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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 6317/2021

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED: YES/~~NO~~

Date: 6 July 2023

In the matter between:

NORIA MARGARETH MASHABANE

Applicant

And

MINISTER OF DEFENCE AND MILITARY VETERANS

1st Respondent

THE CHIEF OF THE NATIONAL DEFENCE

2nd Respondent

SOUTH AFRICAN MILITARY OMBUD

3rd Respondent

JUDGMENT

SETHUSHA-SHONGWE AJ

INTRODUCTION

1. The applicant, a former employee of the Department of Defence, South African Military Health Service (SAMHS), approached this court requesting for an order in the following terms:

1.1 "Declaring the first and second respondent's failure to implement the findings and recommendations of the South African Military Ombud (herein "the third respondent") issued and published as per report number: 85/2020 dated 15th May 2020 hereby unlawful is set aside.

1.2 An order directing the Minister of Defence and Military Veterans (herein "the first respondent") to issue- out direct command to the Chief of the South African National Defence Force (herein "the second respondent") to comply and implement the recommendation of the Military Ombud (herein "the third respondent") within a period of 10 (ten) days of the date of the order.

1.3 That the Chief of the National Defence Force (herein "the second respondent"), its Military Health Service Division re-appoint Major N. J.Mashabane of force number 947[...] to a position of lieutenant colonel as from the 1st June 2020 within a period of 30 (thirty) days of the date of her re-employment;

1.4 That the first and/or the second respondent be ordered to compensate the applicant for all lost earnings and benefits relevant to the post of lieutenant colonel as from the 01st June 2020 within a period of 30 (thirty) days of the date of her re-employment;

1.5 An order directing the first and second respondents to pay the applicant's costs jointly and severally the one paying and the other to be absolved."

2. The application is opposed by the first and second respondents. The third respondent, South African Military Ombud, is only cited as a party solely by reason of having an interest in the outcome of the matter, there is no order sought against the institution by the applicant. This matter was set down on the unopposed motion court on 30th November 2021, the reason it

was on the unopposed motion court is because the respondents failed to file an answering affidavit or filed a defective answering affidavit. Upon discovering that the matter is indeed opposed it was again set down for the 23rd May 2023.

3. The first and second respondents also applied for condonation of their late filing and service of their answering affidavit and that the time period for the filing and service be extended. On 23rd May 2023, when the matter was before court condonation was granted with costs and the court reserved the reasons for granting it and undertook to give reasons in the judgment when considering the main application. The court proceeded to hear oral submissions on the merits. The matter was adjourned and judgment was reserved. What follows are the reasons for judgment.

FACTUAL BACKGROUND:

4. It is common cause that the applicant was employed by the Department of Defence, (DOD), in the rank of a major, having been integrated into the SAMHS in 1994. She was in active service until she resigned on 1st March 2018. She tendered her 24 hours' resignation notice on 12th February 2018 and upon acceptance, she left her employment with immediate effect. She sighted, as her reasons for resignation, the continued intimidation, harassment, verbal and emotional assault by her senior officer. Upon her resignation she lodged a complaint with the office of the Military Ombud. After an investigation by the office of the Military Ombud, a final report together with recommendations was made public.

5. Amongst other recommendations, it was recommended that the SAMHS consider re-appointing the applicant on a new contract within three months of the directive from the Minister of Defence and Military Veterans for implementation and on a Lieutenant Colonel post which would have been the rank she occupied. Further that the office of the Minister of Defence was

requested to ensure that the Chief of the South African National Defence Force (C SANDF) implements the recommended relief within 3 (three) months of the date of signing of this report.

6. Upon realising that the recommendations are not being complied with, the applicant approached the office of the Military Ombud again to enquire of the progress. She was informed to approach the High Court for further action, hence this application. Let it be known that all the relevant facts advanced by the parties have been taken into consideration. Failure to refer to each of the facts mentioned should not be construed as having been ignored, it is for reason of brevity that they are not specifically all mentioned in the judgment.

7. The C SANDF and the Minister responded in that the legal premise upon which the applicant's case rests is fatally flawed and incorrect. They aver that the Military Ombud simply made a recommendation in terms of section 6(7) and/or section 6(8) of the Military Ombud Act 4 of 2012 (***"the Military Ombud Act"***) and not an order. In other words, the said recommendation is not binding but remains a recommendation. Basically, they challenge the efficacy of compelling a litigant by court order to implement a recommendation. I now turn to deal with the applicant's replying affidavit which now states in paragraph 4.2.5 of the replying affidavit that:

"Currently, the recommendation by the Military Ombud is no longer an issue that require further attention by this Honourable Court. I say so because the Military Ombud has since discharged its duties and forwarded the recommendations to the Minister of Defence. On 29th July 2020, the Minister of Defence then issued signed directives in exercised of the executive powers for the Chief of the Defence Force to implement these recommendations. The office of the Public Protector also confirmed to the applicant, these instructions by the Minister of Defence directing or commanding the Chief of Defence Force to re-employ the applicant on a new contract."

8. It would appear that there is a slight shift from the original claim of the applicant's case. The applicant's case is now founded on the failures of the C SANDF to comply or obey a lawful instruction or direction or command of the Minister of Defence. It must be noted that no- where does the Minister of Defence say that the applicant must be re-employed on a new contract, nor does the Military Ombud in its recommendations say that the applicant must be re-employed on a new contract. All that the Military Ombud said was that the C SANDF was to consider re-employing her.

DISCUSSION:

9. When one looks at prayer 1 of the notice of motion, the first impression I get is that it is impracticable, ineffective and unenforceable. I fail to fathom on what basis a court can declare a respondent's failure to implement a recommendation unlawful and set it aside. What the court is asked to do is to declare a failure to implement a recommendation unlawful. Is it feasible? With all due respect, I don't think it is feasible. I, therefore, agree with the respondents' submission that the applicant has failed to make out a case. Courts loathe to issue out ineffective and impracticable orders; orders must make sense to the ordinary reader and to enable the sheriff to execute them efficiently and effectively.

10. It appears that counsel for the applicant abandoned prayer 2, after discovering that the second respondent, the Minister of Defence, had already positively responded to the request of the Military Ombud. Therefore, there will be no need to deal with prayer 2. Save to add that in terms of section 200 (1) read with 202 of the Constitution of the Republic of South Africa 1996. The Military Ombud is not part of the chain of command. The Minister too is not part of the chain of command, but is mandated to issue directions to those in the chain of command under the authority of the President, who is at the top of the chain of command. See **Colonel Protas Sibonelo Lembede v**

Minister of Defence and Military Veterans Case no: 9642/2020; High Court of South Africa, Gauteng Division, Pretoria. I will now deal with prayer 3.

11. Prayer 3 is asking this court to order the C SANDF to re-appoint the applicant to a position of lieutenant colonel. It is safe and significant to mention that neither the Military Ombud nor the Minister of Defence has mentioned or suggested any re-appointment of the applicant to the position of lieutenant colonel. All that the Ombud recommended was that the applicant be considered for re-employment on a new contract and equivalent to Lieutenant Colonel post which would have been the rank she would have occupied. Section 4 of the Military Ombud Act provides that the mandate of the office of the Ombud is to investigate complaints by a member or former member of the defence force regarding his or her conditions of service. Sub-section 4 (2) states that 'For purposes of this section, conditions of service bear the same meaning assigned to it under section 1 of the Defence Act, 2002 (Act no 42 of 2002), as amended.'

12. Section 6 of the Military Ombud Act provides comprehensively for the investigative function of the office of the Military Ombud. Section 6 (7) - (8) further provides that, after investigating a complaint, the Ombud must uphold or dismiss the complaint, or issue an alternative resolution, recommend an alternative to the Minister, or if the Ombud upholds the complaint, the Ombud must **RECOMMEND** the appropriate relief for implementation to the Minister. (My emphasis). My understanding of the word recommend is the ordinary and grammatical meaning that of a suggestion and not a directive, order or command. Therefore, prayer 3 is incompetent, this court cannot and should not entertain a recommendation as being an order or command. In my considered view, the C SANDF is under no legal duty or obligation to accept, approve or implement that recommendation.

13. The purpose of the application before this court is, with respect, not to evaluate the applicant's competence or lack thereof, to work or to be re-

employed, but for the court to determine whether or not the C SANDF failed to implement the recommendations of the Military Ombud. This is a matter of interpretation of the word recommend or consider as per final report of the Military Ombud. See ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 ZSCA 13 (15 March 2012) para 17.

14. The applicant further asked to be compensated for loss of earnings and benefits relevant to the post of Lieutenant Colonel from the 1st June 2020. Nowhere does the applicants set out the basis or grounds of her claim. Simply because the Military Ombud recommended her re-employment to a higher rank, therefore, argues the applicant, she is entitled to be compensated. I fail to comprehend the logical conclusion arrived at by the applicant to be compensated monetarily without laying a basis for it. This prayer is also rejected as incompetent.

15. As regards costs, it is trite that, the unsuccessful party pays the costs. For the above reasons, the application falls to be dismissed and it is so dismissed.

16. I make the following order:

1. The application is dismissed with costs, including the costs of two counsel wherever employed.

N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court

Appearances

Counsel for the Appellant :	Advocate K.J. Maleka
Instructed by:	Leshilo Inc. Attorneys, Pretoria

Counsel for the Respondent : Advocate Marius Oosthuizen SC
Instructed by: State Attorneys, Pretoria

Date of the Hearing : 02 May 2023

Date of Judgment: 06 July 2023

Judgment transmitted electronically