

SEAFARER SUBJECT GUIDE

USING LAWYERS IN NAMIBIA

This Guide deals in general terms with using lawyers in Namibia. It aims to help a seafarer understand the legal profession in Namibia, and how to select, engage and if need be, change his lawyer. This Guide does not, however, constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practise in Namibia.

1. What is the structure of the legal profession?

- 1.1 In Namibia, the legal profession is governed and regulated by the Legal Practitioners Act (the Act).
- 1.2 There are traditionally two types of lawyers: advocates and attorneys. Prior to the Act, the legal profession distinguished between advocates and attorneys whereby only advocates could appear in the High and Supreme Courts. However since the inception of the Act both advocates and attorneys have the right of appearance, as it provides that a legal practitioner, who is duly admitted and enrolled as such, shall have the right of appearance in any court or tribunal in which persons are entitled to legal representation on whatever matter be it criminal or civil.
- 1.3 However, in practice the distinction between advocates and attorneys still exists as was traditionally the case. Attorneys can be directly approached for legal advice and representation by the general public whereas advocates only accept instructions from attorneys and cannot be directly approached by clients.
- 1.4 Attorneys are general legal practitioners who can advise a client on any matter whereas advocates are specialists in criminal and civil court procedures and evidence. When in need of the services of an advocate the client must first consult and instruct an attorney who will in turn instruct the advocate. The attorney is also personally liable for the fees of the advocate. Attorneys may form firms or partnerships whereas the advocates practice on their own account.

2. How is the legal profession regulated?

- 2.1 Both practicing advocates and attorneys are members of the statutory body the Law Society of Namibia and are regulated in accordance with a strict professional code of conduct and ethics. Advocates are usually also members of the Society of Advocates

Using Lawyers in Namibia. This Guide reflects the law as at 01 February 2013.

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which is, however, a voluntary, non-statutory umbrella body that regulates the advocates' profession.

3. How can a seafarer find a lawyer?

- 3.1 Finding the right lawyer for the client's particular needs may be a daunting task and especially so for foreign nationals. It is advisable that when in doubt to contact the Law Society of Namibia which is based in the capital Windhoek at Tel.264-61-230263 or through the website of Lawyers Access Web(Namibia) at www.lawactive.co.za or E-Mail lawnam@lawactive.co.za.
- 3.2 Seafarers with labour or employment related issues on board the ship are further advised to seek advice from specialist maritime lawyers who are usually stationed at the coastal towns of Walvis Bay and Luderitz. When a seafarer is faced with criminal investigations by the police, Directorate Maritime Affairs, Ministry of Fisheries and Marine Resources or Customs then they should seek advice from criminal lawyers. When seafarers are investigated or arrested for illegal fishing, dumping of fish, pollution from ships and/or maritime related offences or accidents at sea or on board the ship it is advisable to seek assistance from their employer's lawyers. This is important since foreign seafarers especially may be arrested when they commit offences within Namibian jurisdiction. In Namibia many seafarers are also members of seafarers' unions who may be able to assist in recommending or appointing a suitable lawyer. Foreign seafarers who find themselves in trouble with the law may also seek advice from the Mission to Seafarers in 13 Road Walvis Bay (Tel. 264-64-202594 and email.mtswb@iafrica.com.na).

4. On what terms can a seafarer engage a lawyer?

- 4.1 The terms of engagement of a lawyer can be negotiated by the seafarer client. In particular the basis of charges of the lawyer should be clearly understood in advance.

5. How will a seafarer be charged fees by his lawyer?

- 5.1 Lawyers in Namibia charge an hourly and/or daily rate. The amount varies between lawyers and is mostly based on experience, expertise and the complexity of the matter. In most cases lawyers would charge an hourly rate for consultations and advice but charge a daily rate for court appearances. The client is expected to pay the full daily rate irrespective of whether the lawyer spends the full day or part of the day in court. The basis for charging the full daily rate is the assumption that the lawyer has reserved the day especially for that particular case and the lawyer is not always capable of predicting

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whether the case or a full hearing will take place or not. For example, in criminal cases state witnesses may fail to appear or the prosecutor or the Judge may have taken ill.

- 5.2 Clients must also distinguish between fees and cost.
- 5.3 Fees are the rates charged by the lawyer for his professional knowledge and expertise whereas cost are those costs incidental to the case such as telephone charges, stamp duties, sheriffs' fees and photocopies.
- 5.4 In Namibia, unlike in South Africa, lawyers are not entitled to charge contingency fees. Contingency fees are not based on an hourly or daily rate but represent a percentage of the award should the client be successful with his claim. Should the claim be unsuccessful the lawyer will not be entitled to any fee. The practice of charging contingency fees is generally regarded as unethical in Namibia and therefore not allowed.

6. Can a seafarer get legal aid in a criminal case?

- 6.1 Legal Aid is based upon the premise that the Namibian Constitution in Article 12 (1) (e) determines that every person shall be entitled to legal representation by a legal practitioner of his or her choice. Legal representation in Namibia is very expensive and many people are unable to afford legal representation and may thus apply to the State for legal assistance. The State therefore has a duty to provide legal representation under certain circumstances. There are various forms of legal aid namely:

.1 Pro deo representation, which is where the state appoints a legal practitioner to represent an accused person especially in criminal cases.

.2 Pro amico is legal representation free of charge given by lawyers to their friends and relatives.

.3 Pro bono is a free legal service given to society or to the communities by lawyers. The centres are called legal aid clinics and are usually run by law departments of universities. They are intended to give law students some practical experience and also to inform communities of their legal rights.

.4 The Legal Aid Board is a body created by statute to provide legal aid to indigent people.

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6.2 In criminal cases of a serious nature, the courts may direct the Legal Aid Board to provide a defendant with a legal practitioner. The Legal Aid Act makes no distinction between legal aid for criminal and civil cases. Each case is assessed by the Director Legal Aid or a committee and the Regulations to the Act set out different income criteria in order to qualify for legal aid. Clients who qualify may also be required to make a contribution towards the fees of the lawyer.

7. Can a seafarer get legal aid in a civil case?

7.1 Civil law prohibits the infringement of the rights of others. These are instances where there is a difference of opinion or a dispute between individual persons or between legal entities and or between the state and individuals and or legal entities. The court in civil cases will order the person who loses the case to pay compensation to the one who wins and may also order the loser to pay the legal costs of the one in whose favor the court rules.

7.2 As outlined in Question 6.1.1 to 6.1.4 above, there are a number of ways in which any member of the public can attempt to obtain free legal advice. The Legal Aid Act makes no distinction between legal aid for criminal and civil cases.

8. Can a seafarer get any other free legal advice?

8.1 In certain instances where a litigant who brings or defends a matter before court on their own or in forma pauperis (in the manner of a pauper) the Namibian High Courts may instruct the Registrar of the High Court to refer the litigant to a lawyer for assistance. This is usually the case where it is clear to the court that the matter is a complicated one and in order to do justice to the litigant they will need professional legal assistance. There will be an investigation into the means and the merits of the case and once satisfied that the matter is worthy and proper to act in forma pauperis the Law Society or the Society of Advocates nominate a lawyer or advocate to act on behalf of the litigant without charging fees.

9. Can a seafarer sue his lawyer?

9.1 A seafarer may sue his lawyer if the lawyer has displayed gross ineptitude and gross negligence. The Legal Practitioners Act does not protect legal practitioners' civil liability but rather turns the matter over to the court to penalize improper actions of lawyers in the exercise of their official duties. Lawyers must behave in accordance with the Act to avoid criminalisation for unprofessional, dishonourable or unworthy conduct.

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10. How can a seafarer complain about his lawyer?

- 10.1 When a seafarer is of the opinion that a lawyer is acting improperly, is not within the terms of his instruction, is not attending to his case in a timely manner or is generally dissatisfied with the services rendered, he may lay a complaint against the lawyer by following the law firms' complaints procedure, especially in bigger firms, as all law firms are required to have an internal procedure for attending to complaints of clients. Lawyers are also expected to act in an ethical manner and it is further expected that complaints must be treated promptly, fairly, reasonably, openly and effectively.
- 10.2 In the case of a complaint against an advocate the same principles as for Lawyers would apply. However, with advocates it may be a little bit more difficult to lay complaints since they usually operate as one man practitioners. In such instances the litigant should discuss his concerns or complaints with his lawyer who instructed the advocate. Should this approach not have the desired result then the litigant may report the advocate to the Society of Advocates of Namibia and in the case of the Lawyer to the Law Society of Namibia.

11. How can a seafarer change his lawyer?

- 11.1 A seafarer is entitled to change his lawyer at any time, whether he is satisfied with the services of his lawyer or not. He can then appoint another lawyer to take over his case and to represent him.
- 11.2 It is important to note that the decision to change one's lawyer or advocate should not be made frivolously since it may cause delays and may also involve additional cost, especially at advanced stages of the case, such as just prior to the matter being heard by the court. If the new legal representative does not have sufficient time to study and prepare for the case, the hearing may be postponed and a cost order for the delay may be granted against the seafarer litigant.
- 11.3 In cases where the lawyer had appointed an advocate the seafarer may ask his lawyer to terminate the services of the advocate.
- 11.4 It is, however, important to note that if the lawyer or advocate is still owed fees for work done, they may retain all documentation relating to the case or matter until the outstanding fees are paid.

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12. Is a foreign seafarer treated differently?

- 12.1 Generally foreign nationals are treated no differently from Namibian nationals under the law. However, in certain instances a foreign seafarer may experience difficulties in instituting or defending civil claims before Namibian courts. For example, a foreigner who institutes or defends a claim may be required by the Registrar of the Court to provide security for cost, so that if the foreign national loses the case then the other party is guaranteed to recover his costs from the foreign national. In such instances where no attachable property or security exists, the foreign national may run the risk of being arrested as a *suspectus de fuga* (foreign suspect), meaning the court will have no jurisdiction over the foreign national and therefore the only manner in law by which jurisdiction over the foreigner can be obtained in law is by arresting them.

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