



THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 131/06

Reportable

In the matter between

**MINISTER OF DEFENCE
CHIEF OF THE SOUTH AFRICAN NATIONAL
DEFENCE FORCE
SECRETARY OF DEFENCE**

1st Appellant

2nd Appellant

3rd Appellant

and

LH DUNN

Respondent

**Coram: HARMS, BRAND, LEWIS, CACHALIA, JJA and THERON
AJA**

Heard: 10 MAY 2007

Delivered: 31 May 2007

Summary: Appeal against decision that appointment of person to post in SANDF was reviewable under Promotion of Administrative Justice Act 3 of 2000; grounds for review not established by the respondent - appeal upheld: order that person not promoted be paid salary he would have received had he been promoted impermissible.

**Neutral citation: This case may be cited as Minister of Defence v Dunn [2007]
SCA 75 (RSA) .**

JUDGMENT

LEWIS JA

[1] Captain Louis Dunn, the respondent, applied unsuccessfully for a promotion to a newly created position in the South African National Defence Force (the SANDF). He brought an application to review the decision of the appellants in the Pretoria High Court. In this he was successful. Van Rooyen AJ found that the decision made by the respondents to appoint Brigadier General Coetzee to the position and not to promote Dunn was flawed in several respects. In spite of this he did not set aside Coetzee's appointment, but instead awarded Dunn damages under s 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In effect Dunn was awarded the salary that he would have received had he been promoted, and was also awarded punitive costs, the appellants being ordered to pay costs on an attorney client scale. (Dunn's claim to set aside the decision to appoint Coetzee was not pursued before this court since there was no cross-appeal.) The judgment of the high court is reported.¹ The court refused leave to appeal against its decision. The appeal to this court is with its leave.

[2] The background to the application to the high court is this. Captain Dunn is a lawyer. He holds the degrees of B Juris (1972), LLB (1975), a further undergraduate degree in political science (1991) and a master's degree in law (1993). He qualified as an attorney and was admitted to practice in 1979. He practised law for a short period and then joined the SANDF in 1986 where he was employed as a legal officer in the Navy until 1994. He left for a period of two years to work for the Legal Aid Board as an administration officer. In May 1996 he was reappointed as a senior legal officer in the Navy and attained the rank of Captain (SA Navy) (equivalent to a Colonel in the army) in 1999. That rank is on post-level 12 within the SANDF.

[3] During 2002 a new position was created by the SANDF: director, anti-fraud. It was classified as a level 13 post, above that of Dunn on level 12. Calls for nominations were made. Dunn saw the post advertised and asked the Chief of the Navy, Vice Admiral Retief, to nominate him for what was in effect a promotion. Retief did so. There were other contenders for the position, including Colonel Jansen van

¹2006 (2) SA 107 (T).

Vuuren and Brigadier General Coetzee. Coetzee also has legal qualifications and practical legal experience. Coetzee was already at post-level 13. He was appointed to the post director: anti-fraud. Dunn joined him as a respondent in the court below but he did not participate, and as I have said, Dunn has withdrawn his claim for the setting aside of Coetzee's appointment.

The legal grounds for review

[4] Dunn's application for review was based on a number of grounds, all of which assume that the decision of the Minister of Defence, the first appellant, to appoint Coetzee and not to promote Dunn constituted administrative action as contemplated by PAJA. That is not contested by the parties and was assumed to be so by the court below. It should be borne in mind, however, that administrative action is defined in PAJA as a decision taken which '*adversely affects* the rights of any person and which has a direct, external legal effect'.² The justification for regarding the appointment of a person to a post as administrative action, even though it cannot be said to adversely affect the 'right' of a person who is non-suited, is to be found, inter alia, in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*³ where Nugent JA said that while PAJA's definition of administrative action refers to decisions that '*adversely affect the rights of any person*' (my emphasis), the literal meaning cannot have been intended by the legislature. The qualification, he said, was '*probably intended to convey*' that the decision '*has the capacity to affect legal rights*'.⁴

[5] The procedure preceding and underlying the decision of the Minister, and which resulted in the recommendation to appoint Coetzee to the post of director: anti-fraud, was alleged to be procedurally flawed and unfair, in contravention of s 3(1) and ss 6(2)(a)(i), (b), (c), (e)(iv) and (f)(i) of PAJA. Section 3(1) requires that administrative action which '*materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair*'. Section 6(a)(i) provides for judicial review if the administrator who took the administrative action was not

²Section 1.

³2005 (6) SCA 313 (SCA).

⁴Para 23. See also *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) para 19 which dealt with the position before the enactment of PAJA, and *Kiva v Minister of Correctional Services* ECD case 1453/04 of 27 July 2006 para 28, unreported, but referred to by Cora Hoexter *Administrative Law in South Africa* (2007) p 204. See generally the discussion by Hoexter pp 202-204.

authorized to do so. Section 6(b) deals with the failure to comply with a mandatory and material procedure laid down by an empowering provision; s 6(c) provides for review where the action was procedurally unfair; s 6(e)(iv) deals with action taken 'because of the unauthorized or unwarranted dictates of another person or body'; and s 6(f)(i) provides for review where the action contravenes a law or is not authorized by the empowering provision.

The appointment and promotion procedures of the SANDF

[6] Before turning to whether the decision not to appoint Dunn was in violation of any of the provisions of PAJA, thus warranting judicial review, it is necessary to examine the procedures of the SANDF for the appointment and promotion of personnel. These are reflected in two documents. The first is the Department of Defence Instruction Senior Management Services (SMS-DODI). The appellants contend that this document is not relevant since it came into operation only when signed by the Secretary of Defence on 13 September 2002, after the dispute arose. Dunn contends that its implementation date is 1 January 2001. Nothing, in my view, turns on whether the procedures set out in SMS-DODI were applicable and it is not necessary to decide when it became operative. In any event Dunn conceded at the hearing of the appeal that other personnel guidelines, reflected in the second document, were operative at the time the decision was taken.

[7] These are referred to as the 'Interim Measures for the Appointment and/or Promotion of Top Officers . . .' (the Interim Measures). They are dated 1 July 2002. The procedures set out are stated to be mandatory for all divisions within the Department of Defence. The purpose of the Interim Measures was to 'establish procedures in respect of the appointment and the promotion of officers to the rank of Colonel and higher'. The appellants contend that the procedures in the appointment of Coetzee, rather than Dunn, were those contained in the Interim Measures. These require a formal placement process. A 'seminar' is held to determine whether posts should be created or filled. Nominations of persons to fill the posts are then invited from service and divisional chiefs. The nominated candidates, if they have provided the information required about themselves, are then considered by the members present at the seminar. The Interim Measures also provide for an informal ad hoc

placement for posts on the rank of Colonel and higher. The appellants do not rely on the informal procedures.

The process followed

[8] The annual seminar in question in this case was held on 29 August 2002. The Chief of the Navy, Retief, attended the seminar and confirmed his nomination of Dunn to the post of director: anti-fraud. The Secretary of Defence, the third appellant, decided, however, that this post should be referred to and considered by a separate, special placement board. The reasons for this included the sensitivity and importance of the post and the fact that it was newly-created. The special placement board comprised Mr T E Motumi, Chief of Policy and Planning in the Defence Secretariat, who acted as chairman of the board and who deposed to the answering affidavit; the Inspector-General of the Department of Defence, Major General Ramlakan; the Chief of the Human Resources Centre, Major General Shoke; Major General Pitso, representing Defence Intelligence; and Brigadier General Luck who acted as secretary to the special placement board.

[9] Shortly after the seminar was held Luck asked Motumi whether he should arrange interviews with the candidates by the special placement board. Motumi asked him to do so. Luck then telephoned the candidates, including Dunn, and requested them to be available for interviews by the board. There is a dispute about the dates in this regard. Motumi maintains that the special placement board met on 2 September and that Dunn was asked for his curriculum vitae, and telephoned on 30 August immediately after the seminar was held. Dunn avers that he was asked for his curriculum vitae on 6 September and phoned by Luck on that date, and that the special placement board met on 9 September. The difference between the parties as to the dates is in my view of no significance: first, bearing in mind that these are motion proceedings, the version of the respondents in the court below (the appellants) is to be accepted (subject to the usual rules); and second, Dunn concedes that the placement board did indeed meet.

[10] The invitation to an interview, says Dunn, created a legitimate expectation that he would be given a hearing. But on 2 September (on the appellants' version) Luck again telephoned Dunn and told him there would be no interview. He gave no reason

to Dunn. Motumi had decided, it transpired, that there was no need to hold interviews because the placement board had sufficient information about the candidates available to it.

[11] The minutes of the special placement board meeting reflect that it recommended to the Chief of the SANDF that if there were to be no promotion, Coetzee should be appointed to the post (he was already on level 13), but that if there were to be a promotion Colonel Jansen van Vuuren ought to be promoted. The minutes also reflect that Dunn was considered and indeed preferred by one member of the board. Luck said that the meeting took about four hours. He took notes on his laptop computer. The members of the special placement board debated each candidate and relied on their curricula vitae. After he had compiled the minutes he handed them to Motumi. They were signed by Motumi, the Chief of the SANDF and the Secretary of Defence. Luck had no reason to keep the minutes: they were sent to the registry for safekeeping. When the minutes could not be found during the course of the proceedings, Luck retrieved the document from his computer and printed it out. There is no suggestion that the printout is not authentic.

[12] In due course Luck sent the recommendations of the seminar and of the special placement board to the Minister via the office of the Secretary of Defence. The Minister approved the appointment of Coetzee on 13 September. The letter sent to the Minister by the Chief of the SANDF recommending the numerous appointments in the SANDF was dated only 'September' with no day specified. It referred only to the 'annual placement and transfer seminar' held on 29 August 2002, and not to the special placement board meeting held on 2 September. Much was made by Dunn of the omission of the exact date and the failure to mention the meeting of the special placement board. I shall revert to the issue.

[13] Dunn learned of Coetzee's appointment on reading a general bulletin about SANDF appointments and promotions. He was aggrieved. In December 2002 he requested the Minister to provide reasons for his non-promotion. These were provided by the State Attorney in March 2003.

Reasons afforded for the appointment of Coetzee rather than the promotion of Dunn

[14] The letter setting out the reasons points out, first, that the appointment was made in terms of the Interim Measures. It denies, secondly, that Dunn had any legitimate expectation that he be interviewed in the light of the invitation extended by Luck and subsequently cancelled. Dunn, it states, was considered for the post together with three other candidates. The curricula vitae of all the candidates were 'scrutinised' and points were awarded to each candidate in respect of a number of factors. These included knowledge, analytical skills, numerical skills, security clearances, other training and development, managerial experience and promotional requirements. Each candidate's curriculum vitae was 'fully comprehensive', hence the decision not to interview them. The letter states 'After taking into consideration all the information at the Board's disposal the candidate found to be most suitable for this position was then recommended'.

[15] It is noted at this point that in the course of the proceedings that ensued, Dunn discovered that the curriculum vitae that he had submitted had literally come apart. Letters of reference that he had attached were missing when papers were supplied to him. From this he inferred that his curriculum vitae had not been properly considered.

The application for review

[16] Not satisfied with the reasons given for Coetzee's appointment, Dunn brought the application for review, claiming the setting aside of the decision to appoint Coetzee, alternatively compensation under s 8(1)(c)(ii)(bb) of PAJA. As I have indicated the Pretoria High Court, finding that the decision of the Minister to appoint Coetzee was flawed in several respects, declined to set the decision aside but ordered the SANDF to pay Dunn the salary he would have received had he been promoted to the post of director: anti-fraud on level 13.

[17] As counsel for the appellants point out, the judgment of the court below is not a model of clarity. There appear to be several findings on some of the PAJA grounds of review.⁵ I shall deal only with the main grounds of review and findings of the court below.

⁵See for example paras 28 and 40.

Fairness and transparency

[18] Dunn contends, and the court found, that the procedure followed by the SANDF, and on which the decision of the Minister was based, was neither transparent nor fair. The allegations made in support of this argument are based on the chronology of events. Dunn points out that the undated September letter (discovered by him fortuitously during the course of the court proceedings) followed on the general seminar held on 29 August 2002, and that the appointment of Coetzee is recommended in that letter without reference to the special placement board. It will be recalled that that letter to the Chief of the SANDF referred to numerous recommendations as to appointments and promotions, but refers only to the seminar on 29 August. From this Dunn infers that the decision to recommend the appointment of Coetzee was made at the general meeting and not by the special placement board. The consequence of this, it is argued, is that Dunn was not considered for the post at all since his papers were not before the seminar. The court found that on this basis the decision was neither transparent nor fair.⁶

[19] The finding ignores certain undisputed facts. It is not denied that Motumi convened a special placement board for the one post, and that four candidates were considered. Dunn expected to be interviewed. He claims in this regard a legitimate expectation to have been heard. If the decision to appoint Coetzee had been made on 29 August then Dunn could certainly not have had an expectation that he would be given an oral hearing by the special placement board. Moreover, the entire rigmarole of setting up a special board for a new and sensitive post, and extending invitations to be interviewed to the four candidates, would have been an elaborate sham.

[20] One would have to disregard the minutes (admittedly unsigned) of the special placement board and the evidence of Motumi and Luck, and conclude that their version is a dishonest fabrication, in order to reach the conclusion that the special placement board did not sit and did not consider the information before it. There is no suggestion that the minutes of the meeting of the board were not authentic.

⁶Para 15.

Accordingly Dunn's inference as to when the decision was made must be rejected as must the finding based upon it that the procedure was not transparent or fair.

[21] The other grounds on which Dunn contends that the Minister's decision is reviewable are based on the premiss that the special placement board did meet and consider Dunn's application for promotion. The attack is thus levelled in the alternative at that procedure.

Meeting the requirements of the SANDF appointment and promotions procedures: s 3 of PAJA

[22] Although the court below appeared to consider that the SMS-DODI was applicable at the relevant time, Dunn concedes that the Interim Measures did apply. And the court indeed found that since the appellants had invoked the formal placement procedures set out in the Interim Measures, Dunn had acquired certain rights under them which had been breached.⁷ These included the right to participate in the selection process, that the process be properly applied and the right to uniform treatment of candidates in the process. The process required also that proper submissions should be made to the board and that the personal profile of each candidate be evaluated by the board. The evidence of Motumi, supported by the documents already referred to, indicates that the requirements laid down in the Interim Measures were fulfilled.

[23] The high court's finding that the appellants had not met the requirements of the Interim Measures, and thus acted in breach of s 3 of PAJA,⁸ is accordingly also based on the assumption that the appellants were conspiring against Dunn and fabricating their evidence. There is, as I have said, nothing to support this assumption, and the contention that there was dishonest conduct on the part of the appellants and those involved in the procedures could not have been based solely on the papers. If fraud were in issue the court should have referred the matter to oral evidence or trial. But there is nothing in the papers themselves to controvert the evidence of Motumi and Luck, and the finding on this basis is rejected.

⁷Para 25.

⁸Para 27.

Section 6 irregularities

[24] Dunn's contention that the procedures of the special placement board are reviewable under s 6 of PAJA overlap to a considerable extent with the contentions already traversed in relation to the infractions of s 3. The high court nonetheless found that the whole process of appointment made on the recommendation of the special placement board was fraught with irregularities and defects, infringing a number of the provisions of s 6.⁹ Sections 6(2)(a)(i) and 6(2)(b) were violated, the court found, because the mandatory procedures under the Interim Measures had not been followed: there was a deviation from the standard procedure. Appointments and promotions had to be made by a full, formal seminar. There was no provision (other than informal procedures not relied on by the appellants), it concluded, for a separate placement board for one post only. The seminar was *functus officio* after it had convened on 29 August and no further meetings were permitted.

[25] The appellants contend, however, that the Chief of the SANDF has the prerogative to make appointments and promotions. This flows from s 8 of the Defence Act 44 of 1957, in force at the time, read with reg 13. Section 8(2) provided that 'The Chief of the Defence Force shall be the principal adviser to the Minister on any military, operational and administrative matter' within his competence. These included the performance of all staff functions (s 8(g)). Regulation 13 to the Defence Act provides:

'The Minister or an officer authorised thereto by him or her may subject to the other provisions of this Regulation and provided that a suitable vacancy exists, promote any officer on grounds of his or her efficiency, qualifications and seniority.'

[26] The appellants argue that the statutory authority vests significant powers in the Minister and the Chief of the SANDF. The Interim Measures are no more than policy documents and thus do not fetter their discretion. Whether or not that is so, in my view a reading of the measures does not show that a separate placement board was not permitted. The reasons advanced by Motumi for having a special board, comprising the senior officers concerned with the position, to consider a significant and new post are plausible. Dunn does not show, in any event, quite how the Interim

⁹Para 28.

Measures were infringed: he does not point to any passage that requires the same board to consider all appointments. Indeed, the Interim Measures themselves indicate that there should be different seminars for different rank levels. There was thus no infringement of s 6(2)(a)(i) nor (b) and no need to decide what the status of the Interim Measures was nor whether the Chief of the SANDF or the Minister could permit deviation from them. This conclusion applies also to the complaint under s 6(2)(f)(i) that there had not been compliance with the empowering provision.

The legitimate expectation that there be an interview

[27] The high court also found an infringement of s 6(2)(c) of PAJA in that Dunn, having been invited to an interview, had a legitimate expectation that he be heard (interviewed) by the placement board.¹⁰ It is to be noted that s 3 of PAJA does not afford a right to 'appear in person' before a decision is taken. The decision-maker may, in order to give effect to procedurally fair administrative action, afford a person who will be affected the opportunity to be heard in person. Even where that is not the case, the audi principle nonetheless applies: a person in respect of whom administrative action is to be taken is entitled to a hearing and to make representations. But Dunn was not denied that opportunity. He placed information about himself before the special placement board and according to Motumi and Luck it was considered. Although he contends that not all of that information was before the special placement board (because annexures to his curriculum vitae had become detached), there is nothing to suggest that the board did not have sufficient information available and that he was not 'heard'.

[28] Dunn's contention that his legitimate expectation to be heard was thwarted by the cancellation of the interview was accepted by the high court on the basis argued by Dunn, that the race between him and Coetzee was so close that 'an appointment could have been made at the flip of a coin'.¹¹ The court declined to infer from this that an interview would not then have made any difference saying that the 'alleged equality . . . contributed to making an interview an imperative'.

¹⁰Para 40.

¹¹Para 28.

[29] The contention that Dunn and Coetzee were ranked as equal is without foundation. The minutes, as I have already said, show that if a promotion were to be made then Jansen van Vuuren was the majority of the board's recommendation, and if an appointment not involving promotion were to be made then Coetzee was the preferred candidate.

[30] That is not an answer, however, to the assertion that Dunn had a legitimate expectation to an interview. Dunn's argument in this respect is that the telephone call from Luck inviting him to an interview created the expectation that he be given the opportunity to place his credentials before the board in person. He argues that the fact that the Interim Measures do not expressly provide for an interview is irrelevant. He was entitled to be treated lawfully and fairly in terms of s 33 of the Constitution. Thus, he contends, where the circumstances demonstrate a reasonable selection process cannot take place without interviews, the selection board must hold interviews. The circumstances he refers to are the fact that initially Motumi thought the interviews were necessary; the evidence of an expert (an industrial psychologist) that interviews were required in this kind of selection process; and the arbitrary decision by Motumi to cancel because of the bulk of the information to be considered.

[31] In *South African Veterinary Council v Szymanski*¹² Cameron JA approved the requirements relating to the legitimacy of an expectation explained by Heher J in *National Director of Public Prosecutions v Phillips*.¹³ The law, said Heher J, does not protect every expectation. It protects those that are legitimate. To meet this criterion, the representation made by the functionary concerned must be 'clear, unambiguous and devoid of relevant qualification'.¹⁴ This requirement protects public functionaries against the risk that their 'unwitting ambiguous statements may create legitimate expectations'. Heher J added that it is always open to those who rely on such statements to obtain clarification. Second, the expectation must be reasonable. Third, it must have been introduced by the decision-maker. And fourth, the representation must be one which it is competent for the decision-maker to make.

¹²2003 (4) SA 42 (SCA) paras 19 and 20.

¹³2002 (4) SA 60 (W) para 28.

¹⁴The quotation comes from De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed (1995) para 8-055.

[32] In *President of the Republic of South Africa v Rugby Football Union*¹⁵ the court said that meeting the requirement of reasonableness depends not only on the expectation in the mind of the person relying on it but also on whether ‘viewed objectively such expectation is, in a legal sense, legitimate.’ In my view, Dunn’s claim to a legitimate expectation fails on the reasonableness requirement. There was no representation that he was the likely candidate for the post. There was only an invitation to attend an interview (which could give rise to no more than a procedural expectation of an oral hearing): at most the invitation might amount to a representation that an interview might be of benefit. But it is equally likely that it would not have advanced Dunn’s cause. There is nothing to show that anything would have turned on that interview.¹⁶ None of the candidates was interviewed. There was no unequal treatment. And, as I have said, there is no requirement that interviews be conducted. Nor was there evidence of a regular practice of holding interviews by the seminars or placement boards, a further factor referred to by Corbett CJ in *Administrator, Transvaal v Traub*,¹⁷ and approved by the Constitutional Court in *President of the RSA*.¹⁸ There was no need, in order for the decision to be made, to have an oral hearing.¹⁹

[33] Accordingly, I consider that there was no basis at all for the decision of the Minister to be reviewed. I shall, however, deal with the remedy granted by the court below because I consider it important that there be clarity as to when compensation under s 8 of PAJA should be awarded. Even if there had been a reviewable irregularity in the decision to appoint Dunn, was an award of what is in effect a salary promotion for the rest of his career in the SANDF permissible?

The order that Dunn be paid the salary of a rear admiral on level 13

[34] The high court considered that it would not be in the interests of justice to order that the appointment of Coetzee to the post be set aside: ‘Coetzee did no

¹⁵2000 (1) SA 1 (CC) para 216.

¹⁶See Hoexter op cit p 381, referring to Isabeau Southwood ‘Legitimate Expectation: A Case of Paradigm Lost’ (1998) 13 *SA Public Law* 197. Southwood argues that where the benefit expected is a hearing, there is no point to it unless some other benefit is expected to flow from the hearing.

¹⁷1989 (4) SA 731 (A) at 756l.

¹⁸Above para 212.

¹⁹*President of the RSA* above para 216.

wrong'.²⁰ There is no cross appeal against this finding and Dunn, as I have said, does not persist in his request that the decision be set aside.

[35] Instead, the court ordered the Department of Defence, in terms of s 8(1)(c)(ii) (bb) of PAJA, to ensure that Dunn

'receives the same salary and benefits, dated back to 1 October 2002 with interest calculated at 11% per annum that he would have received had he been promoted to the level 13 post of Rear Admiral (Junior Grade) on 1 October 2002. The Department of Defence is entitled to give effect to this order by granting applicant protective promotion as provided for in the Public Service Act.'²¹

[36] Section 8(1)(c)(ii)(bb) provides that a court in proceedings for judicial review may, *in exceptional circumstances* (my emphasis), direct 'the administrator or any other party to the proceedings to pay compensation'. The exceptional circumstances that the high court found were 'the absence of respect for imperative procedure; the insouciance displayed towards mandatory departmental policy and procedure; the secretive manner in which Coetzee's selection and appointment took place; the selective manner in which the record was furnished; the disingenuous explanation for not proceeding with the interview . . .; the various versions proffered for the procedure that was followed and the conflict between such versions and the documents pertaining to them; the prejudice which Dunn suffered'.²²

[37] The criticism of the way in which documents were furnished during the course of the proceedings is warranted, but it does not affect the decision itself. It is a matter that should be dealt with by an appropriate costs order. Apart from the prejudice to Dunn, to which I shall return, the other reasons advanced have no basis in fact as discussed, and are not grounds for review under PAJA.

[38] That leaves the question as to prejudice caused to Dunn. The court considered that that prejudice lay in the 'absence of administrative action that complies with the rule of law and fairness in reaching that decision [to appoint

²⁰Para 42.

²¹ Public Service Act, 1994 (Proclamation 103 of 1994). The concept of 'protective promotion' is not to be found in that Act but in the Public Service Staff Code which was repealed before 2002.

²²Para 42.

Coetzee]'.²³ But it also said that 'the prejudice does not lie in the *result of the appointment procedure*' (my emphasis)²⁴ since non-promotion is always a possibility where there are competing candidates for a position. If that is so, what prejudice did Dunn suffer as a consequence of the decision to appoint Coetzee? None was shown by Dunn to exist.

[39] Even if there were exceptional circumstances, it is impermissible for a court to substitute its own decision – in this case to give Dunn an effective promotion in the Defence Force – for that of the Minister.²⁵ It is the Minister, in terms of the Defence Act, who has the power to make appointments and promotions.

[40] If it is a monetary award that Dunn wanted then he should have proved some loss. But he did not. Compensation was accordingly not justifiable even had the administrative action complained of been reviewable.²⁶ The appeal must therefore succeed: the decision to appoint Coetzee rather than to promote Dunn was not reviewable, and the order of the court as to the payment of compensation was impermissible.

Costs

[41] The high court ordered that the appellants pay punitive costs, on the attorney client scale, because of their behaviour during the course of the appointment procedure and because they had failed to provide important documents during the course of the litigation. There is no warrant for ordering such costs on the basis of the alleged bad behaviour in the appointment process. The appellants were not as efficient in the running of the procedure as they should have been, but deliberate misconduct and dishonesty were not proved. There is, however, some merit in the argument that the appellants provided documents selectively in the course of the application and that Dunn had to go to great lengths to extract information from

²³Para 41.

²⁴Para 41.

²⁵See *SA Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) (discussed above) paras 14 and 15.

²⁶Dunn did not claim constitutional damages under s 38 of the Constitution, which have been awarded in cases where there has been unfair administrative action, and actual financial loss shown, such as *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) and *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA). See Hoexter op cit pp 503ff.

them. These are set out in the reported judgment of the court below.²⁷ In my view, therefore, the appellants should not be allowed to recover costs in the application proceedings, although they are fully entitled to costs on appeal.

[42] The following order is made:

1 The appeal is upheld with costs, including those occasioned by the employment of two counsel.

2 The order of the court below is set aside and replaced with:

‘The application is dismissed.’

C H Lewis
Judge of Appeal

Concur:

Harms ADP

Brand JA

Cachalia JA

Theron AJA

²⁷Paras 6-10.