IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE Date: 2008-10-27

Case Number: 35674/06

& Case Number: 36618/07

In the matter between:

LETSATSI SUN MOSIANE

and

THE MINISTER OF DEFENCE First Respondent

THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE Second Respondent

THE CHIEF OF THE SOUTH AFRICAN AIR FORCE Third Respondent

JUDGMENT

SOUTHWOOD J

Case Number 35674/06

[1] In this application the applicant seeks an order that the decision by the third respondent of the 9th of September 2005 to terminate the services of the applicant as a member of its staff be reviewed and set aside and that the respondents be ordered to reinstate the applicant to his position with the third respondent on the same terms and conditions with immediate effect.

[2] Until July 2005 the applicant was a major in the South African Air Force. On 16 or 17 August 2005 at a meeting with Brig Genl. Masters at Air Command (Air Force HQ) the applicant was informed that he had been dismissed with effect from 12 August 2005. The applicant unsuccessfully attempted to obtain the reasons for his dismissal and then instructed an attorney, Jake Maseka, to assist him. On 6 September 2005 Jake Maseka addressed a letter to the Chief of the South African Air Force, the third respondent, in which the attorney pointed out that the applicant had been informed of his dismissal; that his salary had been stopped and that he, the attorney, was not in possession of any documents that show that the applicant has been dismissed or that any disciplinary proceedings had taken place.

[3] On 9 September 2005 the third respondent addressed the following letter to Jake Maseka:

'TERMINATION OF SERVICE: MR. L.S. MOSIANE

Your facsimiles dated 31 August, 06 and 07 September 05, as well as our facsimile to your office dated 06 September 2005, refer.

This letter confirms that in terms of the provisions of Section 59(3) of the Defence Act, Act No 42 of 2002, your client, Mr S.L. Mosiane, has been dismissed by the Department of Defence (SA Air Force) with effect from 23 June 2005. The reason for your client's dismissal was on account of misconduct as a result of his absence from official duty at the Air Command for a continuous period exceeding 30 days, calculated from 23 June 2005.

In terms of Section 59(3) of the Act, your client has the right to submit reasons to Chief of the National Defence Force why he should be re-instated. The dismissal of your client therefore remains valid until Chief of the National Defence Force instructs otherwise. Your client will therefore not be allowed to report for duty at the Air Command, or any other Department of Defence Unit as contemplated in your letter.

Due to the fact that your client has been dismissed, the decision has been taken not to pursue your client's grievances any further.

Regarding your request for information as per 31 August and 07 September 2005, you are referred to our facsimile of 06 September 2005.

On 16 August 2005, your client visited the Air Force Headquarters building for an unknown reason. As part of the entrance control measures, your client handed in his personal driver's licence. During this time your client was informed that he should wait for the arrival of the Military Police, but he

> refrained to do so. Instead, your client left and intentionally drove through one of the security booms situated on SANDF property and drove away. At no stage was any shot fired at either your client, or his vehicle. The Military Police arrived after your client's departure and took possession of your client's personal drivers licence. Any further queries regarding his drivers licence must be directed to Staff Sergeant Cloete at (012) 674-4280.
>
> In view of the abovementioned, it is emphasised that your client has been formally dismissed from the Department of Defence (SA Air Force). You are therefore advised that in view thereof, and the fact that your client has also threatened some Air Force personnel at the Air Command in the past, your client has been declared *persona non grata* at the Air Command and is not allowed to enter the Air Command's security area. Should he do so, the necessary action will be taken against him.'

[4] The third respondent's letter accurately conveys the gist of section 59(3) of the Defence Act, 42 of 2002 ('the Act') which 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.'

On 12 September 2005 Jake Maseka replied to the third respondent's letter of 9 September 2005 and said with regard to reinstatement in terms of the subsection –

> '… (o)ur client has proven beyond doubt that he was not absent from official duty for more than 30 days. Therefore there is no need to request reinstatement from the Chief of the SA National Defence Force as contemplated by the Act.'

[5] The applicant considered that he had been unlawfully or unfairly dismissed and over the following months unsuccessfully attempted to have this dispute determined by the Safety and Security Central Bargaining Council, the Public Service Commissioner, and the Commission for Conciliation, Mediation and Arbitration, none of which was prepared to exercise jurisdiction. Eventually the applicant consulted attorneys J.W. Wessels and Partners Inc who, on 27 February 2006, addressed a letter to the third respondent contending that the applicant's dismissal was procedurally and substantially unfair and demanding that the applicant be reinstated within 3 weeks failing which the High Court would be approached. According to the letter, the applicant was dismissed on 23 June 2005 on account of misconduct as a result of his absence from official duty at Air Command for a continuous period of 30 days and despite the applicant's efforts to obtain records to show that the applicant was not absent without leave. On 26 June 2006 the state attorney addressed the following letter to J.W. Wessels and Partners:

‘MAJOR L.S. MOSIANE/MINISTER OF DEFENCE

With reference to your letter dated 27 February 2006 and my letter dated 29 March 2006, I have to inform you that my client has instructed me as follows:

1. In your letter, you allege, for the reasons set out therein, that your client’s dismissal was “procedurally and substantially unlawful”.

2. The concepts of procedural or substantive unfairness or unlawfulness of dismissal are not applicable in the contact (sic) of a termination of service in terms of section 59(3) of the Defence Act, 42 of 2002:

   2.1 Where a member of the Regular Force has absented himself from official duty without the permission of his commanding officer for a period exceeding 30 days, section 59(3) provides that he **must** be regarded as having been dismissed on account of misconduct, with effect from the day immediately following his last day of attendance at his place of duty or the last day of his official leave.

   2.2 The deeming provision of section 59(3) came into operation when your client absented himself from official duty without the permission of his commanding officer, for a period exceeding 30 days. The coming into operation of the deeming provision was not dependent on any

decision by your client's former commanding officer, a military court or anyone else. In other words, the dismissal occurred by operation of law.

2.3 Therefore, the notification to your client that he has been dismissed in terms of section 59(3) was not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law.

3. In terms of a proviso to section 59(3), the Chief of the Defence Force may on good cause shown, authorise the reinstatement of a member on such conditions as he may determine. It may be seen, therefore, that the proviso affords your client an opportunity to be heard and to be reinstated, provided that he is able to show good cause as to why the Chief of the Defence Force should reinstate him.

4. This letter serves, therefore, as an invitation to your client to place before the Chief of the Defence Force material or facts which may move the latter to reinstate him.

5. Should it be more convenient to do so, your client is welcome to deliver his representations through you, to this office for transmission to the Chief of the Defence Force.'

It will be noted that the state attorney explained the operation of section 59(3) of the Act: that no decision was taken by anyone in authority and that the dismissal occurred by operation of law. At no stage did the applicant attempt to show good cause why he should be reinstated.

[6] In July 2006 the applicant consulted yet another attorney, Mokwana Inc, and further correspondence passed between Mokwana Inc and the respondents. Eventually, on 1 November 2006, Mokwana Inc launched this application as an urgent application for hearing on 30 November 2006. The respondents opposed the application and on 30 November 2006 Patel J made the following order by agreement:

> '(1) The applicant's application is struck off the roll with costs, which costs include the costs of two counsel;
>
> (2) The applicant is to file his replying affidavit by not later than 16 January 2007;
>
> (3) The matter will be enrolled for hearing upon a date mutually agreeable to the parties.'

[7] The applicant did not attempt to enrol the application and in March 2008 the matter was enrolled at the instance of the respondents.

[8] Despite seeking an order that the decision by the third respondent to terminate the services of the applicant be reviewed and set aside Mokwana Inc did not use the provisions of Rule 53. Neither the third

respondent nor any other officer in the South African Air Force was called upon to despatch to the registrar a record of the proceedings together with his or her reasons for the decision. The thrust of the applicant's affidavit is that he was not absent without leave during the relevant period and he sets out where he was on a number of days during that period. In summary, the applicant alleges that he was not formally transferred from the Directorate of Air Force Acquisitions (DAFA) to the Directorate of Technical Support Services (DTSS) and that he had no office to work in, no superior to report to and no duties to perform. While agreeing that there was no formal signal to effect the applicant's transfer from DAFA to DTSS the respondents have comprehensively answered the applicant's allegations. According to their evidence the applicant was temporarily transferred from DAFA to DTSS by arrangement between the directors; he was given a Colonel Greebe's office at DTSS to work in; he was assigned the drafting of a manual and he was to perform this work under the supervision of Colonel Luden. The applicant was required to attend the roll call every day in the tearoom at DTSS and the roll call records reflecting the applicant's presence from 9 June 2005 to 22 June 2006 and absence from 23 June 2005 to 19 August 2005 are confirmed by the responsible warrant officer and sergeant. It is common cause that on 23 June 2005 Colonel Classen laid two charges against the applicant, one for being absent without leave and non-attendance where required to attend (a contravention of section 14(b) of the Military Discipline Code (MDC)) because the applicant left his place of duty on 21 June 2005

without good and sufficient cause, the other for using threatening, insubordinate or insulting language (a contravention of section 17 of the MDC) because of the way the applicant spoke to Colonel Classen on 22 June 2005 and refused to comply with an order. It is also not in dispute that members of the Military Police arrested the applicant on these charges on 11 July 2005 and took him to the detention barracks where he was detained *incommunicado* until 13 July 2005 when he was released by the military court at approximately 15h00. The order contained the following conditions relating to the applicant's work at DTSS:

> '9. Major Mosiane must report at Col J.J. Visser (office D207) of Directorate Technical Support Services every working day at 07h45 for roll call. The Major will then be handed specific tasks to complete and feedback must be given to Col. J.J. Visser.
>
> 10. Major Mosiane must report at Col J.J. Visser (office D207) at 12h30 again.
>
> 11. Major Mosiane must report at J.J. Visser (office D207) in the afternoon 16h15 before going from duty.
>
> 12. Major Mosiane must be present at his place of work as determined by the task given to him for the duration of the day.'

[9] It is not in dispute that the applicant failed to comply with these conditions. He does not pertinently allege that he did and Col Visser

states unambiguously that he did not. Col Visser states that on 14 July 2005 Brig Genl Emhke instructed him, Col Visser, that the applicant had to report to him instead of Col Classen. He confirms that on 14 July 2005 the applicant did not report to him and was absent without leave. Col Visser states further that on 15 July 2005 quite by chance, he saw the applicant and his legal advisor at DTSS and he had a meeting with them at 10h00. At the meeting he informed the applicant, in the presence of his legal representative, as well as Lt Col Le Roux and Lt Col Ramchuran, what the applicant's tasks would be and the rules relating to the roll call and absence without leave. Col Visser told the applicant that he must report for roll call at 07h45 each morning and he ordered the applicant not to leave the building without his permission and, if he, Col Visser, was not available, the permission of Lt Col Le Roux or Lt Col Ramchuran. At the meeting the applicant requested leave of absence for the afternoon of 15 July 2005 and Col Visser told him he could have leave if he submitted the necessary application. The applicant did not report for duty on 15 July 2005 at 07h45, he did not apply for leave as suggested by Col Visser and he absented himself without leave during the afternoon of 15 July 2005. On 18 July 2005 after the applicant failed to attend roll call, Col Visser unsuccessfully attempted to communicate with the applicant to ascertain why. The applicant did not provide an answer. Col Visser states that the last time he saw the applicant was at the meeting of 15 July 2005. Lt Cols Le Roux and Ramchuran confirmed what happened at the meeting between the applicant and Col Visser on 15 July 2005

and that from 15 July 2005 to the end of August 2005 the applicant did not approach them to arrange for absence from official duty. Warrant Officer Williams and Sergeant Mokwena who called the roll at DTSS confirmed with reference to the roll call register that the applicant failed to attend roll call from 22 June 2005 to 31 August 2005.

[10] Against this background the court must decide whether the applicant is entitled to the relief sought bearing in mind that the applicant seeks final relief on notice of motion and that such relief may be granted only in the circumstances outlined in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E-635C. Generally, final relief may be granted only when the facts alleged by the respondent together with the facts alleged by the applicant and admitted by the respondent justify the grant of such relief.

Review

[11] Despite not having used the correct procedure the applicant seeks an order reviewing and setting aside the decision to dismiss him (allegedly) taken by the third respondent on 9 September 2005. It was essential for the applicant to establish that the third respondent (or some other officer) took a decision on 9 September 2005 to dismiss the applicant. In the absence of an administrative action, in this case, a decision taken by a natural or juristic person, when exercising a public power or performing a public function in terms of an empowering

provision, there was nothing to review. See section 6 read with the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This was also the case before PAJA – see ***Minister van Onderwys en Kultuur en Andere v Louw*** **1995 (4) SA 383 (A)** at 388G-J. Notwithstanding the fact that the state attorney pertinently addressed the issue in his letter on 22 June 2006 and told the applicant's attorney that the applicant had been dismissed by operation of law in terms of section 59(3) of the Act, the applicant persisted in seeking to review a decision. The respondents' evidence is clear. Neither the third respondent nor any other officer under his command, took a decision to dismiss the applicant. His dismissal took place by operation of law in terms of section 59(3) of the Act. See ***Minister van Onderwys en Kultuur en Andere v Louw supra*** at 388E-399I; ***Phenithi v Minister of Education and Others*** **2008 (1) SA 420 (SCA)** para 10. The same conclusion has been reached in a number of cases involving provisions, which although not identically worded to section 59(3) of the Act, have the same effect – see ***Mkhwanazi v Minister of Agriculture and Forestry*** **1990 (4) SA 763 (D & CLD)** at 768C-G; ***Yanta and Others v Minister of Education and Culture, KwaZulu, and Another*** **1992 (3) SA 54 (N)** at 55H-56B; ***Dyani v Director-General for Foreign Affairs and Others*** **[1998] 7 BLLR 735 (Tk)** at 740-741. The application could therefore be dismissed on this ground alone.

Declaratory order

[12] During argument the question arose whether the court should not issue a declaratory order that the dismissal of the applicant in terms of section 59(3) of the Act was invalid if the affidavits reflect that he was not absent without the permission of his commanding officer for a period exceeding 30 days. Because of the way the parties approached the issue of the applicant's absence the court considered that in order to do justice to the parties the court should not be limited by the technicality (in this case) that the applicant is seeking to review and set aside a decision. On the same papers he could have sought the declaratory order referred to. The applicant asked for such an amendment to the notice of motion. The respondents objected to this procedure being adopted on the ground that the respondents would lose the defence of prescription. In my view prescription does not apply in this case. The applicant seeks simply to have a judicial determination relating to the correct facts underlying the operation of section 59(3) of the Act. Accordingly, if the court should find that the applicant was not absent without leave for a continuous period of 30 days (it is common cause that the period must be continuous) it should make such a declaration and also declare that his dismissal in terms of section 59(3) in 2005 was invalid and of no force and effect. It would then follow that the applicant is still a major in the South African Air Force and would be entitled to the salary and benefits accruing from that position as from 23 June 2005 until he is lawfully dismissed.

[13] The question arises because of the applicant's arrest on 11 July 2005 and detention in the detention barracks until the afternoon of 13 July 2005. It is not in dispute that this period could interrupt the 30 day period relied upon by the respondents: i.e. 23 June 2005 to 22 July 2005. Four issues must be considered –

(1) Whether the applicant's arrest on 11 July 2005 and detention until 13 July 2005 was absence without the permission of his commanding officer for the purposes of section 59(3) of the Act; and if so –

(2) Whether such arrest and detention interrupted the continuous period of 30 days contemplated by section 59(3) of the Act; and if so –

(3) Whether the applicant was, in any event, absent without the permission of his commanding officer for a continuous period of 30 days from 14 July 2005; and if so –

(4) Whether the respondents are entitled to rely on the second period of 30 days from 14 July 2005.

[14] The respondents' counsel did not dispute that if the period of 30 days was interrupted the dismissal would not be lawful. It also seems clear that if the approach is adopted of doing justice to both parties the

respondents must be allowed to rely on the second period of absence. It is clear that if the second period of absence is established the applicant will be dismissed by operation of law.

[15] With regard to the applicant's arrest and detention the respondents referred to cases which do not pertinently deal with the issue or provide a clear answer. As pointed out by Hugo J in ***Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu supra*** at 768E-F the use of the words 'absents himself' clearly import an element of volition. That is clearly inconsistent with arrest and detention. According to the learned Judge the section in that case contained its own built-in remedy. He says (at 769A-B) that the officer can apply for his re-employment, and, 'if at that time he is able to show that his absence from work was not voluntary, then the deemed misconduct and his discharge must necessarily fall away.' This reasoning applies equally to section 59(3), save that this cannot be the only remedy. In terms of section 59(3) this would not necessarily be sufficient for his reinstatement. There is no good reason why the officer could not seek a declarator that the dismissal was invalid – see ***Minister van Onderwys en Kultuur en Andere v Louw supra*** at 338D-H. In my view the applicant's arrest and detention for almost three days is not absence without leave for the purposes of section 59(3) of the Act and it interrupts the period of 30 days so that the dismissal did not occur by operation of law on 22 July 2005.

[16] The difficulty is the applicant's absence after his release from detention barracks on 13 July 2005. As already pointed out, there is a formidable body of evidence that the applicant was absent without leave from 14 July 2005 to 24 August 2005. At best for the applicant this creates a dispute of fact which cannot be decided on the affidavits. This is clearly not a case where the respondents' evidence must be rejected on the papers and the probabilities do not justify referring the issue for the hearing of oral evidence – see ***Kalil v Decotex (Pty) Ltd and Another*** **1988 (1) SA 943 (A)** at 979E-J. The applicant has therefore not established that he was not absent without leave from 14 July 2005 to 24 August 2005.

[17] In these circumstances, it will serve no purpose to amend the notice of motion as the facts do not justify the grant of a declaratory order. The application will therefore be dismissed with costs. Such costs will include the costs consequent upon the employment of two counsel. In my view the complexity of the issues, the amount of work and the importance of the matter to the respondents justified the employment of two counsel.

Case Number 36618/07

[18] While the application under case number 35674/06 was pending, the applicant launched this application under case number 36618/07. After some preliminary skirmishing, on 23 November 2007 the respondents

filed their answering affidavit together with an application for consolidation of the two applications. On 30 November 2007 the applicant delivered a notice of withdrawal which reads as follows:

> 'NOTICE OF WITHDRAWAL
>
> TAKE NOTICE that the applicant withdraw his application under case number 36618/07 due to be heard on 14 December 2007.
>
> TAKE FURTHER NOTICE that the applicant may re-instate the abovementioned application upon finalisation of pending application under case number 35674/06, should he be advised to do so.'

[19] On 12 December 2007 the state attorney addressed the following letter to the applicant:

> 'YOURSELF/MINISTER OF DEFENCE AND OTHERS
>
> I refer to your notice of withdrawal, dated 30 November 2007 under case number 36618/07 ("the document").
>
> Although the document is headed "Notice of Withdrawal" its contents are unfortunately to say the least, ambiguous. On the one hand, you purport to withdraw the application, yet, on the other hand, you state that you may reinstate the application "upon finalisation of pending application under case number 35674/06", should you be advised to do so.
>
> Kindly note that the withdrawal of an application has certain consequences. These consequences include the fact that the

> case has come to an end. Further, upon withdrawal of an application and in the absence of an agreement to the contrary, the respondents are entitled to costs of the application.
>
> Kindly confirm in writing, by no later than the close of business on Friday, 14 December 2007 that you have withdrawn the application number 36618/07, as opposed to having it removed from the roll.
>
> If your intention was, indeed, to withdraw the application, kindly indicate, further, whether you tender the costs of the application.
>
> In the absence of any written confirmation from you to the contrary by the close of business on 14 December 2007, the respondent will proceed to make application to the court for an order for the costs of the application (number 36618/07).'

The applicant failed to clarify the notice of withdrawal. In the circumstances the respondents were entitled to take the notice of withdrawal at face value. If the applicant intended to merely postpone the matter he would have said so. There was no certainty that the matter would ever proceed and it does not appear that it ever will.

[20] The applicant did not tender costs in the notice or afterwards and the respondents ask for costs in terms of Rule 41(1)(c). There is no reason to deviate from the general rule that the party who delivers a notice of withdrawal is, in effect, the unsuccessful litigant and should bear the costs. There is however no justification for the costs of two counsel sought by the respondents. The reserved costs of the Rule 30

proceedings brought by the respondents will however be paid by the applicant.

[21] It is recorded that the applicant who appeared in person, withdrew his objection to the authority of Col Gernandt to depose to the answering affidavits after the respondents produced the original letter from the Minister of Defence. It is also recorded that the respondents' further answering affidavit was not received by the court.

Orders

[22] I Case Number 35674/06

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

II Case Number 36618/07

The applicant is ordered to pay the respondents' costs of the application, including the reserved costs in terms of the order made by Rabie J on 17 October 2007.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 35674/06 & 36618/07

HEARD ON: 21-22 October 2008

FOR THE APPLICANT: In person

FOR THE RESPONDENTS: ADV. A.J. LOUW SC
ADV. L.P. DICKER

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 27 October 2008