

SOUTH AFRICA / JUDGMENT

Mahlangu and Another v Minister of Defence and Military Veterans and Another (31824/2017) [2018] ZAGPPHC 526; [2018] 4 All SA 402 (GP) (1 June 2018) [2018] ZAGPPHC 526

COURT

North Gauteng High Court, Pretoria

BEFORE

Dodson AJ

CASE / FILE NUMBER

31824/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO; 31824/2017

1/6/2018

In the matter between -

MAHLANGU, KHOHLIWE ELIJAH

First Applicant

BUSHULA, ARNOLD NELISILE

Second Applicant

And

THE MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

THE GENERAL OFFICER COMMANDING,

SA ARMY ENGINEER FORMATION

Second Respondent

JUDGMENT

DODSON AJ

Introduction

- [1] The applicants were appointed to the reserve force on 13 January 2014 and 7 November 2014 respectively. Each was appointed for a period of five years. The reserve force is part of the South African National Defence Force ("SANDF"). The first applicant was appointed as officer commanding 44 Parachute Engineer Regiment and the second applicant as acting officer commanding 19 Field Engineer Regiment.
- [2] They complain that their appointments as officers commanding were unlawfully terminated in April 2017 and ask that the termination in each case be reviewed and set aside. They also seek reinstatement.
- [3] The respondents deny that the applicants' appointments have been terminated. They say that, whilst membership of the reserve force is on-going for the period of their appointment, actual service in the reserve force is part-time and subject to their being called up. Members are called up for fixed periods on a rotational basis, depending upon the needs of the regiment. The applicants' last call-up expired by effluxion of time on 30 April 1997. They remain liable to be called up, subject to rotation and need.

Background

- [4] The applicants say in their brief founding affidavit that, following their appointments in 2014, they served on a "continuous basis" until April 2016 when the second respondent unlawfully terminated their appointments.
- [5] In May 2016 they both lodged separate complaints with the military ombud appointed in terms of the Military Ombud Act[1] about this termination. They allege that for a period of 10 months while the matter was dealt with by the military ombud, they were "deprived of [their] livelihood".
- [6] Following this, on 24 January 2017, on the recommendation of the military ombud, the chief of the South African Army instructed the second respondent to reinstate the applicants in their respective posts as officer commanding and acting officer commanding.

- [7] On 1 February 2017 they were both summoned to appear before the second respondent. He informed them that they would be called up for a period of "only three months", from 1 February 2017 to 30 April 2017. This they say was in conflict with the Regulations for the Reserve Force, 2017,[2] which envisage a five-year term of office as officer commanding.
- [8] On 11 April' 2017 the second respondent informed them by letter that their call-ups would end on 30 April 2017 and that from 1 May 2017 they would not be considered for a call-up, although they would remain on the reserve force. The effect of this, they say, is that their appointments as officers commanding of their respective reserve force units have again been terminated. They allege that these terminations were unlawful and reviewable under the Promotion of Administrative Justice Act No. 3 of 2000 and the principle of legality.
- [9] The second respondent deposed to the answering affidavit. The thrust of the answering affidavit is that the applicants are "deliberately confusing the duration of the period of call-up instruction with the period of appointment which is for five years". He asserts that the applicants are "still active on the database of the Reserve Force ,, and staffed at their original positions in the SA Army· Engineer Formation. As is customary, the applicants are being utilised in the Reserve Force as and when the need arises, on a rotational basis." An extract from the reserve force database is put up reflecting their names.
- [10] The second respondent goes on to explain how the reserve force functions and what its role is. A system of call-ups is used and it is these that determine the time when the members of the reserve force are in active service. The system is used in respect of all ranks and positions. The call-up order is made at the discretion of the relevant general officer commanding the formation in question ("GOC" a position filled by the second respondent) who is the officer designated by the chief of the SANDF for this purpose.
- [11] The GOC only has authority to call-up members for a maximum of 180 days in any one year. To extend any period beyond 180 days, the GOC would be required to obtain authority and approval from the "Chief Army Office". The second respondent emphasises that the 180 days is the maximum and does not mean that the reserve force member in question will be called up for that many days.
- [12] As far as the events complained of by the applicants in 2016 are concerned, the second respondent avers that the applicants were busy with call-ups during 2016 and these were terminated prematurely by reason of the applicants' misconduct and poor performance.
- [13] In the case of the first applicant. this allegedly involved a sequence of events culminating in an inspection of the first applicant's unit which revealed that, amongst other things, "the bungalows were dirty and untidy. The troops were not at their duty stations. Some were cutting their hair during office hours. There were crates of alcohol bottles in the living quarters."

[14] Based on this the second respondent avers that on 22 April 2016 he notified the first applicant of his decision to "discontinue the first applicant's call-up orders until further notice". it should be noted, however, that the document put up as communicating his decision records:

"Member will not be called up again, refer to GOC decision. Member to hand over unit to Cpt Bentswana by 29/04116."

[15] In the case of the second applicant, the second respondent alleged that there were complaints of Inter alia insubordination towards his superior, Lt Col Mashilo , financial mismanagement and unfair treatment of members of the unit he commanded. These culminated in a board of inquiry that recommended that his call-up be discontinued and that disciplinary steps be taken against him. The documents put up by the second respondent include a letter of apology from the second applicant regarding the insubordination, including a request that he "be given a second chance" and the record filed by the respondents includes the recommendations of the board of inquiry.

[16] The second respondent alleges that in the case of the second applicant he was "brought on verbal office orders and advised that his call-up was being discontinued"

[17] Also put up is a letter from Lt Col Schoeman dated 14 April 2016 addressed seemingly to the Department of Defence which reads as follows:

"Feedback on call up 94099827BV Major NA Bashula - SAEC

1. Letter ... dated 06 April 2016 has reference.
2. During February 2016 the GOC SAEC instructed AISSO Reserves Lt Col Mashilo and the MS officer Maj Masango to visit 19 Field Engineer Regiment in Durban due to allegations made by members of the unit with regards to the following:
 - a. misuse and management (sic) of state funds;
 - b. members does not comply with the guidelines from GOC; (sic)
 - c. misuse of military vehicle;
 - d. favouritism in terms of calling up members;
 - e. all these actions have an effect on the morale of the unit to function properly.
3. After feedback from the said investigation team to the GOC, the GOC suggested that the member be given a second I chance to prove that he is worth the position his (sic) currently occupying and a BO/ must also be forthcoming on these I matters.

4. Unfortunate (sic) member did not held (sic) his end of the bargain. The decision made by the GOC and his command group, was that Maj Bashula be released from his post as Acting Officer Commanding of 19 Field Engineer Regiment and that no further call-ups be considered for him in future."

[18] The second respondent goes on to say that the military ombud mistakenly interpreted these actions as termination of their appointments. Before they could explain this error to the military ombud, an instruction was received from the chief of the army in respect of both applicants which was as follows:

"The GOG SA Army Engineer Formation is hereby instructed to call-up and reinstate the above-mentioned members.

3. The call-up period is at the GOC's own discretion.
4. The members are to be informed in writing of their call-up and reinstatement and feedback to reach the Office of Director Army Human Resources, Grievance Officer by no later than 27 January 2017."

[19] The second respondent goes on to say that in compliance with the instruction of the chief of the army, the applicants were called up for a period of three months from 1 February to 30 April 2017. For reasons that are not explained, the documents effecting the call ups only refer to periods of service "on a continuous basis over the period 1 February 2017 to 28 February 2017 (28 days)" in the case of the first applicant and "a non- continuous basis over the period 1 February 2017 to 28 February 2017 for 20 days" in the case of the second applicant. He also attaches contracts of service signed by the applicants in respect of these call-ups on 2 February 2017 in which each seemingly volunteer for non-continuous periods of service of 30 days each.

[20] The contracts also include the following provisions:

"3. The actual period of utilisation will be in accordance with the call-up order issued for each period of utilisation.

4. At the discretion of the SANDF and depending on service requirements, the member may volunteer to serve with or without remuneration for a period or periods longer or shorter than the above undertaking to serve in the Reserve Force.
5. The SANDF has no obligation to utilise the member for the period or periods for which that member has undertaken to be available.

....

13. There is no obligation on the part of the SANDF to offer a subsequent contract on the termination or lapsing of this contract."

[21] On 11 April 2017 letters were despatched to each of the applicants which read as follows:

" 1. This serves to remind you that according to the call-up you have signed with the SAAEF on behalf of the Department of Defence as your employer, your term of employment will end on 30 April 2017.

2. The above implies that from 1 May 2017 you will not be considered for a call-up although you will still remain on the strength of the SA Army Engineer Reserves."

[22] The second respondent explains these letters as follows:

"This meant that although they were not going to be called up immediately after the expiry of the three month call-up instruction, they still remained on the database and would be called up as and when the need arises."

[23] The second respondent goes on to say that at the time of the launch of the review application, the second applicant had lodged a complaint with the military ombud that had yet to be finalised,

[24] The applicants did not respond by way of a replying affidavit. The applicants were not legally represented, although their founding

affidavit and heads of argument suggest that they did have some legal knowledge or legal assistance of a limited kind.

[25] The applicants ask the court to declare that the decision of the second respondent "to terminate the appointment and continuous utilisation of the first applicant and the second applicant as Officers Commanding 44 Parachute Engineer Regiment and 19 Field Engineer Regiment, respectively" was unlawful. They also seek the review and setting aside of the decision and reinstatement into their posts.

Statutory framework

[26] Section 200 the Constitution of the Republic of South Africa provides that "[t]he defence force must be structured and managed as a disciplined military force." ·

[27] Section 11 of the Defence Act[3] provides as follows:

"11. Composition of South African National Defence Force

The South African National Defence Force established by s 224(1) of the Constitution of the Republic of South Africa, 1993[4] ... continues to exist and consists of the -.

(a) Regular Force , the members of which serve full -time until-

(i) reaching their age of retirement;

(ii) expiry of their contracted term of service; or

(iii) otherwise discharged from the Defence Force in accordance with the law; and

- (b) Reserve Force, the members of which serve on a part-time basis for such periods as they have been contracted for, unless their service is terminated in accordance with the law."

[28] Chapter 9 of the Defence Act deals with "employment in defence force". Section 51 provides...

" 5 1. Application

Unless the contrary appears from the context, this Chapter [9] applies to members of the Regular Force and to members of the Reserve Force."

[29] Section 52 deals with the members of the Regular Force. Section 53 then provides, in relevant part, as follows:

"53.(1)(a) ...

(1A)(a) Any member of the Reserve Force is liable to render service in terms of a contract entered into between the Defence Force and such member.

- (b) The content and the format of the contract contemplated in para (a) must be prescribed.
- (c) The period for which a member of the Reserve Force must render the service contemplated in paragraph (a) and the calculation thereof must be prescribed.
- (2) The terms and conditions of service as well as conditions for and procedures regarding enrolment, appointment, promotion, transfer and termination of service, but excluding remuneration, in the Reserve Force must be prescribed.
- (3) .. .

(3A)(a) A Reserve Member must comply with a call-up order issued by that member's commanding officer in terms of which such member must report for services as contemplated in this Act or the Constitution.

- (b) The content and format of such call-up order must be prescribed."

[30] Section 82 of the Defence Act empowers the Minister of Defence to make regulations regarding a wide variety of matters including, in terms of s 82(1)(zE)-

"any matter which this Act requires or permits to be prescribed or which it is necessary or expedient to prescribe in order to ensure the good governance of the Department.[5]

[31] The applicants contend that the applicable regulations relevant to the present dispute are the Regulations for the Reserve Force, 2017[6] ("the 2017 Regulation").

[32] Although the events to which the matter relates pre-dated the promulgation of the 2017 Regulations on 2 June 2017, the applicants contended that they were of retrospective application. However there is nothing in the 2017 Regulations to suggest that this is the case. Accordingly, the regulations that applied at the time of the events giving rise to this dispute were the Regulations for the Reserve Force 2009[7] ("the 2009 Regulations").

[33] Regulation 15 of the 2009 Regulations provides as follows:

"Contract of service for volunteer members

15. A member of the Reserve Force and the Department must enter into a formal contract of service in writing which must contain at least the following:

- (a) that the member has volunteered his or her services to the Department;
- (b) that the member has been enrolled as a member of the Reserve Force of the Defence Force;
- (c) the period or periods of utilisation agreed upon;
- (d) that the member may, on a voluntary basis, render service with or without remuneration in addition to the service stipulated in the contract;
- (e) that service may be rendered on either a continuous or a non-continuous basis, or both;
- (f) the conditions of service and service benefits applicable to the form of service rendered; ..."

[34] "Continuous service" is defined in regulation 1 as meaning-

"a training camp, course or training exercise and any period of service which commences on one day, continues over midnight and ends on an ensuing day, and which shall be reckoned as service for the number of days it was rendered without a break and is therefore uninterrupted."

[35] "Non-continuous service" is defined as:

"[a]ny period of service which is not defined as continuous. Non- continuous service of-

eight hours' duration on one day; or

any period of less than eight hours' duration on different days;

must be properly recorded for audit purposes."

[36] Regulation 11 provides:

"Appointment of officer commanding

11.(1) The Chief of the Defence Force may appoint any Reserve Force officer to any post of officer commanding in the Reserve Force for which such officer is qualified.

- (2) An officer who is appointed as officer commanding of a unit is on probation during the first 12 months after his or her appointment, which period may be extended for a further period not exceeding 12 months.

- (3) The Chief of the Defence Force may:
- (a) terminate an appointment contemplated in subregulation (1) if it appears to him or her that the officer concerned is not competent to serve as officer commanding, but only after having informed the officer of his or her reasons for not regarding the person as competent, and having afforded the person a reasonable opportunity to respond thereto; or
 - (b) at the end of his or her probation, if he or she considers the officer concerned qualified to perform the duties efficiently, confirm him or her in his or her appointment as officer commanding with effect; from the date of such appointment.
- (4) The appointment of an officer commanding contemplated in this regulation is for a period not exceeding five years: Provided that the Chief of the Defence Force may, with due observance to the needs of the Defence Force and the age and physical abilities of the officer commanding concerned, extend or terminate such appointment at any time: Provided further that no such appointment may be terminated unless . the Chief of the Defence Force, or an officer designated by him or her for that purpose, has first informed the appointee of the reasons for the Intended termination, and has afforded the appointee an opportunity to respond thereto within 14 calendar days”
- [37] Regulation 28 provides for termination of service in the reserve force. However because this application is relevant to the applicants' appointments as officers commanding, rather than membership of the reserve, this provision is not relevant.
- [38] Much of the 2017 Regulations is a re-enactment of corresponding regulations in the 2009 Regulations. Although the 2009 Regulations applied at the time of the events complained of in this case, the 2017 Regulations are also relevant to this matter inter alia because that is the regime that will apply to the applicants if they are called up again. The following provisions of the 2017 Regulations are new provisions relevant to the adjudication of this matter:

[38.1] "continuous utilisation" is defined to mean:

"any period when a member renders service for an uninterrupted time which is longer than one day, and which is reckoned in days for as long as the member continues to render service without a break."

[38.2] "non-continuous utilisation" Is defined to mean:

"any period of time reckoned in hours during which a member renders service and which does not constitute continuous utilisation."

[38.3] "utilisation" is defined to mean:

"the period when a member renders service in terms of a call-up order."

[38.4] regulations 11(1) to (3) remain the same, save that the powers of chief of the SANDF may be exercised by "an officer designated by him or her for that purpose";

[38.5] regulation 11(4) now reads:

"Unless the Chief of the Defence Force or the designated officer at the time of his or her appointment of an officer commanding as contemplated In sub-regulation (1) specifies a longer or shorter period, the appointment shall be for a period of five years."

[38.6] a new regulation 16 provides as follows:

"Format of call-up order

16(1) A call-up order must at least state-

- (a) the purpose of the call-up;
 - (b) the time and place where the member must report;
 - (c) the expected duration of the call-up;
 - (d) the travel arrangements to the point of call-up;
 - (e) whether the call-up is for continuous or non-continuous utilisation; and
 - (f) any other information deemed necessary by the member's commanding officer.
- (2) Subject to compliance with sub-regulation (1), a call-up order must be in the general format contained in annexure C or D as the case may be."

[38.7] separate regulations now provide for "termination of membership of Reserve Force" (regulation

30) and "termination of call-up" (regulation 31).

[39] Some of the annexures to the 2017 Regulations are significant. Annexure B Is the "General format of service contract for members of the Reserve Force". It is this standard form contract that was signed by the applicants in respect of their last call-up ending on 30 April 2017, notwithstanding the fact that the 2017 Regulations were not yet in force then.

[40] Annexure C is the standard form "call-up order for Reserve Force utilisation on a non-continuous basis". Paragraph 1 of the standard form call-up order reads as follows:

"You are herewith called-up in terms of s 53(3A)(a) and (b) of the Defence Act, 2002 (Act No 42 of 2002), for military utilisation on a non-continuous basis over the period ... to ... at ... (name of HQ or Unit) and will be utilised for a maximum period of ... hours/days."

[41] Annexure D is the "call-up order for Reserve Force utilisation on a continuous basis". Paragraph 1 of that call up order provides as follows:

"1. You are herewith called-up in terms of s 53(3A)(a) and (b) of the Defence Act, 2002 ..., for military utilisation on a continuous basis over the period .. . to ... (.. .days) at ... (name of HQ or Unit)"

[42] It is within this statutory framework that the applicants' judicial review applications must be considered. However, there is a preliminary issue in relation to the exhaustion of remedies.

Internal remedies

[43] Although not raised squarely in the answering affidavit, the respondents in their heads of argument contended that the applicants had failed to exhaust the internal remedies available to them in terms of s 61 of the Defence Act, as they were required to do in terms of s 7(2)(a) of the Promotion of Administrative Justice Act ("PAJA"). On this basis it was argued that the applications should be dismissed without considering the judicial review sought.

[44] In this regard, the respondent accepted that the second applicant's lodging of a complaint with the military ombud in terms of the Military Ombud Act represented compliance with the grievance procedure envisaged in s 61 of the Defence Act, which they recognised as an internal remedy. However they argued that he had failed to allow his complaint to the military ombud to be

finalised before launching the review application. They averred further that the first applicant had taken no steps at all to exhaust

internal remedies.

[45] The applicants contended that the grievance procedure envisaged under s 61 of the Defence Act had no application to them as civilians. They contended further that the remedies afforded under the Military Ombud Act were not internal

remedies as contemplated in s 7(2) of PAJA

[46] Section 7(2)(a) of PAJA provides -

"Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

[47] In a modern constitutional democracy based on the separation of powers, internal remedies perform an important constitutional function. This was explained by the Constitutional Court in *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*[8] In the Constitutional Court, in interpreting s 7(2) of PAJA, as follows:

"[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, I before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to Justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution...

[48] It is important therefore to scrutinise whether or not there were internal remedies available to the applicants that they should have exhausted before bringing judicial review proceedings.

Grievance procedure

[49] Section 61 of the Defence Act forms part of chapter 9. As pointed out earlier, s 51 renders chapter 9 applicable both to members of the regular force and the reserve force unless the contrary appears from the context.

[50] Section 61 provides, in relevant part:

"61. Procedures for redress of grievances

- (1) Any person to whom this Act applies and who is aggrieved by any act or omission of any other person to whom this Act applies, may lodge his or her grievance in writing.
- (2) The Minister must prescribe procedures, which must, among other things, specify the expeditious processing of grievances and the chain of command through which individuals and groups within the Department may address individual and collective grievances."

[51] Acting pursuant to s 61 and s 82(1)(zD) of the Defence Act, the Minister promulgated the Individual Grievances Regulations, 2016[9] ("the Grievance Regulations") These regulations repealed the Individual Grievances Regulations, 2010.[10]

[52] The Grievance Regulations read in relevant part as follows:

"(1) In these regulations, any word or expression to which a meaning has been assigned in the Act has the meaning so assigned and, unless the context otherwise indicates-

'grievance' includes, but is not limited to, a written expression of dissatisfaction by a member or employee regarding an official act or omission relating to his or her promotion, placement, course nomination, assessment or service benefits, but excluding dissatisfaction relating to-

- (a) matters pending before, or a decision of, a military court or disciplinary hearing, a civilian court or an institution with quasi judicial powers;
- (b) ...
- (c) matters falling under the Jurisdiction of the state institutions contemplated in Chapter 9 of the Constitution of the Republic of South Africa, 1996; and
- (d) matters that have been dealt with as grievances in terms of these regulations.

Purpose and application

2(1) The purpose of these Regulations is to give effect to s 61(2) of the Act as far as it applies to individual grievances.

- (2) Subject to regulation 18, these regulations apply to all members and employees who lodge individual grievances after the commencement of these regulations.

Chain of command

3 A member or employee must address an individual grievance through his or her chain of command, which may include the following:

- (a) the Unit Officer Commanding;
- (b) the Formation Officer Commanding;
- (c) the Chief of the relevant Service or Division;
- (d) the Grievance Board; and
- (e) the Secretary for Defence or the Chief of the Defence Force, depending on the grievance.

4. ...

Timeframes

5. For the purposes of the expeditious processing of grievances-

- (a) [this deals with a position where a grievance is lodged with a Unit Officer Commanding.]
- (b) [this deals where a grievance is lodged with a Formation Officer Commanding.]
- (c) a Chief of a Service or division must cause a grievance to be finalised and ensure that the aggrieved person is informed of the decision and the reasons for the decision within 20 working days

... or within the extended period consented to by the Secretariat, after consultation with the aggrieved person.

[1] Act No 4 of 2012.

- [2] They refer to sub regulation 11(4) of the Regulations for the Reserve Force, 2017, promulgated under 82(1)(r) and (zD), read with s 53 of the Defence Act No. 42 of 2002 published in Government Gazette GG 408e6 under GN527
- [3]No. 42 of 2002.
- [4] Under the Constitution of the Republic of South Africa, 1996, the Defence Force is provided for in sections 200 to 204.
- [5]In terms of s 5 of the Defence Act. the Department of Defence consists of the Defence Secretariat, the SANDF and any auxiliary service.
- [6] Promulgated in GN 527 of 2 June 2017 contained in GG No. 40686.
- [7] Promulgated in GNR799 of 31 July 2009 contained in GG No. 32453
- [8] 2010 (4) SA 327 (CC).
- [9] These are contained in GNR12693 of 14 October 2016 contained in GG 40347.
- [10] Promulgated by GNR572 of 30 June 2010.

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