



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 337/2017

In the matter between:

MINISTER OF DEFENCE

FIRST APPELLANT

CHIEF OF THE SOUTH AFRICAN

NATIONAL DEFENCE FORCE

SECOND APPELLANT

and

BONGANI POSTOLIE XULU

RESPONDENT

Neutral citation: *Minister of Defence v Xulu* (337/2017) [2018] ZASCA
65 (24 May 2018)

Coram: LEWIS, WALLIS, SALDULKER and MOCUMIE JJA and
PILLAY AJA

Heard: 14 May 2018

Delivered: 24 May 2018

Summary: Defence Act 42 of 2002 – soldier enrolled as member of the South African National Defence Force on fixed term contract – contract renewed on three occasions – renewal considered when due to expire but refused – refusal constituting administrative action in terms of Promotion of Administrative Justice Act 3 of 2000 – decision reviewed and set aside – appropriate relief.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay J, Raulinga and Khumalo JJ concurring):

- 1 Special leave to appeal is granted.
- 2 Paragraph 1 of the order of the full court is amended to read:
‘The appeal is upheld with costs, and paragraphs 2 and 5 of the high court’s order are set aside.’
- 3 The appeal is otherwise dismissed with costs.
- 4 The Respondents are ordered jointly and severally to compensate the Applicant for such further losses as he may have incurred as a result of his fixed term contract not having been renewed in 2011, the amount of such losses to be agreed between the parties within 30 days of the date of this order, failing which they are to be determined summarily on the written representations of the parties by an arbiter chosen by them or, in the absence of agreement, appointed by the Chair for the time being of the Pretoria Bar.

JUDGMENT

Wallis JA (Lewis, Saldulker and Mocumie JJA and Pillay AJA concurring)

[1] Until the events giving rise to this appeal the respondent, Mr Xulu, was a soldier. He joined the South African National Defence Force (SANDF) on 29 July 1996, initially for a fixed term of two years. In 1998

his contract was extended until 2000 in which year it was further extended until 2005. The final extension was in 2005 until 31 July 2011. At the end of November 2010 he was informed by the SANDF that it did not intend to renew his 'employment contract' when it expired on 30 June 2011. Notwithstanding his own representations and detailed representations made on his behalf by his attorney, he was informed on 29 April 2011 that his contract would not be renewed.

[2] Mr Xulu challenged the decision not to extend his contract in the Gauteng Division of the High Court, Pretoria. He was unsuccessful at first instance before Lephoko AJ, but succeeded on appeal to the full court (Tolmay J, with Raulinga and Khumalo JJ concurring). It set aside the decision and ordered the SANDF, represented by the first and second appellants, respectively the Minister of Defence (the Minister) and the Chief of the SANDF, to appoint him on a contract for a further six years expiring on 30 June 2017. The application by the Minister and the Chief of the SANDF for special leave to appeal was referred for argument to this court in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

[3] The special circumstances advanced in support of the grant of special leave to appeal were that the SANDF were not represented before the full court when the appeal was argued in the high court and that it needed clarity from this Court on its legal obligations when dealing with the non-renewal of fixed term contracts of members of the Regular Force. As to the first of these, notwithstanding the various excuses advanced in the application the blame for the non-appearance has to be laid at the door of their attorney. Notice of set down had been sent to her office by telefax in November 2015 and one of the judges sitting in the appeal had caused his secretary to telephone her offices on several occasions to enquire why

no heads of argument had been filed. Her claim that her office was unaware of the set down on 1 February 2016 did not hold water.

[4] Ordinarily, in the absence of an explanation for the SANDF not being represented at the appeal hearing, there would have been no good cause for the grant of special leave to appeal to this court. However, it is common cause that there are a number of cases pending, in which the failure by the SANDF to renew fixed term contracts under which various members serve in the Regular Force constitutes the *casus belli*. There is therefore a considerable need for clarity on the proper basis, if any, for such cases. Albeit reluctantly, I am therefore persuaded that the issues raised are of such a character that they should be addressed by this court. Special leave to appeal will therefore be granted.

The facts

[5] The letter informing Mr Xulu that the SANDF did not intend to renew his contract was received at the end of November or early December 2010 and read as follows:

‘EXPIRY OF CORE SERVICE SYSTEM CONTRACT: 96678958 MC RFM BP XULU, SAIC

1. The Department of Defence intends not to renew your employment contract when it expires on 30 June 2011. The following offences were taken into consideration.

a 1XSec 10

b 1XSec 33(b)

2. Department of Defence intends to terminate your current service contract in terms of the provisions of the New Service System, the Defence Act, Act No 42 of 2002 and the General Regulation Chapters III and IV [when it] expires.’(My insertion.)

Mr Xulu was afforded an opportunity to make representations and did so on 10 December 2010 by way of his own submissions and, thereafter, on 18 March 2011, through his attorney. These representations cast light on

the two offences that had been taken into consideration when the original and provisional decision had been taken.

[6] The first offence is described in the Military Discipline Code as ‘mutiny’. That was a pretentious title for a relatively trivial work stoppage arising from the failure by the SANDF to pay transport costs to certain members of the force to their homes away from base. The SANDF’s own records describe it as being absent without leave. Mr Xulu’s role, as a representative of his colleagues, was to convey their refusal to accept a proposal by a senior officer to resolve the dispute. His own participation was limited and the stoppage was short-lived. Mr Xulu was dealt with informally and had R75 deducted from his salary. He was thereafter permitted to complete his basic training. This occurred in 1997, a year after he joined the SANDF, and it did not provide a bar to the extension of his contract in 1998, 2000 or 2006.

[7] The second offence occurred in 2001 when Mr Xulu was to be deployed to Durban from his base in Mthatha. Apparently he was called upon at short notice and unexpectedly to draw his unloaded weapon and place it on board a bus being used to transport members to Durban. He had been off duty at his accommodation outside the base when the order came and had been drinking. A senior officer noticed this and he was charged with being unfit to perform his duties. He was sentenced to a reprimand. Notwithstanding this additional offence his contract was extended on 6 June 2006.

[8] From 2006 until November 2010 Mr Xulu’s military career appears to have blossomed and he may well have entertained ideas of promotion. He attended and performed well on several courses, one of which was

described as being for servicemen seeking promotion to the rank of a junior non-commissioned officer. This latter course was undertaken from 31 May to 26 November 2010.

[9] Mr Xulu's commanding officer, Lieutenant Colonel Oss, fully supported the extension of his contract. He wrote in his report to the Review Board that ultimately made the decision that:

‘- Member proved himself a future leader and an asset of DOD. There are projects in the unit which members must complete.

- He just completed the JIN LP and he [has] done exceptionally well. See the attached confidential report from Infantry School.

- There was no incident or offence reported about the member for the past 10 year ... I fully recommend that the member's contract to be renewed since it won't be a mistake.

- The member will soon be appointed as Section 2IC¹ and bulk store man.’

The unit personnel officer said that he had no objection to Lieutenant Colonel Oss's recommendation.

[10] Mr Xulu's attorney's letter was sent on 18 March 2011 and received a response on 29 April 2011. The reply incorrectly claimed that Mr Xulu had not responded timeously to the notice letter and went on as follows:

‘Despite the fact that the member had previous disciplinary offences as mentioned in our letter dated 26/11/2009, it remains the GOC Infantry Fmn² prerogative to renew the member's contract or not. It must further be noted that there is no clause or agreement that is entered into with the member that his contract is renewable after every 5 year term of its expiry.’

¹ An abbreviation for second in command.

² An abbreviation for General Officer Commanding Infantry Formation.

[11] The letter correctly stated that the terms of Mr Xulu's contract did not provide for an automatic extension on its expiry. That emerged from his service agreement which provided that:

'A member shall be informed at least 18 months prior to the lapsing of his/her CSS³ contract of the intention of the SANDF to offer a subsequent employment contract or not. For Enlisted Personnel a three months' notice period applies.

There is no obligation on the DOD to offer a subsequent contract when the said period of employment lapses.'

[12] While under no obligation to offer an extension of the contract the quoted provision indicated that the SANDF would engage in a process in which it would consider whether to offer such a contract and would do so at least 18 months before the existing contract was due to expire. Lieutenant General Nkabinde, who deposed to the answering affidavit on behalf of the SANDF, denied that 18 months' notice had to be given and claimed that the required period was eight months. He was relying on a policy document to which I will revert in due course, but this was inconsistent with the service conditions attached to Mr Xulu's contract letter in 2005, which said that 18 months' notice would be given of the SANDF's intentions in regard to renewal. This undertaking was not followed as Mr Xulu was only informed of the fact that the SANDF did not intend to extend his contract at the end of November or early December 2010. Somewhat deceptively, the letter advising him of the SANDF's intentions was dated 26 November 2009. There was no explanation of how this occurred.

[13] Apart from the problem with the dates and the statement that Mr Xulu had not made timeous representations, the letter of 29 April 2011

³ An abbreviation for Core Service System.

again referred to the two disciplinary offences already described. There was also a suggestion that the GOC Infantry Fmn had a 'prerogative' whether or not to extend a contract, but the affidavits on behalf of the SANDF do not suggest that Mr Xulu's contract was not extended in the exercise of the claimed prerogative and counsel accepted that the reason lay in the two disciplinary offences.

[14] It transpired from the review record delivered on behalf of the SANDF that the decision not to extend Mr Xulu's contract was taken on 17 January 2011 at a meeting of the Infantry Formation Review Board for the Non-Renewal of CSS Contracts. Major General Nkabinde (as he then was) chaired that meeting and the other participants were two members of his human resources support team, Colonel Fongoqa and Major Joki, and Lieutenant Colonel Maungwa, who was described as being from legal services. According to the minutes, the secretary read the representations by each of the thirteen members, the non-renewal of whose contracts were under consideration at that meeting, and the Board 'took note of the generic reasons provided by the members ... as well as the fact that they have rehabilitated from the conduct as presented against them'. Presumably in the case of Mr Xulu the latter was a reference to the two offences referred to in the original letter. That is reinforced by the following paragraph of the minutes:

'After thorough deliberations the board felt that these members did not advance sufficient arguments instead of their socio-economic conditions which they failed to consider when committing these offences.'

The Board concluded that none of the ten individuals whose cases they were considering should have their contracts renewed and a week later, on 26 January 2011, gave authority to terminate Mr Xulu's services.

[15] Lieutenant General Nkabinde, was subsequently promoted and was the head of human resources of the SANDF when he deposed to the answering affidavit on behalf of the SANDF. He said that his two subordinates, Colonel Fongoqa and Major Joki, had noticed, during their inspection of various contracts that had come up for renewal, that Mr Xulu's had previously been renewed, despite his convictions. This caused Lieutenant General Nkabinde to instruct them to review all similar cases meticulously and bring them to the attention of the Review Board. He had not been a member of the Review Board in 2006 and claimed that had he been he would not have renewed Mr Xulu's contract. He described the previous decisions to renew Mr Xulu's contract as 'flawed' and incorrect. It is apparent that his focus throughout was on these offences.

[16] While Lieutenant General Nkabinde did not say that the Board disregarded the views of Lieutenant Colonel Oss, he said that he had not worked with Mr Xulu for six months prior to his submissions and that the report from Mr Xulu's commanding officer should have come from a Colonel Ngcobo. There was no explanation for the absence of a report from Colonel Ngcobo, although Lieutenant General Nkabinde acknowledged that under ordinary circumstances an application for non-renewal would come from the member's commanding officer.

[17] Lieutenant General Nkabinde also claimed that Mr Xulu had been convicted of further offences after 2006, but the convictions reflected in the records to which he referred occurred in March 2011 after the decision not to renew Mr Xulu's contract had been taken. At most the Board could have been aware that he was facing certain charges as the alleged offences had arisen in February 2009 and February 2010 respectively. There is, however, nothing in the Board's record of

proceedings to suggest that it had any regard to these offences. The records show that the first one attracted a reprimand and the second an unspecified period of detention, although Mr Xulu said he was fined R1500. His contract terminated before he could appeal.

The legislative and regulatory background

[18] The governing statute is the Defence Act 42 of 2002 (the Act). It provides in s 11(a) that the SANDF, constituted in terms of s 224(1) of the Interim Constitution (now s 200 of the Constitution), consists of the Regular Force, the members of which serve full-time until they reach the age of retirement or their contracted term of service expires or until they are discharged, and the Reserve Force. The members of the Regular Force may serve in a permanent or a temporary capacity in accordance with prescribed terms and conditions of service, as well as prescribed conditions and procedures regarding enrolment, contract, promotion and transfer (s 52(2)).

[19] Members of the Regular Force are enrolled as such, ‘enrol’ being defined in s 1 of the Act as meaning ‘to accept and record the attestation of any person as a member of the Regular Force’. This appears to be something different from concluding a contract of employment, as the definition of ‘employee’ in the Act does not encompass members of the Regular Force or members of the Reserve Force.⁴ This caused O’Regan J in *SANDU (1)*⁵ to say that they do not enter into a contract of employment as ordinarily understood, but nonetheless their enrolment as members of

⁴ It reads: “‘**employee**’ means a person appointed to the Department in terms of the Public Service Act, 1994 ... or any person regarded as having been appointed to the Defence Secretariat in terms of section 6(4).”

⁵ *South African National Defence Union v Minister of Defence and Another (SANDU 1)* [1999] ZACC 7; 1999 (4) SA 469 (CC) para 22. That statement was made in respect of the position under the Defence Act 44 of 1957 but the position under the present Act does not appear to be any different.

the SANDF carries with it legal consequences. Although their relationship with the SANDF is unusual and not identical to an ordinary employment relationship they are nonetheless workers and entitled to the constitutional protection that workers enjoy under s 23 of the Constitution.⁶

[20] At the expiry of his previous fixed term period of service in the SANDF in June 2006, Mr Xulu was re-appointed for the period from 29 July 2006 to 31 July 2011. The contract was made under s 52(1) of the Act. The letter of appointment attached a service contract that Mr Xulu signed and that said it was in accordance with the prescribed conditions of service of the SANDF.

[21] Some of the provisions of the contract are relevant for present purposes. It said that the member's service 'is terminated' on the lapsing of the contract in terms of the Act.⁷ The reference to the Act was a reference to s 59(1)(b), which provides for a member's service to be terminated on the termination of any fixed term contract or the expiry of any extended period of such contract. Clause 1 said that the member should be informed 'at least 18 months prior to the lapsing of his/her CSS contract of the intention of the SANDF to offer a subsequent employment contract or not.' It recorded that there was no obligation on the Department of Defence to offer such a contract. Where a service contract expired the member would be entitled to the benefit of what were called Mobility Exit Mechanism and Labour Market Entry Enablement, both

⁶ *SANDU (I)* para 27.

⁷ There is also a reference in the letter to General Regulations Chapters III and IV, but it is unclear whether these are still in force and no-one suggested that they had any bearing on the case.

being aimed apparently at facilitating the member's transition to civilian life.

[22] The last relevant document is a publication by the Human Resources Division of the Department of Defence ('the Policy') entitled 'Process and Procedures for the Management of the Separation of Officials from the Department of Defence (DOD).'

The Policy was issued on 27 January 2010 under the joint names of the Acting Secretary of Defence and General Ngwenya, the Chief of the SANDF, having been approved by the Defence Policy Board. The foreword records that it was published under the authority of an earlier Department of Defence Instruction and goes on to say that it:

'... must be implemented in conjunction with instructions prescribed therein, This publication describes the process and procedures to be followed when officials of the Department of Defence (DOD) separate (terminate service) from the Department of Defence.

This publication must be implemented by the Chiefs of the Services and Divisions down to the applicable levels of command and management.'

The stated aim of the Policy⁸ was to prescribe the administrative process and procedures for the management of separation of officials⁹ from the DOD within budget provision.

[23] The Policy dealt comprehensively with the various circumstances in which a member of the SANDF might cease to be such. Thus it covered compulsory and early retirement, resignations, and various situations in which a member could be discharged, such as medical reasons, administrative discharge, discharge by virtue of being sentenced

⁸ Clause 3, vol 2, p 277.

⁹ The definitions made it clear that 'officials' included members employed in terms of the Defence Act and the word 'member' in relation to the Defence Force meant any officer and any other rank. (Clauses 4 d and e.)

to imprisonment or the sentence confirmed by a court of military appeals, cancellation of the commission of an officer and absence without permission.

[24] In the midst of these provisions, clause 17 of the Policy dealt with ‘Expiry or Non-Renewal of Fixed Term Contracts’ commencing with the following:

‘Whenever the need exists for the non-renewal of a fixed term contract of a member, the following administrative actions must be effected:

- a. Members must receive letters to remind them of the expiry of their fixed term contracts by the last day of the eighth-month prior to the month in which the contracts expire.
- b. The Officer Commanding of a member must submit an application for the non-renewal of the fixed term contract to the respective Career Manager.
- c. In the application, the Officer Commanding must substantiate the reason for the non-renewal of the fixed term contract by completing a report iro the events which have led him or her to the decision to apply for the intended non-renewal of the contract.’

The further provisions of clause 17 provided for the Commanding Officer’s request to be reviewed by a review board and, once it had made a provisional recommendation, for the Commanding Officer to provide the member with specific reasons for the intended non-renewal of their contract as well as the specific measures under which the member’s contract would be terminated. The member was then to be allowed ten days to respond, in accordance with the *audi alteram partem* rule, before the entire matter would be referred to higher authority via the Career Manager. All this was to be done five months before the existing contract expired.

[25] The provisions of the Policy were plainly intended to satisfy the requirement in clause 3 of Chapter XX of the General Regulations to the Defence Act¹⁰ that members of the SANDF are entitled to fair labour practices, a conclusion that necessarily followed from *SANDU (I)*. Whether, like the provisions of Chapter XX they had statutory force,¹¹ was unclear and counsel were unable to assist us in that regard. Assuming that they did not have statutory force, they nonetheless prescribed the procedures that were to be followed before a decision was taken not to renew a member's fixed term contract. These were described as 'administrative actions', which was consistent with the purpose of the Policy, namely, to prescribe the administrative process and procedures to be followed when managing the separation of officials from the Department of Defence. Lastly the Secretary for Defence and the Chief of the SANDF issued it with a clear instruction that it was to be followed.

The issue

[26] The provisions of the Policy were not followed in any material respect in Mr Xulu's case. I highlight only the following. The notice given to Mr Xulu was not given eight months before the expiry of his contract¹² and it went far beyond the permissible provisions of such a notice, by informing him of the Department of Defence's intention not to renew his contract. No application for non-renewal had been received from Mr Xulu's commanding officer. Lieutenant Colonel Oss, who clearly understood that he was his commanding officer, whatever Lieutenant General Nkabinde said in that regard, and urged that his

¹⁰ Chapter XX was originally introduced by GNR 998 of 20 August 1999 (Government Gazette 201376), but rapidly replaced by GNR 1043 of 1 September 1999 (Government Gazette 20425).

¹¹ *South African National Defence Union v Minister of Defence and others* [2007] ZACC 10; 2007 (5) SA 400 (CC) para 51.

¹² I leave aside for the present that the conditions attached to his letter of contract provided for 18 months' notice of an intention to renew or not to renew.

contract be renewed. No reason for non-renewal emanating from Mr Xulu's commanding officer was presented and the reasons given were those of Major General Nkabinde, who had no right to be involved at that stage under the process prescribed in clause 17.

[27] The end result was that someone who had already determined that his contract should not be renewed considered Mr Xulu's representations, together with his own subordinates. In substance Major General Nkabinde played the roles of prosecutor, judge and executioner. That was flatly contrary to the Policy and an infringement of Mr Xulu's right to fair labour practices. Counsel for the SANDF did not dispute this. The issue is to determine its legal consequences.

[28] In the high court Mr Xulu's case was argued on the basis that consideration of the non-renewal of his contract constituted administrative action within the meaning of that expression in s 33 of the Constitution and PAJA.¹³ Lephoko AJ rejected this contention, holding that the Constitutional Court had held that employment related decisions do not constitute administrative action. For this he relied upon the decisions in *Chirwa*¹⁴ and *Gcaba*.¹⁵

[29] On appeal Mr Xulu relied on both PAJA and the constitutional principle of legality. The full court held that it was unnecessary to decide whether the decision constituted administrative action as it could, so it held, be resolved by applying the principle of legality.¹⁶ It held that in

¹³ The Promotion of Administrative Justice Act 3 of 2000.

¹⁴ *Chirwa v Transnet Ltd and others* [2007] ZACC 23; 2008 (4) SA 367 (CC) para 139.

¹⁵ *Gcaba v Minister of Safety and Security* [2009] ZACC 66; 2010 (1) SA 238 (CC) para 64.

¹⁶ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC) (*SARFU*) paras 147 and 148; *Pharmaceutical*

disregarding its own policy relating to non-renewal of fixed term contracts and Mr Xulu's right to fair labour practices the SANDF acted contrary to the principle of legality. Its decision not to renew Mr Xulu's contract accordingly fell to be set aside.

[30] In this court the SANDF submitted that Mr Xulu's application was founded entirely on the refusal to renew his contract being administrative action under PAJA. It submitted that the decision was not taken in the exercise of public power under a statute, but was a contractual decision not to renew his contract, which had the effect under s 59(1)(b) of the Act of automatically terminating his contract. The decision, so the argument proceeded, had no direct, external legal effect. Insofar as the principle of legality was concerned the SANDF submitted that all of the grounds invoked by Mr Xulu under this head were grounds of review of administrative action under PAJA. Therefore the principle of legality was being used to disguise a PAJA review of conduct not constituting administrative action as reviewable on a different basis.

[31] In their heads of argument counsel for the SANDF had submitted that departures from the Policy were permissible provided Mr Xulu's situation was fairly considered in the exercise of the SANDF's discretion whether to renew it. All that was required was substantial compliance with the Policy and any deviations that had occurred were minor and should be condoned. The absence of a recommendation of non-renewal was dismissed on the grounds that Lieutenant Colonel Oss had not served in that role for six months prior to making his recommendation that Mr

Xulu's should be retained in service. It was submitted that fairness was ensured by Lieutenant General Nkabinde sitting on the review board and applying his mind to the matter.

[32] This argument was untenable in the light of the gross departures from the Policy outlined in paragraphs 26 and 27 and was not pursued in oral argument. Instead counsel submitted that any claim available to Mr Xulu was a contractual claim, perhaps sounding in damages but not one based on the review of the non-renewal decision.

Administrative action

[33] PAJA gives effect to the right to just administrative action in section 33 of the Constitution. It provides for judicial review of administrative action. What constitutes administrative action is the subject of a lengthy and somewhat convoluted definition, which was consolidated and abbreviated by Nugent JA in *Grey's Marine*,¹⁷ in the following terms:

‘Administrative action means any decision of an administrative nature made ... under an empowering provision [and] taken ... by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect ...’

¹⁷ *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others (Grey's Marine)* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21.

[34] The Constitutional Court,¹⁸ citing *Grey's Marine* with approval, has broken the definition into seven components, namely that 'there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[35] The SANDF conceded that the decision not to renew Mr Xulu's contract satisfied three of these requirements, namely that the decision was one by an organ of state; that it adversely and directly affected Mr Xulu's rights and that the decision did not fall under any of the enumerated exceptions. I turn to consider each of the remaining requirements.

[36] What constitutes a decision of an administrative nature can be a difficult question and depends upon the nature of the decision and whether it is of an administrative character. The function rather than the functionary is important.¹⁹ A number of factors suggest that the decision not to renew Mr Xulu's contract was administrative. It related to employment and involved no issue of policy. The SANDF repeatedly described the Policy as involving the taking of administrative steps. These followed a clear bureaucratic course. The starting point was that unless the member's commanding officer made a request that the contract not be renewed it would be renewed automatically. That reflected a policy choice, as s 59(1)(d) of the Act provides for the automatic

¹⁸ *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) (*Motau*) para 33.

¹⁹ *SARFU* para 141.

termination of the contract on expiry of its fixed term. Once such a request was made a number of further steps had to be taken. The non-renewal of the contract would only occur at the end of this process after all the prescribed steps had been taken. This exhibits all the characteristics of an administrative process leading to an organ of state taking a decision.

[37] The subject of the decision was the non-renewal of the fixed term contract of a member of the Regular Force. The steps had to be taken in terms of the Department of Defence's Policy in dealing with such matters. The characteristic of administrative action identified by Nugent JA in *Grey's Marine*,²⁰ that it is the conduct of the bureaucracy in the application of policy, applies in this case.²¹ A similar decision not to reinstate a member of the SANDF, after his contract had been terminated by operation of law in consequence of his being absent without leave, was held by this Court to amount to administrative action.²²

[38] The cases relied on by the judge at first instance to hold that this was not administrative action, namely *Chirwa* and *Gcaba*, are in my view distinguishable. In *Chirwa* the claimant alleged that she had been unfairly dismissed, a claim falling within the Labour Relations Act 66 of 1995 (the LRA) and initially pursued under that Act. The majority in the Constitutional Court rejected her reformulated claim, based on the right to just administrative action. They did so firstly on jurisdictional grounds that are not relevant in this case. Their second ground was that although it

²⁰ *Grey's Marine* para 24.

²¹ See also *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (Section 21) (PE) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC) paras 18 to 21.

²² *Minister of Defence and Military Veterans and Another v Mamasedi* [2017] ZASCA 157; 2018 (2) SA 305 (SCA) para 15.

involved the exercise of public power it was not in terms of a statute, but the exercise of a contractual right, and therefore not administrative action.²³

[39] What distinguishes this case from *Chirwa* is that the actions of the SANDF were not taken in terms of the contract under which Mr Xulu was appointed. The contract made no provision for its renewal and recorded expressly that it would terminate in terms of s 59(1)(b) of the Act on expiry of the fixed term. The decision not to renew was one in terms of s 52(2) of the Act, because it involved the extension of Mr Xulu's contract and hence his further enrolment in the SANDF. It concerned the procedures relevant to the enrolment of members of the Regular Force, read in conjunction with the Policy. While Mr Xulu lost his post as a member of the SANDF as a result, this was not because he was dismissed, but as a result of the application of s 59(1)(b) of the Act.²⁴ It was the statutory consequence of his contract not being renewed. The dispute between the parties is not a dismissal dispute, but a dispute in relation to the decision of the SANDF not to extend Mr Xulu's contract.²⁵

[40] *Gcaba* is far closer to the type of issue in the present case. It involved a police officer who applied for a promotion post, but was not appointed. The Constitutional Court held that the failure to appoint him

²³ See the judgment of Ngcobo J in *Chirwa* para 142 and the majority judgment of Skweyiya J at para 73. The minority judgment of Langa CJ held that her dismissal was the exercise of a contractual right not involving the exercise of a public power and therefore not administrative action.

²⁴ A dismissal occurring by operation of law does not involve a decision and is not administrative action: *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA). That judgment is unaffected by the decision in *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) where the court held that the appellant had not in fact absented himself and hence did not come within the provision that such absence could by operation of law terminate his employment.

²⁵ The distinction between the termination of the contract by operation of law and the decision not to extend the contract is similar to the distinction drawn in *Mamsedi* fn 42 *supra* between a termination by operation of law and a decision not to reinstate the member.

was a quintessential labour issue with little or no direct consequence for any other citizens.²⁶ On that basis it held that the failure to appoint him was not administrative action. It said that generally employment and labour relationship issues do not amount to administrative action within the meaning of PAJA.²⁷

[41] By contrast the issue in the present case is of importance to the citizenry at large, namely the manner in which people are selected for enrolment in our armed forces and the circumstances in which their contracts may be terminated. It cannot be categorised as the exercise of a contractual power under a contract of employment, because that is not the nature of the contract between a soldier and the SANDF. Irrespective of the precise nature of the contract, the decision not to renew it did not involve an exercise of contractual power, because no such exercise was required in the situation. If nothing had been done the contract would have come to an end by operation of law. If Mr Xulu had found more lucrative employment elsewhere, perhaps in the security industry, he was perfectly entitled to walk away and there was nothing the SANDF could do to stop him. His obligation to serve until discharged in terms of s 52(3)(d) of the Act would have terminated on the termination date of his fixed term contract, entitling him to his discharge in the absence of either of the special circumstances referred to in s 59(5) of the Act. Unlike *Gcaba*, which was a dispute over promotion in the context of a contract of employment, falling within the dispute resolution mechanisms of the

²⁶ *Gcaba* para 66. For a criticism of the grounds of the decision see Cora Hoexter *Administrative Law in South Africa* (2ed, 2011) pp 214 to 218.

²⁷ *Gcaba* para 64. This was taken one step further in *National Director of Public Prosecutions and Another v Tshavhungwa and Another; Tshavhungwa v National Director of Public Prosecutions and Others* [2009] ZASCA 136; 2011 (1) SA 141 (SCA) para 22, where it was said: ‘*Gcaba* makes it clear that the dismissal of an employee in the public sphere does not constitute “administrative action” ...’

LRA, this is a non-contractual dispute over the exercise of a statutory power to extend Mr Xulu's period of enrolment in the SANDF falling outside the LRA.

[42] Referring in *Chirwa*²⁸ to the pre-democracy cases of *Zenzile*²⁹ and *Sibiya*,³⁰ Skweyiya J pointed out that the rationale for those judgments, in which it was held that employment disputes in the public sector involved exercises of public power, could not be faulted at a time when public sector workers were not accorded rights under labour legislation. He said: 'In the absence of such rights being afforded to them there was, in my view, a judicial duty on the judicial officers to extend protection to State employees.'

For most employees in the public service this imperative fell away when the LRA was enacted bringing them under the umbrella of the same legislation as employees in the private sector. But the SANDF is excluded from the operation of the LRA and the remedies under the LRA are not available to its members. In the result, the reasons given in *Gcaba* and *Chirwa* for holding that *Zenzile* and *Sibiya* were no longer applicable in a dispensation where public and private sector employees enjoy the same labour rights, are inapplicable here and the judicial duty referred to by Skweyiya J remains clamant.³¹

[43] I therefore hold that the Policy was correct to describe as administrative the steps it prescribed to be taken when considering the non-renewal of the fixed term contract of a member of the SANDF. The

²⁸ *Chirwa* para 39.

²⁹ *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A).

³⁰ *Administrator, Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A).

³¹ Cora Hoexter *op cit* 211 says that these decisions have lost their force. That may not be correct, at least not entirely.

decision not to renew was a decision of an administrative nature. The court of first instance was wrong in holding that it was not.

[44] Turning to the remaining requirements for the decision not to renew Mr Xulu's contract to constitute administrative action, the analysis already undertaken of the source of the power to renew, or decide not to renew, fixed term contracts, demonstrates that it is a public power sourced in the Act. That conclusion is reinforced by the SANDF's obligation to give effect to the soldier's constitutional and statutory right to fair labour practices. The Policy was designed to give effect to these rights and to set out the manner in which the public power was to be exercised.

[45] The final question is whether the exercise of the power in this case, by way of the decision not to renew Mr Xulu's contract, had direct, external legal effect. Here there is a large measure of overlap with the admitted impact on his rights. The decision meant that he became unemployed and lost the benefits to which he was entitled to as a member of the SANDF, including membership of the group life insurance scheme and pension fund. Whatever the precise scope of this requirement may be, it is in my view satisfied for reasons similar to those advanced by the Constitutional Court in *Joseph*.³²

[46] I accordingly conclude that the decision not to renew Mr Xulu's fixed term contract as a member of the SANDF constituted administrative action. It was therefore subject to review in terms of s 6 of PAJA.

³² *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) para 27.

The principle of legality

[47] Before dealing with the relevant grounds of review it must be said that the approach of the full court, in avoiding the question whether this was a case of administrative action and disposing of it on the basis of the principle of legality, was in principle incorrect and one to be discouraged. The right to just administrative action is the primary source of the power of courts to review the actions of the executive and the administration. The Constitution required legislation to be enacted to provide for this and PAJA is the result. It is specific, although not necessarily simple, in its provisions and prescribes procedures that must be followed in pursuing judicial review, while vesting rights in people dealing with the administration, such as the right to reasons. It imposes significant limitations in regard to the requirement to exhaust internal remedies and in regard to the time within which review proceedings must be brought. Litigants and courts should not circumvent these by proceeding directly to questions of legality. If action by the executive and administration is administrative action, then the jurisprudence of the Constitutional Court is clear in saying that this is the path that the litigation must follow.³³

[48] The role of the principle of legality as developed and explained by the Constitutional Court in *Pharmaceutical Manufacturers*³⁴ is to provide a control over exercises of public power that do not constitute administrative action. In that case the court was concerned with the issue of a proclamation by the President bringing certain legislation into force without the promulgation of the schedules necessary to render it

³³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 11; 2004 (4) SA 490 (CC) para 25; *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* [2005] ZACC14; 2006 (2) SA 311 (CC) para 95 (per Chaskalson CJ) and paras 436 and 437 (per Ngcobo J).

³⁴ *Pharmaceutical Manufacturers* fn 34 *supra*.

operative, thereby removing any regulation from the distribution of pharmaceutical and other drugs in South Africa. The Court held that the President's decision was executive rather than administrative action. It applied the principle of legality and its requirement of rationality as a threshold requirement for action falling outside the ambit of administrative action.³⁵ As had been the case in *Fedsure*,³⁶ it first dealt with whether the case involved administrative action and only once it had concluded that it did not proceed to rationality review under the principle of legality. The scope of rationality review has broadened somewhat to include rationality in both the decision itself and in the process whereby the decision is taken,³⁷ but this does not justify ignoring PAJA and proceeding directly to a rationality review under the principle of legality.³⁸

[49] In *Albutt*³⁹ the Constitutional Court held that it was not necessary to consider whether the action of the President in not giving victims a hearing before exercising the power of pardon under s 84(2)(j) of the Constitution constituted administrative action under PAJA. However, that was a very special case and Ngcobo CJ said that there was a substantial measure of doubt as to whether the exercise of the power of pardon constituted administrative action. I share that doubt and point out that the 'context-specific features of the special dispensation' apparently dictated

³⁵ Cora Hoexter *op cit* p124 describes it as a safety net.

³⁶ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC).

³⁷ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC) paras 33 to 37.

³⁸ For a forceful criticism see Cora Hoexter *op cit* pp131-137 and her article 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 218-221. The criticisms are referred to by the Constitutional Court in *Pretorius and Another v Transnet Pension Fund and Another (Pretorius)* [2018] ZACC 10 para 37.

³⁹ *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) paras 80-82.

the Court's approach.⁴⁰ It provides no warrant for avoiding the question whether a review is one under PAJA and dealing with it as a legality review.⁴¹

[50] Apparently there may be a species of judicial review that falls under neither PAJA nor the principle of legality, but concerns cases brought on the basis of unconscionable state conduct that is in breach of constitutional principles of reliance, accountability and rationality.⁴² The scope of these principles is unclear, but they appear to apply only in certain exceptional cases. In my view they do not justify a departure from the general principle that when dealing with the conduct of the executive and administrative arms of government the starting point is whether the conduct in question constitutes administrative action. If it is, the principle of subsidiarity demands that it be dealt with under PAJA. If it falls outside PAJA, then the principle of legality may come into play, bearing in mind that this is a threshold requirement and that the concept of rationality that it invokes is a narrow one, not necessarily the same as that applied in a review under s 6(2)(f)(ii) of PAJA. The development of a coherent administrative law demands that litigants and courts start with PAJA and only when PAJA does not apply should they look to the principle of legality and any other permissible grounds of review lying outside PAJA.

⁴⁰ *Ibid* para 81.

⁴¹ The jurisprudence of this Court likewise does not support that approach. Both *Minister of Home Affairs and others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) and *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) were decided on the footing that the action under review was not administrative action and not reviewable under PAJA. In those circumstances this Court dealt with both of them under the principle of legality.

⁴² *Pretorius ibid* paras 33 to 36. The foundation for such a ground of review is the judgment in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC) where a claim pleaded and argued on contractual grounds was upheld on public law and regulatory grounds.

Review of the decision

[51] Counsel did not seriously contend that the decision not to renew Mr Xulu's contract was not vulnerable to attack under PAJA. That was a wise approach. From a procedural perspective the decision-making process in defiance of the SANDF's own policy was unfair. From a substantive perspective it was not a reasonable decision in the sense of one that a reasonable decision-maker could make in the circumstances. It was based solely on the two old convictions without any investigation of the circumstances in which they had occurred, their relative inconsequentiality and the fact that equally senior officers to Major General Nkabinde had not in the past thought them an obstacle to the extension of Mr Xulu's contract. In the decision-making process the strong recommendation by Lieutenant Colonel Oss was disregarded. So was Mr Xulu's record of advancement during the previous five years and the successful completion of a course that could lead to his promotion to non-commissioned officer. This was a classic case of irrelevant, or only marginally relevant, considerations being taken into account and all the relevant considerations being discounted or ignored completely.

[52] It is unnecessary to go further and consider any other possible grounds of review in terms of s 6(2) of PAJA. Those set out above suffice for the decision not to renew Mr Xulu's contract to be set aside. The order of the full court was therefore correct although for different reasons. Some consideration must, however, be given to the relief that it granted.

Relief

[53] The order granted by the full court reads:

'1 The appeal is upheld.

2 The respondents' decision not to renew the appellant's fixed term contract is declared unlawful and is set aside and is replaced by the following:

"The appellant's fixed terms contract is extended from 2011 until 30 July 2017 under the same conditions applying to other members of the SANDF employed on fixed terms contracts."

3 The respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved, including the costs for the leave to appeal.'

[54] Counsel for the SANDF accepted that it would be desirable to vary this order in certain respects with a view to finalising the dispute as soon as possible. Although there was no cross appeal, he accepted that para 1 of the order needed to be amended to deal with the costs in the high court, while preserving two costs orders already made in favour of Mr Xulu relating to certain reserved costs. The easiest way in which to do this is to add words to para 1 of the full court's order so that it reads:

'The appeal is upheld with costs and paragraphs 2 and 5 of the high court's order are set aside.'

[55] 30 July 2017 has come and gone thereby rendering para 2 of the full court's order one with purely financial consequences. In those circumstances it was accepted that it should rest undisturbed, whatever criticisms might otherwise have been addressed to it. We were asked to make an order further extending it but that is inappropriate in view of the absence of a cross appeal and the absence of any information concerning Mr Xulu's fitness to return to duty as a soldier and the SANDF's need for his services. Instead this court should exercise its powers, in terms of s 19(d) of the Superior Courts Act 10 of 2013, to render 'any decision that the circumstances require', and make an order that addresses any further claims Mr Xulu may have as a result of the elapse of the period

provided by the full court and the fact that he will not be returning to the SANDF. In my view the need for this is met by our granting the following order:

‘The Respondents are ordered jointly and severally to compensate the Applicant for such further losses as he may have incurred as a result of his fixed term contract not having been renewed in 2011, the amount of such losses to be agreed between the parties within 30 days of the date of this order, failing which they are to be determined summarily on the written representations of the parties by an arbiter chosen by them or, in the absence of agreement, appointed by the Chair for the time being of the Pretoria Bar.’

[56] There is no need to alter para 3 of the full court’s order dealing with the costs of the appeal in that court.

[57] I grant the following order:

- 1 Special leave to appeal is granted.
- 2 Paragraph 1 of the order of the full court is amended to read:
‘The appeal is upheld with costs and paragraphs 2 and 5 of the high court’s order are set aside’.
- 3 The appeal is otherwise dismissed with costs.
- 4 Respondents are ordered jointly and severally to compensate the Applicant for such further losses as he may have incurred as a result of his fixed term contract not having been renewed in 2011, the amount of such losses to be agreed between the parties within 30 days of the date of this order, failing which they are to be determined summarily on the written representations of the parties by an arbiter chosen by them or, in the absence of agreement, appointed by the Chair for the time being of the Pretoria Bar.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: G T Avvakoumides (with him L Harilal)

Instructed by: Mokuena Attorneys, Midrand
McIntyre Van der Post, Bloemfontein

For respondent: G L van der Westhuizen

Instructed by: Viren Singh & Co, Durban
Mthembu, Van Niekerk Inc, Bloemfontein.