

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 57651/2011**

**DATE: 25 JANUARY 2016**

In the matter between:

**SIBONGISENIMDLETSHE**

**Applicant**

**And**

**MINISTER OF DEFENCE  
CHIEF OF THE SOUTH AFRICAN  
NATIONAL DEFENCE FORCE**

**First Respondent**

**Second Respondent**

**JUDGMENT**

**KGANYAGO. AJ**

[1] The applicant has brought an application seeking an order in the following terms:-

1.1. That the decision of the First Respondent and/or the Chief of the SANDF (second Respondent) and/or the Chief of the South African Infantry Formation, which decision was taken between 26th November 2009 and February 2011 as reflected in “Annexure SM8”, refusing to renew the applicant’s fixed term contract, is hereby reviewed, set aside and corrected.

1.2.1. That the respondent is ordered to provide a contract of employment on the same terms and conditions as other members of the SANDF who are on medium term contracts.

Alternatively

1.2.1. That the respondent be directed to reconsider the issue of the continued employment of the applicant and to provide reasons to the applicant within fourteen (14) days of the date of the decision in the event that it remains of the view that the respondent should not be employed on a further contract.

1.3. That the respondents are directed to pay the costs of this application.

[2] The respondents are opposing the applicant’s application. The applicant was employed in the South African National Defence Force (“the SANDF”) with the rank of rifleman

with force number [9.....]. The applicant was employed on a fixed term contract that was renewed on several occasions. Applicant's first contract was for a period of two years from 1996 to 1998. This contract was renewed in 1998 until 2000. In 2000 the contract was renewed up until 2005. In 2005, applicant's contract was extended up until the 28th February 2011.

[3] On the 1st December 2010, the applicant was served with a letter dated 26th November 2010, wherein he was informed that the department intends not to renew his employment contract when it expires on the 28th February 2011. The letter from Col.P C. Z Foncoqa reads as follows:- " 1. *The department of Defence intends not to renew your employment contract when it expires on 28th February 2011. The following offences were taken into consideration.*

a. 3 x sec 14 (a)

b. 1 x sec 36(1)

c. 1 x sec 12(b)

d. 1 x sec 4(b)

2. *The department of Defence intends to terminate your current service contract in terms of the provisions of the New Service System, the Defence Act, No 42 of 2002 and the General Regulation Chapter 111 and iv expires.*

3. *NB You are afforded an opportunity to make presentation within 10 working days of receipt of this letter as to why you believe the Department should not terminate your employment contract.*

4. *Your co-operation will be highly appreciated. "*

[4] The applicant submitted his written presentation within the stipulated time period. His presentation reads as follows:-

"1. *your letter Inf Fmn/c/107/2 dated 26 November 2010 refers:*

2. *I [9.....] MC RFN S.M Mdletshe hereby request my contract not to be terminated due to the following reasons:-*

a. *We are 17 at home and I am a breadwinner for the whole family.*

b. *The other thing is that currently the workplace outside requires some skill and I don't have any skill that will make me survive when my contract is terminated.*

- c. *I will struggle to be employed because of my age.*
  - d. *The other thing is that I have changed my attitude towards SANDF as a whole that can be confirmed from my current Company Commander and Batalion Commander.*
  - e. *Currently I am one of the positive soldier around willing to do my duties anytime.*
  - f. *I promise I will stay out of trouble and I will respect my superiors.*
  - g. *I am in need of this job that is the only thing that makes me to survive.*
3. *Hope my request will be accepted. "*

[5] On the 26th January 2011, the applicant was served with a written letter notifying him that his contract that was expiring on the 28th February 2011 will not be renewed. Indeed his contract was not renewed when it expired.

[6] The applicant in his founding affidavit contends that the respondents did not investigate or conduct an enquiry upon which they can rely to substantiate that he was an undesirable element in the SANDF or that he was not amenable to military discipline. According to him, from 2008 up until the termination of his contract in 2011, he has not contravened the military discipline code at all.

[7] According to the applicant, a section 14(a) offence refers to being absent without leave, and he has committed that offence twice and was punished for that. Section 36(1) offence emanates from his refusal to answer a question relating to a board of enquiry, and he was punished for that. Section 12(b) offence relates to a member leaving his post without just cause, and he was punished for that. The applicant contends that his employment contract was renewed three times after commission of the abovementioned offences.

[8] With regard to the section 4(b) offence, according to the applicant the said offence took place in 2004, and the sanction imposed on him was that of a reprimand. Despite that conviction in 2004, his contract was again extended in 2005.

[9] On the 28 July 2011, commander DS Mabasa wrote to the applicant a testimonial letter which reads as follows;-

*" 1. I, the undersigned hereby state that I know Mr S.M Mdletshe and he was working under my command since he joined the Department of Defence. Mr Mdletshe was a well trained and disciplined soldier who was a good example to his colleagues.*

2. *The member was a kind of a soldier who can be tasked at any time and was willing to be deployed anywhere and will ensure that his duties are excuted to a high standard required in the organization. It was not necessary to supervise the member, he knew exactly what was expected from him.*
3. *This member is definitely not lazy and is always eager to undertake more and more task. Success of the organization is of the core values and nothing holds him back. He was always eager to support the superiors in whatever capacity was expected of him, and more importantly, he can be relied on to make a success of it.*
4. *This member never lacks in support, and he gave his full co-operation without any doubt. He was however not blind and will share problem arrears that need to be addressed in a positive fashion so that the situation can be improved to the advantage of the organization.*
5. *His knowledge and skills together with his maturity enabled him to relate to his seniors with confidence. He is able to debate his point of view without being offensive.*
6. *His relationship with other members was of great standard and he was always willing to share ideas with them. He had that understanding of how to work with different people and will always try to socialize with every one around him.*
7. *I further state that any employer would be proud of having someone of Mr S.M Mdletshe's caliber as part of his/her team.*
8. *Should you wish to contact me personally, do not hesitate I will be available at any time at the above mentioned address and telephone numbers. "*

[10] The applicant contends that the respondents have breached their own policy which governs the termination of fixed term contracts. According to the applicant, he had a legitimate expectation that his contract will be renewed when it expired on the 28th February 2011. The applicant relies on the principle of legality and not PAJA in challenging the non-renewal of his contract.

[11] According to the respondents, SANDF never terminated the applicant's contract, but that his employment contract ran out, and SANDF elected not to renew it and the reasons for that were given to the applicant. The respondents contends that the decision not to renew the applicant's contract was not based on arbitrary reasons, and was neither capricious nor unfair.

[12] Counsel for the respondent in their heads of argument has stated that although

there may be some merit in the applicant's argument that the process of nonrenewal of his contract was unfair because the SANDF did not apply its own policy document that does not mean that his contract has been terminated. Counsel for the respondents has submitted that the applicant's contract came to its natural expiry date.

[13] It is not in dispute that the applicant's fixed term contract was not renewed when it expired on the 28th February 2011. The issue which I must decide is whether the respondents have acted unlawfully or not in not renewing the applicant's contract. If I find that the respondents have acted unlawfully, I must determine whether the applicant is entitled to the relief that he is seeking.

[14] The respondents have policies in place which regulate the administrative process and which also govern the termination or non-renewal of fixed term contracts. Clause 17 of that policy is termed "Expiry or non-renewal of fixed term contracts" and it reads as follows:

- " 17. Whenever the need exists for the non-renewal of a fixed term contract of a member, the following administrative actions must be effected (Defence Act, Section 59(1) (b) (Refence c):*
- a. Members must receive letters to remind them of the expiry of their fixed term contracts by the last day of their eight month prior to the month in which the contract expires.*
  - b. The Officer Commanding of a member must submit an application for the nonrenewal of the fixed term contract to the respective Career Manager.*
  - c. In the application, the Officer Commanding must substantiate the reason for the non-renewal of the fixed term contract by completing a report in respect of the events which have led him or her to the decision to apply for the intended non-renewal of the contract.*
  - d. Once the Review Board at Service/Division level has made a preliminary recommendation the Officer Commanding must provide the member, in writing, with the specific reasons for the intended non-renewal of contract, as well as the specific measures under which the member's fixed term contract will be terminated. It must also be made clear that such a recommendation is a preliminary recommendation and that no final decision has been taken yet.*
  - e. The Officer Commanding must then allow the member at least ten (10) working days, in terms of the audi alteram partem rule, to provide written reasons why his or her fixed term contract should not be renewed.*
  - f. The applicant for his or her non-renewal of the fixed term contract, together with the member's*

*representations against the said intention, should be forwarded by the particular Unit to CD HRM (DHR Sep) via the respective career manager five (5) months before his or her contract expires.*

*g. If the career manager can add value to the application for the termination of the fixed term contract, it should include its recommendations with the intended non-renewal. The application must be recommended by the relevant Chief of Service/Division in person (at least four months prior to the expiry of contracts) (see Appendix E).*

*h. Upon receipt of the application at the D HR Sep, a submission must be forwarded to the MOD for final decision. In order to assist the MOD in making a final decision, all relevant information, as stated above must be supported with copies of documentation/statements in the application for the non-renewal of the fixed term contract (see Appendix F).*

*i. Once the MOD has made a decision wrt the non-renewal of the fixed term contract of the member, DHR Sep must promulgate the authority on the TERMINATIONS program, at least three months prior to the final date of service.*

*j. On receipt of the Administrative Authority (but not a shorter notice period than one month), the Officer Commanding must inform the member, in writing, that his or her contract will not be renewed. The final date of service must be included in the letter and it must be the same date as was approved on the TERMINATIONS program. ”*

[15] The applicant in his founding affidavit has brought the review application in terms of PAJA. On receipt of the policies of SANDF which were filed by the respondents in terms of Rule 53(1) of the Uniform Rules of Court, the applicant filed a supplementary affidavit wherein he also based his review application on the principle of legality.

[16] The respondents in their answering affidavit had contended that if the applicant was bringing his application in terms of PAJA, he should have done so within 180 days of the decision complained of, but has failed to do so. The applicant in his replying affidavit reiterated what he has already stated in the founding affidavit by stating that his review application was also based on the principle of legality. When the matter was argued, counsel for the applicant argued that the applicant's review application is not based on PAJA but on the principle of legality.

[17] In terms of clause 17(h) of the respondents policies, the Minister of Defence has a final decision in relation to non-renewal of fixed term contracts. It is now settled law that the decision the Minister amounts to an executive action. It follows that if it is an

executive action, it is subject to the less exacting constraints imposed by the principle of legality. ( See Minister of Defence v Motau 2014 (5) SA 69 (CC)).

[18] In order to determine whether the respondents have acted lawfully in not renewing the applicant's contract I must first assess the reasons stated in the letter dated 26/11/10 in paragraph 3 *supra*, and determine whether there was good cause to justify the action taken by the respondent. In Minister of Defence v Motau, *supra* the court held that good cause may be defined as a substantially or legally sufficient reasons for a choice made or action taken. Assessing whether there is sufficient cause for a decision is a factual determination dependant upon the particular circumstances of the case at hand.

[19] An employer may only terminate a fixed term employment contract of an employee, if he can show good cause for doing so, or if the parties have initially agreed otherwise. If the employer fails to show good cause, such termination will be regarded as unlawful, and the employer will be in breach of contract. The employee will be entitled to the common law remedies for the breach of contract.

[20] The applicant is relying on an alleged legitimate expectation that his contract will be renewed. In Duncan v Minister of Environmental Affairs and Tourism 2010 (6) SA 374 (SCA) at para 15 the court stated the following:

*"Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualified as legitimate. The requirements for the legitimacy of such an expectation have been formulated thus"*

(a) *The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.*

(b) *The expectation must have been induced by the decision-maker.*

(c) *The expectation must be reasonable.*

(d) *The representation must be one which is competent and lawful for the decision-maker to make".*

[21] The reasonableness of the expectation operates as a precondition to its legitimacy. The first question is factual, whether in all the circumstances, the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose. Only if that test is fulfilled does the further question, whether in the public law, the expectation is legitimate.

[22] The grounds upon which the applicant relies for his alleged reasonable expectation that his contract will be renewed has been stated in his founding affidavit as follows:-

- ❖ Section 12(b) offence took place in 1998, and his contract of employment was renewed three times after the commission of this offence.
- ❖ Section 4(b) offence took place during 2004, and he was reprimanded for that. In 2005, despite the conviction his contract was extended.
- ❖ For section 36(1) offence, he was convicted of it during 2008 by a military judge and sentenced to a fine of R1000-00.
- ❖ For section 14(a) he has been convicted twice of it and not thrice. According to the applicant there are hundreds of soldiers who have worse disciplinary record relating to section 36 offence and are still retained by SANDF. He has also mentioned the names of some of them.

[23] The respondents in their answering affidavit in justifying their actions conceded that the section 12(b) offence took place in 1998, and after that his contract was renewed three times. However, the respondents submitted that the applicant



during the last term of his contract committed further offences, which were all taken together in deciding not to renew his contract. The applicant denied that in his replying affidavit.

[24] The respondents also conceded that the applicant's contract was previously renewed despite committing a section 4(b) offence, but stated that the applicant has committed further three offences, and that his attitude towards SANDF did not improve.

[25] The respondents conceded that regarding the section 36(1) offence, the applicant was fined R 1000-00 by the military judge. According to the respondents, his disciplinary record has counted against him when they consider whether to offer him another medium term contract or not.

[26] Concerning the section 14(a) offence, the respondents disputed that the applicant was convicted of two offences. They attached a record which reflect more than two offences which the applicant was convicted of. The applicant in his replying affidavit denied that.

[27] Regarding the section 14(a) offence, according to the respondents' records, during the last term of his contract, the applicant was convicted of two offences, in 2008 and 2009 respectively. Regarding section 36(1) offence, as per the respondents' records the applicant was convicted during 2008. All other offences were dated years back and some of them are more than ten years old. The last time the applicant was convicted of an offence was two years prior to the termination of his contract.

[28] Despite the record of the applicant, commander Mabasa whom the applicant was working under wrote a very good testimonial letter for him. According to commander Mabasa, the applicant was a disciplined soldier, matured and related well with his seniors. That is a totally different picture of what the respondents saw in the applicant. According to the respondents, the applicant's attitude towards the SANDF did not improve. The fact that for the last two years of his contract, the applicant did not commit any offence, explains why commander Mabasa held the applicant in high esteem. He saw him as a changed person.

[29] The applicant has stated that there are hundreds of soldiers who are having worse disciplinary records than him, and has also mentioned the names of a few. The respondents did not dispute that. What the respondents did was to state that there is no

obligation on the SANDF to reveal the extent of the disciplinary measures of these members. The respondents went on to state that the first three names mentioned by the applicant are permanent members of the SANDF, and to terminate their service is not an easy matter. This in my view I find to be an admission on the part of the respondents that they are inconsistent in applying their policies at the workplace.

[30] That admission, I find to be absurd. Whether permanent or not, they are all members of the SANDF and are subject to the same policies and rules. There is no justification in treating permanent members differently from non-permanent members when instilling discipline at the workplace.

[31] The applicant's contract of employment was previously extended despite him having previous convictions. In 2011 some of his previous convictions were more than ten years old, and for the last two years prior to the termination of his contract he had a clean record.

[32] At the time the applicant's contract was still in force, he was disciplined and sanctioned for his misconduct. However, the respondents cannot overlook his previous record when his contract is about to be extended taking into consideration the types of offences that he has previously committed. But for the fact that in past his contract was renewed despite his previous record, in my view he would have expected that the respondents would again condone that.

[33] In the past, the applicant's contract of employment was renewed despite his previous convictions. As at 2011 some of his previous convictions were more than ten years old. There are other members of the SANDF with worse disciplinary records than the applicant. Under the circumstances of this case, in my view, the applicant's expectation that his contract of employment will renewed was reasonable and legitimate.

[34] I now turn to the procedure that was followed in terminating the applicant's contract. The procedure of not renewing a fixed term contract is regulated by clause 17 of the respondents' policy document. It is clear that the said policy was not followed in terminating the applicant's contract. The respondents in their heads of argument have conceded that they did not apply their own policy when the applicant's contract was not renewed and that the procedure that was followed was unfair.

[35] Under the circumstances taking into consideration the facts of the applicant's case in its totality, I am of the view that the respondents have failed to show good cause why they did not renew the applicant's contract. Therefore, the respondents have acted unlawfully in failing to renew the applicant's contract, and their actions stand to be reviewed and set aside.

[36] On the 28th July 2014, the costs for contempt of court application were reserved for determination by the court hearing the review application. The applicant wants the respondents to be ordered to pay the costs of the contempt of court application that was brought by the applicant as a result of the respondents having failed to provide them with the policy documents as per court orders. The policy document was provided to the applicant a few days before the hearing of the contempt of court application. Under the circumstances, I am satisfied that the applicant is entitled to the costs of the contempt of court application.

[37] In the result I make the following order-

37.1. The decision of the respondents to refuse to renew the applicant's fixed term contract in 2010/2011 is hereby declared unlawful and is set aside as void and of no force and effect.

37.2. The respondents are directed to provide the applicant with a fixed term contract of employment on the same terms and conditions as other members of the SANDF, who are on medium term contracts, such contract being deemed to have been entered into from the date of the launch of this application being 3rd October 2011.

37.3. The respondents, jointly and severally are directed to pay the applicant's costs of the main action including all costs previously reserved.

37.4. The respondents are directed to pay the costs of the contempt of court application and associated applications including all reserved costs jointly and severally the one paying the other to be absolved.

**M.F KGANYAGO**

**ACTING JUDGE OF THE HIGH COURT**