

DELIVERED: 28 APRIL 2009
NOT REPORTABLE

/BH

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 57536/2007

IN THE MATTER BETWEEN:

BELINDA CROUKAMP

APPLICANT

AND

THE MINISTER OF DEFENCE

FIRST RESPONDENT

THE SECRETARY FOR DEFENCE

SECOND RESPONDENT

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

THIRD RESPONDENT

COLONEL M NDLOVU
(in his capacity as Acting
Officer, Commanding 1
Military Hospital)

FOURTH RESPONDENT

JUDGMENT

SERITI, J

I INTRODUCTION

[1] This matter came to Court by way of motion. In the notice of motion, the Applicant is praying for an order in the following terms:

“1. The first, second, third and fourth respondents are called upon to put forward reasons why the purported decision by the fourth respondent, on or about 21 December 2006, in terms whereof the applicants services in the Department of Defence was terminated on account of misconduct (administrative dismissal) should not

be reviewed and/or corrected and/or set aside.

Alternative to prayer 1

2. That the first, second, third and fourth respondents are called upon to put forward reasons why the first respondent's purported decision on or about 29 September 2006 in terms whereof the applicant's applications for "Mobility Exit Mechanism (MEM) was not approved should not be reviewed and/or corrected and/or set aside."

[II] BACKGROUND FACTS

In the founding affidavit, which was apparently attested to on 11 December 2007 the applicant states that she is currently employed at Unitas Hospital, Centurion. She joined the South African National Defence Force (SANDF) on 1 January 1991 as a candidate officer and she progressed in the ranks and she held the rank of captain in 1998. She received, *inter alia*, her nursing training and qualified as a nurse whilst in the employ, of the South African National Defence Force. She performed her duties, from January 1995 at 1 Military Hospital, Thaba Tshwane, initially as a junior registered nurse and in the year 2006 she held

a position of Head of the Department Infections Control at 1 Military Hospital, Thaba Tshwane.

[3] The SANDF introduced to its members a procedure called Mobility Exit Mechanism ("MEM") in terms whereof members are afforded an opportunity to exit and/or retire from the service prior to the usual retirement age of 65 years. In terms of the MEM members, who meet certain criteria, could retire prior to their attaining 65 years and receive certain benefits therein mentioned.

[4] On or about 22 February 2006 the Applicant applied for early retirement in terms of the MEM mentioned above. The date of termination

of services was mentioned as 31 December 2006. The application was recommended on the same date by Chief Professional Nurse and approved by Brigadier General Dabula.

On 12 June 2006 she received a letter from Surgeon General's office, in which letter her MEM application was recommended. The exit date was mentioned as 31 December 2006.

Applicant alleges that the letter was framed as an offer which she accepted on or about 16 June 2006.

[5] Applicant further alleges that as a result of the fact that her application was recommended

by all her superiors she applied, in accordance with relevant regulations, for three months MEM leave, which was to commence on 1 October 2006 with final exit date of 31 December 2006. The application for 3 months paid leave was approved by the General Officer Commanding 1 Military Hospital Brigadier General Dabula on 31 August 2006.

[6] In a letter dated 11 September 2006 signed by Brigadier General Dabula together with two other senior officers indicated that there are no prosecutions, investigation pending nor proceeding against the Applicant, and that it is recommended that the final date of her service be 31 December 2006.

In the light of the fact that her application for 3 months paid leave was approved she started looking for alternative employer. She received an offer for employment from Netcare Limited to be appointed at Unitas Hospital. She accepted the offer and she resumed her duties at her new employer on 1 October 2006.

[7] On several occasions, she went to the previous employer to enquire about her MEM application and she was assured that it is only a matter of time before she receives the necessary Ministerial approval.

[8] On or about 12 September 2006 certain sensitive information relating to the premises of the SANDF was leaked to the media and SANDF suspected that same was leaked to the media by the Applicant.

A Board of Inquiry was established with the purpose of establishing who is responsible for the said leakage, so that disciplinary steps could be taken against such a person. The Board of Inquiry commenced carrying out its functions on 19 September 2006 and completed its work on or about 26 October 2006. At the time that the Board of Inquiry completed its functions, Applicant was already employed by Netcare Ltd.

[9] Shortly before the establishment of the Board of Inquiry, the Applicant's MEM application was put on hold pending the finalisation of the enquiry or any legal action that might follow thereafter.

[10] On Friday 29 September 2006, prior to her starting work at her new employer, she went to 1 Military Hospital to make final arrangements for her to go on leave and she was informed, according to her that her MEM application has been withdrawn, although the Respondents allege that she was informed that the said application was put on hold. Despite the fact that her MEM application was put on hold or withdrawn, she

started working for her new employer on 1 October 2006.

[11] Captain Hobyana of the Legal Department, in a letter dated 2 November 2006 addressed to Brigadier General Dabula, after commenting on the report or proceedings of the Board of Inquiry, states, *inter alia*:

“In conclusion, the only way is to charge and prosecute culprits and in this case in issue, captain Croucamp must be charged for contravening the provisions of section 104(7) of the Defence Act 42 of 2002.”

[12] She applied for unpaid leave and same was rejected and she was told to report for duty at SANDF on 20 November 2006. She could not comply with the said request as she was already employed by Netcare Limited and again, on 1 December 2006 she was informed to report on duty and she failed to do so.

III FINDINGS

[13] As from 1 October 2006 the Applicant started working at Unitas Hospital. She was informed to report on duty at SANDF on 20 November 2006 and she failed to do so. Again on 1 December 2006 she was informed to report on duty and again she failed to do so.

Section 59(3) of the Defence Act *supra* reads as follows:

"a member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave ..."

Section 52(5)(a) of the Act reads as follows:

“A member of the Regulator Force must place the whole of his or her time at the disposal of the State, and may not perform remunerated work or engage himself or herself to perform work outside his or her employment unless prior authority has been obtained from the Secretary for Defence.

[14] The Applicant was requested, at least on two occasions to report for duty and she failed to do so. She was absent from duty without permission for a period exceeding 30 days. She was told to report for duty on 20 November 2006

and she failed to do so. On 21 December 2006 she was advised that her services in the Department of Defence has been terminated in accordance with section 59(3) mentioned above.

[15]The termination of the services of the Applicant came about as a result of the operation of law and not as a result of any administrative action – See *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 3883 (A) at 388G-I. In this case, the court was dealing with almost an identical provision. See also *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA) at p424G-425I (Paragraphs 9 and 10.)

[16] The Applicant's counsel submitted that section 59(3) should be read in conjunction with section 103 of the Defence Act. Section 103 provides that a Board of Inquiry must be convened if a member of the Defence Force is absent from work for more than 30 days, in order to enquire into such absence.

There is no merit in the said submission. Section 59(3) does not have to be read in conjunction with section 103. Besides that in this case, it is common cause that the Applicant was absent from work as she was working for Netcare Ltd, in contravention of section 52(5)(a) of the Defence Act. There is

no suggestion that she obtained authority of the secretary for Defence.

[17] The decision to put on hold (according to the Respondents) or to withdraw her MEM application (according to the Applicant) after the article which appeared in the newspaper and the Respondents suspected that the Applicant might have leaked said information to the media.

[18] The Respondent, in my view, were entitled to put on hold, the MEM application of the Applicant pending the finalisation of the enquiry into the leakage of information to the media. In fact, as stated earlier, the Legal Division of the Respondent was of the view that

disciplinary steps should be taken against the Applicant.

[19] No disciplinary steps were taken against the Applicant, probably because she had already left the services of the SANDF and she was working for Netcare (Pty) Ltd. My view is that the Applicant has failed to make out a case for any of the prayers contained in the notice of motion.

[20] The Court therefore makes the following order:

20.1 The Application is dismissed.

20.2 The Applicant is to pay the costs of the Respondents on a party and party scale, which costs will include costs consequent upon the employment of two counsel.

W L SERITI
JUDGE OF THE HIGH COURT

HEARD ON: 15 April 2009-04-17

APPLICANT'S COUNSEL: J P VAN DEN BERG

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RESPONDENTS COUNSEL: BR TOKOTA SC AND ZZ MATEBESE

INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA