

Appointing acting judges to the Namibian bench: A useful system or a threat to the independence of the judiciary?

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Introduction

As a young country, deprived of educational and employment opportunities for a long period by the colonial administrations that governed it prior to independence in 1990, Namibia is in dire need of judicial officers, particularly at its High and Supreme Courts. The Namibian Constitution requires a quorum in the Supreme Court to consist of three judges. However, not once in the Supreme Court's existence since 1990 has there been a quorum of three permanent judges. Every year, the President has appointed acting judges to the Supreme Court to complement the permanent judges. Since 2006, the only two permanent judges are the Chief Justice, Mr Justice Peter Shivute, and Judge of Appeal, Mr Justice Gerhard Maritz. As regards the High Court, there were only four permanent judges on the bench in 1990, and five acting judges were appointed for different lengths of tenure.¹ There is no requirement how many judges should be appointed in the High Court. The Supreme Court should have at least three.

Recruiting judges from the ranks of experienced private legal practitioners remains problematic in Namibia, as such lawyers have to forego the considerable rewards of private practice for lesser rewards as a judicial appointee.² This obviously has a severe impact on the administration of justice in Namibia, with the most obvious being a huge backlog of cases – especially in the High Court. The development of jurisprudence is important for any country, but especially true for Namibia. As a young democracy with a brutal history of institutionalised lack of rule of law, despite its progressive Constitution, the country is stifled by not having an adequate pool of judges with diverse legal backgrounds and philosophies.

1 Legal Assistance Centre. [Various]. *Namibian Law Reports* (1990–2005). Lansdowne: Juta Law Publishers.

2 Hatchard, J, M Ndulo & P Slinn. 2004. *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective*. Cambridge Studies in International and Comparative Law. Cambridge: University of Cambridge.

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The Constitution allows for the appointment of acting judges to serve on both the High Court and Supreme Court benches, and several acting judges have indeed been appointed since independence in order to alleviate the acute shortage of judicial officers. However, this can have a number of problems as well as benefits for the judiciary. For example, in some instances, judges of the High Court were appointed to the Supreme Court on an acting basis. This practice can be problematic, as the Lesotho High Court case of *The Law Society of Lesotho v Mr Justice Michael Ramodibedi and Others*³ demonstrated. The Law Society of Lesotho brought an application to the High Court of Lesotho, in which it raised its concern about High Court judges who were being elevated to the Court of Appeal to hear High Court appeals. The concern was that this could impact the independence of the judiciary, in that the dual roles of the High Court judges would create the perception that the Court of Appeals might be loath to overturn judgments delivered by their High Court colleagues. Whilst this practice of such appointments seems to be the standard practice in Lesotho, in Namibia it does not appear to happen often.

Legal practitioners with large private practices and, therefore, a large volume of clients, may find it difficult to be appointed to the bench on an acting basis, particularly as Namibia's population is rather small. It was recently revealed in a local tabloid⁴ that an acting judge had sat on a case in which his private law firm was representing one of the litigants. At the time of writing, the matter was sub judice;⁵ suffice it to say here that, on closer examination of the record of this case, the newspaper report was grossly inaccurate and the matter had been blown out of proportion. The same newspaper reported that another acting judge had adjudicated on a case in which one of his family members was a witness for one of the litigants.⁶ Judges, whether permanent or acting, can recuse themselves from sitting on cases in which they may have an interest, but it may then happen that the judge with a large volume of clients in his/her private practice will literally recuse him or herself from just about every other case, thus rendering the short tenure at the bench underutilised or the appointment meaningless. However, the High Court roll indicates that all the judges appointed on an acting basis have been very busy during their short tenure, which demonstrates the need for

3 *The Law Society of Lesotho v Mr Justice Michael Ramodibedi and Others*; unreported judgment of the High Court of Lesotho, delivered 15 August 2003. The judgment can be found at www.venice.coe.int/SAJC/contributions/LES; last accessed 4 October 2008.

4 Moyo, T. 2008. "Judges' conduct queried: Conflict of interest casts shadow over judicial system". *The Namibian Sun*, 2 October.

5 The Registrar of the High Court issued a press release on 10 October 2008 stating that the Judge-President would comment on the matter after the conclusion of the case.

6 Moyo (2008).

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judicial officers. It also evidences how the system of appointing acting judges has assisted in reducing the backlog of cases and providing access to justice for litigants who would otherwise have to wait for many years before their matters are called in court. However, the problems associated with conflict of interest may still arise.

The system of acting judges does fulfil a number of useful functions, however, such as assessing the suitability of individuals for possible permanent appointment, and providing potential appointees to gain experience. It also helps ease the backlog of cases.⁷ In a press release dated 10 October 2008, the Registrar of the High Court, Mr Edwin Kastoor, gave the following response to negative media coverage of an acting judge's handling of a litigation matter:

Acting judges from private practice play an important role in our judicial system. Most come to assist the Court at great personal sacrifice. It is important therefore not to demonise the practice of appointing acting judges from private practice to assist the High Court in the performance of its functions.

Several judges who have served on the bench of the High Court as acting judges at various times since Namibia's independence in 1990 have become permanent judges, and have written judgments of exceptional quality. Indeed, many of Namibia's landmark constitutional judgments have been delivered by acting judges, which testifies that the development of jurisprudence in Namibia has benefited from the diversity of judicial officers enabled by the system of appointing acting judges.

The value of acting judges may be also seen through the reappointment of some acting judges for further terms, even though they may have handed down judgments which may be seen as 'anti-government'. For example, the acting judge who presided over a 2005 judicial inquiry into the affairs of a company under liquidation – which attracted unprecedented public interest and attention, not least because of the involvement of some senior ruling party politicians – was reappointed for another term in 2007.⁸

7 Hatchard et al. (2004).

8 On the judicial inquiry, see generally Dentlinger, L. 2005. "What is the Avid Company inquiry all about?". *The Namibian*, 12 August; Amupadhi, T. 2005. "Don't blame Avid". *Insight Magazine*, August 2005, p 18. The former President sued at least one newspaper for defamation after being linked to the liquidation scandal. Several people, including a former deputy minister, were ultimately criminally charged. At the time of publication, the criminal trial was under way.

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In February 2001, acting Justice Elton Hoff, sitting with Justice Mainga, convicted the then Minister of Home Affairs, Jerry Ekandjo, of contempt of court after the Minister refused to obey an earlier court order to release Mr Sikunda, a detainee. This case was very controversial, with senior ruling party officials and the Minister openly calling for the defiance of the court order and deportation of the suspect. They also called for the resignation of acting Justice Manyarara, who had issued the order for Mr Sikunda's release. The former Judge-President, Justice Pio Teek, recused himself from hearing the matter,⁹ and instead laid criminal charges of contempt of court against two local newspapers and the Society of Advocates after they criticised him for not enforcing the earlier court order.¹⁰ A complaint was also communicated to the African Commission on Human and Peoples' Rights by the International Centre for the Legal Protection of Human Rights, a human rights organisation based in the United Kingdom. In response, the Chairperson of the African Commission wrote to the Namibian authorities expressing concern on the threat of the imminent deportation of the detainee. During a promotional visit to Namibia in July 2001, one of the Commissioners of the African Commission, Andrew Chigovera, also raised the matter of this complaint with officials from the Ministries of Justice and Foreign Affairs.

However, the complaint to the African Commission was ultimately ruled to be inadmissible for lack of exhausting local remedies. In fact, at the time that the complaint was communicated to the African Commission, the same matter was pending in the High Court of Namibia, with Mr Sikunda being victorious in both the High Court and the Supreme Court.¹¹

Before they convicted the Minister of contempt of court, Justice Mainga, with whom acting Justice Hoff agreed, said the following:¹²

...[t]o refuse a litigant who has successfully secured his liberty in a Court of law is a practice inconsistent with our commitment to the rule of law – and it should be rejected and it is rejected and should be condemned in the most strongest [sic] terminology.

The *Sikunda* case was no ordinary matter, and it had high stakes for the judiciary.

9 The recusal judgment of Justice Teek is reported as *Sikunda v Government of the Republic of Namibia (1)* 2002 NR 67.

10 The Prosecutor-General refused to prosecute any of the parties for lack of a prima facie case.

11 See *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002). A copy of the African Commission's decision is available at http://www.chr.up.ac.za/centre_publications/ahr/r/AHRLR-2002-text.pdf; last accessed 4 October 2008.

12 *Sikunda v Government of the Republic of Namibia (2)* 2001 NR 86 at 93H.

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However, despite these controversies, Justice Hoff was shortly thereafter appointed as a permanent judge in February 2001, thus indicating the value of acting judges in Namibia.

The government appealed Mr Sikunda's case to the Supreme Court, where two of the three judges – Justices O'Linn and Chomba – were serving in an acting capacity at the time. The judgment of the Supreme Court, which was written by Acting Justice of Appeal O'Linn, was much more critical of the government's defiance of the court order than the judges of the High Court had been in their conviction of the Minister of contempt of court.¹³ All three judges (Justices O'Linn and Chomba, and former Chief Justice Strydom) were subsequently appointed to the Supreme Court as Acting Judges of Appeal.¹⁴ Again, this indicates the value of acting judges in Namibia.

In 2000, the same Minister threatened to withdraw the work permits of all foreign judges after an acting judge, who is of foreign nationality, prevented the police by way of an interdict from arresting a group of refugee musicians who had performed at an opposition party's public rally.¹⁵ The Minister ultimately publicly apologised for his conduct after a meeting with the Chief Justice and the Judge-President.

Acting Justice John Manyarara, who was appointed on an acting basis in 2000, was continually reappointed at the expiry of his one-year tenures, despite calls from certain politicians that his tenure should have been terminated because of his order against the Minister of Home Affairs to release Mr Sikunda. Acting Justice Manyarara was also the judge who had issued the order interdicting the police in 2000 to prevent them from arresting the refugee musicians; this led to the threats that his and other foreign judges' work permits would be withdrawn and had them facing deportation from Namibia.

The courts have been very forceful in protecting their independence. Shortly after Namibia's independence, judges of the High Court came under public attack – partly because they were mostly white, and partly because it appeared that they

13 Menges, W. 2002. "Supreme Court slams Govt over Sikunda case". *The Namibian*, 22 February. The Supreme Court judgment is available at <http://www.saflii.org/na/cases/NASC/2002/1.html>; last accessed 4 October 2008 and *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

14 Justice Strydom retired as the Chief Justice in 2004, but has been called to the bench on several occasions as an Acting Judge of Appeal in the Supreme Court.

15 The Minister of Home Affairs asserted that it amounted to criminal conduct for refugees to participate in the political affairs of their host country, even though it was common knowledge that the same musical group had performed at the ruling party's rallies and at government functions on numerous occasions.

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had previously imposed lenient sentences against white treason convicts. Justice O'Linn, at that time a judge of the High Court, wrote as follows in a judgment:¹⁶

Can a Judge effectively perform his onerous task if people are allowed to continue undeterred to scandalise the Judges – to misrepresent, to agitate, to incite, to demand, to dictate and even to threaten from public platform, from the bush and from the streets, through the media and through the structures of their parties, trade unions and churches? The answer is clearly in the negative.

The independence of acting judges is a particular issue as they have a short tenure. This issue is compounded by the fact that there have been more acting appointments than permanent appointments to the Namibian judiciary, and because of the threats of removal made against acting judges of foreign nationality. Security of tenure is key to judicial independence. The reason is obvious: if judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the appointing authority in order to obtain reappointment for another term.

In an age when judicial decisions can be the subject of intense public controversy, particularly where sentencing of criminal offenders or the review of actions and decisions of the executive branch are concerned, how is the appearance of independence to be maintained when an acting judge makes difficult and potentially controversial decisions during his/her short tenure? Although this is a concern, all acting appointments to Namibia's bench have been uncontroversial so far. In fact, in his article on Namibia's judiciary in the current publication, Peter VonDoepp¹⁷ states that –

... as a whole, the [Namibian] judiciary has performed quite admirably in terms of independence from the other branches. The extent of deference to the executive has been minimal.

The constitutional process of appointing

The integrity of the appointing process is safeguarded by the Judicial Service Commission, a constitutional body which makes all the recommendations to the President for the appointment of judges. The Commission was created by Article 85 of the Constitution, and is composed of the Chief Justice as its chairperson, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated by the professional organisations representing

16 *S v Heita and Another* 1992 NR 403 (HC) at 414D–E.

17 See Peter VonDoepp in this publication

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the interests of the legal profession in Namibia. The Commission's composition is designed to ensure that the body is, and remains, independent, free from any party-political influence, so as to –¹⁸

... preclude a process of political selection and appointment where the incumbents may feel themselves obliged to do the bidding of political taskmasters rather than executing their powers, duties and functions independently, impartially and only subject to the Constitution and the laws applicable thereunder.

In the past, it appeared to be the practice to appoint acting judges, whether to the High Court or to the Supreme Court, simply by the Judge-President or Chief Justice making a request to the President, and not on recommendation by the Judicial Service Commission.¹⁹ This was highlighted in a High Court case which sought to challenge the appointment of an 'acting' Prosecutor-General. Justice Maritz, with Justices Sylvester Mainga and Elton Hoff concurring, stated in his judgment that the Constitution expressly required all appointments of judges to the Supreme Court and the High Court, including acting judges, to be made by the President on the recommendation of the Judicial Service Commission.

It is not known how many of the appointments have been made without the intervention of the Judicial Service Commission, since its deliberations are not open to public scrutiny. However if, in the period 1990 to October 2003,²⁰ the President indeed appointed some acting judges without due recommendation by the Judicial Service Commission, the consequences are serious. Several hundred cases have been heard by acting judges in cases involving millions of dollars, and several hundreds of people have been sentenced in criminal cases – some of whom were given lengthy periods of imprisonment, others stiff fines. Such cases would possibly have to be reheard at enormous costs to the litigants and to government – not to mention the many potential claims for damages against the state arising out of decisions passed by acting judges so unconstitutionally appointed. This error could be worth millions, if not billions, of dollars. However, it seems as if the High Court is of the opinion that such appointments can be ratified by retroactive action.²¹

18 *S v Zemburuka (2)* 2003 NR 200 (HC) at 204J.

19 This was possibly on the reading of Articles 82(2) and 82(3) of the Constitution in isolation of Article 82(1).

20 All the President's appointments of acting judges to the High Court and Supreme Court have, since October 2003, been done strictly on the recommendation of the Judicial Service Commission.

21 See *S v Zemburuka (2)* 2003 NR 200 (HC), at 201f. See also footnote 476 below.

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After all, Article 12(1) of the Constitution requires that the determination of all civil rights and obligations as well as criminal charges are to be made by “a competent court”: *competent* not only in terms of the jurisdiction of a particular court to hear a particular type of a case, but also a competent presiding officer or officers, and if such presiding officer was appointed in violation of the Constitution, s/he can never be a competent judge.

This has happened elsewhere in the world. John Duffy claimed²² that several of the judges on the United States of America’s Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences had been appointed unconstitutionally, since the government official who had made the appointments did not have the capacity – or competence – to do so. Duffy concludes that the decisions taken by such improperly appointed judges are, therefore, invalid. At the time of writing, a case is pending in the United States Supreme Court, challenging the validity of a decision taken by an improperly appointed judge.²³

However, it was argued that the problem could be solved by legislation retroactively validating the decisions made by the unconstitutionally appointed judges.²⁴ On 12 August 2008, United States President George Bush signed a bill which allowed for the retroactive appointment of such unconstitutionally appointed judges, with the aim of validating their decisions. However, some academics there were sceptical about the constitutionality of the retroactivity provision.²⁵

In Namibia, something similar occurred, albeit in a slightly different context. The Ombudsman is also appointed by the President upon the recommendation of the Judicial Service Commission. On 16 September 1996, former President Sam Nujoma announced the appointment of Ephraim Kasuto as Namibia’s Ombudsman. However, the purported appointment was withdrawn shortly thereafter, following the revelation by *The Namibian* that the Judicial Service

22 Duffy, J. 2008. *Are administrative patent judges unconstitutional?* Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128311.htm; last accessed 4 October 2008.

23 *Translogic Technology, Inc., Petitioner v Jonathan W Dudas, Director, Patent and Trademark Office*. Procedurally, however, the case is only a request at this point for the United States Supreme Court to consider the issues. The Supreme Court may even decline to review the case. The status of the case can be found at <http://www.supremecourtus.gov/docket/07-1303.htm>; last accessed 4 October 2008.

24 Grady, MH & HS Engelson. 2008. “Unconstitutional judges? Not just a question for academics”. *IP Law Advisory*, July.

25 Liptak, A. 2008. “Fix to patent judge appointment procedure”. *New York Times*, 13 August.

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Commission had not even known about the appointment, let alone recommended it.²⁶ The appointment was invalid on the grounds of the lack of an appropriate recommendation by the Judicial Service Commission,²⁷ and it appears that the same argument would apply to the appointments of judges appointed without the recommendation by the Commission.

It is ironic that the primary reason for the appointment of acting judges – that of easing the backlog of pending matters – could be negated by the very appointment of acting judges because of this oversight in the appointment procedure, or the wrong interpretation of the relevant constitutional provisions.

After the passing of the *S v Zemburuka (2)* judgment by the full bench of the High Court, the Judicial Service Commission promptly made recommendations to the President for the appointment of acting judges, some of whom were already serving on the bench at that time. The recommendations for their appointments were made retrospectively, therefore. This potentially serious constitutional crisis, which could have tumbled the administration of justice into possibly irreparable harm, passed without any public debate – even in the legal profession – and was only reported in a local daily, as follows:²⁸

The Judicial Service Commission moved swiftly last week to plug a constitutional gap in the appointment of Acting Judges that emerged from a judgement of a full bench of the High Court last Tuesday.

The Commission (JSC), which has to recommend the appointment of High Court and Supreme Court Judges to the President, had an urgent meeting last Wednesday to make recommendations on the appointment of Acting Judges who are currently serving in Namibia's judiciary.

By Friday, the President had acted on the JSC's suggestions and had appointed four Acting Judges in the High Court and five Acting Judges of Appeal to the Supreme Court, it was confirmed from the Office of the Chief Justice at the Supreme Court yesterday.

The steps were taken after the High Court ruled on Tuesday that the Constitution requires that all appointments of Judges to the High Court and Supreme Court have to be made by the President on the JSC's recommendation.

Since October 2003, all the President's appointments of acting judges to the High Court and Supreme Court have been done strictly on the recommendation

26 Fild, L. 1996. "Decision of Kasuto can be challenged". *The Namibian*, 16 September.

27 Maletsky, C. 1996. "Who's advising the President? Illegal appointment of Ombudsman questioned". *The Namibian*, 25 September.

28 Menges, W. 2003. "Acting Judges' appointments corrected after court ruling". *The Namibian*, 7 October. See also *S v Zemburuka (2)* 2003 NR 200 (HC).

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of the Judicial Service Commission, which confirms the reasoning of the full bench of the High Court in *S v Zemburuka (2)*.²⁹ It is important to note, however, that the court did not say that the previous appointments were unconstitutional; in fact, the court did not express itself on the issue. However, the fact that the court accepted that an omission of the President to announce the extension of the acting Prosecutor-General's appointment could be ratified later, may indicate that, were the court to rule on the constitutionality of the appointment of acting judges, it may have concluded that the flaw in the appointment of acting judges was ratified by the correct procedures in October 2003.³⁰

The functioning of the acting judge in the framework of constitutional independence

According to the Namibian Constitution, the appointment of acting judges is aimed at filling casual vacancies, and in the Supreme Court, as –³¹

... ad hoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice[,] it is desirable that such persons should be appointed to hear such cases by reason of their special knowledge of or expertise in such matters.

In addition to filling casual vacancies, the appointments of acting judges to the High Court are –³²

... to enable the Court to deal expeditiously with its work.

As stated earlier, Namibia suffers from an acute shortage of judicial officers, and as a result, the High Court and Supreme Court continuously make use of acting judges. In the Supreme Court, only six permanent appointments have been made from 1990 to 2008. Justice Berker was appointed Chief Justice at Namibia's independence, and on his retirement, Justice Mahomed was appointed. When Justice Mahomed retired from the bench, he was succeeded by Justice Strydom, who in turn was succeeded by Justice Shivute in 2004. Justices Teek and Maritz, as Judges of Appeal, were the only other permanent appointees to the Supreme Court. All the appointments were made at different times and, as a result, the highest court of the land has never had a full quorum of permanent judges: all

29 *S v Zemburuka (2)* 2003 NR 200 (HC).

30 *S v Zemburuka (2)* at 201f. See footnote 24 on retroactive legislation in the USA to solve a similar problem.

31 Article 82(2), Namibian Constitution.

32 Article 82(3), Namibian Constitution.

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the other appointments have been for acting positions. In other words, acting judges play an important role in dispensing justice in Namibia. Justice Teek resigned in 2005, thus robbing the Supreme Court of an opportunity to have a full quorum of permanent judges. Justice Maritz was appointed on 1 January 2006 as a permanent judge to the Supreme Court bench.

Security of tenure for judicial officers is indispensable for the independence of the judiciary. Under the Constitution, judges can only be removed under the most stringent circumstances, such as gross misconduct or mental incapacity, and then only by the President on recommendation of the Judicial Service Commission. In terms of Article 82(4) of the Constitution, all permanent judges would otherwise hold office until the prescribed retirement age of 65 years, which may be extended by the President to 70 years.³³ It is not immediately clear whether the President can only extend the retirement age with the recommendation of the Judicial Service Commission. It would appear this is the case, since these would be judges already appointed on recommendation of the Judicial Service Commission, and the President would then simply extend their tenure to a higher retirement age. It will not be a fresh appointment, so no recommendation from the Judicial Service Commission should be necessary in such instances.

Since acting judges do not have the security of a long tenure, their independence will, of course, be an issue. Some judges are appointed for very short periods such as a month, or for particular cases. For example, South African Judges of Appeal Piet Streicher, Kenneth Mthiyane and Fritz Brand, who are all members of the bench of the Supreme Court of Appeal in South Africa, were appointed in August 2008 as Acting Judges of Appeal in Namibia's Supreme Court to hear an appeal in the criminal trial of a former Namibian Supreme Court judge.

Whilst the independence of the Judicial Service Commission – and, therefore, the integrity of the recommendations it makes – in respect of the appointment of acting judges received a welcome boost in *S v Zemburuka*, the perceived independence of the judiciary will always remain a concern because of the high number of appointments in judges acting capacities. Studies of the judiciary in other parts of the world have suggested that judges who lack security of tenure are likely to be the ones most lacking in independence.³⁴

33 It is interesting to note that there is no compulsory retirement age for members of the executive or legislative branches of government.

34 See Peter VonDoepp in this publication.

Tenure of office and casual vacancies

As some of the judges are continuously appointed as acting judges on a one-year-tenure basis, which is then renewed time and again at the expiry of the previous tenure, questions arise as to how that may impact on the independence of the judiciary.³⁵ There is no empirical evidence to suggest that acting judges may have passed their decisions in such a way as to please the government due their lack of an extended secure tenure. However, VonDoepp³⁶ has indicated that foreign judges appointed on Namibia's bench have displayed a tendency to side with the government – especially after 2000, when such judges became the target of attack from political circles after their decisions in certain contentious cases.

The question then also arises whether acting appointments to the Supreme Court are strictly in accordance with the provisions of the Constitution. The Constitution requires that such appointments are made solely to fill casual vacancies, to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, or where the Chief Justice is of the opinion that it is desirable that an acting judge should be appointed by reason of his/her special knowledge or expertise in the matter at hand. In light of the Supreme Court's chronic shortage of judges since independence, there can be no doubt that vacancies in the Supreme Court have not been of a "casual" nature, as contemplated by the Constitution.

Most of the cases that reach the Supreme Court invariably involve complicated constitutional matters or issues of fundamental rights and freedoms, which, considering Namibia's young and developing jurisprudence, would require careful adjudication and by able and highly experienced judicial officers. The Supreme Court is also the highest court of the land, and the court of last appeal. Since there is no further platform to adjudicate in the event that a litigant is not satisfied with the outcome of a case in the Supreme Court, it is of utmost importance that any decision by this court should stand the test of time.

However, in the normal course of the many cases served before the Supreme Court, mostly appeals from the High Court or Labour Court, many would be straightforward and uncomplicated matters. Nonetheless, in all cases brought before the Supreme Court, regardless of their complexity or lack thereof, the bench has always consisted of permanent judges sitting together with acting judges; and in some cases, only acting judges constituted the quorum of the Supreme Court.

35 See LAC ([Various]).

36 See Peter VonDoepp in this publication.

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If the Supreme Court has a 'chronic' vacancy (not a "casual" one, as contemplated by the Constitution), and if some of the matters are not of a constitutional or human rights nature requiring special knowledge or expertise, then it follows that some of the appointments of judges on an acting basis to the Supreme Court have not been strictly within the parameters of the Constitution. Acting judges to the Supreme Court are appointed for a particular term of the court or for a particular year. The Supreme Court has no control over the nature of cases placed before it, as this is largely dependent on appeals from the High Court. As a result, the acting judges appointed for a particular term will sit on such cases, not because these cases are necessarily complicated, but simply because they were set down in that particular term. This ought to be rectified, lest a point is taken in a litigation matter that such judges are unconstitutionally appointed and, therefore, that the validity of their decisions may be questionable.

Of course, the answer to the vacancy issue lies in more serious commitment needing to be displayed as regards the independence of the judiciary, by making permanent elevation to the bench attractive to private legal practitioners. Until fairly recently, judges did not even have computers to work with; and it is common knowledge that the remuneration of even senior judges is far less than what senior legal practitioners command in private practice.

Conclusion

In general, the Namibian judiciary has performed remarkably, and the system of appointing acting judges has greatly assisted the development of the country's young jurisprudence and eased the burden of the High Court's caseload. Indeed, as VonDoepp concluded –³⁷

... for those who are concerned with the independence of the judiciary, there is much to celebrate here.

However, in the long term, it is not a healthy situation that so few lawyers are able and willing to serve on the bench on a permanent basis; thus, the courts rely on the appointment of acting judges from time to time. Without the security of long tenure, there may be a perception that such judges are more likely not to have independence in the execution of their functions on the bench.

37 (ibid.).

Appendix 1

Article 82 Appointment of Judges

- (1) All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.
- (2) At the request of the Chief Justice the President may appoint Acting Judges of the Supreme Court to fill casual vacancies in the Court from time to time, or as ad hoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice it is desirable that such persons should be appointed to hear such cases by reason of their special knowledge of or expertise in such matters.
- (3) At the request of the Judge-President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work.
- (4) All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge to seventy (70). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

Article 85 The Judicial Service Commission

- (1) There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.
- (2) The Judicial Service Commission shall perform such functions as are prescribed for it by this Constitution or any other law.
- (3) The Judicial Service Commission shall be entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with this Constitution or any other law.
- (4) Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.