

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' PRACTICE NOTE

1. PARTIES:-

1.1 Mozamane Teapson Maswanganyi: Applicant

1.2 Minister of Defence and Military Veterans: First Respondent

1.3 Chief of the SANDF: Second Respondent

1.4 Secretary for Defence: Third Respondent

2. ISSUES FOR DETERMINATION:-

2.1 This application for leave to appeal and appeal concern the interpretation and application of the provisions of Section 59 (1)(d) of the Defence Act 42 of 2002 (“Defence Act”). The section provides:

“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.”

2.2 The applicant was charged and convicted of rape by a civilian court and sentenced to life imprisonment. Although the applicant appealed against such conviction and sentence, he remained incarcerated until his appeal was concluded about 7 months later.

2.3 The applicant’s appeal against conviction and sentence was successful and such conviction was set aside. Upon his release from custody, the applicant then sought to be reinstated as of right to his previous position with retrospective effect from the date of his initial conviction and sentence. The respondents indicated that the applicant had to apply for re-employment as section 59(1)(d) did not provide for consideration of a reinstatement application.

- 2.4 An application seeking reinstatement was instituted in the High Court (HC) whereupon the HC reviewed 'the decision' of the respondents and ordered the reinstatement of the applicant with retrospective effect from 18 July 2014, being the date of conviction and sentence.
- 2.5 The respondents successfully appealed to the Supreme Court of Appeal (SCA) where it was found that the applicant had been discharged by operation of law immediately upon his conviction and sentence as contemplated in section 59(1)(d) of the Defence Act.
- 2.6 The applicant now seeks the determination of the following issues by this court:
- 2.6.1 Whether or not this court has jurisdiction and whether or not leave to appeal against the SCA judgment ought to be granted. This part of the case is no longer in issue due to the respondents' concession in this regard;
- 2.6.2 Whether the interpretation of section 59(1)(d) by the SCA is constitutionally aligned when it found that the discharge occurred *ex lege* immediately upon the conviction and sentence by the trial court. The applicant contends for the interpretation that the conviction and sentence referred to in that section could only become final upon the conclusion of the appeal processes and therefore the discharge could only take effect then;

2.6.3 Whether or not the impugned interpretation violated the applicant's rights to fair labour practice, fair trial and dignity; and

2.6.4 Whether or not the setting aside of the conviction on appeal entitled the applicant to reinstatement as of right.

3. **SUMMARY OF THE RESPONDENTS' SUBMISSIONS ON THE ISSUES**

The respondents have conceded that leave to appeal may be granted by this court. As to the substantive issues, our submissions are as follows:

3.1 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:

3.1.1 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 pending such appeal.

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

3.1.3 On the facts of this case the applicant was not suspended in terms of section 42(1) of the MDSMA. The SANDF did not know that he was undergoing trial until he was convicted and sentenced. 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. By then section 59(1)(d) had taken effect.

3.1.4 The interpretation advanced by the applicant also loses 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.

3.1.5 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 and/or seeking the reading into the section provisions that 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.

4. 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:
 - 4.1 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.
 - 4.2 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*".
 - 4.3 The automatic termination imposed by section 59(1)(d) is further supported by its association with a sentence involving discharge imposed under the Code.

5. As to section 42(1) of the MDSMA, such provision finds no application in the present case, in that:
 - 5.1 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.

- 5.2 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.
- 5.3 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.
6. 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:
- 6.1 For the reasons as already outlined in paragraph 3.1 above, this contention is unsustainable.
- 6.2 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.

6.3 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.

6.4 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.

7. DETAILS OF COUNSEL FOR THE RESPONDENTS

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M Gwala SC: 073 872 5859 mgwala@law.co.za

8. RECORD

The whole record is relevant.

9. ESTIMATED DURATION

4 hours

10. LIST OF AUTHORITIES

- 10.1 AAA Investment (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC)
- 10.2 Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)
- 10.3 Electoral Commission v Mhlope 2016 (5) SA 1 (CC)
- 10.4 Gihwala v Grancy Property Ltd 2017 (2) SA 337 (SCA)
- 10.5 Grootboom v NPA 2014(2) SA 68 (CC)
- 10.6 Intl Trade Administration Commission v SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC)
- 10.7 Minister of Defence and Military Veterans and Another v Mamasedi 2018 (2) SA 305 (SCA)
- 10.8 Minister of Defence and Others v South African National Defence Union and Another 2014 (6) SA 269 (SCA)
- 10.9 Minister of Justice and Constitutional Development v Chonco 2010 (4) SA 82 (CC)

10.10 Phenithi v Minister of education and Others 2008(1) SA 420 (SCA)

10.11 Potgieter v Potgieter N.O. 2012 (1) SA 637 (SCA)

10.12 Solidarity & Another v Top Health & Welfare Sectoral bargaining council & Others (2013) 34 ILJ 1503 (LAC)

11. **Statutes**

11.1 Companies Act no.71 of 2008

11.2 Criminal Procedure Act no. 51 of 1977

11.3 Defence Act no.42 of 2002

11.4 Military Discipline Supplementary Measures Act no.16 of 1999

11.5 Republic of South Africa of the Constitution, 1996

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

Adv DT Skosana SC

Adv M Gwala SC

Counsel for the Appellants

New Court Chambers

Pretoria