

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-052069

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:
DATE	SIGNATURE

[Handwritten signature] 14/01/2026.

In the matter between:

MAHLATSE ERNEST MODULA

Applicant

and

MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

SECRETARY FOR DEFENCE

Second Respondent

CHIEF OF THE SOUTH AFRICAN

NATIONAL DEFENCE FORCE

Third Respondent

ADJUTANT GENERAL MAJOR GENERAL, E MNISI

Fourth Respondent

JUDGMENT

**THIS JUDGMENT IS HANDED DOWN REMOTELY AND WILL BE
CIRCULATED TO THE PARTIES ELECTRONICALLY.**

WELGEMOED, AJ

[1] This is an opposed application that was set down for hearing on the opposed motion roll for 24 November 2025 and heard on 26 November 2025, wherein I reserved judgment. The applicant sought the following relief:

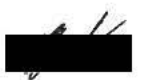
- "1. That the decision by the Fifth Respondent of 31 January 2024 declining to consider the Applicant's complaints, be reviewed and set aside;*
- 2. Directing the Third and Fourth Respondents to reinstate the Applicant to his employment in the South African National Defence Force in the same rank and applicable benefits with effect from the 13th December 2017;*
- 3. Directing the Fifth Respondent make a recommendation that the First Respondent reinstate the Applicant to his employment in the South*

African National Defence Force in the same rank and applicable benefits with effect from the 13th December 2017;

3. *Directing the First, Third and Fourth Respondents to pay Applicant his salaries and benefits from the 13th December 2017 to date of his reinstatement in the South African National Defence Force;*
4. *Costs of the application on Attorney and Own-client scale against the First, Third and, Fourth Respondents."*

BACKGROUND:

- [2] The facts of the application are largely common cause between the parties and are set out hereunder.
- [3] On 29 April 2002, an offer was made to the applicant to be appointed in the Medium-Term Service System of the SANDF as Prosecutor in the Legsafo Bloemfontein Sub-Office Kimberley in the South African Air Force with effect from the date of acceptance of the offer. The applicant accepted the offer on 6 May 2002 and he commenced his service on 1 June 2002.
- [4] On 5 September 2006, the applicant was given notice that his contract with the SANDF would terminate on 31 May 2007. The applicant was offered a contract of employment in the core service system of the SANDF for a



period of 10 years commencing on 1 June 2007 and ending on 31 May 2017.

[5] In terms of the service contract signed by the applicant, his service could be terminated under the following circumstances:

- Firstly, at the lapsing of the service contract as contemplated by the Defence Act, Act 42 of 2002 and Chapters III and IV of the General Regulations promulgated in terms of the Defence Act ("the Regulations");
- Secondly, termination by the SANDF at any time on the grounds stipulated in the Defence Act and Chapters III and IV of the Regulations;
- Thirdly, by the applicant's voluntary resignation on a 90-day notice period.

[6] In 2014, the applicant was assigned to assist in a trial of accused soldiers of the SANDF held at the SA Army Gymnasium in Heidelberg. The trial was collectively referred to as Operation Flicker. Attending these trials required that the applicant travel from Legal Satellite Office (Legsato) Polokwane to Military Base Heidelberg (SA Army Gymnasium) and to remain in Heidelberg for periods of time whilst the trials were ongoing. For this purpose, the applicant was permitted to draw subsistence and travel



allowance advances to cover his accommodation and other expenses in Heidelberg.

- [7] Upon his return to Polokwane from Heidelberg the applicant would then submit counter claims to reconcile the advances with his expenses. The applicant also used detailed trip sheets to claim compensation for the use of his private vehicle for official trips whilst attending these trials. The trials would occasionally be postponed from time to time during which time the applicant was required to return to Polokwane until the trial resumes.
- [8] During 2017, the applicant was charged with various charges relating to his subsistence claims and his failure to return to Polokwane whilst the trials, were postponed. The applicant was charged with 9 charges. Charges 1 to 6 and their alternative charges related to fraud, contravention of section 30 Military Disciplinary Code ("MDC") - false statements made in official documents. Charges 7 to 9 related to contravention of section 14(a) of the MDC, being absent without official leave. The Court of the Senior Military Judge ("CSMJ") heard the matter on 13 December 2017 whereby the applicant was found guilty of the alternative charges to charges 1 to 5, acquitted on charge 6 and found guilty on charges 7 to 9. The sentence imposed was dismissal from the SANDF.
- [9] As provided for in section 34(2) of the Military Discipline Supplementary Measures Act, 16 of 1999 ("MDSMA"), the findings of the CSMJ were

reviewed by the Court of Military Appeals ("CMA") on 04 July 2018, and 25 July 2018, when the CMA was addressed by counsel for the accused. The chairperson of the CMA was the Honourable Bam J and the two presiding members were Colonel Venter and Colonel Barnard appointed in accordance with section 7(1)(b) of the MDSMA.

- [10] At the conclusion of the review, conflicting judgments were handed down by the chairperson and the two members. On 26 September 2018, the chairperson amended the findings of the CSMJ and substituted the sentence of termination of service with a fine of R2000.00 ("the dissenting/minority judgment"), which was not permitted under the relevant legislation. The two members, on the other hand, did not agree with the judgment of the chairperson. Also, on 26 September 2018 the members upheld the findings and sentence of the CSMJ of dismissal from the SANDF. The CMA further confirmed and upheld the trial *a quo* court orders in terms of section 128(1)(a) and 129(1) of the MDC. The applicant forfeited full pay for periods absent without leave (26 days) and applicant placed under deduction of pay in the amount of loss of state property or fruitless expenditure, namely R 35 470.06, ("the majority judgment").
- [11] The chairperson thereafter delivered an addendum to his dissenting judgment on 28 September 2018 wherein he expressed the view, though incorrect in law, that his judgment is the prevailing and final judgment. The first to fourth respondents do not agree with the view of the chairperson.



The reason being that in terms of the MDSMA the CMA is comprised of three members. It would be contrary to the intention of the legislator and non-sensical if the judgment of one of these members (a minority judgment) is enforced despite the existence of a majority judgment by two of the members. This would make the requirement that there must be three appeal members redundant. Section 89 of the MDC confirms this.

- [12] It is of importance to point out that while the military judicial proceedings against the applicant were pending, his contract expired and he resigned. The applicant failed to place these facts before court. At a meeting held by the Defence Legal Services' Contract Review Board on 28 February 2018, it was resolved that the applicant's contract would not be renewed but that the SANDF had to await the outcome of the CMA to ascertain whether the reason for termination of the applicant's service would be captured as a dismissal by court order of the CMA/CSMJ or the non-renewal of his contract. On 31 July 2018, the applicant tendered his resignation with effect from 1 October 2018 with his last working day being 30 September 2018.

- [13] Section 59(1)(a) of the Defence Act states that the service of a member of the Regular Force is terminated upon the expiration of three months after the date on which the member lodged his or her resignation or upon the expiration of any shorter period approved by the Chief of the Defence Force. Furthermore, section 59(1)(b) of the Defence Act states that the service of a member of the Regular Force is terminated on the termination of any fixed

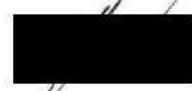


term contract concluded between the member and the Department of Defence or on the expiration of any extended period of such contract.

[14] The applicant's resignation was not accepted. In terms of section 59(5)(b) of the Defence Act, a member who is entitled to be discharged due to resignation from the force may not, without the prior consent of the Chief of the Defence Force, be permitted to obtain his or her discharge while disciplinary proceedings are still pending against him or her. In August 2018 the SANDF informed the applicant that his contract was extended until 31 September 2018 only for purposes of awaiting the outcome of the review by the CMA. It was important to await the outcome of the review to ascertain whether the termination of the applicant's service must be recorded as dismissal, the expiry of the contract or resignation.

[15] On 28 September 2018, two days after receipt of the judgments of the CMA, the SANDF in a memorandum by Brigadier General Myburgh (former Director Military Judicial Reviews) confirmed that the reason for termination of the applicant's service with the SANDF is dismissal, in line with the majority judgment of the CMA. In this letter it is recorded that the Adjutant General ("AG") confirmed that the majority judgment will stand. The majority judgment of the CMA was accordingly sent to the applicant's unit in Polokwane for promulgation and implementation.

- [16] On 29 January 2020, the applicant issued summons against the first respondent in the Pretoria High Court under case number 6611/2020 wherein he sought an order, *inter alia*, that the court confirms the judgment of Judge Bam to be the final and prevailing judgment with further relief that mirrors the essence of the current relief sought from this Court. The applicant applied for summary judgment in respect of the above action on 29 September 2020, which application was unsuccessful. On 30 September 2020, the applicant brought an urgent application in the Pretoria High Court under case number 50151/2020 against the first respondent wherein the applicant sought similar relief. The urgent application was opposed, and the action and urgent application was still pending in this Court when the Applicant filed a complaint with the fifth respondent on 5 July 2022.
- [17] In the complaint the Applicant sought that the minority judgment be implemented.
- [18] The fifth respondent provided the applicant and the SANDF with his preliminary report on 11 October 2023. Paragraphs 4.1.1, 6.1 and 6.2 of the Ombud's Preliminary Investigation Report, informed that in terms of section 7(1)(c), the Military Ombud is prohibited from investigating the matter on which a decision has been taken by a military or civilian court, as the SANDF correctly stated.



- [19] On 31 January 2024 the fifth respondent informed the parties that it does not have jurisdiction to investigate the complaint. It is this outcome of a lack of jurisdiction, that forms the subject of the review application before this Court.

RELIEF MOOT:

- [20] No matter the outcome of the CMA which forms the basis of the complaint to the fifth respondent, the service of the applicant with the SANDF was bound to terminate at the end of September 2018, not only due to the expiry of his contract but also due to his resignation. The majority outcome of the CMA merely confirmed the reason for termination to be dismissal as held by the CSMJ, which preceded the expiry of the contract and the applicant's resignation. In terms of section 116 of the MDC any finding, sentence or order of a CSMJ as upheld, substituted or varied by a review authority (in this instance the CMA) shall be deemed to be the finding of the CSMJ that made the finding and the date of the order deemed to be the date of the initial order.

- [21] There is therefore no basis for granting the relief sought by the applicant relating to his reinstatement and the payment of forfeited benefits, which complaint was lodged with the fifth respondent. The dismissal of the applicant by court order gave effect to the only valid judgment of the CMA

the judgment reflecting the majority vote of the members which judgment was correctly accepted by the SANDF as the prevailing judgment.

[22] The applicant has not brought a review application against the majority judgment or the decision of the SANDF to enforce the majority judgment and to dismiss the applicant. Accordingly the application is moot and the relief sought will not have any practical effect.

[23] The fifth respondent, even if it was found to have the requisite jurisdiction, to hear the complaint does not have the power to usurp a court order.

[24] In ***Mokheseng v Minister of Defence and Military Veterans and others*** [2022] JOL 57145 (GP) par 70 – 82 the court considered whether a member of the SANDF should be reinstated under circumstances where his service contract had lapsed due to the effluxion of time. The respondents, in addition to a point raised regarding an unreasonable delay in bringing the application, argued that the matter has in any event become moot. The court held the following:

“70. Such argument is premised upon the fact that the applicant's contract was for a period of 10 years commencing on 3 January 2011 to 31 December 2020.

11/11/2022

71. *Consequently, the entire period of the contract has been discharged by the effluxion of time and consequently, the rights and remedies of the applicant that he might have had, are no longer available because the contract has expired through the effluxion of time.*
72. *Consequently, there is no contract to which the applicant should be reinstated.*
73. *I was referred specifically to the matter of Notyawa v Makana Municipality and Others, where the court decided that the matter was moot because the employment contract, which was the subject of the litigation, would have come to an end very shortly by the time the application was heard.*
74. *The respondents further contend that where a contract is the subject of dispute has discharged by effluxion of time, the matter is moot, and the court does not have jurisdiction to entertain the matter, unless there were exceptional circumstances.*
75. *The applicant's contention is that given the fact that it is only the decision of the Ombud that is now being reviewed and considered that the court should restrict itself to whether the review of that decision has been brought in time and that there is no need to regard the entire delay period.*



76. *The Respondents in their heads of argument raise the argument that the matter has become moot.*

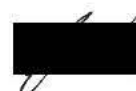
77. *On the question of mootness, the Act in terms of section 6(8) states as follows:*

"If the Ombud upholds the complaint, the Ombud must recommend the appropriate relief for the implementation to the Minister."

78. *Even if the court were to substitute its decision with that of the Ombud, the only competent relief is to uphold the complaint and to recommend reinstatement to the Minister of Defence.*

79. *The Minister of Defence then would be met with a situation where the contract period has run out through the effluxion of time and the underlying termination has not then been reviewed and set aside.*

80. *The applicant, as alluded to earlier, made the submission that any referral to the Minister would be a foregone conclusion, and that is why the applicant initially sought the court to order reinstatement: The applicant however did not persist with that relief.*

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81. *The underlying contract period has run out through the effluxion of time.*

82. *Consequently, I am of the view that the question of mootness raised by the respondents is applicable in the circumstances. This is so, regardless of whether the review is to operate in a process akin to an appeal, in terms of PAJA or in terms of a legality review.*

[25] I am in agreement with the above conclusion reached by the Court in the matter of Mokheseng. In this application the applicant's contract of employment has run out of due to the effluxion of time. The fifth respondent therefore cannot be ordered to make a recommendation for the applicant's reinstatement where the service contract no longer exists. The application is moot and serves no practical purpose and falls to be dismissed.

[26] I will however still hereunder address the merits of the application illustrating that the application is in any event without merit, even if I am wrong on the above finding.

MERITS OF APPLICATION:

[27] It is disputed by the Respondents that the decision of the fifth respondent is in fact a decision capable of being reviewed and further alternatively that there is any merits in the application. I do not intend to decide on what



precise grounds the applicant argues that the decision of the fifth respondent is reviewable, whether the application is in terms of PAJA or brought under the principle of legality.

- [28] The facts of the application illustrate beyond any doubt that the decision of the fifth respondent was in law and fact correct and therefore no application for review can be successful.
- [29] As for the information considered by the fifth respondent, it is clear that the fifth respondent considered all relevant information. The applicant was afforded an opportunity to make representations in respect of the preliminary report and to place all information before the fifth respondent for consideration.
- [30] It is not in dispute that as at 31 January 2024 (when the fifth respondent provided his outcome on jurisdiction) there were pending actions in the High Court wherein the applicant sought similar relief. These actions were only withdrawn on 6 March 2024. The fifth respondent committed no error of law. To the contrary, the fifth respondent acted in accordance with the MOA that limits its jurisdiction to investigate a complaint if it relates to a judgment of a Military Court or if there is pending litigation in a civilian court.
- [31] The applicant has failed to put forth valid grounds of review, whether in terms of PAJA or otherwise. It is clear that the fifth respondent followed the

correct procedure and considered what was before him in determining whether he has jurisdiction to investigate the applicant's complaint. The fifth respondent correctly concluded that he does not have jurisdiction to investigate the complaint.

ORDER:

[32] Consequently, I make the following order:

1. The application is dismissed with costs on Scale B



WELGEMOED CJ

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG

DIVISION, PRETORIA

Date of Hearing: 26.11.2025

Date of Judgment: 14.01.2026

Counsel for Applicant: KP Seabi

Counsel for Respondents: Adv F Storm