IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 55030/2012

	REPORTABLE: YES / NO
(1)	OF INTEREST TO OTHER JUDGES: YES/NO
(2)	REVISED.
_____	_____
DATE	SIGNATURE

In the matter between DELIVERED: 25/4/2014

BARRY WILLIAM RAAFF **Applicant**

and

MINISTER OF DEFENCE & MILITARY VETERANS	**1st**	**Respondent**
COL PV NOMOYI NO	**2nd**	**Respondent**
HON. JUDGE PRESIDENT BM NGOEPE NO	**3rd**	**Respondent**
MAJ GEN V L SINDANE NO	**4th**	**Respondent**
COL A M KOLBé NO	**5th**	**Respondent**

JUDGMENT

ISMAIL J:

[1] Mr Raaff, the applicant, in this matter, brought an application wherein he sought an order in the following terms:

1. That, to the extent necessary, the period of 180 days, referred to in section 7 of the Promotion of Administrative Justice Act 3 of 2000, be extended from the date of the expiry thereof to a date one day after is application is served on the last of the Respondent;

2. reviewing and setting aside of the decision by the Second Respondent, as the Presiding Senior Military judge of a Court of Senior Military Judge held at Pretoria, in terms of which Applicant was convicted and sentenced to "*Dismissal from the SANDF"* ON 11 June 2008, *alternatively* declaring the said proceedings and/or decision by the Second Respondent null and void *ab ignition.;*

3. reviewing and setting aside of the decision by the Court of Military Appeals held at Pretoria, under the chairmanship of the Third Respondent and with the Fourth Respondent and the Fifth Respondent as the other two members thereof, taken on 189 November 2008 in terms of which the said conviction was confirmed and the said sentence was varied to *"Reduction to the lower commissioned rank of Captain";*

4. referring the matter back to a Court of Senior Military Judge, to be heard afresh by a different Presiding Senior Military Judge;

5. reinstating the Applicant in the rank of Major, with retrospective effect as from 1 June 2008, on the terms and conditions that would have applied to him as from that date;

6. for the back-payment of remuneration, calculated from 11 June 2008, *alternatively* from 18 November 2008, *further alternatively* from such date as the Honourable Court deems fair and reasonable on the basis of the terms and conditions that would have applied to the Applicant as from the relevant date;

7. that the Respondents pay the costs of this application jointly and severally, the one to pay the other to be absolved and including the costs of two counsel;

8. for such further and/or alternative relief as the Honourable Court deems fit; and that the accompanying affidavit of BARRY WILLIAM RAAFF will be used in support thereof.

Background

[2] The applicant was a Colonel in the South African National Defence Force. He was charged with an offence of assault with the intention to do grievous bodily harm. It was alleged that on the 22 April 2005, he assaulted staff sergeant, Kagiso Mampe, with the intention of causing him grievous bodily harm.

[3] The matter was heard before the court of Senior Military Judge who presided in the matter. Upon conviction of the applicant the court made a finding that the applicant be dismissed from the military.

[4] Pursuant to the court's finding the matter went on appeal to the Court of Military Appeals. This court was composed of Judge President Ngoepe, the third respondent and two senior officers. The Court of Military appeals (hereinafter referred to as Appeal Court) confirmed the conviction and set aside the sentence. The original sentence imposed was replaced with the sentence that the applicant's rank be reduced from colonel to that of captain.

[5] The finding was made by the Appeal Court on the 18th of November 2008.

[6] The applicant launched review proceedings in terms of the Promotion of the Administrative Justice Act no 3 of 2000 (PAJA).The applicant's case being that the hearing before the senior military judge should be set aside on the basis of legality, in that the proceedings were *ultra vires*. The reason being that no preliminary enquiry was held prior to the trial, in terms of section 29 (3) (f) Military Discipline

Supplementary Measures Act 16 of 1999 (hereinafter referred to as the MDSMA).

Section 29 (3) (f) stipulates:

"(3) When a person is brought in terms of this section before a military court other than a disciplinary hearing, that court…

(f) shall in every case where the offence charged is not a military disciplinary offence cognisable by a disciplinary hearing, direct that a preliminary investigation be held;…"

[7] The review application was launched on the 20 September 2012, approximately 4 years subsequent to the Court of Military Appeals findings in this matter. It is clear that the delay in this matter by far exceeds the period of 180 days, prescribed in terms of section 7 of PAJA. For this reason the applicant seeks an order, for condonation, in terms of prayer 1 of the Notice of Motion.

Undue Delay

[8] On behalf of the respondents the argument advanced was that there had been an undue delay on the part of the applicant to bring this matter in terms of PAJA.

[9] It was submitted on behalf of the respondents that the applicant did not deal, at all, with the question of undue delay in his heads of argument apart from submitting that Section 9 of PAJA should be

considered as it would be in the interest of Justice to do so.

[10] I do not propose to deal with the applicant's dilatoriness in great detail. Apart from stating that in summary, the applicant seems to suggest that it was always his intention to take the matter further. He experienced certain financial constrains due to his demotion in rank, and that he consulted numerous legal representatives and could not afford their fees. His present attorneys in turn briefed counsels who were amenable to doing the work on a contingency fee basis. There had been a delay in drafting the papers as both his counsel were otherwise engaged in other matters.

[11] On behalf of respondents, Mr Dreyer SC, submitted that before the court even entertained the merits of the matter the question of the time delay should be considered. The court should consider the inordinate delay within which this matter was brought. Mr Dreyer submitted that even in terms of the common law the application was not brought within a reasonable period.

There are two reasons for bringing the application within the structure set out in PAJA or in terms of the common law within a reasonable period. The first being that the failure to bring the review within a reasonable time will cause prejudice to the respondents and secondly there is a public interest element namely that the formality of the administrative decisions and the exercise of the administration should be exercised and be finalised reasonably.

The question which needs to be determined is whether the 4 year period which the applicant took to bring this matter under review should be condoned. This issue must be seen in the light of the judicial precedent.

In the matter of *Opposition to Urban Tolling Alliance and Others v The South African Roads Agency Limited and Others* a judgment of Brand JA in the Supreme Court of Appeal under case number 90/2013 particularly at para [36] and [38] the court stated:

" [36] the fourth basis invoked by the appellants as to why the 180 day time bar should be extended was that it was the requirement of the rule of law that the exercise of all public power should be lawful and that SANRAL and the government has failed to act legally. As I see it, however, the argument is misconceived. While it is true that the principle of legality is constitutionally entrenched, 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 to delay."

Further on at para [38] the learned judge continued;

" [38] However, the passage in *Oudekrall* upon which the appellants rely is authority for the contrary. The passage makes clear that, unless an invalid administrative act is set aside by a competent court, it is regarded

as valid for the purposes of consequent acts. This is supported by the following statement in the unanimous judgment by the Constitutional Court in *Camps Bay Ratepayers' & Residents' Association and another v Harrison and another* 2011 (4) SA 42 (CC) at para 62:'As was explained in *Oudekrall estates (Pty) Ltd v City of Cape Town and others* [par 31] administrative decisions are often built on supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court , its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence."

[12] *Gqwetha v Transkei Development Corporation Limited and Others* 2006 (2) SA 603 (SCA) the majority judgment handed down by Nugent JA at para 25 thereof stated:

"[25] The challenged decision in the present case was a decision to dismiss the appellant for complicity in financial irregularities. A decision of that kind will necessarily have immediate consequences for the ordinary administrations of the organisations, and for other employees who will be called upon to perform the functions of the dismissed employee or even to replace her…. The very nature of such decision speaks of the potential for prejudice if they were all to be capable of being set aside on review after the lapse of any considerable time"

At para 32 of the judgment Nugent AAJ continued and stated the following:

"[32] As pointed out by Mpati DP the learned Judge exercised his discretion in that regard solely on the grounds that the period of delay was ' not very long' and that the appellant was 'quiet strong on the merits of the application'. I agree with the Court *a quo* that the approach of the Learned Judge was unduly narrow.

[33] As to the first ground upon which the learned Judge exercised his discretion, the delay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the prejudice in the mind. In abstract terms the period of delay might be described as being 'not very long' but it was correctly found to have been unreasonable…"

[13] Counsel for the respondents submitted that the delay in bringing this review application was inordinately lengthy. Furthermore, the applicant did not tender a full explanation regarding why the delay lasted for four years. In general terms his explanation was that he was impecunious and that his attorneys and counsel were prepared to do the matter on a contingency fee basis. In general terms he stated that he saw several counsel sought to be paid and were not prepared to do the matter on a contingency fee basis.

However, the applicant failed to mention who these counsel

were whom he approached and more particularly when he approached them.

[14] There had been a time delay of several months from the time his attorney settled the draft of his papers in April. These documents were only given to the junior counsel in November. No reasons whatsoever were furnished for the delay of that six months period by the applicant. In addition the applicant suggested that this was a complicated matter which required the expertise of legal practitioners who specialised in military matters.

Mr Dreyer on the other hand submitted that the trial before the Senior Military Judge was nothing other than a criminal proceeding in a military setting.

[15] It was submitted on behalf of the respondents that nowhere in the papers does the applicant depose to the fact that he constantly enquired from his attorney about the progress of the application.

[16] Counsel for the respondents submitted that the court should

dismiss the application with costs solely on the grounds of the undue delay in this matter. In this regard it would be prudent to mention what Mpati DP in the *Gqwetha* matter, *supra,* stated at para [5] at page 606:

"[5] The attitude of our courts when faced with the issue of delay in matters of this nature is neatly captured by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) at 321B (SA) as follows:

'[46]… it is a long standing rule that the courts have the power, as part of their inherent jurisdiction to regulate their own proceedings to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would " validate" the invalid administrative action . (see e.g *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison *d'etre* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of the administrative decisions and the exercise of administrative functions.(see eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kapstaad* 1978 (1) SA 13 (A) at 41).

[17] Cora Hoexter in her book *Administrative Law in South Africa*

(2012) explained the effect of unreasonable delay as follows:

" [I]t is possible for a delay to be found to be unreasonable even if proceedings are brought within the 180 day limit."

In the matter of *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) at para [59] the court adopted the view that:

" Section 7(1) requires that the proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days.." this entails a twofold enquiry: the first is whether the proceedings were instituted " without unreasonable delay". If they were not, then the enquiry ends there, without having regard to whether such proceedings were instituted within the period of 180 days. In other words, a period less than 180 days could be found by the court to constitute unreasonable delay."

[18] I am inclined to agree with respondents' counsel, Mr Dreyer's, argument that this application was launched after a considerable period, which in my view is neither reasonable nor tenable. However, Mr Oosthuizen SC, on behalf of the applicant, submitted that the applicant's case was strong on the merits and for that reason the delay should be

condoned.

[19] I have entertained and considered Mr Oosthuizen's argument before me regarding the failure of the Senior Military Judge to hold a preliminary enquiry. I also considered the decisions which I was referred to regarding the failure to hold the preliminary enquiry. Amongst the cases I was referred to was the *Jacobs* matter in the Court of Military Appeals heard by the Honourable Judge Mbha and Colonel Step and colonel Taljaard, as well as the matter of *Sgt Thomas Oscar Maluleke* heard in the Court of Military Appeals before the honourable Judge ML Mailula and colonel Zimmer and Colonel Kolbe.

[20] Mr Oosthuizen's argument is premised on the principle of Legality. He submitted that a preliminary enquiry was peremptory. According to him a failure to hold a preliminary enquiry rendered the proceedings annulity. This aspect, namely the failure to hold a preliminary enquiry was never raised at the hearing of Military Court of Appeal. This point

is raised for the first time in the review proceedings before me. In my view the *Oudekraal* principle applies.

[21] Mr Oosthuizen submitted that there would be no prejudice to third parties in that any appointment made as a consequence of the applicant's lowering in rank would not have to be set aside in view of him having been subsequently promoted to colonel again. The only aspect that would need consideration would be the financial difference which the applicant suffered as a consequence of his rank being lowered to captain from that of a colonel. In other words the difference in salary which the applicant earned by his rank being lowered from that referred to above.

[22] I will briefly deal with the grounds of review which the applicant raised. I do not propose to deal with each and every ground raised by the applicant. Some of the grounds were not abandoned however they were not strenuously argued before me. The most significant ground being that

the preliminary investigation was not held at the first disciplinary investigation of the applicant. The second ground of review being that Major Selolo was not present at the preliminary investigation. (Major Selolo being the military prosecution counsel). Another ground of review being that on 29 June 2006 the applicant was warned with a charge of assault with intention to do grievous bodily harm against him, however the fact of his arrest on the 23rd of June was simply ignored.

[23] Section 30 (11) of the MDSA reads as follows:

"(11) When a preliminary investigation is held in respect of any offence other than an offence referred to in subsection (8), the prosecution counsel shall-

(a) read over to the accused the particulars of each witness and-

(i) a summary of the available evidence from whichever sources which each such witness will give; or

(ii) a signed statement of a witness; or

(b) call witnesses to give evidence *viva voce* and under oath, in which event subsections (8), (9) and (10) shall apply, subject to the necessary changes.

Mr Dreyer submitted that the prosecutor was of the view that a

sentence not exceeding 10 years will be imposed therefore the leading of evidence was not required. The test to be applied in this regard was an objective one. Mr Oosthuizen on the other hand submitted that a test cannot be applied when one starts out with an investigation. One would have no idea how serious the matter would turn out to be. He submitted that the correct test would be to determine the maximum sentence that can be imposed as a penalty by the court for that offence and therefore a preliminary investigation should have been held.

I beg to disagree with the learned senior's argument as the prosecutor seized with the matter would have been in possession of the witnesses' statement and he/she would be able to make a decision whether the matter would call for a 10 year term of imprisonment upon conviction or a lesser period.

[24] Mr Dreyer submitted that the applicant had the statements of the various witnesses who testified and that there was no prejudice to the applicant as he was aware of the allegations against him which the witnesses made. Furthermore, the applicant was represented during the trial by an experienced person. The applicant also raised a ground of review to the effect that his counsel was not suitably qualified and as a consequence he did not receive a fair trial. For this reason the review should succeed.

In this regard Mr Dreyer relied *upon R v Matonsi* 1958 (2) SA 450 AD at 456A-H where Schreiner stated at 456 B-C:

"The English cases show that in general, trials cannot be conducted partly by the client and partly by counsel. Once the client has placed his case in the

hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not."

In *Hlobo v Multilateral Motorvehicle Accident Fund* 2001 (2) SA 59 (SCA) 65 C- E the following was stated:

"What is more, in this country (as in England) the conduct of a party's case at the trial of an action is in the entire control of the party's counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary. In England his apparent authority to compromise cannot be limited by instructions unknown to the other party. *Halsbury's Law of England* 4th ed vol 37 para 511. Counsel's general authority in South Africa is similar. *R v Matonsi* 1958 (2) SA 450 (A)*per* Schreiner JA at 456A - H and *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 428E - F. At the stages prior to the assumption of control by counsel the attorney of record stands in the same position."

[25] Interestingly the Senior Military Judge informed the applicant that he must challenge whatever a witness said against him which he did not agree with. The applicant was warned of this, notwithstanding the fact that he was represented during the proceedings. At page 296 line 30 to 35 of the record a conscious decision was taken between the applicant and his counsel that they were not going to dispute the evidence regarding the assault in the work shop. During cross examination it was put to him that these aspects were not disputed.

[26] Having read through the record I am of the view that the applicant is unjustifiably blaming his lawyer for the manner in which the trial was conducted. At best his legal representative could be criticized for failing to raise the aspect of a preliminary enquiry being held as was argued before me.

Mr Dreyer also submitted that in the definition section of PAJA in terms of para (ee) the following is stated:

> which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
>
> (aa)…
>
> (ee) "the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;"

Mr Dreyer submitted that the hearing of the Senior Military Judge and the Military Court of Appeal were excluded in terms

of the provisions of para (ee) of PAJA.

[27] Examining the totality of the arguments advanced before me by both parties I am of the view that the time periods prescribed by PAJA should not be extended and for that reason the application should be dismissed due to the undue delay in bringing the application. Having said that it must not be assumed that the merits of the matter were not be entertained. In fact the merits was entertained in me arriving at this conclusion.

[28] Accordingly I make the following order:

The application is dismissed with costs. Such cost to include the cost of senior and junior counsel.

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APPEARANCES:

For the Applicant: Adv M Oosthuizen SC assisted by Adv H A Percival

Instructed by Van Schalkwyk attorneys , Pretoria.

For the Respondents: Adv J H Dreyer SC assisted by Adv Z Z Mastebane

Instructed by State Attorneys Pretoria.

Date of hearing: 3 March 2014

Date of Judgment: 25April 2014.