

SOUTH AFRICA / JUDGMENT

Mosima and Another v Minister of Defence and Military Veterans and Others (21026/22) [2022] ZAGPPHC 293 (28 April 2022)

[2022] ZAGPPHC 293

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

21026/22

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 21026/22

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

Date:

28 April 2022

In

the matter between:

M
M P F
MOSIMA
FIRST APPLICANT
C
SIMONSE
SECOND APPLICANT
and
MINISTER
OF DEFENCE AND MILITARY VETERANS
FIRST RESPONDENT
SECRETARY
FOR DEFENCE
SECOND RESPONDENT
CHIEF
OF THE SOUTH AFRICAN NATIONAL
DEFENCE
FORCE
THIRD RESPONDENT
MILITARY
COMMAND COUNCIL
FOURTH RESPONDENT
REGULAR
FORCE MEDICAL CONTINUATION FUND
FIFTH
RESPONDENT
MANAGEMENT
BOARD OF REGULAR FORCE
MEDICAL
CONTINUATION FUND
SIXTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

and background

[1] The applicants brought the current proceedings on an urgent basis seeking, amongst others, the following relief in the notice of motion:

i.A declarator that the decision of the fourth respondent to increase monthly contributions to the fifth respondent as taken at a meeting of the fourth respondent on 7 March 2022 as invalid and void;

ii. Alternatively, and in the event that the court is not inclined to grant the relief in (i) above, to interdict the first to sixth respondents from implementing the increase in monthly contributions as allegedly decided by the fourth respondent on 7 March 2022, pending proceedings to review and set aside such alleged decision;

iii. Further that the applicants be directed to institute the proceedings mentioned in (ii) above within twenty days from the date of the court order.

[2] I must state from the onset, that since these proceedings were conducted in the urgent court, I am not inclined to grant any order

with a final effect. Wepener J explained in *In re* several matters on the urgent court roll^[1] that the urgent court is not geared to deal with matters that include some complexity. I am thus merely considering whether the applicants made out a case for the interim relief sought. In considering this application, I am aware that an interim interdict is to be granted only in the clearest of cases and after a careful consideration of the so-called 'separation of powers harm'. When a court considers to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.^[2] This, however, does not mean that organs of state are immunised from judicial review – 'The exercise of all public power is subject to constitutional control', and in an appropriate case an interdict may be granted against it.^[3]

[3] It is trite that the sixth respondent, the Management Board of the Regular Force Medical Continuation Fund (the Board) has statutory powers to decide and effect an increment of the tariffs of the Regular Force Medical Continuation Fund (the Fund) as it deems fit.

[4] Section 82(1)(k) of the Defence Act 42 of 2002 (the DA) empowers the Minister to make regulations providing for medical, dental and hospital treatment of retired members of the Regular Force and their dependants. The aim of the Fund is to provide for continued medical, dental and hospital treatment to members of the Regular Force and their legal dependants who qualify to be admitted to the Fund. Chapter XV of the General Regulations for the South African National Defence Force (GR XV) provides for the establishment and control of the Fund.

[5] The Board is established in terms of regulation 19. Regulation 19(1) provides that the Board consists of the following members who will also have the same fiduciary duties as Trustees:

- (a) The Surgeon-General as Chairperson;
- (b) One member appointed by each of the Chiefs of the Services of the SANDF;
- (c) The Chief Financial Officer of the Department of Defence (the DOD) or a member appointed by him or her;
- (d) A Service System Specialist from Chief Director HR Policy and Planning;
- (e) The Chief of Joint Support or a member who is directly responsible for the administration of the Regular Force Medical Continuation Fund in the DOD appointed by him or her;

- (f) The Sergeant-Major of the SANDF;
 - (g) Three retired members of the Regular Force who are beneficiaries of the Fund, nominated by the other members of the Board at their first meeting of any year, of which one shall be a Warrant Officer or Non-Commissioned officer;
 - (h) Four members from the ranks of registered military trade unions, provided that no military trade union shall have more than two members at any given time;
 - (i) A registered medical officer nominated by the Surgeon-General;
 - (j) A medico-legal qualified officer from the Medico-Legal Services of the South African Military Health Services nominated by the Surgeon-General; and
 - (k) A communications officer nominated by the Surgeon-General in consultation with the Chief of Defence Corporate Communication as a co-opted member.
- [6] Regulation 21 prescribes that every member of the Permanent Force who contributes to the Government Employees Pension Fund, and every person who becomes a beneficiary of the Fund in terms of subregulation (4), and every former member of the Permanent Force who, through compelled demilitarisation becomes an employee of the DOD, is a member of the Fund and compelled to contribute toward the Fund according to the tariffs which the Board may determine from time to time. (My emphasis).
- [7] This urgent application relates to an alleged unlawful increase in the monthly contributions payable to the Fund.

Factual context

- [8] The applicants are two individuals serving in the South African National Defence Force (SANDF). They are obliged to make monthly contributions to the Fund. The applicants are members of the union SANDU. SANDU received correspondence from the DOD dated 1 April 2022 wherein they were informed that:

‘in order to ensure the sustainability of the Fund, it is advised that membership contributions be increased. The proposed increase will be adjusted according to the different rank groups mentioned below:

Seniority

Group

Rank Group

% Increase

a

B

c

1 Lt Gen/ V Adm, Maj Gen/R Adm, Brig Gen/R Adm (JG)

12.0%

2 Col/Capt (SAN), Lt Col/Cdr, Maj/Lt Cdr, Cpln

10.2%

3 Capt/ LT (SAN), WO1, WO2, S SGT/F, SGT/CPO

9.0%

4 Lt/Ens, 2 Lt, O Lt, Sgt/PO, CpL/LS, L Cpl/AB,

Pte/MAN/SMN,CO

5.1%

5 Civilian

5.1%

The increment will be effected as from 1 May 2022.'

[9] SANDU responded to the letter received from DOD in a letter dated 4 April 2022 and sought information as to who took the increment decision and when the decision was taken. A response was received from the DOD that the decision to impose the tariff increase was taken by the fourth respondent, the Military Command Council (the MCC) in support of the recommendation by the Board Trustees. The decision was said to be taken on 7 March 2022. This communication was emailed to SANDU's legal representatives on 7 April

2022. A letter of demand was sent to the first respondent, the Minister, on 7 April 2022 wherein she was informed of the applicant's intention to review and set aside the impugned decision on the basis that the MCC did not have the authority to decide on a change in tariff, and that only the Board, that is said in the letter to be dysfunctional, has the authority to take any decision on tariff changes. The Minister was informed that the said decision was, according to SANDU, unlawful and ultra vires. She was requested to provide an undertaking that the impugned decision would not be implemented. The Minister did not respond to the said letter of demand and the application was instituted in the urgent court.

[10] The respondents oppose the application. They submit that the dysfunctional Board was dissolved by the Minister in 2017 and that an interim Board was appointed by the Minister on 18 April 2018. The respondent admitted that no union representatives formed part of the 'interim board'. The respondents allege that the reason for the exclusion of union members at the time of the appointment of the interim board, was because no employee union was registered with relation to the SANDF at the time the interim board was appointed. In reply,

the applicants refute this allegation and state that SANDU was registered as a union as far back as 30 July 2000 and is still registered as such. I must pause at this junction to indicate that the ratio of prescribing in the legislation that there must be union representatives on the Board speaks for itself, decisions regarding tariff increases directly affect the nett salary that is received by contributing members and the union representatives' participation and input in the determination process are thus indispensable.

[11] The respondents claim in the answering affidavit that the decision regarding the increase of contributions to the Fund was not taken by the MCC on 7 March 2022, but by the Board in September 2021.

[12] The respondents explain that the current, interim Board, was appointed as an intervention to manage and address a crisis that was created by the previous Board in terms of management of the Fund. The turnaround strategy put in place by the interim Board included improved governance and improved management. As of March 2021, the Fund has improved its finances and the value of the Fund. An evaluation was commissioned by the interim Board in 2021 and it was found that the low monthly contribution model and the claims costs which has increased significantly between 2010 and 2017 posed significant challenges to the Fund. Despite a flat increase of R600 per month instituted in 2018 that resulted in a significant change in the financial status of the Fund, the situation is still far less than ideal. As part of the turnaround strategy the interim Board passed a resolution in September 2021 that monthly

contributions to the Fund be increased by 6.65% as of 1 April 2022. Without an increase on the contributions and underfunding of 92%, the solvency of the Fund will be compromised. The respondents then first state that the Fund will deplete its assets by 2026 if there is no increase in the contributions, and two paragraphs later state that in the event that there are no contribution increases the Fund will deplete its assets between 2024 and 2025. This is particularly caused by the fact that the claims expenditure is set to exceed the contribution income from 2021 onward. The increase accords with the current Health Care Cost inflation of 6.65% for 2021.

[13] The interim Board took the decision to increase the tariff payable to the Fund and the MCC simply endorsed and supported a decision that was already taken by the Board. The respondents submit that the communication dated 4 April 2022 wherein SANDU was informed that the decision to increase the tariffs were taken by the MCC on 7 March 2022 was wrong. The author of the letter confirmed under oath that the letter did not put the position correctly as the decision has been taken as far back as 30 September

2021. The deponent to the answering affidavit states:

‘Indeed, there may have been some confusion between the applicants in so far as the understanding they have with regards to the meeting that the Military Command Council held in March 2022. This on its own does not change the correct fact that a decision was taken by the board and not the Military Command Council as alleged in the founding affidavit.’

- [14] In reply, the applicants took issue with the respondents claim that the decision was taken by the interim Board. They submit that in review proceedings decision makers are judged by the reasons initially given, and in casu, this would entail that the MCC took the decision without having any authority thereto. I pause to state that no reasons for the impugned decision were asked or provided. The Minister's office was requested to indicate who took the decision and when. The respondents admit, however, in the answering affidavit that there might be confusion as to what transpired in the meeting of the MCC held in March 2022. This is, in my view, an aspect that a review court will consider in deciding whether to review and set aside the impugned decision.
- [15] The applicants point out in reply that the 'decision' taken by the Board differs from the decision allegedly endorsed by the MCC in two major respects: (i) the implementation dates differ, and (ii) the decision allegedly taken by the Board is – 'Approval of a 6.65% contribution increase for VPA Members and Active Force Members on 1 April 2022', while the decision communicated to SANDU during April 2022 and initially attributed to the MCC indicates different increases of between 5.1% and 12% which differs according to rank group. Counsel for the respondents submitted that the effect of the contribution increase based on seniority of rank equivalent using a tier increase structure ultimately translates to a 6.65% contribution increase. Neither counsel, nor I, are mathematical experts but it does seem as if there is some correlation between the proposed 6.65% and the weighted average reflected in the tiered increase structure. This being said, there is no indication before me that the usage of a tiered increase structure was approved by the Board. The letter signed by the Chairperson of the Board, erroneously dated 11 March 2021 instead of 2022, is a communication of the MCC's decision. The minutes of the meetings of the Board, which would constitute prima facie proof of any decision taken, was not placed before the court, a fact ascribed by counsel to the speed with which the answering affidavit had to be drafted.
- [16] The applicants submit in reply that there is no provision in the applicable regulation for the Minister to have dissolved the Board, and counsel for the respondents submitted that it is the Minister's constitutional right to dissolve a dysfunctional Board. The regulations do not provide for the constitution of an interim Board outside the prescripts of regulation
19. If regard is had to the composition of the Board, the Board can consist of a minimum of fifteen members. The interim Board merely consisted of 11, and it is not evident from the answering affidavit how these 11 were identified and whether the prescripts and nomination processes provided for in regulation 19 were adhered to and followed. The regulations are clear that some members of the Board are appointed by different functions. Of greater importance is the absence of any union representatives, a fact already alluded to herein above. In addition, the Minister prescribed that the Board must consist of, at least 30% women. The Minister's authority to impose a gender-quota is not contained in the regulations.

- [17] The respondents aver that the court should not consider this application because the applicants did not exhaust the available internal remedies. The applicants state that even if there were internal remedies that could be utilised, which they denied, that it is an aspect for the review court to consider as they are entitled to ask the review court to condone the fact that all internal remedies were not exhausted, and exempt them from exhausting such remedies.

Urgency

- [18] The respondent denies that the applicants meet the threshold for the application to be dealt with on an urgent basis. The impugned decision affects the nett salary received by thousands of members. It is unfortunate that this court was not provided with the exact extent to which individual members will be affected if the increase is implemented. A bigger concern for me, however, is the effect that it will have on the Fund if a review court ultimately finds that (i) the decision was taken by the MCC and is invalid, or (ii) even if the decision was taken by the Board, that the Board was not properly constituted either on the ground that the prescripts of regulation 19 was not adhered to or due to the vacancies that existed at the time, or both. By granting an interim

interdict, if all the requirements therefore are met, the respondents will be forced to take a step back and do some introspection rather earlier than later and be able to rectify any flaws in the current constitution of the Board. To strike this application from the roll will merely induce complacency on the part of the respondents.

Requirements for an interim interdict

- [19] The applicants rely on a prima facie right. They are contributing to the Fund and any unlawful or invalid decision affects them directly. They will suffer actual harm when the increases are deducted from their salaries. In the event that the Fund experiences severe financial difficulties in the absence of valid and legal decisions taken regarding contribution increases by a validly constituted Board, the applicants stand to suffer irreparable harm in future. All the current beneficiaries of the Fund likewise have an interest therein that the Board is lawfully constituted and that tariff increase decisions are lawful and enforceable. The balance of convenience favours the applicants whose right to just administrative action is guaranteed in the Constitution.
- [20] It is evident from the correspondence sent to SANDU dated 30 December 2021 that the Fund intends to establish a Board of Trustees. It can only be assumed that this Board is intended to replace the interim Board. It might be wise if the respondents focus on the prescripts of the applicable regulations, and if necessary for the Minister to attend to the amendment of the regulations, e.g. in relation to the number of union representatives if there is only one employee union registered for the SANDF while the regulations speak to more, to ensure that a validly constituted Board can fulfil their fiduciary function in ensuring and protecting the continued function of the Fund to the benefit of its beneficiaries.

[21] The applicants seek a costs order but did not persist in the prayer for a punitive costs order to be granted. I am of the view that it is fair and just that the costs in this application be costs in the review.

ORDER

In the result, the following order is granted:

1. The respondents are interdicted from implementing the increase in monthly contributions payable to the Regular Force Medical Continuation Fund, pursuant to the decision of the Military Command Council or the Regular Force Medical Continuation Fund, pending the institution and finalisation of proceedings to review and set aside such decision.
2. The applicants are directed to institute the proceedings referred to in the preceding paragraph, within 20 (twenty) days of the date of this order.
3. The costs of this application are costs in the review proceedings.
4. The parties may approach the Deputy Judge President with a request for a preferential allocation when the matter is ready to be heard.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant: Adv. J. G. C. Hamman

Instructed by:

Griesel Van Zanten Inc.

For the respondents: Adv. S. Mpakane

Instructed by:

State Attorney

Date of the hearing: 27 April 2022

Date of judgment: 28 April 2022

[1] 2013

(1) SA 549 (GSJ) at para [15].

[2] National Treasury and Others v Opposition to Urban Tolling Alliance 2012 (6) SA 23 (CC) paras [45] – [50].

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- [3] OUTA- judgment, supra, para [64], Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (4) SA 179 (CC) para [42].
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Prepared on 14 October 2026 · Esheria