REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 262/2013

In the matter between:

1.1.1.1. **DESMOND DE-ALFA KERAMEN**

APPLICANT

And

COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**1st RESPONDENT**
THE BOARD OF INQUIRY	**2nd RESPONDENT**
NIILO K TAAPOPI	**3rd RESPONDENT**
ADAM EISEB	**4th RESPONDENT**
ABRAHAM KANIME	**5th RESPONDENT**
MS S SIMPSON	**6th RESPONDENT**
NDAPANDA KANJEMBA	**7th RESPONDENT**

Neutral citation: Keramen v Council of the Municipality of Windhoek (I2622/2013) [2014] NAHCMD 237 (8 August 2014)

Coram: SMUTS, J

Heard: 24 July 2014

Delivered: 8 August 2014

Flynote: Application to review and set aside decision making resulting in the discharge of the applicant as a member of the Windhoek City Police. The thrust of the applicant's challenge was an infringement of the double jeopardy rule because board of inquiry under Regulation 18 had found he was unfit for service on grounds and factual matter which had formed the subject matter of prior disciplinary proceedings under Regulation 19. The court found that the different purpose of board of inquiry meant the double jeopardy rule had not been infringed. The court found that the applicant had failed to establish any vitiating irregularity and dismissed the application with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

SMUTS, J

(b) The applicant was a member of the City Police of the Windhoek Municipality. In this application, he seeks to review and set aside the decision making which led to a decision to discharge him from the City Police. It involved a board of inquiry which recommended his discharge from his position and the dismissal of the internal appeal against the decision to discharge him.

(c)

(d) Although several review grounds are raised in the founding affidavit, the applicant's challenge against the decision making crystallised in the applicant's complaint that the decision making was in violation of his rights under articles 18 and 12 of the Constitution because that decision making was based upon facts which had formed part of an earlier disciplinary proceeding taken against him. In those disciplinary proceedings he had been acquitted on all but one of the

charges and been sentenced to a reprimand in respect of the charge upon which he had been found guilty. The applicant contended that his right to a fair trial and to fair and reasonable administrative action were infringed because of the doctrine of *atrefois acquit* or the double jeopardy rule had been violated. Several other review grounds were raised in the founding affidavit. But they were unsupported and the applicant did not supplement those review grounds after the record had been filed.

(e) The dispute between the parties is thus rather narrow. This is because the respondents' version is that they accept that the charges which formed the subject matter at the disciplinary hearing were substantially the same as those raised against the applicant at the subsequent board of enquiry. But the respondents deny that the applicant was subjected to double jeopardy because a board of enquiry under Regulation 18 of the Windhoek Municipality Police Serves Regulations (the Regulations) differs from disciplinary proceedings directed at misconduct under Regulation 19. The respondents assert that the nature and purpose of the two different enquiries, posited by Regulations 18 and 19 respectively, are entirely different. The respondents contend that the enquiry based upon Regulation 18 (1)(c) is directed at the protection of the public and the State and not at disciplining a member of the City Police.

Factual background facts

(f) The applicant joined the Windhoek Municipal Police Service(the City Police) in 2005. He had subsequently been promoted to the position of sergeant.

(g)

(h) During 2011 he was charged with several counts of misconduct. Shortly stated, these charges were:

- That the applicant during November 2009 had falsely represented himself as an investigator of the Namibian Police leading persons to believe that this activity was authorised by the police or by the City Police;
- Between November 2009 and June 2011 the applicant associated

with or was seen in the presence of persons who were under investigation;

- That the applicant refused to or neglected to follow orders by a superior officers during May 2011.
- That during November 2009 the applicant falsely represented himself to be investigator of the police in order to obtain statements which involved a fraud and as result brought the City Police into disrepute;
- That the applicant had in November 2009 attempted to extort and advantage from members of the public which was not due to him

(i) A disciplinary inquiry was held in September 2011. The applicant was found guilty on the charge relating to the refusal or failure to obey orders from his superior officers in May 2011 and was acquitted on all of the other charges. The disciplinary committee members could not however agree upon a recommended sanction. The three members each made their own recommendation. These were a suspended dismissal, demotion in rank and remuneration and thirdly a reprimand valid for 12 months respectively. The Municipality's Chief Executive Officer (CEO) adopted the last recommendation (of the reprimand) and the applicant's suspension from duties was lifted on 8 February 2012.

(j) Shortly afterwards and on 7 March 2012 the applicant was given notice that a board of enquiry had been constituted under Regulation 18(1) for the purpose of enquiring into his fitness to remain in the Municipal Police Service under Regulation 18(1)(c).

(k) On 5 April 2012, the applicant was provided with the grounds which formed the subject matter of the enquiry upon which it would be determined whether he was fit to remain in the Service. Most of these grounds had formed the subject matter of the disciplinary proceedings against him held in September 2011. They were specified as follows:

- On 1 June 2009 the applicant was said to be in the company of

well known criminals off duty, with his two way radio on;

- The applicant was implicated in the case of fraud of N$42 million on 16 November 2009 and was criminaly charged for that offence;
- While on suspension from his service, the applicant was seen at the Hakahana Service Station again in the company of Mr Kambou who was alleged to be a well known diamond dealer and that this fact (of being in his company) had been confirmed by Mr Kambou;
- The applicant was involved in an armed robbery at the Safari Hotel on 13 May 2011;
- That the applicant had failed to carry out an instruction by the area commander to report at his office on 13 May 2011;
- The applicant failed to comply with the similar instruction given to him by the head of the City Police to report himself on 14 May 2011 at 8h00 hours;
- The applicant had failed to carry out the instruction of the Acting Senior Superintended to surrender all City Police properties in his possession on 19 May 2011.

(l) It is common cause that except for having his two way radio on whilst in the company of alleged well known criminals, the grounds of the enquiry were identical to the charges which formed the subject matter of the disciplinary proceedings against him in September 2011.

(m)

(n) The board of enquiry commenced its proceedings in July 2012 and concluded them on 8 August 2012. The board found that the applicant was not fit to remain in the service of the City Police and recommended his discharge from the Service. In reaching this conclusion, the board referred to the role and function of the City Police Service which concerned the protection of life and the provision of security and concluded that the applicant's association with well known criminals and his conduct during the Safari Hotel robbery incident gave rise to a risk to the State, and persons residing in the city of Windhoek and property within Windhoek.

(o) The board's recommendation was subsequently accepted by the CEO of the City of Windhoek on 1 February 2013. The applicant appealed against the CEO's acceptance of the recommendation to the City Council. The Council in turn dismissed the appeal and upheld the decision of the CEO to accept the recommendation of the board of inquiry that the applicant be discharged from the services of the City Police with effect from 2 February 2013.

(p)

(q) The question for determination thus relates to whether the proceedings conducted under Regulation 18 offended against the double jeopardy rule and thus violated the applicant's constitutional rights to fairness in that sense. In determining this question, the purpose and ambit of the two respective regulations are first considered.

Regulation 18

(r) Regulation 18 forms part of the Regulations promulgated in 2004 under s42 of the Police Act, 1990.[1] These regulations set out the fixed establishment and organisation of the Service and conditions of service including appointments and termination of service of its members. They further provide for matters of discipline and other issues relating to conditions of service. By virtue of establishment of the City Police under the Police Act, the Labour Act[2] does not apply to the employment of members of the City Police.[3] That is the reason why these proceedings are brought in this court and not in the Labour Court.

(s) Regulation 18 is entitled 'Inquiries.' The relevant portion of the regulation are as follows:

> '(1.) The Chief Executive Officer may designate three members or staff members, one representing the Service, one with expertise in Industrial Relations and a member of the Council's Legal Division, to be known as a board of inquiry who, in general or in a specific case, may inquire into –
>
> (a) the fitness of a member to remain in the Service on account of indisposition, ill-health, diseases or injury;

[1]Act 19 of 1990.

[2]Act 11 of 2007.

[3]S2 of Act 11 of 2007.

(b) The fitness or capacity to perform his or her duties or to carry them out efficiently;

(c) The fitness of a member to remain in the Service if the member's continued employment constitutes a risk for the State, any person residing in the City of Windhoek or any property situated with the City of Windhoek.

(d) An injury alleged to have been sustained by a member in an incident arising out of or into the course of his or her duty or a disease or indisposition alleged to have been contracted in the course of his or her duty or any subsequent incapacitation alleged to be due to the same injury, disease or indisposition; or

(e) the death of a member alleged to have been caused as a result of circumstances referred to in paragraph (d).

. . .

(4) After the conclusion of an inquiry referred to in subregulation (3), the board of inquiry must –

(a) compile a report on its findings and recommend to the Chief Executive Office one of the following –

(i) no action may be taking against the member;

(ii) the member be discharged from the Service; or

(iii) any other appropriate steps be taken against the member, including referral to a disciplinary inquiry in terms of regulation 19.

(b) in writing inform the member who is the subject of the inquiry of its findings and recommendations.

(5) The Chief Executive Office, on receipt of the recommendations contemplated in subregulation (40, may –

(a) accept and implement any recommendation; or

(b) change any recommendation as he or she thinks reasonable and fair under the circumstances.'

(t) Regulation 19 on the other hand is headed 'Disciplinary Inquiries.' It sets out the procedure to be followed by a board when disciplining a member for an act of misconduct. It sets out the manner in which charges are to be preferred against a member and the procedure to be followed at a disciplinary enquiry. It provides that if a member who is charged with misconduct is found guilty, the

board is to file a report on its findings and recommend one of six different options in respect of a sanction. These include a reprimand, reduction in rank or remuneration of both, a fine not exceeding N$2000, being required to pay any loss, discharge from the service and finally being called upon to resign from the service on day to be fixed by the CEO.

(u) A board of enquiry under Reg 18 thus concerns the fitness of a member to remain in the Service by reason of indisposition, ill-health, disease or injury, capacity to perform duties efficiently or if that member's continued employment constitutes a risk for the State or persons residing in Windhoek or property in Windhoek or by reason of an injury or death on duty.

(v) As was pointed by Mr Marcus, who represented the respondents, Reg 18 vests in the CEO wide powers to convene such an inquiry. No jurisdictional facts are set by the Regulation in order to invoke the power to do so. The regulation sets the purpose for which it is convened and the range of recommendations which may be made to the CEO at its conclusion in Reg 18(4)(a). There are three options. No action may be recommended against the member or his discharge may be recommended or any other appropriate steps including a referral to disciplinary inquiry under Reg 19.

(w) Mr Denk who appeared for the applicant argued that the referral to a disciplinary inquiry as one of the options expressly provided for meant that the CEO would be precluded from convening an inquiry under Reg 18 after a disciplinary inquiry under Reg 19 (as that option would no longer be open to him. I disagree. The fact that a referral for a disciplinary inquiry is one of the recommendations which can be made, does not in my view mean that an inquiry under Reg 18 cannot be convened after a disciplinary inquiry. It simply does not follow from the two regulations considered in the context of the regulations as whole.

(x)

(y) The fact that recommending a disciplinary inquiry is one option open to a board of inquiry under Reg 18 does not mean that a Reg 18 inquiry would be precluded when disciplinary inquiries have been held. The argument confuses

the source of the power to convene an inquiry with one of the options open to a board to recommend. Regulation 18 does not, upon its ordinary meaning, restrict the CEO's power to convene such inquiries in cases excluding those where disciplinary proceedings have been held. Reg 18 inquiries are essentially to consider the capacity and fitness of members to serve as opposed to addressing discipline. If in the course of such an inquiry, a board considers that the matter referred to it amounts to misconduct and should form the subject of a disciplinary inquiry, this would be an option open to it in the range of recommendations it can make. It does not mean that a Reg 18 inquiry cannot follow a disciplinary inquiry as that is not its overall object. It would merely exclude that option from its range of options open to it in that instant.

(z) Although a disciplinary inquiry can also result in a discharge from the Service, a lesser sanction may mean that a disciplined member could be considered unfit for the Service by reason of the conduct which formed the subject matter of the disciplinary action even though discharge was not considered the appropriate sanction as a disciplinary measure for the infraction.

(aa) The two inquiries have different purposes. Under Reg 18, the purpose is to determine whether a person is fit or not fit for the Service in order to protect the public and public order represented by the State and property. Mr Marcus argued that this regulation is enacted for the protection of the public who rely upon the police to maintain law and order. He referred to the approach of Van Niekerk J in her closely reasoned minority judgment in *Disciplinary Committee for Legal Practitioners v Murorua.*[4] When discussing the nature of the enquiry as to whether to strike a practitioner off the roll, Van Niekerk J referred to sound authority of the South African Supreme Court of Appeal,[5] where it was stressed that the main consideration is the protection of the public.[6] Although hers was a dissenting judgment in the matter, the majority did not question the soundness of the approach in *Malan* and in fact cited it with approval. The majority rather differed on the question as to whether the practitioner question should be struck

[4]2012 (2) NR 481 (HC) at par 19.

[5]*Malan and another v Law Society, Northern Provinces* 2009 (10 SA 216 (SCA).

[6]Supra at p219H – 220B.

from the roll.[7]

(bb)

(cc) A disciplinary inquiry under Reg 19 is directed punishing a member for misconduct if it is established. This on the other hand is a vastly different purpose to an inquiry under Reg 18.

(dd)

(ee) In considering whether a member is fit or unfit for the service, Mr Marcus referred to the duties of members of the police articulated in *S v Nakale and Others*.[8]

> 'The public expects members of the police to act with integrity and to discharge their difficult duties with honestly and dedication. If police officers conduct themselves dishonesty, abuse the extensive powers vested in them by law for the good of all and strike fear in the hearts of those they are supposed to serve to extort money or favours from them, it will lead to a loss of respect, confidence and faith in the very mechanisms society has put up through Government to protect against such abuses.'

(ff) Mr Marcus referred to the oath which the applicant as a City Police member is required to take when assuming his duties. It includes performing his duties to the best of his ability and to faithfully and impartially maintain law and order, prevent crimes and protect life and property.

(gg) In this matter the board of inquiry was convened after the applicant had been found guilty of disobeying instructions of his supervisors in May 2011. Those instructions were given in connection with an alleged robbery at the Safari Hotel. He had failed to follow the instruction given to him and to assist in the investigation after having been identified in CCTV as being at the scene. The CEO decided to convene an inquiry to investigate his fitness as a member after this and to look into the other matters raised in his disciplinary proceedings.

(hh)

(ii) In considering whether he was fit to serve, the incident at the Safari Hotel understandably was a weighty consideration when considered by Council

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[7]Supra at 497-498A.

[8]2007 (2) NR 427 (HC) at par 13.

on appeal from the CEO's acceptance of the recommendation to discharge the applicant.

(jj) In her answering affidavit the Mayor stated that the Council took into account:

- 'In order for the police to properly discharge their constitutional and statutory function of maintaining law and order it is essential that the members of the public and trust in the members of the police service;
- Whether or not the public has the necessary trust in the police, depends on the integrity of the individual officers when performing their police function;
- Given the sometimes dangerous overt or convert operations that police officers engage in, when fighting crime and maintaining law and order, it is necessary for the individual members to trust each other and to be able to depend on each other;
- To effectively perform their police functions maintenance of discipline, which includes following lawful orders is essential.'

(kk) The Mayor further pointed out:

'The board found that, the allegations that the applicant was associating with a known criminal and was seen with the two-way radio on while in such company had been established.

The record established that the applicant admitted to socialising with 'Chicken' and also viewed it as part of his right or freedom to associate with whomever he wanted to.

In the opinion of Council, the finding by the board on his charge impacts on the fitness of the applicant to remain in the police service. Quite clearly, members of the public will be less willing to come forth with confidential information or seek the assistance by the applicant if he is known to associate with known criminals.

Council also was of the view that the fact that applicant had his two way-radio on while he was at 'Chicken's' house, can only serve to undermine the trust and confidence that his colleagues have in him: information communicated to the applicant will not be deemed to be safe. It's a matter of common knowledge that

confidential information is often exchanged via two-way radios between members. During the inquiry Sup Kellermann testified that he no longer trusts the applicant.'

(ll)

(mm) With reference to the Safari Hotel incident, the Mayor stated:

- 'Applicant was seen on the CCTV with one of the victims of the robbery;
- If the applicant's intention was merely to assist the victim, as he claimed, why did he not report the incident to his immediate supervisor or colleagues, and why did he not remain at the crime scene in order to do a proper hand over of the crime scene?;
- Applicant failed to heed the instruction by Superintended Kellermann to immediately report to the office, after he had been told that he had been identified as one of the persons on the CCTV at the hotel;
- Applicant told Kellermann that he was out of town when requested to report to the office. However the telephonic transcripts of the conservation between Kellermann and the applicant showed that the applicant had been in town;
- Assistant Sup James also testified that, after the applicant was identified he called him to come to the Safari Hotel. The applicant told him that he would come to the hotel but he failed to do so.'

(nn) The Mayor concluded:

' 27.9 In the opinion of Council, the applicant's failure made him unfit to remain in the force and his continued employment constitutes a risk to the State (police force) and the residents of the City, as well as their property.

27.10 Based on the above considerations Council accepted the decision that applicant should be dismissed from the police force.'

(oo) Mr Marcus submitted that there was sufficient evidence for the board and Council to conclude that the applicant's continued employment constituted a risk as contemplated by Reg 18(1)(c) and that they appreciated the nature of the discretion vested in them.

(pp) Mr Denk on the other hand argued that it was not competent and *ultra vires* for the CEO to convene a Reg 18 enquiry after a disciplinary inquiry under

Reg 19 had been exhausted on the same matters. He relied upon a decision of the Judge-President in *Immanuel v Minister of Home Affairs*.[9] But this decision does not in my view support the proposition contended for by him. A close reading of this judgment, which related to the invocation of a similar power against a member of the Namibian Police (although after conviction of theft in a criminal court and not in internal disciplinary proceedings), if anything, lends support to the respondents' case, even though the challenge to the decision was on different bases.

(qq) Mr Denk also relied heavily upon *Carlson Investments Share Block (Pty) Ltd v Commissioner, SA Revenue Service*.[10] But that case is in my view entirely distinguishable. It concerned the power of the Commissioner to revisit an assessment within 3 years after an objection to the assessment had been allowed. The taxpayer challenged the constitutionality of the provision which authorised this. The challenge was based upon the principle of finality in administrative decisions. Mr Denk relied upon much of the argument raised in support of the challenge. The court in that matter however rejected the challenge and upheld the constitutionality of the provision which afforded the Commissioner the opportunity to rectify mistakes of fact and law. Navsa, J (as he then was) found that this power was in the national interest and that it did not sanction arbitrary and capricious behaviour.[11]

(rr) Unlike *Carson Investments*, there was not in this matter a revisiting of the disciplinary proceedings themselves. A separate and distinct inquiry was convened which had an entirely different object and purpose. The fact that the same factual matter was considered in each instance does not avail the applicant. The one inquiry related to punishing the applicant for misconduct in the form of infractions. The other concerned whether the facts raised by the infraction rendered him unfit for service as contemplated by Reg 18(1)(c).

(ss) Given the difference in the purpose and nature of the latter inquiry the

[9]2006 (2) NR 687 (HC).

[10]2001 (3) SA 210 (W).

[11]Supra at 240 A-D.

applicant was not exposed to double jeopardy in any impermissible sense. The evidence before me demonstrates that the respondents appreciated the different nature and ambit of the inquiry and their powers and discretion under Reg 18. The challenge to their decision making on that basis contained in the founding affidavit does not establish the invalidity of the proceedings.

(tt) It follows that the application is to be dismissed with costs.

(uu) The order I make is:

The application is dismissed with costs.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	A Denk Instructed by Tjitemisa & Associates
RESPONDENT:	N Marcus Instructed by Nixon Marcus Public Law Office