CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 170/19

Date of hearing: 19 November 2019

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 Tuesday, 19 November 2019 at 10h00, the Constitutional Court will hear an application for leave to appeal against an order of the Supreme Court of Appeal, which overturned an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court had ordered the reinstatement of the applicant, a former member of the South African National Defence Force (SANDF).

The applicant was charged with and convicted of rape. On appeal, the criminal conviction and sentence were set aside. The applicant at the time of arrest, conviction and sentence was an employee of the SANDF. Once convicted, the SANDF terminated his service in terms of section 59(1)(d) of the Defence Act 42 of 2002 (Defence Act), which provides that the service of a member of the Regular Force is terminated if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine. Upon the applicant having the conviction set aside on appeal, he sought to be reinstated to his former position and the SANDF refused to reinstate him. It stated that his service terminated by operation of law in terms of section 59(1)(d) of the Defence Act which did not provide for reinstatement and in addition his position had been filled before the finalisation of his appeal.

The applicant instituted an application in the High Court on the basis that the SANDF relied on 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 the Defence Act and the MDSMA should be read conjunctively and that the second respondent had a choice between invoking either

section 59(1)(d) or 59(3) of the Defence Act or section 42(1) of the MDSMA. The election to invoke section 59(1)(d) of the Defence Act, and not one of the other two sections, was in itself an administrative decision which was "arbitrary in the circumstances". Consequently, the High Court ordered the reinstatement of the applicant and the reimbursement of his salary and benefits from the date of his conviction.

On appeal, the Supreme Court of Appeal overturned the order of the High Court and held that section 59(1)(d) of the Defence Act must be read contextually and it does not afford the applicant automatic reinstatement. The Supreme Court of Appeal further held that section 42(1) of the MDSMA requires two jurisdictional facts to be met, namely: (i) the SANDF must be aware of the applicant's appearance in court; and (ii) the applicant should be physically present and in active duty before the directive not to report for duty is issued. The Supreme Court of Appeal held that since the applicant failed to meet these two jurisdictional facts, the MDSMA had no application on these facts. The Supreme Court of Appeal held that once the applicant was sentenced to life imprisonment, his service in the SANDF was terminated by operation of law, in terms of section 59(1)(d).

In the Constitutional Court, the applicant argues that section 59(1)(d) must be interpreted purposively and in line with section 39(2) of the Constitution. The applicant further relies on the following provisions of the Constitution in an attempt to achieve reinstatement: section 10, the right to dignity; section 23(1), the right to fair labour practices; and section 35(3)(o), the right of appeal to or review by a higher court. The applicant argues that the Supreme Court of Appeal erred by not reading the provisions of the Defence Act and MDSMA together. The former applies to a final sentence only, while the latter governs the interim position, where a member of the Regular Force has been convicted and sentenced but is pursuing an appeal.

The respondents in turn argue that the applicant's interpretation of section 59(1)(d) of the Defence Act in accordance with section 39(2) of the Constitution is ill-founded in that it renders section 59(1)(d) nugatory and suggests that the discharge of a member who is convicted and sentenced by a trial court as contemplated in section 59(1)(d) can only take place after a lengthy appeal process. The applicant's interpretation also undermines the important scheme of section 59 as a whole. In addition, the interpretation is problematic on the facts since the applicant was not suspended in terms of section 42(1) of the MDSMA. Furthermore, the respondents were unaware of the pending trial until the applicant was convicted and sentenced, and in any event, section 59(1)(d) had already taken effect. Therefore, the respondents submit that section 42(1) of the MDSMA is not applicable in this matter. Furthermore, the applicant's interpretation undermines constitutional principles of legality and separation of powers.