REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: 24/11/2023

24/11/2023 _____
DATE SIGNATURE

CASE NO: 63900/2019

In the matter between:

BENITA NOLA GALLANT	**Applicant**
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	**1st Respondent**
SECRETARY FOR DEFENCE	**2nd Respondent**
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**3rd Respondent**
CHIEF FOR SOUTH AFRICAN NAVY	**4th Respondent**
CHIEF HUMAN RESOURCES	**5th Respondent**
ADJUDANT GENERAL: DEFENCE LEGAL SERVICE DIVISION	**6th Respondent**

JUDGMENT

(The matter was heard in open court but judgment was handed down electro-nically by uploading it onto CaseLines and forwarding it to their presenta-tives of the parties via Email. The date of the judgment is deemed to be the date of uploading onto CaseLines)

BEFORE: **HOLLAND-MUTER J:**

[1] The applicant, a former employee of the Department of Defence, seeks an order finding that her 10 (ten) year Core Service System (CCS) contract offered to her and accepted by her on 29 November 2017, be implemented and captured onto the system with effective date as from 1 July 2018. She also requested the following relief flowing from the above in that the respondents pay her all allowances and benefits associated with the position she became entitled to in terms of the 10 (ten) year CCS contract with effect from 1 July 2018 and lastly a declaratory order that the defendants (in particular the 5th respondent) acted unlawfully not to renew her employment contract with the defence force's Core Service System.

[2] The respondents alleged that the 10 (ten) year CCS contract drafted by Warrant Officer Mdlalose ("Mdlalose") and "approved" by Warrant Officer Engelbrecht ("Engelbrecht") is invalid because Mdlalose and Engelbrecht did not have the necessary authority to perform such duties.

FACTUAL BACKGROUND:

[3]The applicant joined the Army Reserve Force during 2008 and attended a Basic Army Orientation Course during February 2008 and an Advanced Military Law Course during June 2009.

[4] The applicant applied for an appointment in the regular force during 2012 as a result of an advertisement for such post. After she was accepted she signed a contract of employment with the Department of Defence on 18 June 2013 in terms of section 52(1) of the Defence Act, 42 of 2003 ("DA act"). She was assigned as a Defence Counsel or Military Law Practitioner and assigned to the South African Navy ("Navy").

[5] Her appointment was for a fixed period of five (5) years subject to the following suspensive conditions:

5.1 That she is declared medically fit for her post and utilization; and

5.2 That she successfully completes a basic military course and/or formative officer's course.

[6] She was assigned to the Navy and therefore she had to attend a basic military course and the formative officer's course, both courses in the naval core. The applicant denies that the courses referred to in her letter of appointment are naval courses. The appointment letter does not indicate that she must complete the naval courses but logic determines that she should complete the courses in her Core (Navy). It must be noted that the SA National Defence Force comprises of the Army, Air Force, Navy and Medical forces and I will use the term "Core" referring to such. It was contended on behalf of the respondent that once a person is appointed to a specific Core (in her case to the Navy), the person ought to complete the core's courses (in her instance she should complete Naval courses).

[7] After she was refused to attend the required naval courses due to her medical situation, she applied for an inter-arms transfer to the SA-Army during 2013. She indicated in her request that she does not meet the physical medical classification of G1K1 as required for officer training in the SA Navy. She was classified as G2K1 and it would hamper her ability to cope with physical training associated with necessary naval officer training. See annexure BNG-4.

[8] The applicant also requested that the basic army courses she completed earlier during 2008 and 2009, be accredit as a naval courses but this request was declined. These courses were attended to during 2008 and 2009 when she joined the Reserve Force and were in the Army Core and no proof is annexed that these courses were applicable to her new permanent appointment during 2013.

[9] The applicant was nominated and accepted to attend a Selection Board for the purposes of determining whether she qualifies to be enrolled at the naval college for formative officer's training. This was within a year after her five (5) year appointment. She attended such Board but was not recommended to attend the officer's training due to the fact that she was found medically unfit to attend the course. It is also accepted that the Navy Formative Officers' Course is more stringent than similar coursed in the other services or Cores of the Defence Force.

[10] The applicant's request for an inter arms (Core) transfer was turned down in January 2014 and the Personnel Utilisation Committee decided that she had to remain in the navy and must comply with the appointment conditions supra. The defendant further avers that the other services (Cores) refused to accept her request for a transfer.

[11] The main reason for the Army Core to refuse her transfer was that military law officers in the Army were over supplied whilst a need existed for Naval

military officers due to operation requirements. The respondent supplied the necessary statistics of the over population of military officers in the Army and the under population in the Navy. This was not denied by the applicant.

[12] On 21 November 2017 the Director: Legal Services Support, addressed a letter to the applicant via her office and informed her that her contract would expire on 30 June 2018. She was advised to apply for a renewal or termination thereof. She was advised that her application for renewal will be presented to the Personnel Utilization Committee for consideration and to advise the Chief of the Navy.

[13] Although she was nominated on 14 December 2016 to attend a naval formative course, she was not accepted on the course (due to her medical condition). She however attended an Army formation training course from 15 January 2017 to 15 June 2017. She successfully completed the course but she attended this course without the approval of her Core, the Navy.

[14] The Navy declined to approve the applicant's request that this army course be accredited. She was informed of the Navy's decline to accredit the course on 18 July 2018 by the sixth respondent. She remained non-compliant with the conditions of her employment as a naval officer.

[15] On 10 September 2018 the sixth respondent addressed a letter to the applicant informing her that her employment contract with the Defence Legal Service Division is expiring on 30 September 2018. She was further informed that the contract renewal board granted her an extension of her CCS contract for a year to end on 31 December 2019. The extension was subject to her being declared medically fit for her mastering/utilization and successful completion of the required navy courses as stipulated in her initial contract.

[16] The applicant then informed the sixth respondent that she does not accept the extension of her existing contract because she already accepted a ten (10) year CCS contract offered to her. This was the first time that her career manager (the sixth respondent) became aware of the existence of the alleged ten (10) year CCS contract.

[17] It became known that the applicant was offered a ten (10) year CCS contract after completing the Army Officers' Formative Course on 27 November 2017. It has to be mentioned that she attended to the Army Formative Course and that the ten year CCS contract offer was done without the knowledge of Navy Headquarters by Warrant Officers Mdalose and Engelbrecht, both without the necessary authority do make any offer. This was later confirmed by them during a board of enquiry investigating the procedure followed by the two warrant officers. It was also done without involving the applicant's headquarters at Legsato in Cape Town.

[18] The letter forwarded to the applicant by Engelbrecht offering the ten (10) year CCS contract contained the suspensive conditions that the applicant be medically fit for mastering/utilization requirements for the post; that she successfully complete all prescribed military and functional courses in accordance within the contract and remain medically fit for service for the specific mastering/post for the duration of the contract period. These are similar conditions as earlier in the five (5) year CCS contract, conditions never met by the applicant.

[19] It is clear that the contract offered was invalid as it was not authorised. Engelbrecht conceded he did not have any authority to sign on behalf of a Captain (SAN) Mboyise and he confirmed that he only signed a covering letter and not the contract. There is no signature by any person on behalf of the Navy on the contract but only two signatures as witnesses appear on the contract. It can be accepted that although it may appear that the naval Contract Renewal

Board recommended the extension of the applicant's contract for ten years, it was never approved by the sixth respondent or the Chief of the SA Navy.

[20] Although section 23 of the Constitution of the Republic of South Africa, 108 of 1996 guarantees everyone the right to fail labour practices, members of the Defence Force are excluded from the provisions of the Labour Relations Act 66 of 1995 (LRA). See section 2 of the LRA.

[21] In **Xulu v Minister of Defence (A46/2015) [2017] ZAGPPHC 310 (1 March 2017) at par [33]** it was held that where a fixed term contract expired and the provisions of the policy is not followed to exit the SANDF, the appropriate relief would be for a further extended period. This can be distinguished from the present matter as all policy provisions were followed in the present matter. The applicant is not free of any blame as she knew she was nominated for a naval course but opted to attend an army course, with the knowledge that she was in the naval core and that naval courses were more stringent when compared with army courses. She was fully aware of the conditions she never complied with. It was her choice to join the naval core and that her requests for inter-core transfers were refused. She was given the option to apply for extension but, but being provided with the belated 10 year CCS contract under those circumstances, she did not apply for any extension of her initial contract. She cannot bemoan her fate because she knew all along of the suspensive conditions which she never met.

[22] It was argued on behalf of the applicant, with reference to **Minister van Kultuur en Onderwys v Louw 1995(4) SA 383 (A)** that is can generally be accepted that certain events take place by operation of law not entailing a decision. It was held that an employee was "deemed to be discharged" if absent for a period, and that a dismissal followed automatically by operation of law. It was further argued that the same would apply and, depending on the circumstances, if certain jurisdictional facts are not present leading to automatic dismissal, the contract will automatic continue. I fail to see the

relevance to the issue before court. The applicant was informed that her contract was to expire and she was given the choice to apply for an extension which she declined. This can also not be any authority for the invalid contract to be validated.

[23] The next argument on behalf of the applicant is that only a court may invalidate such contract. Reliance was placed on **Department of Transport v Tasima (Pty) Ltd 2017(2) SA 622 cc at par [147]:** *"Our Constitution confers on Courts the role of the arbiter of legality. Therefore, until a Court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, if has binding effect merely because of its factual existence".*

[24] The applicant conceded at the Board of Enquiry that Mdlalose and Engelbrecht did not have any authority to act on behalf of the respondents. Both warrant officers conferred this at the enquiry. Engelbrecht clearly stated that he only signed the covering letter addressed to the applicant and Mdlalose signed as witness. Nobody signed on behalf of the respondents. For the applicant now to argue and rely on an unsigned contract fails to convince.

[25] Under the circumstances the relief sought by the applicant in the first and second prayers in the Notice of Motion cannot succeed.

[26] The declaratory order requested in the third prayer falls within the ambit of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). There are two types of declaratory orders to be sought form court; (1) to declare a person's rights and (2) to test the validity of administrative action. See **De Ville, Judicial Review of Administratve Action in South Africa, Butterworths 2nd ed p 338.**

[27] The applicant ought to have instituted review proceedings to set aside an administrative action. It is clear that the decision taken on 30 May 2018 by the

Defence Legal Services Division to implement the decision taken by the Defence Legal Services Division Contract Renewal Board on 28 February 2018 not to renew her existing contract constitutes administrative action. To have this decision set aside, the applicant ought to rely on PAJA to review such action. She failed to do so. In **Bato Star Fishing (Pty) Ltd v Minister of Enviromental Affiars and Others 2004 (4) SA 490 CC, Merafong Municipality v Anglo Gold Ashanti 2016 (2) SA 177 CC** and **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (3) All SA 1 (SCA)** the similar as to here challenge the administrative act in review proceedings in review proceedings.

[28] The applicant failed to raise such challenge. The applicant cannot ignore the decision taken not to review her existing contract and try to rely on an unsigned contract. She was aware that she did not meet the existing suspensive conditions and that her requests for a core transfer was refused more than once. To be 'offered' a new contract under these circumstances raised suspicion and is no sanction for her to accept it without enquiring why it was not signed by a representative of the respondents. The onus is on the applicant to prove

[29] No reliance can be placed on the alleged ten (10) year SSC Contract in view of the applicant's own version that Engelbrecht did not sign the contract but merely made her aware thereof and that Mdlalose had no authority to act on behalf of the respondents. Mdlalose only signed as witness thereto. There can be no doubt that the contract was invalid from the beginning. The failure to challenge the decision by the respondents not to extend her existing agreement and only extending it for a year with the request to accept or reject the proposed extension reasonably should have alerted the applicant that the newly offered CCS contract could not be correct.

[30] In the alternative should it be held that the applicant's application is indeed a review application with regard to the relief sought, the evidence is clear that the decision taken by the Renewal Board was valid and that the CCS

contract "offered' by Engelbrecht and Mdlalose was invalid for lack of authority. This was clearly established at the Board of Enquiry conducted by the respondents.

[31] On the applicant's own version there should have been doubt as to the validity thereof in view that it was not signed and contrary the current process between her and the respondents. She is no novice in law and ought to have known better. Her request for a declaratory order cannot find favour.

ORDER:

The application is dismissed with costs on a party and party scale.

HOLLAND-MUTER J

Judge of the Pretoria High Court

Heard on 2 August 2023

Judgment on 24 November 2023

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