REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 129/2011

In the matter between:

VENANCIA SIMANA	**FIRST APPLICANT**
DAWID CHRISTIAANS	**SECOND APPLICANT**
MARUKUJANI NICKLAAS NGAUJAKE	**THIRD APPLICANT**
THOMAS DANSTER	**FOURTH APPLICANT**
FELICITIS MWIYA	**FIFTH APPLICANT**

and

THE COMMISSIONER GENERAL CORRECTIONAL SERVICES	**FIRST RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**SECOND RESPONDENT**
THE MINISTER OF LABOUR AND SOCIAL WELFARE	**THIRD RESPONDENT**
THE ATTORNEY-GENERAL	**FOURTH RESPONDENT**
THE PRIME MINISTER	**FIFTH RESPONDENT**
THE PUBLIC SERVICE COMMISSION	**SIXTH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**SEVENTH RESPONDENT**

Neutral citation: Simana *v The Commissioner General Correctional Services* (A 129/2011) [2012] NAHCMD 57 (09 November 2012)

Coram: GEIER J
Heard: **23 October 2012**
Delivered: **09 November 2012**

Flynote: Review — Review in terms of rule 53 of High Court Rules — Unreasonable delay — What constitutes — Question whether delay unreasonable within court's discretion — Delay can be condoned – Applicants seeking to review and set aside a Directive issued by the Commissioner of Prisons in expectation of the implementation of the Labour Act 2007 which would impact on their working conditions as it excluded them from the application of that Act — the effect of which would inter alia be that members of the Prison Service could no longer be member of trade unions - Applicants becoming aware of decision during October 2008 — Applicants launching proceedings at end of May 2011 — Court not satisfied with explanation for delay — Condonation of delay not justified under all the circumstances — efficacy of review relief also not given in view of continuing underlying statutory basis - Application for review dismissed on ground of unreasonable delay –

Declarator - court also refusing to exercise discretion of accede to declaratory relief sought as declaratory order would cause an absurd resultant position where - on the one hand - the‘Commissioner’s Directive 03/2008’ would be declared unconstitutional and invalid – and – on the other - the underlying provisions of the enabling legislation, the Labour Act - would continue to exist - this creating a highly contradictory situation and a state of affairs that should for obvious reasons be avoided -

Summary: Applicants seeking to review and set aside a Directive issued by the Commissioner of Prisons in expectation of the implementation of the Labour Act 2007 to the effect that members of the Prison Service could no longer be member of trade unions and that they no longer would be entitled to overtime payment – this situation having been caused by the exclusion of members of the prison Services from the application of that Act — - Applicants becoming aware of decision during October 2008 – review launched at end of May 2011 – delay of some two years and seven months – in the alternative and in the event of review relief being refused, applicants also seeking declaratory relief that said Directive be declared unconstitutional –

Held : That a delay of some two tears and seven months in the bringing of a review application per se constitutes an unreasonable delay for which the court's condonation would be required –

Held : Applicants had not been forthright in their explanation of for the delay – court not placed in position to assess the dilatory conduct of the applicants and their motives, unless they intended their evasiveness to be deliberate in order to cover up their remissness. Applicants had not demonstrated any urgent resolve to take their grievance to a court of law and to have the issues raised by them determined promptly.

Held : If the court were to overlook the paucity of information offered by applicants in their explanations and not attach any consequence thereto – the court would be amiss if it would not express its displeasure at the applicants' lack of frankness with the court and the court would send out the wrong signal if it were to condone the applicants' lackadaisical conduct in the circumstances and their failure to provide a full and acceptable explanation for their delay.

Held : Additional factors such as prejudice to the respondents and the principle of finality to litigation - overshadowed by a 'less than satisfactory explanation' for

the delay – would on their own already have merited the summary refusal of the review relief sought-

Held : The Courts discretion in respect of the granting of alternative declaratory relief also had to be exercised against applicants due to the applicants confining the declaratory relief sought to the complained of 'Commissioner's Directive' only and their failure to directly attack the underlying provisions of the Labour Act 2007 in the proper manner – which failure would would thus only by implication pronounce itself indirectly on the constitutionality of the applicable provisions of the Labour Act 2007 -

Held : The resultant position created a highly contradictory situation and a state of affairs that should for obvious reasons be avoided.

Held : that the continued survival of the underlying provisions of the Labour Act 2007 directly undermined the efficacy of both the review and declaratory relief sought.

Held : As the necessary efficacy of the review and declaratory relief sought could not be achieved court also declining to exercise discretion in favour of both the review and the declaratory relief sought 'despite the case raising important constitutional issues.

Held : That the application therefore had to be dismissed with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

GEIER J:

[1] Towards the end of October 2008 the first applicant became aware of 'Commissioner's Directive' 03/2008 which had been posted on the notice board of the Walvis Bay Prison. It reads as follows:

'COMMISSIONER'S DIRECTIVE NO. 03/2008

DIVISIONAL HEADS
SUB-DIVISION HEADS
OFFICERS IN-CHARGE – ALL PRISONS
COMMANDANT – NAMIBIAN PRISON SERVICE TRAINING COLLEGE

IMPLEMENTATION OF TBE LABOUR ACT, 2007 (ACT NO. 11 OF 2007)

As it was announced recently in the National Assembly by the Honourable Minister of Labour and Social welfare, the Labour Act, 2007 (Act No. 17 of 2007) is expected to come into operation as from 01 November 2008. As you might be aware, apart from section 5, this Labour Act excludes from its application the Namibian Prison Service, amongst other institutions.

This exclusion from the Labour Act, 2007 will bring to us significant changes which we are required to know and get prepared for them in order to ensure that no disruptions are occurring in fulfilling our duties. Among the changes which will take place as from the date of coming into operation of this Act include:

1. Overtime

There will be no overtime payment for prison members. Thus, all of you are

required to ensure that, prison members are doing their work within their normal prescribed hours of work. Where it is absolutely necessary that a prison member has to perform work over his or her prescribed ordinary hours of work, arrangement can be done for such a member to get an off day or off hours for the extra hours he or she had worked, where the supervisor deems fit and necessary.

2. Sunday, Public Holiday and Sunday Work Allowance.

There will be no allowance payment for prison members for work done during Sunday, Public Holiday or during the night hours.

3. Membership to Trade Unions

Prison members will no more be members of Trade Unions. Thus, for those who are members of Trade Unions and are paying subscription to such Trade Unions through stop orders, should contact the respective Trade Unions in order to stop the deductions. The Prison Service will not be held responsible for any further deductions as from the date of coming into operation of the Labour Act, 2007.

There will no more representation by Trade Unions in our disciplinary inquiries except for the pending cases that started before the implementation of the Act and where the Trade Union was already representing the prison member.

In order to ensure smooth running of activities especially during weekends, the prohibition for senior prison members to be weekend heads that was put in December 1994 through Circular No. 15 of 1994 is hereby lifted. As from the date of coming into operation of the Labour Act, 2007 senior prison members as from the rank of Prison Superintendent (SP) down wards, will have to be booked to be week end heads. After the work as weekend heads, such heads will be given off day proportional to the days they were on duty. For example, if the week end was booked to work on Saturday only, he or she will be given one off day on Monday, die following week, but if he worked on Saturday and Sunday he or she will be given two off days on Monday and Tuesday. The supervisors, for good reason may give the off days on other days of the following week not necessarily being Monday

or Tuesday.

It is required all of you to bring this information to all prison members under you and for officers-in-charge to ensure that proper arrangements are put in place to ensure the normal performance of activities at their respective prisons. Don't hesitate to contact this Office for any other matter that may arise due to the implementation of the Act, which matter is not covered above or for any clarity.

Yours sincerely

E. Shikongo
COMMISSIONER OF PRISONS '

[2] The applicants – all senior officers in the Prison Services – now seek the review and setting aside of this directive.

[3] In the alternative they also seek an order to have the said directive declared constitutional. They also seek certain ancillary relief.

[4] All the respondents opposed this application.

[5] The matter was ultimately set down for hearing on the 23rd October 2012.

THE ISSUE OF POSTPONEMENT

[6] When the matter was called on 23 October 2012 the respondents applied for a postponement on the ground that Mr Markus - who had received instructions to represent and advise the respondents in this matter - would have to withdraw from the case due to the fact that his advice had not been accepted by the respondents. The postponement was sought to enable the respondents to seek new legal representation. The application was refused.

[7] This refusal is to be viewed against the following background.

[8] On 4 November 2011 the applicants legal practitioners gave notice in terms of Rule 6(5)(i) of the Rules requesting that the matter be allocated to a managing judge. On 9 February 2012 a reminder was faxed to the Registrar's office enquiring when the appointment could be expected. The matter was initially allocated to Swanepoel J who responded thereto only on 14 March 2012 by directing that the initial case management hearing would take place on 27 March 2012.

[9] On the 26th of March 2012 by way of a letter addressed to Swanepoel J the Government Attorney, representing the respondents herein, informed the judge that the parties had been unable to meet and prepare a joint case management report and that they would therefore request a postponement to the third week of April.

[10] On the 27th of March 2012 the Judge President postponed the matter to the 24th of April 2012 to enable the parties to compile their outstanding case management report.

[11] On the 24th of April 2012, when the matter came before me, the application was then, for the first time, set down for hearing on the 29th of May 2012.

[12] This early date was allocated in consultation with the parties and because the court wanted to facilitate the expeditious hearing of the matter as envisaged by the new case management rules.

[13] On the 24th of May however, and again under cover of a letter, the parties now requested a further postponement of the hearing on the grounds that the date set had proved not suitable to the parties as too little time had been

allowed for the filing of heads of argument and because both parties could in any event not file heads heads as *‘ … applicants counsel was in London and also the only person at the office who bore the necessary knowledge to draft the heads of argument and she only returned on 7 May 2012 and the representative for 1st Respondent was leaving her position at the Government-Attorneys and was at the time not sure who she would transfer the said file to’*.

[14] Despite not being convinced of the veracity of the reasons that had so been advanced I nevertheless reluctantly allowed the matter to be removed from the roll on the 29th of May 2012 and the parties were granted leave to approach myself in chambers for the allocation of a new hearing date.

[15] On the 14th of June 2012 the parties appeared before myself in Chambers.

[16] The court was prepared to allocate a hearing date for this application on the 31st of July 2012.

[17] Mr Markus then indicated that an early date was not suitable, as the matter was complex and that he needed more time to advise his clients on this matter.

[18] It was in such circumstances, and in order to accommodate this request, that the application was then set down on 14 June 2012, for hearing on the 23rd of October 2012.

[19] On 23 October - and without notice to the court – apparently the Government Attorney had at least, belatedly, that morning, and shortly before the hearing, telephonically informed the applicants’ legal representatives – that a further postponement would be applied for.

[20] Mr Markus then orally applied for such postponement from the bar. He was constrained to explain that he had rendered his written advice already during August and that he had also, in response to certain additional questions supplemented his advice in answer to such questions. Nothing further was done even though the filing of the applicant's heads of argument on 1 October 2012 must have alerted the respondents that they could not just sit back and do nothing as the matter would come up for hearing on 23 October 2012.

[21] It apparently only belatedly became clear during October – if I understand Mr Markus correctly - that his clients did not want to accept his advice. It was thus submitted that he would now have to withdraw from the matter in order for the respondents to find someone who would be prepared to act on the respondents' instructions and for this purpose a further postponement was sought as mentioned above. It really became quite clear that the respondents had not fully explained their inaction.[1]

[22] In addition it needs to mentioned also that the case management order of 14 June 2012 had directed strict compliance with such order failing which - and in the event of the non-compliance by a party with its terms - the defaulting party would become liable *ipso facto* for sanctions as contemplated in Rule 37 (16) of the Rules of High Court, unless the defaulting party would have sought condonation for such non-compliance by way of application on five days notice.

[23] This order thus also became of relevance to the respondents' quest for a postponement as the respondents had also not filed any heads of argument in accordance with the terms of the said case management order, nor had they sought any condonation for such non-compliance on not less than five days notice as was required.

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[1] It should be noted in this regard that Mr Markus had been instructed prior to his first appearance in this matter on 14 June 2012. He did not explain what he did in the period June to August and why it took him so long to render his advice.

[24] Needless to say the applicants opposed the granting of the postponement on various grounds and after hearing argument on the issue the court refused the postponement mainly because of the circumstances and the manner in which the application had been made which revealed that most of the standard requirements for a postponement had not been met, given the above set out history of the matter, from which it also became clear that the finalisation of this case had mainly been delayed to accommodate the needs of the respondents to consider their position and where more than enough time had been afforded to the respondents for this purpose and to get their house in order.

[25] It was also not without significance that the respondents had not complied with the terms of the case management order of 14 June 2012 for which they had also not sought any condonation as was required. This factor - and also the additional factors enumerated by the court in *Hailulu v Anti – Corruption* Commission *& Others* 2011 (1) NR 363 (HC) at [33] to [36][2] - particularly those impacting on the administration of justice - obviously also tipped the scales against the granting of a further postponement.

[26] It was in such circumstances that Mr Markus withdrew from the matter and argument was only heard on behalf of the applicant.

THE ARGUMENT ON BEHALF OF APPLICANTS

[27] In her written heads of argument Mrs. Conradie, who appeared on behalf of the applicants, essentially submitted, with reference to certain case law[3], in

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[2]Approved and applied in *Namibia Health Plan and Others v Schroeder and Others* (I 177/2010) [2011] NAHC 76 (15 March 2011) at paras [19] and [33] - reported on the Saflii Namibia High Court web-site at http://www.saflii.org/na/cases/NAHC/2011/76.html

[3]*adebe v Government of the Republic of South Africa & Others* 1995 (3) SA 787 (N) at 798H-799A, *Yuen v Minister of Home Affairs & Another* 1998 (1) SA 958 (C) at 969A-F, *Gencor SA Ltd v Transitional Council for Rustenburg and Environs & Another* 1998 (2) SA 1052 (T) at 1066, *Belloccio Trust Trustees v Engelbrecht NO & Another* 2002 (3) SA 519 (C) at 523H-524A, *Kruger v Transnamib Ltd (Air Namibia) & Others* 1996 NR 168 (SC), *Disposable Medical Products (Pty)*

regard to the point *in limine* raised in the answering papers - to the effect that this application for review had been inordinately delayed - that the court ought to condone the long time lapse between the issuing of the Directive and the launching of these proceedings as the steps which had been taken by the Public Service Union after the directive had been brought to their attention had been fully explained, which explanation had been amplified by Mrs Dumba-Chicalu. In any event the respondents had not indicated what prejudice, if any, they had suffered as a result of this delay, or that the delay had caused them any hardship. The court should therefore dismiss the objection that the review had been brought without due delay.

[28] She pointed out that it was also significant that it took the first respondent almost four months to file his answering affidavit.

[29] She argued further that Mr Kazonyati and the Public Service Union tried everything in their power to resolve this matter without resorting to litigation. When the Union reached the point where litigation was its only option, it could not find funding, despite having made every effort. It was at that stage that the Legal Assistance Centre was approached. The subsequent delay was caused because it was difficult to find applicants who were willing to take the risk of bringing the present application. If regard was had to the cited case law it appeared that all the cases were distinguishable. The fact that there had been a delay had not affected the rights of the respondents, unlike in the *Namibia Grape Growers, Disposable Medical Products, Kruger and Radebe* cases. While the *Trans-African Insurance case* and other similar cases which dealt with technical objections that were not in the context of review proceedings, it was submitted that these cases have persuasive value. The present case raises

Ltd v Tender Board of Namibia & Others 1997 NR 129 (HC), *Namibia Grape Growers & Exporters Association & Others v The Ministry of Mines & Energy & Others* 2004 NR 194 (SC) at 214-216, *Eilo & Another v Permanent Secretary of Education & Others* 2008 (2) NR 532 (LC) at 537-538, *Black Range Mining (Pty) Ltd* v *Minister of Mines & Energy & Another* 2009 (1) NR 140 (HC) *Purity Manganese(Pty) Ltd v Minister of Mines & Energy & Others ;Global Industrial Development (Pty) Ltd v Minister of Mines & Energy & Another* 2009 (1) NR 277 (HC) at284 paras [14] - [15]

important constitutional issues which will affect the rights of hundreds of Namibians. It would be unfortunate if these issues *were* avoided because of a mere technicality.[4]

[30] During oral argument - and in response to questions by the court relating to the issue of the applicants' delay in the bringing of this application - Mrs Conradie countered these - without conceding that there was any undue delay on the part of her clients - with reference to the court's own decision in *Merlus Seafood Processors (Pty) Ltd v The Minister of Finance*[5] and were the court had allowed the applicant in that case – who had inordinately delayed the bringing of a review – and who had subsequently conceded such inordinate delay - and who had therefore belatedly indicated - for the first time – in heads of argument that it would no longer persist to seek review relief at the hearing – to nevertheless pursue the declaratory part of the relief that had been sought in that matter since the outset – that she would - on the strength of that authority - similarly persist in seeking the declaratory relief contained in prayer 2 of the notice of motion[6] in the event that the court would not condone her clients' delay in this instance.

[31] It was against this background that Mrs Conradie continued to motivate, why, in her submission, the complained of Directive violated the Article 10 – 'equality before the law provisions' – and the 'freedom of association' provisions – as contained in Article 21(1)(e) of the Namibian Constitution. She also fairly qualified her reliance on Article 18 in regard to administrative justice as the Article 18 constitutional rights would only come into play should the court find that the review was properly before the court. All these issues then fell to be

[4] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G, *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 805B-D

[5] Judgment of the High Court delivered on 11 November 2011 under case number A 4.07/09 - reported on the SAFLII Namibia High Court database at http://www.saflii.org/na/cases/NAHC/2011/331.html

[6] *'An order declaring the said directive unconstitutional, based on the following grounds: a) a violation of article 10 of the Namibian Constitution which guarantees equality before the law; b) a violation of article 18 of the Namibian Constitution, which guarantees fair administrative justice; c) a violation of article 21(1)€ of the Namibian Constitution which guarantees freedom of association, including the right to be a member of a trade union.'*

determined against the following background.

THE ASPECT OF UNDUE DELAY

[32] The application was launched on 26 May 2011.

[33] The founding papers in this application however - so it needs to be mentioned - were arranged in a most peculiar fashion. The first document – as was to be expected - was the notice of motion. One would then also expect such notice of motion to be followed by the founding affidavit, to which any number of supporting and/or confirmatory affidavits could have been annexed. Not so in this application. The first affidavit following the notice of motion was an affidavit by Mrs Linda Dumba Chicalu, the erstwhile legal practitioner of applicants, who essentially sketched her involvement in this matter from 'May or June 2010' up to the bringing of this application. The next affidavit was by Mr. Victor Kazonyati, a Public Service Union official who set out the Union's involvement in this matter as of October 2008. He also elaborated on the advantages of the union membership. This affidavit was followed by the second applicant's affidavit. He merely identified himself as a Senior Correctional Officer of the Correctional Services. This affidavit was just a confirmatory affidavit to the first applicant's affidavit, which had by then not featured. The second applicant's affidavit, in turn, was followed by a further confirmatory affidavit deposed to by the third applicant, also a Chief Correctional Officer. Again only the contents of the first applicant's founding affidavit was confirmed. In the same vein another confirmatory affidavit followed, this time by the fifth applicant. Finally, and out of sequence, one got to the last confirmatory affidavit, namely that of the fourth applicant, similarly a Chief Correctional Officer. No apparent reason for compiling the application in such a strange and illogical fashion and in such haphazard order emerged or was given.

[34] Finally one got to the founding affidavit sworn to by the first applicant.

She confirmed that she is a Chief Correctional Officer and that her co-applicants were all members of the Namibian Prison Service which falls under the Ministry of Safety and Security. Her evidence relative to the aspect of delay was that she was informed of the complained of directive towards the end of October 2008, a copy of which had been placed on the notice board of the Walvis Bay Prison. The Public Service Union was approached to deal with the matter. Incidentally all the applicants are members of this trade union.

[35] First applicant continues to state that she does not know what steps the Union took. She does also not say when the Union was approached and by whom and in what manner.

[36] If one then reverts to the supporting affidavit deposed to by Victor Kazonyati, the Secretary-General of the Public Service Union of Namibia, it emerges that the union initially made representations in regard to the exclusion of members of the prison service from the new Labour Act 2007 before such act even came into force. Mr. Kazonyati acknowledged that the complained of directive was brought to his attention.

[37] Also Mr Kazonyati does not say when the directive was so brought to his attention and who brought it his attention.

[38] He does however state that he immediately communicated his concern in this regard to the relevant ministries but was met with no response. Again he did not disclose when he communicated his concern and in what manner and whether he followed up in this regard.

[39] He apparently also contacted the International Labour Organisation (ILO) and studied similar legislation in other Southern African Countries. He does not state when he contacted the International Labour Organisation (ILO) and when he studied similar legislation.

[40] He was then apparently informed, upon enquiry, that the matter would be placed on the agenda of the ILO at a meeting which was to take place in Geneva in June 2009, and that he was later informed that the Government had requested that the matter be withdrawn from the ILO agenda so that further consultations could take place between the Public Service Union and the Government of Namibia.

[41] Again Mr. Kazonyati supplied no details in regard to any of these steps.

[42] In July 2009 the Union engaged the services of GF Köpplinger Legal Practitioners, as a result of which a letter, dated 6 July 2009, was sent to the office of the Commissioner of the Namibian Prison Services. This letter was annexed. This letter, in the main, addressed the complaint regarding the constitutionality of the 'Commissioner Directive 03/2008'. It is important to note that a deadline of 5 days for a response was set in this letter and within which it was demanded that the directive should be withdrawn failing which GF Köpplinger Legal Practitioners indicated that they held instructions *' to approach a competent court for appropriate relief '*.

[43] A dilatory response, to the effect, that time was needed to consider the position, was received from the Government Attorneys on 22 July 2009. No further communication was thereafter received.

[44] Neither Mr. Kazonyati, nor the legal practitioners referred to, did anything further for the remainder of 2009 to pursue this matter.

[45] In early 2010 an unnamed private practitioner was approached and a consultation with an unidentified member of the Society of Advocates was apparently arranged.

[46] Again no specifics were supplied.

[47] Importantly Mr. Kazonyati however states that he was informed that the costs of litigation would be very high and that "*our attempts at obtaining funding for the case were unsuccessful*".

[48] As far as these referred to attempts at obtaining funding are concerned, Mr. Kazonyati did not explain what attempts were made, how many attempts were made, when such attempts were made, and with whom such attempts were made. Simply no detail was provided in this regard.

49] In addition it is not disclosed whether any attempts were ever made to obtain cheaper and thus affordable legal services.

[50] In any event it remains inexplicable why the Public Service Union, which represents all civil servants in Namibia, was not able to fund the envisaged litigation.

[51] Again, and in a most vague fashion Mr. Kazonyati explained further that, 'some time later', he approached Mrs. Linda Dumba Chicalu of the Legal Assistance Centre, and that this approach was made 'during May or June 2010' and that Mrs. Dumba Chicalu undertook to investigate the matter.

[52] This is where Mr. Kazonyati's affidavit then links up to the first affidavit, namely that of Mrs. Linda Dumba Chicalu, who confirmed that she was indeed approached 'during May or June 2010' as stated.

[53] Strangely enough also Mrs Dumba Chicalu provides no detail. Surely a legal practitioner can be expected to keep a diary or the notes she must have taken during this consultation – a file must have been opened or some electronic record kept? Also the staff of the Legal Assistance Centre, who might

have facilitated the appointment, should have been able to find some record of this first consultation.

[54] Ultimately it appears that it took Mrs. Linda Dumba Chicalu about one month to address a short 'four paragraph' letter to the Government Attorney. This was done on 23 June 2010, merely requesting a reconsideration of the matter.

[55] On 8 July 2010 the Government Attorneys informed the Legal Assistance Centre that 'the office of the Commissioner of the Namibian Prison Services had no plan on amending or correcting the directive in question'.

[56] Mrs. Dumba Chicalu then only goes on to confirm that she indeed promised during the said consultation that she would investigate the matter and also whether or not 'the LAC would be in a position to conduct a case on behalf of Prison personnel'.

[57] She does unfortunately not say what she did in this regard and by when the LAC decided that it would be in the position to conduct a case on behalf of paid senior prison personnel.

[58] The latter enquiry is puzzling as the union and the applicants – who are all Senior Officers in the employ of the Prison Services - all cannot be impecunious. Even if it is accepted that the applicants' financial resources are/were limited it is not explained why they did not promptly attempt to secure affordable legal representation – a wide spectrum of also cheaper legal services must certainly have been available immediately at the time. They do also not explain why they did not apply for legal aid?

[59] Be that as it may - ultimately the services of the Legal Assistance Centre came free of charge and it thus became apparent that the further delay from

'May or June 2010' to May 2011 in the bringing of this application could thus not have been caused by a lack of funds. Also this ground seemed contrived and obviously amounts to a ruse to overcome inexcusable dilatory conduct.

[60] Finally – in an obvious attempt to gloss over the further delay - Mrs. Linda Dumba Chiculu merely states that she was only able to find applicants, who were prepared to bring this application, during February 2011.

[61] She however fails to explain what efforts were made in this regard in the period of July 2010 to February 2011 or on how many occasions such attempts were made – and - with whom such attempts were made. She also does not explain what caused the applicants to belatedly make themselves available.

[62] Given this history of dilatory conduct also the final delay - of a further three months – which it took the applicants to launch this short application[7] - (it was eventually brought at the end of May 2011) - does not come as a surprise – and was – as could be expected - also not explained.

THE ASPECT OF CONDONATION

[63] It is clear from the applicable authorities that a review remedy is in the discretion of the court which can be denied if there has been an unreasonable delay in the seeking of it.[8]

[64] There is no prescribed time limit and each case will be determined on its facts[9]. The discretion is necessary to ensure finality to administrative decisions

[7] The founding papers are not voluminous – they comprise some 35 pages, inclusive of annexures and the abovementioned confirmatory affidavits.

[8] See for instance : *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at [41] – [44] in which the applicable Namibian authorities are conveniently set out – See also the the recent judgment *Ogbokor and Another v Immigration Selection Board and Other* (A 223/2011) [2012] NAHC 268 (17 October 2012) at [16] and [28] – [29] reported on the SAFLII Namibia High Court database at http://www.saflii.org/na/cases/NAHC/2012/268.html

[9] *Ebson Keya v Chief of Defence Forces and Three Others Case* No A 29/2007 (NmHC)

to avoid prejudice and promote the public interest in certainty[10].

[65] The first issue to consider is whether on the facts of this case the applicants' inaction was unreasonable. That is a question of law. If the delay was unreasonable the court has discretion to condone it. There must be some evidential basis for the exercise of the discretion. The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.[11]

[66] If one turns to the history of this matter it appears that the complained of directive first appeared on the notice board of the Walvis Bay Prison as far back as October 2008. The application was only launched on 26 May 2011. That is a delay of some two years and seven months. It must be fairly obvious that this is the type of delay which, on the face of it, seems unreasonable and for which the court's condonation would be required.

[67] In paragraphs [32] to [62] supra I have endeavoured to set out in some detail against which evidential background facts the court's discretion has to be exercised in this instance.

[68] The main feature apparent from the applicants' papers is that they have not been forthright in their endeavours to explain their failure to prosecute their intended legal action with any promptitude. No real effort was made to take the court into their confidence and to show how the various delays really came about. The court was thus not placed in a position to understand the dilatory conduct of the applicants and their motives, unless they intended their evasiveness to be deliberate in order to cover up their remissness. The lack of

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unreported judgment delivered on 20 February 2009 at 9 – 11, paras 16 – 19

[10] *Ebson Keya v Chief of Defence Forces and Three Others op cit,Yuen v Minister of Home Affairs and Another 1998 (1) SA 958 (C) at 968J – 969A; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41E – F and Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) para 22*

[11] See *Ebson Keya v Chief of Defence Forces and Three Others Case* as cited in the *Kleynhans* decision at para [41]

any purposive action on their part does in any event not disclose any urgent resolve to take their grievance to a court of law and to have the issues raised by them determined promptly. Ultimately - and if the court were to overlook the paucity of information offered by applicants in their explanations and not attach any consequence thereto – the court would be amiss if it would not express its displeasure at the applicants' lack of frankness with the court and the court would send out the wrong signal if it were to condone the applicants' lackadaisical conduct in the circumstances and their failure to provide a full and acceptable explanation for their delay.

[69] In these premises it soon became clear that counsels submission - *'that the court ought to condone the long time lapse between the issuing of the directive and the launching of these proceedings as the steps which had been taken by the Public Service Union after the directive had been brought to their attention had been fully explained, which explanation had been amplified by Mrs Dumba-Chicalu'* – could not be upheld in view of these findings.

[70] Contrary also to counsel's submissions the applicants' delay must also have caused some prejudice to the respondents, at least in in the sense that the Commissioner's Directive - which has been operational for some four years already - has probably - on a daily basis - been heeded by the members of the Prison Service for all this time. It can also be safely assumed that all the necessary administrative structures must also have been implemented since the promulgation of the Labour Act 2007 – all these would have to be reversed again at great expense.

[71] These additional factors - as well as the principle of finality to litigation - overshadowed by a 'less than satisfactory explanation' for the delay - would - in my view – on their own – already have merited the summary refusal of the courts exercise of its discretion in favour of the applicants.

[72] I will revert to impact on this review of the all- important further factor of the 'efficacy of the relief sought below.

THE ENTITLEMENT TO DECLARATORY RELIEF?

[73] In such circumstances the alternative argument, mustered on behalf of applicants, comes to the fore. This argument pertinently raises the question whether or not the applicants would, nevertheless, and in circumstances where the court will refuse to grant review relief, still be entitled to declaratory relief.

[74] In the relied upon *Merlus Seafood Processors*[12] decision the Court referred to and applied the approach to the granting of declaratory relief which had recently been set out the decision of *Daniel v Attorney-General & Others; Peter v Attorney-General & Others* 2011 (1) NR 330 (HC) and which entails the following enquiries :

> *"[17] The Court approaches the question of a declarator in two stages. ... First, is the applicant a person 'interested' in any 'existing, future or contingent right or obligation'. Secondly, and only if satisfied at the first stage, the Court decides whether the case is a proper one in which to exercise its discretion.*
>
> *[18] It was decided in Ex parte Nell 1963 (1) SA 754 (A) that an existing dispute is not a prerequisite for jurisdiction under section 19(1)(a)(iii). There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, or course, incline the Court, in the exercise of its discretion, not to grant a declarator."*[13]

[75] The first leg of the enquiry poses no obstacle to the applicants herein - they are obviously interested persons to have the alleged violation of their Article 10 – 'equality before the law rights' - and their constitutional rights to

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[12] SAFLII Namibia High Court database at *http://www.saflii.org/na/cases/NAHC/2011/331.html*
[13] At page 337

freedom of association and their right to belong to a trade union – determined by a competent court.

[76] It is also clear that any declaratory order granted by the Court herein will be binding on the parties hereto.

[77] Also in this case certain declaratory relief was sought from the outset as appears already from the Notice of Motion filed of record herein. To some extent the issues relevant thereto were thus ventilated and canvassed in the papers filed of record.

[78] It is however doubtful whether any tangible and justifiable advantage in relation to the applicants existing and/or future constitutional rights would flow from the granting of the declaratory order sought herein in view of the continued existence of the applicable provisions of the Labour Act 2007 which factor dictates that this would not be proper instance in which to exercise any discretion in favour of the applicants and why in my view the applicants cannot overcome the second hurdle on the way to any declaratory relief.

THE FAILURE TO APPROPRIATELY ATTACK THE LABOUT ACT 2007

[79] The declaratory relief pursued by applicants is sought on the limited compass that only the ‘Commissioner’s Directive 03/2008’ is to be declared unconstitutional.

[80] The relief sought in paragraph 2 of the notice of motion does not attack the underlying provisions of the Labour Act 11 of 2007. The Notice of Motion discloses that no relief is sought in respect of any specific provisions of the underlying Labour Act 2007.

[81] Mrs Conradie was also repeatedly asked by the court whether or not this application was only confined to the setting aside of the complained of directive,

which aspect was confirmed by her.

[82] It thus became clear that the issue up for decision would thus essentially have to be confined to the validity of the directive alone.

[83] At best the constitutional questions raised in relation to the validity or otherwise of the aforesaid 'Commissioner's Directive' would thus only by implication pronounce itself indirectly on the constitutionality of the applicable provisions of the Labour Act 2007.

[84] The resultant position would thus be an absurd one if the court were to accede to the relief sought, as, in such event, a situation would be created where - on the one hand - the'Commissioner's Directive 03/2008' would be declared unconstitutional and invalid – and – on the other - the underlying provisions of the enabling legislation, the Labour Act - would continue to exist. This would create a highly contradictory situation and a state of affairs that should for obvious reasons be avoided.

[85] It is also clear that any judicial pronouncement on the constitutionality of the applicable provisions of the Labour Act would be *obiter* as the real issue to be determined falls to be decided within a much narrower ambit.

[86] It should also be taken into account in this regard that if the applicable provisions of the Labour Act 2007 would have squarely and directly fallen into the focus of the applicants' attack, the government should have been given the opportunity to defend the particular enactment - as it is obliged to do – head on. This obligation would not only have included the submission of legal argument but also the placing before Court of the requisite factual material and policy considerations.[14] Although all the relevant parties were cited this opportunity was not really created or invited by the narrow ambit within the relief

[14]See for instance : *Kavendjaa v Kaunozondunge NO & Others* 2005 NR 450 (HC) at p 465 E - F

sought fell and the issues which had to be addressed and decided for that purpose.

[87] Finally I take into account that the continued survival of the underlying provisions of the Labour Act 2007 - ensured by the failure to attack the constitutionality of the relevant underlying provisions in the appropriate way - directly undermines not only the efficacy of any review relief sought and to be granted in terms of prayer 1 but also that of any declaratory order which would be issued in terms of prayer 2 of the notice of motion.

[88] The necessary efficacy of the review or declaratory relief sought in this instance can in such circumstances not be achieved.[15]

[89] It is for these reasons that I decline to exercise my discretion in favour of acceding to the review and the declaratory relief sought 'despite the matter raising important constitutional issues'.

[90] In the result the application is dismissed with costs.

H Geier

Judge

[15] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* op cit at [44]

APPEARANCES

APPLICANT:	L. Conradie..... Instructed by Legal Assistance Centre
RESPONDENT:	No appearance.....