

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2021/00308

In the matter between:

SABIANUS SHIVUTE IYAMBO

APPLICANT

and

MINISTER OF HOME AFFAIRS, IMMIGRATION,

SAFETY & SECURITY

ETIENNE MARITZ NO

PUBLIC SERVICE COMMISSION OF NAMIBIA

COMMISSIONER-GENERAL OF THE NAMIBIAN

CORRECTIONAL SERVICE

ATTORNEY-GENERAL OF NAMIBIA

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

Neutral Citation: *Iiyambo v Minister of Home Affairs, Immigration, Safety & Security*
(HC-MD-CIV-MOT-GEN-2021/00308) [2022] NAHCMD 442 (30 August 2022)

Coram: UEITELE J

Heard: 16 February 2022

Delivered: 30 August 2022

Flynote: *Legislation - Statutes of limitation* – Time bars do not affect a substantive right guaranteed under a Constitution, but merely limit in time the remedy of bringing proceedings to enforce that right.

Civil procedure – Cause of action – The definition and parameters of what constitutes a cause of action, and when it arises, restated.

Legislation – Public Service Act - The Prime Minister has the power to determine conditions of service of staff members.

Legislation – Public Service Act – Staff Rules - Schedules I, II, and III which mentions offices, ministries, and agencies do not mention the different services in terms of the law, such as the Correctional Services, as such, the Public Service Staff Rules mentioned in s 35 of the Public Service Act do not apply to members of the services.

Summary: The applicant is an officer employed by the Namibian Correctional Service and has been so employed since 15 May 1995. During January 2014, the applicant applied for special leave for a period of four years with full benefits in order to pursue studies at the University of Namibia. On 13 February 2014, Commissioner-General addressed a letter to the applicant in which he communicated the approval of the applicant's application for study leave and set out the conditions subject to which the study leave was approved.

Upon approval of the special study leave during February 2014, the applicant commenced his studies at the University of Namibia. On 19 February 2016, the

applicant was called to the offices of the Commissioner-General to sign the agreement referred to in the letter communicating the approval of his study leave.

The applicant alleges that during the course of his studies when examinations ended or as recess would start, his supervisor required of him (applicant) to report for duty despite the fact that he had study commitments to attend to, and because of these requirements, he was forced to take 72 days of vacation leave to attend to those study commitments.

Upon his return after his special study leave, the applicant sought the restoration of his leave days, as he felt he should not have been forced to take vacation leave, while on special study leave. When the fourth respondent refused to do so, the applicant engaged the Public Service Commission, who advised the fourth respondent to restore to the applicant's leave days. The fourth respondent refused.

The fourth respondent then sought an opinion from the fifth respondent, who confirmed the advice of the Public Service Commission. The fourth respondent further refused to implement the decision, and ordered the Executive Director of the first respondent not to implement the decision. When the fourth respondent persisted in his refusal, the applicant approached the court for such an order. The opposing respondents, however, raised a special plea of prescription to the claim of the applicant, and further filed a counter application to have the recommendation of the Public Service Commission declared void, and have it set aside.

On the pleadings it is also clear that it is during September 2018, that he first complained about the fact that he had to utilise his vacation leave days while he was on study leave. On 7 March 2019, the Commission expressed its opinion and advised

the fourth respondent to credit the applicant with the leave days that he utilised during the period he was on study leave, and which decision was confirmed by the Attorney-General on 10 October 2019. On 8 November 2019, the Commissioner-General communicated his disagreement with the Commission and the Attorney-General and indicated that he will not implement the decision.

Held that the applicant's cause of action arose on 8 November 2018, and by 4 August 2021, when the applicant commenced proceedings, his cause of action had already prescribed. His claim was accordingly refused and the point *in limine* of prescription upheld.

Held that, in respect of the counter application, challenging the decision of the Commission, the granting of special study leave to correctional officers is a matter which falls within the exclusive jurisdiction of the Commissioner-General and not within the purview or domain of the Commission.

Further held that, the Commission accordingly does not have the authority to advise or order the Commissioner-General on how to apply the provisions of the study leave granted in terms of the Correctional Services Regulations.

As a result, the challenge to have the decision of the Commission set aside succeeds with costs.

ORDER

- (1) The applicant, Mr Sabianus Shivute Iiyambo, claim has prescribed and the respondents' point *in limine* of prescription is upheld.
- (2) The respondents counter application succeeds and the decision of the Public Service Commission (the third respondent in the main application) which was communicated to the first respondent (first applicant in the counter application) in a letter dated 7 March 2019 is declared unlawful, void and is hereby set aside.
- (3) The applicant, Mr Sabianus Shivute Iiyambo, must pay the first, second, and fourth respondents' costs of suit.
- (4) The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] The applicant, in this matter is a certain Mr Sabianus Shivute Iyambo a major male person who is employed at the Correctional Service of Namibia, holding the rank of Assistant Commissioner.

[2] The first respondent is the Minister of Home Affairs, Immigration, Safety and Security, a minister of state, appointed in terms of Article 32 of the Namibian Constitution and cited in his official capacity. The second respondent is Mr Etienne Maritz who is also cited in his official capacity as the Executive Director of the Ministry of Home Affairs, Immigration, Safety and Security. The third respondent is the Public Service Commission of Namibia. The fourth respondent is the Commissioner-General of the Namibian Correctional Service, and the fifth respondent is the Attorney-General of Namibia.

[3] I will for ease of reference refer to Mr Iyambo as the applicant, the first respondent as the Minister, the second respondent as Mr Maritz, the third respondent as the Commission, the fourth respondent as the Commissioner-General, and the fifth respondent as the Attorney-General. I will collectively refer to the respondents as the 'respondents'.

[4] On 4 August 2021, the applicant commenced proceedings in this court against the respondents, although, he did not seek any substantial relief against the Commission and the Attorney General. In the notice of motion the applicant sought the following relief:

'1. Directing the 2nd Respondent to implement the decision of the 3rd Respondent dated 7 March 2019, directing to the 2nd Respondent and the 4th

Respondent, that the vacation leave days taken by the applicant during the period of special study leave must be credited back to my vacation leave days.

2. Alternatively an order declaring the 4th Respondent's directive requiring the applicant to take vacation leave whilst the applicant was granted special study leave unlawful.

3. In the event prayer 2 is successful, an order setting aside the 4th Respondent's directive requiring the applicant to take vacation leave whilst the applicant was granted special study leave and directing that the vacation leave days taken by the applicant during the period of special study leave be credited back to the applicant's vacation leave days.

4. Directing that the 1st Respondent, alternatively the 4th Respondent, refund the applicant in the amount of N\$ 17 000.00 that the applicant paid to the University of Namibia for the 2017 academic year.'

[5] Of the five respondents three of the respondents namely the first, second, and fourth respondents indicated that they will and did oppose the applicant's application. In addition to opposing the application the opposing respondents filed a counter application seeking a review of the Commission's decision. I will refer to the respondents who oppose the applicant's application as the 'opposing respondents'.

The background to this application

[6] The facts upon which the applicant basis his application are not in dispute. The background facts that I set out in this judgment are the facts that I discerned from the applicants allegations in his supporting affidavit which are not disputed by

the respondents and they are as follows: The applicant is an officer employed by the Namibian Correctional Service and has been so employed since 15 May 1995. The applicant currently holds the rank of Assistant Commissioner and has been responsible for Community Service Orders since 1 May 2013.

[7] During January 2014, the applicant applied for special leave for a period of four years with full benefits in order to pursue studies at the University of Namibia. On 22 January 2014, the former Head: Corporate Management, Deputy Commissioner-General RT Hamunyela recommended to the then Commissioner-General E. Shikongo, that the applicant's application for special study leave be approved.

[8] The former Commissioner-General, Commissioner Shikongo approved the applicant's application for special study leave. Commissioner Shikongo communicated the approval of the study leave to the applicant by letter dated 30 January 2014. I quote verbatim from that letter:

'This letter serves to inform you that, you have been granted special study leave with full remuneration and financial assistance for a period of four (4) years with effect from 10 February 2014 to 30 November 2017 to pursue a Bachelor Degree in Law, LLB (Honours) at the University of Namibia, provided that you entered into a contractual agreement with the Namibia Correctional Service.

You are therefore requested to complete the attached agreement.'

[9] On 13 February 2014, Commissioner-General RT Hamunyela addressed a further letter to the applicant in which he also communicated the approval of the

applicant's application for study leave and set out conditions subject to which the study leave was approved. I, in part, quote verbatim from the letter:

'This letter serves to inform you that, you have been granted special study leave with full remuneration and financial assistance for a period of four (4) years with effect from 10 February 2014 to 30 November 2017 to pursue a Bachelor Degree in Law, LLB (Honours) at the University of Namibia.

During the period of study you shall be subjected to the provisions of the Correctional Services Act, 2012 (Act No. 9 Of 2012). Correctional Services Regulations, Standing Orders and Directives issued in terms thereof. The Namibian Correctional Services may at any time withdraw you from your study in the event of:

Misconduct;

Making no satisfactory progress in your study/training, or

Violation of the law and regulations of the Namibian Correctional Services in particular and the country in general ...

Take note that you should report to your respective institution or office on a working day immediately following the day the examination has ended or recess has started.

All administration work regarding your vacation leave, sick leave, etc. should be arranged with your head of Directorate.'

[10] Upon approval of the special study leave during February 2014, the applicant commenced his studies at the University of Namibia. On 19 February 2016, that is slightly more than two years after he was notified of the approval of his study leave, the applicant was called to the offices of the Commissioner-General to sign the agreement referred to in the letter communicating the approval of his study leave. The applicant attached a copy of the agreement that he and the Namibia Correctional

Services signed as an annexure to his founding affidavit and that agreement reflects that the applicant signed it on 19 February 2016.

[11] The applicant alleges that during the course of his studies when examinations ended or as recess would start, his supervisor a certain Commissioner Martin required of him (applicant) to report for duty despite the fact that he had study commitments to attend to. Because of the study commitments he had he would, when required to report for duty during lecture free periods or University recess, invariably apply and would be granted vacation leave to enable him to attend to his study commitments. The applicant further alleges that as a result of him being required to report for duty during lecture free periods or University recess periods he, over the four-year period of his studies, utilised 72 days in respect of his vacation leave.

[12] Upon successfully completing his studies during July 2018, the applicant formed the view that he was wrongly and forcibly required to take vacation leave whilst on full time special study leave. He thus, demanded that the 72 vacation leave days that he utilised be credited back to his vacation leave days. The executive management of the Correctional Services rejected the applicant's demand. As a result the applicant, during September 2018, approached the Public Service Commission for it to intervene.

[13] On 7 March 2019, the Commission, having considered the applicant's complaint, ruled in applicant's favour and advised the Commissioner-General that:

'in terms of the Public Service Staff Rules made under the Public Service Act, 1995 it is not mandatory for a staff member who is on special study leave to report for duty

when on school holiday, neither does it make provision for them to take vacation leave’.

As a result of that advice the Commission stated that “the vacation leave taken by Assistant Commissioner Iyambo be credited back to his vacation leave days”.

[14] The Commissioner–General, disagreed with the interpretation proffered by the Commission and instructed Mr Maritz not to implement the Commission’s recommendation or advise. The Commissioner–General’s stance prompted the Commission to seek a legal opinion from the Attorney General. On 10 October 2019, the Attorney General concluded his legal opinion and advised that:

‘a) ...members of the services are indeed bound by the Public Service Staff Rules (PSSR) like any other staff member in the Public Service. They are not exempted, the determination of leave days and all relevant matters are, therefore, governed by the Public Service Act, 1995 read together with the applicable PSSR....

b) ...it is illegal to require or compel Assistant Commissioner Iyambo to take his vacation leave whilst on special study leave. The PSC is, therefore, correct in its view that the vacation leave days purported to have been taken by Assistant Commissioner Iyambo be credited back to his annual leave days.’

[15] Despite the legal advice rendered by the Attorney-General, the Commissioner–General remained of the view that the Commission has no jurisdiction over the conditions of service relating to persons employed in the Namibia Correctional Services. He (the Commissioner–General) thus, persisted with his refusal to implement the Commission’s recommendation or advice. The

Commissioner General, in a letter dated 8 November 2019, requested the Attorney-General to reconsider his opinion.

[16] Frustrated by the stalling of his demand the applicant, on 10 December 2019, referred a complaint to the office of the Ombudsman, seeking the Ombudsman's intervention in the matter. When nothing was forthcoming from the office of the Ombudsman by 15 May 2020, the applicant on 2 July 2020, addressed a letter to Mr Maritz and the Commissioner General requesting them to implement the Commission's recommendation.

[17] On 3 July 2020, Mr Maritz responded to the applicant's letter of 2 July 2020, and informed him that the Commission's recommendation or advice will not be implemented until the Attorney-General has reconsidered his legal opinion. This prompted the applicant to, on 2 June 2021, approach his legal representatives who in a letter demanded that Mr Maritz implement the Commission's decision, but when Mr Maritz and the Commissioner-General did not move or implement the Commission's decision the applicant launched these proceedings. As I indicated earlier the Minister, Mr Maritz and the Commissioner-General opposed the applicant's application.

Point in Limine

[18] The respondents in their opposition to the applicant's claim raised a point *in limine* to the effect that, the applicant's claim for the credit of the leave days and the refund of the amount of N\$ 17 000 for tuition fees has prescribed in terms of s133 (3) of the Correctional Services Act¹.

¹ Correctional Services Act 9 of 2012

[19] At the hearing of this matter Mr Enkali, who appeared for the applicant indicated that he concedes that the applicant's claim for the refund of the tuition fees in the amount of N\$ 17 000 has prescribed, and the applicant thus abandons that claim. Since the applicant abandoned his claim for the refund of the N\$ 17 000 I will say nothing more about that claim in this judgment.

[20] The applicant denies that his claim for accrued leave days prescribed in terms of section 133 (3) of the Correctional Service Act. He furthermore denies that the Correctional Service Act is applicable to his claim. He contends that sections 5(3), 5(2), 13, and 34 of the Public Service Act, identify the correct authority to determine the conditions of service of staff members in the Public Service, which is the Prime Minister and that this authority is not limited to staff members, but also extended to expressly include members of the services.

[21] He furthermore contends that he issued a notice to institute legal proceedings under s 33 of the Public Service Act, which he says is the correct statute governing his claim. The applicant continued and contended that even if it is found that the notice to institute legal proceedings should have been given in terms of s 133 (3) of the Correctional Service Act, the notice submitted (under s 33 of the Public Service Act) did constitute proper and sufficient notice of legal proceedings.

[22] The applicant continued to deny that that his claim for accrued leave days prescribed either in terms of s 133 (3) of the Correctional Service Act or s 33 of the Public Service Act. He contends that the main relief that he seeks is an order directing Mr Maritz to implement the decision of the Commission dated 7 March 2019. He further argued that on 20 March 2019, the Commissioner General refused to accept and became opposed to the implementation of the decision of the

Commission. He continued and contended that in response to Mr Maritz's refusal to implement the Commission's decision the Commission sought a legal opinion from the Attorney General. On 10 October 2019, the Attorney General concluded the legal opinion and advised that the Commission was correct in its decision. He thus concluded his contention by stating that the cause of action in relation to the implementation of the decision of the Commission for all intends and purposes arose during June 2021, when it became apparent that Mr Maritz would not implement the Commission's advice/decision.

[23] I find it appropriate to first deal with the special plea raise by the respondents. Both sections 33 of the Public Service Act and s 133 of the Correctional Services Act, circumscribe the period within which a person may institute legal proceedings in respect of anything done or omitted in terms of those two statues. Section 33 of the Public Service Act, provides as follows:

'33 (1) No legal proceedings of whatever nature shall be brought in respect of anything done or omitted in terms of this Act unless such proceedings are brought within 12 calendar months from the date on which the claimant had knowledge or might reasonably have been expected to have knowledge of that which is alleged to have been done or omitted, whichever is the earlier date.

(2) No such legal proceedings shall be commenced before the expiry of 30 days after written notice of intention to bring such proceedings, containing full particulars as to that which is alleged to have been done or omitted, has been served on the defendant.'

[24] Section 133(3) of the Correctional Services Act, provides as follows:

'133 (3) No civil action against the State or any person for anything done or omitted in pursuance of any provision of this Act may be entered into after the expiration of six months immediately succeeding the act or omission in question, or in the case of an offender, after the expiration of six months immediately succeeding the date of his or her release from a correctional facility, but in no case may any such action be entered into after the expiration of one year from the date of the act or omission in question.'

[25] In the matter of *Mwellie v Minister of Works, Transport and Communication and Another*,² Strydom JP opined that in general, statutes of limitation do not affect a substantive right guaranteed under a Constitution, but merely limit in time the remedy of bringing proceedings to enforce that right. They only require that the constitutional right be asserted within a particular time, and thus concluded that as a general rule, statutes of limitation are constitutional. It therefore follows that the question that needs to be answered in this matter is, 'when did the applicant's 'cause of action' arise?

[26] A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have occurred which are material to be proved to entitle the applicant to succeed.³ In the matter of *McKenzie v*

² *Mwellie v Minister of Works, Transport and Communication and another* 1995 (9) BCLR 1118 (NmHC) at p 1135F-G.

³Per Gardiner, JP, adopting s 64 of *Halsbury*, xix, in *Coetzee v SAR&H* 1933 CPD 570.

Farmers' Co-operative Meat Industries Ltd,⁴ the phrase “cause of action” was defined,⁵ to be:

‘Every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved’.

[27] In the matter of *Abrahamse & Sons v SA Railways and Harbour*,⁶ Watermeyer J examined the meaning of the expression “cause of action” and concluded that:

‘The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or

⁴ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922, AD 16 at par 23; see also Erasmus Superior Court Practice, pp D1-302;

⁵ See also *Cooke v Gill*, LR 8 CP 116, S 64(1) of Act 22 of 1916: means “every fact which is material to be proved to entitle a plaintiff to succeed in his claim” (*Lyon v SAR&H* 1930 CPD 276); but it can mean “that particular act on the part of the defendant which gives the plaintiff his cause of complaint”

⁶*Abrahamse & Sons v SA Railways and Harbours*, 1933 CPD 626.

'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause action.'

[28] In the present matter the applicant applied for study leave during February 2014, and during that month his application for study leave was approved and it was during that period that he was informed that he must report to his office on a working day, immediately following the day the examination has ended or recess has started. From the pleadings before me it is also apparent that the applicant utilised his vacation during the period 8 December 2014 to 27 July 2017. On the pleadings it is also clear that it is during September 2018, that he first complained about the fact that he had to utilise his vacation leave days while he was on study leave.

[29] It is further apparent that, on 7 March 2019, the Commission expressed its opinion and advised the Commissioner-General to credit the applicant with the leave days that he utilised during the period he was on study leave. There is also no dispute that the Commission was confirmed in its opinion by the Attorney General on 10 October 2019. On 8 November 2019, the Commissioner-General communicated his disagreement with the Commission and the Attorney-General and indicated that he will not implement the decision by the Commission until when the Attorney-General has reviewed his opinion.

[30] From what I have stated in the preceding paragraphs, it is clear that by 8 November 2019, there was a person who could sue and another who could be sued, and there was a complaint about vacation leave days that were allegedly wrongfully utilised and so was there also a demand that those allegedly wrongly used days be credit back to the person. It was also clear that the demand was not going to be acceded to. I am therefore of the view that, at the latest by 8 November 2019, all the

facts which are material to be proved to entitle the applicant to succeed had occurred and as such the applicant's cause of action had arisen by that date, that is 8 November 2019.

[31] It is also common cause that, the applicant only instituted his claim on 21 June 2021 which is more than 6 months or 12 months after the facts which are material to be proved to entitle the applicant to succeed had occurred. The opposing respondents' special plea of prescription (either under the s33 of the Public Service Act or s 133(3) of the Correctional Service Act) has thus been correctly raised. The applicant's claim for accrued leave days has prescribed.

[32] I will now turn to the counter application that confronts me.

Counter application

[33] I indicated earlier in this judgment that the opposing respondent (I will continue to refer to the parties as is in convention namely Mr Iiyambo as the applicant, the Minister, Executive Director and the Commissioner-General as the opposing respondents or simply the respondents, the Public Service Commission as the Commission and the Attorney-General by that title) in addition filed a counter application in which they seek the following relief:

'1. That the decision of the 2nd respondent (Public Service Commission) the 3rd respondent in the main application which was communicated to the 1st respondent (applicant in the main application) by a letter dated 7 March 2019 be declared unlawful, null and void and is hereby set aside.

2. A party that opposes this counter application be ordered to pay the cost of this application.
3. Granting the Applicants further and/or alternative relief as the Court deems fit.'

[34] In support of their counter application, the respondents contend that the Commission's reliance on the provisions of the Public Service Act, the Regulations thereto and the relevant PSSR D.I. Part XI dealing with the staff members' special study leave is misplaced, and it is outside the scope of its powers. The respondents further contend that the only power which the Commission has pursuant to s 34(1)(c) of the Public Service Act, the regulations made under that Act, and the PSSR is to recommend to the Prime Minister the granting of the special study leave to staff members. The Prime Minister may then grant to a staff members who qualify in terms of the requirements of the said PSSR.

[35] The respondents furthermore contend that the provisions of s 36(1)(b) provide that the Public Service Act shall apply to all members of the service, but only to the extent provided in the Act. On the basis of this provision, the respondents contend that the application of the Public Service Act, (including the regulations made under that Act and the PSSR) to the members of the services is limited to what is provided for in the Act. It is therefore their averment that the provisions of the Public Service Act read with the Regulations and the PSSR are not applicable to the granting of the special study leave to the members of the service. The terms staff members and members of the services as defined in the Public Service Act are not interchangeable, thus each one of them does not include the other, so the argument went.

[36] The respondents further contend that, the Commission's assertion that the Commissioner-General has no authority to grant special study leave to members of the services and that such authority vests in the Prime Minister subject to the recommendation of the Commission is founded on a misreading of ss 5(3), 5(2), 13, 34(1) and 36(1)(b), of the Public Service Act, the Regulations made under the Public Service Act, and the PSSR and amounts to unlawful usurping of the powers of the Commissioner-General.

[37] The respondents contend that the provisions of the Public Service Act, the Regulations made under that Act, and the PSSR do not provide for the granting of the special study leave to members of the service. The respondents contend that the provisions that deal with the granting of leave to members of the services are found in the Regulations made by the Minister responsible for the Namibian Correctional Service in terms of s 132 of the Correctional Services Act.

[38] The respondents argue that the Minister acting on the omnibus provision under s 132(1)(a)-(f) prescribed Regulations published under *Government Gazette* number 5365. Regulations 37 to 39 deals with the granting of leave to the correctional officers (applicant included) in general terms. In addition to the above regulations and to give meaning and effect to the said Regulations, the Commissioner-General in his capacity acting in terms of s 5(3) of the Correctional Service Act issued a directive on leave of absence.

[39] The respondents furthermore contend that, the Commission and the Prime Minister have no jurisdiction in so far as the granting of leave to a member of the services is concerned and therefore the Commission and Prime Minister acted *ultra vires* their powers to make the decision regarding the applicant's special study leave

with full remuneration. The decision/recommendation of the Commission that was communicated to the Commissioner-General on 7 March 2019, is accordingly unlawful because the Public Service Act, the Regulations made under the Public Service Act, and the PSSR do not give the Commission the power to recommend to the Prime Minister the granting of special study leave with full remuneration to correctional officers.

Applicant's answering affidavit to the counter application

[40] The applicant denies the contentions made by the respondent and insist on his contention that ss 5(3), 5(2), 13, and 34 of the Public Service Act, identify the correct authority to determine the conditions of service of staff members in the Public Service, which is the Prime Minister and that this authority is not limited to staff members but also extended to expressly include members of the services.

[41] The applicant furthermore contends that both the Public Service Act, and the relevant PSSR are silent on the matter of members of the services, but s 23(7) of the Labour Act,⁷ provides that an employer must not require or permit an employee to take annual leave during any period of leave to which that employee is entitled in terms of that provision. The applicant admits that the provisions cited by the respondents do make reference to powers of the Commissioner-General, but denies that the Commissioner-General does have the power to grant special study leave to correctional services officials.

⁷Labour Act No. 11 of 2007.

[42] The applicant furthermore denies that his application was made in terms of the said Regulations read with s 5(3) of the Correctional Service Act, and further disputes that his application was approved within this framework of the Act. In amplification of his denial, the applicant contends that the directives were issued by the Commissioner-General on 23 August 2017, years after he assumed special study leave and commenced with his studies. Therefore, the directives issued by the Commissioner-General cannot operate retrospectively against him.

[43] The applicant further contends that the Commission acted within its powers in terms of the Public Service Act, and the relevant Public Service Staff Rules, and that there is no legal basis upon which that decision stands to be set aside. The applicant contends that the Commissioner-General has not made out a case for the relief he is seeking in his counter application and prays that the counter application be dismissed with costs.

The issue for determination in the counter application

[44] The issue that I am called upon to determine, is, which entity (the Commission or the Commissioner-General) is empowered to administer conditions of employment of the correctional services officials and thus grant special study leave with full remuneration to the applicant.

The legislative frame work

[45] In my view the starting point is the Constitution of the Republic of Namibia. The Constitution in Chapter 13 Article 112, provides for the establishment of a Public Service Commission, which shall have the function of advising the President on the

matters referred to in Article 113 of the Constitution, and reporting to the National Assembly on such matters.

[46] Article 113 of the Constitution provides that the functions of the Public Service Commission must be defined in an Act of Parliament. Parliament indeed passed the Public Service Act. The long title of that Act provides that the purpose of the Act is to:

‘Provide for the establishment, management and efficiency of the public service, the regulation of the employment, conditions of service, discipline, retirement and discharge of staff members in the public service, and other incidental matters.’

[47] Part I⁸, of the Public Service Act, amongst other matters deals with the establishment and management of public service; the offices, ministries, and agencies of the public service; the composition of public service; the functions and powers of the Prime Minister to inquire into the efficient functioning of offices, ministries, and agencies and the efficiency of staff members and the delegation of powers and assignment of duties of Prime Minister. Part II⁹, of the Public Service Act deals with the Personnel Administration, it amongst other matters provide for remuneration of staff members and members of the services, the obligations of staff members and members of the services; transfer and secondment of staff members

⁸This Part consists of sections 2-12.

⁹ This Part consists of sections 13-24.

and retirement and discharge of staff members. Part III,¹⁰ deals with misconduct and Part IV,¹¹ contains the general provisions such as the political rights of staff; assignment of other functions to staff members, Labour relations, Limitation of legal proceedings, the power to make regulations, and the Public Service Staff Regulations.

[48] Section 4 of the Public Service Act, provides that the public service consists of all such persons as may be employed permanently or temporarily on a full-time or part-time basis or under a special contract or under any contract of employment contemplated in s 34(1), in a posts on the establishment or additional to the establishment. Establishment is defined in section 1 to mean “a post created for the normal and regular permanent requirements of any office, ministry or agency or any organisational component thereof”.

[49] The Public Service Act, in section 1 further defines ‘member of the services’ and ‘staff member.’ ‘Member of the services’ is defined as any member,

¹⁰ This Part consists of sections 25-29.

¹¹ This Part consists of sections 30-41.

'(a) of the Namibian Defence Force established in terms of section 5 of the Defence Act, 1957 (Act 44 of 1957), and includes any person appointed to or engaged in any auxiliary service or nursing service established in terms of that Act;

(b) of the Namibian Police Force established by section 2 of the Police Act, 1990 (Act 19 of 1990); or

(c) of the Correctional Service established under section 2(1) of the Correctional Service Act, 2012 (Act No. 9 of 2012)'.

[50] Staff member is defined as any person employed in a post on or additional to the establishment as contemplated in section 4, and includes the Secretary to the Cabinet and the Secretary to the President.

[51] Section 34(1) of the Public Service Act, empowers the Prime Minister to, amongst other matter, on the recommendation of the Commission, make regulations relating to; the manner and conditions, including contracts of employment, for the appointment, promotion and transfer of staff members; the discipline, powers and duties, and hours of attendance of staff members; conditions of service and entitlements, including the occupation of official quarters, of staff members and members of the services; the procedures to be observed in investigating and dealing with grievances of staff members; the procedures to be observed in investigating and dealing with allegations of inefficiency of or misconduct by staff members; a code of conduct with which staff members shall comply; any matter which in terms of this Act is required or permitted to be prescribed; and generally, any matter in respect of which the Prime Minister, on the recommendation of the Commission, considers it necessary or expedient to make regulations in order to achieve the objects of the Act.

[52] Section 35 of the Public Service Act provides for Public Service Staff Rules. That section reads as follows:

- '(1) Any-
- (a) standing recommendation or advice of a general nature made or given by the Commission; and
 - (b) directive by the Prime Minister to elucidate or supplement any regulation, and which is not contrary to this Act, may be included in rules called the Public Service Staff Rules.
- (2) The provisions of section 34(2) shall apply *mutatis mutandis* in respect of the Public Service Staff Rules.
- (3) The provisions of the Public Service Staff Rules are binding upon any office, ministry or agency or any staff member in so far as they apply to that office, ministry or agency or that staff member.'

[53] Section 36 of the Public Service Act provides that the Act will apply to or in respect of all staff members, whether employed in or outside the Republic of Namibia, and all members of the services, but only to the extent provided for in this Act.

[54] Having set out the legislative frame work as contained in the Public Service Act, I now proceed to the Correctional Services. The Namibian Constitution in Chapter 15 Article 121 provides for the establishment of a Correctional Service which must be headed by Commissioner-General of Correctional Service, and who must be appointed by the President. The Constitution enjoins the Commissioner-General of Correctional Service to make provision for a balanced structuring of the correctional

service and has the power to make suitable appointments to the correctional service, to cause charges of indiscipline among members of the correctional service to be investigated and prosecuted and to ensure the efficient administration of the correctional service.

[55] The Act of Parliament envisaged by Article 121 of the Namibian Constitution is the Correctional Services Act. Part I of the Correctional Service Act, amongst other matters, provides for the establishment, functions and administration of Namibian Correctional Service, the principles that guide the Correctional Service, and the appointment and functions of Commissioner-General. Section 5 of the Correctional Services Act, provides for the appointment and functions of the Commissioner-General. Section 5(2) of the Correctional Services Act provides that in addition to such other powers, duties and functions as may be conferred upon or assigned to him or her by or under this Act, is responsible for the efficient supervision, administration and control of the Correctional Service. Section 5(3) provides that:

‘(3) Subject to the provisions of this Act, the Commissioner-General may, for the efficient supervision, administration and control of the Correctional Service and for observance by offenders and correctional officers, make or issue such rules, standing orders or administrative directives as he or she may consider necessary or expedient...’

[56] Section 132(1)(a) of the Correctional Service Act, provides that the Minister may make regulations as to the manner, including contracts of employment, of appointment, training, promotion, posting, retirement, resignation, discharge on account of ill health or otherwise, transfer and, subject to section 13 of the Public Service Act, the conditions of service of correctional officers.

Discussion

[57] Before I turn to the specific statutory provisions raised in this application, I will briefly refer to the approach that Courts have adopted to the interpretation of text – both statutory and contractual.

[58] The Supreme Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*,¹² recently adopted the articulation of the approach to be followed in the construction of text by Wallis JA in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹³ where he said:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in

¹² *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paras 17-20. Also see *Torbitt v International University of Management* 2017 (2) NR 323 (SC) para 26.

¹³*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[59] The Supreme Court furthermore referred to the approach in England and concluded that:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

[60] In *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & Another*,¹⁴ the Supreme Court advised that:

'To paraphrase what was stated by this court in *Total*,¹⁵ the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.'¹⁶

¹⁴ *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & another* 2017 (3) NR 853 (SC) paras 39-40

[61] In the matter of *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia*,¹⁷ the Supreme Court stressed the importance of the Constitution in interpreting statutory provisions it said:

‘The Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.’

[62] It is against the backdrop of what I have alluded to in the preceding paragraphs that I turn to the issues confronting me in this matter. From the legislative frame work, it is clear that the Namibian Constitution envisages the establishment, by an Act of Parliament, of a Public Service Commission, whose function is to advise the President and the Government; on the appointment of suitable persons to specified categories of employment in the public service, the exercise of adequate disciplinary control over such persons in order to assure the fair administration of personnel

¹⁵Para 24.

¹⁶Para 41.

¹⁷*Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* 2018 (4) NR 1115 (SC) para 31.

policy; the remuneration of person employed in the public services and on all matters pertaining to the public service.

[63] The Constitution furthermore envisages the establishment, by an Act of Parliament, of a Correctional Service which shall be headed by a Commissioner-General, who amongst other duties has the duty to ensure the efficient administration of the correctional service.

[64] Both the Public Service Commission and the correctional services envisaged in the Constitution were established by two different Acts of Parliament namely the Public Service Act, and the Correctional Services Act. The Public Service Act, provides, in s 5(2)(j), that the Prime Minister is responsible to direct the Public Service and his or her functions in particular include the determination of conditions of service, including the establishment of a pension fund for the benefit of staff members and their dependants. What is clear from s 5(2)(j) of the Public Service Act, is that the Prime Minister has the power to determine conditions of service of staff members. The Public Services Act, differentiates between staff members and members of service. It follows that the conditions of service which the Prime Minister determines in terms of s 5(2)(j) do not apply to members of the service. In my view the maxim '*expressio unius est exclusio alterius*¹⁸' a Latin term literally meaning "the expression of one thing is the exclusion of the other" finds application.

[65] Section 34 of the Public Service Act, 1995 empowers the Prime Minister, to on the recommendation of the Commission, make regulations relating to amongst other conditions of service and entitlements, including the occupation of official quarters, of staff members and members of the services. The Act furthermore provides that

¹⁸ This is a common law principle for construing legislation which holds that a syntactical presumption may be made that an express reference to one matter excludes other matters.

different regulations may be made in respect of different categories of staff members, or to suit the different requirements of different offices, ministries or agencies or organisational components thereof, or of different kinds of employment in the Public Service.

[66] Section 35 of the Public Service Act, provides that a standing recommendation or advice of a general nature made or given by the [Commission](#); and a directive by the [Prime Minister](#) to elucidate or supplement any regulation, and which is not contrary to [the Act](#), may be included in rules called the Public Service Staff Rules. The section furthermore provides that the Public Service Staff Rules are binding upon any [office](#), [ministry](#) or [agency](#) or any [staff member](#) in so far as they apply to that [office](#), [ministry](#) or [agency](#) or that [staff member](#).

[67] I have looked for the regulations made by the Prime Minister under s 34 of the Public Service Act, on the recommendation of the [Commission](#), relating to the conditions of service of [staff members](#) and [members of the services](#), but could not find any nor was I referred to any. The majority, if not all, of the conditions of service of staff members are contained in the Public Service Staff Rules contemplated under s 35. That section furthermore states that the Public Service Staff Rules apply to offices, ministries, and agencies or the concerned staff member. Schedules I, II, and III which mentions offices, ministries, and agencies do not mention the different services such as the Correctional Services. I have thus come to the conclusion that the Public Service Staff Rules mentioned in s 35 of the Public Service Act, 1995 do not apply to members of the services. In fact PSSR/D.I/IX which regulates the study leave of staff members provides that study leave with full remuneration may be granted to [staff members](#) on the basis and subject to the conditions and general rules laid down in the Public Service Staff Rules.

[68] In contradistinction the Minister responsible for Correctional Service has, under s 132 of the Correctional Service Act made the regulations contemplated in that Act. Regulation 1(3) of the Namibian Correctional Service Regulations (the Correctional Services Regulations), provides that the Public Service Act, the Public Service Regulations and Public Service Staff Rules applicable to officers apply to any aspect pertaining to personnel, which has not been dealt with in Chapter 2.

[69] Chapter 2 of the Correctional Services Regulations consists of 18 parts and Part 9 of those parts deal with the leave of correctional service officers. Regulations 37 to 39 of the Namibian Correctional Service Regulations make provision for the leave of correctional officers; and Regulation 37 specifically provides, that, the leave conditions of correctional officers shall be as prescribed, this means as prescribed by the Commissioner-General. The leave (including special study leave of correctional services officers is dealt with by the Correctional Services Regulations. It thus follow that that the Public Service Act, the Public Service Regulations and Public Service Staff Rules do not apply to the leave conditions of correctional officers.

[70] In addition s 5 (3) of the Correctional Service Act, 2012 empowers the Commissioner-General to make or issue such rules, standing orders or administrative directives as he or she may consider necessary or expedient for the efficient supervision, administration and control of the Correctional Service and for observance by offenders and correctional officers. The applicant is a member of the correctional services and as such is subject to the directives issued by the Commissioner-General.

[71] I thus of the view that, read within the context of the Constitution which envisages the establishment of a Public Service Commission to advise the President and the Government on matters relating to the Public Service and the establishment of a Correctional Service headed by a Commissioner-General who must ensure the efficient operation of the Correctional Services, the only reasonable conclusion is that the granting of special study leave to correctional officers is a matter which falls within the exclusive jurisdiction of the Commissioner-General and not within the purview or domain of the Commission. The Commission accordingly does not have the authority to advise or order the Commissioner-General on how to apply the provisions of the study leave granted in terms of the Correctional Services Regulations.

[72] I have thus come to the conclusion that the Commission has no jurisdiction in so far as the granting of leave to a correctional officer is concerned. The Commission thus acted *ultra vires* their powers to make the decision regarding the applicant's special study leave with full remuneration. The decision/recommendation of the Commission that was communicated to the Commissioner-General on 7 March 2019 is accordingly unlawful and is set aside.

Costs

[73] It is settled law that costs are within the discretion of the court. Following the general rule, a successful party to a suit must be indemnified for the costs reasonably incurred by the institution or defense of a suit. In light of the conclusion I have come to in this matter, the first, second, and fourth respondents having been successful in warding off the applicant's claim, there is no reason why the first, second, and fourth respondents must not be indemnified for the costs they have incurred.

Order

[74] I therefore make the following order:

- (1) The applicant, Mr Sabianus Shivute Iyambo's, claim has prescribed and the respondents' point *in limine* of prescription is upheld.
- (2) The respondents counter application succeeds and the decision of the Public Service Commission (the third respondent in the main application) which was communicated to the first respondent (first applicant in the counter application) in a letter dated 7 March 2019 is declared unlawful, void and is hereby set aside.
- (3) The applicant, Mr Sabianus Shivute Iyambo, must pay the first, second, and fourth respondents' costs of suit.
- (4) The matter is finalised and removed from the roll.

S F I UEITELE

Judge

APPEARANCES:

APPLICANT:

N Enkali
of Kadhila Amoomo Legal Practitioners
Windhoek

1ST 2ND & 4TH RESPONDENTS:

R Ketjijere
of Office of the Government Attorney
Windhoek

3RD & 5TH RESPONDENTS:

No appearance