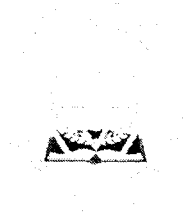
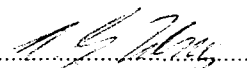


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A 468/2015

Date: 1 | 3 | 17

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒ YES
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	☒ YES
(3) REVISED	☐ YES
1-3-2017	
DATE	SIGNATURE

In the matter between:

BONGANI POSTOLIE XULU

APPELLANT

AND

MINISTER OF DEFENCE

FIRST RESPONDENT

CHIEF OF THE SOUTH AFRICAN

SECOND RESPONDENT

DEFENCE FORCE

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] The Appellant appeals against a judgment of this Court in which Appellant's review application to have a decision by Respondents not to extend his fixed term contract was dismissed.
- [2] The Court *a quo* found that the Appellant's application was based on a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that the conduct of the Respondents does not constitute an administrative action. Consequently the Court *a quo* found that the conduct of the Respondents is not reviewable under PAJA and dismissed the application.
- [3] Leave to appeal was granted by the Court *a quo*. At that hearing it was argued by the Appellant's legal representative that the Appellant's application was not only based on PAJA, but also on the principle of legality and it was conceded that PAJA does not find application. At the hearing of the appeal however counsel for Appellant argued that the concession was incorrectly made and based his argument on both PAJA and the principle of legality.
- [4] It needs mentioning that despite opposing the application and subsequent leave to appeal, the Respondents did not file heads of

argument in the appeal nor was there any appearance on behalf of the Respondents at the hearing of the appeal.

- [5] Save for certain urgent relief which the Appellant initially sought (and which is no longer relevant) the Appellant seeks an order that the non-renewal of his fixed term contract entered into during 2006, should be declared unlawful, unconstitutional and that it must be set aside and replaced with a decision providing Appellant with a fixed term contract on the same terms and conditions as other members of the South African National Defence Force ("SANDF") with similar rank as that of the Appellant. In the alternative the decision not to renew the last fixed term contract must be set aside and the matter referred back to the Respondents for reconsideration.

FACTUAL BACKGROUND

- [6] The Appellant joined the SANDF in July 1996. Until his employment was terminated Appellant was employed in terms of successive fixed term contracts. Firstly from 1996 to 1998 when his contract was renewed until 2000. In 2000 Appellant's contract was renewed until 2005. The last fixed term contract states that it was effective from 29 July 2006 to 31 July 2011. This contract will be referred to as the "*last fixed term contract*".
- [7] In terms of the last fixed term contract Appellant was appointed to the Core Service System ("CSS") and his appointment was subject to the SANDF's prescribed conditions of service as amended from time to

time. Appellant's appointment was in terms of section 52(1) of the Defence Act of 2002 ("the Defence Act").

[8] On or about 1 December 2010 on receipt of a letter dated 26 November 2009, Appellant was informed that the Department of Defence ("DOD") intended not to renew his fixed term contract which was to expire on 30 June 2011. Two offences were taken into consideration in deciding not to renew Appellant's fixed term contract. Appellant was given 10 days to make representations as to why the DOD should not terminate his employment contract.

[9] Appellant submitted written stating his personal circumstances as part of the reasons why his employment contract was not to be terminated. In addition, Appellant also dealt with the two offences which were taken into consideration when deciding not to renew the last fixed term contract.

[10] The two offences considered respectively date back to 1996/1997 (being an offence in relation to a charge of mutiny) and 2001 in relation to section 33(b) of the Military Disciplinary Code ("MDC") (in relation to a charge of drunkenness). The mutiny offence was allegedly committed when Appellant's first fixed term contract was in place and the offence pertaining to the alleged drunkenness during the period of the third fixed term contract. On the Respondent's version, which was never disputed, these offences were not serious.

- [11] The officer commanding, 14 SAI Battalion (where Appellant was stationed at the time), Lt Col TD Oss, recommended the renewal of Appellant's last fixed term contract. Neither Appellant's own company commander and/or the personnel officer of the unit raised any objection to the extension.
- [12] Prior to 17 January 2011 Maj Gen TM Nkabinde (the deponent to the answering affidavit), Col PCZ Fongoqa (the author of the letter dated 26 November 2009, Lt Col MJ Maungwa and Maj J Joki met, purportedly as a "*contract review board for the non- renewal of CSS contracts: SAIC*" for the infantry formation. In the minutes of this meeting the aim of the meeting is described as "*to conduct an Inf Fnn Review Board for members whose contracts must not be renewed and who have submitted representations to their respective OCs*". Appellant's name appear in paragraph 2 of this minute as a member who made representations why his fixed term contract should be renewed.
- [13] A blanket approach was followed and the "*Review Board*" concluded that the members concerned, including Appellant, "*did not advance sufficient arguments instead (sic) of their socio economic conditions which they failed to consider when committing these offences.*" As a general statement it is then also recorded that the SANDF is under no obligation to renew any fixed term contract when it lapses. The minute is signed and indicated to be "*mandatory with effect from 17 January 2011*" by Maj Joki and Maj Gen Nkabinde.

- [14] On 26 January 2011 authority was issued for the termination of Appellant's contract with effect from 30 June 2011. Appellant's last fixed term contract subsequently was terminated with effect from 30 June 2011.

PROCEDURES PERTAINING TO TERMINATION

- [15] The Appellant falls under the Defence Act as sec 11(a)(ii) states that the SANDF consists of the Regular Force, which *inter alia* includes the members who serve fulltime until the expiry of their contracted term of service.
- [16] The employment of members of the SANDF is regulated by the provisions of Chapter 9 of the Defence Act. Section 59(1)(b) provides for the termination of a fixed term contract concluded between a member and the DOD or on the expiration of any extended period of such contract and the procedure that should be followed is set out in clause 17 of the policy. The appointment, employment and termination of a member's services are therefore regulated by legislation.
- [17] When Appellant's employment was terminated the DOD had a policy ("the policy") in place (it is still in place) called "***PROCESS AND PROCEDURES FOR THE MANAGEMENT OF THE SEPARATION OF OFFICIALS FROM THE DEPARTMENT OF DEFENCE (DOD)***". The policy was applicable to the management of Appellant's last fixed term contract and clause 17 thereof deals with the expiry or non-renewal of fixed term contracts.

[18] Clause 17 reads as follows:

"Whenever the need exists for the non-renewal of a fixed term contract of a member, the following administrative actions must be effected (Defence Act, Section 59(1)(b)) (Reference C):

- a. Members must receive letters to remind them of the expiry of their fixed term contracts by the last day of the eight-month prior to the month in which the contract expire;*
- b. The Officer Commanding of a member must submit an application for the non-renewal of the fixed term contract to the respective Career Manager;*
- c. In the application, the Officer Commanding must substantiate the reason for the non-renewal of the fixed term contract by completing a report iro the events which have led him or her to the decision to apply for the intended non-renewal of the contract;*
- d. Once the Review Board at Service/Division level has made a preliminary recommendation the Officer Commanding must provide the member, in writing, with the specific reasons for the intended non-renewal of contract, as well as the specific measures under which the member's fixed term contract will be terminated. It must also be made clear that such a recommendation is a preliminary recommendation and that no final decision has been taken yet;*
- e. The Officer Commanding must then allow the member at least ten (10) working days, in terms of the audi alteram partem rule, to*

provide written reasons why his or her fixed term contract should not be renewed;

- f. The application for his or her non-renewal of the fixed term contract, together with the member's representations against the said intention, should be forwarded by the particular Unit to CD HRM (D HR Sep) via the respective Career Manager five (5) months before his or her contract expires;*
- g. If the Career Manager can add value to the application for the termination of the fixed term contract, it should include its recommendation wrt with the intended non-renewal. The application must be recommended by the relevant Chief of Service/Division in person (at least four months prior to the expiry of contracts, (See Appendix E);*
- h. Upon receipt of the application at the D HR Sep, a submission must be forwarded to the MOD for final decision. In order to assist the MOD in making a final decision, all relevant information, as stated above, must be supported with copies of the documentation/statements in the application for the non-renewal of the fixed term contract (see Appendix F);*
- i. Once the MOD has made a decision wrt the non-renewal of the fixed term contract of the member, D HR Sep must promulgate the authority on the TERMINATIONS program, at least three months prior to the final date of service;*
- j. On receipt of the Administrative Authority (but not a shorter notice period than one month), the Officer Commanding must inform the*

member, in writing, that his or her contract will not be renewed. The final date of service must be included in the letter and it must be the same date as was approved on the TERMINATIONS program”.

[19] The Respondents did not comply with the prescribed procedures set out in the policy in various respects. No need was identified for the non-renewal of Appellant's last fixed term contract as provided for in the introductory sentence in clause 17. Appellant did not receive a reminder of the expiry of his fixed term contract as is envisaged in clause 17(a). Appellant's Officer Commanding, Lt Col Oss did not submit an application for non-renewal as contemplated in clause 17(b). In fact, Lt Col Oss recommended the extension of the last fixed term contract. None of the procedures and requirements as envisaged in clause 17(c) to (j) has been followed.

[20] From the aforesaid it is abundantly clear that the Respondents did not follow their own procedures pertaining to the termination of the Appellant's fixed term contract.

THE APPLICABLE LEGAL PRINCIPLES

[21] PAJA will only be applicable if the Respondents' decision to renew the last fixed term contract constitutes an “administrative action” as defined in section 1 of PAJA. Section 6 allows for the judicial review of administrative action and in terms of sub-section (2) the Court has the power to judicially review an administrative action if certain requirements are met.

[22] Our Courts have defined what would constitute an administrative action.¹ Pertaining to the dismissal of state employees the Constitutional Court concluded that the action of the employer did not constitute administrative action.² However one must take into consideration that the Labour Relations Act (LRA) does not apply to members of the SANDF and an argument may be raised that, as a result the situation of members of the SANDF could be distinguished from those of other state employees.³ Consequently the Appellant is not entitled to the remedies provided, including sec 186(1)(b) read with sec 191 of LRA, to claim that he was unfairly dismissed because his fixed term contract was not renewed whilst there was a reasonable expectation that it would be renewed.

[23] That the exercise of a public power in the context of an employment relationship in the public sector, where the LRA applies, may still be administrative action within the context of section 33(1) of the Constitution (and also PAJA) is illustrated in the matter of **Ntshangase v MEC for Finance, KwaZulu Natal and another** where the decision of a chairperson of a disciplinary hearing was held to be an administrative action.⁴

¹ President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000(1) SA 1 CC par 1434

² Chriwa v Transnet & Others (2009) 29 ILJ 73 (CC); Gcaba v Minister of Safety and Security (2010) 31 ILJ 296 (CC)

³ Section 2(a) of LRA

⁴ 2010 (3) SA 201 (SCA) at par [10] – [12]; In **Dlamini v Minister of Defence and Others** (7669/2012) [2012] ZAGPPHC 337 (14 December 2012) and **Snyman and Others v Minister of Defence and Another** (46670/70/08, 46671/08, 46672/08) [2014] ZAGPPHC 72 (28 February 2014) the Gauteng North High Court concluded with reference to the Chirwa and Gcaba cases *supra*, that PAJA is not applicable to the dismissal of public service employees. It was contended by counsel that both cases were decided wrongly or are

[24] However in my view it is not necessary for this Court to determine whether PAJA find application or not. One needs only to consider the principles of legality. In this regard the provisions of the Constitution are of importance, the following should be considered:

- a. the Bill of Rights applies to all law and binds all organs of state.⁵
- b. everyone has the right to fair labour practices;⁶
- c. everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁷

[25] In terms of section 2(g) of the Defence Act the fundamental rights of its members must be respected. Consequently one should refer back to the Constitution and specifically the Bill of Rights.

[26] When considering the principle of legality the following is of importance:

- a. The holder of a public power must act in good faith and not misconstrue his/her powers;
- b. Public power should not be exercised arbitrarily or irrationally;
- c. The requirement of rationality includes that the public power must act in a way that is procedurally fair;

distinguishable from the matter before the Court. It appears that in neither case was any consideration given to the fact that members of the SANDF have no protection under the LRA.

⁵ Section 8(1) of the Constitution

⁶ Section 23(1) of the Constitution

⁷ Section 33(1) of the Constitution

- d. There must be lawfulness in the conduct of the person exercising the public power, which apart from the substantive requirement, also incorporates that there must be procedural fairness and that the public power must not act in a biased manner.⁸

[27] The termination of a fixed term contract of employment takes place in terms of the provisions of the Defence Act, of course read with the provisions of the policy referred to earlier. The statutory provision however is underlying to the termination. The policy is ancillary to the statutory provisions and provides that the decision not to extend must be exercised in accordance with the provisions of the policy, requiring that there must be a need not to extend and that a specified procedure must be complied with.

[28] Appellant's last fixed term contract was not extended because of the alleged mutiny and drunkenness, respectively happening in 1996/1997 and 2001. Both these incidents occurred prior to him entering into the last fixed term contract. The last fixed term contract was concluded notwithstanding Appellant's "conviction" on both these offences. Appellant was also punished for both offences. These offences were correctly not considered when the last fixed term contract was entered

⁸ **Masethla v President of the Republic of South Africa and Another** 2008 (1) SA 566 (CC) par [78]; **President of the Republic of South Africa v South African Rugby Football Union** *supra* at par 148; **Masethla v President of RSA** *supra* at par 81; **Pharmaceutical Manufacturers Association of South Africa and another : in re ex parte President of the Republic of South Africa and another** 2000 (2) SA 674 (CC) at par 85; **Albutt v Centre for the Study of Violence and Reconciliation** 2010 (3) SA 293 (CC) at par 49 and 50; **Competition Commission of S A v Telkom SA Ltd and another** [2010] 2 All SA 433 (SCA) at par 13.

into and it also should not have been considered in 2011 when his fixed term contract was not extended. Not only was there no rationality in not extending the previous fixed term contract, considering this, but the Appellant was also punished twice for the same offence. It is generally accepted that it is unfair to punish an employee twice for the same offence.⁹ The Respondents were consequently not entitled to rely on these two offences when the last fixed term contract was considered.

[29] Over and above the aforesaid the procedure in the policy was simply ignored by the Respondents and particularly Lt Gen Nkabinde who decided not to extend the last fixed term contract.

[30] Under the circumstances Lt Gen Nkabinde's recommendation and ultimately Second Respondent's approval thereof does not meet the requirements for legality and was unlawful, because it did not comply with the Respondents' own policy and disregarded Appellant's rights in terms of the Bill of Rights and his right to fair Labour Practice. In the light of the aforesaid the decision not to renew Appellant's last fixed term contract should be set aside.

⁹

Amalgamated Engineering Union of South Africa and Others v Carlton Papers of South Africa (Pty) Ltd (1998) 9 ILJ 588 (IC) at p 596 C – F.

[31] The Court has a discretion whether to refer the matter back for reconsideration. In exceptional circumstances a review Court may substitute the impugned decision with its own decision¹⁰.

[32] In the light of the long period of time that lapsed, the fact that the Respondent did not comply with the Defence Act and applicable policies and the prejudice that the Appellant has suffered I am of the view that exceptional circumstances exist which will allow for this Court to substitute the impugned decision with its own.

[33] As a result the last fixed term contract should be extended on the same conditions applying to other members of the SANDF employed on fixed term contracts. Due to the fact that the appeal was only heard after the fixed term contract would have expired it should be extended until July 2017, in order to allow for due process to be followed pertaining to the consideration of any further contract between the Appellant and the SANDF.

[34] The following order is made:

35.1 The appeal is upheld;

**35.2 The Respondents decision not to renew the
Appellant's fixed term contract is declared unlawful
and is set aside and is replaced by the following:**

¹⁰ Johannesburg City Council v Administrator, Transvaal, and Another 1969(2) SA 72 (T) at 75H-77C

“The Appellant’s fixed terms contract is extended from 2011 until 30 July 2017 under the same conditions applying to other members of the SANDF employed on fixed term contracts”

35.3 The Respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved, including the costs for the leave to appeal.



R G TOLMAY
JUDGE OF THE HIGH COURT



T J RAULINGA
JUDGE OF THE HIGH COURT



N V KHUMALO
JUDGE OF THE HIGH COURT

DATE OF HEARING:

1 FEBRUARY 2017

DATE OF JUDGMENT:

1 MARCH 2017

ATTORNEY FOR APPELLANT: VIRENSINGH AND COMPANY

ADVOCATE FOR APPELLANT: G L VAN DER WESTHUIZEN

ATTORNEY FOR RESPONDENT: MOKUENA ATTORNEYS

ADVOCATE FOR RESPONDENT: NOT REPRESENTED