A. 83/2001

WALTER MOSTERT v MINISTRY OF JUSTICE

An *ex parte* application was launched for relief which could not in law be granted *ex parte.* The application was not dismissed and by conduct converted into notice of motion proceedings.

The application to review and set aside the Permanent Secretary's decision to transfer applicant, a magistrate, from Gobabis to Oshakati refused. Waiver and abandonment of right to review considered.

Transfers of magistrates permissible by reason of magistrate's contract express or implied with State and law of practice existing at time of Independence of Namibia applicable by virtue of Article 138(2)(a) and 140(1) of Constitution.

Transfer of magistrates not a threat to their independence.

Section 23(2) of Public Service Act not applicable to magistrates but that order not to become effective until 1st March 2003 but could be expunged if Parliament remedied defects giving rise to order.

Case No.: A. 183/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WALTER MOSTERT

APPLICANT

and

MINISTRY OF JUSTICE

RESPONDENT

CORAM: Levy, AJ

Heard on: 2001.10.29

Delivered on: 2001.11.23

JUDGMENT

LEVY, AJ: The applicant is represented by Advocate E Du Toit SC and with him Advocate Z Grobler and the respondent by Advocate D F Smuts and with him Advocate K van Niekerk.

On 9Ih July 2001, applicant launched what applicant called "Notice of Motion" proceedings and purported to join the "Ministry of Justice" as a respondent in such proceedings. The Ministry of Justice is not a persona but applicant did correct this in his supporting affidavit and cited the Minster of Justice as respondent.

Applicant gave notice that on 23rd July 2001, he was going to apply for the following relief:

> "1. That this application is semi-urgent in terms of Rule 6(12) and that the Rules in respect of time periods and service be disposed with.
>
> 2. That a Rule Nisi be issued calling upon the Respondent on a date to be determined by the Honourable Court to furnish reasons to the above Honourable Court why an order should not be made in the following terms:-
>
> 3. That the decision of the Permanent Secretary for Justice to transfer the Applicant to Oshakati be reviewed and set aside.
>
> 4. To declare that the judiciary, including the magistrate's, are independent in terms of Article 78 of the Namibian Constitution and that the Permanent Secretary for Justice has no jurisdiction to appoint, transfer and/or terminate the services of a magistrate, in particular that Section 23(2) of the Public Service Act does not apply to Magistrates.
>
> 5. Costs of suit.
>
> 6. Further and/or alternative relief.

3. That the respondent be interdicted to transfer the Applicant from Gobabis and/or evict him from the government house situated at Luitenant Lampe Street, Gobabis, pending the finalization of the Application referred to in paragraph 2."

In his very first claim, applicant alleges that the application is "semi-urgent" in terms of Rule 6(12) and asks that "service be disposed of (sic). In his certificate of "urgency" filed with these papers, Mr Grobler described the application as "semi-urgent" as well.

Rule of Court 6(12) whereon applicant relied applies only to "urgent' matters and not to semi-urgent matters.

In terms of Rule of Court 6(13) applicant was obliged to give respondent 15 days notice after service unless the Court specially authorized a shorter period- which the Court did not do.

In addition to these defects the application was fundamentally inappropriate and impermissible.

Under no circumstances can the relief claimed by the applicant be granted *ex parte.* Rule of Court 53 regulates review proceedings. *Federal Convention of Namibia v Speaker, National Assembly of Namibia, and Others* 1994(1) SA 177 (Nra HC). In Namibia, the Courts have in exceptional cases permitted applications for review to be brought by Notice of Motion but Notice of Motion does not include *ex parte* applications. Even where an applicant for a review does not invoke Rule of Court 53 but comes by way of Notice of Motion, the applicant loses some of the benefits provided by Rule of Court 53 and is confined to the provisions of Rule of Court 6 of the High Court. In so far as the claim for a declaratory order is concerned, die onus is upon an applicant to prove its case and an applicant is not entitled to prove only a prima facie case and to claim a rule *nisi* which ultimately casts an onus on the respondent to disprove the applicant's case. Applicant's third claim was an outright claim for an interdict, not a rule *nisi*, and no service on respondent whatsoever as applicant asked that service be dispensed with. There is no such procedure in our law.

On 23rd July 2001, applicant came to Court presumably for a rulemsr in terms of his notice but did not move for the relief claimed the argument being confined to a question of urgency.

The Court did not dismiss the application because of the aforegoing defects but postponed the hearing to a date to be arranged. On 12th September 2001, respondent filed opposing affidavits and the applicant filed a replying affidavit on 12th October 2001. The matter was set down for hearing on 17th September 2001 but then postponed to 24,h September 2001. There was an application for interim relief which was heard on 24lh September 2001 and which with the main claim was postponed to 29*' October. The interim relief application was not pursued. The applicant took up the appointment in Oshakati to which magistracy he had been transferred. The question of costs for the interim relief application stood over. The main application which was so semi-urgent that applicant wished to dispense with service was finally set down and heard on 29th October 2001.

Respondent filed an application to strike out portions of applicant's replying affidavit. This is opposed.

Both parties filed heads of argument and also additional and supplementary heads of argument.

After the case was called and argued the court pointed out to applicant's counsel that applicant had overlooked the Magistrates Court Amendment Act 1999, and had made no mention thereof in his papers.

Mr du Toit requested an opportunity to consider the Act and after discussion it was agreed that both parties could augment their heads of argument by written heads dealing with the said Act.

These written heads have now been received by the Court. The Court expresses its gratitude to counsel on both sides for the detailed heads of argument.

Applicant's case briefly constitutes a claim that this Court declare the judiciary including magistrates independent in terms of Article 78 of the Constitution of Namibia and that section 23(2) of the Public Service Act, Act No. 13 of 1995, does not apply to Magistrates. Furthermore, applicant asks that his own transfer to Oshakati be reviewed and set aside. There is also a claim for an interdict to restrain respondent from transferring him from Gobabis.

1 deal firstly with the application that the judiciary including the Magistrates' Courts be declared independent.

In the latter part of the 18th Century the world revolution for liberty, equality and fraternity gathered momentum with the fall of the Bastille in Paris in 1789 and with the writings of political philosophers and jurists in various countries. A prominent French jurist of the time, Montesquieu, in his thesis the "Spirit of the Law" wrote;

> "There is no liberty if the judiciary power be not separated from the legislature and the executive. Were it joined with the legislative power the life and liberty of the subject would be exposed to arbitrary control; for the judges would then be the legislators. Were it joined to the executive power, the judges might behave with violence and oppression."

At that time, the settlers in America were engaged in casting off the shackles of British Colonialism and influenced by the writings of Montesquieu they drafted a Constitution for the United States of America attempting to embrace therein the doctrine of separation of

powers recognizing that government consisted of three arms, the legislature, the executive and the judiciary and that these arms should be separate from each other because if more than one function of society was concentrated in any one arm, the liberty of the individual would be threatened.

World War II and the establishment of the United Nations Organisation gave impetus to the idealistic vision of a new world which respects, protects and promotes the basic dignity of humanity, through a commitment, universally, for the attainment of fundamental human rights and freedoms and through government by the rule of law.

See Mahomed C.J. *"The Independence of the Judiciary"* 1998 SALR at 658.

The way to ensure fulfilment of this vision was for States to have Constitutions guaranteeing these freedoms and human rights and recognizing an independent judiciary which could enforce these freedoms and human rights.

The Constitution of the Republic of Namibia has since 21st March 1990, the day of the State's inception and independence, specifically provided for and guaranteed these freedoms and human rights and has specifically recognized the independence of the judiciary.

Article 78 of the Constitution provides:

> "(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
>
> (a) a Supreme Court of Namibia;
>
> 7. a High Court of Namibia;
>
> 8. Lower Courts of Namibia.
>
> 9. The Courts shall be independent and subject only to this Constitution and the law.
>
> 10. No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Court may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.
>
> (4) ....."

Accordingly no order declaring the judiciary independent is necessary. The terms of the aforesaid Article are clear and unambiguous.

While the Constitution of Namibia contained provisions for the establishment of the Supreme Court, the High Court and the appointment of judges to those Courts, it did not have similar provision in respect of the lower courts or Magistrates Courts and for the appointment of magistrates to the Magistrates' Courts.

At the time that the Republic of Namibia obtained independence, there existed a system of lower courts popularly known as Magistrates Courts which had been established during the South African occupation of Namibia and which operated in terms of Act 32 of 1944 of the Republic of South Africa. The Constitution of South Africa at that time did not contain provisions for the

separation of powers so that Section 9(1)(a) of Act 32 of 1944 provided *inter alia:*

> "1(a) Subject to the provisions of the law governing the government service and the provisions of paragraph (b) of this sub-section and of section 10, the Cabinet may appoint for any district division, district or sub-district a magistrate or one or more additional magistrates and for every regional division a magistrate or magistrates.
>
> (aA) The Minister may, in a particular case or generally and subject to such directions as he may deem fit, delegate the power conferred upon him by paragraph (a) to the Secretary or a deputy-secretary of his department,...."

Article 138(2)(a) of the Namibian Constitution provides:

> "The laws in force immediately prior to the date of Independence governing the jurisdiction of Courts within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges, Magistrates and other judicial officers, shall remain in force until repealed or amended by Act of Parliament, and all proceedings pending in such Courts at the date of Independence shall be continued as if such Courts had been duly constituted as Courts of the Republic of Namibia when the proceedings were instituted."

Article 140(1) of the Constitution provides as follows:

> Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court."

Article 83 of the Constitution reads as follows:

> "(1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.
>
> (2) Lower Courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament."

It is to be observed that Magistrates' Courts in the Republic of Namibia are not presided over by

"Staff Members" but by magistrates or other judicial officers.

A comprehensive Act of Parliament in respect of the Magistrate's Courts has not been enacted by the Parliament of Namibia. However, on 9th March 1999, the Magistrates Courts Amendment Act was promulgated. This amending legislation purported to amend the Magistrates Court Act (No 32 of 1944) in certain respects including the substitution of Section 9 of Act 32 of 1944, by a new section 9. 1 refer only to the purported new Section 9(1)(a) and (b) which provides:

> "9 (l)(a) Subject to the provisions of the laws governing the Public Service and section 10 of this Act, the Minister may appoint for any regional division, district division, district or subdistrict a magistrate and one or more additional magistrates.
>
> (b) The Minister may, in a particular case or generally and subject to such direction as he or she may deem fit, delegate the power conferred upon him or her by paragraph (a) to the Permanent Secretary: Ministry of Justice or any other staff member in the Ministry of Justice."

Counsel for applicant in Additional Heads of Argument dealing with the Amending Act contend that "Act 1 of 1999 does not amend any of the basic principles contained in Section 9 of the Magistrates' Courts Act, but only adapts it to the specific conditions in Namibia." Respondent agrees with this contention as well.

The amendment purports to make the appointment of magistrates "subject to the provisions of the laws governing the Public Service" and the Minister (who is the Minister of Justice) is to appoint magistrates.

The words "subject to" have been interpreted by the Courts from time to time. InC *& J Clark Ltd v Inland Revenue Comrs* (1973) 2 All ER 513 at 520, Megarry J said:

> "..... the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master sections. When there is no clash, the phrase does nothing; if there is collision, the phrase shows what is to prevail".
>
> ***S*** v ***Marwane*** 1982(3) SA 717 (A) at 748

In other words applying this statement of the law to the instant case, should there be a clash between the provisions and laws of the Public Service and the laws regulating the appointment of magistrates used by the Minister, the Public Service Act and the provisions and laws

thereunder in respect of making appointments, will prevail.

The amendment does not make magistrates in the exercise of their functions subject to the Public Service Act nor does it purport to make magistrates subject to transfer in terms of the Public Service Act. The right to transfer a magistrate is still, to this day, regulated by the law as it was prior to the Independence of the State of Namibia, and Articles 138(2)(a) and 140(1) of the Constitution is therefore applicable and such transfers are valid and binding either by virtue of the aforesaid law or by virtue of the contract that magistrates have concluded with the State. 1 deal with this more fully hereunder. Section 23(2) of the Public Service Act which is applicable only to "Staff Members" does not apply to magistrates. I repeat, magistrates are not "Staff Members" (See Article 83(2) of the Constitution) and Section 23(2) of the Public Service Act does not apply to magistrates as I explain more fully hereunder.

In order to make Section 23(2) of the Public Service Act applicable to magistrates it would be necessary to interpret the amended Section 9(1)(a) that is the words "Subject to the provisions of the laws governing the Public Service as meaning that the entire Public Service Act is applicable to magistrates, Magistrates' Courts and the functions of magistrates. Section 2 of the Public Service Act provides:

> "There shall be a Public Service for the Republic of Namibia which shall be impartial and professional in its effective and efficient service to the Government in policy formulation and evaluation and in the prompt execution of Government policy and directives so as to serve the people of the Republic of Namibia and promote their welfare and lawful interests." (My emphasis)

If the Public Service Act were applicable to magistrates, this would make magistrates subject to "Government Directives". This would fly in the face of Article 78(3) of the Constitution which specifically and clearly prohibits this and makes the Courts independent of the Government. The interpretation that I have given the new section 9 of Act 32 of 1944 means that the Public Service provisions apply only to the method of appointment of magistrates and not to their functions. Where a statute is capable of two interpretations, one whereof would render the statute *ultra vires* the Constitution, while the other interpretation is in favour of validity the latter interpretation would be applicable and such interpretation is obviously preferable. Legislation will only be struck down as unconstitutional if such course is absolutely necessary and required

by "the precise facts to which it is applied".

Zantsi v Council of State Ciskei and Others 1995(4) SA 615 (CC) at 617 H-I

While Act 32 of 1944 is still applicable in Namibia subject to the amendments aforesaid, nevertheless the personnel implementing the law in respect thereof has obviously changed.

This Court is fully aware that a vast infra structure exists in Namibia in respect of magistrates and that the position inherited from South Africa was an administration integrated with the government or public service. If the intention of the draftsmen of the Magistrates Court Amendment Act was to legislate so as to perpetuate that situation, the legislation for the reason set out above is *ultra vires.* It may be argued that everything done pursuant to that legislation is therefore *ultra vires* as well. This argument is unsound. Legislation visualized by Articles 83(1) and 140(1) of the Constitution which would replace the South Africa era legislation, is legislation which is *intra vires.* If such legislation is *ultra vires,* then it is *ultra vires* from its inception and whatever was done was still done under and in terms of the old legislation and by reason of Articles 138(2)(a) and 140(1), was and is perfectly valid.

If, however, the State requires section 23(2) of the Public Service Act to be validand binding on magistrates, it can find ways to cure the defects. Section 2 of the Public Service Act could be amended or a new comprehensive Act in respect of magistrates could be drafted, or, the existing Act 32 of 1944, could be appropriately amended. In any event the disengagement of the present administration applicable to magistrates from the Public Service is involved and may take time.

To enable this to be done as effectively as possible, I invoke purely as a guide the provisions of Article 25(1)(a) of the Constitution which provides as follows:

> "(1) Save in so far as it may be authorized to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid."

1 shall order that the date whereon this part of my Order shall become operative shall be postponed to 1st March 2003.

Parliament can do whatever it considers is appropriate, provided the independence of the magistrates is recognized and not threatened. Should this be done before 1st March 2003, my order in this respect falls away.

I turn now to the question concerning the right to transfer magistrates.

The legal relationship between a magistrate and the State is contractual. The terms of the contract can either be specifically agreed upon, or all, or some of the terms, may be implied. When a person applies for the position of a magistrate, such person may be asked to complete an application form which may well include a question asking the magistrate if he or she is prepared to be transferred. An affirmative answer would mean the contract is specifically concluded on that basis. If the question is not put in the application form, the right to transfer a magistrate could be implied. It is of general knowledge that every part of Namibia falls under the jurisdiction of one or other magistracy. It is also known that judicial efficiency requires such magistracies to be staffed by persons with knowledge and skill and that it may become necessary that a magistrate be transferred to some magistracy where his or her skill can be utilized. Any person therefore joining the profession is bound by an express or an implied contract that he/she is liable to fair, proper and lawful transfer. Implied contracts are as effective and important as express contracts.

One of the requirements of public policy is that parties who have freely entered into a contract express or implied, should in the absence of fraud, be held to it.

Wells v *South African Alumenite Company1927 AD 69*

Anschutz v Jockey Club ofSA 1955(1) SA 77 (W) 80B-F

Society cannot function if people are allowed to escape their contractual obligations however unpleasant the consequences may be. In any event in Namibia, the personal circumstances of the magistrate are considered before a transfer is made final.

In the present case the applicant at no time contended that respondent had no right to transfer him. The correspondence discloses that from the commencement, applicant acoepted respondent's right to transfer him to Oshakati. He only wanted more time before taking up his new post. Applicant has not alleged in his affidavit that his transfer will impede his functions as a magistrate or interfere with his objectivity. Applicant is bound by his contract (whether it is express or implied) with the State and is liable to transfer.

Mr du Toit on behalf of applicant nevertheless argues that the very fact that magistrates can be transferred is a threat to their independence. He relies *inter alia* on the judgment of Southwood J in *Van Rooyen and Others v The State and Others20Q\{<\)* SA 396. That case is under appeal and I refrain from commenting thereon. I have confined myself to the situation in Namibia and I continue to do so.

A person who desires to be a magistrate voluntarily applies for the position. He or she voluntarily agrees to be liable for transfer. When a magistrate receives notification of intention to transfer him or her, such magistrate is entitled to make representations objecting thereto or dealing with other matter relating to the proposed transfer such as postponing the date of transfer. The right to transfer is therefore exercised fairly and judicially.

Article 78(3) of the Constitution of Namibia states:

> "No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the

> Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law."

And finally, every magistrate takes an oath or affirms as follows:

> "I, ... (full name), do hereby swear /solemnly and sincerely affirm and declare that whenever I may be called upon to perform the functions of a judicial officer in any magistrate's court, I will administer justice to all persons alike without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of Namibia"

I am confident that persons with integrity apply to be magistrates and respect their oath or affirmation and that the Minister respects such oath/affirmation taken and made by the magistrate. I am confident that the oath/affirmation is taken consciously knowing that there may be transfers in the future. The proper administration of justice requires the transfer of magistrates as and when necessary. I am confident that Article 78(3) would be a deterrent to any person from interfering with the administration of justice and that the prospect of being prosecuted for so doing is a further deterrent. In the circumstances I am satisfied that the right to or practice of, transferring magistrates is not *ultra vires* and is not a threat to their independence.

I turn now to applicant's claim to review the decision to transfer him.

In his founding affidavit, applicant says that he is a magistrate "employed" by the respondent. Inasmuch as applicant's case includes a contention that the judiciary including magistrates are independent, it is strange that in the first paragraph, he should allege that he is "employed' by respondent.

Applicant avers that he was appointed additional magistrate in Gobabis but that he could not occupy the house reserved for the magistrate in that town as it was occupied by one Ella Hamunyela, the prosecutor. He says that in April 2000, he realized that certain witnesses in respect of whom Hamunyela claimed fees were not witnesses at all and that this led to a police investigation resulting in 28 charges of fraud against the said Hamunyela and the court orderly Joseph Kwere. Applicant alleges that Hamunyela and Kwere were suspended and thereafter there followed an "orchestrated" attempt by Castro Kavari the Swapo Party Official to have him

"removed from his post".

Applicant refers to reports in newspapers and on television which are irrelevant or inadmissible in and to these proceedings and which I deal with in the application to strike out. Applicant says that a departmental investigation exonerated him from allegations of racial bias and irregularities. This is also irrelevant to these proceedings. Nevertheless he says on 16th February 2001, he received a letter from the Permanent Secretary for Justice informing him that he had been transferred to Oshakati with effect from 1st March 2001. Applicant says he immediately made representations to her pointing out that he could not accept a transfer "at this stage". He annexes his letter to his affidavit.

It is clear from his letter and his affidavit that applicant did not object to being transferred to Oshakati but objected to the short notice he received concerning his transfer and gave reasons pointing out that he would have to have some time to organize his personal affairs. Correspondence which followed between him and the Permanent Secretary eventually culminated in a letter from Mr Unengu Chief Lower Courts dated 3 April 2001 officially informing him that his transfer had been delayed and extended until further notice. He was finally told to take up his new post by 1 £h June 2001.

The Permanent Secretary actually alleges that the decision to transfer applicant was originally that of Mr Unengu. Be that as it may, the Permanent Secretary clearly endorsed such decision and took responsibility therefor. If applicant has a legitimate application for review, it could be pursued against the Permanent Secretary.

The original application which included an application for review was not pursued by applicant on 23"' July 2001.

An applicant for review who fails to bring the application within a reasonable time or who engages in activity inconsistent with the object of the review proceedings, loses the right to complain of the irregularity in respect whereof the review is brought.

Others 2001(4) SA 149 (SCA)

There were Court proceedings brought for interim relief to prevent or stay his transfer to Oshakati and after argument in Court, the applicant agreed to go to Oshakati but the question of costs in respect of those proceedings stood over for decision.

Despite the initial innuendo and indeed allegations by applicant that there was political influence in the decision to transfer him, applicant eventually withdraws entirely from this suggestion and says in paragraph 8.3 of his founding affidavit (I quote verbatim):

> "I do not wish to accuse her (the Permanent Secretary) of being politically influenced in her decisions, especially with regard to the transfer of myself to Oshakati."

This is a specific abandonment of the contention that the decision to transfer him was politically motivated.

Applicant nevertheless persists in his application to review the decision concerning his transfer contending that he was not given an opportunity to place his case before respondent, that is, that the principle of law expressed in the maxim *"audi alteram partem* was not afforded him and that the Permanent Secretary "did not apply her mind" to his representations. He says in the circumstances he is entitled to review her decision to transfer him to Oshakati.

The Permanent Secretary has made a full affidavit in reply to applicant's allegations. It is unnecessary to analyze or set out her affidavit in any detail. She denies applicant's contention that his representations did not receive consideration, and says:

> "Despite the wording of the letter (stating that he had already been transferred) I wish to make it clear that the standard practice is that such a letter gives notice of the intention of the Ministry to transfer and the decision to do so is at that stage provisional. It is dependent upon representations made in response to it. This was also the intention and what occurred with the applicant's transfer."

In notice of motion proceedings where a dispute of fact has arisen, which could not have been anticipated when the proceedings were instituted, the Court will assist in the resolution thereof where there is a properly motivated request for oral evidence or cross-examination. Prior to the

institution of the present proceedings, the correspondence between the parties revealed an inevitable conflict of fact in respect of whether the decision to transfer applicant from Gobabis to Oshakati was improperly taken for one reason or another and whether applicant's representations in respect thereof were duly and properly considered. Once again I stress that these are not Rule 53 proceedings. 1 also point out that in any event here has been no properly motivated request for oral evidence or cross-examination. Accordingly the Court is bound by the facts as stated by respondent read together with the facts which are admitted.

Plascon-Evans Paints Ltdv Van Riebeeck Paints (Pty)Ltd 1984(3) SA 623 (A)

Applicant is therefore bound by respondent's answer that his representations were taken into account.

The facts as stated by applicant himself in any event confirm this. Applicant says he received a letter from Mr Unengu on 3rd April 2001 which extended his departure for Oshakati from 1st March 2001 until further notice. Thereafter, applicant was told to report in Oshakati by 18' June 2001 and in any event he did take up his appointment in September 2001. Finally, applicant waived and abandoned any right he may have had in respect of reviewing and setting aside the decision to transfer him when he wrote to the Permanent Secretary on 14th June 2001 as follows:

> Transfer: Oshakati: Myself
> Due to circumstances I will be able to go to Oshakati on 1/9/2001. I hope you find it in order."

Applicant is therefore not entitled to a rule *nisi* or an order of any description reviewing and setting aside the decision to transfer him to Oshakati.

Applicant has asked for an Order declaring that "the judiciary including magistrates are independent in terms of Article 78 of the Constitution" (sic) and that section 23(2) of the Public Service Act does not apply to them.

Inasmuch as Article 78 of the Constitution is clear and unambiguous in respect of the

independence of the judiciary no declaration by this Court to this effect is necessary.

I have already pointed out that Section 23(2) of the Public Service Act is inapplicable to magistrates in that and because the entire Public Service Act is inapplicable except for the method therein provided for making appointments and which is to be used in respect of magistrates, only if there is a clash with the method the Minister may use.

Applicant has asked for a declaratory order that "the Permanent Secretary for Justice has no jurisdiction to appoint, transfer and/or terminate the services of magistrates". Save and except in respect of his transfer applicant has not alleged any fact which entitles him to ask for a declaratory order of this nature. Neither his appointment nor the termination of his service are in issue in these proceedings. Nevertheless for the sake of completeness I shall set out as fully as possible in my Order my conclusions. At this stage I point out that although I have found that Section 23(2) of the Public Service Act, does not apply to magistrates, I did so on grounds not argued by applicant's counsel. Before recording my

Order in this, the main application, it is necessary to consider the application brought by respondent to strike out certain portions and paragraphs of applicant's replying affidavit. Normally an application of this nature is argued before and decided before the main application, as its outcome can affect the final decision of the main application. However, by agreement between counsel, the application to strike out was argued at the end of the proceedings.

Rule of Court 6, specifically provides that all applications to Court are to be brought by Notice of Motion. An applicant must set out his/her case in his/her founding affidavit so that the respondent can answer the applicant's allegations. There must be service of the notice of motion and affidavits on respondent giving it sufficient time in terms of the Rules to do so. After the respondent files his/her opposing or answering affidavit, applicant can reply thereto. In such replying affidavit the applicant may not try to augment the allegations in his founding affidavit by including new material. The applicant's cause of action must be cottained in the founding affidavit. If the applicant tries to introduce new material in his replying affidavit the respondent can apply to Court to strike out all or any new material. Further, because affidavits constitute the

evidence whereon the parties rely no affidavit can contain inadmissible evidence such as hearsay or irrelevant evidence, nor may affidavits contain scandalous or vexatious matter.

Rule of Court 6(15) provides:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate or as to costs, including costs as between attorney and client, and the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his or her case if it be not granted."

In *Vaatz v Law Society of Namibia* 1990 NR 332, this court considered what the words "scandalous", "vexatious", "irrelevant" and "prejudiced" as used in Rule of Court 6(15) meant. To do so once again would be an exercise in superfluity. I shall apply the meanings of those words as there laid down. The same applies to the meaning of hearsay evidence in affidavits. In *Cultiira 2000 v Government of the Republic of Namibia* 1993(2) SA 12 (NmllC) at 2711 the Court (Full Bench) struck out hearsay. The courts have frequently been called upon to strike out new matter introduced for the first time in replying affidavits. Whether such matter is merely in reply to the respondent and not intended to augment, applicant's case is a question of fact. As Reynolds JP said \n*Anderson and Another v Port Elizabeth Municipality* 1954(2) SA 299 (E):

> "the striking out procedure was not intended to be utilized to make technical objections of no advantage to anyone and just increasing costs".

However, if respondent would be prejudiced (in the sense stipulated in the *Vaatz* case at p 335 E to IT) if allegations whether scandalous, vexatious, irrelevant, hearsay or new matter in replying affidavits, were allowed to remain, then the respondent is entitled to have them struck out.

In paragraph 5.3 of the replying affidavit applicant alleges the following:

> "This impression is fortified by newspaper reports as that which appeared in the *Observer* of 22 September 2001 under the heading 'Stop all Interviews, permanent Secretary orders'."

Newspaper reports or articles are obviously hearsay unless confirmed by the person who wrote

them and their content can be vexatious as in the instant case.

Thereafter, applicant annexes what he alleges is a photocopy of the report. He comments on the contents of the report trying to create an atmosphere of political intrigue. I have quoted paragraph 8.3 of applicant's founding affidavit in full where he says the Permanent Secretary was not politically influenced in his transfer. All these paragraphs therefore are not only new matter, they are irrelevant, vexatious and scandalous and are intended to be prejudicial and if allowed to remain would be exactly that.

Paragraphs 5.3, 5.4 with the annexure "WM17", 5.5, 5.6,9.2.2 and 35.1.1 of applicant's replying affidavit are stuck out.

Respondent applies to strike out the following paragraphs on the grounds that applicant (Mostert) has introduced new matter in his replying affidavit:

2(a) Paragraph 6.9;
(b) Paragraph 9.2.1;
(c) Paragraph 9.2.3;
(d) Paragraph 9.2.4;
(e) The words 'radio services' in paragraph 17.1;
(0 The words 'listen to the radio' in paragraph 17.3;
(g) Paragraph 17.4;
(h) The portion of paragraph 21.6.1 starting with the words 'and without' until the end of such subparagraph;
(i) Paragraph 21.7;

(j) Paragraph 21.10

(k) Paragraph 28.2;

(1) Paragraph 35.1.1;

(m) Paragraph 35.1.2;

(n) Paragraph 35.1.5;

(o) Paragraph 35.2.2

(p) Paragraph 35.5.3.

It is abundantly clear that the matter complained of in these paragraphs is new matter. The allegations are irrelevant to applicant's original case and should they remain they would be

prejudicial to respondent. The defamatory campaign of which applicant complains, is not part of his original case for review and furthermore he has specifically said that the Permanent Secretary for Justice was not politically influenced to transfer him

The application to strike out:

> "(e) the words 'radio services' in paragraph 17.1, and (f)
>
> the words 'listen to the radio; in paragraph 17.3

is not properly motivated and is somewhat vague

Accordingly, save for the allegations referred to in paragraphs (e) and (f), those portions and paragraphs of applicant's replying affidavit referred to in paragraphs 2(a) to (p) of the respondent's application to strike out, are struck out.

Finally, respondent moved to strike out the allegations set out hereunder on the grounds that they are scandalous and vexatious and prejudicial to the respondent as well as constituting new matter:

> "3(a) The introductory portion of paragraph 35.1;
>
> 11. Paragraph 35.1.1;
>
> 12. Paragraph 35.1.5;
>
> 13. The portion of the second sentence of paragraph 35.2.2 commencing with the words 'and 1 submit' and continuing to the end of that subparagraph;
>
> (c) The second sentence of paragraph 35.5.3.

It is unnecessary to repeat the principles of law applicable. The content of the paragraphs complained of are indeed scandalous and vexatious and prejudicial to respondent if permitted to remain. They also constitute new matter.

Accordingly, the portions and paragraphs of applicant's replying affidavit referred to in paragraph 3 of respondent's application to strike out, are struck out.

To sum up, the Order of this Court in respect of respondent's application to strike out is:

A. (1) The following portions, paragraphs and annexure of applicant's replying affidavit are struck out:

Paragraphs 5.3, 5.4 with annexure WM17, 5.5, 5.6, 9.2.2 and 35.1.1.

14. Save for the allegations in paragraph 2(e) and (f) of respondent's application to strike out, those portions and paragraphs in applicant's replying affidavit set out in paragraphs 2(a) to (p) of respondent's application to strike out, are struck out.

15. The portions and paragraphs of applicant's replying affidavit set out in paragraph 3(a), (b), (c), (d) and (e) of respondent's application to strike out are struck out.

B. Applicant shall pay the costs of the application to strike out. For the benefit of the taxing master the argument in respect of the application took about ten (10) minutes.

The Order in respect of the Main Application is:

1. The application to review and set aside the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati is dismissed.

16. Inasmuch as the provisions of Article 78 of the Namibian Constitution declaring the Judiciary including magistrates independent, are loud and clear, it is unnecessary for this Court to make such a declaration.

17. In terms of section 9 of Act 32 of 1944 as amended by the Magistrates' Courts Amendment Act (Act 1 of 1999) the Minister of Justice, or such person duly delegated in terms of the said Act, may appoint magistrates.

18. Magistrates are liable to be transferred by virtue of their contracts, express or implied, with the State and by virtue of the law and practice in terms of Act 32 of 1944, as read with Articles 138(2)(a) and 140(1) of the Constitution of Namibia.

19. The transfer of magistrates does not constitute a threat to their independence.

20. Section 23(2) of the Public Service Act is not applicable to magistrates but this Order, i.e. Order 5, shall not become effective until 1st March 2003, and furthermore it shall be expunged and cease to exist, in the event of legislation correcting the defects which have

caused the making of this Order,being properly passed and gazetted.

21. The application for the interdict and other relief claimed in claim 3 of the Notice of Motion is refused.

22. Applicant shall pay the costs.

The costs of the interim application stood over for decision. Briefly, the application was to stop the transfer of applicant to Oshakati. The application was abandoned and applicant has taken up his post in Oshakati. Applicant must therefore pay the costs of the interim application. The Order of the Court in this regard is:

Applicant shall pay the costs of the interim application.

LEVY, AJ

For the Applicant:	Advocate E du Toit SC and with him Advocate Z J Grobler
Instructed by:	**Messrs A Louw & Co**
For the Respondent:	**Advocate D F Smuts and with him Advocate K van Niekerk**
Instructed by:	**The Government Attorney**