti-Corruption Commission has adopted the following approach to prevent corruption

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at all costs. The Anti-Corruption Commission has adopted strategies to prevent corruption after carefully studying and analysing existing policies and procedures at institutions, and the lack of transparency and accountability at government institutions. The lack of proper policies, rules, regulations and procedures are the root causes of corruption since it creates room for corruption to take place. Formulating policies, procedures and regulations as an initiative of the Commission has seen some decline in corruption at work places.

The Commission also embarked on public education which is aimed at sensitising the youth, churches, schools, politicians, public office bearers, community leaders, the private sector and the nation at large against the evils and the bad consequences of corruption so that they may feel free and also feel obliged to report any suspicions of corruption to the Commission without fear of victimisation.

The public play a very significant role because it exercises pressure on government to increase accountability and transparency at public institutions and also to take necessary action against corruption. The development of educative materials such as brochures and booklets have been done for distribution to mostly schools and public and private institutions to read and understand the activities of the Commission and also to sensitise the Nation at large as to the effects of corruption in the country. There is therefore a positive outcome in that corruption is reported on a daily basis to the commission because awareness has reached the majority of citizens, the business community, the youth and the public sector.

#### **A. Media**

The media is also used by the Commission to educate the nation. Seminars and workshops are conducted with community leaders and churches. The church serves as a vehicle to reach out to ordinary citizens, to raise awareness, sensitising people and instil moral values such as honesty, integrity, transparency, stewardship, respect and justice through teaching, preaching and education of their members and communities at large.

The free media in the country also contribute in fighting and preventing corruption due to the fact that corrupt practices are published and read by the society and the involved people exposed. This has a deterrent effect to future or potential corrupt public and private sector employees. The Commission is relatively new and much still needs to be done to achieve its intended goal of a free of corruption Nation.

#### **B. Political Will**

The President has launched a civic initiative, the “Zero Tolerance for Corruption Campaign” (ZTFCC). He has targeted mismanagement of public funds, poor service delivery and corruption as key government priorities, and directed the investigation of cases of alleged malfeasance. The Namibian Government has shown its commitment to combating corruption by the creation of an Ad Hoc Ministerial Committee assisted by a Technical Committee on the Promotion of Ethics and Combating of Corruption in March 1997 for the purpose of developing legislative and administrative proposals for a comprehensive ethics/anti-corruption regime in Namibia. Political will is also very crucial for Namibia’s anti- corruption efforts to be successful therefore politicians at all levels of government strife to eliminate corruption and adopt necessary policies and procedures to promote accountability and transparency in public institutions.

## **VII. DEFINITION OF CORRUPTION**

Corruption is generally defined as **an “abuse of (public) office for private (personal) gain”**. It includes: behaviour that may involve fraud, theft, misuse of position or authority or other acts that are unacceptable to an organization and which may cause loss to the organization, its clients or the general public; and dishonestly putting personal interests above those of the people and ideals one has pledged to serve. Defining corruption is not so simple, because it can take on many forms.

#### **A. Legal Corruption Definition of Namibia Anti-Corruption Act, 2003 (Act No 8 of 2003)**

The **Anti-Corruption Act, 2003 (Act No 8 of 2003)** defines “corrupt practice” as any conduct contemplated in Chapter 4 of the Act which Chapter deals with offences. In the Chapter 4 offences, the

word “corruptly” is mostly used together with the word gratification”. “Corruptly” — the definition has recently been declared unconstitutional and struck down. Corruptly will thus now bear its ordinary grammatical meaning. “Gratification” has been broadly defined and includes, amongst others, *gifts, loans, fees, rewards, commissions, privileges, favours.*

1. Penalty for Offences under Chapter 4:

Conviction leads to a fine not exceeding N\$500,000 or to imprisonment for a term not exceeding 25 years, or to both (imprisonment and fine).

2. Prevalence of Corruption

Corruption is not really rife in Namibia. Many cases received by the Commission are not related to corruption and they have to be referred either to the other institutions like Namibian Police, relevant Ministries and the Ombudsman.

3. Statistics

<u>Year</u>	<u>Number of Cases Received</u>	<u>Referred to PG</u>	<u>Percentage</u>
2006/2007	686	0	-
2007/2008	900	30	9%
2008/2009	928	93	9.28%
2009/2010	445	67	4%
2010/2011	297	55	2%
2011/2012	617	46	6.17%

4. Types of Corruption

**Bribery:** Rewards in cash/kind given to change the judgment or corrupt the conduct or influence decision-making

**Embezzlement:** This involves theft of resources by persons entrusted with the authority and control of such resources.

**Abuse of power:** This involves a public officer using his/her vested authority to improperly benefit another public officer or entity or person. Note: Public officer is any officer who renders service to the public

**Conflict of Interest:** Acquiring a position or commercial interest that is incompatible with one’s official role and duties for the purpose of illegal enrichment e.g. awarding a tender to a company in which you have interest without declaring such interest and recusing yourself from the process.

**Conflict of Interest** may be seen as corruption if not disclosed. Often there is a debate on whether gifts may be forms of corruption or not. The debate is based on our traditional values.

**Fraud:** Behavior that involve irregularities such as false statements, evasion, manipulation of information and other illegal acts characterized by intentional deception.

**Favoritism and nepotism:** This is the assignment of appointments, services or resources according to family ties, party affiliation, tribe, religion, and other preferential groupings.

**Inside trading:** Involves the use of information secured during the course of duty for personal gain

5. Administrative Corruption or Maladministration

Officers in most cases commit corruption as a result of:

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- Lack of adherence to ethical standard resulting in mismanagement of offices
- Lack of code of conduct, policies and regulation or/and non-adherence thereof
- Inconsistency in applying rules
- Negligence, delay in execution of functions
- Ignoring the principle of good corporate governance
- Unnecessary travel adding to claim S&T.
- Official time used to run personal errands.
- Vehicle abuse: Research has found that about 20-30% of the cost of providing company vehicles reflects non-business use.

6. Factors/Causes Leading to Corruption

**Opportunity:** People get involved in corruption when systems don't work well and they need a way to get their things done regardless of the procedure and laws.

**Little chance of getting caught:** A **lack of accountability** comes primarily from a **lack of transparency** (No need to explain what, why and how), and **weak enforcement** (law agencies don't impose sanctions on power holders who have violated their public duties).

**Bad incentives:** e.g. a clerk not earning enough to live on, or not being sure that he will have a job tomorrow.

**Certain attitudes or circumstances** make average people disregard the law. People may try to get around laws of a government they consider illegitimate. Poverty or scarcity of goods (such as medicine) may also push people to live outside the law.

**Culture:** "Corruption is a matter of culture" A culture where a small reward is always paid for service rendered, special honor for the Chiefs. Can also be practiced in business arena.

**Range of Discretion:** If one person has too much power to exercise discretion, if there is no one to answer to, having discretion to decide how rules should be applied, it may be abused.

7. Corrosive Effects

Some factors leading to corruption have many corrosive effects. Such factors include a shortage of essential services such as schools and hospitals; insufficient public facilities; a decline in economic development; a high unemployment rate; poverty and inequality; the facilitation of organized crime such as drugs, arms trade and money laundering; the violation of human rights; the undermining of the rule of law and representative democracy; an increase in political instability; the enrichment of a few at the expense of the majority. Greed; to wish to have everything.

## VIII. CASE STUDIES

### A. The State versus Sackey Namugongo 2006

#### 1. Background

The accused was a Deputy Director in the Ministry of Environment and Tourism responsible for the gambling house licences. There was a moratorium placed on the issuance of gambling licences during 2006. The accused disregarded this moratorium and continued to issue fake permits to authorise gambling machine owners to use the gambling machine until the moratorium is lifted. He received cash totalling to N\$ 332 500.00.

2. Court Proceedings

The accused was arrested in 2007 and charged on 42 counts of corruption, fraud, forgery and uttering. He was granted bail of N\$20 000.00.

3. Trial

The trial took about 4 years and finally the accused was convicted on 19 counts of corruption. He was sentenced to 10 years imprisonment, of which 2 years were suspended for 5 years on condition that he is not convicted of corruption during the period of suspension. He appealed against the sentence to the Supreme Court while in prison but the appeal failed. The accused started his prison term in 2010. The rest of the counts could not be proven as there was insufficient evidence. The accused was released from prison during August 2013 on a Presidential Pardon.

**B. State versus Armugham Thambapilai 2005**

1. Background

The accused is a prominent lawyer in the northern town of Ondangwa, Oshana region in Namibia. The accused is a practising lawyer who has admission to the lower courts and the High Courts of Namibia. He regularly acted on behalf of his clients to lodge accident benefit claims from the Motor Vehicle Accident Fund (MVA) of Namibia. The accused lodged accident benefit claims from the Motor Vehicle Accident Fund between 2000 and 2005. The Motor Vehicle Accident Fund is mandated a statutory body mandated to compensate victims of motor vehicle accidents in Namibia. The accused after receiving instructions from his clients; falsified the information and submitted fraudulent claims to the Motor Vehicle Accident Fund. Numerous fraudulent claims were paid out by the fund.

Sometimes towards the end of 2005 a whistle blower informed the Commercial Crime Unit that the accused was busy with corrupt activities at his law firm by presenting fraudulent information to the MVA Fund. The accused managed to lodge claims to the value of about 4 million Namibia dollars from the fund. The falsification of the information was mostly aimed at getting more financial benefit from the Fund, for example a certain claimant was injured in a car accident and due to this accident he lost his income. This man never worked in his life which means he never had an income as a business man. The MVA Fund pays for loss of income. This details were misrepresented and a total of 2,8 Million Namibia Dollars were paid to the lawyer and his client. An investigation was launched, It was established that the claimant was not a businessman. It was further found that the accident details submitted to the fund to support the claim were not real, but falsified. An accident truly happened but the details of the correct accident were never revealed to the MVA Fund. The MVA Fund did not suspect any wrongdoing and accepted the claim in good faith. After the conclusion of the investigation, the lawyer together with his clients were indicted for 16 counts of fraud, 9 counts of forgery and uttering, 1 count of theft.

2. Trial

The trial started in 2007 and the accused pleaded not guilty to all the charges he faces. The State presented its case in the High court by calling witnesses and presenting the falsified claims information to the court. The accused also testified in his own defence, and put the blame on his clients saying that he only acted upon instructions from his clients and if there are any misrepresentations than it should be from his clients and not him, he stated to the court. At the end of the trial the accused lawyer asked for the discharged of his client arguing that the state witnesses contradicted themselves and that the State did not have a case against his client. That request was not granted by the presiding Judge. The submissions were already done, and now it is up to the Judge to pronounce his findings. The case is postponed to December 2013.

**C. The State versus Veronika Kituna Thomas and Others 2010**

1. Background

The accused was a Registry Clerk/Data Typist in the Ministry of Finance, Inland Revenue responsible for receiving Income Tax Returns, capturing of Employers Tax Reconciliation, capturing of PAYE 5 (Pay as You Earn) certificate. The allegation is that the accused stole cheques paid over by Companies to the Ministry of Finance as employee tax remittance, and value added tax. The accused then handed the cheques to a middle man who in return handed the cheques to a business man. The business man deposited the cheques into his business account with a similar name of that of the

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Ministry of Finance (MFinance). The total amount of the cheques were N\$ 3,329,489.64.

2. Trial Proceedings

The businessman was arrested during March 2010 and was released on bail of N\$30,000.00. The main accused and the middleman were indicted before the High Court on 10 charges of corruption during November 2010.

The main accused pleaded guilty in terms of section 112(2) of Act 51 of 1977, on 5 counts of corruption and was consequently convicted on 10 February 2012 and sentenced on 27 March 2012 to 12 years imprisonment of which 4 years were suspended for a period of 5 years on condition that accused is not convicted of theft or corruption committed during the period of suspension; however she lodged an application during April 2012 for leave to appeal the sentence imposed against her, which is still pending in the High court. She is currently serving her jail sentence in Walvisbay Prison in Namibia.

The middleman and the businessman pleaded not guilty to all 10 charges of corruption and the matter is pending before the High court.

**D. The State versus Gerry Munyama 2005**

1. Background

The accused was a Director General, the chief executive officer and a member of the board of Namibian Broadcasting Corporation (NBC) established in line with the Namibian Broadcasting Act, Act 9 of 1991, in terms of this act the NBC is a juristic person and as government agency; is responsible for provide information and news to the public and updating in the international events.

The accused was having exercises control and supervision over officers and employees of NBC and performs the duties assigned to him by the NBC board. During October 2005, the accused forged a NBC board resolution and opened a new bank account at Standard Bank Namibia which authorized him to be a sole signatory power on the account and paid NBC cheques to the amount of N\$ 480,000-00 into the fake bank account and made several withdrawals and pretending that he settled the debts of NBC by paying creditors. Two cheques totalling N\$ 280,000-00 were deposited into the bank account of Cooling's CC; a CC business which was responsible of installing air conditions at NBC while the CC was already paid for the service rendered to NBC.

2. Court Proceedings

The accused was arrested during October 2005 and charged on counts of corruption, fraud, forgery and uttering and theft. He was granted bail of N\$20,000.00.

3. Trial

The trial took about 5 years and finally the accused was convicted on all above counts. He was sentenced to 10 years imprisonment, of which 4 years were suspended for 5 years on condition that he is not convicted of corruption during the period of suspension. He appealed against the sentence to the Supreme Court while in prison and succeeds. The accused started his prison term in October 2010 and was released from prison during October 2012.

**IX. CONCLUSION**

Governments should regularly come together to revisit the effectiveness of the current laws to fight corruption and also to seek new ideas in preventing corruption.