IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 424/98

In the matter between:

WILLEM JOHANNES JANSE VAN RENSBURG Appellant

and

THE MINISTER OF DEFENCE Respondent

CORAM : NIENABER, HARMS, PLEWMAN JJA, MELUNSKY, FARLAM AJJA
HEARD : 14 MARCH 2000

DELIVERED : 31 MARCH 2000

JUDGMENT

DEFENCE ACT REGULATIONS - INTERPRETATION - DIFFERENCES BETWEEN ENGLISH AND AFRIKAANS TEXTS - APPELLANT ATTEMPTING TO REJECT ONE CONDITION OF HIS TRANSFER WHILE ACCEPTING OTHERS.

MELUNSKY AJA

MELUNSKY AJA:

[1] This appeal is concerned with the position of the appellant on the seniority roll (ansiënniteitslys) of the South African National Defence Force ("the SANDF"). The appellant started his military career in 1986 as a national serviceman. At the beginning of 1988, and after the completion of his national service, he joined the Permanent Force in the Corps of the Military Police with the rank of lieutenant. On 1 January 1991 he was promoted to the rank of captain.

[2] After obtaining the degree of B Juris at the end of 1992, the appellant applied to be transferred to the Professional Officers' Corps ("the POC") as a military law officer. In anticipation of his transfer he signed a written declaration at the request of the SANDF on 11 December 1992 in which he stated that he was completely conversant with the terms relating to his transfer contained in the declaration and that he accepted them. The only term that has relevance for the purposes of this

appeal is (a) which is an acknowledgement that

> "[m]y senioriteit in die nuwe beroepsklas geld van die dag waarop ek oorgeskakel word en dat my militêre en funksionele bevordering kan daardeur vertraag word."

[3] On 8 February 1993 the appellant was informed in writing, under the hand of the Chief of the Army (Personnel Utilisation), that approval for his transfer from the Military Police Corps to the POC as a military law officer had been granted with effect from 1 January 1993 subject to certain conditions, one of which was

> "die behou[d] van rang en salaris en verlies van ansiënniteit."

On the same day the appellant in writing accepted the conditions. To all intents and purposes, therefore, he was appointed a military law officer with the rank of captain at his current salary with effect from 1 January 1993 but with a loss of seniority.

[4] It is necessary to detail what the loss of seniority entails in this case. According to the SANDF it means that on his transfer the appellant was to be regarded as junior to a captain D F Britz, who was then the most junior officer in

the POC. Britz had been promoted to the rank of captain on 1 January 1993. Although the appellant had attained that rank two years earlier, his seniority date, too, was deemed to be 1 January 1993 and he would rank immediately below Britz on the seniority roll. It should be noted that an officer's promotional prospects and remuneration depend on his position on this roll. If the appellant had retained the seniority which he had earned in the Military Police, he would have been due for promotion to the rank of major on 1 January 1994 and to the rank of lieutenant colonel on 1 January 1997, whereas, having regard to the loss of seniority, the dates for promotion were 1 January 1996 and 1 January 1999 respectively. It is hardly necessary to mention that the holding back of promotion did adversely affect the appellant's salary.

[5] On 6 February 1996 it came to the appellant's notice that the respondent, the Minister of Defence ("the Minister"), had not approved, or even considered, his transfer to the POC. He made various representations to superior officers in which

he contended, for reasons that will become apparent later, that only the Minister could require him to lose his seniority. On 8 October 1996, and after he had been promoted to the rank of major, he wrote a letter to the officer commanding his division in which he denied that he had "forfeited" his seniority. He said in this letter:

> "It is my submission that both the General Regulations as well as the Personnel Administration Standard (PAS) must be used to enable the Minister to exercise his discretion."

The appellant was invited to make further representations which he did by letter dated 11 December 1996 in which he wrote, *inter alia*:

> "In the light of General Regulations (GR) Chapter 3 par 11.5 it is absolutely vital for the Minister to consider an officer's age, military and educational qualifications and experience AND as a condition for such transfer or reclassification, before such officer can be reclassified in his rank."

[6] As a result of the appellant's representations the matter was eventually referred to the Minister. On 17 January 1997 the Chief of the SANDF advised the

Minister that, in his view, the appellant's "reclassification was handled correctly". He made certain recommendations which the Minister approved on 26 August 1997. These were that the appellant be "reclassified to military legal officer with entrance from 1 January 1993"; that he retain his rank and salary "as on 1 January 1993"; and that he loses his seniority date of 1 January 1991 with his new seniority date being 1 January 1993. The Minister's decision was conveyed to the appellant before he instituted legal proceedings.

[7] The appellant was of the view that the SANDF had, in effect, completely ignored his five years' service in the Military Police. Aggrieved at this perceived injustice and at the loss of his seniority, he instituted motion proceedings in the Transvaal Provincial Division. The matter came before Spoelstra J who dismissed the application but made no order as to costs. This is an appeal, with the leave of the court *a quo*, against the dismissal of the application.

[8] Before coming to the main issues on appeal, two contentions raised by the

appellant in his affidavits can be disposed of briefly. The first is his averment that after the transfer to the POC he retained the right to be promoted to major during 1994 and that the loss of seniority meant only that he was to be regarded as the most junior captain due for promotion during that year. According to this argument he should have been promoted to the rank of major on 1 August 1994 and to lieutenant colonel three years later. Secondly, he repeatedly contended that his five years' service in the Military Police had been completely ignored by the SANDF. Counsel for the appellant, quite correctly, did not persist in these contentions. While he strenuously disputed that the respondent was entitled to require the appellant to take a lower position on the seniority roll, he accepted the SANDF's interpretation of how the loss of seniority was to be determined.

[9] The outcome of the appeal depends largely on the construction and application of Chapter III of the General Regulations ("the regulations") made in terms of s 87(1) of the Defence Act, 44 of 1957 and published on 10 December

1971. The title of Chapter III is "Officers (including Female Officers and Nursing Officers) and Candidate Officers" and, according to the sub-heading, the Chapter is concerned with "Ranks, Precedence, Appointments, Promotions, Termination of Service and Reserve Liabilities". The arguments submitted on the appellant's behalf were based on regulation 11 and more particularly regulations 11(1) and (5).

Regulation 11(1) reads:

> "Except as otherwise provided in this regulation, the seniority of any officer (including an officer on whom temporary commissioned rank has been conferred in terms of section 83 of the Act) in any substantive or temporary rank shall, in relation to other officers of the same or equivalent substantive or temporary rank, be determined by the date of his appointment in or promotion to such substantive or temporary rank: Provided that any officer holding substantive rank shall be senior to all officers holding temporary rank of the same or equivalent grade."

There are significant differences between the English and Afrikaans versions of regulation 11(5). The former provides:

> "Any officer transferred or reclassified in the exigencies of the service,

> but not at the request of the officer concerned, from any branch, arm of the Force or corps, shall not as a result thereof forfeit his seniority: Provided that if any officer serving in a professional capacity applies for reclassification for service in any capacity other than a professional capacity, the Minister may, with due regard to such officer's age, military and educational qualifications and experience and as a condition of such transfer or reclassification, require that officer to accept a lower position on the seniority roll."

The Afrikaans text reads as follows:

> "'n Offisier wat weens diensvereistes, maar nie op versoek van die betrokke offisier nie, van enige diensvertakking, weermagsdeel of korps na 'n ander diensvertakking, weermagsdeel of korps oorgeplaas of herklassifiseer word, verbeur nie sy ansiënniteit as gevolg daarvan nie: Met dien verstande dat indien 'n offisier aansoek doen om sodanige oorplasing of herklassifikasie of as 'n offisier, wat in 'n professionele hoedanigheid dien, aansoek doen om herklassifikasie vir diens in 'n ander hoedanigheid as 'n professionele hoedanigheid, die Minister, met behoorlike inagneming van sodanige offisier se ouderdom, militêre en onderwyskwalifikasies en ondervinding en as 'n voorwaarde van sodanige oorplasing of herklassifikasie, van daardie offisier kan vereis dat hy 'n laer plek op die ansiënniteitslys aanvaar."

[10] The differences between the two texts are discussed in par 12 below. The language of both texts gives rise to difficulties in interpretation. In particular it is

not altogether clear what is meant by the words “transfer” and “reclassification”. The former seems to apply to a movement from one branch, arm or corps to another, while “reclassification” may denote vertical movement or change of function within a branch, arm or corps. In the main provision of both texts and in the first part of the Afrikaans version of the proviso, the words appear to be used interchangeably. The English version of the proviso contains an internal contradiction in that initially it deals with a reclassification only but subsequently refers to “such transfer or reclassification”. The second part of the Afrikaans version of the proviso may be tautologous, if, as appears to be the case, the first part covers all transfers and reclassifications at the request of an officer. Fortunately it is not necessary to resolve all these difficulties as the appellant's circumstances do not fall within the English text or the second part of the Afrikaans text of the proviso.

[11] A proviso is usually an exception or qualification to the contents of the

preceding enactment. Its effect is

> "to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

(*Craies on Statute Law*, 7th ed, at 218; *South African Textile and Allied Workers' Union and Others v Skipper International (Pty) Ltd* 1990 (4) SA 842 (A) at 847A-D; *Land- en Landboubank van Suid-Afrika v Rousseau NO* 1993 (1) SA 513 (A) at 517B-D.) It does not follow, however, that a proviso always consists of a limitation on the enactment to which it is attached. It may, in substance, be a fresh enactment which adds to and does not merely qualify that which goes before it. (See *S v Rosenthal* 1980 (1) SA 65 (A) at 81E-H; *Halsbury's Laws of England*, 4th ed Reissue, Vol 44 (1) par 1400.)

[12] The effect of the proviso to regulation 11(5), according to both texts, is not to provide exceptions or qualifications to the rights of an officer who is transferred

or reclassified "in the exigencies of the service". The proviso is, in truth, an enacting provision which deals with the position of an officer who himself seeks to be reclassified or transferred. The English version thereof covers one case only - that of an officer serving in a professional capacity who applies for a reclassification in a non-professional capacity, a circumstance which is also dealt with in the second part of the Afrikaans text. The first part of the Afrikaans text, however, goes much further: it deals with the position of any officer who applies to be transferred or reclassified from any branch, arm or corps to another. (The English text does not expressly provide for a transfer *to* some other branch, arm or corps, but a provision to this effect is to be implied.)

[13] It is of crucial importance to determine whether preference should be given to the English or the Afrikaans texts of the proviso. The English version does not cover the transfer of the appellant from the Military Police to the POC, nor does it provide for the Minister to require him to accept a lower position on the seniority

roll as a result of such transfer. The Afrikaans text, if applicable, clearly covers the case of the appellant and it authorises the Minister to require the appellant to accept a lower position on the seniority roll as a condition of his transfer or reclassification. In the court *a quo* Spoelstra J held that the English version was to prevail. He based his conclusion on the following observations of Van den Heever, JA in *New Union Goldfields Ltd v Commissioner for Inland Revenue* 1950 (3) SA 392 (A) at 406G-H:

> "... when a Legislature speaks in two languages in the same breath, it seems to me that that which is common to both versions must be regarded as Parliament's true intention. The surplus on one side must be regarded as due to incautious expression."

On the basis of the English text, which makes no provision for the appellant's circumstances, Spoelstra J held:

> "Daar is nie aangetoon dat die voorwaardes wat vir die applikant se herklassifikasie gestel is en wat hy aanvaar het, nie 'n geldige en afdwingbare ooreenkoms daar gestel het nie."

For the purposes of this appeal, however, it is not necessary to decide whether an officer may conclude a valid and enforceable agreement relating to his seniority where the circumstances are not covered by the regulations. In this court both counsel - the respondent's counsel after some equivocation - submitted that the Afrikaans version should prevail. For reasons which follow, I agree with this submission.

[14] In *New Union Goldfields* Van den Heever JA was concerned with the interpretation of an Act of Parliament in the light of s 67 of the South Africa Act, 1909. Section 67 provided, *inter alia*, that the signed text should prevail in the case of conflict between the English and Afrikaans version. (Similar provisions were contained in s 65 of the Republic of South Africa Constitution Act, 32 of 1961 (subsequently renamed) and s 35 of the Republic of South Africa Constitution Act, 110 of 1983.) The learned judge's views, however, were obiter and were expressed in the course of a dissenting judgment. In *R v Silinga* 1957 (3) SA 354

(A) at 358H-359D Schreiner JA (who delivered the majority judgment in *New Union Goldfields)* made the following observations:

> "As was remarked in the majority judgment in the *New Union Goldfields* case, at p. 399, the question of the operation of secs. 67 and 91 of the South Africa Act is interesting and important; I should add that, in my view, it is also a difficult question upon which the last word has not been spoken. For instance, what one might term the highest common factor of the texts, the more limited meaning as opposed to the wider meaning, does not meet the difficulty that arises when the difference cannot be described in terms of width or narrowness. Nor does it, I think, take account of important elements in interpretation to which effect should if possible be given, such as whether the language to be interpreted appears in a provision imposing a penalty or in one granting a power or an exemption. Where there is no provision like secs. 67 and 91, as in the case of regulations, the Court can use both texts freely to discover the intention to be attributed to the draughtsman (cf. *Lekhari v Johannesburg City Council*, 1956 (1) S.A. 552 (A.D.), *per* CENTLIVRES, C.J. at p.557). But although in such a case the highest common factor notion may sometimes be important, the application of a wider or a narrower meaning may depend on whether the provision is penal or not (*Rex v. Alberts*, 1942 A.D. 135 at p.140). In cases falling under sec. 67 or sec. 91 a rule that, when one text admits of two meanings and the other of only one of those two, the meaning common to both must be adopted might in a particular case produce the result that effect is

> given to the meaning of the signed text which is less proper, according to ordinary principles of interpretation, to the exclusion of the more proper. These and similar considerations seem to justify a doubt whether secs. 67 and 91 do not in their concluding sentences give preference to the signed text whenever there might be a different result according as the one text or the other is followed."

(See also *R v Vilbro and Another* 1957 (3) SA 223 (A) at 231 *in fin* - 232A and *Peter v Peter and Others* 1959 (2) SA 347 (A) at 350E-H.)

[15] The learned judge *a quo* seems to have assumed that the highest common factor approach should be applied without exception wherever the language of one text of a statute or regulation was wider than that of the other. That approach has indeed been applied in this Court and in the Provincial Divisions in cases in which its application was regarded as appropriate, for instance, to give the benefit to an accused in a penal statute (*S v Makunga and Others* 1977 (1) SA 685 (A) at 691 *in fin* - 692C), to protect an accused against "grave prejudice" or where the wider meaning would lead to an anomaly (*S v Moroney* 1978 (4) SA 389 (A) at 408H-

409C). However, as Schreiner JA indicated in *R v Silinga,* it is not a rule of universal application. In an article entitled "Statutory Bilingualism as an Aid to Construction in South Africa" in 107 (1990) *SALJ,* Devenish wrote the following at 448:

> "The highest-common-factor methodology may have to be departed from in order to give expression to the true intention of the legislature. That intention may be inferred from a process of contextual interpretation involving the statute as a whole and its internal anatomy, in a way that makes it clear that the wider meaning rather than the highest common factor must be applied."

(See, also, Devenish: *Interpretation of Statutes* 151.)

[16] Although the provisions of s 67 of South Africa Act and its successors have no application to matters concerning the construction of regulations, the highest common factor approach has often been adopted, particularly in relation to the interpretation of regulations which contain a penal provision. Thus, in *Rex v Alberts* 1942 AD 135, De Wet CJ said at 140:

> "In dealing with these differences between the two versions it must be borne in mind that the provisions of secs. 67 and 91 of the South Africa Act do not apply to Regulations promulgated in the *Gazette*. The Regulations we are dealing with were presumably approved by the Executive Council before the Proclamation promulgating them was issued by the Governor-General. It seems to me to be irrelevant to inquire whether the English or Afrikaans version of the Proclamation was signed by the Governor-General: indeed it is probable that he signed both versions. The Regulations have been duly promulgated in both official languages and both versions have the force of law. They are of a penal nature and a citizen is entitled to consult either version in order to ascertain what his duties and obligations are. That being so, it seems to me it is the duty of the Court, if possible, to adopt an interpretation which both versions are capable of. In the present case we have to deal with penal provisions, the English version of which is capable of bearing a wide meaning while the Afrikaans version is only capable of a restricted meaning. Under those circumstances I think we must adopt the restricted meaning of the Afrikaans version."

[17] There is, however, no rule of construction that is to be applied in every case where there are differences between the English and Afrikaans texts of a regulation. In *Du Plessis and Others v Southern Zululand Rural Licensing Board and Another* 1964 (4) SA 168 (D), Henning J approached the matter in the following

way at 172H-173A:

> "Regulations are not required to be signed by the person making them, and even where one text has been signed it would not thereby acquire greater force than the other. In the case of a difference in wording regard may be had to both versions to ascertain the true intention of the lawgiver, and the interpretation which accords with that intention will prevail. Steyn *Uitleg van Wette*, 3rd ed. p. 136. Omissions in one version may be remedied by reference to the other version. *R v Goldberg*, 1959 (3) S.A. 429 (T) at p. 439."

To that may be added the principle that a court should, where possible, adopt an interpretation of which both versions are capable. If this is not possible, regard may be had to other principles, for example the preference of the text that is more favourable to the person affected (cf. *Bolnik v Chairman of the Board appointed by the SA Council of Architects* 1982 (2) SA 397 (C) at 401D-E).

[18] A court fulfills its function by attempting to give effect to the intention of the lawgiver. If the highest common factor approach is applied mechanically it may result in a construction which is purely arbitrary and which could not have been

intended. Save, perhaps, where penal provisions are concerned, this approach should not be adopted as a rule of first resort. All other methods of interpretation should be considered with a view to arriving at the intention of the legislator. I leave out of consideration the possibility that the two versions may be so irreconcilable that a regulation may be held to be a nullity (cf *Kock v Scottburgh Town Board* 1957 (1) SA 213 (D) at 215C).

[19] It is in the light of the aforegoing principles that I turn again to consider the provisions of regulation 11. It is reasonable to assume that the regulation is intended to be exhaustive of the subject with which it deals. This follows from the provision in regulation 11(1) that "except as otherwise provided in this regulation" the seniority of an officer is to be determined by the date of his appointment or promotion. The first part of regulation 11(5) deals with the retention of seniority in all instances of transfer or reclassification of officers in the exigencies of the service and not on the officer's own application. The proviso deals with the

converse case: where seniority may be forfeited because transfer or reclassification occurs on the application of the officer concerned. The English version of the proviso, as I have mentioned earlier, makes provision for one such eventuality only and one which, judging from the examples furnished by counsel, is likely to occur only infrequently, while the Afrikaans text is of general application and conforms to the scheme of the regulation. What is more, the English text deals with reclassification only and not transfer, while the later phrase "*such transfer or* reclassification" appears to be explicable only on the grounds of a material omission from that version. In my view, therefore, the Afrikaans version reflects the intention of the legislator and there is no reason why the restricted meaning of the English version should prevail.

[20] In the amended notice of motion the appellant claimed the following relief in addition to costs (I omit the prayers that were not persisted in):

"2. Dat 'n bevel verleen word wat verklaar dat die voorwaarde soos

gestel in die seinberig gedateer 8 Februarie 1993 ingevolge waarvan daar deur die Hoof van Leer van die Appellant vereis is om afstand te doen van sy ansiënniteit, *ultra vires* en ongeldig is;

3. Dat die Respondent gelas word om die Appellant in sy ansiënniteit met effek van 1 Januarie 1993 te herstel ooreenkomstig die toepaslike voorskrifte van Regulasie 10 en Regulasie 11 van die Algemene Regulasies uitgevaardig in terme van Artikel 87 van die Verdedigingswet, No. 44 van 1957;
4. Dat die Respondent gelas word om die datum van die Appellant se bevordering tot die rang van Majoor reg te stel na 1 Januarie 1994 en die datum van sy bevordering na die rang van Luitenant-Kolonel reg te stel na 1 Januarie 1997."

It is clear from the prayers and from the contents of his affidavit and the submissions of his counsel, that the appellant wishes to retain his position as a military law officer in the POC. His only complaint is against the requirement that he accepts a lower position on the seniority roll, a condition which, it was submitted, was invalidly imposed. According to counsel's argument the only functionary who could require him to accept a lower position on the seniority roll was the Minister. Consequently the condition to this effect which was presented

by the Chief of the Army on 8 February 1993 was *ultra vires* and of no force and effect. That the Minister subsequently imposed the same condition did not alter the appellant's position, for, so it was argued, it was not legally competent for the Minister to impose a condition on 26 August 1997 which affected the appellant's seniority retroactively to 1 January 1993.

[21] It is important to observe that the terms governing the appellant's transfer, which were accepted by him on 8 February 1993, are part of an indivisible whole. The provision relating to his loss of seniority is inseparable from the other terms. Consequently, it is not open to the appellant to claim the benefit of his transfer to the POC and, in the same breath, to rely on the alleged invalidity of the requirement relating to his loss of seniority. Yet this is the result that he seeks to achieve. His counsel submitted that if the provision relating to the loss of seniority is invalid, the appellant is entitled to the relief claimed notwithstanding that he does not wish to return to the *status quo ante*. This submission is untenable. The appellant was

entitled to accept or reject the transfer in its entirety. He cannot abide by the transfer and the provisions relating to the retention of rank and salary and, at the same time, require this court to order that his loss of seniority is *ultra vires* or otherwise unenforceable.

[22] It follows that the appeal cannot succeed and it therefore becomes unnecessary to deal with the effect of the Minister's decision and the other matters raised in argument.

[23] All that remains is the question of costs. Counsel for the appellant submitted that this Court should make no order as to costs irrespective of the outcome of the appeal. He relied, in this regard, on the approach adopted by Spoelstra J in the court *a quo.* The learned judge *a quo* made no order as to costs partly because he considered the regulations to be almost incomprehensible and partly because he held that the appellant's argument was justified to the extent that it was based on the Afrikaans version of regulation 11(5). These reasons no longer apply. In the court

a quo the learned judge was called upon to interpret various regulations that did not feature in the appeal. Moreover, the appellant's reliance on the Afrikaans version of regulation 11(5) did not, in the result, prove to be successful. In all events this Court retains a discretion in relation to costs and, in my view, there is no reason why the ordinary rule should not apply.

[24] The appeal is therefore dismissed with costs.

.....
L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur :
Nienaber
Harms
Plewman JJA
Farlam AJA