REPORTABLE

CASE NO: A 148/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRISTOPH NAKANYALA	**APPLICANT**
and	
INSPECTOR-GENERAL OF NAMIBIA	**1st RESPONDENT**
MINISTER OF SAFETY AND SECURITY	**2nd RESPONDENT**
ANANIAS MUZILE	**3rd RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 24 June 2011

Delivered on: 5 July 2011

JUDGMENT

SMUTS, J:

[1] The applicant is a senior police officer. He has approached this Court on an urgent basis for interim relief pending the finalisation of his application to review the decision of the Inspector-General of the Namibian Police to transfer him from his position of Head of the VIP Protection Directorate ("VIPPD") in the Namibian Police to Regional Commander, Omaheke Region.

[2] The interim relief he seeks is of a two-fold nature. He firstly seeks an order interdicting the Inspector-General from persisting or proceeding with the decision of 13 June 2011 to transfer him or to do at anything which is frustrating or obstructing the applicant from performing his usual work before 13 June 2011 as before. In the second instance he seeks an order directing that he be reinstated to his position as head of the VIPPD pending the finalisation of the review. He initially sought costs of the interim application but Mr Namandje, who appeared for him, rather proposed that costs should be costs in the review.

[3] The Inspector-General is cited as the first respondent and the Minister of Safety and Security is joined as the second respondent. The third respondent is the police officer appointed on 13 June 2011 to the applicant's erstwhile position of the Head of the VIPPD. He does not oppose the application for interim relief. Nor does the Minister.

[4] The applicant's personal background is not in issue. He grew up in the northern part of Namibia and left the country in 1975 to take up arms and to fight for the liberation of Namibia as a member of the Peoples Liberation Army of Namibia. He served in this capacity until 1989 and thereafter returned to Namibia. During this period, the applicant received training in VIP protection and continued this work after Independence. He was initially part of the Presidential Security Detail to the founding President and in December 2005 was appointed as Head of the VIPPD. He took up this appointment as a Deputy Commissioner and in 2008 was promoted to the full rank of Police Commissioner in the same position.

[5] The VIPPD is entrusted with the security and protection of both national and visiting dignitaries. As background to the application, he referred to some incidents which occurred from 2006 to 2010 in which accusations were made that he favoured one or more tribes or clans at the expense of others. He denied these accusations and stated that he abhors tribalism. As a consequence, he addressed a submission to the Inspector-General in 2008 and again in 2010 seeking an investigation of the allegations of this nature made against himself. It would appear that no investigation was held.

[6] On 13 June 2011, the applicant was summoned to a meeting at Police National Headquarters chaired by the Inspector-General. Ten senior officers, including the Inspector-General and the applicant were

present. The applicant states that this meeting was about 10 minutes in duration.

[7] At the meeting, the Inspector-General referred to a text message sent to one of his deputies, Major General Tjivikua. The Inspector-General proceeded to read the message to the meeting. It raised issues of a tribalistic nature. It is common cause that the Inspector-General then stated that he suspected the applicant of sending the message – or to be involved in sending the message. This was because the text message had emanated from a cellular phone (handset) with a specific serial number, being a Nokia E7 which was the usual handset used for the applicant's cell number. The cell number (and SIM card) from which the text message was sent was however different to the applicant's number. The Inspector-General stated that the applicant's SIM card would appear to have been removed from the handset and replaced by a different SIM card with a different number and the message was then sent from the same handset.

[8] After reading and thus referring to the text message, the Inspector-General then announced to the meeting that the applicant was to be transferred from VIPPD with immediate effect to take up the position as Regional Police Commander in the Omaheke Region. The third respondent was then transferred from the Crime and Investigation Department to take up the applicant's position. The Regional Commander in the Omaheke Region was simultaneously transferred

and appointed as Regional Commander to the Caprivi Region. The incumbent to the latter position was then appointed as the Head of the Crime and Investigation Department.

[9] The applicant stated that he requested the opportunity to respond to the allegations related to sending the text message but that this was denied. The Inspector-General however does not dispute that the meeting lasted only about 10 minutes but states that he said that the applicant should address any response or make representations concerning the allegations against him to an investigating committee he had appointed comprising Commissioner Shilunga as head of the committee. He occupies a position as Head of Internal Investigations. The other committee members are Commissioner Libuto (Head of Special Branch) and Commissioner Nahole (Head of the Communications). The committee was instructed to investigate the allegations against the applicant and address a report to the Inspector-General for final consideration. A decision would then be taken as to whether to charge the applicant with an internal or criminal offence.

[10] The Inspector-General does not dispute that he required the applicant to vacate his office with immediate effect and that Major General Hifandaka accompanied him to remove his personal items from his office. The applicant states that he was humiliated by this and felt that he was being treated like a criminal. He was provided with an office at Police Headquarters. The Inspector-General states that the

move to the Headquarters was with immediate effect (and the removal from the position as head of the VIPPD). He confirms that the applicant was not given any opportunity to make representations on that move but stated that his rank, salary and personal position relating to his home and children would not be affected by that move.

[11] The applicant then applied for leave which was granted. The Inspector-General further stated that after the investigation is finalised and if the applicant were not to be "formally suspended or charged", he and the other consequential transferees would take up their new positions. He denies that the transfers were thus with immediate effect but would only be implemented upon the conclusion of the investigation. He pointed out that all of the other members who are to be transferred were (unlike the applicant) still serving in their current positions. But the applicant was not serving in his position by virtue of the fact that it is a position of trust. The Inspector-General stated that he had lost confidence in the applicant's decision-making ability and judgment as a consequence of the text he was suspected of sending. He thus removed him from his position pending the investigation and pending the decision to press internal or criminal charges against the applicant. It emerges from the answering affidavit that the text message was the cause of the decision to transfer the applicant. This was confirmed in argument on behalf of the Inspector-General by his counsel, Mr G Narib.

[12] In his answering affidavit, the Inspector-General did not place the wording of the text before Court. He merely referred to it as being "very serious, offensive and extremely tribalistic" and did not want it to become public information owing to the in depth investigation and what he termed the inflammatory nature of it, having "racial, tribal, ethnic and regionalistic connotations" which he considered impacted upon "the dignity of a number of people within the State Machinery including the Office of the President".

[13] The text of the message was however attached to the applicant's replying affidavit. At the hearing, Mr G Narib, who appeared for the Inspector-General, sought an order to prevent its disclosure. I asked him to state the basis for doing so. He pointed out that it would be detrimental to the discipline of the Police Force and not in the national interest. He correctly conceded that State privilege had not been properly claimed as is required by Van der Linde v Calitz [1]. No other basis to prevent the disclosure of the text was raised. I accordingly decline to make such an order.

[14] In the absence of the proper invocation of State privilege, and as it is relevant, I set out the text in the form attached to the replying affidavit. It states:

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[1] 1967 (2) SA 239 (A).

“INSPECTOR GENERAL TAKE NOTE THAT THE HISTORY WILL SAY ABAUT YOUR AGE THAT YOU WERE WHO WAS RICH IN HATES OF THOSE YOU CALLED OSHIWAMBO SPEAKING PEOPLE IN THE NAMIBIAN POLICE FORCE, PARTICULAR THE NON KWANYAMAS OSHIWAMBO SPEAKING. REMEMBER DURING THE WAR OF LIBERATION THESE PEOPLE WERE THE MAJORITY THEN YOU KWANYAMAS AND THE SO CALLED OTHER TRIBES WHO BECAME YOUR DAILY SONG OF HAPPENES, STOP ALSO CALLING US WAMBO,S, WERE ARE WHO WE ARE AND WE CAN BE IDENTIFIED BY OUR TRIBES AS

KOLONKADHI, KWALUDHI, MBALANTU, MBANDJA, NDONGA, NGANDJERA, KWAMBI, OVADEMB A, OVAHIMBA, NDONGONA, HAKAHONA NOT WAMBOS AS YOU ARE CALLING US, WE WERE THE PEOPLE WHO WERE IN THE BATTLE TO LIBERATE THIS COUNTRY WE DID SO WITH VINGUOS AND DETERMINATION SHANAKULYA OSHANA KULONGA, WE DID NOT FOUGHT THOSE BATTLES TO CAME AND SUFFER ON OUR OWN EXPENSES TO THE

SO CALLED ATHER TRIBES, CAPRIVI, KAVANGO, NAMA, HERERO, DAMARA WERE THERE AND WE CAN COUNT THEM, TSANA, S WERE NO WHERE TO BE SEEN, WE ARE DEMANDING THAT THIS TIME THERE MUST BE A NDONGA,

KWAMBI, NGANDJERA, KWALUDHI MAJOR GENERALS IN THE POLICE FORCE AND STOP THE KWANYAMA HERERO WHITES ONLY MONOPOLY OF THE POLICE, YOU SHOULD ALSO MAKE SURE THAT THE NEXT INSPECTOR GENERAL IS FROM THOSE FOUR TRIBES REFERED TO ABOVE, WE HAVE ENOUGH OF YOU KWANYAMAS, HERERROS AND YOUR WHITES, AND HERERROS SINCE IDEPEANCE. OUR INTELLIGANCE CAN NOT CONTINUES TO INSULTED ANY LONGER BY YOU,

YOURS GEN, NATSE OTWEYA" (sic)

[15] Whilst the tone of this text is disrespectful, and arguably insubordinate if made by a subordinate officer, it would appear to be an inarticulate, poorly formulated and possibly intemperate critique of the composition of the top structure of the Namibian Police, suggesting tribalism in the filling of such positions whilst at the same time making tribalistic comment. Given the conclusion I reach in this matter, it is not necessary for me to further deal with or comment upon the context and terms of this text.

[16] The Inspector-General further stated that he had become aware of the text message on 28 May 2011 and had instructed a preliminary investigation by Commissioner Nahole. This investigation had provided him with what he termed a reasonable suspicion that the text emanated

from the applicant "or from the cell phone associated or previously associated with the applicant". This was with reference to the serial number of the handset and the fact that the same handset had been used by the applicant's number even though the text message had been sent with a different SIM card apparently inserted in that handset.

[17] Following his summary removal from his position, the applicant approached his legal practitioner who addressed a letter to the Inspector-General on 14 June 2011 raising the failure to have afforded the applicant an opportunity to be heard prior to the decision to remove him from his position and to transfer him to the Omaheke Region. An undertaking was then sought that the transfer not be proceeded with, failing which an urgent application would be brought. In response to this letter, the Inspector-General on 15 June 2011 stated that the investigating committee would hear the applicant's side of the story with respect to the investigation of the allegations. He also stated that if the applicant had any issue concerning his transfer, he would be at liberty to meet the committee members at any time. No undertaking was however given. The applicant's legal practitioner addressed another letter on 15 June 2011 reiterating the request for an undertaking. When this was not supplied the application was launched.

[18] The applicant then brought an application to review the decision to transfer him on a number of review grounds, seeking interim relief on an urgent basis.

[19] The application was launched on 16 June 2011 and served on the respondents on the following day. It was set down for and heard on 24 June 2011. An answering affidavit was served on the afternoon before the date of hearing. It was pointed out that the Inspector-General had been out of office and was only able to file an affidavit at that stage. In his opposition to the application for interim relief, the Inspector-General confined himself to setting out his own duties and functions and briefly referred to the nature of the duties and functions of the VIPPD. He also raised certain points *in limine*. These included challenging the urgency of the application and taking the point that the applicant had not exhausted his internal remedies. He also even contended that the decision to transfer the applicant was not justiciable. The Inspector-General reserved the right to fully address the allegations with reference to the review in due course.

[20] I first deal with the preliminary points and then turn to the requisites for interim relief and examine whether those were met by the applicant.

Urgency

[21] The main thrust of the first respondent's argument on urgency is that the formal transfer letter addressed to the applicant on 13 June 2011 (which stated that it was with immediate effect) was in fact incorrect and that the applicant would remain in the office allocated

to him at Police Headquarters until the investigation concerning the allegations against him was finalised. This was spelt out in a letter addressed by the Government Attorney to the applicant's legal practitioners on 21 June 2011. It was thus denied that the matter was urgent in that the transfer was not with immediate effect in that the applicant was removed to the Police Headquarters on a temporary basis until the finalisation of the investigation against him and that he could also make representations to the committee investigating the allegations against him concerning his transfer.

[22] The applicant's legal practitioner rejected this approach contending that it was self-serving and crafted to form the basis for taking the point of urgency in opposition to the hearing of the application. It was asserted that the applicant had in fact been transferred with immediate effect, as has been told to him, and confirmed in the letter of the same date.

[23] The position as set out in the Government Attorney's letter (of 21 June 2011) was reiterated by the Inspector-General in his answering affidavit. He further asserted that the removal of the applicant from his position as head of the VIPPD was on grounds of national security. Even though he states that the applicant would occupy his office in Police Headquarters on a temporary basis pending the finalisation of the investigation, he does not state what actual position (as opposed to a physical office) the applicant would occupy in the sense of duties

allocated to him. There is also no indication whatsoever as to how long the investigation would take. Presumably he would be capable of finalisation reasonably quickly. The Inspector-General regarded the applicant's occupation of the office in Police Headquarters as temporary. The decision is thus partially implemented and its completion is merely temporarily held up.

[24] In the course of the argument, Mr Narib also complained about the short time period within which the Inspector-General was required to file his answering affidavit. I enquired as to whether he sought further time within which to amplify his affidavit. I did so in order to establish the extent to which there was prejudice on the part of the respondents, given the tight time periods, and to address that prejudice, if need be. Mr Narib however responded that the Inspector-General did not seek any further time. It would follow that there was not any real prejudice as a consequence of the short time periods.

[25] I then enquired from Mr Narib, seeing that the Inspector-General did not seek further time to file any further papers or time for preparation, whether he contended that the application for interim relief was not urgent in the sense that the applicant would be able to receive redress in the ordinary course. He submitted that this was the case. I also pointed out to Mr Narib in determining the question of urgency, this Court would assume for that purpose that the applicant's case is a

good one and that the decision to transfer would fall to be set aside, in accordance with the authorities accepted by this Court [2].

[26] Applying this test to the facts of this case, it is abundantly clear to me that the applicant would not be afforded redress in the normal course if the application for interim relief were to be brought in that way.

[27] It is also clear to me that the applicant acted with all due speed in bringing this application and has not unduly delayed in bringing this application or created his own urgency, applying the principles set out by this Court in Bergmann v Commercial Bank of Namibia Ltd [3].

[28] In the exercise of my discretion, I accordingly grant condonation for bringing this application as one of urgency under Rule 6(12).

Exhaustion of internal remedy

[29] In his answering affidavit, the Inspector-General refers to the powers vested in him under s 3 of the Act. He specifically refers to

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[2] Twentieth Century Fox Film Corporation and Another v Antony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586G, followed by this Court in Sheehama v Inspector-General of the Namibian Police 2006 (1) NR 106 (HC); Walmart v Chairperson, Namibian Competition Commission and Others, unreported judgment dated 28 June 2011.

[3] 2001 NR 48 (HC).

s 3(2)(d) which empowers him to "organise or reorganise the force into various components, units and groups". He surprisingly did not refer to the regulations promulgated under the Police Act, 19 of 1990 as amended. These were referred to in Viljoen and Another v Inspector-General of the Namibian Police [4]. That case concerned the transfer of a police officer which was set aside by virtue of the decision being in conflict with Article 18 of the Constitution. There was in that case a reference to Regulation 2(2) which authorises the Inspector-General to "transfer any member permanently or temporarily from one district, station, office or institution to another". I return to this aspect when referring to the requisites for interim relief.

[30] The Inspector-General however proceeds to refer to the powers of the Minister under s 3A of the Act which include the power to "set aside or vary any decision or action taken by the Inspector-General or any member to whom any power or function may have been delegated or assigned. The point is then taken that the applicant was required to exhaust this internal remedy afforded to him under the Act (and apply to the Minister to set aside the transfer) that the application was premature and should be dismissed on this ground as well.

[31] The test as to whether the exhaustion of internal remedy or statutory remedy would be required was recently succinctly

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[4] 2004 NR 225 (HC).

summarised by this Court in National Union of Namibian Workers v Naholo [5]. In that matter, Tötemeyer AJ held that the real enquiry was to give a proper interpretation to the provisions of the statute providing for the domestic remedy in order to establish whether a party was first required to exhaust the internal procedure before approaching this Court. He held that the mere fact that the legislature had provided an extra judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person had exhausted his or her statutory remedies. Tötemeyer AJ concluded that only where the statutory provision properly construed requires the exhaustion of an internal remedy first, would it defer the jurisdiction of the High Court until the internal appeal remedy is exhausted.

[32] In considering whether the remedy asserted by the Inspector-General required exhaustion, regard should also be had to the other provisions of the Act and the Regulations. These include those embodied in Chapter III of the Act with reference to discipline.

[33] In disciplinary proceedings against members, a member of the Police Force has expressly been provided with the right to appeal to the Minister against the conviction and punishment imposed upon him or

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[5] 2006 (2) NR 659 approved and followed in Wal-Mart Stores Inc v Chairperson, Namibian Competition Commission and Others *supra*.

her in disciplinary proceedings taken under the Act. There is also s 23 dealing with suspension of members. It specifically empowers the Inspector-General to suspend a member from office pending a trial or an enquiry or the institution of disciplinary proceedings against that member. This section does not however provide for a right of appeal to the Minister against such a suspension, given the fact that there is a right of appeal at the conclusion of disciplinary proceedings against a specific member.

[34] It would not seem to me that a construction of the Act and Regulations referred to in the Viljoen judgement required the exhaustion of the internal revenue referred to before an applicant may approach the Court. This point was not raised in that matter. Nor was it raised in the Sheehama-matter. It would seem to me that the wording of the statutory provisions and in particular s 3A do not support such a construction. This section does not refer to it as a right of review enjoyed by members. Nor is there reference elsewhere in the Act to members enjoying such an internal right of review. They are thus not informed in the Act of this internal right of review and are not in my view on notice to exercise it. Section 3A merely vests the Minister with the power to set aside or vary decisions or actions taken by the Inspector-General. In the context of disciplinary action – which the decision-making in this matter may give rise to - there is an express provision concerning an appeal to the Minister against a conviction and punishment imposed in the course of disciplinary proceedings taken

under the Act. An express remedy for an appeal is not provided for in the context of a suspension. Nor is one fashioned for a transfer under the Regulations. It would also not seem to me that the wording of s 3A, which does not expressly state that access to the Courts should be deferred pending recourse to the Minister, would give rise to a deferral of the right to approach the Court. There are also practical reasons why an applicant would not in my view need to approach the Minister in the event of an immediate transfer. There a decision is taken which has immediate consequences, it may well render an affected member of the Force remediless if the Minister is first approached and a decision is not urgently taken.

[35] I am accordingly of the view that the provision of s 3A when considered with the other provisions of the Act would not require the exhaustion of a remedy contained in s 3A of the Act before an applicant may approach this Court. It follows that s 3 A does not in view constitute an internal remedy which requires exhaustion and that this point taken by the Inspector-General must fail.

Interim relief

[36] I turn to the requisites for interim relief. These are well settled and were neatly summarised in Hix Networking Technologies v System Publishers (Pty) Ltd [6] as follows:

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[6] 1997 (1) SA 391 (A) at 398-399.

"The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

(a) a prima facie right,

(b) a well-grounded apprehension of irreparable harm if the relief is not granted,

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

To these must be added the fact that the remedy is a discretionary remedy and that the Court has a wide discretion." [7]

[37] It is also well established that the grant of interim relief can be utilised in review proceedings [8].

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[7] As followed in Sheehama v Inspector-General, Namibian Police 2006 (1) NR 106 (HC) at 117.

[8] Safcor Forwarding (Pty) Ltd v NDC 1982 (3) SA 654 (A) at 675.

[38] In order to establish a *prima facie* right, the applicant would need to do so with reference to the review of the decision to transfer him from the position of head of VIPPD to the Regional Commander, Omaheke Region. That decision is challenged on the various review grounds set out in the founding affidavit. These include asserting that the decision was based on ulterior motives and the failure to apply the mind to the issues at hand. It is also contended that the Inspector-General acted arbitrarily and also failed to afford the applicant the opportunity to be heard prior to taking the decision. This latter failure is alleged to be manifested in two ways, namely with reference to the right to respond to the allegations made against him and to afford him the opportunity to be heard as to why the transfer with immediate effect should not proceed. The applicant also challenges the decision-making as being in conflict with Article 18 of the Constitution and that the allegations against him were unfounded and not made in a sound factual basis.

[39] In advancing argument in support of these grounds, Mr Namandje on behalf of the applicant, contended that the right to be heard should have been accorded to the applicant, even on an attenuated basis. He submitted that there was a comprehensive failure to accord the applicant the right to be heard in the 10 minute meeting which took place, resulting in the applicant's summary removal from his position and his transfer.

[40] Mr Narib submitted on behalf of the Inspector-General however that the applicant could make representations to the investigation committee on both the allegations made against him as well as the transfer.

[41] The Inspector-General, by referring to the applicant being able to make representations to the committee in respect of the transfer, would appear to correctly accept that the right to be heard should be accorded to a person in the position of the applicant with reference to his transfer. This was also established in Viljoen and Another v Inspector-General of the Namibian Police [9]. With reference to the regulations promulgated under the Act, that Court stated:

> **"The transfer regulations specifically stipulated that there should be prior consultation with affected officers before the transfer was made." [10]**

[42] These regulations were however not referred to by either the applicant or the Inspector-General in argument or in their papers. I must accept that what was stated by this Court in Viljoen and Another v Inspector-General would apply. This case was extensively referred to by Mr Namandje in argument.

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[9] *Supra.*

[10] *Supra* at 325.

[43] Mr Narib, in correctly accepting that there would be a right to make representations, indicated that this could happen afterwards and that the Inspector-General had expressly invited the applicant to make representations concerning his transfer to the committee investigating the allegations against him. Mr Narib referred to the decision of the Supreme Court in Mostert v Minister of Justice [11] where the Court found that the making of representations subsequent to a provisional decision to transfer may (and in that matter did) meet the requirements of *audi alteram partem*. But that judgment should be understood on its facts and within the overall approach of the Supreme Court to the right to be heard articulated in that judgment.

[44] In reaching its conclusion, the Supreme Court however found that in general, the right to be heard should be accorded prior to a decision being taken but that there could be a departure from this principle where clearly justified by specific facts, where an initiator makes a provisional decision to be followed by representations. (This is for instance what frequently occurs in a planning context.) In the Mostert matter, the Permanent Secretary of Justice had given notice to a magistrate of a transfer. The magistrate then objected to that transfer and made extensive representations to the Permanent Secretary. In the course of this exercise, the Permanent Secretary had informed the magistrate that the decision to transfer was not final and that it was

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[11] 2003 NR 11 (SC).

open to him to make representations concerning the transfer which then proceeded over an extended period of time. There was also evidence that the practice within that Ministry was to give magistrates notice of an intended transfer and afford them the opportunity to make representations. The transfer would thus be initiated by the Permanent Secretary and representations would be received and considered with an open mind concerning the decision to transfer that specific magistrate. The Supreme Court accepted that the transfer notice was thus provisional and subject to representations.

[45] In this instance, no evidence was placed before me as to any practice of that nature. On the contrary, the manner of the decision-making would indicate its finality, given the consequential transfers which were also announced. In the Mostert matter the Court found that the magistrate had not established on a balance of probabilities that the decision to transfer him was a final decision.

[46] The degree of proof to establish a *prima facie* right is well established. It has been consistently applied by the courts. It has been cogently summarised by Justice Harms in The Law of South Africa [12] in the following way:

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[12] Vol 11 (2nd edition) at 420.

> **"The degree of proof required has been formulated as follows: The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed."**

[47] The applicant's version that the transfer was to take immediate effect is put in issue. His version is however confirmed in the official notice of his transfer given to him on the same day as the meeting. The manner in which the applicant's transfer was announced and the further consequential transfers were also announced – both with reference to the text bringing about the transfers and the further consequential transfers, would also demonstrate that a final decision in respect of the transfers was thus made by the Inspector-General and that the transfers were to proceed. There was no indication that the decision to transfer was provisional in any respect at all, unlike the clear facts set out in the Mostert matter. On the contrary, the decision

to transfer the applicant was in fact partially implemented forthwith. He was required to remove himself physically from his office at the VIPPD and he was summarily stripped on his duties and functions with regard to the VIPPD. This was unlike all of the other consequential transfers. The transfer was thus to take place straight away with the applicant being removed from his position. The transfer was thus put in motion with immediate effect. The further component of taking up the new position was put on hold temporarily.

[48] The invocation of national security and compelling urgency raised by the Inspector-General to take that decision however fail to take into account that he was already aware of the text for more than 2 weeks before he announced the transfer and removed the applicant from his position on 13 June 2011. To have accorded the applicant his right to be heard even on an attenuated basis would thus hardly delay the decision - by a few hours or a day or two. It was not explained why this could not occur or was not feasible. The failure to do so is in my view fatal to the Inspector-General's case. As was emphatically stated in Mostert v Minister of Justice [13]:

> **"Non-compliance with the audi rule, where the rule applied, invariably leads to the setting aside of the administrative action."**

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[13] At 22.

[49] The Court also stressed that the right to be heard should as a general rule be accorded prior to the decision in the following way:

> **"In the case of Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A) at 750C - E, Corbett CJ stated the following in regard to the rule, namely:**
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> > **'Generally speaking, in my view, the audi principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see Blom's case supra at 668C - E; Omar's case supra at 906F; Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264 (W) at 274B - D). Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken (see Omar's case supra at 906F - H; Chikane's case supra at 379G and Momoniat's case supra at 274E - 275C). This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or if for some other reason it is not feasible to give a hearing before the decision is taken.'"**

[50] As to whether representations subsequent to a decision would suffice, the Court in Mostert dealt with that issue by referring with approval to South African authority:

> **"In the matter of Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (SCA) the Court referred with approval to the statement by Baxter op cit at 588, namely:**
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> > '**In certain instances a Court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken, where there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing; the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and the affected individual has not thereby suffered prejudice.**' [14]

[51] This Court in the Viljoen matter held that prior consultation was required with reference to a decision to transfer officers of the Namibian Police, in cases where a transfer could adversely affect them, and that the failure to accord officers the right to be heard in that context would result in such a decision being set aside. I am bound by that approach,

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[14] Government of the Republic of Namibia v Sikunda 2002 (NR 203 (SC).

which I in any event consider to be entirely correct [15]. I am further and in any event of the view that the test for a subsequent hearing to meet the *audi* principle as set out in Mambolo would not be met by the offer to the applicant to hear representations subsequently. The decision has been partially implemented, the applicant has suffered prejudice and it is not clear to me that the Inspector-General has retained a sufficiently open mind as the basis for the transfer is the text and the applicant's involvement, upon which he has expressed strong views.

[52] Furthermore, taking into account the statute under which the Inspector-General acts with reference to transfers and discipline, the right to be heard is given prominence both with reference to disciplinary proceedings against members of the Force as well as a decision to suspend a member. Section 23 specifically requires that, except where it is in the interest of the Force that a member be immediately suspended, the Inspector-General is obliged to conduct a hearing at least 7 days before the suspension of a member so that the member is afforded an opportunity to make representations as to why he or she should not be suspended. A shorter period would be permissible where the interest of the force requires a decision to be taken immediately.

[53] It would seem to me that the applicant has in effect been suspended, given the fact that his transfer is not to be implemented to

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[15] See also Onesmus v Permanent Secretary, Finance and Others 2004 NR 225 (HC).

finality until the investigation is completed and a decision taken whether to take disciplinary action against him. He has in the interim been stripped of his duties and functions in his position as head of the VIPPD, unlike the other senior officers who will be transferred as a consequence of his transfer. The applicant is required to report to an office without any duties having been assigned to him. I enquired from Mr Narib as to the applicant's current duties and he was not able to state what the applicant's functions and duties would be in the office temporarily assigned to him at the Police Headquarters. What emerges from the facts is that he is stripped of his duties and functions and temporarily consigned to an office pending the outcome of the investigations of the allegations against him.

[54] Given the statutory context in which the decision was taken and where a decision to suspend would ordinarily need to be preceded by an opportunity to be heard and a transfer requires prior consultation, I am of the view that *audi alteram partem*, even in an attenuated form, should have been observed when the decision to transfer the applicant was taken and thereafter partially implemented by removing him from his position. I am reinforced in this view by virtue of what was stated in Muller and Others v Chairman, Minister's Council, House of Representatives and Others [16] and cited with approval in the Sheehama [17] matter as follows:

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[16] 1992 (2) SA 508 (C).

[17] At 116.

> **"Now the correct approach to the question whether the audi rule applies in a statutory context is this. When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary: Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A) at 748G ...."**

[55] There is not only no indication in the Act and regulations that the decision to transfer the applicant would exclude the application of the *audi* rule. On the contrary, the Viljoen matter makes it clear that it should apply.

[56] It would follow in my view that *audi alteram partem* rule should have been observed by the Inspector-General before the applicant could be transferred in a manner in which he sought to do so and that the failure to do so would be fatal to his decision-making. This is especially so when the decision to transfer was triggered by the text message which the Inspector-General considered to render the applicant unsuitable to continue in his position. Plainly the applicant should have been heard in relation to that. He has in my view at the very least established a *prima facie* right to have been heard. The Inspector-General had the matter provisionally investigated for more than

2 weeks. As I have said no explanation is given why the applicant could not be heard on the issue on short notice – such as a few hours or even a day or two. As Mr Narib conceded, there was no evidence that his security clearance has been removed or in any way affected by that text message sent more than 2 weeks before.

[57] It would follow that the applicant has in my view established a *prima facie* right to the review relief claimed.

[58] Mr Narib invited me to accord due deference to the administrative context of the decision-making and to appreciate the legitimate and constitutionally ordained province of the Inspector-General's right to assess and determine suitability for positions within the Force. He referred to the judgment of the South African Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [18]. This principle has also being followed and accepted by the Supreme Court [19]. It would in my view not have any application to the present circumstances. The Bato Star Fishing matter concerned the expertise entailed in what was correctly termed "policy - laden and polycentric issues" in the context of decision-making with regard to the determination of a total allowable (fishing) catch and the allocation of

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[18] 2004 (4) SA 490 (CC), per O'Reagan J at par [46]-[48].

[19] Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism 2010 (1) NR 1 (SC) at 33C-E (per Shivute CJ).

rights to fishing concerns to exploit that catch. The Waterberg case concerned issues of biodiversity in decision-making by the Ministry in question. I would agree that there is limited room for judicial intervention in the weighing up of countervailing considerations in the review of decisions of that nature or of a highly technical kind. This approach is also consistent with the fundamental principle in the review of administrative decision-making namely that it entails a review of the decision, thus relating fundamentally to its irregularity as distinct from an appeal. The present circumstances relate to the failure to accord the applicant a hearing within the context of his transfer, particularly when it was triggered by an incident which called for the application of the right to be heard. There can be no application of any judicial deference to the decision-making where there has been such a fundamental failure of procedural fairness. That failure has nothing to do with the weighing up of technical or specialised considerations where judicial intervention may be inappropriate.

[59] As to the requisites of a well grounded apprehension of irreparable harm and the balance of convenience, I am also of the view that the applicant has established these requisites for interim relief. The fact that a physical office is accorded to him in the Police Headquarters and that he is still will receive his salary and other employment benefits in the meantime and that his service in the VIPPD was not be of a permanent nature in any event and that he was susceptible to a future transfer, would not avail the Inspector-General

in this regard. Clearly, the circumstances surrounding the transfer, almost amounting to a form of suspension, particularly when considered in the context of the other transfers, and the way in which he was escorted to his erstwhile office to remove his belongings and to take up the position in Police Headquarters would clearly in my view involve a degree of stigma. Being seen to be so removed from his position by his fellow officers compounds this stigma. Even if he were not to be disciplined and the pending transfer were then to proceed, there is a serious possibility of an injustice arising. In applying Bandle Investments (Pty) Ltd v Registrar of Deeds and Others [20], I am of the view that the balance of convenience would also favour the granting of the interim relief. In that matter it was stated [21]:

> **"In considering the balance of convenience it behoves me to take cognisance of the fact that the refusal of the relief sought will cause the loss of the right, whilst granting the relief will cause the further respondents no loss whatsoever. In fact if the right lapses, it reverts to the third respondent who thereby acquires an extremely valuable right. What should be avoided is the possibility of doing an injustice. It is apposite in this context to refer to the remarks of Hoffman J**

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[20] 2001 (2) SA 203 (SE) at 215, expressly approved in Sheehama v Inspector-General, Namibian Police *supra* at 117-118.

[21] At 215-216 and quoted in Sheehama at 117-118.

in the English case of Films Rover International Ltd and Others v Cannon Film Sales Ltd [1986] 3 All ER 772 (Ch) at 780-1, where he stated:

> **"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (orwould succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."**

There is furthermore no question that the applicant has no other remedy. I am therefore satisfied that neither authority nor principle precludes me from granting the relief sought by the applicant."

[60] As to the requisite of an alternative remedy, it is clear to me on the facts that the applicant does not have an adequate alternative remedy to the interim relief sought by him.

[61] I am accordingly satisfied that the applicant has established the requisites for interim relief and that he should be granted certain interim relief, although not in the broad terms set out in the notice of motion. The terms of the order sought by the applicant are in my view too wide and could be interpreted to preclude the Inspector-General from validly taking disciplinary steps against the applicant after the conclusion of the investigation, if he is so minded or advised. The Inspector-General should then be interdicted from implemented the decision to transfer the applicant pending the outcome of the review and to reinstate him in his prior position pending the review.

[62] I accordingly grant the following order:

(a) Condoning non-compliance with Rule 6(12) of the Rules of this Court and hearing the application for interim relief on an urgent basis;

(b) A rule *nisi* hereby issues interdicting the first respondent from implementing his decision of 13 June 2011 to transfer the applicant as Regional Commander: Omaheke Region pending the finalisation of the application to review that decision;

(c) Directing that the applicant be reinstated to his position as head of the VIP Protection Directorate with immediate effect pending the finalisation of such review application;

(d) Directing that the order set out in (b) and (c) operate as interim interdicts with immediate effect;

(e) Directing that the costs of the application for interim relief be costs in the review application.

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SMUTS, J

ON BEHALF OF APPLICANT	Mr S Namandje
Instructed by:	Sisa Namandje & Co
ON BEHALF 1st RESPONDENT	Mr G Narib
Instructed by:	Government Attorney