THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 739/18

In the matter between:

THE MINISTER OF DEFENCE AND MILITARY VETERANS **FIRST APPELLANT**

THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE **SECOND APPELLANT**

THE SECRETARY FOR DEFENCE **THIRD APPELLANT**

and

MOZAMANE TEAPSON MASWANGANYI **RESPONDENT**

Neutral citation: *Minister of Defence and Military Veterans v Maswanganyi* (739/18) [2019] ZASCA 86 (31 May 2019)

Coram Navsa ADP and Majiedt, Van der Merwe and Molemela JJA and Davis AJA

Heard: 21 May 2019

Delivered: 31 May 2019

Summary: Interpretation of statute – s 59(1)(*d*) of Defence Act 42 of 2002 – operates ex lege – no decision required to be made – nothing capable of being reviewed and set aside – no automatic reinstatement in terms of that section.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and substituted with the following:
'The application is dismissed with costs'.

JUDGMENT

Majiedt JA (Navsa, Van der Merwe and Molemela JJA and Davis AJA concurring):

[1] The central issues in this appeal are, first, whether s 59(1)(*d*) of the Defence Act 42 of 2002 (the Defence Act) operates *ex lege*, or whether a decision must be made by any one or more of the appellants to put it into operation. The second issue is whether reinstatement follows automatically in terms of that section. The respondent, Mr Mozamane Teapson Maswanganyi, was a member of the Regular Force of the South African National Defence Force (the SANDF) until his appointment was terminated in terms of s 59(1)(*d*) of the Defence Act. He applied to the Gauteng Division of the High Court, Pretoria, for his reinstatement to the SANDF and for the reinstatement of his salary and benefits, both with retrospective effect. Although the relief sought in the Notice of Motion was framed as a mandamus, Raulinga J reviewed and set aside the 'decision' of the second appellant, the Chief of the SANDF. The learned Judge also issued orders for the retrospective reinstatement of the respondent to the SANDF and of his salary and benefits. This appeal is with the leave of this court.

[2] The factual background is largely common cause or not seriously disputed. The respondent became a permanent member of the SANDF on 1 April 2009.

During the course of 2010 the respondent was arrested on a charge of rape. He was convicted as charged on 18 July 2014 and sentenced to life imprisonment. He immediately began serving his sentence and, although he lodged an appeal against conviction and sentence, he was not granted bail pending his appeal. On 13 February 2015 the respondent's appeal succeeded and his conviction and sentence were set aside. He was released from prison on 16 February 2015.

[3] After his release from prison, the respondent, whose employment had been terminated by the SANDF upon his conviction and sentence in terms of s 59(1)(*d*) of the Defence Act, applied for his reinstatement to the SANDF. The appellants refused to re-employ the respondent. They adopted the stance that the termination of his service had occurred by operation of law and that he could not simply be reinstated, as the Defence Act did not provide for such reinstatement. The respondent was informed of this stance and also that his post had been filled before the finalisation of his appeal. He was advised that he had to follow the normal recruitment process for employment in the SANDF.

[4] There is a dispute on the papers with regard to whether the SANDF was aware of the respondent's arrest. For the reasons that follow, this aspect has no bearing on the outcome. In any event, even if it had any relevance, that dispute must be resolved in favour of the appellants.

[5] As stated, the appellants' case was that s 59(1)(*d*) operated *ex lege* and that, upon the respondent's conviction and sentence to life imprisonment, his service as a member of the Regular Force was automatically terminated. Therefore there was no need for a decision to be taken in this regard. The respondent, on the other hand, contended that, instead of invoking s 59(1)(*d*), the appellants, more particularly the second appellant, should, in terms of s 42(1), read with s 42(2), of the Military Discipline Supplementary Measures Act 16 of 1999 (the MDSMA), have suspended him from duty pending his trial and subsequent appeal. As an alternative, it was contended that, if the argument that s 59(1)(d) operates *ex lege* were to be upheld, then the converse must also apply, namely that upon the setting aside of the conviction and term of life imprisonment, the respondent's reinstatement should automatically have followed.

[6] The high court upheld the contentions advanced by the respondent. It held that subsections 59(1)(*d*) and 59(3)[1] of the Defence Act and s 42(1) of the MDSMA had to be read conjunctively. Raulinga J reasoned that, because the respondent had spent more than 30 days in prison until his release, the Chief of the SANDF had a choice between invoking s 59(1)(*d*) or s 59(3) or S 42(1). The election to invoke s 59(1)(*d*), and not one of the other two subsections, was in itself an administrative decision which was 'arbitrary in the circumstances'. Raulinga J found that the SANDF was aware of the respondent's arrest. He ordered the respondent's reinstatement to the SANDF and the reinstatement of his salary and benefits, both retrospectively from the date of his arrest, 18 July 2014. As stated, the 'decision' of the Chief of the SANDF (the second appellant) was also reviewed and set aside by the high court.

[7] Section 59(1)(*d*) of the Defence Act reads as follows:

'**59 Termination of service of members of Regular Force**

(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. . .' (emphasis added).

Section 42 of the MDSMA reads:

'**42 Suspension awaiting trial or appeal**

(1) When in the opinion of the Chief of the South African National Defence Force, it will be in the interest of the good governance or reputation of the South African National Defence Force, or in the interest of justice, he or she may order any person subject to the Code *not to return to duty during any period subsequent to that person* –

(*a*) appearing as an accused before any civil court or military court; or

[1] Section 59(3) reads as follows:
'A member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such member on such conditions as he or she may determine.'

(*b*) having been convicted by any civil court or military court, if that person intends appealing against the conviction or applying for the review of the case, pending the conclusion of the trail, appeal or review as the case may be.

(2) The Chief of the South African National Defence Force shall give written notice of his or her intention to consider exercising the power contemplated in subsection (1) to the affected person and shall allow that person to respond in writing within 24 hours, or any longer period that the Chief my determine, of that person's receipt of such notice'. (emphasis added).

'Code' is defined in both s 1 of the Defence Act and s 1 of the MDSMA as '. . . . the Military Discipline Code referred to in Section 104(1) of the Defence Act [44 of 1957]'. Section 104(1) of the 1957 Defence Act provides that '(t)he provisions of the First Schedule together with the rules made under subsection (3) shall comprise, and may for all purposes be cited as the Military Discipline Code'. It is common cause that, as a member of the Regular Force of the SANDF, the respondent was at all material times subject to the Code. It is clear that the MDSMA is concerned with matters of military discipline. In terms of s 42 the military can rightly be concerned about someone charged with a criminal offence continuing in active service. It would be concerned about public perception and morale.

[8] The respondent's reliance on s 42 of the MDSMA is at variance with the case pleaded in his founding affidavit. After narrating the factual background and citing the provisions contained in s 59(1)(*d*) and s 42, the respondent made the following averment:

'20. I confirm that I was not suspended during my trial or after my conviction, as stipulated in section 42(1) of [the MDSMA]. In fact, I was called up to attend a course in the midst of my trial. . .' (my emphasis).

It is plain that the respondent did not bring his application in terms of s 42 of the MDSMA. In any event, the requisite jurisdictional requirements for that provision to operate were lacking. Section 42(1) envisages the Chief of the SANDF forming an opinion, while having regard to certain factors, as to whether a member should be suspended from duty pending trial or appeal or review. It is axiomatic that suspension from duty presupposes that the member concerned is in fact still in the service, in the sense of physically presenting himself or herself for duty, or being able to do so. The provision can self-evidently only find application where the SANDF is aware of a member's appearance in court (civil or military). In his

answering affidavit on behalf of the first and second appellants (qua respondents in the high court), General Shoke, the Chief of the SANDF, stated that the respondent managed to conceal his arrest and criminal trial and that he never informed his superiors of it. He stated that the SANDF only became aware of the respondent's arrest and trial for the first time when the respondent was sentenced to life imprisonment. Since the respondent sought final relief in motion proceedings, absent a rejection of these averments as being implausible, far-fetched or palpably false, the application had to be decided on the common cause facts and the appellants' version (qua respondents in the application).[2]

[9] In reply, the respondent sought to counter this by placing reliance on a letter dated 26 October 2010 written on behalf of the SANDF and on an entry by the investigating officer on the docket of the respondent's criminal case. Both the letter and the docket entry constitute inadmissible hearsay as their authors did not confirm same under oath. The letter reads as follows:

'**Confirmation of Employment**

1. This office hereby confirms that 92687524PE Pte Mzamani Teapson Maswanganyi is currently employed by SANDF working at 7 SAI BN in Phalaborwa.

2. The member has been withdrawn from the deployment structure.

3. Hope you find the above in order.'

The inscription in the docket by the investigating officer, Warrant Officer Chauke, reads:

'**Time, date** **Tyd, datum**		**Reference** **Verwysing**
10:15	At Phalaborwa 7 SAI Infantry	
	Battalion I spoke to Assistant	
	Officer Commander in Charge	
10-10-26	Captain W.B. Maake, I informed him about the Accused in this case and he alleged to me that the accused is the member in their unit. And I further informed him about the accused's arrest and he indicated to me that he had already received the message about the rape crime committed by the accused, and that their office has taken	

[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

	a [fundamental] decision to withdraw the accused for going to perform six month duty at the neighbouring country of Democratic Republic of Congo [formerly] known as Zaire in Central African Republic. The Capt also submitted to me a confirmation of employment letter of the Accused as per filed	B-5'

[10] As stated, this inadmissible hearsay evidence was adduced in the replying affidavit. But there is a fundamental difficulty with the respondent's belated attempt to bring his case under s 42 of the MDSMA. Section 42 affords the Chief of the SANDF a discretion, namely whether to suspend from duty a soldier who is facing criminal[3] or disciplinary[4] charges pending the trial or appeal or review, as the case may be. The MDSMA is, as the long title indicates, concerned with 'the enforcement of military discipline'. Section 42 must thus be read in the context of military disciplinary matters. By contrast, s 59(1)(*d*) falls under a section which deals with 'termination of service of members of Regular Force'. Furthermore, self-evidently the Chief of the SANDF had no reason to consider whether or not to permit the respondent to return to duty in circumstances where the respondent was serving a term of life imprisonment. It will be recalled that s 42 bears the heading 'Suspension awaiting trial or appeal'. The suspension is effected by the person concerned being directed not to report for duty. This presupposes that the person is physically present and in active duty prior to the directive being issued. The respondent was not in a position to physically present himself for duty. The jurisdictional facts for the operation of s 42(1) and (2) are lacking in this case. The power afforded the Chief of the SANDF in these subsections is discretionary in nature. A public authority, such as the Chief of the SANDF, must determine the exact scope of its powers whenever it acts. That determination entails questions of both fact and law. Thus, the public authority must not only be satisfied that it will be acting within the permissible legal confines of its powers, but also that the requisite factual state of affairs exist for it to exercise that

[3] 'Civil court' is defined in paragraph 1 of the First Schedule to the Defence Act of 1957 as 'any court of criminal jurisdiction in the Republic' and 'civilian court' is defined in s 1 of the MDSMA as 'any competent court in the Republic having jurisdiction in criminal matters'.
[4] In a military court.

power.[5] Section 42 therefore did not apply in this case and Raulinga J erred in his finding that it did.

[11] In interpreting s 59(1)(*d*), we must apply the well-established approach of affording meaning to the words by applying the normal rules of grammar and syntax, viewed within the relevant factual context, in order to ascertain the Legislature's intention.[6] Section 59 envisages the termination of the service of members of the SANDF who serve in a full-time capacity[7]. Part-time members of the SANDF serve in the Reserve Force as provided for in s 11(b) of the Defence Act. There are three broad categories of termination envisaged in s 59:

(a) First, s 59(1) deals with termination which ensues automatically upon the occurrence of certain events, namely –

(i) after the expiry of three months (or such shorter period as the Chief of the SANDF may approve) of a member's resignation (s 59(1)(a));

(ii) upon the termination of a fixed term contract (s 59(1)(b));

(iii) where a member reaches retirement age or exercises the right to go on pension (s 59(1)(c));

(iv) if a member is sentenced to a term of imprisonment without the option of a fine by a competent civilian court or if a sentence involving discharge or dismissal is imposed upon him or her under the Code (s 59(1)(d)); or

(v) if the Surgeon-General or any person authorised thereto by him or her certifies a member to be medically or psychologically unfit to serve permanently in the SANDF (s 59(1)(e)).

(b) Second, there is the discretionary termination of service in s 59(2) in instances of:

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[5] Baxter, *Administrative Law*, 1984 at 452.

[6] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013(5) SA 1 (SCA) para 24; *Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd* 2016(1) SA 518 (SCA) para 28.

[7] 'Regular Force' is defined in s 1 of the Defence Act with reference to s 11(a) of that Act which reads as follows:

'11. Composition of South African National Defence Force—

The South African National Defence Force established by section 224 (1) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), continues to exist and consists of the –

(a) Regular Force, the members of which serve full-time until –

(i) reaching their age of retirement;

(ii) expiry of their contracted term of service; or

(iii) otherwise discharged from the Defence Force in accordance with the law.'

(i) the abolition of the post or a reduction or adjustment of post structures (s 59(2)(a));

(ii) if the discharge of the member would enhance efficiency or cost-effectiveness (s 59(2)(b));

(iii) unfitness for duty or inability to carry out duties (s 59(2)(c));

(iv) if a member's permanent appointment is not confirmed after serving a period of probation (s 59(2)(d); or

(v) if the member's continued employment constitutes a security risk to the State (S 59(2)(e)).

(c) Third, there is a provision that a member who absents himself or herself from duty without leave for a period exceeding 30 days, is deemed to have been dismissed or discharged on account of misconduct. (S 59(3)).

[12] Termination under s 59(2) was considered by this court in *Minister of Defence & others v South African National Defence Union (SANDU) & another*[8] and the provisions in s 59(3) occupied this court's attention recently in *Minister of Defence and Military Veterans and another v Mamasedi*[9]. As far as I could ascertain, s 59(1) or any of its subsections have not been considered as yet by this court. We have also not been referred to any decided cases on those provisions.

[13] It is striking that the Legislature uses the words 'the service of a member . . . *is terminated*' in s 59(1), designedly so, in my view. (my emphasis). The intention is plainly that in the instances listed from s 59(1)(*a*) up to and including s 59(1)(e), termination follows ex lege. Thus, for present purposes, it means that once the respondent had been sentenced to life imprisonment, his service in the SANDF was terminated by operation of law in terms of s 59(1)(*d*). No decision was required by any one or more of the appellants to effect that termination.[10] This conclusion is reached by giving the words its plain meaning and considering them against the contextual setting of s 59(1). Thus in the other four instances listed in s 59(1),

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[8] *Minister of Defence & others v South African National Defence Union & another* 2014 (6) SA 269 (SCA).

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

[10] Compare: *Phenithi v Minister of Education & others* [2005] ZASCA 130; 2008(1) SA 420 (SCA) paras 9, 10 and 17.

namely resignation, retirement (or pension), termination of a fixed term contract and medical or psychological unfitness for duty, retirement would follow automatically. It would be an absurdity to, for example, require any one or more of the appellants to take a decision on termination of service where a member has reached retirement age or has elected to go on pension. In the premises, since the respondent's service was automatically terminated by the operation of s 59(1)(d) when he was sentenced to life imprisonment, there was no 'decision' that could be reviewed and set aside.

[14] That brings me to the respondent's alternative argument that the section must also operate automatically in a converse factual scenario, namely that upon the setting aside of the respondent's conviction and sentence of life imprisonment, reinstatement to the SANDF had to follow automatically. That argument is fatally flawed. Section 59(3), cited above, pertinently makes provision for reinstatement by the Chief of the SANDF. Section 59(1) contains no such provision. In *Mamasedi*, this court held that '. . . reinstatement does not follow from the setting aside of the decision not to reinstate 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 reinstate him, he remains dismissed from the SANDF.'[11] A fortiori, in the present instance, absent a provision for any reinstatement in s 59(1)(*d*), the respondent remained dismissed by operation of law. It is difficult to conceive of such reinstatement automatically following upon, for example, a member who has become unfit for duty and has been certified as such under s 59(1)(e), being cured and becoming medically fit for duty.

[15] In the premises, Raulinga J erred in his finding that s 59(3) of the Defence Act and s 42(1) of the MDSMA also applied in this case. Section 59(1)(*d*) was the only applicable provision here. The jurisdictional facts for the coming into operation of s 59(1)(d) are that a member of the Regular Force must have been sentenced to a term of imprisonment without the option of a fine by a competent civilian court. Those facts are common cause. For the reasons set out above, the subsection operates automatically. The appellants were thus correct in requiring the respondent to apply for re-employment. It bears mention that the respondent was arrested on 26 October

[11] Supra fn 9 para 24.

2010 and his conviction and sentence only followed on 18 July 2014. The date of arrest emerged for the first time in the respondent's replying affidavit. Be that as it may, the respondent should have advised his superiors of his arrest immediately once it occurred. Section 42(1) could then have been applied. The belated attempt to invoke s 42(1) after the fact was misconceived.

[16] The appeal must succeed and costs should follow the outcome.
The following order issues:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the high court is set aside and substituted with the following:
'The application is dismissed with costs'.

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S A Majiedt
Judge of Appeal

APPEARANCES:

For First Appellant:	D T Skosana SC (with him M Gwala)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For Second Respondent:	G L van der Westhuizen
Instructed by:	Griesel Breytenbach Attorneys, Pretoria
	Phatshoane Henny Attorneys, Bloemfontein