IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4190/2014

In the matter between:-

VUYELWA MPHELO Applicant

and

THE MINISTER OF DEFENCE 1st Respondent
OFFICER COMMANDING, AIR FORCE BASE, BLOEMSPRUIT 2nd Respondent

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JUDGMENT BY: TSATSI, AJ

HEARD ON: 16 SEPTEMBER 2014

DELIVERED ON: 16 OCTOBER 2014

INTRODUCTION

[1] This is an opposed urgent application for an interdict. The applicant brought this application on an urgent basis in order to secure a stay of execution of a sentence imposed on the applicant by the Court of Military Appeal. The respondents opposed the application. The matter was heard on 16 September 2014. I delivered a ruling on that day dismissing the application with costs. I was subsequently requested to provide reasons of my ruling. These are those reasons.

[2] The applicant sought an order in the following terms:

2.1 Non-compliance with the Uniform Rules of Court relating to forms, service and time period are condoned and the matter is heard as an urgent application.

2.2 Non-compliance with the provisions of section 35 of the General Law Amendment Act 62 of 1955 as condoned.

2.3 That the Honourable Court will grant a rule *nisi* which calls upon the first and/or second respondents to give reasons, if any, on 6 November 2014 at 9H30 why the following orders will not be granted.

2.4 The first respondent and or the second respondent is/are ordered and/or directed to stay the execution of the sentence imposed on the applicant, namely of “Dismissal from the South African National Defence Force” issues by the court of a senior Military Judge on 21 February 2014, under case number 37/2014 Bloemfontein, and upheld by the court of Military Appeals CMA28/2014, pending finalisation of this application.

2.5 The order in the aforementioned paragraph 2.4 serves as an interim interdict with immediate effect pending finalisation of litigation to be instituted by the applicant against the first and/or second respondent.

2.6 The first respondent to be ordered to pay the costs of this application.

2.7 The second respondent be ordered to pay the costs of this application, if opposed.

[3] The applicant intended lodging a review application. The said review application was not before me.

FACTS

[4] The applicant was employed as the corporate communications officer, with the military rank of major, at the Air Force Base Bloemspruit, in the employ of the first respondent, Bloemfontein

[5] The applicant was instructed by the then officer Commanding Air Force Base, Bloemspruit Colonel Opperman, to conduct a board of enquiry into certain internal matters. She was appointed as the president of the board of enquiry. WO1 Martin and WO2 Louw were appointed as members.

[6] On 1 September 2009, both WO1 Martin and WO2 Louw, together with the applicant travelled to Cape Town to interview witnesses and obtain statements from them. They were booked at Sonskyn Guesthouse by Sergeant U I Johnson, who was responsible for the administration of all subsistence and transport allowance and claims at Air Force Base, Bloemfontein.

[7] The applicant and her two colleagues were meant to book accommodation at Sonskyn Guesthouse, from 1 September to 3 September 2009. Air Force Base, Bloemspruit gave the applicant a cash advance to enable her to pay for all the necessary expenses. In addition an amount of R1 500, 00 was advanced to the applicant as payment of accommodation at Sonskyn Guesthouse.

[8] It is common cause that the applicant slept at Sonskyn Guesthouse, only the first night, which was 1 September 2009.

8.2 The remaining two days, 2nd and 3rd September 2009 the applicant slept at her mother's house.

[9] According to the applicant, she gave WO1 Martin an amount of R1 500, 00 in cash in an envelope to pay for her accommodation in advance. When the applicant enquired about the receipt from WO1 Martin, he assured the applicant that everything was in order.

[10] On 7 September 2009, the applicant was provided with subsistence and transport allowance form for signature. The document was completed by the subsistence and transport clerk, Sergeant Johnson. The applicant signed the document as she was satisfied that the information thereon was correct.

[11] On 17 November 2009, Wo1 Martin requested the applicant to complete another set of forms regarding the trip to Cape Town. These documents reflected the period used for accommodation from 1 to 4 September 2009. Sergeant Johnson explained to the applicant that the previous document was incorrect and the amount which was advanced to the applicant to pay for all the expenses had been deducted from the applicant's salary. The applicant filled in the second set of subsistence and allowance documents simply to have the amount deducted from her salary paid back. The said amount that was deducted from the

applicant's salary was paid back after the applicant's signed the second set of subsistence and allowance documents.

[12] On 20 April 2012, Sergeant Mokhele at the Military Police informed the applicant about a complaint of fraud lodged against the applicant. The latter, WO1 Martin and WO2 Louw were charged with fraud on 29 July 2013. They pleaded not guilty to the charges. A preliminary investigation was conducted by LEGSATO Bloemfontein. LIPCO provided the applicant with a legal representative by the name of Mr Botha. After consultation with the said Mr Botha, the matter was enrolled to be heard by a court of a Senior Military Judge in Bloemfontein on 25 November 2013.

[13] WO1 Martin, WO2 Louw and the applicant were charged with common law fraud, namely

> "On or about the 7th of September 2009 and at or near Bloemspruit, the said accused unlawfully and intentionally with the intention to defraud, made a misrepresentation to the SANDF that they were entitled to claim for accommodation at Sonskyn Guesthouse for the period of 1 – 4 September 2009 and through the said misrepresentation moved the SANDF to pay out this claim while in truth and in fact the said accused knew that they were only entitled to claim for one night's accommodation namely the 1st of September 2009. The total loss to the state was R2 600, 00."

[14] In the alternative to the above mentioned charge, the applicant and two others were charged with contravening section 46 of the Military Disciplinary Code "MDC") named that:

> "On or about the 7th of September 2009 and at or near Bloemspruit the said accused unlawfully and negligently by act or omission caused actual or potential prejudice to good order and militants discipline in that they were entitled to claim for accommodation at Sonskyn Guesthouse for the period of 1 – 4 September 2009 and through the said misrepresentation moved the SANDF to pay out this claim while in truth and in fact the said accused knew that they were only entitled to claim for the night's accommodation namely the 1st September 2009 and thereby the said accused caused actual or potential prejudice to the SANDF. The total loss to the state was R2 600, 00."

[15] During the military trial, the applicant's legal representative advised her not to testify as this would "open a can of worms". The applicant was allegedly advised to close her case without testifying. On 21 February 2014, WO1 Martin and WO2 Louw and the applicant were found guilty of common law fraud and not guilty of the alternative charge. The applicant was dismissed from her position of corporate communications officer with the military rank of major, at the Air Force Base Bloemspruit, Bloemfontein.

[16] The applicant appealed the guilt finding to the Court of Military Appeals, and she was represented by Captain Litabe. On 14 August 2014 the finding and sentence of the court of a Senior Military Judge was upheld. Captain Litabe was allegedly not present to address the court of Military Appeals on behalf of the applicant. Captain Litabe made written submissions on behalf of the applicant to the Court of Military Appeals.

ISSUES

[17] The main issue in this application is to order the stay of execution of the sentence imposed on the applicant pending the finalisation of the application for review of the court of Military Appeals.

SUBMISSIONS

[18] A submission was made on behalf of the applicant that first respondent be ordered to stay execution of the sentence, as she was ordered to vacate her post on 16 September 2014. If the applicant had to vacate her post, it was not known when the review application will be heard and finalized. The first respondent will not suffer any prejudice if the applicant was kept on her post. The applicant did not have an alternative relief. Counsel for the applicant argued that the applicant has reasonable prospect of success with regard to the review application (**Zulu v Minister of Defence and Others** (28410/04) (2005) SAGPHC. Counsel for the applicant further submitted that the applicant did not have adequate legal representation at the Military Court. There were no submissions made on behalf of the applicant at the Court of Military Appeals.

[19] Counsel for the respondent argued that written submissions were made on behalf of the applicant to the Court of Military Appeals. The applicant was convicted of a serious offence of common law fraud. The applicant was given an advance cash payment of

R1 500, 00 for accommodation. She stayed for one night only. She did not inform South African National Defence Force that she only stayed for one night, and paid only R500, 00. She should have paid back R1 000, 00 that she was given. Failure to pay back the R1 000, 00 and to disclose the true facts was in itself fraudulent. Counsel for the respondent referred the court to invoice number 30, attached to the court papers on page 65. There are discrepancies between the original invoice and carbon copy invoice. The original invoice indicated that an amount of R1 300, 00 was paid for three people. It has been indicated in the papers that the R1 300, 00 was for payment of R400, 00 each for WO1 Martin and WO2 Louw. The remaining R500, 00 from the R1 300, 00 was for the applicant's accommodation. It appeared on the invoice that check in was on 1/9/2009 and check out was on 4/9/2009. Below the same invoice an amount of R3 900, 00 was written which seemed to be for accommodation for three days. The information on invoice number 30, was the same as information on the carbon copy. The only difference between the two invoices was that at the bottom of the carbon copy there was additional information which read as follows: "*Kontant R1 300, 00 1 nag*".

<u>THE LAW</u>

[20] Section 35 of the General Law Amendment Act no 62 of 1955 provides that:

> "Notwithstanding anything to the contrary contained in any law, no court shall issue any *rule nisi* operating as an interim interdict against the

Government of the Union … unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the Government … at least seventy two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application."

[21] It is trite that the requirements of an interim interdict are as follows:

21.1 The applicant must show a *prima facie* right, an injury actually committed or reasonably apprehended, the absence of similar protection by any other ordinary remedy and the balance of convenience in favour of granting the interim relief (**Joubert NNO and Others v Maranda Mining Company (Pty) Ltd and Others** (2010) 2 All SA 67 (GNP) para 26).

[22] According to Schedule 8 of Labour Relations Act 66 of 1995, (LRA, the Act)

" any person who is determining whether a dismissal for misconduct is unfair should consider -
(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and (b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.”

[23] In **Overstrand Municipality v Magerman NO and Another** (186/2013) (2014) 35 ILJ1366 (LC) the Chief Law Enforcement and Security official was among other charges, charged with fraud. In mitigation the chairperson took into account the following factors:

21.1 A clean disciplinary record over 17 years;

21.2 The fact that the employee was appointed as head of legal enforcement in 2009.

21.3 That his performance was good.

21.4 That the charges were not connected to his duties.

[24] The court in **Overstrand** *(supra)* said the following:

> “… I fail to understand how the fact that the employee had been appointed as the head of legal enforcement in 2009 could be a mitigating factor. If anything, that should have been aggravating.”
>
> “Given the seriousness of the misconduct and the position of the employee as chief of law enforcement, the sanction imposed by the chairperson was irrational and unreasonable … The mitigating factors that he took into account do not remove the operational need of the municipality to ensure that senior officials in those positions are exemplary in their conduct and can be trusted by the municipality and the public … If the employee were to remain in the employ of the municipality, it would be failing in its duties to its ratepayers.”

24.1 In **Overstrand** *(supra)* case, the court ordered a sanction of summary dismissal of the employee.

[25] Theft and fraud have always constituted good grounds for dismissal as they frequently constituted a fundamental breach of the employment contract. The cases have, in the past emphasised, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour (**Toyota SA Motors (Pty) Ltd v Radebe and Others** (2000) 3 BLLR 243 (LAC). The court held as follows in **Toyota South Africa** (*supra)*:

> "Although a long period of service as employee will finally be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such serious act of misconduct is gross dishonesty."

[26] Zondo AJP, as he then was, quoted **Toyota South Africa** (*supra)* in **De Beers Consolidated Mines (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others** (JA68/99) (2000) XALAC 10 (3 March 2000) and said:

> "I am not saying that there can be no sufficient mitigating factors in cases of dishonesty, nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a

serious degree as to be described as gross, then dismissal *inter alia*, an appropriate and fair sanction."

26.1 It was stated in **S v Tyers** 1997 (1) SACR 261 (NC) at 267 g-h **t**hat a morally unacceptable motive is aggravating especially where the fraud and theft is motivated by greed or not explanation at all (see **Piater v S** (743 /13) [2014] ZASCA 134 25 September 2014).

APPLICATION OF THE LAW

[27] The applicant failed to comply with the provisions of section 35 of the General Law Amendment Act in that she brought this application less than 72 hours, under the auspices of urgency. The question arises whether it would be proper to condone non-compliance. I am inclined to condone non-compliance as I am of the view that the respondents will not be greatly prejudiced by this decision.

[28] The requirements for the grant of an interim interdict are trite. The applicant alleged in her founding affidavit that she has a *prima facie* right on the probabilities to succeed in an application for review application to have the finding and sentence of the Court of Military Appeal set aside. The applicant further stated in her founding affidavit that she has a *prima facie* right not to be dismissed pending the finalization of the review application. The applicant did not establish a *prima facie* right, which was proof of facts which established a right in terms of substantive law. In

Setlogelo v Setlogelo 1914 AD 221 at 227, Innes JA referred to a right which "though prima facie established is open to some doubt". It was held in two cases reported that this phrase indicated that the court must take into account the allegations made by both the applicant and the respondent in deciding whether a *prima facie* right has been established. It is not sufficient that the applicant has in affidavits, taken alone made out a prima *facie* case (see **Webster v Mitchell** 1948 (1) SA 1186 (W) at 1189; **Ndauti v Kgami** 1948 (3) SA (W) at 35 - 36). The right asserted by the applicant in this case, is the right to order stay of execution of the sentence imposed on her by the employer.

[29] It is not sufficient for the applicant simply to allege irreparable harm. The facts that establish an actual or well-grounded apprehension of irreparable loss if no interdict is granted must be set out (**Stern & Ruskin NO v Appleson** 1951 (3) SA 800 (W) at 813 B). In *casu,* I am of the view that the applicant did not lay out sufficient facts that form the basis of her allegation that she will suffer irreparable harm if the interim interdict was not granted.

[30] The applicant for an interim interdict must establish that there was no other alternative remedy available. The alternative remedy available must satisfy the following requirements, be adequate in the circumstance, be ordinary and reasonable, be a legal remedy, grant similar protection (Per Friedman AJP in **Minister of Law and Order v Committee of the Church Summit** (1994) (3) SA 89 (B) at 99).

[31] Regarding the balance of convenience the Court had to weigh up the likely prejudice to the applicant if the interim interdict was not granted and later shown to have been wrong against the likely prejudice to the respondents if the interim interdict was granted and the grant of the said interim interdict was shown to have been wrong. I am not convinced that the balance of convenience favoured the applicant. In this regard the applicant blamed her lawyers who represented her. It seems as if the applicant did not want to take any responsibility for any part in the whole process. First she blamed her colleagues and then her legal representatives. In **Mkhize v First National Bank and Another** (1998) 11 BLLR 1141 CLC, the court held that there was a limit to the extent to which an applicant would blame the negligence of her legal representatives. Our courts have also disregarded an excuse where a blame was cast on a legal representative by an applicant (**Kurt Fontein v South African Breweries** JR1583/01 and others.

31.1 The applicant was legally represented at both the Military Court and Court of Military Appeal. She cannot be heard to want to benefit from her failure to place information before court. Sufficient information must be placed before court to enable it to determine the appropriate sentence. It was not explained to this court what was meant by the applicant's lawyer, Mr Botha when he said that testifying by the applicant will "open a can of worms'. I would have expected the applicant to take this court into her confidence and clarified this phrase which she failed to do. There was no submission made that, despite the applicant's attempt to clarify the "opening can of worms" issue with her legal representative, the latter insisted that the applicant should not testify. I am of the view that the applicant knew or was reasonably expected to know what "opening can of worms" meant.

[32] As counsel for the respondent rightly submitted, should the court order the stay of the execution of sentence and then the review application did not succeed, the respondents may not be able to recover all the monies paid in the form of salaries. If the court ordered the stay of execution of the sentence, and the review application became successful, the applicant will be able to sue the respondent for the recovery of all the money due to her. The applicant will not be prejudiced in the long term if the stay was not ordered. The applicant will not suffer irreparable harm if the relief was not granted as she has a chance of being reinstated if the review application was successful.

[32] Misconduct can take on many forms, but the legal basis for dismissal is usually the same: The employee violated the regulations of her contract in one way or another. In this case the applicant breached the provisions of Schedule of 8 of the LRA. These rules are usually set out in an employee's contract or in a policy or a disciplinary code of the company, or are general practices in the workplace that could justify dismissal. If an employer has not implemented a disciplinary code, Schedule 8 of the Code of Good Practice in the Labour Relations Act (LRA) will apply, but it is generally regarded as a guideline only. Gross

dishonesty, for example, fraud is classified as one of the serious misconducts.

[33] I am of the view that the prospect of success was slim as the applicant had been convicted of a serious offence of fraud, which has an element of dishonesty and deception. This was further demonstrated by case law that fraud constituted good grounds of dismissal as it was considered a breach of the relationship of trust that occurred when an employee was guilty of such a misdemeanour. I am satisfied that the review application that the applicant intended lodging in this court satisfies the above requirements. Therefore the applicant had an alternative remedy, which was a review of the decision of the Court of Military Appeal.

[34] I am mindful of the decision in **Zulu v Minister of Defence and Others** (*supra)*. Although facts of that case seem similar to the case in question, there are fundamental differences. The applicant in **Zulu** (*supra*) was not charged and convicted of fraud. Fraud has elements of deception and dishonesty which has a tendency of irretrievably breaking the employment relationship between the employer and the employee down. (**Edcon v Pillemer NO and Others** (2009) 30 ICJ 2642 (SCA). Due to the personal nature of a contract of employment, the fact that the relationship between the parties may have broken down irretrievably was one of the factors which may be taken into account when the decision to reinstate or not was made. In this case the decision would have been to order the respondents to stay the execution of the sentence imposed on the applicant.

[35] There are various authorities by our courts when a senior person in an employment environment charged with fraud was considered aggravating. In *casu,* there are aggravating factors. The applicant was a senior employee in a position of trust. She allegedly committed fraud against her employer. The applicant expressed no remorse and there has been no offer to repay her employer. (**Pienaar v S** (564/11) (2012) ZASCA 60.) It is my view that the more senior the position, the greater need for high levels of trust. The applicant as a senior employee, employed by the respondent owed the respondent a fiduciary duty of loyalty, trustworthiness and good faith.

[36] Although I have taken the applicant's mitigating factors, into account, including her achievements and awards such mitigating factors do not remove the obligation to ensure that senior officials in such positions are exemplary in their conduct and that they can be trusted by their employer.

[37] In light of the preceding I am not convinced that the applicant satisfied all the requirements of an interim interdict. The applicant's right, whatever it may be, had to be balanced with the respondents' right to have the relief sought granted. In view of the above I am not inclined to exercise my discretion to grant an interim interdict for the protection of a *prima facie* right which I had already indicated did not exist. I am of the view that the balances of the requirements for the grant of an interim interdict are not satisfied. The applicant failed to make out a case on a balance of probabilities for the relief sought.

[38] I accordingly make the following order:

38.1 The application is dismissed with costs.

E. K. TSATSI, AJ

On behalf of the applicant:	Adv. J.J. Buys Instructed by: Land V Attorneys BLOEMFONTEIN
On behalf of the respondents:	Adv. H. Murray Instructed by: The State Attorney BLOEMFONTEIN

A determination had to be made whether or not the invoices of Sonskyn Guesthouse as submitted by the applicant constituted fraud.