REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00440

In the matter between:

GODFRIED KHARISEB **APPLICANT**

and

MINISTRY OF SAFETY AND SECURITY **FIRST RESPONDENT**
INSPECTOR-GENERAL: NAMIBIAN POLICE **SECOND RESPONDENT**
REGIONAL COMMANDER: OTJOZONDJUPA REGION **THIRD RESPONDENT**

Neutral citation: *Khariseb v Ministry of Safety and Security* (HC-MD-CIV-MOT-GEN-2017/00440) [2018] NAHCMD 355 (7 November 2018)

Coram: ANGULA DJP
Heard: **11 July 2018**
Delivered: **7 November 2018**

Flynote: Application – Labour Law — Applicant absent from work for continuous period of 30 days – Applicant discharged from the Police Force pursuant to the provisions of section 9 of the Police Act 19 of 1990 – In an application for reinstatement and payment of his salary, the Minister of Safety and Security and Inspector-General of the Namibian Police Force ('Inspector-General') raised a special plea of prescription by virtue the provisions section 39 of the Act – The section stipulates that legal proceedings against the Minister must be brought within

12 months after the cause of action arose, unless the period has been waived by the Minister – Application brought after the expiry of 12 months and no waiver obtained from the Minister – Special plea upheld and application dismissed.

Summary: Applicant absent from work for a continuous period of 30 days – Applicant discharged from the Police Force pursuant to the provisions of section 9 of the Police Act 19 of 1990 – In an application for reinstatement and payment of his salary, the Minister and Inspector-General raised a special plea of prescription by virtue the provisions section 39 of the Act – The section stipulates that legal proceedings against the Minister must be brought within 12 months after the cause of action arose, unless the period has been waived by the Minister – Application brought after the expiry of 12 months and no waiver obtained from the Minister.

Court held: The applicant's cause of action arose when he absented himself for a continuous period of 30 days without leave or permission from the Inspector-General. The cause of action arose on 3 March 2016, or on 4 April 2016 when the Inspector-General conveyed to the applicant that he could not reinstate him. The application for reinstatement was served on the respondents on 5 December 2017 which is a period more than the period of 12 months stipulated by section 39. The claim has therefore become prescribed.

Court held further: The approach adopted by our courts is that when the internal mechanism is within the administrative hierarchy, it is rational and desirable that the possibilities of internal appeal be exhausted before a party resorts to the court. The intention that an obligation to exhaust internal remedies must therefore be clear from the legislation.

Held further: The applicant failed to comply with the peremptory requirements of section 39. It follows that the point *in limine* is upheld and the application stands to be dismissed.

ORDER

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1. The point *in limine* of prescription in terms of the provisions of section 39 of the Police Act, No. 19 of 1990 for reinstatement is upheld.

2. The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

3. The matter is removed from the roll and is considered finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an application in which the applicant seeks the following orders:

1. The notice that the applicant is discharged from the service of the second respondent dated 3 March 2016 is hereby declared unlawful, invalid and of no force and effect *ab initio*;

2. Applicant is hereby reinstated;

3. First and second respondent must pay applicant his full salary for the period 18 January 2016 till date of reinstatement; and

4. Respondent who opposed this application must pay the applicant's costs of suit.

The parties

[2] The applicant is a career police officer with over 30 years of service in the Namibian Police Force. He held a rank of Deputy-Commissioner prior to his discharge from the Force. He was transferred on 26 July 2014 from Windhoek to

Otjiwarongo in the Otjozondjupa Region to serve as Regional Crime Investigation Coordinator with effect from 1 January 2015.

[3] The first respondent is the Minister of Safety and Security. He is the Executive in charge of the administration of the provisions of the Police Act, Act No. 19 of 1990. He is sued in his capacity as such.

[4] The second respondent is the Inspector-General who is in command of the Namibian Police Force[1]. He is equally cited to these proceedings in his capacity as such.

[5] The third respondent is the Regional Commander for the Otjozondjupa Region under whose supervision the applicant was subjected to. He recommended to the Inspector-General that the applicant be discharged from his duties due to absenteeism without leave. No relief is sought against him.

Factual background

[6] It is common cause that the applicant received a letter from the Inspector-General dated 3 March 2016, advising him that he has been discharged from the Force on account of misconduct with effect from 18 January 2016. The reason for the applicant's discharge was that the applicant absented himself from duty without the permission of the Inspector-General during the period 18 January 2016 to 3 March 2016.

[7] Thereafter the applicant wrote a letter to the Inspector-General requesting the latter to reinstate him. The Inspector-General declined the applicant's request. Subsequent thereto and on 25 April 2016 the applicant lodged an appeal to the Minister against the Inspector-General's refusal to re-instate him. The appeal was dismissed by the Minister on 5 December 2016.

[8] The applicant then instituted these proceedings on 5 December 2017. According to the deputy-sheriff's return of service the application was served on the respondents on 5 December 2017.

[1] Section 3 of the Police Act, 1990.

The parties' contentions

[9] The applicant alleges that he was discharged without a fair and valid reason and without following a fair procedure. He verified that his discharge was procedurally unfair, due to the absence of a disciplinary enquiry before he was discharged. It is further the applicant's case that the principles of natural justice, ie *audi alteram partem* rule ought to have been applied before he was discharged.

[10] The respondents on the other hand contend that the applicant was discharged in terms of the deeming provisions of section 9 of the Police Act 19 of 1990 ('the Act') which reads:

> '**9 Discharge of members on account of long absence without leave**
>
> A member who absents himself or herself from his or her official duties without the permission of the Inspector-General for a continuous period exceeding thirty days, shall be deemed to have been discharged from the Force on account of misconduct with effect from the date immediately following upon the last day on which he or she was present at his or her place of duty: such other conditions as the Inspector-General may determine.'

[11] It is further the respondents' contention that the deeming provisions of the section comes into effect by operation of the law and the notice of discharge sent to the applicant was merely to confirm the applicant's discharge from the Force. Furthermore, the respondents contend that the applicant's discharge is based on fact that he had absented himself from work for a period exceeding 30 days without leave or permission from Inspector-General.

Points *in limine*

[12] The respondents raised two points *in limine*. The first point is that the applicant failed to comply with the provisions of section 39 of the Act which require any civil proceedings against the State or any person in respect of anything done in pursuance of the Act to be instituted within 12 months after the cause of action

arose. The section further stipulates that a notice in writing of any such proceedings and of the cause thereof must be given to the defendant not less than one month before the proceedings are instituted: The section contains a *proviso* which provides that the Minister may at any time waive compliance with the provisions of the section.

[13] On the respondents' version, the cause of action arose on 3 March 2016 when the notice to discharge the applicant was communicated to the applicant by the Inspector-General, alternatively by the 4 April 2016 when the request for reinstatement was declined. It is common cause that the application was served on the respondents on 5 December 2017.

Compliance with s 39 of the Police Act

[14] The applicant contends that he was obliged to exhaust all internal remedies as envisaged by the law and that his appeal to the Minister on 25 April 2016 was one of such internal remedies. In this connection Counsel for the applicant argued that the institution of legal proceedings was only possible after the exhaustion of internal remedies. Accordingly, he submitted the cause of action arose on the date that the decision by the Minister was communicated to the applicant and it was thus not open to the applicant to institute proceedings prior to receiving the Minister's response. Therefore, so the applicant contends, section 39 has been complied with because the application was brought on 5 December 2017, within 12 months of the Minister's decision which was made on 5 December 2016.

[15] It would appear to me from the notice of motion that the applicant considers the date when his cause of action arose to be the date he received the letter of discharge being 3 March 2016. His request to the Inspector-General for reinstatement was refused on 4 April 2016. This conclusion is reinforced by the fact that despite his contention that his cause action arose on 5 December 2016 when his appeal was refused by the Minister, he does not seek an order to declare the Minister's decision null and void.

[16] In any event, given the provisions of section 9 of the Act, it would appear that an incompetent relief is sought, namely to declare the notice of discharge null and

void, which merely served to confirm an act or a consequence which had taken place by operation of the law. In my view, the Inspector-General was correct in law when he pointed out to the applicant in his letter that 'you are deemed to have discharged yourself from the Force, thus this letter merely serves as notification for record purpose of that which has already occurred by operation of the law'. I am therefore of the considered view that it was not the Inspector-General who discharged the applicant but that he was discharged by operation of the law.

[17] The Supreme Court held in *The Ministry of Home Affairs v Majiedt and Others*[2] at 482F-G that the 12-month limitation period and the requirement of prior notice before commencement of proceedings contained in section 39(1) of the Police Act are connected to a legitimate governmental purpose of regulating claims against the State in a way that promotes speed, prompt investigation of surrounding circumstances, and settlement. Section 39(1) contains a *provisio* which states that the Minister's power of waiver can be exercised at any time.

[18] Taking into account the foregoing, the conclusion I have arrived at is that the applicant's cause of action arose when he absented himself for a continuous period of 30 days without leave or permission from the Inspector-General. At worst the cause of action arose on 3 March 2016, and at best, it arose on 4 April 2016 when the Inspector-General conveyed to the applicant that he could not reinstate him. The application was served on the respondents on 5 December 2017, which is a period more than the period of 12 months stipulated by section 39. The claim has therefore become prescribed.

[19] I proceed to consider the applicant's contention that he first obliged to exhaust internal remedies before he could institute this application. In this regard, he alleges that the internal remedies included the appeal to the Minister that was done on 25 April 2016. He only received the Minister's decision on 5 December 2016 and shortly thereafter he instituted the present proceedings on 5 December 2017. Therefore, so the submissions continues, his cause of action only arose after he received the Minister's decision. He contends that his claim has not prescribed.

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[2] 2007 (2) NR 475 (SC) at 482D-E.

Was the applicant obliged to exhaust internal remedies before instituting legal proceedings?

[20] Our courts have held that the duty to first exhaust internal remedies is aimed at maintaining the principle of separation of powers and to enable organs of State to maintain their autonomy and to keep their houses in order. The intervention of judicial power acts as a check against legal compliance without usurping the administrative function. The South African Constitutional Court in *Kayabe v Minister of Home Affairs*[3], per Mokgoro J, pointed out that that internal remedies 'are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation'. Accordingly, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms, undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and functions.

[21] The question of whether the applicant ought to have exhausted internal remedies is answered by the words of O'Regan AJA in *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated*[4] where the learned judge said the following:

> '[45] Ordinarily, the question whether an applicant will be required to exhaust internal remedies before approaching a court for relief, turns on the interpretation of the relevant statute. . . At times, a statute may expressly provide that an internal remedy must be exhausted before approaching a court. More commonly, though, the statute does not expressly insist that an applicant exhaust the internal remedy it provides before approaching a court. The question is whether the statute implicitly requires exhaustion of the internal remedy. The mere fact that a statute has provided an internal remedy is not generally sufficient to establish that it intended to insist that the internal remedy be exhausted before a court is approached for relief[5]. More is required.

[3] 2010(4) SA 327(CC) at 341B-C.

[4] (SA 41/2011) NASC (11 November 2011), para 45.

[5] See *National Union of Namibian Workers v Naholo,* cited above n6, at paras 59 - 60. On this point, the Court cited with approval the decisions of the South African Appellate Division in *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503 C – D and *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (A) at para 15.

> [46] In *National Union of Namibian Workers v Naholo*, Tötemeyer AJ identified two considerations relevant to the determination of whether internal remedies should be exhausted. The first is the wording of the relevant statutory provision; and the second is whether the internal remedy would be sufficient to afford practical relief in the circumstances. In *Naholo*'s case, Mr Naholo, the Acting General Secretary of the National Union of Namibian Workers, had been dismissed by the Union. A clause of the Union's constitution provided that Mr Naholo would have the right to appeal to the next national congress of the Union. Tötemeyer AJ observed that national congresses only occurred every four years and that if Mr Naholo had to wait years to prosecute an appeal, he would be "virtually remediless"[6]. This consideration persuaded the Court that the internal remedy provided by the Union's constitution would not provide effective relief and therefore did not need to be exhausted before Mr Naholo approached the Court.'

[22] The above approach is in harmony with the common law which requires that domestic or internal remedies be exhausted. The approach adopted by our courts suggests that when the internal mechanism is within the administrative hierarchy, it is logical and desirable that the possibilities of internal appeal be exhausted before a party resorts to the court[7]. The intention that an obligation to exhaust remedies exists must therefore be clear from the legislation.

[23] It is necessary to scrutinise the relevant provisions of the Act. The applicant states in his replying affidavit that the appeal he had lodged on 25 April 2016 was not an appeal in terms of s 8(2) but was a request to the first respondent to exercise his powers in terms of s 3A(1)*(b)* of the Police Act which reads:

> '(1) Notwithstanding anything contained in this Act or any other law, the Minister may, in writing –
>
> (a) . . .
>
> (b) set aside or vary any decision or action taken by the Inspector-General or any member to whom any power or function may have been delegated or assigned.'

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[6] Id at para 61.

[7] *Chairperson of the Council of the Municipality of Windhoek and Others*, *Roland and Others* (SA 48-2012) NASC (15 November 2013), para 25.

[24] In my view the provisions of this section are not applicable to facts of the present matter. I have earlier found that the Inspector-General did not take the decision to discharge the applicant and that the applicant was discharged by operation of the law. There was therefore no decision or action of the Inspector-General that could be varied or set aside. The Minister is only vested with the power of appeal by section 8 in the event a member has been discharged from the Force or reduced in rank by the Inspector-General. It is only in that event that a member may appeal to the Minister against the decision of the Inspector-General. I have further had regard to the provisions of section 9, which do not vest the Minister with any power of appeal in the circumstance such as the present matter where a member has been discharged by operation of the law. It follows therefore that on the facts of this matter there were no internal remedies open to the applicant. Under those circumstances the applicant was under obligation to immediately institute the present proceedings either after 3 March 2016 alternatively 4 April 2016.

[25] In the light of the finding in the preceding paragraph, the applicant's contentions and argument based on the exhaustion of internal remedies stand to fail.

[26] Even if I was wrong in my finding above, the applicant was at liberty to resort to the *proviso* in terms of section 39 to his advantage by requesting the Minister to waive the 12 months period in order for him to exhaust his alleged internal remedies.

[27] My understanding of the *proviso* is that it permits a party 'at any time' even before or after instituting legal proceeding to request the Minister to waive compliance with section 39. Such an avenue was not resorted to and as a consequence, the 12 months period lapsed before legal proceedings could be instituted.

[28] I have therefore arrived at the conclusion that the applicant failed to comply with the peremptory requirement of section 39. It follows that the point *in limine* is sound and must be upheld as I hereby do. The application stands to be dismissed.

[29] In the result, the following order is made:

1. The point *in limine* of prescription in terms of the provisions of section 39 of the Police Act, No. 19 of 1990 for reinstatement is upheld.

2. The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

3. The matter is removed from the roll and is considered finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	E NEKWAYA Instructed by PD Theron & Associates, Windhoek
FIRST, SECOND AND THIRD RESPONDENTS:	J NCUBE Instructed by Government Attorney, Windhoek