

(REPUBLIC OF SOUTH AFRICA)



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 9642/2020

(1)	REPORTABLE: NO / <input checked="" type="checkbox"/> YES
(2)	OF INTEREST TO OTHER JUDGES: NO / <input checked="" type="checkbox"/> YES
(3)	REVISED.
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MOOSA TAJ	15/12/2021

In the matter between:

COLONEL PROTAS SIBONELO LEMBEDE

Applicant

and

MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE N. O

Second Respondent

SECRETARY FOR DEFENCE

Third Respondent

MILITARY OMBUD

Fourth Respondent

JUDGEMENT

MOOSA AJ:

1. This is a *mandamus* application.
2. The Applicant seeks:
 - 2.1 An order that the First and Second Respondents failure to implement the findings and recommendations published by the Fourth Respondent ("MO"), in the report number 08/2018 (dated 26 March 2019), ("the report") be reviewed and set aside in terms of Section 6(2)(g) of the Promotion of Administration Justice Act, Act 3 of 2000 (if necessary).
 - 2.2 An order that the First and Second Respondents are directed and ordered to implement the findings and recommendations published by the MO in report number 08/2018 (dated 26 March 2019) within 30 (thirty) days from the date of service of this order
 - 2.3 That First, Second and Third Respondents be ordered to pay the costs of this application, jointly and severally, the one to pay and the other to be absolved on a scale as between attorney and client.

Brief Overview:

3. During December 2012 to December 2016 the Applicant was deployed as a Defence Attaché in Italy, accompanied by his wife and two children of school going age.
4. At the time of his deployment the Applicant signed a declaration and was aware that the Department reserved the right to cancel the deployment at any time.¹
5. The Applicant realized that the education systems of Italy and South Africa were different and affected his children's education.²
6. On 26 February 2016 the Defence Force instructed him in writing to return to South Africa by no-later than 31 December 2016, and in the same letter advised him to adhere to the Return Guidelines that were provided to him at the time of his deployment.
7. A history of repeated applications for an extension of the return date followed, with the Applicant not returning upon any of the return date as instructed but only returning to South Africa On 4 July 2017.

¹ Record p 001-124 to 001-125 (para 40 of the affidavit)

² Record p 001-14(para 19 of the affidavit)

8. In result the Applicant did not report in time for taking up the post to which he was promoted, as Commandant of the Military Academy, which resulted in the Minister withdrawing his promotion.³
9. The Applicant complained to the MO that his promotion had already come into effect and was unilaterally withdrawn without due process.
10. The MO conducted investigations and found in favour of the Applicant and upheld the complaint.

Applicant's submissions:

11. The Applicant bases his argument in terms of the Statutory framework:
 1. Section 23(1) of the Constitution of the Republic of South Africa 1996, ("the Constitution") which provides that:

"(1) everyone has the right to fair labour practises"
 2. Section 33 of the Constitution, which guarantees everyone the right to just administrative action.
 3. Section 3(1) of the Promotion of Just Action Act 3 of 2000 (PAJA) which state that an administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair.
 4. Section 8(1) of the Constitution, the Bill of Rights, applies to all and binds the Legislature, the Executive and Judiciary and all Organs of State.
 5. That it has been authoritatively held by the courts of the Republic of South Africa that the protection of the right to fair labour practises also included members of the South African Defence Force("SANDF") and therefore the Applicant.
 6. Regulation 1 of the SANDF provides;

"Unfair labour practice" means any act or omission that arises between a member and the employer involving: (b) the unfair conduct by the employer relating to the appointment to a post, promotion, demotion or training of a member or relating to the provision of benefits to a member."
12. It being the Applicants contention that the unilateral withdrawal of his promotion infringed the rules of natural justice and the *audi alteram partem*- rule, which the common law makes provision for.

³ Record p 001-21 (para 43 of the affidavit)

13. That no procedure at all was followed, that the decision to withdraw was only made based on a submission that was made to the Minister of Defence and Military Veterans, that this decision also infringed the principle of legality.
14. That although the Applicant does not concede that it is necessary in this application that the court review the failure of the First and Second Respondents to adhere to the recommendation of the MO, provision is made for review and in this regard the Applicants cites, that Section 6(g) of PAJA, makes provision that a failure to make a decision, to be reviewed by this court.
15. That in spite of the Applicant having referred his complaint to the MO and there being a finding in his favour the First and Second Respondent's continue to ignore the findings of the MO and that Applicant has a clear right and reasonable apprehension that the Respondent's conduct will continue to have an adverse effect on the Applicant.
16. That other than approaching this court the Applicant has no other satisfactory remedy for the implementation of the findings of the MO.

Respondent's submissions

17. The Respondents main submissions are that, on a proper interpretation of Section 6(8) of the Military Ombud Act, the legal nature of a recommendation is only that of a recommendation and not that of a directive in terms of which the Military Ombud can order the Minister or the Chief of the South African National Defence Force to promote the Applicant.
18. That the report is fatally flawed and cannot be enforced because:
 - 18.1 The complaint investigated did not fall within the scope and ambit of section 4 of the Military Ombud Act and thus the investigation was *ultra vires*.
 - 18.2 The MO erred and/or did not take into account that the promotion of the Applicant did not come into effect because he did not report in time to his new post;
 - 18.3 The recommendation is inconsistent with the imperative for military discipline is contained in section 200 of the Constitution and thus invalid by virtue of the supremacy clause of section 2 thereof;
 - 18.4 The recommendation is inconsistent with the constitutional role and function to be performed by the Defence Force and thus invalid by virtue of the supremacy clause section 2 thereof; and/or

18.5 The said report is tainted by procedural unfairness.

In this Court -Issues:

19. The issue turns on whether the recommendations made by the MO in the report, in terms of Section 6 (8) of the Military Ombud Act, Act 4 of 2012 are legally binding upon the First and Second Respondents.
20. Should this court conclude that the recommendations made by the MO are legally binding on the Respondents, whether the recommendation should be set aside under a collateral challenge to the lawfulness and constitutionality thereof.

The legal nature of "recommendation"

21. The MO is a creature of statute and, in accordance with the doctrine of legality one must look for its jurisdiction or powers within the four corners of its empowering legislation.
22. The White Paper on the National Defence of the Republic of South Africa (1996) envisaged a wide role and function for the office of the Military Ombud: the original role as envisaged:
 - 22.1 to monitor adherence to the democratic civil – military relations created under (interim) Constitution;
 - 22.2 to undertake (any investigations at the request of Parliament; and
 - 22.3 to investigate complaints against the South African National Defence Force ("SANDF") by military personnel and by members of the public.
23. The last-mentioned function of investigating complaints was provided for, as appears from section 3 of the Military Ombud Act, accordingly and contrary to other foreign legal systems, the office of the MO does not function as an institution safeguarding democracy, as an institution monitoring civil-military relations or as an institution for the exercise of effective political control by Parliament over the SANDF.
24. It appears from section 3 of the Military Ombud Act, the objective of the office of the MO is not to resolve disputes but to investigate complaints in terms of a very specific and circumscribed mandate to be found in section 4 of the Military Ombud Act, which provides as follows:

"4. Mandate of Office

(1) The mandate of office is to investigate complaints lodged in writing by-

- (a) a member regarding his or her conditions of service;*
- (b) a former member regarding his or her conditions of service;*

(c) a member of the public regarding the official conduct of a member of the Defence Force; or

(d) a person acting on behalf of a member.

(2) For purposes of this section, conditions of service bear the same meaning assigned to it under section 1 of the Defence Act, 2002 (Act No 42 of 2002), as amended."

25. Section 6 of the Military Ombud Act provides comprehensively for the investigative function of the office of the MO and then continues to provide as follows in section 6(7)-(8) thereof:

"(7) After investigating a complaint, the Ombud must-

(a) Uphold or dismiss the complaint, or issue an alternative resolution;

(b) Recommend an alternative resolution to the Minister;

or

(c) Refer the complainant to the appropriate public institution for finalisation, if the matter falls outside his or her jurisdiction.

(8) If the Ombud upholds the complaint, the ombud must recommend the appropriate relief for implementation to the Minister"

26. Parliament has deliberately used the word "recommend" in this context, of which the ordinary and grammatical meaning is that of a suggestion and not a directive, order or command. This in my view is the correct interpretation. See: *Walele v City of Cape town*.⁴ And *Minister of Health NO v New Clicks South Africa (Pty)Ltd*.⁵
27. The Respondents correctly contend that there is nothing in the context, including the historical context, of the Military Ombud Act, to justify any other interpretation of Section 6(8) thereof and, if Parliament wished such a recommendation, it would have expressly said so.
28. In the Defence Act 42 of 2002 ("the Defence Act"), there is no reference to the office of the MO in the Defence Act itself.
29. Section 4 of the Defence Act distinguishes between the ministerial power to issue a directive to the Secretary for Defence and the ministerial power to issue a directive to the Chief of the SANDF, but this ministerial power is expressly made subject to section 202(2) and section 204 of the Constitution.

⁴ 2008 (6) SA 129 (CC) par [64]-[72]

⁵ 2006 (2) SA 311 (CC) para [542]

30. Section 202(2) of the Constitution read with section 14(b) of the Defence Act contemplates ministerial directions under the authority of the President (to the Chief of the SANDF) whilst section 204 of the Constitution makes provision for a ministerial power for the issuing of directions to the Civilian Secretariat for Defence, regardless of a recommendation by the MO, the ministerial power for the issuing of directions to the Chief of the SANDF is constitutionally and legally constrained.
31. The Military Command of the SANDF, as referred to in Section 202(1) of the Constitution, is circumscribed in section 4A of the Defence Act; not only is this Military command appointed by the President, but the MO is not listed as being part of the Military Command of the SANDF.
32. The Defence Act makes provision for the resolution of grievances and disputes within the SANDF in section 61 thereof.
33. From Chapter 11 of the Constitution appears a very carefully- constructed and balanced scheme for the command, control and oversight of the SANDF as the only "*Lawful military force*" in the Republic of South Africa.
34. There can be no room for the office of the MO as an alternative chain of command, as this would compromise the constitutional imperative for military discipline or would undermine political control of the State over the SANDF, its only relevant function to be that of performing a support function in the governance of, in the military command over the SANDF.
35. In the premise, a proper interpretation of the word "recommend" as used in section 6 (8) of the Military Ombud Act, is a mere recommendation; it is not in the nature of a directive in terms of which the MO may order the Minister or the Chief of the SANDF to promote the applicant to the senior rank of Brigadier – General.
36. Section 13 of the Military Ombud Act provides as follows:

"Any person aggrieved by a decision of the Ombud may apply to the High Court for review of that decision within 180 days of the decision of the Ombudsman"
37. It is correctly contended by the Respondents that the definition of "*person*" in section 2 of the Interpretation Act 33 of 1957 has been held to include a natural or a legal person but does not include the State.⁶
38. A judicial review is not an effective remedy for the Minister, if an Organ of State brings a review application, then the yardstick for review is the Doctrine of Legality but if the complainant brings the review application, then the yardstick is section 6 of PAJA, this arbitrary consequence could not have been intended.

⁶ See: *Union Government v Rosenberg (Pty) Ltd* 1946 AD 127

39. If a recommendation is only in the nature of advice to the Minister, there can be no practical reason why she would be under any compulsion to have such recommendation reviewed in terms of section 13 of the Military Ombud Act; such an interpretation is also consistent with the constitutional imperative in section 41 of the Constitution that litigation between organs of the State should be avoided.
40. In view of a foregoing, even if the Respondents were not in agreement with the recommendations made by the MO, they were not obliged to bring review proceedings. In this instant the collateral challenges having no moment.
41. In the result I find that that the findings and recommendations made in terms of section 6(8) of the Military Ombud Act 4 of 2012 by the MO in report 08/2018 to be a recommendation and not a directive.
42. The applications are accordingly dismissed with costs, including the costs of two counsel.



T. MOOSA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 December 2021

For the Applicant:

ADV J EASTES

Instructed by:

ERASNUS SCHEPERS INC
 172 Bronkhorst Street
 Neuw Muckleneuk
 Pretoria
 Tel: 012 460 0396
 Email: hdw@esattorneys.co.za
 REF: Dj de waal/ad/L757/18

For the First Respondent:

ADV. MM OOSTHUIZEN
ADV RM MOLEA

Instructed by:

STATE ATTORNEY PRETORIA

Ground Floor, SALU Building
316 Thabo Sehume Street
Pretoria
Tel: 012 309 1672
Email: mletsoko@justice.gov.za
REF: 0151/2020/Z14/lr

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