IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 25/5/2005

CASE NO: 19162\04

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
24/5/05
DATE SIGNATURE

UNREPORTABLE

In the matter between:

LOTIJOHANNESSESHOKA APPLICANT

VS

DIE NASIONALE KOMMISSARIS VAN DIE SUID AFRIKAANSE POLISIEDIENS FIRST RESPONDENT

MINISTER VAN VEILIGHEID EN SEKURITEIT SECOND RESPONDENT

JUDGMENT

SHONGWE, J

[1] The applicant seeks an order that the decision of the 1st respondent, in refusing to place the applicant on early retirement or pension due to medical unfitness, be reviewed and set aside-That such decision, having been set aside, be substituted with an order declaring the applicant medically unfit and placing him on early pension with retrospective effect to the 18 March 2003.

[2] It is common cause that the applicant is employed by the South African Police Service since 1986. He holds the rank of Captain and is stationed at Kwa-Mhlanga Police Station in the province of Mphumalanga.

[3] It is furthermore common cause that the applicant took to illness. He, on his own, consulted Dr Verster, a psychiatrist. Dr Vester informed him, after consultation that his condition has developed so much that his prognosis of discovery is weak. He further informed him that there was no way that he could return to work in the police service. The reason being that the applicant was generally a danger to all, that is, his colleagues and the public and more so a danger to himself. The applicant was then placed under medication. The diagnosis by Dr Verster was that the applicant suffers from post traumatic stress resulting from depression. A comprehensive report was prepared by Dr Verster on the 20th November 2002 and recommended a medical board.

[4] On the strength of what Dr Verster told the applicant he decided to apply for a medical board. In simple terms he applied to be declared medically unfit and he be put into early retirement or pension. Upon doing so he handed Dr Verster's report in.

[5] It is common cause that he was referred to Dr Van der Merwe, a general practitioner. After consultation with Dr Van der Merwe, the applicant was referred to Dr Grobler, a psychiatrist who also prepared a comprehensive report after having sight of Dr Verster's report. I

pause to mention that the reference to Dr Van der Merwe was the beginning of a process of appointing the medical board.

[6] Dr Grobler's conclusion is to the effect that the applicant presents with two serious, chronic psychiatric illnesses. He observed also that the applicant needs a long term treatment for his full recovery. He mentioned that he is presently receiving appropriate therapy to which

he is positively responding. His recommendation is that the applicant

cannot be declared totally and permanently medically unfit for his work, because he has not been receiving this treatment long enough. He further recommended that his sick-leave may be terminated in April 2003 and that an attempt at work rehabilitation be made by way of offering him a light weight work, alternatively, if possible, to re-deploy him. This report was also handed over to Dr Van der Merwe.

[7] All the reports were subsequently placed before Dr Van der Merwe who

then made a recommendation to the Commissioner in terms of the Regulations (Regulation 28 (4) (c)). In a nutshell the board recommended that the applicant needed about 3 months sick -leave to enable him to react properly to the medication. That after the 3 months sick-leave the applicant should be redeployed and that Dr Grobler should reassess him later. The commissioner had all the reports before her and decided that the applicant should return to work.

[8] It is significance to note that there is no dispute on the question of whether or not the applicant is suffering from a post traumatic stress. The applicant contends that there is a procedural defect. In that Regulation 28 (4) (c) was not strictly speaking followed. It reads as follows:

> "*Medical reports or sheets which may have a bearing on the case as well as all relevant reports which the member concerned may wish to submit, shall be placed before the board for consideration and shall be included in the proceedings. If such member so desires, he may at his own expense be represented at the proceedings of the board by his private registered medical practitioner".*

[9] The applicant argues that Dr van der Merwe did not inform him that if he 'so desires, he may at his own expense be represented at the proceedings of the board by his private registered medical practitioner': Therefore by his failure to inform him of this 'right' the *Audi Alteram* rule was breached, which breach rendered the Commissioner's decision unreasonable and unfair. He argues further that the Commissioner should not have endorsed the recommendation of the board without any representations on behalf of the applicant by his private practitioner.

[10] The applicant further argues that the recommendation of Dr Van der Merwe is apparently based on Dr Grobler's report, therefore Dr Grobler must have jointly singed the recommendation with Dr Van der Merwe.

It is said that the failure to jointly sign the recommendation is in breach of Regulation 28 (4) (d). It reads as follows:

> *"After examination the member concerned and considering the reports or sheets referred to in paragraph (c), the board shall record its report, finding and recommendation on the prescribed form. The records of the board shall be signed by all the members thereof".*

[11] It is clear from the papers before me that Dr Van der Merwe was the only member of the board, therefore there was no need for Dr Grobler to sign the recommendation or the record. Dr Grobler came into the picture because Dr Van der Merwe referred the applicant to him for examination and report in his capacity as a psychiatrist and not as a member of the board. There is no substance in the applicant's submission.

[12] Regulation 28 (4) (c) does not place a duty on the board to inform the applicant that if he so desires, he may be represented by a practitioner of his choice. The wording of the Regulation is clear in that it says 'if such member so desires'. In the present case the applicant was aware at all material times that Dr Van der Merwe was, at least, a member of the board because the applicant by his own admission says, at p 25 para 8.19 of the paginated papers:

> *"Hy (Dr Van der Merwe) het my meegedeel dat Dr Grobler se verslag na hom gestuur sou word en dat hy dan aanbevelings aan die Polisiediens sou maak oor my"*

[13] The applicant knew that he initiated a medical board and he knew that Dr Van der Merwe was going to make a recommendation to the Police Service regarding his application. There can be no question that he did not know and therefore he should have been informed of his rights to be represented by his private practitioner. Dr Versters' comprehensive report had been submitted to Dr Van der Merwe for his consideration in any event.

[14] The thrust of applicant's Counsel's argument was on the defectiveness of the procedural steps. The contention was that because the procedure was breached therefore the decision of the commissioner was unreasonable.

[15] On the other hand the respondent maintains that everything required by the Act **(South African Police Service Act 68 of 1995)** read together with the Regulations has been complied with. The applicant's private practitioner, Dr Versters' report was considered. Dr Groblers' report was also considered. As indicated earlier, the respondent does not dispute that the applicant is suffering from some kind of stress related to depression. However the respondent contends that the application is premature.

[15] The authorities are clear that for an applicant to succeed in an application for review it must show that the decision under review is grossly unreasonable. To me this is an extremely difficult onus to discharge (See **Johannesburg c c** ʏs **Administratior, TVL & Mayofis 1971 (1) 87 (AD) at p 100** A-B). It is for the applicant to

demonstrate some irregularity, *arbitrariness or mala fides.* Mere unreasonableness is not in itself sufficient ground to having a decision set aside on review **(Standard Bank of Bophuthatswana Ltd vs Reynolds No 1995 (3) SA 74 (BGD) at p 89 H)**

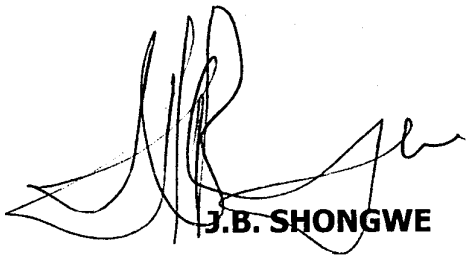
[17] The *audi alteram* partem rule was adequately satisfied. The applicant's private practitioner's report was considered. Regulations 28 (4) (c) provides that "should the board recommend that the member concerned be discharged from the Force on account of ill health, he shall be given the opportunity to make written representation to the Commissioner", It is only in the event of a discharge that the Regulations are peremptory otherwise there is no duty on the board to advise the applicant to invite his private practitioner.

[18] It is significant to note that the applicant failed to file a replying affidavit. This means that the averments made by the respondent in the answering affidavit stand uncotroverted. I pause to mention also that the second re-assessment report by Dr Grobler, cannot take this matter any further as the decision complaint of had long been made before this second report.

[19] There is truly no substance in the argument pursued by the applicant.

The applicant has therefore failed to make out a proper case for interference with the Commissioners decision. In the light of my conclusion to dismiss the application, it is not necessary to deal with the question whether or not this Court has authority to declare the applicant medically unfit to continue working.

[20] In the result I make the following order: The application is dismissed with costs.



J.B. SHONGWE

JUDGE OF THE HIGH COURT