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# ETHICAL JUDICIAL CONDUCT IN NAMIBIA

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SUPERIOR COURTS



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# RULES OF ETHICAL JUDICIAL CONDUCT IN NAMIBIA

## PART A

### RULES OF ETHICAL JUDICIAL CONDUCT IN NAMIBIA

WHEREAS Article 12(1)(a) of the Constitution of Namibia entrenches the fundamental right of all persons to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law in the determination of their civil rights and obligations or any criminal charges against them;

AND WHEREAS the importance of a competent, independent and impartial judiciary is indispensable to uphold the Constitution; to preserve the rule of law; to safeguard democracy; to sustain the division of the powers of State; to protect of human rights; to dispense justice to all and to preserve public confidence in the judicial system and in the moral authority and integrity of the judiciary;

NOW THEREFORE we, the Judges of the Supreme and High Courts of Namibia voluntarily and unanimously adopt the following rules of ethical judicial conduct:

#### 1. INDEPENDENCE

Judges should persistently maintain, jealously defend and vigorously enforce their judicial independence and that of other Judges and judicial officers and the independence and authority of the Courts of Law established by or under the Constitution. Without derogating from the generality of this duty, Judges –

- 1.1. shall exercise their judicial discretion and functions on the basis of their assessments of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats, or interference, direct or indirect, from any person or entity or for any extraneous reason whatsoever;
- 1.2. shall maintain and respect the division of the powers of State between the Executive, the Legislature and the Judiciary as contemplated in Article 1(3) of the Constitution;
- 1.3. shall enforce the provisions of Article 78(3) of the Constitution prohibiting any member of the Cabinet or the Legislature or any other person to interfere with Judges or judicial officers in the exercise of their judicial functions, and requiring of all organs of the State to accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law;
- 1.4. shall, unless required by law to take cognisance of the interest or values of society, be independent in relation to society in general and be independent in relation to litigants in disputes which the Judges have to adjudicate on and to so manifest such independence in their conduct that it is apparent to a reasonable observer.

## 2. IMPARTIALITY

Judges shall perform their judicial duties and functions impartially without fear, favour, bias or prejudice and only in accordance with the Constitution and the laws of Namibia. Without detracting from the generality of this duty, Judges –

- 2.1 shall, in relation to matters or cases upon which they are or may be called to adjudicate, conduct themselves both in and out of court in a manner which

maintains and enhances the confidence of the public, the legal profession and the litigants in the impartiality of the Judges and the Judiciary in general;

- 2.2 shall, as far as reasonable, so conduct themselves as to minimize occasions on which it will be necessary for them to recuse themselves from hearing or deciding cases;
- 2.3 shall recuse themselves from proceedings in which they are unable to decide the issues impartially or in which there is a reasonable apprehension of bias in the mind of a reasonable litigant or observer unless the basis of such apprehension is disclosed on record and the litigants have agreed in writing or on record that the Judge in question may participate or continue to participate in the proceedings and Judge shall not recuse themselves in any other circumstances unless required by law to do so.

### 3. INTEGRITY

Judges shall perform the duties of their judicial office with honour and integrity.

### 4. PROPRIETY

Judges shall conduct themselves in the discharge of their judicial duties and functions properly, decently and respectably. Without diminishing the importance of this general principle, Judges –

- 4.1 shall conduct themselves with honour and avoid impropriety and the appearance impropriety in their judicial conduct and related activities;
- 4.2 shall maintain order and decorum in all court proceedings in which they are involved;

- 4.3 shall not communicate with any litigant in the absence of other litigants or their legal representatives except when permitted by law to do so or after notice to, and with the consent of, the other litigants;
- 4.4 shall not use or disclose any confidential information acquired by them in their judicial capacities for any purpose not related to their judicial duties;
- 4.5 shall not use their positions or allow their positions or offices to be used to ask for or accept, any gift, bequest, loan or favour or apply the prestige of their judicial offices to advance their private interests or that of any other person;
- 4.6 shall not be actively involved or publicly participate in any party-political activity or in causes, organisations or affairs which may detract from the dignity or independence of their offices in the mind of the reasonable observer or which otherwise interfere or is likely to interfere with the performance of their judicial duties;
- 4.7 shall not do anything or allow anything on their authority to be done which may bring the Judiciary into disrepute.

## 5. EQUALITY

Judges shall treat all persons and litigants in legal proceedings equally and with dignity and consideration. Judges shall not, in the performance of their judicial duties, discriminate or knowingly permit any member of the Courts' staff or any legal practitioner to discriminate in their presence against any litigant or other person on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status except to such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

## 6. COMPETENCE AND DILIGENCE

Judges shall perform their judicial functions and duties competently and diligently. Without derogating from the generality of this principle, Judges

- 6.1 shall give judgments, orders or rulings without unreasonable delay;
- 6.2 shall take reasonable steps to maintain and enhance their knowledge, professional skills and personal qualities necessary for the proper performance of their judicial duties;
- 6.3 shall not engage in any conduct incompatible with, or which may adversely affect, their mental ability to diligently discharge their judicial duties.



# GUIDELINES FOR ETHICAL JUDICIAL CONDUCT IN NAMIBIA

## PART B

### GUIDELINES FOR ETHICAL JUDICIAL CONDUCT IN NAMIBIA

#### CHAPTER ONE

##### INTRODUCTION

By the Honourable Chief Justice Peter Shivute

1. It is desirable that any guidelines for ethical judicial conduct (or such expression of principles for the judiciary) should be formulated by the judiciary itself. That this is so is consistent with the principle of judicial independence and with the doctrine of separation of powers. An illustration in point is that Parliament regulates how its members are expected to behave and what their ethical duties are. It is thus a matter of common sense, rather than of rigorous logic, that it is appropriate for the judiciary to establish its own guidelines for ethical judicial conduct. If the judiciary fails or neglects to assume responsibility for ensuring that its members maintain high standards of judicial conduct expected of them, public opinion and political expediency may tempt the other organs of the State – the Executive and the Legislature – to intervene.

2. The purpose of this document is thus to record, amplify and discuss the standards of ethical conduct for judges in the Namibian Judiciary as contained in the Rules of Ethical Judicial Conduct in Namibia (the Rules), to provide guidance to judges in extra-judicial activities and, in some respects, to set a standard of conduct which judges may aspire to. The guidelines are intended to be interpreted in the light of the Rules and consistently with the requirements of judicial independence, impartiality, integrity and the rule of law as contained therein. They are designed as an internal confidential memorandum to provide guidance to judges and to afford a structure for regulating ethical judicial conduct. These guidelines presuppose that judges are accountable for their conduct to an appropriate institution established to maintain judicial standards, which is itself independent and impartial, and, therefore, the guidelines are intended to supplement, and not to derogate from, existing Rules and principles which bind judges.
  
3. (a) The judicial role is a public one, as such, the conduct of judges has increasingly come under public scrutiny and this has given rise to a growing interest in standards of ethical judicial conduct. The necessity to identify standards of conduct appropriate to judicial office has been articulated by a judge – JB Thomas, JS of Queensland, Australia, in these terms

*“No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations.*

*We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the*

*exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations.”<sup>1</sup>*

(b) It is absolutely essential that the standards aforesaid are effectively maintained in order to avert the risk of eroding public confidence in the independence and impartiality of the judiciary as well as the trustworthiness of judges so as to enhance the administration of justice.

(c) It is public confidence in the independence of the judiciary, in the integrity of its judges, and in the impartiality and effectiveness of its processes that sustain the judicial system of a democratic country. As has been observed by a judge

*“The Court’s authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the class of political forces in political settlements.”<sup>2</sup>*

4. (a) The guiding principles applicable to ethical judicial conduct have three main objectives, namely:

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<sup>1</sup> J.B. Thomas, *Judicial Ethics in Australia*, Sydney, Law Book Company, 1988, at 9.

<sup>2</sup> *Barker v Carr*. Supreme Court of the United States, (1962) 369 US 186, *per* Frankfurter, J.

- (i) to uphold public confidence in the administration of justice;
  - (ii) to enhance public respect for the institution of the judiciary; and
  - (iii) to protect the reputation of individual judges as well as that of the judiciary.
- (b) Clearly, any course of conduct that has the potential of putting at risk any of the foregoing objectives must be very carefully considered and, as far as possible, avoided.
5. At a meeting of “the Judicial Group on Strengthening Judicial Integrity,” held in 2001 in Bangalore, India, Chief Justices recognized the need for universally acceptable standards of judicial integrity and drafted the Bangalore Principles of Judicial Conduct. Those principles arose from a United Nations initiative with the participation of Datò Param Cumaraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers. A draft code of judicial conduct was prepared by a group comprising senior judges from Commonwealth countries. This was discussed at several conferences attended by judges of both common law and civil law systems; and it was subsequently considered by the Consultative Council of European Judges. Revised principles were prepared in November 2002, following a round-table meeting of Chief Justices held at the Peace Palace, The Hague, and were endorsed at the 59th Session of the United Nations Human Rights Commission at Geneva in April 2003. In March 2007, the Inter-Governmental Expert Group met in Vienna, Austria, and deliberated on the Development and Review of a Commentary on the Bangalore Principles of Judicial Conduct and a Technical Guide on Strengthening Judicial Integrity and Capacity.
6. The principles referred to under paragraph (para) 4, supra, are succinctly stated as “six fundamental and universal values”; their stated intention is:

*“To establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and Legislature, and lawyers and the public in general, to better understand and support the judiciary.”*

The basic values are (a) independence, (b) impartiality, (c) integrity, (d) propriety, (e) equality and (f) competence and diligence. All these values are dealt with in the Rules and expounded on in Chapter Two.

## CHAPTER TWO

### 1. INDEPENDENCE

#### (a) Principle

Judges should persistently maintain, jealously defend and vigorously enforce their judicial independence and that of other Judges and judicial officers and the independence and authority of the Courts of Law established by or under the Constitution.

#### (b) Discussion

(i) The principle of separation of powers contemplated in Article 1(3) of the Constitution requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive organs of the State. The relationship between the judicial organ of the State and the other organs should be one of mutual respect, each recognizing the proper role of the others.

(ii) Judicial independence is the main pillar of democracy which values the protection of human rights and of the rule of law. It is not the private right of a judge but the foundation of judicial impartiality and constitutional rights of all individuals in Namibia.

(iii) An independent judiciary is indispensable to the delivery of impartial justice under law. It is a cornerstone of a democratic society and a safeguard of the freedoms and rights of the citizen under the rule of law.

(iv) Judicial independence is not a privilege or prerogative of the individual judge. It is thus not a licence for irresponsible or inappropriate conduct. It is a

responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence adduced, without external pressure or influence and without fear of interference from anyone. The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the Court; no outsider – be it government, pressure group, individual or even another judge – should interfere, or attempt to interfere, with the way in which the judge conducts a case and makes a decision. The independence of the judiciary and of the individual judge will best be served by reliance on personal integrity and the dictates of conscience.

(v) Consultation with other judges is important in the maintenance of high standards, more so when points of difficulty arise. As regards the performance of judicial duties, however, a judge shall be independent of other judges and solely responsible for his or her decisions and decision-making.

(vi) Judicial independence presupposes total impartiality on the part of a judge.

(c) Application

(i) A judge should uphold the independence of the judiciary and the authority of the courts.

(ii) A judge should maintain and respect the division of the powers of State between the Executive, the Legislature and the Judiciary as contemplated in Article 1(3) of the Constitution.

(iii) A judge should enforce the provisions of Article 78(3) of the Constitution prohibiting any member of the Cabinet or the Legislature or any other person to interfere with Judges or judicial officers in the exercise of their judicial functions, and requiring of all organs of the State to accord such assistance as the Courts may

require to protect their independence, dignity and effectiveness, subject to the terms of the Constitution or any other law.

(iv) A judge shall exercise the judicial function independently, on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats, or interference, direct or indirect, from any quarter or for any reason whatsoever.

(v) A judge shall, unless required by law to take cognisance of the interest or values of society, be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

(vi) A judge shall not only be free from inappropriate connections with, and influence by, the executive and the legislative organs of the State, but must also appear to a reasonable observer to be free therefrom.

(vii) In performing judicial duties, a judge shall be independent of other judges in respect of decisions which the judge is obliged to make independently.

(viii) A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

(ix) A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

## 2. IMPARTIALITY

### (a) Principle

Judges shall perform their judicial duties and functions impartially without fear, favour, bias or prejudice and only in accordance with the Constitution and the laws of Namibia.

### (b) Discussion

(i) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself, but also to the process by which the decision is made.

(ii) Impartiality is the fundamental quality of a judge and the core attribute of the judiciary.

(iii) A judge must thus be, and should appear to be, impartial with respect to his or her decisions and decision-making.

(iv) Impartiality exists both as a matter of fact and as matter of reasonable appearance. Reasonable appearance of partiality can be impossible to dispel, leaving a sense of injustice, which is deeply destructive of confidence in judicial decisions.

a. A judge must not only be impartial, but must also be seen to be impartial.

b. Impartiality is measured by the test of reasonable apprehension of bias in the mind of a reasonable observer.

c. The appearance that a judge is not impartial can be given by, for instance, an apparent conflict of interest, judicial behaviour on the Bench, and associations and activities off the Bench. Whether such appearance could reasonably be given is often extremely difficult to judge in advance or at the time. A judge will need to be careful about expressions of views which might give the appearance of bias, particularly in relation to differences arising from culture, race, religious belief or gender.

(v) As the judge's task and responsibility are to discharge the judicial function, it follows that a judge should, so far as is reasonable, avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from such activities.

**(c) Application**

(i) A judge shall perform his or her judicial duties without fear, favour, bias or prejudice and only in accordance with the Constitution and the laws of Namibia.

(ii) A judge shall strive to ensure that his or her conduct, both in and out of Court, in public and in private, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality of the judge and of the judiciary.

(iii) A judge shall, as far as is reasonable, so conduct himself or herself as to minimize occasions on which it will be necessary for the judge to be recused from hearing or deciding cases.

(iv) A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect

the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

## **Recusal**

(v) A judge should not be unduly sensitive when recusal is sought, and ought not to regard an application for recusal as a personal affront.

(vi) A judge should always recuse himself or herself in any case where he or she has doubts as to his or her ability to be impartial.

(vii) A judge shall recuse himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which there will be a reasonable apprehension of bias in the mind of a reasonable observer. Such proceedings include, but are not limited to, instances where:

- a. the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
- b. the judge previously served as a legal representative or was a material witness in the matter in issue;
- c. there is a conflict of interest, such as where the judge or a member of the judge's family, a close friend or associate, has an economic or any other interest that could be substantially affected by the outcome of the case.

As Perell<sup>3</sup> puts it, “A common or unifying theme for the various classes of conflicts of interest is the theme of divided loyalties and duties.”

(viii) Personal friendship with, or personal animosity towards, a party is also a compelling reason for recusal. Friendship may be distinguished from acquaintanceship which may or may not be a sufficient reason for recusal, depending on the nature and extent of such acquaintanceship.

(ix) A current or recent business association with a party will usually mean that a judge should not sit on a case. A business association would not normally include that of insurer and insured, banker and customer or local authority council and council ratepayer. Judges should also recuse themselves from a case in which their legal representative, accountant, doctor, or other professional adviser is a party.

(x) The requirement of impartiality does not mean that a judge cannot have sympathies or opinions about matters of public interest. However, he or she must recognize and suppress his or her own views in doing right according to law and with an open mind in the particular case.

### **Waiver of recusal**

(xi) a. A judge who would otherwise have to recuse him- or herself may, in suitable cases, instead of withdrawing from the case, disclose on the record the basis of such possible recusal.

b. If, based on such disclosure, the parties independently of the judge’s participation, agree in writing, or on record, that the judge may participate, or

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<sup>3</sup> Paul M Perell, Conflict of Interest in the Legal Profession (1995) at 5.

continue to participate, in the proceedings, the judge may do so. The consent by the parties and/or their legal representatives shall form part of the record of proceedings.

(xii) Recusal is not appropriate if:

- a. the matter giving rise to the perception of a possibility of conflict of interest is trifling or would not support a plausible argument in favour of disqualification; or
- b. no other tribunal can be constituted to deal with the case.

(xiv) Save for the foregoing, a judge has a duty to perform the functions of his or her judicial office; and litigants, or their legal representatives, do not have a right to choose a judge.

### 3. INTEGRITY

#### (a) Principle

Judges shall perform the duties of their judicial office with honour and integrity.

#### (b) Discussion

(i) Integrity is essential to the proper discharge of the judicial office.

(ii) A judge should, therefore, strive to conduct himself or herself with integrity so as to sustain and enhance public confidence in the judiciary.

(iii) Integrity is the attribute of rectitude and righteousness.

(iv) In general, a judge is entitled to exercise the rights and freedoms available to all citizens, such as the freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always strive to conduct himself or

herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. While appointment to judicial office brings with it limitations on the private and public conduct of a judge, there is a public interest in judges' participating, insofar as their office permits, in the life and affairs of the community.

- a. It is, however, necessary to strike a balance between the requirements of the judicial office and the legitimate demands of the judge's personal, family and social life.
- b. A judge has to accept that the nature of his or her office exposes him or her to considerable scrutiny and puts constraints on his or her behaviour, which other people may not experience.
- c. A judge should try to avoid situations which might reasonably lower respect for his or her office or might cast doubt on his or her impartiality as a judge. Thus, a judge should always, not only in the discharge of official duties, endeavour to act honourably and in a manner befitting the judicial office.
- d. Behaviour which might be regarded as merely unfortunate if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

(c) Application

- (i) A judge shall conduct themselves with honour and avoid impropriety and the appearance impropriety in their judicial conduct and related activities.

(ii) A judge shall ensure that his or her conduct in court is above reproach in the view of a reasonable observer.

(iii) The behaviour and conduct of a judge in court must reaffirm the people's faith in his or her integrity and the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

(iv) A judge, in addition to observing personally the standards of these guidelines, shall encourage and support their observance by other judges.

#### 4. PROPRIETY

##### (a) Principle

Judges shall conduct themselves in the discharge of their judicial duties and functions properly, decently and respectably.

##### (b) Discussion

(i) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

(ii) Propriety and the appearance of propriety are essential elements of a judge's professional life and he or she should also strive to maintain that value in his or her extra-judicial conduct. So often, what matters from the public's perspective, is not only what a judge does or does not do, but also what others think the judge has done or might do. Since the public expects a high standard of conduct on the part of a judge, he or she must, out of an abundance of caution, and/or when in doubt about an event or receiving a gift, however small, ask the question: "How might this look in the eyes of the public?"

(iii) The test for impropriety is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or is likely to create, in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is significantly impaired.

(iv) A judge is required to live an exemplary life on the Bench. Even in private life, he or she will be well advised to behave in public with the sensitivity and self-control demanded by the judicial office, because a display of injudicious temperament may be considered as demeaning to the process of justice and inconsistent with the dignity of the judicial office.

(v) A judge should always in the discharge of official duties act honourably and in a manner befitting the judicial office.

(vi) A judge should attend chambers and Court in such a manner, and at such times, as are necessary and appropriate to perform all official duties properly, timeously and in an orderly manner.

(vii) A judge who reasonably believes that a fellow judge has been, or is, acting in a manner unbecoming of the judicial office, should raise the matter with the judge in question and, if appropriate, with the head of the Court concerned.

(viii) A judge shall not engage in an independent investigation of the facts of a case before him or her except under the authority of law and by notice to, and with the consent and in the presence of, the parties.

(c) Application

(i) A judge shall shall conduct themselves with honour and avoid impropriety and the appearance of impropriety in their judicial conduct and related activities.

(ii) As a subject of constant public scrutiny, a judge shall aspire to conduct himself or herself in his or her interaction with the public in a way that is consistent with the dignity of the judicial office.

(iii) A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always strive to conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

(iv) A judge shall, in his or her personal relations with individual members of the legal profession, particularly those who practise regularly in the judge's court, be aware of situations that might reasonably give rise to suspicion, or appearance of favouritism or partiality, in the mind of a reasonable observer.

(v) A judge should endeavour to avoid, as far as may be reasonably expected, being involved in litigation, either on his or her own behalf, or on behalf of others.

(vi) A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or has a direct or substantial interest in the case.

(vii) A judge shall not allow the use of his or her residence by a member of the legal profession to receive clients or other members of the legal profession.

(viii) A judge shall refrain from conduct, such as membership of groups or organizations, or participation in discussion open to the public, which, in the mind

of a reasonable observer, might undermine confidence in the judge's impartiality with respect to any issue that may come before the Court.

(ix) A judge shall, upon appointment, cease to be actively involved or publicly participate in any party-political activity or in causes, organisations or affairs which may detract from the dignity or independence of their offices in the mind of the reasonable observer or which otherwise interfere or is likely to interfere with the performance of their judicial.

(x) A judge shall not allow his or her family, social or other relationships, to improperly influence his or her judicial conduct and judgment as a judge.

(xi) A judge shall not use or lend the prestige of the judicial office to advance his or her private interests, or those of a member of his or her family or of anyone else, nor shall the judge convey or permit others to convey the impression that anyone is in a special position, to improperly influence him or her in the performance of judicial duties.

(xii) A judge shall not testify voluntarily as a character-witness, except that he or she may testify as a witness in criminal proceedings if the judge, or a member of his or her family, is a victim of an offence, or if the accused is a member of the judge's family or in like exceptional circumstances.

(xiii) Subject to the proper performance of judicial duties, a judge may engage in activities such as:

- a. writing, lecturing, teaching and participating in activities concerning the law, the legal system, the protection of human rights, the administration of justice, or related matters;

- b. appearing at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;
  - c. serving as chairperson of a government commission of inquiry and as a member of an official or an advisory body devoted to the improvement of the law, the legal system, the protection of human rights, the administration of justice, the public service or related matters, if such position or membership is not inconsistent with the perceived impartiality and political neutrality of a judge and if the activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.
  - d. participating in other civic or charitable activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.
- (xiv) A judge shall not practise law while being the holder of the judicial office.<sup>4</sup>
- (xv) A judge may speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social and recreational activities, if such activities do not detract from the dignity of the judicial office, or otherwise interfere with the performance of judicial duties in accordance with the Rules.

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<sup>4</sup> See Chapter Four, 12

(xvi) A judge may participate in civic and charitable activities that do not reflect adversely on the judge's impartiality or interference with the performance of judicial duties.

(xvii) A judge strive to avoid being involved in fund-raising activities that may reflect adversely on the integrity of the judge or the reputation of the judiciary.

(xviii) A judge shall not serve as an executor, an administrator, a trustee, a guardian or other fiduciary, or act as surety in securitatem debiti, except for the estate, trust or person connected with a member of the judge's family, without permission of the Judicial Service Commission and then, only if such service will, or does, not interfere with the proper performance of judicial duties, or is likely to give rise to financial embarrassment.

(xix) Confidential information acquired by a judge in his or her judicial capacity shall not be used or disclosed by the judge for any purpose not related to the judge's judicial duties.

(xx) A judge may form or join an association of judges or participate in other organizations representing the interests of judges to promote professional training and to protect judicial independence.

(xxi) A judge and members of the judge's family shall not use the position of the Judge to ask for, or accept, any gift, bequest, loan or favour.

(xxii) A judge shall maintain order and decorum in all proceedings in which he or she is involved. He or she shall strive to adopt a calm, dignified and courteous approach as far as reasonably possible in relation to litigants, witnesses, legal practitioners and others with whom he or she deals in an official capacity. Subject to the forensic techniques of legitimate advocacy, the judge shall require similar

conduct of legal practitioners, Court personnel and others subject to his or her influence, direction or control.

## 5. EQUALITY

### (a) Principle

Judges shall treat all persons and litigants in legal proceedings equally and with dignity and consideration. Judges shall not, in the performance of their judicial duties, discriminate or knowingly permit any member of the Courts' staff or any legal practitioner to discriminate in their presence against any litigant or other person on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status except to such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

### (b) Discussion

(i) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

(ii) In conducting judicial proceedings, a judge should thus give special attention to the right of equality before the law and the right of equal protection and benefit of the law.

(iii) Fair and equal treatment has long been regarded as an essential attribute of justice. Equality according to law is not only fundamental to justice, but is also a feature of judicial performance which is strongly linked to judicial impartiality.

(c) Application

(i) A judge shall strive to be aware of, and to understand, diversity in society as well as differences arising from various sources, including, but not limited to, race, colour, gender, religion, creed, national origin, ethnicity, disability, age, marital status, social and economic status and other like causes (“irrelevant grounds”).

(ii) A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group of persons, save to the extent as may be required by an Act of Parliament lawfully enacted.

(iii) A judge shall carry out judicial duties with appropriate consideration for all persons, such as parties, witnesses, legal practitioners, Court personnel and other judges, without unjust differentiation on any irrelevant grounds immaterial to the proper performance of such duties.

(iv) A judge shall not knowingly permit Court personnel or others subject to the judge’s influence, direction, or control, to differentiate in their presence between persons concerned in a matter which is before the judge, on any irrelevant grounds.

(v) A judge shall require legal practitioners in proceedings before the Court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such ground is legally relevant to an issue in the proceedings.

(vi) A judge shall not be a member of, nor be associated with, any group, association or body that, to his or her knowledge, practices unjust or invidious discrimination on the basis of any prohibited or irrelevant grounds.

- (vii) A judge shall not, in the absence of other parties to proceedings before him or her, or the parties' legal representatives, communicate with any party to the proceedings except under the authority of law or by notice to, and with the consent of, the parties.

## 6. COMPETENCE AND DILIGENCE

### (a) Principle

Judges shall perform their judicial functions and duties competently and diligently.

### (b) Discussion

- (i) Competence and diligence are prerequisites to the due performance of the judicial office.
- (ii) As Lord Bingham of Cornhill aptly stated in his 1993 lecture to the society of Public Teachers of law, entitled: Judicial Ethics:

*"It is a judge's professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence."<sup>5</sup>*

- (i) Socrates counselled judges to hear courteously, answer wisely, consider soberly and to decide impartially.
- (ii) Hence, a judge should take reasonable steps to maintain the necessary level of diligence and professional competence in the law.

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<sup>5</sup> Ethical Principles for the Judiciary, 2004, Kingdom of Lesotho, at 7

(iii) Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation.

(iv) Judicial competence maybe diminished and compromised when a judge is impaired by drugs, alcohol or other mental or physical impairments. In some cases, this may be the product of an incapacity or a disability, for which the only solution – an extreme one – may be constitutional removal from office.

(v) Diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

(vi) While a judge should exhibit diligence in the performance of judicial duties, his or her ability to do so will depend on the burden of the workload, the adequacy of resources, including personnel, technical assistance and time for research, deliberation, writing and other judicial duties, apart from sitting in Court.

(vii) The judicial duties of a judge take precedence over all other activities.

**(c) Application**

(i) A judge shall devote his or her professional activity to judicial duties. Such duties are broadly defined and include, not only the performance of judicial functions and responsibilities in Court and the making of decisions, but also other tasks relevant to the judicial office or the Court's operations.

(ii) A judge shall take reasonable steps to maintain and enhance his or her knowledge, professional skills and personal qualities necessary for the proper performance of judicial duties, taking advantage, for this purpose, of the training and other facilities that should be made available, under judicial control, to judges.

- (iii) A judge shall keep himself or herself informed about relevant developments in international law.
- (iv) A judge shall perform all judicial duties, including the delivery of reserved judgments, efficiently, fairly and with reasonable promptness.
- (v) A judge shall not engage in any conduct incompatible with, or which may adversely affect, the diligent discharge of his or her judicial duties.
- (vi) A judge shall not be swayed by partisan interests, public clamour or fear of criticism.

## CHAPTER THREE

### PROPER CONDUCT IN COURT

#### (a) Discussion

(i) The discussion of aspects of a judge's conduct in court and the application thereof has been canvassed under the various values and principles canvassed in Chapter Two. To that extent, this discussion may to some extent be repetitive of what has already been stated but it is nevertheless deemed convenient to consolidate discussions of the various values in so far as they relate to proper conduct in court under one heading because of the importance for a judge to maintain a standard of behaviour in Court that is consistent with the status of the judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge and the Court. This discussion should not be understood to, in any way, detract from what has already been stated and is intended only to further elaborate thereon and guide judges towards what is ideally required.

(ii) A judge must be firm but fair in the maintenance of decorum and, above all, even-handed in the conduct of a trial. This involves not only observance of the principles of natural justice, but also the need to protect a party or a witness from any display of racial, gender or religious bias or prejudice.

(iii) It is common, and often necessary, for a judge to question a witness or engage in debate with a legal representative, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the

arena and thereby appear to be taking sides, or to have reached a premature conclusion.

(iv) A judge should not exert undue influence in order to promote a settlement (in civil cases) or obtain a concession from any party. In this regard, a judge should normally refrain from expressing views about the merits or demerits of the case.

(v) The principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal representatives or a witness for a party) otherwise than in the presence, or with the previous knowledge and consent of, the other party (or parties) in connection with the case or where the law otherwise requires or allows, is very well known. Accordingly, an approach to a judge in chambers by a legal representative for one party should not be made without the presence, or the knowledge and consent of, the legal representative for the other party.

(b) Application

**Courtroom Conduct**

(ii) A judge should as far as reasonably possible, aspire to:

- a. be courteous to, and patient with, parties, witnesses, legal practitioners and the public, and should require them to act likewise.
- b. be dignified;
- c. continually remind himself or herself that a party is not simply a name on a piece of paper: the parties are looking to the Court to see that justice is administered objectively, fairly, diligently, impartially and with unquestionable integrity;

- d. never make fun of a party or a witness: a matter which may seem minor to the judge may be very important to a party or a witness;
- e. bear in mind that the judge's duty is to administer the law, the creation of which is the prerogative of the Legislature and not of the judiciary. Criticism of the law should thus be a rare occurrence and in muted and restrained terms.
- f. never state an opinion or display conduct that would, or might reasonably, indicate that the judge has already made his or her decision before all parties are heard.

### **Communicating in Court**

- g. endeavour to use simple language without jargon;
- h. avoid a patronizing and/or unduly harsh tone;
- i. always express himself or herself clearly and audibly;

### **Listening Actively**

- j. be attentive and be seen to be attentive in Court;

### **Right to a Fair Hearing**

(iii) The right to a fair hearing embraces the concept of substantive and procedural fairness and includes respect for the principles of adversarial proceedings; of equality before the Court and of expeditious proceedings, and so, a judge should resolve disputes by making findings of fact and applying the appropriate law in a fair hearing. This includes:

- a. observing the audi alteram partem rule, unless the law otherwise requires or allows;
- b. remaining manifestly impartial; and
- c. giving adequate reasons for decisions other than ex tempore rulings

### **Judicial Demeanour**

(iv) Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and/or improper remarks about litigants and/or witnesses, statements evidencing prejudgment, intemperate and/or impatient behaviour, may affect the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the Court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and to avoid creating in the mind of a reasonable observer any impression of lack of impartiality. It is necessary to stress that any action which, in the mind of a reasonable observer, would give rise to reasonable suspicion of a lack of impartiality, must be avoided. When such impressions are created, they adversely affect, not only the litigants before the Court, but also public confidence in the judiciary generally.

### **Dealing effectively with unruly defendants, parties, witnesses and spectators**

- (v) A judge should, in such circumstances:
  - a. be decisive and firm;

- b. deal promptly with interruptions or rudeness; and
- c. may clear the Court or adjourn, if necessary.

## CHAPTER FOUR

### EXTRA-JUDICIAL CIVIC ACTIVITIES

#### 1. GENERAL

- (a) A Judge, like anyone else, is entitled to enjoy private and civic life. However, he or she should aspire to so conduct his or her extra-judicial civic activities as to minimize the risk of conflict with judicial duties, or to avert tarnishing his or her personal integrity and dignity. The discussion under this topic relates to a Judge's duty not to bring the Judiciary into disrepute in his or her interaction in a civic context. It is again intended to serve as a guide to judges interacting with the public on that level and, as in the previous chapter, seeks to set a standard to be aspired to.
- (b) A judge should conduct all extra-judicial civic activities so as not to cast doubt on his or her capacity to act impartially, or to demean his or her office, or to interfere with the proper performance of judicial duties.
- (c) A judge may not, without the consent of the Judicial Service Commission, hold or perform any other office for profit, or receive in respect of any service, any fees, emolument or other remuneration, apart from the salary and any other allowances payable to the judge in his or her judicial capacity.

#### 2 AVOCATIONAL ACTIVITIES

- (a) A judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, both within and outside the judge's jurisdiction. Such contributions may take the form of writing, lecturing and teaching. Provided such activities do not adversely affect the dignity of the

judicial office, or detract from the discharge of judicial obligations, and to the extent that time permits, a judge is to be encouraged to undertake such activities.

- (b) Judicial office is a full-time occupation and the timely discharge of judicial duties must take priority over avocational or any other similar non-judicial activity.

### 3 CIVIC AND CHARITABLE ACTIVITIES

- (a) A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality, or interfere with the performance of his or her judicial duties. Examples of such activities include: charitable organizations, university and school councils, lay religious bodies, hospital boards, social clubs, sporting organizations and organizations promoting cultural or artistic interests. Judging is onerous work. The judge's primary responsibility is to fulfill the judicial function. Any other outside activities should not be on a scale that might significantly detract from the judge's principal responsibilities. Involvement in such an organization is not appropriate where:
  - (i) it is likely to be regularly or frequently involved in litigation; or to expose the judge to public controversy;
  - (ii) it is likely to make excessive demands on the judge's time;
  - (iii) its finances are unsound;
  - (iv) the standing of the judicial office could be used to solicit funds, or lend the judge's name to any fund-raising activities;
  - (v) the objects of the organization include law reform or political activities.

- (b) Where a judge serves on the Board of an organization (other than one which seeks to contribute to the development of the law or the infrastructure thereof) which is not for profit, or raises funds from the public, the judge should not permit his or her name or title to appear on documents associated with an appeal for funds.
- (c) A judge should not personally solicit funds (except from judicial colleagues or entities which seek to contribute to the development of the law or the infrastructure thereof) or lend his or her name to fund-raising activities.

#### 4 FIDUCIARY ACTIVITIES

A judge should not serve as an executor, administrator, trustee, guardian or other fiduciary position without the permission of the Judicial Service Commission, except for the estate, trust or person of a member of the judge's family, and then, only if such service will not significantly interfere with the proper performance of his or her judicial duties. Absent exceptional circumstances, a judge should not seek permission of the Judicial Service Commission if it is likely that, as a fiduciary, he or she will be engaged in legal proceedings which would ordinarily come before him, or if the estate, trust or ward becomes involved in legal proceedings in the Court in which he or she serves or one under its appellate jurisdiction. The management of family assets and the estates of deceased, close family members, whether as an executor or a trustee, is unobjectionable and may be acceptable for relatives or friends if the administration is not complex, time-consuming or contentious. However, the risks, including the risk of litigation, associated with the office of trustee, even of a family trust, should not be overlooked, and factors involved need to be weighed carefully before the office is accepted.

## 5 BUSINESS AND FINANCIAL ACTIVITIES

- (a) The requirements of the judicial office clearly place restraints upon the permissible scope of a judge's involvement with business and financial activities.
- (b) A judge may own investments and real property; provided that, the extent of such holdings should not be such that the management thereof is attended to personally by the judge, would unreasonably interfere with the proper performance of judicial duties.
- (c) However, otherwise permissible investment or business activities are to be avoided if they:
  - (i) reflect adversely on judicial impartiality;
  - (ii) unreasonably interfere with the proper performance of judicial duties;
  - (iii) exploit to their benefit the judicial position; or
  - (iv) involve the judge in frequent transactions (other than banking and other commercial or financial transactions) with legal practitioners or with people likely to come before the judge's Court.
- (d) A judge must refrain from entering into, or continuing, any business activity, however unimportant it may be, with any party to a case before him or her other than normal recurring transactions or transactions required by law with banks, building societies, investment houses, local, regional and central governmental transactions. Should the activity be unavoidable, the judge must discontinue his connection with the case forthwith.

- (e) A judge should discourage members of his or her family from engaging in dealings that would reasonably appear to exploit his or her judicial position. This is necessary to avoid creating an appearance of exploitation of the judicial office or favouritism, and to minimize the potential for disqualification.

## 6 ACCEPTANCE OF GIFTS AND PAYMENT OF EXPENSES

- (a) It is necessary to draw a distinction between accepting gifts in a personal capacity, unrelated to the judicial office, for instance, from family or close friends, and gifts which, in some way, relate, or might appear to relate, to the judicial office. It is in relation to the latter category that acceptance of gifts or other benefits essentially needs careful attention; judges should be on their guard against any action which could be seen to undermine their impartiality.
- (b) Caution should thus be exercised when considering whether to accept any gift or payment of expenses that may be offered.
- (c) A judge and members of the judge's family shall neither ask for, nor accept any gift, bequest, favour or loan on account of anything done or omitted to be done by the judge in the discharge of judicial duties.
- (d) A judge shall not knowingly permit Court personnel or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
- (e) Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit appropriate to the occasion on which it is made, provided that such gift, award or benefit might not reasonably be

perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

- (f) A judge is, however, permitted to accept:
- (i) personal gifts or benefits from relatives or personal friends to such an extent, and on such occasions, as are recognized by custom;
  - (ii) small or token gifts for participating in a public or private function;
  - (iii) with the approval of the Judicial Service Commission, honoraria, or speaking fees provided that the compensation is reasonable and commensurate with the task performed.
  - (iv) books supplied by publishers on a complimentary basis;
  - (v) a loan from a lending institution or a discount from retailers in the regular course of their business on the same terms generally available to people who are not judges;
  - (vi) a scholarship or fellowship awarded on the same terms applicable to other applicants.
- (g) Provided that such gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality, there is generally no objection to a judge receiving travel and accommodation benefits (expenses) in return for presenting papers at conferences. If the host organization is a university, college, training or teaching institution, or a body of the organized legal profession, there will generally be no problem. If, however, the organization is

a private one associated with a particular cause or which is a potential litigant before the courts, or if the arrangements are unusually lavish, consultation with the Chief Justice or the Judge-President, as the case may be, before accepting, is advisable.

- (h) Caution is necessary in respect of any significant benefits. There are two risks:
  - (i) any suggestion of exploitation of the standing of the judicial office to obtain a benefit; and
  - (ii) anything which might be interpreted as an attempt to influence the judge in the performance of judicial work, or otherwise give rise to an appearance of partiality.
- (i) A judge should be wary about acceptance of any gift or benefit that might be interpreted by a reasonable observer as an attempt to woo judicial goodwill or favours. Gifts or benefits from practicing members of the legal profession may fall into that category.

## 7 SOCIAL CONTACT WITH THE LEGAL PROFESSION

Social contact between members of the judiciary and members of the legal profession is a long-standing tradition and is proper. However, as a matter of common sense, depending on the circumstances, a judge should exercise caution. Since judges do not live in ivory towers but in the real world, they cannot be expected to sever all of their ties with the legal profession upon assuming judicial office. Nor would it be entirely beneficial to the judicial process for judges to isolate themselves from the rest of society which includes some who may have been school friends, former associates, or colleagues in the legal profession. Indeed, a judge's attendance at social functions with lawyers offers some benefits. The

informal exchanges that such functions allow may help reduce tensions between the judiciary and legal practitioners and alleviate some of the isolation from former colleagues that a judge experiences upon elevation to the judicial office. In Namibia, as in most democratic countries, it is normal for judges to attend functions organized by members of the legal profession and to mix with legal practitioners on a social basis. However, as a matter of commonsense, a judge should exercise caution by conducting himself or herself with propriety.

## 8 SOCIAL RELATIONSHIP WITH INDIVIDUAL LEGAL PRACTITIONERS

Having a social relationship with a lawyer who regularly appears before a judge is fraught with danger and entails a balancing process. On the one hand, the judge should not be discouraged from having social or extra-judicial relationships. On the other hand, the obvious problem of the appearance of bias and favouritism exists when a friend or a former associate appears before the judge. The judge is the ultimate arbiter of whether he or she has an excessively close or personal relationship with a legal practitioner, or has created that appearance. Where that line is to be drawn is a decision that the judge will have to make. The test is whether the social relationship interferes with the discharge of judicial responsibilities, and whether a disinterested observer, fully informed of the nature of the social relationship, might reasonably entertain a significant doubt that justice would be done. The judge must also be mindful of the enhanced danger of inadvertently being exposed to extra-judicial information concerning a case that the judge is hearing or one with which the judge may become involved. A judge would, therefore, be wise to avoid recurring contacts with a legal practitioner in circumstances that would create a reasonable perception that the judge and the legal practitioner have a close personal relationship whilst a particular case is proceeding or pending in which the legal practitioner is appearing before the judge.

## 9 OTHER SOCIAL CONTACTS

- (a) Social activities need to be assessed in the light of the judge's duty to maintain the dignity of the office and not to permit associations which may affect adversely the judge's ability to discharge his or her duties.
- (b) A judge should always be careful about being present in circumstances where premises are not being, or are likely not to be used, or the gathering may not be conducted, in accordance with law; or where there is a risk of associating with people who are either involved in criminal activities or are of doubtful character.

## 10 VISITS TO PUBLIC HOUSES, ET CETERA

- (a) In general, there is no prohibition against a judge visiting public bars, or similar venues, but discretion should seriously be exercised. The judge should cautiously consider how such visits are likely to be perceived by a reasonable observer in the community in the light, for example, of the reputation of the place visited, the type of persons likely to frequent it, and any concern that may exist as to the place not being operated in accordance with law.
- (b) A judge should exercise care in relation to using clubs and other social facilities. For example, care should be exercised in attending venues run by, or for members of, the Police Force, the Anti-Corruption Commission, the Customs and Excise Department, and other institutions and organizations, which are, or whose members are, likely to appear frequently before the courts. While there is no objection to a judge accepting an occasional invitation to dine, for instance, at a police mess, it would be undesirable for the judge to frequent, or become a member of such a club, or to be a regular user of such facilities.

## 11 GAMBLING

There is no prohibition against a judge engaging in occasional gambling as a leisure activity, but discretion should seriously be exercised, bearing in mind the perception of a reasonable observer in the community. It is, for instance, one thing to pay an occasional visit to horse races, or to a casino, or to play cards with friends and family. It may be quite another for a judge to stand too frequently at the betting windows of racetracks, or to become an inveterate gambler, or a dangerously heavy punter, which may give rise to impropriety or financial embarrassment.

## 12 PRACTISE OF LAW

- (a) A judge should not practise law or, without the permission of the Judicial Service Commission, act as an arbitrator whilst being the holder of judicial office.
- (b) An acting judge, who is also a legal practitioner, should not sit in any case in which his or her firm or State institution (as the case may be) is, or was, involved as a legal practitioner of record or in any other capacity.

## 13 FREEDOM OF EXPRESSION

### (a) Participation in public debate

(i) In accordance with the fundamental rights enshrined in the Constitution, a judge is, like any other citizen, entitled to freedom of expression; provided, however, that in exercising such right in a manner or on an occasion accessible by the public, the judge shall always conduct himself or herself in such a manner as

to preserve the dignity of the judicial office, and/or the impartiality and independence of the judiciary.

(ii) A judge, while free to participate in public debate on matters pertaining to legal subjects, the functioning of the judiciary and the administration of justice, should carefully consider the effects of views expressed which may undermine the standing and integrity of the judiciary. Such participation may contribute to the public understanding of the administration of justice and to public confidence in the judiciary.

(iii) As a general rule, a judge should be slow to participate in public debate for, although the judge may express himself or herself in temperate language, others may not be so restrained.

(iv) Care should, however, be taken about the place at which, and the occasion on which, a judge speaks so as not to cause the public to associate the judge with a particular organization, group or cause. The participation should not be in circumstances which may give rise to a perception of partiality towards the organization (including a set of chambers or a firm of legal practitioners), group or cause involved, or to a lack of even-handedness.

(v) It is well established that a judge does not comment publicly once reasons for judgment have been given, not even to clarify an ambiguity.

(vi) On occasions, decisions of the Court may attract unfair, inaccurate or ill-informed comment. Some judges may consider that, according to the circumstances, the Court (or the judge concerned) should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such

response should be dealt with by the Chief Justice or the Judge-President, as the case may be.

(vii) A judge should refrain from making public statements on matters of public policy affecting Namibia or any other country.

**(b) The Media**

(i) In so far as the media are concerned, a judge should exercise his or her freedom of expression, not only with the greatest circumspection, but also with the utmost restraint.

(ii) In the event of media criticism of a decision, or a criticism mounted by interested members of the public, the judge should refrain from answering such criticism by writing to the press or making incidental comments about such criticism when sitting on the bench. A judge should speak only through his or her reasons for judgments in dealing with cases being decided. It is generally inappropriate for a judge to defend judicial reasons publicly.

(iii) If there is media misreporting of Court proceedings or a judgment, and a judge considers that the error should be corrected, the Registrar or the spokesperson for the Judiciary may issue a press release to state the factual position, or take steps for an appropriate correction to be made.

(iv) Judges should not air disagreements over judicial decisions in the press (or in public).

(v) A judge should refrain from commenting, or granting an interview to the media, or speaking in public on matters which are sub judice.

(vi) A judge should generally avoid communicating with the media on matters which constitute a public controversy.

(vii) A judge should not seek publicity or the approval of the public or the media.

**(c) Social Media**

(i) Judges do not, on taking up office, renounce their entitlement to have a private life nor are they required to isolate themselves from their communities. Accordingly, there is no issue with a judge holding a Facebook, Twitter, LinkedIn or similar account of social media.

(ii) That said, the judicial function is a demanding one, and requires judges to be aware of their role in upholding the independence, impartiality, and, above all, integrity of the judiciary. This is an onerous obligation that applies on and off the Bench.

(iii) In this regard, the following are forbidden:

- a. judge issuing friendship requests to counsel, or accepting such requests.
- b. A judge sharing, retweeting or republishing in whatever form, political stories that might reveal political affiliation of favour.
- c. A judge sharing, retweeting or republishing in whatever form an opinion as to the legality of an event that involved alleged unlawful conduct or a story that is likely to be brought before a court of law.

(iv) Further to this, the utmost caution is urged in respect of the affiliation through whatever means on social media with organisations, stories or individuals that might demonstrate favour in the eyes of a reasonably informed and objective

third party. Similarly, judges must at all times remind themselves that what is simply in bad taste for a citizen at large will be inappropriate for the judiciary.

(v) Finally, it is urged that judges ensure that they do not publically identify themselves as judges on these forms of social media (e.g. by adding post-nomials like CJ, J, AJ etc).

#### 14 USE OF JUDICIAL LETTERHEAD

- (a) In general, judicial stationery is intended for use when a judge wishes to write in an official capacity.
- (b) A judicial letterhead should not be used in any way that amounts to an abuse of the prestige of the judicial office.
- (c) A judge should avoid the use of a judicial letterhead in correspondence unrelated to his or her official duties in circumstances where the use of the letterhead might be taken to suggest a request for, or expectation of, some form of preferential treatment.

It is, however, customary and proper for a judicial letterhead to be used for some private purposes connected with a judge's office, such as writing or responding to notes sent on the occasion of a friend's appointment to, or retirement from, the Bench.

#### 15 REFERENCES

In principle, there is no objection to a judge giving references for character or professional competence for persons who are well known to the judge. However, consideration should be given as to whether the judge is the appropriate person

to give the reference requested, the principle being that someone should not be deprived of a reference because the person best able to give it happens to be a judge. Quite clearly, a judge should guard against inappropriate requests. The following guidelines are apposite:

- (a) A judge should not write a letter of reference for a person whom he or she does not know.
- (b) A judge may write a letter of reference if it is one which would be written in the ordinary course of business, (for instance, a staff member seeking a reference).
- (c) A judge may write a letter of reference for someone whom the judge knows personally but not professionally, such as a relative or a close friend, if it is one which he or she would normally be requested to write as a result of personal relationship.

## 16 POLITICAL ACTIVITIES

- (a) A judge shall refrain from public political activities which, in the mind of a reasonable observer, would undermine confidence in his or her impartiality with respect to issues that are, or could come, before the courts.
- (b) A judge shall refrain from conduct connected with a political party which, in the mind of a reasonable observer, could give rise to the appearance that he or she is an office-bearer of the political party.
- (c) A judge shall not:
  - (i) hold office in a political organization;

- (ii) publicly endorse or oppose a candidate for a political office;
  - (iii) make speeches on behalf of a political organization;
  - (iv) solicit funds for, or make contributions to, a political organization or candidate;
  - (v) attend a political fund-raising event;
  - (vi) participate in a political campaign;
  - (vii) sign a petition to influence a political decision; or
  - (viii) publicly take part in a controversial political discussion, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary and/or the fundamental aspects of the administration of justice.
- (d) Members of a judge's family have every right to be politically active. Sometimes, however, this may adversely affect the public perception of the judge's impartiality. In any matter before the Court where there could reasonably be such a perception, the judge should not sit.

## CHAPTER FIVE

### ACCOUNTABILITY

- (a) By the nature of his or her judicial office, a judge is not, except in accordance with the law, accountable to any organ or entity of the State for his or her judicial decisions.
- (b) Mr Dato' Pram Kumaraswamy, The UN Special Rapporteur on the Independence of the Judiciary, in his submission to the Truth and Reconciliation Commission in South Africa during 1988, had this to say<sup>4</sup>:

*"...[J]udicial accountability is not the same as the accountability of the executive or the legislature or any public institution. This is because of the independence and impartiality expected of the judicial organ ... though judges are accountable, their accountability does not extend to their having to account to another institution for their judgments."<sup>6</sup>*

- (c) Accountability relates to a judge's conduct, other than to his or her judicial decisions. Judicial independence, on the other hand, denotes the concept of freedom of conscience for judges, and non-interference in their decision-making; it is not concerned with their conduct individually or collectively.

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<sup>6</sup> Quoted by Prof. D. Zeffertt in 1999, SA Law Journal 668 - 669

- (d) The independence of the judiciary does not only confer rights on a judge, but also imposes ethical duties. Without accountability, judicial independence may be an unruly horse<sup>5</sup>.

A judge is, in general, accountable for his or her conduct to his or her head of jurisdiction, that is: the Chief Justice or the Judge-President, as the case may be, and to the Judicial Service Commission, in particular.

## CHAPTER SIX

### POST JUDICIAL ACTIVITIES

- (a) The purpose of this chapter is not to dictate to retired judges, but to give guidance to serving judges who are, or may be contemplating, to go into, or planning for their, retirement.
- (b) Although there are some judges who choose, or may choose, to undertake only recreational activities in retirement, the receipt of a judicial pension is not in itself a bar to post judicial remunerative activities. Most judges, on appointment, make a substantial financial sacrifice in terms of earning capacity. A judge in retirement may:
  - (i) engage in alternative dispute resolution, such as mediation and/or arbitration;
  - (ii) accept an appointment as an acting judge;
  - (iii) engage in a commercial activity;
- (c) Even in retirement, however, and regardless of whatever activity one chooses to participate in, a former judge may still be regarded by the general public as a representative of the judiciary; hence, any activity that might tarnish the reputation of the judiciary should be avoided.

## CHAPTER SEVEN

### PRE-SERVICE ORIENTATION AND CONTINUING JUDICIAL EDUCATION

#### (a) Introduction

The performance of judicial work professionally and diligently implies that a judge should have substantial professional ability, acquired, maintained and regularly enhanced by continuing judicial education which the judge has a duty, as well as a right, to undergo.

#### (b) Pre-Service Orientation

- (i) It is highly desirable, if not essential, that upon first appointment, a judge should receive detailed, in depth and diversified pre-service orientation appropriate to the judge's professional experience, so that he or she is able to perform judicial duties satisfactorily. The knowledge that is required may extend not only to aspects of substantive and procedural law, but also to the real life impact of the law and the courts.
- (ii) It is, therefore, necessary for a judge to have a depth and diversity of knowledge which extends beyond the technical field of law, to areas of important social awareness concerns, as well as to courtroom and personal skills and understanding so as to enable the judge to manage cases and to deal with all persons involved appropriately and with sensitivity.
- (iii) Pre-service orientation is, in short, essential for the objective, impartial and competent performance of judicial functions, and for the protection of judges from inappropriate influences.

- (iv) A contemporary judge should, therefore, usually receive pre-service orientation on appointment in such matters as sensitivity to issues of gender, race, ethnicity, indigenous cultures, religious diversity, HIV/AIDS status, disability and so forth.

### (c) Continuing Judicial Education

Besides the basic knowledge which a judge needs to acquire at the commencement of his or her judicial career, a judge is, or should be, committed, on appointment, to perpetual study and learning which is often facilitated by continuing judicial education. Continuing judicial education is made indispensable by constant changes in the law and in technology. Such educational programmes offer opportunities for an exchange of views among judges and promote a more cohesive and consistent approach to service in the higher judiciary.

### (d) Duty of the State to Facilitate Judicial Education Programmes

- (i) The State, arguably, has a duty to provide the judiciary with the necessary means, and to meet the costs incurred by judges and others involved in pre-service orientation and continuing judicial education programmes. The judiciary should be responsible for organizing and supervising pre-service orientation as well as continuing judicial education programmes.
- (ii) Under the authority of the judiciary, pre-service orientation and continuing judicial education programmes should, ideally, be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise such programmes and to ensure their implementation. It is important that such programmes should be carried out by judges and by experts in each discipline.

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