**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 25 November 2024

SIGNATURE: [redacted]

**CASE NO: A96/2024**

**In the matter between:**

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| **GALLANT, BENITA NOLA** | **APPELLANT** |
| **And** | |
| **THE MINISTER OF DEFENCE AND MILITARY VETERANS** | **FIRST RESPONDENT** |
| **THE SECRETARY FOR DEFENCE** | **SECOND RESPONDENT** |
| **THE CHIEF OF SOUTH AFRICAN NATIONAL DEFENCE FORCE** | **THIRD RESPONDENT** |
| **THE CHIEF FOR SOUTH AFRICAN NAVY** | **FOURTH RESPONDENT** |

**THE CHIEF HUMAN RESOURCES** **FIFTH RESPONDENT**

**ADJUDANT GENERAL: DEFENCE LEGAL SERVICE DIVISION** **SIXTH RESPONDENT**

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*Coram:* Mnqibisa-Thusi J *et* Collis & Millar JJ

*Heard on:* 16 October 2024

*Delivered:* 25 November 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 08H30 on 25 November 2024.

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**ORDER**

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**It is Ordered**:

[1] The appeal is dismissed with costs.

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**JUDGMENT**

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**MILLAR J (MNQIBISA-THUSI *et* COLLIS JJ CONCURRING)**

[1] The appellant was a military law officer[1] who brought an application against the respondents (for convenience referred to collectively as the SANDF) for declaratory orders relating *inter alia* to an offer and acceptance of further

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[1] Appointed and assigned as a defence counsel in terms of section 14(3)(a) of The Military Discipline Supplementary Measures Act No. 16 of 1999.

employment. The application was refused[2] by the High Court. Leave to appeal to this court is with the leave of the court *a quo*.[3]

## BACKGROUND

[2] On 27 November 2017 the appellant, who was at that time employed on a fixed term Core Service System (CSS) Contract by the SANDF received a letter which purported to confirm the expiry of her existing contract on 30 June 2018 and to be an offer in respect of a new CSS contract for a period of 10 years. The 10 year contract would commence on 1 July 2018 and expire on 30 June 2028.

[3] On the same day that the letter was received, the appellant purported to accept the offer contained in it. This set in motion a series of events which led ultimately to the institution of proceedings by her for the following declaratory orders:

> *"1. An order that the Applicant's 10(ten) year CSS Contract which was offered and accepted by the Applicant on 29 November 2017, be implemented and captured on the system with effective date from 1 July 2018;*
>
> *2. An order that the Respondents pay to the Applicant all the benefits, allowances and benefits associated with the position she became entitled to in terms of the 10(ten) year CSS Contract with effective date as from 1 July 2018.*
>
> *3. A declaratory order that the Department of Defence (Defence Legal Service Division) acted unlawfully by deciding on 30 May 2018 to implement the decision taken by the Defence Legal Service Contract Renewal Board on 28 February 2018 not to renew the Applicant's employment contract with the Department of Defence Core Service System."*

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2 On 24 November 2023.
3 Leave to appeal was granted on 13 February 2024.

[4] The case that was argued on appeal had, besides the relief originally claimed, two further alternative claims. The first was that even if it was found that no offer had been made to the appellant, the SANDF was bound to give effect to the offer as its making (and acceptance) was an administrative act on the part of the SANDF which had to be given effect to until set aside. The second was that even if no contract came into existence, the extant contract was not terminated in terms of the SANDF policy and that in consequence it renewed automatically.

[5] Before dealing with the issues on appeal, it is necessary to set out the chronological background. While this is not in dispute between the parties, it provides the context for the issues in this appeal. I intend to draw from the Court *a quo's* summation[4].

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

[7] During 2012, the appellant applied for appointment in the regular force as a result of an advertisement for such post. She was accepted and signed a 5 year contract of employment with the Department of Defence on 18 June 2013 in terms of section 52(1) of the Defence Act.[5] She was assigned as a Defence Counsel or Military Law Practitioner and assigned to the South African Navy.

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

[8.1] That she was declared medically fit for her post and utilization; and

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[4] Paragraphs [6] to [16] are paraphrased from the judgement of the court a quo dated 24 November 2023 and are reflected in that judgement as paragraphs [3] to [13]. Additionally, paragraphs [20] to [23] are also paraphrased from the same judgment and are reflected therein as paragraphs [14] to [17].

[5] 42 of 2003.

[8.2] That she successfully completed a basic military course and/or formative officer's course.

[9] She was assigned to the Navy and therefore had to attend both a basic military course and the formative officer's course in the naval core. The appellant denied that the courses referred to in her letter of appointment were naval courses. The appointment letter did not indicate that she must complete the naval courses but it is a matter of common sense that the courses were in the branch of service[6] to which she had been appointed – the Navy.

[10] The appellant was refused attendance at the required naval courses due to her medical condition. Application was made by her for an inter-branch transfer to the Army during 2013. The transfer was premised on her being unable to meet the physical medical classification of G1K1 as required for officer training in the Navy. The appellant was classified as G2K1 which meant that she did not meet the physical requirements to even attend the naval officer training.

[11] The appellant requested that the basic army courses she had completed during 2008 and 2009 be accredited as naval courses, but this request was declined. These courses were attended to during 2008 and 2009 when she joined the Reserve Force and was in the Army.

[12] The appellant was nominated and accepted to attend a Selection Board for the purposes of determining whether she qualified to be enrolled at the naval college for formative officer's training. This was within a year of her five (5) year appointment in 2013. She attended such Board but was not recommended to attend the officer's training due to the fact that she was found medically unfit to attend the course. It is not in dispute that the Navy Formative Officers' Course is more rigorous than the equivalent courses for the other branches of service and in particular that for the Army.

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[6] The SA National Defence Force comprises of the Army, Air Force, Navy and Medical Services.

[13] The appellant's request for an inter-service transfer was declined in January 2014 and it was further decided that she was to remain in the navy and had to comply with the conditions of her appointment.

[14] It was not in issue between the parties that the primary reason advanced for the Army's decision to refuse to approve her transfer was that military law officers in the Army were over supplied whilst a need existed for Naval military officers. This was a matter of the operational requirements of the respective services.

[15] The appellant was nominated on 14 December 2016 to attend a naval formative course but was not accepted on the course due to her medical condition. However, she attended an Army course from 15 January 2017 to 15 June 2017 which she successfully completed. This was done without the knowledge or approval of the Navy.

[16] On 21 November 2017 the Director: Legal Services Support, addressed a letter to the appellant and informed her that her contract would expire on 30 June 2018. She was advised to apply for a renewal or give notice that she did not intend to do so. The appellant was further informed that an application for renewal would be presented to the Personnel Utilization Committee for consideration which would make a recommendation to the Chief of the Navy.

**WAS A CONTRACT CONCLUDED ON 29 NOVEMBER 2017?**

[17] I intend to deal firstly with whether or not a contract was concluded on 29 November 2017 and thereafter, with the two alternative claims.

[18] The letter containing the offer was in the following terms:

1. *"You are aware that your current employment contract with the Department of Defence lapses on 30 June 2018.*

2. *In order to consider your further employment in the DOD a contract selection Board was held on 02 October 2017. It was decided at the*

*board to offer you a subsequent contract in the CSS for the period of ten (10) years with effect from 01 July 2018 in your present mustering and with the salary and military/functional rank as on the day of your current CSS contract.*

3. *Your contract in the CSS will be subject to the following:*

   a. *That you are medically fit for your mustering/post/utilisation on reporting for duty,*

   b. *That you successfully complete all the prescribed military and functional courses in accordance with your corps/mustering within your contract period.*

   c. *That you remain medically fit for service in your specific mustering/post/ utilisation for the duration of your contract period;*

   d. *That you accept the SANDF transfer and deployment policy, with the understanding that you may be transferred at any time in the interest of the SANDF to any place in the SANDF to any place of the world.*

4. *Should you decide not to accept the offer of this new contract you are to please state such intention in writing to the Fleet Internal Appointments section (Room 185)."*

[19] It is clear from the terms of the letter that the offer was conveyed to the appellant on the day the letter was authored. Attached to the letter was a copy of a CSS Contract, signed by the appellant as offeree. Two persons signed as witnesses, Warrant Officer Mdlalose and another person whose name is unknown. The covering letter was signed by Warrant Officer Engelbrecht. The contract was unsigned on behalf of or by the SANDF as offeror.

[20] The appellant, in an effort to comply with requirement that she attend the prescribed Navy courses as mentioned already sought to have the Army courses she had attended, accredited by the Navy. This was declined and she was notified of this on 18 July 2018. The appellant remained non-compliant

with the conditions of her employment as a naval officer in terms of the initial 5 year contract.

[21] On 10 September 2018 the appellant was informed that her employment contract was expiring on 30 September 2018. It appears that the extant contract was extended from 30 June 2018 to 30 September 2018. She was also informed that the contract renewal board had granted her an extension of her 2013 CSS contract for a further period until 31 December 2019. The extension was also subject to her being declared medically fit for her mastering/utilization and successful completion of the required Navy courses as stipulated in her initial contract.

[22] It was at this point that the appellant indicated that she was not prepared to accept the extension of her existing contract because in her view she had already accepted a ten (10) year contract on 29 November 2017. This was the first time that her career manager, the Adjutant General: Defence Legal Service Division became aware of the existence of the alleged ten (10) year contract.

[23] A board of enquiry into the circumstances under which the 10 year contract had been signed followed. The appellant, in reply, said of this:

> *"During the Board of Inquiry WO1 Engelbrecht was asked whether he had authority to sign the contract to which he answered in the negative. I admit that WO1 Engelbrecht did not have authority to sign the contract. It is however denied that WO1 Engelbrecht ever signed the contract. I signed the contract with two witnesses. WO1 Engelbrecht only signed the covering letter of 29 November 2017, which he was duly authorised to do."*

[24] It is readily apparent that the appellant knew that the contract which she had signed had not been signed on behalf of the SANDF. Warrant Officer Engelbrecht had not signed the contract on behalf of the SANDF.

[25] The appellant, accepting that Warrant Officer Engelbrecht knew he did not have authority to bind the SANDF, nevertheless proceeded both in her

engagement with her career officer and in both the court *a quo* and this court, to argue that the covering letter in its terms constituted a binding offer of employment which she accepted.

[26] The two propositions are irreconcilable and mutually destructive. If Warrant Officer Engelbrecht did not have authority to sign the contract, it follows that the contents of the covering letter which he did sign, could not be construed as a binding offer.[7] The appellant on her own version knew this and accepted this to be so.

[27] Additionally, it is not in issue that the appellant also failed to comply with any of the conditions to which the purported offer in the covering letter had been made subject to. Her argument in this regard was that she had attended Army courses but these were not the specific courses that were to be attended in order for her to fulfil the conditions that the purported offer required. The terms of her existing contract required fulfilment of the conditions attached to it *per specifica.*[8] The appellant was required to attend navy courses and not those offered by other branches of the SANDF.

[28] It is not a matter of substantial compliance insofar as an equivalence between the Navy and Army courses are concerned. The appellant attended and completed the Army courses but was not, due to her G2K1 classification, even accepted to attempt the Navy courses. So even if the covering letter had been a binding offer, (which it was not) the appellant did not comply with the conditions to which it was subject.

[29] On a proper consideration of events, the appellant knew that she would not or could not comply with the condition to which the purported offer had been subject, for the plain reason that her extant 5 year contract had been subject to the same conditions and she had been unable to fulfil them.

[30] The letter of 27 November 2017, did not contain an offer that was capable of being accepted by the appellant and so contractually it was a nullity. However,

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[7] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras [48] – [49].
[8] *Van Diggelen v De Bruin and Another* 1954 (1) SA 188 (SWA) at 192H-193F.

even if it could have been accepted, she had failed to fulfil the conditions that it was subject to.

[31] The fact that the SANDF permitted the non-compliance with or waived conditions in respect of the extant 5 year contract did not mean that it would do so in respect of any subsequent contract. This, however, is the seed from which the appellant would have her alternative claims grow.

**ALTERNATIVE CLAIMS ARGUED DURING THE APPEAL**

[32] Neither of the alternative claims argued on appeal were pleaded in the original notice of motion although both of these were argued before the court *a quo*.

[33] Firstly, were the unauthorised contents of the letter of 27 November 2017, notwithstanding that it was not an offer which was capable of being accepted by the appellant, of such a nature that it constituted for the SANDF an administrative decision to which the SANDF was bound?

[34] It was argued for the appellant that the mere conveyance of the letter to the appellant and her purported acceptance was administrative action and that even though it may have been unauthorised and invalid, it stood and was to be complied with until it was set aside by a court. The argument went further – presumably to counter the failure to plead that the conveyance of the letter was administrative action, that it was incumbent upon the SANDF to apply to have it set aside or otherwise be bound by it.

[35] The appellant relied on *Department of Transport and Others v Tasima (Pty) Ltd* [9] where it was held that :

> *"Our Constitution confers on Courts the role of the arbiter of legality. Therefore, until a Court is appropriately approached and an allegedly*

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[9] 2017 (2) SA 622 (CC) at para [147]. See also *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [26].

*unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence."*

[36] The proposition is trite but not applicable in the present matter. In *Department of Transport and Others v Tasima (Pty) Ltd* the parties had had a binding agreement and sought to extend it. This was in the context of public procurement which is subject to prescribed processes. In issue was whether or not proper process had been followed in coming to the decision to extend the contract and whether the person who had agreed to it was authorized to do so. The facts in the present matter are distinguishable because in the present case, it is not whether a correct process was followed to extend a contract but rather whether a contract had ever come into being in the first place.

[37] The second alternative claim, that the extant 5 year contract had not been terminated because the SANDF had failed to follow due process in doing so, is without merit for the following reasons.

[38] In *Minister of Defence v Xulu*[10] it was held that once an employment contract had been entered into *"...the SANDF's obligation [was] to give effect to the soldier's constitutional and statutory right to fair labour practices. The Policy was designed to give effect to the rights and set out the manner in which the public power was to be exercised."*

[39] It is only once an employment contract has come into existence that the policy and the obligation of the SANDF to act in terms of it becomes operative. Insofar as the letter of 27 November 2017 is concerned, inasmuch as the appellant could not have been "press ganged"[11] into service by the unilateral decision taken on the part of the SANDF, similarly, it could not be bound to an employment contract by the unilateral act of the appellant.

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[10] 2018 (6) SA 460 (SCA) at para [44].

[11] "press gang" – A body of men employed under the command of an officer to press men for service in the army or navy.

[40] It is not in issue that the SANDF followed proper procedure with regards to the extant 5 year contract. The appellant was invited to apply for a renewal of that contract but declined[12] to do so. Her reason for declining is irrelevant. For this reason alone the present case is distinguishable from *Minister of Defence v Xulu*. However, if there was a basis to impugn the process in regard to the first contract, this ought to have been done in terms of The Promotion of Administrative Justice Act.[13]

[41] In summary, firstly, the letter of 27 November 2017 did not constitute an offer that was capable of being accepted. There being no employment relationship created in consequence of that letter, the SANDF was under no obligation to the appellant in respect thereof.

[42] Secondly, since the creation of an employment relationship is a bilateral act, the authoring of the letter alone was not an administrative act to which the SANDF was bound.

[43] Lastly, insofar as the SANDF policies were of application to the appellant's extant 5 year contract, they complied by inviting her to apply for an extension – an invitation which she declined. On this aspect the court *a quo* correctly found that any challenge in this regard ought to have been brought in terms of PAJA, which she had not.

[44] It is for these reasons that I propose the order that I do.

[45] In regard to costs, these will follow the result.

[46] In the circumstances, I propose the following order:

[46.1] The appeal is dismissed with costs.

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[12] Para [22] *supra*.

[13] 3 of 2000. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and* Others 2004 (4) SA 490 (CC) at para [26].

[redacted]

**A MILLAR**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

**I AGREE AND IT IS SO ORDERED**

[redacted]

**MP MNGQIBISA-THUSI**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

**I AGREE**

[redacted]

**C COLLIS**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

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| HEARD ON: | 16 OCTOBER 2024 |
| JUDGMENT DELIVERED ON: | 25 NOVEMBER 2024 |
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| COUNSEL FOR THE APPELLANT: | ADV. GL VAN DER WESTHUIZEN |
| INSTRUCTED BY: | GRIESEL VAN ZANTEN INC |
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