



Legal Opinion on Namibian Legislation affecting Volunteerism

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Legal Opinion on the Implications of some Namibian Legislation on Volunteerism.

A. Introduction.

1. There is no law that specifically provides for volunteerism and regulation of volunteers in Namibia. However there are various laws that may have an impact on the activities and the promotion of volunteerism in the country. Although there may be a culture of volunteerism in the country and a national policy has been developed, there is need for a legal regime that is designed to promote and protect volunteers if volunteerism is to take root and positively contribute to national development. Legislation affecting labour relations, social insurance, personal income taxation, immigration and civil liability has a direct effect on volunteers and they could promote or frustrate volunteers. This is an effort to look at some laws, including the Constitution of the Republic of Namibia, that may directly or indirectly impact on volunteerism.

B. The Constitution.

2. The Constitution of the Republic of Namibia, under Article 9(2) provides that no persons shall be required to perform forced labour. The implication of this Article is that people should freely give their labour, whether it is paid labour or unpaid labour, and this must be voluntary labour. This provision is reinforced by Article 21(1) j which provides as a fundamental freedom for all persons in Namibia to have a right to practice any profession, or carry on any occupation, trade or business. This right may be exercised as an employee of another person or as a volunteer in any legal activity that one may opt to participate in. The interpretation of these two provisions suggests that the Constitution, which is the grundnorm of Namibia, allows volunteerism and voluntary service in Namibia and other enabling legislation has to conform to what these provisions provide.

C. Legislation which impacts on Volunteerism.

3. Other Legislation that affect volunteerism in Namibia include the following;
 - a. The Labour Act, 2007 (Act 11 of 2007)
 - b. The Immigration Control Act, 1993.
 - c. The National Youth Service Act, Act No. 6 of 2005.
 - d. The Public Service Act, 1995.
 - e. The Social Security Act, Act 34 of 1994.
 - f. The Income Tax Act, 1981 as amended.
 - g. The Employees Compensation Amendment Act, 1995 (amended the Workmen's Compensation, Act 1941..
4. The relevant provisions of the above legislation will be looked at more closely;

a) The Labour Act, (Act 11 of 2007).

5. The Labour Act is the law that all stakeholders would refer to before engaging any person to perform any service or when one intends to provide labour to another person or entity¹. Thus its provisions may promote or discourage volunteerism depending on how they are interpreted by those concerned. Under its Section 2, it is provided that the Act applies to employees and employers. The Act defines employees and employers in its Section 1. An employee is defined as an individual who works for another and is entitled to receive remuneration, or in any manner assists in carrying on or conducting the business of an employer. On the other hand, an employer is also defined as a person, including the state who employs or provides work for an individual and who remunerates or undertakes to remunerate, or permits the individual to assist that person in any manner in the carrying on or conducting that person's business.²

¹The title of the Labour Act provides that the Act is to establish a comprehensive labour law for all employers and employees, among other things.

² "employee" means an individual, other than an independent contractor, who- a) works for another person and who receives, or is entitled to receive remuneration for that work, or b) in any manner assists in carrying on or conducting the business of an employer. "employer" means any person, including the state, who- a) employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate an individual, or b) permits an individual to assist that person in any manner in the carrying or conducting that person's business.

6. Both definitions of employee and employer cover volunteers and those involved in volunteerism. In accordance with the definition of employee, a volunteer is not an employee under the first paragraph of the definition, but he/she may be regarded as an employee under the second paragraph so long as he/she assists in carrying on and conducting the business of an employer. Similarly, the second paragraph of the definition of employer is to the effect that if a person permits an individual (a volunteer) to assist in running his/her business, then such a person is an employer and consequently, may be required to observe the provisions of the Labour Act, even though the individual they are engaging is a volunteer. The first parts of both definitions have remuneration as the main element for one to qualify as an employee or employer, while in the second parts of both definitions the main element is participating or being permitted to assist in ones business, without necessarily expecting any remuneration.
7. Although ordinarily volunteers do not and are not entitled to remuneration, they may receive some allowance. The Act defines remuneration in Section 1 to include any payment received by the employee from the employer, in cash or in kind. This also qualifies any volunteers who may receive any remuneration in form of allowances as an employee and therefore their (volunteers) relationship covered by the Act. It is therefore important that the law should clearly and unequivocally provide that a volunteer is not an employee within the meaning of the Act, and that an employer who engages the services of a volunteer shall not be regarded as an employer for the purposes of the Act. This could be included in the definition section of the Labour Act or in any legislation that may be enacted to provide for volunteerism.
8. The Labour Act, provides for obligations to employees by any employer and failure to observe these obligations may have serious implications for the employer, including judicial process which the employers may not be ready to be subjected to. The provisions that require payment of a minimum wage, keeping of records, allowing employees to participate in trade unions, collective bargaining and collective agreements³ e.t.c may not be attractive to employers who would have otherwise accepted volunteers. Provisions relating to employee remuneration under Sections 10 to 14; those relating to hours of work in Sections 19 to 22 as well as provisions concerning leave and termination of services need not apply to volunteers like they apply to regular employees under the Act. In order

³These are largely provided for under Parts B to F of the Act, which are referred to as Basic Conditions of employment under Section 9 of the Act.

to promote volunteerism, it is ideal that employers be exempted from the application of such provisions.

9. On the other hand there are some provisions that need to be globally applied to both volunteers and other paid employees under the Act because they are for the employees' benefit. The provisions relating to the health, safety and welfare of employees and those concerned with the maintenance of conducive working environment⁴ by employer are meant to protect the employees and as such even those involved in volunteerism and volunteers should be equally protected. Persons willing to participate in volunteerism and voluntary activities may find it unattractive to offer their services in an environment where their health and safety is at risk. Accordingly, provisions in Sections 39 to 47 of the Act, which provide for health, safety and welfare of employees, should remain applicable to volunteers as well.

b) The Immigration Control Act, 1993.

10. This Act, has an effect on international volunteers who may wish to enter the territory of Namibia offer with a view to offering their services in Namibia as volunteers. For any foreigner to enter or reside in Namibia for the purpose of employment or conducting a business or carrying on a profession or occupation, an employment permit is required in accordance with Section 24(b)i of the Act. The Immigration Board may subject such foreigner's stay in Namibia to some conditions to be stated in the employment permit according to Section 27(1) and under subsection (4) the foreigner may be required to deposit a guarantee with the authorities to ensure that the conditions of the permit are complied with.
11. The requirement for employment permits⁵ may be a deterrent for international volunteers in Namibia, especially if the process for applying for the said permit is long. Besides, the conditions imposed by the board may have the effect of creating an added burden on prospective international volunteers. In most cases payment of a fee is among the conditions that are attached to acquisition of an employment permit. Such a fee, coupled with the possibility of lodging a guarantee may not encourage international volunteers in Namibia. It is appreciated that none

⁴ Chapter 4 of the Act.

⁵ Besides the employment permit, any foreigner intending to do volunteer work in Namibia must be in possession of a valid visa issued under Section 12 of the Act to allow him/her enter into the country..

citizens need employment permits, and cannot take up employment as of a right, but the process for securing the permits as well as the conditions under which the permits are given could be made less cumbersome, especially if the international volunteer concerned is to offer services to benefit the general public. The visa requirements for prospective volunteers could also be made more favourable compared to the other visitors' visas, who may visit as tourists.

c) The National Youth Service Act, Act No.6 of 2005.

12. It is provided under Section 4(1)d that the Act is meant to provide opportunity for the youth to participate in the national development of the country on a voluntary basis. A youth is defined as a person who is a citizen of Namibia, aged 16 to 30 years⁶. This age limit is so, restrictive and excludes other active citizens from volunteerism under this law. Although this Act may be strictly targeting young persons, there appears to be no other specific legislation that provides for the participation of adults above 30 years in voluntary activities. Rather than restrict it to the youth alone, the service could be left open so that other able-bodied citizens may participate, especially if they may not have had opportunity to participate in the service when they were below statutory age of 30 years. This does not have to be done under this Act; another law could be enacted for that purpose.

13. It is noted that Section 13(4) of the Act exempts the service from the provisions of the Labour Act. This is a boost to volunteerism that could be extended to other categories of volunteers under the other relevant laws. Sections 14 and 15 of the Act serve the same purpose by providing for incentives to those who participate in the service in form of allowances and preferential consideration when accessing the public service⁷. However, it could also be said that the service is not a voluntary service because participants are recruited with expectation of accessing the job market and do not participate on their free will.

d) The Social Security Act, Act 34 of 1994.

⁶ Section 1 of the Act.

⁷ Section 15 of the Act.

14. The Social Security Act, is the law that provides for employees and employers contribution to a fund from which payments may be made to members in case of sickness, maternity treatment or death of the employee⁸. Under its Section 2, the Act covers all employees and employers. Under Section 1, an employee is stated to be a person under 65 years old, employed for at least 2 days in any given week and entitled to receive any form of remuneration from the employer. Likewise, an employer is one who employs another or in any manner permits another person to assist him/ her in business and undertakes to remunerate that person⁹.
15. The above definitions include volunteers in their fold and as such any person who permits another to assist them (volunteer) in their business, may be deemed to be an employer and therefore eligible to have him/herself registered as employer and register the employees as well and make contributions under Sections 20 and 21 of the Act. Similarly, so long as any person is engaged in some work for another person, including the state and receives any payment, such a person is supposed to be a member of the funds created under the Act and make contributions as provided for under the Act. Failure to make the contributions is a punishable offence under Section 23 of the Act.
16. These obligations may be a disincentive for any person or entity that would have engaged the services of volunteers. Although it could be safe to engage persons above 65 years old without invoking the provisions of the Act, engaging persons less than 65 years or even paying them any minimum allowance puts such person under the Act and the consequential obligations accrue. Thus, volunteers may not be taken on due to fear of repercussions in case the authorities claim that the provisions of the Act are not being complied with. In view of such fears, entities and persons involved in volunteer work and volunteerism should be exempted from the application of the provisions of this law. This exemption may be contained in a separate article in the Act providing that the provisions of the Social Security Act shall not be applicable to persons involved in volunteers activities.

e) The Income Tax Act, (Act 24 of 1981)

⁸ Part V (Sections 28 – 31) of the Act

⁹ Section 1 of the Act

17. The Income Tax Act, as successively amended provides for the taxation of personal income earned individuals. All persons whose personal income exceeds a stated amount, is obliged to pay income tax on any amount above the threshold imposed by the law. Accordingly, in case of volunteers and people involved in volunteerism, this taxation may prove to be a burden in case any limited allowance they may be allowed exceeds the statutory threshold for income tax. In view of this, all persons and entities involved in volunteerism should be exempted from the payment of the income tax¹⁰.

f) The Employees Compensation Act (The Workmen's Compensation Act, Act 30 of 1941).

18. This law provides for the compensation of employees for disablement or death suffered due to accident that occurs or industrial disease contracted in course of employment. Whereas, this law is aimed at ensuring the welfare of the employees, some employers may be reluctant to engage volunteers in order not to expose themselves to civil liability under this Act. Similarly persons wishing to engage in volunteer activities may be reluctant to offer their services if there is no possibility of being compensated for injury or death during course of employment. On the other hand, volunteers also need protection against civil liability for any accidents that may be occasioned by them while doing volunteers activities. In view of this, the Employees Compensation Act, should include volunteers as persons entitled to compensation for any accident that occurs during the course of duty and they should also be protected from any civil liability that may be occasioned by them while performing voluntary work.

D. Conclusion.

19. The Republic of Namibia has an adequate national policy pertaining to volunteerism and volunteers in Namibia.¹¹ However, this policy needs to be re-enforced with a corresponding legal regime that favours and promotes volunteerism. If the policy is not backed by a relevant law, the position of volunteers and volunteerism remains standing on a weak

¹⁰ Under the Income Tax Amendment Act, Act 5 of 2010, any taxable amount in excess of N\$ 40,000 is taxable.

¹¹ The National Policy on Volunteerism (Revised Draft 20th July 2010),

foundation because policies could be easily changed and therefore less certain compared to legislation, and unlike legislation, policies are not enforceable. Although it is stated in the national policy the volunteerism is part of culture in Namibia, it appears those involved as volunteers participate with expectation of being rewarded in one way or another. There is need to clearly define what volunteerism is in the context of Namibia and what volunteers should expect from voluntary service, but not for them to claim for similar benefits and privileges that are reserved for paid employees.

20. Accordingly, it is my opinion that Namibia needs to enact a legislation providing for volunteerism and volunteer related activities in the country. Such legislation shall, as a direct consequence, amend the existing legislation, whose provisions contradict the spirit of volunteerism in Namibia, as outlined above. It should also create an independent organ to coordinate voluntary activities, especially the regulation and monitoring of voluntary organizations operating in the country as well as vetting international volunteers wishing to offer their services in the country, among other things. Enacting an independent legislation providing for volunteerism and voluntary related activities in Namibia will have an advantage of having a single law covering the field of volunteerism, rather than having the law scattered in various legislation. It will also give opportunity to legislate for details which are specific to volunteerism and may not be accommodated in other legislation dealing with other matters.