CONSTITUTIONAL COURT OF SOUTH AFRICA

Mozamane Teapson Maswangayi v Minister of Defence and Military Veterans and Others

CCT 170/19

Date of hearing: 19 November 2019
Date of judgment: 20 March 2020

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 20 March 2020 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal, which overturned that of the High Court of South Africa, Gauteng Division, Pretoria. The High Court had ordered the reinstatement of the applicant to the South African National Defence Force (SANDF), but the Supreme Court of Appeal reversed that order.

The applicant was charged with rape and on appeal, the criminal conviction and sentence were set aside. The applicant was, at the time of arrest, conviction and sentence an employee of the SANDF. Once convicted, the SANDF, relying on section 59(1)(d) of the Defence Act 42 of 2002 (Defence Act), terminated his employment. Section 59(1)(d) provides that the service of a member of the Regular Force is terminated through the operation of law, if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine. After the criminal charges against the applicant were set aside, the SANDF refused to reinstate him.

The applicant launched an application in the High Court alleging that the SANDF, when terminating his services, relied on section 59(1)(d) of the Defence Act, when in fact it should have relied on section 42(1) the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA), which provides for suspension of a convicted person from duty until the conclusion of an appeal or review. The High Court held that after the SANDF was informed of the conviction and sentence of the applicant, it ought to have invoked the provisions of section 42(1) of the MDSMA. It further held that the provisions of

section 59(3) could also have been invoked. The High Court ordered the reinstatement of the applicant and payment of his salary and benefits with effect from the date of his arrest.

On appeal, the Supreme Court of Appeal overturned the order of the High Court. It held, that section 59(1)(d) must be read contextually and that on a contextual interpretation it means that once the applicant had been sentenced to imprisonment, his services at the SANDF were terminated through the operation of law. Consequently, so concluded the Supreme Court of Appeal, absent a provision for any reinstatement in section 59(1)(d), the applicant remained dismissed through the operation of the law. The Supreme Court of Appeal further held that in order to invoke the provisions of section 42(1) the applicant had to be able to present himself physically for work, and that as he could not do so after his imprisonment, following his conviction and sentence, he could not rely on section 42(1)(d) of the MDSMA. The Supreme Court of Appeal further found that the applicant's reliance on section 42(1)(d) of the MDSMA was at variance with the case pleaded in his founding affidavit.

The applicant then applied to the Constitutional Court for leave to appeal relying on his section 10 constitutional right to dignity, section 23(1) right to fair labour practices and section 35(3)(o) right to appeal or review by a higher court. The SANDF opposed the application for leave to appeal to this court. It contended that section 59(1)(d) took effect *ex lege* (by operation of law) upon the applicant's conviction and sentence, and that the application should be dismissed.

In a unanimous judgment penned by Tshiqi J, the Constitutional Court held that the words "conviction" and "sentence" in section 59(1)(d) of the Defence Act must be interpreted to refer to valid and final convictions and sentences, in instances where there is an appeal. Once the decision of the trial court was, therefore, set aside, there was no longer any lawful conviction nor sentence and the jurisdictional factors set out in section 59(1)(d) of the Defence Act fall away or were, as a result, absent. The member would no longer have a criminal record and no purpose would be served by continuing to subject such a member to the penal provisions of the section.

The Court further held that it follows that once the applicant's appeal was successful, there was no longer any connection between the purpose for which section 59(1)(d) was enacted and the application of the provision to him. When the jurisdictional factors of section 59(1)(d) fell away, the termination of employment was reversed by operation of law. This is because, properly understood, in the absence of a valid conviction and sentence, in the form of a final order confirming the order of the trial court, there was no valid termination of his employment. As the jurisdictional factors for the operation of section 59(1)(d) are absent, the applicant's employment was never validly terminated.

In the result, the application for leave to appeal was granted and the appeal upheld. The Constitutional Court issued an order declaring that the applicant's service with the SANDF did not terminate as contemplated in section 59(1)(d) of the Defence Act and that he continues to be in the employ of the SANDF in the same position and capacity he was, on

18 July 2014. The respondents were ordered to pay the applicant's costs in the High Court and in the Supreme Court of Appeal, jointly and severally.