


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/3/14

CASE NO: 6600/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED.
10/03/2014	
DATE	SIGNATURE

In the matter between:

MAARTEN OPPERMAN

Applicant

v

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

Respondent

DATE OF HEARING: 30 January 2014

DATE OF JUDGMENT: 12 March 2014

JUDGMENT

MALINDI AJ

INTRODUCTION

[1] The Applicant seeks declaratory relief in respect of the manner in which the applicant is remunerated by the respondent based on an alleged contractual right and his right to fair labour practices. In terms of the Notice of Motion (as amended) the applicant seeks an order:

“1. That it be declared that:

1.1 the deprivation of applicant by respondent of the income received by him in terms of the occupation specific dispensation, as set out in a letter of 12 December 2012 from the Directorate: Career Management, constitutes an unfair labour practice and is unlawful.

1.2 applicant has a contractual right to be remunerated in terms of the occupation specific dispensation until 31 March 2014.

2 That the respondent remunerate applicant in terms of the occupation specific dispensation.”

[2] The applicant alleges that he has a contractual right to be remunerated in terms of the Occupation Specific Dispensation (OSD), as contained in his performance agreement dated 1 April 2012. In his rank as Brigadier General in the South African Military Health

Services (SAMHS) his salary level is described as “OSD (MO) MSS-3 + CAT 3/2, and with a post designation of Inspector General SAMHS.

- [3] The applicant's rank designation and salary level in this contract flow from instruction number 24/11 of 31 October 2011 in which Brigadier General PJ Masisi gave instructions that the applicant be given the functional promotion and OSD benefits.
- [4] The OSD dispensation means that an employee who performs 80% of their time on functional duties and only 20% on administration qualifies for extra remuneration.
- [5] The applicant further relies on his right to fair labour practices in terms of Section 23(1) of the Constitution of the Republic of South Africa (the Constitution).
- [6] The gist of this dispute is that the applicant received a letter dated 12 December 2012 which sought to address errors that were made in relation to his salary level when promoted, the effect of which was that his remuneration would be in terms of Senior Management Services (SMS) post and not as an OSD post. In its practical effect, the applicant would not benefit from the extra remuneration that is afforded OSD Posts. The problem that this poses to the applicant is stated as follows:

"6.8 On the 13th of December 2012, a letter that was addressed to the Surgeon General (for the attention of Col V Burger), dated 12 December 2012, with reference CD HRM/DCM/C/104/1 written by the Chief Directorate HR Management (Directorate Career Management) was handed to me (hereto attached as ANNEXURE "MO7"). This letter confirmed that, despite the aforementioned documents, the IG SAMHS post was a Senior Management Service (SMS) post and not an OSD post with the associated benefits of being a medical officer and that I would be remunerated according to the SMS system. In practical terms this meant that even though I had consistently been remunerated as if I have never been promoted (i.e. as a Senior Clinical Manager), I had allegedly now been overpaid. According to the Chief Directorate HR Management, R24 277.01 was to be deducted from my salary in January or February 2013 for overpayment since 1 May 2012. I did not consent to this deduction, as is evident from my attorney's letter, addressed to the C SANDF; Chief Directorate HR Management (Directorate Career Management) and Surgeon General. (Hereto attached as Annexure "MO8"). My attorney, Tanya van Schalkwyk, has not had any response to Annexure "MO7". I append, for the sake of completeness, a letter dated 8 November 2012 from the Chief Director: Human Resource Management to the Chief of Human Resources (both of the SANDF) which appears to have preceded the letter of 12

December 2012 (Annexure "**MO7**"). I mark this letter Annexure "**MO9**".

FINANCIAL IMPLICATIONS

The negative impact on my finances has been substantial. I am under-paid by R179 739 per year. This amount is calculated as follows:

7.1 *According to paragraph 7 of the annexure to "MO9-1" I should be paid at an annual total package of R850 182. According to the letter of 2 October 2012, which is ANNEXURE "MO6", I was paid at a rate of R908 595,00 annual total package, which included the OSD, which increased to R978 819,00 in terms of the ANNEXURE "MO6". The difference between the two figures is R128 637. The difference between this figure and the R179 739 referred to at the beginning of this paragraph is due to difference in the rate at which overtime is calculated. I have taken the average number of hours I have contracted to work overtime in the past 12 months in making this calculation.*

7.2 *A possible further negative effect of the unilateral conduct by the Human Resource Division of the SANDF is that I could forfeit my right to continued membership of the Professional Provident Society of South Africa. This body provides cover for*

long and short term disability of its members, who have to be graduate professionals who are using their knowledge gained at University in the applicable professional field. Whilst I might convince PPS that I am doing so as IG of SAMHS, the fact that my employer believes I do not need to be registered as a medical practitioner or need to have a professional qualification to do the job, could well persuade PPS to terminate my membership, commenced shortly after I left University.

8. *To support the fact that I have been remunerated as an OSD Senior Clinical Manager, I attach my previous 3 months' salary advice (pay slips) dated October 2012, December 2012 and January 2013, respectively, as ANNEXURE "MO10.1-3".*
9. *This underpayment also has an effect on my pension, since pension is calculated on a member's salary notch, which in my case has been substantially less than it should have been. This has a direct effect on my retirement planning."*

[7] A brief synopsis of the applicant's claim is set out in the respondent's heads of argument as follows:

- "2. From the founding papers it appears that the applicant's case is premised on the following grounds:

- 2.1 *That he was promoted from Senior Clinical Manager at the Directorate Medicine to Senior Manager Medical Services in the post of IG SAMHS with effect from 1 April 2012.*
- 2.2 *That the question whether the OSD applied to his new position was canvassed extensively and it was agreed that the OSD was to be applied to his predecessor in the post of IG SAMHS, Brig. Gen. Cloete.*
- 2.3 *That in terms of the criteria apparent from Annexure MO3 he qualifies, as other occupants of the post since 1996, to be remunerated in terms of the OSD.*
- 2.4 *That in terms of Annexure MO4 he was promoted with two other medical officer colleagues whose functional promotions also refer to OSD grading.*
- 2.5 *That on 16 April 2012 he entered into a Performance Agreement with the Surgeon General for the period 1 April 2012 to 31 March 2013 which agreement inter alia confirmed his salary package as R914 784 + R343 545 (the latter being in respect of Commuted Overtime) and his salary level as OSD (Medical Officer) MSS-3 + CAT 3/2". That he is accordingly contractually entitled to be*

remunerated in terms of the OSD and also had a legitimate expectation to be remunerated in terms of the OSD."

- [8] The respondent opposes the application on the basis that the applicant does not qualify for OSD because in his current post he is not expected to perform any clinical duties and is also not expected to supervise people performing clinical duties, and that the applicant does not perform 80% of his technical skills and 20% of managerial skills, which places him outside of the OSD scope.
- [9] Whilst the applicant does not deny that his current post falls outside the OSD scope, he contends that the extra remuneration in terms of OSD is a contractual term of his contract of employment and that to take it away at this stage would amount to a breach of his contract and an unfair labour practice.
- [10] The respondent contends that due to an administrative error the applicant continued to be paid as if he was entitled to OSD and that this error was only noticed in October 2012. The issue was settled by the Military Ombud on 6 May 2013 when he ruled that the post of Inspector General of the South African Military Health Services is a common post and is not classified as a career path post and therefore falls outside the scope of OSD for medical officers. The Military Ombud made this ruling in respect of Brigadier General Cloete who

occupied the position until his retirement in 2012 and the applicant succeeded him.

[11] The respondent further opposes the application on the grounds, *inter alia*, that the applicant has failed to follow the dispute resolution mechanisms and the grievance procedures of the department before bringing this application.

[12] In his founding affidavit the applicant anticipates that the respondent would put up a defence that he has not utilized the grievance procedure published by the Minister of Defence in government notice 572 of 30 June 2010 (the Individual Grievances Regulations) before approaching this court. He states that he has not done so since the definition of grievance excludes matters related to remuneration and that it would serve no purpose to lodge a grievance against the very same division which would adjudicate the grievance or convene a grievance board.

[13] The applicant's case is therefore that he should be afforded OSD benefits although he does not qualify therefor merely on the basis that it's a contractual term and that to take away a benefit which he does not qualify for would constitute an unfair labour practice as this would be tantamount to taking away a vested right.

[14] The Regulations define grievance as follows:

“grievance” includes, but is not limited to, a written expression of dissatisfaction by a member or employee regarding any act or omission of a person to whom the Act applies relating to his or her promotion, placement, course nomination, assessment or service benefits, excluding dissatisfaction relating to ...”

- [15] Regulation 17 states that a member or employee may only take further action to address a grievance once he or she has exhausted all his or her internal remedies in the department.
- [16] The applicant’s counsel made it clear that this application is not about the merits whether the applicant’s position falls within the OSD scope, but about whether he has unfairly been deprived of an income.
- [17] The ordinary and unambiguous reading of the Regulations is that the applicant is entitled to lodge a grievance regarding any act or omission relating to his promotion, placement or service benefits. He may only take further action to address his unresolved grievance once he has exhausted all internal remedies.
- [18] The applicant has not provided any exceptional circumstances why he should be exempted from exhausting internal remedies first, save for alleging that it would be a futile exercise since the grievance body would be appointed by the people against whom he would be

complaining. This has no merits as the applicant has not alleged any bias or *mala fides* on the part of the relevant persons.

[19] The applicant relies on the exclusion from reliance on the Labour Relations Act (LRA), and therefore approaching the court in terms of the contractual claim and constitutional claim, because section 2(a) of the LRA excludes members of the South African National Defence Force (SANDF) from the ambit of the LRA.

[20] The applicant did not pursue his argument that Regulation 17 is invalid since it is *ultra vires* the empowering statute or that it permits a deviation therefrom as the use of the word “may” gives a discretion whether to exhaust internal remedies first or to proceed directly to take further action.

[21] In *South African National Defence Union v Minister of Defence and others*¹ the following was stated:

“51 Section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. The question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution. In *Naptosa and Others v Minister of Education, Western Cape, and Others*, the Cape High Court held that a litigant may not bypass the provisions of the Labour Relations Act, 66 of 1995, and rely directly on the

¹ [2007] (5) SA 400 (CC); [2007] 28 ILJ 1909 (CC)

Constitution without challenging the provisions of the Labour Relations Act on constitutional grounds. The question of whether this approach is correct has since been left open by this Court on two subsequent occasions. Then, in Minister of Health And Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae), Ngcobo J writing a separate judgment held that there was considerable force in the approach taken in Naptosa. He noted that if it were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation. In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.

52. *Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution*

to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now.”

[22] In this case legislation does exist in the form of the Regulations in terms of Government Notice 572, in particular Regulation 17 which provides that a member or employee may only take further action to address a grievance once he or she has exhausted all his or her internal remedies in the Department. The definition of “*grievance*” includes the subject matter of this application. He alleges that the employer’s unilateral decision to promote him and designate him to a particular post designation resulted in a negative impact on his service benefits.

[23] I am of the view therefore that the application is premature and no special circumstances have been pleaded or established as to why the applicant should be exempted from exhausting internal remedies.

[24] The dicta in *South African National Defence Union* was much more recently applied in *MEC for Education, KwaZulu-Natal and others v Pillay*² that “*a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right.*” In the absence of a direct challenge to an Act, the


² [2008] (1) SA 474 (CC) at Para [40]

courts must assume that the act that has been enacted to give effect to a constitutional right is consistent with the constitution and such claims must be decided within its margins.

[25] In the event, I make the following order:

1. The application is dismissed.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS 12TH DAY OF MARCH 2014


MALINDI AJ
Acting Judge of the High Court

Appearances:

For Applicant: Adv. RG Beaton SC

Instructed by: Van Schalkwyk Attorneys

For Respondent: Adv Z.Z. Matebese

Instructed by: State Attorney Matladi J