REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1629/2019

In the matter between:

BOTHATA MOSIKILI **Applicant**

and

SOUTH AFRICAN BOARD OF SHERIFFS **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: THURSDAY, 11 NOVEMBER 2021

NZIWENI AJ

Introduction

[1] These proceedings are a sequel to the appeal proceedings of the South African Board of Sheriffs (the Respondent). Before this Court, the Applicant now seeks to appeal a decision by the Respondent barring the Applicant from practicing as a sheriff. The background culminating in the present application is as follows:

The litigation between the Applicant and the Respondent has its genesis in the disciplinary hearing of the Respondent, wherein the Applicant was found guilty on a slew of charges of misconduct, on the 23rd of November 2017.

[2] On the 12th of February 2018, The Disciplinary Committee recommended the expulsion of the Applicant as a sheriff of Wesselsbron; High and Lower Courts. Aggrieved by the decision of the Disciplinary Committee, the Applicant sought to have recourse to this court by filing an appeal, with the Board of Appeal.

[3] The Board of Appeal resolved to uphold the removal of the Applicant as a sheriff.

[4] Now the Applicant is challenging the decision of the Appeal Board on grounds that its outcome was unlawful, irrational and irregular, in terms section 61 (1) (c) of the Sheriffs Act, 90 of 1986 (the Act). In the notice of motion the applicant essentially seeks, *inter alia*, the setting aside of the decision by the Appeal Board.

[5] Initially, the Applicant was not legally represented and as a result he drafted his own papers. The founding affidavit of the Applicant is far from a model of clarity by any measure. Albeit not a model of clarity, I could still decipher the grounds of appeal therefrom. I also keep in mind what was stated succinctly in *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC): when the Constitutional Court opined as follows at paragraph 13:

> "[13] Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings

but also from the context in which the pleading is prepared. Form must give way to substance."

[6] The Applicant also sought condonation for the late filing of his application for leave to appeal. In light of what is stated in the application for condonation, I was satisfied that the Applicant fully accounted for the belated submission. Furthermore, the Respondent conceded that it would not suffer any prejudice due to the delay and importantly, the prospects of success are stacked in favour of the Applicant. Thus, I considered it appropriate to grant the indulgence sought by the applicant.

Common cause Issues

[7] I propose to outline some of the incontrovertible facts as follows:

(a) That the Applicant had been issued with notices of both the disciplinary and appeal hearings.

(b) It is common cause that neither the Applicant, nor his representative turned up to defend the allegations levelled against the Applicant in the disciplinary hearing.

(c) That the legal representative of the Applicant sent a colleague to the disciplinary hearing to seek a postponement of the hearing.

(d) That the Applicant sent a medical certificate in an attempt to explain his absence at the disciplinary hearing.

(e) Though the Applicant sent a medical note, the disciplinary hearing continued in his absence.

(f) That neither the legal representative of the Applicant, nor the Applicant waived their right to attend the disciplinary hearing.

(g) That it was not the first time that the disciplinary hearing was convened against the Applicant. The first one convened, as the record reflects, was abandoned; and thereafter the one under consideration was convened for the hearing to start *de novo*.

The main issues

[8] The root cause, or the core of this case emanates mainly from the fact that the Applicant was absent and unrepresented at the hearing of the Disciplinary Committee.

[9] The following is contended in the heads of argument, on behalf of the Applicant:

". . . Absent the evidence to controvert the clear and obvious inference to be drawn from the medical certificate, the appeal tribunal could not properly have found that there was nothing to prevent the original hearing from proceeding. It erred . . . in this regard. It is trite that the right to a hearing is fundamental to fair administrative procedure. It was denied to the Applicant. In itself this is sufficient for the decision of the appeal tribunal to be set aside."

10] In addition, it is also the Applicant's contention that the Respondent flouted a number of procedural requirements contemplated in Regulation 12. It is further the Applicant's assertion that the Respondent does not deny the contraventions of the Regulations.

[11] Primarily, this case concerns the question of whether the Applicant's dismissal was lawful, and procedurally fair to the extent that the dismissal of his appeal was justified.

[12] Accordingly, this Court has to determine as to whether the decision to dismiss the appeal of the Applicant by the Appeal Committee was rational considering what was placed before it.

Was the decision of the Appeal Board unlawful, irrational and irregular , as alleged by the Applicant?

[13] In the case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018), the Court perfectly encapsulated the meaning of procedural fairness as follows at paragraph 64:

> "Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."

[14] I deem it proper to begin this judgment with the aspect of the absence of the Applicant and his legal representative at the disciplinary hearing.

[15] Gleaning from the record of the appeal proceedings, it is axiomatic from the submissions of the Applicant's representative that she made it clear; that she pertinently desired that the Appeal Board consider the fact that the Appellant was absent and was unrepresented during the disciplinary hearing. In the same vein, the legal representative of the Applicant made much of the fact that the Applicant was not able to make representations at the disciplinary hearing, during the appeal proceedings.

[16] It was further contended by the legal representative of the Applicant before the Appeal Board that the chairperson of the disciplinary hearing had violated the Applicant's constitutional right to administrative justice.

Should the proceedings have proceeded in the absence of the Applicant?

[17] It is beyond doubt that it is an overarching and essential right of an accused person to be tried in his or her presence. If there is any deviation, it must always be kept in mind that the deviation may, often inadvertently, do more harm than good. For instance, on occasion, it may affect the equality of arms between the accused person and the accuser, with devastating consequences. It may place an accused person at a disadvantage. Hence, a hearing in the absence of an accused person may be justified only in exceptional circumstances. Similarly, it is significant that there should always be clear, valid and convincing reasons to proceed in the absence of an accused person.

[18] When a presiding officer is confronted with the possibility of excluding the accused person from the proceedings; it must be emphasized that it is prudent to be mindful of the fact that the benefit of finalising the matter speedily; can most probably be far outweighed by the potential harm of material deprivation of a right to a fair hearing.

[19] The Appeal Committee stated the following in its finding:

> "The Appeal Committee has come to the conclusion that there is nothing that prevented the Chairperson of the Disciplinary hearing . . . from proceeding with the hearing on 23 November 2017, for the following reasons:

128.1 The Notice of the Disciplinary hearing, notifying both Appellant and his legal representative . . . were fully aware of the disciplinary hearing approximately a month and a half, or six weeks before the hearing took place. The Appellant's attorney only applied for postponement on the day of the hearing. Furthermore, there were no good reasons, nor exceptional circumstances which were provided to the chairperson to prove that both the Appellant and his attorney were prevented from attending the hearing. The reasons furnished for the application for postponement on the day of the hearing were instead in contradiction to the reasons provided by the Appellant's attorney. The Appellant's representations for postponement of the disciplinary hearing were thoroughly considered by . . ., but he ruled in favour of the Board. The Appeal Committee finds that there were no justifiable reasons for the postponement of the disciplinary hearing.

128.2 The Appeal Committee is of the view that the Appellant had failed to provide sufficient and reasonable proof that he was unable to attend the disciplinary hearing

on the 23 November 2017, as result of being involved in an accident. The medical certificate does not indicate that the Appellant was incapacitated from attending the disciplinary hearing. The Appellant had also not provided reasonable and adequate evidence of the alleged car accident that took place on the 23 November 2017.

128.3 The Appeal Committee is of the view that the Appellant had a legal representative on the day of the disciplinary hearing. The legal representative chose to withdraw, apparently on instruction.

128.4 It is the view of the Appeal Committee that, whilst it is common cause that the disciplinary hearing did proceed in the absence of the Appellant, this did not render proceedings invalid. Section 47 (3) of the Sheriffs Act 90 of 1986 (hereinafter referred to as "the Sheriff Act") allows for disciplinary hearings to proceed in the absence of the sheriff. The relevant section reads: "(3) The failure of the sheriff charged to attend the inquiry shall not invalidate the proceedings."

128.5 The Appeal Committee is of the view that the Board had a very strong case in the hearing with evidence corroborated by witnesses. Even a prima facie glance of the complainants would provide in itself overwhelming evidence of misconduct by the Sheriff. There has been submission of facts by the Sheriff in his Notice of Appeal that would help his case so it is unnecessary to traverse the transcripts to verify the evidence presented . . ."

[20] I now turn to deal with each finding of the Appeal Board separately;

> 'The Applicant and his legal representative were fully aware of the disciplinary hearing for a month and a half. Application for postponement was only lodged on the day of the hearing.

No good reasons, nor exceptional circumstances which were provided to the chairperson to prove that both the Appellant and his attorney were prevented from attending the hearing'.

[21] Palpably, in this matter the Appeal Committee was of the view that the chairperson of the Disciplinary Committee had properly exercised his discretion to continue the hearing in the absence of both the Applicant or his representative. This much was made clear by the simple fact that the Appeal of the Applicant was dismissed.

[22] Notwithstanding the gravity of the case the Applicant was facing, he was never given the sufficient opportunity to participate in the proceedings. There is always an immediate oddity about dispensing with the presence of an accused person in a hearing.

[23] In this case it can never be successfully argued that the presence of the Applicant was unnecessary, particularly, if regard is had to the sanction which was ultimately meted out to the Applicant and the number of charges the Applicant was facing.

[24] Moreover, it was never the contention of the Applicant that he, together with his representative, were prevented from attending the disciplinary hearing.

[25] Insofar as the suggestion that the Applicant was never prevented from attending the hearing is concerned; this suggestion, in turn implies that the Applicant and his representative have deliberately absented themselves from the hearing. In fact, it is common cause in this matter that the Disciplinary Committee was informed of the Applicant's and the legal representative's circumstances. Both the Applicant, and his legal representative, conveyed to the Disciplinary hearing that their failure to appear was for exigent reasons beyond their control. However, the Disciplinary Committee decided to proceed without the Applicant.

[26] Importantly, there is no scintilla of evidence in the appeal record, which suggests that the Applicant or his representative, through their words or conduct, abandoned, or waived their right to the hearing. The Applicant and his representative did not voluntarily leave the hearing. Additionally, there was no evidence to suggest that the Applicant had absconded. On the contrary, the appeal record reflects that the Applicant and his representative were actually seeking an indulgence for the adjournment of the proceedings.

> 'The reasons furnished for the application for postponement on the day of the hearing were instead contradictory to the reasons provided by the Appellant's attorney.'

[27] Regarding the above finding, the Appeal Committee does not provide a sound basis for it. *Ex facie* the record of the Appeal Board hearing, it is clear that the reasons of the Applicant for not attending varied from those of his legal representative. The Applicant could not attend due to an accident and the attorney on the other hand, could

not attend due to prior commitments. Put it another way, there is no incongruence or contradiction but different excuse for each absence.

[28] As a point of departure, the record of the Appeal Committee reflects that the Applicant's reasons for not attending the disciplinary hearing, for that matter, were provided to the hearing, by the very legal representative who came to ask for a postponement. There is obviously not one iota of indication from the appeal record that conflicting versions were given. This much was not even argued by the representative on behalf of the Respondent.

> 'The Appellant's representations for postponement of the disciplinary hearing were thoroughly considered.'

[29] It was argued on behalf of the Respondent before the Appeal Committee that the Appellant was fairly judged by the chairperson of the disciplinary hearing, because he made an informed and considered decision. It is further contended that the chairperson of the disciplinary hearing kept an open mind and there was no bias throughout.

[30] The above contention on behalf of the Respondent is not made with reference to anything. The mere say-so that the chairperson of the Disciplinary Committee made an informed and considered decision is certainly not sufficient. Particularly if this is disputed.

[31] It is quite striking and extraordinary that the Appeal Committee was not directed to clear evidence upon which the chairperson of the Disciplinary Committee decided to proceed without the Applicant, or to any reason why the Disciplinary Committee decided not to postpone the hearing any longer. I find that anomalous and hasten to add that because of this, it should have been difficult for the Appeal Committee to assess whether the chairperson of the Disciplinary Committee adequately considered the Applicant's representation for postponement.

[32] In my view the Appeal Committee's finding in this regard is not contextualised, but rather generalised as it was not enlightened as to what these considerations were. Taking into account the submissions placed before the Appeal Committee, it is my further view that its conclusions in that regard are unsustainable for the following reasons:

There was no indication during the appeal proceedings to indicate that:

(a) The Disciplinary Committee made any attempts to contact the Applicant in order to establish the facts of the accident; or

(b) It tried to obtain an alternative medical opinion on whether the Applicant was fit to attend the disciplinary hearing; or

(c) Whether there was any form of investigation before any decision to proceed in the absence of the Applicant was taken; or

(d) Whether an adjournment or rescheduling of the disciplinary hearing was ever seriously considered; or

(e) There was evidence to indicate that the Applicant in the past persistently or repeatedly failed, or was unwilling to attend the disciplinary hearing; or

(f) Reasonable attempts, or efforts on the part of the Disciplinary Committee were made to involve the Applicant in the process; or

(g) The Disciplinary Committee explained why it was justified in proceeding straightaway, given that there had already been a substantial delay previously, which was not occasioned by Applicant; or

(h) The Applicant was given many opportunities, previously, to make representations at the disciplinary hearing and he failed to use them.

(i) Whether there were objective facts present to show that the Disciplinary Committee had reason to believe that the Applicant was feigning the accident or injury; or

(j) Considered the impact of the decision to proceed in absence of the Applicant, on the Applicant.

[33] There is no indication in the appeal record of the Appeal Board that due diligence, was exercised by the Disciplinary Committee in investigating the absence of the Applicant. I must emphasize that the above-adumbrated factors do not provide an exhaustive list.

> 'The Applicant failed to provide sufficient and reasonable proof that he was unable to attend the disciplinary hearing because of being involved in an accident. The medical certificate does not indicate that the Applicant was incapacitated from attending the hearing. The Applicant did not provide reasonable and adequate evidence of the alleged accident.'

[34] Interestingly, there is no mention in the finding of the Appeal Board that the Disciplinary Committee ever found the Applicant's tendered explanation for his absence in the disciplinary hearing to be false, or that it contained apparent lies.

Equally, as I have pointed out, there is no mention that the explanation given by the Applicant was ever investigated.

[35] In the present matter, the important issue to note is that, apart from the explanation advanced by the Applicant at the disciplinary hearing, there is nothing objective or otherwise, on the appeal record to indicate that the Disciplinary Committee was presented with anything to gainsay the account of the Applicant. All the more reason why the version of the Applicant, had to carry the day, or at least be investigated. Because, the medical certificate and the affidavit of the Applicant's legal representative reasonably served to excuse their absence. Their versions at least warranted a consideration that their absence was for reasons beyond their control.

[36] I would again emphasise that the account given by the Applicant required that at the very least, before anything else, a concerted effort had to be made to hold an enquiry; if there was a reasonable suspicion about the explanation given. Particularly, if a medical certificate was provided.

[37] I am fully mindful of the fact that the Disciplinary hearings do not have all the machinery which is provided for instance, in criminal proceedings, to conduct enquiries. However, the enquiries are extremely important and essential safety valves and mechanism to enhance fairness and to guard against miscarriages of justice. Otherwise, the system will definitely not work unless all the parties are fairly treated.

[38] It is important to note that, I should not be interpreted as saying that in each and every case an enquiry should be held. However, when the facts and circumstances of a case are calling for one, like in this instant case; an enquiry or investigation ought to be undertaken; before proceeding with the hearing in the absence of the accused person. As a result, circumstances should be considered on a case-by-case basis.

[39] In the context of this case, the enquiry could for instance have been held, by getting more information and further clarification.

> 'Appellant had a legal representative on the day of the disciplinary hearing. The legal representative chose to withdraw, apparently on instruction.'

[40] It is common cause that another legal representative, other than the one which was on record on behalf of the Applicant, appeared on the day of the disciplinary hearing; to launch a formal application for the postponement of the proceedings. Purportedly on the basis that the date of the hearing did not suit the attorney of record of the Applicant; and that the Applicant was involved in a motor vehicle accident. It is not entirely correct to say the Applicant had legal representative on the day of hearing, or the legal representative withdrew because of instructions. The record reflects that the legal representative of the Applicant in an affidavit informed the chairperson of the disciplinary hearing that he had other prior commitments on the day of the hearing, which made him not to be available for the hearing.

[41] The legal representative of the Applicant, deposed to an affidavit as well, in order to account for his absence on the day of the hearing. He also saw it fit to send someone to go and move the application on his behalf. He did not abandon, the disciplinary hearing, or leave his client in a lurch. What emerges with clarity from the record of the Appeal is that the legal representative who was present on the day of the hearing was at the behest of the attorney of record of the Applicant and was not there to substitute the attorney of record.

[42] Notably, it is not clear why the Appeal Committee observed that the legal representative of the Applicant chose to withdraw, apparently on instruction. Clearly, the Appeal Committee in this regard is making assumptions without evidence. That reasoning is totally flawed, as it is inferred on presumption without any factual basis.

[43] Manifestly, this assumption or speculation was of vital importance to the determination of whether the Applicant had legal representation at the hearing. In the context of this case, it was too speculative to conclude that the legal representative on behalf of the Applicant chose to withdraw on instruction. Additionally, it is too farfetched that the Applicant who is absent at the hearing would choose to terminate the mandate of his legal representative.

[44] Given what is argued on behalf of the Applicant and the Respondent during the appeal hearing, I am satisfied that the Appeal Committee was plainly wrong to state that the Applicant had a legal representative at the disciplinary hearing. Surely, if the legal representative who attended the disciplinary hearing merely came to ask for

postponement, it does not follow that he was there to represent the Applicant. What matters most is the purpose for which the legal representative attended the proceedings.

> 'Whilst it is common cause that the disciplinary hearing did proceed in the absence of the Appellant, this did not render proceedings invalid. Section 47 (3) of the Sheriffs Act 90 of 1986 (hereinafter referred to as "the Sheriff Act") allows for disciplinary hearings to proceed in the absence of the sheriff.'

[45] From the foregoing passage, I get the distinct impression that the Appeal Board harboured the view that Section 47 (3) of the Act, grants *carte blanche* for disciplinary hearings to proceed in the absence of the sheriff. On the contrary, the provision does not give unfettered discretionary power to do so.

[46] I interpose to state that; even if the statute allows that a disciplinary hearing to continue in the absence of the sheriff; surely, that discretion ought to be exercised with great caution and circumspectly. A statute that allows proceedings to proceed in the absence of an accused person has a potential of flying in the face of constitutional values or due process. Particularly, the right to a fair hearing. It is thus important, that such a statute should be construed in such a manner that it does not impinge on the constitutional values or upon the rights of an individual.

[47] After all, as the author *John Grogan, Workplace Law*, 11th ed, 2015 on page 277 succinctly sums up the purpose of disciplinary hearing:

"The purpose of disciplinary hearings is to ensure that accused employees have an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of their accusers before an adverse decision is taken."

[48] Section 47 (3) of the Act was not intended to disregard the right to fair hearing.

Conclusion

[49] Having considered the entire reasoning of the Appeal Committee, I am convinced that it is problematic in many areas. From the abovementioned, it is entirely inconceivable that it can ever be said that the Appeal Committee had sufficient evidence, or facts to support the finding that the decision of the Disciplinary Committee; to proceed with the hearing in the absence of the Applicant was reasonable. Consequently, no one can say that the deviation did not materially affect the Applicant's right to a fair hearing.

At the risk of repeating myself; clearly, given the ultimate sanction recommended by the disciplinary hearing, surely it was significant for the Appeal Committee to satisfy itself that the Disciplinary Committee investigated, or at least considered the deferment of the disciplinary hearing given the severity of sanction. Which it did not.

[50] Having considered all the facts and circumstances of this case, I am convinced that the conclusion of the Appeal Board for a host of reasons was fallacious. In my view, it is an indisputable fact that the disciplinary process was flawed. Hence, I am

inclined to agree with the Applicant's assertion that by all account the decision of the Appeal Committee that the disciplinary hearing was procedurally fair was irrational.

[51] Based on what was placed before it; the Appeal Board in the context of this matter should have found that the dismissal was procedurally unfair, as it failed to comply amongst others with the *audi alteram partem* principle.

[52] I hasten to add that, given that the glaring anomaly of conducting the disciplinary hearing in the absence of the Applicant was the main issue in this matter, this appeal can be upheld merely based on the above-mentioned ground. It is thus, not necessary to determine other grounds of appeal.

[53] Finally, it was submitted on behalf of the Applicant that, should the appeal succeed it will be just and fair that an order reinstating the Applicant as a sheriff in terms of section 50 (2) (c) of the Act should be granted. In this matter I have found that the dismissal of the Applicant to have been procedurally unfair only.

[54] It was argued on behalf of the Respondent that this Court does not have those powers to reinstate the Applicant as those powers are exclusively vested with the Minister.

[55] I think it is highly important to quote in full the provisions of section 50 of the Act:

"50 Suspension of sheriff

(1) The Minister may suspend a sheriff from his office at any time before the sheriff is charged with improper conduct in accordance with this Chapter, or after he has been so charged.

(2) A sheriff who has been suspended from his office shall forthwith be reinstated in office-

(a) if he is not charged with improper conduct within a period of 12 months after the date of his suspension;

(b) if he is found not guilty on the charge in question;

(c) if he or she appeals under section 18 (3) (a) or 61 (1) against his or her conviction on the charge in question and the appeal is upheld; or [Para. (c) substituted by s. 16 of Act 74 of 1998.]

(d) if a penalty referred to in paragraph (a) or (b) of section 49 (1) is imposed upon him.

(3) The Minister may at any time cancel the suspension of a sheriff, but the cancellation shall not prevent the sheriff from being charged with improper conduct in accordance with this Chapter."

[56] The provisions of section 50 are clear and unambiguous. Apart from that t, and perhaps more importantly, it must be noted that section 50 (2) states that the sheriff shall be reinstated in the office if his appeal against his conviction on the charge in question and the appeal is upheld. Section 50 (3) further states that the Minister may

at any time cancel the suspension, but the cancellation shall not prevent the sheriff from being charged with improper conduct.

[57] The Act specifically deals with the scenario of reinstatement, pursuant to a successful appeal and it is instructive as to what should happen. There is also no expressed provision to the contrary.

[58] Based on the provisions in section 50 of the Act, there seems to be nothing under the circumstances which compels this Court to act when it comes to reinstatement. It would have been different if the Act was silent on the aspect. Consequently, the procedure of reinstatement should take its course based on the provisions of section 50 of the Act.

[59] In the result, I make the following order;

[59.1] Appeal is upheld. The Applicant's convictions and the sanction are hereby set aside.

[59.2] The Respondent is ordered to pay costs of this application.

CN NZIWENI

Acting Judge of the High Court

Appearances

Counsel for the Applicant:	Mr SJ Koen
Instructed by	Bisset Boemke McBlain
	Mr S Koen
Counsel for the Respondent:	Adv A Montzinger
Instructed by:	Turner Ntshingana Kirsten Raven Abrahams Inc.
	Mr B Ravens