

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 31197/2020

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>		
(1)	REPORTABLE:	<i>No</i>
(2)	OF INTEREST TO OTHER JUDGE:	<i>No</i>
(3)	REVISED:	<i>No</i>
<i>7/mar 2023</i> DATE		<i>[Signature]</i> SIGNATURE

In the matter between:

ELMARINTHEA SHELLMARIE BRUINTJIES

APPLICANT

and

THE MINISTER OF DEFENCE AND

MILITARY VETERANS

SECRETARY OF DEFENCE

CHIEF OF THE SOUTH AFRICAN NATIONAL

DEFENCE FORCE SURGEON GENERAL:

SOUTH AFRICAN

MILITARY HEALTH SERVICES

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

**CHIEF JOINT TRAINING FORMATION
DIRECTOR COLLECTIVE MECHANISMS
AND ACTING DIRECTOR LABOUR AND
SERVICE RELATIONS OFFICER IN CHARGE
SOUTH AFRICAN
MILITARY HEALTH SERVICES GRIEVANCE OFFICE
OFFICER COMMANDING SCHOOL FOR
MILITARY TRAINING LIEUTENANT
COLONEL MPHASHI
MAJOR NTLAKANA**

5th RESPONDENT

6th RESPONDENT

7th RESPONDENT

8th RESPONDENT

9th RESPONDENT

10th RESPONDENT

Heard: 1 June 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and uploaded on case lines. The date and time for hand-down is deemed to be 10h00 on 7 June 2023.

JUDGMENT

LE GRANGE AJ:

[1] For adjudication, is a review application brought in terms of the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)* for¹:-

- '1. To condone the applicant's non-compliance with the prescribed period in terms of section 7(1).
2. The following decisions are reviewed and set aside, and declared invalid:

¹ Notice of motion

- 2.1 The assessment of the tenth respondent of the applicant's summative assessment on medical support during the Junior Command and Staff Duty Course 01/2016.
 - 2.2 The re-assessment of the ninth respondent of the applicant's summative assessment on medical support during the Junior Command and Staff Duty Course 01/2016.
 - 2.3 The seventh respondent's outcome of the applicant's internal grievance lodged on 25 July 2017.
3. The fourth and eighth respondents are directed to conduct a summative assessment on the medical support of the applicant according to the principles of assessment as prescribed by the DEPARTMENT OF DEFENCE INSTRUCTION: TRG NO 00006/2003 (EDITION 1); MANAGEMENT OF LEARNER ASSESSMENT BY PROVIDERS IN THE DOD within ten (10) days of the date of this order.
4. The eighth respondent is directed to credit the applicant according to the principles of recognition of prior learning, for the skills, knowledge and experience build up through formal learning that occurred in the past for the module "Peace Support Operations".
5. The fourth and eighth respondents are directed to issue the applicant with the required course report for the Junior Command and Staff Duty Course 01/2016 and to effect the necessary changes on the DOD PERSOL system accordingly.'

Procedure for judicial review

[2] Relevant hereto, Section 7 of PAJA provide: -

- (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
 - (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
 - (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

- (2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

(Own emphasis added)

Introduction

- [3] What led to this application (that what is not in dispute) is the following: - The applicant registered and attended a (military) course, titled JCSD 01/2016, for a duration of six months that commenced on 07 January 2016 and ended in June 2016. The course consists of 12 modules, of which the applicant failed two modules, namely: - (i) Operational Concepts; and (ii) **Medical Support**. Subsequent thereto, the course leader reassessed the Operational Concept module and passed the applicant – this then not being in issue. Failing the Medical Support Module, the applicant became entitled to a reassessment which she also failed but was however offered (by the course leader) a further opportunity to retrain (or do supplementary training) and to rewrite the module. This offer was rejected, instead a process of grievance was pursued by the applicant.

Review

- [4] The review application is aimed at setting aside this assessment, the outcome of the internal grievance that was lodged, and with further other related relief,

the applicant contending²: - that (i) the ninth and tenth respondents acted contrary to the principles of assessment when they conducted the applicant's submissive assessment on medical support during the junior command and staff duty course 01/2016; (ii) the said respondents were biased towards the applicant when they conducted the applicants submissive assessment on medical support during the junior command and staff duty course 01/2016.

- [5] The respondents oppose the application *inter alia* on the basis of: - (i) condonation; and (ii) the applicant's failure to exhaust her internal remedies.
- [6] At the outset of the matter, the applicant's counsel indicated that the applicant does not persist with prayer 2.3 (i.e. the grievance). This abolishment dispensed with a substantial part of the application.

Condonation

- [7] The applicant is of the view³ that the effective date, for the calculation of the 180 days, started to run on 3 October 2019 and explains the reasons for her default (in the hope of condonation) from there.
- [8] As the review, pertaining to the setting aside of the grievance (which started then) was abolished, all that remains relevant is the date of the final assessment (of the examinations and/or re-examinations) of Medical Support (the course of which ended no later than end of June 2016) that the applicant seeks to set aside.
- [9] This means that the review (in that regard) has been brought (at least) four years after the fact and three-and-a-half years after the provided 180 days.
- [10] I find this delay in itself to be unreasonable. The applicant (save for the explanation regarding the aforementioned grievance procedure taken) failed to explain the delay or submit evidence of what interests of justice would be

² Paragraph 6.2 and 6.3 of the founding affidavit

³ Paragraph 14.2 – 14.3 of the founding affidavit

served by the extension of the 180-day period pertaining to the assessment itself.

Internal remedies

[11] The applicant, at paragraph 10.4 of the founding affidavit, state that: -

‘I have attempted at great length to exhaust my internal remedies without any success, I content that I have complied with the requirement that I had to satisfy all internal remedies before seeking and external remedy to address my grievance.’

[12] This stance been taken; the applicant did not (in terms of Section 7(2)(c)) apply for nor set out exceptional circumstances that would enable the court to decide whether, to exempt the applicant – imperative to exhaust her internal remedies.

[13] In answer to the respondents’ allegation that the applicant failed to exhaust her internal remedies) the applicant replied⁴: -

‘... It follows that I could not lodge an appeal because I did not receive my exam script.’

[14] Still an application in terms of Section 7(2)(c) amiss, I requested the applicant’s counsel to clarify this remark/contention, to which he indicated that the internal appeal process warranted (in strict compliance) that the applicant must annex the exam script to the appeal form, which could not have been done as the applicant was not granted access thereto as explained in her affidavit.

[15] The relevant portion of Appendix H sections 3 & 4 of the ETD policy provides as follows: -

1. It is imperative that a Provider has an internal system for Learner Appeal against an assessment decision. The system must not prejudice the learner in any way.
2. Providers and learners shall attempt to resolve matters internally before seeking recourse with the relevant ETQA

⁴ Paragraph 11.3 of the replying affidavit

3. If a learner is not satisfied with their assessment decision, he or she may appeal on the following grounds:
 - a. Circumstances exist that materially affected the learner's performance, which were not known to the assessor when an assessment was made, and which were reasonably impractical for the learner to make known to the assessor beforehand.
 - b. Procedural irregularities occurred in the conduct of assessments, which were of such a nature as to create a reasonable possibility that the result might have been different had the irregularities not occurred.
 - c. Evidence of prejudice, bias or inadequate assessment on the part of one or more assessors.
 - d. In the case of circumstances beyond the learner's control (illness, death, accident etc), which might influence the learner's performance, the learner must inform the assessor prior to the assessment, to reschedule the assessment. A medical certificate from a registered medical practitioner must support the citing of a medical factor.

PROCEDURE FOR LEARNER APPEAL

4. Documentary proof of the appeal is imperative. See appeal procedure/document below to be used for all assessment appeals. All the assessment documents/records should be attached to the appeal document.
5. A learner with a complaint about an assessment matter should raise this concern with the assessor as soon as possible (immediately after the assessment). Completion of Appeal Document, Stage 1, is imperative.
 - a. The assessor should respond by giving a clear explanation of the decision.
 - b. Alter the assessment or remain with the initial decision.
 - c. This aspect must be dealt with within 36 hours.
6. If the learner still disagrees with the assessment, the appeal will proceed.
7. The assessor forwards the complaint for further action to an internal moderator of the Provider. Complete Appeal Document, Stage 2.
8. The internal moderator must provide the learner with the reconsidered decision within 36 hours after a thorough evaluation of
 - a. the learner's evidence and associated records;

- b. the assessor's rationale for the decision; and
 - c. the learner's opinion.
9. The internal moderator has two options:
- a. Alter the assessment if an error of judgement has been identified.
 - b. Request a re-assessment (It is advisable to use a different assessor).
10. If the appellant is still dissatisfied with the decision of the internal moderator, the learner may appeal to the external moderator at the applicable ETA the Provider is accredited with. The ETQA will prescribe the appeal procedure.
11. If dissatisfaction still exists, the learner can appeal to the South African Qualifications Authority, which is the final level of appeal.
12. If the learner accepts the assessment decision at any stage, the final stage of the appeal must be completed.'

(The entire provision cited being relevant for purposes of the judgement, and own emphasis added)

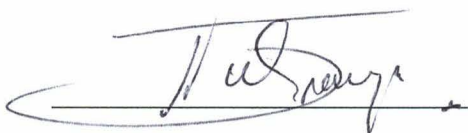
- [16] It is clear from this (proper) internal system/remedy as a whole, that everything must be done, by all parties involved, in an effort to resolve any issue, swiftly and cost-effectively and that the learner should not be prejudiced in the process. To this, a written appeal document (i.e., H-5) needs be completed/compiled where to all the assessment documents should be annexed.
- [17] Important here is that nowhere in this appeal process provision, does it state or provide that the applicant is (was) obliged to annex the exam script to the appeal document herself, failing which her appeal could not be entertained or could be dismissed on that basis.
- [18] It simply provide that the assessment document(s) need be annexed, and that the documentary proof of the appeal is imperative, the reason being that a proper appeal record be compiled.

- [19] In my view, the applicant neither attempted 'at great length' to, nor did, exhaust her internal remedies which provided for a proper three-stage process (which could have encapsulated the 'prejudice, bias or inadequate assessment' complained of) within days, but consciously elected not to appeal, but to pursue a grievance process instead.
- [20] In the premises, it cannot be disputed that the delay in lodging the review application is excessive and the reasons advanced in explaining the delay are misdirected i.e., at the grievance process. Together with this, the applicant has failed to: - (i) convince this court that she exhausted (or even tried to exhaust) her internal appeal remedies; or (ii) apply for the exemption thereof.
- [21] As a result, the court finds that the applicant has not established that condonation of her delay in the institution of the proceedings would be in the interests of justice.
- [22] Regarding prayer 4, I find that the applicant's failure to obtain the necessary credit (if qualified) is of her own doing as she failed to file all necessary documents in support thereof as requested.
- [23] Regarding prayer 5, I find that the applicant is not eligible for the course report until she completes it.

Order

In the result I make the following order:-

1. The application is dismissed with costs.



AJ LE GRANGE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the applicant: Adv. MJ Kleyn on the instruction of Rianie Strijdom Attorneys.

For the respondent: Adv B Nodada on the instruction of the State Attorney.