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: YES/NO

DATE SIGNATURE

Case Number: 37166/2023

In the matter between:

MARIUS JACOBUS SULLIVAN	First Applicant
NICOLAS JOHANNES JACOBS	Second Applicant
ELMARIE NEL	Third Applicant
LEONARD ROBERT XABA	Fourth Applicant

and

MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
SECRETARY OF DEFENCE	Second Respondent
CHIEF OF SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Respondent
MINISTER OF FINANCE	Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the order is deemed to be 29 February 2024

JUDGMENT

MYBURGH, AJ

The Facts

[1] The applicants are employees of the South African National Defence Force (the "SANDF"). They describe themselves simply as "photographers"; however, it appeared to be common cause on the papers that their work encompasses considerably more than simply the taking of photographs. Precisely what each of them does from day to day is not however relevant to the matter. I will accordingly say no more in that regard.

[2] Until March 2023, each of the applicants received a so called "technical allowance" over and above his or her normal salary. The quantum of the allowance varied between the applicants. The first applicant's allowance amounted to R 8 125.00, the third applicant received R 6 175.00 and the remaining applicants each received R 4 225.00. These allowances had been paid in terms of a standing policy which was aimed at attracting and retaining scarce skill sets. That policy had been in place since 2010, and each of the applicants had received such allowances for extended periods by the time matters came to a head. In each case, the allowance constituted a substantial portion of the employee's overall remuneration package.[1]

[3] By way of background, other state departments had, prior to the introduction of these allowances, adopted a so-called Occupation Specific Dispensation ("OSD") in terms of which scales of remuneration were determined according to occupational categories. It appears that the intention was for the OSD to apply to all state departments; however, that was not possible in the case of the

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[1] The respective packages and the amount of the technical allowances differed from employee to employee as they held different ranks and were on different pay grades.

SANDF because of features which are peculiar to that institution and others like it. The SANDF accordingly set about drawing up its own dispensation. In the meanwhile, and for the reason already mentioned, the SANDF resolved to introduce and in fact introduced the system of technical allowances.[2]

[4] During 2019, the SANDF let it be known that it intended to implement the so-called Military Dispensation for Engineers and Related Professions ("the new dispensation) with effect from 1 April 2020. In terms of the new dispensation, the remuneration of employees would be determined according to a new scale, and allowances of the kind in issue would be abolished. In some or possibly even most cases, employees who had received allowances would not be prejudiced as they could be "translated" into the new dispensation; however, others, like the applicants, were not so fortunate. The reason, according to the evidence, was and continues to be that it is a requirement of the new dispensation that an employee who, in effect, practices a profession, will only qualify if he or she is, in order to practice, required to be a member of a statutory body - by way of example, the Engineering Council of South Africa.[3] No such body exists in respect of photographers; nor is membership of any body a requirement in order to practice or conduct business as a photographer. Thus, the implementation of the new dispensation would result in persons in the position of the applicants losing benefits which they had become accustomed to receiving.

[5] This news prompted the first applicant to initiate a grievance process. His evidence, which was not disputed on this issue, was that he, in effect, acted on behalf of himself and the other photographers. The details of the complaint are not important; suffice to say that what the first applicant sought to achieve was to have himself and the other photographers accommodated under the new dispensation on the basis that they would not suffer any financial disadvantage. The SANDF adopted the position that the grievance was premature as the version of the dispensation which was then in circulation was simply a draft policy document, which had not yet been implemented. The process

[2] While the dispensation, as a whole, appears to have been approved during 2010, it did not cater for the unique needs and occupational categories of the SANDF. For that reason, it was supplemented by the system of allowances.

[3] In respect of trades, the requirement is possession of an appropriate certificate.

accordingly failed to yield the result which the first applicant was seeking. The first applicant then took the matter up with the military ombud, but, again, to no avail. Having been so advised, the first applicant took the issue up with the Defence Force Service Commission.[4] That however also failed to yield the desired result. According to the first applicant, whose evidence on this issue was not disputed, he received no response from that quarter.

[6] By way of written communication dated 31 August 2021, the SANDF announced that it intended to introduce the new dispensation with effect from 1 April 2022. The implications remained as set out above. In short, people in the position of the applicants stood to be prejudiced financially.

[7] The first applicant thereafter initiated a further grievance process. The result which he sought to achieve was the same as before. The remaining applicants also, in due course, lodged grievances. Their objectives were the same as those of the first applicant. Correspondence also ensued between the first applicant's attorneys and the SANDF. Again, the details are not important for present purposes save to say that what the first applicant sought to obtain was an undertaking to continue paying the technical allowance pending the finalisation of his grievance process and that no such undertaking was forthcoming.

[8] The S A Army Engineer Formation, which is the section that the applicants fall under, also requested amendments to the new dispensation. What was proposed was that the Printing Industries Federation of South Africa should be regarded as the relevant body in respect of photographers. That proposal could however not be accepted as that Federation is not a statutory body whose members are obliged to be registered with it in order to practice their professions or trades.

[9] In the meanwhile, the SANDF had extended the date of the implementation of the new dispensation to 1 April 2023. It appears from the answering papers that that decision was motivated by two considerations. In the first instance, the

[4] The commission established in terms of S 62A of the Defence Act 42 of 2002. The commission is the body which has the primary responsibility for, *inter alia*, reviewing conditions of service and making recommendations to the Minister (S 62B).

SANDF was investigating how members who would potentially stand to suffer a drop in pay could be accommodated in the new dispensation. Secondly, or so the evidence went, the purpose was to give members who stood to be forced to take a drop in pay an opportunity to rearrange their affairs accordingly. Thus, the applicants continued to receive their allowances throughout 2022 and into 2023.

[10] On 14 March 2023 the SANDF circulated a newsflash in which it informed members that the payment of technical allowances would be abolished with effect from 1 April 2023; and indeed, that is what happened. Thus, each of the applicants ceased to receive their respective allowances and so effectively suffered a drop in income with effect from that date. The applicants contend that this development came as a shock to them. They also all complain that they have been severely prejudiced as they can no longer make ends meet. The respondents' evidence was that the news ought not to have come as a shock to anyone as it was simply a confirmation of what had previously been communicated. The respondents also contend that the applicants had received ample warning and that they ought to have adjusted their expenses accordingly.

[11] To backtrack slightly, the applicants' evidence was that the third applicant had attended a meeting with a certain Major Raaff on 23 March 2023, in the course of which the said major had stated that the technical allowances would in fact remain in place for a further year – i.e. until March 2024, and that documentation to that effect would be circulated. While the evidence of the third applicant relative to her meeting with major Raaff was not directly challenged, the respondents' evidence was that no decision had been taken to continue paying technical allowances beyond 1 April 2023. It was moreover common cause on the papers that no documents declaring a continuation of the regime beyond 1 April 2023 were ever in fact circulated.

The Application

[12] The present application was launched on an urgent basis on 21 April 2023. In terms of the notice of motion, the respondents were given until 2 May 2023 to deliver their answering affidavits, and the date of hearing was stated to be 9 May 2023. Condonation was sought in respect of the truncation of time periods in terms of sub rule 6(12) of the Uniform Rules of Court.

[13] The substantive relief which the applicants seek is an order compelling the SANDF to pay them their monthly technical allowances together with their salaries pending the final resolution of their respective grievances and any review proceedings which any of the applicants may potentially institute following the finalization of his or her grievance. The prayer is further qualified by the condition that any party who may wish to institute review proceedings must do so within 20 days of receipt of the notice of finalization of his or her grievance.

[14] The first to third respondents delivered an answering affidavit, which was deposed to by a Rear Admiral Morake, who described himself as the Director Human Resources Systems of the SANDF. That affidavit was supported by a confirmatory affidavit deposed to by a Colonel Jansen Van Vuuren, who described his position as that of Chief of Staff South African Army Formation.

[15] The application was not opposed by the fourth respondent, who took no part in the proceedings.

[16] In their answering affidavit, the first to third respondents, whom I will, for the sake of convenience, refer to herein simply as “the respondents” took issue with the applicants both in relation to the alleged urgency of the matter (the respondents contended that the urgency had been self-created) and in relation to the merits. In a nutshell, their case on the merits was that the new dispensation accords with the occupation specific dispensation which applies in respect of engineers and related professions which has applied in other state departments since 2009 and that the requirement for professionals to be registered with a statutory body had been established by the Department of Public Service and Administration and was appropriate. The respondents also alleged that a significant number of SANDF members who had previously

received technical allowances ought not, in fact, to have received such allowances given the nature of the services which they actually rendered. The applicants were alleged to have fallen into that class. In addition, it was specifically alleged that the fourth applicant had been promoted and that he was occupying, and had for some time occupied, the position of purchasing officer, which was not a technical position.

[17] In their replying affidavit, which was deposed to by the first applicant, the applicants persisted in the contention that they are employed in technical capacities and some proof was annexed in respect of the first to third applicants. The respondents' evidence to the effect that the fourth respondent had been promoted to a non-technical position was however not directly challenged; nor was the relying affidavit supported by an affidavit deposed to by the fourth respondent.

[18] The matter could in fact not be accommodated on the urgent roll when it was first set down as the pages exceeded 500 in number. It was accordingly removed from the roll by agreement and costs were reserved.[5] Liability for the wasted costs occasioned by the removal of the matter from the roll on that occasion is accordingly one of the things which I must pronounce on.

The law

[19] The relief which the applicants seek was categorised by both the applicants and the respondents as an interim interdict. I have some doubts as to the correctness of that proposition and think that the application is possibly better characterised as one for final relief which will operate only for a limited period – i.e. much like an order for payments of amounts of maintenance *pendente lite* in divorce proceedings.[6] However, given that the parties approached the matter on the common basis that what was sought was relief of an interlocutory nature, and as this issue was not addressed in argument, I do not consider it appropriate to hold otherwise. I would add that I do not consider that the

[5] Court order dated 9 May 2023; date stamped 12 May 2023.
[6] Orders made in terms Uniform Rule 43 are final, albeit of limited duration, and would be appealable but for the provisions of sub section 16(3) of the Superior Courts Act, Act 10 of 2013.

outcome would be any different if I were to approach the matter on the basis that the claim falls to be regarded as one for final relief – albeit of limited duration. The reason for my saying so will become evident from what follows.

[20] The requirements for interlocutory interdictory relief are well known. They are: a) the establishment of a right, which may be open to some doubt (i.e. what is often referred to as a "*prima facie* right"); b) harm or a well-grounded apprehension of harm; c) the absence of a satisfactory alternative remedy; and d) that the balance of convenience favours the applicant.[7] In respect of a final interdict, the applicant is required to establish a clear right, and the requirement in respect of a balance of convenience falls away.[8]

[21] In the context of an application for an interim interdict pending the outcome of review proceedings, an applicant has, in order to establish a right (albeit perhaps open to some doubt), to show that it has some prospects of success in the review proceedings.[9] The same test would, in my view, be applicable to internal grievance procedures of the kind which the applicants have initiated.

[22] While the establishment of a substantive right (at least *prima facie*) is a *sine qua non*, it is also settled that a strong balance of convenience in favour of an applicant can compensate for weaknesses in its case in relation to the right contended for. In assessing the balance of convenience, the court is constrained to weigh the harm which is likely to follow if the relief is granted against that which is likely to follow if it is not. In undertaking this exercise, the court is entitled to have regard to a diverse range of considerations, one of which is the likely duration of the interim regime if the relief is granted. Relief will more readily be granted if the period during which it will operate is short and *vice versa.* It is also appropriate to have regard to the relative positions of the parties, this especially so when the relief sought involves the payment (or non-payment) of moneys. To explain: a monthly shortfall of say ten thousand rand in

[7] Harms "Interdict" in *LAWSA* 2 ed (2008) Vol 11 at para 403-4 and the authorities cited.
[8] *Setlogelo v Setlogelo* 1914 AD 221 and cases following.
[9] *National Treasury and others vs Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) at para 26; *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at para 25; *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at para 40; *National Commissioner of Police and Another v The Gun Owners of South Africa and Another* 2020 (6) SA 69 (SCA).

an individual's "pay packet" may frequently be expected to have quite a devastating impact on the individual concerned and his or her dependants, whereas an amount of that order would be a drop in the ocean to many major employers.

[23] As to the assessment of the evidence in matters of this kind, it is well settled that the proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should, on those facts, obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If they throw serious doubt on the applicant's case, the latter cannot succeed.[10] The standard of proof is the normal civil one – i.e. a balance of probabilities.

Discussion

[24] On the evidence, the first to third applicants stand on a different footing to the fourth applicant – this for the reasons set out above. I am accordingly constrained to approach the matter on the basis that the first to third applicants continue to occupy technical positions but that the fourth applicant does not. References to "the applicants" hereunder, save where expressly qualified, are to be read as referring only to the first to third applicants.

[25] Starting with the right contended for, the applicants contend that they have good prospects of obtaining the relief which they seek in their respective grievance processes. In my view, this is correct. The starting point, as I see it, is the principle that an employer is not ordinarily entitled to unilaterally reduce an employee's remuneration. In this regard, it is to be noted that paragraph 22 of the communication of 31 August 2021 (i.e. the communication in which notice was given of the implementation of the new dispensation with effect from 1 April 2022) provides for the translation into the new dispensation of serving members not in possession of the specified appointment or registration requirements at "the appropriate salary grade" as a "once off measure". The

[10] Harms "Interdict" in *LAWSA* 2 ed (2008) Vol 11 at para 404 and the authorities cited.

meaning and import of that provision was not addressed by the parties, either in their papers or in the course of oral argument. That being the case, I will not express a firm view (which would in any event not be appropriate in interlocutory proceedings); however, I have to say that my *prima facie* view is that that paragraph was formulated with the principle I have referred to in mind – i.e. to accommodate persons who previously qualified for and received technical allowances but who did not satisfy the registration requirement of the new dispensation. To this, I would add that it seems to me that even if I am wrong as to the meaning and import of paragraph 22, then all that is required in order for the applicants to be "translated" into the new dispensation is a minor amendment of the qualifying criteria. In this regard, I believe it bears mentioning that the qualifying criteria for tradespeople do not include registration with a statutory body. It also bears mentioning that in the case of one category of "professional technologist" (viz. Ammunition Technologist) the designated "Registering Council" is stipulated as "Department of Labour".

[26] Turning to the prospects of success in respect of any review proceedings which may ensue, counsel who appeared for the applicants contended that the applicants would have an unanswerable case in such proceedings. His argument on that issue focused on the provisions of section 55 of the Defence Act.[11] That section reads as follows:

> **"55 Pay, salaries and entitlements.**—
>
> (1) Members of the Regular Force and Reserve Force must receive such pay, salaries and entitlements including allowances, disbursements and other benefits in respect of their service, training or duty in terms of this Act as may from time to time be agreed upon in the Military Bargaining Council.
>
> (2) If no agreement contemplated in subsection (1) can be reached in the Military Bargaining Council, the Minister may, after consideration of any advisory report by the Military Arbitration Board and with the approval of the Minister of Finance, determine the pay, salaries and entitlements contemplated in that subsection.
>
> (3) In the event that the processes contemplated in subsections (1) and (2) do not materialise, the Minister may, taking into account any recommendation by the

[11] Act 42 of 2002.

Commission, and with the approval of the Minister of Finance, determine pay, salaries and entitlements of the members of the Defence Force."

[27] It was common cause that neither sub section 1 nor sub section 2 was of application as the new dispensation was not the result of an agreement agreed upon in the Military Bargaining Council; and the Military Arbitration Board has fallen away pursuant to the decision of the Constitutional Court in *South African National Defence Union v Minister of Defence and Others*.[12] The question which therefore fell to be answered, so the argument went, was whether sub section 3 had been complied with. The applicants stated that the first respondent had not, as far as they were aware, either sought or obtained the approval of the minister of finance. They accordingly alleged (subject to what the respondents might have to say) that the implementation of the new dispensation had been *ultra vires*. The respondents were expressly challenged on this issue. Curiously, they did not answer this challenge. Perhaps that was an oversight, or perhaps it was because they had no answer. Whatever the explanation may be, the rules which govern proceedings of this kind require me to regard allegations made by the applicants and not answered by the respondents as true. Thus, for the purpose of this application, I must accept that the requirements of sub section 55 (3) were not in fact satisfied. It follows, axiomatically, that I must also accept that the decision to implement the new dispensation and to discontinue the payment of allowances was not taken in a lawful manner, and hence that the implementation of the new regime was unlawful. Clearly, if that be the case, then the applicants are correct: they would indeed have an unanswerable case on review. They have a clear right not to be subjected to unlawful administrative action - or indeed any unlawful conduct for that matter.

[28] I am accordingly satisfied that the first requirement for the grant of an interim interdict is satisfied. Indeed, on the available evidence, it appears to me that the applicants have gone far beyond what is required and I am entitled to approach the matter on the basis that they have succeeded in proving a clear right. However, as it is not necessary, I will not make a final decision on that issue.

[12] 2007 (5) SA 400 (CC).

[29] That the applicants stand to suffer irreparable harm and that they have no satisfactory alternative relief available to them is, to my mind, abundantly clear. The respondents contend that the applicants will have a remedy in damages if it should ultimately be found that their rights were infringed. That is, however, no answer to people who can no longer repay their bond or car instalments. The respondents' contention that the applicants can study further and thereby provide their own remedy is also no answer: what is in issue is whether the applicants have a satisfactory alternative remedy in law – which they clearly do not have.

[30] Given the strength of the right which I consider the applicants to have established, a consideration of the balance of convenience is arguably superfluous. I will nevertheless address it. Two considerations weigh heavily with me in this context. The first is the relative impact of the relief sought. The second concerns the length of time for which the relief would operate.

[31] Starting with the first, the impact of the pay cuts on the applicants is dire whereas the impact on the SANDF of having to pay the applicants amounts equal to what they were accustomed to receiving will be negligible – literally a drop in the ocean. The respondents contend that the impact will be much greater than the applicants' papers suggest as there are hundreds of other SANDF staff members who find themselves in positions similar to those of the applicants. According to the deponent to the respondents' answering affidavits, the cost to the state would potentially run to many millions of rands. I do not believe that I can properly have regard to that evidence. In the first instance, none of the documentary evidence was placed before the court. What is more, it cannot simply be assumed that whatever applies in respect of the applicants in this matter applies equally to all the other employees which the respondents refer to. On the contrary, common experience suggests that each case will have its own facts. To this I would add that if the positions of some or all of the other employees which the respondents refer to are indeed indistinguishable with those of the first to third applicants, then their cases are also unanswerable or, if not, then at least very strong. That the SANDF may have to pay them more than it had budgeted for is a neutral consideration in this context. To hold

otherwise would be to allow a party to raise, as a defence, the financial consequences of having to comply with its lawful obligations – something which our law does not and clearly cannot countenance.

[32] The second consideration which weighs in favour of the applicants is that the relief which I propose to grant is likely to be of limited duration. The applicants' founding papers contain a timeline in respect of the SANDF's internal grievance procedure. If those had been adhered to, then the grievances would, by now, have been finalised. Review proceedings can, in appropriate circumstances, also be dealt with and finalised quite expeditiously.

Costs

[33] The first to third applicants have been successful in their application. The ordinary rule dictates that they should be awarded costs, and it was not argued that the ordinary rule should not apply. Nor do I see any reason to depart from it.

[34] As to the position of the fourth applicant, I do not consider that any separate order is justified.

[35] As to the wasted costs occasioned by the removal of the roll when it was first set down, I do not believe that any of the parties can properly be blamed for that. They should accordingly be regarded as costs in the cause.

Conclusion

[36] I accordingly make the following order.

Order

1. Pending the finalisation of the grievances instituted by the first to third applicants ("the applicants") pertaining to the discontinuance of moneys which were historically paid to them by way of technical allowances and any review proceedings which any of the applicants may institute within a period of 21 (twenty one) calendar days of receipt of notification of the outcome of such proceedings, the first to third respondents shall ensure that each of the said

applicants is, in addition to his or her monthly salary and such other amounts as may ordinarily become due to him or her (as the case may be) by way of remuneration from month to month, an amount at least equal to the technical allowance which he or she would have received prior to the coming into effect of the current military dispensation and abolition of technical allowances on or about 1 April 2023.

2. The order set out in paragraph "1" above shall operate retrospectively to 1 April 2023.

3. The accrued arrears (i.e. amounts equal to the allowances which would have been paid from 1 April 2023) shall be paid to the applicants within two calendar weeks of the date of publication of this order.

4. In the event of any of the applicants being unsuccessful in respect of his or her grievance and failing to institute review proceedings within the period stipulated in paragraph 1 above, then this order will *ipso facto* lapse and cease to be of effect.

5. The first to third respondents are ordered to pay the costs of the first to third applicants, including those costs which were wasted as a result of the removal of the matter from the roll on or in the week of 9 May 2023 – such liability to be joint and several, the one paying, the others to be absolved.

6. In respect of the fourth applicant, I make no order.

G S MYBURGH

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Date of Hearing: 1 August 2023

Date of judgment: 29 February 2024

APPEARANCES:

For the Applicants: Adv J G Hamman
Instructed by: Griessel Van Zanten Attorneys

For the First to Third Respondents: Adv B Yawa
Instructed by: State Attorney