THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 622/2017

In the matter between:

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

CHIEF OF THE SANDF **SECOND APPELLANT**

and

JONAS MOLEFI MAMASEDI **RESPONDENT**

Neutral citation: *Minister of Defence v Mamasedi* (622/2017) [2017] ZASCA 157 (24 November 2017)

Coram: Ponnan and Majiedt JJA and Plasket, Mbatha and Schippers AJJA

Heard: 15 November 2017

Delivered: 24 November 2017

Summary: Defence Act 42 of 2002 – Section 59(3) – deemed dismissal of member after absence of 30 days – re-instatement of member on good cause shown – board of enquiry making recommendation to Chief of SANDF not to re-instate member – member not given opportunity to participate in proceedings of board of enquiry, contrary to s 102 of Act – decision of Chief of SANDF not to re-instate member correctly set aside by court below on account of procedural unfairness – order of re-instatement of member incorrectly made and set aside.

ORDER

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

(a) The appeal succeeds to the extent that paragraph 2 of the order of the court below is set aside.

(b) The order of the court below is accordingly amended to read as follows:

'1 The decision of the second respondent not to re-instate the applicant made on 4 June 2013 is reviewed and set aside.

2 The respondents are ordered to pay the applicant's party and party costs.'

JUDGMENT

Plasket AJA (Ponnan and Majiedt JJA AND Mbatha and Schippers AJJA concurring)

[1] 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 (1) aside the Chief of the SANDF's decision not to re-instate Mamasedi; (2) 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'; and (3) directing the appellants to pay Mamasedi's costs. When the appellants applied for leave to appeal against her order, she granted leave to appeal to this court.

The facts

[2] On 29 November 2011, Mamasedi 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. Section 59(3) provides:

'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.'

[3] It has been held by this court, dealing with similar provisions in other employment-related legislation, that dismissal follows absence in excess of the prescribed period by operation of law, consequently no decision is taken to dismiss the employee that is susceptible to review, but that thereafter a decision may be taken to reverse a dismissal if good cause for so doing is shown.[1]

[4] According to Mamasedi, 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.

[5] His commanding officer, Lieutenant-Colonel Jansen, informed him that she would 'only deal with [the] grievance as soon as she receives a confirmation from SANDF, Pretoria'. In the meantime, she said, Mamasedi should remain in the barracks. He left the barracks on 9 March 2012 when he was, he claimed, 'unceremoniously locked out of the barracks'.

[6] In the meantime, a board of enquiry had been convened on 18 January 2012 – the day of Mamasedi's return to his unit – to investigate the reasons for Mamasedi'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

[1] *Minister van Onderwys en Kultuur en andere v Louw* 1995 (4) SA 383 (A) at 388G-I; *Phenithi v Minister of Education & others* 2008 (1) SA 420 (SCA) paras 9-11.

December 2012 when Mamasedi 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, Mamasedi 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'.

[7] The letter acknowledging receipt of the representations informed Mamasedi that 'the matter is currently being investigated and a response will be made available in due course'.

[8] On 11 July 2013, Mamasedi received 'final feedback from SA Army Headquarters regarding the Ministerial Enquiry' into his absence without leave. The report of the board of enquiry, including its recommendation, dated 21 February 2013, was attached. The board of enquiry recommended to the Chief of the SANDF that Mamasedi not be re-instated. The Chief of the SANDF accepted the recommendation and decided not to re-instate Mamasedi.

[9] The board of enquiry appears to have been convened in terms of s 101 of the Act. Section 101(1) provides:

'The Minister, the Secretary for Defence or the Chief of the Defence Force may, at any time or place, convene a board of inquiry to inquire into any matter concerning the Department, any employee thereof or any member of the Defence Force or any auxiliary service, any public property or the property or affairs of any institution or any regimental or sports funds of the said Force, and to report thereon or to make a recommendation.'

[10] I have said that the board of enquiry appeared to have been convened in terms of s 101(1) of the Act because the answering affidavit of the Chief of the SANDF is unhelpful in this respect. He does not say whether he or someone else convened the board of enquiry and nor is the convening order disclosed. Because the board of enquiry was referred to in its report as a 'ministerial enquiry' it presumably was convened by the Minister of Defence and Military Veterans in terms of s 101(1) of the Act.

[11] Both counsel for the appellants and for Mamasedi assumed that the board of enquiry was one contemplated by s 103 but that assumption is incorrect, and both conceded as much in argument. A board of enquiry contemplated by s 103 is convened by the absentee soldier's commanding officer while the soldier is still absent without leave and its purpose is to establish the fact that the soldier is absent without leave and whether any of his or her kit is missing. It has no power to determine the reasons for the absence without leave.[2]

The issues

[12] Two issues arise for decision. They are, first, whether the decision not to re-instate Mamasedi was vitiated by a failure of procedural fairness in that he was not given an oral hearing before the board of enquiry made its recommendation to the Chief of the SANDF and to comment on the recommendation; and secondly, if that point succeeds, whether re-instatement was relief that was competent in the circumstances. The implications of our findings, insofar as the question of costs are concerned, will also have to be considered.

Procedural fairness

[13] The procedure that was followed in this case was a two-stage process. The board of enquiry investigated the facts relevant to the reason for Mamasedi's absence without leave, and made a recommendation to the Chief of the SANDF, who then took a decision in terms of s 59(3) of the Act. This appears to have been a sensible approach because a factual dispute existed as to whether or not Mamasedi had been abducted and taken to an initiation school, or had gone there of his own free will.

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[2] Section 103 provides:
'(1) When any member of the Defence Force has been absent without leave for more than 30 days and is still absent, a board of inquiry must be convened by the commanding officer of the absent member to inquire into such absence.
(2) If a routine inspection reveals any deficiency in the kit, arms and equipment or any public property issued to the person contemplated in subsection (1), the board of enquiry may also inquire into such deficiency.
(3) If the board of inquiry finds that such member has been so absent for more than 30 days and is still so absent, it must record such finding, including the date of the commencement of the absence without leave, and also its finding on any deficiencies of the kit, arms and equipment and any public property issued to him or her and the estimated value thereof.'

[14] In my view, the two-stage process in this case must be viewed holistically and be seen as affecting rights at each stage, as was held to be the case in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)*,[3] rather than as a bifurcated process involving, first, an investigation with no effect on rights and, secondly, a decision that affects rights, as was the approach in such cases as *Cassem en 'n ander v Oos-Kaapse Komitee van die Groepsgebiederaad en andere*[4] and *South African Defence and Aid Fund & another v Minister of Justice*.[5] The latter two cases, based as they were on the discredited 'classification of functions' approach to procedural fairness and the idea that a right to be heard only applied if it was impliedly incorporated into the empowering provision, are not compatible with s 33 of the Constitution.

[15] The investigation of the board of enquiry followed by the decision taken by the Chief of the SANDF not to re-instate Mamasedi – to refuse to make a 'determination' – taken together, was an administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA): it was an exercise of a statutory power of a public and administrative nature taken by an organ of State which adversely affected Mamasedi's rights and which had a direct, external legal effect.[6]

[16] The PAJA gives effect to the fundamental right to administrative action that is lawful, reasonable and procedurally fair.[7] Section 3, insofar as it is relevant to this case, provides:

'(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (*a*) A fair administrative procedure depends on the circumstances of each case.

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[3] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & another as amici curiae*) 2006 (2) SA 311 (CC) paras 137 and 141 (Chaskalson CJ), 441-442 (Ngcobo J) and 672 (Moseneke J). See too *Administrator, Cape & another v Ikapa Town Council* 1990 (2) SA 882 (A) at 889J-890C; *Director: Mineral Development, Gauteng Region & another v Save the Vaal Environment & others* 1999 (2) SA 709 (SCA) para 19; *Oosthuizen's Transport (Pty) Ltd & others v MEC, Road Traffic Matters, Mpumalanga & others* 2008 (2) SA 570 (T) para 25.

[4] *Cassem en 'n ander v Oos-Kaapse Komitee van die Groepsgebiederaad en andere* 1959 (3) SA 651 (A).

[5] *South African Defence and Aid Fund & another v Minister of Justice* 1967 (1) SA 263 (A).

[6] The PAJA, s 1. See the definitions of 'administrative action' and 'decision'. See too *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) paras 21-24.

[7] Constitution, s 33.

(*b*) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

(*a*) obtain assistance and, in serious or complex cases, legal representation;

(*b*) present and dispute information and arguments; and

(*c*) appear in person.'

[17] Section 3(5) of the PAJA provides that where an administrator 'is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure'.

[18] Section 6(1) of the PAJA provides that any person affected by administrative action 'may institute proceedings in a court . . . for the judicial review of an administrative action'. Section 6(2) catalogues the grounds upon which administrative action may be reviewed. Section 6(2)(*c*) provides that administrative action may be reviewed by a court if 'the action was procedurally unfair'.

[19] The proceedings of the board of enquiry were regulated, procedurally, by s 102 of the Act. Section 102(4) provides that the evidence given in any hearing of a board of enquiry must be given orally, subject to three exceptions not relevant in this case.[8] Section 102(6) provides that if a person's reputation is likely to be affected by evidence adduced before a board of enquiry, that evidence must be given orally even if one of the exceptions applies, and the person affected has the right to be present,

[8] Section 102(5).

to cross-examine the witness who tendered it, to testify himself or herself and to call witnesses.

[20] Section 102(7) places an obligation on the president of the board of enquiry to notify such an affected person timeously 'of the time and place' of every meeting of the board of enquiry and of his or her rights in terms of s 102(6). That person, in terms of s 102(7), may address the board of enquiry on the evidence that had been tendered in favour of and against him or her and has a right to legal representation at his or her own expense or assigned to him or her at State expense. Finally, s 102(9) provides:

'Before the record of proceedings is submitted to the person who convened the board, the relevant findings and recommendations of a board of inquiry must be communicated to each person who is adversely affected by such findings and recommendations and that person has the right to make written representations to the person who convened the board of inquiry within 14 days of receipt of the relevant findings and recommendations.'

[21] It is clear from s 102 that Mamasedi, 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 PAJA. He had a right to give oral evidence, to call witnesses, to cross-examine witnesses and to be legally represented. The procedure created by s 102 of the Act is more extensive in its procedural protections than the PAJA and on that account, I find that it is a procedure that is fair and different to s 3(2) of the PAJA, as contemplated by s 3(5) of the PAJA.[9]

[22] It is common cause that Mamasedi 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. His right to procedurally fair administrative action was violated, and the ground of review envisaged by s 6(2)(*c*) of the PAJA was

[9] *Police and Prisons Civil Rights Union & others v Minister of Correctional Services & others (No. 1)* 2008 (3) SA 91 (E) para 71.

established, with the result that the Chief of the SANDF's decision not to re-instate him was correctly set aside by the court below.

Re-instatement

[23] After the court below had made an order setting aside the decision of the Chief of the SANDF, a further order was made re-instating Mamasedi retrospective to 15 December 2011. That order cannot stand. I say this for two reasons.

[24] The first reason is that re-instatement 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.

[25] The second reason is 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.[10]

[26] It is only in limited circumstances when such a 'usurpation' of administrative power is permitted. Section 8(1)(*c*)(ii) of the PAJA provides that 'in exceptional circumstances' a court, having reviewed and set aside administrative action may substitute or vary the administrative action. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*,[11] the Constitutional Court set out the way in which the exceptional circumstances exception is to be applied:

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[10] *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) paras 28-29.
[11] *Trencon Construction (Pty) Ltd v Industrial Development Corporation fo South Africa Ltd & another* 2015 (5) SA 245 (CC); [2015] ZACC 22 para 47.

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[27] In this case, if Wentzel AJ indeed intended to substitute the Chief of the SANDF's decision with her decision, she did not expressly consider whether exceptional circumstances were present. If she had, she would have found immediate difficulties in following this course because there was, on her own showing, an irresolvable dispute of fact as to whether Mamasedi was abducted or went to the initiation school voluntarily. She simply was not in any position, let alone as good a position as the Chief of the SANDF, to take the decision to re-instate Mamasedi.[12] Without the factual dispute having been resolved one way or the other, it could not be said that the decision was a foregone conclusion. There is, furthermore, no indication that the Chief of the SANDF is biased or otherwise precluded from taking the decision again when the facts are properly determined.

[28] In the result, the appeal must succeed to the extent that the order re-instating Mamasedi must be set aside.

Costs

[29] Counsel for the appellants very fairly conceded that Mamasedi was entitled to his costs in the court below. Having taken instructions, he also was prepared to concede that, even though the appellants had achieved significant success on appeal, the parties should each bear their own costs of the appeal.

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[12] *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape & another* 2007 (6) SA 442 (Ck) para 43.

The order

[30] The following order is made:

(a) The appeal succeeds to the extent that paragraph 2 of the order of the court below is set aside.

(b) The order of the court below is accordingly amended to read as follows:

‘1 The decision of the second respondent not to reinstate the applicant made on 4 June 2013 is reviewed and set aside.

2 The respondents are ordered to pay the applicant’s party and party costs.’

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C M Plasket

Acting Judge of Appeal

APPEARANCES

For the Appellants:	V D Mtsweni
Instructed by:	The State Attorney, Pretoria
	The State Attorney,Bloemfontein
For the respondent:	D Lebethe
Instructed by:	Ditheko Lebethe Attorneys, Pretoria
	Webbers, Bloemfontein