

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-MOT-GEN-2020/00290

In the matter between:

PHELEM MASEKA MASULE

APPLICANT

and

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	1st RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	2nd RESPONDENT
CHAIRPERSON PUBLIC SERVICE COMMISSION	3rd RESPONDENT
PUBLIC SERVICE COMMISSION	4th RESPONDENT
DIRECTOR GENERAL OF THE ANTI-CORRUPTION COMMISSION	5th RESPONDENT
ANTI-CORRUPTION COMMISSION	6th RESPONDENT
EXECUTIVE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION	7th RESPONDENT
HANNU SHIPENA (N.O.)	8th RESPONDENT
JUSTINE KANYANGELA	9th RESPONDENT
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	10th RESPONDENT

Neutral citation: *Masule v Prime Minister of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00290) [2023] NAHCMD 220 (25 April 2023)

Coram: RAKOW, AJ

Heard: 1 March 2023

Delivered: 25 April 2023

Flynote: Review Application – Applicant’s appointment set aside by first respondent due to the complaint laid – Section 7(2) of the Public Service Act which allows her to vary or set-aside decisions of an Executive Director – Recommendation of the interview panel was in favour of promoting an ACC staff member and not the best performer in the interview – Section 9 of the Public Service Act it must be understood that only the President may vary or reject any recommendation relating to the Public Service made by the Commission in terms of this Act or any law – The Prime Minister’s role is limited to the rejection of advice provided by the Commission – Review application is successful.

Summary: The applicant approached the court on an urgent basis on 10 September 2020 seeking an urgent interim interdict. The applicant was aggrieved by the decision of the first respondent on 31 July 2020. In the initial urgent application, the court found that the High Court sitting as such does not have jurisdiction to adjudicate a matter in respect of s 117(1)(c) of the Labour Act 11 of 2007 as that section confers exclusive jurisdiction to the Labour Court. This decision was overturned on appeal and remitted to the High Court to be heard and determined by a judge assigned by the Judge President to the Labour Division of the High Court.

The background information to this application emerged as a result of a vacant position that was advertised in local newspapers for the position of Chief: Investigations and Prosecutions Grade 3 at the Anti-Corruption Commission. The advertisement listed the requirements that the applicants need to meet to qualify to be invited to an interview. This includes the attachment of certain documentation to the said application, with the condition that incomplete applications or applications without confirmation of satisfactory completion of the probationary period will be disqualified.

The interviews were conducted on 16 June 2020. Nineteen applications were received of which only nine met the advertised requirements and were invited to the interview. It seems that four of these applications did not attach all or some of the required documents and were contacted by a Senior Human Resources Practitioner of the ACC, who asked them via email to submit outstanding or incomplete documentation.

The interview took place and the panel recommended the applicant, although he was not the highest scoring candidate, but second highest. Mr Hannu Shipena the then Executive Director of the ACC wrote a submission dated 24 June 2020, addressed to the Deputy Executive Director for the Department Public Service Commission Secretariat, recommending Mr Iiyambo, the candidate who scored the highest for the position and therefore overriding the recommendation of the interview panel.

This recommendation was forwarded to the Public Service Commission and they communicated their decision to the Executive Director of the ACC in a letter dated 14 July 2020. In essence, they concluded that Mr Iiyambo did not submit all the needed documentation with his application and was asked to do so after the closing date for submitting the applications and should have been excluded from the selection process since his application was incomplete.

In a letter dated 16 July 2020 Mr Shipena, the Executive Director of the ACC informed Mr Masule that he is promoted to the position of Chief: Investigation and Prosecution Grade 3 on 12 calendar months' probation as from 1 August 2020 and set out information regarding the annual salary, etc. In a letter, addressed to both the Prime Minister and the Director General of the ACC dated 17 July 2020, Mr Iiyambo complained that although he attached both his driver's license and the confirmation of probation letter to his original application, he was called at a later stage to again submit those documents. He further claimed that the security screening that should form part of the requirement process did not take place and the process proceeded without it. The recommendation of the interview panel was in favour of promoting an ACC staff member and not the best performer in the interview. He then requested an investigation into his complaint.

The first respondent informed the applicant, Mr Masule in a letter dated 31 July 2020 and received by Mr Masule on 3 August 2020 that she is exercising her powers in terms of s 7(2) of the Public Service Act which allows her to vary or set-aside decisions of an Executive Director. In line with that power, she notified him that his appointment is set-aside due to the complaint laid at her office on the alleged irregularities that may have taken place during the process of recruitment which she intends to investigate in due course. She also invited him, should he be aggrieved

by the decision, in terms of s 7(2)(b) of the Public Service Act, to make submissions to her office within 14 days.

Held that: from the reading of s 9 of the Public Service Act it must be understood that only the President may vary or reject any recommendation relating to the Public Service made by the Commission in terms of this Act or any law and the Prime Minister's role is limited to the rejection of advice provided by the Commission.

Held further that: it is clear that the first respondent acted in circumstances where she had no power to act. The determination of complaints rests with the fourth defendant as they are the impartial, independent body created to deal with complaints. They had to arrive at a just and fair decision regarding promotions in public service. At most, the Prime Minister could have looked into the decision and advised the President as he is the next role player that can decide to either confirm or set aside the recommendation of the Public Service. The Prime Minister's decision of 31 July 2020 is therefore reviewed and set aside.

ORDER

1. Condonation for the late filing of the answering affidavit is not granted.
2. The review application is successful and the Prime Minister's decision of 31 July 2020 setting aside the appointment of the applicant in the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission is set aside with costs, to include the costs of one instructed and one instructing counsel.
3. The counter application is dismissed with costs, including the costs of one instructed and one instructing counsel.
4. The matter is finalized and removed from the roll.

JUDGMENT

RAKOW J:

Introduction

[1] The applicant approached the court on an urgent basis on 10 September 2020 seeking an urgent interim interdict. The applicant was aggrieved by the decision of the first respondent on 31 July 2020. In the initial urgent application, the court found that the High Court sitting as such does not have jurisdiction to adjudicate a matter in respect of s 117(1)(c) of the Labour Act 11 of 2007 as that section confers exclusive jurisdiction to the Labour Court.

[2] This decision was overturned on appeal. The Supreme Court's decision reads as follows¹:

'The first instance judge declined to hear Mr Masule's matter on the basis that it was a matter properly within the 'exclusive jurisdiction' of the Labour Court. That is a misdirection. She should have heard the matter and considered whether it is the kind of dispute covered by the Labour Act; whether it was brought in terms of the rules of court governing labour disputes and whether the remedies sought were competent under the Labour Act.

It is for these reasons that I too will allow the appeal, set aside the judgment and order of the High Court, and remit the matter to the High Court to be heard and determined by a judge assigned by the Judge President to the Labour Division of the High Court.'

[3] All judges of the High Court are assigned by the Judge President to the Labour Division of the High Court and the matter, therefore, returned to me to deal with the merit of the main application.

Part B of the initial application

[4] Part B of the initial application deals with the merit of this matter and reads as follows:

¹ *Masule v Prime Minister of the Republic of Namibia* (SA 89 of 2020) [2022] NASC 2 (4 February 2022).

'BE PLEASED TO TAKE NOTICE THAT, an application will be made on behalf of the above-cited Applicant on a date to be determined by this honourable court for an order in the following terms:

1. Reviewing and setting aside the decision of the first respondent of setting aside the applicant's appointment as Chief: Investigations and Prosecutions at the Anti-Corruption Commission taken on the 31st of July 2020 and or on any other date;
2. In the alternative to prayer 2 above, declaring the first respondent's decision of setting aside the applicant's appointment as Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as conflicting with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia.
3. If it is found that the recommendation of the fourth respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecution at the Anti-Corruption Commission were varied and or set aside by the second respondent or any respondent; an order reviewing and setting aside the decision of the second respondent or any respondent varying or setting aside the recommendation of the fourth respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission.
4. In the alternative to prayer 3 above, declaring the second or any respondent's decision of varying or setting aside the recommendation of the fourth respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as conflicting with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia.
5. Reviewing and setting aside the decision taken by either the first, fifth, sixth, or seventh respondent to appoint the ninth respondent to act as Chief: Investigations and Prosecutions at the Anti-Corruption Commission from the 14th of August 2020 up to the 14th of February 2021.
6. An order directing that any respondent that will oppose this application is liable jointly and severally (the one paying to be absolved) for the costs of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

7. If part B of this application is dismissed on any basis, an order directing that, the first respondent is liable for the costs of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

8. An order granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.

BE PLEASED TO TAKE NOTICE FURTHER that the decisions that the Applicant seeks to have reviewed and set aside are as follows:

- The decision setting aside the appointment of the applicant in the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission taken by the first respondent on the 31st of July 2020 and or on any other date;
- If it is found that the recommendation of the fourth respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission was varied and or set aside by the second respondent or any respondent; the decision varying or setting aside the recommendation of the fourth respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission;
- The decision was taken by either the first, the fifth, or sixth, or seventh respondent to appoint the ninth respondent to act as Chief: Investigations and Prosecutions at the Anti-Corruption Commission from the 14th of August 2020 up to the 14th of February 2021.

BE PLEASED TO TAKE FURTHER NOTICE THAT in respect of any respondent that took any of the aforesaid decisions, you are hereby called upon to show cause if any, why your above-mentioned decision or decisions should not be reviewed, corrected, or set aside;

BE PLEASED TO TAKE FURTHER NOTICE THAT in respect of any respondent that took the aforesaid decisions including any respondent that caused or in any way contributed to the taking of any of the aforesaid decisions, you are hereby called upon to serve on the applicant within fifteen days after being served with this application, a copy of the complete record that includes emails, any transcript of a record of whatever nature, and all correspondences, that were exchanged by and on behalf of the respondents that relates to the decisions being reviewed herein and to file with the Registrar of the above Court, the original copy of the aforesaid record of your proceedings that relates to the afore-mentioned

decisions that are sought to be reviewed, corrected or set aside together with your reasons for your aforementioned decisions and to notify the applicant that you have done so.'

Counter application

[5] The first respondent further filed a counter application in terms of which she asks for the following:

'Take Notice that, in the event that it may be held that the first respondent did not have the power to act as she had under section 7(2) of the Public Service Act, the first respondent shall apply to the above Honourable Court at the hearing of the main application for an order in the following terms:

1. Reviewing and setting aside the 4th respondent's decision of 14 July 2020 to recommend the applicant for the position of Chief: Investigations and Prosecutions of the 6th respondent.
2. Reviewing and setting aside the 7th respondent's decision of 16 July 2020 to appoint the applicant to the position of Chief: Investigations and Prosecution of the 6th respondent on the recommendation of the 4th respondent.
3. Directing that the orders in prayers 1 and 2 shall operate from 14 July 2020 and 1 July 2020 respectively
4. Directing that the recruitment and appointment process for the position of Chief: Investigations and Prosecutions of the 6th respondent shall start afresh.
5. Further and or alternative relief.
6. Costs of suit for the counter application against those parties who may oppose the counter application, jointly and severally with the one paying and the other to be absolved if more than one party should oppose.'

Background and factual basis for review

[6] From the founding affidavit, opposing affidavit, and supporting affidavits, the following background information to this application emerges. The position of Chief: Investigations and Prosecutions Grade 3 at the Anti-Corruption Commission became vacant and was advertised in local newspapers like the Namibian on Friday 29 November 2019.² The advertisement listed the requirements that the applicants need to meet to qualify to be invited to an interview. This includes the attachment of

² Annexure D2 of the opposing affidavit of Saara Kuugongelwa-Amadhila.

certain documentation to the said application, with the condition that incomplete applications or applications without confirmation of satisfactory completion of the probationary period will be disqualified. The closing date for submission of the applications was 23 December 2019.

[7] The interviews were conducted on 16 June 2020. Nineteen applications were received of which only nine met the advertised requirements and were invited to the interview. It seems that four of these applications did not attach all or some of the required documents and were contacted by a Senior Human Resources Practitioner of the ACC, who asked them via email to submit outstanding or incomplete documentation.

[8] The interview took place and the panel recommended the applicant, although he was not the highest scoring candidate, but second highest. Mr Hannu Shipena the then Executive Director of the ACC wrote a submission dated 24 June 2020, addressed to the Deputy Executive Director for the Department Public Service Commission Secretariat, recommending Mr Iiyambo, the candidate who scored the highest for the position and therefore overriding the recommendation of the interview panel.³

[9] This recommendation was forwarded to the Public Service Commission and they communicated their decision to the Executive Director of the ACC in a letter dated 14 July 2020. In essence, they concluded that Mr Iiyambo did not submit all the needed documentation with his application and was asked to do so after the closing date for submitting the applications and should have been excluded from the selection process since his application was incomplete. The commission pointed out that the ACC erred when they deviated from their advertisement requirements and/or conditions when they allowed the applicants with incomplete documentation to submit these documents after the closing date for applications. The commission in terms of s 5(1) of the Public Service Act 13 of 1995 recommended the promotion of Mr Masule (the applicant) to the post and cautioned the Agency in the future not to deviate from their advertisement conditions as this might create a precedent.

³ See annexure D4 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

[10] In a letter dated 16 July 2020 Mr Shipena, the Executive Director of the ACC informed Mr Masule that he is promoted to the position of Chief: Investigation and Prosecution Grade 3 on 12 calendar months' probation as from 1 August 2020 and set out information regarding the annual salary, etc.⁴ In a letter, addressed to both the Prime Minister⁵ and the Director General of the ACC⁶ dated 17 July 2020, Mr liyambo complained that although he attached both his driver's license and the confirmation of probation letter to his original application, he was called at a later stage to again submit those documents. He further claimed that the security screening that should form part of the requirement process did not take place and the process proceeded without it. The recommendation of the interview panel was in favour of promoting an ACC staff member and not the best performer in the interview. He then requested an investigation into his complaint.

[11] Mr Noa from the ACC wrote to Mr liyambo acknowledging receipt of the complaint and indicating that he requested a report on the issue. Mr Shipena provided Mr Noa with a report⁷ dated 20 July 2020 in which he pointed out that the complainant addressed his complaint to the wrong forum. He advised that it should be addressed to the Deputy Executive Director: Secretariat of the Public Service Commission. He further reported on what he found concerning the complaint. He indicated that he checked the file and saw that Mr liyambo did not attach his driver's license initially and it was only received on 9 March 2020. It seems as if Mr Noa at some stage gave a second chance to persons to submit their driver's licenses but that the one of Mr liyambo was received after that date. Mr liyambo also did not attach a probation report and only provided one after he was requested to do so. He then deals with the complaint regarding the security screening and indicated that the human resources department deals with that when they do certain reference checks before the appointment of the successful candidate.

[12] He also clarified that his recommendation to the Public Service Commission was that the highest-scoring candidate, Mr liyambo, should be appointed as the reasons provided by the interview panel for recommending the second highest-scoring candidate was inconsistent with the Public Service Staff Rules. He then highlighted the recommendation from the Public Service. Mr Noa provided feedback

⁴ See annexure PM1 to the founding affidavit of Phelem Masule.

⁵ See annexure SKA-OPP-1 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

⁶ See annexure PN 1 to the opposing affidavit Paulus Kalomho Noa.

⁷ See annexure PN 2 to the opposing affidavit of Paulus Kalomho Noa.

to the complainant and clarified that contrary to the recommendation of Mr Shipena the Public Service Commission appointed Mr Masule. He advised Mr Iyambo to take the matter up with the Public Service Commission as this was the extent of what his office can investigate.

[13] The Prime Minister also reacted to the complaint received by her office. She shared the complaint with the Chairperson of the Public Service Commission and requested all relevant documents from him. She received:

- a) Letter from the Office of the Prime Minister: Cabinet Secretariat approving the ACC's request to fill certain positions;
- b) Vacancy announcement for the position Chief: Investigation and Prosecution published in the Namibian newspaper on 29 November 2011;
- c) Emails from the ACC Senior Human Resources Practitioner to various applicants dated 9 March 2020, requesting copies of documents;
- d) Correspondence from two interview candidates providing reasons for declining an invitation not to attend the interviews dated 16 June 2020;
- e) Public Service of Namibia Application for Employment Forms and Health questionnaires, along with Curriculum Vitae and supporting documents for 5 applicants.
- f) Recruitment Policy of the Public Service – PSSR B II
- g) Recruitment Policy of the Public Service – PSSR B II Annexure D: Interview Guidelines;
- h) A document containing the 2nd shortlisting of applicants for the position;
- i) Individual Score Sheets for the top 3 interviewed candidates by each interviewing panelist;
- j) Combined Score Sheet for the Advertised Post with additional panel members' marks and signatures;
- k) Letter from the ACC Executive Director to the Deputy Executive Director – Department of Public Service Commission Secretariat dated 24 June 2020;
- l) Public Service Recommendation to ACC Executive Director dated 14 July 2020.

[14] The Prime Minister then forwarded all the documents she received to the Secretary to Cabinet on 21 July 2020 and asked him to review the documents

against Mr Iiyambo's written complaint and to advise her. She received his advice the next day. In the report⁸ it was pointed out to her that the advertisement indicated that "incomplete applications or applications without confirmation of satisfactory completion of the probation period will be disqualified". The ACC further received nineteen applications and only nine met the advertised requirements. Four of these candidates did adhere to the advertisement and attached their documentation required as per the advert. The report then deals with the recommendation of the Public Service Commission and then made certain observations regarding the deviation from the requirements as set out in the advertisement when allowing applicants with incomplete documentation to submit these after the closing date.

[15] The Secretary to Cabinet was of the opinion that the ACC has waived its requirement for compliance and as a result, the non-adherence to the advertisement requirement cannot be used to disadvantage candidates who submitted their documentation late. He further observed that the non-compliance principle to eliminate and disqualify candidates has therefore rendered the entire process unfair and unlawful and the recommendation of the second candidate based on personal attributes above the candidate who scored the highest marks has further rendered the process subjective, contrary to professional ethics and administrative fairness.

[16] The Secretary to Cabinet advised that the entire recruitment process was flawed and should be declared null and void in terms of the existing law and recommended that the Prime Minister approach His Excellency, the President to vary or reject the recommendation of the Public Service Commission, in terms of s 9(a) of the Public Service Act 13 of 1995. She was further advised to also discuss the matter with the Chairperson of the Public Service Commission, which she did on 24 July 2020. She was informed that the Public Service Commission had been advised previously that they could not change their recommendation once such a recommendation has been relayed to the person affected by the recommendation. She further also sought advice from the Office of the Attorney-General and was advised to write to the applicant, to communicate her decision.

[17] She informed the applicant, Mr Masule in a letter dated 31 July 2020⁹ and received by Mr Masule on 3 August 2020 that she is exercising her powers in terms

⁸ See annexure SKA-OPP 4 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

⁹ See annexure PM2 to the founding affidavit of Phelem Masule.

of s 7(2) of the Public Service Act which allows her to vary or set-aside decisions of an Executive Director. In line with that power, she notified him that his appointment is set-aside due to the complaint laid at her office on the alleged irregularities that may have taken place during the process of recruitment which she intends to investigate in due course. She also invited him, should he be aggrieved by the decision, in terms of s 7(2)(b) of the Public Service Act, to make submissions to her office within 14 days.

[18] On 3 August 2020¹⁰, seemingly after receipt of the letter from the Prime Minister, the applicant requested all documents having a bearing on the matter, including the advertisement, the shortlisting, the selection and composition of the panel, the score sheets, and the recommendation, etc. from the Executive Director of the ACC. The new Executive Director, Mr Shilongo responded in an undated letter¹¹ and indicated that they can only avail a copy of the advertisement to him and not the other documents requested and the shortlisted criteria that were used for the shortlisting. He was then advised to channel any complaints regarding the appointment to the office of the Prime Minister. The Applicant then wrote to the Prime Minister on 11 August 2020¹² and requested the same documents.

[19] The Prime Minister responded to the request in a letter dated 14 August 2020¹³ and indicated that she was advised that he is not legally entitled to the host of documentation that he is seeking at that stage of the matter. She further informed him that he is entitled to reasons for her decision and then proceeds to provide him with reasons for her decision being the following:

- a) In the process of filling the vacant post, the Anti-Corruption Commission of Namibia committed the following irregularities:

- b) During the process of shortlisting, the ACC deviated from its own requirements/conditions as advertised and contravened the provisions of PSSR B II in the following:

¹⁰ See annexure PM6 to the founding affidavit of Phelem Masule.

¹¹ See annexure PM 7 to the founding affidavit of Phelem Masule.

¹² See annexure PM 8 to the founding affidavit of Phelem Masule.

¹³ See annexure PM 9 to the founding affidavit of Phelem Masule.

- c) ACC considered and shortlisted applicants who failed to attach certified copies of educational qualifications and certificates of service from previous employees (Rule 6.5.1(d));
- d) ACC inappropriately invited candidates who omitted to submit complete information as specified in the advertised requirements and proceeded to consider such applications for nominations (Rule 6.5.3);
- e) After the closing date of the advertisement, ACC made further communications/correspondences with applicants when Rule 6.5.4 prohibits such further communications except for the purpose of informing the applicants that their applications were received, and
- f) The panel took into account other considerations other than those provided for in ranking candidates notwithstanding PSSR B II which provides that the suitability of a candidate for a post should be determined by means of an overall interview performance of the candidate and not by selected attributes.
- g) She also provided him with an opportunity to supplement his representations.

[20] The applicant on 17 August 2020,¹⁴ wrote to the Prime Minister and took up the issue regarding the documentation he requested. He indicated that he is entitled to those in order for him to make further and well-informed representations to her. He further pointed out that there is a connection between the reasons provided by her and the documents he requested. He pointed out that the decisions taken by her are not justifiable in law.

[21] The applicant also asked to be advised on any statutory powers either in the Public Service Act or any other law that confers on the Prime Minister the power and options to deal with the representations that she asked him to submit. He further asked for clarification as to whether the decision conveyed in the letter of 31 July 2020 was a temporary decision as he was asked to make submissions before a final decision is taken according to his reading of the said letter, the decision is a final

¹⁴ See annexure PM 10 to the founding affidavit of Phelem Masule.

one. He pointed out to the Prime Minister that he intends to take legal action if the matter cannot be resolved.

[22] The Prime Minister responded in a letter dated 20 August 2020¹⁵ that she stands by her position regarding the availing of the documents the applicant requested. She further pointed out that she disagrees that the steps she took and is still in the process of taking, are unlawful. She explained that she was legally advised that she is empowered by s 7(2)(b) to vary or set aside the specific appointment pending her investigation into the alleged irregularities. She again pointed out that she did not make a final decision and that was the reason why he was invited to make representations to her in terms of s 7(2)(b) of the Public Service Act. The Prime Minister then indicated that she can only agree to an amicable solution of the matter where a full investigation is conducted ensuring that his appointment was properly done procedurally and substantively correct.

The arguments

[23] The applicant is aggrieved by the decision of 31 July 2020 by the first respondent, which resulted in the institution of these proceedings against the respondents. This decision came as a result of a complaint from a certain Mr liyambo. It was argued that the applicant takes the view that at the most basic level, the first respondent's review record should have at least shown that she conducted some investigations into these allegations, which it does not. This makes her actions arbitrary.

[24] They further argued that the first respondent could not on a proper interpretation of the Public Service Act, set aside the decision in appointing the applicant without first taking the steps contemplated by the said Act to set aside the recommendation by the third and fourth respondents. It was pointed out that when it comes to the appointments of members to the public service, the first respondent has no actual decision-making powers and discretion.

[25] For the applicant, it was argued that the Prime Minister performed her functions as per the duty created in s 7 of the Public Service Act. Although not in

¹⁵ See annexure PM 11 to the founding affidavit of Phelem Masule.

terms of s 7(2)(b) as what she initially indicated in her letter but in terms of s 7(2)(a). This section allows her to set aside or vary any decision she has taken. Although the act only then calls for the person affected by the decision to then make written submissions within 14 days, it still allows for *audi*. It was argued that her letter of 31 July 2020 was an attempt to merge the provisions of s 7(2)(b) with the provisions of Article 18 of the Namibian constitution as it is clear that she had not yet arrived at a conclusion.

The late answering affidavit

[26] The applicant took issue with the late filing of the answering affidavit of the respondents and pointed out that the said affidavit was due on 28 July 2022. An extension was then requested and they were to file their affidavit on 5 August 2022. On 19 August 2022, the respondents again requested an extension, which further extension was granted to 6 September 2022, and the answering affidavit was only filed on 28 October 2022 without a condonation application accompanying it. This application only followed later in November.

[27] In trying to explain the delay, the government attorney concedes that they could have done better and did not intentionally delay the filing of the replying affidavit. Things went wrong and that was explained. He explained that it took some time to get the affidavit after it was returned from counsel, and signed by the necessary party. Their offices are further experiencing a very high workload as they lost ten experienced legal practitioners during the past year.

[28] In *Sun Square Hotel (Pty) Ltd v Southern Sun Africa and Another*¹⁶ the court said the following about condonation applications:

'It is trite law that for a condonation application, such as the present one, to succeed there are two broad considerations. First, there must be a reasonable and acceptable explanation for the non-compliance. Second, there must be reasonable prospects of success on appeal.¹⁷ There is some interplay between these two considerations, eg good prospects of success may lead to the granting of a reinstatement application even if the explanation is

¹⁶ *Sun Square Hotel (Pty) Ltd v Southern Sun Africa and Another* (SA 26 of 2018) [2019] NASC 598 (9 December 2019).

¹⁷ *United Africa Group (Pty) Ltd v Uramin Inc & others* 2019 (1) NR 276 (SC) para 4 and cases there cited.

not entirely satisfactory. Thus, in *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* overwhelming prospects of success and public importance of the issue in question led to a condonation application being granted despite non-compliance which bordered on being glaring, flagrant, and not satisfactorily explained.¹⁸ Whereas the broad considerations are generally considered conjunctively this is not always so. Thus, where there is no acceptable explanation for the glaring or flagrant non-compliance with the rules, the application may be dismissed without consideration of the prospects of success on appeal.¹⁹ Conversely, an entirely satisfactory explanation will not save an application when there is no prospects of success on appeal.'

The legal principles in review applications

[29] In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*²⁰ the South African Constitutional Court said the following regarding review applications, which also find application in labour review matters:

'For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. Whilst procedural fairness and the audi principle are strictly upheld, substantive fairness is treated differently. As Corbett CJ said in *Du Preez & Another v Truth & Reconciliation Commission*:²¹

"The audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly . . . The duty to act fairly, however, is concerned only with how the decisions are taken: it does not relate to whether the decision itself is fair or not."

[86] The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

¹⁸*Road Fund Administration v Scorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) para 2.

¹⁹*Katjaimo v Katjaimo* 2015 (2) NR 340 (SC) at 350C-D.

²⁰*Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265.

²¹*Du Preez & Another v Truth & Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A) at 231G.

[87] The role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken per the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, courts would not interfere with the decision.'

The applicable statutory provisions

[30] The Public Service Commission is established according to Article 112 of the Constitution with Article 113 setting out its functions.

'(1) There shall be established a Public Service Commission which shall have the function of advising the President on the matters referred to in Article 113 hereof and of reporting to the National Assembly thereon.

(2) ...

(3) ...

(4)...

Article 113 Functions

The functions of the Public Service Commission shall be defined by an Act of Parliament and shall include the power:

(a) to advise the President and the Government or:

(aa) the appointment of suitable persons to specified categories of employment in the public service, with special regard to the balanced structuring thereof;

(bb) ...

(cc) ...

(dd) ...

(b) to perform all functions assigned to it by Act of Parliament;

(c) to advise the President on the identity, availability, and suitability of persons to be appointed by the President to offices in terms of this Constitution or any other law.'

[31] The next piece of legislation important to this matter is the Public Service Act 13 of 1995. Section 5 of this Act sets out the functions of the Prime Minister in relation to the Public Service and specifically in s 5(1) refers to the appointment, promotion, transfer, or discharge of a person. It reads:

'(1) The appointment of any person to, or the promotion, transfer or discharge of any staff member in or to or from, the Public Service shall be made by the Prime Minister on the recommendation of the Commission in accordance with the provisions of this Act.'

[32] This section deals with the role of the first respondent. She is to receive a recommendation from the Public Service Commission and then act per that recommendation. It is contended that the Prime Minister indeed acted in terms of s 7(2)(a) although the letter written by the Prime Minister on 31 July 2020 refers to s 7(2)(b). Section 7 (1) and (2)(a) and (2)(b) of the Public Service Act says the following:

'(1) The Prime Minister may, subject to such conditions as he or she may determine, delegate any power, excluding the power to make regulations under section 34 or assign any duty entrusted to him or her by or under this Act to any staff member or staff members in any office, ministry or agency.

(2)(a) A delegation or assignment under subsection (1) shall not divest the Prime Minister of any power delegated or duty assigned, and he or she may at any time vary or set aside any decision made thereunder.

(b) If a decision so varied or set aside relates to any person, that person may, within 14 days after the variation or setting aside of the decision, make written representations to the Prime Minister in connection with such variation or setting aside.'

[33] Section 9 of the Public Service Act regulates the rejection or variation of the Commission's recommendations or advice and reads as follows:

'After consultation with the Commission-

(a) the President may vary or reject any recommendation relating to the Public Service made by the Commission in terms of this Act or any other law;

(b) the Prime Minister may vary or reject any advice relating to the Public Service given by the Commission in terms of this Act or any other law. '

[34] From the reading of this section it must be understood that only the President may vary or reject any recommendation relating to the Public Service made by the Commission in terms of this Act or any law and the Prime Minister's role is limited to the rejection of advice provided by the Commission.

[35] In terms of legislation some regulations and staff rules were also published. These regulations and rules are the tools with which the public service is managed. In terms of Public Service Staff Rule 5.1 the Public Service Commission is the decision maker concerning complaints that may arise in terms of recruitment to and promotion in the public service. Part I of Public Service Staff rule B.II rule 5 names the stakeholders in the recruitment process and refers to the Prime Minister and the Public Service Commission as follows:

'In terms of Section 5(1) of the Public Service Act, 1995, the appointment of any person in the Public Service is made by the Prime Minister on the recommendation of the Public Service Commission. The approval and recommendation of appointments at certain levels have been delegated (See Delegations of the Prime Minister) in order to support the speedy filling of posts.

The Public Service Commission

The Public Service Commission is the arbiter of transparency and fairness of recruitment and selection in the Public Service. The Public Service Commission will continue to assess the level of transparency and fairness in the application of the process. Any part of the process, including the style used in an advertisement, medium of advertising, etc. can thus be ruled unfair by the Public Service Commission. It may as a result withdraw any delegation at any time if it is deemed appropriate.'

[36] It is clear that the Public Service Commission is the decision maker and also the body that deals with complaints. In this instance, the Public Service Commission indicated that they stand with their decision.

Applying the law and interpretation of statutes

[37] When interpreting the Public Service Act and rules, one should rely on the literal, grammatical ordinary interpretation of the language utilised by the legislature. In *Torbitt and Others v International University of Management*²² the Supreme Court said the following:

²² *Torbitt and Others v International University of Management* (SA 16 of 2014) [2017] NASC 8 (28 March 2017).

‘As a point of departure, it must be emphasised that what was stated by this court in *Minister of Justice v Magistrates Commission*²³ correctly reflects the approach in the interpretation of statutes where this court expressed itself as follows in para 27:

‘The respective roles of the minister and the commission can be determined on a proper interpretation of the words “may” and “must” as used in ss 13 and 21(3)(a). In terms of what is commonly referred to as the cardinal rule of interpretation, where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning unless it is apparent that such an interpretation would lead to manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature.’

[38] When various provisions of a statute are being interpreted, the approach as set out in *Ohorongo Cement (Pty) Ltd vs Jack Trading CC* should be used. The court in this matter held as follows:

‘The provisions of an Act must be interpreted together. This approach is known as the *ex visceribus actus* approach, which emphasizes that a particular provision of a statute must be understood as part of the more encompassing legislative instrument in which it has been included.²⁴ This approach assists the court to harmonise ostensibly conflicting provisions of one and the same statute.²⁵ Therefore, sections 65(1) and (8) of the Customs and Excise Act must be interpreted in the context of the entire Act.

When interpreting legislation, this court must take a different approach than the one it takes when interpreting the Constitution.²⁶ In interpreting legislation the court must give effect to the ordinary meaning of the words used to formulate the provisions being interpreted. The court will only go beyond the ordinary grammatical meaning of the words in the event that the ordinary meaning of those words generates an absurd or repugnant interpretation that undermines the intention of the legislature or which is unconstitutional. In the event of such absurdity or repugnancy, the court will then have to consider the purpose of the provision as well as its textual and contextual background. This approach was approved by this court in *S v Strowitzki*²⁷, where the court endorsed the following dictum by Park B in *Beck v Smith (1836) 2 M & W 191* at 195:

²³ *Minister of Justice v Magistrates Commission and Another* (SA 17 of 2010) [2012] NASC 8 (21 June 2012).

²⁴ Du Plessis. *Re-Interpretation of Statutes* (2002) at 112.

²⁵ *Principal Immigration Officer v Bhula* 1931 AD 323 at 335; *S v Dlamini*, *S v Dladla and others*, *S v Joubert*, *S v Schietekat* 1999 (4) SA 623 para 84.

²⁶ *Attorney-General of Namibia v Minister of Justice and others*, 2013 (3) NR 806 (SC), para 7

²⁷ *S v Strowitzki* 2003 NR 145 (SC) at 157.

“The rule (ie the golden rule) is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified, to avoid such inconvenience, but no further.”

Furthermore, when interpreting legislation, the court must assume that the legislature is consistent with itself and therefore, the provisions of the same Act are concurrently operational unless there is an irreconcilable conflict between the two provisions.¹⁴ An irreconcilable conflict exists when the two provisions prescribe antagonistic requirements which cannot be enforced concurrently without considering the other provision to be invalid. Thus, after determining the ordinary meaning of the provision, the court must establish if there is an irreconcilable conflict between the two provisions. If the conflict is reconcilable, the court must adopt an interpretation which upholds that the two provisions are concurrently operational.’

[39] The first respondent only plays the role of putting into effect the decisions of the fourth respondent. In this instance the findings by the Supreme Court in *Minister of Justice v Magistrates Commission and Another*²⁸ is apposite. In this matter, the court dealt with a recommendation by the Magistrates Commission to the Minister of Justice regarding the dismissal of a magistrate. The discussion regarding the interpretation of the word must and the actions of the Minister concerning that instructions reads as follows:

‘The power of the Minister in terms of section 21(3) is very narrow. She does not have the power to disagree with the determination by the Commission and the High Court on the substantive question whether there are grounds for the removal of the Magistrate. That is an issue reserved first for the Commission and then the court. Her role is only to make sure that the decision referred to her is indeed a decision of the Commission. In order to perform this narrow power, the Act requires that the record, reasons, representations and comments are forwarded to her. The view that section 21(3)(a) provides for a dual decision-making process was accordingly correctly rejected by the High Court. Given that one of the tasks of the Minister is to uphold the independence and integrity of the courts, she should exercise the powers conferred upon her by section 21(3) promptly and efficiently. In this she has failed.

...

²⁸ Supra.

In this case there is no silence or ambiguity of the legislation in providing for the dismissal of a public functionary. The Act states explicitly how the dismissal should take place, namely, that on the recommendation of the Commission to that effect, the Minister must dismiss the magistrate. The Court is therefore not called upon to read into the words of the Act an implied power to dismiss.’

Whether the first respondent’s actions were ultra vires?

[40] The principle of legality was explained by this court in *Namibian Employers’ Federation v President of the Republic of Namibia*²⁹. It was summarized as follows:

‘The ultra vires doctrine in simple terms means that a functionary has acted outside his or her powers and as a result the function performed becomes invalid. The rule forms part of the principle of legality, which is an integral component of the rule of law. The South African Constitutional Court in the matter of *Affordable Medicines*³⁰ affirmed the principle in these terms:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”

[72] Ordinarily, the ultra vires principle applies where the repository of the public power performs a function outside of the scope of the power conferred. If the functionary had no power at all, then the validity of the relevant action is not impugned regarding this principle. It has to be challenged on other grounds. In applying the principle in *Affordable Medicines* the Constitutional Court stated:

“In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and is in

²⁹ *Namibian Employers’ Federation and Others v President of Republic of Namibia and Others* [2020] NAHCMD 248 (23 July 2020).

³⁰ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.

breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law because of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality.”

[41] Applying the above principles, it is clear that the first respondent acted in circumstances where she had no power to act. The determination of complaints rests with the fourth defendant as they are the impartial, independent body created to deal with complaints. They had to arrive at a just and fair decision regarding promotions in public service. At most, the Prime Minister should have looked into the decision and advised the President as he is the next role player that can decide to either confirm or set aside the recommendation of the Public Service. The Prime Minister's decision of 31 July 2020 is therefore reviewed and set aside as the decision ultimately rests with the President of the Republic of Namibia.

The counter application

[42] The respondents chose to file one answering affidavit, combined with an affidavit in support of a counter-application. In *Hamupolo v Simon N.O and Others*³¹ Masuku J said the following regarding this:

I am of the considered view, in this connection, that the first issue to be disposed of relates to what the respondent calls a counter-application in his papers. The respondent, in his answering affidavit, purported to seek relief of his own without applying therefor. Rule 69 deals with counter-applications and requires the party bringing the counter-application, to comply with the periods set out in the rule relating to applications.

[26] It is accordingly clear that an applicant in a counter-application must file the said application, consisting of a notice of motion and an affidavit supporting that application. The respondent to the counter-application must be afforded time to deal with the counter-application as would be the case in an ordinary application.

[27] This was not done by the respondent in this matter. As such, there is no counter-application properly so-called, to be dealt with in these proceedings. The court will accordingly be confined to dealing with the application and the basis of the opposition, which

³¹ *Hamupolo v Simon N.O. and Others* (HC-MD-CIV-MOT-GEN 78 of 2020) [2022] NAHCMD 37 (8 February 2022).

are properly before the court. The rules even when generously interpreted, do not conceive a fusion of two applications, namely an application and a counter-application in one answering affidavit. This is so because the answering affidavit is designed and dedicated to dealing pound for pound with the allegations contained in the founding affidavit. The cutting of corners in this regard, is not acceptable, even if it may seem convenient.'

[43] This application is accordingly dismissed.

[44] The following order is therefore made:

1. Condonation for the late filing of the answering affidavit is not granted.
2. The review application is successful and the Prime Minister's decision of 31 July 2020 setting aside the appointment of the applicant in the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission is set aside with costs, to include the costs of one instructed and one instructing counsel.
3. The counter application is dismissed with costs, including the costs of one instructed and one instructing counsel.
4. The matter is finalized and removed from the roll.

E Rakow
Judge

APPEARANCES

APPLICANT:

T Chibwana

Instructed by Shakwa Nyambe & Co Inc,
Windhoek.

RESPONDENT:

R Maasdorp

Instructed by the Government Attorney,
Windhoek.