

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-014981

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
2025-08-22	
DATE	SIGNATURE

In the matter between:

VUKILE EZROM SIBIYA

Applicant

and

THE MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

THE SECRETARY FOR DEFENCE

Second Respondent

THE CHIEF OF THE SOUTH AFRICAN NATIONAL

DEFENCE FORCE

Third Respondent

THE CHIEF OF THE SOUTH AFRICAN ARMY

Fourth Respondent

CHIEF HUMAN RESOURCES

Fifth Respondent

ADJUTANT GENERAL: DEFENCE LEGAL SERVICES

Sixth Respondent

DEPUTY DIRECTOR, SECRETARIAT OF THE GRIEVANCE

BOARD

Seventh Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 22 August 2025.

JUDGMENT

POTTERILL J

Introduction

[1] On 28 February 2024 the Court ordered on an urgent basis that the first to seventh respondents to whom I will collectively refer to as “the Minister”, and individually where necessary, are interdicted from taking any steps to implement and enforce the transfer of the applicant [Lt. Col. Sibiya] from the Military Academy, Saldanha to Legatso and to proceed with any disciplinary steps against Lt. Col. Sibiya. Pending the review of the decision to transfer Lt. Col. Sibiya he was to be reinstated to the position of Military University Educator at the Military Academy Saldanha with his salary and benefits from 1 February 2024.

[2] A review in terms of the Promotion of Administrative Justice Act 3 of 2000 [PAJA], alternatively a legality review, of the decision to transfer Lt. Col. Sibiya from Saldanha to Legatso is before me. Lt. Col. Sibiya is also seeking the review and setting aside of the decision of the DLSD Grievance Committee to dismiss his grievance pertaining to the transfer. Furthermore, to review and set aside the decision by the Grievance Board, as ratified by the Chief of the South African National Defence Force to dismiss Lt. Col. Sibiya’s grievance about the transfer. The Court is also asked to order his reinstatement pursuant to finding that the decision to transfer is unlawful and unconstitutional.

Common cause facts

[3] Lt. Col. Sibiya holds this rank in the South African National Defence Force [SANDF] in the function of Military University Educator as Chair: Department of Mercantile and Public Law since 2006.

[4] The DLSD had a staffing work session on 12 and 13 July 2022 where the decision was taken to interview the two candidates and transfer him. Lt. Col. Sibiya was not informed of this geographical transfer and only in the record came to know about this.

[5] On 13 October 2022 two candidates were interviewed for the post he was occupying. He was not informed thereof but he had informally heard from colleagues that he was to be transferred to Legatso. He had never requested a transfer and his career manager had not before his transfer conducted a career interview. He did not receive any reasons for his transfer to Legatso or any formal notice at that stage.

[6] He lodged a grievance to the Defence Legal Service Division Grievance Committee [DLSD GC] on 14 October 2022. He also in October received a transfer signal via Whatsapp to Legatso effective 2 January 2023. On 30 March the DLSD GC confirmed its decision that the decision to transfer was not unlawful or flawed. This was because Lt. Col. Sibiya had ample time to obtain an LLM degree that was a post requirement and he did not meet the minimum requirements for the post he occupied. Furthermore, the DLSD is entitled to transfer members according to organisational needs and that the transfer to Legatso is still within the Western Cape.

[7] On 4 May 2023 Lt. Col. Sibiya escalated his grievance to the Grievance Board.

[8] In May/June 2023 Col. Morake reported at the Military Academy. There was no outcome of the escalated grievance to the next higher level in terms of the Individual Grievance Regulations [IGR]. Lt. Col. Sibiya continued to work as a lecturer in Saldanha.

[9] On 7 November 2023 Lt. Col. Sibiya received the outcome of his grievance from the DOD Grievance Board. The outcome was that the interviews could not be halted as it had already taken place and a new member had been appointed in that post. The Adjutant General, the sixth respondent, will address the reasons and rationale for the transfer as well as a career interview as a Career Manager for Lt. Col. Sibiya. The

decision also relied on the Personnel Management Code: Military Law Practitioners which indicated that lateral transfers may be effected within the SANDF at the discretion of the Chief of the Defence Legal Services in the interest of organisational effectiveness and of member development.

[10] The Chief of Staff supported the Grievance Board decision and was accepted by the Chief of the SANDF.

[11] On 29 January 2024 Lt. Col. Sibiya was instructed to report to Legatso Cape Town on the same day. His salary was stopped on 1 February 2024 and then part A of this application was launched.

Issue to be decided

[12] Must the decision to transfer be reviewed and set aside.

Preliminary issues

[13] On behalf of the Minister it was argued that the application was fatally flawed because Lt. Col. Sibiya did not in terms of PAJA exhaust his mandatory internal remedies. Lt. Col. Sibiya should have pursuant to receiving the unfavourable outcome from the Grievance Board referred the matter to the Military Ombudsman. This is so because the Military Ombudsman can entertain complaints about "a member regarding his or her conditions of service."

[14] If Lt. Col. Sibiya wanted to approach the Court directly he should have set out exceptional circumstances and applied for exemption from the obligation to exhaust external remedies, he has not done so.

[15] Reliance was placed on the dictum of *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) at par [34] where the Constitutional Court found that without exhaustion of internal remedies the judicial process is premature. Furthermore, internal remedies are cost-effective relief affording the executive the opportunity to utilise its own mechanisms before turning to the Courts. Internal remedies are valuable *inter alia* in that the court can have the benefit of a full record of the internal adjudication.

[16] On behalf of Lt. Col. Sibiya it was argued that all the internal remedies were exhausted. Nowhere in the grievance procedure is there a further step of a referral to the Ombudsman. Utilising the Ombudsman is an add-on, not a requirement as an internal remedy. Support for this submission was found in the matter of *Dauids v Minister of Defence and Military Veterans and Others* 2024 JDR 5311 (SCA) par [17]:

“Their conditions of service are governed by the Defence Act 42 of 2002 and the Individual Grievance Procedure Regulations. The Act was passed as an adjunct to the need to provide additional redress for complaints concerning conditions of service and other complaints that are not excluded under s 7 of the Act, which limits the Ombud’s jurisdiction. That the Ombud’s recommendation is not final and binding does not mean that the purposes of the Act are frustrated or impeded. It simply means that it falls to the Minister to decide, in light of the recommendation made by the Ombud, upon the appropriate relief for implementation.”

Reasons for decision on internal remedy

[17] I am satisfied that Lt. Col. Sibiya exhausted all the internal remedies prescribed in the relevant legislation; Individual Grievances: Regulations 2016. In terms of regulations 12, 14 and 15, the internal remedy is to lodge a grievance to the Unit Officer Commanding, thereafter to the Formation Officer Commanding then to the Service or Division Grievance Committee and then finally to the Grievance Board. It is common cause that Lt. Col. Sibiya did this. Nowhere in the Regulations is there a further grievance step to the Ombudsman. There is nothing in the Regulations from which it is to be assumed, or requires interpreting, as to whether referral to the Ombudsman is the last step in the grievance procedure. The Minister’s own regulations simply do not provide for any other internal remedies.

[18] This view is fortified by the fact that the Military Ombudsman Act 4 of 2012 has been interpreted as “The Act was passed as an adjunct to the need to provide additional redress for complaints concerning conditions of service and other complaints that are not excluded under s 7 of the Act, which limited the Ombud’s jurisdiction.”¹ It is different to the grievance procedure and not a step in the grievance

¹ *Dauids v Minister of Defence and Military Veterans and Others* 2024 JDR 5311 (SCA) par [17]

procedure. In terms of the grievance procedure all the internal remedies were exhausted.

[19] But, in any event, Regulation 7 bars the Ombudsman to investigate a complaint relating to a matter pending before a military or civilian court.

Unreasonable delay

[20] It was submitted that the civilian court attack against the decision to transfer him and the decision of the Grievance Committee to dismiss his grievance was only brought 18 June 2024, 7 months after the decision was taken. The 180 days in terms of the PAJA Act was thus not complied with. This is so because in the amended notice of motion the review was extended to include an attack on the transfer.

[21] On behalf of Lt. Col. Sibiya it was argued that the date he exhausted his internal remedies were 7 November 2023, that is the date he received the decision of the Grievance Board. This application was launched on 12 February 2024, thus within the 180 days.

Decision on unreasonable delay

[22] This point *in limine* must be dismissed. In part A urgent relief was granted to interdict the transfer from taking place. This issue was already before court. Furthermore, the decision of the Grievance Board related to the transfer, the two issues are intertwined, one cannot exist without the other, seeking the review of the decision to transfer is the transfer. A party is entitled to amend its notice of motion after receiving the Rule 53 record. Lt. Col. Sibiya has done so. This does not affect the timeline of 180 days; the date of the decision being 7 November 2023 to the date the application was launched 12 February 2024.

The non-joinder

[23] On behalf of the Minister it was argued that it was fatal that Col. Morake, the incumbent of Lt. Col. Sibiya's post, was not joined in the review. It would have an adverse effect on Col. Morake's legal interests in which he has a direct and substantial interest. If regard is had to the remedy sought in prayer 5, i.e. to order that Lt. Col. Sibiya be reinstated in his post it would directly affect the non-joined person.

[24] On behalf of Lt. Col. Sibiya it was submitted that this Court need only grant prayer 1, i.e. reviewing and setting aside the decision to transfer Lt. Col. Sibiya from Saldanha to Legatso Cape Town. Lt. Col. Sibiya is accordingly not seeking that the Court grant any substitution of the decisions and therefore no rights of Col. Morake is affected.

Decision on non-joinder

[25] In view of Lt. Col. Sibiya abandoning the other prayers and only seeking prayer 1 on the amended notice of motion, there is no non-joinder of Col. Morake. In the Supreme Court of Appeal in the matter of *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) in par [13] addressing non-joinder of a party on par with the matter before me found: "The mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity" and "The result is therefore that the first declaration sought would not in itself affect the validity of Judge Henney's appointment ..."² This point *in limine* is dismissed.

The merits

The post requirement of an LLM

[26] The argument on behalf of the Minister that an LLM-degree was a requirement for the post that Lt. Col. Sibiya held and as he did not have a LLM-degree he had to vacate the post by means of transfer, is simply untrue. The record discloses that the position's qualification criteria is a "Higher Diploma/Diploma/NQF Level 7/8. It is undisputed that an LLB degree is equivalent to an honours degree; NQF Level 8 in terms of the South African Qualifications Authority. At the time of obtaining his degree from the University of Natal his LLB degree was then on NQF Level 7, complying with the requirement for the post. The University of Stellenbosch Military Science works in conjunction with the Military Academy of the Minister. The Dean of Law confirmed that although further education, i.e. a Master's Degree is encouraged, for Lt. Col. Sibiya's post this [the LLM] was not a requirement to teach at undergraduate level at

² Par [14]

Stellenbosch. Currently all advertisements do require an LLM, but Lt. Col. Sibiya had in the meantime obtained his LLM degree.

[27] The record further disclosed that "Lt. Col. Sibiya was utilised at the Military Academy as a lecturer from 2008 but does not have a LLM as is an unwritten requirement by the University of Stellenbosch." This is not what the Dean of Law had set out in his letter and is unfounded:

"Although the Office of the Dean of the Faculty of Military Science, Stellenbosch University encourages all Military University Educators to improve their academic qualifications and it is considered best practice that lecturers at least hold a Master's degree when teaching at a tertiary institution, it is not a requirement to teach at undergraduate level at Stellenbosch University. It is a recommendation but unless the advertisement stipulates the qualification as such, there is no prohibition on appointment without a Master's degree. Currently, all advertisements require a minimum of a Master's degree for appointment."

[28] There is thus no formal requirement for an LLM or an "unwritten rule" pertaining to such requirement. The fact that the advanced diploma in military law was introduced did not lead to the amendment of the post requirement as it was. The decision based on the LLM requirement is irrational and must be reviewed and set aside.

Was there consultation with Lt. Col. Sibiya before the transfer and must it take place before the decision to transfer?

[29] I need not find if there was consultation with Lt. Col. Sibiya pertaining to the transfer as it was conceded in the findings by the Secretariat of the Grievance Board that no proof could be provided to it by the SGB that "there was ever any consultation (Career Plan) with the member with him being transferred."

[30] It can also not be denied that in terms of the Interim Procedure Instruction: Identification of Defence Members For placement in Vacant Post paragraph [5] in strict terms provide that no placement or envisaged placement can take place, unless the member or incumbent is advised of the pending placement and "has been provided the necessary opportunity to react to the move." Paragraph 15k reads: "All members

must be allowed the opportunity to state their case in terms of the *audi alteram* principle in respect of any placement."

[31] On behalf of the Minister it was argued that the right to be heard is not an absolute right, neither is the right to be heard before the decision was taken an absolute right. The circumstances of the transfer necessitate a departure from the normal principle. These circumstances are that vacant posts are identified, suitably qualified members who meet the requirement for the posts are identified. The Staffing Board will then discuss the information and inform the individuals that they are being transferred. After the transfer a career interview is conducted with the member when the member will be informed of the reasons of the transfer and then be afforded an opportunity to make representations. Upon considering a representation the decision is confirmed or reversed.

[32] None of these factors set out can constitute reasons for a departure from the Minister's own instruction as to consultation. There was no consultation, before or after, the transfer, despite the Minister being alive to the grievance procedure that was instituted pertaining to the transfer.

[33] The case law relied on by the Minister that under the circumstances there can be *ex post facto* consultation is not at all on par with the facts of the matter before me. The matter of *Masetlha*³ was not a review in terms of PAJA, but the President's power to appoint in terms of the Constitution. The Court found to dismiss under those circumstances does not require procedural fairness, a far cry from the matter before me where PAJA requires procedural fairness.

[34] Reliance on *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) for the Minister is also completely misplaced. Just as in this matter, the Court found that there was no circumstances, for example expedition, to make the decision or some other feasible reason why consultation prior to the decision could not be made. I reject the notion that due to mass transfers the sacrosanct principle of *audi alteram partem* could be negated, especially so where there was a grievance lodged

³ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC)

against the transfer. This is not a rare occasion where the countervailing interest is so compelling that negating the *audi alteram partem* rule is sensible.⁴

[35] The matter relied on of *Patel v Chief Immigration Officer, OR Tambo International Airport* [2009] 4 All SA 278 (GNP) is patently distinguishable from the matter at hand and it is frowned upon that counsel relies hereon to support the Minister's deviation of the *audi alteram partem* rule. Comparing the duties of an immigration officer to refuse entry prescribed in section 8 of the relevant Act with a transfer is non-sensical.

[36] What is worrisome is that the Secretariat found that the decision to transfer Lt. Col. Sibiya was unlawful and invalid. The Grievance Board approved this recommendation, yet the decision was without any explanation amended diametrically to a finding of one of being valid and lawful. The argument that the Board agreed with the recommendations of the secretariat, but did not agree that the transfer be declared procedurally flawed and unlawful, is simply not borne out by the record.⁵

Ultra vires

[37] Not complying with its own prescripts and the *audi alteram* principle renders the transfer flawed.

[38] The Minister relies on the Personnel Management Code (PMC) that Lt. Col. Sibiya may be transferred at the discretion of the Chief of the SANDF. The Chief of the Legal Services must exercise its discretion in doing so by ensuring that a transfer is "in the interest of the organisational effectiveness and member development."

[39] On behalf of the Minister it was submitted that although there was no consultation on member development there is no specific rule as to when such consultation must take place. The transfer was to a division where Lt. Col. Sibiya was previously in that post and suited him.

[40] The post was not a critical post and the Minister did not in the papers rely on organisational effectiveness. As for consultation on member development none took

⁴ *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) par [22]

⁵ 25c and 27c

place and what I found on the *audi alteram partem* rule is also applicable here. The Minister did not consult and thus did not comply with the policy they relied on.

Section 3(2)(b) of PAJA

[41] The argument that after the transfer has taken place the *audi alteram partem* principle kicks in is not procedurally fair. But, also is wrong on the Minister's own argument before me. If there has to be joinder of the new incumbent of Lt. Col. Sibiya's post, as argued, because his right will be affected, it will result therein that the *audi* will have no effect because another person has already been appointed or transferred and any consultation will bear no fruit. This is fortified by the decision of the Grievance Board that the grievance could not be adhered to as "a new member had been appointed in that post." *Ex post facto* consultation will have no purpose and defeats the entrenched principle of being heard as part of procedural fairness. Lt. Col. Sibiya in any event denied that any career management meeting was held; they just conveyed a message.

[42] The *audi alteram partem* principle is the cornerstone of procedural fairness.⁶ Section 3(2)(b) of PAJA requires from an administrator to give effect to procedurally fair administrative actions by giving adequate notice of the nature and purpose of the administrative action, and a reasonable opportunity to make representations. This is the embodiment of the *audi alteram* principle. The administrative action herein did not comply and was not procedurally fair.

[43] The outcome of the Grievance Board *inter alia* set out:

"The SGB is of the opinion that the DLSD needs to engage the member in order to discuss the member's career path in the SANDF.

The SGB also consulted with DLSD on 10 July 2023 and could not be provided with any proof that there was every any consultation (Career Plan) with the member wrt him being transferred." (sic)

[44] The decision to transfer was administrative action and can be reviewed in terms of PAJA. The decision was irrational in that the post requirement of Lt. Col. Sibiya

⁶ *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC) par 42

was not a LLM degree. This was accordingly an irrelevant consideration taken into account and is also irrational in that it took its decision based on such requirement. The decision offended subsection 6(2)(c) of PAJA since no participation procedure was followed. The decision is made without adherence to the one leg of the PMC and the decision is thus also arbitrary.

Remedy

[45] I find it unnecessary to address the Minister's argument on section 172(1)(b) as the remedy lies in PAJA itself. I cannot rely on section 172(1)(b) when PAJA prescribes the remedy in terms of the principle of subsidiarity.

[46] I find a just and equitable order to be to review and set aside the transfer of Lt. Col. Sibiya from Saldanha to Legatso Cape Town. The effect of this order is that he must return to Saldanha.

[47] The objections that there is no post for Lt. Col. Sibiya at Saldanha is strange in that Col. Morake reported at the Military Academy in May 2023 and Lt. Col. Sibiya stayed on at Saldanha for the remainder of 2023, both were present.

[48] I am not usurping the power of the Minister, I am reviewing and setting aside the transfer.

Costs

[49] I find no reason to not follow the trite rule that costs must follow the successful party.

[50] I make the following order:

The transfer of Lt. Col. Sibiya from Saldanha to Legatso Cape Town is reviewed and set aside.

The first to seventh respondents are to carry the costs, jointly and severally.


S. POTTERILL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-014981

HEARD ON: 12 August 2025

FOR THE APPLICANT: ADV. J.D. MATTHEE

INSTRUCTED BY: Griesel van Zanten Inc.

FOR THE RESPONDENTS: ADV. D. MTSWENI

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 22 August 2025