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PREFACE

Following the imposition of South African Administration on South West Africa, after the granting of the League of Nations Mandate over the territory to South Africa, one obvious historical fact was the extension of the application of the South African legal system to the territory. One basic characteristic of the South African legal system is the element of Roman-Dutch law constituting, as it were, the nucleus of South African law and hence the common law of South Africa. In so far as South West Africa (Namibia) was concerned, Roman Dutch law was formally introduced as the common law of the territory by Proclamation 21 of 1919 (S.W.A. Gazette, 25 of 1919) which provided *inter alia* that Roman-Dutch law was to be applied in the territory as existing and applied in the Province of the Cape of Good Hope and the proclamation remained the legal basis for the application of the common law of the Cape as a source of law of South West Africa (Namibia) until the promulgation of the Namibian Constitution.

The Namibian Independence Constitution came into force on the eve of independence as the supreme law of the land and therefore the ultimate source of law in Namibia. Article 140 of the Constitution provides that all laws that were in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent court. By virtue of this provision, the sources of law in Namibia comprise the laws that were in force on the eve of independence and after independence. With respect to the common law, article 66(1) specifically stipulates that the common law of Namibia in force on the date of independence shall remain valid to the extent to which such common law does not conflict with the Constitution.

A component of the legislative sources of Namibian law was the legislation introduced by South Africa. In 1925, the South African Parliament was given full power of legislation over South West Africa (Namibia). Consequently, some of the South African statutes were extended to South West Africa by proclamation. The legislative authority over the territory, however, was not vested in the South African Union government alone. The local legislature, which comprised the Legislative Assembly of South West Africa and the local Administrator-General of South West Africa, had residuary legislative functions subject to the superior legislative functions vested in the Union Parliament. The former exercised its legislative functions in the form of ordinances whereas the latter was in the form of proclamations. The head of the Union of South Africa also had the power to legislate for the territory by proclamations, (section 38(1) of the South West Africa Constitution Act 39 of 1968 as amended by section 1 of the South West Africa Constitution Amendment Act 95 of 1977 and the case of *Binga v Administrator-General, South West Africa and Others*)¹ but after 1978 South African legislation did not automatically apply to Namibia. This only applied to the extent that it had been declared so by proclamation by the Administrator-General of South West Africa (Namibia). After the promulgation of the Namibian Constitution, however, full legislative power was vested in the National Assembly 'with the power to pass laws with the assent of the President'. Current legislative functions therefore vest in the National Assembly but the legislative sources of Namibian law have more components than the enactments passed by the National Assembly of Namibia.

In the context of property law, the current sources of property law in Namibia comprise the Namibian Constitution, legislation, Roman-Dutch law and international conventions. The Constitution has two pertinent provisions relating to property rights and property relations in Namibia which have been used as the legal basis of land reform in Namibia. The common law has substantially remained basic Roman-Dutch law principles and as developed by precedents of the South African courts. Legislative sources are both South African and Namibian. But as stated earlier, the post-1978 South African legislation does not have general application in Namibia.

The above exposition means that Namibia belongs to the Roman-Dutch Law tradition and it is a truism that because of Namibia's historical connections with the

1 1984 (3) SA 949.

South African Judiciary,² Namibia's common law is greatly influenced by the South African legal system. Purely on account of these historical factors, Namibian legal literature is dominated by writers of South African pedigree, whose publications primarily reflect the South African laws and legal system. Needless to say, there is the need for the publication of autochthonous Namibian legal literature reflecting the current Namibian jurisprudence for reasons stated hereunder.

Following the attainment of independence and sovereignty, Namibia has an independent Judiciary with a Supreme Court as the highest Court of Appeal and therefore South African precedents have only persuasive effect on the Courts of Namibia. The judicial independence endowed on the Namibian Judiciary has led to the development of home-grown jurisprudence by the superior courts of Namibia since independence. The foregoing notwithstanding, the Parliament of Namibia in the exercise of its sovereign legislative functions has promulgated pieces of legislation to address the needs of the Namibian people and in the process some pieces of legislation promulgated by the erstwhile colonial regime have either been amended or repealed.

The cumulative impact is that Namibian law has acquired a national character and identity which must be captured and given due recognition in the legal literature of the country. In fact, there is a practice directive issued by the Judge President obligating counsel appearing before the Superior Courts of Namibia to first and foremost cite Namibian authorities on a point they want to rely on and when citing foreign authorities to declare that a diligent search had been undertaken and that no relevant Namibian authority on the point could be found. In the realm of property law, for example, there have been developments relating to land tenure titles and land reform that have been brought about by the Constitution and legislation. In the premise, therefore, the rationale for the publication of the law of property in Namibia is grounded in the current trend towards the growth and development of autochthonous Namibian jurisprudence and legal literature.

The book contains chapters on traditional concepts of property law such as the scope and nature of the law of property, classifications of things, real rights and personal rights, ownership and possession. Chapter 9 is devoted entirely to remedies, which is a departure from the norm, but where relevant, appropriate remedies are indicated in the specific parts of the text.

In order to give prominence to Namibian property jurisprudence topics on the genesis of the land tenure systems of Namibia, land reform, and property rights of women in Namibia have either been dealt with in separate chapters or been included as parts of other chapters.

Since the publication of the first edition of *Property Law in Namibia*, there have been developments in the jurisprudence of the law of property in Namibia which are captured in this edition. Firstly, a national land conference was held in October 2018 and one of the resolutions taken was the establishment of a commission of inquiry into claims of ancestral land rights and restitution. A commission was set up by the President of Namibia, President Hage Geingob and upon the finalisation of their mandate the commission submitted its reports to the President. Some salient parts of the findings and recommendations of the Report are summarised in chapter 11 of this edition. Secondly, some pieces of legislation have since the publication of the first edition of *Property Law in Namibia* have been promulgated and these include the Sectional Titles Act, 2009 (Act of 2009), Flexible Land Tenure Act, 2012 (4 of 2012) and Water Resources Management Act 11 of 2013 (11 of 2013). Thirdly, there is additional information on the Communal Land Reform Act 5 of 2002, which includes the registration process and case law. Fourthly, chapter 11 on the historical development of the Land Tenure System of South West Africa/Namibia contains the write-up on the tenure system of the *Baster Gabet* of Rehoboth. Fifthly, this edition contains the principles of water law in Namibia as contained in the Water Resources Management Act 11 of 2013 and the common law, and the development of settlement areas in term of the Regional Councils Act 22 of 1992. Finally, this edition also captures the latest figures and statistics.

2 See the Supreme Court Act 59 of 1959.

This publication is meant to be utilised by law academics, property law lecturers, legal practitioners and conveyancers, law students, students pursuing specialised land related programmes such as land use planning and officials in government ministries, especially the Ministry of Lands and Resettlement.

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Windhoek

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A publication on the property law of Namibia will inevitably include references to South African authorities. Prominent South African authorities such as WA Joubert *et al The law of South Africa* (1987); DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993); WJ Hosten *et al Introduction South African law and legal theory 2nd ed* (1997); PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006); F du Bois Wille's *principles of South African law 9th ed* (2007); AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009); and H Mostert *et al The principles of the law of property in South Africa* (2010) have been cited. The author hereby wishes to acknowledge references to their publications.

The chapters on the genesis of land tenure systems of Namibia, land reform in Namibia and property rights of women in Namibia contain contributions from the publications by S Haring 'Property rights and land reform in Namibia' in B Chigara (*Southern African development land issues: Towards a new sustainable land relations* (2012); SK Amoo & SL Haring 'Namibian land law: Land, law reform, and the restructuring of post-apartheid Namibia' in *University of Botswana Law Journal* Vol 9, June 2009; SK Amoo 'The exercise of the rights of sovereignty and the laws of expropriation of Namibia, South Africa, Zambia and Zimbabwe' in MO Hinz *et al The Constitution at Work: 10 years of Namibian nationhood: Proceedings of the conference: Ten Years of Namibian Nationhood, 11-13 September 2000, Windhoek, Namibia* (2002); D LeBeau *et al Women's property and inheritance rights in Namibia* (2004); and D LeBeau *et al Structural conditions for the progression of the HIV/AIDS pandemic in Namibia* (2004). I accord similar acknowledgments to all.

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Writing this book exerted strains on the patience and understanding of my family, my wife Chipso and my children, Yaa, Kwesi, Ama and Ewuraefua. I admire the steadfastness that they demonstrated towards the achievement of my goal. I am most grateful to them and may the Almighty grant them good health and wisdom to continue to afford me such support and comfort.

BIOGRAPHY

Prof Emeritus Samuel Kwesi Amoo

Prof Emeritus Samuel K Amoo was appointed a member of the academic staff of the Faculty of Law, University of Namibia, in August 1995 and retired in December 2018 as Associate Professor. He was involved in both undergraduate and graduate tuition and performed various administrative responsibilities including Dean of the Faculty of Law and Acting Director of the Justice Training Centre (JTC). He also performed quasi-judicial functions in his capacity as chairperson and member of the panels of various disciplinary hearings. Prof Amoo has been an accredited mediator of the High Court of Namibia since 2014 and is currently a legal consultant.

Prof Amoo's quasi-judicial responsibilities include particularly serving as the chairperson of an Appeal Tribunal under the Communal Land Reform Act and an accredited mediator of the High Court of Namibia. In general, he has performed functions involving resolution of labour disputes, adjudication, judgment writing and rendering of legal advice.

Prof Amoo has written extensively on the Namibian legal system in books and reputable journals of international standing and his recent publication is a Training Manual for Mine Workers Union of Namibia on Namibian Labour Law.

He has also undertaken some legislative drafting assignments including the drafting of the consolidated Draft consolidated Bill of the Agricultural (Commercial) Land Reform Act, 1995 and the Communal Land Reform Act 5 2002 of Namibia, Regulations for the Appeal Tribunal established under the Communal Land Reform Act, Regulations for the National Council for Higher Education, the Constitution of the Namibia Red Cross and Amendments to the Namibia Red Cross Act.