IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 11458/2021

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

23/11/2022

SIGNATURE DATE

In the matter between:

KAMOFELO RICHARD MOKHESENG	Applicant
and	
THE MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
THE SECRETARY FOR DEFENCE	Second Respondent
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Respondent
THE SURGEON GENERAL OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Fourth Respondent
THE MILITARY OMBUD	Fifth Respondent

JUDGMENT

ACTING JUDGE RIP

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1. The applicant launched an application to review and set aside the final report and recommendations of the Military Ombud, the Fifth Respondent, in terms of which the applicant's complaint was dismissed.

2. The review was brought in terms of section 1(c), in terms of the principle of legality, and section 23(1), right to fair labour practices, respectively of the Constitution of South Africa, act 108 of 1996, as well as section 13 of the Military Ombud Act 4 of 2012.

3. The application is opposed by the first to fourth respondents.

4. The applicant's services were terminated by the third respondent in terms of section 59(3) of the Defence Act, 42 of 2002.

5. At the outset of the matter, counsel for the applicant indicated that the applicant was not persisting with the relief sought in prayers 2 and 3 of the notice of motion. In other words, the applicant was no longer seeking to set aside the original decision of the third respondent.

6. The applicant was further not seeking reinstatement.

7. The applicant, however, was persisting with prayer 1 of the notice of motion and seeking an order that the fifth respondent's finding that the third respondent's

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decision to terminate the applicant's service in terms of section 59(3) is not unfair, is reviewed and set aside.

8. Consequently, the nature and effect of the Ombud's decision stands to be considered.

9. The applicant had in the founding papers proceeded on the basis that it was entitled to proceed with its review premised on the principles of legality.

10. In the replying affidavit in relation specifically to the question of reinstatement, the applicant in attempting to make out a case that the court was in as good a position as the chief of the SANDF in making a decision regarding the applicant's reinstatement, argued that such decision falls to be considered in terms of the Promotion of Administrative Justice Act, 2 of 2000 (hereinafter referred to as "*PAJA*").

11. The reasons put forward for that, amongst others, was that the applicant had exhausted all of his internal remedies, and that the applicant has already pleaded his case with the Chief of the SANDF and that the Chief was not willing to reconsider the decision to terminate him. Accordingly, it was alleged the decision of the Chief of the SANDF was a foregone conclusion.

12. It is against this background that the applicant then only proceeded to attack the decision of the Ombud.

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13. Given the change in the applicant's case, the parties were afforded the opportunity to file supplementary heads of argument to address specifically the issue of whether the decision of the Military Ombud is reviewable under PAJA or in terms of section 1(c) of the Constitution or both.

14. The applicant's argument in this regard can be summarized as follows:

15. It was contended that a review in terms of section 13 of the Military Ombud Act, 4 of 2012 ("*the MOA*") is akin to an appeal.

16. Further the applicant contends that section 13 of the MOA confers upon the High Court a statutory power review, which review, considering that the Military Ombud must promote the observance of fundamental rights of members of the Defence Force and that staff of the Military Ombud must serve independently, impartially and performing their functions in good faith and without fear, favour, bias or prejudice, is more akin to an appeal then a review.

17. I was referred to the matter of **Fesi v Ndabeni Communal Property Trust**[1] where the Supreme Court of Appeal with respect to reviews provided for in specific legislation said the following:

> "*This kind of review is dealt with by professor Hoexter under the heading 'special statutory review' (Act 113) as distinct from a PAJA and other types of review. She points out that this is sometimes a wider power than an ordinary*

[1] (2018) 2 All SA 617 (SCA) at para 54.

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review and thus more akin to appeal but that it might well be narrower with the court being confined to particular grounds of review or particular remedies. It would, of course, depend on the relevant statutory provision…"

18. Section 13 of the MOA does not provide for particular grounds of review or particular remedies, the section makes it plain that the court may consider the disputed issue anew.

19. The applicant contends that if the review under section 13 is not akin to an appeal, it is then a review in the wide sense allowing the court to interfere on any grounds permissible in law.

20. The applicant then put forward the following arguments in support thereof:

    20.1 The objectives of the office of the Military Ombud, and the powers and function of the Military Ombud are similar to the powers and functions of the public protector, a section 9 institution in terms of the Constitution of the Republic of South Africa, Act 108 of 1996, with the additional powers and functions as determined in the Public Protector Act, Act 23 of 1994).

    20.2 The Public Protector replaced the Ombudsman who prior to the repeal of the Ombudsman Act, 118 of 1979, exercised similar functions and powers as the Public Protector. The roll of the Public Protector for all practical purposes is similar to that of an Ombudsman.

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21. The applicant then referred to the matter of **The Minister of Home Affairs v Public Protector of the Republic of South Africa**[2], where the Supreme Court of Appeal, after analyzing the roll of the Public Protector and the office of the Public Protector came to the conclusion that decisions and recommendations of the Public Protector are reviewable under the principles of legality and not under the provisions of PAJA.

22. The applicant further contended that the recommendations and findings of an investigative body such as the Military Ombud can only be reviewed under the principle of legality. The reasons advanced therefore are the following:

22.1 The Military Ombud is a unique institution designed to play an oversight role in the relationship between members of the SANDF, including former members, and where there are complaints of members of the public regarding the official conduct of members of the Defence Force.

22.2 The Military Ombud's office does not fit into the institutions of public administration but stands apart from that. It is a purpose-built watchdog that is independent and appointed in terms of the MOA.

22.3 The Military Ombud stands outside the democracy of the SANDF, and its decisions and recommendations are not of a bureaucratic nature.

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[2] 2018 (3) SA 380 SCA at paras 27-37.

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22.4 The Military Ombud and its staff members serve independently and impartially and must perform their functions in good faith and without fear, favour, bias or prejudice subject to the Constitution and the law (MOA Section 8).

22.5 The Military Ombud's function is not to administer, but to investigate, report and make recommendations. It has brought discretionary powers as to what complaints to accept, what allegations to investigate, how to investigate them and what recommendations to make.

22.6 The recommendations of the Military Ombud are not administrative in nature. PAJA does not apply to the review of the exercises of power by the Military Ombud.

23. The first to fourth respondents contend that a decision of the Military Ombud is reviewable under PAJA and not in terms of the principles of legality.

24. The respondents contended the following:

24.1 The Military Ombud is established in terms of section 2 of the Military Ombud Act 4 of 2012. Its mandate is set out in section 4 thereof and is to investigate complaints; lodged in writing by members or former members regarding conditions of service, by members of the public regarding the official conduct of a member of the Defence Force, or by a person acting on behalf of the member.

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25. Section 239 of the Constitution defines an organ of state as:

a. Any department of state or administration in the national, provincial or local sphere of government; or

b. Any functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.

26. Accordingly, the respondents contend that the Military Ombud is an organ of state as defined by the Constitution.

27. Section 1 of PAJA defines an administrative action as any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power or performing a public function in terms of any legislation.

28. An administrator is defined as an organ of state, or any national person or juristic person, taking administrative action. Decision means any decision of administrative of nature made, propose to be made, or required to be made, as the case may be, under an empowering provision.

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29. PAJA excludes certain functionaries from the ambit of the act, but the Military Ombud is not amongst those functionaries that are excluded by PAJA.

30. Accordingly, the respondents contend that the decision of the Military Ombud meets the criteria set out for administrative action and referred to in the matter of **Minister of Defence and Military Veterans v Motau and Others**[3].

31. In the matter of **Motau** referred to by the respondents, Justice Khampepe concludes that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA.[4]

32. Justice Khampepe also refers to the matter of **New Clicks**[5], where Justice Chaskalson CJ suggested that the definition of administrative action under PAJA must be *"construed consistently"* with the right to administrative justice in section 33 of the Constitution. As section 33 itself contains no expressed attempt to delimit the scope of *"administrative action"*, it is helpful to have reference to jurisprudence regarding interpretation of that section.

33. The respondents contend that if one considers section 13 of the Military Ombud Act, which states:

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3 2014 (5) SA 69 (CC) para 33.

4 See para 34 of the judgment.

5 Minister of Health and Another N.O. v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Aniki Coria) 2006 (2) SA 311 (CC) at paras 100 – 128.

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"Any person who is aggrieved by a decision of the Ombud may apply to the High Court for a review against the decision within 180 days of the decision of the Ombudsman."

34. That firstly the Act recognises that the Ombud takes decision in the exercise of its public powers in terms of the Act.

35. Secondly, that the legislature carefully aligned the period of review of the decisions of the Ombud decisions with the period of the review of an administrative decision in terms of section 7(1) of PAJA.

36. Thirdly, the legislature has not provided substantive grounds for review of the *"decision"*, as that will be contained in PAJA. The respondents contend that any other interpretation of section 13 will lead to an absurdity.

37. In the matter of **Colonel Protas Sibonelo Lembede v Minister of Defence and Others**[6], the court, dealing with the challenge to the report of the Military Ombud stated:

"..., if an organ of state brings a review application, then the yardstick for review is the doctrine of legality but if the complainant brings a review application, then the yardstick is section 6 of PAJA, this arbitrary consequence could not have been intended."

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6 (9642/2020) [2021] ZAGPPHC858 (15 December 2021) at para 38.

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38. The respondents then referred to the matter of **State Information Technology Agency SOC v Gijima Holdings**[7], where the court distinguished a PAJA review from a legality review:

> *"It is necessary to distinguish between a PAJA review, on the one hand and a legality review, on the other. PAJA was enacted to give effect to the right to lawful administrative action in section 33 of the Constitution and, as it was intended to be, and in substance it is a codification of the rights in section 33, so the Constitutional Court said in New Clicks, it was not possible for litigants to go behind, by relying either directly on section 33(1) or when reviewing unlawful administrative actions as this would undermine the very purpose for which it was enacted. So, PAJA covers administrative action in private (contractual) power remains reviewable. In short, if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law.*
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> *In my view, the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the laws allow no other administrative challenge the unlawful exercise of public power. There can not be the first port of call or an alternative path to review, when PAJA advise."*

39. The respondents therefore contend that the applicant was confined to bring the application in terms of PAJA if he wanted to review the decision of the Ombud and that a legality review may not be used where PAJA applies.

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7 (2016) ZASCA143 (30 September 2016).

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40. The respondents contend that the applicant's argument that the review contemplated in section 13 of the Ombud Act is akin to appeal is incorrect as it is distinguishable from the other types of reviews referred to by the author Hoexter.

41. The rationale put forward is that there are no substantive grounds provided in the Ombud Act and that the law of general application which provides for reviews of administrative decisions is PAJA.

42. Accordingly, the only interpretation that is sensible is that the decision of the Ombud cannot be akin to an appeal. There are no remedies anyway if one takes out the remedies in PAJA. The Ombud is *functus officio* and cannot re-investigate its own decision.

43. Section 13 must be read to be what it is: that the decision of the Ombud is subject to review by a court subject to the grounds and remedies contained in PAJA.

43. I find the argument on behalf of the respondents compelling and in agreement with the rationale put forward.

44. Accordingly, I find that the decision of the Military Ombud does amount to administrative action as contemplated by PAJA and consequently that the applicant should have proceeded in terms of PAJA.

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The question of delay and mootness

45. Section 13 of the Military Ombud Act states as follows:

> *"13 review – any person aggrieved by a decision of the Ombud may apply to the High Court for review against that decision within 180 days of the decision of the Ombudsman."*

46. The Military Ombud is granted its powers by section 6 of the Act.

47. Section 6(1) of the Act states that the Ombud must investigate complaints lodged with the office in accordance with section 6(6) which states:

> *"For the purposes of subsection 1 the Ombud-*
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> *(a) may summon any person to submit an affidavit or affirm declaration or to appear before him or her to give evidence or peruse any document that has a bearing on the matter before him or her;*
> *(b) may resolve any dispute by means of mediation, conciliation or negotiations or any other expedient manner; and*
> *(c) must promote the observance of the fundamental rights of the members of the defence force."*

48. Section 6(8) of the Act states:

> *"If the Ombud upholds the complaint, the Ombud must recommend the appropriate relief for the implementation to the Minister."*

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49. In this matter, the respondent raised a point *in limine*, namely that there was an unreasonable delay in bringing the application.

50. The respondents contend that the clock started when the applicant became aware of his discharge on 17 April 2012, as stated in the founding affidavit.

51. He was then advised that his attempt to be reinstated by the Chief of the SANDF had failed during July 2013, as is evidence by the letter from the Chief of the SANDF attached to the founding affidavit as "KIN15".

52. The application before me was instituted in March 2021.

53. The applicant in this regard contends firstly, that he was no longer seeking that the decision to terminate the applicant's claiming a service with the SANDF in terms of section 59(3) of the Defence Act of 2002, unlawful and invalid.

54. The applicant is now only proceeding to attack the fifth respondent's decision and consequently, the applicant submits that the fifth respondent granted condonation to the applicant to investigate the complaint.

55. The applicant states in the founding papers that he approached the office of the Military Ombud for assistance in 2013, and that the Military Ombud kept on rejecting his complaint citing a lack of evidence.

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56. The applicant goes on to state that during 2016, he was then advised to visit the document centre for evidence and from 2016 until 2018, he attempted to obtain further documents without success.

57. Then the applicant wrote a letter to the Minister of Defence on 29 November 2016 and did not receive a response.

58. During March 2017, the applicant addressed a further letter to the Chief of the SANDF.

59. On 8 May 2017, the Chief of the SANDF acknowledged receipt of the letter and documents and confirmed that the applicant was discharged in terms of section 59(3) of the Act.

60. The applicant then states that on 18 August 2018, he learned of the Board of Enquiry that had been set up for the first time, and on 16 August 2018, he wrote a further letter to the Minister of Defence.

61. The applicant states that he received no reply from the Minister of Defence and had no further internal remedies available to him at that stage. I pause at this stage to consider what internal remedies were available to the applicant.

62. I am of the view that the only internal remedy that had to be satisfied before the applicant could have acted was that of the initial request to the Chief of the SANDF for reinstatement.

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63. Consequently, when that request was dismissed by the Chief of the SANDF the internal remedies had then been exhausted.

64. I am of the view that the right of the applicant to lodge a complaint with the Ombud and have such complaint investigated, is not an internal remedy as envisaged by PAJA.

65. Counsel for the applicant agreed with this proposition.

66. The applicant lodged his complaint with the Military Ombud during February 2019.

67. On 19 June 2020, the applicant received the Ombud's preliminary report for his perusal and comments, and he submitted such comments on 25 June 2020.

68. On 9 September 2020, the Military Ombud issued its final report.

69. The respondents in addition to the point regarding an unreasonable delay also argues that the matter has in any event become moot.

70. Such argument is premised upon the fact that the applicant's contract was for a period of 10 years commencing on 3 January 2011 to 31 December 2020.

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71. Consequently, the entire period of the contract has been discharged by the effluxion of time and consequently, the rights and remedies of the applicant that he might have had, are no longer available because the contract has expired through the effluxion of time.

72. Consequently, there is no contract to which the applicant could be reinstated.

73. I was referred specifically to the matter of **Notyawa v Makana Municipality and Others**[8], where the court decided that the matter was moot because the employment contract, which was the subject of the litigation, would have come to an end very shortly by the time the application was heard.

74. The respondents further contend that where a contract is the subject of dispute has discharged by effluxion of time, the matter is moot, and the court does not have jurisdiction to entertain the matter, unless there were exceptional circumstances.[9]

75. The applicant's contention is that given the fact that it is only the decision of the Ombud that is now being reviewed and considered that the court should restrict itself to whether the review of that decision has been brought in time and that there is no need to regard the entire delay period.

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8 (2017) 4 All SA 533 (ECG) (24 August 2017) para 59.

9 RMR Commodity Enterprises CC t/a Krass Blankets v Chairman of the Bid Adjudication Committee and Others.

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76. The Respondents in their heads of argument raise the argument that the matter has become moot.

77. On the question of mootness, the Act in terms of section 6(8) states as follows:

> *"If the Ombud upholds the complaint, the Ombud must recommend the appropriate relief for the implementation to the Minister."*

78. Even if the court were to substitute its decision with that of the Ombud, the only competent relief is to uphold the complaint and to recommend reinstatement to the Minister of Defence.

79. The Minister of Defence then would be met with a situation where the contract period has run out through the effluxion of time and the underlying termination has not then been reviewed and set aside.

80. The applicant, as alluded to earlier, made the submission that any referral to the Minister would be a foregone conclusion, and that is why the applicant initially sought the court to order reinstatement. The applicant however did not persist with that relief.

81. The underlying contract period has run out through the effluxion of time.

82. Consequently, I am of the view that the question of mootness raised by the respondents is applicable in the circumstances. This is so, regardless of

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whether the review is to operate in a process akin to an appeal, in terms of PAJA or in terms of a legality review.

83. Given my findings, it is not necessary to deal with the merits of the review itself. I further do not need to determine the question of delay.

CONCLUSION

84. I accordingly find that the application should have been brought as a PAJA review and as a result stands to be dismissed on this ground alone.

85. Secondly, that the issue has in any event become moot.

86. Accordingly, I make the following order:-

1. The application is dismissed with costs on a party and party scale.

C M RIP

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on

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CaseLines. The date for hand-down is deemed to be 23 November 2022.

HEARD ON 27 OCTOBER 2022

JUDGMENT DELIVERED ON 23 NOVEMBER 2022.

APPEARANCES

On behalf of the Applicant:	**Adv. G L VAN DER WESTHUIZEN**
Instructed by:	**GRIESEL VAN ZANTEN INC**
On behalf of the Respondents:	**Adv. MATHE-NDLAZI**
Instructed by:	**THE STATE ATTORNEY**

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