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Of interest to other judges

## **THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

### **JUDGMENT**

Case no: C 381/17

In the matter between:

**SOLIDARITY obo A GERBER**

**Applicant**

and

**THE SOUTH AFRICAN POLICE  
SERVICE**

**First respondent**

**MINISTER OF POLICE N.O.**

**Second respondent**

**NATIONAL COMMISSIONER OF  
SAPS N.O.**

**Third respondent**

**PROVINCIAL COMMISSIONER  
(WESTERN CAPE) OF SAPS N.O.**

**Fourth respondent**

**NATIONAL SECTION HEAD:  
MEDICAL ADMINISTRATION (SAPS)**

**Fifth respondent**

**DEPUTY PROVINCIAL  
COMMISSIONER (WESTERN  
CAPE): HUMAN RESOURCE  
MANAGEMENT OF SAPS, N.O.**

**Sixth Respondent**

**Heard:** 4 August 2017

**Delivered:** 11 August 2017

**Summary:** Urgent application – unlawful transfer interdicted.

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## JUDGMENT

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### STEENKAMP J

#### Introduction

- [1] The applicant, Sergeant Armand Grobler, suffers from post-traumatic stress disorder (PTSD) as a result of a traumatic event in the course of his duty as an officer of the South African Police Service (SAPS). As a result, he has been declared unfit to carry a firearm and he has been temporarily placed in an administrative function at the Client Service Centre (CSC) – commonly referred to as the charge office – in Oudtshoorn. But the Deputy Provincial Commissioner of SAPS for the Western Cape dealing with human resources (the sixth respondent) has instructed him to report for duty at the Oudtshoorn Magistrate's Court – a position that, according to its key performance areas (KPAs), includes the provision that he must be armed. He<sup>1</sup> seeks to interdict the transfer on the ground that it is unlawful.

#### Background facts

- [2] Sgt Gerber has been a police officer for some 15 years. In 2014 he was exposed to a traumatic incident on duty that triggered PTSD. After consulting a clinical psychologist and an occupational therapist they recommended that he be placed in an alternative job. On 16 February 2015 SAPS declared him unfit to possess a firearm for five years, i.e. until February 2020.
- [3] Sgt Gerber was temporarily placed in a desk job at the Oudtshoorn CSC, awaiting the outcome of a medical assessment. On 16 February this year, 2017, the deputy provincial commissioner: human resource management

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<sup>1</sup> The applicant is in fact Solidarity, Sgt Gerber's trade union, acting on his behalf.

for SAPS in the Western Cape, Major General M C Mzamane (the sixth respondent) sent a letter to all station commanders in the Western Cape confirming that Gerber (amongst others) was unfit to possess a firearm. He stated:

“You are hereby instructed to consult with the affected members and serve a notice of redeployment in terms of SSSBC Agreement 5 of 1999 to a position identified by Station Management where the carrying of a firearm is not a prerequisite to perform such duties.”

- [4] SSBC Agreement 5 of 1999 is a collective agreement reached in the Safety and Security Sectoral Bargaining Council in October 1999 between SAPS and three recognised trade unions. It binds the employer and employees in SAPS. It governs transfers and states, in peremptory terms:

“10.1.3 The employee whose transfer is being considered must be informed that the transfer is being considered, and given the reasons for the proposed transfer. He or she must be allowed a reasonable opportunity to make representations concerning the transfer, if he or she wishes to do so. Under normal circumstances a period of 21 days will suffice for this purpose. The final decision must be communicated to the employee concerned within 21 days after his or her representation. If the employee accepts the transfer and fails to make any representations, the necessary notice may be issued and the transfer carried out.

10.1.4 If the employee makes representations, the commissioner responsible for considering the transfer must consider the representations and decide the matter. If the transfer has to be considered by more than one provincial or divisional commissioner, each commissioner must be given a copy of the representations to allow him or her to take an informed decision.

10.1.5 After the representations of the employee have been considered, the employee must be informed in writing that the representations were considered, and the outcome must be stated. If the representations were not favourably considered, the reasons why the representations were rejected must be set out in brief.”

- [5] On 3 March 2017 the acting station commander in Oudtshoorn, Col C Marnewick, sent Sgt Gerber a letter in the following terms:

“Member must be informed that his possible placement at the Court will be considered.

The member has 21 days to make a representation to this office.”

- [6] Sgt Gerber did make representations. He did so on 3 April 2017. But he received no response. The deponent to SAPS's answering affidavit, Brigadier Januari, says she never received it; but that is contradicted by her own letter, written on 30 May 2017, that she did receive it. More of that later. What is common cause, is that Sgt Gerber's representations were not considered; nor was he given “the reasons why the representations were rejected” as required by the SSSBC collective agreement.
- [7] Instead, before the 21 days for him to make representations had expired, a Captain Dean of Oudtshoorn SAPS gave Gerber a letter dated 14 March 2017 informing him of his “possible placement” at the Oudtshoorn Magistrate's Court. It did not contain a post description or the date when he had to report for duty. And on 24 April 2017 Col Dreyer told Gerber that he would be placed at “Oudtshoorn Vispol Support (Court)”. [Vispol is an abbreviation for Visible Policing]. It purported to be on Brig Januari's instruction, although she had not considered or responded to Gerber's earlier representations.
- [8] On 23 May 2017 Brig Januari transmitted an email annexing a letter from a Col van Rooyen, the provincial head: personnel management. That letter deals with the placement of members of SAPS declared unfit to possess firearms in terms of the Firearms Control Act. Col van Rooyen confirms that: “You had to consult the member/s and serve a notice for redeployment in terms of the transfer policy (SSSBC Agreement 5 of 1999) to the position that was proposed by this office. Representations had to be considered if submitted and the information submitted to this office”. Brig Januari had neither considered Gerber's representations nor submitted them to Col van Rooyen's office. She did not follow the steps set out in SSSBC agreement 5 of 1999.
- [9] The performance plan output and standards for rendering duty at court include the following:

- 9.1 “Always be well-armed when an average of 15 prisoners are [sic] transported to and from their places of detention daily.”
- 9.2 “Always handle any dangerous situations daily, when an average of 15 prisoners are transported from and to their places of detention.”
- 9.3 “Handle any dangerous situations daily in court building.”
- 9.4 “Arrest an average of 5 persons per month who are held in connection with contempt of court daily.”

[10] Sgt Gerber points out that these tasks are in conflict with his final medical assessment in terms of which he must be kept away from dangerous and stressful situations. He is also not allowed to carry a firearm.

[11] On 7 June 2017 Brig Januari sent Gerber a letter – without having consulted him – stating:

“PLACEMENT AT COURT

- 1. As per PC instruction and head office approval you are hereby instructed to report to the above component before 2017/06/08.
- 2. Non-compliance will be dealt with departmentally and can result in stopping of salary.”

[12] Gerber was booked off ill by a Dr Fourie.

[13] On 14 June 2017 the principal social worker of SAPS’s Employee Health and Wellness Social Work Services, Capt J E Neethling, sent Brig Januari a report. She confirmed Gerber’s medical condition and noted that he was “correctly placed (according to his medical evaluation and diagnosis) for the last year”. She concluded and recommended that it would not be in the interests of Gerber or SAPS for him to be transferred. Once again, Brig Januari did not respond.

[14] Sgt Gerber then approached his trade union, Solidarity. Its official, Renate Barnard, wrote to Brig Januari on 15 June 2017. She requested Brig Januari to provide feedback on Sgt Gerber’s representations of 3 April 2017 in terms of the SSSBC collective agreement and to reconsider his placement at court; and to take into consideration the National Instruction 5 of 2015 regarding alternative placement. Barnard included another copy of Gerber’s representations of 3 April 2017. She pointed out that SAPS

were not adhering to its own collective agreements and policies. Once again, Brig Januari did not respond.

- [15] Instead, and without responding to Solidarity, a Lt Col du Plessis, the Operational Support Commander at Oudtshoorn SAPS, wrote to the station commander on 21 June 2017. She alleges that Gerber was consulted on 13 February 2017 on possible placement at court and that Gerber was “not interested”. Gerber’s version is that he could not take up that position due to his PTSD and the risk to him, other SAPS members and the public at large. Du Plessis stated:

“The member has not yet taken up his post. By instruction of Col Dreyer on 2017-06-20 after he interviewed the member, this letter to be [sic] drawn up and member to be given 5 days to liaise with myself [sic] and the court commander and take up his placement at court. There is no work or office for the member currently at Vispol Operational Support. If the member does not comply with instruction, the stopping of salary will be investigated. Disciplinary file was already opened for non-compliance with an instruction. Member was served a copy of this letter.”

- [16] Solidarity’s attorneys wrote to Brigadier Januari twice, on 23 June and 26 June 2017, in an effort to prevent litigation. By now it should come as no surprise that she did not respond. The attorneys then brought this application on an urgent basis on 28 June 2017. It asked SAPS to deliver an answering affidavit by 4 July. Brig Januari delivered an answering affidavit on behalf of SAPS on 5 July 2017. Gerber replied the next day. The matter was set down for hearing during court recess on 6 July 2017. On that day, and by agreement, Lagrange J made the following order:

- “1. First respondent [SAPS] does not concede that the matter is urgent and reserves all its rights in this regard.
2. Applicant and first respondent agree that urgency or the alleged lack thereof, as per first respondent, would not be affected by the matter being heard in the first week of the third term as requested by Lagrange J.
3. Applicant shall continue to render services at the enquiry desk, Oudtshoorn police station forthwith until the application has been heard on 4 August 2017 at which date the Presiding Judge may make further directions (if applicable) and should judgment not be given on such date.

4. All issues of costs including the scale thereof stand over for determination.”

[17] The matter was then enrolled for 4 August 2017. Having heard argument, I reserved judgment and extended the arrangement set out in paragraph 3 of Lagrange J’s order until the date of judgment.

#### The relief sought

[18] Solidarity and Sgt Gerber seek the following relief:

“1. The applicant’s failure to comply with the form and time requirements for service and filing of the application as required by the rules and the LRA are condoned and the matter be heard and dealt with on an urgent basis;

2. Declaring the decision by the sixth respondent [the Deputy Provincial Commissioner (Western Cape): human resource management of SAPS] that the individual applicant (Sgt Armand Gerber) is placed at the Magistrate’s Court in Oudtshoorn in the position of “court duties” as from 26 June 2017 to be unlawful and of no force and effect;

3. Interdicting and restraining the first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) to forthwith refrain from placing the individual applicant in a position or at a place where he may be required to possess and/or handle a firearm for the period that he was declared to be unfit to possess and handle a firearm and where the individual applicant’s current medical situation (PTSD) will preclude him from rendering duty in or at, for as long as the individual applicant continues to suffer from his current medical condition;

4. Directing the first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) to allow the individual applicant to continue rendering service at the Oudtshoorn CSC (client services centre) in an administration capacity as he did prior to the unlawful instruction being issued for him to be placed at the Magistrate’s Court in Oudtshoorn in the position of “court duties” as from 26 June 2017;

5. Interdicting and restraining the first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) forthwith to place the individual in any other or alternative position than Oudtshoorn CSC (client services centre) in an administration capacity if the relevant provisions of the SSSBC Agreement 5 of 1999 and the National Instruction

5 of 2015 (ill-health retirement and ill health related matters) were not followed and adhered to;

6. Interdicting and restraining the first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) from instituting and/or from proceeding with any disciplinary steps against the individual applicant for his failure to comply with the instruction by his superiors to report for duty at the Magistrate's Court in the position of "court duties" and for any failure to render duty in this position as from 26 June 2017;

7. Interdicting and restraining the first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) from withholding the individual applicant's monthly salary as a result of his failure to comply with the instruction by his superiors to report for duty at the Magistrate's Court in Oudtshoorn in the position of "court duties";

8. That the first to third respondents be ordered to pay the applicant's costs, the one paying the others to be absolved;

9. That the fourth to sixth respondents be ordered to pay the applicant's costs, the one paying the others to be absolved, only in the event of opposition;

10. Further and/or alternative relief."

### Evaluation / Analysis

[19] The relief sought is in the nature of an interdict. The applicant has to establish a clear right; an injury actually committed or reasonably apprehended; and the absence of another satisfactory remedy.<sup>2</sup> The applicant also has to establish why the matter should be heard urgently.

### *Urgency*

[20] Ms *De Wet*, for SAPS, submitted that the matter was not urgent. Gerber received a placement letter on 7 June 2017. And he knew of his possible placement – before making representations – on 14 March. She referred

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<sup>2</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 224; C B Prest, *The Law and Practice of Interdicts* (Juta 1993) at 44-45.



to *BEMAWUSA v SABC*<sup>3</sup>, where an application was struck from the roll for lack of urgency where the union was aware of a pending disciplinary process for many months but had taken no action.

- [21] In this case, the date of 14 March is a red herring. At that stage, had the union approached the Court on an urgent basis, it would have been given short shrift as its member had not availed himself of the opportunity to make representations as outlined in the collective agreement. In this case, Sgt Gerber did make representations. He followed the process outlined in the collective agreement. Brig Januari and SAPS did not. He and his union could not come to court at that early stage.
- [22] Having received the placement letter on 7 June, Sgt Gerber again took further steps to prevent unnecessary litigation and costs. His social worker wrote to Brig Januari. As is her wont, she did not respond. As a last resort, he approached his trade union. Solidarity wrote to Brig Januari on 15 June. It included his representations again. It reminded Brig Januari of her duties. Again, it waited in vain for a response. It is only on 21 June, having seen Col du Plessis's letter, that it became clear that Brig Januari and SAPS had no intention to respond to the applicants' representations and that this application was the last resort. And then they brought this application within a week.
- [23] I am satisfied that this is one of those rare cases where exceptional circumstances exist to hear the application on an urgent basis, as grave injustice may otherwise result<sup>4</sup>, given that the applicants' representations and their attempts to comply with the collective agreement have fallen deaf ears.

*Clear right?*

- [24] In order to decide whether Sgt Gerber has a clear right to the relief he seeks, a fundamental question is whether SAPS has considered his representations not to be transferred, as they were compelled to do in

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<sup>3</sup> (2016) 36 *ILJ* 1394 (LC).

<sup>4</sup> Cf *Booyesen v Minister of Safety & Security* [2011] 1 83 (LAC) para 54.

terms of the SSSBC Agreement. And here lies a fundamental and startling contradiction.

- [25] The deponent to SAPS's answering affidavit is Brigadier Lavona Magdalene Januari, the Oudtshoorn Station Commander. She says under oath, in response to Gerber's allegation that he made representations on 3 April 2017:

"I note that Applicant alleges that he had submitted representations to myself [*sic*] and Col Festus. It was never brought to my or Col Festus's attention and I am investigating whether the submissions were indeed submitted as alleged by Applicant".

- [26] Brig Januari deposed to this affidavit, it appears, early in July 2017. (Her affidavit is signed but undated. The State Attorney filed it on 5 July 2017). But this allegation by Brig Januari is contradicted in a letter under her own hand and signature on 30 May 2017 – barely a month earlier – and addressed to the provincial commissioner, dealing with the placement of SAPS members declared unfit to possess a firearm, in which she refers to the letter sent to Gerber on 14 March 2017. Then she states:

"Only one [1] [*sic*] member: no 7000678-4 Sgt A Gerber submitted his representation to this office on 2017-04-03."

- [27] Brig Januari wrote that letter to the Provincial Commissioner and other SAPS officials, including the Oudtshoorn Vispol Commander, under the heading: "PLACEMENT: MEMBERS OF THE SA POLICE SERVICE DECLARED UNFIT TO POSSESS FIREARMS into. SECTION 102 AND 103 OF THE FIREARMS CONTROL ACT, 2000 [ACT 60/2000]: WESTERN CAPE." It refers to the intended redeployment of a number of SAPS members, including Sgt Gerber.

- [28] Colonel Erika van Rooyen, responsible for human resources, deposed to a supporting affidavit. She confirms under oath that "a letter was received from the Station Commander [i.e. Brig Januari] on 2017-05-31 that Sergeant Gerber has not yet executed his transfer to the Oudtshoorn Court." But she attaches no such letter. The letter that is attached is the one from Brig Januari dated 30 May 2017, in which she states that Sgt Gerber had made submissions on 3 April 2017. That corroborates Sgt

Gerber's version and contradicts Brig Januari's own later statement under oath. Sadly for a high ranking SAPS officer, the ineluctable conclusion is that Brig Januari did not, under oath, play open cards with the Court.

- [29] To make matters worse, Brig Januari – having received Gerber's representations twice, if the second copy attached to Solidarity's letter of 15 June 2017 is considered – did nothing about it. She did not respond and she did not give reasons why he would, despite his representations, be transferred. Nor did she refer it to the commissioner responsible for the transfer for his or her consideration. That is contrary to the prescripts of the collective agreement reached in the Bargaining Council on 8 October 1999. Sgt Gerber's representations were, quite simply, never considered. And he has a clear right for them to be considered. The collective agreement says so in clear and peremptory terms. And that agreement is binding on SAPS.
- [30] SAPS have also not complied with National Instruction 5 of 2005 dealing with ill health. It did not convene a meeting as set out in paragraph 9 of that Instruction, nor did it follow the procedures set out in paragraphs 10 and 11.
- [31] Sgt Gerber and his trade union have a clear right to the relief they seek. SAPS – and Brig Januari in particular – simply disregarded their obligations in terms of SSSBC agreement 5 of 1999. That is unlawful. And her attempt to evade her obligations by alleging that she never received those representations is based on a distortion of the truth.

*An injury committed or apprehended?*

- [32] The KPAs attached to the position to which Sgt Gerber is to be transferred, specify that he must carry a firearm. That would be unlawful. He has been declared unfit to carry a firearm.
- [33] In response, Brig Januari says that an exception will be made and that he will not have to carry a firearm, despite the KPAs to the contrary. But even if that were to be accepted, he will still be required to carry out "KPA 3 and 5", according to Brig Januari. And that includes duties like the following:

“Escort an average of five prisoners to the clerk of the court per week to pay a fine or bail.

No escapes from prisoner [*sic*] while the prisoners are escorted.”

[34] As Mr *Bekker* argued, since Gerber suffers from PTSD, any possible escape by a prisoner would create a stressful situation. It may well trigger his PTSD, as is clear from his medical report. He reasonably apprehends further injury to his mental health, should he be transferred to the court position.

#### *Alternative remedy?*

[35] The application rests on lawfulness, not unfairness. It is analogous to the situation in *Solidarity v SABC*<sup>5</sup> in which Lagrange J referred to the judgment of the Constitutional Court in *Steenkamp v Edcon Ltd.*<sup>6</sup> In that case, Zondo J cautioned that, where an LRA remedy exists, that is the remedy that litigants should use. But that does not mean that other remedies may not exist in specific factual circumstances.

[36] This is a case akin to dealt with in *Dlamini v The Independent Police Investigative Directorate*<sup>7</sup> where Van Niekerk J commented:

“To the extent that counsel for the respondents has relied on the availability of an adequate alternative remedy in the hands of the applicants, he conceded during argument that the remedy sought in the bargaining council was one premised on fairness, in which the applicants seek redress for what they contend was an unfair labour practice committed by their employer. In these proceedings, what is at issue is the lawfulness of the applicants continued precautionary transfer. The referral of a dispute to the bargaining council is therefore not an adequate alternative remedy; it is no more than a separate substantive cause of action arising from the same set of facts.”

[37] Sgt Gerber has attempted to make use of the procedures prescribed by the SSBC agreement. SAPS have not. This is not a dispute that he can

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<sup>55</sup> (2016) 37 *ILJ* 2888 (LC). See also the discussion by Dr John Grogan, “Summary Justice” *Employment Law*, Volume 32, December 2016 4-12.

<sup>6</sup> (2016) 37 *ILJ* 564 (CC).

<sup>7</sup> [2016] ZALCJHB 452 (29 April 2016) par 12.

refer to the Bargaining Council as an unfair labour practice as is the case, for example, with allegedly unfair suspensions. He has no adequate alternative remedy left, other than to approach this Court for relief.

### Conclusion

[38] The applicant is entitled to the relief it seeks. It has satisfied all the requirements for an urgent interdict. And all it seeks is for the respondents to abide by their own agreements and instructions.

[39] Despite the apparent duplicity of the deponent to SAPS's answering affidavit, Brigadier Januari, Mr *Bekker* told the Court that Solidarity would not seek costs against any of the respondents or against her, given the ongoing relationship between the union and SAPS. I respect that request.

### Order

[40] I therefore make the following order:

40.1 The forms and time for service as required by the rules are dispensed with and the matter was heard on an urgent basis.

40.2 The decision by the sixth respondent [the Deputy Provincial Commissioner (Western Cape): Human Resource Management of the SAPS] that Sgt Armand Gerber is placed at the Magistrate's Court in Oudtshoorn in the position of "court duties" as from 26 June 2017 is declared to be unlawful and of no force and effect;

40.3 The first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) are interdicted and restrained from placing the individual applicant, Sgt Gerber, in a position or at a place where he may be required to possess and/or handle a firearm for the period that he was declared to be unfit to possess and handle a firearm and where his current medical situation (PTSD) will preclude him from rendering duty, for as long as he continues to suffer from his current medical condition;

40.4 The first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) are directed to allow Sgt Gerber to continue rendering service at the Oudtshoorn CSC (client

services centre) in an administration capacity, as he did prior to the unlawful instruction being issued for him to be placed at the Magistrate's Court in Oudtshoorn in the position of "court duties" as from 26 June 2017;

40.5 The first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) are interdicted from placing Sgt Gerber in any other or alternative position than Oudtshoorn CSC (client services centre) in an administration capacity if the relevant provisions of the SSSBC Agreement 5 of 1999 and the National Instruction 5 of 2015 (ill-health retirement and ill health related matters) were not followed and adhered to;

40.6 The first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) are interdicted from instituting or from proceeding with any disciplinary steps against Sgt Gerber for his failure to comply with the instruction by his superiors to report for duty at the Magistrate's Court in the position of "court duties" and for any failure to render duty in this position as from 26 June 2017;

40.7 The first to fourth respondents and the sixth respondent (and any person authorised or instructed by them) are interdicted from withholding Sgt Gerber's monthly salary as a result of his failure to comply with the instruction by his superiors to report for duty at the Magistrate's Court in Oudtshoorn in the position of "court duties".

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Wilhelm P Bekker  
Instructed by Serfontein Viljoen & Swart.

RESPONDENTS: Alma de Wet  
Instructed by the State Attorney, Cape Town.

LABOUR COURT