

SOUTH AFRICA / JUDGMENT

**Phike v South African National Defence Force
(Defence Special Tribunal DST-J1/00) [2001] ZALC
152; 2002 (3) SA 648 (LC); (2001) 22 ILJ 2298 (LC);
[2001] 12 BLLR 1404 (DST) (28 September 2001)
[2001] ZALC 152**

COURT
Labour Court

BEFORE
A A Landman

CASE / FILE NUMBER
DST-J1/00

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IN THE DEFENCE SPECIAL
TRIBUNAL
(THE
LABOUR COURT OF SOUTH AFRICA)
(Held
at Johannesburg)
Case
No: DST-J1/00
In

the matter between:

KHULULEKILE
CHRIS PHIKE Applicant
and
SOUTH
AFRICAN NATIONAL DEFENCE FORCE Respondent

JUDGMENT

Landman J:

The Constitution of the Republic of South Africa Act of 1993 (Interim Constitution) was established to provide for the new order in South Africa, one following the cessation of hostilities between the South African Defence Force and TBVC Defence Forces and the opposing forces of Umkhonto We Sizwe (MK) and Azanian People's Liberation Army (APLA).

A new beginning was to be made. A new national defence force was to be established. To this end s 224(1) of the Interim Constitution provides: "The National Defence Force is hereby established as the only defence force for the Republic."

Section 224(2) dealt with the staffing of the new SANDF. It provided that:

The South African National Defence Force shall at its establishment consist of all members of the South African Defence Force;

any defence force of any area forming part of the national territory; and

any armed force as defined in section 1 of the Transitional Executive Council Act, 1993 (Act No. 151 of 1993) and whose names, at the commencement of this Constitution, are included in a certified personnel register referred to in section 16 (3) or (9) of the said Act: Provided that this subsection shall not apply to members of any such defence or armed force if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did not take part in the first election of the National Assembly and the provincial legislatures under this Constitution. The result of this was that on the promulgation of the Interim Constitution on 27 April 1994, the SANDF consisted of the members of the South African Defence Force, the Defence Forces of the TBVC countries and MK. MK members were included as the requirements of the proviso to s 224(2) of the Interim Constitution had been met. See D Basson South Africa's Interim Constitution

(1994) 271. APLA did not comply with the proviso and its members did not become members of the SANDF.

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any armed force as defined in section 1 of the Transitional Executive Council Act, 1993 (Act No. 151 of 1993) and whose names, at the commencement of this Constitution, are included in a certified personnel register referred to in section 16 (3) or (9) of the said Act: Provided that this subsection shall not apply to members of any such defence or armed force if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did not take part in the first election of the National Assembly and the

provincial legislatures under this Constitution.

The result of this was that on the promulgation of the Interim Constitution on 27 April 1994, the SANDF consisted of the members of the South African Defence Force, the Defence Forces of the TBVC countries and MK. MK members were included as the requirements of the proviso to s 224(2) of the Interim Constitution had been met. See D Basson South Africa's Interim Constitution

(1994) 271. APLA did not comply with the proviso and its members did not become members of the SANDF.

Section 224(2) was subsequently amended by item 3 of part D of the 6th Schedule to the Constitution of the Republic of South Africa of 1996 (1996 Constitution). Section 224, as amended, was one of the sections of the Interim Constitution which were not repealed. The proviso to this subsection was replaced by the following: "Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution." The amendment was effected to cater for the inclusion of APLA in the SANDF. The result is that when the 1996 Constitution was promulgated on 4 February 1997, the members of APLA became part of the SANDF by operation of law. This did not involve consent or any other act on the part of an APLA member. APLA members were now entitled, and in my view, obliged to report for duty in the SANDF. I now turn to the facts of the present case. Khululekile Chris Phike, the applicant, trained as a member of APLA in 1983 and was an APLA member.

Section 224(2) was subsequently amended by item 3 of part D of the 6th Schedule to the Constitution of the Republic of South Africa of 1996 (1996 Constitution). Section 224, as amended, was one of the sections of the Interim Constitution which were not repealed. The proviso to this subsection was replaced by the following:

"Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution."

The amendment was effected to cater for the inclusion of APLA in the SANDF. The result is that when the 1996 Constitution was promulgated on 4 February 1997, the members of APLA became part of the SANDF by operation of law. This did not involve consent or any other act on the part of an APLA member. APLA members were now entitled, and in my view, obliged to report for duty in the SANDF.

I now turn to the facts of the present case.

Khululekile Chris Phike, the applicant, trained as a member of APLA in 1983 and was an APLA member.

He was infiltrated into the Bophuthatswana Defence Force (BDF) in

1984. During April 1994 the members of the BDF became members of the newly established South African National Defence Force (SANDF). The applicant therefore became a member of the SANDF and held the rank of captain. APLA instructed the applicant to resign from the SANDF. He resigned with effect from 30 June 1995. The applicant took up employment, inter alia, with Old Mutual (from 1 October 1995 to January 1996) and with Cash Paymaster Services (from April 1997 to June 1997). The applicant was also involved in the official activities of APLA. On 2 July 1998 the applicant attended at Wallmannstal, an induction centre for APLA members, operated by the SANDF. He entered into an interim service agreement with the SANDF with the provisional rank of a private. When the applicant appeared before the SA Air Force Senior Manning Board the SANDF realised that the applicant had been a member of the SANDF and had resigned. The SANDF terminated the applicant's interim service contract on 28 February 1999. The agreement was terminated because, in the view of the SANDF, the applicant had been integrated into the SANDF and could not be integrated a second time.

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On 2 July 1998 the applicant attended at Wallmannstal, an induction centre for APLA members, operated by the SANDF. He entered into an interim service agreement with the SANDF with the provisional rank of a private.

When the applicant appeared before the SA Air Force Senior Manning Board the SANDF realised that the applicant had been a member of the SANDF and had resigned. The SANDF terminated the applicant's interim service contract on 28 February 1999. The agreement was terminated because, in the view of the SANDF, the applicant had been integrated into the SANDF and could not be integrated a second time.

After attempting various extra-curial measures to secure his rights the applicant launched an application in the Defence Special Tribunal which is the Labour Court sitting in terms of the Defence Special Tribunal Act 81 of 1998 (DSTA). The answering affidavit alleges that the applicant does not meet the definition of an employee and therefore the court does not have jurisdiction. This point was correctly not pursued. See the definition of "employee" in s 1 of the DSTA. It includes a former employee. The dispute between the parties related to a matter which results from or is attributable to the implementation of transitional arrangements in respect of military institutions and which is connected with the remuneration or any other conditions of service of an employee in terms of a law regulating employment, or with any unfair labour practice by virtue of such a law. See s 1 of the DSTA. Consequently this tribunal has jurisdiction to entertain the application. The parties held two pre-trial conferences. They narrowed the issues to two items and eliminated the need for oral evidence. The

issues

are:

1. Whether condonation should be granted to the respondent for the late filing of its answer.
2. Whether applicant was entitled to reintegrate into the SANDF on 2 July 1998 in view of the fact that applicant resigned from the SANDF with effect from 30 June 1995 after his initial integration into the SANDF. The late filing was condoned. This brings me to the main issue, the so-called "integration" issue.

After attempting various extra-curial measures to secure his rights the applicant launched an application in the Defence Special Tribunal which is the Labour Court sitting in terms of the Defence Special Tribunal Act 81 of 1998 (DSTA). The answering affidavit alleges that the applicant does not meet the definition of an employee and therefore the court does not have jurisdiction. This point was correctly not pursued. See the definition of "employee" in s 1 of the DSTA. It includes a former employee. The dispute between the parties related to a matter which results from or is attributable to the implementation of transitional arrangements in respect of military institutions and which is connected with the remuneration or any other conditions of service of an employee in terms of a law regulating employment, or with any unfair labour practice by virtue of such a law. See s 1 of the DSTA. Consequently this tribunal has jurisdiction to entertain the application.

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The late filing was condoned. This brings me to the main issue, the so-called “integration” issue.

Mr Havenga, who appeared for the SANDF, submitted that the applicant has failed to take the clear wording and purpose of s 224 of the Interim Constitution into account. The applicant was clearly entitled to “integrate” into the SANDF either as a member of the BDF or APLA. He submitted that the applicant did so integrate before his resignation from the SANDF on 30 June 1995. If at the time he could have obtained better conditions of service or a better rank as a member of APLA rather than a member of the BDF, this is something that could have been handled internally and by way of representations. Once “integration” has taken place, if that is the correct word, such a person is a member of the SANDF in terms of s 224 of the Interim Constitution and if he then resigns, as the applicant did, he cannot then again be “integrated” in terms of s 224 at a later date. He can only rejoin the SANDF through the normal personnel acquisition channels and would be in the same position as any other member of the SANDF who has resigned from service and wants to be re-employed. The applicant was invited to do so. For the reasons expressed above I am of the opinion that the applicant, like all APLA members, became a member of the SANDF by operation of law on 4 February 1997 ie prior to his reporting at the induction centre and even in the absence of his signing the interim service agreement.

Mr Havenga, who appeared for the SANDF, submitted that the applicant has failed to take the clear wording and purpose of s 224 of the Interim Constitution into account. The applicant was clearly entitled to “integrate” into the SANDF either as a member of the BDF or APLA. He submitted that the applicant did so integrate before his resignation from the SANDF on 30 June 1995. If at the time he could have obtained better conditions of service or a better rank as a member of APLA rather than a member of the BDF, this is something that could have been handled internally and by way of representations. Once “integration” has taken place, if that is the correct word, such a person is a member of the SANDF in terms of s 224 of the Interim Constitution and if he then resigns, as the applicant did, he cannot then again be “integrated” in terms of s 224 at a later date. He can only rejoin the SANDF through the normal personnel acquisition channels and would be in the same position as any other member of the SANDF who has resigned from service and wants to be re-employed. The applicant was invited to do so.

For the reasons expressed above I am of the opinion that the applicant, like all APLA members, became a member of the SANDF by operation of law on 4 February 1997 ie prior to his reporting at the induction centre and even in the absence of his signing the interim service agreement.

The Interim Service System, according to its terms, is a temporary system for the accommodation of non-statutory force members, for the interim period prior to their entering into an agreement in the SANDF. It appears that this contract has its origin in an administrative procedure prescribed by the Joint Military Co-ordinating Committee, a sub-committee of the Transitional Executive Council established in terms of the Transitional Executive Council Act 151 of 1993. The administrative procedure, as explained in the answering affidavit acknowledges, that “integration” takes place by operation of law. On identification of the attendee as a member of a non-statutory force ie APLA an interim service agreement is concluded. If certain conditions are not met the attendee is demobilised. The legal position, as I have outlined it, takes care, at least in the circumstances of this case, of the position of what one may call a double enlistment - a soldier wearing two helmets. The applicant, assuming he had an election to belong to the SANDF as a member of the BDF or APLA, could not have made the election at the relevant time. APLA members were not to be part of the new national defence force. It is true that the applicant could have remained a covert member of APLA in the SANDF and have emerged on 4 February 1997 to claim rank and privileges as an APLA member. He did not do this. He had resigned, remained a member of APLA and in 1998 he sought to rely on his APLA membership and take his place as a SANDF member. In my view, for the reasons outlined above, he was entitled to do this.

The Interim Service System, according to its terms, is a temporary system for the accommodation of non-statutory force members, for the interim period prior to their entering into an agreement in the SANDF. It appears that this contract has its origin in an administrative procedure prescribed by the Joint Military Co-ordinating Committee, a sub-committee of the Transitional Executive Council established in terms of the Transitional Executive Council Act 151 of 1993. The administrative procedure, as explained in the answering affidavit acknowledges, that “integration” takes place by operation of law. On identification of the attendee as a member of a non-statutory force ie APLA an interim service agreement is concluded. If certain conditions are not met the attendee is demobilised.

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The result is that the applicant is entitled to be reinstated in the SANDF. He asks that he be reinstated with retrospective effect. I understand this to be to the date that his interim contract was terminated on 28 February 1998. The applicant prays that his proposed rank, terms and conditions of employment be retained. APLA proposed that the applicant be appointed to the rank of colonel. At the time the interim service agreement was terminated the senior manning

board was considering, inter alia, the appropriate rank for the applicant. This process has not been completed. The most that the applicant is entitled to is reinstatement in terms of his interim service agreement which carries the rank of private. Thereafter the placement process will take place. The board is not functus officio. It has not made a recommendation regarding the applicant's rank. The following order is made:

1. The applicant is reinstated in the South African National Defence Force retrospectively to 28 February 1998 on the same terms and conditions and rank set out in the interim agreement.
2. The respondent is ordered to pay the applicant's costs. Signed and dated at BRAAMFONTEIN this 28th day of September 2001.

A A Landman Judge of the Labour Court of South Africa Date of hearing: 25 September 2001. Date of judgment: 28 September 2001. For the Applicant: Adv M J Mosopa, instructed by Khoza Seelane Motaung and Associates.

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A A Landman

Judge of the Labour Court of South Africa

Date of hearing: 25 September 2001.

Date of judgment: 28 September 2001.

For the Applicant: Adv M J Mosopa, instructed by Khoza Seelane Motaung and Associates.

For the Respondent: Adv H S Havenga, instructed by the State Attorney.

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