

February 21, 2007

Enquiries: GMT Kirsten

Circular Letter: PI/STI/2/2007

TO : ALL REGISTERED SHORT-TERM INSURANCE COMPANIES

RE: APPOINTMENT OF LEGAL PRACTITIONER BY LEGAL INSURER

NAMFSA received queries on whether insurance companies are allowed to prescribe to the policy holder who their legal representative would be in light of article 12 (1) (e) and 11(5) of the Namibian Constitution. In terms of article 12 (1) (e) *"All persons shall be afforded adequate time and facilities for the preparation of their defence, before the commencement of and during their trial and shall be entitled to be defended by a legal practitioner of their choice"*

The question to be answered is whether insurance companies can decide which legal practitioner should represent an insured that has a policy for legal insurance with them. We have perused the policy contracts of the companies in order to determine how legal practitioners are appointed for the Insured.

Rarely, the policy contract of some companies makes no reference to the procedure of appointing a legal practitioner. However, some has provisions on how the legal representative would be appointed. The provisions in the contracts are made in terms of the *insured risk, excess are applied and consideration of accreditation of Legal Practitioner to deal with the matter. Member's choice of Accredited Legal Practitioner are provided for, however the final decision shall be made by the company having regard to the nature and magnitude of the matter, consideration of cost and specific fields of expertise of the legal practitioners proposed by the Member and the company respectively.* It appears that the insurance companies would in most cases have the final say as to which legal practitioner would be appointed. The question is whether this right to appoint a legal practitioner infringes on the constitutional right of the Insured to be defended by a legal practitioner of his choice.

The case of **S v Kuzatjike** 1992 NR 70 (HC) dealt with the right of an accused to have a legal practitioner of his choice. The accused had applied for a postponement of his trial due to the fact

that Counsel from South Africa who had been briefed on the case was unavailable. The accused relied on article 12 (1) (e) of the constitution advancing to the court that he was allowed by the Constitution to be defended by a legal practitioner of his choice. The court relying on South African and Zimbabwean case law held that *"neither in South Africa nor Zimbabwe which had a similar clause in its constitution was an absolute right to insist on a specific counsel recognised"*. This would mean that the right to have a legal practitioner of one's choice should be exercised reasonably and that a defendant or accused cannot request a postponement in order for the court to wait for the preferred legal practitioner.

The Zimbabwean case of **Paweni and Another v Acting Attorney** 1985 (3) SA 720 relied on in **Kuzatjike** sets out what the right entails more clearly. Judge Frank in the **Kuzatjike** case did not discuss what the right entailed. In the case of **Paweni** the Zimbabwean Supreme Court had to decide whether the court a quo's refusal to grant a postponement infringed on the right of the appellants. The Supreme Court held that *"The inalienable right to a 'legal representative of his own choice' afforded to an accused by section 18 (3) (d) of the Constitution of Zimbabwe does not mean that if for one reason or another it is not convenient for the person chosen to conduct the case on the date set for hearing, the Court has no option but to order that the proceedings be held in abeyance pending his availability. What is protected is the right of an accused to resist a legal practitioner being foisted upon him even where such service will be rendered without charge. He is entitled to choose whom he wishes to represent him, but if his prime choice is unavailable, then he is obliged to look further afield and engage someone else. In other words the right of choice is always subject to the practitioner's availability on trial date"*

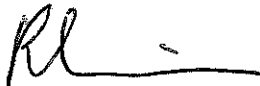
This implies that the Insured was consulted on who should represent him. The right of choice is subject to availability of the legal practitioner chosen. However the case of Paweni stated that "what is protected is the right an accused to resist a legal practitioner being foisted upon him".

We consequently direct that the insurance company should not force the Insured to take a particular legal practitioner should he have chosen another legal practitioner.

In addition, the matter shall be brought to the attention of the Insured through consumer education programmes. We will inform consumers about their right to choose a legal practitioner, in order to protect themselves from having legal practitioners forced on them by insurance companies.

We trust that the above is in order, and further anticipate your usual compliance.
However you are welcome to contact us if you need any clarification.

Yours sincerely



Rainer Ritter

REGISTRAR SHORT-TERM INSURANCE COMPANIES