IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: _____

SUPREME COURT OF APPEAL CASE NUMBER: 739/18

HIGH COURT CASE NUMBER: 5309/2016

In the matter between:

MOZAMANE TEAPSON MASWANGANYI Applicant

And

THE MINISTER OF DEFENCE AND MILITARY VETERANS First Respondent

THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE Second Respondent

THE SECRETARY FOR DEFENCE Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

MOZAMANE TEAPSON MASWANGANYI

state under oath as follows:

1 I am an adult male who is currently unemployed. I reside at 64B Malamulele, Limpopo Province. The circumstances giving rise to my unemployment after more than twenty years of service in the Defence Force are the subject of this application.

2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and to be best of my knowledge are true and correct. Where I make submissions of a legal nature, I do this on the advice of my legal advisors.

PARTIES

3 I am the Applicant in this matter.

4 The First Respondent is the **MINISTER OF DEFENCE AND MILITARY VETERANS** (the "**Minister**"), cited in her representative capacity as the member of Cabinet responsible for defence in terms of section 201 of the Constitution. The Minister is situated at Defence Headquarters, corner Nossob and Boeing Streets, Erasmuskloof, Pretoria, Gauteng.

5 The Second Respondent is the **CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE** (the "**Chief of the SANDF**"),

appointed in terms of section 13 of the Defence Act 42 of 2002. The Chief of the SANDF is situated at Defence Headquarters, corner Nossob and Boeing Streets, Erasmuskloof, Pretoria, Gauteng.

6 The Third Respondent is the **SECRETARY FOR DEFENCE**, appointed in terms of section 10 of the Defence Act 42 of 2002. The Secretary for Defence is situated at Defence Headquarters, corner Nossob and Boeing Streets, Erasmuskloof, Pretoria, Gauteng.

OVERVIEW OF THIS APPLICATION

7 This application for leave to appeal concerns the proper interpretation and application of section 59(1)(d) of the Defence Act 42 of 2002 ("**the Defence Act**"), and my rights to fair labour practices, to dignity, and to a fair trial guaranteed by sections 23, 10 and 35 of the Constitution.

8 Section 59(1)(d) of the Defence Act provides that the service of a member of the defence force is terminated if he is sentenced to a term of imprisonment by a competent civilian court (without the option of a fine).

9 I joined the South African National Defence Force ("**SANDF**") almost thirty years ago. When I was wrongly charged, convicted of a crime and sentenced to imprisonment, the SANDF relied on section 59(1)(d) of the Defence Act to terminate my employment automatically.

10 My conviction and sentence were wholly quashed on appeal. Notwithstanding this, the SANDF has refused to reinstate me, on the basis that the termination of my employment occurred automatically, by operation of law. As a result, I have lost my livelihood after years of service and am still being penalised for an incorrect conviction that has since been set aside.

11 The High Court (per Raulinga J) held in my favour, finding that the respondents could not continue to rely on section 59(1)(d) of the Defence Act, and ordered my reinstatement. On appeal, the Supreme Court of Appeal (per Majiedt JA) disagreed, finding that once I had been convicted and sentenced to a term of imprisonment, the subsection came into operation *ex lege* and conferred no discretion. As a result, the Supreme Court of Appeal held that the subsequent appeal which overturned my conviction and sentence did not alter the automatic effects of section 59(1)(d).

12 I now approach this Court in a final attempt to safeguard my rights. This Court has not yet pronounced on the interpretation to be given to this provision of the Defence Act. It is in the interests of justice for it to do so now.

13 There are three crisp legal issues to be determined:

13.1 First, whether s 59(1)(d) of the Defence Act operated *ex lege*, from the moment I was sentenced, or whether a further decision was required to put it into operation.

13.2 Second, if section 59(1)(d) operates *ex lege*, whether it operated from the moment that I was sentenced in the trial court or whether it applies only on the basis of a final, lawful conviction and sentence, after all rights of appeal and review have been exhausted.

13.3 Third, whether I have an automatic right of reinstatement after my conviction and sentence were set aside on appeal.

14 This affidavit is structured as follows:

14.1 First, I outline the factual and legal background to this application, including the High Court and Supreme Court of Appeal judgments.

14.2 Second, I demonstrate that leave to appeal should be granted, in that this Court's jurisdiction is engaged and it is in the interests of justice for the appeal to be heard.

14.3 Third, I explain that my rights to fair labour practices, to dignity and to a fair trial are implicated – and are infringed by the interpretation adopted by the Supreme Court of Appeal's judgment.

14.4 Fourth, I advance submissions on the proper interpretation to be given to section 59 of the Defence Act as well as a related provision, section 42 of the Military Discipline Supplementary Measures Act 16 of 1999 ("**MDSMA**"). The submissions I advance in this regard address four propositions:

14.4.1 First, section 59(1)(d) of the Defence Act must be interpreted in light of its purposes, and in a way that promotes the spirit, purport and objects of the Bill of Rights, as section 39(2) of the Constitution mandates. The provision cannot be interpreted mechanically, when doing so fails to give any effect to the rights to fair labour practices, to dignity and to a fair trial, and runs counter to established principles of natural justice and procedural safeguards.

14.4.2 Second, section 59(1)(d) is a penal provision. Its application has the consequence that the services of a member of the SANDF are terminated. The provision must be interpreted restrictively, and any ambiguity in section 59(1)(d) must be resolved against the risk of being penalised.

14.4.3 Third, even if section 59(1)(d) were to operate *ex lege,* it can only do so on the basis of a final, lawful conviction and sentence. A conviction and sentence that is subsequently set aside on appeal is neither final nor lawful. In the circumstances, the necessary jurisdictional facts that are required for section 59(1)(d) to be engaged are entirely absent, and there was no lawful termination of my services.

14.4.4 Fourth, section 42(1) of the Military Discipline Supplementary Measures Act 16 of 1999 puts in place interim safeguards, allowing the SANDF to suspend the duties of any member who has been convicted by any civil court if that person intends appealing against that conviction.

14.5 Finally, I explain why it is in the interests of justice for this Court to condone the regrettably late filing of this application.

FACTUAL AND LEGAL BACKGROUND

15 There are no material disputes of fact on the papers. This application turns essentially on questions of law. I begin by outlining the relevant legal provisions.

Legal framework

16 Section 59 of the Defence Act sets out the grounds on which the service of a member of the Regular Force may be terminated. It is helpful to set out sections 59(1)-(3) in full:

> "*(1) The service of a member of the Regular Force is terminated -*
>
> *(a) upon the expiration of three months after the date on which such member lodged his or her resignation or upon the expiration of such shorter period as may be approved by the Chief of the Defence Force;*

(b) on the termination of any fixed term contract concluded between the member and the Department or on the expiration of any extended period of such contract;

(c) if he or she has reached the prescribed age of retirement or, where applicable, if he or she exercises his or her right to retire on pension in accordance with the provisions of the applicable pension laws;

(d) if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine or if a sentence involving discharge or dismissal is imposed upon him or her under the Code; or

(e) if the Surgeon-General or any person authorised thereto by him or her issues a certificate to the effect that due to medical or psychological reasons, such member is permanently unfit to serve in the Defence Force.

(2) The service of a member of the Regular Force may be terminated in accordance with any applicable regulations -

(a) as a result of the abolition of such member's post or any reduction or adjustment in the post structure of the Department of Defence;

(b) if for reasons other than the member's own unfitness or incapacity, such discharge is likely to promote efficiency or increased cost-effectiveness in the Department of Defence;

(c) on account of unfitness for his or her duties or inability to carry them out efficiently, irrespective of whether such unfitness or inability is caused by such member's ill-health not amounting to a condition referred to in subsection (1)(e);

(d) if, after serving a period of probation in terms of this Act, his or her appointment is not confirmed; or

(e) if his or her continued employment constitutes a security risk to the State or if the required security

clearance for his or her appointment in a post is refused or withdrawn.

(3) A member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such member on such conditions as he or she may determine."

17 Section 42 of the Military Discipline Supplementary Measures Act ("**MDSMA**") headed "*Suspension awaiting trial or appeal*", provides that the Chief of the SANDF may suspend a member while awaiting the conclusion of an appeal:

"*(1) When in the opinion of the Chief of the South African National Defence Force, it will be in the*

interest of the good governance or reputation of the South African National Defence Force, or in the interest of justice, he or she may order any person subject to the Code not to return to duty during any period subsequent to that person

(a) appearing as an accused before any civil court or military court; or

(b) having been convicted by any civil court or military court, if that person intends appealing against the conviction or applying for the review of the case,

pending the conclusion of the trial, appeal or review, as the case may be.

(2) The Chief of the South African National Defence Force shall give written notice of his or her intention to consider exercising the power contemplated in subsection (1) to the affected person and shall allow that person to respond in writing within 24 hours, or any longer period that the Chief may determine, of that person's receipt of such notice."

My circumstances

18 I joined the SANDF on 1 September 1992 when I was employed on contract. I became a permanent member from 1 April 2009.

19 I was arrested on 26 October 2010 on the basis of an unsustained charge of rape. On 18 July 2014, I was convicted of the charge and sentenced to life imprisonment by the Regional Magistrates' Court.[1] I appealed this conviction and, on 13 February 2015, the High Court upheld my appeal, setting aside my conviction and sentence. I was issued with a warrant of liberation and released from custody with immediate effect.

20 However, because of my initial conviction and imprisonment, my service with the SANDF was terminated from the date of my sentence (18 July 2014). This was notwithstanding that, during my imprisonment, I had informed a sergeant from my unit that I was in the process of appealing against my conviction. The SANDF was thus well aware that I intended to – and successfully did – appeal my conviction and sentence.

[1] In the courts a quo, the Respondents disputed that they were informed of my arrest and trial, and allege that they first came to know of this when I was sentenced. Their version does not withstand scrutiny, as the record will demonstrate should this Court decide to set the matter down. Instead, the Respondents have been aware of the charges that were laid against me at all relevant times, as Raulinga J found in the court *a quo*. In any event, this does not have any bearing on the constitutional interpretation to be given to section 59(1)(d) of the Defence Act.

21 On 16 February 2015, three days after my release from prison, I submitted the court order and warrant of liberation to the relevant official at my unit, requesting my reinstatement and tendering my services. I was informed that I needed to submit a formal application, which I duly did on 13 March 2015. I have never received any response to my application for reinstatement. Both my union's (the South African National Defence Union – "**SANDU**") and my many attempts to contact the relevant officials telephonically and via correspondence went entirely unanswered.

22 My family and I have suffered immense hardship as a result of my imprisonment and the loss of my employment. My wife, who is a teacher, has been supporting our three children on her meagre monthly salary. At times, we have struggled to meet not only our monthly financial commitments and medical needs, but also our children's basic needs (including their school fees, resulting in their schools withholding their academic records).

High Court judgment

23 On 25 January 2016, in order to vindicate my rights and in an attempt to ameliorate the hardship suffered by my family, I

approached the High Court for relief. I sought that the respondents be ordered to reinstate me with effect from the date of termination of my service, alternatively from the date on which my conviction and sentence were set aside. I also sought reinstatement of the payments and benefits that I would have been entitled to, but for the termination of my services.

24 In the High Court, I argued that because my sentence was set aside on appeal, the termination of my service in terms of section 59(1)(d) of the Defence Act is unlawful and infringes on my right to fair labour practices. Section 42 of the MDSMA allows for the Chief of the SANDF to order a person not to return to duty pending the determination of any appeal against a conviction. The SANDF failed to have recourse to this provision to govern the interim consequences before my criminal appeal was determined.

25 The respondents placed emphasis on section 200 of the Constitution, which provides that the "*defence force must be structured and managed as a disciplined military force."* On their interpretation of section 59(1)(d) of the Defence Act, termination of employment operates *ex lege:* once conviction and sentencing occurred, the consequences kick in and cannot be reversed. The

respondents contended that this ties the SANDF's hands and that the legislation does not provide for any discretionary power to reinstate a member under these circumstances. As a result, I was required to apply for re-employment, rather than seek reinstatement. The respondents disputed that the MDSMA is either practicable or relevant, because I was in prison when my criminal appeal was prosecuted.

26 Raulinga J handed down judgment on 31 July 2017. I attach a copy of this judgment as **Annexure MTM1**. Raulinga J ordered my reinstatement, as well as the reinstatement of my salary and benefits, from the date of termination, and awarded punitive costs against the respondents. Raulinga J based this order on the following:

26.1 The respondents had a choice between invoking section 59(1)(d) of the Defence Act; section 59(3) of the Defence Act (which provides for deemed dismissals of members of the force who absented themselves from official duty); and section 42 of the MDSMA (which provides for the Chief of the SANDF to suspend a member from their duties pending the conclusion of a trial, appeal or review).

26.2 In terms of both sub-sections 59(1)(d) and 59(3), member's services may be terminated or regarded as having been dismissed or discharged. However, while subsection 59(1) is silent regarding possible reinstatement, subsection 59(3) provides for the power to reinstate on good cause shown.[2]

26.3 All three legislative provisions were applicable. The respondents elected to apply subsection 59(1)(d) to the exclusion of the other provisions. This decision was arbitrary in the circumstances,[3] and so must be reviewed and set aside.

27 The Respondents sought leave to appeal the High Court's judgment, which Raulinga J refused. I attach the High Court judgment and order dismissing the application for leave to appeal as **Annexure MTM2**.

28 Leave to appeal was, however, granted by the Supreme Court of Appeal (per Wallis and Mocumie JJA) on 15 June 2018. A copy of the order granting leave to appeal to the Supreme Court of Appeal is attached, marked **Annexure MTM3**.

[2] HC judgment para 14.
[3] HC judgment para 18.

Supreme Court of Appeal judgment

29 On appeal, the respondents persisted with their arguments that once section 59(1)(d) applies, termination occurs *ex lege* and no decision is made or public power exercised. Additionally, the respondents pressed the contention that whether the strict application of the provisions of section 59(1)(d) results in unfairness or not is irrelevant. (This was despite my contentions that the interpretation of section 59(1)(d) advanced by the respondents infringes my right under section 23(1) of the Constitution to fair labour practices.) Finally, the respondents contended that Raulinga J's order reinstating me constituted an arrogation of power.

30 The matter was heard in the Supreme Court of Appeal on 21 May 2019, with Majiedt JA handing down a unanimous judgment on 31 May 2019. A copy of the Supreme Court of Appeal judgment is attached as **Annexure MTM4**.

31 The Supreme Court of Appeal upheld the respondent's appeal and set aside Raulinga J's order, on the following grounds:

31.1 Section 59(1)(d) must be interpreted by applying the normal rules of grammar and syntax, and by ascertaining the Legislature's intention.[4]

31.2 Consistent with the wording in section 59(1) that "*the service of a member … is terminated*", the termination that section 59(1)(d) contemplates is *ex lege,* and follows automatically.[5] In this respect, termination under sub-section 59(1) is distinct from the provisions governing termination under sub-sections 59(2) and 59(3).

31.3 However, while section 59(1)(d) is automatically operative on a member's sentencing to a term of imprisonment (without the option of a fine), the section does not operate automatically in the converse factual scenario. There is no automatic reinstatement once the sentencing is set aside. This is because (unlike in sub-section 59(3)) there is no express provision for reinstatement in sub-section 59(1)(d).[6]

31.4 Only section 59(1)(d), and not also section 59(3) or section 42 of the MDSMA, is applicable. Section 42 provides for suspension where the military is concerned about a member

[4] SCA judgment para 11.
[5] SCA judgment para 13.
[6] SCA judgment para 14.

who has been charged with a criminal offence continuing in active service. In any event, the section does not apply where a member is serving a term of imprisonment because in those circumstances, the member could not report for active duty.[7] As a result, the jurisdictional facts for the operation of section 42(1) and (2) are absent.

32 The Supreme Court of Appeal upheld the appeal, set aside the High Court's order and substituted it with an order dismissing my application with costs.

33 I now seek to appeal this judgment.

LEAVE TO APPEAL

Jurisdiction

34 I am advised that this Court has jurisdiction to entertain the matter.

35 This Court's jurisdiction is provided for in section 167(3) to (7) of the Constitution. Section 167(3) provides:

"The Constitutional Court—

[7] SCA judgment paras 7 and 10.

(a) is the highest court of the Republic; and

(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) *makes the final decision whether a matter is within its jurisdiction.*"

36 It is well-established that in determining whether an argument raises a constitutional issue, the question is whether the Court is asked to consider constitutional rights or values.

37 This matter raises several constitutional issues. In particular:

37.1 the right to fair labour practices in section 23(1) of the Constitution, in that the consequence of the Supreme Court of Appeal's interpretation of section 59(1)(d) is that my employment was terminated automatically, without any

procedural safeguards or a hearing, in circumstances where the triggering jurisdictional fact for section 59(1)(d)'s application was absent;

37.2 the right to dignity in terms of section 10 of the Constitution, in that the freedom to engage in productive work is an important component of human dignity;

37.3 the right to a fair trial in terms of section 35 of the Constitution (including the right, in terms of section 35(3)(o) of appeal to a higher court), in that the consequence of the Supreme Court of Appeal's judgment is that my original conviction and sentence – which was set aside on appeal – continue to exert residual punitive effects. This impairs my right to an appeal, properly understood;

37.4 the structure and management of the defence force as a disciplined military force in terms of section 200 of the Constitution; and

37.5 insofar as the matter concerns the proper interpretation of the Defence Act and the MDSMA, the obligation in section 39(2) of the Constitution to interpret legislation in a manner

consistent with the spirit, purport and object of the Bill of Rights.

National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others **[2019] ZACC 25 para 10**

Klaas v S **[2018] ZACC 6; 2018 (5) BCLR 593 (CC); 2018 (1) SACR 643 (CC) para 21**

Liesching and Others v S and Another **[2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) para 21**

38 Alternatively, even were this Court to conclude that there is no constitutional matter raised, this application falls within the Court's jurisdiction as an arguable point of law of general public importance, which ought to be considered, in that it concerns the proper interpretation of the Defence Act and, in particular, the effect of an overturned sentence on a member's employment. As I submit below, the application has at least arguable prospects of success.

Paulsen and Another v Slip Knot Investments 777 (Pty) Limited **[2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) paras 20ff**

Interests of Justice

39 I am advised that it is well established that whether this Court grants leave to appeal turns also on what is in the interests of justice.

Competition Commission v Yara South Africa (Pty) Ltd and Others **[2012] ZACC 14; 2012 (9) BCLR 923 (CC) para 37**

40 The "interests of justice" are determined with reference to a range of factors, which include:

40.1 the circumstances of the parties;

40.2 the nature of the rights involved;

40.3 whether the issue has been decided by the Supreme Court of Appeal;

40.4 whether or not other parties may be harmed by the relief sought; and

40.5 prospects of success, which are important but not necessarily decisive.

***Phumelela Gaming v Gründlingh and Others* 2006 (8) BCLR 883 (CC) para 24**

41 It is in the interests of justice that this Court determine the matter because:

41.1 The rights that are involved are fundamental – this matter squarely implicates my rights to fair labour practices, to dignity and to a fair trial;

41.2 My family and I have suffered undue hardship as a result of the interpretation of section 59(1)(d) adopted by the Supreme Court of Appeal;

41.3 The issues raised are of wider significance beyond the parties, in that they have the potential to affect any member of the SANDF who is similarly situated;

41.4 A decision by this Court would provide helpful clarity to an undecided legal question, particularly in circumstances where the High Court judgment and the Supreme Court of Appeal judgment took such divergent approaches. That this is a

factor militating in favour of the interests of justice for a matter to be heard has been recognised by this Court.

AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another **[2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) para 26**

41.5 I respectfully submit that this application has at least reasonable prospects of success. Moreover, reasonable prospects of success are evidenced by the fundamentally different approaches taken by the High Court and the Supreme Court of Appeal.

42 Finally, in my founding affidavit, I have advanced the argument that the interpretation and application of section 59(1)(d) implicates my constitutional rights.[8]

43 Although I referred only to my rights under section 23 of the Constitution, this Court has previously recognised that every court that interprets legislation – as both the High Court and Supreme

[8] For example, in para 29 of my founding affidavit in the High Court (which will form part of the record should this Court decide to hear the matter), I stated that, in addition to being unlawful, the termination of my services and failure to reinstate me "*infringes on my right to fair labour practices protected in section 23 of the Constitution"*. The respondents attempted to address this point in para 36 of their answering affidavit.

Court of Appeal did in this matter – is obliged to read a legislative provision through the prism of the Constitution. This obligation is mandatory, and requires courts to apply section 39(2) of the Constitution *mero motu*, regardless of the way in which the parties have framed their case.

> ***Makate v Vodacom (Pty) Ltd*** **[2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) paras 87-88**

44 As a result, and in light of all the relevant factors, I am advised that it is in the interests of justice for this Court to hear the matter. I now turn to a discussion of the merits.

IMPLICATED RIGHTS

The right to fair labour practices

45 I am advised that section 2(a) of the Labour Relations Act 66 of 1995 makes it clear that that legislation does not apply to members of the SANDF. As a result, section 23(1), which provides that "*[e]veryone has the right to fair labour practices*" applies directly.

***SANDU v Minister of Defence* 1999 (4) SA 469 (CC) paras 25-27**

46 My right to fair labour practices, guaranteed in section 23 of the Constitution, has been foregrounded from the outset of this litigation. The content of the right to fair labour practices resists precise definition.

***National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) para 33**

47 At minimum, however, it can never constitute a fair labour practice for employment to be terminated irrationally, and without any grounds. Nor can it be fair, or consistent with the principle of *audi alteram partem*, for that termination to occur without my being afforded any opportunity for a hearing. This Court has recently reaffirmed that the "*right not to be unfairly dismissed is one of the most important manifestations of the constitutional right to fair labour practices*".

National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical

Services (Pty) Limited and Others **[2019] ZACC 25 para 10**

The right to dignity

48 I am advised that both this Court and the Supreme Court of Appeal have recognised that the right to work in order to support oneself and one's family is a component of the right to human dignity.

Stratford and Others v Investec Bank Ltd and Others **2015 (3) SA 1 (CC) para 35**

Affordable Medicines Trust and Others v Minister of Health of RSA and Another **[2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 59**

Minister of Home Affairs and Others v Watchenuka and Another **2004 (4) SA 326 (SCA) para 27**

49 Before my conviction, I had served the SANDF for over twenty years. My work within the SANDF has formed an important component of my identity and sense of self-worth. The position that the SANDF has adopted has impaired my dignity, and compounds the stigmatising effect of my unlawful conviction and sentence.

The right to a fair trial, including the right to an appeal

50 The right to a fair trial is safeguarded by section 35 of the Constitution. This right (in terms of sub-section 35(3)(o)) includes the right of appeal to, or review by, a higher court. I am advised that this Court has recognised that the sub-section addresses the risk of wrongful convictions and the consequent failure of justice, and that the appeal must be as fair as the trial itself must be.

> ***S v Twala (South African Human Rights Commission Intervening)*** **[1999] ZACC 18; 1999 (2) SACR 622 (CC) para 9**
>
> ***S v Shinga (Society of Advocates (Pietermaritzburg)) as Amicus Curiae), S v O'Connell and Others*** **[2007] ZACC 3; 2007 (5) BCLR 474 (CC); 2007 (2) SACR 28 (CC); 2007 (4) SA 611 (CC) para 28**

51 My right of appeal to a higher court is undermined where, notwithstanding that the appeal is upheld and my conviction and sentence overturned, the original findings of the trial court continue to exert residual force (in the form of penal consequences).

INTERPRETATION OF SECTION 59(1)(D) OF THE DEFENCE ACT

52 I am advised that the respondents' case and the findings made by the Supreme Court of Appeal turn on an incorrect approach to the interpretation of the relevant provision of the Defence Act.

53 The Supreme Court of Appeal found that section 59(1)(d) must be interpreted according to the "*well-established approach of affording meaning to the words by applying the normal rules of grammar and syntax, viewed within the relevant factual context, in order to ascertain the Legislature's intention*".[9] Nowhere in the judgment is there any mention of my constitutional rights, or the mandates of section 39(2).

54 I am advised that at the heart of the present matter lies a legal question – the proper interpretation of the Defences Act. It is therefore essential to identify the correct approach to the interpretive exercise. There are three key interpretive principles in this regard:

54.1 First, the provisions of the Defence Act and the MDSMA must be interpreted purposively.

[9] SCA judgment para 11.

54.2 Second, the provisions must be interpreted in a manner that best promotes the spirit, purport and objects of the Bill of Rights.

54.3 Third, because section 59(1)(d) involves the imposition of sanctions (in the form of termination of employment), it must be interpreted restrictively. Any ambiguity in the provision or uncertainty about its meaning must be resolved against the risk of being penalised.

Section 59(1)(d) must be interpreted in light of its purposes

55 This Court has previously recognised that statutory provisions should always be interpreted in context, and in a manner that accords with their purpose. A meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results must not be preferred.

> ***Road Traffic Management Corporation v Waymark (Pty) Limited*** **[2019] ZACC 12 (2 April 2019) paras 29-32**
>
> ***Cool Ideas 1186 CC v Hubbard and Another*** **[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28**

56 Section 2(g) of the Defence Act affirms the principle that the SANDF must respect the fundamental rights and dignity of its members and of all persons.

57 Section 59(1)(d) has the purpose of ensuring that the SANDF not have in its ranks members who have been convicted of serious crimes (and sentenced to imprisonment on this basis). I accept that, in principle, this is a lawful purpose that is in line with section 200(1) of the Constitution.

58 However, this purpose is not served in any way where the member's conviction and sentence is overturned. On the contrary, the underlying purpose is entirely defeated in circumstances where an appeal court has determined that there was no lawful basis for the conviction or sentence. Where this is the case, it is irrational – and indeed, at odds with the provision's underlying purpose – to nonetheless interpret and apply the section so that the member's service is terminated.

The interpretive obligations imposed by section 39(2) of the Constitution

59 I am advised that section 39(2) of the Constitution obliges every court, tribunal and forum, when interpreting any legislation, to "*promote the spirit, purport and objects of the Bill of Rights*". Section 39(2) requires more than simply adopting an interpretation that avoids unconstitutionality; instead, it involves adopting the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights.

> ***Makate v Vodacom (Pty) Ltd*** **[2016] ZACC 13; 2016 (4) SA 121 (CC) para 89**

60 Earlier, I explained that, on the interpretation proffered by the respondents and accepted by the Supreme Court of Appeal, my rights to fair labour practices, to dignity and to a fair trial are infringed. Section 39(2) of the Constitution requires that this interpretation be avoided, if the Defence Act is reasonably capable of another interpretation. As I demonstrate below, the Defence Act is plainly capable of a constitutional interpretation.

Section 59(1)(d) must be interpreted in accordance with interpretive presumptions

61 Finally, the meaning to be given to section 59(1)(d) must be informed by well-established canons of statutory construction.

Penal provisions must be interpreted restrictively

62 I am advised that section 59(1)(d) of the Defence Act is a penal provision. In addition to any sentence of imprisonment, a member of the SANDF is additionally subject to the sanction of termination of employment. Courts have recognised that legislative provisions that have disciplinary consequences – which can include the loss of, or discharge from, employment – constitute penal provisions.

***Hira v Booysen* 1992 (4) SA 69 (A) at 78**

63 This Court has affirmed that provisions that impose penal consequences must be interpreted restrictively, and that any ambiguity in them must be resolved against the risk of being penalised. This is underpinned by the rule of law, a founding constitutional value under section 1(c) of the Constitution.

***Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC) paras 129-131**

64 Section 59(1)(d) must be interpreted to have restrictive application. The Supreme Court of Appeal judgment thwarts this principle: it interprets the provision as continuing to apply even where a conviction and sentence is set aside on appeal. This means that the provision's penal consequences are extended, without any justification (for, as I explained earlier, the penal consequences no longer serve any purpose).

<u>The reference to any action / conduct is a reference to lawful or valid action / conduct</u>

65 Section 59(1)(d) of the Defence Act provides that the service of a member of the SANDF is terminated if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine. In accordance with interpretive principles, the reference to the sentence to a term of imprisonment must, I am advised, be a reference to a lawful or valid sentence of imprisonment.

> ***S v Mapheele*** **1963 (2) SA 651 (A) at 655D-E**
>
> ***Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*** **[2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 241 fn 205**

City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others **[2018] ZASCA 77; [2018] 3 All SA 605 (SCA) para 21**

66 This is in line with the recognition that any legal determination which has been taken on appeal cannot be considered to be final until the appeal is concluded.

Auction Alliance (Pty) Ltd and Another v Minister of Police and Others **[2014] ZAWCHC 180 para 35**

67 In the context of this application, the trial court's conviction and sentence was neither final nor lawful. A sentence that has been overturned on appeal is simply not a valid sentence. That sentence cannot be relied on and cannot have legal effect, particularly where this would infringe on constitutional rights.

<u>The audi alteram partem principle</u>

68 The principle of *audi alteram partem* requires that a party be afforded the opportunity to be heard. I am advised that it is a settled principle of statutory construction that the *audi* rule should be enforced unless it is clear that the legislature has precluded its application.

Minister of Defence and Military Veterans v Motau and Others **[2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) para 83**

R v Ngwevela **1954 (1) SA 123 (A) at 131H**

69 If section 59(1)(d) were to be interpreted in accordance with the Supreme Court of Appeal's judgment, members of the SANDF would be stripped of their right to be heard. Instead, termination from service is automatic, and there is no scope for the member to put forward a case for why it is inapplicable (including, for example, because the conviction and sentence is to be appealed and thus is not final). This injustice is particularly acute where the member's conviction and sentence is then quashed on appeal.

Applying the interpretive principles

70 On the basis of these interpretive principles, I submit that section 59(1)(d) must be interpreted as requiring a decision to bring it into operation, following a fair hearing. It is not in keeping with the rights and principles outlined above to hold that it operates *ex lege*, as a guillotine that falls as soon as a member of the Regular Force is sentenced to a term of imprisonment.

71 The interpretation adopted by the Supreme Court of Appeal runs contrary to the rights to fair labour practices and the right to be heard. I was not afforded any opportunity to be heard, or to put forward my case for why my service should not be terminated.

72 This discretion under section 59(1)(d) is reinforced by section 42 of the MDSMA. That section provides the Chief of the SANDF with the discretion to suspend a member, pending the outcome of an appeal. In this respect, the MDSMA and the Defence Act must be read alongside each other, in line with established doctrines of interpretation. Section 59(1)(d) cannot be read as extinguishing the discretion that is expressly conferred under section 42 of the MDSMA. If it did have that effect, the two provisions would be directly in conflict.

73 I submit that the SCA therefore erred in concluding that section 59(1)(d) must be interpreted as excluding all discretion. That interpretation does not best promote the rights identified above.

74 Even if it is held section 59(1)(d) operates *ex lege*, it could never be constitutional for section 59(1)(d) to apply in circumstances where there is no final or lawful conviction or sentence. On the Supreme

Court of Appeal's approach, the appeal quashing my conviction and sentence is of no significance whatsoever. As I explained earlier, this undermines my rights to fair labour practices, to dignity and to a fair trial, and subjects me to continuing residual penalties. On a proper interpretation, section 59(1)(d) could only operate from the time that any rights of appeal or review has been exhausted.

75 The Supreme Court of Appeal further erred in holding that I have no right to automatic reinstatement. It juxtaposed subsection 59(1)(d) with sub-section 59(3) and incorrectly concluded that because sub-section 59(3) allows for reinstatement to be authorised "*on good cause shown*" and sub-section 59(1) does not, automatic reinstatement is precluded by sub-section 59(1). With respect, this conclusion does not withstand scrutiny.

75.1 If anything, the fact that sub-section 59(3) affords discretionary powers to the Chief of the Defence Force to allow for reinstatement on good cause shown, and sub-section 59(1)(d) does not include analogous wording, militates against the Supreme Court of Appeal's interpretation. Where the requirements for sub-section 59(1)(d) are absent, the termination of employment should be reversed by operation of law (that is, reinstatement should be automatic). This is

because, properly understood, there was no valid termination. Ordering reinstatement does not fall within the discretion of the Chief of the Defence Force not because there is no scope for reinstatement. Instead, it does not fall within the discretion of the Chief of the Defence because, in effect, the reinstatement is automatic.

75.2 In this case, the requirements for sub-section 59(1)(d) were absent. There was no valid sentence to a term of imprisonment, because the sentence imposed by the trial court was entirely overturned on appeal. This is consistent with established principles of statutory interpretation.

City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others **[2018] ZASCA 77; [2018] 3 All SA 605 (SCA) para 21**

S v Mapheele **1963 (2) SA 651 (A) at 655D-E**

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others **[2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 241 fn 205**

75.3 In the different context of the Public Service Act 103 of 1994, I am advised that this Court previously held that there simply

was no deemed or automatic dismissal of an employee where the jurisdictional facts that are required for the relevant provision to apply were absent.

75.4 Put differently, where the necessary conditions for the provision (giving rise to a deemed or automatic dismissal) are not established, there can be no lawful termination. Where there is no lawful termination, there is no need for any employer to exercise discretion to reinstate the employee.

Grootboom v National Prosecuting Authority **[2013] ZACC 37; 2014 (1) BCLR 65 (CC) para 42**

See also S*olidarity and Another v Public Health & Welfare Sectoral Bargaining Council and Others* [2014] ZASCA 70; [2014] 8 BLLR 727 (SCA); 2014 (5) SA 59 (SCA); [2014] 3 All SA 550 (SCA) para 10

T Cohen "Termination of employment contracts by operation of law" 2006 17 (1) *Stellenbosch Law Review* 92

75.5 For this reason, and contrary to the respondents' submissions made in the courts below, there is no question that by ordering

my reinstatement, the Court would effectively compel the respondents to act or perform an act which is outside the law.

75.6 Nor is it any answer – as the Respondents suggested in the courts below and the SCA accepted – to suggest that I ought simply to have applied for re-employment. With respect, this entirely misses the point. I am entitled to reinstatement of my position, and to my salary and benefits for the period during which my employment was terminated. In any event, the SANDF has suggested that there is no guarantee that I would be re-employed.

75.7 To the extent that there is any concern regarding the status of a member who has been convicted and sentenced to imprisonment but who intends to prosecute an appeal, that concern can be answered by section 42 of the MDSMA. That section provides a mechanism to the Chief of the SANDF to effectively suspend that member, pending the outcome of the appeal. In this respect, the MDSMA and the Defence Act must be read alongside each other, in line with established doctrines of interpretation.

Ruta v Minister of Home Affairs **[2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) para 42**

***Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) para 19**

76 In sum, I respectfully submit that the interpretation of section 59(1)(d) that was endorsed by the Supreme Court of Appeal must be rejected.

CONDONATION

77 This application will be filed approximately a week late.

78 I am advised that condonation may be granted if the interests of justice permit. Whether condonation should be granted depends on the facts and circumstances of each case. While there is no precise formula for determining when it is in the interests of justice to grant condonation, generally the following factors are considered—

78.1 the nature of the relief sought;

78.2 the extent and cause of delay;

78.3 the effect of the delay on the administration of justice and on other litigants;

78.4 the reasonableness of the explanation proffered for the delay;

78.5 the importance of the issue to be raised; and

78.6 prospects of success.

Van Wyk v Unitas Hospital and Another **[2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) paras 20 and 22**

Brummer v Gorfil Brothers Investments **(Pty) Ltd [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 37**

79 I am further advised that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those factors set out above. The particular circumstances of each case will determine which of the above factors are relevant.

Grootboom v National Prosecuting Authority and Another **2014 (2) SA 68 (CC) at paras 22 and 35.**

80 Unfortunately, this application will be filed 6 court days late. In accordance with Rule 19, the application had to be filed within 15 days of the SCA's order, on 24 June 2019. The reasons are set out below. I respectfully point out that I have no legal training, nor do I

have the money to hire my own lawyer. I am entirely dependent on my union, SANDU, to secure legal services on my behalf.

81 I attach a confirmatory affidavit from Ms Heidi van Zanten, an attorney at Griesel Breytenbach Attorneys, my attorneys of record. Ms van Zanten has informed me as follows:

81.1 On 31 May 2019, the Supreme Court of Appeal upheld the respondents' appeal.

81.2 My legal representatives studied the judgment and, in discussions on 6 June 2019, considered whether to apply to this Court for leave to appeal. At that stage, my legal representatives and counsel were preparing advice on the appropriate legal path forward.

81.3 Given that the correct interpretation of section 59(1)(d) of the Defence Act raises constitutional questions and has the potential to impact on not only my fundamental rights, but also the rights of all those who are similarly situated, it was imperative to consult with and instruct a senior counsel with expertise in constitutional law, as well as in the specialised field of law regulating the national defence force.

81.4 As a result, on 21 June 2019 SANDU (my union) conveyed instructions to my attorneys of record to brief and consult with new senior counsel who is specialised in the area of law involved in this case and its constitutional implications.

81.5 On 26 June 2019, a consultation was held with new counsel, who read into the matter comprehensively and immediately began preparing this application for leave to appeal. The papers were drawn as expeditiously as possible, and filed three court days following this consultation.

82 I respectfully submit that no prejudice would be suffered by the respondents as a result of the delay. The prejudice that I would suffer if the late filing of this application is not condoned is significant, as I have lost my livelihood and my family suffers ongoing financial difficulties. If I am not allowed to place relevant facts and legal arguments before this Honourable Court, the infringement to my rights to fair labour practices, to dignity and to a fair trial would remain unremedied.

83 In the circumstances, I respectfully submit that it is in the interests of justice that I am granted condonation for the late filing of this application:

83.1 I have satisfactorily explained the steps I have taken to serve and lodge this application for leave to appeal, and provided a reasonable explanation for the delay;

83.2 The delay in filing, while regrettable, is not significant and the respondents will not suffer any prejudice as a result of the delay;

83.3 Conversely, I will suffer great prejudice should this Court decline to grant condonation;

83.4 The issues raised in the application for leave to appeal are in the public interest. My appeal raises an important legal question that warrants this Court's consideration; and

83.5 The application for leave to appeal has reasonable prospects of success.

CONCLUSION

84 For the reasons set out above, I pray for relief sought in the notice of application.

_____

MOZAMANE TEAPSON MASWANGANYI

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the _____ day of _____ **2019**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, have been complied with.

_____

COMMISSIONER OF OATHS

Full Names in Print:

Designation:

Area: