



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-APP-ATL-2019/00003

In the matter between:

**NELAO KASHE**

**APPELLANT**

and

**VETERANS BOARD**

**FIRST RESPONDENT**

**VETERANS APPEAL BOARD**

**SECOND RESPONDENT**

**CHAIRPERSON OF THE VETERANS APPEAL BOARD**

**THIRD RESPONDENT**

**Neutral citation:** *Kashe v Veterans Board* (HC-MD-CIV-APP-ATL-2019/00003)  
[2020] NAHCMD 535 (20 November 2020)

**Coram:** ANGULA DJP

**Heard:** 16 July 2020

**Delivered:** 20 November 2020

**Flynote:** Statutory appeal – Appeal from the Veteran Appeal Board – Condonation application – Notice of appeal – Veterans Act, 2 of 2008 – Section 27(2) (b) – No detailed and accurate explanation for the delay in bringing the condonation application – No prospects of success on appeal – Application for condonation dismissed – Appellant’s conduct not vexatious or frivolous nor amounts to an abuse of court process – Accordingly no order as to costs.

**Summary:** This is an appeal against the decision of the Veterans Appeal Board's decision upholding the decision of the Veterans Board, not to confer a veteran status on the appellant for the reason that she failed to prove that she carried out the activities she claimed consistently and persistently up to the date of independence of Namibia – The appeal has been filed outside the time period prescribed by the Act, it is thus accompanied by an application for condonation for the failure in lodging the appeal timeously.

*Held;* that the appellant failed to discharge the onus on her by failing to furnish a full, detailed and accurate explanation for her failure to file the appeal timeously and without delay.

*Held;* the appeal lacked prospects of success.

*Held;* the appellant failed to prove on a balance of probabilities that she consistently and persistently up to the date of independence engaged in underground activities in furtherance of the liberation struggle.

*Held;* activities that carried out on account of fear or under duress or intermittently on an *ad hoc* basis, did not qualify as carried in furtherance of the liberation struggle.

*Held;* there was no evidence before court that the claimed activities were performed underground.

*Held;* the rationale behind the requirement that the activities must have been carried out persistently and consistently is to distinguish such activities from activities carried out intermittent and/or on humanitarian gestures.

*Held;* that a person who provided food for PLAN combatants, attended to their wounds or retained their weapons for safekeeping, intermittently or on ad hock basis, could not be said to have done so consistently and persistently.

*Held;* there was no evidence that the SWAPO police was an underground movement accordingly the activities that were carried out by the applicant while she was a

member of the Swapo police when she mobilized people, were not carried out underground within the meaning of the Veterans Act.

*Held;* the two requirements for granting condonation for the late filing of an appeal have not been met, accordingly the application for condonation was dismissed and no order as to costs was made.

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### ORDER

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1. The application for condonation is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

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### JUDGMENT

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ANGULA DJP:

#### Introduction

[1] This is an appeal against the decision of the Veterans Appeal Board confirming the decision of the Veteran Board not to confer a war veteran status on the appellant. The appeal is accompanied by an application for condonation for the late filing of the notice of appeal. Both the appeal and the application for condonation are opposed.

[2] The appellant advances grounds 'of facts and law' in her notice of appeal which reads thus -

1. The Presiding Officer erred in law in finding that the appellant did not meet the requirements to be recognized as a veteran in terms of the Act;
2. The Presiding Officer erred in fact in finding that the appellant did not call witnesses to support her version and that the only version before the Appeal Board was that of a single witness who is the appellant herself, despite the fact that appellant provided two written statements made under oath;
3. The Presiding Officer erred in law/and or in fact in finding that the appellant was too young in 1982 such that the claimed activities could only be carried out under or on the instructions of the parents, as she was under the guidance of the parents despite there being no age limitations prescribed in the Act at the time the activities were carried out;
4. The Presiding Officer erred in fact in finding that no PLAN Combatants would have handed their weapons for safe keeping to a 13 year old girl or child;
5. The Presiding Officer erred in fact in finding that a 13 year old child could not provide food to PLAN fighters or any person without the indulgence of the elders. This finding was made on an assumption and not supported by any facts;
6. The Presiding Officer erred in fact in finding that even if appellant's version were to be true, it constituted a once-off activity and that the activity does not correspond to the appellant's age, and further that despite finding that the activities could be true, the chairperson still found that there were no such activities;
7. The Presiding Officer erred in law in finding that the appellant lacks consistency and persistency without substantiating the said finding with any facts.

[3] The appellant was represented by Mr Muhongo assisted by Mr Shimakeleni whilst the respondents were represented by Mr Kashindi. For ease of reading, I will refer to the parties as 'the appellant' and 'the respondents' in this judgment.

#### Brief factual background

[4] The appellant initially applied to the Veteran Board to be conferred a war veteran status. I should interpose to mention that in terms of the Veteran Act, Act No. 8 of 2000 ('the Act'), a person who has been conferred a veteran status is entitled to receive monetary assistance from the Veterans Fund. In any event, the appellant's application was declined on 23 November 2015. She then appealed to the Veteran Appeal Board. The Veteran Appeal Board on 11 March 2018 dismissed her appeal and confirmed the decision of the Veteran Board.

[5] As regards the late filing of her appeal, the appellant claims that she only became aware of the outcome of her appeal during May 2018. Aggrieved by the outcome of her appeal from the Veteran Appeal Board, she approached her legal insurer, LegalWise Insurance Namibia ('LegalWise') on 15 May 2018 to provide legal representation for her appeal in terms of the insurance policy existing between her and LegalWise. The current legal practitioners of record for the appellant were then instructed by LegalWise on 14 August 2018 to act on behalf of the appellant in present appeal.

[6] On 14 November 2018, the appellant filed an appeal against the decision of the Veteran Appeal Board, under a different case number ('the first appeal'). The respondents filed their notice to oppose and answering papers on 7 December 2018 and 24 January 2019, respectively. The appellant then withdrew that appeal on 15 February 2019, without tendering wasted costs.

[7] Between 18 and 19 February 2019 and soon after the withdrawal of the first appeal, the respondents' legal representative engaged with the appellant's legal representative in terms of rule 32(9) in respect of the absence of an offer by the appellant to pay the respondents' wasted costs. It is necessary to mention that, notwithstanding such engagement and the absence of an offer to pay the wasted costs, the appellant filed the current appeal on 20 March 2019.

[8] On 9 May 2019 the appellant set down the condonation application for hearing on the residual court roll for 7 June 2019. The condonation application was set down without it being served on the respondents. According to the respondents' legal practitioner, they only became aware of the application on the day of the hearing, when they perused the court roll for the day. They then appeared before court and pleaded from the Bar that the respondents be afforded an opportunity to oppose the application and to file papers. It so happened that I was presiding over the residual session on that day. I granted the respondents leave to oppose and to file their papers. That is how I ended up being seized with this appeal.

[9] The respondents raised five points *in limine* in their opposing affidavit to the condonation application. These include the issue that the appellant failed to tender wasted costs when she withdrew her first appeal; that the current proceedings are frivolous and an abuse of court process; that the appeal has lapsed; and that the appellant had failed to serve the notice of appeal and the application for condonation on the respondents. I will now turn consider each point.

*First point in limine: Failure to tender wasted costs for the aborted first appeal.*

[10] With this point the respondents allege that by failure or refusing to tender the respondents' wasted costs when the appellant withdrew the first appeal, she has approached the court with dirty hands. For that reason the application for condonation and the appeal must be dismissed with costs.

[11] In my judgment the doctrine of dirty hands does not find application to the facts of the present matter. In *Shaanika & Others v Windhoek City Police & Others*<sup>1</sup>, the Supreme Court cautioned the use of the doctrine of 'dirty hands' to bar litigant's to access courts and points out that the doctrine of 'dirty hands' will only stand where the party raising it puts forth evidence depicting the existence of dishonesty, fraud or *mala fides*. In the present matter there is no such evidence put forward by the respondents.

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<sup>1</sup> *Shaanika & Others v Windhoek City Police & Others* (SA 35/2010) [2013] NASC 9 (15 July 2013).

[12] In my view there is no merit in this point. I say this for the reason that rule 97 of the rules of this court provides that a party who instituted proceedings, withdraws such proceedings without a consent to pay the opposing party's wasted costs, the other party may apply to court on notice to the other party for an order of costs. It is important to note that there is no time limit within which the opposing party may apply for such an order of costs.

[13] It thus follows that the respondents are not without remedy. The issue of wasted costs of the withdrawn appeal, is not before this court. It must be decided by another court under the case number of the aborted first appeal. It is to be noted that the respondents did not apply for the stay on the present appeal pending them instituting proceedings against the appellant in respect of the unpaid wasted costs. That was another option open to the respondents. They failed to take that course. For all those reasons, I hold that the point is unmeritorious and is therefore rejected.

*The application is frivolous and an abuse of court process:*

[14] As regards this point the respondents allege that because the appeal was filed while the appellant knew that it had lapsed, in doing the appellant's conduct is frivolous and amounts to an abuse of court process.

[15] To my mind, the respondents' point in this regard cannot be correct. This is because the framers of the rules of this court, knew from experience that life is full of vagaries in that things do not always happen according to set rules or plans. They foresaw that it would not always be possible for litigants to abide by the time periods prescribed by the rules. Hence, rule 55 was promulgated dealing with the extension of time and condonation in the event of non-compliance with time period prescribed by the rules on good cause shown. It follows therefore, the noting of an appeal by the appellant knowing that it had lapsed, cannot *per se* be an abuse of court process or be said to be frivolous.

[16] In support of the allegation of 'frivolous conduct' the deponent to the respondents' answering affidavit states the following: 'the re-enrolment of the notice of appeal and application for condonation and without tendering wasted costs and in complete ignorance of the pre-emptory provisions of section 41(1) of the Veterans

Act read with regulation 23 is frivolous'. The respondents accordingly submit that on this ground alone the matter should be dismissed with costs.

[17] Section 41(1) of the Veteran Act establishes the Appeal Board. The relevance of this section in the context of the allegation of frivolous conduct is not apparent to me given the fact that the appeal is before this court and not before the Veteran Appeal Board. The reference to that section has also not been explained neither in the answering affidavit nor in counsel's written submissions.

[18] Regulation 23 referred to, deals with an appeal from the Veteran Appeal Board to this court. Similarly the reference to this regulation in the context of the allegations of frivolous conduct has not been explained neither is it apparent to me. To my mind the Regulation, which is perhaps relevant to the respondents' complaint is Regulation 24 of the Regulations Relating to Appeals to Veterans Appeal Board and the High Court<sup>2</sup>. Regulation 24 provides *inter alia* that any court hearing any matter regarding the Veteran Act or the Regulations promulgated thereunder may make an order of costs order against any party that has acted in a 'frivolous or vexatious manner by instituting, proceeding with or defending the appeal'.

[19] As regards the respondents' complaint towards the appellant re-enrolling the appeal without tendering wasted costs in respect of the withdrawn first appeal, I have already earlier in this judgment disposed of that complaint, holding that the respondents have a remedy provided by rule 97; and that in any event the issue of those wasted costs is not before this court.

[20] In respect of the allegation of 'frivolous conduct and an abuse of court process' as pointed out earlier, Regulation 24 vests the court with the power to make an order of costs against a party who is found to have acted frivolously by instituting an appeal. As have been noted, respondents are not only asking that the appellant be ordered to pay costs because the appellant allegedly acted frivolously but they are in addition asking that the appeal be summarily dismissed.

[21] In order for this court to make an order for costs against the appellant in this matter, a finding that the appellant acted frivolously is required.

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<sup>2</sup> Published in GG 4693, GN 45 of 2011, 18 April 2011.



[22] At common law, the court has an inherent right to stop proceedings that are frivolous or that amount to an abuse of court process<sup>3</sup>. The concepts of frivolous, vexatious and what amounts to an abuse of court process have received judicial attention in this jurisdiction. The court in *National Enterprise v Beukes and Others*<sup>4</sup> had an occasion to consider the meaning of frivolous and vexatious. It said the following:

'In its legal sense, "vexatious" means "frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant".

(*Shorter Oxford English Dictionary*). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; "abuse" connotes a misuse, an improper use, a use *mala fide*, a use for an ulterior motive.<sup>5</sup>

[23] It has further been held that whilst a litigant may approach the court with the purest of intentions, the effect of the suit may also be frivolous<sup>6</sup>, in which event, the court's common law power to stop such proceedings may be invoked.

[24] Keeping the foregoing principles in mind, the question that arises is whether the appellant instituted the present proceedings for the sole purpose of annoying the respondents and without sufficient ground or for a purpose that is improper or *mala fide*. If the answer to that question is in the negative, the next question is, whether even if the proceedings were instituted with the purest intentions, is the effect of the present proceedings frivolous?

[25] The respondents assert that it was pointed out to the appellant that her withdrawn appeal had lapsed and that it had no prospects of success however she persisted up to the point where the respondents had to file their answering affidavits and then only did the appellant withdraw the first appeal. In response, the appellant points out that she was advised by her legal practitioner that the withdrawn appeal did not comply with the rules. That was the reason why she withdrew the first appeal.

<sup>3</sup> *In re: Anastasiades* 1955 (2) SA 220 (W) at 224 A.

<sup>4</sup> 2009 (1) NR 82 p 78 F-G.

<sup>5</sup> *National Housing Enterprise v Beukes and Others* 2009 (1) NR 82 (LC).

<sup>6</sup> *In re: Alluvial Creek Ltd* 1929 CPD 532 at 535.

She states further that as a result the present appeal was filed out of time and that it is the reason why it is accompanied by an application for condonation. The appellant points out further the fact that she did not file the appeal within the time stipulated by the rules does not bar her from approaching the court by way of a condonation application.

[26] In my judgment there is nothing on papers before court which indicates that the appellant's conduct in instituting the present appeal was done with the sole purpose of annoying the respondents and without sufficient ground or for a purpose that is improper or *mala fide*. In my view, the explanation given by the appellant for withdrawing the first appeal and instituting the present appeal is reasonable and credible. It would have been irresponsible if not reckless on the part of the appellant if she had forged ahead with a defective appeal. To my mind she did the right thing to withdraw the first appeal on the advice of her legal representative. Nothing appears to have been done with improper motive or to annoy the respondents. I gained a distinct impression that the appellant is desperate and has a genuine intention to have her appeal heard. In addition there is nothing to show that the effect of the present proceedings is frivolous.

[27] The respondents' insistence that the appeal has lapsed and that for that reason the appellant cannot approach this court has no foundation in law. In this connection, I have already referred to rule 55 of this court which provides for a procedure for condonation in the event of non-compliance with time periods stipulated in the rules. In addition at common law and in terms of the Constitution this court has inherent jurisdiction to, if it is so satisfied, on application, grant condonation for non-compliance, 'when principles of justice and fair play demand it to avoid hardship and when the reasons for non-compliance with the time limits have been explained to the satisfaction of the court'.<sup>7</sup> This is so even in the absence of a provision specifically providing for a condonation application.<sup>8</sup>

[28] It thus follows that both the 'frivolous' and 'abuse of court process' points *in limine* have similarly been disposed as unmeritorious.

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<sup>7</sup> A C Cilliers, Loots C and Nel, H C. 2009. *Herbstein and Van Winsen: Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, Vol 2, p 1227.

<sup>8</sup> *Ibid.*

*Appellant set down the condonation application without serving it on the respondents.*

[29] The respondents lament the fact that the condonation application and the notice of appeal were set down without first being served on them. It is not the respondents' case that they have been prejudiced by the non-service of the papers by the appellant on them. They simply complain. Regardless of how the respondents became aware of the matter, they appeared before court and asked for an opportunity to file their notices of opposition and answering papers. The court granted them that opportunity. The purpose of service is for the opposing party to become aware of the matter. That object was met in the present matter.<sup>9</sup> This point is equally dismissed as lacking in merit.

[30] What remains for consideration is the issue of wasted costs of the day. The matter was postponed to allow the respondents to file their notice of opposition and answering affidavit. In my view, given the fact that the respondents were not on record when the matter was postponed for them to file papers, they are not entitled to wasted costs occasioned by that postponement.

[31] My foregoing finding, should however not be construed as absolving the appellant from her non-compliance with the rules of this court. Our courts do not allow or condone the practice of 'trial by ambush', but frown upon such conduct. In fact, the conduct of a litigant who cites a party but fails to serve the papers on that party amounts to first, misleading the court by creating the impression that the party so cited is aware that proceedings have been instituted against that party; and second, compromising the opposing party's fundamental right to fair trial. A party cited to the proceedings has a right to be served and to be timeously informed that litigation has been commenced against her or him in order to afford such party time to prepare her or his defence.

[32] That having been said, as indicated earlier, this court is not in position to sanction the appellant's conduct by way of a costs order, as a sign of its disapproval of her conduct due to the fact that the respondents were not on record at that stage. I next move to consider the point *in limine* relating to undue delay.

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<sup>9</sup> *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at para 21.

### Undue delay and condonation application

[33] The point *in limine* on 'undue delay' will be dealt jointly with the condonation application. In doing so, it is necessary to set out the sequence of events as how the appellant's case evolved from the point the Veteran Appeal Board delivered its judgment dismissing her appeal.

[34] The appellant's application to be conferred a veteran status was rejected by the Veteran Board on 23 November 2015. The appellant then appealed to the Veterans Appeal Board, which is the second respondent in this matter. The appeal was heard by the Veterans Appeal Board on 11 March 2018. It confirms the decision of the Veteran Board and dismissed the appellant's appeal.

[35] In support of the allegation of undue delay, the deponent to the respondents answering affidavit points out that the appellant's notice of appeal was served on them on 8 March 2019, more than 10 months after the appellant became aware of the decision of the Veteran Appeal Board. This is not quite correct because the deponent overlooked dealing with the circumstances around the first notice of appeal which was withdrawn. In view that is not a fair presentation of what really transpired.

[36] The full sequence of events is set out by the appellant. According to the appellant she became aware of the decision of the Veterans Appeal Board sometime during May 2018. Thereafter, she approached the offices of LegalWise Insurance, Namibia (hereafter 'LegalWise') on 15 May 2018 in order to obtain legal representation in terms of an insurance policy taken out with LegalWise for the purpose of litigation. After the internal process at LegalWise, the appellant received a letter of approval for her application from LegalWise on 14 August 2018 appointing the legal practitioners currently on record for the appellant to represent her in the appeal.

[37] The legal practitioner for the appellant then filed the first appeal on 14 November 2018. The respondents filed their opposition on 7 December 2018 and filed an answering affidavit 24 January 2019. The appellant then withdrew the first

appeal on 15 February 2019 as it turned out that it had incorrectly been filed in terms of a wrong rule of this court.

[38] Subsequent thereto and on 8 March 2019 the appellant served the present notice of appeal on the respondents which was uploaded on E-justice on 20 March 2019. On 10 May 2019, the appellant filed the present condonation application.

[39] As regards the delay, the appellant states that the delay in noting the appeal was due to an unfortunate sequence of events. Interpose to say those events have not been specified. The appellant submits however that the respondents have not suffered any prejudice due to the late filing of the appeal.

[40] Regarding the prospects of success, the appellant states that she has a strong case on the merits in that the Appeal Board failed to apply its mind and further failed to interpret the Veteran Act correctly resulting in the Board declining to confer on her a veteran status.

[41] The respondents challenge the condonation application contending that the appeal has lapsed; and that the appeal has no prospect of success.

#### Applicable legal principles to an application for condonation

[42] In determining whether or not to grant condonation, 'It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay . . . that "an application for condonation is not a mere formality" (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply . . . The affidavit accompanying the condonation application must set out a "full, detailed and accurate" explanation for the failure to comply . . .'<sup>10</sup> (Underlined for emphasis).

[43] The appellant's condonation application, fails to explain the reason why there was a delay of about three months after the withdrawal of the first appeal before the appellant filed her condonation application. In my view, her explanation falls short of

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<sup>10</sup> *Petrus v Roman Catholic Archdiocese*, 2011 (2) NR 637 (SC) at 639-640.

a 'full, detailed and accurate' explanation for her delay to re-lodge the present appeal. The period 16 February 2019, the very next day after the first appeal was withdrawn to 9 May 2019 when the condonation application in the present matter was filed, is not explained. Thereafter the appellant only filed the notice of motion and supporting affidavit in respect of this condonation application on 10 May 2019. That is almost three months after the first appeal was withdrawn. This failure in my view is, 'glaring and inexplicable'.<sup>11</sup> There is no explanation tendered for this delay.

[44] If regard is had to the fact that the notice of appeal had already been drawn it should not have taken such a long time to reproduce and serve and file it. The cause of the delay is not explained. It is also not clear who caused the delay. Was it caused by the appellant or by her legal representative? Or was it caused by external factors to which the appellant and her legal practitioner had no control? These questions are relevant because our courts make a difference, up to a certain point, where the delay is for instance caused by the legal practitioner as opposed to delay caused by a client. In that event a court might take the view that the client should not suffer because of the conduct of his or her legal representative. In this connection the Supreme Court said the following in *Jonas v Ongwediva Town Council*<sup>12</sup> at para 23:

'It is settled law that whilst an appellant should not be prejudiced by his or her legal representative is incompetence, there is a degree beyond which a litigant cannot be excused thereby.'

[45] I have therefore arrived at the conclusion that the appellant has failed to discharge the onus on her to satisfy the court that there is sufficient cause to grant condonation. I now turn to consider whether the appeal enjoys any prospect of success.

#### *Proceedings before the Appeal Board*

[46] Before I deal with the proceedings before the Appeal Board, it is necessary to mention that the appeal proceedings in terms of the Act are not strictly speaking confined to the four corners of the record. Section 42(1) of Veteran Act provides that the Appeal Board must *inter alia* take into account the circumstances which were

<sup>11</sup> *Petrus* matter (supra).

<sup>12</sup> (SA 16/2018) [2020] (27 January 2020).

considered in arriving at the taking the decision or performance of the act appealed against; the grounds of appeal; the documentary or oral evidence submitted or given by the person at the request or with the permission of the Appeal Board; and any other information at the disposal of the Appeal Board. This provision must be read together with rule 20 of the Regulations Relating to Appeals to the Veteran Appeal Board and to the High Court. It provides that the Appeal Board 'may hear such evidence as may be necessary for the determination of the appeal and hear or receive oral or written submissions made by the parties to the appeal'. It appears from those provisions that the appeal proceedings before the Appeal Board are therefore, for all practical purposes, a re-hearing. It appears from the record that the appeal was not opposed. Furthermore, only the appellant testified and filed two affidavits deposing to issues in support of her appeal.

[47] The evidence before the Appeal Board was that the appellant was 13 or 14 years old during 1982; that during 1982 she cooked for PLAN combatants and further took their weapons for safe keeping. Furthermore that between the years 1986 – 1987 she continued providing food for the PLAN combatants. She further testified that during 1988 she joined the Namibian Police (a Swapo's police wing) in Windhoek referred to as Okakulumbwati; and that in that capacity she mobilized people to join the Swapo political movement.

[48] The Appeal Board found that the appellant did not call witnesses and for that reason she was considered as a single witness. It further found that the appellant was too young in 1982 and such that the activities she claimed to have carried out did not correspond to her age of 14 years in 1982. The Appeal Board further reasoned that even if it were to be accepted that she carried out the claimed activities during 1982, it would amount to a once-off activity. It reasoned further that as the appellant was too young in 1982, the claimed activities could only be carried out under or on instructions of her parents.

[49] The Appeal Board further found that no PLAN combatants would hand over their weapons for safe keeping to a 13 year old girl or child.

[50] The Appeal Board referred to the evidence tendered by one of the appellants witnesses Jonas Jonas in the form of a sworn declaration where it is stated: 'I know

her very well, she has been assisting PLAN combatant since 1982 until 1984'. The Appeal Board was of the view that even if what is contained in the declaration of Mr Jonas, were to be accepted, it did not fit in with the definition of a veteran as per Veteran Act. The Appeal Board accordingly concluded that 'based on the evidence placed before the Appeal Board, the appellant lacks consistency and persistency'.

#### Submission by counsel for the parties

[51] Mr Muhongo, for the appellant submits in his heads of argument that the appeal enjoys prospects of success. In this connection counsel submits that the Appeal Board was wrong in concluding that the appellant was too young at the time the claimed activities took place and that her actions lacked consistency and persistency.

[52] Mr Kashindi, for the respondents' approach was to defend the findings of the Appeal Board.

#### Applicable legal principles to the appellant's prospects of success

[53] The relevant provisions for the purpose of this question is section 27(2)(b) of the Veteran Act, which provides that -

'A veteran is a person who -

- (a) was a member of the liberation forces, provided the person was above 18 years of age on 21 March 1990;
- (b) Consistently and persistently participated or engaged in any political, diplomatic or under – ground activity in furtherance of the liberation struggle up to the date of independence. . .'

[54] The above section must be read with section 1 of the Act, which amongst other matter, defines who is a 'member of the liberation force'. It defines 'a member of the liberation forces' as:



'Any person who underwent military training and participated consistently and persistently in the war in order to bring about the independence of Namibia: Provided that a person is deemed to have consistently and persistently participated in the war of liberation notwithstanding that he or she was reallocated to other liberation struggle functions or duties.' (Underlined for emphasis)

[55] It was never the appellant's case that she 'was a member of the liberation forces'. She did not claim to have undergone military training neither did she claim to have participated in the war of liberation for the independence of Namibia. It follows thus that section 27(2)(a) is not applicable to the appellant's case.

[56] The appellant's case is predicated on section 27(2)(b). In other words she claims to have consistently and persistently participated in under-ground activities inside Namibia in furtherance of the liberation struggle.<sup>13</sup> I should immediately point out that when she testified she did not say that she was involved in those mentioned activities up to the date of Namibia's independence which is a material requirement for qualification under this sub-section. I will return to this aspect later in this judgment.

[57] One of the appellant's gripes against the board's findings is that the Appeal Board found that she was a single witness. She takes issues with this finding and points out that she had submitted two declarations which according to her were not considered. It would appear to me that this complaint took the Appeal Board's statement about her being a single witness out of context. The statement was made in the context that the appellant did not 'call witnesses to support her version'. In my view, that statement by the Appeal Board cannot be taken to mean anything else other than meaning to call a witness to give oral evidence corroborating the appellant's evidence. It is common cause that the appellant was the only person who gave oral evidence before the Appeal Board.

[58] The foregoing conclusion is borne out by the fact the Appeal Board did consider the non-oral evidence placed before it by the appellant in the form of sworn declarations by witnesses Mr Jonas and Mr Abraham.

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<sup>13</sup> Form VA 1, Part 3 at p 84 of the Record.

[59] As regards the sworn statement by Mr Benjamin Abraham, it is correct that the Appeal Board did not mention it. In this regard there is ample authority for the proposition that the mere fact that a trier of facts did not specifically mention a certain piece of evidence served before him or her, does not necessarily mean that he or she did not consider such evidence.<sup>14</sup>

[60] Quite apart from the fact that the evidence in Mr Abraham's sworn declaration was not mentioned by the Appeal Board in its findings, I find the statement to be problematic to the appellant's case. He declared as follows:

'I [the] above mentioned declare under oath that Kashe Nelao, ID 68090800351, I know her very well. She has been working as Namibia Police since 1987 until Namibia got independence. That is all I declare.'

[61] First, the statement contradicts the appellant's version as to when she started working for the Swapo police wing, called the Namibian Police. The appellant evidence before the Appeal Board was that, during 1987 she was taken by a family member to a place called Onaina. She testified that: 'The following year 1988, I came to Windhoek'. Her evidence was that she joined the Swapo police after she moved to Windhoek in 1988.

[62] Second, the appellant never testified that she worked for the Namibian Police until Namibia got independence in March 1990. Her evidence before the Appeal Board on this point went as follows:

'Mr Salionga: What was the job of the Namibian Police by then? "We were mobilizing people and tell them that we must work hard so that the land can be free that was all.'

The record of her oral evidence ends with the above quoted extract.

[63] What is one to make of Mr Abraham's evidence? That piece of evidence contradicts the appellant's evidence as demonstrated above. The additional problem with the statement is that it is too cryptic. It does not add other information to support why he knows she moved to Windhoek in 1987. It is common logic that where one

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<sup>14</sup> *S v Teek* (SA 12/2017) [2018] NASC (3 December 2018).

statement contradicts another, both statements cannot be correct: one of them must be false. It is likely that Mr Abraham was honestly mistaken as to the year when the appellant moved to Windhoek. If regard to the appellant's narration of the years where she was and what happened in a particular year, her evidence is to be preferred as more probable above that of Mr Abraham. For instance, she recalls that she was taken to Onaina during the year 1987 and that the following year, namely 1988, she moved to Windhoek.

[64] As regards to Mr Abraham's bald statement that the appellant worked for Namibian Police until independence, again he does not say how he knows that given the fact that the appellant herself did not testify to that fact. He does not for instance say they lived in the same neighbourhood or that he knows of a person who was mobilized by the appellant. It is a fact that appellant herself did not testify about that fact. The statement is uncorroborated. Taking all those factors into consideration it makes Mr Abraham's statement unreliable on this point. To my mind the unreliability of that portion of the statement negatively affects its probative value. As a result, it does not prove on a balance of probabilities that the appellant did work for the Namibian police up to the date of independence.

[65] The appellant further took issue with the Appeal Board's finding that the appellant was too young and could therefore not have carried out the claimed activities without the guidance from the parents. It is then argued that there is no age limit prescribed by the Act at the time of carrying out the claimed activities. Mr Muhongo argues the Appeal Board simply made an assumption unsupported by any evidence, as a 13 year old girl is capable of carrying out those activities.

[66] It is correct that the Act does not prescribe an age limit. In my view, the above finding by the Appeal Board is borne out by the evidence and cannot be faulted. The appellant testified that the years 1982 to 1983 at an area called Nengudu she used to be with the combatants. The record reads:<sup>15</sup>

'Mr Nghishililwa: Doing what [with the combatants]? --- Sometimes I used to take food for them when my mother cooked.'

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<sup>15</sup> Record p 101.

[67] In the light of the above quoted piece of the evidence, I do not agree with counsel's submission that the finding that the appellant was too young was based on assumption. In my view the Appeal Board simply carried out an assessment of the evidence before it and in weighing the probabilities, it concluded that it was improbable that the appellant could have carried out the claimed activities without the parents' assistance. The point is a bad one and falls to be rejected.

[68] The next issue raised by the appellant is that the Appeal Board erred in law in finding that the appellant's activities lacked consistency and persistency.

[69] The court in *Josephina Kamati v The Chairperson of the Veteran Board*<sup>16</sup> was faced with facts similar to the facts in the present matter. In the *Kamati* matter, the grounds of appeal were *inter alia* that – the Appeal Board erred (a) when it found that Ms Kamati was acting on the instructions of her parents; (b) when it found that Ms Kamati was only 18 years old at the time of her involvement in the furtherance of the liberation struggle and she was therefore not a veteran; and (c) that she failed to comply with s 27(2)(b) of the Act.

[70] The court found that Ms Kamati's evidence that she cooked for the PLAN fighters; that she was arrested and questioned; that she attended SWAPO meetings between 1982 and 1983; that she treated injuries of PLAN fighters in 1975; and that she was arrested and interrogated in 1976 were not confirmed. The court then interpreted the requirement that the activities must have been consistent and persistent as 'of perpetual nature until the date of independence'. And whilst the court accepted that there were incidence of activities carried out by Ms Kamati, it found that such activities were not of a perpetual nature until the date of independence. The court therefore dismissed the appeal.

[71] I consider the interpretation and the approach by the court in *Kamati* to be sound and will accordingly adopt and apply it in the present matter.

[72] A person who claims recognition for a veteran status based on the grounds that he or she consistently and persistently participated or was engaged in

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<sup>16</sup> *Josephina Kamati (Abner) v The Chairperson of the Veterans Board* (HC-MD-CIV-APP-ATL-2018-00002) [2019] NAHCMD 70 (6 March 2019).

underground activities must prove on a balance of probabilities that such activities were carried out voluntarily, in a determined and unwavering manner; and that the claimed activities must have been carried out while the applicant was operating underground with the aim of furtherance of the liberation struggle. Activities carried out of fear or duress or intermittently, on an *ad hoc* basis, would not, in my view, qualify.

[73] Furthermore the applicant must prove that the claimed activities were carried out while the applicant was operating from 'underground'. The word underground must be given its ordinary grammatical meaning. According to the definitions by major English dictionaries the concept of 'underground' means: clandestine, secret, surreptitious, undercover<sup>17</sup>; 'hidden, concealed, secret; not open to public: movement or activity especially one aiming to subvert an established order or ruling power<sup>18</sup>; secret, hidden: underground activities, a movement dedicated to overthrowing a government or occupation forces'<sup>19</sup>.

[74] What is to be gathered from those definition is that the applicant must demonstrate that such claimed activities carried the element of being secretive and/or clandestine and/or covert and under cover. In addition, the underground activities must have been carried out or performed against the laws of the occupying regime or forces. Furthermore such activities carried with it the risk to liberty, life and limb of the applicant, with the sole aim to subvert the illegal regime.

[75] In my view, the rationale behind the requirement of 'persistently and consistently' is to distinguish such activities from activities carried out intermittently and/or activities of humanitarian gestures. It follows thus that a person who for instance assisted the PLAN combatants by providing them with food or shelter or attended to their wounds on an intermittent basis cannot be said to have done so 'consistently and persistently'. To hold otherwise would undermine the requirement that the activities must have been carried by the applicant while operating underground and at the same time being exposed to the risk and danger lurking underground. It would further blur the difference between activities carried out

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<sup>17</sup> Oxford Dictionary Thesaurus.

<sup>18</sup> Shorter Oxford Dictionary 6<sup>th</sup> Edition.

<sup>19</sup> Collins English Dictionary 6<sup>th</sup> Edition.

underground and activities carried out of fear or sympathy or humanitarian consideration.

[76] In the instant matter the evidence paints a picture of intermittent activities over the years, neither consistent nor persistent. On her own evidence the appellant carried out the activities during 1982, 1983, 1984, 1986, 1987 and 1988. The appellant's evidence that she carried out activities during 1982 to 1984 is corroborated by Mr Jonas' evidence. It is not the appellant's case that she carried out the claimed activities throughout each of those mentioned years.

[77] It is to be noted further that there is no evidence that the appellant carried out any activity during 1985. This militates against the requirement of consistency and persistency. In addition, as pointed out earlier in this judgment, there is no evidence that she carried out the claimed activities until the date of independence. In my judgment this, again, undermines the requirement that the activities must have been carried out 'consistently and persistently'.

[78] As regards the requirement that the activities must have been carried out while the applicant was operating underground, the appellant's alleged that she joined the Swapo police in Windhoek during 1988 and while being a member she was involved in activities of mobilizing people to join the Swapo movement or to work hard. It is not the appellant's case that the Swapo police was an underground movement involved in subversive activities aimed at the overthrowing the then South African occupation regime. It is a well-known historic fact that the Swapo movement was never banned as a political movement in Namibia, unlike the African National Congress and Pan African Congress of South Africa who were banned by the South African authority to carry out political activities in that country.

[79] It follows therefore, in my view that, having been a member of the Swapo police would not qualify the appellant as having operated underground. It is also not the appellant's case that it was prohibited by law to mobilise people to become members of Swapo and therefore it could only be carried out in secret. It follows thus equally that the claimed activities carried out by the appellant when she mobilized people were not carried out 'underground' within the meaning of the Veterans Act.

[80] From the discussion above it is apparent that, I considered the issues relating to the merits and from that discussion it is clear that there are no prospects of success on appeal. For all those reasons and considerations, I am of the considered view that the finding by the Appeal Board that the activities carried out by the appellant lacked consistency and persistency, cannot be faulted.

[81] In summary, I have arrived at the conclusion that the appellant failed to satisfy the court that there is sufficient cause to grant condonation for the non-compliance within the stipulated time period for filing an appeal from the Veteran Appeal Board to this court. In this connection, I found that the appellant's explanation fell short of 'a full, detailed and accurate' explanation for the delay. Furthermore, the appellant has failed to show that there are prospects of success of the appeal if condonation were to be granted.

#### Costs

[82] As indicated earlier, the Act, provides that costs orders should not be made in matters brought in terms of the Act, unless the court finds that a party had acted frivolously or vexatiously or in a manner that amounts to an abuse the court processes.

[83] I have found, when dealing with the points *in limine* raised by the respondents, that the applicant did not act frivolously or vexatious neither did she abused the court process. Accordingly, I do not propose to make an order of costs.

#### Order

[84] In the result, I make the following order:

1. The application for condonation is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

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H Angula  
Deputy-Judge President



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