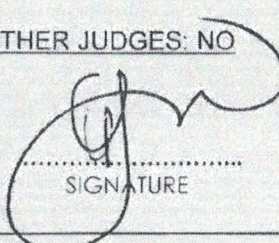




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58708/2020

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: YES</u>
[13 March 2023]	
 SIGNATURE	

In the matter between:

LESIBANA PHILLEMOK MOKGATA

First Applicant

MARCUS KGOKE MOKGOKOLO

Second Applicant

SESI LINAH MABENA

Third Applicant

BUSISIWE DYNA MASIMULA

Fourth Applicant

SIMPIWE MGONONDI

Fifth Applicant

TEBOGO DONALD BOPAPE

Sixth Applicant

WILKY MALEKA MATSEMELA

Seventh Applicant

FRANCINAH NTABISENG BALOYI

Eighth Applicant

VINCENT SEBEYA

Ninth Applicant

OCTOVIA NOMPI THABETHE

Tenth Applicant

THULANE JEFFREY SONQUOLO

Eleventh Applicant

FREDDY MBEWANA MAJOLO

Twelfth Applicant

THABO EDWIN LETHLAGE

Thirteenth Applicant

LEBOGANG WELMINA MASHIANE

Fourteenth Applicant

RANTSHIA ADAM SEFATSA

Fifteenth Applicant

and

**THE MINISTER OF THE DEPARTMENT
OF DEFENCE AND MILITARY VETERANS**

First Respondent

THE SECRETARY OF DEFENCE

Second Respondent

**THE CHIEF OF THE SOUTH AFRICAN
NATIONAL DEFENCE FORCE**

Third Respondent

**THE SURGEON-GENERAL OF THE SOUTH AFRICAN
MILITARY HEALTH SERVICES**

Fourth Respondent

**THE OFFICER COMMANDING OF THE SOUTH
AFRICAN MILITARY HEALTH SERVICES
HEADQUARTERS**

Sixth Respondent

J U D G M E N T:

NEL AJ

[1] In this opposed application the Applicants seek a variety of relief arising from the enforcement of a rotational policy by the Fourth Respondent in respect of the utilisation of Reserve Force Members within the South African Military Health Services.

[2] The Applicants seek the following relief as set out in an Amended Notice of Motion dated 14 February 2022:

[2.1] That the Respondents' decision to terminate the continuous three-month call-up contracts of the Applicants be reviewed and set aside;

- [2.2] That the Respondents' decision to apply a rotational policy in respect of the renewal of the three-month call-up contracts be reviewed and set aside;
- [2.3] Directing that the Applicants are to provide protection services at the Military Headquarters on a permanent basis;
- [2.4] That the Respondents' decision to reduce the salary of the Applicants be declared unlawful, reviewed and set aside;
- [2.5] Directing that the Respondents make payment to the Applicants of the amounts deducted from the Applicants' salaries;
- [2.6] Directing the Respondents to pay the Applicants' "salary" retrospectively, from the date of the termination of the "employment call-up contracts" to the date of "reinstatement"; and
- [2.7] The costs of the Application.

THE ISSUES TO BE DETERMINED

- [3] The issues that need to be determined mirror the relief being sought by the Applicants, but there are two major aspects to be considered and determined, the determination of which will impact to varying degrees on the consideration of all of the issues, being firstly, whether the rotational policy implemented and enforced by the Fourth Respondent is fair and reasonable, and secondly, whether the Applicants had a legitimate expectation of "permanent" employment at the South African Military Health Services Headquarters.

- [4] I will however consider all of the issues that require determination under separate headings.

THE ROTATIONAL POLICY

- [5] On 17 September 2019 the Office of the Surgeon-General, South African Military Health Services issued an Instruction (Number 42 of 2019) ("the Directive") relating to the utilisation of Reserve Force Members linked to the South African Military Health Services ("SAMHS").
- [6] In terms of the Directive the objectives that should be achieved by utilising Reserve Force Members is to, *inter alia*, enforce the consistent rotation of Reserve Force Members after the prescribed 90-day call-up period, and to enforce the completion of Service Contracts and call-up orders.
- [7] The aim of the implementation of the Directive is recorded as being the establishment of a "*sound administrative process*" for the call-up of Reserve Force Members in order to avoid irregular expenditure and fraudulent administration.
- [8] The Directive records that the SAMHS has 2766 Reserve Force Members, of which 37% had not been utilised in the preceding 5 years.
- [9] In terms of the Directive the objective of enforcing the consistent rotation of Reserve Force Members should be executed by, *inter alia*, implementing the general guideline that non-continuous call-ups must enjoy priority over continuous call-ups.

- [10] It is also recorded in the Directive that individual Reserve Force Members may not be called up for a period exceeding 90-days per annum.
- [11] It is clear from the Directive that the intention of the SAMHS is to utilise its entire Reserve Force component on a rotational basis until such time as the structural deficiencies within the SAMHS are resolved to ensure that Regular Force Members can fulfil all of the required functions.
- [12] The SAMHS recognises the need to call-up Reserve Force Members on a rotational basis to not only provide assistance to the Regular Force Members as and when required, but also to ensure that the Reserve Force Members are prepared or "battle-ready" (through regular training and service) if needed in a surge military capacity.
- [13] A Reserve Force is of no assistance to the South African National Defence Force, if the Reserve Force Members are not regularly trained, do not participate in military exercises, and are not regularly called-up to refresh their required or specific military skills.
- [14] The Directive is clearly aimed at implementing and achieving the required and stated objectives. Insofar as the Directive is primarily a guideline, provision is made in the Directive for deviations from the stipulated guidelines, including the restriction on call-up periods not exceeding 90-days. Such deviations however require specific compliance with the instructions set out in the Directive.

- [15] The Applicants are all members of the Reserve Force attached to the SAMHS, although they describe themselves as having been "*in the employ*" of the Minister of the Department of Defence and Military Veterans.
- [16] The Applicants do not refer to the Directive in their Founding Affidavit, but are clearly aware of the rotational policy, but state that "*the usual rotational policy*" was waived.
- [17] The Directive was discovered by the Respondents as part of the Record in terms of Rule 53 of the Uniform Rules of Court. In response to such Record, the Applicants filed a Second Supplementary Affidavit dated 11 November 2021.
- [18] In the Second Supplementary Affidavit, the Applicants specifically respond to the discovery of the Directive by alleging firstly that it is not applicable to the Applicants, as the rotation policy was waived in respect of the Applicants, secondly that the Directive was issued when the Applicants were "*in the continuous service*" and therefore the Directive cannot be applied to the Applicants retrospectively, and thirdly that the Applicants' cause of action is based on a legitimate expectation. The reference to a "*legitimate expectation*" is an expectation of being permanently employed by SAMHS.
- [19] In the Replying Affidavit, the Applicants expanded on such response by alleging that the Directive is not applicable to the Applicants as the rotational policy was waived in respect of the Applicants, that they had been "*exempted*" from the rotational policy, that they had been "*selected to work continuously*", that there was a decision "*to retain us on permanent basis*", and that they were to work on a "*continuous basis*".

[20] The Applicants' contentions were repeated in the Applicants' Heads of Argument, and it was submitted that the Applicants were subject to a "*special dispensation*" which entitled them to work on a continuous basis.

[21] It is accordingly clear that the Applicants do not suggest that the Directive itself is invalid or unenforceable, but rather contend that the Directive is not applicable to the Applicants.

THE CONTENTIONS OF THE PARTIES

[22] The Applicants state that they initially served in terms of the Respondents' 90-day call-up policy which prohibited Reserve Force Members from serving beyond the prescribed 90-day period. Such allegation contradicts the contention that the Applicants were in continuous service and records that the Rotational Policy was being applied to the Applicants on a rotational basis.

[23] The Applicants allege that they became "*attached*" to the SAMHS, for the provision of security services, at various dates over the period from September 2009 to September 2012.

[24] In the Replying Affidavit, in response to the allegation in the Answering Affidavit that there are no permanent positions available at SAMHS Headquarters for guards, the Applicants allege that they were not all utilised as guards, and that some performed services in Administration and Human Resources. The relief sought is however a directive to the effect that the Applicants provide protection services on a permanent basis. There is no detail provided as to which of the Applicants rendered services in Administration and Human Resources.

- [25] In the Replying Affidavit, also in response to the allegation that there are no permanent positions available at the SAMHS Headquarters, the Applicants state that the nature of the posts are irrelevant, as the Applicants' legitimate expectation is based on permanent employment, and not in respect of any particular post.
- [26] The Applicants state that they were enrolled in the Reserve Force as from the dates on which they became "attached" to the SAMHS, and were placed on continuous call-ups since such dates, until their continuous call-ups were terminated on 28 July 2020. There is no dispute that the Applicants are currently all Reserve Force Members.
- [27] The Applicants allege that as a result of the quality of services being rendered by the Applicants, the "former" Surgeon-General and their previous Commanding Officer, Lt.-Colonel Maswanganyi recommended that the Applicants be employed permanently. This would naturally have required the Applicants to join the Regular Force, if they met the criteria that may be required.
- [28] There is some confusion as to the identity of the Surgeon-General at the relevant times, but the personal identity or details of the Surgeon-General is not relevant to the determination of any of the issues.
- [29] The Respondents allege that Lt.-Colonel Maswanganyi had no authority to make such a recommendation, but the issue of authority is also not relevant, as both parties are *ad idem* that the statements by Lt.-Colonel Maswanganyi constitute recommendations only.

- [30] The "*continuous call up contracts*" as referred to by the Applicants consisted of 90-day call-up periods, as referred to in the Directive, which 90-day call-up periods were then extended for further 90-day periods at the termination of each particular 90-day period. The Respondents accept that the Applicants were called up for 90-day call-up periods, which were then renewed at the end of each 90-day period.
- [31] The Directive recognises the potential existence of "*continuous*" call-up periods, but seeks to restrict the call-up periods of Reserve Force Members to 90-days per annum, if possible, and specifies the requirement of 90-day call-up periods being prioritised over "*continuous*" call-up periods.
- [32] The call-up notices as contained in the Record reflect the 90-day call-up periods, but the number of Reserve Force Members called up differs, as for example in one instance 62 Reserve Force Members were called up, but in the next 90-day period only 52 Reserve Force Members were called up. The number of Reserve Force Members called up was accordingly not consistent. I have however accepted that all of the Applicants were called up for 90-day periods on a consistent basis, as the Respondents make such admission.
- [33] In support of the allegations that the "*former*" Surgeon-General and Lt.-Colonel Maswanganyi were going to employ the Applicants as Regular Force members or absorb them into the "*core service system*", and would not rotate the Applicants, the Applicants refer to a document dated 16 February 2016 ("the 16 February Document").
- [34] The 16 February Document is on a SAMHS letterhead, and appears to have been signed by Brigadier-General Maminze. Brigadier-General Maminze was

the appointed Officer Commanding (Director) of the SAMHS Reserve Forces, and the Respondents state that such position was that of a functional director, without any command authority.

[35] The 16 February Document refers to the members performing guard duties at the SAMHS Headquarters having been screened, and that their applications (presumably for absorption into the Regular Force) were "*being processed*". The 16 February Document also records that the SAMHS Headquarters "*will keep their current personnel until further notice*".

[36] The Applicants allege that the letter endorsed the "*status quo*" of the Applicants remaining at the SAMHS Headquarters on a "*continuous permanent basis*", that the Applicants would not be subject to the "*usual rotational policy*", and that the rotational policy was waived in respect of the Applicants. Whilst the 16 February Document certainly records that the members rendering guarding services at SAMHS Headquarters at the time would remain "*until further notice*", there is no recordal of the rotational policy being waived, that the Applicants would be retained at the SAMHS Headquarters on a "*permanent basis*", or that the Applicants would not be subject to the normal *rotational* policy. The phrase "*until further notice*" cannot simply be equated to a "*permanent basis*".

[37] It is clear from the Applicants' Affidavits that they accept that the norm was the 90-day rotational policy, and that the continuous extension of the 90-day periods was the exception to such norm.

[38] The Applicants allege that the Surgeon-General, Lt.-General Sedibe endorsed the 16 February Document in manuscript, and recorded that "*other units*

should create a safe and secure environment by utilising transitional guards to be rotated with them accordingly."

- [39] The comment of the Surgeon-General (Lt-General Sedibe) appended to the copy of the 16 February Document attached to the Founding Affidavit is not clear, but it is clear from the legible portion that the Surgeon-General referred to a need for rotation.
- [40] In the Record, a copy of the 16 February Document was discovered, where the manuscript note was legible, which reads "*Other units should create a safe and secure environment by utilizing trained guards to be rotated within their environment*".
- [41] Whilst the Surgeon-General referred to "*other units*", it does not follow that the Surgeon-General endorsed the views or recommendations of Brigadier-General Maminze. The Respondents allege that the recommendation of the Brigadier-General was not accepted by the Surgeon-general, and was in fact overruled by the Surgeon-General.
- [42] The Surgeon-General who appended the comment to the 16 February Document is the same Surgeon-General who issued the Directive enforcing the rotational policy.
- [43] Even if the comment by the Surgeon-General were to be interpreted as an endorsement of Brigadier-General Maminze's recommendations, it would be an endorsement that the Reserve Force Members performing guarding services would be retained "*until further notice*".

- [44] The Applicants allege that the 16 February Document records that both Lt.-Colonel Maswanganyi and Brigadier-General Maminze recommended that they should be employed permanently as guards at the SAMHS Headquarters.
- [45] The 16 February Document does not indicate that the Surgeon-General, Brigadier-General Maminze, or Lt.-Colonel Maswanganyi intended to retain the Applicants on a permanent basis. The contents of the 16 February Document, at best for the Applicants, reflects that Brigadier-General Maminze intended to retain the Applicants at the SAMHS Headquarters "*until further notice*" pending the processing of the Applicants' applications for employment as Regular Force Members. Lt.-Colonel Maswanganyi is only recorded as being the person to be contacted for enquiries.
- [46] The Applicants also allege that they were "*earmarked for permanent employment*", and provided written undertakings committing themselves to permanent employment as guards at the SAMHS Headquarters.
- [47] It is clear from the written undertakings referred to that the Applicants declared their willingness to perform guarding services at the SAMHS Headquarters, and recorded that in the event of them being employed permanently, they would not seek a transfer to any other unit.
- [48] The Applicants conclude that having regard to the sequence of events as set out above, the Respondents expressly or tacitly undertook or agreed to provide the Applicants with "*permanent positions*", and undertook that the Applicants' services would not be "*arbitrarily terminated*".

- [49] The Applicants allege that the termination of their "*continuous call up contracts*" was motivated by an abuse of power, and was effected with an ulterior motive. Other than the reference to a comment by a Warrant Officer, who would not have had the authority to determine the fate of the Applicants, being that the Applicants had "*overstayed*" their welcome, there is no evidence of an abuse of power or any ulterior motive.
- [50] The Applicants allege that the termination of their "*continuous employment*" was unfair, unjust and irrational.
- [51] The Applicants submitted that the grounds of review in respect of the decision to terminate the Applicants' "*continuous call up contracts*" are that the decision was irrational, constituted an abuse of power and amounted to a violation of a right to fair administrative justice.
- [52] On 11 November 2021, and after the filing of the Record by the Respondents, the Applicants filed the Second Supplementary Affidavit, which contained brief comments on the contents of the Record.
- [53] The Applicants also filed a prior Supplementary Affidavit, dated 21 June 2021, which relates to the Applicants' claim for payment.
- [54] The Respondents' Answering Affidavit is deposed to by John McNally, who was the Officer Commanding of the SAMHS Headquarters at "*all times relevant to this matter*". The military rank of Mr McNally does not appear from the Answering Affidavit, but in a document discovered in the Record, it appears that he was a Colonel in 2011.

- [55] The Respondents allege that the Applicants were utilised as guards at the SAMHS Headquarters, and that the SAMHS Headquarters utilises Reserve Force Members for such function, as there are no permanent posts available for such function within the Headquarters' unit.
- [56] The Respondents allege that as there are no permanent posts available at the SAMHS Headquarters, effect could not be given to a Court Order directing that the Applicants be permanently employed at the SAMHS Headquarters.
- [57] The Respondents set out the purpose of the implementation of the rotational call-up of Reserve Force Members, including the need to augment the Regular Force in peace support operations, and to form part of the standing and surge military capability.
- [58] The Respondents allege in the Answering affidavit that the purpose of issuing the Directive was to, *inter alia*, ensure that all Reserve Force Members are utilised. The Surgeon-General instructed the Officer Commanding of the SAMHS Headquarters in January 2020 to rotate the guards at the SAMHS Headquarters, when their call-up periods terminated, in accordance with the purposes of the Directive, including the provision of the opportunity to serve to other Reserve Force Members.
- [59] The Applicants were advised of the pending enforcement of the existing rotational policy, and were provided with a period of six months notice before the implementation of the next rotation.

[60] The Respondents state that the Applicants remain on the list of Reserve Force Members, and will in future be called up in accordance with the rotational policy of the SAMHS.

COMPETENCY OF A REVIEW APPLICATION

[61] As set out above, the Applicants seek orders reviewing and setting aside the decision of the Respondents to terminate the “*continuous*” three-month call-up contracts of the Applicants, the decision of the Respondents to apply a 90-day rotational policy, and the decision to reduce salary payments.

[62] In the Founding Affidavit the Applicants refer to themselves as being employed by the Department of Defence.

[63] It was submitted in the Applicants’ Heads of Argument that the Applicants’ employment was terminated, that the dismissal should be set aside, and that the Applicants should be reinstated as employees.

[64] The allegations of “*employment*” are relevant in considering whether a review is the correct procedure for the Applicants to have followed.

[65] In the matter of *Chirwa v Transnet Limited & Others*¹ the Constitutional Court held that public servants cannot challenge their dismissal by relying on administrative review procedures, as public servants enjoyed the protection conferred by the Labour Relations Act.²

¹ 2008 (4) SA 367 (CC) at [143] to [150].

² No. 66 of 1995, as amended.

- [66] The Constitutional Court accordingly prohibited reliance on the review process to challenge the validity of a dismissal from employment.³
- [67] Despite the allegations in the Founding Affidavit, and the submissions made by the Applicants' counsel, I am of the view that the nature of the review relief sought by the Applicants do not relate to a dismissal of employment.
- [68] On a complete reading of the Affidavits filed, the administrative decisions which the Applicants seek to review, relate to contractual and policy decisions rather than decisions relating to the termination of employment,
- [69] In any event, the Applicants' "employment" relationship with the Department of Defence and Military Veterans, if it is indeed an employee-employer relationship, has not been terminated, as the Applicants remain members of the Reserve Force.
- [70] In the circumstances, I am satisfied that I have the necessary jurisdiction to determine the review relief as sought in this Application.

CONSIDERATION OF THE REVIEW ASPECTS

- [71] In the matter of *Pharmaceutical Manufacturers Association of Africa; In re: Ex Parte President of the Republic of South Africa*⁴ the Constitutional Court held that the common law principles that previously provided grounds for review have been subsumed under the Constitution.

³ See also *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA)

⁴ 2000 (2) SA 674 (CC) at 692; See also *South African Jewish Board of Deputies v Sutherland* 2004(4) SA 368 (W) at 383.

- [72] In the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*⁵ the Constitutional Court stated that Section 6 of the Promotion of Administrative Justice Act⁶ ("PAJA"), indicates a clear purpose to codify the grounds of judicial review of administrative action, and that the basis for judicial review now arises from PAJA, not the common law, and that the authority of PAJA in turn rests squarely on the Constitution.
- [73] In the matter of *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management*⁷, the Supreme Court of Appeal held that the right to just administrative action is derived from the Constitution, that the different review grounds have been codified in the PAJA, much of which has been derived from the common law, and that pre-Constitutional case law must be considered in the light of the Constitution and PAJA.
- [74] The Applicants did not make any reference to PAJA and did not specify which provisions, if any, of PAJA the review relief is based on.
- [75] Insofar as the Applicants seek the review and setting aside of three specific decisions, being the decision to terminate the continuous call-ups, the decision to apply a rotational policy and the decision to reduce the salary payments of the Applicants, the only ground of review raised by, or on behalf of, the Applicants was that the decisions of the Respondents were unfair, having regard to the factual circumstances as alleged by the Applicants.

⁵ 2004 (4) SA 490 (CC) at 506; See also *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at [431].

⁶ No. 3 of 2002, as amended.

⁷ 2006 (2) A 191 (SCA) at 196. See also *Trinity Broadcasting, Ciskei v ICASA* 2008 (2) SA 164 (SCA) at 171;.

- [76] The Applicants' counsel also suggested that the aspect of a legitimate expectation of continuous call-ups or permanent employment was an additional ground of review, but I am of the view that such legal principle cannot constitute a ground for review, and relates to a different issue and cause of action to be considered, which I deal with below.
- [77] In the matter of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*⁸ the Constitutional Court held that the basic test for administrative review was whether the decision reached is one that no reasonable decision-maker could reach.
- [78] In the *Sidumo* matter the Constitutional Court summarised the right to fair administrative actions as being a reflection of what is set out in Section 33(1) of the Constitution, being the right to lawful, reasonable and procedurally fair administrative action.⁹
- [79] Whilst the test for a successful review of any administrative action will be fact dependent, in essence a party will succeed in a review application if that party establishes that the administrative decision taken was one that no reasonable decision-maker could reach.
- [80] Applicant's counsel did not refer me to, or rely on, any authorities relating to the requirements for the granting of the review relief sought, but based the justification for the granting of the relief sought on the principle of a legitimate expectation, which I have referred to above, and will deal with below.

⁸ 2008 (2) SA 24 (CC) at [110].

⁹ At paragraphs [89] and [112], see also *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v Nalimal Bargaining Council and Another* 2009 (3) SA 187 (W).

[81] It is clear from the Affidavits filed in this Application, the Heads of Argument and the submissions made, that the Applicants contend that the decisions taken by or on behalf of the SAMHS are reviewable on the basis that such decisions were unfair.

[82] It is accordingly necessary, in determining the issues relating to the review of the decisions taken, whether such decisions were fair, in the circumstances of this Application, having regard to, in particular, Section 33 of the Constitution and Sections 3(1) and 6 of PAJA.

THE FIRST ISSUE: DECISION TO TERMINATION CONTINUOUS CALL-UP PERIODS

[83] The Applicants seek the review and setting aside of the Respondents' decision to terminate the Applicants' *"continuous 3-months call up contracts"*.

[84] It was submitted on behalf of the Applicants, as set out in the Applicants' Heads of Argument, that the termination of the Applicants' *"employment"* was unfair in respect of the Applicants, and that there had been a *"promise"* to retain the services of the Applicants on a permanent basis.

[85] It was also submitted that the termination was *"grossly unfair"* and amounted to an *"unfair dismissal"* of the Applicants. Applicant's counsel also submitted that the principle of legitimate expectation was a further ground for review.

[86] In the Founding Affidavit, the Applicants alleged that the termination was unfair, unjust, irrational, constituted an abuse of power and amounted to a violation of the right to fair administrative justice.

[87] The Applicants accordingly contend that the decision to “*terminate*” the continuous 90-day call-up contracts was unfair, unjust and irrational, on the bases that the Applicants would be retained on a “*permanent basis*”, and that the rotational policy of SAMHS Reserve Force Members had been waived in respect of the Applicants.

[88] There is no evidence that the Applicants were to be retained as guards at the SAMHS Headquarters on a permanent basis. On the Applicants’ version, they had applied for either permanent employment or absorption into the Regular Force, but it is evident that such applications were not successful, or not granted.

[89] There is also no evidence of the rotational policy being waived for the Applicants, and the “*proof*” of such waiver, as relied on by the Applicants, does not support the reliance on a waiver of the rotational policy. As already set out above, at best for the Applicants the 16 February Document indicates an intention to retain the Reserve Force services of the Applicants “*until further notice*”. The “notice” arose on 17 September 2019, when the SAMHS directed the enforcement of the existing rotational policy.

[90] Whilst it is correct that the Applicants received the benefit of their 90-day call-up contracts being renewed at the end of the 90-day periods, such conduct appears to be the result of a combination of the failure by the responsible officials to implement the rotational policy and the views of Brigadier-General Maminze rather than a waiver of the rotational policy.

[91] There was however no decision taken to terminate the Applicants’ “*continuous 3 month call up contracts*”, but rather a decision was taken to implement and

enforce the existing 90-day rotational call-up policy of the SAMHS in respect of the Reserve Force Members.

[92] Whilst it is not necessary for me to determine whether the alleged decision to terminate the "*continuous 3 month call up contracts*" is unfair and reviewable, as I have found that no decision was taken to terminate the continuous call-up contracts, I point out that even if a decision to terminate the "*continuous 3 month call up contracts*" had been taken, such decision would not have been unfair or irrational, that it would have been reasonable in the particular circumstances, and accordingly would not have been reviewable.

[93] In the circumstances, I find that the relief as sought in paragraph 1 of the Amended Notice of Motion cannot be granted.

THE SECOND ISSUE: APPLICATION OF ROTATIONAL POLICY

[94] The Applicants seek the review and setting aside of the Respondents' decision to apply the rotational policy of 90-day call-up contracts for Reserve Force Members. As set out in determining the First Issue, such decision was indeed taken.

[95] In order to succeed with the granting of such relief, the Applicants are required to establish that the decision to enforce the rotational policy was unlawful, unreasonable or procedurally unfair, and accordingly a decision that no reasonable decision-maker would make.

[96] The basis for the Applicants' review of the decision to apply the rotational policy is that the rotational policy was waived in respect of the Applicants. I have already found that there was no such waiver.

- [97] Having regard to the reasons for the implementation and enforcement of the Rotational Policy, as advanced on behalf of the Respondents, and as set out in Directive number 42 of 2019, I am satisfied that the decision was lawful and reasonable.
- [98] Whilst the Applicants did not specifically suggest that the enforcement of the rotational policy was procedurally unfair, the Respondents' counsel submitted that the implementation of the rotational policy was procedurally fair, and despite the Applicants having no automatic entitlement to the renewal of the 90-day call-up periods, the Applicants were provided with reasonable notice of the enforcement of the rotational policy.
- [99] The Applicants were provided with a 6-month notice period of the enforcement of the rotational policy.
- [100] Respondents' counsel referred me, in such regard, to the matter of *Premier Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*¹⁰ where the Constitutional Court held that government policy will ordinarily not be altered without providing citizens with reasonable notice of the intended change or providing citizens with an opportunity to make representations to the decision-maker.
- [101] Although the enforcement of the Rotational Policy does not equate to the alteration of a government policy, the Applicants were given reasonable notice of the rotational policy, and as appears from the Founding Affidavit, the

¹⁰ 1999 (2) SA 91 (CC).

Applicants made representations not only to the decision-maker, but also to various other persons and entities, including the Military Ombudsman.

[102] I am accordingly satisfied that the decision to enforce the rotational policy was not unlawful, unreasonable or procedurally unfair, and that the decision was in accordance with what a reasonable decision-maker would have decided.

[103] I accordingly find that there is no basis for the review and setting aside of the decision to implement and enforce the 90-day rotational policy.

THE THIRD ISSUE: PERMANENT PROVISION OF SERVICES

[104] The Applicants seek an order directing the Respondents to appoint the Applicants to provide protection services at the SAMHS Headquarters on a permanent basis.

[105] The basis for the relief sought is the Applicants' reliance on a legitimate expectation of "*permanent employment*".

[106] The Applicants' contention of a legitimate expectation of "*permanent employment*" is, in turn, based on the allegations that the rotational policy was waived in respect of the Applicants, and that the Applicants were provided with express, alternatively tacit, undertakings that their services would be retained on a permanent basis.

[107] In the Founding Affidavit, under the heading of "**LEGITIMATE EXPECTATION**", the Applicants list the "reasons" why the Applicants have a legitimate expectation of permanent employment: The Applicants repeated and elaborated on the "*reasons*" in their Replying Affidavit.

- [108] The Applicants essentially contend that the duration of the continuous call-ups and the conduct of the Respondents gave rise to the legitimate expectation of permanent employment.
- [109] Applicants' counsel referred me to certain authorities in the Applicants' Heads of Argument, in support of the submissions made relating to the aspect of legitimate expectation, of which only one authority had the citation included. There was no list of authorities filed, but I nevertheless considered all of the authorities that I was referred to.
- [110] Applicants' counsel submitted that the doctrine of legitimate expectation entails that a reasonable expectation based on a well-established practice or an express promise by an administrator acting lawfully gives rise to legal protection when the practice or promise is clear, unambiguous and unqualified.
- [111] In the matter of *National Director of Public Prosecutions v Phillips and Others*¹¹ the Court carefully considered the doctrine of legitimate expectation and set out that a legitimate expectation arises when a decision-maker has induced a reasonable expectation in the person relying on the doctrine, that the person will receive or attain a benefit, which reasonable expectation arises either from an express promise made or from the existence of a regular practice which the person can reasonably expect to continue.¹²

¹¹ 2002 (4) SA 60 (W).

¹² At [27]; See also *President of the Republic of South Africa and Others v SARFU and Others* 2000 (1) SA 1 (CC) at [212]; *Administrator, Transvaal and Others v Traud and Others* 1989 (4) SA 731 (A) at 756.

[112] In the *Phillips* matter the Court (Heher J) set out the requirements for the legitimacy of an expectation¹³. The list of requirements is clearly not intended to be exhaustive, but at least the requirements listed should be met for an expectation to be considered to be a legitimate expectation.

[113] The requirements to be met are the following:

[113.1] the representation relied on must be clear, unambiguous and devoid of qualification;

[113.2] The expectation must be reasonable;

[113.3] The representation must have been induced by the decision-maker; and

[113.4] The representation must be one which the decision-maker could competently and lawfully make.

[114] In the matter of *South African Veterinary Council and Another v Szymanski*¹⁴ the Supreme Court of Appeal referred with approval to the requirements set out by Heher J in the *Phillips* matter.

[115] The Supreme Court of Appeal held that the reasonableness of the expectation relied on is a pre-condition to the legitimacy of the expectation. The circumstances from which the expectation allegedly arose must be considered

¹³ At [28].

¹⁴ 2003 (4) SA 42 (SCA) at [19]; See also *Minister of Environmental Affairs and Tourism and Others v Phambile Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at [65].

objectively, and if it is found that the expectation was reasonable, its legitimacy must then be considered and determined.¹⁵

[116] In the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁶ the Constitutional Court stated:

"The question whether a legitimate expectation ... exists is therefore more than a factual question. It is not whether an expectation exists in the mind of the litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate ..."

[117] The principles applicable to a consideration of the legitimate expectation doctrine were summarised in the matter of *National Commissioner of Police and Another v Gun Owners South Africa*¹⁷, as follows:

"Whether an expectation has been created is a question of fact to be answered in the light of the circumstances of a particular case. The expectation must be legitimate in an objective sense: the question is not whether it exists in the mind of the litigant but 'whether, viewed objectively, such expectation is in a legal sense, legitimate'. In South African Veterinary Council v Szymanski this court held that for an expectation to be legitimate, it must be: (i) a reasonable expectation; (ii) induced by the decision-maker (in this case, the State functionary); (iii) based on a clear and unambiguous representation; and (iv) one that is competent and lawful for the decision-maker to make. Cameron JA emphasised that 'the reasonableness of the expectation operates as a pre-condition to its legitimacy'. Further, no one can have a legitimate expectation that relates to the doing of something unauthorised or unlawful."

[118] The authorities to which I was referred by the Applicants' counsel relate primarily to the concept of "reasonable expectation" as considered in terms of the Labour Relations Act¹⁸, and are not directly applicable to the issues to be considered in this Application.

¹⁵ At [21].

¹⁶ 2000 (1) SA 1 (CC) at [216].

¹⁷ 2020 (6) SA 69 (SCA) at [38].

¹⁸ No. 66 of 1995, as amended.

[119] As already set out above, in the Amended Notice of Motion the Applicants seek an order directing the Respondents to "*place the Applicants on permanent basis*" as guards at the SAMHS Headquarters.

[120] The submissions made on behalf of the Applicants were that they had a legitimate expectation of permanent "*employment*". The submissions were that the Applicants expected to be "*retained permanently*", and that they would be retained "*on a permanent basis*".

[121] In the Founding Affidavit, the Applicants alleged that they expected to be placed in "*permanent positions*" and "*to be made permanent in our positions*".

[122] It is accordingly clear that the Applicants contend for a legitimate expectation of permanent "*employment*" with the SAMHS (whether this be effected by way of becoming Regular Force Members or some other form of contractual arrangement) as opposed to having a legitimate expectation of the continuous 90-day call-up contracts being continued indefinitely.

[123] This is emphasised by the amendment of the Notice of Motion, by the deletion of the prayer seeking reinstatement of the Applicants on continuous 3-month renewable contracts, as initially sought in the original Notice of Motion.

[124] In support of the claim based on the legitimate expectation of permanent "*employment*", the Applicants allege that the factors illustrating a legitimate expectation were the following:

[124.1] The express or tacit waiver of the 90-day rotational policy;

[124.2] The contents of the 16 February Document;

- [124.3] The contents of the 10 February 2016 Statement signed by the Applicants;
- [124.4] The contents of the grievance form demanding permanent employment;
- [124.5] The duration of the continuous extension of the 90-day call-up periods;
- [124.6] The express intention to retain the Applicants on a permanent basis by Surgeon-General Sedibe and Surgeon-General Ramlakan;
- [124.7] The fact that the positions that the Applicants occupied still exists; and
- [124.8] Their names were included in the list of members earmarked for permanent employment.
- [125] I have already found that there was no express or tacit waiver of the 90-day rotational policy. The Applicants were required to conclude new 90-day call-up contracts at the conclusion of each 90-day period.
- [126] The contents of the 16 February Document did not in any way indicate permanent employment of the Applicants. All that is recorded in such letter is that Brigadier-General Maminze intended to retain the Applicants at SAMHS Headquarters "*until further notice*". Brigadier-General Maminze was not in control or command of SAHMS Headquarters, but rather in control of the entire Reserve Force of the SAMHS.

- [127] The Statement dated 10 February 2016 is simply a Statement signed by the First Applicant, confirming his willingness to perform guard duties at the SAMHS Headquarters, and acknowledges that if he is permanently employed, he would not seek a transfer.
- [128] The grievance form does not assist the Applicants in any way, as it simply records their grievances, and their view of their Reserve Force engagement.
- [129] The duration of the continuous 90-day call-up contracts may very well have caused the Applicants to expect such arrangement to continue, but it could not have given rise to an expectation of permanent employment.
- [130] The Applicants also contend that Surgeon-General Sedibe and Surgeon-General Ramlakan intended to retain the Applicants on a permanent basis. The contention in regard to Lt-General Sedibe is based on the contents of the 16 February Document, but such contentions are misconceived, as Lt-General Sedibe clearly required the rotation of Reserve Force Members, and there is no intention of the permanent placement of the Applicants.
- [131] The Directive of 17 September 2019 (Instruction Number 42 of 2019) is signed by Lt-General Sedibe, and such Directive prohibits call-up periods in excess of 90-days per year.
- [132] There is no mention of Lt-General Ramlakan in the Applicants' Founding or Supplementary Affidavits. In the Replying Affidavit the Applicants simply state that there was an express or tacit waiver of the rotation policy by Lt-General Ramlakan and Lt-General Sedibe.

- [133] The bald allegation in the Replying Affidavit could never amount to evidence of an express intention by Lt.-General Ramlakan to retain the Applicants on a permanent basis.
- [134] The Applicants' version changes subtly in the various affidavits filed, in that the Applicants initially refer to statements and conduct as evidencing a waiver of the rotation policy, and then in the Replying Affidavit allege that the same statements and conduct are evidence of an intention to retain the Applicants as permanent employees. Such change is presumably as a result of the deletion of the prayer seeking the reinstatement of continuous 90-day call-up contracts.
- [135] The Applicants allege that the guarding positions that they occupied "*still exist*". The guarding positions will always exist, but in terms of the rotational policy of SAMHS those positions will be filled by different Reserve Force Members on a rotational basis. The positions are certainly not vacant.
- [136] The Respondents have pointed out that the guarding positions are not positions that could be filled on a permanent basis, and that it is for such reason that the guarding positions are filled by Reserve Force Members on a rotational basis. The Respondents specifically state that there are no permanent guard posts within the SAMHS Headquarters' structure.
- [137] In response the Applicants' state in the Replying Affidavit that they are prepared to take up permanent positions elsewhere within the SAHMS structure, but there is no evidence that there are other alternative posts available. It is the Applicants' case that they are entitled to be employed

permanently in the guarding positions at the SAMHS Headquarters and not generally wherever a permanent post may become available. .

[138] The allegation that they were "earmarked" for permanent positions, does not assist the Applicants, as it could never amount to a representation that could lead to a legitimate expectation.

[139] As regards the requirements to be met in order to establish that an expectation is a legitimate expectation, the Applicants:

[139.1] Did not establish that the expectation of permanent employment was reasonable;

[139.2] Did not establish that the representations alleged were clear, unambiguous and devoid of qualification. To the contrary, on their own evidence, the representations relied on were vague, and the qualification of being taken up into the Regular Force Members applied to them.

[139.3] Did not establish that the representations were induced by the decision-maker;

[139.4] Did not establish that Brigadier-General Maminze was competent to make such representations, or that it was lawful for Brigadier-General Maminze to make such representations. Whilst Lt.-General Sedibe may have been entitled to make such a representation, there was no evidence that Lt.-General Sedibe made a representation of permanent employment.

[140] In the circumstances, I find that the Applicants have not met the requirements of the doctrine of legitimate expectation, and the Applicants cannot succeed with the claim for permanent positions at the SAMHS Headquarters.

THE FOURTH AND FIFTH ISSUES: REDUCTION OF SALARY

[141] The Applicants seek an order in terms of prayer 4 of the Amended Notice of Motion, reviewing and setting aside the decision to *"arbitrarily reduce the Applicants' salary by more than half, and declaring such deductions as unlawful"*.

[142] The Applicants seek an order in terms of prayer 5 of the Amended Notice of Motion for payment of the deducted amounts.

[143] I was not specifically addressed on such aspect issue by Applicants' counsel, but the aspect was raised in the Applicants Heads of Argument.

[144] It was alleged that the Respondents' deducted certain amounts from the Applicants' salaries, and that the deductions were acknowledged by the Respondents to be unfair.

[145] The Applicants submitted that the Respondents contend that the deductions were paid to the Applicants whilst the Applicants deny this. The Applicants require proof of the payments by way of bank deposit documentation.

[146] In the Founding Affidavit the Applicants allege that during the period from May 2017 to June 2018, the Applicants' salaries were reduced *"by more than half"*. The Applicants state that the Respondents conceded that the deductions were unlawful and unfair, and undertook to make payment to the Applicants.

- [147] On 18 August 2021 the Applicants filed a Supplementary Affidavit, attaching an annexure, and stating that such annexure reflects "*the total amount owed*" to the Applicants.
- [148] The annexure is a spreadsheet, reflecting the details of the Applicants, the number of days worked during the period June 2017 to May 2018, the daily tariff payable to the Applicants, the total amounts outstanding, and interest on such amounts.
- [149] In the Answering Affidavit the Respondents accept that the Applicants did raise grievances in respect of deductions, but state that such grievances were resolved by the shortfalls in salaries being paid to the Applicants.
- [150] The Respondents allege that the dispute relating to the deduction of salary amounts had therefore been resolved, and that the Applicants were paid the amounts due to them.
- [151] In reply the Applicants' alleged that the outstanding salary dispute has not been resolved, and that both formal and informal grievances have been lodged.
- [152] During her address, Respondents' counsel submitted that proof of payment was provided to the Applicants' attorney and that there were no further responses or queries thereafter.
- [153] There is a clear factual dispute between the Applicants and the Respondents (which appears to be ongoing in terms of lodged grievances) as to whether the Applicants have been paid the shortfall or deductions referred to in the Founding Affidavit.

- [154] The Applicants must have foreseen that there was going to be a dispute as regards the payment of the "*deductions*", as on their version, they have continuously raised grievances in such regard from at least 2018, without resolution.
- [155] Other than the schedule prepared by the Applicants, there is no documentary evidence relating to the shortfall.
- [156] In the Record provided, I found a document headed "*REMUNERATION OF SAMHS RESERVE FORCE MEMBERS AS INSTRUCTED BY SG ON 6/8/2020*". Such document was a schedule of payments made to the Applicants.
- [157] I compared the two schedules, and found that there were discrepancies, and it was not possible to determine whether the Applicants had been paid in full, or whether the Respondents had made partial payments to the Applicants.
- [158] In the circumstances, and having regard to the evidentiary principles applicable to application proceedings, I find that the Applicants have not established on a balance of probabilities that any amounts are due to them.
- [159] As regards the relief relating to the review of the decision to arbitrarily reduce the salaries, there is no evidence whatsoever of any decision taken to reduce the Applicants' salaries.
- [160] In the circumstances, the Applicants cannot be granted the relief sought in prayers 4 and 5 of the Amended Notice of Motion.

SIXTH ISSUE: ARREAR INCOME

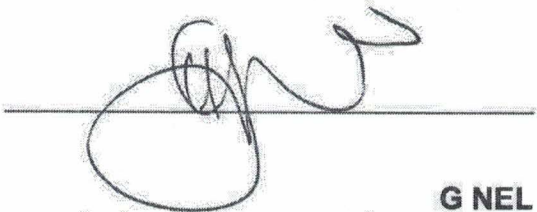
- [161] The Applicants seek an order directing the Applicants to pay the Applicants' salary from the date of termination of the employment contract call-ups to the date of reinstatement.
- [162] Such relief is naturally dependent on me finding that the implementation of the rotational policy was wrongful, and finding that the Applicants are entitled to permanent employment positions at SAMHS.
- [163] As already set out above, I have found that the enforcement of the rotational call-up system is not irrational or wrongful. I have also found that the Applicants are not entitled to permanent employment positions at the SAHMS Headquarters.
- [164] In the circumstances, the Applicants are not entitled to payment of any amounts after the enforcement of the rotational policy, other than in respect of the periods that they may have been called up for guarding duties since the enforcement of the rotational policy, after 2020.

ORDER

[165] In the circumstances, I make the following Order:

[165.1] The Application is dismissed;

[165.2] The Applicants, jointly and severally, are to pay the costs of this Application.



G NEL
[Acting Judge of the High Court,
Gauteng Division,
Pretoria]

Date of Judgment: **13 March 2023**

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