IN NORTH GAUTENG HIGH COURT: PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case number: 57292/2008

14/7/2010

ETE WHICHEVER IS NOT APPLICABLE

~~YES~~/NO.

JUDGES: ~~YES~~/NO.

6/7/10

SIGNATURE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE SIGNATURE

In the matter between:

KAREL FREDERIK EHMKE	Applicant

And

THE MINISTER OF DEFENCE	First Respondent
THE HEAD OF THE SOUTH AFRICAN DEFENCE FORCE	Second Respondent
THE HEAD OF THE SOUTH AFRICAN AIR FORCE	Third Respondent
THE DIRECTOR: MILITARY PROSECUTIONS	Fourth Respondent

JUDGMENT

TOKOTA AJ

[1] The applicant is employed by the South African National Defence Force as a Brigadier-General stationed as such at Air Force division as a Director Technical Support Services. On 23 February 2007 he was placed on compulsory special leave by Lt. General Gagiano on the instructions of the CSANDF. He was then precluded from communicating with any member of the Directorate Technical Support Services and prohibited from visiting Head Quarters or Security area. Charges of sexual harassment and disgraceful conduct have since been preferred against him.

[2] The purpose of this application is to seek an order staying those proceedings permanently and lifting his "skorsing" (suspension) from duty and that it be ordered that he be reinstated to his post. The said charges were a sequel to complaints of sexual harassment which were laid against him by one Ms De Kok and Ms Smith. He was then, on 23 January 2007, placed on special leave on the instructions of the Chief of the South African National Defence Force (CSANDF

[3] After he was placed on compulsory leave he heard nothing from the department until the 12th of February 2008 when he was called by Col. Hartley to report at Air Force Head Quarters. He was informed that he would be required to report in order to meet legal personnel who were going to either arrest him or release him on warning. He informed Colonel Hartley that the time period within which he was required to report was unreasonably short as he needed to contact his lawyers to represent him at the meeting. He requested that he be given documentary proof of what he was required for. He was then faxed what is termed "Account of Offence"

[4] On 13 February 2008 he was again called by Major Kodisang and informed that he was required to report to the Chief of the Air Force offices to be given a warning that there were pending investigations of charges of sexual harassment and disgraceful conduct. He informed Kodisang that he was already aware of such allegations since February 2007, thereupon Kodisang undertook to come back to him. On 11 April 2008 Kodisang once again called the applicant and informed him that

the Senior prosecutor together with the Chief of the Air Force wanted him to appear before the Chief of the Air Force.

[5] On 14 April 2008 Lt.Col. Roger Coetzee delivered a letter from the Chief of the Air Force in which the applicant was informed of the need to initiate legal proceedings and that he should report to the Chief of the Air Force's office on 23 April 2008. On 23 April 2008 the applicant and his lawyers were informed at the parking area that the Chief of the Air Force was not available to see them as he was engaged with other commitments.

[6] On 6 May 2008 applicant's attorneys wrote a letter to the department of Defence ("the department") requesting that arrangements be made for a further meeting and proposed certain dates. The third respondent replied and suggested a meeting of the 14th of May 2008. The applicant was, at the meeting of the 14th May 2008, informed of the charges of indecent assault and improper conduct. He was represented by his lawyers. It was at this meeting that counsel for the applicant raised certain objections on the grounds of irregularities allegedly committed by the department. The third respondent left the meeting and his

secretary handed over to the applicant the charges preferred against him.

[7] On 2 July 2008 the applicant appeared in the Military Court before Senior Military Judge Captain R P Masutha. His Counsel put on record that the applicant was insisting that formal investigations be held. He requested the fourth respondent to furnish him with statements and that an agreement be reached for the date of the proceedings. The case was then postponed to 1 September 2008 for further investigation and for the preliminary investigation.

[8] On 7 August 2008 applicant's counsel agreed with Kodisang that the preliminary investigation be held on 18 August 2008. On 14 August 2008 applicant's counsel further requested that the matter be heard on 29 September 2008 to 1 October 2008. Kodisang once again agreed to this proposal.

[9] On 15 September 2008 the applicant's attorney wrote a letter to Kodisang informing him that there were still outstanding statements and information which he considered to be relevant and necessary for the hearing. On 17 September 2008 Kodisang

wrote back to applicant's attorney and informed him that he had given him all the statements. In that same letter Kodisang suggested that a pre-trial conference be held to discuss the issues raised by applicant's attorney in his letter.

[10] On 17 September 2008 applicant's attorney wrote another letter to Kodisang informing him that he was adamant that he did not receive all the statements and information that he required and requested that a docket be made available for making copies of the contents thereof. On the same date Kodisang responded to the applicant's attorney and informed him that the recording officer , as a result of prior commitment, would not be available on the scheduled dates and suggested that the preliminary investigation be commenced on 29 September 2008 and at the same time be postponed to further dates to be agreed upon, if necessary.

[11] On 29 September 2008 the applicant appeared before the recording officer Captain J J Renecke for the preliminary investigation. During these proceedings applicant's legal representatives insisted that the prosecuting authority be informed that he was insisting on the formal preliminary investigations and that witnesses should be called to give viva voce evidence and be

cross-examined. Despite this, the recording officer suggested the witnesses' statements be read out because that was a prescribed procedure. Applicant's legal representatives, however, indicated that there was no need to read out the statements but insisted that the witnesses be called to give evidence. The rights of the applicant in terms of section 30(12) of the Military Discipline Supplementary Measures Act 1999 were explained and the applicant was given the document to sign that he understood his rights which he did.

[12] After the above procedure was followed the recording officer announced that the preliminary investigations were completed. Applicant's legal representatives objected to this and noted in the last page of the record of the preliminary investigation that the proceedings were not finalised.

[13] I do not deem it necessary to deal with the events that took place after the preliminary investigation was allegedly completed. Suffice it to say that there were exchanges of correspondence between the parties until 21 January 2009. No further hearing was held thereafter.

[14] At the hearing of this matter two preliminary issues were brought to my attention. First, the condonation of the late filing of the answering and the replying affidavits. Both parties were in agreement that condonation should be granted. This was accordingly granted. Second, Mr Barnardt, who appeared for the applicant, applied for the striking out of a portion of the typed affidavit of Ms De Kok (annexure SANDF 4) on the grounds that;

(a) it has not been attested to;

(b) it scandalous and irrelevant;

(c) it is hearsay evidence.

Mr Dreyer SC, who, together with Mr Britz, appeared for the respondents argued that the statement has been incorporated to the manuscript statement, which has been sworn to, by reference. Furthermore it has not been tendered to prove the truth thereof but merely to show that a communication was made. The argument went further and he argued that the scandalous and irrelevant allegations have not been identified in the statement.

[15] In my view the objection to the statement is a technical issue which does not affect the determination of the real issues in the matter. It can be disposed of by reference to the case of **Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at**

278F where it was stated that *"No doubt parties and their legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

[16] In my view the applicant has suffered no prejudice resulting from the inclusion of the statement. For the determination of the real issues in the matter it is not necessary to have regard to the statement. Accordingly the application must be refused.

[17] The issue that has to be decided now is whether this court has the power to stay the disciplinary proceedings of the Military Court and to uplift the alleged suspension. The power to institute disciplinary proceedings in the Military Court vests in the Military Prosecution. Section 22 of Military Discipline Supplementary Measures Act No. 16 of 1999 stipulates functions, directions and control of military prosecution authority It provides that the *"(p)rosecutions in any military court shall be conducted, and the prosecuting authority shall be exercised on behalf of the State."*

Subsection (2) provides that "*(w)here the available evidence against any person subject to the Code prima facie discloses the commission of an offence, that person shall be prosecuted unless the charge has been rendered non-justiciable, or has prescribed, or any other legal impediment renders the charge or person incapable of being tried, either by a military court or at all.*"

Subsection (3) provides that the *"Director: Military Prosecutions-*

(a) shall institute and conduct prosecutions on behalf of the State;

(b) shall carry out all necessary functions incidental to instituting and conducting prosecutions, including the determination of whether or not investigations are complete; and

(c) may discontinue prosecutions."

[18] Mr Barnardt submitted that the alleged sexual harassments having taken place during 2005 and 2006 and the witnesses being unwilling to continue with case, the insistence to proceed with the matter casts suspicions that there may be a hidden agenda on the part of the department. However, one must not loose sight of the fact that these complaints were only brought to the notice of the

department in 2007. It is true that these witnesses have already left the department and are unwilling to continue with the case. However Ms De Kok has indicated that although she is no longer interested in the matter she is nevertheless willing to give evidence, if needs be.

[19] In terms of section 35(3)(d) of the Constitution of the Republic of South Africa Act 108 of 1996 an accused person has a right to have his *"trial begin and conclude without unreasonable delay"*. Section 342A of the Criminal Procedure Act 51 of 1977 deals with unreasonable delays in criminal trials

It provides *"(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness."*

For the determination as to whether there has been unreasonable delay the court must investigate various factors including, the duration of the delay; the reasons therefore; whether any person can be blamed for the delay; the effect of the delay on the personal circumstances of the accused and witnesses; the seriousness, extent or complexity of the charge or charges; actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost; the effect of the delay on the administration of justice; the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; any other factor which in the opinion of the court ought to be taken into account.

These factors have not been canvassed in the papers.

[20] The unreasonable delay in the context of the Criminal Procedure Act 51 of 1977 is usually dealt with by the trial court. The charges preferred against the applicant usually form the basis of a disciplinary process and not of a criminal nature. I am not sure whether the Military court in instances of this offence sits as criminal court or not. However, in view of the course I prefer to take in the matter it is not necessary to decide this issue.

[21] If regard is had to facts of this case there appears to have been an unreasonable delay in deciding where or not to proceed with the complaints. It took the department a year to decide to

prosecute the applicant. In my view this aspect should have been raised at the trial court during the preliminary hearing. It was not raised. Instead dates were arranged to proceed with the matter. I do not think it is far fetched to attribute the stance of the applicant to stop these proceedings to the fact that the witnesses are no longer employed and interested in the matter.

[22] The issue of stopping prosecution permanently already enjoys judicial precedent. I can do no better than quote extensively from the case **Zanner v Director of Public Prosecutions, Johannesburg 2006 (2) SACR 45 (SCA) at 50B-J51A-B** where the Learned Acting Judge of Appeal, as she then was, stated *"[10] (T)his is, however, a drastic remedy which is granted sparingly and only for very compelling reasons. Describing the remedy in Sanderson v the case of* ***Sanderson v Attorney-General, Eastern Cape 1998 (1) SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675) para [38]****, where the Court was dealing with an accused's right to a speedy trial under s 25(3)(a) of the interim Constitution, the precursor to s 35(3)(d) of the Constitution (which, although worded differently, has the same object), Kriegler J said:*

'[T]he relief is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins and

consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by s 7(4)(a) of the interim Constitution',

[the similarly worded precursor to s 38 of the Constitution.]

The learned Judge continued at para [39]:'A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.'

*The remedy may be granted in the absence of trial-related prejudice, where 'there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate'. (**See Wild and Another v Hoffert NO and Others 1998 (2) SACR 1 (CC) (1998 (3) SA 695; 1998 (6) BCLR 656) para [27]; see also McCarthy v Additional Magistrate, Johannesburg, and Others 2000 (2) SACR 542 (SCA) ([2000]** 4 **All SA 561).)***

[11] Section 35(3)(d) entrenches an accused's right to a speedy trial and provides:

'Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.'

The object of this provision is to protect an accused's liberty, personal security and trial-related interests (see Sanderson para [20]; ***Wild*** *para [5]).*

[12] The protection of these three rights is described in a judgment of the Supreme Court of Canada, R v Morin (1992) 8 CRR (2d) 193 at 202, quoted with approval in Sanderson para [20], as follows:

'The right to security of the person is protected . . . by seeking to minimise the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.'

(See also Barker v Wingo, Warden 407 US 514 (1972) at 532.)

Trial-related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial. (See

S v Dzukuda and Others; S v Tshilo 2000 (2) SACR 443 (CC) (2000 (4) SA 1078; 2000 (11) BCLR 1252) para [51].)"

[23] If one were to investigate the trial related prejudice by the applicant one can only speculate in this regard. There is no evidence that he has witnesses which he would have called but have now disappeared or that their memories have now faded. He has not is established that he has suffered irreparable trial prejudice as a result of the delay.

[24] Regard being had to the above principles and applying the same to the facts of the present matter I am not persuaded that it has been shown that there are trial related prejudicial issues. The only issue to me which appears to have been shown is the fact that the State witnesses are no longer interested in the matter. The department has decided not to proceed with charges concerning Ms Smith.

[25] It is for the Military Prosecuting authority to decide whether or not to proceed with the matter as that function has been assigned to it by section 22 quoted above. In my view the applicant

is free also to raise the point once again before the trial court at the commencement of the proceedings. I am therefore not persuaded that this is a typical case where this drastic remedy should be granted.

[26] Concerning the relief relating to the upliftment of "suspension", Mr Barnardt argued that the special leave granted to the applicant was effectively a suspension. However, it does not appear to me that the applicant is on suspension. There is a certain procedure to be followed when a member is to be suspended in terms of the policy. Firstly, the member concerned must be given hearing before a suspension can be effected. Secondly, other measures must first be considered such as transfer, warning not to interfere with witnesses and granting of leave to the member concerned. In this case the latter has been considered appropriate. Therefore the question that remains is whether the person who granted it had authority to do so.

[27] Mr Barnardt argued that even if it were to be ruled that the applicant is on special leave such leave was invalidly granted in that the person who granted it had no power to do so. It is only the

Chief of the South African National Defence Force who has the power to grant such leave.

[28] In my view if the decision, as appears from the letter addressed to the applicant putting him on special leave, was taken by the Chief of the South African National Defence, it is not necessary that he should communicate the same himself to the member concerned. In the letter addressed to the applicant it is stated *"that the CSANDF has authorised CAF to order the leave on instruction on CSANDF's behalf and that CSANDF will furnish the relevant documentation to him in due course."* From the contents of this letter it is therefore clear that the CSANDF took the decision himself. The fact that it was communicated to the applicant by someone else is irrelevant.[1] Accordingly the argument cannot be sustained.

[26] Furthermore I was informed from the bar by Counsel for the applicant that it is a process for the applicant to resume his duties. Certain formalities must be negotiated. I am therefore of the opinion that the applicant should approach the Chief of the Defence Force to reconsider his decision in this regard in the light

[1] See Jeewa v Donges NO 1950(3) SA 414 (A) at 420I

of the fact that the witnesses are no longer employees of the department. Only thereafter should consideration be given as to whether the decision taken in that regard, if it is negative, should be reviewed and set aside.

[27] As regards costs the general rule is that they should follow the event. Mr Dreyer SC for the respondents argued that this is case where the respondents have considered it to be wise and a precautionary measure to employ two Counsel and therefore in the event they are successful I should award costs of two counsel. Although I agree that employment of two Counsel was not unreasonable I have decided in the exercise of my discretion not to award costs of two Counsel.

In the result I make the following order.

1. The application is dismissed with costs.

B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

DATE HEARING: 9 JUNE 2010.

DATE OF JUDGMENT:

Appearances For the applicant: Adv HM Barnadt instructed by

Marinus Incorporated

For the respondents Adv JH Dreyer SC

Adv E Britz

Instructed by the State Attorney Pretoria