



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:A358/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

24/4/2017

20/4/2017
DATE

Ranchod J.
SIGNATURE

In the matter between:

THE MINISTER OF DEFENCE FIRST APPELLANT
THE HONOURABLE JUSTICE MR MORNE BOTHA
SECOND APPELLANT

and

POWER MANDLA MBAMBO RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an appeal against the whole of the judgment and order of Kollapen J in the court *a quo* in which the learned judge granted the respondent condonation for the late bringing of a review application and

upheld the application on the merits. The appeal is with the leave of the court *a quo*.

[2] The respondent held the rank of captain in the South African National Defence Force (the SANDF) when he was dismissed¹ after a hearing before a Military Court Judge on a charge of intimidation as well as assaulting a superior officer. The proceedings were conducted in terms of the Military Disciplinary Supplementary Measures Act 16 of 1999 (the Act).

The issues to be determined

[3] Three issues arose before the court *a quo* for determination, namely:

- 3.1 Whether the respondent should be granted condonation for bringing a review application against his conviction and sentence in a military court some eleven years out of time;
- 3.2 Whether a preliminary investigation as contemplated in the Act was held prior to his trial in the military court; and
- 3.3 Whether the fact that the military trial judge sat without assessors was permissible under the Act, alternatively, whether the military trial without assessors was *per se* unfair.

Background

[4] The respondent was charged with:

- 4.1 Contravention of section 1(1)(b) of the Intimidation Act No 72 of 1982, as amended, read with sections 1, 48, 50, 51, 56, 88 and 93 of the Military Discipline Code, and section 12 of the Military Discipline Supplementary Measures Act No 16 of 1999, as amended, and
- 4.2 Contravention of section 15 of the Military Discipline Code: Assaulting a superior officer.

In the alternative:

¹ The term used in the military is 'cashiering'. The concept of cashiering is not defined in legislation but it has the traditional meaning of a ritual discharge of an officer from a military force at a parade and in front of the assembled troops, where he or she is publicly disgraced by stripping the officer of his or her rank and then chased off the parade ground.

- 4.3 Contravention of section 15 of the Military Discipline Code:
Assaulting a superior officer; and
- 4.4 Contravention of section 45(a) of the Military Discipline Code:
Riotous or unseemly behaviour.

[5] The trial took place before the second appellant from 4 December 2000 to 6 December 2000. The respondent was found guilty on both the main counts and sentenced to cashiering.

[6] However, the sentence was not executed until the proceedings were reviewed by the Military Court of Appeals in terms of s34(2) of the Act on 27 October 2001 and the conviction and sentence were confirmed. The respondent was informed of the decision of the Military Court of Appeals on 1 November 2001 and his employment was terminated on 30 November 2001.

[7] In the application for condonation for the late filing of the application for review the respondent sets out in the founding affidavit the steps he says he took to seek redress against what he perceived to be an incorrect conviction and sentence. On or about 6 November 2001 he approached Legalwise which is a legal expense insurance company, of which he was a member, to assist him. He was referred to a firm of attorneys who launched an appeal in this division of the High Court. The matter was eventually heard on 25 August 2004. The Full Court struck the appeal from the roll on 12 October 2004 and remarked that the respondent should have applied for a review and not an appeal.

[8] He almost immediately went to Legalwise for further assistance but they could not assist him any more as he was no longer a contributing member.

[9] The respondent says that he then approached the Durban Justice Centre of Legal Aid who asked him to furnish a copy of the record, which he did. (It is not clear which record is being referred to, i.e. of the trial or of the Military Court of Appeals but I assume it is the former.) He says he waited for

some two years – between September 2004 and September 2006 before he was informed by it that they will not assist him as they saw no prospects of success in the matter.

[10] The respondent says 'another reason' for the two-year delay was that his Legal Aid attorney had advised him that counsel had been briefed for an opinion. He attached a letter (annexure "PMM2") dated 29 May 2012 from the Durban Justice Centre in support of this allegation.

[11] The respondent says he then sought assistance from the Human Rights Commission. After about six months he was told that the Commission does not take on matters which had been 'finalised'.

[12] At the beginning of 2007 he approached the Human Rights Centre in King Williams Town for assistance and attached a letter dated 27 February 2009 addressed by the Centre to the 'State President' seeking the latter's assistance to have him re-instated in the ranks of the SANDF. That apparently came to nought as will be apparent later.

[13] Undaunted by these setbacks, he then approached the Presidency directly in 2009 and, at the request of the Secretary in the Presidency provided a copy of the record by sending it via ordinary mail. He made various telephonic enquiries with the Secretary (who had confirmed receipt of the documents) who referred him to a certain Nonhlanhla. He contacted the latter who told him the record was handed over to another person in the Presidency, namely a Mr Vusi Mona. Respondent says he telephonically contacted Mr Mona, 'around 2010' who told him the matter is receiving attention. About two months later he made a telephonic follow up enquiry only to be told that Mr Mona no longer worked at the Presidency. Respondent says no one at the President's office knew what he was talking about or where his documents were.

[14] The respondent then approached the Defence Commission 'between the periods 2010 until February 2012' which is when he last had a telephonic

conversation with someone in the office of the Defence Commission. He says he was advised that his documents had been referred to the Chief of the South African Air Force and attached a copy of the reply he says he received from the latter which is dated 8 October 2010. (It is to be noted that the letter is addressed to the Human Rights Centre in King Williams Town and was written in October 2010.)

[15] The respondent then says another major cause of the delay was that he had become extremely depressed and mentally distressed after his matter had been struck off the roll in August 2004, it led to his 'mental instability' and to him being admitted to various mental institutions. He attached letters from various doctors and hospitals, being annexures 'PMM6' – 'PMM10'.

The legal principles regarding applications for condonation

[16] In *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa*² the Constitutional Court made it clear that the body of common law which comprised administrative law has been constitutionalised and that the common-law principles have now been subsumed under the Constitution so that there are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest court but only one system of law: that system of law is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

[17] For the purposes of the issue of condonation it is not necessary to determine whether the original review application was one under the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA") or was one under the doctrine of legality: in both instances (and under the common-law delay rule³) a review application has to be launched without any unreasonable

² 2000(2) SA 674 (CC).

³ See *Wolgroeiens Afslaaers (Edms) Bpk v Munisiplaiteit van Kaapstad* 1978(1) SA 13 (A).

delay and the basic principles applicable to the granting of a condonation for such delay are in essence the same.

[18] The Supreme Court of Appeal in *Beweging vir Christelik-Volkseie Onderwys v Minister of Education*⁴ held that – in the application of both the common-law delay rule and section 7 or section 9 of the PAJA – a two-stage approach is required:

18.1 The first question is whether the delay in launching the application was unreasonable, or (under the PAJA) whether it was launched more than 180 days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge.

18.2 The second question is whether, if the first question is answered in the affirmative, the delay ought to be condoned or in the case of the PAJA whether it is in the interests of justice that the 180-day period be extended.

[19] The two decisions that were taken on review were made on 6 December 2000 (by the Military Judge) and on 27 October 2001 (by the Military Court of Appeals) respectively.

[20] Hence the internal remedy was concluded on 27 October 2001 and the review proceedings only instituted some 11 years later (that is, when the application was launched on 23 July 2012).

[21] In *Melane v Santam Insurance Co Ltd*⁵ it was held:

‘...the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are

⁴ [2012] 2 All SA 462 (SCA) 464.

⁵ 1962(4) SA 531(A) at 532, per Holmes JA.

interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits....'

- [22] In *Opposition to Urban Tolling Alliance v SANRAL*⁶ it was said that:
 '...the constitutional enjoinder to fair administrative action, as it has been expressed through PAJA, expressly recognises that even unlawful administrative action may be rendered unassailable by delay.'

Discussion

- [23] I deal firstly with whether the delay of about eleven years before the respondent launched the review application is inordinate and whether it causes actual or potential prejudice to the appellants.

- [24] It is apparent from the annexures attached to the founding affidavit that the respondent relied to a large extent upon documentary hearsay to explain the various cumulative delays. His explanations in this regard are often vague or not explained in proper detail.

- [25] For example, there is no proper explanation why the abortive 'appeal' to the High Court took nearly three years to reach the court in August 2004.

⁶ [2013] 4 All SA 639 (SCA) at para 36.

[26] On his own version, the respondent did nothing but wait for the Durban Justice Centre from 2004 to 2006 to revert to him which, in any event, informed him that it saw no prospects of success in the matter. There is no substantiation or corroboration for the hearsay allegation that an advocate was partly responsible for the delay between 2004 and 2006. In the letter of the Durban Justice Centre dated 29 May 2012 which was apparently in response to the respondent's attorneys who wrote to the Board on 26 May 2012 it is stated that a file was opened on 6 December 2005 and closed on 27 November 2006. It is apparent that although the respondent refers to an advocate Irvan Markham the letter refers to an Advocate Manickum but that Legal Aid's records do not reflect any referral of the matter to Advocate Manickum although it cannot deny (presumably on the basis that the Board can only confirm what is in its records) that Mr Manickum might have been briefed. But it appears, contrary to the respondent's averment that he approached Legal Aid in 2004 already, that it had opened a file only in December 2005. Hence the respondent's allegation that he approached Legal Aid in 2004 cannot be correct as, in all probability, Legal Aid could not have acted in the matter without first opening a file.

[27] The respondent says he sought assistance from the Human Rights Commission. On his own version the respondent waited for some six months for a response from it. He appears to have done nothing in the interim and, he fails to explain what 'assistance' he applied for.

[28] Between 2007 and 2009 the respondent again did nothing. Apart from stating that the legal advisor at the Human Rights Centre – a Mr Tetyana – had passed away the respondent does not elaborate on the more than two years that elapsed since he approached the Human Rights Centre at the beginning of 2007 and the letter written to the President at the end of February 2009. It appears that that letter of the Human Rights Centre was referred to the Interim National Defence Force Commission. The Chief of the Air Force Lt Gen Gagiano responded to the letter in a letter dated 8 October 2010. Gagiano informed the respondent that there would be no intervention in the matter and that only a court of higher jurisdiction than the Court of

Military Appeals may intervene. As I said, he was informed about this in October 2010 yet launched his application for condonation and review only in July 2012 – almost two years later.

[29] The respondent also relied on the fact that he had been ill and in and out of hospital. He says he became 'extremely depressed and mentally distressed' after August 2004. In June 2005 he was diagnosed with a bipolar type schizophrenic disorder. Between 2005 and 2009 he was treated for bipolar mood disorder. In September 2010 he was diagnosed with acute psychosis and mental disturbance and in the following month he underwent a hip replacement. Among others, the respondent attached a letter dated 2 April 2012 from a Dr Moosa Desai stating that he was suffering from 'anxiety and depression because of stress from dispute at work with the SANDF.' However, by that time the respondent no longer worked for the SANDF but had been cashiered some ten years earlier. (None of the documents attached in support of the submissions have been confirmed under oath and therefore are of little or no evidential value.)

[30] Even if it is accepted that the respondent suffered from the stated illnesses it does not adequately explain the long delay in bringing the review application which is no doubt prejudicial to the appellants. The respondent seeks reinstatement to his previous rank. This would mean undoing years of progression in the ranks of others in the military which would be prejudicial not only to the appellants but also to those military officers.

Review on the merits

[31] On the merits the court *a quo* entertained two grounds for review, namely:

- 31.1 Firstly, that no preliminary investigation was held as is allegedly required (as a jurisdictional condition for a military trial under the Act), in respect of which the learned Judge concluded that the SANDF (as the then respondents in motion proceedings) had not proven on a preponderance of probabilities that such an investigation was held; and

31.2 secondly, the allegation that the respondent was not informed of his right under the Act to elect to be tried by assessors, in respect of which the learned Judge concluded that the right of the respondent to a fair trial was breached. .

[32] It is apparent that the court *a quo* approached the evaluation of the evidence before it from the perspective that the SANDF carried the burden of proof to dispel the grounds of review, whilst it is trite law that the onus of proof was upon the respondent (as the applicant in the review application) to establish the grounds of review relied upon⁷. As a result of this point of departure the court *a quo* found that there was no proof on a preponderance of probabilities that a preliminary investigation was conducted in the matter and held that with regard to the appointment of military assessors, there was no evidence by the SANDF indicating that the respondent's trial before the military court was fair and just. The SANDF had no such onus. In any event, the findings were against the evidence before the court *a quo*.

[33] In *National Director of Public Prosecutions v Zuma*⁸ Harms DP (as he then was) held:

'In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph [the *Plascon-Evans* rule] governs irrespective of where the legal or evidential onus lies'.

[34] The risk of a factual dispute rests upon the litigant electing to proceed on motion proceedings. It appears that the respondent (as applicant in the review proceedings) at no stage applied to have the matter referred to evidence or trial, or have the deponents to the affidavits filed by the SANDF called for cross-examination, either before or after argument in the matter⁹.

⁷ See record vol 3 p 288 (line 13) – p 289 (lline 1)

⁸ [2009] 2 All SA 243 (SCA) par 27.

⁹ *Kalil v Decotex (Pty) Ltd* 1988(1) SA 943 (A) at 981D-G.

[35] The general principles applicable to disputes of fact in motion proceedings are summarised in para B6.45 of *Harms Civil Procedure in the Superior Courts* (footnotes omitted):

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

...

Whether a factual dispute exists is not a discretionary decision; it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion given by rule 6. It is not a question of any difference of character between the various kinds of claims being enforced, but a question of the proper method of determining in each case the facts upon which any claim depends.

The rule of evidence that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a *prima facie* case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out above governs irrespective of where the legal or evidential onus lies.'

The '*Plascon-Evans*' rule is a reference to the well-known principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁰

¹⁰ 1984(3) SA 623 (AD) at 634 E- 635 C.

The preliminary investigation

[36] Section 10 of the Act, dealing with the composition and jurisdiction of the court of a military judge, provides that the court shall consist of:

- (a) an officer of not less than field rank and with not less than three years' experience as a practising advocate or attorney of the High Court of South Africa or three years' experience in the administration of criminal justice or military justice, assigned in terms of section 14(1)(b) to act as a military judge; and
- (b) subject to sections 20 and 30(24) of the Act, a military assessor.

[37] Section 20 of the Act provides, inter alia, for the appointment of two assessors. Section 30(24) provides (in the context of a provision dealing with preliminary investigations) that upon the completion of a preliminary investigation, the presiding judge, commanding officer or recording officer shall at the end of that preliminary investigation – which is a separate proceeding from the trial before a military court-

- '(a) inform the accused of the accused's right to elect-
 - (i) to be tried by a military court consisting of a presiding judge and two assessors; and
 - (ii) that one of the assessors shall be a warrant officer; and
- (b) explain section 20(1), (2), (3) and (4) to the accused.'

[38] This duty to inform and the right to elect should take place prior to the military trial as part of the proceedings during the preliminary investigation.

[39] If the respondent did not make an election then the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* applies. The maxim was applied in the recent case of *Phillips v South African Reserve Bank*¹¹ where the Supreme Court of Appeal remarked:

'The maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* (all [official acts] are presumed to have been duly performed

¹¹ [2012] 2 All SA 532 (SCA) para 48.

until the contrary is proved), on which the appellant's counsel relied, applies, as it did, for example, in *Cape Coast Exploration Ltd v Scholtz* 1933 AD 56. In that case, one of the issues was whether the defendant had been sent a letter from the Civil Commissioner for Namaqualand notifying him that his diamond prospecting certificate had been withdrawn. A copy of the letter had been found in the commissioner's office but no evidence was led to the effect that the original had been posted. Wessels CJ said (at 76):

"Absolute proof is well-nigh impossible where the frail recollection of men is a factor, and especially is this the case when we have to deal with the recollection of officials who almost automatically do much of their routine work. Hence the importance of the maxim *omnia praesumuntur rite esse acta*. See *Byers v Chinn and Another* 1928 AD at p. 332. We must presume that an official will carry out the ordinary routine work of his office, for in our experience this is what usually occurs. Hence we must presume that if an official letter is written and a copy filed, that the former is dispatched in the ordinary course of business to the person concerned and that he has received it."

[40] In terms of s32(4)(d) of the Act military assessors are appointed only 'where applicable' and not inevitably. Hence, in the military context, a different set of values inspired by the imperative for military discipline apply and therefore trial before assessors is not a condition or requirement for a fair or just trial¹².

¹² *Legal Soldier (Pty) Ltd v Minister of Defence* 2002(1) SA 1 (CC) at 20 para 44 D-G where it was said:

'The impugned sections of the Act differentiate between soldiers and other people. Such differentiation is rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable military justice system. The ground of differentiation is not one specified in s 9(3) of the Constitution; it applies equally to all members of the SANDF in their capacity as such. This basis of differentiation can have no adverse effect on their human dignity or have any comparable impact on them. It has not been suggested that it is unfair to apply the machinery of the military justice system, including the prosecution regime created by the Act, to people who voluntarily join the SANDF in the knowledge that it is a disciplined force with its own disciplinary rules and enforcement machinery. The differentiation is therefore not unfair discrimination within the meaning of s 9(3) of the Constitution.'

[41] The respondent was legally represented at the trial. Defence counsel did not raise any issue about whether a preliminary investigation had been conducted or not.

[42] The respondent says in the review application ('Notice of Review') that:
'It is trite that in the event of a Captain (as the respondent was at the time) being prosecuted that a preliminary investigation (known as the 'PI') should have been held with regards to the charges against such a Captain'.

The respondent then alleges that such an investigation was never held.

[43] The appellants contended that the investigation was in fact held but that due to the long period of time that had lapsed they were unable to locate the record of the investigation.

[44] The court *a quo* decided the merits of the review application on the factual basis that a preliminary investigation was not conducted, whilst this allegation of the respondent was contradicted by the sworn testimony of three witnesses testifying from their personal knowledge on behalf of the SANDF (with one of those witnesses being the defence counsel of the respondent himself at the military trial) that a preliminary investigation was in fact held. That testimony was not of such a nature that it could be rejected (nor was it expressly rejected) on the papers as they stood.

[45] The court *a quo* did not take into account the explanation on record under oath that no original record of the preliminary investigation or a copy thereof could be produced as a result of the delay of more than 10 years in bringing this review application.

[46] Of importance also is that when the respondent testified before the military court he said:

'Then with this right hand of mine because I was facing – I don't know whether like you've got a picture of those rooms even when maybe like

when you did PI, that is being investigation especially for this case you should go to those rooms of ours.¹³ [My emphasis.]

There can be no doubt that the reference to 'PI' by the respondent must have been a reference to the preliminary investigation and that he was aware that it had been held.

[47] In my view the court *a quo* erred in finding as a fact that no preliminary investigation had been conducted.

Appointment of military assessors.

[48] It is common cause that the trial took place without the assistance of military assessors. It is apparent from the respondent's founding papers that it was not his case that he had been deprived of the right to have assessors preside with the judge in the trial nor was his case based on a complaint that his trial was unfair because it took place without the assistance of military assessors. Those were not the issues in the case that the SANDF was called upon to meet.

[49] The respondent simply alleged that his military trial took place without a military assessor, apparently on the supposition that such a trial of an officer with the rank of Captain was a nullity *per se*. His complaint on the papers was not, as the court *a quo* assumed, that a military judge had the legal duty but failed to inform him of his right to elect to be tried before a court composed of a judge and assessors. In this, the court *a quo*, with respect, departed from the wrong premise.

[50] The respondent, in my view, has no reasonable prospects of success on review. In all the circumstances I would uphold the appeal.

Costs

¹³ Record Vol 2. p168 lines 26-30.

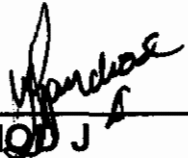
[50] During oral submissions, counsel for the appellants said that the appellants will seek only the costs of the appeal.

[51] I would make the following order:

51.1 The appeal is upheld with costs, such costs to include the costs of two counsel and the costs of the application for leave to appeal.

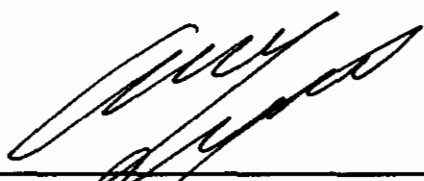
51.2 The order made by the court *a quo* is set aside and replaced with the following order:

'The application for condonation is dismissed. There is no order as to costs.'



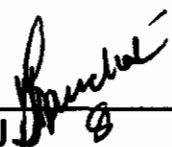
 RANCHOD J
 JUDGE OF THE HIGH COURT

I AGREE



 A.A LOUW J
 JUDGE OF THE HIGH COURT

I AGREE


 for _____
 BAM AJ
 ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellants : Adv M.M Oosthuizen (SC)

: Adv M.S Mphahlele

Instructed by : The State Attorney

Counsel on behalf of Respondent : Adv L.S De Klerk (SC)

: Adv A.S.L Van Wyk

Instructed by : Ehlers Fakude Inc.

Date heard : 19 October 2016

Date delivered : 24 April 2017