

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2020/00102

In the matter between:

**MATIAS AMUGULU**                      **APPLICANT**

and

<b>MINISTER OF SAFETY AND SECURITY</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>INSPECTOR GENERAL: NAMIBIAN POLICE</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>REGIONAL COMMANDER: OSHIKOTO REGION</b>	<b>3<sup>RD</sup> RESPONDENT</b>

Neutral Citation: *Amugulu v Minister of Safety and Security* (HC-MD-CIV-MOT-GEN-2020/00102) [2021] NAHCMD 538 (18 November 2021)

**CORAM:**                      **MASUKU J**

**Heard on:**                      18 May 2021

**Delivered on:**                18 November 2021

**Flynote:** Legislation – Section 9 of the Police Act No. 19 of 1990 ('the Act') – discharge of an officer – what constitutes absenteeism in terms of s 9 of the Act - court endorsed the approach taken by Mainga J, in *Khariseb v Minister of Safety and Security*, namely that s 9 of the Act that a member who absents himself or herself without leave for a continuous period in the excess of 30 days, the deeming provision kicks in and the member is deemed discharged by operation of the law – applicant failed to discharge the onus that he

performed official duties during the period of absence. Application dismissed with costs.

**Summary:** This is an opposed application in which the applicant approached the court seeking an order that the notice issued by the second respondent to the effect that the applicant is discharged from the service of the Namibian Police Force, dated 1 July 2019, be declared unlawful, invalid and of no force and effect *ab initio*.

The applicant contended that he could not present himself for duty as he did not hold any position in the Force at the time nor did he have any job description.

The respondents' contention was that there is no evidence that the applicant performed his official duties from 2 April 2019 until 16 May 2019 as detailed in his job description.

*Held:* that the approach taken by Mainga J, in *Khariseb v Minister of Safety and Security*, namely that s 9 of the Act requires a member absenting himself or herself from his or her official duties without leave, in the excess of 30 days is deemed discharged from the Force, by operation of law must be followed.

*Held that:* the applicant deliberately stayed away from his official duties described in Chapter 3 of the Police administration manual and Responsibilities of a Warrant Officer and a Sergeant/and commanders.

*Held further that:* in the absence of a replying affidavit by the applicant, the allegations of fact by the respondents stand unchallenged and must be accepted.

The court dismissed the application with costs.

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## ORDER

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1. The Second Respondent's notice dated 1 July 2019 to the effect that Applicant is discharged from the service of Namibian Police Force dated 1 July 2019 is hereby confirmed.
  2. The applicant is ordered to pay the cost of application.
  3. The matter is removed and regarded as finalised.
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## JUDGMENT

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**MASUKU J:**

### Introduction

[1] This is an opposed application in which the applicant has approached the court seeking the following relief:

'The notice of the Second Respondent that Applicant is discharged from the service of Second Respondent dated 1 July 2019 is hereby declare unlawful, invalid and of no force and effect ab initio:

1. Applicant is hereby reinstated and deployed in accordance with the establishment and structure of the Namibian Police Force.
2. First and Second Respondents must pay applicant his full salary for the period of 02 April 2019 till date of reinstatement.
3. Respondent who opposed this application must pay the Applicant' costs of suit
4. Further and/or alternative relief.'

### The parties

[2] The applicant, is Mr Matias Amugulu, a major male, formerly employed by the first respondent. The first defendant is the Ministry of Safety and security duly established in terms of the Laws of the Republic of Namibia. The second defendant is Sebastian Haitota Ndeitunga in his official capacity as the Inspector general of the Namibian Police. The third defendant is the Regional Commander of the Oshikoto Region.

[3] The applicant is herein represented by Mr. P. Coetzee. The first, second and third respondents herein, are represented by Mr. J. Ncube, of the Office of the Government Attorney.

### Background

[4] The applicant is a career police officer with over 10 years' experience in Police Service, having started his career in 2007. The applicant's service came to an unfortunate end when he was served with a letter of termination dated 1 July 2019 for being absent from his official duties for the period 2 April 2019 to 16 May 2019, exceeding thirty (30) days continuously without leave, valid reason or authorisation from the second respondent.

### Basis of application

[5] The basis for the relief sought, according to the applicant, is that he was not absent from duty without permission of the Inspector General from 2 April 2019 until 16 May 2019 as contemplated in section 9 of the Police Act, No. 19 of 1990. He contends that he could not present himself for duty as he did not hold any position in the force at the material time nor did he have any job description ascribed to him.

[6] The applicant deposes that he was transferred from Tsumeb police station, which is an A-class police station to Nomtsoub police station, which is a C-class police station during April 2016. The applicant was appointed as the Unit Commander of the Uniform Investigation Unit at Nomtsoub police station. It however became clear to the applicant that due to restructuring of the police

stations in Namibia, Nomtsoub police station did not have a Uniform Investigation Unit and thus the applicant was a member of the Namibian Police without a portfolio or duty station.

[7] Furthermore, it is the applicant's case that he addressed a letter to the second respondent in which he brought to light his intention to bring the proceedings before being in compliance with section 39 of the Police Act. The respondents do not take issue with this and thus nor will this court.

[8] On 17 September 2018 the applicant addressed a letter to the Inspector General of the Namibian police force relaying his concerns to the Inspector General and further requesting a transfer to the Tourist Protection Sub-Division. The applicant was instead transferred to the Criminal Investigation unit at Nomtsoub police station. The applicant contends that the transfer was procedurally incorrect, a fact that he brought to the attention of the Inspector-General, the second respondent.

[9] The applicant deposes further that he performed his official police duties during the period in which he allegedly absented himself in Tsumeb. The applicant further deposes that he attended to various separate criminal matters at Tsumeb Police Station and most notably acted in line with his duties as a state witness at the Tsumeb Magistrates Court, under case numbers 3584/2017 and 2387/2015 respectively. He further states on oath that the continuous period as per the provisions of Section 9 of the Police Act was interrupted when he appeared in court as a state witness on 9 and 16 April 2019, respectively, in the matters referred to above and as detailed in the occurrence book entries.

[10] The respondents, for their part, contend that there is no evidence that the applicant performed his official duties from 2 April 2019 until 16 May 2019 as detailed in his job description. The respondents questioned how, where and when the applicant performed or could have performed his official duties

given his claim that he was a member without a portfolio, duty station and job description. This is especially so because the applicant's superiors were not continuously apprised of the duties the applicant was performing, at the time material to this application.

[11] The respondents submit that the applicant failed to discharge the onus on him to prove that he performed his official duties during the period in question. He thus absented himself from duty for a continuous period exceeding 30 days and the second respondent was, in terms of the law, correct to issue the notice of discharge.

### The Law applicable

[12] Section 9 of the Police Act 19 of 1990, reads as follows:

'Discharge of members on account of long absence without leave:

9. A member who absents himself or herself from his or her official duties without the permission of the Inspector-General for a continuous period exceeding thirty days, shall be deemed to have been discharged from the Force on account of misconduct with effect from the date immediately following upon the last day on which he or she was present at his or her place of duty: Provided that if any member absents himself or herself from his or her official duties without such permission and accepts other employment, he or she shall be deemed to have been so discharged even if he or she has not yet so absented himself or herself for a month: Provided further that if a member deemed to have been so discharged, again reports for duty, the Inspector-General may, notwithstanding anything to the contrary contained in any law, reinstate him or her in his or her former post or appoint him or her to any other post or appointment in the Force on such conditions as the Inspector-General may deem fit, and in that event the period of his or her absence from his or her official duties shall be deemed to have been absence on vacation leave without pay, or leave on such other conditions as the Inspector-General may determine.' (Emphasis added).

[13] This provision, interpreted, simply states that an officer, who absents himself or herself from official duties without the permission of the Inspector-

General for a continuous period of thirty days shall be deemed to have been discharged from the Force on account of misconduct. The section does not state what the nature the permission by the Inspector-General should assume in order to be to be valid, i.e. whether written or oral.

[14] I am of the considered view that the Force, being a professional and official institution, for the most part, relies on written information that would have to be filed for purposes of the record. It would seem to me therefor that written permission would have to be the ordinary manner of granting permission, except if there be some exceptional circumstances at play.

[15] The deeming aspect of the provision also applies to an officer who absents himself or herself from official duties without permission and accepts other employment elsewhere. He or she, is also deemed to have been discharged. In this connection, the provision does not consider the actual taking up of employment. Acceptance of employment suffices. I note that in this scenario, there is no stipulated time period of absence. The acceptance of new employment, even after two days of absence, it would seem to me, suffices.

[16] Last, the provision allows an officer deemed to have been discharged, to report again for duty and the Inspector-General may reinstate the said officer on such conditions as he or she may deem fit. In this regard, the period of absence without leave is deemed to have been absence on vacation without pay, or leave on such conditions the Inspector-General may consider appropriate.

#### The parties' contentions

[17] The only issue that this court is called upon to adjudicate is whether or not the applicant was absent from his official duties for the period of 2 April 2019 until 16 May 2019 without authorisation. I should add that there is no doubt that the period in question is more than the 30 day period prescribed in the Act for the deeming provision to take effect.

[18] The Applicant submitted that on 9 April 2019 and 16 April 2019 he attended at the Magistrates Court, held at Tsumeb to act as a state witness, which duty forms part of his official duties. He further submits that between 4 March 2019 to 9 March 2019 he attended to facilitate and dispose of Pol 7 475/2019 and further adduced evidence in a matter heard in Tsumeb, under case number TSU-CRM 411/2016.

[19] He contends that he was present at a duty station during the period 2 April 2019 to 16 May 2019, namely Tsumeb police station.

[20] The respondents oppose the applicant's application on the grounds that the applicant did not perform his official duties, as per the duties and responsibilities set out in the Police Manual. In terms of Chapter 3 of the Police Administration manual, the duties and Responsibilities of a Unit Commander are to:

‘1. Supervise the investigation of all crimes in the station area, in co-operation with the Station Commander.

2. Monthly inspect all case dockets<sup>1</sup>.

3. Liaise and co-operate with magistrates and officials of other government departments. Further that Chapter 3 of the Police administration manual the duties and Responsibilities of a Warrant officer and a Sergeant are that:

1. Warrant officers and Sergeants not yet appointed as Commanders must assist their immediate commanders and ensure effective carrying out of police duties and responsibilities.

2. Standing Orders dealing with Duties of Station Commanders in relation to members under their command, apply equally to Warrant Officers and Sergeants.

3. They must put forward proposals and recommendations which may promote efficiency in the force.

4. Warrant officers and Sergeants work in closer contact with members of lower ranks than commissioned officers and can influence the shaping and adaptation of subordinates.’

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<sup>1</sup> (See Operational Manual chapter 4.F.5.c.).



[21] It is respondents' contention that the applicant does not indicate in his pleadings that he has performed his duties in terms of the Chapter 3 of the Police administration manual the Duties and Responsibilities during the time in question.

#### Determination

[22] The applicant in this matter, it is common cause, had been in the employ of the Ministry of Safety and Security since 2007. That is more than 10 years' experience as a police officer. He had been serving as the Unit Commander for Nomtsoub Uniform Investigation Unit since his appointment in April 2016 this is apparent from the letter of appointment dated 25 April 2016 and marked 'annexure M3' as attached to the applicants founding papers. The applicant had subsequent to his appointment due to restructuring of the uniform investigations units which were abolished at all "B" and "C" class police stations on the structure of the Namibian Police and an attempt to address the vacuum created by the restructuring, the applicant was considered for a transfer and appointed as a Unit Commander of Nomtsoub Criminal investigation unit as per letter dated 26 October 2018 (Applicant's Annexure M 7).

[23] It was the applicant's contention that he was an officer without post or job description, although this was true for a certain timeframe it was remedied by the letter dated 26 October 2018. The applicant remained adamant not to accept the proposal by the first respondent to appoint him to unit commander of Nomtsoub Investigation unit. The initial appointment as unit commander of the uniform investigation unit became futile when the restructuring occurred within the Namibian Police and of which the applicant became aware off.

[24] The applicants absence was noted as early as February 2019 by the then acting unit commander Ms Fabiola Tjizao and then later by Mr Cornelius Tsandib who then reported the applicant to the Regional Commander.

[25] This court is satisfied with the evidence on record that the applicant deliberately absented himself from his official duties. He did not report for duty at the station where he had been deployed and this was in the excess of the prescribed period of 30 days. As such, the deeming provision took effect.

[26] I agree with Mr. Ncube that there is no official instrument transferring the applicant to Tsumeb. There is accordingly nothing in the records that shows that he actually performed official duties as he alleges. It is a fundamental principle of the law that he who alleges must prove.

[27] It is perhaps important that I should mention that the respondents filed affidavits of the officers, some of whom are in charge of the applicant. They state that he was not on duty at his duty station for a period in the excess of 30 days and no leave or permission in that regard was granted. These are Mr. Armas Kasita Shivute, the Regional Commander of the Oshikoto Police Region and Ms. Abiola Rita Tjizao, a Warrant Officer Class 2. They both confirm, and the latter by reference to the relevant excerpts from the occurrence books she maintained at the Nomtsoub police station, that the applicant did not attend duty during the period in question and without any authorisation.

[28] It is necessary to state in this connection, that the applicant chose not to deal with these affidavits. As such, the version placed before court by the respondents, namely, that the applicant did not attend work at his duty station for more than 30 days, leading to them stopping his salary stands uncontroverted. The applicant decided, probably upon advice, not to file a replying affidavit. In this connection, the allegations of fact deposed to by the respondents regarding the applicant's absence for the time alleged, stand uncontested and must accordingly be accepted.

[29] In any event, the version advanced by the respondents in their papers regarding the applicant's absence, cannot, on any interpretation, be regarded as contrived, far-fetched or palpably implausible or uncreditworthy. The version is predicated in part on the records maintained by the relevant officer,

showing that the applicant did not attend at his duty station to perform his official duties within the period in question. In this connection, the applicant has failed to discharge the onus thrust upon him.

[30] Even if it can be stated that there is a genuine dispute of fact in this matter, it is clear that the applicant should have foreseen it before launching the application. He went ahead with the application and did not, after the answering affidavits were filed, request the court to exercise its discretion in terms of rule 67 and refer the disputed issues to oral evidence in good time. He tried his luck during the hearing and for obvious reasons, the application was refused, regard had to its lateness and considering also that the case management order had long been issued.

[31] I am of the view, in any event, that the remarks from the case of *Bahlsen v Nederlof and Another*<sup>2</sup>, especially those underlined below, should not be allowed to sink into oblivion. There the court stated the following in applications where disputes of fact arise:

‘Should disputes of fact arise on the papers the court may still grant the final order if the facts deposed to by the applicant and admitted by the respondent, and the facts alleged by the respondent, justify such an order. Even if the facts are not formally admitted, but it is clear that they cannot be denied, the court must regard them as admitted. In certain circumstances, denial of a fact may not be such as to raise a real dispute, genuine or *bona fide* of fact. Should a genuine dispute of fact exist on the papers, and it was not referred to oral evidence, the court must accept the version of the respondent unless it is so far-fetched that it can be rejected simply on the papers.’ (Emphasis added).

[32] In line with the underlined portion of the excerpt above, it is clear that the version deposed to by the Inspector-General, and his officers, must be accepted. I say so because it cannot be properly regarded as far-fetched, implausible or contrived, to merit it being thrown out of hand.

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<sup>2</sup> *Bahlsen v Nederlof and Another* 2006 (2) NR 416 at 424 E-G.

[33] In *Khariseb v The Minister of Safety and Security*,<sup>3</sup> Mainga JA stated the applicable principles in these case in the following terms, at paragraph [33]:

‘Once a member absents himself or herself from his or her official duties without leave for a continuous period exceeding 30 days, the deeming provision kicks in and that member is deemed discharged. That consequence follows by operation of the law and not as a consequence of the exercise of any discretion on the part of the I-G. The second provision authorises the I-G to reinstate such a discharged member on such conditions as deemed fit by the I-G. This proviso can only apply if that discharged member ‘again reports for duty.’

[34] I should mention finally, in dealing with the effect of the provisions of s 9, that it is clear, in terms of the last proviso, that an officer, who is deemed to have been discharged, may report again for duty and place himself, so to speak, at the mercy of the Inspector-General, regarding his or her reinstatement. The applicant did not avail himself of that opportunity and he has no one to blame in that regard.

[35] I am of the considered opinion that the applicant falls neatly within the provisions of s 9 of the Act, as neatly delineated by Mainga JA above. He did not report for duty during the period in question and did not, thereafter, upon being discharged, avail himself of the opportunity to report again for duty at least for the Inspector-General, to consider reinstating him.

### Conclusion

[36] As a member of the public service appointed to serve the Namibian nation the applicant has failed in this duty. This courts understanding is that once there is a grievance at the work place an employee does not simply stay away until their grievances are resolved. Such employee needs to present themselves to work until such a time there is a resolution to their grievances.

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<sup>3</sup> *Khariseb v Minister of Safety and Security* (Case No. SA 68/2018), Page 15.

[37] The applicant deliberately stayed away from his official duties in terms of Chapter 3 of the Police administration manual the duties and Responsibilities of a Warrant officer and a Sergeant/and commanders. Thus this court finds that the applicant failed to discharge the onus placed upon him. The application ought to fail for those reasons, in my considered view.

#### Costs

[38] I am of the considered opinion that there are no circumstances apparent or suggested for the court to deviate from the principle rule regarding costs, namely, that costs follow the event. The applicant has failed in his application and that being the case, the court will thus grant costs in favour of the respondents.

#### Order

[39] As a result I make the following order:

1. The Second Respondent's notice dated 1 July 2019 to the effect that Applicant is discharged from the service of Namibian Police Force dated 1 July 2019 is hereby confirmed.
2. The applicant is ordered to pay the cost of application.
3. The matter is removed and regarded as finalised.

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T. S. Masuku  
Judge

APPEARANCES:

APPLICANT: P. Coetzee  
Of PD Theron & Associates, Windhoek

FIRST, SECOND AND  
THIRD RESPONDENTS: J. Ncube  
Of the Office of the Government Attorney,  
Windhoek