IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: A474/08

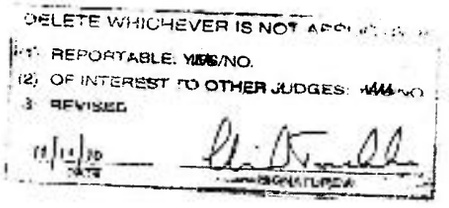
In the matter between: 12/11/2010

MINISTER OF DEFENCE First Appellant

DIRECTOR, MILITARY PROSECUTIONS,

DEPARTMENT OF DEFENCE Second Appellant

and



GOODMAN MANYANYA PHIRI Respondent

JUDGMENT

Tuchten J:

1 This appeal arose from a dispute about access to documents in the context of proceedings in a military court, similar to the access to the docket to which an accused in a criminal case is entitled[1] and

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Shabalala and Others v Attorney-general of Transvaal and Another 1995 2 SACR 761 CC

analogous to a discovery dispute in a civil case. The respondent was arraigned to appear before the military court on 9 March 2001. He was charged with several offences, including using threatening or insulting language, insubordination and disobeying lawful orders.

2 On 23 March 2004 the respondent brought an urgent application before this court under case no. 7697/2004, alleging that he was entitled to certain documentation in the possession of the Department of Defence. On 23 March 2004 and in default of appearance or opposition by the appellants, the High Court stayed the proceedings in the military court pending compliance with its orders directing the first appellant to provide the respondent with certain identified documentation.

3 Amongst the documentation which the High Court directed the first appellant to provide was the following, relevant to this appeal, which I shall call collectively the documentation in issue:

3.1 "South African Army Inspector General's report, involving Phiri et al at the South African Army College, February to March 2001"; and

3.2 "The B. Matt Intervention report (intervention at the SA Army College - January/February 2001 by the British Military advisors to SA National Defence Force".

4 The trial before the military court was part heard when the High Court granted its order. On 8 October 2004, the respondent's trial before the military court was due to continue but the respondent sought, and was granted, a postponement on the ground that the documentation in issue had not been produced. At the same time, the military court ordered that a "ministerial investigation report" be handed over to the respondent.

5 The appellants' case is that the documentation in issue had indeed been provided under cover of a letter dated 19 April 2004. The appellants say that they provided what they had in relation to the SA Army Inspector General's report in what they called *Enclosure 1* and to the B Matt intervention report in what they call *Enclosure 4*.

6 The respondent's answer to this claim of full compliance is contained in a letter dated 3 May 2004, written by the respondent's attorney to the State Attorney. The respondent's complaints in relation to the

documents provided under cover of the letter dated 19 April 2004, to the extent relevant, were as follows:[2]

6.1 In relation to Enclosure 1:

> Enclosure 1 is incorrect in that what is sought in terms of the court order is specifically the SA Army Inspector General's report instigated by the SA Army College presiding General Moshoana, which report was finalised on the 6th March 2001. Full transcript of the witness testimony is required as it is relevant to the proceedings presently before the court of a Military Judge, Thaba Tshwane.

6.2 In relation to Enclosure 4:

> Enclosure 4 thereof relation to the B Matt intervention report is truncated and incomplete as it lacks the deliberations by our client and the Board's response. Full communicate is missing in its entirety.

7 By notice of motion dated 25 July 2005, the appellants moved the High Court for an order declaring that the first appellant had fully complied with the order of 23 March 2004. The appellants' case was simple: they said that they had provided what documents they had in

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[2] With the exception of one typographical error, which I have corrected, I reproduce the passages from the respondent's attorney's letter as they appear in the record.

relation to the documentation in issue and could do no better because the additional documentation sought did not exist.

8 In the answering affidavit, but not in the attorney's letter to which I have referred, the respondent claimed further to be entitled to the "ministerial investigation report" referred to by the military court when it granted the postponement on 8 October 2004.

9 In relation to the complaint that Enclosure 1 did not contain the SA Army Inspector General's report instigated by the SA Army College at which General Moshoana [sic] presided and a full transcript of the witness' testimony, the appellants said that they had given the respondent what they had. They pointed out that the respondent had misspelt the name of Brigadier General Mashaola (ie not "Moshoana") and that the general had not compiled the report, as in fact the report had been compiled by Colonel Mokalake.

10 The respondent's answer to this is that there is a report of the SA Army Inspector General finalised in March 2001. He does not dispute that the report was prepared by Colonel Mokalake but says that the report he wants and which the High Court order the first appellant to produce is not that contained in Enclosure 1.

11 In reply the appellants reiterate that they have given the respondent, through Enclosure 1, all they have in relation to the SA Army Inspector General's report.

12 In relation to the complaint that Enclosure 4 is truncated and incomplete as it lacks the deliberations by the respondent and the Board's response, the appellants say that no B Matt intervention report exists but that it provided what records it had of a meeting of a body called the JCSD Assessment Board, at which no such deliberations were minuted. For these reasons, the appellants say, the further documentation sought in relation to Enclosure 4 does not exist and cannot be provided.

13 The respondent's answer to this is to admit that "the B-Matt intervention report does not exist and only the minutes of the JCSD Assessment Board exist". He insists that in the minutes of the Assessment Board there will be a record of the deliberations in question.

14 The appellant dealt with the "ministerial investigation report" in the replying affidavit and demonstrated conclusively that it does not exist. This conclusion renders the order of the military court relating to production of the "ministerial investigation report" moot, ie incapable

of fulfilment and the order of the military court in this regard must not be utilised further to delay the trial of the respondent.

15 In argument before us, the respondent accepted that on the appellants' version, they had complied with the order of the High Court. But his counsel submitted, the respondent's version raises a dispute of fact which, on the *Plascon-Evans* rule, cannot be resolved on paper.

16 This was the basis on which the court *a quo* found for the respondent. As I shall show, the learned judge *a quo* erred in his regard. The *Plascon-Evans* rule provides no bar to the applicant because no real dispute of fact is raised in the papers.

17 Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously

and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him or her. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they are not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied. A court will have such difficulty "generally" because factual averments seldom stand apart from a broader matrix of circumstances, all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If

that does not happen it should come as no surprise that the court takes a robust view of the matter.[3]

18 The respondent himself does not have the knowledge on which his denials of the appellants' case is based. On the other hand, the appellants witnesses do have such knowledge and abundant documentary and testimonial evidence was placed before the court *a quo* to bear out the appellants' contentions that the documents in issue had been furnished, to the extent that they existed and the appellants' were able to provide them, and that the "ministerial investigation report sought by the respondent did not exist.

19 I have said that this is akin to a discovery dispute. It is trite that the courts are reluctant to go behind a discovery affidavit, which is regarded as conclusive, save where it can be shown either from the discovery affidavit itself, from the documents referred to in the discovery affidavit, from the pleadings in the action, from any admissions made by the party making the discovery affidavit or the nature of the case or the documents in issue that there are reasonable rounds for supposing that the party making the discovery affidavit has or had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit

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3 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 3 SA 371 SCA paras 12-13

should be made.[4] A party who is not satisfied with the discovery made by his adversary bears the onus of proving on the probabilities that the documents for which he contends in fact exist.[5]

20 In my view these principles are, *mutatis mutandis*, applicable to the present dispute. Bearing in mind the incidence of the onus, it is clear that the respondent has not succeeded in making a case on paper for the proposition that there existed documents contemplated in the High Court order, in addition to those made available as Enclosures 1 and 4, which the appellants have omitted to make available to the respondent. It thus follows, in my judgment, that no dispute of fact, as that concept is understood within the context of the *Plascon-Evans* rule, was raised by the respondent.

21 As to costs: I do not think that the issues were of any complexity. I therefore do not think that the case justified the employment of two counsel.

22 It therefore follows, in my view, that the appeal must succeed. I propose that the following order be made:

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4 Erasmus, *Superior Court Practice* (looseleaf ed), note to rule 35(3) at B1-256A-B1-257 and cases there cited.

5 *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others* 1999 2 SA 279 T 320D

22.1 The appeal succeeds, with costs.

22.2 The order of the court *a quo* is set aside and replaced with the following:

1 It is declared that the applicant has fully complied with the order of the High Court granted on 23 March 2004 under case no. 7697/04;

2 It is declared that the proceedings in the military court against the respondent, Lieutenant Colonel Phiri, that were previously stayed by order of the High Court must continue and resume;

3 The respondent must pay the costs of the application.

NB Tuchten
Judge of the High Court
10 November 2010

I agree.

P Ebersohn
Acting judge of the High Court
10 November 2010

I agree. It is so ordered.

BR Southwood
Judge of the High Court
10 November 2010

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HEARD ON: 10 November 2010

FOR THE APPELLANTS: ADV. H.J. DE VOS SC
ADV. M.D. MOHLAMONYANE

INSTRUCTED BY: State Attorney

FOR THE RESPONDENT: ADV. S. JOUBERT SC
ADV. A.T. NCONGWANE

INSTRUCTED BY: Msiza, Kruger & Bembe Inc.

DATE OF JUDGMENT: 12 November 2010