



**REPORTABLE**

CASE NO: SA 63/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF SAFETY AND SECURITY**

**First Appellant**

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE**

**Second Appellant**

**COMMISSIONER-GENERAL FOR THE**

**KUNENE REGION**

**Third Appellant**

and

**PHILLIPUS LONGER**

**Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and ANGULA AJA

**Heard:** 2 November 2020

**Delivered:** 12 November 2020

**Summary:** This appeal stems from a review application of a decision arising from the termination of service of a former police sergeant, (the respondent), in September 1993. Briefly, the facts are that, on 17 August 1993 the respondent was convicted on five counts of fraud and sentenced to nine months imprisonment suspended for three years by the magistrate's court in Arandis. On 17 September 1994, the respondent belatedly lodged an appeal to the Minister against his 'dismissal' purportedly under s 8 of the Police Act 19 of 1990 (the Act) read with the Regulations for the South African Police (GN R203, RG 299, 14 February

1964). Under these regulations, which applied at the time, an appeal against discharge was required to be lodged within 14 days of the discharge. Respondent's case is in essence that he was constructively dismissed by reason of being told to resign.

For several years, a decision by the first appellant on the respondent's internal appeal was not forthcoming. On 5 March 2018, the Minister responded, after an application was brought to compel an answer. In that decision, the Minister stated that, after considering the respondent's file, it came to light that the respondent had in fact resigned from the Police Force through his own voluntary action and had not been discharged. It was further stated that his services thus came to an end by way of voluntary action and not by virtue of any action under s 8 of the Act by or on behalf of the Inspector-General.

The High Court reviewed and set aside the Minister's decision and found that the respondent was unfairly and unlawfully dismissed and ordered that he be paid his salary and benefits up to the date upon which he would otherwise have retired.

The fundamental question lying at the heart of this appeal is whether the respondent established that he had been discharged or dismissed and had not resigned voluntarily.

*Held that*, a member of the Police Force claiming redress when their services are terminated is confined to the remedies contained in the Act and to the right to reasonable administrative action protected by Art 18 of the Constitution.

*Held that*, in an employment context where an employee chooses to resign rather than undergo disciplinary proceedings, this would not of its own amount to a constructive dismissal.

*Held that*, the respondent may have felt under pressure when resigning because of the alternative prospect of a discharge, but this does not amount to his resignation transforming itself into a dismissal as repeatedly asserted.

*It is thus held that*, the respondent did not establish that his resignation amounted to a dismissal or discharge.

The appeal is upheld.

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### APPEAL JUDGMENT

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SMUTS JA (DAMASEB DCJ and ANGULA AJA concurring):

[1] This appeal concerns the review of a decision arising from the termination of services of the respondent, a former police sergeant, some 27 years ago. The High Court found that he was unfairly and unlawfully dismissed and ordered that the respondent be paid his salary and benefits up to the date upon which he would otherwise have retired. This is an appeal against those orders.

[2] The pertinent facts in these unusually protracted proceedings in essence occurred in September 1993.

[3] The respondent joined the South West African Police in 1982 and continued service with its constitutional successor after independence (the Force). In 1993, he served as a police sergeant at the Khorixas police station. On 17 August 1993, he was convicted and sentenced to a suspended sentence of nine months imprisonment on five counts of fraud in the Magistrate's Court, Arandis.

[4] The crux of the respondent's case is set out in his founding affidavit in these terms:

'On or about 13 September 1993 Inspector Ochurup, the station commander at Khorixas, summoned me to the police station and told me that I had to resign as a consequence of this conviction and if not I will be dismissed summarily for fraud. He told me it was instructions from Police head office. I felt I had no choice in the matter and under protest signed an application for discharge from the Police (Pol 181). I annex a copy marked "3". . . .'

[5] The annexure in question is a form with the heading 'Application for transfer/discharge by purchase/notice.'

[6] On the form, the respondent placed a cross next to the words 'I hereby apply to purchase my discharge' and filled in the date for his discharge as '93/10/15'.

[7] The respondent also completed the next item on the form by inserting that same date at the end of the text as follows:

'I hereby tender my resignation in terms of Reg. 15(1)CC/Sect. 3(2) of Act 7 of 1958. My last working day will be 93.10.15.'

[8] In the space provided for reason for application, the respondent in his own handwriting inserted 'Forced to resign from Namibian Police'. The form is dated 13 September 1993.

[9] The form would appear to be for 'both discharge by purchase' and for resignations. Discharge by purchase occurred under regulation 15(1)(e) of the regulations promulgated under the previously applicable Police Act 7 of 1958 and contemplates a voluntary resignation coupled with the payment of a consideration.<sup>1</sup> It provided that Force members were not entitled to resign within

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<sup>1</sup> Regulations for the South African Police, GN R203, RG 299 14 February 1964.

their first three years of service, but if they sought to do so, they could with the approval of the Commissioner purchase their discharge from the Force by payment of prescribed amounts depending on which year of service the member was serving at the time of the request. That would account for that item on the form which did not apply to the respondent as he did not need to purchase his discharge when voluntarily resigning. Those regulations were not repealed when the Act came into operation by virtue of s 45(2) of the Act which provided for their continuation. The South African regulations were however repealed in 1994 in Government Notice 167 of 1994.<sup>2</sup> This would explain the use of that form.

[10] It would appear that the following was inserted (by someone else) in brackets after the respondent's stated reason:

'Section 8(2) of Police Act 19 of 1990 applicable.'

[11] The respondent states that a former colleague subsequently delivered a notice on police form 168 signed by Deputy-Commissioner A.J. Louw, then officer commanding of the Otjizondjupa region, certifying that he had been in service from 19 August 1982 to 11 October 1993. On the next line, it is stated that his rank was sergeant at the time of his discharge and under 'remarks' in the next paragraph, it is stated:

'Discharge in terms of section 8(2) of Police Act of 1990.'

[12] Section 8 of the Police Act 19 of 1990 (the Act) provided:<sup>3</sup>

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<sup>2</sup> General Regulation, GN 167, GG 919, 16 September 1994.

<sup>3</sup> Section 8 has since been amended.

'(1) Any non-officer may be discharged from the Force or reduced in rank by the Inspector-General if, after enquiry by a board of enquiry in the prescribed manner as to his or her fitness to remain in the Force or to retain his other rank, the Inspector-General is of the opinion that he or she is incapable of performing his or her duties efficiently: Provided that if a period of 12 months from the date of appointment of such non-officer has not lapsed, it shall not be necessary to hold an enquiry by a board of enquiry.

(2) Notwithstanding the provisions of subsection (1), the Inspector-General may discharge any such non-officer from the Force in the absence of any such enquiry if the non-officer has been sentenced to imprisonment without the option of a fine.

(3) Any non-officer who has been discharged from the Force in terms of subsection (1) or (2), or who has been reduced in rank in terms of subsection (1), may in the prescribed manner appeal to the Minister against such discharge or reduction, as the case may be, who may thereupon set aside or confirm his or her discharge or reduction in rank, as the case may be.'

[13] In his founding affidavit, the respondent further amplified that he 'was told to resign because of this (fraud) conviction.' He further stated: 'I resigned under duress to avoid a discharge. There was no enquiry by a board of enquiry. Also, I was never given a hearing before this "discharge" occurred nor was I informed of my rights.'

[14] He further stated that he subsequently (in 1993) approached Inspector Ochurup and Warrant Officer Martinus Wessels about the discharge and was told by the latter that the Act permitted it and that nothing could be done about it.

[15] Some three years after his fraud conviction, the respondent applied for condonation for the late filing of an appeal against that conviction which was refused. An appeal to the Supreme Court against that refusal succeeded and the

matter was remitted to the High Court, differently constituted. A majority upheld the conviction and the respondent again appealed to the Supreme Court and in 2001 succeeded in having his conviction set aside by the Supreme Court.

[16] In the meantime, the respondent on 17 September 1994 sought to appeal against his 'dismissal' by lodging an appeal to the Minister purportedly under s 8 of the Act. The explanation given for the considerable delay in lodging that appeal was confined to stating that he 'started reading the Act in 1994'. No further explanation was provided. Under the 1964 regulations applicable in 1993, an appeal against a discharge was required to be lodged within 14 days of the discharge.<sup>4</sup> A similar timeline applies in the currently applicable 1994 regulations promulgated in 16 September 1994.<sup>5</sup>

[17] The appeal is based upon being 'wrongly and constructively dismissed.' He sought a redress of wrongs and asked that he be re-employed. The respondent further stated:

'I was forced to resign for the suspended sentence of 9 months and after that dismissed without a hearing from the police Force . . . .'

Under the then applicable 1964 regulations, there was provision for redress of wrongs for members who felt aggrieved by any act on the part of another member.<sup>6</sup> This provision is in similar terms to Regulation 31 of the current regulations, cited by the appellants.

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<sup>4</sup> Regulation 65.

<sup>5</sup> Regulation 13(1).

<sup>6</sup> Regulation 13.

[18] A decision on that internal (and out of time) appeal was inexplicably not forthcoming for several years. Eventually the Minister responded to it on 5 March 2018 and then only after an application was brought to compel an answer. In that decision, the Minister stated that, after considering the respondent's file, it came to light that the respondent had in fact resigned from the Force through his own voluntary action and had not been discharged. It was further stated that his services thus came to an end by way of voluntary action and not by virtue of any action under s 8 by or on behalf of the Inspector-General (I-G). The appeal thus failed.

[19] The respondent thereafter brought an application to the court below to set aside that decision on review and also sought a further order seeking his reinstatement to his position or a commensurate one within the Force.

[20] After service of the application, the review record was eventually made available – after yet further delays. It comprised his personal file. Despite his statement in his founding affidavit under oath that he had a clean record, his personal file revealed that he had a conviction for driving under the influence of excessive alcohol. It also referred to a range of charges brought against him under two case dockets in August 1993, the month preceding his notice of resignation. In his supplementary affidavit, the respondent stated that he was acquitted on the charges brought against him under the one docket and acquitted on all but one of the charges in the other matter. On advice of his lawyers, he pleaded guilty to and was convicted of assault with intent to do grievous bodily harm and fined N\$300. The respondent says that these cases were finalised in 1993 without specifying a date and especially whether before or after his 'resignation'. He further says that



both sets of charges were brought against him by the late Warrant Officer Pretorius. The respondent does however confirm that he was charged for these offences. As the dockets would appear to have been opened in August 1993, these charges were presumably pending when he submitted the resignation/discharge form, as was stated as a fact in the answering affidavit and not put in issue by the respondent in reply.

[21] The crux of the opposition to the review application is foreshadowed in the Minister's letter of 5 March 2018 to the effect that the respondent resigned voluntarily and a denial that he was forced to resign. The I-G in his answering affidavit points out that the respondent did not lay any complaint against anyone as a consequence of a forced resignation or institute grievance proceedings under regulations governing the Force.

[22] It was also pointed out that the respondent relied upon statements to him by police officers who had since died or retired or could not be traced. The I-G sought to strike out those allegations on the grounds that they contained inadmissible hearsay evidence.

[23] The I-G further enumerated the charges laid against the respondent by Warrant Officer Pretorius in August 1993. They included theft of oil from a police store, robbery, assault with the intent to do bodily harm, pointing a firearm, providing liquor to a prisoner, unlawful arrest and malicious damage to property. The I-G pertinently states that these charges were pending when the respondent resigned. As pointed out, this statement is not contested in reply.

[24] The I-G also points out that the respondent only lodged his appeal to the High Court against his fraud conviction on 12 August 1996 – some three years afterwards.

[25] The Minister also filed an affidavit and referred to the appeal lodged by the respondent. He reiterated his finding that the respondent had resigned voluntarily and denied the assertion of a forced resignation and denied he was summarily dismissed and denied the review grounds levelled against his decision making. He pointed out that no board of enquiry had been convened to discipline those who had allegedly forced him to resign.

#### The approach of the High Court

[26] The High Court rightly rebuked the Force for the inordinate delay in dealing with the respondent's belated internal appeal. The delay of some 25 years was correctly characterised as egregious. The sentiments expressed by the High Court in that regard are emphatically endorsed. All persons are entitled to have their grievances dealt with within a reasonable time. The failure to do so serves to undermine the values at the heart of this constitutional democracy and is to be deprecated in the strongest terms. Delays of that nature render rights protected under the Constitution illusory.

[27] The High Court also correctly dismissed the appellants' application to strike out statements from those police officers in authority over him as inadmissible hearsay. The police officers were referred to by name and their position, and at the time were members in the Force, acting in their capacities as such.

[28] Statements to the respondent by police officers acting in the course and scope of their duties would amount to statements of a party to proceedings and would not ordinarily constitute inadmissible hearsay. It was open to the appellants to obtain affidavits to deal with them, except in the case of Warrant Officer Pretorius who has since died. No explanation is given why Inspector Ochurup could not have deposed to an affidavit, save for the general statement that officers referred to in the founding affidavit had resigned or were not traceable without further specificity provided.

[29] The High Court criticised the failure of the Minister to file an affidavit to explain his decision making. The record of proceedings does however contain an affidavit from the Minister in the terms already set out. The finding that the decision remained unexplained is unfortunately incorrect and the reference to an abdication on the part of the Minister in this regard is unjustified. What was not however explained by the Minister was the inordinate delay in dealing with the matter. It was incumbent upon him to do so.

[30] Turning to the question as to whether the respondent was dismissed or resigned, the High Court found that the probabilities highly favoured the respondent's version that he was forced to resign. The court found that the Minister's decision that the respondent had tendered his resignation meant that the Minister did not make a decision based on correct facts and that the respondent had in fact been discharged in terms of s 8(2).

[31] The High Court proceeded to set aside the Minister's decision on the internal appeal and found that there was no evidence that the respondent was discharged properly and by the I-G at the time.

[32] The court below further found that the respondent should be reinstated and be paid what he would have been entitled to until retirement age and gave an order to that effect.

[33] The appellants appeal against those orders and the findings upon which they are based.

#### Submissions on appeal

[34] The primary focus of the appellants' appeal is the finding of the court below that the respondent was discharged or dismissed and had not resigned and that the decision to discharge was unconstitutional and unlawful. Mr Ncube, who appeared for the appellants, argued that the respondent had not discharged the *onus* to establish that he had been forced to resign in any unlawful sense. He contended that this was the crux of the appeal.

[35] Mr Ncube further submitted that it was incumbent on the respondent to exhaust his internal remedy of a grievance procedure if he contended that pressure was placed upon him to resign and that there was no evidence of that. Mr Ncube relied upon regulation 31 in support of this contention, despite the fact that that regulation was only enacted a year after his grievance – on 17 September 1994. Regulation 13(1) of the previously applicable regulations which was to similar effect applied at the time.

[36] The thrust of the argument of Mr Coleman, who appeared for the respondent, was that the respondent 'was not given a hearing before he was dismissed in 1993'. He repeatedly referred to the respondents 'dismissal' and the failure to accord him a fair hearing before that 'dismissal' which is said to violate the principles of natural justice. He argued that it was unlawful for the respondent to be told to resign or face a discharge. He amplified that this was unlawful because the respondent had no choice in the circumstances.

[37] Mr Coleman also attacked the first appellant's dismissal of the respondent's appeal, submitting that he was not afforded a hearing as to whether his resignation was voluntary or not and also argued that the first appellant based his decision on wrong facts and supported the judgment of the court *a quo*.

[38] As for the relief granted, Mr Coleman argued that the employer/employee context of the decision making determined that an unlawful dismissal should result in reinstatement and where this would be impractical, an order as granted by the court below of the equivalent of salary earned since the dismissal was apposite and supported. He accordingly supported the order granted by the court below.

Did the respondent establish he was discharged or 'dismissed'?

[39] The fundamental question lying at the heart of this appeal is whether the respondent established that he had been unlawfully discharged or dismissed and had not resigned voluntarily. The respondent's approach is essentially that he was constructively dismissed by reason of being told that he should resign by Inspector Ochurup, failing which he would face disciplinary action and be dismissed from the

Force, as was correctly posited by the court *a quo*. The court *a quo* referred to the respondent's statement that the Inspector had said this was on instruction from the head office and that the respondent said he had no choice and signed the application for his resignation/discharge under protest. Does this amount to an unlawful discharge or 'unlawful dismissal' as repeatedly asserted on behalf of the respondent?

[40] In addressing this question, the starting point to note is that the unfair dismissal regime brought about by the Labour Act, 6 of 1992 and continued by its successor, Act 11 of 2007, does not apply to the Force.<sup>7</sup>

[41] A member of the Force claiming redress when services are terminated is confined to the remedies contained in the Act and to the right to fair and reasonable administrative action enshrined by Art 18 of the Constitution. That is the statutory scheme within which this matter is to be considered and not the unfair dismissal regime brought about by the Labour Act, 1992 and continued in its successor legislation. Employer/employee principles would not directly apply to the present context, given the statutory nature of the respondent's erstwhile service in the Force governed by the Act, although fair and reasonable administrative action required by Art 18 would certainly apply.

[42] The respondent clearly had the *onus* to establish that he was discharged unlawfully as was accepted by Mr Coleman. This would also in any event apply in a claim of constructive dismissal under labour legislation in cases of employer induced or instigated terminations of employment.<sup>8</sup> In that setting, an employee

<sup>7</sup> By virtue of s 2(2) of Act 6 of 1992 and s 2(2) of Act 11 of 2007.

<sup>8</sup> *Kavekatora v TransNamib Holdings Ltd & another* 2012 (2) NR 443 (LC) para 27 in following *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) paras 8-13.

must prove that the resignation was not voluntary and that it was not intended to terminate the employment relationship. Once that is established, the inquiry turns to whether the employer conducted itself in a manner calculated to destroy or seriously damage the employment relationship in the sense of being culpably responsible for making an employee's position intolerable.<sup>9</sup>

[43] Termination of services occurs under the Act by way of resignation, discharge on account of ill-health under s 7, discharge under s 8, discharge under s 9 on account of long absence without leave and as a result of disciplinary proceedings under Chapter III of the Act.

[44] In this matter, the respondent was told by his superior, Inspector Ochurup, that he should resign as a consequence of his conviction on five counts of fraud the previous month or face dismissal (following an enquiry under s 8). The respondent then on 15 September 1993 completed a form applying to resign with effect from 15 October 1993. The form is styled an application for transfer/discharge by purchase/notice. The Act does not make provision for discharge by purchase – which pertained under the South African Police Act, 7 of 1958 which applied prior to the Act. That form of discharge is essentially a voluntary resignation coupled with payment of a consideration application within the first three years of service – for a member to buy him- or herself out. The respondent filled in the portion applying for a discharge by purchase and that portion of the form relating to resignation and stated in the segment of the form referring to the reason for the application: 'forced to resign from Namibian Police.' He was thus signing a form to resign his services.

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<sup>9</sup> *Murray v Minister of Defence* paras 12-13.

[45] The fact that he later received a certificate of service from a Deputy Commissioner in the region where he served and which referred to a discharge in terms of s 8(2) of the Act does not have a bearing on whether the respondent was in fact forced to resign or not. That officer would appear to have considered that the certificate seemed to follow after the respondent completed that form. It does not however mean that the respondent was in fact discharged or was unlawfully coerced into resignation.

[46] What the respondent failed to disclose in his founding affidavit is that there were two criminal prosecutions pending against him at the time he signed the form. Those charges were laid against him by his superior, Warrant Officer Martinus Pretorius. Whilst the respondent does not take issue with the fact stated in the answering affidavit in this regard, including that they were pending at that time, he states that they were finalised in 1993 and that he was legally represented in those prosecutions. The trials would have taken place in the immediate aftermath of his notice of resignation seeing that they were finalised in 1993.

[47] The respondent himself states that he 'resigned to avoid a discharge', presumably with reference to s 8. It would also appear to have been Inspector Ochurup's (imperfect) understanding of the Act that the respondent was liable to face a discharge under s 8 by reason of his conviction and sentence if he did not resign (and presumably compounded by the further charges pending against the respondent).



[48] In order to avoid that consequence, the respondent, in his own words, said he resigned. Can his resignation be said to be impermissibly forced in the circumstances? I think not. In an employment context where an employee chooses to resign rather than undergo disciplinary proceedings, this would in any event not of its own amount to a constructive dismissal.

[49] In the Force, with its far more restricted statutory bases for terminating the service of members, even less so. The respondent may have felt under pressure to resign because of the alternative posited to him, being the possible prospect of a discharge. But this does not amount to his resignation being transformed into a dismissal as he repeatedly asserts, let alone one which was unconstitutional and unlawful, even if it was subsequently styled a discharge on his certificate of service.

[50] At the time of his resignation, the respondent had 11 years of service as a policeman. Around that time or shortly after his resignation, he was also legally represented in two criminal trials which were pending when he resigned. It was open to him to seek advice from his legal practitioners. His sweeping statement in his founding affidavit

‘From the outset I had difficulties challenging my discharge from the Namibian Police because I do not know the law and could not afford a lawyer.’

has a distinctly hollow ring, given his representation at that time and his length of service in the Force.

[51] In my view, the respondent fell far short of establishing that his resignation amounted to an unlawful 'dismissal' or discharge as was repeatedly and interchangeably contended by him. There was thus no discharge to appeal from. The attempt to do so a year later which in itself was massively out of time (in accordance with the applicable regulations requiring that to be done within 14 days) would not and did not amount to an appeal as the respondent has not established a discharge under s 8. In fact, on his own case, that is what he sought to avoid by resigning.

[52] An appeal under s 8 accordingly did not serve before the Minister and he was entitled to dismiss it on the basis that the respondent had resigned and not been discharged. This does not however excuse the inordinate delay in apprising the respondent of that fact. That delay certainly warrants severe censure which would usually result in an adverse cost order. But that does not arise because the respondent's representation has been funded by the Directorate of Legal Aid.

### Conclusion

[53] It follows that the appeal succeeds and the following order is made:

- (a) The appeal is upheld.
- (b) The orders of the High Court are set aside and replaced by the following:

'The application is dismissed, with no order as to costs'.
- (c) No order is made as to the costs of appeal.

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**DAMASEB DCJ**

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**ANGULA AJA**

APPEARANCES

APPELLANTS:

J Ncube

Of Government Attorney, Windhoek

RESPONDENT:

G Coleman

Instructed by Angula Co, Windhoek