

IN THE HIGH COURT OF LESOTHO

CIV/APN/0135/2022

Held at Maseru

In the matter between:

TEBOHO LIAU	APPLICANT
AND	
DIRECTOR GENERAL OF	
NATIONAL SECURITY SERVICE	1ST RESPONDENT
MINISTER OF DEFENCE AND	
NATIONAL SECURITY	2ND RESPONDENT
NATIONAL SECURITY SERVICE	3RD RESPONDENT
THE ATTORNEY GENERAL OF THE	
KINGDOM OF LESOTHO	4TH RESPONDENT
NATIONAL SECURITY SERVICES	
BOARD OF INQUIRY	5TH RESPONDENT

Neutral citation: Teboho Liau v Director General of National Security Service and others [2022] LSHC 138 Civ (17 June 2022)

CORAM: M.J. MAKHETHA J

HEARD: 17th MAY 2022

DELIVERED: 17TH JUNE 2022

SUMMARY

Application for permanent stay of unterminated disciplinary proceedings - grounds for-unreasonably long delays in prosecution, loss of potential witnesses giving rise to extraordinary circumstances, denied access to documentary evidence and dismissal of preliminary points taken without providing reasons– Issue for determination – to what extent will the court intervene in matters of unterminated disciplinary proceedings – application dismissed for want of exceptional circumstances.

ANNOTATIONS:

CITED CASES

LESOTHO

Commander Lesotho Defence Force & Ors vs Second Lieutenant Setho Maluke (unreported) C of A (CIV) No.30/2014) 21

Koetle vs Lesotho National Olympic Committee (unreported) [2018] LSHS 33.

Mda and Another vs Director of Public Prosecutions LAC (2000-2004) 950.

Motlatsi Mofokeng v Commissioner of Police and 2 Others (unreported) (CIV/APN/375/2020) [2021] LSHC 40.

SOUTH AFRICA & OTHER JURISDICTIONS

Bothma v Els (2009) ZACC 27.

Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark (J1672/2016) (2016) ZALCJHB 330.

Sanderson v Attorney General Eastern Cape (1997) ZACC 18.

Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others

Walhaus & Others vs Additional Magistrate, Johannesburg & Another 1959 (3) SA 113 (AD)

Zanner v Director of Public Prosecutions, 2006 (2) SACR 45 (SCA)

AUSTRALIA

Hague v The Queen (2019) VSCA 218

R v Alder (Unreported) New South Wales Court of Criminal Appeal 60727/91
– 11 June 1992

Victoria International Container Terminal Limited v Lunt (2021) HCA11, (20)
Walton v Gardiner (1993) 177 CLR 378 at 392; (1993) HCA 77

STATUTES

High Court Rules No. 9 of 1980

National Security Service Regulations No.4 of 2000 (as amended)

BOOKS

F G Gardiner and C W H Lansdown: The South African Criminal Law and
Procedure (1957) 6th ed. vol.1 150

Herbestein and Van Winsen: The Civil Practice of the High Courts and the
Supreme Court of Appeal of South Africa (2009) 5th ed. 1270

JUDGMENT

1. INTRODUCTION

[1] The Applicant seeks permanent stay of disciplinary proceedings instituted against him by his employer on allegations of possible commission of misconduct relating to the recruitment of new National Security Service (NSS) entrants in 2016. The said proceedings are pending further hearing before the 5th Respondent, a board of enquiry (the Board) established by the 1st Respondent to determine the charges against the Applicant.

[2] The Applicant filed a Notice of Motion with two parts; the 1st part for interim relief sought was for stay of the disciplinary proceedings that were scheduled for hearing on the 29th April 2022, pending final determination of the application in the main (Part 2), and dispatch of the minutes of the part-heard disciplinary hearing of the 13th April 2022. The 2nd part of the application for permanent relief, now under determination, is as briefly described in paragraph (1) above including an order allowing the Applicant to resume his duties.

[3] Before Banyane J on the 27th April 2022 the Applicant was granted the interim reliefs sought as a matter of urgency, including an order for

joinder of the 5th Respondent at the request of the Applicant. Part 2 of the application for permanent relief was argued on the 17th May 2022, following the court's order for revival of the *Rule Nisi* which had elapsed on the 16th May 2022.

[4] The prayers, as fully set out in the Applicant's founding affidavit are as follows;

1. *Dispensing with ordinary and normal modes of service and time frames provided for by the rules of this Honourable Court due to the urgency of this matter.*
2. *A Rule Nisi be issued and made returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause, if any, why the following Orders shall not be made absolute:*

INTERIM RELIEF

a) The disciplinary hearing scheduled to be held on the 29th April 2022 against Applicant regarding alleged misconduct of November and December 2016 be stayed pending final determination of this Application.

b) The 1st Respondent be directed to dispatch the minutes of the part-heard disciplinary hearing of the 13th April 2022.

FINAL RELIEFS

c) That the disciplinary hearing against Applicant regarding alleged misconduct of November and December 2016 be permanently stayed.

d) That Applicant be allowed to resume his duties as an Assistant Director of 3rd Respondent.

3. *Prayers 1 and 2 (a) and (b) be granted to operate with immediate effect as interim relief.*
4. *Costs of suit at Own Attorney and Client Scale.*
5. *Granting the Applicant such further and/or alternative relief as the court may find it fit and proper.*

2. FACTUAL BACKGROUND

[5] In order to appreciate the issues involved in this application, it is necessary to set out, albeit briefly, the material sequence of events that led to the case. From the Applicant's and Respondents' affidavits filed of record, it is apparent that most if not all the material facts in this application are common cause and they can conveniently be set out in a nutshell as follows:

5.1 The Applicant, an employee of the 3rd Respondent was promoted to the position of Assistant Director on or around **February 2017** in terms of Annexure **TL** attached to his founding affidavit. Hardly a year following his promotion the Applicant received a show cause letter on the **4th of December 2017** by which the 1st Respondent directed him (Applicant) to make a representation why he cannot be suspended from duties for failure to adhere to NSS's Recruitment Policy during the recruitment process of new NSS entrants in 2016. This is in terms of **Annexure TL1**.

5.2 The Applicant responded on the following day through **Annexure TL2**, seeking clarifications to the 1st Respondents' show cause letter. This letter was not answered to date.

5.3 Almost two months later, on the **26th of January 2018**, 1st Respondent wrote **Annexure TL3** being another show-cause letter requesting the Applicant to show cause again why he cannot be suspended. This time the reason was that the Applicant is alleged to have failed to advise the NSS Director of Human Resource to adhere to NSS Recruitment Policy of the **9th May 2012** over the employment of 2016 new NSS entrants.

5.4 Applicant responded to the said letter on the **30th of January 2018** through **Annexure TL4** where he insisted on a response from 1st Respondent to the latter's show cause letter of the **5th December 2017** so as to enable him to make a representation. This letter too was not answered to date but in its place the Applicant was served with a suspension letter (**Annexure TL5**) on full pay on the **7th of February 2018** (a month later). According to **TL5**, the Applicant was suspended, with immediate effect, on the basis of 1st Respondent's consideration of all the issues that the Applicant raised in his (written) representations, as well as to allow the Directorate of Corruption and Economic Offences (DECO) to finalize investigations (without interference) against the Applicant on similar allegations of misconduct in relation to the recruitment of the 2016 new NSS entrants.

5.5 For two years and some months between February 2018 and May 2020, the Applicant did not hear from the Respondents about the enquiry against him. It is not obvious from the Respondents' answering papers what the cause of this two-year delay was. At para 5.2 of his answering affidavit the 1st Respondent refers to ongoing investigations against the Applicant by the DCEO for the alleged misconduct; nothing is said about the Respondents' own investigations and how long they lasted, which could possibly explain the delay. The court could not establish for certain if the NSS relied on the DCEO's investigations for similar allegations of misconduct by the Applicant in order to charge the Applicant.

5.6 Only on the **18th of May 2020** did the 1st Respondent write yet another show-cause letter (**TL6**) through which the Applicant was directed to make representations why a disciplinary action cannot be taken against him on two charges of misconduct, followed by a formal charge **dated 30th June 2020** which set the matter down for hearing on the 13th and 14th of July 2020 per **Annexure TL12**".

5.7 It is also common cause that there are occasions when Applicant through his Counsel of record requested documents relating to the

cause of the intended disciplinary action from 1st Respondent. The Applicant and his Counsel were only allowed to inspect and not to obtain copies of all the documents, on the ground that it is classified material.

5.8 When the Applicant attended the disciplinary hearing on the 13th of July 2020, he raised a number of objections including the constitution of the Board in line with **Regulation 29 of the NSS Regulations.**¹ The said regulation provides that only the NSS employees can be members of a Board of Enquiry.

5.9 In its ruling, the Board upheld the Applicant's objection regarding its constitution, resulting in the 1st Respondent advising the 2nd Respondent to reconstitute the Board per **Annexure TL18** dated 16th July 2020. According to the Applicant, 5th Respondent did not make a ruling on the rest of other objections raised. It would seem, for unknown reasons, the Applicant became content with the Board's ruling on only one objection.

5.10 Almost another year and a half elapsed between July 2020 and December 2021 after which 1st Respondent communicated a

¹ No.4 of 2000 (as amended)

reconstituted Board to the Applicant on the 21st December 2021 (as per **Annexure TL20**) and set the matter down for hearing on the 13th and 14th April 2022. The three charges read as follows;

1. *“It is alleged that on or around December 2016, you subverted good order, discipline and lawful authority by signing off or appending your signature on a radio message which were to be signed by Director Operations concerning the names of persons to be vetted in the different districts of Lesotho. The alleged misconduct is in contravention of Regulation 16 (b) of National Security Service Regulations No. 4 of 2000 under Part II as amended.”*
2. *“It is further alleged that during the December 2016 recruitment of new entrants, you failed to report the violation of security regulations in relation to the non-vetting of some of the new entrants in line with Section 11 (1) and (2) of the National Security Service Act No. 11 of 1998 in your capacity as the then Human Resource Manager. The alleged misconduct is in contravention of Regulation 18 (C) of the National Security Service Regulations No. 4 of 2000 under part II as amended. See annexure 1 for list of un-vetted entrants.”*
3. *It is also alleged that on or around November 2016, you failed to ensure compliance with the requirements of the vacancy advertisement dated 4th February 2016, by facilitating the hiring of persons who did not apply, did not meet the specified age and or qualifications requirements for the rank of I.O4. The alleged misconduct is in contravention of Regulation 16 (b) of National Security Service Regulations No. 4 of 2000 under part II as amended. See annexure 2 for the lists and categories of persons who did not qualify.”*

5.11 At the hearing on the 13th April 2022, the Applicant appeared before the disciplinary committee (the Board) where his legal representative once again raised some of the preliminary objections raised earlier at the July 2020 first hearing.

5.12 It is the Applicant's contention also that the Presiding Officer dismissed the points raised without advancing reasons for dismissal and set the matter down for hearing on merits on the 29th April 2022.

5.13 During the interval, the Applicant on 25th April approached this court on urgent basis seeking an interim order for stay of the disciplinary proceedings scheduled for 29th April 2022, pending the hearing on the final relief sought for permanent stay of the proceedings.

5.14 It is common cause that the Applicant was on 27th April 2022 granted interim reliefs as prayed in terms of paragraph 3 above.

3. THE MERITS

[6] The Applicant at **para 16** of his founding affidavit seeks permanent stay of unterminated disciplinary proceedings against him before 5th Respondent based on the following reasons;

6.1 Unreasonably long delays in charging and prosecuting him. He contends that there has been a delay of five to six years from the

occurrence of the alleged offence and his prosecution in violation of his right to fair trial which is in line with his employer's own laws, reference being made to **Regulation 28 of the NSS Regulations** (supra) which provides as follows:

“The purpose of this regulation is to ensure the prompt and fair hearing of questions involving possible misconduct or breach of discipline by members of the service” and,

Regulation 30 (3) (supra) which states that:

“The Board's hearing shall take place within 7 working days and not more than 10 working days after the complaint is received by the member.”

6.2 Loss of potential witnesses (former employees of NSS) who would corroborate his evidence in defence, arising from delays in his prosecution. The Applicant avers that **some** of such persons have passed on, others retired and unreachable while another is in exile. This fact the Respondents have disputed, arguing that some of the potential witnesses mentioned by the Applicant are still alive and they can be subpoenaed at his request. The Applicant did not also mention when the 'witnesses' died. It is my view that there has to be a relationship between the time of delay in prosecuting the Applicant and the unavailability of his witnesses. In the absence of such evidence, I find it in order that the

Respondents have denied liability for the non-availability of the alleged potential witnesses.

6.3 The Applicant further alleges in his founding papers that 1st Respondent denied him access to copies of documentary evidence, allegedly classified material, that he would need to prepare for his defence. Without the said copies, he says he will not be able to prepare for his trial or defence. By this refusal, the disciplinary proceedings against him will not be fair and/or impartial in breach of **Regulation 30 (1) of the NSS Regulations** (supra), he submits. However, the 1st Respondent disputed these allegations and explained that the Applicant and his Counsel of record were given access to the documents for viewing only as it is classified information. That the Applicant has in fact inspected the documents at the employer's office previously is on record, undisputed.

6.4 It is also stated in the Applicant's founding papers that the 5th Respondent has dismissed his preliminary points raised at the 13th April 2022 hearing.

[7] The Respondents' main contention is that the court's intervention at the stage of ongoing/unterminated disciplinary proceedings is unwarranted; they argue that Applicant has prematurely approached this court by way of **Rule 8 (22)(c)** when in fact he has an alternative remedy for either appeal against the decision of the Board in line with **Regulation 32 (2)** of the 3rd Respondent's laws, or review of 2nd Respondent's decision in line with **Rule 50 of the High Court Rules**². Thus, allowing Applicant to be heard in this fashion would be tantamount to treating matters of pending internal processes on a piece-meal fashion. I commend the Respondents for a thorough research on the issue, citing several of local authorities decided in this court and the Court of Appeal in support of the averments made.

[8] The Respondents further allege that they have not unduly contributed to the Applicant's perceived unreasonable delay in the prosecution of his disciplinary hearing. Instead, the Respondents argue that they have timeously collaborated with the legal demands made from time to time by the Applicant without any deliberate delay, submitting therefore that in the determination of unreasonable delay of prosecution, it is not about when the alleged acts of misconduct occurred but when the actual prosecution lasted in the interest of justice and fairness to the Applicant.

² No. 9 of 1980

4. MAIN ISSUE FOR DETERMINATION

[9] To what extent should the court intervene in matters of unterminated disciplinary proceedings of lower courts or tribunals?

5. THE LAW

[10] The law on the issue under determination is fairly well settled for similar cases and it has often engaged the attention of this court in varied fact situations. The Respondents and the Applicant Counsel have provided such authorities in support of their respective cases.

[11] It is well accepted by both Counsel for the Applicant and the Respondents that the High Court has inherent jurisdiction to entertain review applications emanating from the inferior courts and tribunals. However, it is the Respondents case that such power is restricted to certain cases. This position finds support in the case of **Motlatsi Mofokeng v Commissioner of Police and 2 Others**³ where Mokhesi J, dismissing an application for review of unterminated disciplinary proceedings instituted by the Applicant against his employer for allegations of certain misconduct at the workplace held as follows;

“This court has power to review proceedings of inferior courts and tribunals in terms of Rule 50 of the High Court Rules 1980.

³ (CIV/APN/375/2020) (unreported) [2021] LSHC 40

However, that power is not readily exercisable when review is directed at unterminated proceedings...

[12] The Judge also quoted with approval Steyn J in **Walhaus & Others v Additional Magistrate, Johannesburg & Another**⁴ where the learned judge held that,

“The rarity of exercising that power to untermiated proceedings rests on considerations of “grave injustice [which] might otherwise result or when justice might not by other means be attained... It is true that by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme court may, in proper cases, grant relief by way of review This however, is a power which is to be sparingly exercised”

[13] The Respondents also referred the court to the learned authors of Gardiner and Lansdown⁵ who state as follows;

“While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the untermiated course of proceedings in court below, it certainly has power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.”

“In my judgment, that statement correctly reflects the position in relation to uncompleted criminal proceedings in the Magistrates’ courts.....[T]he prejudice inherent in an accused’s being obliged to proceed to trial, and possible conviction, in a Magistrates’ court before he is accorded an opportunity of testing in the Supreme court the correctness of the Magistrate’s decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme court in granting relief before conviction....”

⁴ 1959 (3) SA 113 (AD) at 119 G – 120 B).

⁵ The South African Criminal Law and Procedure (1957) 6th ed. vol.1 p.150

[14] In clarifying the intention behind the above position of the law guiding the courts on review of unterminated proceedings, Mokhesi J at p17 of his judgment in the **Mofokeng’s case** (supra) concluded by saying, and I agree;

*The above policy which eschews piecemeal appeals and review of inferior courts and tribunals has been accepted into this jurisdiction in **Mda and Another v Director of Public Prosecutions**⁶ and has been applied religiously **Koetle v Lesotho National Olympic Committee**.⁷ It is undesirable to attempt to exhaustively define circumstances in terms of which injustice might be thought possible to arise as each case has its own unique features which must be assessed to determine whether they call for review or deviation from the policy against piecemeal review of decision of inferior courts or tribunals.”*

[15] For purposes of this application I also find relevance in the Court of Appeal case of **Commander Lesotho Defence Force & Ors vs Second Lieutenant Setho Maluke (unreported)**⁸ cited by both Counsel where W.G. Thring JA cautioned as follows;

“A permanent stay of prosecution is a drastic remedy which will be ordered only where there has either been an unreasonably long delay in the prosecution or where there are circumstances which render the case so extraordinary as to render appropriate this otherwise inappropriate remedy.”

⁶ LAC (2000 – 2004) 950 at 957

⁷ CIV/APN/42/18 [2018] LSHC 33 paras 6 – 7

⁸ C of A (CIV) No.30/2014) 21 at para 21, see also Zanner v Director of Public Prosecutions, 2006 (2) SACR 45 para 10

[16] **Herbestein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa**⁹ also sets out the much celebrated common law position adopted in many jurisdictions as follows;

“The High Court is very reluctant to interfere with uncompleted proceedings in an inferior court. It will do so only in exceptional instances, where serious injustice would otherwise occur where justice cannot be attained by other means. The court will be more inclined to interfere where the review is aimed at continuing and terminating uncompleted proceedings than where the object is nullifying such proceedings. The court is apparently prepared to exercise a right to interfere with proceedings of a lower court in a broader range of circumstances than those originally required for review proceedings.”

[17] It is also submitted on behalf of the Respondents that the Applicant has two or more remedies if he is not satisfied with the outcome of the internal hearing. He can appeal the decision of the tribunal per **Section 32(2) of the NSS Regulations**. Secondly he can approach the High court for review to challenge the decision of the Minister of Defence and National Security per **Rule 50 of the High Court Rules**. I wholly agree with the Respondents in view of avoiding piece-meal litigation.

[18] The current application is for a permanent stay of disciplinary proceedings brought before this court pending continuation of the proceedings that had been scheduled for the 29th April 2022 before a

⁹ (2009) 5th edition at 1270

board of enquiry established by the 1st Respondent to determine charges of misconduct against the Applicant. In making a fair determination on whether or not the courts may intervene and grant an application for permanent stay of uninterminated disciplinary proceedings, it is important to revisit the Applicant's reasons for justifying the stay.

Unreasonable delays in prosecution

[19] In **Bothma v Els**¹⁰ and **Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others**¹¹ where the court determined the issue of time unreasonableness, which I fully support;

“... a delay in instituting or finalizing disciplinary proceedings on its own is not inherently unfair. Therefore, unfairness must still be determined separately on a case by case basis”, the Judge warned.

[20] To do this, the court employed six factors propounded in **Sanderson vs Attorney General Eastern Cape**¹² and reiterated in **Moroenyane vs Station Commander of the South African Police Services – Vanderbijlpark**¹³ as follows:

¹⁰ (2009) ZACC 21

¹¹ (2018) ZACC

¹² (1997) ZACC 18 para 25

¹³ (J1672/2016) (2016) ZALCJHB 330

- (a) *“The delay has to be unreasonable, in this context, first, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.”*

[21] That there was a lengthy lapse of time between July 2020 (when the 1st decision to indict the Applicant was given effect to) and December 2021 (when he was indicted for the second time) is beyond doubt and unreasonable in my judgement. The Applicant has cited the case of **Zanner v Director of Public Prosecutions, 2006 (2) SACR 45 (SCA)** in support of his application. This case is unfortunately not relevant for the present application. In that case Appellant’s case was dismissed on the ground that at the time that the Appellant was charged again for the same offence, murder, in 2004 following further investigation into the matter, the case had been withdrawn against him in 2003 after the first indictment. So the time interval between 2003 and 2004 could not have been relevant and accordingly justify an application for permanent stay of prosecution (**see para 29**).

[22] The next factor is as follows;

- (b) *The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.*

It is not obvious from the Respondents' answering papers what the cause of this two-year delay was. At para 5.2 of his answering affidavit the 1st Respondent refers to ongoing investigations against the Applicant by the DCEO for the alleged misconduct; nothing is said about the Respondents' own investigations and how long they lasted, which could possibly explain the delay. The court could not establish for certain if the NSS relied on the DCEO's investigations for similar allegations of misconduct by the Applicant in order to charge the Applicant. In my conclusion on this issue therefore, the Respondents have not sufficiently explained away the delays observed between Applicant's suspension in February 2018 and May/June 2020 when he was formally charged, and the interval between July 2020 when a recommendation was made to the Minister to reconstitute the Board and December 2021 when the proceedings resumed leading to the present application.

[23] The third factor in determining unreasonableness of the delay;

(c) "It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.

There is no evidence in either his founding affidavit or replying papers suggesting that the Applicant did make any effort during the years for the time periods mentioned above. Nothing in the evidence suggests that he ever raised any complaint during the extended interval about the effect of delay in prosecuting him. I therefore, find it difficult to find in favour of the Applicant who repeatedly consented to postponements to establish that he had suffered prejudice at a later stage. I am also surprised that when the Applicant first appeared before the old Board in July 2020 and the Board ruled on only one objection out of the number that his counsel had raised, he became content and did not challenge the ruling then.

[24] The fourth most important factor is as follows;

*(d) Did the delay cause material prejudice to the employee?
Establishing the materiality of the prejudice includes an
assessment as to what impact the delay has on the employee to
conduct a proper case.*

[25] The central pillar, as appears from his founding papers, of the Applicant's case for a permanent stay of his untermiated disciplinary hearing is the perceived and actual prejudice that he asserts he has both suffered, and will suffer if the inquiry is permitted to run its course. I agree with the various authorities on the issue of prejudice elaborated in the foregoing paragraphs that in its assessment of this issue any court

that becomes seized with an application of this nature will be bound to have differential regard to the observation by Sachs J in **Bothma** (supra) that, irreparable prejudice must refer to something more than the disadvantage caused to the Applicant by among other claims, loss of some evidence that can happen in any trial. Irreparability should not be equated with irretrievability.

[26] The Applicant in his papers unreservedly blames the unfairness and prejudice caused and/or likely to be caused to him on failure of the Respondents to charge and prosecute him within a reasonable time. The Applicant alleges that he suffered much prejudice because of his suspension since February 2018 which has made it impossible for him to compete for any promotions at work. In **Bothma** (supra), mere assumption on the perceived loss is not enough, and I agree. Applicant also contends that he will suffer irreparable harm as he is more likely to be dismissed from work at the conclusion of the hearing. Against this submission, I share similar remarks by Mokhesi J in **Mofokeng's case**¹⁴ when he said,

“In the instant matter therefore, the fact that the applicant faces the prospects of dismissal does not attract the court’s intervention. Dismissal is part and parcel of any work related disciplinary process, and therefore, there is nothing exceptional about the prospects of it eventualizing. The disciplinary process must be finalised before any challenge can be brought against it to the court.”

¹⁴ Supra p20

I do not find the Applicant’s grounds for the alleged prejudice sufficient or strong enough to justify a permanent stay of the disciplinary proceedings against him before the 5th Respondent.

It is accepted that all the above considerations must be applied, not individually, but holistically” (emphasis).

Loss of Potential Material Witnesses

[27] The Applicant alleges that the delay in prosecuting him has given rise to extraordinary circumstances where **some** of his potential material witnesses have passed on while others are retired and unreachable, including one of his ex-bosses who is currently in exile. He submits that in the absence of these ‘witnesses’ the disciplinary hearing against him will be unfair as he will have no witnesses to corroborate his evidence in defence.

[28] In **R v Alder**¹⁵ however, Gleeson J expressed the view which I share with approval that,

“The fact that a witness who is potentially able to corroborate an accused is, for one reason or another, such as death, disappearance,... unavailable at trial does not normally produce the result that the accused cannot obtain a fair trial and it has not been shown to produce the result in this case”.

¹⁵ Unreported New South Wales Court of Criminal Appeal 60727/91 – 11 June 1992

[29] I also echo with approval the court’s decision in **Hague v The Queen**¹⁶

where the Court held that;

*“The fact that the evidence may be weak or tenuous does not, of itself, give rise to ... or make a trial unfair. Just as the judge has no power to direct acquittal on the basis that the evidence is weak or tenuous, the judge has no power to stay a prosecution due to concerns of the sufficiency of the evidence. It will be in rare cases where loss of evidence, will justify a permanent stay. A fair trial does not require that the prosecution and the accused are able to adduce **all** evidence that is relevant or material.”*

While most of the authorities cited for the purpose of this application are expressed views and/or decisions of the courts in criminal review applications, I find it equally relevant to apply same to civil applications for permanent stay of uncompleted proceedings in inferior courts or tribunals as I do in the present application.

[30] It has come out clearly from the Applicant’s affidavit that it is not all of his potential witnesses who have passed on. The allegation that some of the retired officers are not reachable is doubtful without evidence that previous efforts have been made by the Applicant to trace/locate such persons and in vain. It is my view therefore that, the Applicant will not suffer any unfairness and/or prejudice in the hearing if the disciplinary proceedings are to continue to finality. In fact it is the Applicant himself who alleges that **PIO Tsoaeli** communicated a directive from **Director Administration** directing him to sign off radio messages because he

¹⁶ VSCA (2019) 218

was the senior most Officer present on the day in question. Same was corroborated by the then Director Human Resources Officer Mr Makhalemele who was Applicant's immediate supervisor. There is no information in this application that the said Mr Makhalemele has also passed on or that he is not traceable and it would seem to me that the balance of convenience favours the Respondents in this respect. It is the Applicant again who has it in his founding papers that the said PIO Tsoaeli even appended his signature to some of the messages. For me that evidence in possession of the Applicant further confirms that he is not completely out of supporting evidence as indeed the Respondents have twice previously allowed him and his Counsel to access the documents that the Applicant considered important for his defence.

[31] The above view already addresses my stance on Applicant's 3rd ground for an application for stay where he alleges that the Respondents have denied him copies of the said documents on the ground that it is classified material. To me what is important is that he has not been denied access to any information that he would need to prepare for his defence. And he did inspect the documents at his request despite the fact that they are classified material. It is my expressed view, therefore, that the Applicant is not defenseless in the absence of some and not all

potential witnesses and he cannot rely on unfair trial in the circumstances.

[32] Counsel for the Applicant referred the court to the case of Maluke (supra) to support the alleged extraordinary nature of his case. I am unable to make a meaningful comparison of the exceptional nature of that case to the facts before court. While indeed the High Court ordered and the Court of Appeal confirmed permanent stay of disciplinary proceedings against the Respondent before the courts martial on ground of exceptionality, the apex court in Maluke amended the order of the court a quo as follows, thus opening another door for the Respondent to be prosecuted;

“The court martial proceedings against the applicant by the respondent are permanently stayed, unless the court martial is made up of persons who were not present at the parade

[33] The last part of the apex court order meant that the LDF could still thereafter prosecute the Respondent for the same offence for as long as he appeared before a different panel that was not present at the parade when he was ‘informally’ charged with theft of the employer’s property. In Applicant’s case I find no exceptional circumstances warranting a permanent stay of his hearing.

6. CONCLUSION

[34] At the end, I come to the conclusion that the Applicant in this application has failed to establish any form of prejudice, perceived or actual, based on his grounds a permanent stay of the disciplinary hearing against him before the 5th Respondent. Assessing the evidence as a whole, I am satisfied that although there have been some unreasonable delays in charging and prosecuting him between 2017 when he 1st received a complaint and April 2022 when he brought the current application in this court, the evidence is not sufficient to warrant a permanent stay. The delay alone is not a sufficient ground for permanent stay application. The Applicant has also not satisfactorily shown existence of extraordinary circumstances warranting permanent stay of the hearing. The test for a permanent stay has been expressed as, “Whether in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness”, **Walton v Gardiner**¹⁷. This test directs attention to whether there are other, less drastic remedies available to the court than a permanent stay. A court therefore, cannot order a permanent stay if there are other ways to cure the relevant prejudice, if any exists, to ensure a fair trial (**Victoria International Container Terminal Limited v Lunt**).¹⁸ I agree with the

¹⁷ 1993) 177 CLR 378 at 392; (1993) HCA 77
¹⁸ (2021) HCA11, (20).

Respondents that without causing any prejudice to the Applicant, it would not be justifiable for this court to intervene by granting such a drastic remedy to the Applicant while there exist other internal remedies under the **NSS Regulation 32 (3)** at his disposal. Only after utilization of such remedies then the Applicant can seek relief in this court under **Section 50 of the High Court Rules**.

[35] In the result, it is ordered as follows;

- (a) The Application is dismissed;
- (b) Award of costs; the parties must bear their own costs; and
- (c) A Rule Nisi issued on the 17th May 2022 and returnable today 17th June is discharged

M. J. MAKHETHA
JUDGE

For the Applicant:

ADV. LC MONESA
Instructed by T D Saba & Co Attorneys

For the Respondent:

ADV. MJ NKU
Instructed by Attorney General