

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00288

In the matter between:

IMMANUEL KAULINAWA SHIVUTE

APPLICANT

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA

1st RESPONDENT

DIRECTOR-GENERAL: NAMIBIA CENTRAL

INTELLIGENCE SERVICE

2nd RESPONDENT

DIRECTOR: NAMIBIA CENTRAL

INTELLIGENCE SERVICE

3rd RESPONDENT

NAMIBIA CENTRAL INTELLIGENCE SERVICE (NCIS)

4th RESPONDENT

PRESIDING OFFICER: NCIS DISCIPLINARY COMMITTEE

5th RESPONDENT

Neutral citation: *Shivute v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2021/00288) [2022] NAHCMD 464 (8 September 2022)

Coram: COLEMAN J
Heard: 22 July 2022
Delivered: 8 September 2022

Flynote: Motion – Claim for reinstatement – Reg 11(13) of the NCIS Regulations contemplate that applicant could have legal representation at his disciplinary hearing. Fifth respondent acted arbitrarily and in breach of the provisions of reg 11(13) in conveying to applicant that legal representation is excluded at the disciplinary hearing

Charges – Disciplinary hearing – Applicant charged on the basis that he was arraigned in the Magistrate's Court of Windhoek on 31 charges of theft – Charges withdrawn at the Magistrate's Court – Question raised how being charged with offences without being convicted could constitute misconduct as defined in s 22(e) of the NCIS Directives? – Actual charge and conclusion by fifth respondent at the disciplinary hearing not aligned – No substantive fairness in applicant's disciplinary proceedings

Summary: The applicant was employed by the NCIS until his dismissal. The applicant was transferred from another ministry in the Government of Namibia to the NCIS and because of an administrative oversight, he received double payments for around two years. As a result of this, he was criminally charged with 31 counts of theft. This resulted in disciplinary proceedings which led to the termination of his employment with effect from 1 May 2018. Applicant appealed on 14 May 2018 to the first respondent in terms of reg 11(18) of the NCIS Regulations against this decision to terminate his employment. The first respondent reached a decision on 21 April 2021 dismissing the appeal. Applicant received notice of this decision on 7 June 2021. This triggered this application.

The applicant wants to be reinstated and challenge the first respondent's decision dismissing his appeal, the second respondent's decision to convict and dismiss him as well as the fifth respondent's decision to deny him the right to legal representation at his disciplinary proceedings.

Held that the applicant was unfairly dismissed and should be reinstated.

ORDER

1. Applicant's dismissal from NCIS is declared unfair and unlawful and is hereby set aside.
2. Second respondent is ordered to reinstate applicant to the position at NCIS that he occupied prior to his dismissal, or a comparable position, with effect from the date he was effectively dismissed.
3. Second and third respondents are ordered to take all the necessary steps to effect applicant's reinstatement, including but not limited to issuing a security certificate if necessary.
4. Respondents, jointly and severally, one paying the others to be absolved, are ordered to pay applicant's costs to include the costs of one instructing and one instructed counsel.
5. The matter is removed from the roll and regarded as finalized.

JUDGMENT

COLEMAN J:

Introduction

[1] This is essentially a claim for reinstatement. The employer is the Namibia Central Intelligence Service (NCIS) and the Labour Act, 2007, does not apply to this dispute.

The Facts

[2] The applicant was employed by the NCIS until his dismissal. My understanding is that the applicant was transferred from another ministry in the Government of Namibia to the NCIS and because of an administrative oversight, he received double payments for around two years. As a result of this, he was criminally charged with 31 counts of theft. This resulted in disciplinary proceedings which led to the termination of his employment with effect from 1 May 2018.

[3] The applicant appealed on 14 May 2018 to the first respondent in terms of reg 11(18) of the NCIS Regulations (the Regulations) against this decision to terminate his employment. The first respondent reached a decision on 21 April 2021 dismissing the appeal. The applicant received notice of this decision on 7 June 2021. This triggered this application. By virtue of reg 11(19) of the Regulations, the applicant's dismissal was suspended until the first respondent's decision on the

appeal. I understand the applicant remained employed for the period (more than three years) until the first respondent reached his decision on his appeal.

[4] Applicant was charged with misconduct due to him being arraigned in the Magistrate's Court of Windhoek on 31 charges of theft for the purposes of his disciplinary hearing. On 20 April 2018 he was convicted of the alternative charge in that he was guilty of misconduct as defined in s 22(e) of the NCIS Directives. This led to his dismissal. The charges in the Magistrate's Court were withdrawn on 18 July 2018. Applicant insists he contacted the ministry making the double payments repeatedly to no avail. He also repaid the double payments he received.

Applicant's case

[5] While he wants to achieve his reinstatement, the applicant challenges the first respondent's decision dismissing his appeal, the second respondent's decision to convict and dismiss him as well as the fifth respondent's decision to deny him the right to legal representation at his disciplinary proceedings.

[6] On 21 June 2017 the fifth respondent notified the applicant of his disciplinary hearing. In this notice he informed the applicant that he may be assisted or represented by another person and that legal representation is excluded. The applicant alleges that this is in contravention of reg 11(13) of the Regulations. He goes further and asserts that he requested legal representation at his disciplinary hearing and the fifth respondent declined the request. The second respondent contends that the applicant did not specifically ask for legal representation at his disciplinary hearing.

[7] The applicant challenges the first respondent's dismissal of his appeal on a number of grounds, including that he misconstrued reg 11(13) and that he did not apply his mind in reaching his decision.

Respondents' case

[8] The second respondent filed an answering affidavit and the first respondent a cryptic confirmatory affidavit herein. The second respondent also raised a counter-application for permission to file redacted papers herein. The applicant did not oppose this counter application and I granted the relief.

[9] In essence, the respondents' case is a denial that the applicant was refused legal representation at his hearing and that the dismissal of his appeal by the first respondent is tainted. Reinstatement is also opposed. Counsel for the respondents raised a number of legal issues which I will refer to later where appropriate.

Conclusion

[10] Without an extensive analysis, I am satisfied that the first respondent's dismissal of the applicant's appeal should be set aside, although it may not be necessary in light of my approach herein. Apart from the undue delay in reaching the decision, I agree with the applicant that the first respondent clearly did not apply his mind in this matter. In addition, he also made his decision on the wrong facts, or he disregarded the fact that on 18 July 2018 the charges of theft on which the entire disciplinary proceeding was based were withdrawn.

[11] It is clear that reg 11(13) of the Regulations contemplate that the applicant could have legal representation at his disciplinary hearing. In conveying to the applicant on 21 June 2017 that legal representation is excluded at the disciplinary hearing, the fifth respondent acted arbitrarily and in breach of the provisions of reg 11(13). This in my mind manifests procedural unfairness in labour law parlance. It is neither here nor there whether or not the applicant asked for legal representation at the hearing.

[12] Furthermore, I question the substantive fairness of the applicant's disciplinary proceedings. The charge was based on the fact that applicant was '...arraigned in the Magistrates' Court of Windhoek (Special Court) on 31 charges of theft...' He was convicted by the fifth respondent on the alternative charge that this arraignment rendered him guilty of misconduct as defined in s 22(e) of the NCIS Directives. Section 22(e) of the NCIS Directives stipulates:

'Any staff member shall be guilty of misconduct..., if he or she – (e) conducts himself or herself in a disgraceful, improper or unbecoming manner causing embarrassment to the Government or the Service.'

[13] This raises the question of how being charged with offences without being convicted – and we know now that the charges were withdrawn – could conceivably constitute the misconduct defined in s 22(e) of the NCIS Directives?

[14] The fifth respondent concluded his ruling on the applicant's disciplinary proceedings by stating that the applicant had indulged himself in '...misconduct/penalty involving elements of dishonesty'. Apart from the fact that it does not make sense, it demonstrates that the actual charge and conclusion are not aligned.

[15] I am satisfied that the applicant's disciplinary proceedings were tainted by the fact that the applicant was denied legal representation in an arbitrary fashion. This undermines the validity of the fifth respondent's conclusions and recommendation that applicant should be discharged from the service. Consequently, I am satisfied that the applicant was unlawfully dismissed from NCIS.

[16] As to the question of reinstatement, the applicant was kept on at NCIS while his appeal to the first respondent took almost three years. There is no proven

element of dishonesty here. I can see no reason why applicant should not be reinstated in the position he occupied when his dismissal took effect, or a similar position.

[17] This raises the issue of the applicant's security certificate which is required in terms of s 8(2) of the Namibia Central Intelligence Service Act, 1997 (the Act). Counsel for respondents contend that applicant cannot be reinstated because applicant's security certificate lapsed due to his dismissal and there was no security vetting done as was mandatory. I do not agree. The applicant was employed until 7 June 2021 at NCIS. There is no evidence that applicant's security profile has changed since then. There is also no allegation that the security certificate that must have been issued in order to enable his employment with NCIS in the first place had been withdrawn in terms of s 8(3) of the Act. Even if it can be assumed that the applicant's security certificate lapsed by operation of law due to his dismissal, it was contended on behalf of the applicant that it should be taken to be resurrected when his dismissal is declared unlawful. In terms of s 8(3) of the Act, the Director may withdraw such certificate only on the basis of a reasonable opinion that a staff member may be a security risk. This is not the case here. Therefore, the Director is obliged to issue the required security certificate in order to enable the applicant's reinstatement.

[18] I have taken into account all the allegations on the papers and the submissions by counsel for both sides. In light of the approach I am taking, I do not explicitly deal with any of the other submissions by counsel for the respondents.

[19] I do not see the necessity of granting the entire set of prayers the applicant asks for in his amended notice of motion. In my view, the applicant was unfairly dismissed and should be reinstated. In terms of s 8 of the Act, the second respondent is empowered to make appointments. The third respondent is responsible for issuing security certificates.

[20] I make the following order:

1. Applicant's dismissal from NCIS is declared unfair and unlawful and is hereby set aside.
2. Second respondent is ordered to reinstate applicant to the position at NCIS that he occupied prior to his dismissal, or a comparable position, with effect from the date he was effectively dismissed.
3. Second and third respondents are ordered to take all the necessary steps to effect applicant's reinstatement, including but not limited to issuing a security certificate if necessary.
4. Respondents, jointly and severally, one paying the others to be absolved, are ordered to pay applicant's costs to include the costs of one instructing and one instructed counsel.
5. The matter is removed from the roll and regarded as finalized.

G COLEMAN
Judge

APPEARANCES:

APPLICANT: V Kauta
Instructed by Ndaitwah Legal Practitioner,
Windhoek

RESPONDENTS: D Khama

Instructed by Government Attorneys, Windhoek