**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 20752/14

In the matter between:

**MAARTEN OPPERMAN** **APPELLANT**

and

**THE MINISTER OF DEFENCE AND MILITARY VETERANS** **RESPONDENT**

**Neutral citation**: *Opperman v Minister of Defence and Military Veterans* (20752/14) [2015] ZASCA 153 (2 October 2015)

**Coram:** Maya ADP, Cachalia, Zondi and Dambuza JJA and Gorven AJA

**Heard:** 4 September 2015

**Delivered:** 2 October 2015

**Summary:** Employment – South African National Defence Force – whether contract of employment conferring benefits on employee to which he is not entitled, is enforceable.

## ORDER

**On appeal from** Gauteng Division of the High Court, Pretoria (Malindi AJ sitting as court of first instance):

The appeal is dismissed with costs.

## JUDGMENT

**Zondi JA (Maya ADP, Cachalia and Dambuza JJA and Gorven AJA concurring):**

[1] The appellant, a member of the South African National Defence Force (SANDF) employed as the Inspector-General of the South African Military Health Service, launched an application in the Gauteng Division, Pretoria (the high court) following a dispute between him and the Department of Defence (the Department) regarding the payment of certain benefits. In that application he sought an order declaring that he had a contractual right to be remunerated in accordance with the Occupational Specific Dispensation (OSD) until 31 March 2014 and that his being deprived of OSD income was unlawful and constituted an unfair labour practice in terms of s 23 of the Constitution.[1] On his promotion to Inspector-General, the appellant was initially remunerated in accordance with the OSD, but almost a year later this was withdrawn by the Department. It contended that the Inspector-General post was not an OSD post and he was thus not entitled to OSD benefits. It treated the payments he received as OSD benefits as overpayment, and sought their recovery from him.

[2] In resisting the application in the high court, the respondent ('the Minister')

1 Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides:
'Everyone has the right to fair labour practices'.

took the point that the application was premature. This was so, it was contended, because the performance agreement concluded by the parties on 16 April 2012 and the regulations promulgated by the Minister under the Defence Act 42 of 2002 required the appellant to utilise the internal grievance procedures, prior to approaching a court, which he had not done.

[3] In relation to the merits of the appellant's application, the Minister denied that the appellant was entitled to OSD benefits. She contended that the position of Inspector-General was a senior management service (SMS) post, which in terms of its profile was not an OSD post. The Minister added that the appellant's post could not be translated to an OSD post until a work study to determine its functional and organisational structure has been done. The Minister contended accordingly that in the absence of translation of the appellant's post, there was no lawful basis for the payment of OSD benefits. Although his performance agreement said that the post attracted OSD benefits, the Surgeon-General, with whom the agreement was concluded, had no authority to determine allowances such as those. The provision in the performance agreement providing for the payment of the OSD benefits to the appellant was accordingly unenforceable, contended the Minister.

[4] The high court (Malindi AJ) upheld the Minister's contention that the application was premature because of the appellant's failure to exhaust the internal remedies provided under the regulations before approaching the court. It accordingly dismissed the application with no order as to costs without dealing with the merits of the application. The appellant appeals against the order and conclusions referred to above with the leave of this Court.

[5] In the view that I take of the matter, the appeal can simply be decided on the merits thus rendering it unnecessary to consider whether the appellant was obliged to comply with the grievance procedure or whether it was competent for the

appellant to rely directly on s 23 of the Constitution in asserting his right to be paid OSD benefits. The issue therefore is whether the appellant qualified to be remunerated in accordance with the OSD.

[6] To determine this issue, it is necessary to deal with the background facts in some detail. The appellant, a medical practitioner by profession, became a uniformed member of the SANDF in 1996. On 31 October 2011 he was promoted from the rank of Senior Clinical Manager, an OSD post, to that of Senior Manager: Medical Services, to perform the function of Inspector-General: South African Military Health Service (SAMHS) with effect from 1 April 2012. According to its profile dated 26 February 2009 the purpose of the post is to provide inspection services to the SAMHS. In terms of its position within the organogram it falls under the post of the Surgeon-General and is described as a common post. All the other directorates that fall under it are also common posts, ie they are posts that need not be occupied by medically qualified persons. Although the OSD for medical and dental professionals came into effect on 1 July 2009, at the time of the appellant's promotion there was some uncertainty as to whether the OSD applied to the Inspector-General post. This uncertainty gave rise to the dispute between the parties.

[7] The application of the OSD to a post is associated with certain monetary benefits or allowances. But for the OSD to apply, the work study report commissioned by the Minister required a post to be a production post; secondly, it required a professional career path in a specific field based on qualifications; and thirdly, an incumbent of that post had to maintain or retain registration with the relevant professional body. In other words, as explained by the Minister, 'an incumbent must of necessity perform 80 per cent of his technical skills and 20 per cent of the managerial skills'.

[8] In a letter dated 12 December 2012, the Department's Human Resources Division informed the appellant that following his promotion on 1 April 2012 he no longer qualified to be retained in an OSD post, nor did he qualify for the accompanying allowances. In consequence the benefits he received as the result of the incorrect classification of his post were treated as overpayments in respect of which he was liable to refund the Department. He was invited to suggest a schedule of repayments. He rejected the invitation because, in his view, the Department's decision to terminate these benefits was unfair and unlawful. As a result, the parties reached an impasse on the issue and the Department went ahead and deducted the amount by which the appellant was allegedly overpaid from his March 2013 salary. Thereafter the appellant launched the application in the high court seeking relief to which reference has been made in the preceding paragraphs.

[9] Section 55 of the Defence Act deals with pay, salaries and entitlements of members of the SANDF. It provides that members of the Regular Force and Reserve Force receive such pay, salaries and entitlements including allowances, disbursements and other benefits in respect of their service, training or duty as may from time to time be agreed upon in the Military Bargaining Council. If no agreement is reached in the 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 their pay, salaries and entitlements. It is clear that s 55 is a statutory provision providing a mechanism according to which pay, salaries and other entitlements that become payable to members of the force, are determined. The Department may also become liable for the payment of other allowances such as OSD benefits if the Minister has in terms of s 82(1)(*e*) made regulations regarding conditions under which they may be paid.

[10] In asserting his contractual claim the appellant relied firstly, on a letter dated 31 October 2011 in which Surgeon-General Masisi recommended him for

promotion to the post of Inspector-General: SAMHS and the functional rank of Senior Manager MSS-3 with effect from 1 April 2012. Masisi certified that the recommendation was '. . . in accordance with applicable DOD policy, directives, instructions and orders, that such were considered before making this recommendation.' The promotion was approved by Surgeon-General Ramlakan on 4 November 2011 and by Lt Gen Nkabinde, the Chief Human Resources on 27 January 2012. The appellant's functional promotion was finally approved by General Shoke, the Chief of the SANDF on 2 February 2012.

[11] Secondly, he contended that during 2010 the Director of Human Resources and the Surgeon-General agreed that the OSD was to apply to the post of Inspector-General, which at the time was occupied by Brigadier-General Cloete, the appellant's predecessor. In support of this contention the appellant referred to a letter dated 20 January 2011. This is a letter from the Director of Human Resources Service Systems (Brigadier-General Sitshongaye) to the Surgeon-General in which the applicability of the OSD to the post of Inspector-General was raised. The letter reads:

'1. Letter SG (IG SAMHS)/R/104/10/3 dated 22 November 2010 in which approval is granted for the Inspector-General of SAMHS to translate to the Occupation Specific Dispensation (OSD) for Medical Officers refers.

2. Please note that on date of translation SAMHS did not consider the IG post as recognizable for translation to the OSD for Medical Officer and as a result the implementation date is therefore questionable. I would be advised that the translation takes place on the first day of the month following the approval by the Surgeon-General i.e 1 December 2010.

3. Please note that the post must be converted to an OSD Medical Officer post on the SMCS that implies no other profession will be allowed to be appointed as IG SAMHS in future.'

[12] Thirdly, he relied on the performance agreement he concluded with Surgeon-General Ramlakan, on behalf of the Department on 16 April 2012 for the period 1 April 2012 to 31 March 2013. In this agreement the appellant's salary level was stipulated as being OSD (MO) MSS-3 + CAT 3/2. When the period stipulated in

that agreement expired the appellant and Surgeon-General Sedibe on behalf of the Department extended the duration of the agreement for the period 1 April 2013 to 31 March 2014. The extended agreement specified the appellant's occupational classification as 'Medical Officer (OSD)' and his salary level as being 'Senior Manager Medical (MSS-3) + OSD Benefits.' The appellant relies on these documents for the contention that the agreement he had with the Department obliged it to pay him the OSD benefits at least until 31 March 2014 and that the Department's withdrawal of these benefits constituted an unfair labour practice.

[13] In my view, the appellant's contractual claim should fail. First, his assertion that the Director of Human Resources and the Surgeon-General agreed that the OSD should apply to his post is contradicted by the Director of Human Resources (Brigadier-General Sitshongaye). His evidence was that when he received a letter of Brigadier-General Cloete dated 22 November 2010 in which it was suggested that the Surgeon-General had approved the translation of the Inspector-General post to the OSD for Medical Officers, he informed the Surgeon-General by a letter dated 20 January 2011 that the OSD could not apply to that post before it was converted to an OSD post. He pointed out that the Surgeon-General did not have authority to do so. Such authority was reserved for the Minister. Brigadier-General Sitshongaye's evidence in this regard was not contradicted by the appellant.

[14] That the Department regarded the post concerned as a common post, is also borne out by the Chief Human Resources' letter addressed to the Surgeon-General on 22 December 2011 advising him to request DIMS (Director: Integrated Management Systems) for a new work study to be conducted if he wanted to have the current functional and organisational structure of the SAMHS Inspectorate translated to an OSD post. The Surgeon-General was informed that the post was to remain a common post until that was done. Brigadier-General Cloete, who occupied the position of the Inspector-General at the time challenged the Department's

refusal to translate that post from a common post to an OSD post. His challenge was dismissed by the Military Ombud on 6 May 2013.

[15] Therefore in light of Brigadier-General Sitshongaye's evidence, Surgeon-General Ramlakan did not have any authority to classify the appellant's post as an OSD post or to conclude the performance agreement with the appellant which imposed an obligation on the Department to remunerate him in accordance with the OSD dispensation. Moreover, in terms of s 55 of the Defence Act, the appellant could be entitled to the OSD benefits only if an agreement to pay them had been reached at the Military Bargaining Council or the Minister had determined them. Those requirements were not considered in this matter when the performance agreement was concluded with the appellant. The stipulation in the performance agreement that obliged the Department to pay the appellant in accordance with the OSD dispensation was therefore unlawful and unenforceable.

[16] Secondly, the appellant must have been aware that the post to which he was promoted was not an OSD post as the functions he performed did not meet the OSD requirements. He did not perform clinical work. Moreover, in terms of the performance agreement the key result areas on which his performance was to be assessed did not involve the performance of any clinical duties. As the performance agreement did not require him to perform these functions, there existed no basis for him to be paid or to claim the OSD benefits. In argument before us counsel for the appellant was constrained to concede that there was no legal basis for the appellant to be paid the OSD benefits. For the reasons that I have set out, that concession was correctly made.

[17] However, having made that concession, counsel changed his line of argument. He submitted that the Department's failure to consult with the appellant before terminating the OSD benefits constituted an unfair labour practice. He

argued that, even if contractually the appellant was not entitled to the OSD benefits, he had a right to be heard by the Department before it took a decision to withdraw those benefits and that its failure to afford that opportunity rendered the decision procedurally unfair.[2]

[18] I have two difficulties with counsel's submission. First, the case based on breach of a duty to consult is not made out in the papers. Counsel was unable to refer us to any passage in the appellant's papers in which such a cause of action is pleaded or from which it could be inferred.[3] The affidavits in motion proceedings must contain the factual averments that are necessary to support the cause of action on which the relief that is being sought is based.[4] Counsel referred us to paragraphs 11 and 14 of the appellant's founding affidavit, which he submitted contain the necessary factual averments to support this cause of action. However, on a proper reading of the relevant paragraphs, they do not. In paragraph 11 the appellant contends that in terms of the performance agreement (which was annexed thereto) he was 'contractually entitled to be remunerated in terms of the OSD dispensation' and that 'the conduct of the [Department's] officials in seeking to deprive [him] of [that] right unilaterally [was] patently unfair'. What the appellant seeks to establish in this paragraph is that substantively, the Department had no valid reason to deprive him of the right to be remunerated in terms of the OSD dispensation, not that the Department had` failed to afford him an opportunity to be heard before it took a decision to withdraw the OSD benefits.

[19] In paragraph 14 the appellant contends that the Department's decision to exclude from his remuneration the OSD benefits constituted a deprivation of his professional status contrary to the provision of reg 10(3) of the General

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2 Procedural fairness is listed as one of the grounds of review in the Promotion of Administration Justice Act 3 of 2000 (the PAJA) and s 6(2)*(c)* permits a court to review administrative action on the ground that the action was procedurally unfair. But in attacking the unfairness of the Department's decision to terminate the OSD benefits, the appellant did not rely on s 6(2)*(c)* of the PAJA.

3 See *Radebe & others v Eastern Transvaal Development Board* [1988] ZASCA 8; 1988 (2) SA 785 (A) at 793C-E.

4 *Transnet Ltd v Rubenstein* [2005] ZASCA 60; 2006 (1) SA 591 (SCA) para 28.

Regulations[5] made under the Defence Act. This regulation provides that no officer shall without his own consent be reclassified where such reclassification will deprive him of his professional status. These allegations do not support the contention that the Department's decision to withdraw the OSD benefits was procedurally unfair and thus constituted an unfair labour practice.

[20] Secondly, in a memorandum dated 8 November 2012 the Chief Director: Human Resource Management, in seeking approval for the withdrawal of the appellant's OSD benefits and recovery from him of the amount by which he was overpaid, explained that the payment to the appellant of the OSD benefits was a mistake. He fully explained how that mistake came about. The additional remuneration received by the appellant as result of erroneous classification of his rank therefore constituted wrongly granted remuneration.[6] Where public funds are involved, unauthorised remuneration means that it has been made without a lawful basis and must be recovered. The Department was thus duty-bound to recover it from him once the mistake was detected. The claim based on the case for the right to be heard must therefore fail.

[21] As mentioned, in the light of my conclusion on the merits, the procedural issues fall away. It is therefore not necessary to consider the status of the grievance procedure and whether or not it gives effect to the right to fair labour practices found in s 23 of the Constitution.

[22] With regard to costs, each side was represented by two counsel. In my view, the matter did not warrant the employment of two counsel and for that reason, costs awarded will be limited to those of one counsel.

[23] In the result the following order is made:

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5 General Regulations for the SA Defence Force and the Reserve, GN R2213, *GG* 3327, 10 December 1971.
6 Section 38 of the Public Services Act of 1994.

The appeal is dismissed with costs.

**D H Zondi**
**Judge of Appeal**

Appearances

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|---|---|
| For the Appellant: | R G Beaton SC (with him C Prinsloo) |
| | Instructed by: |
| | Van Schalkwyk Attorneys, Pretoria |
| | c/o Honey Attorneys, Bloemfontein |
| For the Respondent: | Z Z Matebese (with him M Gwala) |
| | Instructed by: |
| | The State Attorney, Pretoria |
| | The State Attorney, Bloemfontein |