CASE NO.: SA 3/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

WALTER MOSTERT APPELLANT

And

THE MINISTER OF JUSTICE RESPONDENT

CORAM: Strydom, C.J., O'Linn, A.J.A., *et* Chomba, A.J.A.

HEARD ON: 20/06/2002.

DELIVERED ON: 28/01/2003

APPEAL JUDGMENT

STRYDOM, C.J.: The appellant in this matter is a magistrate attached to the Ministry of Justice of Namibia. At the time when this application was launched he was stationed at Gobabis. The Permanent Secretary informed the appellant on very short notice that he was transferred from Gobabis to Oshakati. After negotiations between the appellant and

the Permanent Secretary failed he brought an application on a semi-urgent basis to the High Court of Namibia in which the following relief was claimed, namely:

"2. That a Rule Nisi be issued calling upon the respondent on a date to be determined by the Honourable Court to furnish reasons to the above Honourable Court why an order should not be made in the following terms: -

2.1. That the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati be reviewed and set aside.

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2.2. To declare that the judiciary, including magistrates, are independent in terms of Article 78 of the Namibian Constitution and that the Permanent Secretary of Justice has no jurisdiction to appoint, transfer and/or terminate the services of a magistrate, in particular that Section 23(2) of the Public Service Act does not apply to Magistrates.

2.3. Costs of suit.

2.4. Further and/or alternative relief.

3. That the Respondent be interdicted to transfer the Applicant from Gobabis and/or to evict him from the government house situated at Lieutenant Lampe Street, Gobabis, pending the finalisation of the Application referred to in paragraph 2."

After hearing argument, which included an application to strike out certain parts of the replying affidavit of the appellant, the Court *a quo* made the following order:

"That in respect of respondent's application to strike out:

A (1) The following portions, paragraphs and annexure of applicant's replying affidavit are struck out:

Paragraphs 5.3, 5.4 with annexure WM17, 5.5, 5.6,9.2.2 and 35.1.1.

(2) Save for the allegations in paragraph 2(e) and (f) of respondent's application to strike out, those portions and paragraphs in applicant's replying affidavit set out in paragraphs 2(a) to (p) of respondent's application to strike out, are struck out.

(3) The portions and paragraphs of applicant's replying affidavit set out in paragraph 3(a), (b), (c), (d) and (e) of respondent's application to strike out are struck out.

B Applicant shall pay the costs of the application to strike out. For the benefit of the taxing master the argument in respect of the application took about ten (10) minutes.

That in respect of the Main Application:

1. The application to review and set aside the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati is dismissed.

2.1 Inasmuch as the provisions of Article 78 of the Namibian Constitution declaring the Judiciary including magistrates independent, are loud and clear, it is unnecessary for this Court to make such a declaration.

2.2 In terms of section 9 of Act 32 of 1944 as amended by the Magistrates' Courts Amendment Act (Act 1 of 1999) the Minister of Justice, or such person duly delegated in terms of the said Act, may appoint magistrates.

3. Magistrates are liable to be transferred by virtue of their contracts, express or implied, with the State and by virtue of the law and practice in terms of Act 32 of 1944, as read with Articles 138(2)(a) and 140(1) of the Constitution of Namibia.

4. The transfer of magistrates does not constitute a threat to their independence.

5. Section 23(2) of the Public Service Act is not applicable to magistrates but this Order, i.e. Order 5, shall not become effective until 1st March 2003, and furthermore it shall be expunged and cease to exist, in the event of legislation correcting the defects which have caused the making of this order being properly passed and gazetted.

6. The application for the interdict and other relief claimed in claim 3 of the Notice of Motion is refused.

7. Applicant shall pay the costs.

The costs of the interim application stood over for decision. Briefly, the application was to stop the transfer of applicant to Oshakati. The application was abandoned and applicant has taken up his post in Oshakati. Applicant must therefore pay the costs of the interim application. The Order of the Court in this regard is:

That the applicant shall pay the costs of the interim application."

The appellant was not satisfied with the outcome of the case and, in terms of sec. 18(1) of the High Court Act, Act No. 16 of 1990, appealed to this Court. The appeal is against the order whereby parts of the replying affidavit of the appellant was struck out, i.e. Orders A and B as well as some of the orders made by the Court *a quo* in regard to the main relief claimed. Paragraph 1 of the Notice of Appeal states that in respect of the main relief claimed, appellant appeals against orders 1, 2.2, 3, 5, except the first sentence up to and

including the word "applicable", and orders 6 and 7. The notice of appeal consists of some 32 typewritten pages divided into 46 paragraphs and is aimed to cover every conceivable point whether relevant to the issues or not and whether addressed in argument or not. It can hardly be said that such a notice informs the Court and the respondent precisely of the issues involved which, after all, is the purpose of the notice.

The appellant was represented by Mr. Du Toit SC and Mr. Grobler and the respondent by Mr. Smuts and Ms. van Niekerk. Counsel on both sides presented the Court with full and well-researched arguments for which I must express my appreciation. An advent of importance which took place after the appeal was noted was the handing down of the judgment of the Constitutional Court in South Africa in the matter of van Rooyen and Others v The State and Others, which was delivered on the 11th June 2002. This judgment dealt with issues which were germane to the present appeal, and both Counsel referred to various excerpts thereof. This case is now reported in 2002 (8) BCLR 810 (CC).

In his founding affidavit the appellant set out the background history to events, which later led to him instituting the application. He said that he was appointed as an additional magistrate at Gobabis on the 1st December 1999. During this period claims for witnesses, brought to him for approval by the prosecutor, one Ms. Hamunyella, were found not to be in order. This led to a police investigation which resulted in the suspension of the prosecutor and her being charged with 28 counts of fraud. Appellant said that shortly after this an orchestrated attempt, led by the Swapo Party Regional Co-coordinator, one Kavari, was launched to get him removed from his post. Certain defamatory articles also appeared in the media, which lead to actions instituted by the appellant for defamation.

Because of the allegations made against him a departmental investigation was held which investigation exonerated the appellant.

Some months after the happening of the events described above, the appellant, on the 16th February 2001, received a fax in which he was informed by the Permanent Secretary for Justice that he was transferred to Oshakati with effect from 1st March 2001. Appellant said that he immediately made representations to the Permanent Secretary in which he advanced three reasons why he should not be transferred. The first was the disruption in his family and religious life and that of his two school-going daughters. The second was that his wife would have to resign her work, which would cause severe financial hardship to the appellant. The third reason was that the transfer could be interpreted as approval by the Ministry of the campaign to remove him as a magistrate.

In a letter dated the 29th February the Permanent Secretary informed the appellant that the decision to transfer him was not final and he was invited to make further representations. This was done in a letter dated 12 March 2001 in which the appellant repeated more or less the reasons previously advanced by him and to which he added the fact that he was also studying for a LL B degree and needed to be close to resources to assist him with his studies. In a letter dated 2 April 2001 the appellant was informed by the Permanent Secretary that after careful consideration of the representations made by him, her decision that he be transferred to Oshakati still stood and he was further informed that as soon as transfer arrangements were finalized he would be further informed. Appellant, simultaneously, received a letter from the Chief, Lower Courts, to the effect that his transfer had been delayed until further notice.

On the 5th June a further letter was received from the Permanent Secretary in which the appellant was instructed to report to Oshakati not later than the 18th June. Further negotiations ensued and appellant said that he was endeavouring to postpone his date of transfer to the 1st September. Because of the insistence by the Permanent Secretary that he must take up his position in Oshakati as soon as possible the appellant said that he suffered a nervous breakdown and he was booked off until the 31st August. Appellant further stated that attempts by him to arrange a meeting with the Minister of Justice were unsuccessful.

In regard to the appellant's grounds for review of the decision of the Permanent Secretary to transfer him he stated that it was clear from the letter dated 16 February 2001 that she had made up her mind to transfer him and that the belated invitation to make representations was only a ruse when she realized that she had not complied with the *audi alteram partem* rule. Appellant also referred to his unsuccessful attempts to meet with the Minister of Justice and stated that this was a further instance where he was frustrated from making representations.

In support of the declaratory orders, the appellant referred to Article 78 of the Constitution which states that the Judiciary, which included magistrates, shall be independent. Appellant pointed out that sec. 23(2) of the Public Service Act, on which the Permanent Secretary relied, provided for transfers from one post to another and also different posts as long as the new post bore the same designation. Appellant contended that if the transfer of magistrates depended on the will of the Permanent Secretary that that flies in the face of an independent judiciary, at least as far as the magistrates are concerned. He further submitted that this problem should be cured by the appointment of an independent judicial

committee consisting of Judges and senior magistrates who should make representations to the Minister of Justice concerning the appointment of all magistrates.

Lastly the appellant stated that he had at least made out a *prima facie* case for the review of the decision of the Permanent Secretary to transfer him and for the declaratory orders and he asked the Court for a temporary interdict to suspend his transfer until the case was finalized.

Ms. Lidwina Ndeshimona Shapwa, the Permanent Secretary of the Ministry of Justice, made the answering affidavit on behalf of the respondent. She stated that the judiciary of the Republic of Namibia is independent and further stated that magistrates in the lower courts exercise their judicial functions entirely independently. She contended that the appointment and the transfer of magistrates occur in a manner consonant with the Constitution and the important principle already mentioned. The deponent explained that there were several magistrates' courts scattered all over Namibia and that it was inherent in the career of a magistrate to expect to be transferred from time to time. Transfers at a reasonably regular interval were thus the rule and not the exception. She submitted that this was the basis upon which magistrates accepted their appointments when pursuing that career. Although, whenever possible, account was taken of personal interests and circumstances when effecting transfers, certain personal interests of staff members had to give way to the requirements of the due administration of justice and of the public.

Ms. Shapwa further explained that at the time of the transfer of the appellant there were only two magistrates at Oshakati. This came about when one of the magistrates was promoted to divisional magistrate. A former prosecutor with no experience as a presiding

officer took his place. Another magistrate was appointed as a High Court Judge whereas still another magistrate was suspended pending the outcome of a disciplinary inquiry. This magistrate was later discharged and although use was made of relief magistrates, this did not prevent the work from falling into arrears and it became imperative to urgently provide Oshakati with an experienced and hardworking magistrate. In this regard the Chief, Lower Courts, identified the appellant as a suitable candidate to fill that position.

Ms. Shapwa further explained that whenever magistrates were appointed in terms of sec. 9(1) of the Magistrate's Court Act, Act 32 of 1944, or transferred by her in terms of the provisions of sec. 23 of the Public Service Act, Act 13 of 1995, she, as well as the respondent, acted on the recommendations of the Chief of the Lower Courts, who is the head of the magistrates' courts.

In regard to the letter of the 16th February Ms. Shapwa said that, despite its wording, the standard practice was that it only gives notice of the intention of the Ministry to transfer and the decision to do so was at that stage provisional. Where a staff member objected to the transfer he or she was given the opportunity to make representations and the matter is considered afresh by her upon advice of the Chief, Lower Courts. In the present instance the deponent stated that she duly and carefully applied her mind to the representations made by the appellant and the recommendations also made in this regard by the Chief Lower Courts, and she was not persuaded to alter her decision. It was further stated that the conduct of the appellant by constantly seeking a postponement of his transfer, was evidence that he not only accepted her right to transfer him, pursuant to the provisions of sec. 23 of Act No. 13 of 1995, but that he thereby also waived or abandoned his right to review the decision to transfer him.

Dealing with the specific allegations contained in the founding affidavit of the appellant, Ms. Shapwa denied that she was aware of an orchestrated attempt by Kavari to remove the appellant from his post. She stated that a complaint was received from this person, which then led to the internal investigation, the result of which was accepted by the Ministry. She further stressed that the transfer of the appellant had nothing to do with the complaint lodged by Kavari.

Ms. Shapwa denied that the reasons given by the appellant as to why he objected to the transfer, either singly or together, were sufficiently persuasive not to proceed with the transfer. In regard to the appellant's claim that there were no Afrikaans churches, and more particularly a Dutch Reformed church, in Oshakati, the deponent stated that that claim was devoid of truth. Enquiries made by her proved that there was an active Dutch Reformed church in Oshakati. She referred to the affidavit made by Daniel Michael Greeff, a member of the community of Oshakati, who gainsaid this evidence stated under oath by the appellant. Further, according to Greeff, Oshakati was a growing town with a lively business sector with branches of all major retail chains. He stated that there were many business and employment opportunities, especially for persons with experience. References by the appellant to living in a "different social environment in Oshakati" as an area being "predominantly Ovambo speaking" was found by the deponent to be offensive and smacking of sectarianism. She pointed out that it was in the interest of an independent judiciary, and the constitutional values of equality, that officers should serve throughout the country without reference to ethnic origin, race or language groupings.

In regard to the disruption of the education of the children of the appellant it was pointed out that they were both of a relatively young age where disruption would not have such a

severe effect as could be, and would be, during a later phase of their lives when they were older and in more advanced grades. In regard to his further studies and the difficulty to have access to textbooks, and other study material, Ms Shapwa stated that she was personally aware of other employees of the Ministry who likewise have studied and were still studying whilst in outlying areas of the country. In that respect the position of the appellant was no different from that of those other officials.

Ms. Shapwa further explained that the transfer was delayed because the Ministry could not secure accommodation for appellant in Oshakati. Once this problem was solved he was again given instructions to report to Oshakati. In his letter dated 13 June 2001 a further reason for resisting his transfer to Oshakati was given by the appellant as mention was made of the new war situation in Oshakati. The deponent pointed out that there was simply no substance in this allegation and that there was no new war situation prevailing in Oshakati. However, on the 14th June the appellant, by telefax, indicated to the deponent that, due to circumstances, he would be able to go to Oshakati on the 1st September 2001. She submitted that that was a clear acceptance of the position by the appellant and that it was no longer open to him to challenge his transfer to Oshakati.

Ms. Shapwa also stated in her answering affidavit that she was not a political appointee and that politics did not play any part in the transfer of the appellant. She furthermore denied that the purpose of the transfer was to punish him in some or other way and she denied that she acted with any motive ascribed to her by the appellant and she reiterated that she acted in terms of the provisions of sec. 23(2) when she transferred the appellant. That was also the case with transfers of other magistrates.

In his replying affidavit the appellant reiterated his stance that magistrates could not be perceived as independent for as long as the Permanent Secretary, who was a political appointee, had the power to appoint and transfer magistrates. In this regard reference was made to a newspaper report in the Observer quoting the Permanent Secretary as having said that ex-plan fighters should be appointed to posts regardless of their qualifications. The appellant further took issue with the Permanent Secretary on the appointment and transfer of magistrates. He said that all vacancies in the various centres were advertised internally and by way of advertisements in the newspapers and candidates then had an opportunity to apply for such posts. According to the appellant freedom of choice had always been the basis for appointments and transfers. This procedure was not followed when he was transferred to Oshakati. Appellant consequently submitted that his transfer was arbitrary and that his representations were not considered with an open mind.

The appellant admitted that he accepted that he might be transferred when he joined the Ministry but this was subject to the proper procedure being followed and in compliance with the *audi alteram partem* rule. The appellant was sceptical of the Permanent Secretary's denial that she had any knowledge of the concerted effort to remove the appellant from his post, which was widely publicized in the media. Appellant therefore denied that this campaign had nothing to do with his transfer to Oshakati.

Dealing with the affidavit of Daniel Michael Greeff, the appellant stated that he now realized that he was not given the correct information concerning the existence of an active church community in Oshakati. Appellant further denied that he referred to Oshakati as a "backwater" or that he intended to be offensive or was guilty of sectarianism when he referred to Oshakati as a different social environment.

The appellant agreed with the Permanent Secretary that she had the power to transfer him and that such power vested in her in terms of sec. 23(2)(a) of the Public Service Act. He further agreed that representations had to be made to her and that she decided that the reasons advanced were not sufficiently persuasive. In general the appellant denied allegations made by Ms. Shapwa, which were in conflict with allegations made, and conclusions drawn by him, in his founding affidavit.

Before addressing the issues in this matter mention must be made of two applications which were before us. The first was an application for the condonation of the late filing by the respondent of a cross-appeal in regard to the costs orders made by the Court *a quo*. We were informed by Counsel on both sides that this issue was settled and that the respondent was not continuing with the cross-appeal. The second issue concerns an application for condonation by the appellant for the late filing of his Power of Attorney. The respondent did not object to the granting of the condonation and bearing in mind the importance of the matter, and other factors, the appellant was granted the necessary condonation.

It is also convenient to deal at this stage with the submissions made by Mr. Smuts which are to the effect that the appellant has waived his right to take his transfer by the Permanent Secretary on review and to ask for the decision to be set aside. Mr. Smuts based his argument on the negotiations between the appellant and the Permanent Secretary subsequent to his transfer, as represented in letters written by the appellant. In a letter dated 14 June 2001 appellant wrote to the Permanent Secretary and informed her that “Due to circumstances I will be able to go to Oshakati on 1/9/2001”. It was also pointed out by Counsel that already in his initial representations to the Permanent Secretary, the

appellant made it clear that his objection to the transfer was the timing thereof. Also in other letters to which Counsel referred us, attempts were made by the appellant to postpone the date on which he had to report to his new station. Counsel therefore submitted that this conduct of the appellant clearly showed that he accepted the transfer to Oshakati and by doing so had abandoned and waived his right to review such transfer.

Mr. du Toit, on the other hand, submitted that there was no express or implied abandonment by the appellant of his rights in this regard. Counsel submitted, correctly, that the onus was on the respondent to prove waiver on the part of the appellant. Referring to the facts and history of this matter, Mr. du Toit argued that the Court *a quo* wrongly came to the conclusion that waiver was established by the respondent.

In the case of B.K.A. Oppermann v President of the Professional Hunting Ass. of Namibia, an unreported decision of this Court, O'Linn A.J.A., delivered on 28/11/2000, the learned Judge, after referring to various cases on waiver, concluded as follows, p 28:

> "To succeed in such defense the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first respondent."

See further in this regard Hepner v Roodepoort-Maraisburg Town Council, 1962 (4) SA 772(A) and Traub v Barclays National Bank Ltd.: Kalk v Barclays National Bank Ltd., 1983 (3) SA 619(A).

The history of this matter and the facts do, in my opinion, not establish an intention on the part of the appellant to abandon his right to take the Permanent Secretary on review. After receipt of the letter of the 16th February, which set in motion the transfer of the appellant to Oshakati, the appellant immediately wrote back that he was not approached at any stage before the transfer to find out whether he would be prepared to accept a transfer at short notice. He then continued to set out four reasons why a transfer at that particular time would lead to a disruption of his and his families lives and he requested the Permanent Secretary to reconsider her decision. He also made it clear that he was prepared to go to Court if a favourable answer was not forthcoming by the 27th February. In my opinion the objection, in the letter, to a transfer "at that stage", cannot be seen as an acquiescence by the appellant to accept the particular transfer. Of course, and as also admitted by him, he was, as a magistrate, subject to transfer, but the whole tone of the letter, ending as it did, in a threat to go to Court, could not leave anyone in doubt as to the intentions of the appellant.

Thereafter the appellant was invited to make representations regarding his transfer. He accepted this invitation and made representations which, by itself, could not be reconciled with an intention to abandon his rights. On the 2nd April the appellant was informed of the decision of the Permanent Secretary and on the 5th June he was informed to report at his new station on 18th June. On the 13th June the appellant raised further objections but stated also that it was the middle of the school trimester and he asked why, for the sake of

his child, he could not stay on till the end of the school term. He also requested an audience with the respondent. Then the letter of the 14th June followed and on the 15th he again wrote and asked that his transfer stand over till 1st September.

Although the letters of the 13th, 14th and 15th of June were to the effect that the appellant would go to Oshakati it at most is evidence of the fact that the appellant would comply with the order of the Permanent Secretary but it did not follow that by doing so, the appellant also abandoned his rights. This in my opinion is clear from the letters themselves as well as the further course that the matter took. In the letter of the 15th June the appellant again requested an appointment with the respondent, the Minister, and after the appellant was requested to move out of the house in Gobabis, the Permanent Secretary was on 4th July informed of the intention to bring an interim interdict and this litigation followed. I think that once appellant's representations to stop the transfer, were unsuccessful, his own position *vis-à-vis* the Ministry and the uncertainty whether he could still legitimately refuse to go to Oshakati, must have played a role in the decision of the appellant to go to Oshakati to take up the post. However against this background I am satisfied that the respondent did not show on a preponderance of probabilities that the appellant, through his conduct, expressly or by necessary implication, also intended to abandon his right to take the Permanent Secretary on review.

Before dealing with the various grounds for review I must decide the Court's approach to the allegations by the appellant in regard to attempts by officials of the Swapo party to remove him and his allegations, at least in reply, that his transfer was politically motivated. Appellant said that he did not wish to accuse the Permanent Secretary of being politically influenced in her decision to transfer him but because of the campaign his transfer may at

least be perceived by people as an endorsement of the campaign to remove him. In one of his letters appellant said that he saw his transfer as punishment seemingly for blowing the whistle on the prosecutor. In her turn the Permanent Secretary accused the appellant of sectarianism and being insulting. Whichever way one looks at the application there is an undertone created by the appellant that what happened to him was as a result of his involvement which led to the prosecution of Ms. Hamunyella. These allegations are denied by the Permanent Secretary and she explained in detail how it came about that the appellant was transferred from Gobabis to Oshakati. In my opinion a genuine dispute of fact was raised by the denial of the Permanent Secretary and, as the dispute was not referred to evidence, the principles, applied in cases such as Stellenbosch Farmers' Winery Ltd. v Stellenvale Winery (Pty) Ltd., 1957 (4) SA 234 at p. 235 E-G and Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd., 1984 (3) SA 623 (AD), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, the Court is bound to accept the version of the respondent and facts admitted by the respondent, contained in the appellant's affidavit. Bearing in mind these principles I am not able to find that the Permanent Secretary was politically motivated or acted with an ulterior motive when she transferred the appellant. Consequently I shall deal with the matter on the basis that it was an ordinary transfer free from any of the innuendos alleged and suggested by the appellant.

I shall first deal with the appellant's application for review of the Permanent Secretary's decision to transfer him from Gobabis to Oshakati. In this regard it must be mentioned that the appellant did not institute the review in terms of the provisions of Rule 53 but that he did so by ordinary Notice of Motion. The result was that there existed no record of what transpired in regard to the transfer and the appellant also did not have the

opportunity, as provided for in Rule 53, to augment his grounds of review depending on what appeared from such record.

The grounds for review, set out in the founding affidavit of the appellant, were non-compliance with the *audi alteram partem* rule, that the Permanent Secretary did not act fairly and reasonably and that she did not apply her mind to the representations made to her by the appellant. There are also two further points which were not raised by the founding affidavit but which Mr. du Toit submitted were legal points which he was entitled to argue. These points were that there was no evidence that the appellant was appointed by the Minister, or the person delegated with such power, as a magistrate of Oshakati. Secondly it was argued that as a result of the finding that sec. 23(2) of the Public Service Act was not applicable to magistrates it follows that the Permanent Secretary, who relied on this section when she transferred the appellant, acted *ultra vires.*

Both Counsel were agreed that the *audi alteram partem* rule was applicable to a situation where a magistrate was transferred from one station to another. They however differed in their application of the rule. Mr. du Toit submitted that the rule should have applied before the decision to transfer the appellant was made. Referring to the letter of 16 February, Counsel submitted that the Permanent Secretary made a final decision without affording the appellant an opportunity to make representations. This is further supported by the fact that after representations were made the Permanent Secretary persevered in her earlier decision. She in any event did not apply her mind to the representations made.

Mr. Smuts submitted that the letter of the 16th February did not constitute a final decision to transfer the appellant. Mr. Smuts submitted that this was only a provisional decision

and when the appellant raised objections he was invited by the Permanent Secretary to make representations to her. The appellant accepted this invitation. Counsel further submitted that, on all the facts, it is clear that due consideration was given to these representations and the Permanent Secretary only came to a final decision when she informed the appellant by letter dated 2 April of her final decision. Counsel argued that the *audi* rule was a flexible one, which did not in all instances require to be complied with before a decision was made and he submitted that in this instance there was not a breach of this right of the appellant.

Non-compliance with the *audi* rule, where the rule applied, invariably leads to the setting aside of the administrative action. In the present instance it is common cause that no opportunity was given to the appellant to make any representations before he received the letter of 16th February, which informed him of his transfer. Thereafter he fully utilized the invitation by the Permanent Secretary and made extensive representations to her. The question is, whether in all the circumstances, the appellant proved that there was nevertheless not proper compliance with the rule.

In the case of Administrator Transvaal, and Others v Traub and Others, 1989 (4) SA 731 (AD) at 750 C-E, Corbett, CJ, stated the following in regard to the rule, namely-

> "Generally speaking, in my view, the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see *Blom's* case *supra* at 668C-E; *Omar's* case *supra* at 906F; *Momoniat v Minister of Law*

> *and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264(W) at 274 B-D).* Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken (see *Omar's* case *supra* at 906 F-H; *Chikane's* case *supra* at 379G and *Momoniat's* case *supra* at 274E-275C). This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or if for some other reason it is not feasible to give a hearing before the decision is taken."

The fact that in their application the principles of natural justice are flexible was recognized in the judgment of Tucker LJ in Russell v Duke of Norfolk, [1949] 1 All ER 109 at p 118 where the following was stated, namely:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth"

See further Turner v Jockey Club of South Africa, 1974 (3) SA 633 (AD) at p 646 and Baxter: Administrative Law, p541ff. In cases such as S v Shangase, 1962 (1) SA 543 (N), Sachs v Minister of Justice, 1934 AD 11 at 22 and Cape Town Municipality v Abdulla, 1974 (4) SA 428 (CPD), it was stated that where an official made an *ex parte* order which did not take immediate effect and left enough time to the affected party to make representations that would have constituted compliance with the rule provided that due

consideration was given to the representations. (See also the confirmation of this statement in the appeal of the Shangase-case, *supra*, reported in 1963 (1) SA 132 (AD) at p 148A-D). In each instance it of course depends on the circumstances of the particular case and the legislation in terms whereof the official takes his decision. In regard to the first Shangase-case, *supra*, Kotze, J, in Tole v Queenstown Municipality, 1968 (1) SA 486 (ECD) expressed doubt whether the statement by James J meant that a final decision arrived at in disregard of the maxim would be valid because an opportunity remained to make representations. (See p 489 B-E).

In the matter of Mamabolo v Rustenburg Regional Local Council, 2001 (1) SA 135 (SCA) the Court referred with approval to the statement by Baxter, *op. cit.*, at p 588, namely:

> "In certain instances a Court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken, where
>
> - there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing;
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> - the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and
>
> - the affected individual has not thereby suffered prejudice."

The letter of the 16th February was perhaps unhappily worded. It could have dispelled some of the appellant's uneasiness and suspicion if it was differently worded and if it had afforded him more time to prepare and organize his transfer and if he had been invited thereby to put his representations before the Permanent Secretary. There can be no doubt that the transfer of a magistrate, even if it is with promotion, has a bearing on the personal life of the magistrate and his family and may cause great inconvenience and disruption. These are factors which should not be overlooked and should be dealt with in a dignified and accommodating manner as was submitted with force by Mr. du Toit. In the present instance to give the appellant less than 14 days to report at his new station was just not good enough and if the matter had rested there it would have taken some effort to convince me that there was compliance with the rules of natural justice.

As it is, the matter did not rest there. The appellant immediately objected to his transfer and utilized the opportunity to make representations. This was followed by a letter from the Permanent Secretary informing the appellant that the decision to transfer him was not final and that he could make representations concerning his transfer. No time limit was prescribed and as this letter was dated the 29th February it must have been clear to the appellant that he was not required to report to his new station on 1st March. As previously stated the appellant fully utilized this opportunity by letter dated 12th March. On 2 April the appellant was informed of the Permanent Secretary's final decision and he was further informed by the Chief: Lower Courts, that his transfer was delayed until further notice.

In the light of the foregoing circumstances it seems to me first of all that the order or decision of the Permanent Secretary was not to take effect immediately and although there could be complaints about the short time before it would take effect, that was changed

completely when the appellant was invited to put further representations before the Permanent Secretary and he accepted this invitation and was given sufficient time to fully utilize it. It further seems that the Permanent Secretary did not decide the issue finally as soon as she was in possession of the representations made by the appellant. There was some time lapse before she informed the appellant of her decision which is indicative that it was not an overhasty decision.

The appellant also did not complain that when he was given the opportunity to make representations that he was not afforded sufficient time to do so. Mr. du Toit, however, submitted that once the Permanent Secretary had made up her mind she did not again consider the representations made by the appellant and only went through the motions.

In this regard the Permanent Secretary stated under oath that the letter of 16th February was not a final decision to transfer the appellant even though no mention was made in the letter that that was the case. The Permanent Secretary stated that it was the practice that if a magistrate was not satisfied with the transfer he or she could then make representations, which would then be considered. At first blush this seems strange. However it seems that in South Africa, where the issue of transfers is covered by regulation (regulation 22 in this instance), a transfer is first of all initiated by the Director-General of Justice and if a magistrate feels aggrieved then he or she may make representations to the Director-General and if still not satisfied the matter is then dealt with by the Commission.

There seems to me to be some justification in dealing with the issue in this way. Not every transfer is disputed and to call for representations to be made, before a transfer is made, may in many instances be unnecessary and may be a waste of time. I think what is

also of importance, in deciding the attitude of the Permanent Secretary, is the fact that she immediately conceded that the appellant had the right to make representations and he was given this opportunity. This, to some extent confirms the practices, in this regard, to which she has referred.

I think that in conjunction with the above issue one must also look at the Permanent Secretary's reasons for not being swayed by the representations made by the appellant not to be transferred in order to decide whether she in fact considered the representations and did so with an open mind. She also stated under oath that she in fact considered the representations with an open mind. The facts stated by the Permanent Secretary, and her say so under oath, again raised a genuine or *bona fide* dispute which was not referred to evidence, and in respect of which the principles, set out herein before, similarly should apply.

In her answering affidavit the Permanent Secretary dealt fully with the representations made by the appellant. In certain instances further investigations were made to establish the veracity of the allegations made by the appellant and supporting affidavits were filed where this was necessary. Some of the representations made by the appellant did not hold water and this was conceded by him in his replying affidavit. I do not think that it was the intention of the appellant to mislead the Permanent Secretary it is just that later investigation proved him wrong in part in regard to the assumptions made by him. It seems that the appellant assumed that there was no active Dutch Reformed Church in Oshakati and that he and his family would not be able to partake in religious services and be part of an active church and cultural community. These fears were dispelled and it was shown that there was not only an active Dutch Reformed Church but also another

Afrikaans Church, the Reformed Church, active in that community. Appellant's reference to a new war situation in the north, if that was meant to mean the Oshakati and surrounding areas, was without any substance and a clutching at straws.

The other objections raised by appellant such as the disruption in his family life, the schooling of his small daughter and the fact that his wife, who is gainfully employed, and whose income is needed for the support of the family, are all genuine and valid problems caused by the transfer. On the other hand whenever a family is uprooted by a transfer one must expect that there will be some inconvenience and disruption. In certain instances the exigencies of the work may require the taking up of the new post as soon as possible which may require a temporary separation of the family where there are school going children and the time is not convenient for them to make the change to a new school. There can be no doubt that these factors are important and need due consideration when a transfer is made. Unfortunately it is not always possible to avoid the situation.

The Permanent Secretary dealt with each of these issues in her answering affidavit. In regard to the studies of the appellant it was pointed out by her that there were others in the Ministry who are in the same position as the appellant and she denied that there were no books available at the magistrate's court at Oshakati. In regard to the schooling of the appellant's young daughter it was pointed out that she was still relatively young, she is 9 years old, and that the disruption brought about by a change of school at this stage may not be so great as it would have been had she been older and in a more advanced class. In the affidavit of Greeff it was stated that all the major retail chain stores have branches at Oshakati some of which are more modern and bigger than similar branches in Windhoek. According to the appellant his wife is working for Spar that has a branch at Oshakati. There is no indication that the wife of the appellant would not be able to secure a transfer

to Oshakati or would not be able to obtain work from one of the other chains. There is also no indication that she finds herself in a situation where, because of the position that she holds at her present work, she will not be able to take up a comparable position at one of the chains in Oshakati. I am mindful of the fact that there is no allegation that the appellant's wife has already obtained work but these are some of the possibilities, which were considered by the Permanent Secretary in coming to her decision, and in my opinion she was entitled to do so.

Bearing all this in mind I am satisfied that in the present instance the appellant did not prove on a balance of probabilities that the decision to transfer him was, in the first place, a final decision. I also found that after he raised certain objections he was given a full opportunity, which he utilized, to make representations to the Permanent Secretary. That there was proper consideration of his representations by the Permanent Secretary and that it was not shown that she did not approach the issue with an open mind or did not apply her mind thereto. Under the circumstances it was also not shown that the appellant was prejudiced by the fact that he was required to make representations only after he was informed of the provisional decision of the Permanent Secretary. I am therefore of the opinion that the appellant failed to prove that there was not proper compliance with the *audi alteram partem* rule. There can be no doubt that all the above issues, dealt with by the Permanent Secretary in her answering affidavit, again raised genuine disputes of fact, which the appellant was content to leave like that, and although he challenged these allegations and facts in his replying affidavit it is impossible for this Court, or for that matter, the Court *a quo*, to make any credibility findings on the affidavits alone.

The remaining common law grounds for review, set out in the founding affidavit of the appellant, are that the Permanent Secretary acted unreasonably and unfairly and that she did not apply her mind. I have already indicated that it has not been proved that the Permanent Secretary did not keep an open mind and did not apply her mind to the representations made by the appellant. As far as the unfair treatment by the Permanent Secretary is concerned I have found that she afforded the appellant an opportunity to make representations to her concerning his transfer and that it was not shown that she did not consider such representations with an open mind. In my opinion there was therefore no procedural unfairness. If the allegation in the founding affidavit of the appellant was meant to refer to substantive unfairness then there is in my opinion no factual support for such ground except the innuendos of an ulterior motive or political motive on the part of the Permanent Secretary that was disavowed and then again tentatively resurrected. All this was denied by the Permanent Secretary and as the matter was not referred to evidence the principles as set out in the Plascon-Evans-case, *supra*, and various other cases, must apply, with the result that I must assume that no such situation arose. In the case of Bel Porto School Governing Body and Others v Premier, Western Cape and Another, 2002 (3) SA 265 (CC), Chaskalson, CJ, pointed out that substantive fairness was never a common law ground for review. Something more was required. The unfairness has to be of such a degree that an inference can be drawn that the person who made the decision erred in a respect that will provide grounds for review. (See p. 291 I – 292 C.) It is not necessary to decide at this juncture whether our article 18 of the Constitution intended to include substantive fairness or not. I will assume for purposes of this case that that is so. As far as I know this has not yet come up for decision although some decisions may have referred loosely to the application of the words fairness or to act fairly.

The issue of unreasonableness was mainly argued on the basis of the various letters in which the appellant was informed of his transfer and the short time given him to comply with the order. It was also argued against the background of the facts put before the Court and the decision of the Permanent Secretary to persevere with the transfer of the appellant. In terms of our common law the ground for review was gross unreasonableness and review in terms thereof was only justified if from it could be inferred *mala fides* or ulterior motive, or a failure by the person vested with the discretion to apply his mind to the matter. (See The Administrator, Transvaal, and the Firs Investments (Pty) Ltd. v Johannesburg City Council, 1971 (1) SA 56 (AD) at p 80 and Northwest Townships Ltd. v The Administrator, Transvaal, 1975 (4) SA 1 (TPD) at p 8 C-F). Article 18 of our Constitution requires fair and reasonable acts by administrative bodies and officials and further requires them to comply with the common law and any relevant legislation. Whether the Constitution intended to create a new ground for review, not as stringent as that of the common law, was also not yet argued before this Court and in this case the parties accepted that that was so. For purposes of this case I shall also accept that it was enough for the appellant to prove that the Permanent Secretary acted unreasonably.

The word ‘reasonable’, according to The Concise Oxford Dictionary, 9th Ed., means: “having sound judgment; moderate; ready to listen to reason; not absurd; in accordance with reason.” Collectively one could say, in my opinion, that the decision of the person or body vested with the power, must be rationally justified. (See Mafongosi and Others v United Democratic Movement and Others, 2002 (5) SA 567 (Tk HC) at 575 A-E).

Taking into consideration the facts of this case I must agree with Mr. du Toit that the letter of the 16 February, seen objectively and in isolation, would have constituted

unreasonableness on the part of the Permanent Secretary. However, in my opinion, the letter cannot be judged in isolation without having regard to all the other facts which followed thereon. First of all I found that the letter conveyed the provisional decision of the Permanent Secretary. Immediately when the appellant objected he was informed that the decision was not final and he was invited to make representations. The effect hereof was that the time frame, within which the appellant was supposed to report to his new station, lapsed, and he was given opportunity to make representations. There is no complaint that the appellant was not given sufficient time to do so. I have also found that due consideration was in fact given to the representations of the appellant and he was informed that his transfer was delayed. I have also dealt with the motivation, set out in her answering affidavit, as to why the Permanent Secretary finally decided to transfer the appellant. She also explained why the matter had become one of urgency. The short notice, that is complained of, and whereby appellant was informed to report to Oshakati on the 18th June, must be seen against the background that he was already by letter dated 2nd April informed of the decision of the Permanent Secretary that his representations were not successful. At the same time he was also informed that as soon as suitable accommodation became available he would have to go to Oshakati. The appellant therefore had more than 2 months in which to prepare for his eventual transfer. In the result I am satisfied that it was not proved that the Permanent Secretary acted unreasonably and this ground of review must also be rejected.

In the Court *a quo*, as well as in this Court, Mr. du Toit submitted that the respondent did not prove that the appellant was appointed by the Minister as a magistrate for Oshakati. This argument was based on the provisions of sec. 9(1)(a) of the Magistrate's Court Act, Act No 32 of 1944 (as amended) that provides that the Minister may appoint a magistrate

for any regional division, district division, district or sub district. Counsel submitted that a magistrate who was transferred must again be specifically appointed in the new district. For purposes of this case I shall accept that that is the meaning of the section. Mr. Smuts submitted that it was not open to the appellant to take this point at this stage and he further submitted that this point was never taken in appellant's founding affidavit, and for that matter, not even in his replying affidavit, and the respondent therefore had had no opportunity to deal with it in the answering affidavit. Counsel submitted that an applicant for review was bound to the grounds set out in his founding affidavit. Mr. du Toit firstly countered that this was a legal point to which he was entitled to argue. I do not agree with the submissions made by Mr. du Toit. The point raised by him is not a purely legal point and it should therefore have been raised in the founding affidavit of the appellant. If it was so raised it would have been open to the respondent to put evidence before the Court that it in fact complied with it, or if it had not, to state that that was the case. (See Cape Town Municipality v Belletuin (Pty) Ltd., 1979 (2) SA 861 (AD) at 885 A – B and Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others, 1999 (2) SA 279 (TPD) at 324 –325). Secondly we were referred by Counsel for the appellant to certain passages in the affidavits from which the Court was asked to draw the conclusion that the point was in fact raised. No relief was claimed on such basis. In prayer 2.2 appellant asked for a declaratory order to the effect that the Permanent Secretary has no power to appoint, transfer or terminate the services of a magistrate. This was a general prayer based on Article 78 of the Constitution which declared that the Judiciary shall be independent and has nothing to do with whether the Minister appointed him to Oshakati or not. A close reading of the founding affidavit of the appellant also nowhere showed that the appellant intended to raise this issue. In fact in his replying affidavit the appellant referred thereto that he was appointed to the vacant

post in Oshakati but complained that certain procedures were not followed. (See pa. 6.11 of the Replying Affidavit.)

Counsel also raised some argument in regard to the request by the appellant for an interview with the respondent and which did not materialize. In my view it does not take the matter any further. Mr. Smuts pointed out that the Permanent Secretary was the person to whom the power to transfer was granted in terms of sec. 23(2)(a) of Act 13 of 1995, and that she was the person who had made the decision. Whether the Minister would or could do something for the appellant can only be speculated about and is, in my opinion, in any event irrelevant to these proceedings. The appellant also agreed that the Permanent Secretary was vested with the power to make transfers and that she was in fact the person to whom representations had to be made. (See pa. 33.2.2. of the Replying affidavit).

It was also submitted by Mr. du Toit that the Permanent Secretary's power to transfer, based on sec. 23 (2) of the Public Service Act, was *ultra vires* because that section is not applicable to magistrates and could therefore not empower the Permanent Secretary to effect the transfer. I find it convenient to deal with this ground of review when I deal with the appeal against the declaratory order.

Levy, AJ, refused to make a declaratory order whereby it was declared that the magistrates were independent. I agree with the learned Judge that the Constitution clearly provides that the Judiciary, which includes magistrates, shall be independent, and further provides ample protection to ensure such independence. (See Article 78). The provisions of this

article apply to all Courts and judicial officers and include magistrates' courts and magistrates. There is therefore no need for such an order.

In regard to the independence of the Courts, and bearing in mind that we have shared for a long time the same legislative enactment concerning the magistrate's courts (Act 32 of 1944) with South Africa, the general observations by Chaskalson, CJ, in the van Rooyen-case, *supra*, as to what is necessary for protection of the independence of the various Courts at different levels is, in my opinion, also applicable to Namibia. It was pointed out by the learned Judge that the South African Constitution dealt differently with the appointment of Judges, on the one hand, and other judicial officers, on the other hand. This applies also to Namibia. In terms of Article 82 of our Constitution Judges of the High and Supreme Courts are appointed by the President on the recommendation of the Judicial Service Commission whereas Lower Courts, which shall be presided over by magistrates "….(shall be) appointed in accordance with procedures prescribed by Act of Parliament". (Article 83 (2)).

The learned Chief Justice then continued in para. 22 of the above case as follows:

> "The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that '[t]he courts *are* independent'. Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent.

This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean that lower courts have, or are entitled to have their independence protected in the same way as the higher courts."

In paragraphs 24 and 25 it was pointed out –

"But magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions. These are objective controls that are relevant to the institutional independence of the lower courts.

[25] Another relevant factor is that district and regional magistrates' courts do not have jurisdiction to deal with administrative reviews or constitutional matters where the legislation or conduct of the government is disputed. These are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters, are not necessarily essential to protect the independence of courts that do not perform such functions."

And in paragraph 28 the learned Judge expressed himself as follows:

> "…The jurisdiction of the magistrates' courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power, their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction. The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission; their salaries, allowances and benefits may not be reduced; and the circumstances in which they may be removed from office are prescribed. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters. That said, magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher courts."

From the extracts out of the van Rooyen-case it seems clear that all courts are entitled, in terms of the particular Constitution, to the protection of their institutional independence but, depending on the nature of their jurisdiction and the hierarchical differences between

higher courts and lower courts, this protection need not be in the same form. Coming to the situation in Namibia it seems to me that we have the same hierarchical differences between our higher courts and lower courts which is dealt with much the same by our Constitution, as is the case in South Africa. It follows therefore that I am of the opinion that also in Namibia the protection of the institutional independence of the lower courts need not be in the same form as that necessary for the High and Supreme Courts and I say so for the reasons set out in the van Rooyen – case, *supra.*

As far as sec. 23 (2) is concerned all the parties were agreed that it should not apply to the magistracy. This section is part of the Public Service Act, Act 13 of 1995, which regulates the relationship between the Government and its corps of civil servants. Sec. 2 thereof provides:

> "There shall be a Public Service for the Republic of Namibia which shall be impartial and professional in its effective and efficient service to the Government in policy formulation and evaluation and in the prompt execution of Government policy and directives so as to serve the people of the Republic of Namibia and promote their welfare and lawful interests."

Section 23(2) empowers the Permanent Secretary to transfer 'staff members' and it was in terms of this section that the Permanent Secretary of Justice exercised her powers to transfer the appellant, this notwithstanding the clear provisions of the Constitution that magistrates are part of the Judiciary of Namibia whose independence was guaranteed by

the Constitution. This was clearly set out in Articles 12(1)(a), 78(1) and (2) and 83 of the Constitution. These Articles provide as follows:

> "12(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society."

> "78(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
>
> (a) a Supreme Court of Namibia;
>
> (b) a High Court of Namibia;
>
> (c) Lower Courts of Namibia.
>
> (2) The Courts shall be independent and subject only to this Constitution and the law."

"83(1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.

(2) Lower Courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament."

These provisions of the Constitution cannot be reconciled with sec. 2 of the Public Service Act which requires from staff members to execute Government policy and directives or to be described as staff members, which by itself, carries the clear implication of being subject to control in some or other form.

It seems to me that the answer as to why magistrates were dealt with in terms of the Public Service Act must be found in the previous history in regard to the appointment and transfer of magistrates and in Act 32 of 1944 itself. As magistrates and their courts were regulated by the same Act as magistrates in South Africa, what was said in this regard in connection with magistrates in South Africa also applied to Namibia and its prior history. In the van Rooyen-case, *supra*, at p 834, para 77, the learned Chief Justice pointed out that magistrates' courts previously formed part of the civil service. This situation continued after Act 32 of 1944 was promulgated except that the Minister of Justice was now responsible for the appointment of magistrates, instead of the Governor-General, as

previously provided for in Act 32 of 1917. In South Africa magistrates continued to be part of the civil service until the promulgation of Act 90 of 1993 when mechanisms were put in place for the appointment, discipline and removal of magistrates outside the Public Service Act.

Although the Constitution, as far as Namibia is concerned, envisaged an Act of the Namibian Parliament whereby the jurisdiction of the court and its procedures were to be established, and which would also regulate the appointment of magistrates and other judicial officers, this has not happened so far. In Namibia, Act 32 of 1944, with minor amendments, still regulates the procedures and jurisdiction of the court as well as the appointment of its officers. One of the amendments to Act 32 of 1944 was to replace sec 9 of the Act with a new section. This was effected by Act No. 1 of 1999 which became law on the 9th March 1999. The amendment empowers the Minister of Justice, or the person delegated by him, to appoint magistrates but subject to the provisions of the Public Service Act. It further amends the minimum qualifications for regional Court Magistrates and did away with the Appointments Advisory Board established for Regional Divisions. Furthermore subsec. (3) provides that whenever a magistrate or additional or assistant magistrate is unable to carry out his functions, the Minister, or his delegate, may appoint any other competent staff member in the Public Service or a competent retired staff member to act in the place of the absent or incapacitated magistrate. Section 10 of Act 32 of 1944, dealing with the qualifications for appointments of judicial officers, is also subject to the law governing the public service.

The amendments to sec. 9 of Act 32 of 1944 did not give effect to Article 83(1) of the Constitution which provides that lower courts shall be established by an Act of Parliament

and should be independent as further provided for in Article 78(2), read with Article 12(1)(a) of the Constitution. In fact, the amendment, to the contrary, further diminished the independence of, at least the Regional Divisions, by doing away with the Appointments Advisory Board established therefor.

Notwithstanding the provisions of the Constitution the situation in Namibia, so it seems to me, is that in terms of the provisions of Act 32 of 1944, magistrates are still regarded as part of the civil service and the amendment to sec 9 of the Act did not alter the position. When the Permanent Secretary said that she transferred the appellant in terms of the provisions of sec. 23(2) of the Public Service Act she acted in terms of existing legislation. It further seems to me that the mischief was not caused by sec 23(2) but in fact by the provisions of Act 32 of 1944, as amended by Act No. 1 of 1999, and that the appellant should also have attacked those provisions rather than to limit himself to the provisions of the Public Service Act. It seems to me futile to leave intact the provisions of Act 32 of 1944 which are in conflict with the Constitution. To do so would be to give legal impetus to provisions which are not constitutional. In my opinion it is necessary to finally cut the string whereby magistrates are regarded as civil servants, and that will only be possible once new legislation completely remove them from the provisions of the Public Service Act.

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by

the public as independent and as a separate arm of Government. I therefore agree with the order of the Court *a quo* that sec. 23 (2) did not apply to magistrates.

By asking for a declaratory order whereby it was declared that sec. 23(2) of that Act should not apply to magistrates, the mischief created by Act 32 of 1944 was not addressed, and continue to be a threat to the independence of those judicial officers. What was achieved by the appellant in a roundabout way could more properly have been achieved by the direct and certain route of attacking the provisions of Act 32 of 1944. Bearing in mind that we were informed that a new Magistrate's Court Act is being drafted there is in my opinion no prejudice to ensure that those provisions, which militate against the Constitution, namely section 9 (as amended) and section 10 of Act 32 of 1944 are declared unconstitutional.

The effect of all this is that the Permanent Secretary could, in my opinion, not act and transfer magistrates in terms of the provisions of sec. 23(2) of the Public Service Act. Whatever the position was before Independence, once the new Constitution guaranteed the independence of the judiciary, which included the magistrates, they were no longer 'staff members' who could be dealt with in terms of that Act. That is, however, not the end of the matter. Mr. Smuts submitted that if there was some other authority in existence, in terms of which the action could be taken, then the fact that the Permanent Secretary relied on some other authority which subsequently proved to be incorrect, the action would still be valid. Counsel therefore supported the finding by the Court *a quo* that magistrates were liable to be transferred by virtue of their contracts, express or implied, and by virtue of the law and practice pursuant to Act 32 of 1944 as read with Articles 138(2)(a) and l40(1) of the Constitution.

In dealing with the situation where administrative action was taken, in terms of some statutory power, and notice thereof was given to affected parties, Baxter, Administrative Law, p 366, states as follows:

> " The notice must be given in a manner by which it is sure to come to his attention. It need not state the authority for the action, although this is usually done in practice and the provision of such information is a principle of sound administration. If the authority is stated incorrectly, the action is not thereby invalidated so long as authority for the action *does* exist and the conditions for its exercise have been observed."

See further in this regard Latib v Administrator, Transvaal, 1969 (3) SA 186 (T) and R v Standard Tea & Coffee Co (Pty) Ltd, 1951 (1) SA 614 (T).

In my opinion the above principle does not apply to the present instance. From a reading of the cases it seems to me that this principle applies in those instances where a functionary exercises a power in terms of a statutory enactment and, in its notice of the exercise of that power, incorrectly refers to the wrong section or relied on a section other than the one empowering him or her. See in this regard also Partnership in Mining Bpk v Federale Mynbou Bpk en Andere, 1984 (1) SA 175 (T) at 182C-E and S v van Zyl, 1991 (1) SA 804 at 817 (AA). The present instance is different. In this matter the Permanent Secretary relied on a statutory enactment, which was found to be unconstitutional, in its

application to magistrates, and there was no other statutory power to fall back on. Furthermore where it is clear that a specific election was made to rely on a particular provision, which is later found to be inapplicable, or incorrect, it is not open to the functionary to rely on some other power. See in this regard Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk, 1977 (4) SA 829(A) and Minister of Education v Harris, 2001 (4) SA 1297 (CC). The Permanent Secretary elected to effect the transfer of the appellant in terms of sec. 23(2)(a). Under the circumstances it is not open to her to invoke now some other power which was, in any event, only obliquely referred to, if at all.

The Court *a quo* suspended the operation of its order whereby it was declared that sec. 23(2)(a) was not applicable to magistrates. The declarator itself was accepted by all the parties and the appellant's appeal lies against the suspension of the order to take effect only after a specific time. I have set out herein before the history whereby magistrates were regarded as subject to the provisions of the Public Service Act. This was also so understood by the appellant because in paragraph 8.14 of his replying affidavit he agreed that the Permanent Secretary was the final decision maker in regard to transfers and that such power vested in her in terms of Sec. 23(2)(a) of the Public Service Act. Although, by his admission, the appellant accepted the situation, it is clear that be, all along, regarded the exercise of the power, to transfer magistrates in terms of sec. 23(2)(a) of the Public Service Act, as in conflict with the provisions of the Constitution. Hence the application for the declaratory order.

In regard to statutory enactments, or actions in connection therewith, declared by a Court to be unconstitutional, Article 25 of the Constitution distinguishes between two situations.

Firstly in regard to legislation by the Namibian Parliament, which abolishes or abridges any of the fundamental rights or freedoms set out in Chapter 3, that legislation or action shall be invalid. The Court is however given the discretion, in an appropriate case, to afford Parliament the opportunity to correct any defect in such law or action. Where the Court grants Parliament such opportunity the impugned law or action shall be deemed to be valid until such time that it is corrected or on the expiry of the time limit set by the Court, whichever is the shorter. (Article 25 (1)(a)). What is significant is that the Article is not limited to legislation but also includes action by agencies of the Government which abolishes or abridges any of the rights set out in this Chapter.

Secondly in terms of Article 25(1)(b) all law in force immediately before Independence shall remain in force until amended, repealed or declared unconstitutional. In the latter instance the Court is given a similar discretion as set out under sub-article (1)(a). Sec. 9 of Act 32 of 1944 (as amended) is legislation by the Namibian Parliament. It was found that this section (as amended) was unconstitutional as it abolishes or abridges the guarantee as set out in Article 78(2) of the Constitution read with Article 12(1)(a). However this is not the end of the matter as Article 23(1)(a) and (b) of the Constitution provide that the Court may, in its discretion, suspend its order of invalidity. The present case is, in my opinion, an appropriate instance where the Court should exercise its discretion in favour of suspending the operation of its order. In my opinion the same arguments apply to sec 10 of Act 32 of 1944. As this is part of pre-independence legislation the suspension of the Court’s order will be in terms of Article 25(1)(b) read with Article 25(1)(a).

Regarding the declaratory order that sec. 23(2)(a) of the Public Service Act is not applicable to magistrates, I have already pointed out that all the parties agreed that this

order was correctly made. There was some argument on whether the order should have been suspended. I must point out that the section itself, in its application to 'staff members' of the Ministry of Justice, is not unconstitutional. What was found to be unconstitutional was the action undertaken in terms thereof and its application to magistrates by the Permanent Secretary. I have no doubt that the action undertaken in terms thereof runs counter to the provisions of Article 78(2) read with Article 12(1)(a) of the Constitution for the same reasons as set out in regard to ss. 9 and 10 of Act 32 of 1944. I am further of the opinion that this is also an appropriate instance where the Court should use its powers in terms of Article 25 and suspend the effect of the order. Not doing so may create great uncertainty which will be detrimental to the administration of Justice.

Although this leaves, to a great extent, in tact the order made in this regard by the Court *a quo*, the finding of this Court that the Permanent Secretary acted *ultra vires* in applying sec. 23(2)(a) of the Public Service Act, when she transferred the appellant, must have an effect on the orders of cost made in the Court *a quo* and on appeal in this Court. The fact is that this Court has vindicated the stance by the appellant that sec. 23(2)(a) was not applicable to magistrates and that she therefore did not have the power to transfer him in terms thereof. In effect this ground of review was successful but the practical implementation thereof is suspended in order to afford Parliament an opportunity to correct the situation. In my opinion the appellant was substantially successful in his appeal and should therefore be awarded the costs of appeal as well as the costs of the application in the Court *a quo.*

Mr. Smuts requested us, in the event that we agreed with the suspension of the order, to extend the operation thereof with a further year. In my opinion a further extension of the

suspension until 30 June 2003 is justifiable. This also applies to the order of the Court declaring sections 9 and 10 of Act 32 of 1944 unconstitutional.

The appellant also appealed against certain orders made by the Court a *quo* whereby portions of the replying affidavit of the appellant were struck out. There is also an appeal against the order of costs made by the Court in regard to the application for an interim order to prevent the respondent from transferring the appellant to Oshakati *pendente lite*, and which was subsequently abandoned.

The respondent's application to strike out was divided under three headings. The first part dealt with inadmissible hearsay and/or new matter in reply. In my opinion the Court *a quo* correctly found that the matter set out in Paragraph 1(a) to (f) constitute inadmissible hearsay. Although in certain instances where urgency or other special circumstances exist, the Court would allow hearsay in my opinion it cannot be said that at the time when the replying affidavit was drafted that there was either urgency or special circumstances which would justify the acceptance of hearsay in these proceedings. (See Swissborough Diamond Mines and Others v Government of the Republic of South Africa and Others, 1999 (2) SA 279 (TPD) at 336 G-J).

Under the second heading respondent applied for the striking out of new matter in replying affidavit of the appellant. As was pointed out in the Swissborough-case, *supra,* p 323 to 325, the purpose of affidavits in motion proceedings is not only to place evidence before the Courts but also to define the issues between the parties. An applicant must therefore make out his case in his founding affidavit. It is only in exceptional cases where a Court can use its discretion to allow a new cause of action to be raised in replying affidavits.

(See Triomf Kunsmis (Edms) Bpk. v AE & CI Bpk en Andere, 1984 (2) SA 261 (WLD) at 269 B-E) Although the principle is clear it is not always easy to apply. In considering the various paragraphs I came to the conclusion that paragraphs 2 (b), (c), (d) and (g) do not raise new matters and are only explanations given by the appellant in answer to allegations made by the Permanent Secretary in her answering affidavit. Paragraphs 2 (h), (i), (j), (k), (m) (n) and (p), raise in my opinion new grounds, namely that the Permanent Secretary did not follow the correct and usual practice in regard to his transfer. This was raised for the first time in the appellant's replying affidavit. It should in my opinion have been raised in his founding affidavit so that the Permanent Secretary could have an opportunity to reply thereto. These paragraphs were therefore correctly struck from the replying affidavit.

The next heading came under scandalous and vexatious matter, which was prejudicial to the respondent. In Vaatz v Law Society of Namibia, 1991 (3) SA 563 (Nm) at 566D (1990 NR 332 at 334J – 335B), Levy, J, stated as follows in this regard:

> "In Rule 6 (15) the meaning of these terms can be briefly stated as follows:
>
> > Scandalous matter – allegations which may or may not be relevant, but which are so worded as to be abusive or defamatory.
> >
> > Vexatious matter – allegations which may or may not be relevant, but are so worded as to convey an intention to harass or annoy."

Although the founding affidavit contained some undertones that the Permanent Secretary may have acted for political reasons when she transferred the appellant this was later on disavowed. However in his replying affidavit the appellant now wanted to draw the inference that the Permanent Secretary was politically motivated when she transferred him to Oshakati. In certain respects these are new grounds which, if established, would lead to the setting aside of the transfer. However the grounds on which the appellant wishes to draw the inference do not in my opinion support such a finding and are, to say the least, flimsy. The allegations are scandalous and vexatious and prejudicial to the respondent's case and were therefore correctly struck out. Although the appeal succeeds to a certain extend the success is marginal and in my opinion it would be fair not to make any order of costs on appeal.

Lastly there is the interim order which was not moved in the end. The Court *a quo* ordered the appellant to pay the costs of the application. In my opinion there is no reason to interfere with the Court's exercise of its discretion and this ground of appeal is dismissed with costs.

Because of my findings it would be necessary to re-draft and even re-arrange the orders where necessary. Some of the orders also fall away in the light of these findings. In the result the following orders are made:

<u>THE APPEAL AGAINST THE ORDERS MADE IN REGARD TO THE STRIKING OUT:</u>

1. The appeal in regard to orders A.1. and A.3. is dismissed.

2. As far as order A.2. is concerned the appeal succeeds in regard to paragraphs 2 (b), (c), (d) and (g), and the striking out of these paragraphs is set aside.

3. Appellant shall pay the costs of appeal in regard to the application to strike out. For the benefit of the taxing master the argument in respect of the appeal took about ten (10) minutes.

THE APPEAL AGAINST THE MAIN APPLICATION:

1. It is declared that:

(a) Section 23(2)(a) of Act 13 of 1995 is not applicable to magistrates and that consequently the order of the Permanent Secretary to transfer the appellant, was *ultra vires*. This order and the transfer which took place in effect, will however remain in force and effective until 30th June 2003, provided that appropriate legislation is passed and action taken in accordance with such legislation to remedy the defects in the existing transfer, on or before the 30th June 2003.

(b) Section 9 (as amended) and section 10 of the Magistrate's Court Act, Act 32 of 1944, is declared unconstitutional. These provisions will however remain in force until 30th June 2003, on condition that legislation correcting the defects is properly passed and gazetted on or before 30th June 2003.

(c) The transfer of magistrates does not *per se* constitute a threat to their independence.

(d) Until such time on or before 30th June 2003, when the appropriate contemplated legislation is passed to authorize the appointment of magistrates, the

Minister of Justice or such person duly authorized by such Minister may continue to appoint magistrates in terms of s. 9 of Act 32 of 1944, as amended by Act 1 of 1999.

2. The respondent is ordered to pay the costs of the main application in the Court *a quo* as well as the costs of the appeal in regard to the main application on the basis of costs for instructing legal practitioners excluding Counsel.

3. The appeal against the interim interdict set out in paragraph 3 of the Notice of Motion is dismissed with costs. For purposes of taxation it is noted that argument in this regard also did not take up more than ten (10) minutes.

4. Wherever costs are ordered in favour of the respondent those costs shall be taxed on the basis of two instructed Counsel.

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STRYDOM, C.J.

I agree.

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O’LINN, A.J.A.

I agree.

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CHOMBA, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT:	MR.. E. DU TOIT, S.C.
Assisted by	MR. Z. GROBLER
INSTRUCTED BY	A. LOUW & CO.
COUNSEL ON BEHALF OF THE RESPONDENT:	MR. D.F. SMUTS
Assisted by	MS. K. VAN NIEKERK
INSTRUCTED BY	THE GOVERNMENT ATTORNEY