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**INFORMATION ABOUT NAMIBIA'S LAW**

**RULE OF LAW SERIES**

**Rule of Law Article #6**  
**DOING IT RIGHT:**  
**PROPER PROCEDURES**

There is a saying that the journey is more important than the destination. This is very true when it comes to the rule of law. Processes matter just as much as outcomes, and sometimes even more.

The Namibian Constitution and laws contain rules of substance (everyone has the right to freedom of speech) and rules of procedure (the President is elected by the direct vote of citizens over age 18).

Doing things right is very important. To use a sports analogy (as in some of the previous articles), a soccer player may get the ball into the goal, but it will not count if that player or a teammate who assisted violated the off-sides rule during the play.

To give a constitutional example, the Namibian Constitution is silent on what actions are criminal offences, but it does say that everyone who is arrested must be informed of the charge against them and given a fair trial. The Constitution also guarantees administrative justice, which means that decision-makers must give the persons affected by a matter a chance to be heard, base their decisions on rational grounds and provide written reasons for their decisions.

Statutes often set procedural rules. For example, labour cases are often won or lost on whether the employer followed a fair procedure, rather than on whether there was a fair reason for dismissing the employee.

Isn't it just nit-picking to insist on correct procedure? So what if the law said that a board which made a decision should have had five members when it only had four? So what if a decision-maker did not stick to a deadline provided by the relevant law?

Clear procedures are important to fairness. Imagine that you have been charged with a crime, and the magistrate finds you guilty after hearing the State's evidence against you, before you have had a chance to tell your side of the story. Suppose that your employer dismisses you without even telling you what you have supposedly done wrong. In these situations you would,

rightly, feel that you have been treated unfairly. Procedures make sure that people know how and why decisions are made, and how they can take part.

Failure to follow proper procedures can be a slippery slope. If a court convicts someone of a crime after they made a confession while being tortured, the police might be tempted to use torture more often. If your company does not have to follow procedures before dismissing an employee, managers might start firing people they dislike without any good reason. If the awards of government tenders do not have to follow clear procedures, then what is there to stop officials from giving their friends an inside edge?

Many court cases involve procedures. For instance, awards of government tenders have been challenged on procedural grounds on several occasions. In one 2017 Supreme Court case, a huge tender had been awarded for the upgrade of Hosea Kutako Airport, and then stopped by a directive from the Minister of Works and Transport.

The Supreme Court found that the Minister's directive was invalid because he did not have legal authority to stop the project. The Court emphasised that the starting point in any case involving the exercise of public power is the rule of law - meaning that public officials and institutions can act only act in terms of powers conferred on them by law.<sup>1</sup>

However, it did not really matter that the Minister's directive was invalid – because the Supreme Court also found that the original award of the tender for the airport upgrade was invalid. The legal requirements for awarding tenders for capital construction projects had been ignored, so the award of the tender could not stand. The entire process was invalid on procedural grounds, from start to finish.

It is possible that minor technical departures from procedure may sometimes be excused if they caused no prejudice to anyone, but procedural rules must generally be followed very carefully to make sure that decisions are fair.

Members of the public are sometimes particularly bothered when it appears that a criminal goes free on procedural grounds. However, as the Supreme Court has pointed out, the rule of law requires that “even people accused of committing heinous crimes must be dealt with according to law”.<sup>2</sup>

The High Court has elaborated on this, saying: “It would be a sad day in this Republic, if the courts, because of the undeniable need to arrest the ubiquitous incidence of serious crime, including corruption, would close their eyes to the constitutional safeguards, thus sacrificing the rule of law and individual rights and freedoms guaranteed in the Constitution and the laws of this Republic, on the altar of bringing suspects to book, by hook or by crook. This great edifice, under which all persons in this great country seek and find refuge, might fall if that were to be the accepted approach.”<sup>3</sup>

Imagine that you have been arrested and tortured into admitting to a crime that you did not commit, or detained without being informed of what crime you have been accused of, or held in

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<sup>1</sup> *President of the Republic of Namibia & Others v Anhui Foreign Economic Construction Group Corporation Ltd & Another* 2017 (2) NR 340 (SC).

<sup>2</sup> *S v Likanyi* 2017 (3) NR 771 (SC).

<sup>3</sup> *New Force Logistics CC v Anti-Corruption Commission* 2018 (2) NR 375 (HC).

custody without being allowed to appear before a court and apply for bail. In such a situation, you will probably agree that proper procedures are very important.

It is better for a few wrongdoers to go free or to escape liability than for the nation to operate in chaos. And that is why we need the rule of law – to give us all the stability of an orderly society, which is a necessary condition for economic development, peaceful existence and a thriving democracy.

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