



REHOBOTH BASTER GEMEENTE

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22 May 2013

Hon. Dr. Albert Kawana
Attorney General of Namibia
Office of the Attorney General
Private Bag 13339
Windhoek

Delivered by hand

Dear Attorney General Dr.Kawana

**SUBJ: RESTORATION AND PROTECTION OF CERTAIN BASIC RIGHTS
AND FREEDOMS OF THE REHOBOTH BASTER GEMEENTE**

The subject matter has reference.

1. Like everyone else in Namibia, the Rehoboth Baster Community hereinafter referred to as the Gemeente is *de jure* entitled to the enjoyment of all the basic human rights and fundamental freedoms guaranteed by Chapter 3 of the Namibian Constitution. These rights and freedoms include the Gemeente's right to the effective participation in the civil, cultural, economic, environmental, political and social life of the country.
2. However, *de facto*, the Gemeente is being systematically deprived and denied, by the Government of Namibia (GoN), of most of its essential fundamental human rights and freedoms since Namibian independence. These rights include, but are not limited to, the right: (1) to acquire, own and dispose of all forms of **immovable and movable property**, including traditional and or communal lands and sacred places, as guaranteed

by Article 16 of the Namibian Constitution, and (2) to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion as guaranteed by Article 19 of the Namibian Constitution and as contemplated in the Paternal Laws of 1872 as well as in relevant international customary and contemporary human rights law to which Namibia is party. These rights are so essential and are sine qua non for the existence of the Gemeente.

3. The Gemeente is particularly aggrieved by the *de facto* non-recognition by GoN of its right to exist as a social grouping of persons who: (a) share a common ancestry, cultural heritage, language, customs and traditions; (b) recognize a common traditional authority; and; (c) inhabit a common communal lands in what was then commonly known as the Rehoboth Baster *Gebietand*, (d) who own certain immovable and movable property in the Rehoboth district.
4. It appears that in its abolishment or expropriation of the aforementioned **property** of the *Gemeente*, GoN has relied exclusively on the strength of Schedule 5 of the Namibian Constitution, which reads:

“Property vesting in The Government of Namibia

- (1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia. (2) For the purpose of this Schedule, ‘property’ shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein. (3) All such immovable property shall be transferred to the Government of Namibia without payment

of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution. (4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property.”

6. However, in terms of Article 5 of the Namibian Constitution, the fundamental rights and freedoms enshrined in Chapter 3 “shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed”.
7. While pursuant to Article 25(1)(a), read in conjunction Article 5, of the Namibian Constitution: “(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid provided that: (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.”
8. Furthermore, According to Article 22, read together with Article 146(2)(b), of the Namibian Constitution: “Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is

authorized, any law providing for such limitation shall: (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual; (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.”

9. Therefore, Schedule 5 of the Namibian Constitution is unconstitutional in so far as it infringes upon any of the fundamental human rights and freedoms guaranteed by Chapter 3 of the Namibian Constitution. Schedule 5 is also in conflict with the Namibian Constitution in so far as it seeks to empower or authorize the Legislature, to make any law, and the Executive and the agencies of Government to take any action which abolishes or abridges any of the fundamental rights and freedoms conferred by Chapter 3 of the Namibian Constitution. Furthermore Schedule 5 is also unconstitutional in so far it seeks to nullify the fundamental rights guaranteed under Article 16 of the Namibian Constitution.

In light of the above, the objective of this letter is to earnestly request you, as I hereby do, to act in terms of Article 87(c) of the Namibian Constitution and invoke the provisions of Article 79(2) of the said Constitution and by so doing refer Schedule 5 of the Namibian Constitution to the Supreme Court for appropriate interpretation.

Your urgent positive consideration of the contents of this letter is highly appreciated.

Yours sincerely

Signed by : **John McNab**
Kaptein of the Rehoboth Baster Gemeente

Copied to:

HE Dr. Hifikepunye Pohamba, President of Namibia
Right Hon. Dr. Hage G Geingob, Prime Minister of Namibia
Hon. Dr. Theo-Ben Gurirab, Speaker of National Assembly
Hon. Asser Kapere, Chairperson of National Council
Hon. Prof. Peter Katjavivi, Majority Leader in National Assembly
Hon. Hidipo Hamutenya, Minority Leader in National Assembly
Hon Advocate John R Walters, Ombudsman of Namibia
Mr. Phil yaNangoloh, Executive Director, NamRightsInc