

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00407

In the matter between:

RIHAVARA GIVEN KAVEKOTORA KAOMBUNGU	1ST APPLICANT
KAUTJA TJINGORORI	2ND APPLICANT
MAVERIHUNU MUHARUKUA	3RD APPLICANT
ANANIAS NAMHOLO	4TH APPLICANT
LEBEUS HANGULA	5TH APPLICANT
FILLIPPUS ANGALA	6TH APPLICANT
CORNELIUS HANGHOME	7TH APPLICANT
RIJAMEKEE CHRISTOPHINE MBINGENEEKO	8TH APPLICANT
STEPHANUS GARISEB	9TH APPLICANT
STEPHANUS HAILONGA	10TH APPLICANT
IVY BUISWALELO	11TH APPLICANT
MATHIAS KUFUNA	12TH APPLICANT
SAKARIA MWAHALUKA	13TH APPLICANT
ANTON JOHANNES	14TH APPLICANT
ALLAN KAKWASHA	15TH APPLICANT
COLLINS CHRISTIAAN	16TH APPLICANT
MATHIAS NAHAMBO	17TH APPLICANT

SEBESTIAN NEWAKA	18 TH APPLICANT
GEORGE NASHILONGO	19 TH APPLICANT
ERVEN KATITI	20 TH APPLICANT
ERROL VAN ROOYEN	21 ST APPLICANT
CELLESTINUS MUNUNGA	22 ND APPLICANT
SAMUEL SHIPA	23 RD APPLICANT
DAVID MUZANIMA	24 TH APPLICANT
FESTUS SHILONGO	25 TH APPLICANT
WILLEM HAMBIIYA	26 TH APPLICANT
JANUARIES JAGER	27 TH APPLICANT
SALOMON NEGUSHE	28 TH APPLICANT
NYAMBE CHRISTOPHER MASIBI	29 TH APPLICANT
TJISEMO ITEZEUA	30 TH APPLICANT
AMBATA TETUKONDJELE	31 ST APPLICANT

and

COUNCIL OF THE MUNICIPALITY OF WINDHOEK	1 ST RESPONDENT
WINDHOEK CITY POLICE	2 ND
RESPONDENT	

Neutral citation: *Kaombungu v Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-REV-2021/00407) [2023] NAHCMD 567 (13 September 2023)

Coram: TOMMASI J
Heard: 13 July 2023
Delivered: 13 September 2023

Flynote: Regulations — Municipality of Windhoek: Windhoek Municipal Police Service Regulations: Police Act 19 of 1990 — Interpretation of regulation 37(1) of

Government Notice 32 of 2013 — Bonus leave — Whether same is applicable to applicants who were employed after the repeal of the Municipal Police Service Regulations, GN 296 of 1 December 2004.

Labour law — Payment of benefits — If a benefit is not authorised by law and is invalid to that extent, it would not constitute a unilateral change of conditions of employment if it were no longer to be paid.

Constitution — The legality of the differentiation — The person or body which has made it bears the burden to prove that it does not amount to constitutionally impermissible discrimination in the pejorative sense — Differentiation between groups of members not unreasonable and benefit not applicable, without discrimination, to all appointed after 1 March 2013.

Practice — Parties — Authority to institute proceedings — Power of attorney authorising acting Chief Executive Officer to institute action — Minimum evidence required that of the resolution of corporation — Lack of evidence that acting CEO has been acting in consultation with the Chairperson of the Management Committee — Counter application null and void for lack of authority.

Summary: The applicants were appointed as members in accordance with the Windhoek Municipal Police Service Regulations which came into effect on 1 March 2013. They claimed a bonus leave benefit which, according to their contract of employment, accrued to them five years after their appointment i.e. during or about August 2013. The first respondent refused to grant the benefit relying on the fact that the term of the contract was in conflict with regulation 37(1) of the Service Regulations. The applicants now claim the entitlement to the bonus leave alternatively payment in lieu thereof. The first respondent instituted a counter-application. This was struck from the roll for lack of authority.

Held, that the literal and grammatical interpretation of regulation 37(1) is that those members who were in the service of the Council on 1 December 2004 are entitled to

bonus leave if they had completed five years of uninterrupted service and they would also be entitled to a further bonus leave upon completion of a further five year continuous service.

Held, further, that the legislative intent was not to extend this benefit to include the applicants who were appointed after 1 March 2013.

Held, further, that although there is differentiation between the groups that it is reasonably justifiable and it further applies without discrimination to all members who joined the Municipal Police force after 1 March 2013.

Held, further, that the term of the contract is *ultra vires* the Service Regulations.

ORDER

1. The application for this court to grant an order in respect of prayer 2 and 3, is dismissed with costs, the cost is to include the cost of one instructing and one instructed counsel. The applicants are to pay the first respondent's costs jointly and severally, the one paying the other to be absolved.
2. The applicants must pay the wasted costs of the second respondent jointly and severally, the one paying the other to be absolved.
3. The counter-application of the first respondent is struck from the roll with costs, which costs is to include the costs of one instructing and one instructed counsel.

JUDGMENT

TOMMASI J:

Introduction

[1] This is an application for the court to consider whether to grant a declaratory order that the applicants are entitled to bonus leave or payment in lieu of the bonus leave in terms of regulation 37 and if so order that such bonus leave be paid within 30 days from date of the court order.

Background

The application

[2] The applicants are all employed by the second respondent as Cadet Constables since August 2014. The applicants were appointed in terms of a letter of appointment which stipulate *inter alia* that the terms and conditions of service must be read with the Windhoek Municipal Police Service Regulations contained in Government Notice No 32 of 2013 (Service Regulations 2013). These regulations came into effect on 1 March 2013 and it repealed the Municipal Police Service Regulations published under Government Notice No 296 of 1 December 2004.

[3] Regulation 37(1) makes provision for bonus leave. The applicants sought to claim this benefit but were informed by the second respondent that their request for payment of bonus leave will be contrary to the Council resolution 171/06/2014 and were referred to regulation 37 of the Service Regulations which regulates the bonus leave of members.

[4] It is not in dispute that the applicants exhausted the internal grievance procedure before applying to this court for the setting aside of the Council resolution 171/06/2014 and for a declaratory order as stated above. The court granted the applicants the orders they sought which included the review of and the setting aside of the Council resolution 171/06/2014 on 24 January 2022. The respondents brought an application for the rescission of that order. This court granted a rescission of prayer 2 and 3 but declined to rescind the setting aside of resolution 171/06/2014. The reasons for this decision are contained in a separate judgment.¹

[5] The parties are *ad idem* that the only issue for determination in respect of the application is whether the court ought to grant prayer 2 of the application which concerns the question whether the applicants are entitled to bonus leave or payment in lieu thereof in terms of regulation 37. The parties agree that this calls for this court to interpret the provisions of regulation 37 of the Service Regulations which came into operation on 1 March 2013.

[6] The respondents raised a point *in limine* of misjoinder of the second respondent on the ground that the second respondent has no legal capacity to be sued and to sue and as a result, the second respondent has been misjoined to the proceedings. The applicant is of the view that the second respondent has been established in terms of s 43C of the Police Act 19 of 1990 read with regulation 2 of the Municipal Police Services Regulations, 2002 and is similarly a statutory body. They also submit that the plea of misjoinder is dilatory in nature and it would therefore not justify the dismissal of the application. They agree that it would merely render the applicants liable for wasted costs.

[7] The respondents further raises an exception in the application proceedings of the second to the thirty-first applicants in that there has been a failure by these applicants to address the necessary factual allegations to sustain the relief sought. The respondents

¹ *Council of the Municipality of Windhoek & Another v Kaombungu* (HC-MD-CIV-MOT-REV-2021/00407) [2022] NAHCMD 589 (28 October 2022).

submit that the claim by the second to thirty first applicants should be dismissed on the basis that they do not make the necessary allegations to sustain their claim.

The counter application

[8] The respondents brought a counter-application in which they are seeking an order reviewing and correcting or setting aside clause 3.3 of the first to thirty first applicant's letters of appointment as Cadet Constables.

[9] The applicants opposed the counter application raising the preliminary point that Mr Mayumbelo brings the counter-application on behalf of the first respondents which is as juristic persons without a resolution.

The misjoinder

[10] In *Babyface Civils CC JV Hennimma Investments CC and Others v //Kharas Regional Council and Others*² the court deprecated the practice by applicants of citing every person or entity they could think of when instituting the review so as not to be faced with a point of non-joinder being taken. The Council of the Municipality of Windhoek made the Service Regulations and is the 'employer' of the members appointed in terms of regulation 10. Legal proceedings must therefore be instituted against the Council for the Municipality of Windhoek. Citing the second respondent amounts to a misjoinder as the second respondent, apart from not having the right to be sued and be sued, is not the employer of the applicants.

[11] As correctly pointed out by Ms Ambunda-Nashilundo, counsel for the applicants, the plea of misjoinder is dilatory and it does not warrant a dismissal of the application. The court however would in this regard make the appropriate costs order.

The exception

² *Babyface Civils CC JV Hennimma Investments CC and Others v //Kharas Regional Council and Others* 2020 (1) NR 1 (SC).

[12] No argument was raised by the respondents in this regard and it appears from the counter application that the respondents are prepared to accept that the contract of the first applicant captures the contract of employment of all the applicants. I believe that this adequately deals with this aspect. The court would accept for purposes of this judgment that all the applicants entered into a similar employment contract with the same terms and conditions and at the same time.

The merits of the application

[13] The appointment letter of the first applicant is dated 27 August 2014. Its introduction reads as follows:

‘... your appointment and your conditions of service read with the Windhoek Municipal Police Service Regulations, will be as follow:’

[14] Clause 3.3 of the appointment letter provide for the following fringe benefit:

‘Bonus Leave: 73.97 working days per fifth (5) year cycle (valid for two completed cycles only)’ [my emphasis]

[15] The above fringe benefit has its origin in regulation 37(1) of the Service Regulations.

[16] Ms Ambunda-Nashilundo, referring to case law³ setting out the approach to statutory interpretation, submits that the court should subject itself to the proposed approach when interpreting or assessing the various interpretations attached to regulation 37(1). She agrees that although the applicable regulation is not regulation

³ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2009 (2) NR 793 HC at 797C-I and 798A and *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and another* 2017 (3) NR 853.

34(1) of the repealed Service Regulations but that the bonus leave originated from this provision.

[17] It is further the applicants' position that they have been employed since 2014 and the first five year cycle ended during 2019. A second bonus leave would therefore accrue to them by 2024. They claim entitlement to 73, 97 bonus leave days or in the alternative payment of cash value calculated in accordance with regulation 37(8).

[18] Ms Ambunda-Nashilundo submits that it is trite that statutory provisions should be given their literal meaning in total context in order to ascertain the intention of the legislature. She submits that the repealed regulation did not include the words 'thereafter who has completed'. She argues that the word 'thereafter' was purposefully included to ensure the retrospective effect of regulation 37(1), which goes back to December 2004. She submits that it means that all members who were in the employ of the respondents since 2004 and all members employed at any time thereafter, would be entitled to leave bonus for the two five year cycles.

[19] She cites regulation 37(11) in support of her proposed interpretation. She further submits that the literal and contextual meaning of regulation 37(1), read with 37(6), (7) and (11) is that for members employed before the repeal date i.e. 1 March 2013, and who has not completed five years' service, the period already served will continue and the bonus leave would accrue after the first five year continued service period. This alone, she argues, indicate that regulation 34(1), as repealed by 37(1), read with 37(11), is a continuation of the benefit to apply to all members employed by the applicant since December 2004.

[20] Ms Ambunda-Nashilundo concedes that the legislature in terms of regulation 37(1) is meant to have retrospective effect to include members who were employed as from December 2004 and thereafter. She submits that it can be accepted that the legislature did this so that the vested rights of members since 2004 is not affected by the repeal.

[21] Ms Ambunda-Nashilundo argues that the interpretation of the respondents is absurd and it does not reflect the true intention of the legislation as it is a misconstruction of the clear words as they appear from the regulation. She submits that the interpretation suggested by the respondents is not only wrong in law but also unconstitutional as it discriminates between members of the first respondent and disentitles the rest to a statutory benefit without any justifiable grounds.

Respondents' case

[22] Mr Chibwana, counsel for the respondents, argues that the entitlement to bonus leave is not addressed in the regulations in the same manner as all the other employment entitlement for members of the Windhoek Municipal Police. He cites the examples of other fringe benefits which merely refers to 'a member' without any qualification on the identity of the member and most importantly when the member should have been in service to qualify for the employment entitlement. He proposes that the court embark upon the absence of a qualification in comparison to the other provisions that similarly award employment entitlements as he is of the view that this would be a crucial factor which must be taken into consideration.

[23] According to Mr Chibwana, a further crucial factor is the use of the word 'and'. He submits that this should be given its ordinary meaning. He, like Ms Ambunda-Nashilundo, argues that the literal, grammatical and ordinary interpretation of the language utilised by the regulation maker, should be applied when interpreting the regulations, citing *Torbitt and Others v International University of Management*⁴ in support of his submissions. He also provided the court with a list of cases⁵ in support of his contention that the word 'and' as it appears in the regulations is a conjunction and its function is to indicate an additional separate condition to be met for an outcome to be reached. He submits that no absurdity could arise from this interpretation because this interpretation does not render the purpose for the grant of the bonus leave nugatory.

⁴ *Torbitt and others v International University of Management* 2017 (2) NR 323 (SC).

⁵ *R v Mgomo* 1939 EDL 269; *Chapman NO v Balim and Another* 1968 (2) SA 809; and *R v Spareco Meats (Pvt) and another* 1970 (2) 530.

[24] Mr Chibwana, referring to the affidavit filed, argued that there was no dispute that the purpose of the bonus leave was to encourage members of the newly formed Windhoek City Police to serve and stay in the employment of the City Police.

[25] Mr Chibwana raises an interesting question: 'What to make of Regulation 37(11)?' His view is that this regulation is a transitional provision and its purpose was to grant bonus leave to those members who, at the time regulation 34(1) was repealed, had not yet accrued five years of continuous service. In this regard, he refers the court to *Ohorongo Cement (Pty) Ltd v Jack's Trading CC and Others and a Similar Matter*⁶ which sets out the approach to be adopted by the court when interpreting various provisions of a statute.

[26] Mr Chibwana submits that the interpretation advanced by the applicants renders regulation 37(11) unnecessary and therefore non-operational. He proposed an interpretation which would not render another provision ineffectual. His argument is that regulation 37(11) addresses the manner in which the first respondent must consider the grant of bonus leave to persons who joined the employment of first respondent after the enactment of regulation 34(1) and before its repeal. He submit that it did not address members who joined the Municipal Police Service after the enactment of regulation 37(1).

The law

[27] Both parties are *ad idem* when it comes to the law applicable to the interpretation of statutes. It has recently in *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and another*⁷ captured the case law as it applies to the interpretation of statutory provisions as follow:

⁶ *Ohorongo Cement (Pty) Ltd v Jack's Trading CC and Others and a Similar Matter* 2020 (2) NR 571 (SC).

⁷ *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Another* 2022 (2) NR 325 (SC).

[37] This court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* recently adopted the lucid articulation of the approach to be followed in the construction of text by Wallis JA in *South Africa in Natal Joint Municipal Pension Fund v Endumeni Municipality*:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[38] In *Total Namibia*, this court also referred to the approach in England and concluded:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

[39] As this court said in *Namibian Association of Medical Aid Funds*:

'To paraphrase what was stated by this court in *Total*, the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.'

[40] This process has aptly been described as 'essentially one unitary exercise' in which text and context are relevant to construing provisions.

[41] This court has also stressed the importance of the Constitution in interpreting statutory provisions:

'The Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.'

[28] It is important to consider the origin of the provision i.e. the old provision (Regulation 34). It is the origin of the benefit and it is befitting that the court takes cognisance thereof and as a starting point the court must have regard to the clear wording of the provision.

Repealed Regulation 34(1)

[29] The repealed regulation 34(1) reads as follow:

'The Council must grant to a member who is in the service of the Council at the date these regulations come into operation and who has completed a minimum of five years continuous service a bonus leave, and thereafter at intervals of five years' service period, but only for a maximum of two five years' service periods.'

[30] Mr Chibwana correctly points out that this regulation gives a description of the member who qualifies for the benefit ie it is for a member who 'is' in the service of the Council at the date the regulations came into operation. There is nothing ambiguous about this description or qualification of the member. This provision relates to members who 'is' (present tense) in the service of the Council at 1 December 2004. It does not include other members who were appointed after the date the service regulations came into operation.

[31] The first clause of this provision is joined by the word 'and' and this court has to determine whether this word is conjunctive or disjunctive. It is evident from the

grammatical structure of the provision that it is used to add another condition and in this provision therefore is a conjunctive. It adds the condition that the same member described in the first clause ie who is in the service of the Council on 1 December 2004, would have to complete a minimum of five years continuous service before Council must grant him/her a bonus leave. The same conjunctive 'and' joins a further condition for the same member to qualify for bonus leave beyond the first five year continuous service by the use of the word 'thereafter'. It further limits the entitlement to a period of two five year service.

[32] If this court has regard to the context of this 'fringe benefit' in relation to the other benefits, as pointed out by Mr Chibwana, then the only logical conclusion is that the legislative intent was for this benefit to be limited to those who were in the service of the Council on 1 December 2004 and that the benefit was intended for a limited period of ten years. This is consistent with the respondent's averment that the aim was to encourage those members to remain in the service of the Council for at least ten years.

Regulation 37(1)

[33] Regulation 37(1) basically retained the same grammatical structure as the old regulation. Regulation 37(1) and (2)(a)(ii) of the Service Regulations read as follow:

'(1) The Council must grant to a member who was in the service of the Council at the date the regulations repealed by regulation 71 came into operation and thereafter who has completed a minimum of five years continuous service, a bonus leave, and thereafter for one more five year service period, but only to a maximum of two 5 years' service period where after the right to bonus leave lapses.

(2) The number of leave days to be granted for a bonus leave must be as follows:

(a) (i) ...

(b) (ii) 73,97 working days for any other member.'

[34] This regulation still describes the member who qualifies as the member who was in the service of the Council on 1 December 2004. It is noted in passing as pointed out

by Ms Ambunda-Nashilundo that the provision erroneously refers to regulation 71. The word 'and', in a similar manner as the previous regulation, adds the condition that 'thereafter' the same member who was in the service of the Council on 1 December 2004 and who thereafter completed a minimum of five years continuous service is entitled to bonus leave. The word 'thereafter' clearly refers to the period following 1 December 2004 and it does not refer to members who were appointed thereafter as proposed by the applicants. The qualifying phrase still describes the specific group of members who are entitled to this benefit.

[35] The new regulation contains the same limitation of two five year service period as the old regulation. The literal and grammatical interpretation of the new regulation is in fact as proposed by the respondents ie that those members who were in the service of the Council on 1 December 2004 are entitled to bonus leave if they had completed five years of uninterrupted service and they would also be entitled to a further bonus leave upon completion of a further five year continuous service. These members referred to would therefore have been in the service of the Council for a period of nine years and four months (ie from 1 December 2004 to 1 March 2013). They would therefore have qualified for bonus leave on 1 December 2014.

[36] The new regulation contained a provision which was not in the old regulation. It provides that:

'... where after the right to bonus leave lapses.'

The clear meaning is that the right to bonus leave is terminated. Given this court's finding that it the benefit is limited to those who were in the employ of the Council on 1 December 2004 it would mean that once those members have completed their ten years, the benefit of a bonus leave would cease to exist totally. This interpretation would be consistent with the rationale that it was introduced to encourage those members who were in service at the time, to remain in service for a period of at least ten years.

Regulation 37 (11)

[37] Regulation 37(11) reads as follow:

‘(11) Bonus leave which has accumulated under the former conditions of service is deemed to have accumulated for calculation purposes as continuous service in accordance with these regulations, but a member who has not yet accrued five years continuous service at the date the regulations are repealed, such pro rata years of service before such date, are added proportionately to the years of services that follows the date of repeal, for entitlement as the first term bonus leave and thereafter for one more five year service period, but only to a maximum of two five years’ service periods. ‘

[38] Interpreting regulation 37(1) to only include those limited number of members who were in service on 1 December 2001 would make total sense if it was not for regulation 37(11). Mr Chibwana once again correctly identified the conundrum contained in regulation 37(11). It provides as follow:

‘..., but a member who has not yet accrued five years continuous service at the date the regulations are repealed, such pro rata years of service before such date, are added proportionately to the years of services that follows the date of repeal, for entitlement as the first term bonus leave and thereafter for one more five year service period,...’ [own emphasis]

[39] This sub-regulation provides for yet another category of members which could not possibly be the same as those members who were in service on 1 December 2004. Those members would at the date of repeal ie 1 March 2013, have already accrued the first five years continuous service on 1 December 2009 and their second bonus leave would have accrued on 1 December 2014. The members referred to herein can only mean those who were appointed less than five years before the date of repeal. The logical conclusion is that regulation 37(11) makes reference to those members who has been in service after the date of 1 December 2004 but before the date the regulations were repealed. Although this regulation goes further than regulation 37(1), it still does

not make provision for those members who were appointed after 1 March 2013 i.e. the applicants herein.

[40] The court is reminded of the following dicta in *Ohorongoro Cement*⁸ matter supra:

[51] Furthermore, when interpreting legislation, the court must assume that the legislature is consistent with itself and therefore, the provisions of the same Act are concurrently operational unless there is an irreconcilable conflict between the two provisions. An irreconcilable conflict exists when the two provisions prescribe antagonistic requirements which cannot be enforced concurrently without considering the other provision to be invalid. Thus, after determining the ordinary meaning of the provision, the court must establish if there is an irreconcilable conflict between the two provisions. If the conflict is reconcilable, the court must adopt an interpretation which upholds that the two provisions are concurrently operational.'

[41] Regulation 37(11) at first blush appear to be a transitional provision but it does not only address the manner in which the Council must deal with those members who were in service on 1 December 2004, but goes further by creating a transitional provision for a group of members which are not included in regulation 37(1). This court however is not called upon to deliberate upon the fate of those members who were appointed in the period after 1 December 2004 and before the repeal of the Service Regulations of 2004. There is no evidence placed before this court as to whether or not these members received the benefit. It is however clear from a reading of both regulation 37(1) and regulation 37(11) that it was the legislative intent that the bonus leave benefit was to lapse after the period provided for in these regulations. Moreover, it is clear that the legislative intent was not to extend this benefit to include the applicants who were appointed after 1 March 2013.

Constitutionality of the Regulation

[42] The applicants argue that if the court would accept the interpretation as proposed by the respondents such an interpretation would make the regulation unlawful as being

⁸ See footnote 6 above.

contrary to Article 10 of the Namibian Constitution read with the provisions of Article 102 (3) of the Namibian Constitution which reads:

‘(3) Every organ of regional and local government shall have a council as the principle governing body, freely elected in accordance with this constitution and the Act of parliament referred to in sub-art(1) hereof, with an executive and administration which shall carry out all lawful resolutions and policies of such council, subject to this constitution and any other relevant law.’

[43] Article 10 of the Constitution reads:

‘(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.’

[44] The applicants who aver that the regulation(s) are unconstitutional have the onus of persuading the court that the said regulation was not reasonably justifiable in a democratic society.⁹ It was furthermore held in *Uffindell t/a Aloe Hunting Safaris v Government Of Namibia And Others*¹⁰ that for differentiation to be constitutionally impermissible under Article 10(1), it must amount to discrimination in the pejorative sense by being unfair or unreasonable in the circumstances.

[45] The first respondent’s reason advanced for limiting the benefit to those members who joined a newly established police service cannot be said to be unreasonable in the circumstances. This was a benefit bestowed over and above the normal leave provisions to encourage members to remain in the service of the first respondent for a period of at least 10 years. It is my considered view that, although there is differentiation between the groups, that it is reasonably justifiable and it further applies without discrimination to all members who joined the Municipal Police force after 1 March 2013.

⁹ *Maletzky v President of The Republic of Namibia and Others* 2016 (2) NR 420 (HC).

¹⁰ *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC).

Validity of clause 3.3 of the Letter of Appointment

[46] It would follow logically, given the interpretation arrived at by this court, that clause 3.3 of the letter of appointment (contract of employment) would be *ultra vires* regulation 37(1). In *Luderitz Town Council v Shipepe*¹¹ the following was stated:

‘...If a benefit is not authorised by law and is thus invalid to that extent, it would not constitute a unilateral change of conditions of employment if it were no longer to be paid ...’

[47] This court having considered the above, concludes that regulation 37(1) read with regulation 37(11) is not applicable to the applicants. The provisions as interpreted by the court, is not unreasonable nor does it lead to a manifest absurdity or inconsistency or inequality. This court cannot order compliance with paragraph 3.3 of the letter of appointment in light of the fact that such a term would be *ultra vires* the Service Regulations and it cannot therefore be said the first respondent unilaterally changed the conditions of employment by refusing to grant the applicants the benefit or payment in lieu thereof.

[48] The applicants failed to make out a case that they have any existing, future or contingent right in terms of regulation 37. In the result, prayers 2 and 3 of the notice of motion stands to be dismissed.

The Counter- Application

Lack of Authority

[49] The applicants submit that the deponent to the founding affidavit indicated that he is authorised to institute a counter-application on behalf of the first respondent. The lack of authorisation was raised in the answering affidavit to the counterclaim. In response hereto the first respondent attached a resolution No 107/04/2020.

¹¹ *Luderitz Town Council v Shipepe* 2013 (4) NR 1039 (LC) para 18.

[50] The resolution was crafted following a Special Municipal Council Meeting on 20 April 2020. The meeting dealt with an urgent application brought against the respondent at that time. In terms of an existing resolution the Chief Executive Officer was mandated to depose to affidavits on behalf of the first respondent. The resolution No 107/04/2020 changed this situation and it was resolved as follows:

'That Council resolution 19/2/2006 be rescinded in its entirety and the powers on litigation and arbitration revert to Council from the date of this Council resolution;

That future litigation and arbitration matters of Council be done by the Chief Executive Officer in consultation with the Chairperson of the Management Committee.'

[51] The founding affidavit was deposed to by George Mujiwa Mayumbelo in his affidavit stated as follow:

'I am:

an Acting Chief Executive Officer of the First Respondent ...

duly able to depose to this Affidavit and authorised to institute this application on behalf of the First Respondent ...'

The replying affidavit was deposed to by Faniel Ilukena Maanda and he states as follow:

'I am:

... Currently appointed as the Acting Chief Executive Office of the First respondent

...I am duly able to prosecute this application and depose to this replying affidavit ...'

[52] The first respondent's position is that the applicants accepted and conceded the authority of the deponent to the answering affidavit in the main application and that the counter-application is only consequential relief in respect of the defence raised in the main review application.

[53] In *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority*¹² the court held that the minimum evidence required whenever a power of attorney was filed authorising a legal practitioner to appear on behalf of a

¹² *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* 2019 (4) NR 1109 (SC).

corporate entity, was a resolution of the corporation from which it should be apparent that the person who had signed the power of attorney had been authorised to execute it in those terms and there could be no authorisation in the absence of such resolution.

[54] Mr Chibwana submits that the applicants by not opposing the locus in relation to the answering affidavit admit that the deponent is not acting on a frolic of his own but has been authorised to oppose the application and that the deponent's *locus* is established in the replying affidavit.

[55] The first respondent is a corporate entity and as such the resolution must reflect that the deponents are authorised to institute proceedings or to oppose. The fact that it was not raised in respect of the answering affidavit is not relevant when the court considers the objection raised in the counter-application. The guidelines established in respect of authorisation have been set out clearly. If there is no authorisation in the form of a resolution from which it is apparent that Mr Mayumbelo had the authorisation to institute action, such process would be null and void.

[56] The resolution clearly makes provision that litigation of the first respondent must be done by the Chief Executive Officer in consultation with the Chairperson of the Management Committee. There is no evidence that the deponent have consulted with the Chairperson of the Management Committee. The minimum evidence adduced in support of the deponent's authorisation to institute proceedings on behalf of the first respondent is not sufficient to prove that such authorisation has been obtained. For this reason the counter-application stands to be struck from the roll.

Costs

[57] The cost of the application must follow the event which would include the wasted costs of the misjoinder of second respondent. The cost of the counter-application must similarly follow the event. Both parties instructed counsel and the court would accordingly order costs to include the cost of one instructing and one instructed counsel.

[58] In the result the following order is made:

1. The application for this court to grant an order in respect of prayer 2 and 3, is dismissed with costs, the cost is to include the cost of one instructing and one instructed counsel. The applicants are to pay the respondents costs jointly and severally, the one paying the other to be absolved.
2. The applicants must pay the wasted costs of the second respondent jointly and severally, the one paying the other to be absolved.
3. The counter-application of the first respondent is struck from the roll with costs, which costs is to include the costs of one instructing and one instructed counsel.

M A TOMMASI
Judge

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