IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

28/2/2014

HA[illegible] NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR: JA/NEE.
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE.
(3) HERSIEN.
28/02/2014 DATUM ..... HANDTEKENING

CASE NO'S: 46670/08
46671/08
46672/08

In the matters between:

ANTHONY J L SNYMAN — Applicant- Case No 46670/08

THEUNIS JACOBUS VAN NIEKERK — Applicant- Case No 46671/08

PIERRE RAUTENBACH — Applicant- Case No 46672/08

and

THE MINISTER OF DEFENCE — First Respondent

CHIEF OF THE NAVY — Second Respondent

JUDGMENT

BAM J

1. The three applicants, at the relevant time, were employees of the South African Defence Force "*SANDF*". More specifically they were employed in the South African Navy. This judgment deals with review applications instituted by the three applicants .

2. The respondents are cited in their respective capacities as head of the SANDF and head of the South African Navy.

3. The above mentioned applications are of a similar nature. Although the individual personal circumstances of the three applicants differ, all three applications are in principle based on the same grounds. The real issues in dispute are identical. For this reason I deemed it expedient to deal with all three applications in one judgment. The legal representatives, respectively Mr Bouwer for the applicants, and Mr Pio for the respondents, were ad idem in that regard.

4. The three applicants applied for termination of their service in the SANDF in terms of the Mobility/Exit Mechanism (*"MEM"*). This *mechanism* was established to provide for a member of the SANDF to apply to the *"Approval Authority"*, (by definition the first respondent subject to the recommendation of the Chief of the SANDF) for a voluntary exit from the SANDF.

5. On behalf of the applicants it is submitted that the decision to refuse their applications was procedurally unfair, that it was taken arbitrarily and that it was not rationally connected to the information before the *respondents,* hence this review application to set aside the said decision and to order the *"respondent"* to approve their applications for retirement.

6. It was contended by Mr Bouwer that the applicants' rights in law to lodge this review application, are based on the following:

   (i) Section 23 of the Constitution (The right to fair labor practices);
   (ii) Section 33 of the Constitution (the right to fair administrative action);
   (iii) Promotion of Administrative Justice Act No 3 of 2000 (*"PAJA");*
   (iv) Common Law grounds for review; and
   (v) The Court's inherent review jurisdiction.

7. The respondents opposed the applications and raised a point *in limine,* contending that PAJA is not applicable and that the applicants could therefore not rely on the provisions of that act. In view of the fact that the applicants are basing their right to bring this application also on several other constitutional grounds, I deem it expedient, at this point, to say the following:

(i) As far as the applicants' basis for their applications involves the provisions of PAJA, the situation in law was specifically ruled upon by the Concourt. Any reliance on PAJA in matters like these in hand, was ruled out in terms of the dictum in *Chirwa v Transnet Ltd and Others* 2008(4) SA 367 (CC) paras [142] and [150].
(ii)In regards to reviews based on Common Law grounds, it was stated in *Pharmaceutical Manufacturers Association of S A and Others: In re Ex parte President of the Republic of South Africa and Others 2000(2) SA* 674 CC, pars [33] to [44], that the control of public power by courts through judicial review is a constitutional matter and is regulated by the Constitution, the supreme law, which contains express provisions in this regard. The common law principles pertaining to reviews have been subsumed under the Constitution.

8. It follows that the applicants are in law entitled to base their review applications solely on the aforesaid provisions of the Constitution. Sections 23 and 33 of the Constitution, referred to by the applicants, respectively provide for the right to fair labour practices and just administrative action.

9. It is common cause that since the lodging of this application two of the applicants, Mr Snyman (applicant – case 46670/08), and Mr van Niekerk (applicant- case 46671) have resigned from the Navy. On that point, regarding the issue of *locus standi*, the said two applicants base their case on the principles of constructive dismissal. They aver that they were in the circumstances forced to resign. The respondents on the other hand contended that the said two applicants voluntarily resigned.

10. A further point taken by the respondents is that the applications were not considered by the first respondent or the Chief of the SANDF because it did not come to their attention at all. The decision to refuse the applications was taken at a lower level by Rear Admiral PT Duze, at the Fleet Human Resources Directorate, which apparently fell under the command of the second respondent .

11. The overriding purpose of the MEM, which provides for members of the SANDF *"to initiate a voluntary exit from the organization"*, is officially set out and explained by the Department of Defence in a document dated 11 July 2005, annexed to each application, and includes the following:

*"12. The intent with the MEM is to make tangible progress in right sizing the HR (*human recourse) *composition of the SANDF through a process of realistic succession planning but at the same time, to guard against an exodus of scarce skills and specialist knowledge. The process intends to advise Regular Force members of their future career prospects as informed by transformation and restricting imperatives and as guided by the DOD policy on Rank/Age requirements."* and

"13. The initiative with respect to the application of the MEM measures lies primarily with the Services and Divisions who shall conduct realistic succession planning in collaboration with the Career Managers of the respective groupings of personnel at all levels of the organization. At the same time, members who are not contractually bound by their service system contracts in the SANDF and who perceive that they have reached a plateau in their military careers, may indicate their interest in the MEM option to their Career Managers and/or Service or Division Chiefs."

12. In considering any application in terms of the MEM the following guidelines were made obligatory:

"16. ...

a. *Is the functional group/ mustering affected, constrained by critical shortages?*
b. *What is the status of training and education in the functional groups/musterings concerned and what is the relevant learner throughput?*
c. *Will such succession planning ensure the maintenance of operational, administrative, training, logistical, technical upkeep, planning and ceremonial/disciplinary expertise within the particular structure of the DOD/SANDF?*
d. *Will such planning contribute towards the medium to long-term rightsizing of the SANDF HR composition at the particular rank/age level?*
e. *Does the planning contribute towards demographic equity at all rank levels in the SANDF?*
f. *When does the members' service contract expire and is a subsequent service contract justified within the context of the preceding guidelines."*

"17. In the case of officers in the rank groupings Colonel and higher, realistic succession planning and placements shall include the recommendation of the Chief HR Support (DMPU). In the case of the rank groupings Lieutenant Colonel and below serving at Corporate Divisions, supervisors shall apply these guidelines by liaising with Service Career Managers while at the same time, keeping Chief HR Support (DMPU) duly informed".

13. It is clear that although members of the SANDF are entitled to apply for voluntary retrenchment, in terms of the provisions of the MEM, in specific circumstances, such applications are subject to several conditions and considerations, alluded to above.

14. The respondent's argument that the second respondent had no authority to make valid recommendations to the first respondent and that the applicants, once their applications were dismissed by the second respondent, should have approached the Chief of the SANDF, is without substance. The second respondent must have realized that he, nor any deligated officer under his command, was authorized to refuse the applications without referring it to the Chief of the SANDF. From the prescribed MEM procedure it is clear that the Chief of the SANDF was the responsible entity, in the event of the application justifying approval, to make the required recommendation to the first respondent. The flip side of the coin is that in the event of the Chief of the SANDF not being prepared to make such a recommendation, he/she would have been entitled to refuse it. If that would have happened the applicant's would probably have instituted review proceedings against that entity.

15. The applicants did not direct their respective applications in terms of the provisions of the MEM to the Chief of the SANDF. What appears to be clear, and not disputed, is that the first respondent and the Chief of the SANDF were not aware of the applications and did accordingly not entertain or consider the applications . In view of the clear prescriptive procedures in terms of the MEM, in regards to the duties and obligations of the first respondent and the Chief of the SANDF, neither can be held vicariously liable for the conduct of an officer under the direct command of the second respondent. In my view the first respondent can therefore not be presumed to have considered and refused MEM applications in question.

16. The fact that the officer who refused the applications allegedly considered the merits of the applications, and eventually found it not meritorious, is irrelevant. His refusal of the applications, without the first respondent's decision in that regard, is null and void. He had no authority in terms of the MEM to refuse the applications. That is clearly where the matter, in so far it concerned the SANDF, stopped and came to a dead end.

17. The question who should be blamed for the fact that the applications were not considered, or even forwarded to the Chief of the SANDF, or even brought to his attention or that of the first respondent, is, in my view, totally irrelevant as far as the merits of the applications are concerned.

18. The submission advanced on behalf of the applicants that the second respondent should be held liable for not having forwarded the applications to the Chief of the SANDF seems to be sound. That procedure would have accorded with the procedure envisaged by the MEM. There was no indication in the answering papers that the second respondent, or a member of his staff, had the authority to refuse the applications. The SANDF created the MEM and was therefore obliged to adhere to the prescribed procedure. That was not done, to the prejudice of the applicants.

19. In view of the fact that the Chief of the SANDF and the first respondent did not consider or make any decision in regards to the applications in question, there is no decision of the first respondent to be reviewed.

20. The respondents' contention that the applicants themselves should have "*escalated*" the applications to the Chief of the SANDF for a possible recommendation, is clearly a matter of the respondents shifting the blame. The second respondent, in my view, as alluded to above, was obliged to refer the applications to the Chief of the SANDF. It follows that a proper consideration of the applicants' application by the correct entities was frustrated by the conduct of the second respondent's staff member. This surely affects the costs issue. The applicants were undoubtly prejudiced by the conduct of the second respondent staff member. This, in my opinion even calls for a punitive costs order.

21. In view of my finding it will serve no purpose to consider the merits or de-merits of the applicants' applications in terms of MEM, or even the grounds for the refusal of the applications. It will further serve no purpose to consider the issue why the first and second applicants resigned and whether the principle of constructive dismissal applies.

22. I accordingly make the following order.

Order

1. The three applications for review in cases numbers 46670/08, 46671/08 and 46672/08 are dismissed.
2. The second respondent is ordered to refer the applications of the three applicants in terms of the provisions of MEM to the Chief of the SANDF within 10 days from the date of this order.
3. The first respondent is ordered to issue a directive to the Chief of the SANDF to consider the mentioned applications of the three applicants within 20 days of this order and to furnish the applicants with his decision, and his reasons therefore, within 10 days thereafter.
4. The respondents are ordered to pay the applicants' costs on an attorney and client scale.

A J BAM JUDGE OF THE HIGH COURT
26/02/2014