REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 323/2014

In the matter between:

GOTTHARD GURIRAB **APPLICANT**

And

MINISTER OF HOME AFFAIRS AND IMMIGRATION **FIRST RESPONDENT**

EVANGELICAL LUTHERAN CHURCH IN THE REPUBLIC OF NAMIBIA **SECOND RESPONDENT**

Neutral citation: *Gurirab v Minister of Home Affairs and Immigration* (A 323-2014) [2015] NAHCMD 262 (5 November 2016)

Coram: PARKER AJ

Heard: **20 October 2015**

Delivered: **5 November 2016**

Flynote: Administrative law – Exhaustion of internal or domestic remedies before approaching court – Court set out considerations that a court ought to take into account when deciding whether internal remedies should be exhausted before litigant approaches court – Paramount considerations are (1) whether remedies capable of providing effective redress in respect of complainant and (2) whether alleged unlawfulness has undermined the internal remedies themselves – In instant case internal remedy is provided by s 9(2) of the applicable Act being the Marriage Act 25 of 1961.

Summary: Administrative law – Exhaustion of internal or domestic remedies before approaching court – Court set out considerations that a court ought to take into account when deciding whether internal remedies should be exhausted before litigant approaches court – Paramount considerations are (1) whether remedies capable of providing effective redress in respect of complainant and (2) whether alleged unlawfulness has undermined the internal remedies themselves – In instant case internal remedy is provided by s 9(2) of the applicable Act being the Marriage Act 25 of 1961 – Applicant applied to court to review and set aside decision of the first respondent or decision of the Permanent Secretary of first respondent's Ministry to revoke marriage license of applicant granted in terms of Act 25 of 1961 – First respondent has discretionary power under s 9(2) of the Act to review and set aside Permanent Secretary's decision – Court found that applicant has rushed to court prematurely without exhausting the internal remedy provided by the Act without justification – Consequently, court dismissed the application.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] This matter concerns a marriage license granted to the applicant in terms of the Marriage Act 25 of 1961 ('the Act'). The applicant launched the present application to review and set aside, according to the notice of motion, the decision, which, according to the applicant, the first respondent allegedly made, wherein, as

the applicant asserts, the first respondent upheld the decision of the Permanent Secretary to revoke the marriage license that had been issued to the applicant. The first respondent has moved to reject the application; so has the second respondent. In her answering affidavit the first respondent has raised preliminary objections, namely, (a) that the applicant has not exhausted internal remedies provided by s 9(2) of the Marriage Act 25 of 1961 ('the Act'); and (b) that the pleadings do not disclose a cause of action.

[2] In its answering affidavit, the second respondent, too, has raised two points *in limine*. The first is the same as the first respondent's no-cause-of-action *in limine* point. The second piont *in limine* is that the applicant has failed to exhaust (the) remedy in s 9(2) of the Act which is the same as the first respondent's point on exhaustion of internal remedies. The final point is the delay in bringing the application.

[3] Mr Narib, counsel for the applicant, argued that these preliminary objections go to the root of the merits of the case. I tend to agree. The determination of the present application turns primarily on whether on the papers there is evidence that establishes that the first respondent has taken a decision in terms of s 9(2) of the Act which is amenable to judicial review. And if she has not, then, as Mr Ndlovu, counsel for the first respondent, submitted, there is no decision to review and on that basis the pleadings do not disclose a cause of action. It seems to me that it was as a result of such submission that Mr Narib sought to amend the Notice of Motion from the Bar. Mr Narib saw the writing on the wall, as it were. It also indicates in no small measure that the applicant was not, up to the hearing date, clear in his own mind as to who took the decision to revoke his marriage license; and whose decision stands to be reviewed and set aside.

[4] Be that as it may; I should note that the issues that need to be considered and determined, which are set out in para 10 below, cover issues in both the initial notice of motion and the amended notice of motion.

[5] The amendment prays the court to review and set aside 'the first respondent's decision, and/or the first respondent's Permanent Secretary's decision to uphold the revocation of the marriage license of the applicant or to revoke the marriage license of the applicant'.

[6] I accept the submission of Mr Kamanja, counsel for the second respondent, that the formulation of the amendment is unclear. I would say, it is a mouthful. The meaning I make of it – if I understand it – is that the applicant now applies to review and set aside the decision of the first respondent, which decision allegedly upheld the decision of the Permanent Secretary, as well as to review and set aside the decision of the Permanent Secretary which the first respondent allegedly upheld. And as Mr Narib explained, the amendment would only become necessary if the court were to find that the first respondent has not taken any decision.

[7] I also think that the point about no-cause-of-action-disclosed is suited to be dealt with not at the threshold but as part of the merits of the case, not least because it is inextricably bound to the crucial question as to who took the decision to revoke the marriage license of the applicant. Was it the Permanent Secretary or the first respondent? The point about delay in bringing the application stands in the same boat. Unless it is established who took the decision to revoke the license and when such decision was taken, the court is not in a position to decide whether or not there has been undue delay in bringing the application to challenge that decision.

[8] Of the view I take of this case, it seems to me that this case, despite the fact that it has been argued extensively, falls within an extremely short and simple compass.

[9] The interpretation and application of the following provisions of the Act are relevant in the determination of the present application:

> '3. Designation of ministers of religion and other persons attached to churches as marriage officers –

(1) The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish and Mohammedan rites or the rites of any Indian religion.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages –

(a) within a specified area; and

(b) for a specified period.

9. Revocation of designation as, or authority of, marriage officer and limitation of authority of marriage officer –

(1) The Minister or any officer in the public service authorized thereto by him may, on the ground of misconduct or for any other good cause, revoke in writing the designation of any person as a marriage officer or the authority of any other person to solemnize marriages under this Act, or in writing limit in such respect as he may deem fit the authority of any marriage officer or class of marriage officers to solemnize marriages under this Act.

(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.'

[10] I accept Mr Narib's interpretation of s 3 of the Act as the true construction of the provisions contained therein; but in my view, s 3 of the Act is not the applicable law as far as the essence of the dispute between the applicant and the first respondent is concerned. As I see it, the divergent positions of the applicant's and of the first respondent's resolve themselves into the following issues that call for decision: (a) Who took the decision to revoke the marriage license of the applicant?

Was it (a) the Permanent Secretary of the first respondent's Ministry, or (b) the first respondent? If the answer to (a) is affirmative; has the first respondent exercised the discretion vested in her by s 9(2) of the Act upon request by the applicant? If the answer to (b) is affirmative, can the first respondent still exercise the discretion vested in her by s 9(2) of the Act?

[11] To answer question (a) I should trace my steps back to a letter dated 27 November 2013 under the hand of the Permanent Secretary of the Ministry of Home Affairs and Immigration, the Ministry for which the first respondent is responsible, and which is addressed to 'Office of the Acting General Secretary, and for the attention of 'Pastor Wilfred Nico Diergaardt'. The formulation of the addressee is remiss. It does not indicate the 'Office of the Acting General Secretary' of what organization. The confusion is compounded by the fact that the letter dated 23 October 2013 is not before the court.

[12] Be that as it may; after cutting through the maze of evidence placed before the court from both sides of the suit, I make the following factual findings and arrive at the conclusions thereanent: The decision to invoke the license of the applicant was taken by the Permanent Secretary pursuant to s 9(1) of the Act. *Pace* Mr Narib, nothing turns on the use of the pronoun 'we' in the Acting Permanent Secretary's letter of 22 July 2014, addressed to the applicant's legal representatives which was in response to the legal representative's request for reasons for the revocation of the applicant's marriage license. When such pronoun is used, it may carry a plural meaning which is its ordinary, grammatical connotation; it may also carry a singular meaning and it is then understood to be the 'royal we'. Such connotation is not uncommon in formal writing, official communication and speeches. See *Concise Oxford English Dictionary*, 11th ed.

[13] I also find that the first respondent has not exercised her discretion under s 9(2) of the Act to consider the Permanent Secretary's decision with the view to setting it aside. There is not one grain of credible evidence tending to establish the contrary. I, therefore, respectfully reject the applicant's unproved assertion that 'the

Minister (ie the first respondent) has made common course with the Permanent Secretary'. There is no factual basis for such conclusion.

[14] This finding leads me to the next level of the enquiry. It concerns the principle of exhausting domestic remedies. It is that the right to seek judicial review of the act of an administrative body or administrative official may be suspended or deferred until the complainant has exhausted domestic remedies which, as is in the present case, might have been created by statute expressly or by necessary implication. In the instant case, such remedy is created by s 9(2) of the Act.

[15] In *Namibia Competition Commission v Wal-Mart Stores* 2012 (1) NR 69 (SC) the Supreme Court proposed certain considerations that a court ought to take into account in determining the issue of exhausting domestic or internal remedies. (a) The first consideration is the wording of the relevant statutory provision; and (b) the second is whether the internal remedy would be sufficient to afford practical relief in the circumstances. I hasten to add the caveat that the list is exhaustive; neither was it meant to be exhaustive; and neither should the considerations be applied mechanically as if they were immutable prescriptions to be applied without due regard to the circumstances of the particular case.

[16] And Lawrence Baxter writes in his work *Administrative Law*, 3rd Imp (1991), p 721:

> 'Two considerations appear to be paramount: first, are the domestic remedies capable of providing effective redress in respect of the complaint?; and, secondly, has the alleged unlawfulness undermined the domestic remedies themselves.'

[17] To the *Wal-Mart* considerations and the *Baxter* considerations should be added this crucial qualification proposed by Mokgone J in *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC), para 35:

'Internal remedies are designed to provide immediate and cost effective relief, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants access to justice (ie court justice), the importance of more readily available and cost effective internal remedies cannot be gainsaid.'

[18] The *Koyabe and Others* qualification answers to the caution put forth by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), para 45, that '[t]he Court should take care not to usurp the functions of administrative agencies'. Thus, it has been said that if the public authority has not yet completed its decisional process the complainant should not rush to court. (Baxter, *Administrative Law*, p 719). Of course, this proposition should be taken against the aforegoing *Wal-Mart Stores* considerations. All said, the court allowing administrative bodies and administrative officials to complete the performance of their functions and the exercise of their powers before the court intervenes to control such performance of functions and such exercise of powers conduces to the *trias politica* of the doctrine of separation of powers which forms part of the foundation of our constitutional milieu.

[19] In the instant case, it is the first respondent's contention that the principle of exhaustion of domestic or internal remedies is embedded in the s 9(2) of the Act. For this reason the first respondent's position is that the applicant has rushed to court prematurely without waiting for the decisional process provided for in s 9(1) and (2) to be completed and without justification.

[20] It must be noted that I did not hear Mr Narib to challenge the applicability of the principle in the instant case. And that is not surprising. The applicant has all along belaboured in this proceeding under the contention that the decision to revoke the marriage license of the applicant was taken by the first respondent. I have, for reasons given, held that the totality of the evidence debunks any such assertion. And yet; the applicant, through his legal representatives, and, therefore, upon legal advice, wrote to the first respondent as far back as 15 May 2014 in the following terms:

'Having regard to the above we therefore request the Honourable Minister to invoke her powers under s 92(2) of the Marriage Act 25 of 1961 and to set aside the decision to revoke the said marriage license.'

[21] The upshot of that entreaty is that the position of the applicant himself has always been, at least since 15 May 2014, that the Permanent Secretary (or an official acting in that post) took the decision to revoke the marriage license of the applicant; otherwise, the above-quoted excerpt in the applicant's legal representatives' letter of 15 May 2014 would not make sense in law or logic, as Mr Ndlovu appeared to submit. And I accept the uncontradicted evidence on the papers that the first respondent has always been willing to exercise the power vested in her by s 9(2) of the Act in order to do that which the applicant himself asks for, as I have found previously.

[22] In that regard, I find that subsec (1) and subsec (2) of s 9 of the Act read together evince the intention of the Legislature that the decisional process regarding the revocation of a marriage license (issued under the Act) is completed only when the Minister (ie first respondent) has exercised or has refused to exercise his or her power under s 9(2). And I have no doubt in my mind that in the instant matter the internal remedy created under s 9(2) is capable of providing effective redress in respect of the applicant. The alleged wrongfulness of the Permanent Secretary's decision is not capable of undermining the internal remedy provided in s 9(2) of the Act.

[23] After thorough consideration of the matter and looking at the authorities discussed, it is with firm confidence that I hold that the applicant has rushed to court prematurely without justification. He should exhaust the internal remedy provided by the Act in s 9(2) of the Act which, as I say, is capable of providing effective redress in respect of the applicant. The first respondent should, therefore, be given the chance to exercise her discretion under provision which, as I say, has always been the applicant's desire; and the first respondent is willing to so act.

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[24] These findings and conclusions on its own are dispositive of the application in terms of either the original notice of motion or the amended notice of motion. I, therefore, find it unnecessary to consider other interesting points raised, including the issue of delay in bringing the application and the strike out application. These issues do not affect the cogency and prepondence of the factual findings I have made, the law I have applied and the conclusions I have arrived at.

[25] Based on these reasons, the application is dismissed with costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	G Narib Instructed by Tjitemisa & Associates, Windhoek
FIRST RESPONDENTS:	M Ndlovu Of Government Attorney, Windhoek
SECOND RESPONDENT:	A Kamanja Instructed by AngulaCo. Inc., Windhoek