REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2021/00023

In the matter between:

COLLIN ENGELBRECHT **APPLICANT**

and

MINISTER OF HOME AFFAIRS, IMMIGRATION, SATEFY AND SECURITY **RESPONDENT**

Neutral citation: *Engelbrecht v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-MOT-REV-2021/00023) [2022] NAHCMD 224 (29 April 2022)

Coram: RAKOW, J
Heard: **10 March 2022**
Delivered: **29 April 2022**
Reasons delivered: 05 May 2022

Flynote: Judicial Review – *Immanuel v Minister of Home Affairs and* Others - The only time court can interfere with the decision by the Minister is when the Minister acted outside his authority and as such the act is ultra vires, or if authorized to take the decision, the decision in itself is wrong – The court is satisfied that the Minister was authorized to deal with the appeal and the applicant did not discharge the burden placed on him to show that the decision of the Minister was wrong or flawed.

Summary: The applicant, a police constable, was dismissed from the Force after a conviction on a charge of possession of cannabis. He was sentenced to pay a fine of N$ 800 or six month's imprisonment. The respondent's decision followed a recommendation by a Board of Inquiry to determine fitness of the applicant to remain in the Force after his conviction of possession of cannabis. The board conducted an enquiry and recommended to the Inspector General (the IG) that the applicant be discharged from the Force on account of the conviction and sentence in the Magistrate's court. The I.G. then, acting on that recommendation, discharged the applicant from the Force.

The applicant formulated his grounds of appeal and submit it to the Minister for consideration of the appeal. The Minister proceeded and, in his affidavit, indicated that he duly considered this appeal by referring to the evidence lead before the Board, and he denied the applicant's averments that he did not take into consideration his testimony. Minister found that he agrees with the decision of the IG, who in turn discharged the applicant from the Force on the recommendation of the Board.

He brought a review applications seeking the review and setting aside of a decision of the Respondent to discharge to discharge him from the Namibian Police Force.

Held that – evidence were presented to the Board by both the applicant and the Police Force upon which they made a recommendation the IG.

Held further that - The IG acted on those recommendations and dismissed the applicant from the Police Force.

Held further that – He utilized his right to appeal to the Minister and the evidence before this court is that the Minister indeed applied his mind.

Held further that – The only time ae court can interfere with the decision reached by the Minister, is when the Minister acted outside his authority and as such the act is ultra vires, or if authorized to take the decision, the decision in itself is wrong.

Held further that – The Minister was authorized to deal with the appeal and the applicant did not discharge the burden placed on him to show that the Minister's decision as flawed.

ORDER

1. The review application is dismissed with costs.

REVIEW JUDGMENT

RAKOW, J:

Introduction

[1] The applicant who was a constable in the Namibian Police Force was dismissed from the Force after a conviction on a charge of being in possession of cannabis, contravening section 2(b) of the Abuse of Dependence Producing Substances and Rehabilitation Centers, Act 41 of 1971. He was sentenced to pay a fine of N$ 800 or to a term of six month's imprisonment in the alternative. The applicant was convicted in the Magistrate's court after he pleaded guilty to the offence on 27 August 2019.

[2] The applicant has brought a review application seeking the review and setting aside of a decision by the Respondent to confirm applicant's discharge from the Namibia Police Force on 4 November 2020. The respondent's decision followed a recommendation by a Board of Inquiry set up in terms of section 8(1) of the Police Act, 1990 to determine fitness of the applicant to remain in the Force after his conviction of possession of cannabis, contravening section 2(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971.

The Notice of Motion

[3] The notice of motion sets out the relief being sought as follows:

- For the reviewing and setting aside of the Respondent's decision dated 04 November 2020, wherein the Respondent confirmed the decision by the Inspector General to discharge the Applicant from the Namibian Police Force in terms of Section 8(2) of the Namibian Police Act, Act 19 of 1990 as amended (hereinafter referred to as "the Act").

- For an order directing the Respondent to reinstate the Applicant to his previous position with full back pay from the date of discharge to the date of reinstatement.
- Costs in the event that this application is opposed;
- Further and/or alternative relief.

The legal issue for determination

[4] The legal issue to be determine by the Honourable Court is whether or not the decision to discharge the applicant in terms of section 8(1) of the Police Act, 1990 was supported by evidence, in other words whether the Respondent has adduced enough evidence to show that the Applicant was not capable of performing his work efficiently because of his conviction and was as such rightly discharged from the Force.

Evidence before Board of Enquiry

[5] The parties set out the history of the matter in their respective affidavits, for the sake of brevity I will not reiterate it all verbatim. The Board of Enquiry heard the evidence of one Sergeant Kevin Tsei-Tseib who testified about the conviction of the applicant on a charge of Possession of Cannabis, contravening section contravening section 2(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971, and he testified that although the value of the cannabis was only N$50, it is still seen as a very serious offence. He stated further that the State suffered harm as a result of the Applicant committing the offence given his status as a member of the Force despite Applicant not having committed the offence whilst in uniform. He also admitted that there was no aggravating factors or violence involved in the commitment of the crime.

[6] It was further testified that the Applicant was convicted of an offence in terms of the contravening section 2(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971 which is an offence listed under Schedule 1 of the Police Act, 1990. The applicant as a member of the police force, is subject to a higher code of conduct because he is a person who is tasked with enforcing the law and maintaining law and order. Sergeant Moses Jonas also testified. He is the supervisor of the applicant. He testified that the applicant was well aware of section 13 of the Police Act, 1990 which provides that, amongst others, the function of the

Force is to preserve the internal security of Namibia, to maintain law and order and prevent crime. He was further aware of Chapter 11.C,3 of the Administrative Manual of the Police force which provides that the discharge of a member of the Force who is convicted of an offence shall be considered by a Board of Enquiry indicating the possibility of discharge should a member be convicted of a Schedule 1 offence.

[7] It was further testified that the applicant is aware of the Vision, Mission and Values of the Force which values include upholding the principles of the rule of law, national commitment, and unwavering patriotism, to respect the supreme law of Namibia and to be accountable to the nation and the community the Force serves and

The applicant also knows the code of conduct which includes the obligation on members of the Force to respect and uphold the rule of law as well the code of conduct itself, to oppose their violation and to maintain a level of integrity that is beyond reproach.

[8] The evidence presented to the Board also indicated that the applicant is aware of the provisions of section 15 of the Regulations in terms of section 42 the Police Act, 1990 which stipulates that members of the Force shall be guilty of misconduct if they:

conduct themselves in an unbecoming or improper manner which causes embarrassment to the Force; or take an active part in any activity which is likely to interfere with the impartial discharge of his or her duties or which is likely to give rise to that impression amongst members of the public; or uses intoxicating liquor excessively or uses stupefying drugs without a prescription from a medical practitioner; or is convicted of an offence. It was also testified that the applicant received instructions on these instruments during his training.

[9] The applicant did not deny the conviction but expresses his deep remorse for his actions. He testified that he was still able and fit to remain in the force as he has carried out his duties the same as always after the conviction of the crime. He testified that he pleaded guilty because he did not want to waste the courts time and wanted to report for duty the next day. He also testifies that he is able to carry out his work efficiently. He further testified in mitigating that in terms of the Police Regulations, that he will be unable to receive any promotion for a period of 5 years because of this conviction.

[10] It was the finding of the Board of Enquiry that the evidence before it supported a recommendation to discharge the Applicant as he himself expressed that the public would not trust him following his conviction and that his conduct had caused embarrassment to the Force which go to the root of his mandate within the Force.

The consideration by the Respondent

[11] The applicant was brought before a board of inquiry (the board) in terms of the
Police Act No. 19 of 1990 (the Act). The amended, s8 (1)1 reads as follows:

'(1) A member 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 or her 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 member is still serving his or her probation period in terms of section 4 such a prior enquiry shall not be required , but such member shall be afforded an opportunity to be heard prior to any discharge.

(2) A member who has been discharged from the Force or reduced in rank by the Inspector-General in terms of subsection (1), may in the prescribed manner appeal to the Minister against the decision of the Inspector- General, and the Minister may set aside or confirm such decision.

[12] The board conducted an enquiry and recommended to the Inspector General (the IG) that the applicant be discharged from the Force on account of the conviction and sentence in the Magistrate's court. The I.G. then, acting on that recommendation, discharged the applicant from the Force. This is the route that the applicant in the current matter followed. He formulated his grounds of appeal and submit it to the Minister for consideration of the appeal. The Minister proceeded and, in his affidavit, indicated that he duly considered this appeal by referring to the evidence lead before the Board and he denied the applicant's averments that he did not take into consideration his testimony. The Minister emphasized the evidence of Sergeant Tsei-Tseib in that the possession of dependence producing substance is indeed a serious offence and rampant in the Namibian society and a high priority for law enforcement members.

[13] The Minister continued and explained that he did not attach any value to the statement of the applicant that the value of the cannabis was very low as well as the fact that no violence was perpetrated during the commitment of the offence in light of the fact that the applicant is subjected to a higher code of conduct as a person who is tasked with enforcing the law and maintaining the law. He further concluded that in his view the applicant willfully disregarded the various instruments setting out what is expected from a member of the Force and the applicant is therefore not capable of upholding the values of the Force. He further remarked that the applicant cannot be said to be trustworthy for the mere fact that he did not complain when assigned a task by his supervisors. Trustworthiness entails that the applicant can be trusted to uphold and conduct himself in a manner consistent with the Values, Vision and Mission of the Force and respect for the standard of conduct expected of a member of the Force, which in the case of the applicant, he did not prove.

[14] For the above and some further additional reasons set out in the affidavit of the Minister, the Minister then proceeded and found that he agrees with the decision of the IG, who in turn discharged the applicant from the Force on the recommendation of the Board.

Legal considerations and application

[15] When discussing the legal considerations, I found the case of *Immanuel v Minister of Home Affairs and* Others[1] very useful as it dealt with the same piece of legislation. Damaseb J as he then was, in this matter said the following about Judicial review:

'Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision–makers by law (which includes the constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e., that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires*. If the decision is one which the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision. With limited exceptions,

[1] *Immanuel v Minister of Home Affairs and* Others (PA315/05) [2006] NAHC 30 (28AUGUST 2006)

namely an error of law on the face of the record and the still-evolving doctrine of proportionality, the Courts are in principle not prepared to review the merits of the decision unless Parliament has created a statutory right of appeal. (See Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991(4) SA 43 at 46-48; The Western Australia Law Reform Commission 26(11), Working Paper on Judicial Review of Administrative Decisions (1986) at paragraph 1.9.) It must be borne in mind that 'in the absence of irregularity or unlawfulness, considerations of equity do not provide any ground of review': Davies supra at 47G.'

[16] In the same matter between *Immanuel v Minister of Home Affairs and Other*[2] , said the following with reference to *Tala v Village Council of Wolmarandsstad*, 1927, TPD 425 at 428-430 regarding the right to appeal,

'that is authority for the proposition that where the legislature has given a right of appeal against the exercise of a discretionary power and or requires the functionary to give reasons for his or her decision, the use of the expression 'in the opinion' of a functionary is not to be seen as having been intended as a decisive factor precluding judicial review. Under the scheme of the Act there is a right of appeal to the Minister from a decision of the I.G. Second respondent's exercise of his discretionary power under s8(1) is therefore subject to judicial review. My reading of the Act is that an enquiry in terms of s8 (1) must be properly conducted so as to determine the issue whether a member is fit to remain on the Force and the I.G. must have a proper basis for forming the opinion that a member is not fit to remain on the Force.'

[17] Damaseb J further in *Immanuel v Minister of Home Affairs and Others*[3] commented as follows on the application and meaning of the word 'efficiently' in s8(1). He referred to the definition proposed by Mr. Namandje during the arguments and said:

'Relying on the Mini Oxford Dictionary, he submits that the word must be interpreted to mean 'able, productive, competent, useful'. (I will for the purposes of this judgment assume this to be correct.) ……Now, how can a member of the Force be productive and useful to the Force if, as the respondents say, the public stand to lose trust and confidence in them because of the criminal conviction? '

<u>Conclusion</u>

2

3 Supra

[18] From the record of proceedings and the affidavit filed by the Minister it is clear that evidence were presented to the Board by both the applicant and the Police Force upon which they made a recommendation the IG. The IG acted on those recommendations and dismissed the applicant from the Police Force. He utilized his right to appeal to the Minister and the evidence before this court is that the Minister indeed applied his mind. He in detail dealt with his considerations and the reasons for such considerations.

[19] The only time that the court can interfere with the decision reached by the Minister as in this instance, is when the Minister acted outside his authority and as such the act is ultra vires, or if authorized to take the decision, the decision in itself is wrong. The court is satisfied that the Minister was indeed authorized to deal with the appeal and that the applicant did not discharge the burden placed on him to show that the decision of the Minister was wrong or flawed.

[20] I therefore make the following order:

1. The review application is dismissed with costs.

_____

E Rakow

Judge

Appearances:

Appellant:	R Avila of Metcalfe Beukes Attorneys Windhoek
Respondent:	C Van Der Smit of the Office of the Government Attorney Windhoek