

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI  
JUDGMENT

Case No.: CC 5/2018

In the matter between:

**THE STATE**

v

**MUKONKA AMBROSIUS HAINGURA**

**ACCUSED**

**Neutral citation:** *S v Haingura* (CC 5/2018) [2019] NAHCNLD 78 (5 August 2019)

**Coram:** SALIONGA J

**Heard:** 10,11,12,13 and 18 June 2019

**Delivered:** 5 August 2019

**Flynote:** **Criminal law** – Murder and defeating or obstructing the course of justice – Private defence — Requirements for private-defence reiterated – No evidence led supporting the defence – Determination of — Nature of weapon used, position of body where injury inflicted, number of wounds and force used in inflicting injuries considered — *Dolus directus* – *Found not* to have acted in self-defence.

**Criminal law** – Accused after hacking the deceased, did everything in an attempt to defeat or obstruct — No evidence that accused destroyed or discarded evidence

relevant to the investigations. Intention present — Attempt to defeat or obstruct the course of justice proven.

**Summary:** The accused was charged with murder and defeating or obstructing the course of justice. The State alleged that the accused hacked the deceased and buried his body. He also hid the murder weapon and other instruments used in carrying out his act. At trial, accused pleaded not guilty. His defence is that he acted in self-defence in that he had a troubled relation with his father, who assaulted and threatened to kill him. Accused admitted to have caused the injuries as indicated in the Post Mortem report.

Intention is a state of mind which can be inferred from the circumstances of each case. In determining the type of *mens rea* in a murder case, the court will have to look at the nature of the weapon used, together with the position on the body where the injury was directed and the force used. In the present case accused and deceased were in a domestic relationship. The deceased died at the scene due to multiple injuries. In his own version accused hacked his father while lying on the bed in his bedroom. With intent to defeat or obstruct or attempted to defeat or obstruct the course of justice, the accused removed the body of the deceased from the bedroom and buried it. He subsequently hid the bloody items and the murder weapon.

*Held;* that there was no imminent danger or attack on the accused and the accused did not act in self-defence.

*Held further;* that there is no evidence that accused destroyed or discarded evidence relevant to the investigation and thus the complete offence of defeating or obstructing the course of justice was not proven but an attempt to defeat or obstruct the course of justice was proven.

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### ORDER

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Count one: Guilty of murder with direct intent.

Count two: Guilty of attempt to defeat or obstruct the course of justice.

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## JUDGMENT

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SALIONGA, J;

*Introduction*

[1] Accused in this matter is charged with murder read with the provisions of the Domestic Violence Act, Act 4 of 2003 on count one and defeating or obstructing or attempting to defeat or obstruct the course of justice on count two.

[2] The State is represented by Mr Shileka and Mr Bondai on instruction of legal aid appears for the accused.

[3] The allegations according to the summary of substantial facts are that;

'Mukonka Simon Mangundu, the deceased in this matter and the accused were in a domestic relationship as the former is a father to the latter. During the late afternoon hours on the 16 April 2016 at Ndama location in the Rundu district, the deceased was lying down in his bedroom. After his other son left the house, the accused armed with a panga or machete entered into the deceased's bedroom and brutally hacked him several times on the head, neck, abdomen, arms and hand. The deceased died at the scene due to multiple wounds on the head, body and neck as well as bleeding. The accused with intent to defeat or obstruct or attempt to defeat or obstruct the course of justice as highlighted in count two of the indictment, removed the body of the deceased from the scene and buried it near the sewage dam and he further hid the bloodied bedsheets and other items as well as turning the blood stained mattress upside down'.

[4] Accused person pleaded not guilty to both counts. In his plea explanation marked exhibit 'F,' accused stated that he killed the deceased in self defence and had no intention to defeat or obstruct the course of justice in this matter. In the same explanation the accused admitted the identity of the deceased as well as the cause of death as per the findings in the post-mortem report PM 78/2016 compiled by Doctor Yuri Yangazo. He further stated that he will abide by and adhere to all admissions made before this court in the pre-trial pleadings filed of record.

[5] A bundle of exhibits were handed in by consent, indexed exhibits 'A to H' and were marked accordingly. Amongst those exhibits is a post-mortem report where multiple injuries on the head, arms, abdomen, neck and open skull fracture were highlighted. The doctor indicated under a schedule of observations a fracture of occipital area 4 x 6 cm and brain damage. On the neck structures he noted wounds of 11 x 6 cm. The photo plan compiled by D/Sgt Zombo tells a tale of monstrous and brutal savage on the deceased as the face and the neck were totally disfigured. Furthermore a panga was also handed in as Exhibit 1.

### *The Facts*

[6] Sylvester Samoka Samoka was the scene of crime officer who took pictures of the scene of crime. He testified that on 16 April 2016 between 20h00-22h00 he received a report from the charge office about a man who was sleeping in the house and got missing. He drove to the house. Upon arrival, he observed blood on the mattress and on the zinc in the main bedroom. He was taken outside the house by the reporter where he was shown an area which looked like raked or levelled. He went back in the house inspected the room and up in the ceiling he saw blood splatting. He went back to a raked area and inspected further. Thereafter he requested a spade in order to open up the covered hole. After removing around 20 cm soil from the raked area, he saw a checked cloth. When he touched it, it felt like a hip of a human body which observation was confirmed by his colleague. He then called chief inspector Kakoro of Serious Crime Subdivisions who arrived at the scene of crime together with other officer. They exhumed the body and the witness took pictures of the scene and the bloody items. The witness revisited the scene the following day the 17 April 2016 and took more pictures and measurements of the distances between various points at the scene of crime. It is the witness's evidence that Inspector Kakoro and his colleague discovered a panga wrapped in a blue overall in another room. They also discovered two bags with bloody linen / bed sheets, blankets and pillow cases hidden under the animal hay bags. He prepared the photo plan of the incident. The witness gave a detailed description of the photo plan he compiled which was admitted in evidence .According to the witness the accused was taken to the charge office the same day by chief Inspector Kakoro.

[7] In cross-examination Samoka stated that he took photos on the 16 April 2016 and the measurements were only taken the following day. He further confirmed when he arrived at the scene the murder incident had already taken place, the bloody items and the alleged weapon were already hidden. He further confirmed that he did not see the accused and deceased arguing or fighting.

[8] Uatama Richard is a constable in the Namibian police. He received a call from Inspector Kakoro about a report of an incident that happened at Ndama location and they were directed to a certain house. Upon their arrival, they found Detective Sergeant Samoka and Chief Inspector Kakoro. They were taken to a room in the corridor wherein he immediately observed blood stains on the wall and on the white mattress which was turned upside down. Outside the house they dug out the body and discovered that it was for a man who was wearing a boxer. It was partly visible on one side and on the other side was still covered. When the body was removed they discovered that it was a male person who had a trunk. The body was lifted up and had deep injuries on the head and on the neck areas. The witness and Inspector Kakoro took the accused to the police station where he was interviewed.

[9] The witness further testified that after a lengthy interview accused told them that he used a panga to assault his father which caused his death. Thereafter he buried him. At that stage Inspector Kakoro explained his rights. The accused then decided to go and point a place where he hid the murder weapon. They called Sgt Samoka to accompany them to the scene for purposes of taking photos. Accused took them to a room opposite the one the deceased was murdered and pointed out to them a murder weapon wrapped in blue overall. It had bloodstains on it and was hidden underneath the mattress. It was picked up as exhibit. Accused further took them outside the yard where he pointed out two bags hidden between hay bags. On the accused's defence in respect of count two, the witness stated that if a person would bury the body, turn a mattress over to hide blood stains, wrap a weapon and take it from the scene and hide it and other exhibits he would call that conduct of someone trying to defeat the course of justice.

[10] In cross examination the witness testified that when they initially confronted the accused with allegations that he was seen coming from his father's room with bags, accused denied at first and later confirmed that to be the case. The witness denied that the accused was assaulted by Inspector Kakoro and that accused did not tell them that the deceased charged at him. The accused in fact told them that he found his father sleeping in bed and he attacked him.

[11] Mukonka Fabianus Haukuwo is the son of the deceased and a young brother of the accused. He testified that on the day of the incident around 16h00 in the afternoon, he was home reading or studying when the accused arrived home. He greeted the witness and sat on the chair. Whilst studying his friend sent him a text that he should go and meet him at the soccer field of Kamukono Secondary School. When the witness went to meet his friend he left his father with his elder brother at home. He testified that when he returned he did not find anyone at home. He went to his father's room but he was not there and the room was locked.

[12] Fabianus further testified that he went back to the sitting room to listen to music. Whilst there listening to music, he heard a noise and he went to check. He did not see anything. As the noise was persisting he went to his father's room. He saw the accused coming from his father's room. He asked him what he was looking for in the parent's room and where was the father. Accused said he did not know. The witness investigated further and saw blood on the wall inside the room. He went outside and came across a hole dug and raked. He texted his mother to call his father because he called his phone, it was off. When his mother arrived at home the witness went around showing her what he saw in their bedroom and a hole outside.

[13] It was Fabianus further evidence that from the hole outside his mother went back to the main bedroom. She turned the mattress which was turned over and she saw a lot of blood. His mother started crying. That prompted the witness to text the cousin who arrived in a company of a colleague. The cousin went to report the matter to the police station. When confronted with the accused's defence, the witness said accused was lying because when he left the house they were not fighting. The accused was not at home when the cousin arrived but was there at the time his mother arrived home. He

was following them while showing his mother the scene of crime. Accused only returned home after his cousin arrived from the station with the police.

[14] In cross examination the witness disagreed that there was a heated argument between his father and the accused because the father was in the room and accused was outside. The witness maintained that the relationship between his father and the accused was fine except that the accused used to smoke drugs and the deceased used to advise him to stop. He however could not say his father charged at the accused because his father was sleeping and the blood was on the bed. He was not at home when the incident happened. The hole outside was fully covered with sand and it was in fact not a hole but a spot with wet sand on top.

[15] The next witness to testify was Kazumba Veronika Mutando a wife to the deceased and a biological mother of the accused person. On Saturday, 16 April 2016 she worked from 7h00 in the morning till 19h00 in the afternoon. At around knocking off hour she received a text message from Fabianus that she should call her husband. She tried calling the number but was not reachable. When she arrived at home she met Fabianus in the yard who told her that he wanted to show her something in their bedroom which looks like bloodstains. He also told her that he saw his elder brother coming from their bedroom sweating. As she entered their bedroom she noticed that the sheets were changed with other sheets. The bed was properly laid assuming her husband changed the sheets. She also saw blood spattered on the wall. She was taken outside where there was a hole covered with sand and raked on top with a rake.

[16] When they returned back in the house they met the accused and she asked him in a strong tone 'where was his father' and he replied that he didn't know. According to the witness accused looked shocked and afraid when he was replying to her question. When she saw new sheets on the bed she got worried and was the reasons she lifted the mattress to observe a lot of blood on it. The matter was then reported to the police by a relative.

[17] Under cross examination the witness testified that there used to be some heated arguments between the deceased and the accused after the latter failed grade 12 and

the deceased did not take it lightly. She related to an incident when she entered the accused's room and saw the deceased in a physical confrontation with the accused and the accused jumped from the bed telling the father 'please stop it is a taboo to hit back'.

[18] Ndjamba Petrus is the deceased nephew and the accused's cousin. He confirmed the testimony of his cousin Fabianus and that of Mrs Mutando. He testified that he received a text from Fabianus and when he arrived at his uncle's house he was shown blood splashed on the wall. He was also shown the mattress which was turned over and it had a lot of blood. They further informed him that behind the house there was a hole. The witness went to inspect and found hole covered with sand and was levelled with a rake. He then told his aunt that it was a serious matter that needed reporting. The witness was the one who reported the matter and he pointed out the scenes as it was shown to him by Fabianus. He was present when the body was exhumed from the hole.

[19] Next the State handed up the confession by agreement containing accused's statement he made in terms of section 217 of the Criminal procedure Act 51 of 1977 to the District Magistrate Helen Olaiya of Rundu. The accused in that purported confession stated the following amongst others: They were three in the house and his brother went out leaving him the accused and their father. He then wanted to go to the salon. He asked the father N\$30 which he said he did not have. Accused went and sat outside for about 30 minutes. Whilst outside he was thinking how his father used to say and treat him which he did not take very seriously. His father said to him very soon he was to kill him. He then thought that he should kill him before his father kills him. It was at that stage he went to take the panga, went into his father's room for the second time. He used the panga to cause his death by chopping him with it. After he realised the father was dead, he wrapped the body in a blanket because he did not want his young brother to find out. He dug a hole outside buried him and levelled the hole with a rake. He thereafter went to sit where he was seated when his mother came she found bloodstained on the wall and called the police.

[20] The last State witness was Kakoro Johannes Haufiku the head of Serious Crime Subdivision in the Namibian police in Rundu. He received a call from Sgt Samoka that



he got a report that a person was killed in Ndama Location and he attended the scene on the night of the incident. Upon his arrival he was directed inside the house and in the room he observed blood on the mattress, bed and on the wall. The bed was turned upside down. He was taken outside at a hole where he saw a body of a human being. After the body was exhumed it was inspected and he observed wounds on the face and head. When the preliminary investigations were done at the scene the body was identified by his wife as that of Mukonga Simon Mangandu, a 49 year old male, Namibian and a resident of Ndama location who was a soldier. The body was transported to Rundu police mortuary by warrant officer Marisane who was assisted by two police officers at the mortuary to offload the body.

[21] During the investigation he learned that the deceased was at home before he was killed and was with his two sons the accused and his younger brother. Thereafter the younger brother left the house leaving the accused and the father. That time the father was in his bedroom. When the younger brother returned he spotted blood splatting in the room. When accused was asked what happened he responded that he did not know. The witness approached the accused, introduced himself and explained his rights and took him to the police station, where the interview was conducted. Accused undertook to show them where he hid the panga and other items like bed sheets and a rake. During the pointing out photos were taken as per Exhibit "J". On the accused defence to count one the witness reiterated what he had testified. With regard to count two the witness made it clear that accused defeated the course of justice in burying the body, raked and hid the exhibits.

[22] At the end of the state's case, the accused testified in his defence and had no witness to call. He testified that he had a troubled relationship with the deceased since 2016. His father used to assault him and related to the two incidents of assault and one of assault by threat. Accused could not shed more light as to why their relation had broken down. When asked by his legal representation why a troubled relationship, the accused replied that on the first incident it could be because his father asked him where he was coming from that day and he told his father that he went to visit his friend. The second assault happened when he was found with empty water containers

in his room and was told to pick them up, fill and put them back in the freezer. In his testimony accused testified to a third incident when the two met in the corridor and the father asked the accused if he had cooked and cleaned the house to which the accused answered that he was first going to take a bath. On that basis the father promised to kill him soon. The troubled relationship was confirmed by his mother who testified that the relationship between the deceased and the accused was not good after the accused failed to do well in grade 12 his father did not take it lightly.

[23] The accused further testified that on the date of the incident he was sitting outside the house when his younger brother went out. He stood up, fetched a machete and went to his father's bedroom. He found. When he entered his room his father was laying on the bed and could see that he was not sleeping because his eyes were flicking. He immediately hacked him more than once because he did not know what the deceased's intention was. He was however unable to say how many times he cut the deceased. The witness stated that after he observed that his father was dead, he wrapped him in a blanket. He went outside the house, dug a hole inside the yard. He thereafter buried his body alone. He took the panga wrapped it in a blue overall and went to hide it in his sister's room under the mattress. He also turned the mattress upside down. The witness explained that he did all what he did because the deceased threatened to kill him soon and he did not want to die first. He testified that he was sober. He believed the deceased will kill him that is why he hacked the deceased with a panga. He wanted the deceased to let go of him.

[24] Counsel for the State submitted that the accused's action were pre-mediated and is bound to be convicted of murder with direct intent on count one. He had time to reflect and reconsider his unlawful and intentional acts but he didn't. According to Counsel what prompted the deceased to react the way he did to the two incidents was his own conduct to his father's authorities and expectations bordered on some casual disrespect. With regard to the second incident counsel submitted that this assault amounts to displeasure of the deceased to the accused conduct of keeping empty water containers in his room. The incident which caused the father to promise to kill his son amounted to nothing other than a father who had enough of his errant son. Submitted

further that the accused in cross examination conceded that at the time he hacked the father with a panga there was no attack on him which had either commenced or imminent. On count two counsel submitted that accused be found guilty of attempt to defeat or obstruct the course of justice. That was clear from the efforts of the police officers exhuming the body from the ground, were the wounds were soaked with sands and were they tried to find out where the object used and other exhibits were hidden.

[25] Counsel for the defence submitted that the State had failed to prove its case beyond reasonable doubt and implores this court to find him not guilty and acquit him on two charges. In substantiating his submission counsel referred this court to case law and other literature regarding the defence raised by the accused. He further submitted that in the present case evidence showed that the relationship between the deceased and accused were punctuated by unexplained conflicts and was not challenged. Prior to that fateful day the deceased confronted the accused and threatened to kill him soon which threats the accused took seriously. He submitted further that a reasonable person in the position of the accused would have reacted in the same way as the accused did on count one. He further submitted that his explanation that he did not want his family in particular his younger brother to discover what he had done before he reported the matter to the police be accepted and pray that accused be acquitted on both charges.

### *The law*

[26] Both counsel referred me to authorities in connection with the requirements of self –defence and I am grateful for that. The defence raised by the accused is one of private defence. Private defence is defined in Snyman<sup>1</sup> as follows: ‘A person acts in private defence and her act is therefore lawful if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to attack.’

[27] The test for private defence was summarised in *S v Naftali*<sup>2</sup> as follows:

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<sup>1</sup> Snyman CR *Criminal law* Lexis Nexis Durban 5<sup>th</sup> Ed p 103.

<sup>2</sup> 1992 NR 299 HC at 303-4

'(a) the attack, to give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent. (b) the defence must be directed at the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed. A further requirement is that for a defensive act is that the attacked person be aware of the fact that he or she is acting in private defence. The onus is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist or that the bounds of self-defence had not been exceeded'.

[28] Masuku J, in *R v Mtsetfwa*<sup>3</sup> in trying to find the proper application of self-defence, considered a number of judgements from other jurisdictions in which the whole concept of the defence fell for determination. He in particular referred to *Mmoletsi v S*<sup>4</sup> where Dr Twam J.A had said: 'Under the law of this country when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend... The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self-defence'. I respectively endorse the aforementioned court's reasoning.

[29] 'In *Ntanjana v Vorster & Minister of Justice*<sup>56</sup>– D Van Winsen AJ stated the following:

The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom. Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The

<sup>3</sup> (81/10)[2010]SZHC 145 [16 September 2010]

<sup>4</sup> [200]2 BLR 708

<sup>5</sup> 1950 (4) SA 398 (C) at 406A

<sup>6</sup> (1950 (4) SA 398 (C) at 406A – D Van Winsen AJ

self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by law when judging the conduct of a person acting in a situation of imminent peril.'

### *Evaluation of evidence*

[30] Having stated the legal position of private defence I am now proceed to relate the facts of this case to the law. Accused in his testimony admitted to having entered the deceased's sleeping room on the fateful day armed with a machete, found the deceased lying on his bed, attacked the deceased with the machete and inflicted fatal injuries on the deceased who succumbed to the injuries. Accused further admitted that after killing the deceased, he went, dug and buried the deceased. He even levelled the said place and hid the items involved in the commission of the crime. The only issue in dispute is whether or not the accused acted in self-defence in the instant case.

[31] Accused testified that he only acted to ward off a murderous threat on him by the deceased. However at the time accused hacked the deceased to death the scuffle and assault was something of the past as they happened way before the date of the incident. To further demonstrate the accused's intention to kill the deceased is the fact that the accused, not only did he hack the deceased once but hacked him several times on the head, arms, hands and abdomen until he was sure he is dead.. When regard is had to the number of wounds inflicted, the seriousness and the location of those wounds and lethal weapon used on a human being, appears to suggest a deliberate motive. I find no justification that necessitated the use of the panga on a defenceless person.

[32] The accused further testified that he killed the deceased because he did not want to die first. Even if the accused's version is to be accepted that he felt threatened by the deceased utterance and whatever flashbacks he had about the previous assaults he might have received at the hands of the deceased, there can be no doubt that his action

of resorting to using the panga and hacked the deceased several times was not only unnecessary but wholly disproportionate as well.

[33] Accused in this matter had ample time to reflect and desist from his unlawful and intentional thoughts but instead he went to fetch a panga and proceeded to viciously and mercilessly hacking his father. The most logical thing expected of someone to have done in his circumstances was to report the threats to the police which he did not do. This court can in this regard come to no other conclusion than that the deceased at the time of the attack must have been sleeping and correctly said unarmed.

[34] Again when regard is had to the instructions put to Fabianus and Uatema that the deceased charged the accused it is clear that it was an afterthought. If the accused's version was true why should the accused not be consistent with his defence. Accused when confronted in cross examination why he did not report what he considered was a serious assault by threat, he replied that he did not think about it or did not come to his mind. In the circumstances it would appear the accused acted in revenge or retaliation to an earlier grievances as stated in *Mmoletsi*<sup>7</sup>. I agree as I have no reason to depart from the law. It is safe to conclude that there was no manifestation of imminent danger or attack. Therefore the accused's defence ought to be rejected not only as an afterthought but as false beyond reasonable doubt.

[35] With regard to count two, both counsel conceded that a complete offence of defeating or obstructing the course of justice had not been proven. A person could be found guilty of defeating or obstructing only if it could be proven that the justice had in fact been defeated. Accused did not destroy or discarded the evidence relevant to the investigation and despite that the accused cooperated with the police in pointing out the hidden murder weapon and other exhibits, there was until then a clear manifestation on the accused's part to attempt to defeat or obstruct the course of justice. This can be deduced from the efforts of the police officials in exhuming the body from the ground, the wounds which were supposed to be visible but instead were soaked with sand and the officers' efforts in trying to find where the murder weapon and other exhibits were

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<sup>7</sup> Supra para 28

hidden, were all clear indication that accused is guilty of an attempt to defeat or obstruct the course of justice. The accused stands to be convicted for attempting to do so.

*Conclusion*

[36] For the above reasons, I am satisfied that the State has proved beyond reasonable doubt that the accused did not act in self-defence when he hacked the deceased several times. The court is further satisfied that the explanation given by the accused on count two was an afterthought and is accordingly rejected as false beyond reasonable doubt.

[37] In the result:

Count: one: Guilty of murder with direct intent

Count two: Guilty of attempt to defeat or obstruct the course of justice.

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J T SALIONGA

JUDGE

**Appearances:**

For the State:

Mr R Shileka

Of Office of the Prosecutor-General, Oshakati

For the Accused:

Mr G Bondai

Directorate of Legal aid, Ondangwa