



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 24 November 2017

STATUS Immediate

Minister of Defence & another v Mamasedi (622/2017)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today upheld in part an appeal against a judgment that had reviewed and set aside the decision of the second appellant not to re-instate the respondent, and had ordered his re-instatement.

The issue before the SCA was whether the decision not to re-instate the respondent was vitiated by a failure of procedural fairness in that he was not given an oral hearing before a board of enquiry made its recommendation to the Chief of the SANDF and to comment on the recommendation; and secondly, whether re-instatement was relief that was competent in the circumstances.

The respondent, Mr Jonas Molefi Mamasedi, held the rank of sergeant in 1 South African Tank Regiment in the South African National Defence Force (SANDF) before his dismissal. He challenged by way of a review application a decision taken by the second appellant, the Chief of the SANDF, not to re-instate him. Wentzel AJ, sitting in the Gauteng Division of the High Court, Pretoria, made an order setting aside the Chief of the SANDF's decision not to re-instate the respondent; and directed that he be re-instated as a member of the South African National Defence Force with full benefits including his salary from 15 December 2011.

On 29 November 2011, the respondent failed to report for duty as he was required to do. He remained absent without leave until 18 January 2012, when he returned to his unit. By that time, however, he was, in terms of s 59(3) of the Defence Act 42 of 2002 (the Act), deemed to have been dismissed for misconduct. According to the respondent, after his return to his unit, and on discovering that he had been dismissed, he travelled to the SANDF's Headquarters in Pretoria to lodge a grievance about his discharge. He was advised to return to his unit in Bloemfontein, which he did, and to lodge his grievance with his commanding officer.

In the meantime, a board of enquiry had been convened on 18 January 2012 – the day of the respondent's return to his unit – to investigate the reasons for the respondent's absence without leave and to make recommendations to the Chief of the SANDF in that regard. The board of enquiry had yet to make a recommendation by 7 December 2012 when the respondent made representations to the Chief of the SANDF. Receipt of the representations was confirmed on behalf of the Chief of the SANDF on 22 January 2013. In his

representations, the respondent stated that he had been absent without leave because he had been 'abducted and taken to an initiation school for the period from 29 November 2011 to 31 December 2011'.

On 11 July 2013, the respondent received 'final feedback from SA Army Headquarters regarding the Ministerial Enquiry' into his absence without leave. The board of enquiry recommended to the Chief of the SANDF that the respondent not be re-instated. The Chief of the SANDF accepted the recommendation and decided not to re-instate the respondent.

The SCA held that it was clear from s 102 of the Act that the respondent, being a person whose reputation was likely to be affected by evidence led before the board of enquiry, had a right to participate in its proceedings. The procedural rights he enjoyed extended beyond the minimum core rights to procedural fairness envisaged by s 3(2) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). He had a right to give oral evidence, to call witnesses, to cross-examine witnesses and to be legally represented.

The SCA held further that it was common cause that the respondent was never afforded the opportunity to participate in the proceedings of the board of enquiry and neither were its findings and recommendation communicated to him for his comments before being forwarded to the Chief of the SANDF and therefore his right to procedurally fair administrative action was violated.

The SCA found that after the court below had made its order setting aside the decision of the Chief of the SANDF, a further order was made re-instating the respondent retrospective to 15 December 2011 and the latter order could not stand as re-instatement did not follow from the setting aside of the decision not to re-instate the respondent. 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 remained dismissed from the SANDF.

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