REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case No.: 7669/2012

14/12/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2012-12-12
DATE

SIGNATURE

In the matter between:

DEXTRA DLAMINI	**APPLICANT**
and	
MINISTER OF DEFENCE	**FIRST RESPONDENT**
THE CHIEF OF THE NATIONAL DEFENCE FORCE	**SECOND RESPONDENT**
THE CHIEF OF THE SOUTH AFRICAN ARMY	**THIRD RESPONDENT**
GENERAL OFFICER COMMANING SOUTH AFRICAN ARMY SUPPORT FORMATION	**FOURTH RESPONDE**

JUDGMENT

HIEMSTRA AJ

[1] The applicant was a soldier in the South African National Defence Force (SANDF) with the rank of Private. He had been a member of the Regular Force, as defined in s 1 of the Defence Act 42 of 2002 (the Act), since the integration into the SANDF of members of former non-statutory forces.

[2] On 18 November 2002, the applicant was convicted of theft and unlawful possession of a firearm and sentenced to imprisonment for 10 years without the option of a fine. He was then informed by officials of the SANDF of the termination of his service in terms of the s 59(1)(d) of the Act, which provides as follows:

"(1) the service of a member of the Regular Force is terminated—

(a) - (c) ...

(d) if he is sentenced to a term of imprisonment by a competent civilian court without the option of a fine or if a sentence involving discharge or dismissal is imposed upon him or her under the Code; or ..."

[3] The applicant thereafter successfully appealed against his conviction and sentence and they were set aside on 28 May 2007.

[4] The applicant reported for duty on 5 June 2007, but he was told to write a letter to a certain Colonel Richter requesting his reinstatement. He promptly did so on the same date. He says that he had thereafter "followed all the internal processes" to secure his reinstatement to no avail. He did not say what these processes were.

[5] On 23 April 2009, the General Officer Commanding SA Army Support Formation, Major-General, R.Z Mandita, informed the applicant in writing that his request for reinstatement had been "disapproved by C Army."

[6] The applicant did not accept the notification and approached the Centre for Community Law and Development of the Potchefstroom Campus of the North-West

University. The Centre informed him on 18 May 2009 in writing that they had addressed a letter to the SANDF and had made numerous telephone calls, but were still awaiting a response.

[7] Ignoring the fact that he had been notified on 23 April 2009 that his application to be reinstated had not been approved, the applicant wrote to the Minister on 9 July 2009 complaining that he had received no response to this application. He received no response to this letter. On or about 25 March 2010, he instructed Mwalimu Nong Labour Consultants to represent him. Nothing seems to have been achieved by this firm of consultants. On 18 January 2011 he wrote to the Public Protector to assist him. The Public Protector acknowledged receipt of his letter and promised to revert. On 22 August 2011 the above-mentioned labour consultants wrote to the minister, with a copy to the Public Protector, demanding the applicant's reinstatement. On 20 September 2011 the labour consultants received an e-mail from the Public Protector advising them that the matter was being dealt with under file number 7/2-34022/11 and that the office was awaiting a response from the respondent. The applicant does not state whether the respondents had replied to the Public Protector, and if so, what the response was.

[8] On 20 September 2011, the applicant received a letter from the SA Army, dated 12 August 2011. The purpose of this letter seems to be to furnish reasons for the respondents' refusal to reinstate the applicant. According to this letter the Career Manager of the SA Army Support Formation had investigated the possibility of reinstatement of the applicant, but had noticed that the applicant had been absent without leave for 2 years and 48 days and therefore did not recommend the applicant's reinstatement.

[9] The applicant does not dispute that he had been absent from duty as alleged and admits that absence without leave is a dismissible offence. He states, however, that the Army had failed to charge him in a properly constituted disciplinary process with the offence.

[10] The applicant now applies in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) for the review and setting aside of the decision to refuse to re-

instate him and for an order reinstating him on terms and conditions not less favourable than those that applied to him on the date of the termination of his service, being 18 November 2002.

[11] In the alternative, the applicant claims that the failure to reinstate him constitutes an unfair labour practice as defined in Regulation 1 of Chapter XX of the General Relations for the SANDF and Reserve, published in GN R998 in the Government Gazette of 20 August 1999.

[12] The respondents raised certain points *in limine*. The first is that the provisions of PAJA do not avail the applicant since the refusal to reinstate the applicant does not constitute administrative action. The respondents in this regard rely on the Constitutional Court judgments in *Chirwa v Tansnet & Others* 2008 (4) SA 367 (CC) and *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) in which it was held conclusively that the dismissal of a public service employee does not constitute the exercise of a "public power" or the "performance of a public function" and that it is therefore not administrative action under PAJA. In paragraph [64] of *Gcaba* the Constitutional Court held that

"Generally, employment and labour relations issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is do deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few of no direct implications or consequences for other citizens, it does not constitute administrative action."

[11] These decisions are conclusive of the applicant's reliance on PAJA. The refusal to reinstate the applicant has no implications or consequences for other citizens.

[12] In any event, the applicant did not bring this application within the 180 days specified in s 7 of PAJA. His conviction and sentence were set aside on 28 May 2007. Apart from reporting for duty on 5 June 2007 and writing a letter to Colonel Richter on the same date, he did nothing for two years. Only in 2009 did he approach the Centre for Community Law of the North-West University and a labour

consultant. He claims that he had followed internal procedures, but failed to set out what procedures he had followed. According to the deponent to the respondents' answering affidavit the available internal procedures are to approach his Officer Commanding, then the Chief of the Army, then the Chief of the SANDF and finally the Minister. Even on his own averments, the applicant has followed none of these processes.

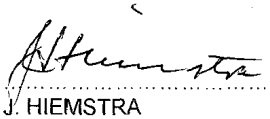
[13] The applicant's contention that the refusal to reinstate him constitutes an unfair labour practice is misplaced. Unfair labour practice is defined in Regulation 1, referred to above is defined as:

"An unfair act or omission involving discrimination, unfair conduct by the employer relating to appointment to a post, promotion, demotion, training or the provision of benefits, unfair suspension or disciplinary action short of dismissal and the failure or refusal to re-instate or re-employ a former member in terms of an agreement."

The conduct complained about does not fall under this definition. In any event, the regulations provide for procedures to adjudicate alleged unfair labour practices by the Military Arbitration Board. The applicant does not state that he had pursued such procedures.

[14] The respondents further invoked the Prescription Act 68 of 1969. The applicable prescription period is three years. In terms of s 12(1) and (2) of the Prescription Act, the period of prescription commences as soon as the deb is due, or as soon as the creditor becomes aware of the existence of the debt. The debt in this case became due on the date on which the applicant's conviction and sentence were set aside. The respondents did not accept liability and no process was served on them within the period.

In result the application is dismissed with costs.



J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	19 November 2012
Date of judgment:	12 December 2012
Counsel for the applicant:	Adv Z.P. Makondo
Attorney for the applicant:	Sekati, Monyane & Partners
Counsel for the respondents:	Adv C. Prinsloo
Attorney for the respondents:	The State Attorney