

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2016/01339

DELETE WHICHEVER IS NOT
APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

12/04/2024
.....
.....
DATE
SIGNATURE

In the matter between:

MANGALISO PETSE

Applicant

and

MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

**DEPUTY MINISTER OF DEFENCE AND MILITARY
VETERAN**

Second Respondent

**ACTING DIRECTOR GENERAL OF DEFENCE AND
MILITARY VETERANS**

Third Respondent

**CHAIRPERSON OF PARLIAMENTS' PORTFOLIO
COMMITTEE ON DEFENCE AND MILITARY VETERANS**

Fourth Respondent

MINISTER OF FINANCE
Respondent

Fifth

In re:

MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

DEPUTY MINISTER OF DEFENCE AND MILITARY VETERANS

Second Respondent

ACTING DIRECTOR GENERAL OF DEFENCE AND MILITARY VETERANS

Third Respondent

CHAIRPERSON OF PARLIAMENTS' PORTFOLIO COMMITTEE ON DEFENCE AND MILITARY VETERANS

Fourth Respondent

MINISTER OF FINANCE
Respondent

Fifth

and

MANGALISO PETSE

Applicant

JUDGMENT

Introduction

1 On 5 May 2022, Keightley J, as she then was, granted the following order.

"1. It is declared that the applicant is entitled to a benefit in terms of regulation 4 and 5 of the 2014 regulations to the Military Veterans Act, 18 of 2011 ("the Regulations"), read with section 4 of the Military Pensions Act 84 of 1976, of such amount as may have been, and as may be, determined from time to time in terms of sections 1(1)(viii) read with section 4 of Act 84 of 1976, on the anniversary of each annual period calculated from 28 August 2016, until the applicant's passing.

2. The first respondent, with such assistance as may be required from the second, third and fifth respondents, is directed to make payment to the applicant, within 30 days of service of this order, of the total sum outstanding from 28 August 2016 owing to him pursuant to paragraph 1 above.

3. The first respondent with such assistance as may be required from the second, third and fifth respondents, is directed to make payment of such amount as contemplated in paragraph 1 above, for each future annual period from the date of this order, until the applicant passes away.

4. The first respondent with such assistance as may be required from the second, third and fifth respondents, is directed, within 30 (thirty) days of any relevant request by the applicant to:

4.1 issue an appropriate card or voucher acceptable to all public transport operators in the Republic, in terms of regulation 12(3) of the Regulations;

4.2 provide access to all available business facilitation services programmes, as contemplated in regulation 11 of the Regulations;

4.3 facilitate such available and suitable employment placement to the applicant, as contemplated in regulation 8 of the Regulations;

4.4 provide access to relevant health care services at One Military Hospital or, where appropriate, to provide the applicant with a referral letter for the provision of health care services at another medical facility at the expense of the Department.

- 2 The applicants in this application before me (first, second and third applicants) are the respondents in the main application which culminated in the aforementioned order of Keightley J (I will refer to the parties as in the main application). The fourth and fifth respondents have not participated in the application and reference to the “respondents” in this judgment does not include them.
- 3 The respondents seek to appeal the judgment and order of Keightley J and to that end, delivered an application for leave to appeal on 29 September 2022. The application was plainly well out of the 15 days prescribed in rule 49(1)(b) of the Uniform Rules of Court and, as a result, the respondents must seek and obtain condonation for the late application, which the court may grant, on good cause shown. However, and notwithstanding the obviously late application for leave to appeal, and the trite rule that a party must seek condonation for default of the rules as soon as it realises its default, the

respondents neglected to file an application for condonation with the application for leave to appeal.

- 4 The application for leave to appeal was enrolled to be heard by Keightley J on 10 November 2022 and, on 9 November 2022, a mere hours before the application for leave to appeal was to be heard, the respondents delivered an application for condonation. The application was not accompanied by an application for a postponement and was opposed by the applicant who sought the opportunity to file an opposing affidavit. Rightly in my respectful view, Keightley J struck the application from the roll on 10 November 2022 with punitive costs ordered against the respondents.
- 5 The circumstances of the striking order are dispiritingly familiar as will become evident further in this judgment, in particular, the respondents' consistency in lackadaisically prosecuting the leave to appeal. If only an ordinary South African trying to vindicate an order granted in his favour in May 2022 was not on the receiving end of the respondents' callous lack of interest to bring the matter to finality.
- 6 Before me is an "*application for re-enrolment/reinstatement of the application for leave to appeal*". The application was delivered on 27 January 2024 and is opposed by the respondent. The matter comes before me following a Directive of the Judge President issued on 24 July 2023 that the application for reinstatement may be enrolled for hearing and the parties were informed on 26 January 2024 that the matter was enrolled for the week 5 to 9 February 2024 and, on 29 January 2024, my Registrar, Ms Yvonne Maja

informed the parties that the matter would be heard on 6 February 2024. On Tuesday, 6 February 2024, when the matter was called there was no appearance for the respondents. I stood the matter down to 14:00 with the direction to the applicant's counsel, Mr Moela, to contact the respondents' attorney Mr Kolin Thaver of the State Attorney, Johannesburg, to appear in court at 14:00. It was not to be and I, again, stood the matter down to 9 February 2024, 10:00, with certain directions that I discuss below. When the matter was re-called on 9 February 2024 at 10:00, again there was no appearance for the respondents or an explanation for the non-appearance. The respondents had also not complied with my directions. As he was entitled, the applicant's counsel sought that the matter proceed and that the application be dismissed. I accordingly proceeded to hear the matter.

7 Before I deal with the merits of the application for reinstatement, it is necessary that I discuss the facts that culminated in the matter being heard in the absence of representation for the applicants.

8 I have referred to the email of 29 January 2024 from Ms Maja to the parties. In response to that email, the respondents' attorney, Mr Thaver, responded by email on 30 January 2024 at 3:29 that

*"Dear Ms Maja,
Your email of 29 January 2024 has reference.
Kindly be advised that Advocate Bokaba who is on brief in this matter has just informed us that he is not available on the 5th of February 2024 as he is acting in the Johannesburg High court. Further to that junior counsel F Opperman has informed us that he has withdrawn from the matter as of 29 January 2024.
Yours faithfully"*

- 9 As appears from the email, Mr Thaver did not say what should happen with the matter. Ms Maja responded on the same day at 8:05 pm that *“Kindly upload and send the necessary document like Notice of Removal/Withdrawal”*. It is necessary to mention that Ms Maja did not represent to Mr Thaver that her response was sent with my directions because it was not. Mr Thaver responded 2 days later on 1 February 2024 that:

*“Dear Ms Maja,
Your trailing email has reference.
Herewith the notice of removal from the roll. Kindly note that we have just had load shedding and I am experiencing problems uploading the document onto caselines. I shall persist and the document shall be uploaded once we have access to caselines.”*

- 10 Of course I must not hold against Mr Thaver the problem visited upon him by the unavailability of electricity supply over which he has no control and I have no reason to doubt that he responded to Ms Maja soonest his electricity supply was restored.

- 11 Mr Thaver’s email of 1 February was copied to the applicant’s attorneys and it elicited a response directed to Ms Maja on the same day at 1:36 pm that:

*“Good Day
Kindly find attached letter for your attention. We also confirm that we are ready to proceed with the matter as Mr. Petse Mangaliso's Attorneys of record. Any request for postponement by the State Attorney on Tuesday 06 February 2024 would be vigorously opposed.”*

- 12 I point out that at this point Mr Thaver had not indicated that he would seek that the matter be postponed and he never did at any point in this sad story of lack of care for the applicant’s cause and common courtesy to the

applicant and to the Court and crude display of unprofessional conduct and incompetence.

- 13 The applicant's attorneys sent a further email to Ms Maja on 2 February 2024 at 11:28 which reads,

"Good morning Ms Maja

Kindly take note that the State Attorney Mr. Thaver has no right to unilaterally remove the matter from the courts roll as he pleases. The Court's roll belongs to the Court and only the Court has the right to decide, after hearing submissions from both parties on the date of hearing, to decide whether or not the matter may be removed from the roll.

The State Attorney through Mr. Thaver are the ones who persisted for the matter to be placed on the roll, and now cannot do as they please and say the matter must be removed from the roll. We urge the Court to protect its processes from an abusive litigant such as the State Attorney. We also request that you bring this email to the attention of Honourable Baloyi AJ as we are opposed to the unilateral removal of the matter from the roll by the State Attorney."

- 14 The above email is attached to a document filed by the applicant's attorneys titled "Notice of Objection to the removal of the matter from the roll" dated 5 February 2024 which states:

***"BE PLEASED TO TAKE NOTICE THAT** the respondents reject to applicants' notice of removal of the above mentioned matter from the courts roll.*

***KINDLY TAKE FURTHER NOTE THAT** the respondent's attorneys have given reasons for such objections in an email dated 02 February 2024 which was addressed and forwarded to the secretary of Honourable Baloyi AJ to bring to the Judge's attention as well as the State Attorney Mr Thaver himself. Attached hereto is the said email marked "**A**" for ease of reference. Further reasons for objection would be advance in Court."*

- 15 The emails to Ms Maja were copied to Mr Thaver.
- 16 Regrettably, the clear intention of the applicant to oppose the removal of the matter from the roll and to proceed with the hearing of the matter did not

rouse Mr Thaver to avail himself or to arrange for other appearance for the respondents on 6 February 2024. Neither did the well-established rule of practice that after a matter is enrolled for hearing, it may only be removed from the roll by agreement of the parties or with the leave of the court. There was plainly no agreement from the applicant that the matter would not proceed as enrolled and the respondents were obliged to be present in court on 6 February 2024.

- 17 On 6 February 2024 when the matter was called, incomprehensibly there was no appearance for the respondents while the applicant appeared through counsel, Mr Moela, and persisted in his position that the matter be heard, - it would appear that Mr Thaver was too busy with more important matters than to appear or arrange for other appearance in this matter that he enrolled. Unnecessary in the circumstances, I nonetheless exercised my discretion to afford the respondents an opportunity to be represented in court and directed Mr Moela to contact Mr Thaver to inform him that I had stood the matter down to 14:00 on the same day for him to appear. When the matter was re-called at 14:00, Mr Moela reported that he called and sent a message to Mr Thaver who responded by text message that he is busy in (another) court. Mr Moela submitted a copy of an email to Mr Thaver advising him that the matter would proceed at 14:00. Again, Mr Thaver would not be bothered to appear or make arrangements for the respondents to be otherwise represented. Being the optimist, I again decided to issue a directive as follows:

"Direction

At the hearing of the matter on 06 February 2024, 14:00, I issued the following direction in the presence of the respondent's counsel and without appearance for the applicants for reinstatement:

This matter is stood down to 10:00, 9 February 2024.

The parties are directed to make written submissions by 12:00, 8 February 2024 on the following questions:

3.1 The status of validity of the applicants' notice of removal from the roll delivered on 6 February 2024.

3.2 The validity of the opposition of removal from the roll and grounds for opposition.

3.3 the merits of the reinstatement application – the respondent may supplement his heads of argument that it (sic) has filed or indicate that he stands by the submission filed.

3.4 It is further directed that the applicants for reinstatement are required to file the heads of argument on the merits by 12:00, 8 February 2024. Failure to do so will not preclude the court from hearing the matter on 9 February 2024, 10:00 and the Judge will hear argument on the merits of the application and the questions in paragraph 3.1 and 3.2”

I ordered that the matter stand down to 9 February for argument.

18 Counsel for the applicant filed the supplementary submissions as I directed.

The respondents did not comply with my directive and there was neither an explanation nor appearance for the respondents when the matter was recalled on Friday 9 February. I accordingly proceeded to hear the matter in the absence of the respondents or their legal representatives or an explanation for their failure to appear.

Removal of matter from the roll

19 The removal of a matter from the roll is in all practical respects akin to a postponement of a matter *sine die*. Indeed this is what the respondents sought without asking. Once a matter is enrolled for hearing by a Judge, as in the present case, and in the absence of an agreement of the parties, an enrolled matter will only be removed from the roll with the leave of the court.

The obvious reason for this is that the court has a duty to ensure that matters are finalised as between the parties without unnecessary and unexplained delay.

- 20 The proper and efficient administration of justice demands that the court must be satisfied about the reasons why a matter cannot proceed, especially where the opponent opposes the removal from the roll or postponement. In such circumstances, the removal of a matter from the roll is not for the taking – the court must be persuaded to exercise its discretion in favour of the requesting party. The underlying consideration in the exercise of the court’s discretion must be to do justice between the parties. This, in my view, is especially the case where a party that succeeded in the main application, such as the applicant was, is delayed from realising the benefit of the order in their favour. A suggestion otherwise would encourage sloven litigation with the knowledge that, without any consideration for prejudice to the opposing party, and in total disregard for the efficient and proper administration of court process, an unprepared party will simply and unilaterally remove a matter from the roll without explanation. This is precisely what the respondents sought to do in this case.

- 21 The applicant opposes the removal of the matter from the roll on the basis that,

1. The matter having been enrolled, the applicants required the leave of the court in the absence of an agreement with the respondent. I agree with the correctness of this submission.

2. The respondent is entitled to finality of the matter. I agree with this too.

22 In the absence of appearance for the respondents, I have not been favoured with a satisfactory explanation why the matter should not proceed. The email to the Registrar is not an explanation to the court for the simple reason that the court does not communicate with parties by email. This is especially significant when it is considered that the applicant's attorneys firmly informed Mr Thaver of the applicant's opposition to a postponement of the matter and of their intention to persist with the hearing of the matter as enrolled. It was not available to Mr Thaver to ignore the applicant's recorded opposition and to spurn the opportunities I afforded him to appear or make arrangements for the respondents otherwise. And yet that is exactly what he did. In any event, even if I had regard to the reasons given to Ms Maja in the email of 30 January, namely, the unavailability of counsel, this is not a good enough reason of itself for the matter not to be heard. The respondents would have had to explain when they became aware of the unavailability of their chosen counsel, the reason why other counsel was not appointed and efforts taken to appoint other counsel and I would have to determine whether the explanation provided is sufficiently satisfactory to warrant that the matter be removed from the roll. No such explanation was properly before me, even after I afforded the respondents two undeserved opportunities to purge their discourtesy to the court and to the applicant and to appear to address me on the intended removal of the matter from the roll. Accordingly, in the absence of a satisfactory explanation, the Notice of Withdrawal stands to be

disregarded and I do so. The applicant deserves that the application for reinstatement must be heard and finally decided in the absence of compelling reasons otherwise and I determined that the matter proceed in the respondents' absence.

- 23 Finally, I sadly must point out that, the issues about the employment of counsel is the very reason that resulted in the application for leave to appeal before Keightley J being struck from the roll. This appears to be a malady that the respondents and their attorney have no urgency to purge themselves of. This appears from the applicants' explanation in the belated condonation application delivered on 9 September 2023 when the matter was struck from the roll by Keightley J. The following is the relevant part of the affidavit in support of condonation:

"I reiterate that Applicants addressed an e-mail to Judge Keightley's Registrar, That respondents attorney of record and counsel, to the effect that in view of senior counsel's late briefing as aforesaid, the need for senior counsel to acquaint himself with the papers and consult with client for purposes of preparing an application for condonation for the late filing of the application for leave to appeal, which in the circumstances may be filed on the eve of the hearing, there might be a need for postponement and thus requested a postponement of the matter for a week or the following week as aforesaid."

- 24 The less said about the penchant to engage the Court by email, the better.

Re-enrolment/Reinstatement

- 25 The applicant opposes the application for reinstatement of the application for leave to appeal and seeks that the application be dismissed on the grounds that - (i) the prospects of success in the leave to appeal application are poor;

and (ii) the applicants perempted the order when they elected not to seek leave to appeal within the prescribed period.

26 To succeed with the application for reinstatement, the respondents were required to explain their default which resulted in the matter being struck from the roll and to explain the default in full. In effect, an application in such situation seeks condonation of their default. The court must consider whether the respondents have satisfactorily explained their default which resulted in the striking of the matter. This is not all that I must consider. I must also consider prejudice to the parties and fairness to both parties. The interest of justice must be the overriding consideration.

27 I have already alluded to the late employment of counsel as a reason offered for the filing of a condonation application a day before the hearing of the application for leave to appeal on 10 September 2023, an application that was not accompanied by an application for a postponement. The affidavits in support of condonation of the late application for leave to appeal, and for reinstatement of the application for leave to appeal offer no explanation why counsel was briefed late; when counsel was briefed; when the respondents became aware that they were required to apply for condonation and why they did not do so sooner; when the respondents became aware they would require a postponement of the matter and why they did not file an application before the matter was called before Keightley J. Instead, the respondents state in the affidavit in support of the reinstatement application that (at best ill-advised and at worst disingenuously in my view),

“It is important to highlight that the need and request for a postponement was to accommodate the court and the respondent, to consider his position and to file an answering affidavit in response thereto.”

“The applicants contend that as counsel for the respondent indicated that they would require an opportunity to consider the condonation application and file an answering affidavit in opposition thereto, Keightley J ought to or could have postponed the hearing of both applications, to allow the respondents to do so, whereafter either the application for condonation or both applications are set down for hearing on a date to be fixed by Her Ladyship Keightley J as was done in setting down the application for leave to appeal as aforesaid.”

“On Monday 7 November 2022 a letter via e-mail (annexure KM hereto), was sent to the court, respondent’s attorneys of record and counsel, requesting the postponement of the matter on the basis of the reasons outlined therein in and in particular alerting the court, respondent’s attorneys of record and counsel of the probabilities of the application for condonation not being finalised before the hearing of the matter on 10 November 2022”

- 28 On this “explanation”, it is the fault of Keightley J that the matter was struck from the roll. Of course, this is a false and preposterous suggestion and need only be repeated to be rejected. A postponement was refused because there was no proper application for a postponement with reasons for the postponement. Just as there is none before me. Keightley J had no obligation to postpone the matter and the respondents lay no legal basis for such an entitlement that they think they had in the circumstances. Clearly, the respondents and their attorney appear to believe, for unexplained reasons that is best not to speculate, that all they need do to avoid the matter being finalised is to send emails to the Registrar and the Judge must abide their wish. This attitude is most regrettable coming from state organs.
- 29 The unavailability of counsel is not a satisfactory explanation for the respondents’ unpreparedness to prosecute the application for leave to appeal when it was called. Neither is the late employment of counsel. There

is no valid reason that the respondents' failure to timeously employ counsel must be visited on the applicant and that the administration of justice must suffer disrepute as a result of their attorney's and their own incompetence.

30 The applicant continues to suffer prejudice and the administration of justice is brought into disrepute each day that the applicant is unable to derive benefit from the order of Keightley J. The order of Keightley J is a money order and each day the applicant is deprived the opportunity to enjoy the practical benefit that flows from the order. He loses interest that he would have earned but for the application for leave to appeal which in any event, does not suspend the judgment and order of Keithley J until condonation is granted. In the circumstances, nothing precludes the applicant executing on the order and this has not fazed the respondents, and yet, the respondents have not conducted themselves with any measure of urgency or real intention to get condonation.

31 In the absence of a satisfactory explanation why the application for leave to appeal should be reinstated on the roll, the applicant must succeed that the application must be dismissed. He deserves finality in the matter. There is nothing before me that evidences any prejudice that the respondents may suffer if the application for reinstatement is dismissed in the circumstances – they spurned the opportunity to place such evidence or explanation before me. The application for reinstatement accordingly fails.

32 In the light of my conclusion that the respondents have failed to provide a satisfactory explanation for the reinstatement of the application for leave to

appeal, and that the application fails for that reason, I do not consider it necessary to consider the prospects of success in the application for leave to appeal and whether the respondents have perempted the appeal.

Events post 9 February 2024

- 33 For completeness, it is necessary that I address events that occurred after the hearing of the matter.
- 34 On 9 February 2024 I reserved judgment. On 12 March, the respondents uploaded Heads of Argument, and on 15 March, an affidavit deposed by Mr Thaver referred to as “Explanatory Affidavit”. Predictably, this elicited an objection from the applicant’s attorneys who filed a “*NOTICE OF OBJECTION TO FILING OF APPLICANTS’ ATTORNEY’S EXPLANATORY AFFIDAVIT*” and an email to Ms Maja to bring the notice to my attention. The email to Ms Maja was copied to Mr Thaver and accordingly he became aware of it.
- 35 The respondents’ Heads of Argument and “Explanatory Affidavit” were filed without my leave. It is plain to me that Mr Thaver opportunistically, if not dishonestly, thought that the reservation of judgment was an opportunity for him to steal the moment to surreptitiously introduce the Heads of Argument and “Explanatory Affidavit”. If this was done to create the impression that he complied with my directive, it would be most shameful and deplorable conduct from an officer of the court.

- 36 The Heads of Argument and “Explanatory Affidavit” not having been filed with my leave, I have not taken them into account and have accordingly disregarded them. For that reason, it is not necessary to address the applicant’s grounds of objection and I do not.

Costs

- 37 The respondents not having succeeded in the application, there is no reason why the applicant should not be awarded costs.
- 38 The conduct of the respondents in the manner that they have prosecuted the application for leave to appeal is cynical and has served only to delay the applicant realising the benefit of a long-obtained order. There is no justification for their conduct.
- 39 The conduct of Mr Thaver to file heads of argument and a supposed explanatory affidavit after judgment was reserved, without my leave and without seeking the consent of the applicant is at best ill-advised and at worst dishonest. It is difficult to believe that he did not comprehend that it was not permissible. This kind of conduct is especially concerning from an officer of the court and should not be tolerated by any court. This and the crude lack of care and courtesy to the applicant and to the court warrants a punitive cost order. I intend to make an order accordingly which, regrettably, will be borne by the taxpayer, including by me.

Conclusion

40 I accordingly make the following order.

ORDER

1. The application for the re-enrolment or reinstatement of the application for leave to appeal is dismissed.
2. The first, second and third respondents are to pay costs on the attorney and client scale, the one paying the other to be absolved.

MS BALOYI AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: **6 and 9 February 2024**

Judgment: **12 April 2024**

APPEARANCES:

For the Applicant: **Adv L Moela**

Instructed by:

Khumalo Attorneys Inc

For the Respondent:

No appearance

Instructed by:

State Attorney, Johannesburg