

SOUTH AFRICA / JUDGMENT

O'Connor v Minister of Defence (4282/2015) [2015] ZAFSHC 195 (29 October 2015) [2015] ZAFSHC 195

COURT

Free State High Court, Bloemfontein

BEFORE

Kruger

CASE / FILE NUMBER

4282/2015

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FREE

STATE HIGH

COURT, BLOEMFONTEIN

REPUBLIC

OF

SOUTH AFRICA

Case

No. : 4282/2015

In

the matter between:-

FRANCIS

MICHAEL

O'CONNOR

Applicant

and

THE

MINISTER OF

DEFENCE

1st

Respondent

A

E

STUURMAN

2nd

Respondent
HEARD

ON: 22
OCTOBER 2015

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 29 OCTOBER 2015

[1] The applicant seeks confirmation of a rule nisi:

“2. A rule nisi is issued calling upon respondents to show cause, if any, on 22 October 2015 at 09:30 or as soon thereafter as applicant’s representatives may be heard, why the following orders should not be granted:

2.1 That 1st respondent is interdicted and prevented from implementing the transfer of the 2nd respondent into position number 676 at Bloemspruit Air Force Base (Bloemfontein) until the internal grievance and possible subsequent

dispute procedures have been exhausted.

2.2 Directing the 1st respondent to register the grievance the applicant filed on 17 August 2015 and deal with the said grievance in accordance with the 1st respondent’s grievance procedure.

2.4 That respondents be ordered to pay the costs of this application.

3. The relief in paragraph 2.1 above operate as an interim interdict with immediate effect.”

[2] The rule was issued on 11 September 2015 on an urgent basis. There are two aspects raised in the Rule Nisi:

(i) para 2.2: Directing the first respondent to register applicant’s grievance and to deal with it.

(ii) para 2.1: Interdicting the first respondent from transferring the second respondent into position 676 at Bloemspruit Air Force Base until the internal grievance has been disposed of.

[3] The Labour Relations Act 66 of 1995 is not applicable to members of the National Defence Force (section 2 of Act 66 of 1995); see LAWSA, Vol 13 part 1 par 65 in the title “Labour Law” by Van Jaarsveld and Others. The labour rights are restricted in the interest of discipline and national security (LAWSA, Vol 7 par 368 in the title “Defence” by BC Stoop). The Constitution in section 23(1) guarantees every person the right to fair labour practices (LAWSA, Vol 13.1 para 690 fn 10; Murray v Minister of Defence 2008 ILJ 1369 (SCA) par [5].

- [4] The applicant is a Flight Sergeant in the Air Force working at Bloemspruit, Bloemfontein. The second respondent is a Warrant Officer, at present working at the Makhado Air Force Base in Limpopo.
- [5] Applicant says the purpose of the application is to interdict the first respondent from transferring the second defendant into post 676 at Bloemspruit Air Force Base “until the internal grievance procedures and possible subsequent dispute procedures have been exhausted”.
- [6] The background to this application is the following:
- (i) The applicant was promoted to Warrant Officer on 1 June 2008.
 - (ii) The applicant was a Warrant Officer until he was demoted to Sergeant by a military court on 7 August 2014 which sanction was implemented on 17 February 2015 after the internal appeal proceedings were exhausted.
 - (iii) On 17 July 2014 the applicant was informed that with effect from 1 August 2014 applicant was placed in position 676. He was placed in position 676.
 - (iv) His rank at that stage was Flight Sergeant.
 - (v) On 3 August 2015 applicant was informed that he would be removed from post 676 because the rank coupled the post 676 is Warrant Officer. Applicant was told he would be held supernumerary which means that he is not held against a specific position. Post 676 has a technical allowance of R4 100 per month coupled to it which applicant says he will lose if he is placed in a supernumerary position. In the answering affidavit it is stated that the applicant will not necessarily lose the allowance if he is placed in a supernumerary position and could still receive his allowance.
 - (vi) On 17 August 2015 applicant tried to file a grievance but that was refused.
 - (vii) After the Rule Nisi was issued the first respondent accepted the grievance for consideration.
- [7] The applicant’s grievance is that he wants to remain in position 676. There is apparently only one such post at Bloemspruit. Applicant says that the transfer of the second respondent from Limpopo to Bloemspruit to fill post 676 will prejudice the applicant and make the grievance procedure irrelevant.
- [8] The deponent to the answering affidavit says that it was never suggested to the applicant that he would most probably have to be transferred to Hoedspruit. In argument Mr Williams stated that the first respondent had no intention of transferring the applicant out of Bloemfontein, and said that the first respondent would have no objection to a court order that the applicant not be transferred out of Bloemfontein.
- [9] It is not in dispute that the rank coupled to post 676 is Warrant Officer. Although the applicant alleges in his papers that the post can be occupied by a Flight Sergeant, the first respondent makes it clear that the rank coupled to the post is Warrant Officer. Only a Senior

Flight Sergeant can apply for post 676, and a person appointed to that post will then be promoted to Warrant Officer. Applicant says that while he was a flight sergeant he executed the work of a warrant officer for three years before he was promoted to the rank of warrant officer.

[10] The applicant was demoted to the bottom notch Flight Sergeant, being entry level Flight Sergeant. Applicant contends that he should have been demoted to Senior Flight Sergeant, the position he held before his demotion. The applicant says his rank should not be Junior Flight Sergeant, where he has been placed following the demotion order by the Military Court, but Senior Flight Sergeant, so that he is able to apply for post 676 so as to be promoted to Warrant Officer in that post.

[11] The applicant relies on a letter written by the Chief of Staff dated 9 January 2014 which sets out the principles applicable during the determination of seniority. The heading of the letter is:

“SAAF SUCCESSION PLANNING FOR THE FILLING OF GENERAL OFFICERS, OFFICERS AND NON-COMMISSIONED OFFICERS’ POSTS: 2014”

The letter contains the following:

“(d) Where a member has been demoted in seniority of rank by a Court of Military Judge, the member’s seniority is determined by the Court of Military Judge

(e) Where a member has been demoted in rank by a Court of Military Judge, the member’s seniority is determined by the seniority he/she had in that rank to which he/she has been demoted”

Applicant says according to paragraph 6(e) he is entitled to be placed as a Senior Flight Sergeant, which is the rank he held before his demotion, so that he can apply for post 676. Having been (wrongly in his view) demoted to a Junior (entry level) Flight

Sergeant, he cannot now apply for post 676. That is his grievance.

[12] The Rules promulgated by the minister provide as follows:

“Effect of sentence of reduction or reversion in rank

112.

- (1) When a person is sentenced to –
- (a) reduction to any lower commissioned rank;
 - (b) reduction to any lower rank;
 - (c) reduction to any non-commissioned rank; or
 - (d) reduction to the ranks;

such a person shall take the most junior position on the seniority list of the rank to which he or she was reduced, and that person's pay shall be diminished according to that which appertains to that new rank."

[13] The demotion of the applicant was done on 7 August 2014. The letter of the Chief of Staff upon which applicant relies deals with "Succession planning". A letter of the Chief of Staff cannot override the clear wording of the regulations promulgated in the Government Gazette. The letter deals with determination of seniority for purposes of "succession planning". The letter does not purport to state in which rank a person must be placed after demotion.

[14] In order to succeed in getting a final interdict, the applicant must show a clear right (Setlogtlo v Setlogtlo 1914 AD 221 at 227). The applicant must establish the right he asserts clearly (Welkom Bottling Co. (Pty) Ltd en 'n Ander v Belfast Mineral Waters (O.F.S) (Pty) Ltd 1967 (3) SA 45 (O) at 56F-H); Herbststein & Van Winsen, The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Ed (2009) Vol II 1459-1460. The applicant alleges that he was placed in the incorrect position (of Junior as opposed to Senior

Flight Sergeant) after his demotion. I have serious doubt whether that is correct. Even if his grievance succeeds, he will only be in a position to apply for post 676. It is not certain that the applicant's application to be placed in post 676 will be successful. The

applicant does not allege that the second respondent is not suitable to be placed in post 676. The applicant cannot stop the first respondent from transferring the second respondent. Applicant's main objection appears to be that he will lose his allowance if he is placed supernumerary. The first respondent says he can still get the allowance. The onus is on applicant to show prejudice. The applicant does not have a clear right to be appointed into post

676. On that basis applicant's request that the transfer of the second respondent be stopped should be refused. There is no indication what his chances are of getting the post. Applicant has failed to show a clear right.

[15] As to the acceptance of the grievance for consideration, the applicant was correct, and has succeeded. But as to the prohibition of the transfer of the second respondent, the applicant must fail. Thus the applicant is entitled to the costs up to the hearing of the urgent application, and the first respondent is entitled to the costs since then. It would be practical to make no costs order.

ORDER

1. Save for para 2.2, the Rule Nisi is discharged.
2. The first respondent is interdicted from transferring the applicant out of Bloemfontein until his grievance has been dealt with.
3. No costs order is made.

A. KRUGER, J

On behalf of applicant: Adv AP Berry

Instructed by:

Hugo Bruwer Attorneys

BLOEMFONTEIN

On behalf of 1st respondent: Adv A Williams

State Attorney

No appearance on behalf of 2nd respondent.

/wm

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Prepared on 14 October 2026 · Esheria