

REPUBLIC OF SOUTH AFRICA

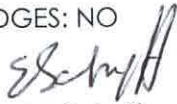


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 21576/22

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 3 May 2022

  
E van der Schyff

In the matter between:

EZAM INDIPILE MAJOKWENI

FIRST APPLICANT

ONALERONA YETI MOKEONA

SECOND APPLICANT

PHIDELIA ZANELE SITHOLE

THIRD APPLICANT

MTHUZI WILSON SHIKWAMBANA

FOURTH APPLICANT

and

MINISTER OF DEFENCE AND MILITARY VETERANS

FIRST RESPONDENT

DEPARTMENT OF SOUTH AFRICAN DEFENCE

SECOND RESPONDENT

CHIEF OF THE SOUTH AFRICAN NATIONAL  
DEFENCE FORCE

THIRD RESPONDENT

SECRETARY OF DEFENCE

FOURTH RESPONDENT

CHIEF OF THE SOUTH AFRICAN AIR FORCE

FIFTH RESPONDENT

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## JUDGMENT

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Van der Schyff J

- [1] The applicants approached the urgent court for relief. They seek an order declaring the decision to terminate their service with the South African National Defence Force unlawful and invalid and to have the decision reviewed and set aside. In addition, they sought to be reinstated with full retrospective effect, with retention of all salaries and benefits. The relief sought by the applicants is opposed by the respondents. The respondents aver that it is important to note that the applicants were withdrawn from the Military Skill Development System training program (the MSDS program) due to medical reasons and by operation of law.
- [2] The application was previously set down in the urgent court on 19 April 2022. The application was removed from the roll, and the applicants re-enrolled the application again. Although the notice of re-enrolment erroneously referred to the matter to be enrolled on Tuesday, 27 April 2022, with Tuesday being 26 April 2022, both parties were in court, and the application was moved. I indicated to counsel that after having read the papers, I was of the view that the issue of urgency if it exists, cannot be decided outside of the context of the case as determined by the facts.

### The facts

- [3] The common cause facts are that the respondents applied in June 2021 to the South African Air Force to enlist as cadets for the 2022 intake in the MSDS program. The MSDS program is a two-year program with an important component called Basic Military Training (BMT). Permanent and temporary commissions are only conferred on selected candidates who must have completed the BMT. The requirements to be selected to participate in the MSDS program are, *inter alia*, that an applicant who holds a Grade 12 qualification must be between 18-22 years, and if an applicant is in possession of a 3-year tertiary qualification, the applicant must be between 22 – 26 years old.



- [4] The applicants underwent psychometrical evaluation tests and medical fitness tests in their respective provinces. As is depicted on the application form, they were informed that if they have not been contacted by 31 December 2021, they should consider their applications unsuccessful. The candidates did not receive any feedback by 31 December 2021 and regarded their applications to be unsuccessful.
- [5] The applicants aver they ingested cannabis either for 'medicinal purposes and/or recreational purposes' at their respective homes during January and February 2022. If one considers that the challenge now faced by the applicants is solely attributable to the detection of cannabis in their blood, it is inexplicable that they did not take the court in their confidence to explain precisely when, where and how much cannabis was consumed, and if for medical reasons what the ailment was for which the drug was used. There are four applicants, and no differentiation is made between the four regarding the use of the drug.
- [6] The applicants were then unexpectedly contacted by the second respondent and informed that they had to report for duty at the Swartkop Air Force Base (Swartkop). The fourth applicant was contacted on 27 February 2022 and had to report at Swartkop to commence with MSDS on 6 March 2022. The second and third applicants were contacted on 3 March 2022 and had to report for duty at Swartkop on 6 March 2022. The first applicant was called on 14 March 2022 and had to report at Swartkop on 15 March 2022.
- [7] On 16 March 2022, the second respondent's Military Police arrived at Swartkop with a canine unit to search for illicit substances. The applicants submit that the search was directed at finding illicit substances like drugs, cannabis, and alcohol. The respondents aver that the instructors at the camp smelled marijuana near the tents occupied by the applicants on 16 March 2022. The canine unit called out two of the selected members of the MSDS program, but after a search was conducted, there was not enough evidence to confirm whether the traces found were traces of illicit substances. On 17 March 2022, all the MSDS cadets were instructed to undergo blood and urine tests for illicit drugs, due to the suspicion of drug use in the camp.

- [8] A private laboratory was approached to test the blood and urine samples. Because of the number of tests that had to be done, the decision was taken to proceed with the training while the testing was done. On 20 March 2022, the applicants were instructed to continue with the BMT training, and they departed to Hoedspruit. On 22 March 2022, the applicants and two other cadets were called to the Health Center to see Dr. Ndlovu. Dr. Ndlovu discussed their test results and indicated that the applicants tested positive for cannabis. The applicants aver that Dr. Ndlovu indicated that they would be sent to Pretoria for further re-evaluation.
- [9] The applicants contend that Colonel Magana informed them on 30 March 2022 that they have withdrawn themselves from MSD training due to medical reasons. They were transported to Pretoria and claim to have been under the impression that they would be re-evaluated in Pretoria. However, they were informed to call their parents to collect them on the way to Pretoria. They were dropped off outside Swartkop Airforce Base.
- [10] The respondents explain that the applicants were required to complete questionnaires wherein they had to disclose any usage of drugs and the reason therefore, as part of the initial selection process. They were accepted into the program. This indicates that no disclosure of drug use, medicinal or otherwise, was made on the questionnaire – because if they did disclose, their applications would have been flagged by the DOD. When they were invited to attend the MSDS program, they received a letter of invitation wherein it is clearly stated that no liquor or drugs are allowed at camp and, if found, may lead to a dismissal. Members selected for the MSDS program would undergo a medical screening again when they arrived at Swartkop. They would again be required to complete a medical questionnaire indicating any drug use and the reasons for such usage. The applicants did not indicate that they take any medication routinely or daily or have had any diseases, illnesses, or serious complaints since their Health Evaluation.
- [11] The respondents contend that Dr. Ndlovu interviewed the applicants and informed them of their results. He further informed them that their medical classification had changed to GT, temporary unfit for employment because they tested positive for cannabis. The standard period for GT is six months. The applicants thereafter read



and signed a notice to withdraw from the MSDS program due to medical reasons. The applicants were not dismissed in terms of labour practices but were withdrawn from the MSDS program due to medical reasons.

- [12] The first, second, and third applicants lodged complaints with the Military Ombud on 31 March 2022. On 5 April 2022, these three applicants approached the same pathology laboratory for a re-evaluation, and their results were negative. On 6 April 2022, these three applicants lodged an appeal with the office of the fifth respondent. Their attorney advised them to also approach the High Court on an urgent basis for reinstatement.
- [13] The applicants claim that the first respondent discharged them for exercising their fundamental right to privacy before commencing training and gaining employment with the DOD. The fifth respondent likewise violated their right to privacy. The applicants' argument that underpins this view is that they were entitled to use cannabis for medicinal or recreational purposes in the privacy of their own homes. They contend that the cannabis detected in their urine and blood samples was present in their systems because they ingested the drug at their respective homes before reporting to Swartkop.
- [14] They also contend that their services were terminated without adherence to the *audi et alteram* principle.
- [15] The applicants elected not to bring this application in terms of Rule 53 and have deprived themselves and the court of the record relating to the decision sought to be reviewed and set aside. The applicants also failed to request that the decision maker provide reasons.

### **Ad urgency**

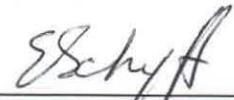
- [16] The respondents deny that this application is urgent. The applicants claim that they will not be able to obtain substantial redress in due course.

- [17] The first to third applicants indicate that they have lodged a claim with the Military Ombud. They all signed a document stating that the complaint lodged with the Ombud does not relate to a matter pending before a military or civilian court. They are aware that they may apply to the High Court for a review against the Military Ombud's decision. The first to third applicants have placed the proverbial cart before the horses by lodging this urgent application. The dispute is being dealt with in another forum. This excludes the application from being dealt with on an urgent basis. Because a review might still follow, and because I am of the view that I am not to deal with the application on an urgent basis, I will transgress if I express my view regarding the applicants' prospects of success.
- [18] As for the fourth applicant, it is evident that an alternative and more appropriate remedy existed, namely to approach the Military Ombud. In light of the doctrine of separation of powers, a court should tread lightly when there is the possibility of intruding into another functionary's domain. The applicant did not make out any case for not exhausting the internal remedies before approaching the High Court for relief.

## Order

**In the result, the following order is granted:**

- 1. The applicants' non-compliance with the forms and service prescribed in the Uniform Rules of Court are not condoned;**
- 2. The application is struck from the roll with costs.**




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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email as a courtesy gesture.

Counsel for the applicants:

A R H Mason

Instructed by:

Mason Attorneys

For the respondents:	Adv. N. Loopoo
Instructed by:	State Attorney
Date of the hearing:	26 April 2022
Date of judgment:	3 May 2022