



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.

(3) REVISED.

18.05.2010
DATE

[Signature]
SIGNATURE

18/05/2010
CASE NO: 12571/2010

In the matter between:

SAMUEL MANDLA-MANDLA MADONSELA

First Applicant

SOUTH AFRICAN NATIONAL DEFENCE UNION

Second Applicant

and

THE MINISTER OF DEFENCE

First Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application. The substantive relief sought by the first and second applicants is set out in paragraphs 3 - 7 of the notice of motion as follows:

3. *The respondent's decision in terms whereof the first applicant was administratively discharged on 30 November 2009, is set aside and suspended, pending the institution and finalisation of an application review that is to be filed by the applicants within 30 (thirty) days from date of this order in the following terms:*
 - a. *The first applicant shall remain suspended with pay;*
 - b. *The first applicant is entitled to receive his usual remuneration and other benefits that he would have received, if not for his administrative discharge.*
4. *The respondent are (sic) ordered to effect payment forthwith, but no later than two calendar days from date hereof, of any/or all of the first applicant's salary and other benefits that he would have been entitled to and received if not for his administrative discharge.*
5. *That the applicants are granted leave to effect service of this court order by transmitting a copy thereof by means of telefax to State Attorney and the respondent.*
6. *The Deputy Sheriff of this Honourable Court is authorised and requested to effect service of this court order by means of accepting and transmitting copies thereof via telefax to the respondent.*
7. *The costs of this application shall be costs in the review proceedings, alternatively, if the respondent oppose (sic) the relief as applied for herein be ordered to pay the costs.*

[2] The application was brought on an urgent basis. Apart from opposition to the substantive relief sought by the applicants, the respondent (“the Minister”) also contests the urgency of the matter, and counsel for the Minister urged me to strike the application from the roll. As a result of the nature of the relief sought, I decided to hear the matter, even though there was sufficient basis to strike the matter off the roll.

[3] The first applicant was employed as a sergeant within the South African National Defence Force (“SANDF”). He was stationed at Airforce base, in Hoedspruit. The second applicant is a trade union, duly registered in terms of regulation 45 of the general regulations for the SANDF and Reserve, published in the Government Gazette R998 of 20 August 1999 (“the regulations”). The first applicant is a member of the second applicant and accordingly, the second applicant assists and supports the first applicant in this application.

[4] The Minister is the political head of SANDF. She exercises the command of SANDF under authority of the President of the Republic.

[5] The common cause factual matrix is the following: On 8 November 2008 at a South African Air Force (SAAF) college in Pretoria, the first applicant shot and killed one of his colleagues, and in the process wounded another. Pursuant to the shooting incident, the first applicant was arrested and criminal charges were preferred against him, which are presently pending. On

26 February 2008, a Board of Enquiry recommended that the first applicant be suspended from active service with full pay and benefits, pending the outcome of his pending criminal trial.

[6] On 4 March 2009 the first applicant received a letter signed by the General Officer Commanding: Air Command, wherein notice of intent to terminate the first applicant's service in terms of section 59 (2) (c) of Defence Act 42 of 2002, ("the Act") was given. In the said letter, the first applicant was invited to make representations why he should not be so discharged.

[7] What followed thereafter was a series of correspondence between the Air Command and the legal section of the second applicant wherein representations were made on behalf of the first applicant, and the merits of the intent to discharge the first applicant, were debated at length.

[8] The SAAF thereafter convened a Personal Advisory Committee (PAC), which met on 1 October 2008 to discuss the future utilization of the first applicant. The PAC considered the first applicant's representations against the intended discharge, and submitted the initial letter of intent, as well as the first applicant's representations, to the Chief Director: Human Resource Management (Directorate Human Resource Separation) on 8 May 2009, who in turn, laid same before the Minister with a recommendation that the first applicant be discharged in terms of section 59 (2) (c) of the Act. The Minister on 23 October 2009, approved the recommendation discharge the first applicant.

[9] Section 59 (2) (c) of the Act empowers the Minister to administratively discharge members of the Regular Force:

- (a)
- (b)
- (c) *on account of unfitness for his or her duties or inability to carry them out efficiently, irrespective of whether such unfitness or inability is caused by such member's ill health not amounting to a condition referred to in sub-section (1) (e);*
- (d)
- (e)

[10] The notice of motion is somewhat inelegantly worded. However, the thrust is clear: the applicants in essence, seek an interim interdict for the suspension of the operation of the Minister's decision to discharge the first applicant, pending the determination of review proceedings. I therefore do not agree with the contention by counsel for the Minister, that the relief sought has the effect of a final interdict. Should the relief sought be granted, and the review proceedings subsequently fail, the effect of the Minister's decision would automatically take effect.

[11] I would, as a result, proceed on the basis that the applicants' relief, is for an interim interdict. The requisites for an interim interdict have been restated in many cases, and are trite. The applicant has to establish the following: a *prima facie* right; apprehension of irreparable harm; that the balance of convenience favours him; and that he has no other satisfactory remedy.

[12] In order to assess whether the first applicant has established the above requisites, I have to have regard to the grounds of review as stated by the first applicant, which in turn, would lead to an assessment of the prospects of success in the review proceedings. In his founding affidavit, the grounds of review are stated as follows at paragraphs 10.2, 10.3 and 10.4.

10.2 *The Respondents (sic) omitted to act in accordance with the principles of natural justice in that they did not afford me sufficient opportunity to address the unfounded allegations against me, alternatively, they omitted to attribute sufficient importance to the reasons advanced by me why I should not be administrative discharged.*

10.3 *The Respondents, (sic) without following any due administrative process and despite undertaking to the contrary, have decided to, through its political head, the First Respondent, to dismiss me with effect 30 November 2009.*

10.4 I immediately need to point out that there exists no internal review or appeal procedure within the SANDF against the decision of the Minister of Defence to administratively dismiss a member of the SANDF.

[13] Section 3 (2) (b) of the Promotion Administrative Justice Act 3 of 2000 (“PAJA”) requires administrative action which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair. Procedural fairness is measured against certain minimum requirements, first, that adequate notice of the nature and purpose of the action; secondly, a reasonable opportunity to make representations; thirdly, a clear statement of the administrative action; fourthly, adequate notice of any right of review or internal appeal, where applicable, and lastly, adequate notice of the right to request reasons.

[14] Inherent in the stated grounds of review as set out above, is that there is no suggestion that the Minister’s decision was incompetent or substantively wrong. The first applicant only relies on procedural fairness of the administrative process. Therefore, the Minister’s power to act in terms of section 59 (2) (c) in general, and the substantive correctness of her decision in this particular instance, are not to be contested on review.

[15] It appears to me that the Minister, in arriving at the decision to discharge the applicant, considered all the relevant information, which included the applicants’ representations. At procedural level, therefore, it seems that the Minister observed the rules of natural justice in that the first

applicant was afforded an opportunity to be heard before the decision was taken. The first applicant, having been invited to do so, made extensive and elaborate representations why he should not be discharged. On this basis alone, the prospects of success in the application to review and set aside the Minister's decision, are significantly diminished. This impacts on the first applicant's *prima facie* right.

[16] Another aspect is the delay, unexplained in the papers, in bringing this application. An application for an interim interdict, must be brought with "reasonable expedition" (*Radio Islam v Chairperson, Council of the Independent Broadcasting Authority and Another* 1999 (3) SA 897 (W) at 908 G). The decision to administratively discharge the applicant, was made known to him on 6 November 2009. This application was only launched on 25 February 2010. This, considered against the prospects of success which I have dealt with above, tilts, in my view, the balance of convenience against the first applicant.

[17] The present is not an ordinary application for an interdict. It concerns the exercise of a statutory power. In the absence of any allegations of *mala fides*, the court does not readily grant an interdict in such instances. (See *Gool v Minister of Justice* 1955 (2) SA 682 (C)). Taking into account all considerations in this application, the first applicant has in my view, failed to establish a *prima facie* right. The irreparable harm requisite is intertwined with the establishment of a *prima facie* right, which I have already found not to exist. The balance of convenience, as a result, does not favour the first

applicant. He is not without satisfactory remedy, for, if ultimately successful in his review application, he would be entitled to claim damages.

[18] Given the view I take of the matter, I do not consider it necessary to address the issue of urgency - the order I am about to make renders it academic.

[19] The application therefore falls to be dismissed. Costs should follow the cause.

[20] I therefore make the following order:

1. The application is dismissed with costs.



T M MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : 24 MARCH 2010

JUDGMENT HEARD : 18 MAY 2010

FOR THE APPLICANTS : ADV J P VAN DEN BERG

INSTRUCTED BY : GRIESEL BREYTENBACH ATTORNEYS,
PRETORIA

FOR THE RESPONDENT : ADV T MASUKU, WITH ADV M K MATHIPA

INSTRUCTED BY : MOKUENA ATTORNEYS, MIDRAND,
AND MATSHEGO RAMAGAGA ATTORNEYS,
PRETORIA