

## **THE CASE OF RE-RANKING AND PROMOTIONS OF MK VETERANS IN SAPS - WHAT IS AT ISSUE**

*By Ms Christine Botha: Acting Director, Centre for Constitutional Rights*

Section 195(1) of the Constitution stipulates clearly the guiding values and principles that public administration must adhere to. It emphasises the need for transparency in public administration, and providing the public with *“timely, accessible and accurate information”*. This section requires *“good human resource management”* and *“career development practices”* to effectively *“maximise human potential”*. It also stipulates clearly that *“employment and personnel management practices”* in public administration must be based on *“ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation”*.

These provisions are constitutional standards, which must be given effect to in national legislation and are a standard against which public administration must be measured. Section 195 of the Constitution is not a mere paper right - it carries weighty constitutional standards.

The question now arises - how does section 195 of the Constitution fit in with the promotion and re-ranking of Non-Statutory Forces (NSF) members, being former members of the *Azanian Peoples’ Liberation Army* and *Umkhonto we Sizwe* (MK), in the South African Police Services (SAPS)? This question is important, particularly in relation to the recent interim interdict granted by the Pretoria High Court on 20 December 2018, in favour of the trade union, Solidarity, against SAPS. This interim interdict prevents SAPS from proceeding with any promotions or re-ranking of NSF members within the SAPS pending the review of the Non-Statutory Forces project within SAPS (NSF project). This review application is yet to be heard by the High Court.

The review application by the trade union against the National Commissioner of SAPS, the Minister of Police and SAPS, essentially seeks to set aside the decision to implement the NSF project in terms of the *Promotion of Administrative Justice Act* of 2000, alternatively on the principle of legality captured in Rule of Law in section 1(c) of the Constitution. The Rule of Law principle essentially entails that public power cannot be exercised outside the confines of the law.

The trade union alleges that the NSF project has been secretly implemented, without consultation or notice and specifically excludes the trade union’s members within SAPS and other career-SAPS officials (who are not NSF members) from participating and applying for the same benefits. These benefits allegedly include promotions and re-ranking of NSF members within the SAPS. The trade union also alleges that senior positions are specifically reserved for NSF-members.



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A key argument made by the trade union is that such re-ranking and promotion of NSF members within the SAPS is currently not provided for in any legislation - and it is unclear in terms of which legal provision this power is being exercised. NSF members qualify as “*military veterans*” in terms of the *Military Veterans Act* of 2011 (MVA Act), which includes any “*citizen who rendered military service to any of the military organisations, statutory and non-statutory, which were involved on all sides of South Africa’s Liberation War from 1960 to 1994*”. The trade union points out that a substantive number of their members affected also fall under the definition of military veterans in terms of the MVA Act.

Section 5 of the MVA Act stipulates benefits which “*military veterans*” are entitled to, including “*education, training and skills development*”; “*facilitation of employment placement*”, and pension benefits. The trade union points out that the MVA Act makes no distinction between non-statutory or statutory military veterans and any statutory benefits provided to NSF members within SAPS should on equal terms be open to non-NSF military veterans in SAPS. The trade union also argues that “*facilitation of employment placement*” in the MVA Act cannot be equated to “*preferential promotion*” within SAPS. Any promotion/appointment within SAPS must comply with Labour Laws, specifically the *South African Police Service Employment Regulations* of 1999 and above all, the Constitution.

One must keep in mind that on granting the urgent interim interdict, no final pronouncement was made on the rights of the parties. The legality of the NSF project was not at stake in this round. The trade union, however, had to show that they had a *prima facie* right to the relief sought in the review application. A key point highlighted by Acting Judge van der Schyff on granting the interim interdict is that the respondents maintained that the trade union’s review application is “*based on speculation*”. However, the respondents failed to produce any policy documents in Court detailing the NSF project that would refute the trade union’s argument that its members’ rights are being infringed. This is an important remark if one considers that this matter was preceded by two Court orders between the parties, in terms of which SAPS was forced to disclose information on the NSF project to the trade union. This all ultimately feeds into the underlying suspicion.

The lack of transparency is highly concerning and an obvious disregard for section 195 of the Constitution. However, more importantly, this matter does not only potentially affect the rights of non-NSF members in SAPS. This matter also concerns the integration of NSF members and using their acquired skills and experiences within these services, which also includes the South African National Defence Force (SANDF) and National Intelligence Agency. The interim interdict order and the previous High Court judgment of 5 April 2018 (ordering disclosure of information on the NSF project) highlighted that the NSF project is of “*national importance*” in this regard. However, this must happen within constitutional prescripts. Section 195(4) of the Constitution makes provision for the appointment in public administration of a “*number of people on policy considerations*” but crucially on the condition that “*national legislation must regulate these appointments in the public service*”.



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The pending High Court review of the NSF project is intricately linked to section 195 of the Constitution. The public has a right to know the details of the NSF project and how non-NSF SAPS career officials will be impacted by the NSF project - in order to test the legality thereof. Public power is constrained by the law and any appointments or re-ranking of NSF members within SAPS must be supported within a legal framework. There have been big promises of a cleaning up State Departments and State-Owned Enterprises (SOEs) but transparency and accountability must be enforced on every level. In a constitutional democracy, projects such as the NSF project cannot be shielded from scrutiny.