**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **YES** |
| **Of Interest to other Judges:** | **YES** |
| **Circulate to Magistrates:** | **NO** |

Case number: 1234/2017

In the matter between:

**MAJOR PETER ERASMUS** First Applicant
[Persol number: **[9...]**]

**MAJOR SARAH REGINA MLAMBO** Second Applicant
[Persol number: **[9...]**]

and

**THE MINISTER OF DEFENCE** First Respondent

**CHIEF OF THE SOUTH AFRICAN AIR FORCE** Second Respondent

**ACTING CHIEF HUMAN RELATIONS:**
**AIR FORCE** Third Respondent

**COLONEL MP KHOASE – OFFICER**
**COMMANDING, AFB BLOEMSPRUIT** Fourth Respondent

**LIEUTENANT COLONEL THABO MOTAUNG** Fifth Respondent

**LIEUTENANT COLONEL R BUYS** Sixth Respondent

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**HEARD ON:** 22 JUNE 2017

**JUDGMENT BY:** DAFFUE, J

**DELIVERED ON:** 24 AUGUST 2017

## I. INTRODUCTION:

[1] Two members of the South African Air Force ("Air Force") with the rank of major on the one hand and the Minister of Defence and senior officers on the other are at loggerheads. The relief sought is uncommon and to my knowledge unheard of in the civil courts. It is therefore no surprise that the parties' legal representatives could not refer the court to appropriate authorities.

## II. THE PARTIES:

[2] First applicant is Peter Erasmus, a major male person and member of the Air Force, a branch of the South African National Defence Force ("SANDF"), with the rank of major. He is resident in the Bob Rogers Park, Bloemspruit, Free State Province.

[3] Second applicant is Sarah Reginah Mlambo, a major female person and member of the Air Force with the rank of major. She is also resident in Bob Rogers Park, Bloemspruit, Free State Province.

[4] First respondent is the Minister of Defence of the SANDF.

[5] Second respondent is the Chief of the Air Force, cited in his capacity as the responsible functionary in terms of s 4A(c) of the Defence Act, 42 of 2002, ("the Defence Act").

[6] Third respondent is the Acting Chief Human Relations: Air Force, Col Mama.

[7] Fourth respondent is Colonel MP Khoase, the Officer Commanding of the Air Force Base, Bloemspruit.

[8] Fifth respondent is Lieutenant Colonel Thabo Motaung, Officer Commanding, 506 Squadron, Bloemspruit Air Force Base ("AFB"), Bloemfontein.

[9] Sixth respondent is Lieutenant Colonel R Buys, the second Officer Commanding, AFB Bloemspruit.

[10] Applicants were represented by Adv PR Cronje, duly instructed by Fixane Attorneys, whilst respondents were represented by Advv PJJ Zietsman and Naidoo, duly instructed by the State Attorney, Bloemfontein.

## III. THE RELIEF SOUGHT AND OBTAINED THUS FAR

[11] On 10 March 2017 applicants approached the court for urgent *interim* relief pending the return date of the *rule nisi* issued. Jordaan ADJP granted the following orders which I quote *verbatim* (the first four paragraphs pertaining to condonation and service of process are not repeated):

"5. A *rule nisi* is issued wherein the respondents are called upon to show cause, if any, on **20 APRIL 2017** why the relief in paragraph 6.1 to 6.6 should not be made final.

6. The fourth respondent is:

6.1 Ordered to reconnect the water and electricity supply to **No. 4 Alouette Avenue, Bob Rogers Park, Bloemspruit, and Unit 11B, Viscount Avenue, Bob Rogers Park, Bloemspruit, Bloemfontein** within 1 (one) hour after receiving notice of the order.

6.2 Ordered to remove the photographs of the first and second applicants from the entrance gate to the Air Force Base within 1 (one) hour after receiving notice of the order.

6.3 Interdicted from restricting the access of the applicants to the Bloemspruit Air Force Base.

6.4 Ordered to ensure that the applicants' names appear on the row-call book not stating their status as AWOL and to ensure that they receive their salaries.

6.5 Interdicted from displaying or taking any action which impedes the applicant's rights to fair labour practices pending the finalisation of the process which were commenced regarding the instructions to report at other bases.

6.6 The fourth respondent is to pay the costs of the application unless any other respondent opposes the application, in which event the respondent/s so opposing shall pay the costs of the application and the second respondent shall pay jointly and severally with the fourth respondent.

7. Pending the return date stated above, the relief set out in paragraph 6.1 serves as interim relief with immediate effect."

## IV. ISSUES NOT IN DISPUTE, ALTERNATIVELY PROBABLY CORRECT

[12] Respondents conceded in their answering affidavits that applicants should have obtained the relief contained in paragraph 6.1 read with paragraph 7 *supra* and that a final order in that regard may be granted.

[13] It is also not in dispute that photographs of applicants were placed at the entrance gate of the AFB, Bloemspruit and that their access to the base was restricted. Respondents deny that any rights of applicants have been infringed in the process and state that it was necessary to post the pictures to assist the guards to prevent applicants from entering the base.

[14] Both applicants received written transfer instructions, issued in December 2016, in terms whereof they had to report for duty at Bredasdorp and Pretoria respectively.

[15] Individual Grievances Regulations have been promulgated in the Government Gazette of 14 October 2016 in terms of the Defence Act. Applicants did not follow the applicable grievance procedure.

[16] The Air Force has adopted a Career Management Policy. It *inter alia* provides that members shall not serve longer than four years in a post on the establishment of the Air Force or at a Division. First applicant has been stationed at the AFB, Bloemspruit since 2009 and in 2013 a process was started to discuss his possible geographical transfer. In 2014 first applicant expressed concerns about a possible transfer, but on 21 September 2016 he was informed that his transfer to Bredasdorp will be recommended. During an Officers Succession Planning Board meeting of 14 November 2016 it was agreed that he be transferred and consequently, a signal was issued on 19 December 2016. When first applicant complained, (not in accordance with the grievance procedure) the matter was elevated to several senior officers and Brigadier General More, the Director: Operational Support and Intelligence Systems remarked that first applicant had to report at his new post.

[17] Second applicant was appointed as officer at AFB, Bloemspruit in 2009. No succession planning took place in 2015 and she was allowed to remain at the base; thereby she became stagnant concerning her career. In September 2016 she was notified of the intention to move her to Pretoria, although no formal career planning session was held with her. She expressed her

unhappiness and the matter was elevated to higher authority. Several senior officers considered the issue, but eventually Brigadier General Malakoane stated that "Comments noted but instructions comes (sic) from Higher Authority. Situation beyond DSS's control." It must also be noted that second applicant's post was allocated to DSS, Air Command, Pretoria according to respondents and therefore, she was merely carried against the same post of DSS, Air Command, but utilised at AFB, Bloemspruit. Second applicant could not really deny this version in reply.

## V. THE ISSUES

[18] First applicant is dissatisfied with the instructions contained in a transfer document, referred to as a signal, dated 19 December 2016 in terms whereof he was transferred to the AFB, Bredasdorp, this being a lateral and geographical transfer without any promotion.

[19] Second applicant is dissatisfied with her transfer instructions received by way of signal dated 4 January 2017 in terms whereof she was transferred to Pretoria.

[20] In terms of the signals both applicants' transfers had to take place on 1 March 2017. They failed to adhere to the instructions and are still residents in Bloemfontein at the residential premises

mentioned *supra.* As mentioned, they approached the court on an urgent basis and obtained *interim* relief on 10 March 2017.

[21] Both applicants entered into correspondence with senior officers wherein they aired their dissatisfaction with their transfers. I shall deal with this in more detail *infra* when the evidence is evaluated.

[22] It is applicants' case that transfer instructions were issued without considering their personal circumstances. Although they have not cleared out at the AFB, Bloemspruit, they are not allowed access to the base to *inter alia* report for duty. Roll-call (not "row-call" as stated in the application papers) is kept and their non-attendance may lead to them being recorded as AWOL (absent without leave) and the eventual non-payment of their salaries.

[23] It is respondents' case that applicants are part of a structured military environment where discipline and hierarchy are essential aspects; therefore applicants cannot flout lawful instructions pertaining to their transfers and they have no authority to be at the AFB, Bloemspruit anymore. As from the 1st of March 2017 they are not regarded as part of the personnel of this base, and consequently, their presence at the AFB, Bloemspruit would be unlawful and equivalent to trespassing. Therefore, the interdictory relief sought is contrary to the Defence Act, the Air Force's Career Management Policy and the Military Disciplinary Code.

[24] Respondents rely on a circular by the GOC Air Command: Major General Mbambo dated 20 February 2014 pertaining to the growing tendency of members to refuse transfers and report to their new posts. Members' attention was drawn to s 50(5)(b) of the Defence Act and that refusal to accept transfers and to report at their new posts is a contravention of the Defence Act. Members were finally warned as follows: "Any member affected by the transfer must still report to his/her new unit whilst the process to address his/her grievance takes its course."

## VI. LEGAL PRINCIPLES

[25] Section 2 of the Labour Relations Act, 66 of 1995 ("the LRA") provides that the LRA does not apply to members of the SANDF.

[26] The Defence Act, 44 of 1957, ("the Old Act") has been repealed by the Defence Act of 2002 ("the Defence Act") with the exception of Chapter XI thereof pertaining to the Military Disciplinary Code and military courts as well as the First Schedule thereto. The jurisdiction of military courts in respect of offences under the Military Disciplinary Code by a person to whom the Code applies is confirmed in s 108 of the Old Act.

[27] The Defence Act defines "conditions of service" in s 1 thereof to include conditions relating to "(d) salaries, allowances and service

benefits, …. (f) working environment and facilities, …..(j) transfers, … (m) grievance and grievance procedures, …. (s) accommodation and (t) any other matter pertaining to conditions of service."

[28] Section 61 of the Defence Act deals with the procedures for redress of grievances. A grievance by any person to whom the Act applies and is aggrieved by any act or omission of any other person to whom the Act applies may lodge his/her grievance in writing in accordance with the procedures to be prescribed by the Minister of Defence. These procedures must specify the expeditious processing of grievances and the chain of command through which individuals and groups within the Department may address individual and collective grievances. Although the word "may" is used in s 61(1), the provision is in essence peremptory.

[29] Individual Grievances Regulations ("the Regulations") have been promulgated in Government Gazette 40347 dated 14 October 2016. It is apparent from the wording of the regulations that a grievance must be lodged (see regulation 6) and this can only relate to a written grievance. I am satisfied that a member of the SANDF aggrieved by any aspect pertaining to his/her conditions of service – transfer included - is bound to utilise the promulgated grievance procedure.

[30] Regulation 17 of the Regulations reads as follows:

"Exhaustion of internal remedies. A member or employee may only seek an external remedy to address a grievance once he/she has exhausted all his or her internal remedies in the Department, or if the Secretary for Defence or the Chief for the Defence Force has failed to act within the 10 working days, contemplated in regulation 5 (e)."

[31] Respondents did not rely on the provisions of the Military Ombud Act, 4 of 2012 and counsel did not make any submissions in this regard. In my view this Act is another stumbling block that applicants need to overcome to be successful. An Office of the Military Ombud was established in terms of this Act, the object of which office is to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner as set out in s 3 thereof. The Mandate of Office of the Military Ombud is set out in s 4 of the Act, *i.e.* to investigate complaints lodged in writing by *inter alia* "(a) a member regarding his/her conditions of service". In terms of s 4(2) the phrase "conditions of service" bears the same meaning as assigned to it under s 1 of the Defence Act referred to *supra*.

[32] The Military Ombud has the powers and functions to investigate complaints lodged with that office in accordance with s 6 of the Act and such complaints must be investigated fairly and expeditiously, without fear, favour or prejudice.

[33] Section 200 (1) of the Constitution stipulates that the "Defence Force must be structured and managed as a disciplined military force". Subsection 200 (2) of the Constitution stipulates the following: "The primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."

[34] It is trite that the military service in this country as in other countries is of a unique nature. The SANDF functions within a unique command structure and strict obedience to lawful orders and professional respect for those in command is required within such structure. Kriegler J criticised the court *a quo's* failure to recognise the realities of military service, military life and military discipline in para [31] of *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence 2001 (11) BCLR 1137 (CC) ("Potsane").* As he said,

"Soldiers live and work in a subculture of their own. This is recognised and accepted by acknowledging the constitutional validity of a separate military justice system with its own unique rules, offences and punishments. … Although the overarching power of the Constitution prevails and although the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features. For instance, what would be acceptable in another employment relationship is not only impermissible for a soldier but may be visited by punishment as severe as deprivation of liberty for several years."

[35] At para [39] of *Potsane* the learned judge continued as follows:

"Modern soldiers in a democracy, those contemplated by Chapter 11 of the Constitution, are not mindless automatons. Ideally they are to be thinking men and women imbued with the values of the Constitution; and they are to be disciplined. Such discipline is built on reciprocal trust between the leader and the led. The commander needs to know and trust the ability and willingness of the troops to obey. They in turn should have confidence in the judgment and integrity of the commander to give wise orders. This willingness to obey orders and the concomitant trust in such orders are essential to effective discipline. At the same time discipline aims to develop reciprocal trust horizontally, between comrades. Soldiers are taught and trained to think collectively and act jointly, the cohesive force being military discipline built on trust, obedience, loyalty, *esprit de corps* and camaraderie. Discipline requires that breaches be nipped in the bud — demonstrably, appropriately and fairly."

[36] Finally, the learned judge in dealing with the separate military justice system found that the basis of differentiation between members of the SANDF and other people can have no adverse effect on the human dignity of such members.

[37] Having dealt with the *dicta* of Kriegler J, speaking for a unanimous court, one should always take cognisance of the fact that members of the SANDF "remain part of our society, with obligations and rights of citizenship." Refer to the judgment of O'Regan J in *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para [12], quoted with approval by Kriegler J in *Potsane* at para [36].

[38] Mr Cronje anticipated that it might be argued that applicants failed to exhaust their internal remedies and therefore relied on the judgment of *Koabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae) 2009 (12) BCLR 1192 (CC),* in particular the *dicta* at paragraphs 44 and 48. The Constitutional Court emphasized that where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy is an effective one. It will only be effective if it is objectively implemented. The internal remedy must be readily available and possible to pursue without any obstruction. Koabe dealt with a review application which is not the case in *casu*. Applicants merely seek *interim* relief in order for them to try and persuade the authorities not to transfer them.

## VII. EVALUATION OF THE EVIDENCE AND SUBMISSIONS OF COUNSEL

[39] I am satisfied that applicants' constitutional right to have access to water as contained in s 27 of the Constitution has been infringed. Clearly, an act of spoliation has been committed. It is deplorable that an individual such as the Officer Commanding of AFB, Bloemspruit acted in the manner admitted by instructing that applicants' electricity and water supply to their homes be disconnected. Respondents do not oppose the relief sought and obtained in paragraph 6.1 of the rule *nisi*. They concede that

applicants are entitled to a final order in this regard. It is common cause that the water and electricity supply was reconnected soon after the *interim* order was granted.

[40] Although the relief sought in respect of paragraphs 6.2, 6.3 and 6.4 of the court order of 10 March 2017 might be regarded as final relief, I accept for purposes hereof that applicants seek *interim* relief pending the outcome of their queries to higher authority in the Air Force as suggested in paragraph 6.5 of the order. Applicants jumped the gun in respect of the possible withholding of their salaries. It is not in dispute that their salaries have been paid to them notwithstanding their refusal to be transferred and there was also no threat that payment of their salaries might be stopped.

[41] I have no reason not to accept the documentation before me and respondents' version in particular pertaining to the processes followed and the outcome of the correspondence initiated by applicants. The transfers have been considered in terms of the military hierarchy and I am satisfied that there was substantial compliance with the applicable policy. However, as mentioned *infra,* the dispute is really one to be dealt with by the military in the first instance.

[42] The applicants do not attack the validity or lawfulness of the signals (instructions) issued for their geographical transfers in their

founding papers although they tried to make out such a case in reply. Second applicant merely mentioned in her founding affidavit that no proper career planning was undertaken pertaining herself and that the Air Force did not comply with its own instructions. Applicants have not taken the decisions to transfer them on review and this court cannot review and set aside such decisions notwithstanding applicants' complaints. We are not in possession of the reasons of the person or body that made the decisions to transfer, obviously insofar as applicants did not file a review application, requesting the functionary to present reasons. It is common cause that applicants refuse to obey the instructions and now seek leave from the court by way of interdictory relief to remain in Bloemfontein pending their further requests to senior officers to reconsider the transfers. According to respondents valid transfer instructions were issued, but contrary thereto applicants failed to follow the correct procedure and chain of command in lodging grievances. It is not in dispute that the grievance procedure was not followed.

[43] The unique nature of the SANDF contemplates the existence of a Military Disciplinary Code and members' entitlement to utilise a particular grievance procedure, but more importantly, to rely on the Military Ombud to investigate their complaints fairly and expeditiously, without fear, favour or prejudice. The SANDF cannot fulfil its constitutional mandate and obligations without the requisite capacity, competence, discipline and professionalism. Civil courts should not be allowed to interfere with the processes of

the military, save in exceptional circumstances and only when there is clear proof of a breach of a member's constitutional rights.

[44] Mr Cronje's reliance on *Koabe supra* as authority for not having to exhaust internal remedies does not hold water. In *Koabe* the court dealt with a review application which is not the case in *casu*. This court was not requested to review and rescind any of the decisions that preceded the transfer instructions. Applicants merely seek temporary relief in order for them to try and persuade the authorities not to transfer them. The requisites for *interim* interdicts must be considered and as indicated *infra* an aspect relevant thereto is whether applicants have another satisfactory remedy available to them.

[45] I referred to several *dicta* of Kriegler J in *Potsane supra.* In my view people who voluntary join the SANDF in the knowledge that it is a disciplined force with its own disciplinary rules and particular requirements should not cry foul every time they believe they have been treated unfairly.

[46] As mentioned, applicants seek *interim* relief, save for the relief contained in paragraph 6.1 of the court order granted on 10 March 2017 which is final in nature. Applicants' entitlement to such an order has been conceded. I accept that they only need to prove a *prima facie* right, even open to doubt, a well-grounded apprehension of irreparable harm if the *interim* relief is not granted

and ultimate relief is eventually granted, that the balance of convenience favours them and that they do not have any other satisfactory remedy. In any event, in exercising its discretion a court is entitled to dismiss an application for an *interim* interdict even if all four these requirements have been proven.

[47] In my view the applicants' complaints fall within the purview of the investigations to be conducted by the Military Ombud. They failed to refer their complaints to the Office of the Military Ombud, but instead require a civil court to deal with aspects that should be dealt with by the military. It appears from the letter of first applicant as if he intended his written complaint dated 27 February 2017 to be sent to the Military Ombud for action, but there is no proof that the complaint reached the Ombud's office, and if so, what transpired in that regard.

[48] Bearing in mind the authorities referred to, I am satisfied that civil courts should not interfere in military matters, save in exceptional circumstances and only when it is clear that a transgression of any of the rights contained in the Bill of Rights has occurred. It is possible that if relief is granted, the floodgates might be opened and each and every disgruntled soldier may in future elect to run off to our civil courts in order to obtain relief from what they regard as oppressive or unfair conduct by superiors. This may lead to preposterous results and an infringement of military discipline and the concomitant command structure of the military. Soldiers may later on be complaining about having to sleep in sleeping bags in

the veld during cold, frosty Free State nights, or lack of sufficient food rations during military operations, or lack of sleep due to training requirements, to mention a few examples.

[49] I am satisfied that applicants have not shown a *prima facie* right to stay on in Bloemfontein as part of the personnel establishment of the AFB, Bloemspruit. They should not be seen to subvert the transfer instructions and this court cannot authorise them to disobey valid transfer orders. Soldiers cannot dictate to the SANDF how and when they will comply with lawful instructions. They cannot be allowed to hold the SANDF at ransom by relying on personal circumstances and inconvenience in the absence of a review application. Such orders, whether unfair or not, remain valid until reviewed and set aside. No such application has to be adjudicated at this stage of the proceedings. In any event, they failed to follow the appropriate grievance procedure, but more importantly, they did not even approach the Military Ombud for a speedy resolution of their disputes. It is their intention as is evident from paragraph 6.5 of the interim order of 10 March 2017 to approach higher authority in the Air Force again in the hope that the transfers might be cancelled. Clearly, these senior officers have already made up their minds and concluded that applicants should obey the transfer instructions. Applicants want to embark on an exercise in futility and are merely buying time to remain in Bloemfontein. This cannot be countenanced.

[50] Applicants, and first applicant in particular, may be inconvenienced, but I am not prepared to find that they have shown

a well-grounded apprehension of irreparable harm if the *interim* relief is not granted and the ultimate relief is eventually granted. Their relocation costs are being paid by the SANDF. As is apparent from the circular of 20 February 2014 referred to *supra,* applicants should have reported for duty at their new units pending finalisation of their grievances.

[51] The balance of convenience does not favour applicants. They live and work in a disciplined, structured military system and their own convenience cannot out-rank that of the SANDF. In any event, if they adhered to the transfer instructions, took up their positions in Bredasdorp and Pretoria respectively and eventually succeed in setting aside the decisions to transfer them, the SANDF will have to pay for their costs to move back to Bloemfontein and to arrange appropriate accommodation.

[52] Applicants do have other reasonable satisfactory remedies as pointed out *supra* and consequently, they also failed to prove the fourth requirement for *interim* interdicts. As mentioned, and save for exceptional cases where the Bill of Rights have been transgressed, the civil courts should not deal with disputes amongst the military, as this will most certainly have a negative effect on the military hierarchy and military discipline.

## VIII. CONCLUSION

[53] In conclusion, I find that the rule *nisi* should be discharged and the

application be dismissed, save in respect of paragraph 6.1 of the order of 10 March 2017, which *interim* order shall be made final as conceded by respondents. Fourth respondent acted in an inhumane manner towards applicants and their families by instructing the disconnection of water and electricity supply to their homes without due legal process. The object was, no doubt, to pressurise the applicants to vacate their homes. He should have known better. If it was necessary to discipline the applicants, appropriate steps should have been taken instead of arrogantly taking the law into his hands. Consequently he should be ordered to pay such costs ordered herein jointly and severally with first respondent.

[54] Applicants are partially successful only. They should not have proceeded with the application in the circumstances. The respondents conceded in their answering affidavit that the water and electricity supply should never have been disconnected and they undertook not to disconnect supply without due process. In exercising my discretion I am satisfied that applicants should be entitled to their costs until receipt and consideration of the answering affidavit only.

[55] Respondents are successful in respect of the remainder of the relief. There is no reason why the applicants shall not be held responsible for payment of respondents' costs from filing of the replying affidavits.

## IX. ORDERS

[56] Therefore the following orders are made.

1. Paragraph 6.1 of the *rule nisi* issued on 10 March 2017 is made final.
2. Save for the order granted in paragraph 1 *supra*, the rule *nisi* is discharged and applicants' application is dismissed.
3. First and fourth respondents shall pay applicants' costs of the application until receipt and consideration of the respondents' answering affidavit, such costs to be paid jointly and severally, the one to pay the other to be absolved.
4. Save for the order in paragraph 3 *supra,* applicants shall pay respondents' costs of opposition of the application since filing of the replying affidavits, jointly and severally, the one to pay, the other to be absolved.

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**JP DAFFUE, J**

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| On behalf of applicants: | Adv PR Cronje |
| Instructed by: | Fixane Attorneys |
| | Bloemfontein |

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| On behalf of respondents: | Advv PJJ Zietsman & Naidoo |
| Instructed by: | State Attorney |
| | Bloemfontein |