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 PRACTICE NOTE

PARTIES

1 The Applicant is Mozamane Teapson Maswanganyi ("**Mr Maswanganyi**").

2 The First Respondent is the Minister of Defence and Military Veterans ("**the Minister**").

3 The Second Respondent is the Chief of the South African Defence Force ("**SANDF**").

4 The Third Respondent is the Secretary for Defence.

DATE OF HEARING

5 19 November 2019.

ISSUES TO BE DETERMINED

6 Mr Maswanganyi, a member of the Regular Force of the SANDF was charged and convicted of a crime, and sentenced to imprisonment. Mr Maswanganyi successfully appealed his conviction and sentence, which were both quashed in their entirety.

7 Section 59(1)(d) of the Defence Act 42 of 2002 ("**the Defence Act**") provides in relevant part:

> *"(1) The service of a member of the Regular Force is terminated—*
>
> *…*
>
> *(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*
>
> *…*

8 On the basis of section 59(1)(d), 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.

9 The High Court (per Raulinga J) disagreed, and ordered Mr Maswanganyi's reinstatement. The respondents successfully appealed this to the Supreme Court of Appeal, which found 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, notwithstanding that his conviction and sentenced were overturned.

10 The issues on appeal are:

10.1 Whether the Court has jurisdiction, and if it is in the interests of justice that leave to appeal be granted;

10.2 Whether Mr Maswanganyi's rights to fair labour practices, a fair trial (including the right of appeal) and to dignity are implicated;

10.3 The proper interpretation of section 59(1)(d) of the Defence Act, including:

10.3.1 Whether section 59(1)(d) of the Defence Act operates *ex lege* from the moment that Mr Maswanganyi was sentenced;

10.3.2 If section 59(1)(d) does operate *ex lege,* whether it operates from the moment that Mr Maswanganyi was sentenced in the trial court or whether the necessary jurisdictional facts for its operation are only established on the basis of a final, lawful conviction and sentence, after all rights of appeal and review have been exhausted;

10.3.3 Whether section 59(1)(d) should be read consistently with principles of natural justice; and

10.4 Whether condonation should be granted for the parties' late filing of the papers in this Court.

SUMMARY OF MR MASWANGANYI'S SUBMISSIONS ON THE ISSUES

11 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.

12 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. For if this were the case, Mr Maswanganyi's original conviction and sentence – which were quashed on appeal – 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 of appeal).

13 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 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. 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.

14 That this is the correct approach is supported by the following:

14.1 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 vinidcated 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.

14.2 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.

14.3 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.

14.4 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.

14.5 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.

14.6 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.

15 Alternatively, and 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.

16 Finally, it is in the interests of justice for the late filing of the application for leave to appeal (which was delayed by just over a week under reasonably explained circumstances) to be condoned.

NAME OF COUNSEL

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RECORD

19 The whole record is relevant.

ESTIMATED DURATION OF ARGUMENT

20 Three hours.

AUTHORITIES TO WHICH PARTICULAR REFERENCE WILL BE MADE

City of Cape Town v Claremont Union College 1934 AD 414.

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

Democratic Alliance v African National Congress [2015] ZACC 1; 2015 (2) SA 232 (CC).

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

Hira v Booysen 1992 (4) SA 69 (A).

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

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

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

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

Principal Immigration Officer v Bhula 1931 AD 323.

R v Ngwevela 1954 (1) SA 123 (A).

Ruta v Minister of Home Affairs [2018] ZACC 52; 2019 (2) SA 329 (CC).

S v Mapheele 1963 (2) SA 651 (A).

S v S 1999 (1) SACR 608 (W)

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

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

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