



15 July 2022

**The Ombudsman**

Mr Basilius Dyakugha

**C/o Ms Imba van Wyk and Mr Titus Mupoh**

Via email: [ivanwyk@ombudsman.org.na](mailto:ivanwyk@ombudsman.org.na), [tmupoh@gmail.com](mailto:tmupoh@gmail.com), [tmupoh@ombudsman.org.na](mailto:tmupoh@ombudsman.org.na)

Dear Sir

**Dr JÜRGEN HOFFMANN // MINISTRY OF FINANCE AND MINISTRY OF  
HEALTH AND SOCIAL SERVICES**

**LACK OF CREDIBILITY OF THE OFFICE OF THE OMBUDSMAN**

1. We refer to the abovementioned complaint which was lodged with the Office of the Ombudsman on 13 July 2016 as well as your letter dated 10 June 2022 (a copy of which is attached for the benefit of all parties copied hereto).
2. Your said letter, which we will reply to in detail hereunder, not only closes the door on a very serious and well substantiated complaint, based on utterly disingenuous grounds, but the letter itself is a gross violation of the complainant's constitutional right not to be discriminated against, while you are supposed to protect the public against exactly such violations. As this is a matter of public interest, which should be of grave concern to all Namibians, and as this matter points to the lack of credibility of your office, for reasons elaborated on hereunder, we have copied the appointing authority of the Ombudsman, His Excellency, President Hage Geingob, and the Judicial Service Commission, on whose advice the President makes such appointment.
3. We also copy the Namibian media, to alert civil society that your office may very well now have become a politically captured institution, seeking to protect those who abuse public power, instead of the victims of such abuse.
4. Before we reply to the specific content of your letter, we provide more background on this complaint for the benefit of all concerned.

## Constitutional duty of the Ombudsman

5. The position of Ombudsman is a crucial pillar in our free, democratic society, created by Chapter 10 of the Namibian Constitution. In addition to his constitutional powers, the Ombudsman has additional powers as set out in the Ombudsman Act 7 of 1990. Article 89(2) of the Constitution states that the Ombudsman shall be independent. Article 89(3) states: “... *all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.*”. As per Article 90(1) the Ombudsman is appointed by the President, on recommendation of the Judicial Service Commission.
  
6. As per Article 91 the duty of the Ombudsman includes (own emphasis throughout):
  - a. *“the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society”*
  
  - b. *“the duty to investigate complaints concerning the functioning of the Public Service Commission, administrative organs of the State, the defence force, the Republic of Namibia police force and the correctional service in so far as such complaints relate to the failure to achieve a balanced structuring of such services or equal access by all to the recruitment of such services or fair administration in relation to such services”*
  
  - c. *“the duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under this Constitution have taken place”*
  
  - d. *“the duty and power to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding Sub-Articles ...”*
  
7. In executing his duties, the Ombudsman may issue subpoenas for attendance of persons before the Ombudsman and for the production of documents, to prosecute persons contemptuous of such subpoenas, to question persons, and to bring proceedings in a competent Court for an interdict to secure the termination of the offending action or conduct, or the abandonment or alterations of the offending procedures.

## Cause of the complaint

8. On 13 July 2016 the Namibian Private Practitioners Forum (NPPF) supported one of its members, Dr Jürgen Hoffmann (the “complainant”), to lodge a complaint with the Office of the Ombudsman based on the following facts:

- a. The complainant is a registered healthcare provider who enjoys the right to practice his profession as guaranteed under Article 21(1)(j) of the Namibian Constitution.
- b. The complainant practices his profession from a private health facility as defined in section 30 of the Hospitals and Health Facilities Act 36 of 1994 (the “Act”).
- c. The Act requires all private health facilities to be licensed and states under section 31 thereof that: *“no person shall establish, conduct or maintain a private health facility, or offer consultations to or engage in the treatment of patients or render any health service at such private health facility without obtaining a licence issued under this section in respect of such health facility, or continue to conduct or maintain such private health facility after the expiry of such licence unless that licence has been renewed in accordance with the provisions of this section.”*
- d. A person who practices from a private health facility which is not licensed under section 31 (quoted above) commits an offence and can be imprisoned upon conviction.
- e. On 26 June 2016 the complainant attempted to file with Ministry of Health and Social Services (“MoHSS”) his duly completed prescribed form for annual renewal of his private health facility license.
- f. The MoHSS refused to accept the application on account of the complainant being unable to provide a Tax Good Standing Certificate from the Ministry of Finance.
- g. There exists no statutory provision by which a Tax Good Standing Certificate is a requirement for the renewal of a private health facility license.
- h. On refusal of his application form the official at MoHSS explained to the complainant that: *“this is a new provision since October 2015 ... no facility will be inspected that does not hand in a Good Standing Certificate from Inland Revenue.”*
- i. The said official provided the complainant with a letter from Ministry of Finance (a copy of which is attached hereto for ease of reference) and told the complainant that: *“we are doing what Ministry of Finance asks”*.
- j. The letter states inter alia that as *“part of tax reforms”* Tax Good Standing Certificates must be provided when applications are made for *“renewal of practicing licenses”* (sic).
- k. The NPPF received several similar complaints before, and also many after this complaint was lodged with the Ombudsman.
- l. In this instance the complainant could not obtain a Good Standing Certificate because he lodged a legitimate, pending dispute with the Commission of Inland Revenue, which

dispute was handled on his behalf by a competent Chartered Accountant - but this is in any event not relevant to this complaint to the Ombudsman.

### **After the complaint was lodged**

9. Only on 15 September 2016 (two months after the complaint was lodged) did the complainant receive an acknowledgment of receipt of his complaint from Ombudsman's office, together with an enquiry that read: "... *it is not clear to me concerning the exact remedies you are seeking from us. Can you put me into perspective in order to avoid speculation?*"
10. Both the complainant and the NPPF's legal practitioner provided a response immediately.
11. The response from the NPPF's legal advisor read as follows (verbatim):

*"I refer to your enquiry in this matter directed to the complainant and in addition to his reply hereunder hope I can be of further assistance with the following:*

- *The Office of the Ombudsman is created by the Namibian Constitution;*
- *In terms of Article 91 it is the "duty" of the Ombudsman to "investigate complaints concerning alleged instances of violation of fundamental human rights ... abuse of power ..." by an official of government;*
- *This is exactly what the complaint in question amounts to;*
- *Fundamental human rights are found in Chapter 3 of the Constitution and includes Article 18 which states: "Administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and relevant legislation ...";*
- *The ministries of Health and of Finance are administrative bodies who must comply with legislation;*
- *More particularly, the inspection and licensing regime for healthcare professionals is clearly spelled out in law, and the regulation of this regime set out in statute;*
- *Healthcare professionals ONLY have to comply with this written law and their regulators are similarly BOUND to regulate within the confines of statutory laws; \_*
- *Statutory requirements CANNOT BE EXPANDED BY A LETTER FROM A GOVERNMENT OFFICIAL, and in no way can the subjects of this regulatory regime be expected to comply with such ULTRA VIRES actions;*
- *There can be no doubt that the action of MoF complained about constitutes a "violation of a fundamental human right", which your office has a duty to investigate;*
- *Powers and duties of the Ombudsman is set out, inter alia, in Article 91 (e), and so he has the "duty to take appropriate action to call for the remedying, correction and reversal of [a violation as described above]";*
- *This sub article goes further in providing the Ombudsman with some examples of remedies it may apply, such as reporting an offending officer to a superior, bringing*

*proceedings before a court for suitable remedy to secure termination of the conduct, or abandonment of the offending procedures.*

*As the Ombudsman's rights and duties as well as the facts in this matter are to me really clear, and especially the Ombudsman's duty to **remedy, correct or reverse** the offending action from the MoF, you will forgive me for being a bit confused with your mail now calling on the complainant to explain his preferred remedy.*

*The Ombudsman must ensure that the continued violation of a human right by the PS of MoF ceases immediately. There is no luxury for any of the parties to discuss "preferred remedies" in the face of a constitutional human rights violation.*

*We look forward to your feedback in this matter.*

12. On 11 October 2016 the complainant and the legal advisor of the NPPF met with the (former) Ombudsman on the merits of the complaint, at which meeting, after hearing the facts of the matter, the Ombudsman stated that he is satisfied that this is a clear case of abuse of public power and that the actions of the officials involved were clearly in violation of the complainants constitutional rights and freedoms, including the right to fair administrative procedure as guaranteed under Article 18 of the Constitution. The Ombudsman undertook to take the matter up with the two ministries "*within a week*".
13. On 28 November 2016 the Ombudsman emailed an unsigned copy of a letter (dated 24 October 2016) to the legal advisor of the NPPF, which letter was sent by the Ombudsman to the (then) PS of MoHSS. The Ombudsman advised that a similar letter was also sent to the (then) PS of Ministry of Finance.
14. The Ombudsman's letters inter alia states: "*The directive of the Ministry of Finance is not a legal requirement and it remains an unenforceable directive, unless prescribed by law. If it is a requirement under the tax laws of Namibia, it will be much helpful to point such law out to Dr Hoffmann in order to comply therewith. It is my view that Dr Hoffmann is under no legal duty to comply with a directive which does not have the force of law. I therefore wish to suggest that you issue Dr Hoffman with the license, if he complies with the legal requirements and in the meantime amend Section 31(3) to include an additional requirement. If my interpretation of the law is flawed, kindly point it out to me so that I can inform Dr Hoffmann accordingly; if not, kindly comply with my suggestion.*" [own emphasis]
15. On 17 January 2017 the NPPF provided a further complaint to the Ombudsman in respect of another healthcare provider, on exactly the same grounds.
16. On 17 January 2017 the Ombudsman's office confirmed that the Ombudsman wrote a follow-up letter to both ministries, as no reply was forthcoming from either.

17. On 10 February 2017 the legal advisor of the NPPF personally met the (then) Minister of Health on this matter. The Minister was unaware of the directive from Ministry of Finance, and after acquainting himself with the content, agreed that the letter from Ministry of Finance cannot place an obligation on the MoHSS to enforce same.
18. On 21 February 2017 the complainant received copies of two letters from the Ombudsman's office. One letter is from the Ombudsman to the (then) PS of MoHSS recording that the PS undertook to the Ombudsman to obtain a legal opinion from the Attorney-General. The second letter is from the (then) PS of MoHSS to the Ombudsman confirming that the "*matter was forwarded to the Attorney-General's Office and the Ministry will revert to you soon after receiving the legal opinion.*"
19. Nothing transpired for many months, while the NPPF received more complaints on the same facts, affecting other healthcare providers, until the NPPF on 16 August 2017 reminded the (then) Ombudsman in writing, that there is no progress in this matter, and urged him to use his constitutional and other statutory powers to bring this matter to finality.
20. On 17 August 2017 the Ombudsman wrote to the (then) PS of MoHSS stating: "*Kindly inform me as a matter of urgency whether you have received the legal opinion from the Attorney-General, and if not, what steps you took to secure the legal opinion*".
21. On 20 September 2017 the NPPF made further enquiries with the Ombudsman urging the Ombudsman that: "*the endless waiting game played by MoHSS is essentially nullifying the statutory powers of the Ombudsman*".
22. No reply was received from the Ombudsman and on 2 October 2017 the NPPF again followed up with the Ombudsman stating inter alia that: "*we [the NPPF] are now receiving a large number of enquiries from healthcare providers sitting in the same predicament. Can you please inform us whether anything has happened in this case in the meantime?*"
23. On 2 October 2017 the Ombudsman's office replied stating that he is out of the office and will revert upon his return within a week.
24. On 16 October 2017 the legal advisor to the NPPF again wrote to the Ombudsman as follows (verbatim):

*"I refer to your mail hereunder dated 2 October 2017. Again, two weeks have passed without feedback. A year has now passed wherein the PS of Health was allowed to completely ignore your office on his unconstitutional conduct.*

*We maintain that that the inaction of the PS of MoHSS, exacerbated by the inaction of your office, leaves this matter at an impasse causing the Ombudsman's office to be defunct; and the public is left without the protection as provided for by the Constitution.*

*As stated before, **the public has the right to know**, about the state of affairs, and we will now provide the media with the facts in this case.”*

25. On 16 October 2017 the Ombudsman replied, stating simply: “*We hope to receive their reply soon.*”
26. On 31 October 2017 the NPPF issued a press release, entitled “*Office of the Ombudsman defunct*”. A copy is attached for your ease of reference.
27. On 15 November 2017 the legal advisor again wrote to the Ombudsman as follows:

*“We still have not received a reply from you on the election of the PSES of MoHSS and MoF to ignore your correspondence from last year stating that the MoF letter to MoHSS was null and void.*

*In the meantime, PSEMAS requires all facilities to be registered (and proof to be provided), with many healthcare providers in limbo as the receiver is simply not able to resolve disputes, let alone the fact that the tax certificate cannot possibly be a requirement.*

*The affected healthcare providers can now simply not provide healthcare services to government employees.*

*I just don’t understand, with the clear powers you have in terms of the Constitution, how this matter can be left dormant for so long, regardless of our numerous enquiries.*

*Kindly provide us with an update.”*

28. On 15 November 2017 the personal assistant to the Ombudsman wrote to the legal advisor of the NPPF as follows:

*“On the 1st of November 2017 the Ombudsman addressed letters to both the Permanent Secretary and the Hon. Minister of Health. Copies are attached.*

*I was asked to send you copies, which somehow slipped my mind. I apologise for my oversight.*

*Therefore, it is not the Ombudsman’s fault that you were not kept in the loop, but mine – again, my apologies”.*

29. The letters attached to the above mail stated inter alia (to the then PS of MoHSS):

*“Your failure to cooperate with my office is a clear indication that you do not wish to accord my office the necessary assistance as needed for the effective execution of my duties. This is a constitutional obligation on all organs of state.*

*I therefore wish to inform you that if you do not submit the application of Dr Hoffman and all others, within 30 days to the Minister for his decision, I will approach the High Court to compel you to do so.*

*I trust that it will not be necessary to go to such extremes.”*

And the letter to the (then) Honourable Minister of MoHSS stated:

*“I have pleasure in enclosing copies of my letters dated 24 October 2016, 17 August 2017 and 1 November 2017 in regard to the above matter.*

*The purpose of writing to you is to inform you of my intended legal action if the Permanent Secretary does not comply with my demands.”*

30. On 5 December 2017 the complainant wrote to the Ombudsman as follows:

*“I like to provide feed-back that the Ministry of Health and Social Service indeed inspected my practice, abolishing their previous condition that they will only do so when a Good Standing Certificate from the Ministry of Finance accompanies the application.*

*Please accept my sincere appreciation that the Ombudsman continued to pursue this matter. If not, there would have not been this outcome.*

*I will notify you again once the certificate was issued, which will be the ultimate test if the MOHSS indeed complied with the Ombudsman’s instructions.”*

31. The undertaking by MoHSS to stop enforcing the ultra vires directive was however dishonest, as the NPPF shortly thereafter was again informed that renewal applications were being refused if not accompanied by a Good Standing Certificate. On 11 December 2017 the NPPF informed the Ombudsman as follows:

*“Despite all your efforts, for well over a year now, with the ministries of Health and Finance regarding their unconstitutional conduct in enforcing an ultra vires requirement for a tax good standing certificate, the gains have been short lived as once again MoHSS refuses to process a healthcare facility licence based on this unconstitutional requirement; this time in respect of the practice of Dr Kinnie Ward. Kindly see the email from Ms Grace Mundia from MoHSS dated 8 December ..., confirming their continued refusal to adhere to your constitutional authority.*



*Please indicate whether you need anything further from us to pursue this matter, as the facts of this case are identical to that of the previous complainant, Mr Hoffman; except that at least this time the MoHSS now provided the reason for their refusal in writing ....*

*We look forward to your reply / action in this case as it is now evidently clear that MoHSS will continue to defy you on this issue.”*

32. Nothing transpired and on 7 May 2018 the legal advisor of the NPPF again wrote to the Ombudsman as follows (verbatim, original emphasis):

*“Please see the email from Jürgen Hofmann hereunder. He confirms that **MoHSS still insists on the tax good standing certificate**, despite all attempts by him (and your office) to comply with MoHSS requirements, and obtain administrative fairness.*

*Kindly advise on the way forward as **clearly MoHSS regards your office as defunct / irrelevant.**”*

33. On 12 June 2018, after telephonic consultation with the Ombudsman, he indicated that his office would approach a legal firm to write a letter of demand to MoHSS and Ministry of Finance.

34. As nothing transpired from this the legal advisor of the NPPF wrote to the Ombudsman as follows:

*“I refer to your instruction to Kruger, Van Vuureen & Co to issue a letter of demand to MoHSS and MoF in the above matter.*

*They still await the signed FIA form to be able to open a file and execute the instruction.*

*Relevant to the letter of demand I just need to understand: Has the Ombudsman excused all its powers/remedies under Article 92 of the Constitution, as further described in the Ombudsman Act, i.e. has a subpoena been issued to the relevant ministers and PSs for attendance and documents, and a subsequent enquiry held?”*

35. Nothing further transpired and on 23 September 2019 the legal advisor wrote to the Ombudsman as follows:

*“I attempted to phone the Ombudsman earlier, but understand he is currently dealing with the media.*

*I kindly need to speak to the Ombud with regard to a very old complaint that has still not been finalised: Ministry of Finance having instructed MoHSS to insist on a Tax Good Standing certificates as an ultra vires requirement in executing its statutory regulatory function.*

*As MoHSS continues with this conduct, and apparently also refuses to answer the Ombudsman after his instruction to do so, just like Ministry of Finance is refusing to answer him, we need to understand how this matter will proceed further.*

*Our country is increasingly falling into a state of denial of constitutional rights, and this is becoming very concerning. Institutional failure is exacerbating the situation.*

*If the Ombudsman can phone me I will appreciate it”*

36. Sometime after this mail the Ombudsman phoned the legal advisor of the NPPF, informing him that no substantive reply has yet been received from either ministry, and despite his numerous follow-up letters, they continued to ignore his communications.
37. Noting further transpired and on 18 January 2021 the NPPF again addressed a letter to the Ombudsman, copied to the PSs of MoHSS and Ministry of Finance. A copy of this letter is attached.
38. On 2 February 2021 the Ombudsman called the legal advisor of the NPPF and confirmed his commitment to get MoHSS and Ministry of Finance to act on his past communications and provide him with a substantive reply.
39. Nothing further transpired until such time as the former Ombudsman vacated his office and the new (current) Ombudsman was appointed. Around the time of leaving office the former Ombudsman confirmed to the legal advisor of the NPPF (telephonically), that neither MoHSS nor Ministry of Finance has ever provided him with a substantive reply to this complaint.
40. On 24 November 2021 the legal advisor of the NPPF wrote to the newly appointed Ombudsman as follows:

*“We write to you on behalf of the Namibia Private Practitioners Forum (NPPF), a section 21 company pursuing the interests of private healthcare providers.*

...

*During 2016 we (NPPF and Dr Hoffmann) lodged a complaint with your office against the Ministry of Finance (Finance) and Ministry of Health and Social Services (MoHSS). I trust you will find all the detail on your file.*

*The complaint originates from a directive from the then ED of Finance in terms of which the regulator of healthcare facilities (MoHSS) may not issue licenses if healthcare providers do not provide a tax good standing. Until today MoHSS enforces this unlawful (for reasons set out hereunder) directive.*

*The regulation of healthcare facilities follows specific statutes (written laws). Neither Finance nor MoHSS has any legal powers to impose arbitrary requirements which are not catered for by these statutes. The requirement to provide a tax good standing to receive a facility license is thus wholly ultra vires, and a gross violation of the affected persons' right to Administrative Fairness as per Article 18 of the Constitution.*

*This was also the opinion of the previous Ombudsman, not surprisingly, as it is such a glaringly obvious position in our law. The Ombudsman communicated this position to the two ministries. I attach one such letter which the previous Ombudsman shared with us. I believe the signed, served copy is on your file.*

*As has become the norm in our government, the two ministries simply ignored the Ombudsman, and never provided a meaningful reply. Despite his several promises, he also did not pursue the matter further. We have made countless follow-up enquiries, to no avail.*

*We trust you will recognise that this is exactly why the Office of the Ombudsman was established in our Constitution, to protect citizens from this abuse, to which they have no alternative remedy apart from spending many millions on civil litigation, simply for a court to rule that the directive was unlawful.*

*We therefore wish to again pray to your good office, especially in this time when the availability of our healthcare providers are sorely needed, to pursue this matter further, and to bring some justice to all healthcare providers who were forced for many years now to endure this abuse of power by Government.*

*We look forward to receive your confirmation in this regard. ”*

41. No reply to the above writing was received and the NPPF followed up on 3 December 2021 as follows:

*“Kindly indicate when we can expect a reply to our email. More healthcare professionals are now being affected by this unlawful conduct by MoHSS, and we need to stress that this matter is urgent, as we are on the cusp of the next wave of Covid infections, while MoHSS is actively, and unlawful prohibiting our healthcare workers from practicing and thus treating patients.”*

42. On the same day the legal advisor of the NPPF phoned the office of the Ombudsman and was transferred to the “new inspector” dealing with the matter. The legal advisor spoke to the inspector and thereafter wrote to the Ombudsman as follows (verbatim, original emphasis”:

*“I spoke to the person you referred me to. I did not get his name. **It is clear that we will not get resolve in this matter soon, probably ever.**”*

*This matter is now coming for **many years**, while your office fully accepts that **those ministries complained against can simply ignore the Ombud**. Now a new investigator is appointed.*

***We will take this matter to the media**, as clearly the Office of the Ombudsman sees no urgency in this matter, and instead prefers to lecture me on the nuance that we are "complainants" instead of "clients".*

*Although extremely tempted, I will not reciprocate with a lecture on the **Ombudsman's Office dereliction of its duties as set out in the Namibian Constitution**.*"

43. Sometime during the middle of December 2021 the office of the Ombudsman telephonically informed the NPPF that the Ombudsman wishes to have a meeting on this matter.
44. On 27 January 2022 the legal advisor of the NPPF met with the Ombudsman, accompanied by a rather large number of his members of staff.
45. At the said meeting the Ombudsman explained that his office grapples with their actual powers given a recent court ruling, and that MoHSS provided him (apparently verbally) with the “*defence that they may apply the Ministry of Finance’s Directive*”. It was agreed at the meeting that the Ombudsman will obtain such “*defence*” in writing and forward same to the NPPF for its consideration and response.
46. Nothing transpired until the legal advisor of the NPPF phoned the office of the Ombudsman on 7 June 2022 to again enquire about the progress on this complaint, and more specifically whether the “*defence*” from MoHSS was received. The legal advisor was informed that the file on this matter was closed.
47. On the same day the legal advisor of the NPPF wrote to the Ombudsman as follows:

*“We refer to the above matter, which complaint was initiated with your office in 2016 already.*

*We contacted your office today to enquire on same. This follows our meeting at your office on 27 January 2022, where you undertook to provide us with the MoHSS’ and MoF’s “defence”.*

*To date you have not communicated same to us or Dr Hoffmann.*

*Today we were informed that you have closed the file. Neither we nor Dr Hoffmann received any notice of same.*

*The primary constitutional duty of your office is to keep Government’s abuse of power in check. This is crucial in a free, democratic society.*

*As it is now abundantly clear that your office has no inclination to fulfil its constitutional duty, at least in this case, the NPPF will now proceed to issue a press release on this deplorable matter.”*

48. On 1 July 2022 the legal advisor of the NPPF received a letter from the Ombudsman, via Nampost, which letter was dated 10 June 2022.

### **The Ombudsman’s final letter**

49. Ombudsman, I now turn to reply to the content of your previous letter dated 10 June 2022.

50. You state that a copy of a judgement was provided to me at our meeting. This is patently untrue as no document of any kind was provided to me during our meeting of 27 January 2022.

51. You state that you “*explained*” the judgment in the case of Prosecutor-General v the Ombudsman to me, insinuating (at least) that such explanation should have sufficed for me to accept that the Ombud has no powers to continue with this matter. This is patently untrue. You mentioned a judgement and stated that your office is not so sure about its powers due to a recent judgement. At no point did I understand this statement to mean that you are of the opinion that you have no powers in this matter, and that you, on that basis already, decided not to pursue same any further. If you did, I would have provided you with detailed reasons why your opinion is misguided in law. I do so hereunder.

52. In the meeting you in fact undertook to provide the written “defence” from the MoHSS to the NPPF for consideration and a response. In your letter you unfortunately make no mention of this undertaking, or your failure to honour same.

53. Your latter is dated 10 June 2022, three days after we were informed (upon own enquiry) that the file in this matter was already closed. Your letter was therefore only in response to our email subsequent to your closing of the file, with no reasons provided at the time.

54. Your letter “highlights” a definition and extract from section 31 (of an unstated act, presumably the Hospitals and Health Facilities Act 36 of 1994). It is unclear whether this “highlight” is in fact the “defence” of the MoHSS, or your own disingenuous, and frankly irrational, attempt to cover for the abuse of power by the MoHSS. We deal with same hereunder nonetheless..

55. You quote a portion of section 31 of the said Act as follows:

*“Where on consideration of an application submitted under subsection (2) the Minister is satisfied that (c) any other prescribed requirements or conditions relating to the maintenance of business or professional premises under this Act or any other law, have been complied with”*

56. Based on this “highlight” you conclude that *“it appears that the Ministry ... enjoy extended powers to place as part of the licensing requirements to ensure compliance with the Tax Act”*.
57. You conclude by clearly closing the door of the Ombudsman to the complainant by stating that if he *“disputes”* you, *“the court is the appropriate avenue to address this matter”*.
58. I return to the most shocking part of your letter, where you state: ***“you (sic) clients (being medical doctors) are generally representative of citizens who has adequate means to enable them to engage legal practitioners like yourself to assist and represent them.”***
59. The above statement is an appalling disregard of the complainant’s right to enjoy the same protection from the Ombudsman as all other Namibian citizens and is in itself a **scandalous act of discrimination against the complainant** based on (what you at least perceive to be) his (and “doctors” in general’s) creed, social, or economic status.
60. **This is an unambiguous act of discrimination against the complainant and all “doctors”, in contravention of Article 10 of the Constitution, the same discrimination your office is supposed to investigate and protect Namibian citizens against.**
61. I return to your disingenuous argument that the MoHSS *“...enjoy extend powers to place as part of the licensing requirements to ensure compliance with the Tax Act.”*:
  - a. Section 31(3)(c) states: *“any other prescribed requirements or conditions relating to the maintenance of business or professional premises under this Act or any other law, have been complied with”* [own emphasis].
  - b. The requirements that may be imposed must therefore be within the ambit of at least two parameters:
    - i. They **MUST** relate to the maintenance of the applicable premises (i.e. the health facility)

- ii. They MUST stem from this Act or any other law.
62. Also, as per section 30 of the Act, “health facility” clearly refers to the premises on which health services are provided.
63. A Tax Good Standing Certificate has got nothing to do with the maintenance of the premises of the health facility.
64. There is no requirement, in this Act or any other law, that such tax certificate is required when an application for renewal for license is filed.
65. In fact, it is very evident from the letter by Ministry of Finance that this “requirement” was dreamt up by the (then) PS of the Ministry of Finance and applied by MoHSS as if it had the status of some statutory requirement.
66. Allow us to explain the ludicrousness of your interpretation by an equally ludicrous example. If your argument (as per your interpretation of the quoted section 31(3)(c)) is accepted as logical and correct, the MoHSS is also allowed to request from healthcare providers in respect of their premises numerous other licences, including but not limited to, liquor licenses, public transport licenses, vehicle registration licenses, firearm licenses, driver’s licenses, and all such other licences required by statute for activities not related to the maintenance of health facilities at all.
67. There can thus be now doubt that both the (then) PS of Finance, and all other executives of Finance and MoHSS thereafter, abused their powers in prescribing and enforcing an ultra vires requirement on healthcare providers.
68. There further can be no doubt that such ultra vires actions, and abuse of power, resulted in several violations of the complainant’s fundamental right to fair administrative action (Article 18 of the Constitution) and the right to practice his profession as healthcare provider (Article 21(1)(j)).
69. I turn to your reliance on the ruling in case of the Prosecutor-General vs the Ombudsman CA 66/2017 [2020] NAHCMD 119 (26 March 2020), as further grounds for your refusal to afford the complainant the protection your office has a duty to provide under the constitution, with the following comments:
- a. Your misreading of this judgement, in relation to the case *in casu*, is inexcusable and outright scandalous.
  - b. In that judgement the court ruled that “ ...*the Constitution preclude the Ombudsman from rendering legal assistance in the form of legal representation to persons, in*

*matters where he would be inquiring into the decisions of a judicial officer.*” [own emphasis]

- c. The complainant in this instance never asked or expected the Ombudsman to be his legal representative, let alone in a matter in which he would seek an inquiry into a decision of a judicial officer.
  - d. The said judgement is therefore completely irrelevant to this matter.
  - e. The complainant did however expect that, and had the legitimate right to the Ombudsman executing his clear constitutional duty to:
    - i. Investigate an apparent violation of his fundamental rights and freedoms, and the abuse of power and unfair and harsh treatment of himself by officials in the employ of organs of Government, and the manifest injustice and conduct by such officials which should be regarded as unlawful and unfair in a democratic society.
    - ii. To investigate the functioning of the administrative organs of the State with regard to unfair administration in relation to services provided (as should be provided under the Hospitals and Health Facilities Act).
    - iii. To investigate the violation of the complainants’ fundamental rights and freedoms under this Constitution, including the right to fair administrative procedure, which includes the duty of the officials to comply with the laws of Namibia (common law and legislation), which they clearly did not, and instead created their own “law” and became a law upon their own.
    - iv. To take appropriate action to call for the remedying, correction and reversal of the instances of abuse of power and violation of freedoms and rights specified above.
    - v. To, in the face of the flagrant disregard of the Ombudsman by the officials involved, issue subpoenas for attendance of persons before the Ombudsman and for the production of documents, to prosecute persons contemptuous of such subpoenas, to question persons, and to bring proceedings in a competent Court for an interdict to secure the termination of the offending action or conduct, or the abandonment or alterations of the offending procedures.
70. In bringing such action, the Ombudsman would duly act within his constitutional powers, in his own name, and against the officials involved. This is very clearly, undisputedly and completely within the constitutional powers of the Ombudsman and his is completely different from the facts of the above cited case, which makes that ruling wholly irrelevant to the case in this complaint.



71. I am perplexed by your gross misreading of the said judgement and attempt to make this judgment applicable to the case *in casu*. One can only speculate whether this was caused by juristic incompetence, or was purposeful, for mischievous reasons.
72. Instead of your office holding all the relevant officials to account for such abuse of power, which your office has failed to do for six years, you now elect not only to deny the complainant the right to the protection which your constitutional office has a duty to provide, but you disgracefully make yourself guilty of discrimination against the complainant (and all “doctors”).

### **In conclusion**

73. In handling this matter, your office has failed appallingly to comply with its statutory mandate.
74. Not only have you failed to acknowledge the complainant’s right not to suffer the abuse of public power, the facts of which were clear and undisputed, but you elected to further discriminate against the complainant (and all “doctors”) in clear violation of Article 10 of the Constitution.
75. Your actions and omissions could stem from incompetence. But this is unlikely as we have to remind ourselves that your position follows a recommendation from the Judicial Service Commission to the President. It is thus also possible that your actions and omissions rather stem from a purposeful and calculated effort to protect officials who are guilty of abuse of public power resulting in a gross violation of the fundamental rights and freedoms of citizens.
76. Your advice that that the complainant should approach the court is noted. However, should we advise the NPPF to take further legal action, it will be for an order against your office, and not the officials involved in this matter. We say this for the following reasons:
- a. A court application against the officials abusing their will cost the applicant many millions in legal fees, with the risk of an adverse cost order which could also run into the millions.
  - b. Such application will be defended with taxpayer funds, while the outcome will only benefit a small portion of taxpayers.
  - c. There can be little doubt that such application will be successful, as the facts and legal principles set out herein are abundantly clear.
  - d. However, such successful application is likely to only result in an order that compels the relevant officials to cease their ultra vires, unconstitutional conduct of requiring the

tax certificate for health facility licenses, and possibly a cost order against the State (and not the officials involved), in favour of the applicant.

- e. Such cost order is an empty judgment, for the experience in the legal fraternity lately is that the State does not have money to pay, and simply fails to honour such orders. Furthermore, our laws do not allow for execution of state property. So, a cost order against the State is of no value.
- f. Once such costly, and likely very time-consuming legal challenge has been finalised successfully, there will be another (or even same official) who the next day abuses his/her public powers and violates one of our member's constitutional rights and freedoms. This must then again be challenged in court, and the costly, time-consuming legal challenge must start afresh, for, according to you, there is no protection from your office in such instances.

77. The above describes the consequences of failure by the Ombudsman to execute his statutory mandate; not to speak of the untenable consequences when the Ombudsman himself, as is the case *in casu*, is guilty of violating a complainant's right not to be discriminated against.

78. Should I advise the NPPF to approach the court it will be to apply for an application against the Ombudsman himself, for a resulting order is more likely to be beneficial for all Namibians. We have witnessed the South African experience, where a country benefitted hugely from a truly independent, competent and honest public protector who exposed state capture, and we have seen the devastating consequences when a public protector does not possess these traits. In the latter instance she had to be repeatedly exposed in legal proceedings brought mostly by civil society, at tremendous cost.

79. The Namibian civil society simply does not enjoy the same economics of scale as in South Africa to fund such numerous, repeated litigious matters to expose undesired public appointees in such crucial positions, and Namibians have no choice but to rely on the integrity and diligence of the appointing authorities to appoint suitable persons in crucial institutions of democracy.

80. The NPPF thus trusts that the Judicial Service Commission takes note of this matter (as there are most likely many other complainants to your office suffering the same fate as the complainant herein) and considers its powers under Article 94 of the Constitution to investigate the Ombudsman.

81. The NPPF is of opinion that it will be a grave injustice to the Namibian people, and our new democracy, if this is not done.

Yours faithfully



**Eben de Klerk**  
**Legal Advisor: NPPF**

**CC: Office of the President**  
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**CC: The Chairperson**  
Judicial Service Commission  
**The Right Honourable Chief Justice Shivute**  
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**CC: The Namibian Media**