

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2016/02751

In the matter between:

SAMUEL A HERERO

PLAINTIFF

and

**THE MINISTER OF SAFETY AND SECURITY
LIEUTENANT GENERAL SEBASTIAAN H
NDEITUNGA**

1st DEFENDANT

2nd DEFENDANT

Neutral citation: *Herero v The Minister of Safety and Security* (HC-MD-CIV-ACT-CON-2016/02751) [2018] NAHCMD 382 (29 November 2018)

Coram: PARKER AJ

Heard: 3, 5 September 2018 and 16 October 2018

Delivered: 29 November 2018

Flynote: Labour law – Unfair dismissal in terms of the Police Act 19 of 1990, s 18 – Failure to follow procedure prescribed by Act 19 of 1990 – Court finding that second defendant acted unfairly for not complying with requirements prescribed by the Act in violation of art 18 of the Namibian Constitution – However, court finding that defendants had good reason to dismiss plaintiff – Defendants therefore acted reasonably on that score – In award of appropriate monetary compensation court considered factors courts and tribunals ought to take into account.

Summary: Labour law – Unfair dismissal in terms of Police Act 19 of 1990, s 18 – Plaintiff employed as police cadet constable – Plaintiff dismissed for not disclosing on application form that he had been charged with certain offences and the case was pending in the magistrates' court and for failing to turn up for duty without the knowledge of shift commander – Court finding that defendants had good reason to dismiss plaintiff – Consequently court finding that defendants acted reasonably – But defendants failed to comply with procedural requirements prescribed by Act 19 of 1990 – Consequently, court finding that defendants acted unfairly procedurally – Court finding further that no evidence was placed before court to persuade court to reinstate plaintiff for unfair dismissal – Court held that in that regard it will be unsafe and unsatisfactory to order plaintiff's reinstatement – Court, however inclined to order monetary compensation and took into account certain factors which court discussed in order to arrive at an appropriate amount of monetary compensation.

ORDER

- (a) Judgment for plaintiff to the extent appearing below.
- (b) Plaintiff is not to be reinstated.

- (c) Defendants must jointly and severally, the one paying the other to be absolved, on or before 31 January 2019 pay to plaintiff an amount equal to his three months' salary, plus interest on such amount at the rate of 20 per cent per annum calculated from 1 August 2016 to date of full and final payment.
- (d) Defendants must jointly and severally, the one paying the other to be absolved, pay plaintiff's costs.
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JUDGMENT

PARKER AJ:

[1] Plaintiff prays for the following relief:

'(1) declaring section 8 of Act 19 of 1990 unconstitutional;

(2) reinstatement;

(3) payment of the amount of N\$49 000 being loss of income;

(4) payment of the amount of N\$4 500 per month as from 1 August 2016 until date of reinstatement;

(5) interest at the rate of 20% per annum as from date of judgment, until date of final payment;

(6) costs of suit.'

Prayer 1

[2] I shall consider prayer (1) now in order to get it out of the way. This is a constitutional challenge. The claim with regard to relief (1) is rejected because it offends the counsel by the Supreme Court in *Minister of Home Affairs v Majiedt and Others*

2007 (2) NR 475 (SC) that it is prudent to join the Attorney-General as a party in challenges to constitutionality of legislation, even where a government department is represented in such action. I reject prayer (1) on another ground, seeing that the present is an action proceeding, but no evidence was placed before the court to establish the unconstitutionality of s 8 of the Police Act 19 of 1990. It follows that plaintiff's claim fails as regards prayer (1). In any case, it would seem plaintiff has abandoned prayer 1. I now turn to consider the rest of the matter.

[3] Divergent versions were placed before the court for the case of plaintiff and for the case of defendants; and so, in weighing the evidence I shall follow the path beaten by the Supreme Court in *Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC). There, at para 31, the Supreme Court, per Damaseb AJA, approving the South African case of *Govan v Skidmore* 1952 (1) SA 732 (n) at 734 A-D, stated:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though it's so doing does not exclude every reasonable doubt...for, in finding facts or making inferences in a civil case, it seems to me that one may... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

That is the manner in which I approach the weighing of the evidence.

[4] Plaintiff was in the employ of Namibia Police (Nampol) as a cadet constable with effect from 1 July 2014, and was dismissed on 17 September 2015. Plaintiff's appeal to first defendant failed as first defendant confirmed the decision of the second defendant. The reasons for his dismissal and the procedure by which he was dismissed are the subject of these proceedings. The basis of plaintiff's claim respecting prayer 2, prayer 3, and prayer 4 is, therefore, plaintiff's allegations that his dismissal from Nampol was 'wrongful, unlawful and malicious'. It follows that in order to succeed, plaintiff must prove

those allegations on a preponderance of probability. Defendants bear no burden to establish that plaintiff's dismissal was right, lawful and unmalicious. He who alleges must prove what he or she alleges. See *Pillay v Krishna* 1946 AD 946.

[5] On the evidence, the following facts are relevant. They are undisputed or indisputable. At the time that he was dismissed, plaintiff was still serving a period of probation. It is immaterial in these proceedings the reasons – if any – why he was under probation for some 14 months instead of 12 months. What is material is that when he was dismissed he had not been confirmed as a police official of Nampol. One significant conclusion to draw from this fact is that plaintiff could not have the same rights in the employment relationship with Nampol as a confirmed police official would have.

[6] Second defendant gave reasons why he dismissed plaintiff. It is to those reasons and the procedure second defendant followed when he dismissed plaintiff that I now turn my attention. The burden of the court is, therefore, to determine (a) whether second defendant acted reasonably and (b) whether second defendant followed a fair procedure within the meaning of art 18 of the Namibian Constitution when he dismissed plaintiff, seeing that the act of dismissal was an administrative act by an administrative official.

[7] In that regard, I should say that plaintiff's reliance on the fair trial provisions of the Constitution, that is, art 12 (1) is palpably misplaced. Second defendant is neither a court nor a tribunal within the meaning of art 12 (1).

Did second defendant act substantively fairly?

[8] On the evidence I find that second defendant's position is that he had two reasons for dismissing plaintiff in terms of s 8 (1) of the Police Act 19 of 1990 (as amended) upon recommendation of one of his regional police officials in the person of Detective Chief Inspector (DCI) Herman Hartzenburg stationed at Karasburg (defendant witness). The first reason is this: Plaintiff failed, when he completed an application form,

which was in the form of a declaration, to disclose that he was an accused person in a pending criminal case or that he had been charged with a criminal offence, even if it was not a Schedule 1 offence in terms of the Police Act. The second reason is this: According to DCI Hartzenburg, the shift commander at plaintiff's work station informed the station commander that plaintiff did not turn up for duty on some particular occasions for reasons unknown to the shift commander. The station commander reported plaintiff's infraction to the Regional commander. The Regional commander directed DCI Hartzenburg, who was 'responsible for any police case' to act. I shall consider these reasons one by one to determine if second defendant acted reasonably, that is, whether his action was that which a reasonable official in his position faced with the facts and circumstances would make.

Reason 1: Plaintiff was an accused person in a pending criminal case or had been charged with a criminal offence.

[9] Keeping the *Kurz* principle and approach in my mental spectacle, I make the following factual findings. Plaintiff, as I have noted previously, joined Nampol on 1 July 2014 as a cadet constable. On 22 June 2014, that is shy of eight days prior to that date, a case of reckless and negligent driving, failing to stop at the accident scene, and failing to ascertain damage to property or injury to other persons involved had been opened against him. It matters tuppence whether such offence was a Schedule 1 offence. No evidence was placed before the court indicating that plaintiff who had never been a police official before, would know what Schedule 1 offences in the Act are for him to determine that the offence he was charged with was not a Schedule 1 offence; and so he did not need to disclose them. All that a person in the position of plaintiff would be expected to do in the circumstances was to disclose the criminal offences for which a case had been opened against him. Plaintiff knew he had been charged with those offences. He was under oath to disclose them on the application form. There is no evidence before the court to establish that a superior to him advised him that those offences were not Schedule 1 offences; and so, he was not obliged to disclose them. As I have said previously, he could not have read and comprehended the Police Act. I find

that plaintiff, when completing the application form, knew that he was an accused person in a case that was pending in the magistrates' court, and yet he failed to disclose that fact when he was under obligation to do so. It is, therefore immaterial, if in due course, he disclosed that fact to some 'relevant police officials', who were not even called to testify to that. In my judgment plaintiff lied.

[10] This court is not competent to decide whether such infraction was so serious as to warrant his dismissal. That is within the power of second defendant. In DCT Hartzenburgs' testimony he thought such infraction was very serious. His evidence stood unchallenged at the close of plaintiff's case.

Reasons 2: Plaintiff's failure to turn up for duty

[11] The evidence which I accept is that from the Occurrence Book ('OB') at plaintiff's work station, it is indicated that plaintiff did not turn up for duty for reasons unknown to his shift commander. In his examination-in-chief-evidence, plaintiff did not offer any evidence to challenge the entries in the OB establishing his failure to turn up for duty. It matters not whether it was on one occasion or on several occasions. All that plaintiff put forth is that the Regional commander, second defendant, as well as first defendant, based their decision on hearsay evidence. This challenge has no probative value.

[12] Based on these reasons, I conclude that plaintiff has failed to establish that plaintiff's dismissal was unfair substantively. In my judgment that second defendant had a good reason to dismiss plaintiff, and the decision, is reasonable but that is not the end of the matter. I proceed to consider whether second defendant acted fairly with regard to the procedure that was followed.

Did second defendant act procedurally fairly?

[13] The first place to look is the statutory scheme that second defendant was obliged to take into account when accepting DCI Hartzenburg's recommendation to dismiss

plaintiff. Section 8 (1) does not apply to plaintiff because he was still serving his probation when he was dismissed; but ss 17 and 18 apply, and they provide in material parts as follows:

'17. Contravention of Act by members

Any member who contravenes or fails to comply with any provision of this Act or any order issued in terms of this Act, shall be guilty of and offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding 6 months or to both such fine and such imprisonment.

'18. Disciplinary proceedings against members

- (1) Notwithstanding the provisions of section 17, a member who is accused of misconduct may be charged with misconduct by the Inspector-General in the manner prescribed.
- (2) Disciplinary proceedings shall be conducted, in such manner as may be prescribed, before-
 - (a) an officer in the force, not being subordinate in rank to the accused, who has been generally or specifically designated by the Inspector General for the purpose; or
 - (b) any legally qualified staff member in the Public Service, designated by the Minister, after consultation with the Attorney-General.
- (3) A person before whom disciplinary proceedings are conducted in terms of subsection (2) may, upon conviction of the member concerned of misconduct and after the member concerned has been given an opportunity of being heard as to the penalty to be imposed, impose any punishment as prescribed, but subject to any restriction which the Inspector-General may impose in a particular case.
- (4) Upon conclusion of any disciplinary proceedings, the person who presided at such proceedings shall transmit the record of the proceedings in the case to the Inspector-

General or any officer in the Force designated by the Inspector –General for that purpose, and the Inspector-General or such office may-

- (a) confirm, alter or quash the conviction; or
- (b) confirm, set aside or alter the punishment imposed, which may include the increase of any penalty imposed.

(5)...

(6) No conviction or punishment imposed by a person referred to in subsection n(2) shall be of any effect unless it has been confirmed or altered by the Inspector-General or the officer referred to in subsection (4)'.

[14] The evidence is overwhelming and uncontradicted that, as Ms Delpont, counsel for plaintiff, submitted, no s18 proceedings were undertaken in respect of plaintiff. As I have said previously, s 8 does not apply to plaintiff, considering the width of the wording of s 8 and the intention of the Legislature clearly expressed in its provisions. It follows that the provisions of s 8 (1) do not apply to plaintiff. It is, therefore, immaterial whether plaintiff was heard or he was not heard 'prior to any discharge' in terms of s 8 (1).

[15] An administrative body or official commits an irregularity if in taking an administrative action they fail to comply with art 18 of the Namibian Constitution. It is the kind of irregularity, which entitles the court to interfere with the impugned decision made as a result. Second defendant did not act fairly, and he failed to comply with the requirement imposed on him by the relevant legislation, i.e. the Police Act s18.

[16] Based on these reasons, I hold that while second defendant had a good reason to dismiss plaintiff, the decision is tainted on account of second defendant acting procedurally unfairly not complying with requirements of the Police Act in violation of art 18 of the Namibian Constitution.

To reinstate or not to reinstate

[17] No evidence was led on either side of the suit on whether reinstatement is appropriate, and on the facts and in the circumstances of the case, I decline to reinstate plaintiff. First, defendant had a good reason to dismiss him, but in the absence of evidence placed before the court to persuade the court to reinstate plaintiff, it will be unsafe and unsatisfactory for the court to order reinstatement.

Payments of moneys to compensate plaintiff for unfair dismissal.

[18] In determining an appropriate amount to award, I should say, I fail to see how plaintiff arrived at the amount of N\$49 000 (prayer 3). No evidence was led to justify that amount. As respects prayer 4, I think I should apply the principles which have been laid down to guide courts and arbitration tribunals when determining the amount of money the court and arbitrator may award in unfair dismissal situations. In *Shilongo v Vector Logistics (Pty)* (LCA 27/2012)[2014] NALCMD 4 (5 February 2014), I set out some important factors, albeit not a closed list, a court or tribunal ought to take into account when considering an appropriate amount of monetary compensation where an employee has been dismissed unfairly. They are the following:

- (a) The amount awarded should be such that it does not aim at punishing the employer. It should aim at redressing a labour injustice (*Pep Stores (Namibia) (Pty) v Iyambo and Others* 2001 NR 211 (LC)).
- (b) What the court or tribunal awards must be compensation and not gratuity, enriching the employee. (*Condons Realty (Pty) Ltd and Another v Hart* (1993) 14 ILJ 1008 (LAC)).
- (c) The amount awarded should be a sum that the employer would have paid to the employee had he or she not been dismissed. On that score, it is not always

necessary for the employee to lead evidence to establish the amount involved. The employer must know (*Pep Stores v Iyambo*).

- (d) A critical and very important factor that the court or tribunal should always take into account is the extent to which the employee's own conduct contributed to the dismissal (*Feroso (Pty) Ltd v de Ruiter* (1993) ILJ 974 (LAC)).
- (e) The length of service of the employee before his or her dismissal.
- (f) The sixth factor is whether the dismissed employee has made any real efforts to mitigate his losses.

[19] In the instant case, plaintiff testified that his salary was N\$ 4 843, 25 per month. Plaintiff's service lasted about 15 months. As I have found previously, plaintiff contributed to a very great extent to his dismissal. This finding should count heavily against plaintiff. The court should not, in awarding compensation be seen to be overlooking any negative attitude and wrongful acts on the part of the employee. Such attitude and such conduct do not conduce to sound employment relationship and promotion of hard work and efficiency at the workplace. Finally, the evidence does not establish that plaintiff has made real and provable efforts to mitigate his losses.

[20] It is important to note that in the following cases, for example, where the court found that the employees there had contributed greatly to their unfair dismissal, the court awarded compensation equal to the employee's four months' salary when length of service was 30 years (*Shilongo v Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 4 (5 February 2014)); and compensation equal to the employee's three months' salary when the employee's length of service was three years (*La Croix Sub Holding (Pty) Ltd t/a Truck & Cab v Indombo N.O* (HC-MD-LAB-APP-AAA-2018/00029) [2018] NALCMD 29 (30 October 2018)).

[21] Based on these reasons and taking into consideration the aforementioned factors, as well as the consideration of costs, I order as follows:

- (a) Judgment for plaintiff to the extent appearing below.
- (b) Plaintiff is not to be reinstated.
- (c) Defendants must jointly and severally, the one paying the other to be absolved, on or before 31 January 2019 pay to plaintiff an amount equal to his three months' salary, plus interest on such amount at the rate of 20 per cent per annum calculated from 1 August 2016 to date of full and final payment.
- (d) Defendants must jointly and severally, the one paying the other to be absolved, pay plaintiff's costs.

C Parker
Acting Judge

APPEARANCES:

PLAINTIFF:

A Delport
of Delport Legal Practitioners, Windhoek

FIRST AND SECOND
DEFENDANTS:

J L Gawises
of the Government Attorney, Windhoek