"REPORTABLE"

CASE NO.: (P) A 315/2005

SUMMARY

SUSANA DIMBULUKWENI IMMANUEL versus **THE MINISTER OF HOME AFFAIRS & 2 OTHERS**

DAMASEB, JP

28/08/2006

POLICE ACT 19 OF 1990: APPLICATION FOR REVIEW IN TERMS OF RULE 53

S8(1) enquiry whether member of the Police Force fit to retain rank. Review application to set aside proceedings which resulted in discharge of member convicted of schedule 1 offence to Police Act.

Held:

- Such proceedings competent in terms of s8(1).
- Review grounds must be supported by evidence under oath. Not enough to simply state review grounds in heads of argument.
- Purpose of judicial review stated: applicant for review bears onus to prove conduct complained of is reviewable.
- Application for review lacking in merit and dismissed with costs.

"REPORTABLE"

(CASE NO.: (P) A 315/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SUSANA DIMBULUKWENI IMMANUEL **APPLICANT**

and

THE MINISTER OF HOME AFFAIRS **1ST RESPONDENT**

THE INSPECTOR-GENERAL OF POLICE **2ND RESPONDENT**

THE CHAIRPERSON OF THE BOARD OF ENQUIRY **3RD RESPONDENT**

CORAM: **DAMASEB, JP**

Heard on: 28.02.2006
Delivered on: 28.08.2006

JUDGMENT

[1] **DAMASEB, JP**: This is a review application in which the following relief is sought:

> "1. Reviewing and correcting or setting aside the decision taken by the first and second respondents during or about 25 June 2004 to discharge the applicant from the Namibian Police.

2. Reviewing and correcting or setting aside the decision taken by the third respondent in June 2004 recommending the discharge of the applicant from the Namibian Police.

3. Declaring the aforesaid decision unconstitutional, and/or null and void.

4. Directing that the respondents pay the costs of this application."

[2] The applicant was employed as a constable by the Namibian Police Force ('the Force'). Whilst in that employ she was found guilty of theft on 15th October 2003 in the Magistrate's court and sentenced to a fine of N$ 2, 500.00, or to imprisonment for 2 years in default of payment. That conviction and sentence were never appealed against. Following conviction and sentence, the applicant was brought before a board of inquiry (the board) in terms of the Police Act No. 19 of 1990 (the Act). The amended, s8 (1)[1] reads as follows:

(1) A member may be discharged from the Force or reduced in rank by the Inspector General, if after enquiry by a board of enquiry in the prescribed manner as to his or her fitness to remain in the force or to retain his or her rank, the Inspector General is of the opinion that he or she is incapable of performing his or her duties efficiently: Provided that if a member is still serving his or her probation period in terms of section 4 such a prior enquiry shall not be required , but such member shall be afforded an opportunity to be heard prior to any discharge.

(2) A member who has been discharged from the Force or reduced in rank by the Inspector- General in terms of subsection (1), may in the prescribed manner appeal to the Minister against the decision of the Inspector- General, and the Minister may set aside or confirm such decision.

The proviso to subsection (1) makes it clear that the only circumstance in which the Inspector – General (IG) is relieved from the obligation to hold an enquiry is if the member is on probation. But the *audi* principle

[1]Police Amendment Act No. 3 of 1999, s5

must still be observed, and he is not under an obligation to discharge. Prior to the 1993 amendment, s8(2) provided as follows:

> "Notwithstanding the provisions of subsection (1), the Inspector-General may discharge any such non-officer from the Force in the absence of any such enquiry if the non-officer has been sentenced to imprisonment without the option of a fine."

[3] The 1993 amendment produced the result that even if a member has been sentenced to imprisonment without the option of a fine, an enquiry must still be held if the discharge of a member is contemplated.

[4] The board conducted an enquiry and recommended to the IG that the applicant be discharged from the Force on account of the conviction and sentence in the Magistrate's court. The I.G. then, acting on that recommendation, discharged the applicant from the Force. She then appealed against the decision of the I.G. to the Minister of Home Affairs (first respondent) as she was entitled to under the Act. Based on a report placed before him by the I.G., the Minister refused the appeal and approved the applicant's discharge from the Force.

[5] The applicant relies on the following review grounds:

> "1. I was not properly informed of the status of enquiry, in particular that I am illiterate;
>
> 2. I was not informed of any rights to a legal representative before or at the time of enquiry;
>
> 3. I was not informed of the finding of the Chairperson of the purported enquiry;
>
> 4. I was not asked to make presentations for mitigation or place material before the enquiry before I was discharged, nor was I given an opportunity to controvert any allegation against me. Nor was I at any stage informed that I was at risk of being discharged or other action would be taken against me;

5. I was not served with any charges and no evidence was led that I am incapable of performing my duties efficiently, nor was I asked to address this issue in any sense;

6. There was thus no inquiry as contemplated by the legislation in any proper sense;

7. The Second Respondent made a decision without any proper record as to why is should be discharged from the Namibian Police;

8. I reasonably apprehend that the Chairperson of the inquiry was biased against me in reaching his conclusion or finding in these circumstances, alternatively took into account irrelevant matter or failed to apply his mind to the enquiry;

9. I was not given any opportunity to cross-examine any witnesses and in fact there were no witnesses;

10. The Minister failed to consider and decide my appeal and instead abdicated his responsibility to the Second Respondent who accordingly acted *ultra vires* his powers; the wrong decision-maker purported to make the decision;

11. I was not accorded the right to be heard on appeal.

12. The decision maker misconstrued the nature of his powers and/or the discretion vested in him.

13. The Second Respondent used unsupported allegation that I stole the government property although there was no evidence to such effect.

14. The decision making by the different respondents against me was unfair and unreasonable and in conflict with Article 18 of the Constitution.

[6] This review application faults the decisions of all three instances which dealt with the applicant's case in terms of the Act. The applicant attacks the decisions on a very broad front. In respect of the board the nub of the attack is that there was no enquiry as envisaged under the Act in that she was not informed of the status and outcome of the enquiry; there were no witnesses called and she was not able to cross

examine any witness; she was not afforded the opportunity to controvert any allegations against her; she was not explained or afforded the right to legal representation; no charges were served on her and no evidence was led to the effect that she is unfit to remain in the Force; she was not afforded to deal with her unfitness; she was not allowed to lead evidence or make submissions in mitigation; and she was not informed she faced the risk of discharge. She faults the second respondent for taking a decision *'without any record'* as to why she should be discharged, and the third respondent for acting on the recommendation of the second respondent and not applying his mind independently. She says, in essence, that the second respondent decided the appeal for the third respondent. She adds, for good measure, that the allegation that she stole was not supported by any evidence.

The applicant's evidence

[7] In her founding affidavit, the applicant deposes that she was served with a convening order on 3rd June 2004 and told to be in Eenhana on 11th June 2004 because of her criminal conviction of 15th October 2003. The convening order informed her that a board of enquiry was being set up for the purpose of inquiring into and making a finding and recommendation whether the applicant is fit to retain her rank or to remain in the Namibian Police as a result of her:

a) convictions of misconduct, as per Pol. 174 or J14
b) unfitness to perform her duty properly
c) inability to perform her duty in an effective manner
d) improper or indecent behaviour and/or conduct and any other fact(s) or matters concerning her.

[8] The convening order was issued by deputy commissioner Armas Kasita Shivute who appointed chief inspector Schalk Coenraad Meuwesen (third respondent) as chairman of the board.
[9] The applicant deposes that she, accompanied by Sgt. Theresia Onesmus, met the third respondent on 11th June 2004. According to the applicant, at the meeting no witnesses were called and no charge was read out to her. She was only told third respondent would write to second respondent about her criminal conviction. According to her, she was also not informed that she could face discharge from the Force; nor was she asked to present mitigating circumstances. She says that the record of the proceedings in the Magistrate's court which resulted in her conviction was not placed before the board of enquiry. She was also not informed of her right to legal representation, and she says she could not ask for such opportunity because she is 'functionally' illiterate.

[10] Applicant says she then got a letter on 5th July 2004 from the second respondent, informing her that she was discharged from the Force. She then, on 10th July 2004, wrote a letter, assisted by a colleague, to appeal against her discharge. In the letter she asks for 're-installation' because she is the mother of 4 children and looks after her aged mother and additional 5 orphaned children as their only bread-winner, without any other income. She also said that at her age, and because of her lack of education, it would be difficult to find another job. As must be discernable, the letter is really a plea for mercy.

[11] On 10th August 2004, applicant's legal practitioner wrote a letter to the second respondent in which he challenged the proceedings that resulted in the applicant's discharge from the Force on grounds which

are substantially and materially the same as those set out in the present application as review grounds.

[12] In the third paragraph of that letter, her legal practitioner states the following:

> "… our instructions are that on 11th June 2004 and at Eenhana, one Chief-Inspector Schalk Coenraad Meuwesen intimated to our client that there was an enquiry related to a criminal matter that was reported against our client at the Onhangwena Police Station." (My emphasis)

This does not support applicant's earlier allegation that third respondent merely told her that he was going to write to the second respondent about her criminal conviction.

[13] On 17th August 2004, after being presented by the second respondent with what is clearly the record of the s8(1) enquiry proceedings which resulted in the applicant's discharge from the Force, applicant's legal practitioner wrote a letter to the first respondent captioned *"Appeal in terms of section 8(2) of the Police Act, Act 19 of 1990 as amended."* The grounds of appeal are set out as follows:

> "a) The member was not properly informed of the status of the enquiry.
>
> b) The member was not at any stage informed of her right to a legal representative at the enquiry.
>
> c) The member was not informed of the findings by the Chairperson of the purported enquiry.
>
> d) The member was not provided with the specific allegations against her and no record of the conviction was served on her.
>
> e) The member was not given an opportunity to make representations as to why she should not be discharged.

f) The Inspector-General made a decision improperly, particularly because he was not provided with all the required materials and documents from the convening authority as required by Police regulation 12(a).

g) The Chairperson was biased as he led and gave evidence himself during the enquiry.

h) The Chairperson failed to give the member an opportunity to cross-examine witnesses and/or to rebut evidence against her.

i) The Chairperson failed to properly record the proceedings.

j) Clause C.3 of the standing order of the Administration Manual read with Schedule I to the Police Act, is unconstitutional as it fetters the Inspector General's discretion." (footnote)

[14] The latter ground is not included as a review ground in the present application. It has also not been included by reference as a review ground. In any event, it was before the first respondent on appeal and I must assume that it was considered by him. No allegation is made that the first respondent did not have regard to it on appeal or, alternatively, that even if he did the process was tainted any way.

[15] The applicant avers that following the appeal, enquiries were made by her legal representative to the first respondent's office about the progress of her appeal and the first respondent's secretary advised[2] that the appeal was forwarded to second respondent *'to consider and decide.'* She says this is wrong and vitiates the decision on appeal. That the second respondent decided the appeal, she avers, was confirmed when she received a letter from second respondent informing her that her appeal was not successful.

The respondent's evidence

[16] The respondents oppose the relief sought. An opposing affidavit was deposed to by third respondent, and confirmed by General Hangula who was the IG at the time, in so far as third respondent

[2] Confirmed by legal practitioner of record in a confirmatory affidavit.

makes allegations concerning the actions of the second respondent. The first respondent also deposed to a confirmatory affidavit. Third respondent confirms that he was the chairperson of the enquiry convened on 11th June 2004.

[17] Third respondent deposes that the admitted conviction of the applicant took place in open court and members of the public are aware the applicant is a convicted criminal. It is the fact of this conviction, he avers, that resulted in the s8(1) proceedings against the applicant.

[18] Third respondent states that the applicant was properly served with the convening order by Onesmus Theresia[3]. He also states that on the 'Pol 174' served on the applicant together with the convening order, she admits the fact of the conviction. (I only need add that the *inscription 'I admit the conviction'* is in English and is signed by the applicant: This is significant in view of applicant's assertion that she does not understand English. She offers no explanation in her papers how this inscription came about in a language she says she does not understand.)

[19] The third respondent denies the convening order was merely served on the respondent, as alleged, and states (duly confirmed by Onesmus) that when the documents were served on the applicant Onesmus explained the contents of the convening order in Oshivambo. She also explained to the applicant that she has the right to legal representation during the hearing. Onesmus also said to the applicant that on the date of the hearing she will be on leave and that Cst. Ngololo will accompany the applicant to the enquiry. Onesmus further avers that upon serving the convening order on the applicant, she told the applicant that in her experience people convicted of theft are

[3] This much is now accepted in reply by the applicant.

usually discharged after an enquiry in terms of s8(1); and that the applicant was crying upon hearing that and Onesmus comforted her.

[20] Third respondent confirms that he chaired the s8(1) enquiry in respect of the applicant, and that at the enquiry the applicant was accompanied by Cst. Ngololo. He states that at the enquiry he introduced himself to the applicant as the chairman of the enquiry and explained the nature and purpose of the enquiry. He also explained to applicant her right to legal representation. All this, he alleges, was explained to the applicant in her native tongue, Oshivambo.

[21] Third respondent also avers that he explained to the applicant that she could be discharged from the Force but that the decision lay with the I.G. He says that the applicant said she wanted the matter to be finalised as soon as possible.

[22] Third respondent admits that the record of the proceedings resulting in the applicant's conviction and sentence in the Magistrate's court was not placed before the enquiry, and that it was unnecessary to do so as the applicant admitted the conviction. He states further that at the enquiry Cst. Ngololo was called as a witness to put the *'relevant documents before the tribunal'*.

[23] The third respondent denies that the enquiry was short and says it lasted from 09h00 to lunch. He says he informed applicant of the findings of the inquiry and the recommendation to the I.G., advising her that, because of the criminal conviction, she would likely be discharged. He also states that the applicant admitted that she made a mistake and wished to be given another chance.

[24] Third Respondent states, duly confirmed by the first respondent, that the decision on appeal was taken by the Minister. He insists he and the I.G. were entitled to place their views before the Minister on appeal. He avers that the letter informing the applicant that her appeal to the Minister was unsuccessful was written to her after the Minister took the decision on 16th September 2004.

[25] Third respondent asserts that the 'import and purport' of s8(1) is that it is not a disciplinary enquiry but an enquiry into the fitness of a member to remain on the Force, and that the enquiry relates to such matters as the integrity and reputation of the Force and the individual member. He then states the following in paragraph 17.2:

> "The question is whether the Applicant is a fit (and proper) person to remain in the Namibian Police Force, taking into account that she has been convicted in an open court of a crime of theft, a crime which has an element of dishonesty. The capacity to perform her duties efficiently is thus looked at from the perspective of the other members of the force and the general public at large. What type of trust does a convicted criminal engender in the general public? Members of the general public should be able to rely on the Namibian Police in the time of their greatest need. The police force should not be seen as a force that has been infiltrated by thieves and other criminals. The force has a duty to guard against such a reputation, lest it becomes more and more inefficient. This I submit is the rational for enactment of section 4(2B) of the Police Act, and this theme applies with equal force to an enquiry in terms of section 8(1) of the Police Act."

[26] The minute of the enquiry is attached to both the founding papers and the answering papers, and was under Rule 53 dispatched as part of the record to the applicant who, as third respondent says, did not supplement her papers in terms of Rule 53 (4) after receiving the record. I will refer to salient elements of the record of the s8(1) enquiry. It shows that Gloria Ngololo testified at the hearing and handed in the convening order and Pol 174. It then says those documents were

examined by the board and the applicant, whereafter they were handed in as 'Exhibit 1'. Ngololo also testified about the applicant's conviction and sentence and handed in the extract of the 'Punishment Book' dated 2003.10.15, and form 'J14', which were then, the record shows, examined by the board and the applicant and handed in as 'Exhibit 2'. Other documents were also handed in which I do not find necessary to refer to here. Ngololo's testimony at the enquiry concludes in the following terms:

> "I did not encounter any problems with her for the time that she served under my command. She is well disciplined and reports always on time for duty".

[27] The record then states that there was no cross-examination of Ngololo. At the end of that the record shows that the '*evidence on behalf of the Board'* was concluded and that the *'defendant does not wish to call witnesses'* but wishes to give evidence. Her evidence is then recorded.
I will quote it verbatim:

> "I am a Constable in the Namibian Police with Force No. 400784 and am stationed at Ohangwena Installation Unit. I am the defendant in this inquiry. I understand the evidence given so far as well as the nature of the inquiry. I admit that I made a mistake and would like to be given another chance in the Namibian Police. It is the first mistake I made since my date of appointment and I have no other convictions recorded against me.
>
> I have four children to maintain apart from any other monthly responsibilities. My salary per months is approximately N$1087.56".

[28] The recorded and typed testimony is then duly signed by the applicant. The record states then: *'statement read over to the defendant and signed by her'.* The record also shows that, having considered all the evidence, the board found:

> "1. The Defendant was enlisted in the force on 1999/10/01.
> 2. She was convicted on 2003/10/15 in the Magistrate Court at Ohangwena on a charge of theft and she was sentenced to a fine of N$2 500.00 or 24 months imprisonment.
> 3. She was convicted on criminal charge that is a deed of dishonesty.
> 4. The reliability of the defendant is under question.
> 5. Theft involved government property.
> 6. The defendant submitted evidence in mitigation.
> 7. <u>The contents of paragraph 2, 3 and 5 shows that she is not fit to remain in the force</u>." (My emphasis)

The board then recommended that the applicant be discharged from the Force.

[29] Following the applicant's appeal to the Minister, the second respondent prepared a memorandum to the Minister setting out the history of the matter, including the applicant's grounds of appeal. (No allegation is made under oath by the applicant that in the memorandum to the Minister, the second applicant included new facts and material which the applicant did not have the opportunity to deal with.)

[30] The I.G. having set out the history of the matter then recommended to the Minister that the appeal be dismissed and the discharge of the appellant be confirmed. The Minister then, on 16th September 2004, 'approved' the recommendation. This is how the appeal was dismissed. The Minister also deposed to a confirmatory affidavit confirming the averments relating to him. Constable Gloria Ngololo confirms the allegations in respect of her.

[31] The applicant in her reply reiterates that a member can only be discharged in terms of s8(1) upon evidence that she is *'incapable of*

performing her duties efficiently'. She avers that there was no such evidence in her case

[32] Nowhere in the reply is it disputed that the applicant stole from her employer. The applicant states that she did not find it necessary to supplement her papers after the record was disclosed to her. That was a serious error of judgment.

Analysis

[33] The applicant did not apply to have any of the disputes on the facts referred to oral evidence. It is trite that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondent's papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers: *Nqumba v The State President,* 1988 (4) SA 224 (A) at 259 C – 263 D); *Walter Mostert v The Minster of Justice 2003 NR 11 at 21G; Republican Party of Namibia and another v Electoral Commission of Namibia and 7 others NmHC (Full Bench) A 387/2005 at pp70-71 (unreported) delivered on 2005.04.26.* I often note, with considerable frustration, that it is not sufficiently appreciated that an applicant in motion proceedings takes a great risk by not resorting to oral evidence where a respondent denies the foundational allegations of the applicant and presents positive facts and proof which a Court cannot, on the papers alone, find to be far-fetched.

[34] As the summary of the evidence shows, the respondents have filed detailed affidavits disputing each of the material factual

allegations of the applicant in support of her review application. They have provided supporting documents in support of their allegations. Based on the above test for approaching disputes of fact, I must accept the following averments of the respondents as I do not consider them to be far-fetched:

i] The theft the applicant was convicted of was from her employer.

ii) The convening order was properly served on the applicant and all her rights were explained to her in a language she understands. She understood the import of the convening order and the enquiry which it envisaged. She knew very well that the enquiry on 11th June was called because she was convicted of a criminal offence and that because of this she may be discharged from the Force.

iii) At the enquiry the applicant's right to legal representation was explained in a language she understands. The charge was read out and explained to the applicant, followed by the leading of evidence against her and the opportunity for her to cross-examine the only witness at the hearing. It was explained to her that the enquiry may result in her dismissal from the force and she was afforded the opportunity to offer evidence in mitigation and in fact did so. The applicant admitted the conviction and sentence in the magistrate's court and asked for mercy and to be given another chance.

iv) The appeal was decided by the first respondent himself, not by the second respondent.

[35] The grounds of review (1-6 and 9) predicated on the allegation that procedural safeguards were not observed before and during the s8(1) enquiry, must therefore fail.

[36] The respondents admit the applicant's allegation that at the enquiry the record of the proceedings in the Magistrate's court which resulted in her conviction was not presented. They say that it was not necessary because the fact of the conviction and sentence were never denied by the applicant. It is worthy of note that in the present

proceedings the applicant owns up to the conviction and sentence any way. I do not see what prejudice she suffered. The applicant was, even by her own admission, found guilty in a court of law and sentenced and never appealed against either conviction or sentence. The respondents were entitled to act on that basis. To imply, as the applicant does, that the authorities had to prove the fact of the conviction and sentence by producing at the s8(1) enquiry the record of the trial court's proceedings, when the fact of the conviction and sentence is admitted, is untenable. This ground (7) is therefore specious and must fail.

[37] I will now consider review ground (10 and 11) which alleges that the second respondent should not have made a recommendation to the first respondent when the matter went on appeal. Neither counsel referred me to the Appellate Division matter of *Terblanche v Wiese* 1973 (4) SA 497 (A), which dealt with a provision of the South African Police Act which is in *pari materia* with our s8(1).

[38] In that case the Appellate Division held that the legislature intended that a quasi-judicial body (being the board of enquiry) should function without being bound by the rules of evidence and without being limited only to the admission of evidence which would be admissible in a court of law (at 505). As regards the appeal procedure to the Minister, the Court held that the commissioner has a 'duty' to submit the appeal, together with the record of the board's proceedings and all other relevant documents, to the minister; and that it is not irregular for the commissioner to submit a memorandum to the minister suggesting that he dismiss the appeal. Where such a memorandum contains no new facts it need not be referred to the appellant in order to afford her the opportunity to reply because the

appellant cannot be prejudiced (at 505-508). In view of the authority which I have just cited, this review ground too must fail.

[39] The other review ground falling for determination is the one alleging that no evidence was led at the enquiry that the applicant was not fit to remain in the Force or to retain her rank.

[40] The respondents allege and argue that the enquiry under s8 (1) is aimed at establishing the fitness of a member to continue as such member. The argument goes that because of the conviction, a member's unfitness is presumed and the I.G. may only retain the convicted member if such member shows that in spite of the conviction, he or she is a fit person to be retained on the Force. Mr Narib submitted with great force and enthusiasm that because of the nature and function of the police force, s8 (1) was so drafted to create a bias against members of the Force who get convicted of criminal offences involving dishonesty. This bias, Mr Narib submits, is reinforced by s4(2B) which states that a person who has been convicted of a schedule 1 offence (to the Act) (theft is included) shall not be appointed as a member. He says *that* provision must be had regard to in interpreting s8(1). If I understand this argument properly, Mr Narib suggests that because the enquiry is aimed at establishing the fitness of the member of the Force, the affected member must present facts which show that, regardless of the conviction and the blemish which it places on the Force, she is still a fit person to remain on the Force. Mr Narib submits that the applicant failed to present any evidence which could have led the IG to take the risk of retaining on the Force a person who has been found guilty in a court of law of a schedule 1 offence.

[41] *Tala v Village Council of Wolmarandsstad,* 1927, TPD 425 at 428-430 is authority for the proposition that where the legislature has given

a right of appeal against the exercise of a discretionary power and or requires the functionary to give reasons for his or her decision, the use of the expression '*in the opinion'* of a functionary is not to be seen as having been intended as a decisive factor precluding judicial review. Under the scheme of the Act there is a right of appeal to the Minister from a decision of the I.G. Second respondent's exercise of his discretionary power under s8(1) is therefore subject to judicial review. My reading of the Act is that an enquiry in terms of s8 (1) must be properly conducted so as to determine the issue whether a member is fit to remain on the Force and the I.G. must have a proper basis for forming the *opinion* that a member is not fit to remain on the Force. That issue cannot be predetermined by some administrative device or diktat which prevents the I.G. from looking at every individual case to determine if a member is unfit.

[42] If the view propounded by Mr Narib were to prevail it will amount to rewriting s8 through interpretation. If that is what the legislature intended, nothing could have been easier for it to say so clearly. In any event, the telling argument against it is the scheme of the Act itself: the amended s8(2) makes clear that the I.G. shall only discharge (having observed *audi*) a member who is unfit to remain in the Force or retain her rank, if such member is at the time still on probation. The provision which empowered the I.G. to discharge without an enquiry a member who had been convicted of an offence without the option of a fine, has since been repealed. What it means is that even a convicted criminal (member of the Force) is entitled to an enquiry. That removes the sting in Mr Narib's argument which is clearly flawed.

[43] Mr Namandje also submits that the word '*efficiently*' in s8(1) must be given its literal grammatical meaning. Relying on the *Mini Oxford Dictionary,* he submits that the word must be interpreted to mean

'*able, productive, competent, useful'.* (I will for the purposes of this judgment assume this to be correct.) This, in reality, amounts to saying that a member found guilty of a criminal offence should not be subject to an enquiry in terms of s8(1). Now, how can a member of the Force be *productive* and *useful* to the Force if, as the respondents say, the public stand to lose trust and confidence in them because of the criminal conviction? I am satisfied that it is perfectly legitimate for the Force to hold an enquiry against a member in terms of s8(1) if convicted of an offence such as the applicant was.

[44] I have already found that the applicant's procedural rights were explained at the enquiry. Not only that, the third respondent makes clear that the applicant was informed that she was facing the prospect of dismissal in view of the criminal conviction and that the enquiry was directed at that. The convening order, although not quite elegantly worded, makes clear that her criminal conviction was considered to render her unfit to perform her duty efficiently. Onesmus who served the convening order also explained to the applicant that normally police officers convicted of criminal offences such as applicant was, are discharged from the Force. I do not think it should be required of the Force to approach the matter in the rather formal way suggested by Mr Namandje, i.e. that she should be told that the enquiry is called to determine if she is 'fit to remain in the Force or to retain her rank. Now please present evidence why you should remain on the Force." That may have been even more confusing to her.

[45] This applicant knew she committed a crime of theft. She knew a board was called to consider whether because of that she should remain in the Force or not. I therefore find nothing improper with the manner in which the enquiry was conducted. The review ground that

the enquiry was not concerned with whether or not the applicant is fit to remain on the Force is without substance and must fail.

[46] As for what transpired before the second respondent, I wish to say the following: Second respondent had before him the report of the board of enquiry stating that because of applicant's conviction for theft from her employer, she was not fit to remain in the Force. This was no ordinary case of theft: It involved theft from an employer. Theft from the employer is a very serious matter and normally justifies dismissal. See *Model Pick & Pay v Mwaala* 2003 NR 175 A-D and the authorities there collected.

[47] It is at the s8(1) enquiry, not before I.G., that the facts and circumstances must be placed as to why a member found guilty of a criminal offence is not fit to remain on the Force, and why such member, in spite of the conviction, should not be discharged from the Force. Both the Force and the member bear an evidentiary onus. The applicant was fully aware of the nature of the proceedings of the board of enquiry. She knew she could be discharged from the Force. The nature of her mitigation makes that clear: She wanted to be given a second chance for fear of losing a livelihood. There is no suggestion that the submissions she made in mitigation were not properly considered. The recommendation to the second respondent was based on the outcome of the enquiry.

[48] In the founding papers no allegation is made that the second respondent operates a practice, based on some internal administrative manual, whereby if a member of the Force is convicted of a schedule 1 offence (which includes theft), such member be automatically discharged from the Force without it being considered, at a s8(1) enquiry, whether the member, because of the conviction, is fit to

remain in the Force. Such a practice if it exists would potentially be *ultra vires* for preventing the second respondent from exercising his discretion whether or not to discharge. (See *Johannesburg Stock Exchange v Witwatersrand Nigel Limited* 1988 (3) SA 132 (A) at 152 B-D.) Based on documents discovered, Mr Namandje relied on this ground and submits in his heads of argument that such practice is *ultra vires* and had a role to play in the present case. It is common cause that after receiving the record of proceedings sought to be reviewed and set aside, the applicant did not, in terms of subrule (4) of Rule 53 *'by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of her notice of motion and supplement the supporting affidavit."*

[49] It has to be mentioned that it is not enough to list every conceivable review ground without also presenting evidence on affidavit which supports each and every ground relied upon. A respondent is under no obligation to counter a review ground which is not supported by evidence given under oath. Mr Namandje seems to think that the same result can be achieved by in his heads of argument relying on review grounds which he discovered after the record was dispatched by the respondents, without complying with subrule (4) of Rule 53.

[50] An applicant for review is not entitled, in heads of argument, to introduce additional review grounds which were not disclosed in the founding papers or through exercising the right conferred by subrule (4) of Rule 53. First, the existence of a practice fettering the second respondent's discretion has not been proved. True, the documents show that the second respondent takes the view that the fact that the Act prohibits the employment into the Force of persons who had been convicted of a schedule 1 offence, necessitates consideration of

discharge, after a s8(1) enquiry, of a member of the Force who is convicted of such an offence. That is not the same thing as saying any member who is found guilty of a schedule 1 offence will be discharged whatever the merits. Second, the notice of motion has not even been amended that such practice, being *ultra vires,* be declared unlawful and therefore be set aside.

[51] It is for these reasons that I do not deal with the additional review grounds improperly disclosed in the heads of argument.

[52] Review grounds 8 and 12 are cast in such generalised terms and are not supported by any of the evidence given on affidavit and do not merit special consideration.

Purpose of judicial review

[53] *Judicial review* has two aspects: First, it is concerned with ensuring that the duties imposed on decision–makers by law (which includes the constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires.* If the decision is one which the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision. With limited exceptions, namely an error of law on the face of the record and the still-evolving doctrine of *proportionality*, the Courts are in principle not prepared to review the merits of the decision unless Parliament has created a statutory right of appeal. (See *Davies v Chairman, Committee of the Johannesburg*

Stock Exchange 1991(4) SA 43 at 46-48; The Western Australia Law Reform Commission 26(11), *Working Paper on Judicial Review of Administrative Decisions* (1986) at paragraph 1.9.) It must be borne in mind that *'in the absence of irregularity or unlawfulness, considerations of equity do not provide any ground of review'*: *Davies supra* at 47G.

[54] The applicant's case is, in reality and substance, a plea for mercy- *to be given another chance* although she was convicted of theft from her employer. The decision of the respondents not to give her *another chance* is not subject to review in the absence of any unlawful conduct on their part. The applicant failed to establish that the respondents did not comply with their statutory obligations. The *onus* rests upon the applicant for review to satisfy the Court that good grounds exist to review the conduct complained of: *Davies supra* at 47 G- H.

[55] I find no irregularity in the actions of the respondents.

[56] This application for review is singularly lacking in merit and is accordingly dismissed with costs.

DAMASEB, JP

ON BEHALF OF THE APPLICANT:	**Mr S Namandje**
Instructed By:	**Sisa Namanje & Co**
ON BEHALF OF THE RESPONDENTS:	**Mr G Narib**
Instructed By:	**Government-Attorneys**