**REPUBLIC OF NAMIBIA** NOT REPORTABLE

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

**JUDGMENT**

Case no: A 166/2011

In the matter between:

**THOMAS K KANIME** **APPLICANT**

and

**THE MINISTER OF JUSTICE** **1ST RESPONDENT**

**THE CHAIRPERSON OF THE MAGISTRATE'S COMMISSION** **2ND RESPONDENT**

**BONGANI NDLOVU N.O.** **3RD RESPONDENT**

**Neutral citation:** *Kanime v The Ministry of Justice* (A 166/2011) [2013] NAHCMD 73 (19 March 2013)

**Coram:** DAMASEB, JP

**Heard:** **12 March 2013**

**Delivered:** **19 March 2013**

**Flynote:** Review in terms of rule 53 – Applicant seeking to review his dismissal as magistrate – Review brought 11 months after dismissal.

**Summary:** Review – Rule 53 – Review application to be brought within a reasonable time – Applicant seeking to review the decision dismissing him as magistrate and seeking an order of reinstatement – Applicant stating that the hearing took place in his absence and when he required legal representation and his lawyer was not available- resultant hearing therefore in breach of articles 18, 12 of

the Constitution as well as s 26(5) of the Magistrates Act, 3 of 2003 – Respondents' case that the applicant had unnecessarily prolonged the hearing though postponements and was granted enough time and disclosure to defend himself against the charges – The fact that applicants lawyer absent from proceedings not due to any unlawful or unreasonable conduct on the part of th respondents – In any event review unreasonably delayed causing prejudice to respondents - Court holding that delay unreasonable in circumstances and no proper foundation laid for condonation – Court satisfied applicant afforded sufficient time to arrange legal representation and to prepare for hearing – non-cooperation between applicant and his insurer and legal representatives no valid reason for not proceeding with hearing – such a contractual issue between applicant and his lawyers – application dismissed.

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**ORDER**

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I make the following order:

The application is dismissed, with costs.

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**JUDGMENT**

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Damaseb, JP:

[1] The applicant seeks to have his dismissal as a Magistrate reviewed and set aside. A disciplinary hearing into his alleged misconduct as contemplated in s 26 (6) – (15) of the Magistrates Act[1] ('MCA') took place on the 01-02 July 2009 in his absence. He was thereafter present on 03 July 2009 when he was found guilty of

[1] Act 3 of 2003.

misconduct by the third respondent ('presiding officer') appointed[2] to conduct the disciplinary hearing. The presiding officer then recommended to the second respondent , the Magistrate's Commission ('the Commission') that the applicant be requested to resign as magistrate[3] and failing such resignation, for the second respondent to recommend his dismissal to the Minister of Justice (third respondent).[4] Upon being so requested to resign, the applicant refused and the second respondent recommended his dismissal to the Minister.[5] The Minister then on 23 July 2010 dismissed the applicant, effective 01 August 2010. It is now settled that once such a recommendation is made, the Minister has no discretion in the matter; he or she must dismiss the convicted magistrate.[6]

[2] The applicant seeks to review and set aside the decisions of all these functionaries. He also seeks reinstatement retroactively from date of dismissal and payment of 'all remuneration, and [to be credited] all benefits that would have accrued' to him but for the dismissal. He also seeks costs of suit.

[3] The incidents which led to the applicant's dismissal occurred during his tenure as magistrate for the district of Oshakati. At second respondent's prompting, the applicant was served with 16 charges of misconduct on 15 October 2008 by the control magistrate (Mr Amutse) having supervisory jurisdiction over him.

[4] Counts 1 – 10 allege absence 'from office or duty without leave or valid cause'. Counts 1-2 allege such absence during specified dates in the month of February 2007. Count 3 relates to a specified date in the month of September 2007. Counts 4-7 refer to absence on specified dates in the month of November 2007. Count 8 -10 similarly refer to absence during March, April and May 2008 on dates that are specified.

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[2] In terms of sec 26 (4) (b).
[3] In terms of sec 26 (12) (bb).
[4] In terms of sec 26(17(b) (i).
[5] In terms of sec 26 (17) (b) (ii).
[6] Minister of Justice v Magistrates Commission and Another, Case No. SA 17/2010 (Unreported), delivered on 21 June 2012.

[5] The remainder of the counts are as follow:

Count 11: Contrary to s 24(h):

During March 2008 and April 2008 Applicant made improper use of Government property to wit a computer, printer, paper and fax facility to request financial assistance or a “helping hand of any kind” from various private companies.

Count 12: Contrary to s 24(k):

During March 2008 and April 2008 Applicant requested financial assistance for personal gain per fax from various private companies. Provided his private Back Account details in the said fax, an act that brings or is likely to bring the administration of justice or the magistracy into disrepute.

Count 13: Contrary to s 24(k)

On 14th May 2008 Applicant assaulted Erastus Pokolo in his shebeen by attacking him physically, an act which brings or is likely to bring the administration of justice or the magistracy into disrepute.

Count 14: Contrary to s 24(f):

During 2002/2003 Applicant instructed Collin Parker to change the minutes of the Liquor Board meeting in order to approve the licence of a certain Jonas Paulus after the Liquor Board decided not to grant Jonas Paulus the liquor licence. This was done as Applicant was promised a reward by Jonas Paulus.

Count 15: Contrary to s 24(k)

On the weekend of 7th to 9th November 2003 and at Moah Bar, Applicant interfered with the duties of the police when they tried to close the bar, an act which is likely to bring the administration of justice or the magistracy into disrepute.

Count 16 Contrary to s 24(k):

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Applicant was running a business without permission from the Magistrates Commission, to wit a shebeen on the Oshakati – Ondangwa road which is interfering with applicant's duties and the running of the shebeen brings or is likely to bring the administration of justice or the magistracy into disrepute.

The record of the investigation

[6] The record of proceedings discovered by the respondents following the filing of the review application shows that at the hearing of 29 June 2009 the applicant was not legally represented. The record shows further that Mr Evad Gous, an admitted legal practitioner of this court, had been appointed by Legal Shield (he knew about the hearing and had committed himself to be present). The applicant conveyed to the presiding officer that he had in fact spoken to Mr Gous that morning and that Mr Gous would not be present. The applicant informed the presiding officer that Legal Shield had only on 19 June 2011 appointed Mr Gous and *that* was too short a notice for Mr Gous to have prepared for and represent him at the hearing. He also stated that the investigating officer had not disclosed to him some documents and that the witnesses who would testify against him would be more than the five he was originally told would testify[7]. The applicant also told the presiding officer that the case was not an 'easy' one and that he would not be able to participate in it without legal representation. He took the stance that he was not responsible for the absence of his appointed lawyer for whose services he had paid 'by going deep into my pocket including the transport whether by road or by flight'. He stated that it mattered not to him that the investigating officer was ready to proceed. As he put it, that carried 'no water to me' and that he was not ready 'and will never be ready because my rights at the end of the day will be tarnished and I need to be fully represented through my own resources that I did pour throughout'. He boldly stated that he had not as at that date received 'any single statement as a disclosure'. The applicant confirmed in his submission that he had been informed by the investigating officer that some witnesses for the Commission were present while others are on standby.

[7] This is an admission that the applicant knew the identities of more than five witnesses of the Commission. It is equally an admission that certain documents were already disclosed to him.

He took umbrage with that and stated 'I do not know whether they are soldiers or police officers to be on standby. The witnesses cannot translate or interpreted to mean on standby as if they are going for war'. He concluded:

> 'I will never, ever be ready to proceed with this matter if my lawyer is not here. To my dead body I will never even say a word if the proceedings is going to commence.'

[7] On his part, the investigating officer[8] confirmed that the witnesses were available and knew they would be called 'anytime this week'. He added that the Act did not require that the investigation be done through statements. He concluded that the disclosure made placed 'sufficient and enough disclosure' for the applicant to prepare. As for the counts allegedly being old, he stated that all related to 2007-2008 and that only one (count 14) related to 2002/2003 and that he intended to withdraw it once the proceedings commenced. To save time, he said, they should not concentrate on that count. The applicant then submitted that if count 14 were to be withdrawn the same should apply to count 15. In respect of the criminal offence alleging assault, the applicant stated that the case was settled as he had paid an admission of guilt fine, thus admitting the allegation that he had assaulted Mr Pokolo.

[8] The record reflects that the presiding officer then gave a reasoned ruling. Inter alia, he sated as follows:

> '[W]e were alive to the fact that Mr Kanime had been told by his insurers Trustco at the latest by 14th of April 2009 to get a disclosure and forward the same to his then representative. Notwithstanding all that, disclosure had not been sought or made and was finally made yesterday the 29th of June 2009.'

[9] In his ruling refusing the application for postponement, the presiding officer also placed on record that the applicant had confirmed having spoken to Mr Gous on the Friday and was to follow up on that discussion but had not done so. He also stated that Mr Gous had advised that he had a problem getting a flight to Ondangwa for the morning of 30th June 2010. The investigating officer then suggested to Mr

[8] Appointed in terms of s 25(1).

Gous to try a flight for the next day or the day after. Mr Gous then called back to tell the investigating officer that he could not as he had meetings to attend. In his ruling, the presiding officer added 'All this is against the background that Mr Gous is reported to have been appointed because he will be available for this hearing the whole of this week'. The presiding officer argued that the applicant had the right to be legally represented but that it was his responsibility to secure such representation. He concluded that it was his duty as presiding officer to ensure that the applicant is afforded a reasonable opportunity to secure legal representation and to prepare his defence and that having regard to 'all the developments in this matter we have afforded Mr Kanime more than sufficient time to secure his representation and to prepare his defence. The postponements cannot in my view go on forever. This delay which stretches over a period of more than eight months can no longer be justified'. Having thus concluded he ruled that the hearing proceed on 1 July 2009 at 09h00. On 1 July the applicant was not present. What happened thereafter I will summarise when dealing with the respondents' affidavits in opposition to the relief sought.

[10] Upon resumption of the hearing on 1 July and in the absence of the applicant, the charges were read out and the investigating officer proceeded to lead witnesses in support of the charges against the applicant. In particular, evidence was led in support of the allegation that the applicant solicited funds for the erection of a boundary wall for his house. Mr Jan Greyling, a legal practitioner who practices in the applicant's area of jurisdiction, testified how when he came to court sometime in 2007, the applicant approached him and made a request for assistance in the form of building material. Mr Greyling later received a fax from the applicant on the letterhead of the Ministry of Justice, signed by the applicant, seeking financial assistance. Mr Greyling testified about the discomfort he felt by such a request from a judicial officer before whom he had to appear. A Ms Annetjie Brandt of the Trustco office in Ondangwa also testified. She stated that she received a fax to similar effect testified to by Mr Greyling in which the applicant was seeking financial assistance for the erection of a wall at his house. That letter was in fact received as an exhibit at the hearing. Other witnesses were called in respect of this and other charges against

the applicant. Correspondence directed to the applicant about his absence from work without leave was received in evidence. When the record of the proceedings sought to be reviewed was filed of record all the documents supporting the charges were available to the applicant. He chose not to amplify his papers as is permissible under the court rules[9] to deal with any aspect of the hearing, the evidence led and the documents proving the charges against him.

[11] After the evidence had been led and submission of the investigating officer received, the presiding officer made a reasoned ruling. He acquitted the applicant (in absentia) of counts 3, 5, 6, and 16 but convicted him on counts 1,2,4,7,8,9,10,11,12,13 and 15. Count 14 was withdrawn. Thereafter, the presiding officer caused the applicant to be informed that the sentencing phase of the proceedings will take place on 3 July 2010. The applicant was contacted and agreed to come. When so contacted, the respondent's Mr Bampton conveyed to the investigating officer that the applicant told him that he was 'shaft by the absence of his legal representation at the hearing but that he will be recovered by tomorrow the 3rd of July and that he will be present to hear the ruling'.

Applicant's case

[12] The applicant's case is that he is innocent of the charges brought against him, and that he could have been able to defeat them if he had proper legal representation and if he was afforded the opportunity to access the records of the magistracy and to present evidence. He further alleged that the misconduct occurred during 2002/2003. He put it as follows:

> 'It would be unfair in the absence of records being submitted to me, to proceed with these charges, considering a long period which had lapsed since the alleged occurrence of the events set out in the charges.[10] If I was properly represented, I submit, that many of these charges would have been quashed on the basis that it

[9] In terms of rule 53(4), the applicant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.

[10] The common cause fact is that except for count 14 which was in any event withdrawn, the rest of the charges allege conduct which took place between 2007 and 2008.

would be unfair to charge me with absenteeism in the circumstances where those events are alleged to have occurred a number of years back.'

[13] The applicant also alleged in his founding papers that the proceedings against him were unfair in the absence of 'records', and that he was not served with the requisite statement of particulars of the alleged misconduct as required by s 26(2)(a) of the MCA.[11] According to the applicant, after the case was postponed in November 2009, he had asked for additional disclosure from the investigating officer but that same was not made by 14th April 2010. According to him, the reason for the postponement in April 2010 was because the legal insurer had not yet appointed a replacement for Mr Van Rensburg and because of incomplete disclosure.

Legal basis for review

[14] Applicant alleges that the proceedings proceeded in his absence and while the presiding officer knew that he was booked-off.[12] The applicant alleges that in the manner the proceedings were conducted, his following rights were violated[13]:

a) to be personally present at the hearing;
b) to be assisted or represented by a legal practitioner;
c) to give evidence;
d) to be heard;

[11] Section (2)(a) reads: 'The Commission must cause the charge to be served on the magistrate charged with misconduct, together with a statement of particulars of the alleged misconduct.'

[12] The basis for this allegation is untenable, considering that on his own version he only handed in the medical certificate on 3 April before the ruling by the presiding officer. On his own version, the hearing proceeded in his absence on 1 July.

[13] Section 26(9) of the MCA, 3 of 2003, states:

'At an investigation the magistrate charged has the right-

(a)to be personally present, to be assisted or represented by a legal practitioner, to give evidence and, either personally or through a legal practitioner-

(i) to be heard;
(ii) to call witnesses;
(iii) to cross-examine any person called as a witness in support of the charge; and
(iv) to examine any book, document or object produced in evidence; and

(b) notwithstanding a denial or failure by him or her referred to in subsection (4), to admit at any time during the investigation that he or she is guilty of the charge, whereupon he or she must be found guilty by the presiding officer of misconduct as charged, and subsection (11) then applies with the necessary changes in respect of the finding'.

e) to call witnesses;
f) to cross-examine any witness called in support of the allegations against him;
g) to examine any book, document or object produced in evidence against him.

[15] The applicant maintains that he was denied the right to fair and reasonable administrative action guaranteed by Article 18 of the Constitution. The applicant alleges that the hearing was conducted in his absence, because when it took place:

a) he was booked off sick on the dates when evidence in the matter was heard;
b) his legal representative was not present;
c) his legal representative was not provided with disclosure of documents and records to be used in evidence against him;
d) disclosure of records and documents to be used against him in the investigation was late and only made available to him on 29 June 2009;
e) he did not have an opportunity to fully appraise himself of the contents of the documents to be used against him;
f) he did not have an opportunity to consult with the legal representative who was appointed by Legal Shield/Trustco to represent him in the proceedings;
g) the charges against the applicant dated back to 2003.

[16] The applicant states that he was able to establish from 'some records of the magistracy' 'subsequent to the verdict' that in respect of the allegations of absenteeism relating to counts 1, 2 and 7, he was indeed either at work contrary to the allegation otherwise, or was booked off sick. He maintains that if he was afforded the opportunity, he could have met those allegations successfully. (He offers no such rebuttal in respect of the rest of the charges.)

[17] The applicant alleges therefore that the proceedings were inherently unfair and contrary to his constitutional right to fair and reasonable administrative action guaranteed by Article 18 and s 26*(a)* of the MCA.

The respondents' case

[18] The main affidavit in opposition to the review application is deposed to by the third respondent who was the presiding officer at the applicant's disciplinary hearing.

The allegations he makes, in so far as they relate to them, are confirmed by the first and second respondents and the individuals who had appeared before the third respondent. According to the third respondent, the applicant on 3 November 2008 in writing sought a postponement of the hearing on the grounds (i) that he did not receive disclosure and required detailed disclosure and (ii) he wanted to consult a legal practitioner of his choice.

[19] Third respondent replied on 31 October 2008 that (i) in terms of s 26(5) of the MCA he was under an obligation to determine a time and date not later than 21 days from date of appointment, (ii) that the determination in respect of the application for postponement could only be made on 3 November 2008. Applicant then appeared with a legal representative, Mr Van Rensburg. The latter advised that he was still awaiting instructions from Legal Shield to represent the applicant and confirmed that the applicant had received the charges. Mr Van Rensburg also stated that the applicant had received some disclosure but was awaiting further documents. Mr Van Rensburg also advised that the applicant was not prepared to enter a plea and that he was not prepared to proceed on 3 November 2008. A postponement was granted to 14 - 28 April 2009, ie for a period of 5 months.

[20] On 14 April 2009 Legal Shield terminated Mr Van Rensburg's mandate[14]. The investigating officer advised the hearing that a Mr Willis, a labour consultant, would represent the applicant. Mr Willis did not attend on 14 April and the applicant confirmed to the presiding officer that a new person was to represent him. The applicant also said that a Mr Willies would represent him and asked for further disclosure. The case was postponed to 29 June - 3 July 2009 to allow the applicant to retain the services of a new legal practitioner and for the investigating officer to secure witnesses. The third respondent postponed the case and warned the witnesses present to appear.

[21] On 29 April 2009 the investigating officer advised the presiding officer that a Mr Gous was appointed to represent the applicant. Applicant who was then present advised the presiding officer that legal Shield advised him that Mr Gous would

[14] The very day on which the hearing was to proceed.

represent him but that he received no call from Mr Gous. He did not specify exactly when Mr Gous was appointed. Applicant also informed the hearing that a Mr Ashipala was appointed to represent him but that the latter never consulted with him. The investigating officer advised the presiding officer that an official of legal Shield, Ms Sandra Miller, informed him on 19 June 2009 that Mr Gous was appointed and would be available during the week of 29 June – 3 July 2009. The investigating officer also reported at the hearing that Mr Gous informed him that he (Mr Gous) would attend the hearing on 1 July 2009. The investigating officer then disclosed documents to applicant in the presence of the presiding officer who confirmed that the 'necessary disclosure' had been made to applicant and his representatives. This, it is said, was in addition to the disclosure made prior to 29 June 2009. On 29 June 2009, the applicant sought a postponement alleging that his legal representative required time to study the documents and that he needed 'full disclosure of the particulars of the witnesses' who would testify against him. The presiding officer refused the request for the postponement on the following grounds:

a) disclosure of all documents and witnesses had already been made;
b) Mr Gous was available during that week;
c) Applicant had to discuss disclosure with the investigating officer in order to avoid prejudice.

[22] The matter was then stood down to 30 June 2009 on which date the presiding officer was informed that Mr Gous would not attend because flights to Ondangwa from Windhoek were full and that he was not prepared to drive to Ondangwa. Mr Gous had also informed the investigating officer that he had asked the applicant for some information but that the applicant did not provide it to him. Mr Gous also informed the investigating officer that he was not able to commit himself to applicant's case that week as he had meetings to attend. This was perceived as a delaying tactic by the presiding officer because Mr Gous had previously advised that he was available during the course of that week. The presiding officer postponed the matter to 1 July 2009.

[23] As for the allegation that the applicant had not yet received full disclosure, the third respondent deposed that he was advised by the investigating officer in the presence of the applicant that he had made enough disclosure in terms of s 25(1) of the MCA. He added that the applicant had the right to apply to the High Court to compel the Magistrates Commission to disclose all documents he needed if he was still not satisfied. According to the third respondent, the applicant was given all the documents which were to be used in support of the allegations against him and which were in fact received as exhibits A - J. As for the charges, the third respondent states that Mr Amutse who served the charges on the applicant confirmed that he indeed served them on the applicant. He also stated that the documents proving applicant's absence from work were fully disclosed to him and appearing at pages 120-124 of the record of the proceedings filed of record in terms of the review.

[24] The third respondent avers that he had properly motivated all his rulings and that the factual bases (as conveyed to the hearing by the investigating officer) underlying the rulings were at no stage disputed by the applicant, in particular that he failed to consult with Mr Gous and that disclosure had been granted in full. For the reasons he fully sets out relating to the conduct of the applicant, the third respondent states that he was satisfied that the applicant was delaying the proceedings by seeking a further postponement.

[25] The third respondent also states that he afforded the applicant sufficient time to arrange his legal representation and to prepare his defence. He also deposed that the fact that the conduct alleged happened in 2003 or 2007 was no bar to misconduct charges being brought against the applicant and that there is no law or presumption precluding the Commission from proceeding against a magistrate on such charges.

[26] On 1 July 2009 the secretary of the second respondent (Mr Bampton) who also deposed to a confirmatory affidavit, informed the hearing that he spoke to the applicant who then said that he went to Ongwediva to finalise issues regarding his legal representation and that applicant had told him that he was on his way to the

hearing. The investigating officer informed the presiding officer that Ms Miller had advised him that she was not aware of any problem concerning applicant's legal representation. At 11H00, the applicant informed the investigating officer that he had parked somewhere as he could not find his lawyer. When the investigating officer and the chief clerk went to that parking lot the applicant was not present. The chief clerk deposed that he called the applicant on his mobile phone and was informed by the applicant that he was on the premises and that he was 'exasperated and disappointed' because he was expected to attend the hearing without a lawyer. The chief clerk Mr Shafuda and Mr Bampton then went and knocked on applicant's door but got no reaction. When called twice, the applicant confirmed that he was indeed in his office and threatened to shoot anyone who would enter his office. An employee of Legal Shield, one Ms Schiven, testified at the hearing that the applicant never came to the offices of Trustco that morning. Schiven confirmed that applicant was advised that a Mr Ashipala would represent him but that he was not happy. It was because the applicant was unhappy with Mr Ashipala that Mr Gous was appointed.

Unreasonable delay

[27] It is trite that a review application seeking to set aside an administrative decision must be brought within a reasonable time. The rationale for this rule is that there is a public interest in the finality of administrative decision-making and challenges thereto. The respondents who have opposed the matter and filed opposing papers have taken the point that there was an unreasonable delay in the launching of the review application and that they have suffered prejudice as a result of the delay for which there is no reasonable explanation. The third respondent who deposed to the main affidavit on behalf of the respondents specifically alleged that 'by now there has been an appointment to the position that was previously occupied by the Applicant and if the Applicant lodged his review timeously and presented it there would have been no prejudice suffered. And it may have been mitigated. He went on to add elsewhere that the delay is 'inordinate, unjustified and incurable.'[15]

[15] There is filed of record together with the opposing affidavit confirmatory affidavits by the first and second respondents who are responsible for the appointment of magistrates.

[28] The third respondent also correctly identified the following as factors that the court would have regard to in determining whether to condone the delay in the bringing of the review: the degree of non-compliance, the explanation for it, the importance of the case, prospects of success, the respondent's interest in the finalisation of the case, and the avoidance of unnecessary delay in the administration of justice. He added that the applicant failed to provide any basis in support of these factors. Unreasonable delay has, therefore, been raised squarely on the papers.

[29] I repeat what I said in K*leynhans v Chairperson of the Council for The Municipality of Walvis Bay and Others*[16]*:*

> '(i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest and certainty. The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.
>
> (ii) if the delay was unreasonable, the court has discretion to condone it.
>
> (iii) there must be some evidential basis for the exercise of the discretion: The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.
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> (iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.
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> (v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.
>
> (vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them

[16] 2011 (2) NR 437 (HC) at 450A-I.

> that a review application is contemplated. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.

[30] The length of time that had lapsed between the cause of action arising and the launching of the review is not a decisive factor although no doubt important.

[31] The applicant was dismissed effective 1 August 2010. He immediately filed a notice of appeal against the dismissal. He then applied for legal aid from the Directorate of Legal Aid and was granted same on 15 December when Mr Kwala, an admitted legal practitioner of this court, was appointed to represent him. According to the applicant, because of the onset of the Christmas holidays it was not possible for him to consult with Mr. Kwala. He therefore only met Mr Kwala in January 2011 when it was arranged with instructed counsel, Mr Narib, to meet the applicant in February 2011. On applicant's own version, therefore, instructed counsel, Mr Narib, already held instructions to act for him as early as February. Yet he suggests that in April Mr Kwala took the view that the matter was complex and that instructed counsel be engaged. Not only is no basis laid for what aspect of the matter was 'complex' or 'novel'[17], but there is inconsistency in the version that instructed counsel who had already consulted with him in February still needed to be instructed. The applicant deposed that the appeal then pending was withdrawn on instructed counsel's advice in March 2010 (while such counsel still needed to be instructed) at which point apparently the decision was taken to pursue the review.

[32] It is common cause that the respondents were not as much as warned that anything else was forthcoming by way of challenge. All they knew was that the appeal was withdrawn. This court has warned in the past that prejudice may well reside in the fact that the opponent is not warned of an impending review. Another remarkable feature of this case is the fact that in his founding papers the applicant gives no reasonable explanation why he took the time he did to come to court. He makes no suggestion that he needed to interview witnesses, that he sought to amicably resolve the matter or that the respondents obstructed him in any way in his search for relevant documents.

[17] As I show later, objectively assessed there is nothing complex about the case.

[33] The applicant's justification for the delay is implausible, inherently inconsistent and improbable even on his own version and is only explicable on the basis that the delay was due to his culpable remissness or that of his legal representatives. I say so for the following reasons: The applicant wants the court to accept that instructed counsel, Mr Narib, who had been appointed allegedly on the basis of the view taken by Mr Kwala in January 2011 that the matter was 'complex' and 'novel' was only appointed by the Directorate of Legal Aid on 8 April 2011. Yet the applicant inexplicably makes the following allegations concerning his instructed counsel's involvement in the matter, which pre-dates 8 April 2011's appointment: That he consulted with Mr. Narib on 3 February 2011 and again on 7 February 2010[18] when the advice was given to withdraw the appeal, then pending.

[34] The version is implausible and inherently improbable and inconsistent for the following further reasons:

(a) nowhere is it specified just what the documents were that counsel required and in whose possession they where, and whether the applicant's inability to access same was in any way attributable to any obstruction by the respondents;
(b) part of the delay is attributed to 'some information' 'still outstanding, including when I was appointed to the magistracy and the full name of the third respondent'. On his own version, that information was required during May 2011 but he was only able to provide it during the week of 20 June 2011. Did it take that long to work out when the applicant was appointed and to establish the identity of the third respondent – the very person that presided over his hearing and recommended his dismissal?
(c) did it take him 11 months to get to wherever he was to where the legal practitioner was? Could he not communicate by telephone or any other means? Was it important and necessary for him to meet his legal practitioner

[18] This advice was acted upon and the appeal was withdrawn on 24 March 2011. He deposed that he had to travel from Oshakati to Windhoek on 17 February 2011 to consult with Mr. Narib who then asked for further documents (not specified) to draw up the papers for the review.

personally to elaborate on the case? Did he attempt to resolve the matter with the respondents amicably before resolving the issue? Did he ask for documents from the 'magistracy' which he did not receive promptly? Was he denied access to any other documents? Only he could explain these questions. He did not.

[35] The application is fairly simple, short[19] and straightforward. It raises no complex factual or legal issues. In it, the applicant does not even traverse the many accusations made against him except in respect of three counts which he says he could meet. What about the others? In all this time after the conviction and dismissal, could he really not have been able to provide his exculpatory version of events so that, as the reviewing court and in the event that the only issue that remained was whether or not condonation should be granted for the late bringing of the review, it could assist the court exercise its discretion? The applicant was a magistrate and the allegations against him were, contrary to his suggestion otherwise, quite specific and particularised. He should have been able to prepare his defence on the information that was disclosed.

[36] This court has held [20] that every step taken which prolongs the bringing of a review must be reasonable in the circumstances of the case. On the contrary, the majority of the documents which are attached as annexures in support of applicant's case were already available to him when the charges were brought against him. Mr Narib was hard pressed during argument to point me to any additional documents that were discovered during the delay and which delayed the application being brought. Counsel could also not show me in what way the applicant's case was complex and required more reflection. He conceded that the applicant's case before this court is simply that the irregularity existed in the refusal to grant the applicant a postponement to be assisted by a legal practitioner and to properly prepare for his case

[19] Consisting of 45 short paragraphs running to 15 pages. It is not supported by any supplementary or confirmatory affidavits and is supported by 16 annexures (Tk 1-16) of which only two (annexures 'TK 5' and 'Tk 6') are documents which he more likely had to source from the respondents.
[20] See Disposable Medical Products (Pty) Ltd v Tender Board of Namibia 1997 NR 129 (HC) at 132E.

[37] The authorities also establish that unreasonable delay is more readily inferred if there has been prejudice to the decision-maker.[21] This is such a case. The respondents have stated unambiguously that the position previously held by the applicant had since been filled by another magistrate. That allegation remains uncontested and must prevail on the *Plascon - Evans*[22] formula.

[38] Should I condone the unreasonable delay? I have discretion in the matter, to be exercised judicially. A factual basis must exist for this court to grant condonation. In the first place, the prejudice to the respondents is enormous given that the position had already been filled. I will accept that there is an acceptable explanation why until 15 December, when Legal Aid was granted to the applicant, no step towards filing review proceedings was taken. That said, there is simply no plausible explanation given by the applicant to form the basis for any reasonable inference that the delay after that date (a period of about six months) in bringing the review was necessary and reasonable in the circumstances of this case. Even if one were to give to applicant the benefit of the doubt, that the inaction since the appointment of Mr Kwala was reasonable, it does not address the prejudice suffered by the respondents as they were not warned that a review was impending and therefore proceeded to fill the vacancy left by the applicant.

[39] Even on the assumption that the applicant had given sufficient reason why the late filing of the review should be condoned (which he has failed to do), there is no basis on which condonation should be granted because there is no merit to the allegation that the respondents failed to act lawfully, fairly and reasonably. I deal with that next.

[40] The applicant's case boils down to the simple proposition that once it became apparent that his legal representative would not attend and that he did not wish to proceed without legal representation, the presiding officer was obliged to postpone

[21] See Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another 2009 (1) NR 277 (HC).
[22] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

the 1-2 July proceedings as requested by the applicant. Mr Narib for the applicant argued that the refusal to postpone the proceedings was in breach of the applicant's right to fair administrative action and in breach of his right under s 26(5) of the Magistrates Courts Act. He expanded this argument by stating that the duty to act fairly is a continuous one and applied even on 1 July 2009 when the proceedings reconvened in the applicant's absence. Mr Narib argued that before proceeding with the hearing on 1 July 2009, the presiding officer ought to have considered the fairness of proceeding with the hearing in the absence of the applicant. The failure to do so was unfair administrative action and a breach of applicant's right to a fair hearing contemplated in s 26(5). It is his case, in addition, that he was simply not in a position to proceed with the hearing because of incomplete discovery. To have expected him to participate in the hearing without complete discovery was unfair, the argument goes.

[41] It is implied in what Mr Narib argued that the reason the legal representative was not available was, on the one hand, not attributable to the applicant and, on the other, immaterial and that the dominant consideration was that the applicant wanted legal representation on account of what were both numerous and very serious charges. He relied on Article 12 of the Namibian Constitution, in particular 12(1)(d). It bears mention that the applicant bears the onus of proof. In addition, he bore the evidential burden in respect of his allegations.

[42] On the Plascon-Evans formula I must accept that enough disclosure had been made to the applicant to enable him prepare for the hearing on 1-2 July. The fact that the applicant was not legally represented was attributable to failure in communication and non-cooperation between him and Legal shield or the legal representative appointed by Legal Shield. I find that Mr Gous had made himself available for the hearing on 29 June but inexplicably failed to co-operate and to appear at the hearing of 29 June or thereafter on 1-3 July. The presiding officer had afforded sufficient time for the applicant to secure legal representation and to prepare his defence. On the Plascon-Evans test, I must accept that the applicant while knowing that the hearing was scheduled for 1 July, failed to appear and lied about the reason for not so appearing by stating that he had gone to Legal Shield's office at Ondangwa to

arrange for legal representation. I must also accept that from the word go, the applicant did not want finality to the hearing as even at the very first hearing, and through his legal representative Mr Van Rensburg, he refused to even plead to the charges. The charges against the applicant were in my view sufficiently particularised as to have enabled him to enter a plea even on the very first day the enquiry convened. I must also accept that the applicant avoided appearing at the hearing of 1 July 2009 and threatened to shoot those who wished to speak with him in order establish if he was still coming to the hearing. The applicant's version that he had not been provided with any records of the magistracy relating to his case is gainsaid by the third respondent and duly confirmed, but is also at odds with his own admissions at the hearing as reflected in the record of proceedings. The suggestion that the witnesses to testify against him were also not disclosed is equally untenable and stands to be rejected in view of the respondent's version to the contrary. He had also failed to proof any right in terms of which the Commission was precluded from pursuing what he called 'dated' charges against him.

[43] In my view, the argument assumes some limitless right of a person charged with misconduct under the MCA to insist on and to be granted postponement of an investigation until the accused had resolved his or her contractual problems with his legal insurer (Legal Shield) or with the lawyer appointed by the insurer. I am not prepared to accept that such a right is implied in either Article 12 of the constitution or s 26(5) of the MCA. To demonstrate the unacceptability of this line of reasoning, I must place the following on record as is apparent from the common cause facts. The applicant was formally charged with misconduct on 18 October 2008. As he was required by the peremptory provisions of s 26(5), the presiding officer immediately set a date for hearing. Notwithstanding those peremptory provisions the applicant (who is a magistrate and thus not unfamiliar with the law) sought to have the hearing postponed even before it took place. He was correctly advised that that was not possible and that he would have to make such request at the hearing. In the event, he showed up and the transcript of the record shows that Mr van Rensburg addressed the hearing and stated he was still awaiting Legal Shield instructions. He stated that the applicant had received the charges and received some discovery. He

added that the applicant was not prepared to plead. He asked for a postponement and it was granted. Same was granted for a not insignificant period of 8 Months, to 29 June 2009. By then the applicant had the charges and had received some discovery. He does not say in his papers what additional discovery he required and the extent to which what he already had was insufficient to enable him prepare for the hearing. When the hearing reconvened on 14 April 2010 the predominant issue was again the legal representation for the applicant, the very reason that occasioned the postponement when the matter was first mentioned before the presiding officer. Some mention was gave disclosure that was required but the record demonstrates that some witnesses intended to be called in support of the charges against the applicant were present. The record shows that the investigating officer had spoken to someone at the applicant's legal insurer and was told that Mr Gous would be representing the applicant and would be available from 1-3 July 2010.[23] The applicant, without explaining why he had not spoken to Mr Gous in anticipation of the scheduled hearing, maintained that as he had not yet consulted with Mr Gous he could not proceed with the hearing.

[44] The suggestion that a hearing into the misconduct of a judicial officer in terms of the MCA must be subordinated to the private contractual arrangements between the accused judicial officer and his legal insurer, only needs to be put to be rejected. No doubt, the reasoning is inspired by the statements made at the hearing by the applicant that his legal insurer or the legal representative(s) appointed by the insurer to represent him were to blame for the situation he found himself in and that he was unable to explain their lack of cooperation considering that he was a paid-up policy holder. One gets the impression reading the record that the applicant somehow expected the presiding officer to assume responsibility and to make the insurer and the appointed legal representative comply with their obligations towards him.

[45] The problems between the applicant and Legal Shield or indeed between him and the lawyer appointed by the insurer to act on his behalf, were not caused by anything unlawful or unreasonable done by the respondents or anyone in their

[23] The record shows that the investigating officer always knew more about the status of the applicant's legal representation than the applicant himself.

employ. That is a matter entitling him to private remedies against the insurer in terms of the contract he had with them or against the appointed legal representative, whose conduct, as a member of the statutory Law Society and as officer of the court, is subject to scrutiny. What is undisputed (and I am bound to accept on the Plascon –Evans test) is that the lawyer appointed to represent the applicant at the hearing which he now seeks to impugn had committed himself to appear at the hearing of 1-3 July but at the last minute, and rather inexcusably, decided not to come, first suggesting that he had problems arranging a flight[24], and later stating that he could not commit himself to applicant's case because he had a meeting to attend. What I find perturbing is the applicant's apparent lack of interest, before the hearing about the whereabouts of the lawyer, or indeed taking positive steps to contact him and to give appropriate instructions and protesting to the insurer if he was not properly assisted. His only contribution on the issue at the hearing was that he had not yet consulted with his lawyer who, he said, had not yet called him and that he wanted a postponement – a much longer one than what the presiding officer was prepared to and in fact granted. Not surprisingly, the presiding officer would have none of that and insisted that the hearing proceed.

[46] I do not find it as unfair or unreasonable that in the circumstances the presiding officer refused to grant the postponement sought. The applicant failed to make out the case that the presiding officer acted unfairly or unreasonably.

[47] Significantly the applicant seeks reinstatement with repayment of his benefits. It is doubtful if such relief is competent in a review application[25]. No explanation is given in the papers why it is not asked that the matter be referred back for a proper hearing affording applicant his rights which he claims were denied if the review succeeds. As the Chief Justice stated in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism*[26]*:*

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[24] A statement which corroborates the respondent's Kesslau that Mr Gous was aware of the hearing. No indication whatsoever that he was not aware of the hearing. In fact his version is corroborated also by Ms Miller who told Kesslau that she was not aware of any problem with the applicant's legal representation on that date.

[25] I see no reason, ether in principle or logic why, even if it were accepted that applicant was entitled to reinstatement, he be absolved from the obligation to have mitigated his damages.

[26] 2010 (1) NR 1 (SC) at 31F-G.

> '…when setting aside a decision of an administrative authority, a review court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist.'

[48] The Chief Justice quoted with approval the following dictum in *Masamba v Chairperson, Western Cape Regional Committee*, *Immigrants Selection Board*, *and Others*[27]:

> 'The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts.' (My underlining for emphasis)

[49] Be that as it may, except for three counts of absenteeism in respect of which he says he has rebuttal evidence, the applicant does not deal at all with the rather serious allegations of assault on a member of the public, interfering with a police officer in the performance of his duties or his soliciting financial assistance. The latter allegation was confirmed under oath by Mr Greyling a legal practitioner and Ms Anne Brandt of Trustco, while in respect of the assault on Mr Pokolo the applicant, it is common cause, had paid an admission of guilt fine. It appears therefore that granting condonation to the applicant and allowing the relief he seeks will have the effect of reinstalling him in office with such clearly unanswerable misconduct. That is not in the public interest.

[50] In the result it is ordered as follows:

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[27] 2001 (12) BCLR 1239 (C) at 1259D-E.

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The application is dismissed, with costs.

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P T Damaseb

Judge-President

APPEARANCES

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|---|---|---|
| APPLICANT: | G Narib | |
| | | Instructed by Kwala & Co Inc, Windhoek |
| RESPONDENTS: | | J Ncube |
| | | Of Government Attorney, Windhoek. |