REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A12/2003

In the matter between:

GEORGE SIMATAA	**APPLICANT**
and	
THE PUBLIC SERVICE COMMISSION	**FIRST RESPONDENT**
THE DEPUTY SECRETARY TO CABINET	**SECOND RESPONDENT**

Neutral citation: *Simataa v The Public Service Commission* (A12-2003) [2013] NAHCMD 306 (30 October 2013)

Coram: VAN NIEKERK J

Heard: 20 October 2004

Delivered: 30 October 2013

ORDER

1. The following decisions are hereby reviewed and set aside:

   (a) The decision by the first respondent taken on 19 November 2002 advising the second respondent to bring fresh charges of misconduct against the applicant.

   (b) The decision by the second respondent taken on 23 January 2003 to bring fresh charges of misconduct against the applicant and the decision to continue with same.

2. The respondents shall pay the applicant's costs jointly and severally, the one paying, the other to be absolved.

JUDGMENT

VAN NIEKERK J:

[1] At the launch of this application for administrative review the applicant was employed in the Public Service as an Under Secretary: Management Services in the Office of the Prime Minister. The first respondent is the Public Service Commission, a body constituted in terms of Chapter 13 of the Constitution and in terms of the Public Service Act, 1995 (Act 13 of 1995). The second respondent

is the Deputy Secretary to Cabinet and the accounting officer of the Office of the Prime Minister.

<u>The history of the matter</u>

[2] On 28 February 2002, the second respondent charged the applicant with two main charges and one alternative charge of misconduct in terms of section 26(1) of the Public Service Act. The particulars in the charge sheet contain allegations about improper conduct relating to certain tenders; causing embarrassment and adverse publicity to the Office of the Prime Minister and /or the Tender Board; and failure to disclose performance of remunerative work outside his employment and involvement in certain profit making ventures.

[3] The second respondent requested the applicant in terms of section 26(3)(b) of the Public Service Act to furnish him, within 14 days after delivery of the charges, with a written admission or denial of the charges and should he so desire, a written explanation. The charges were delivered on 28 February 2002. The applicant denied the charges in writing on 7 March 2002.

[4] On 15 March 2002, the second respondent wrote the applicant a letter in which he informed the applicant in accordance with section 26(5) of the Public Service Act of "the composition of the disciplinary committee that has been established to proceed to conduct an enquiry into the charges" against him. The letter also states that "the inquiry shall be conducted within 21 days from the date of this letter and this date (and the place where the enquiry is to be conducted) will be communicated to you in writing by the chairperson of the Disciplinary Committee soon."

[5] On 5 April 2002 Mr Philander, the appointed investigating officer in the misconduct inquiry, addressed the following letter, which was copied to the applicant's legal practitioner, to the second respondent:

‘As you are aware, writer thereof had been appointed as the investigating officer in this matter. Furthermore, the Public Service Act, 1999 *(sic)* requires that certain functions should be performed within stipulated periods. In this particular matter, the Disciplinary Committee had been appointed outside the time limit (one day) and the hearing did not take place or commenced *(sic)* within the stipulated period.

Against this background, on Thursday, 4 April, writer hereof had been requested to contact Mr Damaseb, who represents the accused staff member to arrange a hearing. Mr Damaseb was in court and could not attend to the issue at that stage.

Writer contacted him (Mr Damaseb) again this morning and discussed the matter. He indicated that he will have to obtain instructions from his client in this regard, i.e. whether they will condone the non-compliance with the Act, and revert to writer hereof on Monday, 8 April.

Any information received shall be communicated to yourselves.’

[6] On 9 April 2002 the chairperson of the disciplinary committee addressed a letter to the applicant informing him that the disciplinary inquiry would be held on 18 April 2002.

[7] On 11 April 2002 the applicant's legal practitioner addressed the following letter in reply:

‘Mr Simataa will be in Tanzania on 18 April 2002 on prior commitment, and writer will be in South Africa on that date too.

We propose the 25th of April 2002 and wish to advise, in any event, that in view of the Statutory *(sic)* time periods not having been met, the hearing of this matter

> will **not** be competent. We need urgent confirmation on what basis you wish to proceed and conduct an illegal hearing.'

[8] On 15 April 2002 the chairperson of the disciplinary committee advised the applicant's legal practitioners as follows:

> 'Kindly be informed that the disciplinary inquiry cannot take place on 25th April 2002 as proposed by you. The said date is not suitable for the committee since one of the disciplinary committee members will be out of the country from 22 April 2002 to 26 April 2002. Mr Simataa is also currently out of the country and will be only be in office on 22 April 2002, therefore the date of the inquiry will be set on the return of the above-mentioned whereafter you will be notified accordingly.'

[9] On 25 April 2002 the chairperson informed the applicant's legal practitioners in writing that the disciplinary committee would conduct its investigation into the charges of misconduct on 6 May 2002.

[10] On 6 May 2002 the inquiry convened. There is a dispute about the nature of the committee's ruling and the reasons therefor. It is common cause that the merits of the charges were not dealt with. According to the minutes the chairperson already at the start of the proceedings indicated 'that the disciplinary committee was not established within the limits of the Public Service Act. In view of that she informed the hearing that the exercise should be discontinued and that the accused would be re-charged.' Having invited comment from the persons in attendance, the applicant's legal practitioner and the investigating officer made certain legal submissions. The chairperson then reiterated her first announcement and the hearing was adjourned.

[11] After receiving the disciplinary committee's report the second respondent sought legal advice from the office of the Attorney-General. Having received same, the second respondent on 3 June 2002 informed the applicant in writing that he had been 'charged with misconduct on 28 February 2002 and the

charges are hereby withdrawn'. The very next day the second respondent charged the applicant a second time with misconduct. Although the charge sheet now contained five main charges and although the charges are worded differently than before, it is clear that they were based on the same facts and allegations as before and that the allegations had just been re-arranged to formulate more charges.

[12] On 17 June 2002 the applicant in writing denied the latest charges against him. He also stated:

> 'The new charges are incompetent and void in law as I had previously been charged - which charges were not prosecuted timeously and were thus withdrawn. There is no authority under law for the Deputy Secretary to Cabinet to bring new charges against me based on the same facts which formed he *(sic)* basis for the charges since withdrawn.'

[13] On 3 July 2002 the chairperson of the disciplinary committee informed the applicant that the inquiry would be held on 8 July 2002.

[14] On 8 July 2002 the inquiry commenced. The charges were read out to the applicant, who pleaded not guilty to all of them. Thereafter the applicant's legal practitioner made certain legal submissions to the committee, which in essence amounted to the position taken by the applicant in his denial dated 17 June 2002. He submitted that the charges are incompetent and that the applicant should be acquitted. The Committee also heard submissions by Mr Philander. After deliberations amongst the members the following was recorded in the minutes:

> 'At the resumption of the hearing the Chairperson said that based on arguments presented by both sides and as much as there is no provision in the Act and Staff Rules, to re-charge or not to re-charge a staff member in case of non-compliance, the committee could not treat this case in isolation of the first

> hearing. Another factor taken into account is that the so-called "new charges" are in effect virtually similar to the first charges.
>
> Therefore, she informed the hearing that the Committee will recommended *(sic)* (to the Deputy Secretary to Cabinet) its decision for the dismissal of the case due to procedural requirements not having been adhered to in the first hearing and that further proceedings would violate procedural fairness in terms of the Act and Staff rules.
>
> The Chairperson thanked everyone present and the hearing adjourned.'

[15] On 7 August 2002 the chairperson forwarded a copy of the minutes of the hearing to the second respondent under cover of a memorandum, directed his attention to the disciplinary committee's recommendations and requested him to indicate whether he approves the findings of the disciplinary committee.

[16] Without giving the requested indication, the second respondent signed the memorandum on 7 November 2002 and the next day forwarded these documents to the first respondent's secretariat under cover of as letter in which stated:

> 'Attached please find the report of the disciplinary inquiry into charges of misconduct against Mr Simataa that has been finalized in terms of section 26(17)(a) of the Public Service Act, 1995 (Act 13 of 1995) for your cognizance.'

[17] On 19 November 2002 the first respondent took a decision concerning the matter which was forwarded to the second respondent and which reads, *inter alia*, as follows:

> '**DECISION** : The Public Service Commission-
>
> (a) takes note of-

(i) the decision of the Deputy Secretary to Cabinet, on the advice of the disciplinary committee, to dismiss his own charges of misconduct because of the procedural failure resulting from non-compliance with Section 26(5) of the Public Service Act, 1995 (Act 13 of 1995) in that the disciplinary committee was not established within seven days from the date of receipt of the written denial of the staff member charged;

(ii) the advice from the Office of the Attorney General as the designated legal advisor of the Government as set out in its letters CN/14/02/PM and RP/08/02/PM dated 28 May and 22 July 2002 respectively, of which the latter was ignored by the disciplinary committee and the Deputy Secretary to Cabinet;

(b) is concerned and extremely disappointed by the serious dereliction of duty by the disciplinary committee in that it allowed itself to be diverted from its **mandate** of looking into the merits of the case by adducing evidence to arrive at a verdict of guilt or innocence based on the balance of probabilities, but instead indulged in arguments of law outside its terms of reference as envisaged in the Public Service Act, 1995 (Act 13 of 1995) and the Rules promulgated under the said Act, resulting in a serious miscarriage of administrative justice which prescribes that all staff members be treated equally before the law without showing any bias (copies of the letters conveying this concern to the members of the disciplinary committee must be submitted to the Public Service Commission);

(c) does not accept parts of the advice contained in the said letter of the Office of the Attorney General contending that -

(i) the decision of the disciplinary committee is final, taking into consideration Section 26(17)(a) and (b) which makes provision for recommendations of the disciplinary committee to be submitted to the permanent secretary and the Public Service Commission;

(ii) the Public Service Commission be approached for a **legal interpretation** if a disciplinary committee can decide whether a permanent secretary can charge a staff member as this is outside its jurisdiction; and

(d) advises the Deputy Secretary to Cabinet to withdraw the current charge of misconduct against Mr George Simataa, re-charge him and appoint the following staff members as members of the disciplinary committee and auxiliary staff to bring the matter to immediate finality.'

[18] On 22 January 2003 the second respondent addressed a letter to the applicant in which the following was stated:

'As you are aware the Disciplinary Committee during its proceedings on 8 July 2002 recommended that misconduct charges against you be dismissed.

The report of the Disciplinary Committee was then referred to the Public Service Commission in terms of Section 26(17)(a) of the Public Service Act, 1995 (Act 13 of 1995). The Public Service Commission responded and advised that the previous charges be withdrawn and that you be re-charged.

However, in view of the fact that most of the envisaged committee members were on annual leave during mid-December 2002 and mid-January 2003, I hereby inform you that I intend to charge with misconduct soon.'

[19] Upon request by the applicant's lawyer, a copy of the first respondent's decision was provided to him.

[20] On 23 January 2003 the second respondent charged the applicant again with misconduct, attaching the same charges as on 4 June 2002. The applicant received this notification on 28 January 2003. On 5 February 2003 the applicant again denied the charges in writing.

[21] On 13 February 2003 the Acting Deputy Secretary to Cabinet informed the applicant of the composition and establishment on 6 February of the disciplinary committee. On 13 February 2003 the chairperson of the disciplinary committee informed the applicant that the inquiry would take place on 21 February 2003.

[22] On 20 February 2003 the applicant launched this application in which he seeks the following relief:

> '1. Reviewing and correcting or setting aside:
>
> (a) The decision by the First Respondent taken on 19 November 2002, requiring Second Respondent to bring fresh charges of misconduct against Applicant;
>
> (b) The decision by the Second Respondent taken on 23 January 2003, to bring fresh charges of misconduct against Applicant and the decision to continue with same;
>
> 2. Declaring the aforesaid decisions unconditional, and/or null and void;
>
> 3. Ordering the Respondents to pay the Applicant's costs, jointly and severally, the one paying the other to be absolved.
>
> 4. Granting such further and/or alternative relief as this Honourable Court deems fit.'

[23] In his affidavit the applicant relied on several grounds for the relief sought. He firstly alleged that the first respondent acted *ultra vires* its powers in directing the second respondent to re-charge him, as the power to charge the applicant lay with the second respondent and not with the first respondent. The applicant points out that the only role envisaged in the Public Service Act for the first

respondent is spelled out in section 26(12). He alleged that in taking the decision to recharge him, first respondent misunderstood the impact of section 26(12).

[24] The applicant secondly alleged that even if the Court would hold that the first respondent had the power to decide to recharge him, the decision was arrived at in a manner which breached his right to fair administrative action in terms of Article 18 of the Constitution, in that he was not afforded an opportunity to be heard before the first respondent took the decision adverse to him. This ground was expressly abandoned at the hearing of the application and I shall not concern myself further with it.

[25] Thirdly the applicant alleged that it is not competent for the second respondent to re-institute misconduct charges against me after the authorities had failed to on their own admission, to prosecute the initial charges against me within the time periods provided for under the Act. His case is that section 26(5) and (6) are peremptory provisions whose breach renders the entire proceedings a nullity such that they cannot be revived by fresh charges being brought against him.

[26] In this regard I pause to note that, although on the papers there is a dispute between the applicant and the second respondent on exactly when the first disciplinary committee was established, counsel for the second respondent conceded during argument that the committee was indeed established on 15 March as alleged by the applicant. In my view this concession was properly made. It is therefore common cause that the disciplinary committee was established one day late.

[27] As far as the 21 day period for the conduct of the misconduct enquiry is concerned, it is common cause that the last day of this period was 5 April 2002.

[28] Fourthly the applicant contends that the Public Service Act does not confer any power on the second respondent to withdraw charges in the face of procedural irregularities so as to institute proceedings *de novo*.

[29] Lastly he alleged that, as the charges against had been dismissed, it was not competent to bring new charges based on the same facts after a delay of about three years.

[30] Mr *Mouton,* who appeared on behalf of the applicant, submitted that the first issue to be decided is whether non-compliance with the provisions of section 26(5) and 26(6) renders the subsequent disciplinary proceedings null and void. These provisions read as follows:

> '(5) If the staff member charged denies the charge, the permanent secretary concerned shall, within seven days from the date of receipt of the written denial, establish a disciplinary committee consisting of -
>
> (a) ……
>
> (b) ……
>
> (c) ……
>
> (d) ……,
>
> to inquire into the charge.
>
> (6) The chairperson shall, in consultation with the other members of the disciplinary committee, fix the time and place of the inquiry and shall give the staff member charged reasonable notice in writing of the said time and place: Provided that such inquiry shall be conducted within 21 days after the establishment of the disciplinary committee.'

[31] He submitted with reliance on the cases of *Hercules Town Council v Dalla* 1936 TPD 229 at p 240 and *Le Roux v Grigg-Spall* 1946 AD 244 at 249 that provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court. He pointed to the fact that the Public Service Act does not give express power to this Court to extend the time limits

imposed by section 26(5) and (6). He further emphasized that the use word ‘shall’ is indicative that the legislature intended the time limits to be peremptory and not directory and that non-compliance be visited with nullity.

[32] Mr *Marcus*, on the other hand, submitted that the non-compliance with section 26(5) and (6) does not need to be considered on the facts of this case, because the allegations of non-compliance only relate to the first hearing, which was discontinued. The question whether the inquiry would have been null and void if the disciplinary committee had decided to continue with the inquiry is therefore, he submitted, academic. He further submitted with regard to the second hearing that the issue of nullity does not arise as the relevant sections had been complied with and if the respondents’ argument that the second respondent could validly have withdrawn and charged the applicant afresh, is accepted.

[33] However, in the event that this Court is inclined to decide the issue as proposed by Mr *Mouton*, counsel for the respondents did not agree with the general proposition that non-compliance with section 26(5) and (6) results in the disciplinary hearing being a nullity. He referred to what was stated in *Volschenk v Volschenk* 1946 TPD 486 at 490, namely:

> 'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity …….
>
> An important consideration should be whether by failure to adhere to a strict compliance with the time provision substantial prejudice would result to persons or classes of persons intended to be protected and if prejudice may result whether it is irremediable or whether it may be cured by allowing an extension of time.’

[34] Counsel submitted that it is significant that the applicant never alleged any prejudice at the first hearing. He further submitted that the interpretation sought to be placed on the relevant provisions is rigid and mechanical and inconsistent with the purposive approach to statutory interpretation advocated by the courts. He contended that it places form over substance and that it would result in a miscarriage of justice in that the applicant would avoid possible punishment with regard to the serious charges brought against him, thereby defeating the aim of the legislature.

[35] I am of the view that it is relevant to decide the issue as proposed by counsel for the applicant. In this regard I agree with Mr *Marcus* that the view contended for by the applicant is too rigid. A more flexible approach has been increasingly followed by the courts. In *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others* 2013 (1) NR 271 (HC) I had occasion to give an overview of this development. Although the latter case and some authorities relied on in that matter were decided after hearing the instant matter, the approach under discussion has been clearly discernible for many decades as is evident from the authorities mentioned at p278B-280F:

> '[22] In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at 513F – 514A the Supreme Court contrasted (and disapproved of) the earlier inflexible approach on statutory time limits as expressed in *Hercules Town Council v Dalla* 1936 TPD 229 at 240 ('. . . the provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court') with '. . . later, more moderated approaches adopted or endorsed by the courts (including the High Court which held that the modern approach manifests a tendency to incline towards flexibility)' (*DTA of Namibia and Another v Swapo Party of Namibia and Others* 2005 NR 1 (HC) at 11C). In this regard the Supreme Court approved of the following extract from *Volschenk v Volschenk* 1946 TPD 486 at 490:

> 'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.'

See also *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* 1978 (1) SA 1027 (SWA) at 1038A – B.

[23] In considering the question raised it is not helpful to focus merely on whether the requirements of s 35 are peremptory or directory. Although these are useful labels to use as part of the discussion (*Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H), the true enquiry is whether the legislature intended the distribution of any assets in terms of the liquidation and distribution account to be valid or invalid where the period for inspection is shorter than 21 days. (*Cf Ex parte Oosthuysen* 1995 (2) SA 694 (T) at 695I). It should be remembered that —

> 'It is well established that the Legislature's intention in this regard is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (*Nkisimane* (*supra* at 434A); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A)).'
>
> [*Oosthuysen supra* at 696A.]

[24] This principle was expanded in *Swart v Smuts* 1971 (1) SA 819 (A), when Corbett AJA (as he then was) said the following at 829E – F:

I

> 'In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule. Thorough consideration of the wording of the statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.' [My translation from the Afrikaans.]

[25] In *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 328A – B the court expressed the issue in this helpful way:

> '. . . what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will

> not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.'

[26] In *Johannesburg City Council v Arumugan and Others* 1961 (3) SA 748 (W) the court considered several authorities on the issue of non-compliance with statutory time limits and concluded that in each of the cases cited the basis upon which the decision in the case was founded was 'the determination of the intention of the Legislature coupled with the possibility of prejudice' (at 757E – F).

[27] In *DTA of Namibia and Another v Swapo Party of Namibia and Others supra* at 9H – 10D the full bench noted with approval the following stated in *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) when Herbstein J summarised what the full bench considered 'certain useful, though not exhaustive, guidelines' when he said at 451:

> 'In *Sutter v Scheepers* (1932 AD 165 at pp. 173, 174), Wessels JA suggested certain tests, not as comprehensive but as useful guides to enable a Court to arrive at that real intention. I would summarise them as follows:
>
> (1) The word shall when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
>
> (2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
>
> (3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
>
> (4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
>
> (5) The history of the legislation also will afford a clue in some cases.'

[28] In *Sayers v Khan* 2002 (5) SA 688 (C) the following was stated at 692A – G (the passage at 692A – D was recently applied in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others supra* at 516I):

> 'The jurisprudential guidelines relevant to the present case as articulated by the South African Courts (particularly in cases such as *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) and *Sutter v Scheepers* 1932 AD 165 at 173 and 174) are usefully summarised by Devenish (*op cit* at 231 – 4) as follows:
>
> If, on weighing up the ambit and aims of a provision, nullity would lead to injustice, fraud, inconvenience, ineffectiveness or immorality and provided there is no express statement that the act would be void if the relevant prohibition or prescription is not complied with, there is a presumption in favour of validity. . . Also where 'greater inconvenience would result from the invalidation of the illegal act than would flow from the doing of the act which the law forbids', the courts will invariably be reluctant - unless there is some other more compelling argument - to invalidate the act. Effectiveness and morality are *inter alia* also considerations that the courts could use in the process of evaluation, in order to decide whether to invalidate an act in conflict with statutory prescription.
>
> (ii) The history and background of the legislation may provide some indication of legislative intent in this regard.
>
> (iii) The presence of a penal sanction may, under certain circumstances, be supportive of a peremptory interpretation, since it can be reasoned that the penalty indicates the importance attached by the legislature to compliance. However, the courts act with circumspection in these circumstances. Therefore, in *Eland Boerdery (Edms) Bpk v Anderson* 1966 (4) SA 400 (T) at 405D – E, the Court made the observation that '(t)rouens, die toevoeging van so 'n sanksie is dikwels 'n aanduiding dat die wetgewer die straf, waarvoor voorsiening gemaak word in die Wet, as genoegsame sanksie beskou en dat hy nie bedoel het, as 'n bykomende sanksie, dat die handeling self nietig sou wees nie'. . . .
>
> (iv) Where the validity of the act, despite disregard of the prescription, would frustrate or seriously inhibit the object of the legislation, there is obviously a presumption in favour of nullity. *This is a fundamental jurisprudential consideration and therefore it outweighs contrary semantic indications*.'

[36] In addition to these authorities it is necessary to bear in mind what was stated in *Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at p433H-434E:

> 'Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 587A - C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence (see, for example, *Sutter v Scheepers* 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327 *in fin* - 328B and *Shalala's case supra* at 587F - 588H, and *cf Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C - E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see, for example, *Rondalia Versekeringskorporasie Bpk v Lemmer* 1966 (2) SA 245 (A) at 257H - 258H).'

[37] In a decision delivered after argument was heard in the instant matter, *Zephania M Tjihumino v The Permanent Secretary of the Ministry of Finance and others* (Case No. LC3/2006, unreported judgment delivered on 2 November 2006) Mainga, P (as he then was) was called upon to consider the provisions of section 26(6). In this matter the applicant was charged with misconduct on 5 September 2005. The disciplinary committee had been established in time. The inquiry was scheduled to take place within the 21 day period on 21 September 2005, but a few days before the date of the enquiry, the applicant in the case was informed by letter that the investigating officer would be out of town until after the inquiry was due to commence. He was further informed that the inquiry scheduled for 21 September was just a commencement and not a full hearing. On that date at the proceedings, the applicant was informed that the investigating officer and one member of the committee were absent. Provisional dates for the inquiry were set at 13 and 14 October 2005. On 7 October the chairperson of the

disciplinary committee informed the applicant that the inquiry was postponed until further notice. On 2 November 2005 the applicant's lawyers in correspondence addressed to the chairperson noted that 43 days had passed since the inquiry was supposed to have been conducted and demanded the applicant's reinstatement within 7 days. No reply was received. On 13 January 2006 the chairperson indicated in writing that the inquiry was postponed to 15 February 2006. The applicant then proceeded to the Labour Court for declaratory relief, including, inter alia, that the charges leveled against the applicant on 5 September 2005 have lapsed.

[38] The argument for the applicant was summarized as follows (at p11-12):

> 'At the hearing of this application Mr Obbes reiterated applicant's stance and contended that the inquiry which was scheduled for 21 September 2005 did not constitute an inquiry as contemplated in the Act as not all members of the disciplinary committee were present. He contended that the time limitations provided in s26(6) are couched in peremptory terms. He submitted that the very purpose of the time periods provided for in section 26 is to ensure that expedition and in line with the peremptory provisions of the Act and that the wording of section 26(6) provides for the inquiry to be conducted within 21 days after the establishment of the disciplinary committee and that this Court is not empowered by the Act to extend that period and that it was the intention of the legislature to ensure that disciplinary proceedings are brought to finality within the period provided for and that the first and second respondents could not abridge (*sic*) the clear and express language employed in the Act. To do so would constitute a nullity. Mr Obbes' submissions bluntly on the provisions of section 26(6) is (*sic*) that the inquiry should have been commenced and completed within 21 days (*sic*) provided for.'

[39] The Labour Court, in considering the arguments, stated (at p.14):

> 'There can be no doubt from the provisions of section 26(6) that the legislature intended that the inquiries on suspensions and misconducts should be dealt with expeditiously to mitigate the stigma involved with the suspension and where

reasonably possible the inquiry should be disposed of within the 21 days. It was however not the intention of the legislature that the inquiry should be commenced and finalised within 21 days. Section 26(6) depending on the circumstances allows for a further postponement which could be within the 21 days or outside that period. What is clear though is that the inquiry must commence within 21 days after the establishment of the disciplinary committee.'

and later (at p.17-18):

'The intention of the Legislature of misconduct inquiries handled (*sic*) expeditiously should be complied with. Imagine a staff member who is suspended with his emoluments and his enquiry is only finalized after a number of years have gone by and he is convicted of the misconduct. He would not be working while earning his emoluments and if convicted he would have earned benefits which he would not have earned had the enquiry been expeditiously finalized.

Ms Sibolile submitted that non compliance with section 26(6) do (*sic*) render the inquiry a nullity. I do not agree. It appears that it must have been the intention of the Legislature that the inquiry envisaged by section 26(6) of the Act would be commenced within 21 days of the establishment of the disciplinary committee. To hold otherwise would defeat the very purpose of the legislative provisions making provision for the commencement of the inquiry within the specified period. It was never the intention of the Legislature that non compliance with the provisions of section 26(6) had no sanctions and that the disciplinary committee can commence the inquiry at any other period. The provisions concerning the commencement of the inquiry within 21 days after the establishment of the disciplinary committee are peremptory and failure to comply with the provisions renders the inquiry a nullity.'

(See also p.21; p.26).

[40] The Labour Court relied on the Public Service Staff Rules to fortify it in its conclusion at p. 26 that:

> 'Once the committee has been established the time clock of the 21 days starts ticking and the inquiry must commence before the 21 days expires (*sic*). …….

[41] After having considered several of the Public Service Staff Rules, the Labour Court concluded that (at p.28):

> 'The staff rules above demonstrates (sic) only one thing, the provisions of Section 26(6) and other time frames provided for in the Act must be strictly complied with. The disciplinary committee in this matter failed to comply with the provisions of section 26(6) which renders the disciplinary inquiry invalid.'

[42] The Labour Court granted an order in, *inter alia*, the following terms:

> 'The misconduct charges levelled against applicant on 5 September 2005 and still pending against him have lapsed and are hereby declared invalid and the respondents are ordered to discontinue the misconduct charges'.

[43] The Public Service Staff Rules are dealt with in section 35 of Act 13 of 1995 as follows:

> '**35 Public Services Staff Rules**
>
> (1) Any-
>
> (a) standing recommendation or advice of a general nature made or given by the Commission; and
>
> (b) directive by the Prime Minister to elucidate or supplement any regulation,
>
> and which is not contrary to this Act, may be included in rules called the Public Service Staff Rules.
>
> (2) The provisions of section 34(2) shall apply *mutatis mutandis* in respect of the Public Service Staff Rules.

> (3) The provisions of the Public Service Staff Rules are binding upon any office, ministry or agency or any staff member in so far as they apply to that office, ministry or agency or that staff member.'

[44] Act 13 of 1995 further defines the expression 'this Act' as including 'the Public Service Regulations and the Public Service Staff Rules mentioned in section 35'.

[45] I do not know when the Public Service Staff Rules relied on in *Tjihumino's* case were drawn up and published, but will assume that they were sufficiently contemporaneous to fit the description of *contemporanea expositio.* A requirement for reliance on contemporary exposition as an aid in the interpretation of a statutory provision is, according to the literal theory of construction followed by Mainga P, that the meaning of the provision must not be clear and unambiguous. (Devenish, *Interpretation of Statutes*, p.136 a.f.) The learned judge did not find that the provisions were unclear or ambiguous. As such it seems, with respect, that reliance on the Rules was not justified. In the instant matter the Rules are not before me and I shall not have regard to them.

[46] For reasons to follow I would personally prefer to follow a more flexible approach to the time limits imposed than was taken in the *Tjihumino's* case. I shall first proceed to apply the approach and guidelines as set out in the various cases above (at paras [35] to [36]) to a consideration of section 26(5). The use of the word 'shall' in section 26(5) is an indication that the provision is peremptory rather than directory. The fact that it is couched in positive terms and that no sanction is provided for non-compliance tend to show that the provision is directory. There is no provision expressly prohibiting, or visiting nullity upon, the establishment of the disciplinary committee after a period of 7 days. There is no provision, for example, that the charges shall lapse. This is to be contrasted with section 26(2)(c)(i) which expressly provides that any staff member who has been suspended shall forthwith be permitted by the permanent secretary to reassume

duty and shall be paid his or her full remuneration for the period of his or her suspension if no charge is brought against him or her under section 26 within 14 days after his or her suspension. This, again, is an indication that the provision is directory.

[47] I now turn to a consideration of section 26(6). Without expressly repeating the analysis done above in relation to section 26(5), I arrive at the same conclusions. However, I do think that the fact that the time limit in section 26(6) is contained in a proviso tends to sway one more into finding that the provision is peremptory.

[48] As the above analysis does not lead to any firm conclusion whether the provisions are either directory or peremptory, it would be useful and appropriate to consider whether exact compliance with the time limits is required or whether substantial compliance is sufficient.

[49] When the object of the provision is considered, I respectfully agree with the views expressed in *Tjihumino's* case that the intention is to conduct misconduct enquiries with promptitude. However, I do not think that it is just a case of fairness towards the person charged with misconduct. It is in the public interest that misconduct by public servants be dealt with not only promptly, but also effectively to, *inter alia*, instill discipline, root out malpractices and to set examples. Section 26(6) requires that the staff member be given reasonable notice of the time and place, but this is limited by the indication that the legislature regarded 21 days as a reasonable time within which the inquiry must be conducted. Other time limits imposed in section 26(2)(b)(c); (3)(b); (4)(b); (12)(a); (13); (14)(a); (17) and (18)(e) tend to confirm the impression that promptitude is required.

[50] The question arises whether the mere fact that a disciplinary committee is established late renders the rest of the process invalid. I do not think so. It

seems to me to be a question of the degree or extent to which the overall purpose of the legislation is achieved or undermined. Although the date of the inquiry is linked in time to the establishment of the committee, it could, e.g. happen that the inquiry is still conducted with such promptness that the 21 day limit is met if measured from the time that the committee should have been established. In such a case it would be absurd to conclude that the inquiry is invalid merely because the disciplinary committee was established late. Even if the 21 day limit as calculated in this example is exceeded because of the fact that the committee is established a day or two late, any resultant prejudice would be immaterial. In my view the fact that in this case the committee was established a day late did not render the rest of the process invalid.

[50] As far as compliance with section 26(6) itself is concerned, I am similarly of the view that the mere fact that the 21 day limit is exceeded does not in itself render the inquiry a nullity. For instance, is the limit is exceeded by a day or two it would cause greater inconvenience if the inquiry is considered invalid than if it were to be considered valid. One can imagine a situation where the misconduct charge is based on the fact that the staff member has been convicted by a court of a serious crime of theft, fraud or corruption. In such a case section 26(10) provides that a certified copy of the record of the staff member's trail and conviction by that court shall, upon identification of the staff member as the person referred in the record, be conclusive proof of the commission by him or her of that offence and to the disciplinary committee that the staff member is guilty of misconduct on account of the commission of that offence. If this inquiry were to be held a few days late, it would be a travesty of justice to hold that it is a nullity. (Cf. *R v Mtembu* 1940 NPD 7 at 9-10).

[51] As I have stated I would personally prefer to follow a more flexible approach to the time limits imposed than was taken in the *Tjihumino's* case. The question is, though, whether I can state that the judgment in *Tjihumino* is clearly wrong on the issue of whether non-compliance with the time limit in section 26(6) renders

the inquiry a nullity. After careful consideration I do not think I can. I am therefore bound to follow it. I nevertheless pause to state that even on the flexible approach I would in any event have found that the non-compliance with section 26(6) in relation to the first inquiry was such that the overall purpose of prompt and expeditious conducting of disciplinary enquiries under the Public Service Act was not met. In this regard the fact that the second respondent did not provide a full and proper explanation by the chairperson for the non-compliance is material. Such explanation as there was did not provide any reason why the first attempts to set a date for the inquiry were made only on 29 March 2002, which was a public holiday. It seems that the investigating officer was only tasked to attempt to arrange a date one day before the 21 day period expired. The letter of 9 April 2002 actually setting a date for the inquiry was sent already four days after the inquiry should have been conducted.

[52] I do not agree with counsel for the respondents that the issue of the invalidity of the first inquiry is irrelevant because the charges were withdrawn and after the applicant was charged again, the time limits were observed. The peremptory requirements of section 26(6) cannot be lawfully evaded by these tactics.

[53] On the view I take of the matter it is not necessary to decide whether the first respondent was entitled to give advice of the general nature contained in its decision dated 19 November 2002. By this I mean advice relating to the specific steps to be taken, the charges to be brought, the composition of the disciplinary committee, etc. I shall assume for purposes of this judgment that the first respondent may do so. However, what the first respondent may not lawfully do is to advise the second respondent to take steps to circumvent and undermine the provisions of the Public Service Act, specifically the provisions of section 26(6). To do so would render those provisions nugatory. Similarly, the second respondent may not take decisions with such effect. By withdrawing the charges of misconduct and re-charging the applicant on the same facts after the disciplinary committee did not comply with section 26(6), the time limit imposed

by the Act was rendered meaningless. The decisions taken by the respondents in this regard are unlawful and fall to be set aside.

[54] The result is as follows:

1. The following decisions are hereby reviewed and set aside:

   (a) The decision by the first respondent taken on 19 November 2002 advising the second respondent to bring fresh charges of misconduct against the applicant.

   (b) The decision by the second respondent taken on 23 January 2003 to bring fresh charges of misconduct against the applicant and the decision to continue with same.

2. The respondents shall pay the applicant's costs jointly and severally, the one paying, the other to be absolved.

(Signed on original)________________________

K van Niekerk

Judge

APPEARANCE:

For applicant: Mr C Mouton
Instr. by Conradie & Damaseb

For respondents: Mr N Marcus
Office of the Government Attorney