



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

CASE NO:48823/20

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



M BALOYI-MBEMBELE

DATE: 20 JULY 2023

In the matter between:

EBRAHIM FISHER

First Applicant

and

**THE MINISTER OF DEFENCE AND
MILITARY VETERANS**

First Respondent

THE SECRETARY FOR DEFENCE

Second Respondent

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

Third Respondent

THE CHIEF OF THE SOUTH AFRICAN NAVY

Fourth Respondent

THE CHIEF HUMAN RESOURCES

Fifth Respondent

THE MILITARY OMBUD

Sixth Respondent

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 20 July 2023.

BALOYI-MBEMBELE AJ

[1] This is an application to review the decision of the Military Ombud dated 16 March 2020.

BACKGROUND

[2] The Applicant joined the South African Defence Force on a two-year Military Skill Development System (MSDS) contract from 09 February 2013 until 30 January 2015. On 27 April 2014, the Applicant was accused of smoking dagga and charged with contravention of Section 46 of the Military Discipline Code. The Applicant's contract was terminated in January 2015, and the case against him was still pending. The Applicant applied for Core System Contract (CSS). He was not recommended by the management resources development Core System Contract Allocation Board due to Applicant's pending offences.

[3] The Applicant was not found guilty by a military court in July 2016. The Applicant filed a grievance following the decision not to award him the CSS contract until the matter was before the Military Ombud. The Military Ombud held that the decision of the Respondents was not unfair as it is in line with its policies. The Applicant brings this review application to review the decision.

LEGAL PRINCIPLE INVOLVED

[4] Section 13 of the Military Ombud Act 4 of 2012 states that any person aggrieved by a decision of the Military Ombud may apply to the High Court for review against that decision within 180 days of the decision of the Military Ombud. The Ombud is *functus officio* and cannot re investigate its own decision. The Court in *Mokheseng v Minister of*

*Defence and Military Veterans and Others*¹ held that the only interpretation that is sensible is that the decision of the Ombud cannot be akin to an appeal.² There are no remedies anyway if one takes out the remedies in PAJA.³ Section 13 must be read to be what it is: that the decision of the Ombud is subject to review by a court subject to the grounds and remedies contained in Public Administrative Justice Act 3 of 2000 “PAJA”).⁴

[4] The Constitutional Court in *Minister of Defence and Military Veterans v Motau & others*⁵ has broken the definition into seven components, namely:

*‘there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.’*⁶

[5] I am satisfied that the Military Ombud decision is an administrative one and reviewable in terms of PAJA.

LEGITIMATE EXPECTATION

[6] The Applicant contends that the Respondents created legitimate expectation firstly, the standard practice that MSDS members automatically qualifies for the CSS contract upon completion of the MSDS contract, this was evident in 2013 wherein 349 MSDS members were recommended for contracts. Secondly, the Director Naval Personnel recommended him for the CSS contract.

[7] The doctrine of legitimate expectation entails a reasonable expectation, based on a well-established practice or an express promise by an administrator acting lawfully which

¹ [2022] ZAGPPHC 919 (23 November 2022)

² *Id* at para 42

³ *Id*

⁴ *Id*

⁵ [2014] ZACC 18; 2014 (5) SA 69 (CC)

⁶ *Minister of Defence and Military Veterans v Motau* at para 33 where Khampepe J was distilling the rather broad definition of administrative action as provided in section 1 of the Promotion of Administrative Justice Act 3 of 2000.

gives rise to legal protection when the practice or promise is clear and unambiguous and unqualified⁷. The Applicant refers to the internal communication not addressed to him, if the Respondents intended to offer him the CSS contract firstly, the communication or the instruction should have been clear and secondly the communication should have directed to him.

[8] The Court in *South African Veterinary Council and Another v Szymanski*⁸ stated that:

*“it is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy. The first question is factual – whether in all the circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose.”*⁹

[9] It is only if that test is fulfilled that the further question – whether in public law the expectation is legitimate - arises. The Respondents submitted that the MSDS contract does not automatically create an obligation on the Respondents to employ their members. The Contract provides “ *the DOD shall employ the member in terms of and subject to the provisions of the MSDS of the Regular Force attached hereto, as amended from time to time, in any capacity as determined by service requirements for a maximum period of 24 months and which term shall lapse upon last day of the month preceding the day the member would have completed 24 calendar months*’.

[9] To answer whether a legitimate expectation was created, the Applicant should demonstrate that the Respondents did promise the CSS contract, and if so, the promise should be unambiguous. It is clear from the wording of the contract that members shall be employed for a period of 24 months. The Applicant, in her affidavit, acknowledges that there is no guarantee that members are automatically granted the CSS contracts.

⁷ *Duncan v Minister of Environmental Affairs and Tourism and Another* 2010 (SA) 374 (SCA) at para 15.

⁸ 2003 ZASCA 11.

⁹ Id at para 21.

It is the Respondents argument that members can be placed if they qualify for the CSS contract. This is subject to the criteria set out in the policy and Admin Instruction 24/14. If the Respondents intended to appoint the Applicant on CSS contract, he would have not been considered as a reserve but CSS contract. I am not persuaded that the Respondents created legitimate expectation. I cannot find the Respondents decision unreasonable since the Applicant was not appointed for the CSS contract. One should take into account that the Respondents have policies and procedures in place.

[11] The Applicant relies on the communication from the Director Naval that he was recommended for the CSS contract the communication was an internal communication not privy to the Applicant. The Court in the *Duncan* case (*supra*) held that an express promise by an administrator acting lawfully gives rise to legal protection when the practice or promise is clear and unambiguous and unqualified¹⁰.

[12] The Respondents considered him a Reserve position this was done in compliant with their policies. It was submitted that the Respondents follow certain criteria before members can be appointed in the core services system. If the Applicant was not appointed based on the fact that he did not meet the requirements in terms of the policies I am satisfied that the Respondents did not create a legitimate expectation.

DECISION OF THE MILITARY OMBUD

[13] The Military Ombud found the decision not to award the Applicant CSS contract was not unfair as it complies with the policy. The report states the following; *“the Respondent considered the guidelines provided in the policy in arriving at its decision. The Military Ombud also considered that the decision was in line with paragraph 4 of Revised Implementation Instructions (MSDS) which reads, “Members are enlisted into Regulars where they will undergo full-time training and utilization for two years. Following this period*

¹⁰ *Duncan v Minister of Environmental Affairs and Tourism and Another* 2010 (SA) 374 (SCA) at para 15.

members could either be recruited to serve in Reserve for a period of five years with a commitment of thirty (30) days per year, or they may be offered opportunities for further services in the CSS of the regulars as vacancies become available in SANDF.”

[15] The military Ombud found the decision to translate the Applicant as Reserve is in line with Instruction 24/14. He considered that the Respondent’s financial status was not the only factor or reason not to award the CSS contract.

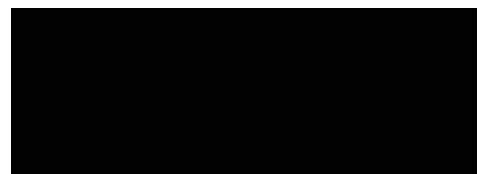
GROUND FOR REVIEW

[16] The Applicant’s grounds for review are that the Military Ombud decision was procedurally unfair as he was not given an opportunity to be heard. It is clear from the report that he was invited to make submission before the final report and he did not. I find the ground unfounded and without basis. The second ground that the Military Ombud took into account irrelevant facts i.e. the Respondent’s financial position which was not before him. The Respondents considered not only the financial position; it is evident that the Respondents took into account the criteria as outlined in the policies before considering the members.

[17] I therefore find that the application grounds for review are unfounded and without merits

[18] I make the following order.

(a) The review application is dismissed with costs.



**M BALOYI-MBEMBELE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES

Applicant's Counsel:	Adv G L van der Westhuizen.
Instructed by:	Griesel Breytenbach Attorneys.
1 st to 5 th Respondent's Counsel:	P Managa
Instructed by:	State Attorney, Pretoria.