

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: A 24/2014

In the matter between:

**VERIESA NGUMBI**

**APPLICANT**

and

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE POLICE**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Veriesa Ngumbi v Minister of Safety and Security* (A 24/2014)  
[2016] NAHCNLD 102 (05 December 2016).

**Coram:** CHEDA J

**Heard:** 03.02; 29.06; 19.10; 23.11; 26.11; 07.12.2015; 12.02; 08.03; 08.04;  
16.06; 19.07; 31.10; 07.11.2016

**Delivered:** 05 December 2016

**Flynote:** An authority charged with making decisions about either natural or juristic persons must do so on the basis of correct facts. Where a decision is made based on wrong facts the courts will intervene as it would not have been a decision based on proper grounds.

**Summary:** Applicant was charged with 3 others for assault with intent to do grievously bodily harm. He was acquitted while his co-accused were convicted but all of them had their bail deposits refunded at the end of the trial. Applicant applied for a firearm certificate and his application was rejected on the basis that he had previous convictions, which he denied. His attempt to prove his acquittal hit a snag as the record of proceedings had been doctored, his record of a bail refund could not be found at the police station. The police report which showed his conviction had not been signed either by the trial magistrate or clerk of court. The whole history of the trial had been interfered with in order to show that applicant had previous convictions which was not true. The court intervened as the record of previous convictions was false and the issuing authority had been misled. Application succeeded.

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### ORDER

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1. The decisions taken by the first and second respondents not to issue a firearm license to the applicant is set aside;
2. Second respondent is ordered to issue applicant with a firearm license within 30 days of this order; and
3. First and second respondents should pay the costs of this application at a higher scale, jointly and severally, the one paying the other to be absolved.

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### JUDGMENT

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CHEDA J:

[1] Applicant filed an application against respondent wherein he sought the following relief:

1. Reviewing and setting aside the decision taken by the first respondent not to give a firearm license to the applicant;

2. An order directing the second respondent to issue the applicant with a firearm license within fifteen (15) days of such order; and
3. Costs of suit.

[2] Applicant resides at Oluno Military Base, Ondangwa and is represented by Ms. Samuel. First respondent is the Minister of Correctional Services whose duty amongst others is the issuance of a firearm certificate to applicants, while second respondent is the Inspector-General of the Namibian Police. They were both represented by Mr. Kashiindi of Office of the Attorney-General.

[3] The background of this matter is that sometime in 1994, applicant together with three others were arrested for assault with intent to do grievously bodily harm. They all appeared before the Magistrate Court at Opuwo under Case No. 266/1995. At the conclusion of the trial, he was acquitted while his co-accused were convicted and sentenced.

[4] On the 08 February 2013 he purchased a firearm and applied for a firearm licence which was turned down on the basis that he had a previous conviction involving violence and it is because of that conviction that he was disqualified to hold a firearm licence.

[5] He appealed to the first respondent who dismissed the appeal on the grounds that he had a previous convictions, a finding that had been made by second respondent. In his founding affidavit he averred that the dismissal of his application was erroneous as he was infact acquitted and as such had no previous conviction and in the circumstances he was entitled to a firearm licence.

[6] It was Ms. Samuel's argument that applicant was granted bail which bail was refunded to him upon his acquittal while his co-accused were also refunded upon their conviction. Applicant was arrested last yet in the records of proceedings he is referred to as accused 3, under normal circumstances he should have been appearing as accused 4. There was, therefore, confusion at that stage as to how applicant was referred to as accused 3 throughout the proceedings.

[7] She further argued that, applicant was indeed refunded his bail although there was no documentary proof of the refund. Ms. Samuel also argued that a Police form 81 (a) was incorrectly completed as it did not bear the signature of the Clerk of Court and/or magistrate and there was no official date stamp. She also submitted that the charge sheet refers to the applicant as accused 3 as well as the court record.

[8] Mr. Kashiindi, could also not explain the irregularities on the submitted record. He however insisted that applicant misled second respondent when he stated that he had no previous convictions, failed to mention that he had a case pending and that he had a bail refund when infact, there was no evidence to that effect.

[9] The fact of matter is that applicant was equally baffled that there was no proof that he was acquitted and that his bail was refunded.

[10] During arguments, it became clear that the dispute was whether or not applicant was ever convicted of an offence which disqualified him from being issued with a firearm license. Ms. Samuel, submitted that there was reluctance from the police to clarify certain issues regarding this matter and applied that the presiding magistrate, a Mr. L Amutse be ordered to appear in court in order to clarify the said issues.

[11] The court ordered him to appear to give *viva voce* evidence. His evidence was that indeed he recalls presiding over the matter and that applicant was accused 3 together with his co-accused 1, 2 and 4. It was also his evidence that accused 1, 2 and 4 were convicted and sentenced while accused 3, being applicant, was acquitted and naturally he had his bail refunded, but, was unable to produce proof thereof as same for some strange reason could not be located. He however produced bail refund slips which indicated that the accused 1, 2 and 4 had their bails refunded after conviction.

[12] Applicant's bail refund slip was missing from the record. The cover of the record of proceedings seemed to have been interfered with in as far as to how the accused were positioned in court. It was not clear who had done so.

[13] Further to this, Ms. Samuel referred him to a Police Report of Conviction form which is completed upon conviction of accused by the police. His comment was that:

- a) it did not bear the signature of the Clerk of Court;
- b) it did not bear the signature of the convicting magistrate;
- c) it did not bear the magistrate court date stamp; and
- d) it stated that applicant was convicted, yet he was not.

[14] Mr. Amutse, further told the court that in light of these anomalies the said report was invalid. The court is grateful to Mr. Amutse's testimony. He was an uninterested party, he did not seek to exaggerate anything in this matter. He gave his evidence in a mature, straight forward manner and was above all honest. He was a very impressive witness. I have no hesitation, whatsoever, but, to accept his evidence in its entirety.

[15] Mr. Amutse's evidence added credence to applicant's version of events as it was corroborated by documentary evidence.

[16] Mr. Kashiindi questioned Mr. Amutse at length regarding certain entries made in the police form number Pol 551. This is a Police form, of which Mr. Amutse as a magistrate has no access, control or right over. In response he told the court that, the said form was only accessible to, by the prosecutors and not magistrates. There was therefore no way he would comment on a document he had no access to.

[17] This indeed made sense as access by magistrates would compromise their impartiality. It is, therefore, logical that he could not comment or account for contents in a document which is inaccessible to him. In my mind this was a fitting response to Mr. Kashiindi's question.

[18] It has been argued by respondent's legal practitioner, that applicant did not comply with the provisions of section 3 (1) and 42 (1) (a) of the Act, being that, he has previous convictions.

[19] I have examined all the evidence before me and I find difficulty in accepting respondent's submission. This being a matter which is based on facts, I find that there is nothing which can persuade me to disbelieve applicant's assertion that he has no previous convictions.

[20] It is clear to me that an error was made by one or more members of the police force at Opuwo. The report of previous convictions, referred to (supra) is invalid as it was not officiated by the trial magistrate and the Clerk of Court. The police form 551 was doctored to suit the intended outcome albeit an unlawful one.

[21] It is clear to me that for some wrongful, unlawful and malicious reasons by someone at Opuwo Police Station was hell bent on frustrating applicant from obtaining a firearm licence.

[22] Whoever, this was, it is an act of serious misconduct and this does not bode well for the police whose aims and objectives of policing are fairness amongst others. Namibia is a democratic nation, its subjects are entitled to fair treatment by the police and expect that the police actions should be beyond reproach.

[23] The firearm licencing authority is a creature of statute and as such must act within the forms of the said statute. Applicant's application was turned down on the basis of his alleged previous conviction. In rejecting the said application, he was performing an administrative as this was within his power and this was a public power or performance of a public function in terms of the Firearms Act. As a general rule, those charged with the exercise of administrative actions are expected to act fairly in the circumstances.

[24] The Licensing Authority, which in this case is second respondent, was ignorant of the fact that applicant had no previous conviction, otherwise, he would not have acted the way he did. He was clearly misled by his subordinates and hence his refusal to issue the license to applicant.

[25] Where the authority acted on the basis of non-existent facts, judicial intervention becomes unavoidable. The "facts" which he acted upon were *mala fide*,

see, *Woolf and Jowell, Judicial Review of Administrative Action 5<sup>th</sup> ed (1995) at 288* where the learned authors stated:

“The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.”(my emphasis)

[26] The need for judicial intervention was also emphasised in *Halsbury’s Laws of England 4<sup>th</sup> ed (2001 re-issue) vol 1 (1) para 76 at 164*, where the English law is stated as follows:

“Errors of fact. In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The Court will not ordinarily interfere with the evaluation of evidence or conclusions of fact reached by a public body properly directing itself in law. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there was no evidence available to the decision maker on which, properly directing himself as to the law, he could reasonably formed that view. The court may also intervene where a body has reached a decision which is based on a material misunderstanding or error of fact.”  
(my emphasis)

[27] Our courts have adopted this approach, which approach is in line with the common law principle of natural justice. I can do no better than associate myself with the remarks in *Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) at 58 H – 59 A-C* where Cloete JA stated:

“In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to

what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*, *Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.”

[28] The question of fairness is indeed wide. However, the performance or exercise of an administrative act must be based on the correct facts, failing which it will result in the application of wrong legal principles. The decision must be based on the existence of correct facts. In *casu* second respondent and indeed first respondent acted on non-existent facts, being that applicant had a previous conviction.

[29] It is categorically clear that second respondent was materially deceived by his subordinates and this resulted in the rejection of applicant's application. The deceit was so fundamental, so much so, that, it vitiated the exercise of his administrative power. Applicant was not fairly treated. He was a victim of some machinations by some police officers at Opuwo.

[30] I should strongly warn police officers and indeed those who are in the decision making positions to completely desist from paddling in the mucky waters of what appears to be corruption which will soil the otherwise good name and stead of the Namibian Police.

[31] The executive powers of a State which resonate across the nation, the police included, should not be tarnished by a few individuals, for it is these few who if let loose can tarnish the contrary's reputation. All Namibians are entitled to fair treatment by our police force.

[32] Those who are disqualified from holding a firearm licence should do so on their own self-created facts not on any other. I find that on a balance of probabilities,



applicant has established a good case for himself and is accordingly entitled to the relief prayed for.

[33] With regards to costs, this is an appropriate case where the court should show its indignation by ordering respondents to pay costs at a higher scale.

[34] The court is greatly indebted to Ms. Samuel who put up a spirited performance by fighting hard to show that there was some profound injustice which occurred in this matter. Such is the expectations from a legal practitioner who was not only being driven by financial gain but was clearly eager to ensure that justice was done in the circumstances.

[35] In the result the following is the order of the court:

1. The decisions taken by the first and second respondents not to issue a firearm license to the applicant is set aside;
2. Second respondent is ordered to issue applicant with a firearm license within 30 days of this order; and
3. First and second respondents should pay the costs of this application at a higher scale, jointly and severally, the one paying the other to be absolved.

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M Cheda  
Judge



## APPEARANCES

APPELLANT: A.M Samuel  
Of Samuel Legal Practitioners, Ondangwa

RESPONDENTS: K. Mathias  
Of Government Attorney, Windhoek