**IN THE GAUTENG DIVISION HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)** 31/07/2014.

**Case Number: 2865/2012**

**Coram: Molefe J**

**Heard: 21 July 2014**

**Delivered: 31 July**

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

31/7/2014. DSMolefe
**DATE** **SIGNATURE**

In the matter between:

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| **MICHAEL GAJI** | **APPLICANT** |
| and | |
| **MINISTER OF DEFENCE AND MILITARY VETERANS** | **FIRST RESPONDENT** |
| **CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE** | **SECOND RESPONDENT** |
| **PRESIDING OFFICER: COURT OF MILITARY APPEALS** | **THIRD RESPONDENT** |
| **PRESIDING OFFICER: COURT OF MILITARY JUDGE** | **FOURTH RESPONDENT** |
| **CHIEF OF MILITARY LEGAL SERVICES** | **FIFTH RESPONDENT** |
| **CHIEF OF THE SOUTH AFRICAN ARMY** | **SIXTH RESPONDENT** |

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**JUDGEMENT**

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**MOLEFE, J:**

[1] This is an application wherein the applicant seeks the following relief:

*"1.1 That the Third and Fourth Respondents should show cause why the Applicant's conviction and sentence handed down on 17 September 2007 should not be reviewed, corrected and set aside;*

*1.2 That the First, Second and Sixth Respondents should show cause why the Applicant should not be reinstated as a member of the South African Defence Force with effect from 17 September 2007, with all benefits and privileges as at the aforesaid date;*

*1.3 Cost of the application and punitive costs on the scale between attorney-and-own client against any respondent who opposes; and*

*1.4 Further and/or alternative relief".*

The application is opposed by the respondents.

[2] At the commencement of the hearing, the court drew the applicant's Counsel's[1] attention to the submission by the respondents that the application is in the form of a rule nisi and the applicant is not asking the court to set aside his conviction and sentence and to order his reinstatement but was inviting the respondents to show cause why his conviction and sentence should not be set aside. In the absence of such prayer, the respondents submit that the Court is not at liberty to set aside the applicant's conviction and sentence and/or reinstate him if the Court should find that the respondent have failed to show cause. Applicant's Counsel amended the prayers to be for the review and setting aside of the applicant's conviction and sentence handed down on 17 September 2007 and for his re-instatement as a member of the South African Defence Force ("SANDF").

[1] Advocate A.J Louw SC

The review is in terms of section 19 of the Supreme Court Act, 59 of 1959 read with section 24 of the same Act.

***Factual Background***

[3] The applicant was employed by the SANDF and held the rank of staff sergeant in the South African Army. The applicant was charged and convicted of indecent assault in that on 18 May 2005, he had intentionally and unlawfully placed his hand on the private parts of a superior female officer without her consent, and that on 24 June 2005, he had intentionally and unlawfully placed the hand of a junior officer on the private parts of the same superior female officer without her consent and this was done in the presence of other junior officers.

[4] The applicant's conviction and sentence were handed down on 17 September 2007 in terms of which he was convicted on two counts of contravening section 47 of the Military Discipline Code[2] and sentenced to be discharged from the SANDF.

[5] The basis of the review application is the applicant's submission that his trial at the Military Court was vitiated by a grave irregularity because it was not preceded by a preliminary investigation in terms of section 30 (8) of the Military Discipline Supplementary Measure Act ("the Military Discipline Act"). It is counsel's submission that this renders the trial proceedings *ultra vires* and also *null* and *void ab initio.*

[6] The relevant subsections under section 30 of the Military Discipline Act for the purpose of this application read as follows:

> *"8) When a preliminary investigation is held in respect of treason, murder, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law*

[2] The Military code is established in terms of section 104 and the First schedule of the Defence Act, 1951

*(Sexual Offences and Related Matters) Amendment Act, 2007, respectively or culpable homicide, committed outside the Republic, or a contravention of section 4 or 5 of the Code or any offence punishable by imprisonment exceeding a period of 10 years, the prosecution counsel shall, subject to subsection (10) lead the evidence of every witness called by him or her and any witness may be cross-examined by the accused and may thereafter be re-examined by the prosecution counsel in relation to any evidence given by that witness under cross-examination and may at any stage of the proceedings be recalled by the presiding judge, commanding officer or recording officer for the purpose of being further examined or cross-examined as the case may be.*

*10) When any witness cannot by reason of illness or the exigencies of the service or for any other reason which the presiding judge, commanding officer or the recording officer deems fit, attend a preliminary investigation to give evidence, a sworn statement purporting to have been signed by such person may be read over to the accused and shall thereupon form part of the record of the proceedings of the preliminary investigation: Provided that the inability of the accused to exercise the rights in terms of subsection (8) which would have accrued to the accused if such person had been called to give evidence shall not be taken or construed in any subsequent proceedings to the prejudice of the accused.*

*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 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 subsection (8), (9) and (10) shall apply subject to the necessary changes".*

[7] It is common cause that the applicant's specific charge was common law indecent assault that occurred at or near Kinshasa in the Democratic Republic of Congo. This is a triable offence in South Africa under the Military Discipline Code in terms of the Defence Act 42 of 2002 as read with section 3(2)(a) of the Military Discipline Act.

[8] In terms of section 3(1) of the Defence Act, the Defence Act applies to all members of the Defence Force whether they are posted or employed inside or outside the Republic of South Africa.

[9] In terms of section 47 of the Military Discipline Code, any member of the Defence Force who beyond the borders of the Republic of South Africa commits an offence that would constitute an offence in the Republic of South Africa, shall be guilty of an offence under the Military Discipline Act imposed by a Military Court in respect of such an offence. The penalty shall not exceed the maximum penalty that could be imposed in respect of such an offence by a civil court.

[10] Common law indecent assault is an offence for which a punishment of imprisonment exceeding 10 years may be imposed. In the circumstances, a preliminary investigation was to be held in *casu* in terms of section 30(8) or section 30(10) of the Military Discipline Act.

***Late Application For Review***

[11] The applicant's review application was instituted on 22 May 2012 approximately 4 years and 7 months after the conviction and sentence on 17 September 2007. The applicant's explanation for the delay is that after his discharge from the SANDF, he moved back to the rural area of the Eastern Cape and did not have any contact with the events unfolding within the military structure. Only on 11 April 2012 when he made a phone call to his attorney of record to discuss his long outstanding account did he become aware of the irregularity that voids his proceedings. His attorney advised him of the judgement in the **Rammekwa** matter, wherein the court of Military Appeals held that a preliminary investigation held in terms of section 30(11) of the Act for indecent assault charges is a procedural irregularity.

[12] Applicant's Counsel contends that although the lapse of more than 4 years is long, it does not determine whether the delay should be disregarded or condoned and referred the Court to the cases of ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others***[3] and ***Setsokosane Busdiens (Edm) Bpk v Voorsiter Nasionale Vervoerkommissie en Ander***[4].

Applicant's Counsel argues that the applicant was gravely prejudiced by the void proceedings which led to his discharge from the SANDF and that as soon as he became aware of the preliminary investigation irregularity, he immediately took steps to institute the review proceedings.

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[3] 2010 (6) SA 333 (SCA) at par 50 and 56
[4] 1986 (2) SA 57 (AD) at 87 E-H

[13] Respondent's Counsel[5] submits that the review application is inordinately late and that not only has the applicant failed to bring the review application within a reasonable period, he also failed to give any reasonable explanation for the lateness.

Respondent's Counsel contends that the delay affects the fair determination of the application in that: a) correspondence and other documents that may be relevant are despite search, no longer available, and b) persons who were directly involved in the matter have either been transferred or no longer work for the Department of Defence.

[14] Respondent's Counsel further argues that the applicant's reliance on the **Rammekwa** decision of the Court of Military Appeals which was handed down on 15 April 2011, is without merit. There are four other cases decided prior to the **Rammekwa** decision wherein it was decided by the Military Court of Appeal that it is peremptory for a preliminary investigation to be conducted in terms of section 30(8) in respect of offences punishable by imprisonment exceeding a period of 10 years:

14.1 Case number CMA 117 of 2003;

14.2 Case number CMA 38 of 2004;

14.3 Case number CMA 31 of 2008; and

14.4 Case number CMA 87 of 2008.

[15] Although there are no specific time limits for launching review applications, proceedings must be brought within a reasonable time[6]. The court must decide:

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[5] Advocate F. Karachi

[6] Chairperson Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) at 649 I-650 B

i) whether there was unreasonable delay; and

ii) if so, whether in all the circumstances, the unreasonable delay ought to be condoned.

Among the circumstances the Court must consider is the giving of a satisfactory explanation for the delay and the absence of prejudice to the respondents[7].

[16] In my view, the suggestion by the applicant that he only came to know of section 30(8) principle in 2012, a year after the Rammekwa case had been handed down, and some nine years after the principle in that decision was first enunciated does not make out a case for condonation. Furthermore, no explanation is given why the applicant's legal representative who must have known of the applicable law with regard to section 30(8) and 30(11) preliminary enquiries, failed to exercise the principles nor to inform the applicant of the principle. In my view the ***Rammekwa*** decision does not avail the applicant because the principle for which he relies on, has been in existence since 2003.

[17] After taking into consideration all the relevant circumstances in this case, I am not persuaded that the applicant has given a satisfactory explanation for a delay of more than 4 years to bring the review application. The facts averred do not constitute an adequate explanation for the extraordinary delay. The delay also prejudiced the respondents as above-mentioned. It is my view therefore that the application was unreasonably delayed and the delay cannot be disregarded or condoned.

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[7] Gqwetha v Transkei Development Corporation 2006 (2) SA 603 (SCA) at 606 H, 612 E – 613 A

***Merits of the Review Application***

[18] Applicant's Counsel submits that there was a material defect in the preliminary investigation procedure in that evidence of the witnesses were not led as required by section 30(8) of the Military Discipline Act ("the Act"). It is the submission of the applicant's Counsel that none of the witnesses orally testified in the preliminary investigation and that signed written statements of witnesses were instead read to the applicant as is envisaged by section 30(11) of the Act. In the circumstances it is counsel's contention that a grave irregularity voiding the trial before the fourth respondent occurred. On the grounds of the irregularity, the application for the reviewing and setting aside of the conviction and sentence by the fourth respondent and as ratified by the third respondent must be set aside and the applicant must be reinstated.

[19] Respondents' Counsel submits that the applicant's preliminary investigation was in fact conducted in terms of section 30(8) and 30(10) and not section 30(11) of the Act. Respondent's counsel referred the court to the DD21 certificate[8] of the Preliminary Investigation annexed to the founding affidavit as "MG3", which indicated that the preliminary investigation was held in terms of section 30(8) and 30(10) of the Act. Counsel submits that the statements were accordingly handed in terms of the *proviso* envisaged in section 30(10). Wrong certificates were however used due to an administrative error – section 30(11) certificates were used instead of section 30(10) certificates[9]. It is counsel's argument that this did not prejudice the applicant in any way.

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[8] Record, page 2
[9] Record, pages 4 to 6

[20] Counsel for the respondent further argues that even if section 30(11) procedure was followed as alleged by the applicant, it would not have prejudiced the applicant in any way because:

20.1 under both procedures the applicant has a right to cross-examine witnesses;

20.2 the applicant's legal representative did in fact cross-examine the complainant and the other witnesses quite extensively[10];

20.3 the provisions of section 30(8) are incorporated by reference in section 30(11), meaning that even if the preliminary enquiry is done under section 30(11), the provisions of section 30(8) would still apply.

Counsel in this regard relied on the following passage of Schreiner J in ***Trans African Insurance Co Ltd v Maluleka***[11]:

*"No doubt parties and their legal advisors should not be encouraged to become slack in the 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".*

[10] Record, pages 111, 172, 202
[11] 1956 (2) SA 273 (A) at 278 F - G

[21] Respondent's counsel further argues that the decision of the Military Court on 17 September 2007 was confirmed by the Court of Military Appeal on 29 February 2008. However, the applicant does not seek good cause to be shown in relation to that decision nor that the decision be set aside on review. The result is that if this court should set aside the decision of the Military Court of 17 September 2007, that order will not vitiate the later decision of the Court of Military Appeals. It is counsel's argument that the latter decision will remain valid, thus rendering academic the Court's Order being sought in relation to the decision of the military court. I do not agree with this argument. I agree with the respondent's argument. This court cannot grant an order for the setting aside of a decision that has not been challenged.

[22] The Respondents' Counsel further contends that the applicant's right of review is perempted in that when the Court of Military Appeal confirmed the decision of the military court, the applicant acquiesced in that decision by his unambiguous conduct which was inconsistent with an intention to review. In my view, this argument is without merit as the onus is on the respondents to prove waiver. It must be shown by the respondent that the applicant with full knowledge of his rights, decided to abandon his right to review the decision.

[23] Common law indecent assault is an offence for which a punishment of imprisonment exceeding 10 years may be imposed. It is therefore common cause that in *casu,* the preliminary investigation was to be held in terms of section 30(8) or 30(10) of the Military Discipline Act. The main issue before the court is whether the preliminary investigation was held in terms of section 30(8) of the Act, and if not,

whether this renders the proceedings of a trial before the fourth respondent *ultra vires* and *null* and *void*.

[24] The material difference between section 30(8) procedure on the one hand and section 30(11) on the other hand is that the former is to be invoked in the case of serious offences and the latter in less than serious offences.

[25] It is clear from the record that the section 30(11) certificates were used instead of section 30(10) certificates and the certificates indicated that the signed statements of the witnesses were read over to the accused by the prosecution counsel in terms of section 30(10) of the Act. It is the respondents' counsel's argument that this was no more than an administrative error. I am persuaded by the submissions and argument by the respondents' counsel and I am of the view that the preliminary investigation procedure in this case was not in terms of section 30(8) but was in terms of section 30(10) of the Act and that the evidence of the witnesses was not led.

[26] The issue now is whether the applicant's trial at the military court was vitiated by a grave irregularity and renders the trial proceedings *ultra vires* and *null* and *void ab initio.*

Section 30(10) of the Military Discipline Act, provides that a sworn statement purported to have been signed by any witness who cannot for any reason attend the preliminary investigation to give evidence, may be read over to the accused and shall thereupon form part of the record of the proceedings of the preliminary investigation: this is provided that the inability of the accused to exercise the rights in

terms of section 30(8) shall not be taken or construed in any subsequent proceedings to the prejudice of the accused.

It is evident from the record[12] that there was no objection raised on behalf of the applicant that a preliminary investigation had not been properly completed either at the preliminary investigation nor at the military court trial. The applicant sought to 'review' the decision of the military court in the Court of Military Appeals. The grounds of review were in fact on the merits of the findings of the military court and not on the procedural step taken in the preliminary investigation.

[27] In my view, even if the section 30(11) procedure was followed as alleged by the applicant, it would not have prejudiced the applicant in any way and would not have been grave and incurable in the applicant's case.

[28] In the decision of ***Geidel v Bosman NO and Another***[13] Trollip J held that:

> *"Section 24(1) of the Supreme Court Act provides that the proceedings of an inferior court may be reviewed on the ground, inter alia, of a 'gross irregularity in the proceedings'. This was the same ground as was previously contained in sec. 19 of the Transvaal Proclamation, 14 of 1902, now repealed. According to the decisions given under the latter and similar statutes a 'gross irregularity' in civil proceedings in a magistrate's court meant an irregular act or omission by the magistrate (or possibly some other officer or official of the court) in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the Court would set aside such proceedings unless it was satisfied that the litigant had in fact not*

[12] Record, page 105, line 26-28
[13] 1963 (4) SA 253 (T) at 255 B-E

*suffered any prejudice (Stemmer v Sabina and Sub-Commissioner for Natives, Johannesburg, 1910 T.S. 479; Ablansky v Bulman, 1915 T.P.D. 71 at p. 75; Jockey Club of S.A v Bulman, 1942 AD 340 at p. 359)."*

[29] Irregularity is not in itself a ground for setting aside a decision on review; the irregularity must be of such a nature that is calculated to cause prejudice[14]. The court will not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, i.e. that the irregularity was not likely to prejudice the applicant.

[30] I am satisfied that the applicant had a fair hearing. Any irregularity that may have been was not material. All the witnesses that gave statements during the preliminary investigation testified at the trial. The applicant was therefore given an opportunity to cross-examine the witnesses as envisaged in section 30(8) of the Act and indeed, his legal representative did cross-examine the witnesses. In my view, if there was an imperfect procedural step, there was absence of prejudice, and it should not interfere with the decision of the case on merits.

**Costs**

[31] The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at[15]. The law contemplates that the court should take into consideration the circumstances of each case and any other circumstances which may have a bearing upon the question of costs and then

[14] Napolitano v Commissioner of Child Welfare, Johannesburg 1965(1) SA 742 (A) at 745 H-746 B
[15] Leuben Products (Pty) Ltd v Alexander Films (SA) (Pty) Ltd 1957 (4) SA 225 (SR at 227 B-C)

make such order as to costs as would be fair and just between the parties. I have considered the applicant's circumstances and am of the view that it is fair and just that each party should pay its own costs.

[32] The applicant has not made out a case for the relief he seeks.

*Accordingly, I make the following order:*

*32.1 The application is dismissed.*

*32.2 Each party to pay its own costs.*

**D S MOLEFE**

**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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| **Counsel on behalf of Applicant** | : | Adv. A. J. Louw SC |
| **Instructed by** | : | **K.P Seabi & Associates** |
| **Counsel on behalf of Respondent** | : | Adv. F. Karachi |
| **Instructed by** | : | **State Attorneys** |