

LAC condemns courts secrecy plan

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The Legal Assistance Centre warned that the proposed changes to regulations on how court cases can be classified as secret might affect the credibility of the judiciary.

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THE Legal Assistance Centre says the proposal by the judiciary to change regulations on how court cases can be classified as secret is against the Constitution and could undermine the independent and transparent justice system.

Judge president Petrus Damaseb is leading a process that will – among others – set new rules on how a court case can be heard behind closed doors.

The Legal Assistance Centre (LAC) is worried that the proposed regulations have no oversight on the judges who will make the decisions; could lead to abuse; and lack provisions for the public to object to an application for secrecy.

The proposed regulations are contained in a consultative public notice Damaseb issued in November 2019, titled 'Amendment of Rules of the High Court of Namibia'.

The notice states that "a person, who requires a prohibition or restriction on access to an e-justice [internet court platform] case file must make a request to the managing judge for the prohibition or restriction on access to the case file by the press or public". This was not the case in the past.

At the moment, the court system relies on Article 12 of the Namibian Constitution, which makes provision for closed courts in certain cases such as those involving child protection, juvenile offenders or child witnesses, rape, domestic violence cases and portions of proceedings involving protected witnesses.

Damaseb said the changes are well-meant and are within the law.

Some lawyers, however, expressed concern about the latest move, with some claiming that it could be a conduit to hide information in cases implicating high-profile individuals, especially politicians.

LAC warned that the proposed changes might affect the credibility of the judiciary. LAC wrote to Damaseb on 27 January 2020, opposing the amendments because the decision-making process on the issue of exclusion would appear to take place entirely in secret, without any criteria to guide discretion beyond the constitutional statement.

"Since no one other than the parties would be involved or even aware of such applications, the public would have no way of knowing if the power of exclusion was being used widely, frequently or inappropriately. This undermines one of the cornerstones of the concept of independent, impartial, and transparent justice – that court proceedings are, except in very limited circumstances, open to public scrutiny," LAC director Toni Hancox said.

She also asked Damaseb to justify why he wants to prohibit access to e-justice materials on the basis of settlement negotiations.

"Settlement negotiations are private and not admissible as evidence, but that does not have any bearing on access to the e-justice materials which relate to the underlying case and not to the settlement negotiations. This basis for restricting access of pleadings other than in the limited cases as approved by the Constitution can therefore not be condoned," she said.

LAC's other concern is that the proposed changes appear one-sided.

"The proposed amendments do not allow any party the right to reply and/or intervene in such a request. This creates the opportunity for a party to submit a request for determination by the court, without the other being awarded the opportunity to oppose on whatever grounds may be necessary, that is, public interest," she said.

Judicial spokesperson Ockert Jansen said Damaseb was acting on instructions from the Judicial Service Commission (JSC) headed by chief justice Peter Shivute.

Jansen said the JSC requested Shivute to "monitor the norms and standards for the exercise of the judicial functions of all courts, to develop guidelines, which would inform judges, legal practitioners and litigants on the process to be followed as well as the grounds upon which public access to e-justice files may be restricted".

Jansen added that although the Namibian Constitution makes provision for in-camera court proceedings, there are currently no guidelines on how that is to be done, hence the JSC's decision.

"The draft rules are intended to bring clarity to litigants," Jansen said.

He said Damaseb sent the draft rules to various stakeholders, including the Law Society of Namibia, the Namibia Law Association, the media ombudsman, the Editors' Forum of Namibia, the Society of Advocates and the government attorney's office on 17 December last year.

According to him, Damaseb had not received any feedback from the said stakeholders by 13 February 2020.

Jansen insisted that Damaseb would only take his final draft to the JSC after receiving comments or feedback from the said stakeholders.

The Law Society of Namibia is also in the process of consulting its members, before submitting its position on the proposed rules to Damaseb.

KORA SAGA

Concern about secrecy in the judiciary was high last year after the High Court was exposed for hiding court papers involving the disappearance of taxpayers' money paid for a failed All Africa Kora Music Awards.

The judiciary claimed the parties involved in the case were in talks for an out-of-court settlement. This turned out to be false.

In fact, *The Namibian* reported in November 2019 that the judiciary misled the public and broke the law when it blocked access to court papers of that case.

At the centre of that con job was president Hage Geingob's friend and businessman, Ernest Adjovi, who is accused of defrauding the Namibian government of around N\$23 million.

Namibian lawyers Eben de Klerk and Norman Tjombe accused the judiciary of setting a dangerous precedent through a court case that implicated Geingob and former justice minister Sacky Shanghala.

The court papers were later made public but some documents were never made public, including WhatsApp exchanges between Geingob and Adjovi.

Those messages revealed that Geingob accused Adjovi of trying to blackmail him into pushing Namibia to host and pay for the failed music awards.

Adjovi's blackmail bid included allegations related to the purchase of the Falcon 900 jet the government bought for former president Sam Nujoma in the early 1990s, and the building of the then prime minister's private residence.

DEADLY SECRETS

Courts in other parts of the world have faced criticism about secrecy due to big business and its legal lieutenants who succeeded in campaigns that ensured that secrecy-cloaked lawsuits alleging that their products can kill or injure people.

For instance, news agency Reuters reported in December last year why big US businesses can count on courts to keep their deadly secrets.

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“Thousands of people were killed or seriously injured by allegedly harmful products after judges in recent years allowed litigants to file under seal, beyond public view, evidence that could have alerted consumers and regulators to the dangers,” the agency reported.

The article added that “over the years, they [judges] threw a blanket of confidentiality over discovery, the pretrial exchange of information between opposing sides. They turned protective orders into pro forma exercises to muzzle lawyers who might otherwise share pertinent information with regulators or the public”.

MATTER OF FACT...

THE Namibian's lead story yesterday titled "LAC condemns courts secrecy plan" contained errors that may have misled the public about the source of information.

The article stated that the Legal Assistance Centre (LAC) wrote a letter to judge president Petrus Damaseb outlining concerns about proposed new rules dealing with access of court documents by the public.

In fact, the LAC wrote the letter to

the Law Society of Namibia, which reportedly requested for input to the amendments of the rules of the High Court of Namibia.

The letter was obtained from confidential sources and not the LAC. The Namibian erred by not approaching the LAC and its director, Toni Hancox, who was quoted extensively in the article.

We apologise for any inconvenience caused.

Apologies placed in the Namibian the day thereafter.