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

Case Number: 46769/2020

Reportable: No

Of interest to other judges: No

Revised: Yes

Signature

Date: 3/9/2024

In the matter between:

SOUTH AFRICAN NATIONAL DEFENCE UNION

First Applicant

KS SETLOGELO PLUS 33 OTHERS

Second to Thirty Fifth Applicants

and

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

First Respondent

MINISTER OF DEFENCE AND MILITARY VETERANS

Second Respondent

CHIEF OF THE SOUTH AFRICAN ARMY

Third Respondent

SECRETARY OF DEFENCE

Fourth Respondent

JUDGMENT

This Judgment was handed down electronically by circulation to the parties / their legal representatives by e-mail and by uploading to the electronic file on Case Lines. The date of hand-down is deemed to be 4 September 2024.

TERBLANCHE AJ

THE PARTIES:

- [1] The first applicant is SANDU, a registered military trade union, as provided for in Chapter XX, Part 3 of the General Regulations promulgated under GNR998 of 20 August 1999.
- [2] The second to thirty fifth applicants were members of the South African National Defence Force (“*SANDF*”).¹
- [3] The respondents are the Chief of the *SANDF*, the Minister of Defence and Military Veterans, the Chief of the South African Army and the Secretary of Defence.

INTRODUCTION:

- [4] During 2015 the individual applicants, with some other members of the *SANDF*, were stationed in the Democratic Republic of the Congo (“*the Congo*”) as part of the *SANDF*’s involvement in the United Nations stabilisation mission in the Congo.
- [5] On the night of 12 September 2015 certain events² occurred, which resulted in the termination of the applicants’ services on 10 November 2015.
- [6] The applicants and some other *SANDF* members applied to Court for the review of the decision to terminate their services.

¹ It is alleged that they were regular members but this is disputed, as will appear hereinbelow.
² The applicants refer to it as the breaking of a curfew whilst the respondents call it mutiny.

- [7] The decision to terminate the services of the applicants and the other members was reviewed and set aside by Raulinga J on 30 August 2018. The Court further ordered that *“The second to forty fourth applicants are reinstated in the service of the SANDF with full retrospective effect, with retention of full salaries and benefits since date of the unlawful termination of their service.”*
- [8] At the time when the aforesaid order was granted by Raulinga J, the fixed term contracts concluded between the individual applicants and the SANDF had already expired due to the effluxion of time.
- [9] The Department of Defence (“DOD”), on the advice of counsel, distinguished between members whose contracts had already expired and those that had not. The group whose contracts had not yet expired were reintegrated and those whose contracts had expired were excluded from the reintegration process. Further, there was an ongoing discussion between the various legal representatives of the parties in an endeavour to find a solution to the impasse. It was not resolved and gave rise to the present application.

THE RELIEF SOUGHT BY THE APPLICANTS:

- [10] In the present application, launched by the applicants on 12 August 2020, the applicants seek an order declaring that, in the absence of the commanding officer/s of the second to thirty fifth applicants’ applying for the non-renewal of the said applicants’ fixed term contracts, the said applicants’ fixed term contracts were automatically renewed on the same terms and conditions.³
- [11] The applicants also seek⁴ that the second to thirty fifth applicants are reinstated retrospectively with retention of all salaries and benefits and on

³ Notice of motion, Prayer 1

⁴ Notice of motion, Prayer 2

the same terms and conditions from the date immediately following after the expiry date of their fixed term contracts.

[12] During argument before me Mr van der Westhuizen, for the applicants, made it clear that it was not an application to hold the respondents in contempt of the Order granted by Raulinga J and that it was not an application for the review of any decision taken or not taken by the commanding officer/s concerned. However, Mr van der Westhuizen, at a later stage, invited me, if I were against the applicants on the relief sought for the declaratory order in prayer 1, to consider the application as an application for the review of the decision of the commanding officer, or rather the failure to take a decision, and to extend the prescribed 180 day period⁵ in the interests of justice. This request cannot be acceded to. The application is not an application for the review of any decision and an application for the extension of time in terms of section 9 of PAJA cannot be made informally. There is, in any event, nothing before the Court indicating that the interests of justice require the extension of time sought by the applicants.

[13] Mr van der Westhuizen, for obvious reasons, did not persist with the relief sought in prayer 2 of the notice of motion that the individual applicants be reinstated again. In my view, this concession was properly made. There is no basis for again making the Order already made by Raulinga J and there is furthermore no case made out in the founding papers for the reinstatement of the applicants.

[14] Mr van der Westhuizen for the applicants thus confined himself to the relief sought in prayer 1, i.e. the declarator to the effect that the applicants' fixed term contracts were automatically reviewed on the same terms and conditions as applied at the time of the expiry of their contracts.

⁵ Section 7 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

[15] The respondents, in their belatedly delivered answering affidavit, explained that the individual applicants could not be brought back into the military system because of the fact that their contracts had expired. The respondents contended that the applicants' contracts were reinstated as per the Court Order granted by Raulinga J until the last day of their contracts. The respondents tendered to pay compensation for the unexpired contract periods to the relevant applicants.

[16] In the answering affidavit the respondents further explained the difference between the so-called Military Skills Development System ("MSDS") contract, where members are enlisted within the SANDF only for the purpose of receiving military skills for a period of 2 years (and no further contracts are given to them unless so selected through the contracts selection boards by their respective arms of service), and the Core Service System ("CSS") contracts awarded to members for a short or a mid-term contract for a period of 1 to 10 years after having served as MSDS members.

[17] In terms of the CSS contracts the DOD has an option of renewing such a CSS contract for a further fixed term.

[18] The CSS / fixed term contracts provide as follows:

"2. *The member shall be employed in the medium service term for the CSS for 5 years, which term shall lapse upon the last day of the month following the day the member completed the agreed years of service.*

3. *There is no obligation on the part of government to offer a subsequent contract to the member on the lapsing of this contract."*

[19] Section 59(1)(b) of the Defence Act, 42 of 2002 (*“the Defence Act”*) on which the respondents based their decision not to reinstate the individual applicants, provides as follows:

“59. Termination of service of members of the Regular Force –

(1) The service of a member of the regular force is terminated –

...

(b) on the termination of any fixed term contract concluded between the member and the department or on the expiry of any extended period of such contract;

...”

[20] The respondents contend that they implemented the Court Order granted by Raulinga J by paying or tendering to pay those applicants whose contracts had expired until the last day of their contracts. This, the respondents contend, amounted to effectively reinstating those applicants in line with the Court Order until the expiry of their contracts. It was, however, not possible to reinstate the applicants once their temporary appointments had terminated.

[21] The application was not prosecuted with any degree of urgency by any of the parties and for various reasons, explained by the respondents in their application in terms of Rule 6(5)(e) for leave to deliver a further affidavit. The respondents also applied in prayers 6 and 7 of their counter application for an order that the Order of Raulinga J is incapable of being complied with for failure to comply with the doctrine of effectivity applicable to court orders and that a compensatory order be issued in terms of which the respondents be ordered to pay each applicant (to the extent that any applicant has to date not received payment) such amount, which the applicants would have

earned including all benefits until the date of expiry of their respective contracts.

[22] I allowed the further affidavit in the interest of justice. The further information provided in the supplementary affidavit and the annexures thereto provide important information necessary for the decision of the issue between the parties, some of which information should have been contained in the applicants' founding affidavit.

THE ISSUES:

[23] The only remaining issue in respect of the applicants' application is whether, as a result of the commanding officer's failure to apply for the non-renewal of the members' fixed term contract, the contract is renewed automatically.

[24] The issues in respect of the respondents' counter application, are whether:

[24.1.] The Order issued by Raulinga J is incapable of being complied with; and

[24.2.] Whether a compensatory order in terms of which the respondents be ordered to make payments to the applicants should be ordered.

[25] I deal separately with each of these issues hereinbelow.

The automatic renewal of the contracts:

[26] Mr van der Westhuizen emphasised that the issue that lies at the heart of the dispute between the applicants and the respondents is whether the failure of the commanding officer to decide not to renew the fixed term contracts resulted in the automatic renewal of those contracts.

- [27] It is common cause that the policy “*PROCESS AND PROCEDURES*” of the management of the separation of officials from the DOD, which policy is part of the conditions of service, also of the individual applicants, in terms of the Defence Act, finds application to the non-renewal of fixed term contracts. Clause 17 of the policy provides (in relevant part) as follows: “*Whenever the need exists for the non-renewal of a fixed term contract of member the following administrative actions must be effected (Defence Act, section 59(1)(b) (Reference C):...*”.
- [28] The said clause 17 then prescribes the administrative action to be followed in the event of the commanding officer being of the view that the fixed term contract ought not to be renewed.
- [29] From the provisions of clause 17, the applicants deduce that in the event of the administrative actions not being effected, it follows that the contract is renewed automatically.
- [30] In my view, it does not follow. The fact that a procedure is prescribed, which is only to be followed in the event of the commanding officer being of the view that the contract ought not to be renewed, does not have as a corollary that in the absence of the procedure being followed, the contract is renewed automatically.
- [31] The provisions of the policy cannot override the clear and unambiguous provisions of section 59(1)(b) of the Defence Act. It also does not override the CSS contract which in terms provides for the lapsing of the contract or the expiry of the term thereof. *A fortiori* the case of the MSDS contract which cannot be renewed. It, in any event, goes without saying that in the event of the DOD intending to renew the contract, on such terms and conditions and for such a duration as it deems fit, there is no need to comply with the onerous provisions of clause 17. Clause 17 is clearly intended to protect the member in the event of the commanding officer being of the view that the contract should not be renewed. It provides a

separate administrative procedure, which must be followed but which does not change the law on the contracts.

[32] I can find no support for the argument in favour of an automatic renewal. There is no provision to this effect in the policy and, moreover, it is indeed contrary to the provisions of section 59(1)(b) of the Defence Act and the contracts themselves. It also does not make sense to give the DOD the option to either renew the contract or not and to then stipulate that in the absence of a failure to effect the administrative action prescribed by clause 17 of the policy, that the agreement would be renewed automatically. It immediately raises the question as to the duration of the renewed contract and the terms of the renewed contract.

[33] Apart from the fact that the interpretation of clause 17 contended for by the applicants is untenable, such an interpretation would also conflict with the provisions of section 59(1)(b) of the Defence Act and would clearly be *ultra vires*.

[34] I must point out that the respondents, in their answering affidavit, admitted the automatic renewal of the CSS contracts. In argument Mr Avvakoumides S.C. argued that the admission was incorrect, that it was an admission of a conclusion of law and that it was therefore not binding on the Court. I agree. For the aforesaid reasons no admission by a party which is clearly in conflict with the relevant provision of the Defence Act can be binding on the Court.

[35] Both counsel referred me to the judgment in **Minister of Defence v Xulu**,⁶ in support of their arguments. The Judgment of Wallis JA, far from lending support to the argument for the applicants, in fact destroys that argument. In paragraph [43] of the Judgment Wallis JA held that the policy was correct to describe as administrative action the steps it prescribed to be taken when considering the non-renewal of the fixed term contract of a member of

⁶ (337/2017) [2018] ZASCA 65 (24 May 2018)

the SANDF. It was further held in paragraph [46] that the decision not to renew Mr Xulu's fixed term contract as a member of the SANDF constituted administrative action, which was subject to review in terms of section 6 of PAJA. This, in itself, puts paid to the contention that there was an automatic renewal of the contracts. The remedy available to the applicants was to apply for the review of the decision, or the failure to take a decision in terms of section 6 of PAJA. Had such an application been successful, the decision not to renew the applicants' contracts could have been set aside with ancillary relief granted to the applicants. That has, however, not happened and the applicants must accordingly stand or fall by their argument that there was an automatic renewal of the fixed term contracts.

[36] It is necessary to point out that the MSDS contracts of the relevant applicants would have expired on 31 December 2015. Those contracts were for a fixed term of 2 years and, as pointed out hereinbelow, could not have been extended, but if they were capable of being extended, and even if they were extended for a further full 2 year term, such extended period would have elapsed by 31 December 2017. That date has also come and gone, and it certainly cannot be seriously contended that those contracts have since then been extended automatically on 3 more occasions.

[37] It is made clear in the Letter of Appointment of Mr S Simonyana, Annexure "EZM6" to the supplementary affidavit, that the appointment in terms of the MSDS contract is a temporary appointment with effect from 12 January 2014 to 31 December 2015. It also appears from the application for Military Skills Development Training in the South African National Defence Force of Mr Setlogelo, the second applicant, Annexure "EZM5" to the supplementary affidavit, that:

[37.1.] The appointment is a temporary appointment; and

[37.2.] That it is for a maximum period of 24 months – thus clearly not extendible.

[38] It is also made clear that if the MSDS member is needed, he will be offered employment in the regular force. This demonstrates that the MSDS contracts were temporary contracts and that the members appointed in terms of the MSDS contracts were not members of the regular force. They were temporary members, not entitled to any extensions of contract as of right.

[39] The CSS contracts stand on a slightly different footing. Those contracts are for 1 to 10 years in respect of regular force members. The provisions of clause 17 of the policy clearly find application to these members. To contend, however, that there was an automatic renewal of these contracts due to the failure by the commanding officer to follow the administrative action prescribed by the policy, is untenable on the basis already discussed hereinabove.

[40] In my view therefor, there is no basis for the contention that there was an automatic renewal of the contracts of the applicants and the applicants are not entitled to the relief sought by them.

The enforceability of the reinstatement order:

[41] Raulinga J granted the reinstatement order on 30 August 2018. By then the MSDS contracts had already expired and had not been automatically renewed.

[42] The respondents submit that they implemented the Order by paying or agreeing to pay monetary compensation to those applicants.

[43] All the CSS contracts that had not expired at the time of the granting of the Order by Raulinga J, have since expired and have not been automatically renewed.

- [44] The order was to reinstate the applicants under the same conditions that applied to their employment at the time of the decision that was ultimately reviewed and set aside. Those conditions included the expiry dates of their contracts. Those dates have come and gone, thereby rendering the Order of Raulinga J with purely financial consequences.
- [45] There is no basis suggested in terms whereof I am empowered to further extend those expired contracts beyond the original expiry dates.
- [46] The respondents are accordingly correct that the Order of Raulinga J would be complied with by the payment of monetary compensation for the unexpired terms of those contracts.

The monetary compensation payable:

- [47] The application by the applicants could have been dismissed on the basis of my findings hereinabove and had I not allowed the supplementary affidavit and the counter application to be delivered, I would have had no basis for the granting of the relief sought in paragraph 7 of the notice of counter application. It was, *inter alia*, for this reason that I deemed it appropriate and in the interest of justice to allow the delivery of the further affidavit and to allow the counter application to be prosecuted.
- [48] Mr Avvakoumides S.C. for the respondents tendered the payment of compensation and it is accordingly not necessary to further consider the basis for the making of such an order. I am of the view that there is a sound basis for the order, as discussed by Wallis JA in the **Xulu** judgment and I am of the view that the tender by the respondents is an appropriate tender.
- [49] I am accordingly of the view that it is appropriate to grant the order relating to monetary compensation sought by the respondents, in the terms offered by the respondents.

COSTS:

[50] I have already ordered the respondents to pay the costs associated with the condonation application and the application for leave to deliver further affidavits in terms of Rule 6(5)(e).

[51] Although the applicants have been unsuccessful with the relief sought by them, they have, largely due to the responsible attitude displayed by the respondents, enjoyed a measure of success in that they stand to receive compensation for the unexpired period of their contracts.

[52] Mr Avvakoumides S.C. also indicated that his instructions were not to ask for costs against the applicants.

[53] I accordingly do not intend to grant any costs order in addition to the costs order already granted.

THE ORDER:

[54] I accordingly grant the following Order:

1. The respondents' various condonation applications are granted, and the respondents are ordered to pay the applicants' costs in respect of such condonation applications.
2. The applicants' main application is dismissed with no order as to costs.
3. The respondents' counter application is granted with no order as to costs in the following terms:
 - 3.1. The respondents are jointly and severally ordered to pay compensation to the second to thirty third applicants, who held Core Services Contracts (CSS), to the extent that any such applicants have not received compensation, for the period

commencing on the date of their administrative discharge to the date upon which their CSS contracts would have expired.

- 3.2. The respondents are jointly and severally ordered to pay compensation to the second to thirty third applicants who at the time of their administrative discharge, were employed under Military Skills Development Systems (MSDS), to the extent that any such applicants have not received compensation, for the period commencing on the date of their administrative discharge to the date upon which their MSDS contracts would have expired.
- 3.3. All payments that may be due under this order shall be made within 30 (thirty) calendar days of this order, subject to each relevant applicant providing copies of their certified identity documents and confirmation of banking details to Defence Legal Services Division at A[...] Building, 3[...] Cnr Nossob and Boeing Streets, Erasmuskloof, Pretoria East.
- 3.4. The amounts which may be due to the CSS and MSDS members shall be agreed upon between the parties within 30 (thirty) calendar days of having furnished the required documents mentioned in paragraph 3.3 above, failing which such amounts shall be determined summarily on the written presentations of the parties by an arbiter chosen by them or, in the absence of agreement, appointed by the chair for the time being of the Pretoria Bar.

TERBLANCHE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Heard:

20 August 2024

Delivered:

4 September 2024

APPEARANCES:

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