



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>07 / 06 / 2019</u> DATE	
 SIGNATURE	

~~APPEAL CASE NO: A419 / 2016~~

~~CASE NUMBER: 6615 / 12~~

29817 / 17

In the matter between:

SARAH MAMADITLHARE REAKGADI TEMANE

APPELLANT

And

MINISTER OF DEFENCE AND MILITARY VETREANS

FIRST RESPONDENT

THE CHIEF OF THE SA NATIONAL DEFENCE FORCE

SECOND RESPONDENT

SOUTH AFRICAN MILITARY OMBUD

THIRD RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The applicant approached this court seeking an order in terms of which:

- 1.1 the third respondent's findings and recommendations as published in Report Nr 12/ 2016 dated 7 June 2016 in so far as it does not correct the error as per prayer 2.2 below is reviewed and set aside; and
- 1.2 correcting the seniority of the applicant to the correct rank of Warrant Officer Class 1 as per initial grievance lodged;
- 1.3 staffing of the applicant in a post of Warrant Officer Class 1;
- 1.4 allocating the applicant's number on the SA Army Signal Formation Officer Class 1 Seniority list, in line with that of applicant's 1996 peers;
- 1.5 costs of suit on attorney and client scale;
- 1.6 Further and or alternative relief.

Background and common cause facts:

[2] The applicant:

- 2.1 is employed by the Department of Defence ("DOD") in the rank of Warrant Officer Class 2 ("WO2"), having joined the DOD in 1999 and is still in active service;
- 2.2 successfully completed her functional and promotion training courses with her intake referred to as intake as group 1;
- 2.3 was erroneously promoted to the rank of Lance Corporal ("l/Cpl") instead of Corporal ("Cpl"), which error had monetary and career prejudice for her. All Ranks are coupled to salary scale and eligibility to attend the next higher level promotional or functional course. Her peers (group 1) whose careers were

not affected by this error were promoted in the correct ranks and their career paths were totally different and also monetarily;

- 2.4 came to know that in 2016, the DoD attempted to correct the administration error of appointing her in the wrong rank (L/Cpl), but again she was wrongly placed in group 2 to align her career path, instead of group 3;F
 - 2.5 was prejudiced by the unjust or erroneous administrative action of the respondent, in that whereas some of the people of her rank at intake were promoted to WO2 in 2007 and WO1 in 2012, for example WO1 Makgale 96203815MC and (SWO) Senior Warrant Officer AMO Sebothoma 96203971, which clearly demonstrate how far behind she was held back by the unjust administrative error or decision of the respondent;
 - 2.6. was negatively affected or prejudiced monetary wise in that her salary and seniority resulted in a difference of R20000. 00 per annum between the ranks;
 - 2.7 has been prejudiced in that the unjust and erroneous administrative decisions by the respondent deprived her an opportunity to be nominated and attend future courses in order to progress in ranks;
 - 2.8 has exhausted all internal remedies in terms of SANDF grievances system and the office of the Military Ombud recommended on the correction of the applicant's prejudice suffered (Report Nr: 12/2016.
- [3] The applicant correctly pointed out that according to S13 of the Military Ombud Act 4 of 2012: "any person aggrieved by a decision of the Ombud may apply to the High Court for a review against the decision within 180 days of the decision of the Ombudsman."
- [4] The applicant contended that the basis of the review application is premised on the facts that the source of the findings and recommendations of the third respondent in report 12/2016 dated 7 June 2016 was incorrect. The SA Army Signal Formation supplied the incorrect group of names (group 2) to the third respondent for

correcting the applicant's career. The first respondent subsequently followed the findings and recommendations of the third respondent and this effected unjust administrative action of the first respondent.

- [5] The applicant contended that this Court has the power to judicially review an administrative action if the administrator, in taking the action, considered irrelevant considerations or disregarded relevant considerations were not considered. The relevant considerations nor regarded in report 12 / 2016 of the third respondent, is the correct group (group 1) the applicant's career should have been aligned with, in order to correct the errors of 1998 (incorrect appointment).
- [6] The applicant further contended that she was prejudiced by the first respondent's unreasonable administrative action and thus her s33 rights were infringed.
- [7] She further contended that DoD has a promotion policy with certain requirements that need to be fulfilled with, prior to promoting a member (para13of the Promotion Policy). Paragraph 13 states that: "Advancements to the nearest higher rank shall take place only when a member is properly qualified for such advancement." *In casu* the DoD deviated from its own policy, and in this regard the applicant referred to certain members who were WO2 without attended the WO Development Course being staffed in a WO1 post and others who were WO Development course qualified but still waiting for years after successful completion for promotion to rank WO1 but not being promoted to such latter rank.
- [8] The first and second respondents contended that:
- 8.1 the applicant does not only seek to review and set aside the recommendations of the Military Ombuds¹, she further seeks an order from this court correcting her seniority to the rank of WO1 and an order staffing her in the post of WO1;
- 8.2 In addition to the said reliefs, she also seeks an order allocating her number on the SA Army Signal Formation WO1 seniority list in line with the so-called

¹ The Military Ombuds recommended that the applicant be placed at a reasonable position on the SA Amy Signal formation WO2' seniority list and that as a guideline consideration should be given to any position between 75 and 93.

Applicant's 1996 peers. The respondents contend that this relief is academic, because the applicant seniority on the Signal Formation was moved to seniority number 74 on Seniority List. The moving to number 74 was made pursuant to the Military Ombud's recommendations, the very recommendations that the applicant seeks to review and set aside.

[9] The respondents further contend that:

- 9.1 the applicant has failed to comply with the provisions of PAJA in particular the provisions of section 7(1);
- 9.2 the applicant has failed to set out the grounds upon which the decision of the Military Ombudsman should be reviewed and set aside;
- 9.3 the applicant failed to comply with the prescripts of the provisions of Rule 53 of the Uniform Court Rules in so far as the filing of the record of the decision that is sought to be reviewed and set aside;
- 9.4 the application is in essence a review of a decision by the SANDF and or failure to take a decision in relation to the applicant's promotion to the post WO1 and in relation to the Applicant's seniority, the application ought to have been brought within the timeframe prescribed by PAJA, which applicant failed to do and as such the application is legally defective;
- 9.5 the applicant has failed to establish that the Military Ombud's decision was incorrect, but she has provided the court with no basis for the extraordinary remedy of substitution.
- 9.6 the conduct of both the Military Ombuds and the SANDF refusing to correct the rank of the applicant to the rank of WO1 and to consequently staff the applicant in the WO1 post falls within the purview of the general provisions of paragraph (g) ("doing or refusing to do any other act or thing of administrative nature,") is an administrative decision within the meaning of PAJA, accordingly the applicant has no election to either rely on PAJA or

common law remedy of mandamus in the circumstances but enjoined to found her cause of action on PAJA, which she has failed to;

- 9.7 *In casu*, there has been an inordinate delay in bring the application, there is no condonation sought in the founding affidavit, but only in the replying affidavit which is impermissible.

[10] The respondents further contended that:

- 10.1 the failure to staff the applicant in a WO1 Class and the applicant's incorrect seniority position in the WO2 seniority list emanated from the decision by the Respondents to promote the applicant to a Lance Corporal post as opposed into a Corporal post. This decision i.e. to promote and staff the applicant to a Lance Corporal post as opposed to Corporal post and or failure by the respondents to promote the applicant into the correct post was taken as far back as 1996;
- 10.2 the decision or failure to take a decision to correct the applicants into the correct post according to the applicant had a ripple effect on her carrier and consequently her ranking in the SANDF.
- 10.3 the decision to promote the applicant to a rank of the Lance Corporal was subsequently corrected and the applicant was promoted to a rank of Corporal =sometime in 1998.
- 10.4 The applicant was dissatisfied at the time and ought to have brought an application for review as far back as in 1998.

[11] It is trite that the applicant must satisfy the court that the impugned decision was materially influenced by errors of law or consideration of wrong facts and must therefore be reviewed and set aside in terms of S8(1)(C) (II) of Promotion of Administration Justice Act 3 of 2000 (PAJA); *vide Edcon v Financial Services Board of Appeal*;² *National Tertiary Retirement v Registrar of Pension Funds*³; *Pepcor*

² 2008 (5) SA 511 (SCA).

³ 2009 (5) SA 366 (SCA) at 375.

*Retirement Fund v Financial Board Services Board*⁴; *Registrar of Pension Funds v ICS Pension Fund*⁵.

[12] It is common cause that:

- 12.1 on the 7 June 2016 the third respondent made a finding that the error of promoting the applicant to Lance Corporal (L/ Cpl) instead of a Cpl adversely affected her career development and this is apparent in her current position on the ASA Army Signal Formation WO2's seniority list;
- 12.2 The third respondent upheld the applicant's complaint lodged in terms of section 6(7) of the Military Ombud Act No 4 of 2012;
- 12.3 The third respondent recommended to the first respondent in terms of section 6(7)(b) of the Military Ombud Act No 4 of 2012 in line with the third's finding and conclusion that the applicant be placed at a reasonable position on the SA Army Signal Formation WO2's Seniority list, as guidelines consideration should be given to any position between 75 and 93;
- 12.4 The respondents do not dispute that the recommendation of the Ombuds was premised on incorrect information. They also do not dispute that, when the correction as recommended by the Ombuds was effected, it too was incorrectly implemented. They do not dispute that the applicant was grossly prejudiced in her career path.

[13] The respondents rely on technical grounds in seeking that the application be dismissed, contending *inter alia*, the applicant failed to bring the review proceedings within 180 days and that she was unnecessarily dilatory in bringing the application. In this regard the applicant submitted that she first had to exhaust internal processes and this contributed towards the delay in bring the application much earlier.

[14] In the matter of *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC_ at page 244E-345A-B Mokgoro J held that: "[44] In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that

⁴ 2003 (6) SA 38 (SCA) at 58 para [47] etc.

⁵ 2010 (4) SA 488 (SCA) at 58.

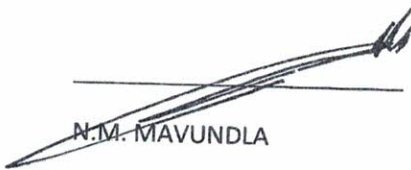
any administrative remedy be an effective one. As a remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without obstruction, whether systemic or arising from unwarranted administrative conduct. Factors such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interest of justice to intervene.

- [15] Section 172(1)(b) empowers a court to make any order that is just and equitable. The power has been interpreted as 'whether considerations of justice and equity in a particular case dictate that the order be made in other words the order must be fair and just within the context of a particular dispute; vide Head of Department; Mpumalanga Department of Education V Hoërskool Ermelo 2010 (2) SA 415 (CC) paras 96-97.
- [16] *In casu*, the Ombuds was supplied with incorrect data, which resulted in him making an incorrect recommendation, to the prejudice of the applicant. The implementation of the Ombuds' recommendation was also flawed, thus causing double prejudice to the applicant. The envisaged remedy sought by the applicant was therefore ineffective, not because of any doing on the part of the applicant, but that of the respondents' functionaries. In my view, the above situation renders itself to be regarded as exceptional circumstances thus warranting this court to decide this matter on the principles of fairness and equity, in favour of the applicant, as prayed for. I also bear in mind the fact that all her efforts to resolve the matter amicable and through internal process came to naught, contributed to the inordinate delay on her part in bringing this application. For these reasons, this court in the exercise of its discretion, finds itself obliged to come to the aid of the applicant and grant the relief sought.
- [17] As a general rule the costs follow the event. In this particular case, regard being had to the fact that the blame for the chagrin of the applicant falls squarely at the door of the applicant. It would seem to me that there was a deliberate intent by one or other administrative functionary to single out the applicant to do her in. There is no

logical explanation why out of her intake group, she is the only one who found herself in this unfortunate position of being "erroneously" held back. In the circumstances, I am of the view that a punitive costs order as sought is justified.

[18] In the result, I am satisfied that the applicant has made a case for the relief sought and the following order is therefore made:

1. That the third respondent's findings and recommendations as published in Report Nr. 12/ 2016 dated 7 June 2016 in so far as it does not correct the error as per prayer 2.2 below is reviewed and set aside; and
2. correcting the seniority of the applicant to the correct rank of Warrant Officer Class 1 as per initial grievance lodged;
- 3 staffing of the applicant in a post of Warrant Officer Class 1;
- 4 allocating the applicant's number on the SA Army Signal Formation Officer Class 1 Seniority list, in line with that of applicant's 1996 peers;
- 5 costs of suit on attorney and client scale.


N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 07/ 06 / 2019

APPLICANT'S ADV. : ADV

INSTRUCTED BY : L. KOCK INC

RESPONDENT'S ADV : ADV. A GXOGXA

INSTRUCTED BY : STATE ATTORNEY PRETORIA