

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: HC-MD-CIV-MOT-REV-2020/00054

In the matter between:

TJIUOVIOJE KAHIMISE

APPLICANT

and

**THE COMMISSIONER-GENERAL OF
CORRECTIONAL SERVICES**

1st RESPONDENT

THE PRIME MINISTER

2ND RESPONDENT

**THE CHAIRPERSON OF THE PUBLIC SERVICE
COMMISSION OF NAMIBIA**

3RD RESPONDENT

**THE GOVERNMENT OF THE REPUBLIC OF
NAMIBIA**

4TH RESPONDENT

Neutral Citation: *Kahimise v Commissioner-General of Correctional Services* (HC-MD-CIV-MOT-REV-2020/00054) [2021] NAHCMD 24 (4 February 2021).

CORAM: MASUKU J

Heard: 8 July 2020

Delivered: 4 February 2021

Flynote: Administrative Law – Review - Legislation – Correctional Services Act, Act, No. 9 of 2012 – disciplinary proceedings – exhaustion of local remedies – whether

the legislation makes it mandatory for an officer to exhaust local remedies before approaching the court for relief – s 133 of the Act – whether the application for review was brought within the period of 6 months mentioned in the said provision – Failure to request the production of the record of proceedings – whether fatal to an application for review - Whether Commissioner-General may, following a guilty finding on disciplinary charges, in addition to demoting an officer in rank, also properly reduce the said officer's salary to the lower rank to which he or she has been demoted.

Summary: The applicant was, following his plea of guilty to disciplinary charges demoted in rank from Assistant Commissioner to Senior Superintendent. The Commissioner-General, at a later stage, reduced the applicant's salary and brought it in line with the rank to which he had been demoted. His protestations in this regard fell on deaf ears and he approached the court for an order reviewing and setting aside the Commissioner-General's decision. The respondents raised points of law *in limine*, namely, that the applicant failed to exhaust the local remedies provided; that the applicant did not bring the application within the 6 month period prescribed in s 133(3) of the Act and that the applicant did not call for the production of the record of proceedings, thus constituting sufficient reason for the court to no-suit the applicant.

Held: that whether a party is required to exhaust local remedies depends on the language of the provision either of legislation or a contract, as the case may be. In the instant case, the relevant provision is not mandatory, indicating that the applicant was at large to choose whether to exhaust the local remedy of appeal or not. His decision not to appeal does not affect the court's jurisdiction in the premises.

Held: that the computation of the time within which the proceedings could be brought should be calculated from the last action which instigated the proceedings. In the instant case, it was the refusal by the Commissioner-General to uphold the applicant's grievance regarding the additional sanction of the reduction of the applicant's salary. This refusal places the applicant's case within the 6-month period provided in s 133(3) of the Act.

Held further that: the applicant's failure to call for the production of the record of proceedings was not fatal to the application for review. This is because the record is

for the benefit of the applicant who may waive the right to obtain the record, which the applicant in this case did.

Held: that in terms of s 51(13) of the Act, there is an exhaustive list of sanctions that may be imposed on an officer, including dismissal, reduction in rank, a fine a written warning and verbal warning. There is no sanction relating to the reduction in rank and as such, it is not open to the respondents to have added that sanction to the respondent in the circumstances.

Held that: the sanction of reduction in rank is serious on its own and does not need the special sting of a reduction in the salary. This is because the reduction in rank affects the officer's dignity, reputation and esteem as he or she has to salute officers who in the past saluted him or her.

Held that: in terms of s 58(7) of the Act, an officer who has been reduced in rank may have his salary reduced to the rank to which he or she has been demoted. That only happens where the said officer has been suspended. Since the applicant was not suspended, it was therefore inappropriate for the Commissioner-General to add the reduction of the applicant's salary in the circumstances.

ORDER

1. The decision of the First Respondent dismissing the Applicant's grievance regarding the deduction of the Applicant's salary is hereby reviewed and set aside.
2. The First Respondent is directed to rectify the Applicant's salary to that of Assistant Commissioner in the establishment of the Correctional Services of Namibia.
3. The Respondents are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The issue for determination revolves around the proper interpretation to be accorded certain provisions of the Correctional Services Act, No. 9 of 2012. Of particular importance is the determination of the question whether a correctional officer, who has been found guilty of a disciplinary offence may not only be reduced in rank but also have his salary reduced to correspond with the rank to which he or she has been demoted.

The parties

[2] The applicant is an adult Namibian male who is in the employ of the Namibia Correctional Services and holds the rank of Senior Superintendent. The 1st respondent, on the other hand, is the Commissioner-General of the Namibia Correctional Services. He has been cited in his official capacity as head of the institution, having been appointed in terms of the provision of Art. 32(4)(c)(cc) of the Constitution of Namibia, as read with s. 5(1) of the Correctional Services Act¹, ('the Act').

[3] The 2nd respondent, is the Prime Minister of the Republic of Namibia, appointed as such in terms of Art. 35(1) of the Constitution. Her office is represented by the Office of the Government Attorney, situate at 2nd Floor, Sanlam House, Independence Avenue, Windhoek. The 3rd respondent, is the Public Service Commission, an entity created in terms of the provisions of Art. 112 of the Constitution. This Commission, is also represented by the Office of the Government Attorney.

[4] The 4th Respondent is the Government of the Republic of Namibia, represented by the Minister of Safety and Security, being the Minister responsible for Correctional

¹ Correctional Services Act No. 9 of 2012.

Services in terms of the Act. As with the other respondents, the 4th respondent is also represented by the Office of the Government Attorney.

Relief sought

[5] The applicant approached the court seeking the relief stated below, namely:

1. Reviewing and setting aside the decision of the first respondent dismissing the applicant's grievance in respect of the unlawful reduction of the applicant's salary.
2. Directing that the applicant's salary be rectified to that of the rank of Assistant Commissioner in the establishment of the Correctional Services of Namibia.
3. An order for costs against the respondents jointly and severally, the one paying the other to be absolved.

[6] It is important to mention that the respondents opposed the relief sought and to this end, filed the answering affidavit of a Commissioner in the Correctional Service. I will deal with both with the merits of the application and the opposition as the judgment unfolds.

Background

[7] The facts giving rise to this application are generally agreed and do not form the basis of much contestation. It is the interpretation and application of the applicable law that appears to be at the centre of the dispute in this matter.

[8] For this reason, I intend to chronicle what are clearly common cause facts below before proceeding to consider and to apply the applicable law. The facts can be summarised as follows:

- (i) the applicant was employed by the Correctional Service in terms of the Act and held the rank of Assistant Commissioner as of 12 March 2012;
- (ii) the applicant was subjected to a disciplinary inquiry in terms of the Act involving the theft of a mobile telephone. A sanction was imposed on him,

having pleaded guilty, namely, he was reduced in rank to Senior Superintendent. This decision was communicated to the applicant via a letter dated 30 November 2018;

- (iii) *in tandem* with the reduction in rank, the applicant's salary was reduced to that of a Senior Superintendent, allegedly in terms of s 58(7) of the Act. The reduction in salary, was communicated by letter dated 24 December 2018;
- (iv) the applicant was dissatisfied with the reduction of his salary, because so he contended, the sanction imposed on him initially did not reduce his salary. He protested at the latter development;
- (v) his protestations appear to have held the implementation of the reduction in salary, in abeyance until 1 August 2019, when the reduction of his salary was effected;
- (vi) dissatisfied with the reduction of his salary, the applicant lodged a grievance in terms of the procedures of the Service;
- (vii) the 1st respondent, in response to the applicant's grievance, held that the applicant could only be remunerated in terms of the rank he holds and that in the circumstances, he could only be remunerated in terms of his present reduced rank of Senior Superintendent;
- (viii) further dissatisfied with the response and determination of the 1st respondent, the applicant approached the court seeking the relief mentioned in paragraph 5 above;
- (ix) the respondents adopted the position that the employees of the Service are governed by the Act and not the provisions of the Public Service Act.² In this regard, the position taken was that the salary is determined by the current rank of the employee concerned.

[9] Having set out the common cause issues, it becomes plain that the issue for determination, as set out above, revolves around the interpretation of the relevant provisions of the Act. This is the exercise that the court may, depending on the determination of the other legal issues raised by the respondents, be called upon to determine.

² Public Service Act No. 13 of 1995.

[10] In the answering affidavit, the respondents, through the instrumentality of Mr. Raphael Malobela, who holds the rank of Commissioner, based at the Correctional institution's head office, raised three points of law *in limine*. These are first that the applicant's claim has prescribed because of the provisions of s. 133(3) of the Act and that the applicant should be non-suited therefor. Second, the respondents accused the applicant of having failed to exhaust the internal remedies provided in terms of the Act. Last, but by no means least, the respondents apply for the dismissal of the application because of the applicant's failure to apply for the production of the record of proceedings.

[11] It is accordingly necessary that the three preliminary points of law should be dealt with first. It is that exercise that I embark upon presently.

Points of law *in limine*

Prescription

[12] In dealing with this particular point of law, the respondents relied on the provisions of s 133(3) of the Act. That provision has the following rendering:

'No civil action against the State or any person for anything done or omitted in pursuance of any provision of the Act may be entered into after the expiration of six months immediately succeeding the act or omission in question, or in the case of an offender, after the expiration of six months immediately succeeding the date of his or her release from a correctional facility, but in no case may such action be entered into after the expiration of one year from the date of the act or omission in question.'

[13] It was the respondents' position, advocated strongly by Ms. Harker, for the respondents, that in this instant case, the date for computation of the time should start to run from the time that the applicant became aware of the grievance, namely, that his salary scale would be reduced to that of the lower rank to which he had been demoted. In this regard, it was contended that the time began to run from the date when the applicant became aware of the reduction of his rank.

[14] This was computed by the respondents to be 30 November 2018 when the 1st respondent informed the applicant he could not be remunerated in terms of his erstwhile rank. In the alternative, the respondents submitted that the date for reckoning the running of the prescription period must be 24 December 2018, when the applicant was furnished with a letter of appointment to a lower rank and salary scale.

[15] Mr. Tjombe, for the applicant, argued contrariwise. He submitted that the computation of the time applicable must be determined by the relief that the applicant seeks. In this regard, he contended, the applicant seeks an order setting aside the decision of the 1st respondent, which was taken on 19 August 2019, namely, the dismissal of the applicant's internal grievance regarding the actual reduction of his salary.

[16] I am of the view that Mr. Tjombe's argument is the correct one in this connection. In this regard, it is important to chronicle the important events. The first, was the letter dated 30 November 2018, which informed the applicant of the outcome of the disciplinary inquiry. In particular, the applicant was advised of the sanction, imposed, namely, the reduction in rank from Assistant Commissioner to Senior Superintendent. It is plain from this letter that the applicant was not told in specific or even wild terms for that matter, about the reduction of his salary.

[17] It is an indisputable fact that the issue of the reduction of the applicant's salary, was only communicated to him by the 1st respondent vide a letter dated 24 December 2018. In this letter, the 1st respondent recorded the following:

'Your reduction in rank is subject to Section 58(7) of the Correctional Services Act 2012 (Act No. 9 of 2012) that reads "**subject to section 52** of section 55, as the case may be, if a correctional officer who was suspended is, pursuant to disciplinary inquiry, reduced in rank, he or she must be paid the salary applicable to the rank to which he or she is reduced from the date when the disciplinary measure became effective.'

[18] It is not disputed that after the communication of the reduction of his salary to the new but lower rank, the applicant lodged a grievance on 5 August 2019. This was after his salary was actually reduced and seen by him on 1 August 2019. This grievance is the one that culminated in the decision made by the 1st respondent on 19

August 2019, that the applicant has taken on review, namely, the tying of the applicant's salary to lower rank to which he had been demoted.

[19] Evidently, the calculation by the respondents loses sight of the decision that is the subject of this dispute, namely the decision made by the 1st respondent by letter dated 19 August 2019. It is, in my considered opinion, the proper date from which the time bar indicated in s 133(3) must be reckoned to run.

[20] There is no denying that the applicant lodged the current application, seeking the setting aside of the decision of 19 August 2019, on 19 February 2020. On a simple computation, it becomes immediately clear that the applicant lodged his application within the period prescribed by the provisions of s 133. To this extent, I am of the considered view that Ms. Harker's contentions cannot be allowed to stand because her computation does not properly consider the decision sought to be reviewed and set aside in the present proceedings.

[21] In the premises, I am of the considered view that the applicant is correct that his application for review was lodged timeously, and within the period prescribed by s 133 of the Act. To this extent, the legal contentions by the respondents to the effect that the applicant's application is time-barred, must fail.

Exhaustion of internal remedies

[22] The next argument raised by the respondents is to effect that this court must throw the applicant's application out with both hands as it were, for the reason that the applicant did not exhaust the internal remedies provided under the Act before he approached the court for the current application for relief. That the applicant did not exhaust the local remedies provided is conceded. The only question for determination is whether this is a proper case in which the court should non-suit the applicant for the failure or neglect to exhaust the local remedies afforded by the Act.

[23] In this regard, the respondents referred the court to the provisions of s 52(1) of the Act, which provide that, 'a senior official who is aggrieved by a decision of the Disciplinary Board or Commissioner-General at the conclusion of the disciplinary

inquiry . . . may within 14 days . . . appeal to the Minister.’ It is the applicant’s decision not to invoke this provision that is the basis for the respondent’s argument under consideration.

[24] It would appear to me that the sustenance of the respondents’ contention will necessarily have to hinge on the word ‘may’ occurring in the above provision. In this regard, the court will have to determine whether if a party decides not to invoke the remedy provided, it may for that reason be properly shown the exit door by the court.

[25] In *National Union of Namibian Workers v Naholo*³, Tötemeyer AJ adopted the position, relying on *Nichol and Another v The Registrar of Pension Funds*⁴ that, ‘Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy has been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies be exhausted first.’ He found that in the matter before him, the provision did not require the internal exhaustion remedies before approaching the court and threw out the argument in the event.

[26] More recently, Ueitele J adopted a similar approach in *Tjirovi v Minister for Land Resettlement*⁵ where the learned Judge interpreted a provision *in pari materia* with the provision under scrutiny in this matter. The learned Judge summed up the position in part, as follows:

‘In my view, the language of the section cannot be said to, expressly or by necessary implication, prohibit access to court for it does not state that no party may appeal to the Lands Tribunal. The section, in my view, provides a party with a choice whether to appeal or seek other judicial remedy.’

[27] Consistently with his finding on the question of law in the case cited immediately above, learned Judge had maintained this stance in *Tjiriange v Kambazembi*⁶. In this matter, the learned Judge had this to say on this question:

³ *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 at 680, para 60.

⁴ A judgment of the South African Supreme Court of Appeal of South Africa delivered on 29 September 2005.

⁵ *Tjirovi v Minister for Land Resettlement* (HC-MD-CIV-MOT-REV-2017/00086) [2018] NAHCMD 56 (19 March 2018), para 20.

⁶ *Tjiriange v Kambazembi* (A 164/2015) [2017] NAHCMD 59 (24 February 2017)

[29] Hoexter acknowledges that the right to seek judicial review might be suspended or deferred until the complainant has exhausted domestic remedies which might have been created by the governing legislation. Hoexter, however, furthermore recognises that this is not automatic as was stated by De Wet J in the matter of *Golube v Oosthuizen and Another* that:

“The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies.

[29] In the matter of *Msomi v Abrahams NO and Another*, Page J said:

“It is clear on the authorities that the Courts will not hold that a person aggrieved by a reviewable irregularity or illegality is precluded from approaching the Courts for relief until he has first exhausted his remedies by appealing to such domestic tribunals as may be available to him, if this is a necessary implication of the statute or contract concerned . . . The implication of the ouster of the Court’s jurisdiction must be a necessary one before it will be held to exist: for there is always a strong presumption against a statute being construed so as to oust the jurisdiction of the Court completely. . . The mere fact that a statute provides an extra-judicial remedy in the form of a domestic appeal or similar relief does not give rise to such a necessary implication; in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for, review by the Courts.’

[28] The court was referred by the respondents to other cases on this issue, including *Hashagen v Public Accountants and Auditors Board*⁷ which deals with the doctrine in question. I am of the view, however, that the *Hashagen* judgment does not deal with the legal question that arises in the current matter, namely, that of the language of the statute on the peremptory nature or otherwise of the recourse to internal remedies.

[29] In view of the foregoing impeccable and sound articulation of the applicable principles in the above judgments, particularly considered in the context of the language employed by the legislature in the Act, which is clearly permissive, and the general approach of the courts in construing such ousters, I am of the considered view

⁷ *Hashagen v Public Accountants and Auditors Board* (HC-MD-CIV-MOT-REV-2017/00210) NAHCMD 336 (10 September 2019).

that the language employed by the legislature in the Act, does not bar a person in the applicant's position from approaching the court before exhausting the local remedies provided.

[30] I am accordingly of the considered opinion that the applicant was not, considering the permissive nature of the choice of language by the legislature in the provision in question, bound to first exhaust the local remedies. He had an election, which he properly exercised in the premises. I accordingly incline to the view, in company with established authority, that this point of law raised by the respondents, is also liable to be dismissed.

Absence of record

[31] The last, but brief additional legal issue that was raised by the respondents relates to the fact that the applicant does not, in his notice of motion, call upon the respondents to avail the record of proceedings. This failure, so contend the respondents, entitles the court to dismiss the application. Is this contention sustainable at law? I should mention in fairness that the respondents did not persist with this argument in their heads of argument. I address the issue nonetheless for the sake of completeness.

[32] I am of the considered opinion that this argument by the respondents is without merit. Although an applicant for review may call for the production of the record of proceedings, which bear on the decision sought to be impugned, it is not the law that the court may dismiss an application for review for the reason that the applicant has not, in terms of rule 76(1), called for the delivery of the record.

[33] The applicable position, has been authoritatively stated by the Supreme Court in the following terms, in *New Era Investment (Pty) Ltd v Roads Authority and Others*:⁸

'It is trite that in review proceedings the production of the record of proceedings and the accompanying reasons sought to be reviewed is for the benefit of the applicant. It has been recognised in a long line of cases that an applicant seeking review may waive the right to

⁸ *New Era Investment (Pty) Ltd v Roads Authority and Others*: (SA 8/2014) NASC 36 (08 September 2017), para 19).

obtain the record of proceedings and the accompanying reasons and proceed to the hearing without first obtaining it. Accordingly, the cross-appeal directed at the absence of the record has no merit and was liable to be dismissed.'

[34] This, in my considered view, provides a full answer to the respondent's complaint. When regard is had to the relief sought and the basis thereof as deposed to in the applicant's affidavits, it does not appear to me that the record of proceedings would have been essential in the determination of any part of the application. Of course there may be cases where the record of proceedings is central to the determination of the application for review. It is in those matters where the failure to call for the record may return to haunt the applicant.

[35] This, in my view is not such a case and the applicant's failure or decision not to call for the production of the record does not appear to have any debilitating effects, regard had to the relief sought and the material on which it is predicated. Ultimately, each case turns on its own merits and particular nuances and may, in appropriate cases justify the dismissal of the application because of the absence of the record of proceedings.

[36] As correctly pointed out by Mr. Tjombe in his heads of argument, placing reliance on *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*⁹ where the court necessarily pointed out that in motion proceedings, the affidavits filed play a dual role as they serve both as evidence before court and also define the issues at play. The issues canvassed by the applicant it is plain, do not necessarily require the production of the record. This in my view renders the respondents' argument also liable for dismissal.

The merits

[37] It would appear that the provisions of s 51(13) of the Act, are at the centre of the case and it is upon them that the applicant relies for the relief sought. Because of their centrality, I quote them in full below:

⁹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T).

'Where a senior correctional officer admits under subsection (6) to have committed the disciplinary offence in question, or where at the conclusion of a disciplinary inquiry under this section the disciplinary board is of the opinion that the senior officer is guilty of a disciplinary offence, it must, after having heard evidence in mitigation, report its findings and the evidence to the Commissioner-General, and it may recommend that any one or more of the following disciplinary measures be imposed by the Commissioner-General upon that correctional officer, namely –

- (a) a verbal warning;
- (b) a written warning;
- (c) a fine not exceeding one month's salary;
- (d) reduction in rank;
- (e) dismissal from the Correctional Service.'

[38] It was Mr. Tjombe's argument that regard had to the above provision, the disciplinary inquiry recommended to the 1st respondent the reduction in rank, as provided in s 51(13)(d) above. This recommendation was accepted by the 1st respondent. It was therefore not open to the respondents to later enhance the punishment by imposing a reduction in the applicant's salary as well.

[39] Central to this particular argument were the provisions contained in the regulation of the Act. Regulation 68(1), promulgated under the Act, in particular, provides that all disciplinary measures and orders issued to a correctional officer during a disciplinary inquiry, must effected on the day following immediately the day of the expiry of a period of 14 days from the date of the sanction.

[40] In the instant case, it was pointed out that the addition of the reduction in salary, was pronounced well after the period of 14 days, namely on 28 December 2018. It was accordingly argued that this sanction was not one properly imposed in terms of the Act and that if it is legitimate, it would have meant that the applicant was entitled to challenge it in a separate process after the reduction in rank, which would be an undesirable piecemeal approach to disciplinary matters.

[41] Mr. Tjombe, was not done. He further argued that on a proper reading of the different types of disciplinary measures mentioned in s 53, there is no mention of reduction of an officer's salary. The reduction of a salary, he further argued, was only

envisaged in terms of s 58(7) of the Act, which will be reproduced later in the judgment.

[42] It was Mr. Tjombe's argument in this regard that the reduction of the salary does not apply to the applicant for the reason that when one reads the provision in question carefully, it only applies to officers who have previously been suspended. This, it was pointed out, did not apply to the applicant and for that reason, the decision of the 1st respondent to reduce his salary in the absence of a previous suspension, is incorrect in law and thus liable to be set aside.

[43] Ms. Harker, for the respondents, on the other hand, argued that the provision regarding salary scales, increments and related matters is to be found in Regulation 135 of the Public Services Act. These, according to the provision, may be determined by the 2nd respondent, the Prime Minister. Inclusive in this category, are issues of the determination of salary scales attached to ranks.¹⁰ It was accordingly argued that the 1st respondent has no power, in terms of the law, to determine the remuneration of any correctional officer, which is not in accordance with the prescribed salary scales.

[44] It was the respondents' contention that once the applicant's reduction in rank was confirmed, this had the automatic effect of reducing his salary to that applicable to the reduced rank. It was argued that a correctional officer's salary is linked to the rank he or she holds. In this regard, an officer may not be remunerated in accordance with a rank which he or she does not hold at the specific time. According to the respondents, the reduction in salary is implied in the reduction in rank and need not be dealt with specifically in legislative enactments.

Determination

[45] I turn, in the first instance, to consider the implications of s 51(13), quoted above. It is clear, when one has regard to that provision that the sanctions that may be imposed on an officer, arise from one of two events. First would be the officer pleading guilty to having committed the disciplinary offence charged. The other route is for the

¹⁰ Section 5(2)(e) of the Public Service Act.

guilt of the said officer to be established in evidence, following a plea of not guilty being entered by the officer. In the instant case, the applicant readily admitted his guilt.

[46] Where either route is followed in reaching certitude of guilt, the provision stipulates the sanctions that may be imposed. These, as stated, include a verbal warning, a written warning, a fine not exceeding one month's salary, reduction in rank or dismissal from the Service. The provision makes it plain that one or more of the sanctions enumerated above may be imposed. There is no omnibus provision allowing the Commissioner to impose any other sanction.

[47] It is accordingly plain that the sanction of reduction of an officer's salary is not one of the sanctions enumerated. I am of the view that it is not open to the court and less so the 1st respondent and the disciplinary inquiry, to impose a sanction that the legislature did not censure. This is more problematic for the reason that the initial sanction did not mention the reduction of the salary and this was only communicated much later. The sanction imposed by the 1st respondent on the recommendation of the disciplinary enquiry, was confined to the reduction in rank.

[48] I must take judicial notice of the notorious fact that the reduction in rank, especially for members of the uniformed forces, is not empty or idle in consequence. Members of the uniformed forces pride themselves in the ranks that they reach, which is ordinarily recognition of their diligence, excellence, commitment to the cause and dedication to duty. To demote one, especially from the rank of Assistant Commissioner, as it is with the applicant, is not inconsequential. The esteem, reputation and dignity of the officer are negatively affected.

[49] In this regard, it need not have the added sting of a reduction in salary to have debilitating effects on the subject. In my mind's eye, I imagine the applicant's previous subordinates who were, in terms of the Service's protocol supposed to salute the applicant. His demotion in rank has the consequence that those who saluted him previously and who are now ranked above the rank to which he was demoted, are in the position where the shoe is on the other foot. The applicant is now required to salute them. That is a bitter pill to swallow but a necessary disciplinary measure.

[50] I accordingly come to the considered view that it was not open to the respondents to have added to the applicant the misery of reducing his salary to the new rank. This is because the respondents do not have the power at law to add that sanction as it is not one authorised by s 53(13). If the reduction in salary is to be regarded as a sanction, Parliament is the proper authority to do so. It accordingly does not lie with the court, or the respondents, for that matter, to arrogate upon themselves the constitutional function of the legislature. The reduction of a salary is not one of the sanctions and it cannot be said to be one that can be assumed or presumed to apply. It must be mentioned in the legislation as a separate sanction, which may be imposed in addition with any other, in appropriate cases.

[51] I do appreciate that there may be some administrative difficulties faced with the line of reasoning that I have adopted. That, however, is a matter that can be attended to by the legislature in dealing with the question of the sanction of a reduction in rank and the related question of the reduction in salary. It is not one that the court is properly placed to sanction in the circumstances.

[52] I digress to point out that when one has regard to the scheme of the Act, no power is given to the 1st respondent to impose a sanction. In this case, he acted on a recommendation of the disciplinary inquiry. There is no evidence that the disciplinary enquiry, at any stage, recommended the additional sanction of the reduction of the applicant's salary. This appears to have been a bolt of lightning from the blue.

[53] This issue arises pertinently when one has regard to the provisions of Regulation 68(1) promulgated under the Act. This regulation provides that all disciplinary measures and orders imposed must be effected immediately after the lapse of the 14th day after the imposition of the sanction. This would, in my view, be geared to give effect to the right of appeal and related processes against the sanction imposed. In the instant case, it is clear that the reduction of the applicant's salary was communicated well after the reduction in rank and also well beyond the period stipulated in the above regulation. This, in my considered opinion, affects the validity of the additional sanction.

[54] I now turn to consider the implications of s 58(7) of the Act. The said provision reads as follows:

'Subject to section 52 or section 55, as the case may be, if a correctional officer who was suspended is, pursuant to disciplinary inquiry, reduced in rank, he or she must be paid the salary applicable to the rank to which he or she is reduced from the date when the disciplinary measure of reduction in rank became effective.'

[55] It is plain that the respondents in their answering affidavit relied on this provision and submitted that the reduction in rank automatically results in the reduction of the salary. Is this contention correct? Before answering this poser, it is important, in my considered view, to acknowledge, as Mr. Tjombe pointed out, that the applicant in this case was never suspended. For this reason, Mr. Tjombe argues that the reduction in salary should not apply to the applicant.

[56] In answering the question whether it is correct that the reduction in salary does not apply to the applicant because he was not suspended, it is in my view important to briefly consider the provisions of s 58. That section deals with suspension and dismissal of correctional officers. Section 58(1) gives the 1st respondent the right to suspend any officer suspected of having committed or charged with having committed an offence from performing his or her functions. This is done pending trial, institution of disciplinary charges, outcome of a disciplinary inquiry or after conviction of the offence.

[57] In terms of s 58(2), the 1st respondent is compelled to suspend an officer who is under arrest or detention or one serving a period of imprisonment for a period of 30 days or less from performing his or her duties. Subsection (3) authorises the 1st respondent, where it is in the interests of the Service, to suspend an officer. Before doing so, however, the 1st respondent is required to grant the said officer a hearing and the officer is required to make representations and show cause why he or she should not be suspended immediately.

[58] A reading of s 58(5) shows that an officer who has been suspended in terms of subsections (1) and (2), is not entitled, during the period of suspension, to any salary as an officer. Only where the Minister orders otherwise, at the request of the officer, may a salary be allowed to be issued to the suspended officer.

[59] I have deliberately considered the above provisions with a view to determining the importance, if any, that attaches to a suspension, and correspondingly, to the absence of a suspension. From a consideration of the above provisions, it occurs to me that the issue of suspension plays a pivotal role in the course that will be followed at the end. A suspension, it would seem, is issued where the offence in question, charged, or being investigated, is serious, or where it would not be in the interests of the Service, to keep the officer in harness as the investigations or the proceedings, whether criminal, or disciplinary, are in motion.

[60] It appears therefore, that the imposition of a suspension carries with it a pernicious and negative effect on the recipient. It suggests very strongly that the offence charged, or pleaded to, is of a serious nature such that the officer should not be allowed to continue performing his or her daily duties pending the finalisation of the proceedings.

[61] Correspondingly, the absence of a necessity to impose a suspension in the interim, suggests that the offence in question is not very serious or the character and behaviour of the officer is not of the kind that would require him or her to be put on ice, as it were. In this regard, the officer may be allowed, even as the investigations or the disciplinary inquiry progresses, to perform his or her ordinary duties, and more importantly, continue to earn a salary. The latter, we should remember, is withheld from suspended officers as the processes are underway.

[62] It is now opportune that I return to deal with the provisions of s 58(7). With the discussion above, it becomes plain for s 58(7) that suspension is a critical component in the determination of the gravity of the offence before the officer is acquitted or found guilty. This means that the 1st respondent should carefully consider the nature, seriousness and impact of the charge or investigation and its effects on the interests of the Service, and then decide whether it is necessary to suspend the officer in question.

[63] As indicated, the decision to suspend normally bodes ill for the officer and tends to suggest a serious offence and an added incompatibility with the said officer continuing to render his or her services pending the finalisation of the proceedings. It is for that reason, in my considered view that the legislature found it necessary to

mention in s58(7), that it is suspended officers only, who are liable to have their salaries reduced to the rank to which they have been demoted.

[64] I am accordingly of the considered view that Mr. Tjombe is correct that where an officer has not been suspended, it would ordinarily be incorrect to then visit the said officer with a sanction that not only reduces the officer's rank, but also the salary to the rank of the demotion. The fact that the applicant continued to perform his duties and to earn a salary as the proceedings ensued, is an indication that his was not considered as a very serious offence as it did not require a suspension pending the finalisation of the disciplinary proceedings. In addition, it would seem he continued earning a salary in the interregnum.

[65] In sum, it would therefor appear to me that firstly, for one to receive the sanction of reduction in salary, the said sanction must be specifically mentioned in the Act, particularly in s 51(13). It does not automatically follow that because one has been reduced in rank, the salary should be reduced to the rank of the demotion. Secondly, where the officer is suspected of having committed a very serious offence, or one which necessitated a suspension for whatever reasons in the intervening period, when such an officer is found guilty and the sanction is to reduce his or her rank, the salary is also reduced to the rank of the demotion.

[66] It would appear that the applicant does not fall into either category. First, there is no provision in the law for automatic reduction in salary as a result of a reduction in rank, save as seen, in cases where the officer has been suspended. The suspension, as indicated, reflects an abhorrence of some level that should suggest that the reduction in rank alone does not suffice. Furthermore, as indicated earlier, the section dealing with sanctions, i.e. s 53(13), does not impose reduction in salary as a separate sanction that may be imposed, either on its own or in conjunction with any other. Neither, I may mention, is it implicitly encapsulated in and regarded as one with the reduction in rank, in my considered view.

[67] In the recently delivered judgment of the Supreme Court, in *Minister of Agriculture, Water & Forestry and Others v Ngavetene and Another*¹¹ the majority of the Court, per Smuts JA, stated the following, in part:

‘This court has stressed in the context of a review that, as a matter of constitutional principle, the exercise of public power in conflict with the law and thus invalid, should be corrected or reversed in accordance with the principle of legality and the rule of law.’

[68] It is manifest, from what has been discussed above that in the instant case, the powers exercised or purported to be exercised by the 1st respondent against the applicant, were *ultra vires* (outside) the provisions of the Act and were thus invalid. The court is, accordingly empowered, in the circumstances, to set aside the 1st respondent’s decision as prayed for by the applicant.

Conclusion

[69] In view of the conclusions reached above, it would appear that the applicant has made a case for the relief he seeks. I find that the 1st respondent did not have the power in terms of the Act to impose the sanction of reducing the applicant’s salary as that is not provided for in the Act. He was accordingly wrong in law to dismiss the applicant’s grievance over the reduction of his salary.

[70] Additionally, I find that the 1st respondent’s reliance on the provisions of s 58(7) is legally incorrect for the reason that the applicant was not, at any stage, according to the papers, suspended before or during the progress of the disciplinary inquiry. That provision, from its wording, clearly applies to officers who were suspended at some stage before or during the proceedings leading to the sanctions imposed and it is accordingly inapplicable to him.

Costs

[71] The ordinary rule that applies in civil proceedings, barring special circumstances, is that costs follow the event. There is no reason in the instant matter as to why the ordinary rule should not apply.

¹¹ (SA 70-2018) [2020] NASC (8 December 2020), para 106.

Order

[72] In the premises, I am of the considered opinion that the following order commends itself as appropriate in this matter:

1. The decision of the First Respondent dismissing the Applicant's grievance regarding the deduction of the Applicant's salary is hereby reviewed and set aside.
2. The First Respondent is directed to rectify the Applicant's salary to that of Assistant Commissioner in the establishment of the Correctional Services of Namibia.
3. The Respondents are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved.
4. The matter is removed from the roll and is regarded as finalised.

T.S. MASUKU
Judge

APPEARANCES:

APPLICANT:

N. Tjombe
Of Tjome-Elago Inc.

RESPONDENTS:

H. Harker
Of the Office of the Government Attorney