IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 95871/2016

[1] REPORTABLE: **YES**

[2] OF INTEREST TO OTHER JUDGES: **YES**

[3] REVISED. **YES**

29 October 2018

In the matter between:

BONGANI RICHARD MTOMBA	Applicant
and	
MINISTER OF DEFENCE	1st Respondent
THE SECRETARY FOR DEFENCE	2nd Respondent
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	3rd Respondent
THE CHIEF OF THE SOUTH AFRICAN ARMY	4th Respondent
CHIEF DIRECTOR ARMY HUMAN RESOURCES	5th Respondent
OFFICER COMMANDING 5TH SAI BATTALION	6th Respondent

JUDGMENT

WEINER J:

INTRODUCTION:

1. The applicant seeks an order declaring that the decision to terminate his service with the South African National Defence Force ("SANDF") is unlawful, unfair and invalid. He seeks to review and set aside the decision to terminate his service and that he be reinstated with full retrospective effect.

2. The issues in the matter are:

   2.1 Whether the decision to discharge (terminate applicant's service) is administrative action and whether the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") are applicable;

   2.2 Whether applicant was obliged to exhaust internal procedures, within the SANDF, before approaching the Court for the relief sought; and

   2.3 Whether the decision to terminate applicant's services is unlawful, invalid and unfair and ought to be reviewed and set aside.

THE LEGAL FRAMEWORK

3. Chapter 2 of the Bill of Rights in the Constitution of the Republic of South Africa[1] (the Constitution) provides:

    3.1 Everyone has inherent dignity and the right to have their dignity respected and protected;[2]

    3.2 Everyone has the right to fair labour practices;[3]

    3.3 Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.[4]

4. In terms of section 200(1) of the Constitution, the SANDF must be structured and managed as a disciplined military force.

5. In terms of the provisions of section 106 of the Defence Act[5] (the 2002 Defence Act), the whole of the previous Defence Act[6] (the 1957 Defence Act), save for sections 104, 105, 106, 108, 109, 111, 112 and the First Schedule, has been repealed.

    5.1 In terms of section 2(g) of the 2002 Defence Act the SANDF must respect the fundamental rights and dignity of its members and of all persons.

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[1] Act 8 of 1996

[2] Section 10 of the Constitution.

[3] Section 23(1) of the Constitution.

[4] Section 33(1) of the Constitution.

[5] Act 42 of 2002

[6] Act 44 of 1957

5.2 The 2002 Defence Act is applicable to all members of the SANDF and in the event of any inconsistency between the 2002 Defence Act and any other legislation, in force at the commencement of the 2002 Defence Act, then the Defence Act prevails.[7]

5.3 Section 59 of the 2002 Defence Act provides the underlying power for the termination of service of members of the SANDF. Section 59(2) of the 2002 Defence Act provides for circumstances under which the service of a member of the Regular Force may be terminated, provided that it must take place in accordance with the applicable regulations. It, *inter alia,* provides for termination of the service of such "a *member if his continued employment constitutes a security risk to the State or if the required security clearance for his or her appointment in a post is refused or withdrawn or if his continued employment constitutes a security risk to the State or if the required security clearance for his or her appointment in a post is refused or withdrawn for reasons that the member's continued service has become undesirable because of a single conviction and sentencing and/or the collective effect of a number of convictions and sentences"*.[8] [emphasis added]

6. Chapter IV of the General Regulations (the General Regulations) promulgated in terms of the 1957 Defence Act was not repealed. Regulation 21(1) thereof provides as follows:

> *"21. (1) Subject to the provisions of sections 12(1), 85 and 96 of the Act, the Minister may, under*

[7] Section 3(2).

[8] Section 59(2)(e).

section 12(1)(f) of the Act, discharge another rank of the permanent Force -

(a) on account of misconduct where -

(i) ….

(ii) he or she has, while serving, been convicted by a Military or Civil Court of an offence which in the light of its nature and gravity considered in conjunction with the nature of the sentence imposed, render his or her continued service in the Permanent Force undesirable;

(iii) before or since his or her appointment he or she has been convicted by a Civil or Military Court on more than one occasion of offences which, considered individually, would not justify or did not lead to his or her discharge on account of misconduct, but considered collectively, render his or her continued employment in the Permanent Force undesirable;

(iv) ……;

(b) …"

7. The applicant contends that Section 12(1)(f) of the 1957 Defence Act has been repealed. This provision, it is argued, provided the underlying required authority for a discharge in terms of Chapter IV of the General Regulations. Because of the repeal of section 12(1)(f) it is not possible, it is contended by applicant, to discharge a member of the SANDF in terms of

the General Regulations. In view of the decision to which I have come, it is not necessary to deal with this submission, which I believe is misconstrued.

THE APPLICABILITY OF PAJA:

8. PAJA is applicable if the respondents' decision to discharge applicant constitutes *"administrative action"* as defined in section 1 of PAJA.

9. Section 6 provides for the judicial review of administrative action. In terms of Section 6(2), the Court has the power to judicially review an administrative action, if:

9.1. the administrator who took the decision was not authorised to do so by the empowering provision;

9.2. the administrator was biased or reasonably suspected of being biased;

9.3. a mandatory or material procedure or conditions prescribed in an empowering provision was not complied with;

9.4. the action was procedurally unfair;

9.5. the action was taken for an ulterior purpose or motive;

9.6. the action was taken because the irrelevant considerations were taken into account or relevant considerations were not considered;

9.7. taken in bad faith; if the action was taken arbitrarily or capriciously;

9.8. the action itself is not rationally connected to the purpose for which it was taken, or

9.9. not rationally connected to the purpose of the empowering provision or to the information before the administrator or for reasons given for it by the administrator.[emphasis added; the underlined sections are relevant to the present case]

10. Although the applicant submits that the decision was taken for an ulterior purpose and/or that it was taken in bad faith, I do believe that he has set out the basis for this submission.

11. In determining whether action constitutes administrative action, Wallis JA in *Minister of Defence and others v Xulu*[9], stated :

> "*the Constitutional Court (CC)*[10]*, citing Grey's Marine Hout Bay (Pty) Ltd v. Minister of Public Works*[11] *with approval has broken the definition into seven components, namely that 'there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions"*[12].

12. The applicant claims that PAJA is applicable to the present proceedings despite it being held in *Gcaba v Minister for Safety and Security and Other*[13] that *"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA."*

13. Regular Force members of the SANDF do not have an ordinary employment relationship with the SANDF. Wallis JA in *Xulu* found that "[*T]hey are enrolled as such, 'enrol' being defined in s 1 of the Act as meaning 'to accept and record the attestation of any person as a member of the Regular Force'. This appears to be something different from concluding a contract of employment, …..*

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[9] [2018] ZASCA 65 (24 May 2018)

[10] *Minister of Defence and Military Veterans v Motau and ano* 2014 (5) SA 69 (CC) para 33

[11] 2005 (6) SA 313 (SCA) para 21

[12] para 34

[13] 2010 (1) SA 238 (CC) para 64

They are nonetheless workers and entitled to the constitutional protection that workers enjoy under s 23 of the Constitution[14].

14. In view of the fact that members of the Defence force are excluded from the operation of the Labour Relations Act[15], the question of PAJA being the applicable remedy, becomes pivotal.

15. Wallis JA in *Xulu*[16], distinguished *Gcaba* and *Chirwa*[17]. The CC in *Chirwa* found that although the impugned decision involved the exercise of public power it was not in terms of a statute, but involved the exercise of a contractual right, and therefore was not administrative action[18].

16. In regard to *Gcaba,* the Court found that his case involved a labour issue, with no consequences for other citizens. The respondents herein rely on *Chirwa* and *Gcaba* in submitting that the present case involves only a labour issue and is not administrative action. However, Wallis JA, in *Xulu* continued as follows (footnotes omitted):

> *[26] Referring in Chirwa to the pre-democracy cases of Zenzile and Sibiya, Skweyiya J pointed out that the rationale for those judgments, in which it was held that employment disputes in the public sector involved exercises of public power, could not be faulted at a time when public sector workers were not accorded rights under labour legislation.*
>
> *[27] For most employees in the public service this imperative fell away when the LRA was enacted bringing them under the umbrella of the same legislation as employees in the private sector. But the SANDF is excluded from the operation of the LRA and the remedies under the LRA are not available to its members. In the result, the reasons given in Gcaba and Chirwa for holding that*

[14] *Xulu* para [19]

[15] Sec 2(a)

[16] Paras 39-40, 42

[17] 2008 (4) SA 367 (CC)

[18] *Chirwa* para 142 and para 73.

Zenzile and Sibiya were no longer applicable in a dispensation where public and private sector employees enjoy the same labour rights, are inapplicable here and the judicial duty referred to by Skweyiya J remains clamant"

17. The source of the power to discharge the applicant is, from the views I have set out above, from an organ of State, exercising a public power or performing a public function, in terms of the empowering provisions of the Defence Act. In terms of both the Constitution and the Act, the SANDF must give effect to a member's constitutional and statutory right to fair labour practices. This amounts to administrative action.

18. In relation to the requirement that a decision must have direct, external legal effect, this involves determining how the applicant's rights were affected[19]. In Joseph and Others v City of Johannesburg and Others, the Constitutional Court[20] explained this concept as follows (footnotes omitted):

> "*…... I need do no more on the facts of this case than endorse the broad interpretation accorded to this phrase by the Supreme Court of Appeal in Grey's Marine where it stated that the phrase "serv[es] to emphasise that administrative action impacts directly and immediately on individuals." Indeed, a finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "direct, external legal effect" on the applicants. Conversely, a finding that the rights of the applicants were not materially and adversely affected would have the result that section 3 of PAJA would not apply ".*

19. The applicant had served in the SANDF for 25 years. The conclusion of the respondents rendered the applicant unemployed and he lost all the benefits to which he was entitled as a member. This requirement is satisfied as the decision 'materially and adversely' affected the applicant's rights.

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[19] *Xulu* para [45]

[20] 2010 (4) SA 55 (CC) para [26]

20. Based on the above analysis, the decision to administratively discharge the applicant was a decision of an administrative nature and PAJA is applicable. It is therefore not necessary to deal with the applicant's alternative reliance on legality.

BACKGROUND FACTS

21. The applicant, a uniformed member of the SANDF employed in the permanent Force commenced his services within the SANDF approximately 25 years ago.

22. On 16 March 2012, the applicant appeared before a Military Judge and was found guilty of theft of State property (80 litres of diesel), (the diesel theft) valued at R680.00. He was sentenced to a fine in the amount of R4 000.00, imprisonment of one year and discharged with ignominy from the SANDF. The entire period of imprisonment and discharge from the SANDF was suspended, for a period of three years, on condition that applicant was not convicted again of common law theft during the period of suspension (the sentence).

23. On 27 June 2013, the conviction and sentence were reviewed by a Military Appeal Court which found the proceedings and findings in accordance with real substantive justice and it upheld the findings and sentence.

24. On 11 October 2013, the fifth respondent recommended that the applicant be discharged administratively from the SANDF. This was approved by the Fourth Respondent on 28 October 2013. The recommendation was made in terms of Section 21(1)(a)(iii) of the General Regulations due to applicant being found guilty of the diesel theft.

25. As set out above, Section 21(1)(a)(iii) applies when a member has been convicted by a civil or military court*" on more than one occasion of offences which, considered individually would not justify or did not lead to his or her discharge on account of misconduct, but considered collectively, render his or her continued employment in the Permanent Force undesirable";*

26. It is apparent that the incorrect section of the regulations was relied upon by the respondents. The applicable section for the single offence would have been Section 12(1)(a)(ii), and not subsection (iii), as it related solely to the diesel theft. This recommendation appears, however, not to have been implemented and applicant remained in the service of the SANDF.

27. Respondents state that on 8 November 2013, a telefax was sent to Lt Col T P Gosani, presumably the head of applicant's unit. It required the applicant to give reasons why his services should not be terminated. This request was repeated on 17 January 2014, when applicant was required to respond by 20 January 2014.

28. Applicant's reasons were received on 31 January 2014. He set out details of his career in the SANDF and the fact that high ranking personnel would attest to his promotions, qualifications and performance. He further stated that "*I give 100% to my work and am available for any questions"*. Again, no further action was taken against the applicant and he remained a member of the SANDF.

29. On 3 November 2015, the fourth respondent gave notice of the intention to discharge applicant, relying upon the provisions of section 21(1)(a)(iii) of the General Regulations. He relied not only on the diesel theft, but also on the conviction of disobeying a lawful command and receiving a sentence of a fine of R200.00 during 2002 and an incident where applicant had paid R5 000,00 as an "acknowledgement of guilt" in relation to a civilian offence of fraud in 2004.

30. The respondents, thus, now sought to rely on subsection (iii) and no longer on subsection (ii) to justify that the continued employment of applicant in the Permanent Force was undesirable. He was informed that the 2012 conviction and sentence, taken together with the 2002 and 2004 charges, "*warrants you unfit to render your responsibilities as a uniformed member of the SANDF. You are also a security risk to the SANDF".* He was further informed that as a result of his misconduct, *"you broke the element of Trust"* and "*your services must be terminated on account of your unfitness for your duties or inability to carry them out efficiently".* He was given until

20 November 2015 to furnish written reasons why the Minister should not discharge him in terms of Section 21(1)(a)(iii) of the General Regulations.

31. On 13 November 2015, the applicant responded. He again set out details of his career in the SANDF and stated that he was not ill-disciplined. He referred to the incident in 2002 as a misunderstanding, rather than disobedience. He also referred to the fact that he had already served the sentence for the diesel theft.

32. The suspended sentence had run its course and he had not been convicted of any offence during the period of suspension or since. Once again, no further action was taken and the applicant remained employed by the SANDF.

33. On 25 April 2016, a submission was made by the fifth respondent to the third respondent, who approved applicant's discharge from the SANDF, now reverting to reliance on section 12(1)(a)(ii) with reference only to applicant's conviction and sentence pertaining to the diesel theft. It was stated that the applicant's representations were not considered valid for the SANDF not to proceed with his discharge.

34. The applicant was accordingly dismissed by the third respondent on 11 May 2016 based on regulation 21(1)(a)(ii) of the Regulations.

35. Applicant's service within the SANDF was subsequently terminated with effect from 30 June 2016.

36. The third respondent in the answering affidavit, alleged that the applicant's previous record of convictions combined, rendered the applicant's enrolment as a member of the permanent force of the SANDF undesirable. This, however, was not the basis upon which the recommendation was made and/or approved.

PROCEDURAL UNFAIRNESS

37. Initially applicant contended that he had not been afforded an opportunity to respond to the respondents' letters. In his replying affidavit, he conceded that he had responded. Respondents thus contend that the procedural

unfairness of the decision to administratively discharge or to dismiss the applicant must fall away. However, the issue of procedural unfairness is wider than that. As stated earlier, the respondents, in the third respondent's answering affidavit, now rely upon the combined effect of the diesel theft and the two prior offences as justification for the applicant's discharge, which is provided for in Regulation 21(1)(a)(iii). This is impermissible. Thus, in dismissing the applicant, under regulation 21(1)(a)(ii), and relying upon the previous offences as well, the respondents took into account irrelevant considerations.

38. The respondents did not apply their minds to the facts which were presented to them. They relied upon facts which should not have been relied upon when the recommendation was made and approved by the third respondent, as they did not relate to regulation 12(1)(a)(ii). The two previous offences cannot now be relied upon by the third respondent as justification for concluding that the discharge was procedurally valid.

39. Even as late as December 2016, the respondents in their letter addressed to the applicant's attorney, specified that the discharge was authorised in terms of Section 21(1)(a)(ii). It was stated that "*the gravity of the [diesel theft] offence, in conjunction with the nature of the sentence imposed, rendered the continued service of your client in the SANDF undesirable."*

40. The two prior offences, which the third respondent seeks to rely upon for the decision, occurred in 2002 and 2004. This is not a reasonable decision to have taken. No investigation was conducted into the circumstances surrounding the two previous offences, or whether they were of consequence at the time the decision was made. Clearly, they were not regarded as sufficiently persuasive to carry out the discharge on three separate previous occasions, in October 2013, January 2014 and November 2015.

41. The applicant submits that, even if the first and third respondents relied only upon the diesel theft (which it appears they did not) the decision is not justified. The applicant received a suspended sentence, which had expired by the time his discharge was recommended. The Military Appeal Court's

decision was that he should not be discharged at that time. No further offence or incidents occurred during the period of the suspension. The gravity of the offence and the sentence imposed were insufficient, in the circumstances, to render the applicant's continued service, undesirable.

42. The applicant accordingly contends that the decision to discharge him for any or all of these reasons is therefore irrational and not logically and rationally connected to the facts which served before the respondents when they considered the applicant's discharge. This is, in my view a valid submission. To quote Wallis JA[21] "*This was a classic case of irrelevant, or only marginally relevant, considerations being taken into account and all the relevant considerations being discounted or ignored …*".

43. The applicant submits that Section 59 of the 2002 Defence Act provides that a discharge may take place on certain grounds and only as provided for in the regulations. In this regard, applicant contends the decision does not comply with the provisions of Section 59. In regard to the diesel theft, the applicant served his sentence and the suspended portion has expired. During that time, he did not commit any offence. His record of promotions and leadership demonstrate that the grounds set out in Section 59 are not applicable, in the present circumstances. The diesel theft and sentence do not, in the face of these other factors, render him undesirable and a security risk. The other offences are more than 14 years old and should not have been taken into account. I therefore conclude that the first respondent, through the third respondent, acted irrationally and his Decision falls to be set aside. [emphasis added]

POLICY DOCUMENT

44. I am of the view, in addition, that this Court can take Judicial notice of a document referred to by Wallis JA in *Xulu*[22], *supra*, even though no

[21] *supra* @ [51]

[22] at [22]

reference was made thereto in the present application. Wallis JA referred to it as follows:

> *"The document is a publication by the Human Resources Division of the Department of Defence ('the Policy') entitled "'Process and Procedures for the Management of the Separation of Officials from the Department of Defence (DOD)". It was issued on 27 January 2010 under the joint names of the Acting Secretary of Defence and General Ngwenya, the Chief of the SANDF, having been approved by the Defence Policy Board. The foreword records that it was published under the authority of an earlier Department of Defence Instruction and goes on to say that it:*
>
> > *'… must be implemented in conjunction with instructions prescribed therein,*
> >
> > *This publication describes the process and procedures to be followed when officials of the Department of Defence (DOD) separate (terminate service) from the Department of Defence.*
> >
> > *This publication must be implemented by the Chiefs of the Services and Divisions down to the applicable levels of command and management.'*
>
> *The Policy dealt comprehensively with the various circumstances in which a member of the SANDF might cease to be such. Thus it covered…..various situations in which a member could be discharged, such as medical reasons, administrative discharge, discharge by virtue of being sentenced to imprisonment or* the sentence confirmed by a court of military appeals, *cancellation of the commission of an officer and absence without permission"* .

45. Wallis JA referred to the definition section in the Policy document, which he stated made it clear that "*officials"* included members employed in terms of the Defence Act. The word *"member"* means any officer and any other rank. The respondents are clearly aware of such document. It appears that

such document deals in detail with the administrative procedures applicable to the discharge of members from the SANDF.

46. It was remiss of the respondents not to place such document before this Court, to enable me to ascertain whether such procedures were followed. It seems clear from the correspondence that the applicant offered to answer any further questions and was never called upon to appear before the officials charged with his dismissal. No other persons were requested to provide information on his performance in the SANDF, although he stated that there were many "*high ranking personnel*" that would confirm his performance and leadership in the SANDF. Presumably, the applicant was not aware that he was required to include details of his personal circumstances, which now appear in his affidavits. However, this Court believes that some of the consequences of the discharge are obvious. They have been referred to above and include, the loss of his salary and the benefits attached to his employment. These are relevant considerations which the respondents were obliged to take into account, and which they did not.

47. It also seems that the respondents did not make available the full record relating to the decision, as required in terms of Rule 53. This is evident from the fact that other relevant documents are mentioned in the correspondence but are not made available to the applicant or the court.

CONCLUSION:

48. I am accordingly of the view that the First respondent's decision to terminate the applicants service falls to be set aside for the following reasons (dealt with in detail above):

    48.1 the decision was procedurally unfair;

    48.2 the decision was taken because irrelevant considerations were taken into account and relevant considerations were not considered;

48.3 the decision is not rationally connected to the purpose for which it was taken, or

48.4 not rationally connected to the purpose of the empowering provision or

48.5 not rationally connected to the information before the first and third respondents or to the reasons given for it by them.

49. Accordingly, the following order is granted:

1. The decision of the First respondent to terminate the applicant's service with the SANDF is reviewed and set aside;

2. The applicant is reinstated in the service of the SANDF with full retrospective effect, including payment of his salary and all conditions and benefits of his employment which he enjoyed prior to his discharge.

3. The respondents are to pay the costs of the application, jointly and severally, the one paying, the other to be absolved.

S E WEINER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Attorney for the Plaintiff:	**Griesel & Breytenbach**
Counsel for the Plaintiff:	**ADV G L VAN DER WESTHUIZEN**
Attorney for Defendant:	**State Attorney**
Counsel for the Defendant:	**ADV E MOKUTU**
Date of hearing:	**7 August 2018**
Date of judgment:	**29 October 2018 :**