

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

HC-MD-CIV-APP-ATL-2020/00015

HELMI MURENGA

APPELLANT

v

THE CHAIRPERSON OF THE VETERANS APPEAL BOARD

RESPONDENT

Neutral citation: *Murenga v The Chairperson of the Veterans Appeal Board* (HC-MD-CIV-APP-ATL-2020/00015) [2021] NAHCMD 255 (26 May 2021)

Coram: RAKOW, J

Heard: 23 April 2021

Delivered: 26 May 2021

Flynote: Veterans Act – Registration as a veteran – Requirements of section 27(2) (b) – Appeal from Veteran’s Appeal Board - Court upholding decision by the Veterans Appeal Board –The Veterans Appeal Board’s decision not to register the appellant as a veteran in terms of section 27 was not incorrect.

Summary: The appellant, Ms Murenga, filed an appeal against the decision of the decision of the Veterans Appeal Board confirming the decision of the Veteran Board not to confer a war veteran status on the appellant and not to register her as a veteran in terms of the Veterans Act 2 of 2008. - The court was tasked to consider the grounds of appeal to determine whether or not the appellant met the qualifying criteria as contemplated in section 27, and whether or not the appellant carried out

only minimum activities in the furtherance of the liberation struggle, and whether or not the respondent failed to apply the requirements set out in section 27(2)(b) of the Act, adequately or at all.

Held – The appellant failed to satisfy court that she 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.

Held further - The decision of the appeal board was in accordance with the requirements of section 27(2)(b).

ORDER

1. The condonation application by the respondents are hereby granted.
 2. The appeal against the decision by the Veterans Appeal Board is dismissed.
 3. No order is made to costs.
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APPEAL JUDGMENT

RAKOW, J

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 to the Veterans Appeal Board was rejected on the 27 February 2020 for registration as a veteran in terms of section 28(4) of the Veterans Act, 2008 (Act No. 2 of 2008) as amended. In this current matter, an application for condonation was filed by the respondents for the late filing of their heads of arguments which was not opposed and therefore granted.

[2] The central issues as argued on behalf of the appellant that stand to be determined by the court are firstly, whether or not the appellant met the qualifying criteria as contemplated in section 27, and whether or not the appellant carried out only minimum activities in the furtherance of the liberation struggle and whether or

not the respondent failed to apply the requirements set out in section 27(2)(b) of the Act, adequately or at all.

[3] It was further submitted that the respondent did not apply the applicable law properly in that it took into account irrelevant considerations, such as that appellant was a minor at the relevant time and as a consequence acted on the instructions of her parents; and failed to take into consideration important facts placed before the respondent, especially because these facts prove the perpetual nature of her involvement, i.e., that she has consistently and persistently participated or engaged in political and under-ground activities in the furtherance of the liberation struggle to the date of independence, and that she consequently satisfied the requirements of continuous participation.

Point in limine

[4] On behalf of the respondents a point *in limine* was raised that the appeal to this court was filed out of time. In terms of section 43 of the Veterans Act, a person aggrieved by a decision of the Appeal Board may in the prescribed form and manner appeal against that decision to the High Court. The prescribed form and manner are regulated by the Regulations relating to Registration and Benefits of Veterans and Dependents of Veterans Government Notice 168 of 2008. In terms of Regulation 31 of the Regulations regulating appeal to this Court, an appeal in terms of section 43 of the Act must be noted within 30 days of the making of the decision appealed against. It was argued that the appeal was only filed on 31 August 2020 which is more than 7 months after the date that the Appeal Board gave their decision.

[5] According to the date stamp on the Appeal Board Decision, the decision was dated 28 July 2020, although the matter was heard on 27 February 2020. The notice of appeal is dated 31 August 2020 but filed on 2 September 2020. The interpretation of days, are court days as per the arrangement as set out in the High Court rules read with the Regulations Relating to Registration and Benefits of Veterans and Dependents of Veterans made in terms of the Veterans Act¹, which stipulates that appeals emanating from the Lower Courts must be filed within 30 days, which days are defined to mean court days.

¹ Act No. 2 OF 2008. Regulation 31.

Background

[4] Ms Murenga sets out her experience in quite some detail as part of her heads of argument as follows:

YEAR	AGE	TIMELINE OF ACTIVITIES CARRIED OUT
1979	12	Started cooking for PLAN fighter at her mother's house in Etoto, on instructions on her parents, and gave them directions. She was at times sent to buy them items such as soap and Vaseline. PLAN fighters included: Katangala, Sindano, Galikutuke, Mukwanoka, Nehale and Ndokosho. <i>*Review Record pg. 20</i>

When PLAN fighters travelled through their village at night, she would wake up early the next morning and walk with a herd of goats to erase their footprints so that the enemy would not make out that the PLAN fighters had passed through their village. **Review Record pg. 20*

1981	14	PLAN fighters went to their house and asked them to vacate leave the house as the SWADF soldiers were camping a distance away from their house and they (the PLAN fighters) intended to attack them from inside the homestead. When the shootings commenced, she and her family ran into the fields and spent the night there. <i>*Review Record pg. 20</i>
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A few days later, when the PLAN fighters had left, the SWADF soldiers went to her village and rounded up all the villagers. They were beaten and threatened with gun shots over their heads as the SWADF soldiers wanted answers as to the whereabouts of the PLAN fighters. They were taken to a school and locked up in a classroom for an entire day, where they were crowded and left without any food or water. Some of the villagers relieved themselves inside that classroom. When they

were released from the classroom, some of the villagers were taken away to be imprisoned. Among those imprisoned was Mayulu Kakondo, Tjwaili, Metatu Munekamba and Jeremiah Tjilumbu. **Review Record pg. 20*

1982 15 PLAN combatants approached them and informed them the mission and vision of SWAPO and why they were there. Helmi continued to cook and provide water for them. She prepared mahangu (maize meal) for combatants on instructions from her parents. **Review Record pg. 4*

1983 16 Provided information to the elders in the community about informants and SA army soldiers spotted in the area, especially in Etoto. **Review Record pg. 11*

A SWADF soldier sneaked into their village and was secretly being accommodated by a neighbor. When she and Rebekka Kamati heard about this, they reported it to the PLAN fighters who afterwards went to that particular neighbor's house and took the soldier. **Review Record pg. 20*

Weeks later, the South Western African Defense Force (SWADF) soldiers went to their village seeking information about their fellow missing soldier. When they were not given the answers they wanted, Helmi and other villagers were beaten and had their properties and ploughing fields destroyed. **Review Record pg. 20*

1985 18 Sent by PLAN combatants to buy drinks at the nearby cucashop (kiosk). **Review Record pg. 4*

Was detained at Etoto Primary School in August. She, among other, was suspected of having been linked to the

death of a Koevoet soldier who came to Etoto in Kunene. While detained, they were interrogated and beaten.

**Review Record pg. 13*

1987 20 PLAN fighters and the enemy fought at Kombungu, after the exchange of gun powder the enemy drove past the village borehole and dropped off three naked bodies of PLAN soldiers. They were commanded to eat the deceased flesh. They took the lifeless bodies of the PLAN soldiers and buried them. When the enemy came back, they were not happy about what they have done and were consequently beaten. **Review Record pg. 19*

Moved to Windhoek and joined SWAPO party as the PLAN fighters were making their way back into the country. **Review Record pg19 1989 22* UNTAG arrived in Namibia. They were attacked by DTA supporters at a SWAPO rally which was held by Jerry Ekandjo and Chief Ankama at A.Shipena Secondary School. **Review of Record pg. 19*

[5] After hearing her, the Veterans Appeal Board found that she does not meet the legal criteria as per the definition of a veteran in section 1 of the Veterans Act 2 of 2008 and therefore did not approve her registration as a veteran under section 28(4). They endorsed the previous finding by the Veterans Board that she was a minor and no further activities were carried out after 1986. The Veterans Appeal Board further observed that the Ms Murenga had minimum activities relating to the liberation struggle.² After receiving their decision, the appellant filed her appeal against the said decision to this court.

[6] Further points *in limine* related to the undue delay in noting the appeal, without the necessary condonation application, which for the reasons as set out above is found without substance and a further point of non-joinder in that the argument is that the citation should have included the Veterans Appeal Board and not the Chairperson of the Veterans Appeal Board only. The court however takes no

² See appeal record page 24 par 5.

issue with the citation of the parties, as it is noted in other similar matters that it is the Chairperson of the Veterans Appeal Board who is usually sited and who also takes on the responsibility on behalf of the Board. The fourth point in limine relates to the introduction of new issues. The respondents argue that the timeline and the summary of underground activities of the appellant are new issues. The court however rules that these documents are a summary of the record before court and supported by citations from the record and therefore no new evidence.

Legal considerations and arguments

[7] In order to be recognized and registered as a veteran one needs to meet the requirements set out in section 27. Section 27(2) of the Veterans Act, 2 of 2008 enacts that a 'veteran' is any person who-

- ' (a) was a member of the liberation forces;
- (b) consistently and persistently participated or engaged in any political, diplomatic or under-ground activity in furtherance of the liberation struggle; or
- (c) owing to his or her participation in the liberation struggle was convicted, whether in Namibia or elsewhere, of any offence closely connected to the struggle and sentenced to imprisonment; But does not include a person who during the war deserted the liberation struggle unless that person subsequently rejoined the struggle;....'

subsection 27(3):

- (a) Persons who were captured, detained or held by the colonial forces before and after the Cassinga Massacre of 1978, provided the persons continued with the liberation struggle activities after being released....

[8] The definition of 'liberation struggle' is given as follows -

'(it) means the political, diplomatic, military or under-ground struggle waged against colonialism and apartheid which struggle was waged in Namibia and other countries and resulted in the attainment of the independence of Namibia on 21 March 1990;...'

[9] In *Leonard v Veterans Appeal Board*³ Parker AJ said the following regarding the meaning of consistently:

³ *Leonard v Veterans Appeal Board* (HC-MD-CIV-APP-ATL-2020/00010) [2020] NAHCMD 488 (26 October 2020).

‘ The adverb ‘consistently’ connotes a happening in the same way and continuing for a period of time; and the adverb ‘persistently’ connotes a determination to do something despite difficulties and continuing for a long period. (See the Concise Oxford English Dictionary, 11th ed.)’

[10] In *Kamati v The Chairperson of the Veterans Board*⁴ the issue of consistent participation was also addressed:

‘The question arises as to the meaning of the words consistently and persistently that are used in section 27(2)(b) of the Act to describe the extent of engagement or participation in the liberation struggle. According to the Concise Oxford English Dictionary the word “consistent” means “acting or done in the same way over time...” In harmony with that is the meaning ascribed to the word “persistent” as “lasting for a long time...” in the Cambridge Advanced Learners Dictionary. In addition, the Legislature included a phrase ‘up until the date of independence’ to further qualify an applicant’s participation and engagement in activities in the furtherance of the liberation struggle.’

[11] It was argued on behalf of Ms Murenga that because she was from a remote village, she could only engage in struggle activities if and when they came to her village, therefore as the opportunity arose and as such could not consistently participate in the struggle, but could only do so at the times she did.

[12] The argument was that Ms Murenga was entitled to be treated fairly in terms of article 18 of the Namibian Constitution which reads as follows:

‘ Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.’

[13] Counsel for Ms Murenga further quoted O’Reagan, AJA from the matter of *Trusco Ltd t/a Legal Shield Namibia and Another v Deeds registries Regulation Board and others*⁵ with regard as to what will constitute reasonable administrative conduct:

⁴ *Kamati v The Chairperson of the Veterans Board* (HC-MD-CIV-APP-ATL-2018/00002) [2019] NAHCMD 70 (6 March 2018).

⁵ *Trustco Insurance T/A Legal Shield Namibia And Another V Deed Registries Regulation Board And Others* [2011] NASC 10;SA 14/2010 (15 July 2011).

'What will constitute reasonable administrative conduct for the purposes of Article 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will be often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

[14] In this instance the court will have to determine whether, with the information available, the Veterans Appeal Board took a decision within the ambit of what is legally required from them, therefore within the ambit of the Veterans Act, 2 of 2008. The issue therefore lies in the interpretation of 'consistently and persistently participated or engaged in any political, diplomatic or under-ground activities in furtherance of the liberation struggle', as in Ms Murenga's case it is not alleged that she was a member of the liberation forces nor convicted of an offence related to the liberation struggle, or for that matter captured, detained or held by the colonial forces.

[15] In *Kamati v The Chairperson of the Veterans Board*⁶Claasen J said the following regarding the participation in the liberation struggle:

'...the level of participation that the Legislature contemplated in terms of s 27(2)(b) of the Act is that of perpetual nature until the date of independence.

[26] On the application of the requirements to the facts, the question is whether Mrs Kamati's participation was sufficient to satisfy the requirement of continuous participation. Although, the appellant's evidence contains incidents of engagement, it did not persist until the year that Namibia attained independence. Her testimony referred to relevant activities that occurred in certain years such as 1975, 1976, 1977 but it leaves a gap in respect of the remaining years until 1990. There is no ambiguity as to the meaning of up until independence and her evidence does not sustain a finding favourable in this respect.'

⁶ Supra.

[16] In *Kashe v Veterans Board*⁷ the test is set out with regards to what a person must meet to be able to claim that he or she 'consistently and persistently participated' in the liberation struggle. Angula DJP said the following:

[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 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', 'hidden, concealed, secret; not open to public: movement or activity especially one aiming to subvert an established order or ruling power; secret, hidden: underground activities, a movement dedicated to overthrowing a government or occupation forces.

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

⁷ *Kashe v Veterans Board* (HC-MD-CIV-APP-ATL-2019/00003) [2020] NAHCMD 535 (20 November 2020).

[17] It can however not be said that the incidents as listed by the applicant Ms Murenga pass the test as set out in *Kashe v Veterans Board*⁸ and as such her appeal must be dismissed.

[18] I therefore order:

4. The condonation application by the respondents is hereby granted.
5. The appeal against the decision by the Veterans Appeal Board is dismissed.
6. No order is made to costs.

E RAKOW
Judge

⁸ Supra.

APPEARANCES

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