



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 4228/2021

In the matter between:

MOTLALEPULA JOHANNES MOKHELE

APPLICANT

and

MINISTER OF DEFENCE

1st RESPONDENT

CHAIRPERSON: COURT OF MILITARY APPEALS

2nd RESPONDENT

MILITARY JUDGE: LT COL STEMMET

3rd RESPONDENT

CHIEF OF MILITARY LEGAL SERVICES

4th RESPONDENT

DIRECTOR: MILITARY PROSECUTIONS

5th RESPONDENT

CORAM: CHESIWE, J et GROENEWALD, AJ

HEARD ON: 22 APRIL 2024

DELIVERED ON: 24 MAY 2024

INTRODUCTION:

- [1] The applicant, Mr Motlalepula Johannes Mokhele, was a military police official in the South African National Defence Force (SANDF) and held the rank of sergeant.
- [2] On 16 July 2019 the applicant was found guilty of the contravention of section 4(1)(a)(iv) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by the Military Court in Bloemfontein.
- [3] The applicant was subsequently sentenced on 16 July 2019 by the Military Court in Bloemfontein to imprisonment for a period of 12 (twelve) months and was discharged with ignominy from the SANDF.
- [4] The conviction and sentence of the Military Court was subject to an automatic review by the Court of Military Appeals in terms of section 34(2) of the Military Discipline Supplementary Measures Act 16 of 1999.
- [5] On 15 May 2020 the Court of Military Appeals confirmed the conviction of the applicant by the Military Court and increased the applicant's sentence from 12 (twelve) months to 48 (forty-eight) months. The sentence regarding the discharge of the applicant with ignominy from the SANDF remained unaltered.
- [6] The applicant seeks to review and set aside his conviction and sentence by the Military Court as well as the order of the Court of Military Appeals in which the applicant's conviction was confirmed and the sentence increased.
- [7] The respondents brought an application for condonation for the late delivery of their answering affidavit and the applicant in turn sought condonation for the late delivery of his replying affidavit. Both counsel for the applicant and the respondents conceded that there would be no prejudice if the said condonation is granted. I therefore granted condonation for the late delivery of the respondents' answering affidavit as well as the applicant's replying affidavit.
- [8] Because both the applicant and the respondents sought condonation for the late delivery of their answering and replying affidavits respectively, I am of the

view that the parties should be ordered to pay their own costs in respect of their applications for condonation.

CONDONATION FOR LATE FILING OF APPLICATION:

[9] The applicant made the following allegations in respect of the application for condonation for the late filing of the application for review:

[9.1] Shortly after his conviction and sentencing on 16 July 2019, the applicant requested the transcript of the trial in the Military Court and that process took approximately 4 (four) months;

[9.2] The applicant has been serving his sentence since 19 May 2020. During this time the country went under level 4 lockdown and the applicant had no access to lawyers;

[9.3] On or about July 2020 the applicant instructed Mr Fannie Zim from Zim Attorneys Inc to assist him with the matter. Mr Zim was however unable to commit to this matter;

[9.4] The applicant then instructed Mr Lebogang Mokhele from Mokhele Inc. to assist with this matter but was informed by Mr Mokhele that he was unable to assist the applicant because Mr Mokhele was involved a complex matter involving inmates from Grootvlei Prison;

[9.5] During this time the applicant suffered from emotional distress as a result of his continuous failure to obtain legal assistance and he felt hopeless;

[9.6] On 20 April 2021 the family of the applicant obtained the services of counsel who assisted the applicant with the drafting of a legal opinion on the matter. The applicant was advised by counsel to launch an application in the High Court and the applicant had to obtain the legal services of an attorney in Bloemfontein;

- [9.7] The applicant was able to obtain the services of his current attorney of record in July 2021;
- [9.8] Due to his incarceration the applicant's family was under immense financial pressure and had to rely on family members to provide financial assistance for applicant's legal fees.
- [10] On 13 September 2021 the application for review was issued by the Registrar of this Court. The respondents delivered their notice of intention to oppose the application for review on 18 October 2021.
- [11] According to the respondents the applicant's explanation for his failure to launch the review application timeously is inadequate and is based on unsubstantiated allegations of being failed by legal practitioners. According to the respondents there are also extensive periods that remain unexplained by the applicant. The respondents further contend that they suffered severe prejudice as a result of the unreasonable delay of the applicant in launching the application for review.
- [12] In **Competition Commission v Pickfords Removals**¹ the Constitutional Court held that condonation is not a mere formality. Good cause must be shown. Courts are afforded a wide discretion in evaluating what constitutes "*good cause*" as to ensure that justice is done. Ultimately the overriding factor is the interests of justice.
- [13] In **Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)**² the Constitutional Court held that whether it is in the interest of justice to grant condonation depends on the facts and the circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants,

¹ 2021 (3) SA 1 (CC) AT 21D - F

² 2008 (2) SA 472 (CC) at 477A - C; Also see *Competition Commission v Pickfords Removals supra* at 21D - F

the reasonableness of the explanation of the delay, the importance of the issue to be raised in the matter and the prospects of success.

- [14] Lateness is not the only consideration in determining whether condonation should be granted. In the interest-of-justice test required for condonation an applicant's prospects of success and the importance of the issues to be determined are relevant factors.³
- [15] In **Valor IT v Premier Northwest Province**⁴ the Supreme Court of Appeal held that one of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for delay, while strong prospects of success may excuse an inadequate explanation for the delay.
- [16] I agree with the respondents that certain time periods relating to the applicant's delay was not fully explained by the applicant. I however keep in mind that the applicant has been incarcerated since 19 May 2020 and apparently struggled to obtain legal representation. The applicant's prospects of successes and the importance of the issues to be determined by the Court remain important factors that the Court needs to consider.
- [17] As will be evident *infra* the applicant has strong prospects of success which in my view may excuse the inadequate explanation for the delay proffered by the applicant.
- [18] The relief that the applicant seeks in this application is in my view very also important as he *inter alia* seeks to review and set aside his conviction and sentence of 48 (forty-eight) months and his discharge with ignominy from the

³ Ferris v Firststrand Bank 2014 (3) SA 39 (CC) at 43G – 44A

⁴ 2021 (1) SA 42 (SCA) at 54E - G

SANDF. Even though the applicant has already served a substantial portion of his sentence, his discharge with ignominy from the SANDF is still an issue that needs to be determined. The relief that the applicant seeks is therefore not only academic in nature as the respondents contend. Should condonation for the late filing of the review application not be granted the applicant will be severely prejudiced as he will be unable to seek the review and setting aside of his conviction and sentence. The prejudice that the applicant may suffer should condonation be refused will in my view outweigh any potential prejudice that the respondents may suffer if condonation is granted.

- [19] Having considered all the relevant facts and circumstances in this matter I am persuaded that it will be in the interest of justice to grant condonation to the applicant for the late filing of his application for review.
- [20] It is trite that an applicant for condonation seeks an indulgence from Court. As a general rule the applicant for an indulgence should pay all such costs as can reasonably said to be wasted because of the application.⁵
- [21] I could find no reason to deviate from the usual cost order and is therefore of the view that the applicant should be ordered to pay the respondents' costs relating to the application for condonation for the late filing of his application for review.

NON – JOINDER:

- [22] The applicant was represented in the Military Court by Mr Crous from Dippenaar & Crous Attorneys in Bloemfontein. The applicant was a policy holder at a legal insurance company known as Scorpion Legal Protection and Mr Crous was appointed by Scorpion Legal Protection to represent the applicant in the Military Court.
- [23] The respondents contend that the applicant should have joined Scorpion Legal Protection and Mr Crous as parties to the application.

⁵ **Myers v Abramson 1951 (3) SA 438 (CPD) at 455G-h**

- [24] The test relating to non-joinder is whether or not a party has a “*direct and substantial interest*” in the subject matter of the application, i.e. a legal interest in the subject matter of the litigation that may be affected prejudicially by the judgment of the court.⁶ The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder challenge.⁷
- [25] The applicant does not seek any relief against Scorpion Legal Protection or Mr Crous and I am of the view that they do not have any direct and substantial interest in this application that may be affected prejudicially by the judgment of the Court.
- [26] I therefore find that there was no need for the applicant to join Scorpion Legal Protection or Mr Crous as parties to this application.

THE GROUNDS FOR REVIEW:

- [27] In the Military Court the applicant was represented by Mr Crous. According to the applicant Mr Crous however never had instructions to represent him in the review proceedings in the Court of Military Appeals. The applicant indicated that the last time he in fact communicated and issued an instruction to Mr Crous was during the trial proceedings in the Military Court.
- [28] It is common cause between the parties that before the review could be adjudicated Mr Crous sent communication to the Court of Military Appeals, on 5 May 2020, indicating that his services as the legal representative of the applicant were terminated.
- [29] On 13 May 2020, after he already indicated that his services as the legal representative of the applicant were terminated, Mr Crous sent further correspondence to the Court of Military Appeals in which he stated that the Court of Military Appeals can adjudicate the review “*on paper*” based on the heads of argument that was submitted. Mr Crous further indicated that he would

⁶ Henri Viljoen (PTY) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 168 -170; PE Bosman Transport WKS Com v Piet Bosman Transport 1980 (4) SA 801 (TPD) at 804B; ABSA Bank v Naude 2016 (6) SA 540 (SCA) at 542I – 534C

⁷ Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at 176I

furnish supplementary heads of argument to the Court of Military Appeals before 14 May 2020.

- [30] In the judgement of the Court of Military Appeals the following was stated:

*“Counsel for the State and accused were alerted to the possibility that the court considered increasing sentence, and were asked to address the court on the matter. Extensive heads of argument were fortunately submitted, for Mr Craus could not attend the proceedings. We are however satisfied that the arguments forwarded by both counsel in their heads of argument were sufficient for this court to come to a finding. **We take note that Mr Craus’ mandate had been ended after he submitted his heads, but the accused and his legal insurance organisation (Scorpion) indicated that they were content that this court decide the matter only on the supplied heads of argument**”⁸ (sic) (Emphasis added.)*

- [31] The applicant denied that he or Scorpion Legal Protection agreed that the Court of Military Appeals could adjudicate the review only on the heads of argument and reiterated that Mr Crouse never had instructions to represent him in the review proceedings.
- [32] The applicant further alleged that he did not receive any notice from the Court of Military Appeals informing him of its intention to increase the sentence of the applicant.⁹ In their answering affidavit the respondents merely alleged that they do not have knowledge of the applicant’s aforesaid allegation and therefore denied same. Counsel for the applicant correctly argued that the respondents’ aforesaid denial constitutes a bare denial.
- [33] According to the applicant he was prejudiced because the Court of Military Appeals effectively entertained the review, confirmed his conviction and increased his sentence in his absence. The applicant therefore contended that

⁸ Record, p.21
⁹ Record, p.92, par 19.2

his right to a fair trial in terms section 35(3) of the Constitution of the Republic of South Africa, 1996 was infringed.

- [34] In terms of section 35(3) of the Constitution of the Republic of South Africa, 1996 every accused person has the right to a fair trial which includes the right to be present when tried and to choose, and be represented by, a legal practitioner.
- [35] In my view Mr Crous was not authorised to agree that the Court of Military Appeals can adjudicate the review on the heads of argument because his mandate was already terminated at that juncture. Despite the fact that Court of Military Appeals was aware that the mandate of Mr Crous was terminated it still proceeded to adjudicate the review solely on the heads of argument. The Court of Military Appeals therefore adjudicated the review in the absence of the applicant and without affording the applicant an opportunity to be represented by a legal practitioner in order to advance the necessary legal argument. I am therefore of the view that the proceedings in the Court of Military Appeals were procedurally unfair and the applicant's right to a fair trial before the Court of Military Appeals was infringed.
- [36] I am therefore of the view that the judgment and order by the Court of Military Appeals should be reviewed and set aside and that the matter should be referred back to the Court of Military Appeals in order to consider the applicant's review afresh.

COSTS:

- [37] A successful litigant is generally entitled to his or her costs.¹⁰
- [38] The respondents argued that should the application be granted in favour of the applicant each party should be ordered to pay their own costs of the application.

¹⁰ Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A) at 679B, Baptista v Stadsraad van Welkom 1996 (3) SA 517 (O) at 521E -F

I was however unable to find any reason why the principle that a successful litigant is generally entitled to his or her costs should not be applied in this application.

[39] I am therefore of the view that the respondents should be ordered to pay the applicants costs relating to the application for review.

[40] All the parties are *ad idem* that the costs consequent upon the employment of counsel in this matter should be allowed on scale A.

[41] Accordingly I make the following order:

[41.1] Condonation is granted to the applicant for the late filling of his application;

[41.2] The applicant is ordered to pay the respondents' costs relating to the application for condonation for the late filling of his application, including costs of counsel as per scale A.

[41.3] The judgment and order by the Court of Military Appeals under case number 41/2019 is hereby reviewed and set aside.

[41.4] The automatic review of the applicant's conviction and sentencing by the Military Court under case number 86/2019 BFN is referred back to the Court of Military Appeals in order to consider the applicant's review afresh.

[41.5] The respondents are ordered to pay the applicant's costs relating to the application for review, including costs of counsel as per scale A.

On behalf of the Applicant: Adv. D De Kock
Wesi Attorneys
Bloemfontein

On behalf of the Respondents: Adv. TM Ngubeni
The State Attorney
Bloemfontein