

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 12619/20

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 August 2021

DATE


SIGNATURE

In the matter between:

JOHANNES PAUL STRIKE DZUMBA

APPLICANT

and

THE MINISTER OF DEFENCE AND
MILITARY VETERANS

FIRST RESPONDENT

THE SOUTH AFRICAN MILITARY OMBUD

SECOND RESPONDENT

JUDGMENT

COCHRANE AJ

- [1] This is a review application in terms of Rule 53 of the Uniform Rules in which the Applicant seeks to review and set aside the decision made by the 2nd Respondent to dismiss the Applicants complaint in terms of Section 7(a) of the Military Ombud Act 4 of 2012.

The Facts

- [2] During February 2006, the Applicant, a member of the South African National Defence Force (SANDF), applied to be enrolled in the Physical Training Instructor's course (PTI Course) offered by the SANDF. To qualify for this course a member is required to undergo a one-week pre-selection course, to complete this course all attendees must be able to complete a 25-meter freestyle swim. Those members who are successful in the one-week pre-selection course qualify for the nine-week PTI Course.
- [3] The Applicant did not pass the one-week pre-selection course due to being unable to complete the swimming component of the course.
- [4] The SANDF also offers what is known as the Basic Water Orientation course, a course specifically aimed at assisting members with no previous swimming experience who wish to qualify for the PTI course. The Applicant attended this course but failed it. The Applicant then attended the one-week PTI pre-selection course for a second time, which he failed once again due to being unable to swim.
- [5] After failing the Basic Water Orientation course the applicant requested the 1st Respondent to evaluate the entry requirements for the PTI Course because he considered the 25-meter freestyle swim pre-requisite to be an unfair and invalid assessment practice on the basis that it is biased, groundless and oppressive. He submitted that the 25-meter freestyle swim entry requirement as well as the lifeguard qualification be removed.
- [6] The Applicant's founding affidavit alleged that certain members of the SANDF had been allowed to pass the PTI Course without being able to swim, a letter

in support of this allegation was annexed to the Applicants Founding Affidavit. The Respondents were accordingly directed by the court to file a supplementary affidavit answering the allegation. The respondent subsequently filed an explanatory affidavit which clarified that these members had successfully completed the 25-meter swim in the pre-selection week but had not passed the more strenuous swimming activities during the nine week PTI course which followed. They were accordingly accredited as Physical Training Instructors but were not to be used in water exercises as they were not yet water safe. Their accreditation was conditional upon a successful re-assessment within the following 12-month period. These members were re-assessed accordingly and found competent.

- [7] The Applicants request to evaluate the entry requirements was rejected by the SANDF on the basis that it lacked substance. The Applicant then approached the 2nd Respondent to investigate the complaint.
- [8] The 2nd Respondent carried out its investigation and determined that (i) it is the responsibility of the SANDF to prescribe policy requirements; (ii) that the PTI Course selection criteria is applicable to all members of the SANDF; and (iii) that the Applicant was not treated unfairly during the course. The complaint was accordingly dismissed by the 2nd Respondent.

The issue

- [9] The Applicant contends that the swimming component of the PTI Course is inappropriate on the basis that it unfairly discriminates against the Applicant.

The law

- [10] In terms of Section 6(1) of the Military Ombud Act 4 of 2012, the 2nd Respondent is authorised to investigate complaints lodged in terms of the Military Ombud Act fairly and expeditiously without fear favour or prejudice.

- [11] Section 9 of the Constitution guarantees that everyone is equal before the law and that no person may be unfairly discriminated against on specified grounds, furthermore Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits discrimination on the basis of socio-economic status.
- [12] The test as to whether there has been unfair discrimination is set out in *Harksen v Lane 1998 (1) SA 300 (CC)*. If the executive conduct differentiates between people or categories of people, there must be a rational connection between the said differentiation and the legitimate governmental purpose it is designed to achieve.

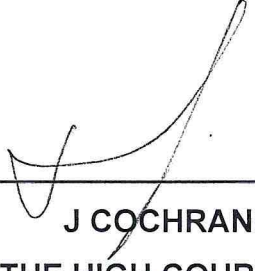
Application to the facts

- [13] Whilst the assessment criteria does differentiate between SANDF members who can and can't swim, it cannot be said that there is no rational connection between such a differentiation and its purpose.
- [14] The purpose of the assessment criteria, which is applicable to all arms of the military and every member who needs to be a Physical Training Instructor in the SANDF, is to ensure that the best candidates become Physical Training Instructors as they are instrumental in producing competent and combat ready soldiers. Furthermore, the purpose of the swimming component, is to ensure that those who successfully complete the course can safely present the Basic Water Orientation course and act as a lifeguard in cases of emergencies.
- [15] In light of the very legitimate purpose of these assessment criteria, applied consistently and equally to all SANDF members, I am of the view that the differentiation does not amount to unfair discrimination.

Order

- [16] The following order is accordingly made:

- (a) The application is dismissed with costs, such costs to include those consequent upon the employment of one counsel.



J COCHRANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

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|------------------------------------|--------------------------------|
| For the Applicant | : Adv T Munotsiwa |
| Instructed by | : Gwanangura Inc Attorneys |
| For the 2 nd Respondent | : Adv. KF Magano |
| Instructed by | : State Attorney: QP Sibanyoni |
| Date of Hearing | : 17 May 2021 |
| Date of Judgment | : 17 August 2021 |

Judgment transmitted electronically.