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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

To: THE HONOURABLE MINISTER OF JUSTICE

I have the honour to submit to you, in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991), the Commission's Report on Marital Property.

.....

ADV J R WALTERS

ACTING-CHAIRPERSON: LRDC

2010-03-01 #

with effect from 5 November 2007, a new LRDC, with five new members was appointed. Adv J R Walters was appointed Acting-Chairperson. The position of Chairperson (full-time) remains vacant.

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) which came into operation on 15 July 1992.

The members of the LRDC on 4 November 2007 were:

Adv J R Walters	(Ombudsman)
Ms L Conradie	(nominated by the Law Society of Namibia)
Ms N N Shivute	(Deputy Chief: Lower Courts in the Ministry of Justice)
Mr S K Amoo	(Lecturer at the Law Faculty of the University of Namibia nominated by the Vice Chancellor of the University of Namibia)
Mr A Vaatz	(Legal Practitioner: Acting Chairperson)
Mr T Kamuhanga-Hoveka	(Legal Practitioner)
Ms M Samson	(Legal Adviser in the Office of the Attorney- General)

The members of the LRDC on 1 March 2010 are (see # on page (iii)):

Adv J R Walters	(Ombudsman: Acting Chairperson)
Ms T Hancox	(nominated by the Law Society of Namibia)
Ms N N Shivute	(Deputy Chief: Lower Courts in the Ministry of Justice)
Mr F Nghishililwa	(Lecturer at the Law Faculty of the University of Namibia, nominated by the Vice Chancellor of the University of Namibia)
Mr A Denk	(Legal Practitioner)
Dr S Akweenda	(Legal Practitioner)
Ms B Burger (now late)	(Legal Adviser in the Office of the Attorney-General)

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CHAPTER 1 – INTRODUCTION

1.1 ORIGIN OF THE INVESTIGATION

- 1.1.1 The Law Reform and Development Commission agreed at its meeting held on **6 December 2005** that the Commission must embark on a new project with regard to the Adjustment of Fines. The Commission's decision emanated from a proposal by Mrs. N Shivute (Deputy Chief: Lower Courts) and a member of the Commission.
- 1.1.2 It was decided that further decisions will be undertaken at the Commission's next meeting to include such proposal as a formal project with clear terms of reference.
- 1.1.3 On **26 June 2006** the Commission finally approved that the Adjustment of Fines proposal be included in the Commission's Programme as a project and it was allocated to Mrs. AH Diergaardt.

1.2 TERMS OF REFERENCE

The following terms of reference were identified by the Commission:

- (a) To look into possible solutions, and make recommendations for the problem created by the fact that, as a result of inflation, fines prescribed in statutes are progressively becoming out of context with periods of imprisonment.
- (b) To look into possible solutions and to make recommendations to ensure more consistency with penalties prescribed in statutes.

1.3 WORKING PAPERS AND RESPONSES TO IT

- 1.3.1 An **Issue Paper** on Adjustment of Fines was published on **31 July 2006** with **21 October 2007** as closing date for comments. By **31 October 2006** various role-players requested extensions. The closing date was then extended to **28 February 2007**.
- 1.3.2 In the Commission's working methodology, an Issue Paper represents the first public announcement of a project or investigation. It aims to set out the Commission's problem and possible solutions and invites comments. It is thus through an issue paper that the Commission tries to involve all stakeholders with the hope of solving the issues at hand.
- 1.3.3 Issue Papers on the Adjustment of Fines project were sent out to each and every Magistrate's office for the attention of Prosecutors and Magistrates. The purpose of the Issue Paper was to elicit response and valuable comments to assist in the research of the topic. However, only **50%** of recipients responded.

The general feeling amongst Judicial Officers and Prosecutors was that there is a need for Adjustment of Fines legislation. They all agreed that penalty clauses in current statutes are indeed outdated and that there is a lot of inconsistency regarding sentencing in courts. The reason for this is that presiding officers are bound by the outdated legislation and therefore use their individual discretion when it comes to sentencing. Some presiding officers just sentence without acquainting themselves with penalty clauses or appropriate legislation like the **Criminal Procedure Act**.

It is clear that at the end of the day it lies in the discretion of the Magistrate as an individual to impose the sentence in the absence of clear guidelines.

Most of the presiding officers and Prosecutors indicated that an Adjustment of Fines Act will make it easier for them to impose fines. However, they will require proper training. They also agreed that if Adjustment of Fines legislation should come into operation it must be amended from time to time to keep up with inflation.

- 1.3.4 Some Prosecutors felt that it is not necessary for an Adjustment of Fines Act, but if a minimum sentence is provided for in such an Act it could be of assistance, unlike the current situation where only the maximum penalty provision is provided in all existing legislation, giving presiding officers leeway to impose very lenient sentences. They feel that presiding officers are either unwilling or scared to impose stiff sentences hiding behind the notion of discretion when sentencing offenders.
- 1.3.5 About **25** Issue Papers were sent out to Legal Practitioners of which only **five** responded and indicated that Adjustment of Fines legislation is needed. They indicated that injustice is done to offenders because of inconsistency in sentencing. Presiding officers need clear guidelines as to sentencing.
- 1.3.6 **A Discussion Paper** that reflected information gathered up to the end of September 2007 was issued on 16 January 2008. Most of the information was retrieved from an Issue Paper that was prepared and sent out to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The Discussion Paper was discussed in a workshop on 11 March 2008. The workshop was attended by several stakeholders and certain resolutions were taken and recommendations made regarding the topic. In my opinion it was a very successful workshop.

1.4 CONSULTATIONS

Several consultations were conducted with the following stakeholders:

1. Law Society of Namibia
2. Magistrates
3. Prosecutors
4. Ministry of Safety and Security
5. Ministry of Labour and Social Welfare

CHAPTER 2 - BACKGROUND DISCUSSION

2.1 THE NEED AND POSSIBLE SCOPE OF REFORM

It was pointed out that the biggest problem is that we still have pre-independence statutes in which maximum fines are prescribed for defined offences as an alternative to a period of imprisonment. As a result of inflation it seems as if these fines are not suitable anymore. It makes it very difficult for judicial officers to impose appropriate sentences.

During the **1990's** the Cabinet Committee on Legislation (CCL) decided on a general ratio to be embodied in each statute, namely a fine of “N\$ **4000-00** or **1 year** imprisonment.” This means it is 1 year for each N\$ 4000-00. This is suspected to be the current position. This N\$ 4000-00 was to be amended a long time already to move with inflation. It was supposed to be N\$ 10000-00 by now! A solution must therefore cover both post and pre-independence statutes.

2.2 SENTENCING

When considering reform the most important factors to be taken into consideration are the purpose of sentencing and consistency.

2.2.1 Consistency

It is common knowledge that consistency with regard to sentences embodied in statutes leaves much to be desired. The sentences for similar or identical offences in different statutes differ significantly. Some statutes provide for very harsh sentences for less serious offences and some for lenient sentences for very serious offences. This forces judicial officers to ignore the guidelines laid down by statute.

This is the cause that consistency is lost in the process. The result of this inconsistency is that the general public loses trust in the judicial system especially the effect of sentencing and the fairness thereof.

It is therefore imperative to find a solution and restore consistency in order to regain public trust in the judicial system. The main solutions will be found in adjustment to the legislative process. That is why it is important to get recommendations from all stakeholders and not only the Law reform Commission.

2.2.2 Purpose of Sentencing

When one thinks of sentencing one immediately think of punishment. However, some writers feel a distinction should be drawn between sentencing and punishment. The question is whether there really is a difference between the two. Van Der Merwe states that “Sentencing is the practical application to a specific accused, in a specific case, of the general principles of punishment”.¹

After an offender has been convicted he must be sentenced. A sentence usually infringes upon offenders basic human rights, such as the right to freedom of movement, privacy and dignity. The question as to what right society has to punish offenders lies in the different theories of punishment.

¹ DP Van Der Merwe, Sentencing , April 1996, Chapter 3

2.2.3 Theories of Punishment:

There are various theories of punishment namely:

The **Absolute Theory**, **Relative Theory** and the combination or **Unitary Theory**. There is only one Absolute Theory, namely the Retributive Theory. According to this theory retribution restores the legal balance which has been disturbed by the commission of the crime. It is said that punishment is the payment of the account the offender owes the society.²

When passing sentence one should take the following remarks into consideration.

“Punishment works through official sanctions calculated to interfere with the life, liberty or property of the offender; it is the authoritative infliction of suffering for an offence.”³

*The sentencing of an offender is a public ritual of symbolic as well as practical significance. It is the moment when a court, speaking on behalf of society as a whole, solemnly declares the penalty that is deemed appropriate for the conduct of the offender, which has been found to contravene the criminal law.*⁴

The purpose of sentencing is also to protect society against the offender and to give the offender the opportunity to lead a crime free life in the future.

There is an expectation that the sentence must be restorative, in the sense both of compensating the victim who suffered as a result of a crime and repairing the social fabric that criminal conduct damages.

It is not only the question whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness.

² CR Snyman, Criminal Law 4th Edition, P14

³ Jonathan Burchell, John Milto, Principles of Criminal La, 2nd Edition, P38

⁴ South African Law Reform Commission, Report on Sentencing, Project 82, November 2000

It is clear that whereas the course of the trial is determined by clearly defined rules of law the approach to sentence is left largely to chance. The current situation is that the individual sentencer will largely determine his approach to a given set of facts, and there will therefore be as many different approaches as there are different sentencers.

It is a fact that presiding officers are just human beings that are influenced by social, psychological and economic factors.

2.2.4 Sentencing Options

There are different sentencing options as provided for in the **Criminal Procedure Act** namely:

- (a) Imprisonment (life)
- (b) Periodical Imprisonment
- (c) A Fine
- (d) An Order of Compensation
- (e) Correctional Supervision
- (f) Committal to an Institution Established by Law
- (g) Suspended Sentence
- (h) Being Warned or Cautioned

For the purpose of this exercise we shall concentrate on Fines as a sentencing option.

Fines

The success of the fine as a type of punishment is probably because it is not tainted with the idea of retribution as revenge, which has led to criticism of capital and corporal punishment.

The biggest problem with a fine is that it seems to serve as individual deterrence only and sometimes does not reflect the seriousness of the offence.

Even if a stiff fine is imposed it usually leads to the alternative of imprisonment. Leading to the argument that the fine was not realistic and that imprisonment should have been imposed in the first place. In some cases the fine is paid by someone other than the accused. The latter serves virtually no purpose of punishment. It is clear that quantum is vital to the successful imposition of this type of punishment.⁵

2.2.5 Sentencing Methodologies

DP Van Der Merwe in his book *Sentencing* describes three methodologies followed in the sentencing process whereby presiding officers try to come to the optimum type and quantum of punishment.

Firstly the **‘intuitive’ approach** where a sentencer listens to the evidence and decides on the sentence while listening and nothing thereafter conflicts with his first inspiration.

Secondly there is the **‘rational’ approach**. In this approach the sentencing officer determines the limits set by the legislature and then within these limits set by the culpability of the offender rationally balances them against each other and forms his final sentence.

Thirdly there is the **‘empirical’ approach** where the sentencer will first investigate various purposes of punishment, previous convictions, arrests, etc and thereafter decides on a suitable sentence.⁶

Once the sentencer has adopted one of the above-mentioned methodologies, he or she will already have a sentencing option in mind.

⁵ DP Van Der Merwe, *Sentencing*, Service 5, April 1996, 4-33

⁶ DP Van der merwe, *Sentencing*, Service 5 April 1996

CHAPTER 3

3.1 CURRENT SITUATION IN NAMIBIA

Currently presiding officers are imposing sentences as contained in penalty clauses prescribed by statutes. As I stated previously most of these statutes are pre-independence statutes in which maximum fines are prescribed for defined offences as an alternative to a period of imprisonment. The jurisdiction in Magistrate's Courts is currently **N\$ 20 000-00** or **5 years** imprisonment and in Regional Courts **N\$ 100 000-00** or **20 years**.

The **Criminal Procedure Act**, both existing **Act No. 51 of 1977** and the new **Act No. 25 of 2004** (which must still come into operation) deal with some options. The new Criminal Procedure Act aims to improve the possibility of compensation to victims of crime and restitution. This Act also contains provisions with regard to victim impact statements.

3.2 PROBLEM ANALYSIS

The Namibian system faces various problems. There is the perception that sentences do not give weight to certain serious offences; that restorative alternatives are not provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.

The seriousness of an offence should be determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed.

The manner in which fines must be calculated must be more closely related to the means of the offender.

When Prosecutors intervene on sentence they must consider the interest of the victims in every case. The court must be aware of what impact the crime had on the victim. The income of offenders must also be revealed so that they can be ordered to make reparation for their crimes in an appropriate way.

3.2.1 Prison services

Statistics reflected that prisons and other correctional facilities in Namibia are so full that it cannot carry the capacity of prisoners in for much longer. At this stage it is unrealistic to impose sentences that require more prison space than is likely ever to be available.

According to the reception officer at prisons they have a very big problem with the manner in which sentences specifically fines are imposed in courts. They indicated that most of the time the term of imprisonment and the fine is not in relation. This makes it difficult for them to calculate the term of imprisonment to be served.

The reception officers explained the procedure after sentencing to be as follows:

After being sentenced the convicted offender is removed from police cells and taken to prison. The offender is then booked in and given a prison number. There the term of sentence as well as a release date is calculated. The problem arises at the point of calculating the term of sentence, as the calculation determines to which prison a convicted offender is sent to serve such period of incarceration. For example, those with a sentence less than 3 years go to Swakopmund Prison and those with more than 3 years go to Walvisbay Prison. It is also recorded who gets remission or not. The calculation is done in the following manner as an example: If the sentence is N\$ 2000-00 or 12 months imprisonment. The amount is divided by 365 (days in a year).

If the prisoner served some days already, e.g. 140 days, it will be deducted from 365. It will then be $365-140 = 225 * 2000/365 =$ N\$ 1232.87. So the amount payable upon release will be N\$ 1232.87.

Walvisbay is a medium prison for low risk offenders with sections A to D and a female section, but there are no facilities for juveniles. The prison is overpopulated. The water and electricity was cut off some time due to lack of funds. Walvisbay Prison has more rehabilitation programmes than Swakopmund like, literacy classes, newsletters. Prisoners prefer to go to Walvisbay Prison rather than Swakopmund as it is a more equipped prison with more benefits. So, if a sentence is wrongly imposed the offender might end up in a prison where he was not supposed to be and will therefore be prejudiced by such sentence.

The head of the prison as well as the social worker felt that the courts sometimes do not take the socio-economic structure in different regions into consideration when passing sentence. According to them Walvisbay and Swakopmund in relation to other places does not have a high poverty rate because of the fishing companies. They were of the opinion that courts should impose higher fines as most people can afford to pay. They must feel at least that they have a hole in the pocket after being sentenced. The reality is that when a prisoner is incarcerated the Government has a duty to maintain that prisoner. A sentence of N\$300-00 or 3 months imprisonment for example works out at N\$ 3-00 per day. To maintain a prisoner in prison is not less than N\$ 600-00 per day. This money comes from the taxpayer who is already the victim.

80% of the prisoners interviewed indicated that they were in a position to pay a fine when they were given direct imprisonment rather. According to some of them they feel financial loss more than incarceration. They become wiser criminals in prison and more equipped to commit offences.

3.2.2 Social services

Most of the social workers especially those who work closely with Magistrates and Prosecutors indicated that sentencing in courts are not effective and that fines imposed are ridiculous and not in proportion. They indicated that Magistrates need a guideline for sentencing.

Social workers also felt that some presiding officers do not listen to accused persons in court and they do not take their personal circumstances into consideration and therefore impose improper sentences.

Social workers highlighted the cost involved in maintaining an incarcerated offender as follows:

1. Three balanced meals per day (+- N\$ 300-00)
2. Water and electricity
3. Clothes and blankets
4. Medical expenses
5. Cleaning materials and toilet paper
6. Postage expenses
7. Transport
8. Legal aid
9. Maintenance grants (responsibility of line Ministry to assist the children of each and every sentenced offender)
10. Social services and other support services : (+- N\$ 1800-00 flexi call cards per month)
11. Education
12. Material assistance: when an offender is released from prison, it is the institutions responsibility to assist with transport and meal costs back to his home.

Offenders have more medical and mental health problems than the general population. This is attributed to the fact that they live in overcrowded conditions.

3.2.3 Courts

According to Presiding Officers court rolls are full and they are overburdened with cases. There is also a shortage of court staff. Court officials in some cases are overworked.

They sometimes ignore the purpose of sentencing and impose sentences only to get rid of a case. They also do not have time to properly calculate fines in order to bring the amount and term of imprisonment to be in proportion. Statistics provided by the Magistrate's Commission proved that presiding officers impose more fines than direct imprisonment.

CHAPTER 4 COMPARATIVE STUDY

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4.1 SOUTH AFRICA

In South Africa an **Adjustment of Fines Act, 1991 (Act No. 101 of 1991)** was passed. It provides in a nutshell that their Minister of Justice can, by notice in the Government Gazette, determine a ratio between a period of imprisonment and a fine and that the fine will apply notwithstanding what is contained in any statute .

The new statute only mentions that a fine, without mentioning an amount, can be imposed.

4.2 UNITED STATES OF AMERICA

In USA they make use of a federal sentencing guideline system that contains rules that set out a uniform sentencing policy for convicted offenders. The guidelines are a product of the United States Federal Commission that was established to investigate the problem of inconsistency in the USA sentencing system and to find solutions. The system is intended to provide determinate sentencing. The guidelines determine sentences based primarily on two factors: **(1)** the conduct associated with the offence, and **(2)** the offender's criminal history

When it comes to imposing fines specifically, Judicial Officers make use of a federal sentencing guideline system calculator.

This is an electronic system where you punch in the offence and other details and the computer will calculate the fine and the term of imprisonment for the presiding officer.

Though the federal guidelines were styled as mandatory, the Supreme Courts 2005 decision in *United States v. Booker* found that the guidelines, as originally constituted, violated the Sixth Amendment right to trial by jury. The guidelines are now discretionary. Judges now use the guidelines as a starting point when sentencing.

4.3 GERMANY

In Germany 83 % of all sentences are fines.

4.4 OTHER COUNTRIES

In some countries sentencing is done by way of units, which is then calculated on the basis of the means of the offender. They have specific guidelines as to how to conduct the calculation.

CHAPTER 5

5.1 EVALUATION

It is clear that sentencing in courts in Namibia is a problem especially when it comes to fines. The inconsistency and lack of proportionality does not only affect the offender and victim, but also other stakeholders. There is thus a need for reform and clear sentencing guidelines. There is also a need to revise penalty clauses as contained in outdated statutes. We need uniformity in the Namibian Justice system at least to regain trust and respect.

It is likely that fines will continue to be an important component of the criminal justice system. The fact that a fine may be imposed for any offence unless any law expressly provides that a fine may not be imposed shall remain unchanged.

However, serious consideration needs to be given to the system for relating the fine to the ability of the accused to pay and the term of imprisonment.

It was decided in the workshop on 11 March 2008 that there is a definite need for an Adjustment of Fines Act and that we should use the South African Adjustment of fines Act (Act No 101 of 1991) as a guideline when drafting our own Bill. It was also recommended that that a ratio of 1: 4 should be used for the purpose of calculating fines.

CHAPTER 6

6.1 RECOMMENDATIONS

Format of Recommendations

Annexure A contains the proposed draft Bill

Annexure B contains a general explanatory note and summary of the key features of the proposed bill and more explanations and comments on the clauses of the bill through the assistance of The Justice College of South Africa.

LRDC recommends:

6.1.1 The enactment of the Proposed Draft Bill (as in Annexure A)

6.1.2 That the necessary steps be taken to ensure training of judicial officers for effective

ADJUSTMENT FINES

To provide that the maximum fine as an alternative to which a period of imprisonment may be imposed in respect of offences in terms of certain laws, shall be in the same ratio with regard to the period of imprisonment as the ratio of the fine as against imprisonment where the court is not a court of a regional division, as contemplated in section 92 (1) of the Magistrates' Courts Act, 1944; and to provide for matters connected therewith.

Section 1 Calculation of maximum fine

(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division.

(b) For the purposes of paragraph (a) a fine as well as imprisonment may be imposed.

(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the

maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1) (a).

Section 2 Calculation of fine in case of fraction of year

Subject to the provisions of section 281 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in the application of this Act-

- (a) a reference in any law to a period of imprisonment of less than 31 days shall be construed as a reference to a period of imprisonment of one month;
- (b) the maximum amount of a fine which may be imposed as an alternative to a maximum period of imprisonment amounting to a fraction of a year, and which does not amount to a multiple of N\$50, shall be rounded off to an amount equal to the nearest higher multiple of N\$50.

Section 3 Act applies to penalties contained in empowering provision

This Act shall mutatis mutandis apply to a provision in any law authorizing the promulgation of another law, which provision confers the power to prescribe a penalty contemplated in section 1 in respect of any contravention of the law so authorized.

Section 4 Savings

This Act shall not apply in respect of a provision providing-

- (a) for the imposition of a fine in the case of an offence or omission which continues; or
- (b) that the court may impose such fine as it may in its discretion deem fit.

Section 5 Short title

This Act shall be called the Adjustment of Fines Act.

Explanatory Note

1. The Bill

The Adjustment of Fines Bill stipulates that where any Act provides for the imposition of a fine or in the alternative for the imposition of a period of imprisonment, irrespective of whether the amount of the fine is specified in that Act or not, the maximum amount of the fine that may be imposed is to be calculated according to a determinable ratio, using the period of imprisonment referred to in that Act as a basis. The ratio to be used is that for each years imprisonment that may be imposed the fine be N\$20 000 (jurisdiction of Magistrates Court at present which is, N\$20 000 or not exceeding 5 years)

This is based on the current ratio provided for in section 92 of the Magistrate`s Court Act, 1944 (Act 32 of 1944)

Ratio: Simplified; N\$20 000 to 5 years ($20\ 000 / 5$) = N\$ 4000 to 1 year

2. Section 1(1)(a)

(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32

of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division.

Section 1 (1) (a) deals with legislation where a penalty clause merely provides for a fine without stipulating the maximum amount thereof but which mentions what period of imprisonment may be imposed. The ratio referred to is then applied using the period of imprisonment as the available determining factor.

For example, *“a fine or to imprisonment for a period not exceeding 3 years”*

Using the same ratio of *N\$5000 to 1 year = N\$4000 * 3 = N\$12 0000 or 3 years*

The jurisdictional limits of lower courts must be borne in mind with the application of this bill.

Section 1(1)(b)

The reason for this section was prompted because of a penalty clause which merely refers to:

“a fine or to imprisonment” or without containing additional words like

“or to both such fine and such imprisonment”

Section 1(1)(b) simply reads that a fine as well as imprisonment may be imposed.

Where a penalty clause merely provides for a fine or to imprisonment and does not contain words:

“...or to both such fine and such imprisonment”

The court's sentencing options would normally be limited to the following:

- (a) a fine (not exceeding the courts jurisdiction); or
- (b) a fine with an alternative of imprisonment in terms of the Criminal Procedure Act

When dealing with statutory offences a Magistrates Court is, despite the jurisdictional limit set in section 92 of the Magistrates Court Act, limited to the penalty provisions of the specific Act. It must be made clear that an Adjustment of Fines Act is a tool to determine what the maximum fine allowable is and it is not to be used to determine the alternative period of imprisonment when the amount of the fine has been decided upon.

Section 1(2) reads:

(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1) (a).

Section 1(2) thus provides that where the maximum amount of fine is stipulated in the specific statute, whether the statute was in operation before the Adjustment of Fines Act or has come into operation since, the same ratio is to be used to determine the maximum fine that may be imposed, ignoring (so to speak) the mentioned fine unless the mentioned fine is higher than that calculated by means of ratio.

For example, S112 (1) (b) of the Criminal Procedure Act:

“N\$ 300 or to imprisonment for a period of three months”

Utilizing the ratio, the fine of N\$300-00 converts to N\$1000-00 (3 months being a quarter of a year so a quarter of N\$4000-00 is N\$1000-00)

In terms of the proviso of section 1(2) the ratio is not utilized where the maximum fine for the offence is higher than what would be calculated.

3. Section 2 reads:

“Calculation of fine in case of fraction of year”

Subject to the provisions of section 281 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in the application of this Act

(a) *a reference in any law to a period of imprisonment of less than 31 days shall be construed as a reference to a period of imprisonment of one month;*

(b) *the maximum amount of a fine which may be imposed as an alternative to a maximum period of imprisonment amounting to a fraction of a year, and which does not amount to a multiple of N\$50, shall be rounded off to an amount equal to the nearest higher multiple of N\$ 50.*

Section 2 deals with the calculations of fines in the case of fractions of a year as well as regarding any period of imprisonment less than 31 days in legislation. In my table I indicate a “rounding off” in terms of this section. For example, 1 month is one twelfth of a year and one twelfth of N\$20 000 amounts to N\$1 666.67, thus rounding off to the next highest multiple of N\$50-00 will give an amount of N\$1700-00. Old legislation that refers to for example pounds can be dealt with using the period of imprisonment referred to in the Adjustment of Fines Act as opposed to attempting to ascertain the latest exchange rate.

4. Section 4 reads

Savings

This Act shall not apply in respect of a provision providing-

(a) *for the imposition of a fine in the case of an offence or omission which continues; or*

(b) *that the court may impose such fine as it may in its discretion deem fit*

Section 4 specifically provides that the Act is not to apply in the case of a penalty for an offence or omission which continues, for example, section 43(4) of the Occupational Health and Safety Act, 1993.

“in the case of a continuous offence, not exceeding an additional fine of N\$200-00 or additional imprisonment of one day for each day on which the offence continues”

The Act will also not apply in respect of an offence where the court is given free reign to impose any fine it deems fit.

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