IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NUMBER: CCT170/2019

In the matter between:

MOZAMANE TEAPSON MASWANGANYI Applicant

and

MINISTER OF DEFENCE AND

MILITARY VETERANS First Respondent

CHIEF OF THE SANDF Second Respondent

THE SECRETARY FOR DEFENCE Third Respondent

RESPONDENTS' HEADS OF ARGUMENT

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1. The applicant has instituted these proceedings seeking an order namely, that:

   1.1 leave to appeal against the judgment of the Supreme Court of Appeal (SCA) under case no. 739/18 delivered on 31 May 2019 ("the SCA judgment") be granted to the applicant;

   1.2 that the appeal be upheld with costs including costs of two counsel; and

1.3 that the order of the SCA be set aside and the order of the High Court be reinstated.[1]

2. The application for leave to appeal was filed with this court outside the prescribed period. Consequently, in addition to the substantive relief, the applicant also seeks an order condoning the late filing of the application. The application for condonation is not opposed by the respondents.

3. The application/appeal turns on the interpretation and application of section 59(1)(d) of the Defence Act 42 of 2002 ("the Defence Act"), which reads:

> "***59 Termination of service of members of Regular Force***
>
> *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."*

4. It behoves emphasis that the applicant has not challenged the constitutionality of section 59(1)(d) of the Defence Act in any of the *fora* including this court. Therefore, the only issue for determination is the interpretation and application of this section.

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[1] **CC Notice of Motion (NOM) - Record Vol 2 p 94**

5. The corollaries of not challenging the constitutional validity of section 59(1)(d) are the following:

5.1 The Constitutional Court can only declare section 59(1)(d) invalid if an application or an appeal is made to it in that regard. As neither the application for leave to appeal nor the appeal itself challenges the constitutional validity of the provision, this court cannot declare it unconstitutional or refer it back to the HC for that purpose.

5.2 The contention that the interpretation given by the SCA to this section violates the Bill of Rights is not only unfounded but also constrained in its claim. We submit that the sound approach would have been to challenge the constitutional validity of the provision, at least in the alternative, rather than to venture into the interpretative controversies.

5.3 What is worse, the applicant's propounded interpretation entails reading additional phrases into the text thereby risking overstepping the constitutional principle of separation of powers under the pretext that a constitutionally aligned interpretation has to be given as required by section 39(2) of the Constitution.

5.4 We submit that the applicant's approach is ill-advised and elaborate further on this later.

SUMMARY OF THE APPLICANT'S CASE

6. The summary of the applicant's case has been outlined in paragraph 3 of the respondent's opposing affidavit[2], the salient features of which are the following:

6.1 That since the application concerns the proper interpretation and application of section 59(1)(d) of the Defence Act as well as the violation of the applicant's right to fair labour practice, dignity and fair trial, this court has jurisdiction to entertain the appeal.[3]

6.2 That, as section 39(2) of the Constitution requires the court to interpret legislation in way that promotes the spirit, purport and object of the Bill of Rights, the *ex lege* operation of section 59(1)(d) of the Defence Act can only take effect on the basis of a final and lawful conviction and sentence, which finality only occurs at a conclusion of appeal processes.[4]

6.3 That the interpretation given to this section by the SCA violates the applicant's right to be heard. The correct interpretation to be accorded to this section is that a decision is required after affording the subject a fair hearing in order to bring it into operation.[5]

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[2] CC Answering affidavit (AA) Record Vol 2 pp 155-157 para 3
[3] CC AA - Record Vol 2 p 155 para 3.1
[4] CC AA – Record Vol 2 p 155 para 3.3
[5] CC AA – Record Vol 2 p 156 para 3.6

6.4 That section 42(1) of the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA) provides interim safeguards through the suspension of a convicted member if he intends to appeal against such conviction. That this section fortifies the contention that there is a discretion to be exercised under section 59(1)(d)[6].

6.5 That, in the alternative, the removal of the conviction and sentence by a successful criminal appeal results in the automatic reversal of the discharge and therefore the reinstatement had to follow as of right[7].

SUMMARY OF THE GROUNDS OF OPPOSITION

7. As regards the application for leave to appeal and the jurisdiction of this court to hear this case, which has been opposed by the respondents, we deem it appropriate to leave that aspect in the hands of the court and to focus on the substantive issues. We make this concession on the following grounds:

7.1 Although no constitutional issue and an arguable point of law of general public importance have been pertinently raised in this matter, we appreciate this court's overarching discretion and authority to determine its own jurisdiction as foreshadowed in section 167(3)(c) of the Constitution.

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[6] **CC AA – Record Vol 2 p 156 para 3.4**
[7] **CC AA – Record Vol 2 p 156 para 3.8**

7.2 Further, the interest of justice as buttressed on the divergent approaches of the HC and the SCA favour the hearing and determination of this appeal by the CC. It must however be noted that the HC did not interpret section 59(1)(d) as such but merely found that other provisions were also applicable.

8. In dealing with the substantive issues we have, except for the first one (leave to appeal) followed the sequence set out in paragraph 5 above. In a nutshell, our submissions are structured as follows:

8.1 The contention that, in interpreting section 59(1)(d) in accordance with the dictates of section 39(2) of the Constitution, the conviction and sentence must be considered as at the time of the conclusion of the appeal processes, is ill-founded in that:

8.1.1 The interpretation propounded by the applicant defies the authority and jurisdiction of the court of the first instance to convict, impose and enforce its sentence. In the criminal law jurisprudence, the appeal against such conviction and sentence does not suspend its operation pending the appeal, though the sentenced person may seek bail[8] pending such appeal.

8.1.2 The interpretation contended for by the applicant is legally impracticable and illogical and renders the provisions of section

[8] Such bail may or may not be granted. If refused, the sentence has to be served. The applicant was not on bail pending the appeal.

59(1)(d) nugatory. In essence, it 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 lengthy appeal processes.

8.1.3 On the facts of this case the applicant was not suspended in terms of section 42(1) of the MDSMA.[9] The SANDF did not know that he was undergoing trial until he was convicted and sentenced.[10] It was only at the time when he was required to sign the documents relating to his pensions that he informed Sgt Mndluli that he was in the process of appealing his conviction.[11] By then section 59(1)(d) had taken effect.

8.1.4 The interpretation advanced by the applicant also losses sight of the important scheme of section 59 as a whole, which deals with different ways of terminating services. This section contains three different methods of termination of services under different circumstances.

8.1.5 Such interpretation further fails to take into account the equally important constitutional principles of legality and separation of powers by demanding the exercise of powers without a statutory source[12] and/or seeking the reading into the section provisions that

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[9] HC FA - Record Vol 1 p 12 para 20
[10] HC AA – Record Vol 1 p 33 para 6; CC AA – Record Vol 2 p 157 para 4.1
[11] HC FA – Record Vol 1 p 12 para 20
[12] This refers to the power to reinstate which, unlike section 59(3), is absent from this section.

were intently excluded. The latter submission is fortified by the provisions of section 36(2) of the South African police Service (SAPS) Act 68 of 1995 which caters for a similar situation contemplated in section 59(1)(d) in cases of successful appeals against conviction and sentence. The SAPS Act is an earlier enactment than the Defence Act.

8.2 The second contention by the applicant that the interpretation accorded by the SCA violates the applicant's right to be heard or to a fair trial, is also unsustainable, in that:

8.2.1 There is a plethora of authorities including decisions of this court holding that certain statutory provisions result in discharge by operation of law, that is, without having to adhere to the *audi* principle.

8.2.2 The provisions of section 59(1)(d) are stronger in purpose than the deeming provisions of sub-section (3) of that section. Section 59(1)(d) uses the obliging phrase "*is terminated*" while sub-section (3) uses a less impelling one "*must be regarded as having been dismissed*".

8.2.3 The automatic termination imposed by section 59(1)(d) is further supported by its association with a sentence involving discharge imposed under the Code.

9. As to section 42(1) of the MDSMA, such provision finds no application in the present case, in that:

9.1 The MDSMA is concerned with and governs disciplinary matters of members through the military courts and the Code. The present case does not involve discipline which resulted in discharge. The discharge in the present case came by operation of law and not through disciplinary action. Section 59(1)(d) is not of a penal nature.

9.2 Section 59(1)(d) takes effect *ex lege* upon conviction and sentence and prior to any disciplinary measures being taken. In this case, it took affect even before the respondents had become aware of the provisions of this section having come into operation on 18 July 2014.[13]

9.3 The application of section 42(1) of the MDSMA as contended for by the applicant is also at variance and in conflict with the facts of this case. The common cause fact that the applicant was imprisoned immediately after his sentence until the conclusion of the appeal renders the application of that section inappropriate and impossible. It would defy all logic to order a member who is imprisoned pending appeal and therefore who cannot attend to his work, not to return to work during that period.

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[13] HC FA – Record Vol 1 p 12 para 20; HC AA – Record Vol 1 p 33 para 6; CC AA – Record Vol 2 p 157 para 4.1

10. Finally, the applicant contends that the removal of the conviction and sentence by the successful criminal appeal should result in the automatic reversal of the discharge followed by the reinstatement of the applicant as of right. We disagree with this proposition on the basis that:

10.1 For the reasons as already outlined in paragraph 8.1 above, this contention is unsustainable.

10.2 Importantly, this contention is in conflict with the constitutional principles of legality and separation of powers as starkly demonstrated by the express and comprehensive provisions of section 36 of the SAPS Act.

10.3 The reversal of a conviction and a sentence on appeal in the criminal law context does not necessarily render such initial conviction and sentence unlawful.

10.4 Moreover, the High Court order which the applicant seeks to reinstate is grossly unfair to the respondents in so far as it orders the remuneration of the applicant during the period of his incarceration pending the criminal appeal. The respondents as former employers are unduly penalized while they were not responsible for the applicant's absence from work during that period. This infringes upon their constitutional right to fair labour practice.

11. We elaborate upon the above stated submissions later herein.

FACTUAL MATRIX

12. The applicant was a member of the South African National Defence Force (SANDF). On 18 July 2015, the applicant was sentenced to a term of life imprisonment pursuant to his conviction on a charge of rape. The SANDF was not aware that the applicant was undergoing trial. It learnt about his arrest and trial only when he was sentenced as aforesaid[14].

13. Upon his sentence, section 59(1)(d) was triggered and his services with the SANDF were terminated accordingly. This termination took place by operation of law. The effect thereof was that the applicant was discharged from service.[15]

14. The applicant instituted a criminal appeal against his conviction and sentence. Whilst the process of appeal was underway, the applicant remained incarcerated from 18 July 2014. On 13 February 2015 the High Court upheld his appeal and set aside his conviction and sentence and released him from imprisonment.[16]

15. After his release from imprisonment, the applicant applied for re-instatement. As at the time of his release from prison, his position had been filled and

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[14] CC AA – Record Vol 2 p 157 para 4.1
[15] CC AA - Record Vol 2 p 158 paras 4.2 to 4.3
[16] CC AA – Record Vol 2 p 158 para 4.4

there were no vacant positions. As a result, he could not be re-instated.[17] In any event, even if there was a vacant position, the applicant could not simply be re-instated after he had been discharged by operation of law. He had to follow the normal recruitment processes as prescribed in terms of the prescripts.[18]

16. On 25 January 2016, the applicant instituted an application in the High Court, Gauteng Division Pretoria (HC). The nature of the relief sought in those proceedings was pleaded as a *mandamus.* He sought an order directing the respondents to reinstate him retrospectively from the date of his sentence, 18 July 2014, alternatively from the date of his release from prison, 13 February 2015. He also sought an order directing the respondents to reinstate his salary and benefits on similar terms as they had been before his termination.[19]

17. The HC found in favour of the applicant. It went further to grant relief that had not been sought, being the review and setting aside of the decision of the respondents. Further, the respondents were ordered to reinstate the applicant retrospectively from 18 July 2014, which was the date on which the applicant had been sentenced to life imprisonment.[20]

18. The HC also ordered that his salary and benefits be reinstated retrospectively from 18 July 2014. The HC took a view that the respondents

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[17] CC AA – Record Vol 2 p 158 para 4.5
[18] CC AA – Record Vol 2 p 158 para 4.5
[19] CC AA – Record Vol 2 p 158 para 4.6; HC Judgment pp 60 to 66
[20] CC AA – Record Vol 2 p 159 para 4.8

took a decision to terminate the services of the applicant or exercised a discretion or made a choice between different legal provisions for this purpose.[21]

19. The respondents appealed to the SCA which reversed the decision of the HC. It held that once the applicant was sentenced to a term of imprisonment without a fine, his services in the SANDF were immediately terminated by operation of law.[22]

20. In the present case, the applicant has not challenged the constitutional validity of any legislation in the HC, the SCA and before this court. There is therefore no issue raised in relation to the constitutionality of the provisions of section 59(1)(d). Instead, in the HC the applicant sought an interdict that the respondents be directed to reinstate him to work with his benefits even for the time he was not rendering any services to the SANDF.[23]

21. Section 59(1)(d) does not provide for the reinstatement of a person whose services have terminated by operation of law.

***EX LEGE* OPERATION**

22. The contention by the applicant that the conviction and sentence as contemplated in section 59(1)(d) becomes final only after the conclusion of

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[21] CC AA – Record Vol 2 p 159 para 4.8; HC Judgment p 64 para 18
[22] SCA Judgment – Record Vol 2 pp82 to 92
[23] HC Notice of Motion – Record Vol 1 p 1 to 2

the appeal, is legally unsound and impractical. Our submission is based on the following:

22.1 As appears from the text of section 59(1)(d) of the Defence Act, the section is invoked by operation of law and no action, choice or decision is required on the part of any of the respondents. Once the facts satisfy the jurisdictional requirements of the section the operation of the section comes into action automatically.[24]

22.2 The meaning of the text is plain and does not admit of the extended meaning proposed by the applicant;

22.3 Subsection (1) starts off with the phrase "[*T]he service of a member of the Regular Force* *is terminated*…" while subsection (2) states "[*T]he service of a member of the Regular Force* *may be terminated* *in accordance with any applicable regulations"* [Our underlining]. We submit that the underlined phrase in subsection (1) signifies termination without the need for a decision while the portion emphasized under subsection (2) denotes a precursory decision making process and/or exercise of discretion. The **SANDU** case made it clear that the termination process under subsection (2) entails a disciplinary process;[25]

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[24] **See Grootboom v NPA 2014(2) SA 68 (CC) para [37]; Phenithi v Minister of education and Others* 2008(1) SA 420 (SCA) para [9] to [11]; Solidarity & Another v Top Health & Welfare Sectoral bargaining council & Others (2013) 34 ILJ 1503 (LAC) para [14] & [18]**

[25] **Minister of Defence and Others v South African National Defence Union and Another 2014 (6) SA 269 (SCA) paras 16 & 17**

22.4 The jurisdictional facts for the coming into operation of section 59(1)(d) are that the member must have been sentenced to a term of imprisonment by a competent civilian court without the option of a fine, which are common cause in the present case. It cannot be gainsaid that the Magistrate Court which convicted the applicant of rape and imposed life imprisonment was not a competent civilian court;

22.5 Although the facts in the case of **SANDU**[26] differ from the facts of the present case which renders the ratio of **SANDU** case inapplicable to this case, that case at least established the principle that Section 59 as a whole was intended to provide for the different scenarios upon which termination of employment may happen and these scenarios are categorized according to the subsections.[27] Subsection (1)(d) was specifically tailored for a situation where a member has been sentenced to imprisonment without an option of a fine. Where a member has been so sentenced, the provision of this subsection must be applied as they directly relate thereto;

22.6 Further, one cannot downplay the fact that this type of termination by virtue of the imposition of a term of imprisonment is placed side by side with a sentence involving discharge or dismissal under the Code.[28] In other words, the sentence of imprisonment without a fine has exactly the same effect as an imposition of discharge or dismissal under the Code;

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[26] SANDU case (supra) paras 18 to 21
[27] See SANDU case(supra) paras 8 & 9
[28] The Military Discipline Code as defined in section 1 of the Defence Act

22.7 As regards section 59(3) of the Defence Act, we submit that the provisions of the subsection do not find application in this case since the respondent's absence was caused by the sentence to imprisonment without a fine. The application of section 59(3) to the facts of this case renders the provisions of section 59(1)(d) nugatory since every member who is sentenced to imprisonment without a fine would then be deemed dismissed in terms of subsection (3);

22.8 The intention of the legislature is clear. We submit that there is a distinction between the circumstances under which sub-section (3) operates as opposed to those to which sub-section 1(d) applies. Sub-section (3) only requires absence from official duty without permission for the prescribed period, after which the person is deemed to have been dismissed or discharged.[29] Sub-section (1)(d), on the other hand, is not a deeming provision but is intended to apply immediately upon the imposition of a term of imprisonment without a fine. The latter sub-section also does not afford an opportunity for a hearing or representation. One must keep in mind that the deemed discharge in terms of section 59(3) is regarded as being *"on account of misconduct*". That is not the case with a termination on the basis of section 59(1)(d);

[29] **See SANDU case (supra) para 9**

22.9 Further, in **Minister of Defence and Military Veterans and Another v Mamasedi,**[30] it was established that, first, the section 59(3) termination requires a fair procedure when re-instatement is being considered after the deemed dismissal has occurred[31] and, second, reinstatement in terms of section 59(3) "*does not follow from the setting aside of the decision not to re-instate Mamasedi. He was discharged by operation of law in terms of s 59(3) and, in the absence of a decision by the Chief of the SANDF to re-instate him, he remains dismissed from the SANDF*;"[32]

22.10 The SCA went further in **Mamasedi** case to hold that " …*if Wentzel AJ purported to substitute her decision for that of the Chief of the SANDF, she misdirected herself in doing so. Administrative decision-making powers are vested by legislation in administrators and not judges. When an administrative decision is set aside on review, generally speaking, it must be taken again by the administrator concerned. As a general rule, judges are precluded by the doctrine of the separation of powers, which allocates powers among the branches of government, from taking such decisions themselves. They also often do not have the expertise to do so;*"

22.11 The HC therefore erred first in finding that the appellants ought to have applied the provisions of subsection (3) for the reasons already stated above. Second, it erred in usurping the functions of the

[30] **2018 (2) SA 305 (SCA)**
[31] **Mamasedi case (supra) paras 13, 15 & 22**
[32] **Mamasedi case (supra) para 24**

respondents by ordering the reinstatement of the applicant without even alluding to the exceptional circumstances entitling it to do so as adumbrated in **Mamasedi** case;[33].

22.12 It follows therefore that the provisions of section 59(3) of the Defence Act are not applicable to the present case and even if they were to be found applicable, the HC order of re-instatement of the applicant was rightly set aside by the SCA. We persist, nonetheless that only the provisions of sub-section 1(d) of section 59 are applicable in this case. The appellants did not have choice to apply other sections. There was only one section which was applicable in the circumstances;

22.13 The critic above against the reasoning of the High Court is relevant because the applicant seeks the reinstatement of the HC order;[34]

22.14 The question whether or not the strict application of the provisions of section 59(1)(d) results in unfairness, is irrelevant. First, the decision of the Supreme Court of Appeal in **Potgieter v Potgieter N.O.**[35] calls for the application of the law without the influence of what is reasonable and fair. Second, the constitutionality of section 59(1)(d) of the Defence Act has not been challenged in this case. This is despite the fact that the applicant has sought to rely on fair labour practice in terms of section 23 of the Constitution. The case must be decided on

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[33] **Mamasedi case (supra) para 26 to 28**
[34] **CC Notice of Motion – Record Vol 2 p 95 para 4**
[35] **2012 (1) SA 637 (SCA) para 34**

the established principle of law and not on one's sense of fairness which may differ from one Judge to the other;

22.15 Further, in the criminal law context, a criminal appeal against conviction and sentence does not, as is the case of civil matters, automatically suspend the operation of the judgment except that bail may granted (or refused) pending appeal.[36] It follows that the validity of a conviction and sentence remain alive until set aside on appeal. Therefore, the termination of the respondent occurred immediately upon his conviction and sentence by the trial court as contemplated in section 59(1)(d);

22.16 The interpretation of this provision as proposed by the applicant is illogical and renders the provision nugatory. The idea of the termination in terms of section 59(1)(d) taking effect only after the normally prolonged appeal processes is repugnant to the text and defeats the purpose of this section;

22.17 The respondents, being Organs of State, can only act within the confines of their statutory powers and in this case they could not reinstate the respondent in the absence of a statutory power within the Defence Act entitling them to do so;

[36] **Sections 307 read with 309 (4) & (5) & 321 of the Criminal Procedure Act 51 of 1977**

22.18 Any exercise of power or any function performed beyond that conferred upon an Organ of State by the law is invalid. The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised;[37]

22.19 We submit that the interpretation proposed by the applicant competes with and negates the principle of legality which, as part of the rule of law is a cornerstone of our legal system. In **Electoral Commission v Mhlope**[38], it was stated thus:

"[130] The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end, no court should be loath to declare conduct, that either has no legal basis or constitutes a disregard for the law, inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable."

22.20 We quote further from the judgment of this court in the case of **Affordable Medicines Trust.**[39]

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[37] **See AAA Investment (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC) 373 A**
[38] **2016 (5) SA 1 (CC) para 130**
[39] **Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) para [49]**

"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality … is one of the constitutional controls through the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[40]

22.21 We submit that the constitutional principles of legality[41] and separation of powers[42] forbids any functionary from exercising any power beyond that which is conferred by the empowering law and further forbids the court from usurping the functions of another sphere of government such as the legislature. The proposed interpretation amounts to such usurpation as it unconstitutionally enlarges the provision in question;

22.22 Section 36 of the SAPS Act is an excellent demonstration that the legislature would have expressly provided within section 59(1)(d) for what the applicant seeks to achieve through this application, had it so intended. Section 36 of the SAPS provides for similar circumstances in the following terms:

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[40] See also Minister of Justice and Constitutional Development v Chonco 2010 (4) SA 82 (CC)
[41] Section 1(c) of the Constitution
[42] Intl Trade Administration Commission v SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC) paras 92 & 93

"36 ***Discharge on account of sentence imposed***

(1) A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.

(2) A person referred to in subsection (1), whose-

(a) conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;

(b) conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or

(c) sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine,

may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment

without the option of a fine, apply to the National Commissioner to be reinstated as a member.

(3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2)(a), the National Commissioner shall reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged."

22.23 We submit that the above quoted provision, which was enacted about 7 years before the Defence Act, demonstrates that, if the purpose was that the provisions of section 59(1)(d) were to take effect only after the conclusion of appeal processes, the section would have expressly provided for that. This piece of legislation also demonstrates the legislature's mind-set that, where a discharge has occurred by operation of law or otherwise, reinstatement can only take place after an application therefor and a decision to that effect.

APPLICABILITY OF THE *AUDI* PRINCIPLE

23. The applicant contends that the interpretation accorded by the SCA violates the applicant's rights to be heard or to a fair trial. We submit that this contention is unfounded for the following reasons:

23.1 There is a plethora of authorities to the effect that such statutory provisions operate *ex lege*[43]. We submit that, as appears from the impelling language used in section 59(1)(d), it operates *ex lege.* This is fortified by the fact that its effect is equated to that of a sentence involving discharge under the Code.

23.2 Since there was no decision taken, administratively or otherwise, prior to the applicant's discharge, there can be no question of a right to be heard.

23.3 As to the right to a fair trial, the applicant argues that, as this right should extend up to the conclusion of the appeal in terms of section 35(3)(o) of the Constitution, it was infringed upon by the interpretation accorded to section 59(1)(d) especially because the latter section is penal in nature. We submit that this contention is wrong in that:

23.3.1 First, section 59(1)(d) is not a penal provision. The section merely provides for the termination of services after a member has been sentenced to imprisonment without a fine. In fact, the whole of section 59 is not of a penal nature. A penal provision would be one where a person is disciplined for misconduct and given a penalty which may include discharge. Such discipline and penalty can only take place under the MDSMA read with

[43] **Phenithi v Minister of Education 2008 (1) SA 420 (SCA) paras 9, 10 & 17; Minister of Defence & Others v SANDU & Another 2014 (6) SA 269 (SCA) paras 9, 16 & 17; Grootboom v NPA 2014 (2) SA 68 (CC) para 37; Minister of Defence & Military Veterans v Mamasedi 2018 (2) SA 305 (SCA)**

the Code. It is therefore the MDSMA that may be penal in nature and not section 59 of the Defence Act.

23.3.2 The purpose of the provisions of section 59(1)(d) are to avoid the situation where a member remains in the employ of the SANDF in certain circumstances. The termination is therefore aimed at protecting the SANDF, the member or the public at large.

23.3.3 In **Gihwala v Grancy Property Ltd**[44], section 16295) of the Companies Act 71 of 2008 was found not to be of a penal nature notwithstanding that it deals with the declaration of a person as a delinquent director which had disastrous effects. The court reasoned thus in that case[45]:

"[142] In order to assess these arguments, it is appropriate first to examine the purpose of s 162(5). Contrary to the submissions on behalf of Mr Gihwala and Mr Manala, it is not a penal provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the misconduct of delinquent directors. What is that conduct? It is helpful to examine some of the other provisions of the section. Under ss 5(a) consentia prescribed office, while ineligible or disqualified

[44] **2017 (2) SA 337 (SCA) para 142**
[45] **At para 142**

from doing so, attracts delinquency. Under ss 5(b) acting as a director while under a probation order in terms of s 162, or the corresponding provision dealing with close corporations, results in delinquency as both orders are directed at preventing that very conduct."

23.3.4 Second, section 35(3)(o) of the Constitution applies within a criminal context, hence it refers to an arrested, detained and accused persons. The fair trial referred to in section 35(3) applies within the criminal law and in this case the applicant was accorded such right. Such right has no bearing on the *ex lege* operation of section 59(1)(d).

24. As to the contention relating to section 42(1) of the MDSMA, we submit that section 42(1) of the MDSM Act does not apply to the present case. This section requires active participation by the Chief of the SANDF. These active steps entail the following:

24.1 The Chief of the SANDF must form an opinion, after being informed of the appeal or intended appeal, that it will be in the interest of good governance or reputation of the SANDF or in the interest of justice to order such the member not to return to duty during his trial or after his conviction pending appeal;

24.2 The order which the Chief of the SANDF is called upon to make relates only to the period during the trial of the person or after his conviction pending appeal;

24.3 Due process is obligatory in terms of section 42(2) whereby the Chief of the SANDF must afford the person an opportunity to make representations before finally taking the decision.

24.4 None of the above steps are required for the operation of section 59(1)(d) of the Defence Act. The latter section comes into play merely upon the coming into existence of a certain set of facts, namely the conviction and sentence without a fine by a civilian criminal court;

24.5 In the present case, the applicant was sentenced to life imprisonment after his conviction and remained in prison from the date of his sentence to the date of the conclusion of his appeal. Apart from the question whether or not the second respondent knew of his criminal trial, it would have been pointless for him to order the applicant not to return to duty pending his appeal while he was imprisoned at the time. In other words, the provisions of section 42(1) of the MDSMA were not practicable or relevant in this matter;

24.6 The application of section 42(1) of the MDSM Act is not only at the second respondent’s discretion but also an adverse action against the applicant. It would be weird therefore for the applicant to rely on the

argument that adverse steps should have been taken by the respondents against him. Hence, the HC finding in that regard constituted a misdirection. This also renders irrelevant the finding of the High Court that the respondents knew about the trial of the applicant and his conviction for the purposes of justifying its judgment and order.

24.7 We submit therefore that this contention ought to be rejected.

AUTOMATIC REINSTATEMENT

25. Finally, the applicant contends in the alternative that the setting aside of the conviction and sentence by the appeal court had the effect of automatically reversing the applicant's discharge and entitled him to reinstatement as of right. Against this we submit as follows:

25.1 This contention loses sight of the important constitutional principles of legality and separation of powers as already submitted herein above;

25.2 We submit that section 59(1)(d) is a one way street providing for discharge and not for reinstatement. If the legislature intended that it should also apply in respect of reinstatement or that its effect should be reversed upon a successful appeal, it would have included appropriate provisions to that end;

25.3 The latter submission is further fortified by the fact that, in the same section, the legislature makes provision for the reversal of a deemed discharge upon good cause being shown[46].

25.4 As submitted earlier, another analogous enactment is the South African Police Service Act 68 of 1995 which commenced on 15 October 1995. Section 36 thereof makes provision for a reversal of a deemed discharge which resulted from a conviction and sentence to imprisonment without a fine. It can therefore not be argued that the legislature erroneously or inadvertently omitted to include such provision in the Defence Act which was promulgated 7 years later.

25.5 We reiterate that both section 36 of the SAPS Act and section 59(3) of the Defence Act are deeming provisions which are less impelling than the provisions of section 59(1)(d) in that in their case the position is deemed to be existing until the contrary is proved while section 59(1)(d) does not deem a person to be discharged but simply states that his or her service is terminated immediately upon the occurrence of the incident referred to therein.

25.6 The deeming provisions referred to above also show that, where the legislature's intention is to create room for the discharge which has occurred by operation of law to be reversed, it made express provisions for the employer to apply its mind to a reinstatement

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[46] i.e. sub-section (3)

application and to make a decision thereon. In the case of section 59(1)(d) the legislature has made no such provision and it can therefore not be reasonably inferred or accepted that the legislature intently omitted to do so.

25.7 The automatic dismissal in terms of section 59(1)(d) took effect immediately upon conviction and sentence and such effect was not uplifted or suspended by the application for leave to appeal or the intention to pursue the appeal against such conviction and sentence. In the present case, the employer even went on to fill the position of the respondent in continuance of its business. We submit that the proposition of the applicant that the discharge would have been automatically removed upon the setting aside of the conviction and sentence is therefore legally unsound.

25.8 Even if it were to be found that the success of the appeal had the effect of reversing the termination of the applicant, which we persist it did not have, then in such a case the reversal would have occurred with effect from the date of the appeal. Consequently, the HC order to reinstate the applicant with effect from the date of sentence (18 July 2014) as opposed to the date of the appeal (13 February 2015) is clearly wrong;

25.9 Therefore, the provisions of this section could not be utilized to justify reinstatement or retrospective payment of salary from 18 July 2017 as ordered by the HC;

25.10 Furthermore, it is clear from the notice of motion in the HC application[47] that the applicant had not brought a review application. The HC order to review the decision of the respondents[48] was incompetent and without a legal basis. First, there was no decision taken by the respondents that could be subjected to review. Second, the applicant did not seek a review.

26. In the circumstances, we submit that the appeal ought to be dismissed with costs including costs of two counsel.

DATED AT PRETORIA THIS THE 11TH DAY OF OCTOBER 2019.

Adv DT Skosana SC
Adv M Gwala SC
New Court Chambers
Pretoria

[47] **HC NOM – Record Vol 1 pp 1-3**
[48] **HC Judgment para 22.2, record p.66 vol.1**