IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 170/19

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

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW OF THE APPLICANT'S CASE

1 Mr Maswanganyi, the applicant, had served the South African National Defence Force ("**SANDF**") for over twenty years, as a member of its Regular Force. He was charged and convicted of a crime, and sentenced to imprisonment. Mr Maswanganyi then successfully appealed his conviction and sentence, which were both quashed in their entirety.

2 Section 59(1)(d) of the Defence Act 42 of 2002 ("**the Defence Act**") provides that the service of a member of the Regular Force of the SANDF is terminated if that member is sentenced to a term of imprisonment by a competent civilian court (without the option of a fine).

3 On the basis of this provision, the SANDF ended Mr Maswanganyi's employment. Notwithstanding that his conviction and sentence were overturned on appeal, the SANDF has consistently refused to reinstate Mr Maswanganyi. Instead, the SANDF maintains that it would be unlawful for it to do so. Its stance has caused Mr Maswanganyi and his family great hardship.

4 The high watermark of the respondents' case is this: section 59(1)(d) had the effect of terminating Mr Maswanganyi's employment with the SANDF automatically, as soon as he was convicted and sentenced by the trial court. That the sentence and conviction were subsequently overturned is of no moment because, on this argument, the necessary jurisdictional fact for section 59(1)(d)'s application was already triggered, and the SANDF has no residual power to reinstate him. So, on this approach, an entirely innocent man with over twenty

years of service must simply lose his job.

5 Mr Maswanganyi turned to the High Court which (per Raulinga J) held in his favour and ordered his reinstatement. However, on appeal the Supreme Court of Appeal disagreed. The Supreme Court of Appeal concluded that once Mr Maswanganyi had been convicted and sentenced to a term of imprisonment, section 59(1)(d) kicked into operation *ex lege* and conferred no discretion on the relevant decision maker. On this basis, the Supreme Court of Appeal held that it was irrelevant that Mr Maswanganyi's conviction and sentence were overturned. Once the conditions of section 59(1)(d) were met, the consequences were automatic and not subject to reversal, irrespective of any later appeal.

6 As we submit below, a proper interpretation of section 59(1)(d) of the Defence Act could never be that Mr Maswanganyi's employment would terminate automatically, without any due process or a hearing, and in circumstances where the triggering jurisdictional facts for section 59(1)(d)'s application were absent. If this were the case, Mr Maswanganyi's original conviction and sentence – which were quashed on appeal – would continue to exert residual punitive effects. This would infringe his rights to fair labour practices, to dignity and to a fair trial (including the right to appeal), and would defeat the purpose of section 59(1)(d) of the Defence Act.

7 Instead, section 59(1)(d) only operates when the necessary jurisdictional facts – that is, being sentenced to a term of imprisonment by a competent court without option of a fine – are conclusively and finally met. Where the trial court's conviction and sentence are overturned, these jurisdictional facts are absent –

not least because the sentence referred to in section 59(1)(d) must be a final, lawful sentence.

8 Our submissions are structured as follows:

8.1 First, we set out the essential factual background;

8.2 Second, we analyse the judgments of the High Court and the Supreme Court of Appeal;

8.3 Third, we submit that leave to appeal should be granted, as this Court has jurisdiction over the matter (given that constitutional issues are squarely raised) and because it is in the interests of justice for the Court to determine these issues;

8.4 Fourth, we set out the applicable constitutional and legislative scheme;

8.5 Fifth, we explain that the Supreme Court of Appeal's reading of section 59(1)(d) of the Defence Act simply cannot be sustained. As soon as Mr Maswanganyi's conviction and sentence were overturned, the jurisdictional facts necessary for s59(1)(d) were absent. The effect of this, in line with this Court's own jurisprudence, is that Mr Maswanganyi continues to be in the SANDF's employ, as a member of the Regular Force. In summary, this is the proper interpretation of section 59(1)(d) for the following reasons:

8.5.1 The purpose of section 59(1)(d) of the Defence Act, read alongside section 200 of the Constitution, is that the military force is managed as a "*disciplined military force*". It ensures, *inter alia*, that there are no members of the Defence Force who have been

convicted of serious offences. While this purpose may be a lawful one, it is not served in any way where a member's conviction and sentence are overturned. The contrary is true: the underlying purpose of section 59(1)(d) is no longer vindicated where an appeal court has quashed the conviction and sentence. Where this is the case, it is irrational and at odds with the provision's underlying purpose to nonetheless interpret and apply the section in the manner that the Supreme Court of Appeal did: that the termination operates automatically, and cannot be undone.

8.5.2 Instead, the reference to the sentence in section 59(1)(d) of the Defence Act must be a reference to a lawful and final sentence. The sentence imposed by the trial court was not final – it was subject to a successful appeal. As a result, the jurisdictional facts required for section 59(1)(d) were not established, and there was no *ex lege* termination of Mr Maswanganyi's services.

8.5.3 Section 59(1)(d) must be read in the context of the provision as a whole, which is consonant with Mr Maswanganyi's reinstatement operating automatically and as of right.

8.5.4 Section 39(2) of the Constitution requires that all courts interpret legislation in a way that promotes the spirit, purport and objects of the Bill of Rights. Here, Mr Maswanganyi's rights to fair labour practices, to dignity and to a fair trial (which encompasses the right of appeal) are squarely implicated. Section 39(2) of the Constitution demands a reading of section 59(1)(d) of the

Defence Act that not only avoids infringing these rights, but that better promotes them.

8.5.5 The right of appeal, as part of the right to a fair trial in section 35(3)(o) of the Constitution, could never mean that the consequences of conviction and sentence continue to exert residual force even once the conviction and sentence are quashed. This reading is also impelled by the fact that section 59(1)(d) of the Defence Act is a penal provision. Accordingly, it must be read restrictively, and in favour of existing rights.

8.5.6 Finally, section 59(1)(d) of the Defence Act must be read harmoniously with section 42 of the Military Discipline Supplementary Measures Act 16 of 1999 ("**MDSMA**"), which empowers the Chief of the SANDF to suspend a person who has been convicted and order that person not to return to duty, pending the conclusion of the appeal or review. This provision answers any concern regarding the applicable interim measures, when the trial court has convicted and sentenced a member of the Regular Force and an appeal of that conviction and sentence is pending.

8.6 Sixth and alternatively, we contend that at a minimum, section 59(1)(d) of the Defence Act must be read in line with the principle *audi alteram partem*, which requires a hearing before the termination of employment. No hearing was afforded in this case, rendering the termination invalid.

8.7 Finally, we briefly deal with condonation of Mr Maswanganyi's late filing of his application for leave to appeal, which was delayed by just over a week under reasonably explained circumstances.

ESSENTIAL FACTUAL BACKGROUND

The arrest, conviction and successful appeal

9 Mr Maswanganyi first joined the SANDF on 1 September 1992, when he was employed on contract. On 1 April 2009, he became a permanent member.[1]

10 On 26 October 2010, Mr Maswanganyi was arrested on an unsustained charge of rape.[2] On 18 July 2014, he was convicted of the charge and sentenced to life imprisonment by the Regional Magistrates' Court.[3] He informed relevant officials at the SANDF of his charge,[4] and subsequently (during his imprisonment) of his intention to appeal the conviction and sentence.[5]

11 On 13 February 2015, the High Court upheld his appeal, setting aside his conviction and sentence.[6] Mr Maswanganyi was issued with a warrant of liberation and released from custody with immediate effect.[7]

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1 CC FA – Record Vol 2 p 109 para 18.

2 CC FA – Record Vol 2 p 109 para 19; HC RA – Record Vol 1 p 49 para 6.1.

3 CC FA – Record Vol 2 p 109 para 19.

4 HC RA – Record Vol 1 p 50 para 7.2; MTM9 – Record Vol 1 p 57; MTM10 – Vol 1 p 58-59.

5 CC FA – Record Vol 2 p 109 para 20; HC FA – Record Vol 1 p 12 para 20; HC AA – Record Vol 1 p 41 para 32.

6 Annexure MTM1 to HC FA – Record Vol 1 p 17.

7 CC FA – Record Vol 2 p 109 para 19; HC FA – Record Vol 1 p 8 para 8.

The attempt to obtain reinstatement

12 Three days after his release from prison, Mr Maswanganyi approached the SANDF to tender his services and resume his position of employment.[8] He provided the relevant official in his unit with the court order on appeal, quashing his conviction and sentence, and with his warrant of liberation.[9] However, the SANDF initially required him to submit a formal application,[10] to which it never responded. Indeed, Mr Maswanganyi and his union's many attempts to contact relevant officials at the SANDF went unanswered.[11]

13 As it emerged in court, the SANDF took the view that his service had been terminated from the date of his sentence (18 July 2014), notwithstanding that it was well aware of Mr Maswanganyi's appeal process.[12] The SANDF instead contended that Mr Maswanganyi was to formally apply for re-employment (which would be uncertain).

14 In substance, there are no material disputes of facts on the papers. Instead, the application turns essentially on questions of law.

14.1 The sole exception is that the respondents erroneously contend that Mr Maswanganyi concealed the fact that he had been charged and was undergoing trial.[13]

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8 CC FA – Record Vol 2 p 110 para 21.
9 CC FA – Record Vol 2 p 110 para 21.
10 CC FA – Record Vol 2 p 110 para 21; HC FA – Record Vol 1 p 9 para 10.
11 CC FA – Record Vol 2 p 110 para 21; HC FA – Record Vol 1 p 10 paras 14-16.
12 CC FA – Record Vol 2 p 109 para 20.
13 CC AA – Record Vol 2 p 157 para 4.1; HC AA – Record Vol 1 p 33 para 6; p 38 para 25.

14.2 The Supreme Court of Appeal accepted the respondents' version on this.[14]

14.3 However, their version is unsustainable in light of the correspondence of Mr Maswanganyi's relevant commanding officers, confirming that they were informed of his arrest and charge,[15] and by the relevant SAPS dossier.[16]

14.4 In any event, nothing material whatsoever turns on this dispute.

Prejudice suffered by Mr Maswanganyi and his family

15 Mr Maswanganyi and his wife (a teacher) have three minor children. The family has suffered immense hardship as a result of his imprisonment and subsequent loss of employment with the SANDF. At times, Mr Maswanganyi and his wife have struggled to meet both their monthly financial commitments and, more distressingly, their children's basic needs (including school fees).[17]

JUDGMENTS OF THE COURTS BELOW

High Court judgment

16 Mr Maswanganyi approached the High Court on 25 January 2016, to vindicate his rights and ameliorate the hardship suffered by his family.[18] He sought reinstatement with the SANDF from the date of the termination of his service, alternatively from the date of the successful appeal of his conviction and sentence.

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[14] SCA judgment – Record Vol 2 pp 87-88 paras 9-10.

[15] HC RA – Record Vol 1 p 50 para 7.2; MTM9 – Record Vol 1 p 57; MTM10 – Vol 1 p 58-59.

[16] HC RA – Record Vol 1 p 50 para 7.2; MTM10 – Vol 1 p 58-59.

[17] CC FA – Record Vol 2 p 110 para 22; HC FA – Record Vol 1 pp 13-14 paras 24-27; p 15 para 33.

[18] CC FA – Record Vol 2 p 110 para 23.

17 Raulinga J handed down judgment on 31 July 2017,[19] ordering Mr Maswanganyi's reinstatement, as well as the reinstatement of his salary and benefits (from the date of his termination), and awarded costs against the respondents on an attorney and client scale, on the basis that the respondents had "*dilly-dallied*" in filing their papers.[20]

18 Raulinga J held the following:

18.1 The respondents could choose between invoking either 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).

18.2 In terms of both sub-sections 59(1)(d) and 59(3), members' 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.

18.3 Given that the respondents had a choice among which of the legislative provisions to apply, their choice in the circumstances was arbitrary and must be reviewed and set aside.

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[19] HC judgment – Record Vol 1 p 60.

[20] HC judgment – Record Vol 1 p62 para 7.

19 Raulinga J refused the respondents leave to appeal.[21] Leave to appeal was subsequently granted by the Supreme Court of Appeal.[22]

Supreme Court of Appeal

20 The Supreme Court of Appeal handed down a unanimous judgment on 31 May 2019. The Supreme Court of Appeal upheld the appeal on the following bases:

20.1 Only section 59(1)(d) – and not also section 59(3) or section 42 of the MDSMA – applies.

20.2 Section 59(1)(d) must be interpreted according to ordinary rules of legislative construction.[23]

20.3 The wording in section 59(1) that "*the service of a member … is terminated*" indicates that the termination occurs *ex lege*. For this reason, termination under sub-section 59(1) is distinct from termination under sub-sections 59(2) and 59(3).[24]

20.4 While section 59(1)(d) operates automatically once a member is sentenced to a term of imprisonment, the opposite is not true: there is no automatic reinstatement once the sentence 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).[25]

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21 HC judgment refusing leave – Record Vol 1 p 74.
22 SCA Court order – Record Vol 1 p 81.
23 SCA judgment – Record Vol 2 p 89 para 11.
24 SCA judgment – Record Vol 2 p 90 para 13.
25 SCA judgment – Record Vol 2 p 91 para 14.

21 For these reasons, the Supreme Court of Appeal upheld the appeal, set aside the High Court's order and substituted it with an order dismissing Mr Maswanganyi's application with costs.

22 Notably, the Constitution and its demands are wholly absent in the Supreme Court of Appeal judgment. Instead, the judgment 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."*[26]

23 In what follows, we set out why the Supreme Court of Appeal erred in making these findings. Before doing so, we deal with why this Court's jurisdiction is engaged, and why it is in the interests of justice for leave to appeal to be granted.

LEAVE TO APPEAL SHOULD BE GRANTED

Jurisdiction

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

> *"The Constitutional Court—*
>
> *(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."*

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[26] SCA judgment – Record Vol 2 p 89 para 11.

The matter raises constitutional issues

25 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*".[27]

26 That is exactly what this Court is asked to do in this matter, which raises:

26.1 The right to fair labour practices in section 23(1) of the Constitution, in that this Court is asked to determine whether the termination of Mr Maswanganyi's employment on the basis of the respondents' interpretation of section 59(1)(d) of the Defence Act was lawful, fair and in line with constitutional precepts;[28]

26.2 The right to a fair trial in terms of section 35 of the Constitution (including the right of appeal to a higher court in terms of section 35(3)(o)), in that Mr Maswanganyi's original conviction and sentence, although reversed on appeal, continue to exert force and preclude him from exercising his existing rights;[29]

26.3 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;

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[27] *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106 (CC) para 23. See also *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) para 33 fn 26; and *Phumelela Gaming v Grundlingh and Others* 2006 (8) BCLR 883 (CC) para 23.

[28] This right recently grounded the Court's jurisdiction in *National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* [2019] ZACC 25 para 10. See also *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (1) BCLR 65 (CC) para 37.

[29] This right recently grounded the Court's jurisdiction in *Klaas v S* [2018] ZACC 6; 2018 (5) BCLR 593 (CC) para 21.

26.4 The correct interpretation to be given to legislative provisions in terms of section 39(2) of the Constitution, which itself raises a constitutional matter;[30] and

26.5 section 200(1) of the Constitution (which provides that the military must be structured and managed as a disciplined military force).[31]

27 The respondents allege that Mr Maswanganyi did not at any stage plead any constitutional issue or raise any constitutional matter, and that accordingly this Court lacks jurisdiction.[32]

28 But this is simply incorrect. Throughout this litigation, Mr Maswanganyi has advanced the argument that the interpretation and application of section 59(1)(d) implicates his constitutional right to fair labour practices.[33] Although the other rights are not specifically mentioned, the necessary factual underpinning for their invocation appears from the facts.

<u>The matter raises an arguable point of law of general public importance</u>

29 Alternatively, even were this Court to conclude that there is no constitutional issue raised, this application falls within the Court's jurisdiction as an arguable point of law of general public importance is raised, which ought to be considered.

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[30] *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC) para 21; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-khafela Tribal Authority* [2015] ZACC 25; 2015 (6) SA 32 (CC) para 34.

[31] The respondents in fact invoke section 200 of the Constitution: HC AA – Record Vol 1 p 32 para 4.2.

[32] CC AA – Record Vol 2 p 159 para 4.7.

[33] For example, in para 29 of the founding affidavit in the High Court (Record – Vol 1 p 14), Mr Maswanganyi stated that, in addition to being unlawful, the termination of his services and failure to reinstate him "*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 ((Record – Vol 1 p 42).

In *Paulsen v Slip Knot*,[34] this Court found that its jurisdiction on the basis of section 167(3)(b)(ii) is established where the matter raises:

29.1 a point of law – "*quite axiomatically, the point must not be one of* fact*";*[35]

29.2 which is arguable, in that there is "*some degree of merit in the argument*", which must "*have a measure of plausibility …. 'in the sense that there is substance in the argument advanced'";*[36]

29.3 which is of general public importance, in that the point "*must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public*";[37] and

29.4 which ought to be considered by the Court, which in effect overlaps with the "*factors that are of relevance to the interests of justice factor*".[38]

30 This matter evidently raises a point of law, rather than merely a point of fact, as it pivots on determining the correct interpretation of section 59(1)(d) of the Defence Act. This is quintessentially a legal, rather than factual, question. The matter is plainly arguable, given the starkly different interpretations of the relevant provision proffered by the High Court and the Supreme Court of Appeal judgments. It is of general public importance, as the matter raises a new and difficult question of law, which this Court has yet to determine,[39] and which would

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

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

[36] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) para 21, citing *Beatley & Co v Pandor's Trustee* 1935 TPD 365 at 366.

[37] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) para 26.

[38] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) para 17.

[39] *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; *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC) paras 8-10.

have ramifications not merely for the present litigants but potentially for all members of the SANDF. Finally, as we demonstrate below in our discussion of the interests of justice, the matter ought to be determined by this Court.

Interests of Justice

31 It is well established that whether this Court grants leave to appeal turns on what is in the interests of justice.[40] The "*interests of justice*" are determined with reference to a range of factors, articulated by this Court in *Phumelela Gaming*:

> **"***Factors which may be relevant to the enquiry include: the circumstances of the parties, the nature of the rights involved, the question whether the issue has been decided by the SCA, the question whether or not anyone else might be harmed by the relief sought and the prospects of success. This last-mentioned factor requires [the Applicant] to show that there is a reasonable prospect that the Court will reverse or materially alter the judgment sought to be appealed against. This Court has however held that although the prospects of success are an important factor, they are not necessarily decisive. Ultimately, the enquiry involves a judgment based on the particular circumstances of each case*."[41]

32 It is in the interests of justice for this Court to grant leave to appeal because:

32.1 The rights that are involved – the rights to fair labour practices, a fair trial and dignity – are fundamental;

32.2 A decision by this Court would provide helpful clarity on an undecided legal question;

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

[41] *Phumelela Gaming and Leisure Limited v Grundlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC) para 24.

32.3 The High Court and Supreme Court of Appeal judgments took starkly divergent approaches, which has previously been held to be a factor militating in favour of the interests of justice;[42] and

32.4 the matter raises important legal issues that are significant not only to the parties before the Court, but "*also in the broader national interest*".[43]

33 As we demonstrate in what follows, the application has reasonable prospects of success on the merits. That much is clear from the fact that the High Court reached a contradictory conclusion to the Supreme Court of Appeal. This constitutes another weighty – though not determinative – consideration militating in favour of granting leave to appeal.[44]

34 The respondents argue that the interests of justice do not operate in favour of determining this matter. Startlingly, they deny that constitutional rights are implicated at all,[45] and suggest that the matter only affects the particular parties before the court.[46] This is consistent with their stance in the High Court, which was that "*cases are not decided on the notion merely of reasonableness, fairness and sympathy*"[47] – a surprising position to take, given that section 23 of the Constitution, which guarantees the right to <u>fair</u> labour practices, is squarely at issue.

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42 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC) para 26.

43 *Pretorius and Another v Transport Pension Fund and Others* [2018] ZACC 10; 2018 (7) BCLR 838 (CC) para 14.

44 *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) para 12; *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) para 31.

45 CC AA – Record Vol 2 pp 162-163 paras 6.7-6.8.

46 CC AA – Record Vol 2 p 163 paras 6.9.1-6.9.2.

47 HC AA – Record Vol 1 p 42 para 35.3.

35 None of these contentions withstand scrutiny. Instead, this Court has not yet pronounced on the interpretation to be given to section 59(1)(d) of the Defence Act. It is in the interests of justice for it to do so now, particularly in the context of rights that are at stake, against the backdrop of divergent approaches taken by the High Court and the Supreme Court of Appeal, and given Mr Maswanganyi's prospects of success.

36 In their answering affidavit, the respondents further suggest that Mr Maswanganyi raises constitutional issues for the first time in this Court, on appeal.[48] For this reason, they contend that the Court ought not to grant leave to appeal.

36.1 But the respondents' contention on this point is simply not true. Throughout this litigation, Mr Maswanganyi advanced the argument that the interpretation and application of section 59(1)(d) implicates his constitutional right to fair labour practices.[49] Mr Maswanganyi's founding affidavit in the High Court stated that the termination of his services "*infringes on [his] right to fair labour practices protected in section 23 of the Constitution*".[50]

36.2 While the rights under sections 10 and 35 are not expressly mentioned, they are most certainly covered by the facts pleased, and the respondents themselves relied on section 200. Moreover, section 2(g) of the Defence Act requires that powers exercised in terms of the Act must be exercised in a way that respects the fundamental rights and dignity of

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[48] CC AA – Record Vol 2 p 159 para 4.7.

[49] See footnote 33 above.

[50] HC FA Record – Vol 1 p 14 para 29.

all members of the Defence Force. The effect of this is that the respondents have not been prejudiced in any way: instead, they have had ample opportunity to meet the case that Mr Maswanganyi has made out, and indeed sought to do so.[51]

36.3 In any event, this matter involves the interpretation of legislation. This Court has previously recognised that every court that interprets legislation – as both the High Court and Supreme Court of Appeal did in this matter – is obliged to read a legislative provision through the prism of the Constitution. This obligation is not optional: on the contrary, the obligation is mandatory, and is imposed on all courts, regardless of the exact characterisation by the parties of the case.[52]

36.4 Finally, in the alternative and only in the event that this Court finds that the constitutional dimensions of this matter were insufficiently pleaded, we submit that it remains in the interests of justice for the Court to grant leave to appeal and decide the matter.

36.4.1 This Court has previously affirmed that—

> *"This is not to say that circumstances could never exist where the interests of justice required that a constitutional matter be raised for the first time on appeal before this Court. They would, however, be rare and the circumstances would have to be exceptional."*[53]

36.4.2 Exceptional circumstances obtain here for a number of reasons:

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[51] See, for example, the HC AA – Record Vol 1 p 42 para 36.

[52] *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC) para 43; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) paras 87-88.; *Phumelela Gaming and Leisure Limited v Grundlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC) paras 26-27.

[53] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC) para 44.

(a) First, the substance of Mr Maswanganyi's case was plainly apparent on the papers. The legislative provisions that are in question were squarely identified in the papers, and constituted the subject of the decisions of the courts below.

(b) Second, the constitutional implications of the matter do not require factual evidence to be led that is not already apparent on the papers.

(c) Third, a clear injustice would result if Mr Maswanganyi is not granted leave to appeal, notwithstanding that the gravamen of his case was always apparent on the papers, and notwithstanding the obligations that are imposed on all courts to read legislation in line with section 39(2) of the Constitution. It would amount to making real *"the risk of crippling formalism*".[54] Indeed, it "*would be formalism of the highest order for courts to ignore substance*".[55]

37 For these reasons, we submit that this Court plainly has jurisdiction to determine the matter, and it would serve the interests of justice for it to do so.

CONSTITUTIONAL AND LEGISLATIVE SCHEME

38 In what follows, we outline the applicable constitutional and legislative provisions.

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[54] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd and Others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC) para 39.

[55] *September and Others v CMI Business Enterprise CC* [2018] ZACC 4; 2018 (4) BCLR 483 (CC); (2018) 39 ILJ 987 (CC); [2018] 5 BLLR 431 (CC) para 54.

Right to fair labour practices

39 Section 23(1) of the Constitution guarantees that "*[e]veryone has the right to fair labour practices*".

40 The Labour Relations Act 66 of 1995 ("**LRA**") is inapplicable to the determination of this matter: section 2(a) makes it clear that the LRA does not apply to members of the SANDF. Section 23 thus applies directly.[56]

41 In *NEHAWU*, this Court noted that the right protected in section 23(1) broadly encompasses the relationship between worker and employer, and "*the continuation of that relationship on terms that are fair to both*".[57]

42 Although the right resists precise definition,[58] it can never constitute a fair labour practice for employment to be terminated without any rational basis. Nor can it be fair, or consistent with *audi alteram partem* and the principles of natural justice, for that termination to occur without any opportunity for a hearing. As this Court recently recognised:

> *"[the] right not to be unfairly dismissed is one of the most important manifestations of the constitutional right to fair labour practices".*[59]

Right to a fair trial

43 Section 35 of the Constitution provides in relevant part:

> *"Every accused person has a right to a fair trial, which includes the right—*
>
> *…*

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[56] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC) para 27.

[57] *NEHAWU v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC) para 40.

[58] *NEHAWU v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC) para 33.

[59] *NUMSA obo Nganezi and Others v Dunlop Mixiing and Technical Services (Ltd) and Others* [2019] ZACC 25 para 10.

(o) of appeal to, or review by, a higher court."

44 This Court has recognised that the right of appeal to a higher court addresses the risk of wrongful convictions and the consequent failure of justice; the appeal must be as fair as the trial itself:

> "*The ambit of the right enshrined in section 35(3)(o) must be determined by having regard to the context in which it appears and the purpose for which it is intended. The right of appeal to, or review by, a higher court is not a self-standing right; it is an incidence or component of the right to a fair trial contained in section 35(3) and appears in that context. It follows that any statutory provision which is concerned with the right to a fair trial must, at the very least, be in harmony with the notion of a fair trial and, more generally, with the standard of fairness which is inherent in the concept of a fair trial. The purpose of section 35(3) read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and section 35(3)(o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing any person of a criminal offence would be subject to reconsideration by a higher court.*"[60] (Emphasis added.)

45 The central purpose of the right to an appeal (as a component of the right to a fair trial) is thus to protect against miscarriages of justice.[61]

46 Mr Maswanganyi's appeal of his conviction and sentence was wholly successful. Notwithstanding this, one of the original consequences of his initial sentence – the termination of his service with the SANDF – remains in force. The effect is that Mr Maswanganyi continues to be penalised for an unsustained conviction and sentence.

47 The respondents contend that section 59(1)(d) does not implicate Mr Maswanganyi's right to a fair trial, because he was afforded this right to the

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[60] *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18; 1999 (2) SACR 622 (CC) para 9.

[61] PD Marshall 'A Comparative Analysis of the Right to Appeal' *Duke Journal of Comparative and International Law* (2011) 22 (1) at 3.

point of appeal in the criminal proceedings.[62] But this fails to account for the nature of the right to appeal, protected in section 35(3)(o) of the Constitution. As our courts have recognised:

> "*[T]his Court is enjoined by section 39(2) of the Constitution of the Republic of South Africa 1996 to "promote the spirit, purport and objects of the Bill of Rights", which provides in section 35(3) that every accused person is entitled to a fair trial, which includes the right of "appeal to, or review by, a higher Court". In our view it would be a parsimonious construction of the Bill of Rights which confined [the right to appeal or review] only to the immediate consequences of the trial itself. In our view the clear spirit, purport and object of that section is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result.*"[63] (Emphasis added.)

48 It cannot be the case that Mr Maswanganyi continues to face impediments from a quashed conviction. This would constitute a "*parsimonious construction"* of section 35(3)(o), and must be eschewed.

Right to and value of dignity

49 The Constitution protects the right to dignity in section 10 which provides that "*[e]veryone has inherent dignity and the right to have their dignity respected and protected*", and the value of dignity in section 1(a) and section 7(1).

50 This Court has held that the right to dignity encompasses the right to work in order to support oneself and one's family:

> *"The interconnection between the right to dignity and work has long been articulated by this Court. In Affordable Medicines it held:*

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62 CC AA – Record Vol 2 p 160 para 4.11.

63 *S v S* 1999 (1) SACR 608 (W) at 612H, cited with approval by the Supreme Court of Appeal in *Stow v Regional Magistrate, Port Elizabeth NO and Others; Meyer v Cooney NO & Others* [2018] ZASCA 186; 2019 (1) SACR 487 (SCA) para 44.

> *"One's work is part of one's identity and it is constitutive of one's dignity. . . . And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of the person's existence'.""*[64]

51 The Supreme Court of Appeal similarly recognised in *Watchenuka* that:

> *"[t]he freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity . . . for mankind is pre eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.*[65]

52 The respondents deny that Mr Maswanganyi's right to dignity is impacted upon, arguing that it is open to him to reapply to secure a job within the SANDF.[66] But this misses the point entirely. He has been deprived of the employment to which he was entitled, and which is an important component of his dignity. In any event, and tellingly, we note that the SANDF has suggested that there is no guarantee that he would be re-employed, were he to apply.[67]

The defence force as a disciplined military force

53 Section 200 of the Constitution, headed "*Defence force*" provides that:

> *"(1) The defence force must be structured and managed as a disciplined military force.*
>
> *(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.*"

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64 *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) para 35, citing *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.

65 *Minister of Home Affairs and Others v Watchenuka and Another* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) para 27.

66 CC AA – Record Vol 2 p 160 para 4.11.

67 HC AA – Record Vol 1 p 36 para 15.

54 However, as we argue below when discussing the purpose of section 59(1)(d), section 200 is not in any way subverted where a member of the SANDF's conviction and sentence have been quashed, as in this case.

The Defence Act

55 The contrary is true, particularly in light of section 2(g) of the Defence Act, which affirms that the SANDF must respect the fundamental rights and dignity of its members:

> *"The Minister and any organ of state defined in section 239 of the Constitution, as well as all members of the Defence Force and any auxiliary service and employees, must, in exercising any power or performing any duty in terms of this Act, have regard to the following principles:*
>
> *…*
>
> *(g) The Defence Force must respect the fundamental rights and dignity of its members and of all persons.*

56 Section 59 of the Defence Act, headed "*Termination of service of members of the Regular Force*" provides in relevant part:

> *"(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." (Emphasis added.)

The Military Discipline Supplementary Measures Act

57 The MDSMA includes as its objects (in section 2(a)) to "*provide for the continued proper administration of military justice and the maintenance of discipline.*"

58 Section 42 of the 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."*

59 Having set out the relevant constitutional and legislative provisions, we now turn to explain the proper interpretation of section 59(1)(d) of the Defence Act.

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

60 The primary issue in this case is the proper interpretation of section 59(1)(d) of the Defence Act (quoted in relevant part above at para [56]), in light of the fundamental rights at stake. It is therefore vital to identify the principles that govern this Court's approach to statutory interpretation.

61 The Supreme Court of Appeal set out the approach to statutory interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

> "*The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of*

> *the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*."[68] (Emphasis added.)

62 This Court has since quoted the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* with approval.[69] We caution, however, that this case omits any mention of section 39(2) of the Constitution. In *Cool Ideas*, this Court articulated the following principles for interpreting legislation:

> *A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).*[70]

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[68] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[69] See, for example, *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 129; *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others [*2017] ZACC 43; 2018 (2) BCLR 157 (CC) para 28*; Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7 para 186; *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) para 29; and *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29.

[70] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.

63 Accordingly, and in line with what follows, these key interpretive principles must inform the Court's approach in this case:

63.1 First, the provision of the Defence Act must be interpreted purposively.

63.2 Second, the reference to the 'sentence' in section 59(1)(d) must be interpreted as a reference to a lawful, and final sentence.

63.3 Third, section 59(1)(d) must be read in context. The differences between its terms and section 59(2) and 59(3) are instructive, and militate in favour of Mr Maswanganyi's reinstatement operating automatically and as of right.

63.4 Fourth, section 39(2) of the Constitution mandates that the provision must be interpreted in a manner that preserves its constitutional validity, and that best promotes the spirit, purport and objects of the Bill of Rights.

63.5 Fifth, because section 59(1)(d) involves the imposition of sanctions – in the form of the termination of his employment – it must be interpreted restrictively. Any ambiguity in the provision must be resolved against the risk of his being penalised.

63.6 Sixth, the long-standing common-law principle which requires statutes to be interpreted in a way that avoid injustice.

63.7 Finally, section 59(1)(d) must be read harmoniously with section 42 of the MDSMA, which ameliorates any concerns regarding the applicable interim measures to be put in place while an appeal is pending.

The purpose of section 59(1)(d) of the Defence Act

64 Section 59(1)(d) of the Defence Act provides that the service of a member of the Regular Force is terminated if he or she is sentenced to a term of imprisonment without the option of a fine.

65 The purpose of section 59(1)(d) is plain: it ensures that the SANDF does not have in its ranks members who have been convicted of serious crimes (and sentenced to imprisonment on this basis). This is in line with section 200(1) of the Constitution, which sets out that the SANDF "*must be structured and managed as a disciplined military force*". We do not challenge the lawfulness of this purpose.

66 However, while we accept that the purpose of section 59(1)(d) may be a lawful one, it is not served in any way where a member's conviction and sentence is overturned. The contrary is true: the underlying purpose of section 59(1)(d) is entirely defeated where an appeal court has quashed the conviction and sentence. This Court has affirmed that "*a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred.*"[71] Were section 59(1)(d) to apply *ex lege* despite the absence of the critical jurisdictional fact (that is, without there being a sentence imposed by a competent civilian court), its apparent purpose would not be served at all.

67 Indeed, it would be irrational and at odds with the provision's underlying purpose to interpret and apply the section in the manner that the respondents urge. The legislative provision must be given a meaning – and applied in a manner – that

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[71] *Road Traffic Management Corporation v Waymark (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC) para 31.

attains its purpose. Given that Mr Maswanganyi's appeal was successful, there is simply no connection between the provision's purpose and the application of the provision to Mr Maswanganyi.

68 This is bolstered not only by the purpose of section 59(1)(d) of the Defence Act, but also the aim of section 200 of the Constitution. As this Court has pointed out, when interpreting that constitutional provision—

> *"Military discipline is not about punishing crime or maintaining and promoting law, order and tranquillity in society. Military discipline, as chapter 11 of the Constitution emphasises, is about having an effective armed force capable and ready to protect the territorial integrity of the country and the freedom of its people."*[72]

69 Given this, military discipline is not served at all by refusing a member of the SANDF his position in circumstances where his sentence by a civilian court was entirely overturned.

70 The respondents attempt to meet these points by contending that Mr Maswanganyi's services were terminated automatically once the trial court had imposed its sentence. This termination operated *ex lege* and, once in force, there was no residual or implied power to reinstate him.[73] For this reason, on the respondents' version whether the effect of section 59(1)(d)'s application infringes Mr Maswanganyi's rights or is unfair is irrelevant.

71 However, the respondents' contentions cannot be sustained.

71.1 First, this Court has previously determined – in a different context – that where the necessary jurisdictional requirements for automatic or deemed

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[72] *Minister of Defence v Potsane and Another, Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* [2001] ZACC 12; 2002 (1) SA 1 (CC) para 38.

[73] CC AA – Record Vol 2 p 158 para 4.5.

dismissal are not established, there simply is no termination of employment.

71.2 Second, the reference to 'sentence' and 'sentenced' in section 59(1)(d) is a reference to a lawful and final sentence.

71.3 Third, section 42 of the MDSMA operates to serve the purposes of military discipline (articulated in section 200 of the Constitution and section 59(1)(d) of the Defence Act), which completely addresses any concern that the SANDF may have regarding the position of members pending an appeal process.

We turn to the first of these points below.

72 Albeit in a different context, this Court has considered the need for the jurisdictional requirements of a provision that results in the termination of employment to be met in *Grootboom v National Prosecuting Authority*.[74]

72.1 Mr Grootboom was employed by the National Prosecuting Authority ("**NPA**") as a public prosecutor. He was suspended by the NPA and, while on suspension, left South Africa to study in the United Kingdom. The NPA then informed him that he had been discharged from public service in terms of section 17(5)(a)(i) of the Public Service Act 103 of 1994, which provides for the deemed discharge of public servants who absent themselves from their official duties for longer than one month, without their employers' permission.

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

72.2 The Labour Court and Labour Appeal Court refused to set aside Mr Grootboom's deemed discharge. On appeal to this Court, however, Mr Grootboom was successful.

72.3 This Court held that, in terms of his suspension, Mr Grootboom had been barred from performing any of his official duties or being present at work. As a result, he could not be said to have absented himself from his duties without his employer's permission.

72.4 Critically, then, the central jurisdictional fact necessary for the relevant provision was absent.[75] Given this absence, section 17(5)(a)(i) of the Public Service Act was simply inapplicable, and Mr Grootboom had remained in the NPA's employ. There was no question of whether Mr Grootboom was required to apply for reinstatement or re-employment.

73 The principles laid down by this Court in *Grootboom* have been applied subsequently:

73.1 In *Solidarity v Public Health and Welfare Sectoral Bargaining Council*, the Supreme Court of Appeal held that there was no deemed dismissal of an employee of a provincial Department of Health, where the jurisdictional facts of the relevant provision were not satisfied.[76]

73.2 *Jethro NO*, a recent Labour Appeal Court judgment (per Murphy AJA) considered the effect of the precedent set down in *Grootboom.* The judgment affirmed that informing an employee of his or her deemed discharge by operation of law (there, in terms of section 14(1) of the

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[75] Ibid para 42.

[76] *Solidarity 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.

Employment of Educators Act 76 of 1998) does not involve any decision taken by the relevant official. The Labour Appeal Court emphasised that legislation providing for automatic and deemed dismissal must be interpreted constitutionally:

> *[H]uman rights are intrinsically interdependent, indivisible and inseparable and the constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes. Accordingly, legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights, including the right in section 23(1) of the Constitution to fair labour practices.*[77]

74 To sum up, in line with the purpose of the relevant provisions and in light of this Court's prior jurisprudence, where the necessary conditions for section 59(1)(d) of the Defence Act are not established, there can be no lawful termination of employment.

"Sentence" in section 59(1)(d) refers to a final, lawful sentence

75 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 line with established legal principle, the reference to "sentence" in the provision must, we submit, constitute a reference to a lawful or valid sentence:

> *"It is a recognised canon of construction of statutes that any reference in any law or conduct, is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct."*[78]

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[77] *MEC for the Department of Education Western Cape Government v Jethro NO and Another* [2019] ZALAC 38 para 40.

[78] *S v Mapheele* 1963 (2) SA 651 (A) at 655D-E, cited with approval by the Supreme Court of Appeal in *MTN International (Mauritius) Ltd v Commissioner of South African Revenue Services* [2014] ZASCA 8; 2014 (5) SA 225 (SCA) para 10; and *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others* [2018] ZASCA 77; 2018 (3) All SA 605 (SCA) para 21. See also *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC) para 241.

See also *Union Government v Schierhout* 1925 AD 322 at 339, that the expression "*is removed from the public service*" must refer to removal that is right and due.

76 Once the trial court's conviction and sentence of Mr Maswanganyi was overturned, there simply was no lawful or valid sentence. Consistent with this point is the recognition that any legal determination which has been taken on appeal cannot be considered to be final until the appeal is concluded.[79]

77 The trial court's conviction and sentence of Mr Maswanganyi was neither final nor lawful. A sentence that is 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. Accordingly, and in line with what we discussed above, the jurisdictional requirements of section 59(1)(d) were not met.

Reading section 59(1)(d) in context

78 The respondents have argued that section 59(1)(d) of the Defence Act operates *ex lege*: once conviction and sentencing have occurred at trial court stage, the consequences (that is, termination of service) kick in automatically, and cannot be reversed. This, say the respondents, ties the SANDF's hands and leaves it without any discretion whatsoever to reinstate Mr Maswanganyi: "*[s]ection 59(1)(d) is a one way street providing only for automatic discharge and not for reinstatement.*"[80] For this reason, they contend that by ordering them to reinstate Mr Maswanganyi, the Court would effectively compel them to perform an act which is outside the law.[81]

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

[80] CC AA – Record Vol 2 p 165 para 10.

[81] CC AA – Record Vol 2 p 166 paras 11-12.

79 The Supreme Court of Appeal accepted this reasoning, and held that Mr Maswanganyi lacks the right to automatic reinstatement (even once his conviction and sentence were overturned). Instead, the Supreme Court of Appeal juxtaposed sub-section 59(1)(d) with sub-section 59(3) and 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 (or, put differently, the preservation of Mr Maswanganyi's existing employment rights) is precluded by sub-section 59(1).

80 Respectfully, this conclusion does not withstand scrutiny. if section 59(1)(d) is read in the context of the provision as a whole (relevant parts of which are quoted above at para [56]), it is clear that the above position cannot be sustained.

80.1 Section 59 deals with different ways in which the service of a member may be terminated. These situations are by no means identical and it would be wrong to treat all of them as equivalent. In the context of the Supreme Court of Appeal's reasoning there is a marked difference between section 59(1)(d) and section 59(3). In the former, there is a determination by an external body – a court – of guilt and sentence, after a full investigation into all the facts. By contrast, section 59(3) deals with an internal matter – absence without the permission of the commanding officer – in respect of which there is no investigation or determination of the cases of such absence. That is why the section has a safeguard of an enquiry into good cause which may justify reinstatement. The safeguard in relation to section 59(1)(d) is the appellate process.

80.2 Section 59(1)(b) provides that the service of a member is terminated on the termination or expiration of any fixed term contract.

80.2.1 However, and as the Supreme Court of Appeal made clear in *Xulu*, the default policy choice is that a fixed term contract between a member of the Regular Force and the SANDF renews automatically, unless a relevant official has indicated anything to the contrary.[82]

80.2.2 A decision in terms of section 59(1)(b) not to renew the fixed-term contract of an SANDF member therefore constitutes reviewable administrative action exactly because there is a "*clear bureaucratic course*" put in place, and a decision must be positively taken to deviate from the default policy choice, which is that the contract will be renewed.[83]

80.2.3 By the respondents' own lights, section 59(1)(d) operates differently: where the jurisdictional facts required for its operation are established, it kicks in automatically, leaving the relevant SANDF officials without any scope for discretion.

80.3 Section 59(2) provides that the service of a member may be terminated in accordance with any applicable regulations for a number of listed reasons, including because of the member's own unfitness of incapacity.

80.3.1 Unlike section 59(1), which provides that the service of a member "*is terminated*" if any of the jurisdictional facts are established,

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[82] *Minister of Defence and Another v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) paras 36-39.

[83] *Minister of Defence and Another v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) para 36.

section 59(2) provides for discretion, as the service of a member "*may*" be terminated.

80.3.2 In *Minister of Defence v SANDU*, the Supreme Court of Appeal held that the decision taken by the Chief of the SANDF to discharge members who participated in a demonstration was reviewable and invalid, for it was procedurally unfair.[84]

80.3.3 Similarly, in *Mtomba*, the High Court held that the dismissal of a member of the SANDF, taken in terms of section 59(2), constituted administrative action, and set aside the relevant decision on the basis that Mr Mtomba's right to procedurally fair administrative action was violated.[85]

80.4 Section 59(3) provides that a member of the Regular Force who absents him- or herself without permission for a period exceeding 30 days must be regarded as having been dismissed. However, section 59(3) empowers the Chief of the SANDF to authorise a member's reinstatement "*on good cause shown*".

80.4.1 Section 59(3) was at issue in *Mamasedi*, where the Supreme Court of Appeal (per Plasket AJA) held that reinstatement does not automatically follow from the setting aside of the decision not to reinstate a member of the SANDF who was discharged in terms of that provision.[86]

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[84] *Minister of Defence and Others v South African National Defence Union and Another* [2014] ZASCA 102; 2014 (6) SA 269 (SCA).

[85] *Mtomba v Minister of Defence and Others* 2019 (3) SA 548 (GP).

[86] The provision was in issue in *Minister of Defence and Military Veterans v Mamasedi* [2017] ZASCA 157; 2018 (2) SA 305 (SCA) para 24.

80.4.2 On this basis, the Supreme Court of Appeal in this matter held that reinstatement would not automatically follow for Mr Maswanganyi, and that there is no residual provision to allow him to apply for such reinstatement.

80.4.3 In this Court, the respondents contend that the legislature's provision for a possible reversal of a deemed dismissal in section 59(3) (in that section 59(3) empowers the Chief of the SANDF to authorise the reinstatement of a member on good cause shown), and its failure to provide for such a power in section 59(1) is instructive.[87]

80.4.4 However, 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 <u>against</u> the respondents' position. Where the requirements for sub-section 59(1)(d) are absent – as in this case – 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. The jurisdictional fact required for there to have been valid termination – that there is a lawful sentence – simply is absent.

80.5 The contention that there is no power to reinstate Mr Maswanganyi consequent upon a successful appeal is also incorrect. There mere fact

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[87] CC AA – Record Vol 2 p 167 para 14.

that section 59(1)(d) is silent on the question of reinstatement is not dispositive of the issues. This is because it is a long-established principle that statutes must be interpreted to include powers which are reasonably necessary or incidental to the powers expressly conferred.[88] Courts are required to look at the issues from the perspective of reasonableness and especially the consequences of holding the particular act in question to be *ultra vires*. It is submitted section 59(1)(d) is an obvious candidate for an implied power of reinstatement. The consequences of holding otherwise would result in palpable injustice.

81 Reading section 59(1)(d) in context, then, it is apparent that there was no need for Mr Maswanganyi to apply for reinstatement, for his service with the SANDF was never terminated. This is entirely consistent with this Court's finding in *Grootboom*.

82 It is also simply no answer to suggest that Mr Maswanganyi ought to have applied for re-employment. (In fact, he did so.) He is entitled to the reinstatement of his position, and to his salary and benefits for the period during which his employment was terminated.

83 We now turn to explain that the interpretation put forward by the respondents – and accepted by the Supreme Court of Appeal – is at odds with Mr Maswanganyi's constitutional rights, and with section 39(2) of the Constitution.

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[88] *City of Cape Town v Claremont Union College* 1934 AD 414 at 420-421*; Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) para 50*; GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape and Another* 1996 (3) SA 45 (SCA) at 51G-H.

Section 39(2)'s mandates

84 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*". This requires more than simply adopting an interpretation that avoids unconstitutionality: instead, a Court must adopt the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights.[89]

85 As this Court has explained:

> *"The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in Fraser:*
>
> > *'Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights."*[90]

86 With respect, in the face of such obvious injustice, it is striking that the Supreme Court of Appeal judgment entirely failed to consider the effect of section 39(2) on the interpretation to be given to section 59(1)(d).

87 Section 39(2) requires an interpretation that promotes Mr Maswanganyi's rights to fair labour practices, dignity, and a fair trial. The interpretation of section 59(1)(d) of the Defence Act proffered by the respondents, and accepted by the Supreme Court of Appeal, infringes these rights because:

87.1 The interpretation would have the effect of terminating his employment with the SANDF automatically, in the absence of the grounds required for

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

90 Ibid para 89.

section 59(1)(d) of the Defence Act to operate, and without providing him with any opportunity to be heard. This termination is manifestly unfair, both substantively and procedurally. It is at odds with section 23(1) of the Constitution, which safeguards everyone's right to fair labour practices, including members of the SANDF.

87.2 The interpretation renders section 35(3)(o) of the Constitution meaningless in the present context. Its effect is that the punitive consequences of a conviction and sentence continue to exert force, notwithstanding that the conviction and sentence have been set aside.

87.3 The interpretation trenches on Mr Maswanganyi's right to dignity, because his work is part of his identity and thus constitutive of his identity. Further, he continues to suffer the stigmatising effects of the original conviction and sentence, that were quashed.

88 The respondents' interpretation should be rejected on this basis.

Section 59(1)(d) is a penal provision, and must be read restrictively

89 Further, our courts have long affirmed that legislation that encroaches on subjects' rights must be subject to a strict construction:

> *"It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole."*[91]

90 This is most vividly the case where the statutory provision in question has a penal consequence. Section 59(1)(d) of the Defence Act is a penal provision: in

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[91] *Dadoo Ltd and Others v Krugersdorp Municipality* 1920 AD 530 at 552.

addition to any sentence of imprisonment, a member of the SANDF is also subject to the sanction of termination of service. Legislative provisions that have disciplinary consequences – which can include the loss of, or discharge from, employment – constitute penal provisions.[92]

91 In *DA v ANC*, this Court affirmed the principle of restrictive interpretation of penal provisions:

> *"In case of doubt, we are obliged to interpret penal prohibitions restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised.*
>
> *The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.*
>
> *This Court has endorsed this approach. And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common law presumption in favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution."*[93] (Emphasis added.)

92 A restrictive interpretation applies whenever punishment is imposed. That punishment need not be only criminal in nature. On the contrary, a restrictive interpretation is apt, too, where an employer faces potential sanction.

92.1 In *Hira v Booysen*, the then-Appellate Division applied the principle of restrictive interpretation in the context of an employee's disciplinary proceedings before a magistrate.[94]

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[92] *Hira v Booysen* 1992 (4) SA 69 (A) at 78D-E.

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

[94] *Hira v Booysen* 1992 (4) SA 69 (A) at 78.

92.2 There, a group of teachers had published an article in their union newsletter criticising the Department of Education, and were charged with misconduct.

92.3 Breaches of the relevant legislative provision in that case did not attract criminal liability. Instead, the teachers were subjected to a disciplinary hearing, which could culminate in their dismissal or a fine.

92.4 The Appellate Division held that as a result, the provision was penal and must be restrictively interpreted in the teacher's favour:

> *"A second consideration which points to the necessity for a restrictive interpretation of s 16(f) is that it is a penal provision, breach of which may render an offender liable to the punishments set out in s 17(23), including discharge from his employment. Steyn's Die Uitleg van Wetter 5th ed at 112 quotes the statement by Kotze JP in Moss v Sissons and McKenzie 1907 EDC 156:*
>
> > *'The observation of Paulus In poenalibus causis benignius interpretandum est (Dig 50, 17, lex 155) is a just and sound one, for it imports that where the language is obscure or ambiguous the Court should give the benefit of the doubt in favour of the defendant or of the accused.'"*[95] (Emphasis added.)

93 Section 59(1)(d) must, then, 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 (as the penal consequences no longer serve any purpose).

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[95] At 78D-E.

Section 59(1)(d) must be read alongside section 42 of the MDSMA

94 Finally, any concern regarding the status of a member who has been convicted and sentenced to imprisonment but who intends to prosecute an appeal is easily answered by section 42 of the MDSMA (quoted above in para [58]). That section provides a mechanism to the Chief of the SANDF to effectively suspend a member, pending the outcome of the appeal.

95 The respondents attempt to argue that section 42 of the MDSMA is inapplicable here because, first, a specific statute must enjoy priority over a general one (and the provisions dealing with discharge or dismissal on sentence in the Defence Act are more specific);[96] and second, the Defence Act was enacted after the MDSMA and so must prevail.[97]

96 The Supreme Court of Appeal similarly found that the MDSMA deals with enforcement of military discipline whereas section 59 of Defence Act deals with termination of service – and accordingly, the statutes are not to be read alongside.[98] Further, the Supreme Court of Appeal found that section 42 of MDSMA only applies where the relevant member is able to be physically present and report for duties, and so its application is precluded where the member is serving a prison sentence.[99]

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96 CC AA – Record Vol 2 p 172 para 17.2-17.3.

97 CC AA – Record Vol 2 p 173 para 17.5.

98 SCA judgment – Record Vol 2 p 88 para 10.

99 SCA judgment – Record Vol 2 pp 85-86 para 7 and p 88 para 10.

97 We submit that this Court should reject those submissions. Instead, section 59(1)(d) of the Defence Act can and must be read in harmony with section 42 of the MDSMA. As this Court noted recently—

> *"[w]ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together."*[100]

98 The provisions can be read consistently: section 59(1)(d) of the Defence Act applies to a final sentence only, while section 42 of the MDSMA governs the interim position, where a member of the Regular Force has been convicted and sentenced but is pursuing an appeal. There is no reason – textually or otherwise – to interpret section 42 of the MDSMA as requiring that a member must be capable of presenting him- or herself for duty in person (as the Supreme Court of Appeal did). On the contrary, section 42 of the MDSMA specifically envisages applying to members who are awaiting appeal.[101] This directly ameliorates any concern that the interpretation that we have put forward above would undermine the SANDF's disciplinary and employment structures.

The presumption against obvious injustice

99 It is a long-standing common law principle of interpretation that—

> *"whenever the language of the legislature admits of two constructions, and if constructed in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words."*[102]

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[100] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC) para 42. See also *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) para 19.

[101] This is bolstered by section 307 read with 309(4) and section 321 of the Criminal Procedure Act 51 of 1997, which sets out that the execution of a sentence is not suspended, pending an appeal process.

[102] *Principal Immigration Officer v Bhula* 1931 AD 323 at 336.

100 It is submitted that the interpretation adopted by the Supreme Court of Appeal leads to "*obvious injustice*". Yet, despite a range of interpretive tools at its disposal, it did not adopt an approach aimed at avoiding that injustice. It could, and should, have done so.

ALTERNATIVELY, THE PRINCIPLES OF NATURAL JUSTICE APPLY

101 However, in the event that this Court is against us on the proper interpretation of section 59(1)(d), we submit in the alternative that at a minimum, the provision must be interpreted in light of the principles of natural justice.

102 It is a settled principle of statutory construction that *audi alteram partem* should be enforced unless it is clear that the legislature has precluded its application. As this Court has noted:

> *"our law has a long tradition – which was endorsed by this Court in Mohamed – of strongly entrenching audi alteram partem ('"hear the other side"), which attains particular force when prejudicial allegations are levelled against an individual. And <u>it is for this reason that dismissal from service has been recognised as a decision that attracts the requirements of procedural fairness</u>."*[103] (Emphasis added.)

103 In *Minister of Defence v SANDU*,[104] the Supreme Court of Appeal accepted that the dual requirements of legality and section 23(1) of the Constitution give rise to a duty of fairness in disciplinary proceedings involving members of the SANDF.[105]

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[103] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 83 (emphasis added). See also *R v Ngwevela* 1954 (1) SA 123 (A) at 131H:

> "*The maxim [audi alteram partem] should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it."*

[104] 2014 (6) SA 269 (SCA).

[105] Ibid para 16.

104 If section 59(1)(d) were to be given the draconian interpretation advanced by the respondents and accepted by the Supreme Court of Appeal, members of the SANDF would be stripped of their rights to be heard. Termination from service would be automatic, without any scope for the member to put forward a case for why the provision does not apply (including, most critically, because the conviction and sentence are to be appealed and thus not final), or why they should be reinstated. This injustice is particularly acute where the member's conviction and sentence are subsequently quashed on appeal.

105 In this respect, we note that *Phenithi* (involving a deemed dismissal in terms of section 14(1)(a) of the Employment of Educators Act) is distinguishable.[106]

105.1 There, the Supreme Court of Appeal found that the relevant provision (which operates *ex lege*) was not unconstitutional on the basis that it does not violate the right to fair labour practices in section 23(1) of the Constitution, preclude *audi alteram partem* or allow for discretion to be exercised.

105.2 However, this is because the relevant statute "*provides ample means to rectify or reverse the outcome*".[107] In terms of section 14(2) of the relevant legislation, an educator is afforded an opportunity to be heard and to be reinstated on good cause.[108]

105.3 There is no equivalent provision in the Defence Act, providing Mr Maswanganyi with the opportunity to motivate for his reinstatement.

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[106] *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA).

[107] *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA) para 19.

[108] *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA) para 21.

Instead, the respondents have vigorously denied that the SANDF has any power at all to order his reinstatement.

106 In the circumstances, then, section 59(1)(d) must be read as including *audi alteram partem,* and affording Mr Maswanganyi the opportunity to make his case for why termination ought not to have occurred.

107 Accordingly, section 59(1)(d) must be interpreted as requiring a decision to bring it into operation, following a fair hearing that at a minimum ascertains whether the member intends appealing their conviction and sentence. It is simply at odds with the rights and principles outlined above to conclude that the provision operates *ex lege*, as a guillotine that falls as soon as a member of the Regular Force is sentenced to a term of imprisonment.

CONDONATION

108 It remains, briefly, to deal with the application for condonation for the late filing of the application for leave to appeal, which was delayed by just over one week (that is, by 6 court days).

109 The interests of justice are paramount to determining whether condonation should be granted:

> *"The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."*[109]

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

110 We submit that the circumstances informing the application for condonation are set out comprehensively in the founding affidavit in this Court.[110]

111 This Court set out the test for condonation in *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC):

> *"A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."*[111]

112 It is in the interests of justice to condone the late filing of the application for leave to appeal because:

112.1 While the delay is sincerely regretted, it was not significant, and a reasonable explanation has been provided for the delay;

112.2 The respondents were not prejudiced by the delay, and have not sought to oppose the application for condonation;[112]

112.3 The prospects of success are strong; and

112.4 It is a matter of significant public interest.

113 For the purpose of completeness, we note that Mr Maswanganyi does not seek to oppose the respondents' application for condonation for the late filing of their answering affidavit in this Court.

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[110] CC FA – Record Vol 2 pp 141-143 paras 80-83.

[111] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 23.

[112] CC AA – Record Vol 2 p 176 para 19.

CONCLUSION

114 For all the reasons canvassed above, Mr Maswanganyi prays that condonation for the late filing of the application for leave to appeal is granted; that he is granted leave to appeal, that the appeal is upheld with costs (including costs of two counsel), and that the order of the Supreme Court of Appeal is set aside and the order of the High Court reinstated.

GILBERT MARCUS SC
MEGHAN FINN
Chambers, Sandton
7 October 2019

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