

IN THE HIGH COURT OF SOUTH AFRICA(TRANSVAAL PROVINCIAL DIVISION)PRETORIA

CASE NO: 18683/07

DATE: 2008-05-16	
DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES /NO
(2) OF INTEREST TO OTHER JUDGES	YES/ NO
(3) REVISED	✓ Original judgment signed
DATE 18.6.08	by the Judge: _____ SIGNATURE

In the matter between

10

S.A. SECURITY FORCES UNION

W.M.M.
26.6.08

Applicant

and

SURGEON GENERAL AO

Respondent

J U D G M E N T

CLAASSEN J: This case has been settled between the parties for everything, except one small prayer that the applicants require. I do not intend giving a judgment on this case, because I said it is settled in the main except for this one issue and on this one issue, I will very briefly state my reasons for the finding.

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The basis of the application is that the health requirements of the South African National Defence Force, regarding the recruitment, deployment and promotion of HIV positive people, are unconstitutional

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JUDGMENT

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and the prayers are that they should be set aside on that basis.

The parties have agreed that they are unconstitutional and should be set aside and have in the rest of the order, made provision for the revision thereof within a six months period. Prayer 4A request the following relief. That the respondents are directed to immediately employ the third applicant. His background is briefly that he was requested by the South African National Defence Force to apply for recruitment, he being a very well qualified musician and trumpeter. He then went through all the medical tests and everything was in order until they found out that
10 he was HIV positive. On that basis he was refused entry and membership of the Defence Force.

As I said the parties have agreed that these regulations or the policies and implementation by the Defence Force of the HIV policy is unconstitutional and a six month period has been given to the Defence Force to revisit the whole issue of employment.

The objection of the Defence Force for making that order now, is that it may create a floodgate of applicants who want to join the Defence Force and will ride on the back of this third respondent if he were to be allowed to enter the Defence Force without going through the new testing
20 and health policy of the Defence Force.

The argument on behalf of the applicants is in essence, although those words were not used, that the third applicant is in a certain sense *sui generis*. He went through the whole process to be employed and passed everything apparently with flying colours, except for

the HIV testing. Secondly, he went to the trouble of being part of this application and in essence he was, together with the other applicants, successful.

It is submitted that it would be highly unfair if he should be in the position where he won the war but lost his personal battle. On the other hand I understand the stance of the respondents. One cannot create a lacuna and leave everything hanging in the air. The respondents must be in the position to properly coordinate and order their intake, their promotions, their deployments etcetera and it cannot be done on a
10 haphazard ad hoc basis. Those are the two opposing views.

I definitely do not want to prejudice the Defence Force in their general health policy and recruitment and deployment and other operations, but every case has to be looked at individually. For the reasons I have stated, regarding the third applicant, one is obviously very sympathetic to his situation and in a sense, the whole basis of this application was to the effect that people like him should be able to join the military because they are not and will not be expected to be in the forefront of a physical war or battle and their health situations obviously would differ greatly from people like the "parabats" and the infantry,
20 etcetera.

Because of that I am persuaded to make an exception as far as he is concerned and specifically order that he specifically and without creating a precedent as far as other people are concerned, should be allowed to join the Defence Force forthwith.

Having said that, I then make an order in terms of the amended

notice of motion as it appears on page 3169 ...[indistinct] of the papers and as further amended by myself and I will read the order in toto.

ORDER

It is ordered:

1. That:
 - a) The third and fourth applicants and three of the individuals who have deposed to supporting affidavits (AKM, TMS and XM) are granted leave to be described in these proceedings only by their initials.
 - 10 b) The names of the individuals mentioned in a) above, are to be provided to the registrar of this court and to the respondents to be retained in a safe place and are not to remain in the court file.
 - c) The names of the individuals mentioned in a) above are not to be disclosed or publicised in any manner or form by the registrar, the respondents or any other person or entity.
2. That the consequences of the HIV testing policy as developed by the first respondent and implemented by the second respondent, in terms of which no person who is HIV positive may be recruited,
20 deployed externally or promoted within the South African National Defence Force, is hereby reviewed and set aside.
3. That the consequences of the HIV testing policy referred to in paragraph 2 is unconstitutional in that it unreasonably and unjustifiably infringes the rights of aspirant and current HIV positive SANDF members

- a) Not to be unfairly discriminated against in terms of section 9(3) of the Constitution.
- b) To privacy in terms of section 14 of the Constitution.
- c) To dignity in terms of section 10 of the Constitution.
- d) To fair labour practices in terms of section 23(1) of the Constitution.
- e) The administrative justice in terms of section 33 of the Constitution.

4. That:

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- a) the respondents are directed immediately to employ the third applicant and
 - b) immediately reconsider the second applicant for external deployment and or promotion.

Paragraphs 5 and 6 are deleted.

7. That the respondents are directed to:

- a) Formulate a new health classification policy within six months of the date of this order for such time period as the court directs and
 - b) Serve on the applicants and lodge with the registrar of the court and affidavit setting out the new health classification policy adopted; and that the applicants are granted leave to
- 20
- apply to the court on the same papers, supplemented as necessary, for such further relief flowing from the new policy as they may be advised to seek.

8. That the respondents are directed to pay the applicants costs, including the costs of three counsel. It is recorded that Advocate Hassim of the applicant's counsel is employed by the Aids Law Project for purposes of the taxing master.

I make that order.
