IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:A314/2014

15/6/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

15/6/2016 .....
DATE SIGNATURE

In the matter between:

THE MINISTER OF DEFENCE	**FIRST APPELLANT**
CHIEF OF THE NAVY	**SECOND APPELLANT**

and

ANTHONY JOHN LEONARD SNYMAN	**FIRST RESPONDENT**
THEUNIS JACOBUS VAN NIEKERK	**SECOND RESPONDENT**
PIERRE RAUTENBACH	**THIRD RESPONDENT**

JUDGMENT

RANCHOD J:

[1] This is an appeal against the second, third and fourth orders made by, and that part of the judgment pertaining to such orders, given by Bam J and dated 28 February 2014.

[2] The three respondents had launched three different review applications which are so similar that for the sake of convenience they were heard together and one consolidated judgment was delivered.

[3] This appeal is with the leave of the court *a quo*.

[4] In the court *a quo* the respondents had applied for a review and setting aside of the decision of the appellants not to grant their application in terms of the Mobility Exit Mechanism (the MEM) and that it be replaced by an order that respondents are ordered to approve their applications.

[5] The application was dismissed but, rather unusually, the learned Judge then went further and made the following orders:

> '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.'

[6] It is these further orders that are the subject of this appeal.

[7] The crisp issue before us is whether the court *a quo* was correct, after dismissing the review application, in making the further orders that it did in the absence of such specific relief having being sought.

[8] The respondents contend that the court *a quo* could indeed do so, apparently, under the rubric 'Further and/or alternative relief.'

[9] Although much of the arguments in the respective heads of argument and in the oral submissions were directed against the reasons and orders granted, in my view, a determination of whether the court *a quo* was correct in granting the relief that it did when such relief was not sought by any of the respondents would be dispositive of the appeal.

[10] At this juncture it should be noted that the respondents have not filed an appeal or cross-appeal against the dismissal of the review application. Mr Bouwer, who appeared for the respondents said it was because the respondents were of the view that the court *a quo* was correct in granting the relief that it did.

[11] In order to place the matter in proper context it is necessary to state the background to the application in the court *a quo.*

[12] During 2001 the South African National Defence Force (the SANDF) embarked on an exercise in 'rightsizing' the SANDF. This exercise called for the services of a number of members of the SANDF to be terminated. However, s59 of the Defence Act 42 of 2002 (the Act) allowed for a termination of service under circumscribed circumstances only. The section provides for termination by way of resignation of the member concerned (which would generally be to the financial disadvantage of the member) or, by a unilateral discharge of the member by the SANDF on a basis other than the member's unfitness or incapacity but that such discharge is likely to promote efficiency or increased cost-effectiveness in the SANDF. The SANDF decided to implement the rightsizing on the latter ground, i.e. on the basis that it is likely to promote efficiency or increased cost–effectiveness in the SANDF.

[13] The result was the creation and implementation of a so-called Mobility Exit Mechanism during 2005 which was designed not only to 'rightsize' the SANDF but also to guard against an exodus of scarce skills and specialist knowledge. The prescribed process for implementation of the MEM entailed that possible MEM candidates (whether they were listed on the initiative of the SANDF or whether they had taken the initiative themselves to indicate an

interest in the MEM option) were first identified on the basis of five selection criteria:

1. certain guidelines (based on the needs of the SANDF) were applied to compile a shortlist from those MEM candidates that met those criteria and the financial implications as well as the availability of funds (for the MEM option in respect of each of them) were to be confirmed;
2. discussions with the identified individual and an opportunity to make representations then followed;
3. the request (for a MEM) is then evaluated at a first level of command and referred to a second level of appropriate command (depending on the rank of the member concerned) for interim approval;
4. once the approval is obtained, a formal offer is then made by the career manager to the member concerned, where-after the member exercises the right to accept or decline the offer; and
5. once an offer has been accepted, the acceptance is forwarded to the Chief Human Resources Support on the next level of command for the exit administrative process.

[14] Within the concept of this process, the MEM Implementation Measure stipulates the following:

> "8. The Approval Authority is solely responsible for approving the voluntary exit of members who avail themselves of the MEM option offered by the SANDF."

[15] The Approval Authority is defined as follows in the MEM Implementation Measure:

> "'Approval Authority' means the Minister of defence, when the MEM opinion has been recommended by C SANDF and accepted by a SANDF member." ['C SANDF' being a reference to the Chief of the SANDF].

[16] The appellants say that the MEM Implementation Measure thus created a process in terms whereof the SANDF could formally make an informed, affordable and written offer (without compromising its own needs) to a selected member of the SANDF for his services to be terminated by way of the MEM option and its associated benefits on an envisaged exit date, which offer the member was free to accept or decline.

[17] After acceptance of that offer by a member of the SANDF, the severance of such members from the SANDF still had to be approved by the Minister of Defence upon a positive recommendation by the Chief of the SANDF.

[18] The respondents contended that any decision made in terms of the MEM had to be approved by the Minister of Defence whether it be the approval of a member's MEM application or its refusal. It is only if a member's MEM application is approved that the Minister of Defence makes a final decision whether to approve the exit of the member or not.

[19] On the other hand the appellants contend that where a *refusal* of an MEM application is made by officers under the command of the Chief of the Navy and acting as career managers at the very first level of screening having formed the view that an applicant is not a suitable candidate under the MEM based on the needs of the SANDF with regard to skills and specialist knowledge then the matter ends at that level and it need not be escalated further up the ranks to the level of the first appellant.

[20] Bam J held otherwise and made the order that he did. In essence the court *a quo* ordered the completion of the processing of the MEM applications up to ministerial level regardless of what the outcome on the lower levels of command was. In my view the court *a quo* lost sight of the fact that the whole MEM process was structured in such a way that all possible MEM cases were screened at various levels – first at the level of the career manager of a member in his unit, then at the level of the second appellant and finally at the level of the Chief of the SANDF before submission to the first appellant.

[21] The MEM provides that only those endorsed by a positive recommendation are referred to the next level and those not so endorsed fall by the wayside. The relief granted by the court *a quo* in effect ordered the appellants to go outside the scope and provisions of the MEM. The learned Judge erred in this regard. It should be borne in mind that none of the respondents sought such relief nor was it fully canvassed in the papers. In *NDPP v Zuma (Mbeki and Another intervening) 2009(4) BCLR 393 (SCA)* para [15] it was held that a judge should confine the judgment to the issues before the court:

> 'It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court I below failed to adhere to some basic tenets, in particular that, in exercising the judicial function, judges are themselves constrained by the law. The underlying theme of the court's judgment was that the Judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the Executive (paras 161 - 162). This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.'

[22] The MEM was no doubt a policy decision of the executive branch of government. In *Zuma* (*supra*) the SCA warned against 'transgressing the proper boundaries between judicial, executive and legislative functions.' This is in accordance with the doctrine of the separation of powers as provided for in the Constitution.

[23] As I said, counsel for the respondents submitted that the Court was correct in granting the relief as it resorted under the prayer for 'further and/or alternative relief.' Counsel for the appellants submitted that the function of

such a prayer is to provide for alternative relief (whether it be a reformulation of the main relief or relief of a different nature not originally envisaged) on the same cause of action, facts or evidence already on the papers before the court. I agree. (See *Johannesburg CC v Bruma Thirty-Two (Pty) Ltd 1984 4 SA 87 (T) 92G-93F*; *Hirschowitz v Hirschowitz 1965 3 SA 407 (W) 409*; *Queensland Insurance Co Ltd v Banque Commercial Africaine 1946 AD 272* at 286.). It seems that the further relief granted by the court *a quo* was premised on the basis that no decision at all had been taken on the respondents' applications in terms of the MEM. But that was not the case advanced in the review applications. Furthermore a decision, albeit a negative one, not to grant interim approval for the respondents' MEM application was indeed taken, though at a lower level of command. According to the MEM an application by a member was simply an indication of a willingness on the part of the member to consider the possibility of a voluntary exit from the SANDF by way of mutual agreement through a formal offer and its written acceptance but subject to the overriding needs of the SANDF and its financial affordability.

[24] The respondents based their review application on the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). The Court *a quo* held, correctly in my view, that PAJA was not applicable and, amongst others, on this ground dismissed the review applications.

[25] In any event, it is not in dispute that the MEM is a non-statutory instrument. Hence, any action taken in terms thereof is by definition not an action in terms of any legislation. Furthermore, a MEM-related matter is in my view not a public matter but an internal matter of the SANDF.

[26] The respondents had an internal remedy, known as a 'redress of wrong' in s134 of the previous Defence Act 44 of 1957 and in s61 of the current Defence Act 42 of 2002 (the Act). From the papers it appears that they did not utilise the internal mechanism for a redress of any alleged wrongs or grievances. Hence it cannot be inferred that the appellants or any of their

subordinates refused, or failed to comply with their obligations under the MEM read with the Act.

[27] The court *a quo*, however, went further and found that each respondent was entitled to base his claims on sections 23 and 33 of the Constitution. Section 23 provides, *inter alia*, that everyone has a right to fair labour practices while s33 provides for just administrative action.

[28] The Constitutional Court has held that 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 first challenging that legislation as falling short of the constitutional standard. This is referred to as the principle of subsidiarity. Hence, where legislation gives effect to a constitutional right, it is not permissible to invoke the right directly; instead, recourse must be had, in the first instance, to the statute giving effect to the right and, if the party contends that the statute does not go far enough to give effect to the fundamental right, only then may it invoke the fundamental right to challenge the constitutionality of that statute. (see *Sali v National Commissioner of the South African Police Service 2014(9) BCLR 997 (CC) par [72]; Mbatha v University of Zululand 2014(2) BCLR 123 (CC) par [173]; Mazibuko v City of Johannesburg 2010(3) BCLR 239 (CC)*).

[29] PAJA was enacted to give effect to section 33 of the Constitution whilst Chapter XX of the General Regulations of the South African Defence Force and the Reserve (dealing with labour rights within the military) was promulgated and/or enacted in Proclamation No R. 998 of 20 August 1999 to give effect to section 23 of the Constitution in a military context.

[30] The court *a quo* erred on the law in this regard.

[31] The court *a quo* held further that the SANDF did not follow its own procedure prescribed in the MEM and this prejudiced the respondents. However, there was no evidence before the court *a quo* that the prescribed procedure was not followed in respect of each respondent. On their version it

is clear that that the procedure was followed at least up to the level where a negative decision was taken. As I said earlier, once that happened, then according to the prescripts of the MEM there was no further process to follow. The assumption by the court *a quo* that each and every 'application' has to be and must be considered by the Chief of the SANDF and ultimately the first appellant is not supported by any of the evidence nor by the provisions of the MEM. It would in any event be totally impractical to expect of the Chief of the SANDF and the first appellant to personally deal with each and every such application.

[32] The respondents also contended in the court *a quo* that the second appellant had no authority to make a decision with regard to or refuse any MEM application. Having dismissed the review application, the court *a quo* nevertheless went on to grant further relief *inter alia* based on this issue. The prescribed process in the MEM provides:

> 'f. Requests in respect of Lt Col/Cdr and lower are to be considered by the Service Chiefs.'

In terms of s12(1) of the Act, the second appellant is one of the four Service Chiefs – the others being the Chief of the Army, the Air Force and the Military Health Service. It is thus apparent that the second appellant had the power to consider requests for the purpose of granting interim approval for a formal offer to be made to those members who applied for discharge in terms of the MEM.

[33] The court *a quo* also concluded that there is no indication in the answering papers that the second appellant or a member of his staff had the authority to refuse any application for the exit option under the MEM. This was not an issue raised in the papers by any of the respondents. Also, the maximum *omnia praesumuntur rite esse acta donec probetur in contrarium* (acts are presumed to have been lawfully done, or duly performed, until proof to the contrary be adduced) finds application. Furthermore, the rule of administrative law against the sub-delegation of a power or duty (*delegatus delegare non potest*) does not apply in the context of a purely administrative process which is part of a non-statutory mechanism for finding consensus on

the termination of the service of a member of the SANDF – something which falls within the domain of the human resources management of the military.

[34] It was thus not incumbent on the appellants to address the issue of authorisation of any application more especially when the option to refuse an application was signed by a senior officer in the office of the second appellant acting within the military chain of command.

[35] The court *a quo* ordered the first appellant 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 the reasons therefore, within 10 days thereafter."

[36] In this regard it is to be noted that two of the respondents (Snyman and Rautenbach) had already resigned and neither was any longer a 'member' of the SANDF. Appellants contended that it would have not served any purpose to make them an offer for the voluntary termination of their service with the SANDF. The respondents' counsel contended that their resignations were in effect constructive dismissals. However, as I said earlier, there is no evidence on the papers that they took any steps in terms of s134 of the Act to seek 'redress of a wrong'.

[37] Finally, there is the issue of the punitive costs order granted by the court *a quo*. It is so that a costs order is within the discretion of the court. However, it seems to me clear that there was no obstructiveness on the part of the appellants nor is there evidence that they deliberately flaunted the provisions of the MEM or the Act. In my view, a punitive costs order should not have been granted.

[38] I propose the following order:

1. The appeal is upheld with costs including the costs of the application for leave to appeal and the costs of two counsel where so employed.

2. The second, third and fourth orders made by the court *a quo* are set aside and substituted with the following order:

"2. Each applicant is ordered to pay one-third of the costs of the respondents."

RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE

TUCHTEN J
JUDGE OF THE HIGH COURT

I AGREE

KUBUSHI J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellants	:Adv M.M Oosthuizen (SC)
	: Adv P.C Pio
Instructed by	: The State Attorney
Counsel on behalf of Respondents	: Adv M. Bouwer
Instructed by	: Johan Gouws Attorneys
Date heard	:1 June 2016
Date delivered	: 15 June 2016