

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 27234/19

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[Signature]

19/07/2019

In the matter between:

WILLIAM FRANCE MASINGA

1st Applicant

RIRHANDZU JOY KHOSA AND 33 OTHERS

2nd to 35th Applicants

and

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

1st Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

2nd Respondent

THE SURGEON GENERAL OF THE NATIONAL

DEFENCE FORCE

3rd Respondent

THE SECRETARY OF DEFENCE

4th Respondent

JUDGMENT

AC BASSON, J

[1] This is an urgent application in terms of which the applicants are seeking an order that the decision of the 1st respondent (the Chief of the South Africa National Defence Force) to terminate their employment be declared unlawful and invalid and that such decision be reviewed and set aside. They also seek an order reinstating them within seven days from the date of this order in the service of the South African Defence Force ("the SANDF") with full retrospective effect, with retention of all salaries and benefits as from the date of the unlawful termination of their service.

[2] Although urgency was not in dispute, I have nonetheless considered the point and I am satisfied that the matter is sufficiently urgent to proceed. This being an urgent application, my reasons for my order will be brief.

Brief background

[3] The applicants are part of a group of the South African Military Health Services that were afforded the opportunity to study medicine ("MBCHB") at the University of Cuba in 2017 (also referred to as "the 2017 group"). The group of 35 consists of officers and non-commissioned officers who were in the employee of the SANDF in various capacities including but not limited to clinical associates, nurses and dental technicians. Many of the applicants have been in the employ of the SANDF for more than 10 years. All the members of this group are registered with the Health Professions Council of South Africa and the South African Nursing Council. They arrived in Cuba during August 2017 and commenced with a Spanish Course and a pre-medical course. Both of these courses were compulsory and ended during July 2018.

[4] During April 2018 the 2017 group raised some concerns with the Surgeon General and the Director of Medicine. The details of these concerns are not relevant for purposes of this judgment. Suffice to point out that these concerns culminated in the applicants taking a decision, effective from 11 February 2019, to refuse to attend classes and/or training at the Military Infantry School. The date of 11 February 2019 is not in dispute. For the entire duration of their refusal to attend classes, the applicants remained at their designated base in Cuba.

[5] There is a dispute about how long the applicants refused to attend classes and when the decision was taken by the first respondent to terminate their services. I will return to this issue herein below.

[6] On 18 February 2019, the applicants were handed a letter dated 17 February 2019 from the third respondent indicating his intention to approach the first respondent to recommend the administrative discharge of the applicants from the SANDF. The applicants were also accused of committing mutiny which is a serious offence in the SANDF. In the letter the applicants were instructed to make written submissions to the first respondent showing good cause as to why they should not be dismissed/discharged. This the applicants did. On 20 February 2019 they were informed that their submissions were not acceptable.

[7] On or about 21/22 February 2019, the applicants were requested to hand in their Cuban uniforms. They were also instructed not to leave their base because they would be returning to South Africa.

[8] On 25 February 2019, four of the group decided to go back to class. They are currently still in Cuba. The applicants state that during this period whilst they were waiting to return to South Africa, they continued to attend the daily roll call.

[9] On 28 February 2019, the applicants were once again instructed by the second in command at the office of the military attaché in Cuba to return to class. The applicants once again refused to do so until their grievances were resolved.

[10] On 8 March 2019 a further meeting took place with a delegation of the South African Military Health Services during which the applicants were again instructed to attend classes. The applicants refused and informed the delegation that they were under the circumstances desirous to return to South Africa and to be withdrawn from the programme. Letters to this effect were submitted. The applicants were informed on the same day that, if they withdraw, they will be discharged from the SANDF.

[11] On 9 March 2019, the Director of Intelligence interviewed the first applicant and informed him (the applicant) that, if they do not return to class, they will be fired. The applicants once again decided not to proceed with their studies because of their concerns.

[12] From the foregoing it is clear that by 9 March 2019 at the latest, the respondents were fully apprised of the intention of the applicants not to return to their classes and that they were in fact withdrawing from the programme.

The letter dated 25 February 2019

[13] On 25 February 2019 the first respondent wrote a letter advising the applicants of his decision to administratively dismiss/discharge them from the SANDF. The letter, although dated 25 February 2019, was only given to the applicants on 26 March 2019. In one instance the letter was already given to another member of the group on 19 March 2019 when she had to return to South Africa to attend a funeral. On their return to South Africa the applicants were escorted by military police to clear out their units where after they were sent home.

[14] The letter dated 25 February 2019 is entitled "*Administrative Dismissal/Discharge from the South African National Defence Force of Members who are Currently Studying in the Republic of Cuba*". The letter records the names of the various applicants and confirms that, as from 11 February 2019, they were refusing to attend classes as required and/or instructed by their superior officers. The letter further states that the applicants' conduct is akin to "mutiny" and if it is not mutiny, it is regarded as a very serious offence or misconduct. Further according to the letter, the Surgeon General requested the first respondent to administratively dismiss the

applicants from the SANDF because of their misconduct. The letter also states that the decision to terminate/dismiss the applicants was taken without affording them a hearing and that their services were terminated with immediate effect. The letter concludes with the following paragraph:

“6. C SANDF [the Chief of the South African National Defence Force: General] is left with no alternative to make a decision without hearing your side. Therefore, you are all dismissed/discharged from the SANDF with immediate effect. You are instructed to return to your Units and clear out of the SANDF.”

[15] Although it is not specifically recorded in this letter, it was common cause that the decision to terminate/dismiss the applicants from the SANDF was taken in terms of section 59(3) of the Act. This section reads as follows:

“59 Termination of service of members of Regular Force

(3) 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.”

[16] The purpose of section 59(3) of the Act was explained by the Supreme Court of appeals in the *Minister of Defence and others South African National Defence Union and another* as follows:¹

“[8] Section 59 of the Act deals with the various circumstances in which the services of a member of the SANDF may be terminated. Section 59(1) covers resignation; the termination of a fixed-term contract of employment; reaching the prescribed age of retirement; being sentenced to a term of imprisonment

¹ 2014 (6) SA 269 (SCA).

by a competent civilian court without the option of a fine or having a sentence of discharge or dismissal imposed upon him under the Military Discipline Code; or if the surgeon-general certifies the member to be unfit to serve in the SANDF. Section 59(3) deals with a member absenting himself or herself from official duty for a period exceeding 30 days. In that event they are treated as having been automatically dismissed.”

[17] A member’s services are thus terminated *ex lege* or automatically in circumstances where the member has absented himself or herself from official duty for a period exceeding 30 days.² If the member has been absent for less than the prescribed 30-day period, the SANDF may not treat the member as having been automatically dismissed.

[18] It is accepted that, where the services of a member has been lawfully terminated in terms of section 59(3) of the Act, such member will remain dismissed until the Chief of the SANDF has taken a decision to reinstate such member.³ Because a discharge in terms of the section 59(3) of the Act constitutes a termination of employment by operation of law, it follows that no dismissal exists that could be challenged: The only recourse that exists is for the member to make submissions to the Chief of the SANDF to reinstate him or her.

[19] Certain jurisdictional facts must, however, be met prior to an automatic dismissal in terms of section 59(3) of the Act: (i) the member must be absent from official duty; (ii) there must be lack of permission from the member’s commanding officer and; (iii) the absence must be for a period exceeding 30 days. Furthermore, in terms of section 103(1) of the Act, a board of enquiry “must” have been established where a member is absent without leave for more than 30 days and is still absent. The

² *Ibid* at para [15].

³ The Court held in *Minister of Defence and Military Veterans and Another v Mamasedi* 2018 (2) SA 305 (SCA): “[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.”

purpose of that enquiry is to determine whether the member is indeed absent without leave and if so, the reasons therefore. This section reads as follows:

“103 Board of inquiry in relation to absence without leave

(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.”

[20] Counsel on behalf of the respondents tried to persuade the court that it is not necessary to have established a board of enquiry prior to the first respondent having taken the decision to terminate the services of the applicants in terms of section 59(3) of the Act. There is no merit in this submission. The import of section 103(1) of the Act is clear: 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. This is a requirement regardless of whether the legal implication of section 59(3) of the Act is that the member who is absent without leave, is dismissed by operation of law. This must be so because otherwise this provision of the Act, which envisage the convening of a board of enquiry where a member is absent without leave, would be meaningless. If a member may be dismissed before the convening of a board of enquiry, then the board would serve no purpose.

Is the decision reviewable?

[21] The decision taken by the first respondent to terminate the services of the applicants in terms of section 59(3) of the Act is an administrative action as defined in

section 1 of the Promotion of Administrative Justice Act⁴ ("PAJA") and is therefore reviewable: The decision taken constituted the exercise of a statutory power of a public and administrative nature taken by an organ of State which adversely affected the applicants' rights and which had a direct, external legal effect.⁵

⁴ Act 3 of 2000.

⁵ See section 1 of PAJA for a definition 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): "[21] What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.... 'Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. . . .'

[22] At the core of the definition of administrative action is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary.

[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution... The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.... Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[22] Counsel on behalf of the respondents also conceded that, in the event this court finds that section 59(3) of the Act was incorrectly or unlawfully applied, then the decision would be reviewable.

Was the applicants absent without leave for a period of not less than 30 days?

[23] I have already referred to the fact that it is a jurisdictional requirement that, before section 59(3) of the Act can find application, the member must have been absent for a period exceeding 30 days.

[24] It is common cause that the applicants refused as from 11 February 2019 to attend classes. The decision to terminate the services of the applicants were taken by the first respondent on 25 February 2019. This is the operative date. The fact that the letter was only handed to the applicants at a later stage (on 26 March 2019) is in my view irrelevant, as the letter clearly reflects the date on which the decision to terminate was taken by the first respondent.

[25] The decision to terminate the applicants' services was thus taken before the lapse of the requisite 30-days and further, without having convened a board of enquiry as required in terms of section 101(3) of the Act. (I will deal more fully with the non-compliance of the latter section herein below.)

[26] Further alternative arguments were also raised on behalf of the applicants to bolster their argument as to why the 30-day period has not lapsed. It was submitted that the applicants were instructed on 21/22 February 2019 to hand in their Cuban uniforms and not to leave the base where they were staying. Effectively they were thus thereafter no longer required to report where training was to take place. On that date, so it was submitted, the 30-day period was interrupted. Because the applicants were only again instructed on 28 February 2019 to attend training (although they again refused), it was submitted that, at best for the respondent, the 30-day period again commenced running on 28 February 2019 until the letters were handed to them on 26 March 2019.

[27] Although there seems to be merit in this submission, it is in my view not necessary to decide whether there was indeed an interruption of the 30-day period in

light of the letter dated 25 February 2019 which records the decision of the first respondent.

Non-compliance with section 101(3) of the Act.

[28] It was common that such a board of enquiry was not convened *prior* to the decision having been made to terminate the applicants' services. This factor, together with my finding that the applicants' services have been terminated in circumstances where they have been absent for a prior less than the requisite 30 days, renders in my view the decision unlawful. The decision taken by the first respondent in terms of section 59(3) of the Act therefore falls to be reviewed and set aside.

Actual dismissal

[29] The applicants were actually dismissed. This is not an instance of a deemed discharge where section 59(3) of the Act could have found application.

[30] It is not this court's finding that the SANDF may not proceed against the applicants on some other basis provided for in the Act or the Military Discipline Code of the SANDF. The SANDF may do so following an appropriate procedure.

[31] It must also be pointed out that the applicants are not seeking to evade the implementation of proper disciplinary procedures against them. All they insist upon is that the correct and appropriate disciplinary procedures be followed and that they be afforded the necessary legal rights and protections.

Appropriate remedy

[15] The applicants have already (on 6 April 2019) requested the first respondent to reinstate them. Counsel for the respondents confirmed that the request has not yet been considered because the first respondent is still awaiting the outcome of the board of enquiry established by him.

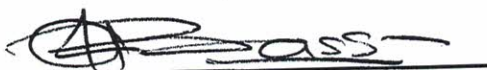
[32] In light of my finding that the decision to terminated in terms of section 59(3) of the Act is reviewable, the functions board of enquiry in respect of the present dispute has become academic.

[33] I am satisfied that reinstatement with full retrospective effect, including salaries and benefits that the members would have been entitled to, is the appropriate remedy in the present circumstances. Reinstatement is further necessary to ensure that the members can face any possible future charges that the SANDF may deem necessary to prefer against the applicants.

Order

[34] In the event, the following order is made:

1. Condonation is granted for the non-compliance with the rules of court in respect of the time, form and service of this application and it is ordered that the application be heard as an urgent application.
2. It is declared that the first respondent's decision to terminate the first to 35st applicants' service with the South African National Defence force ("SANDF") is unlawful and invalid.
3. The first respondent's decision to terminate the first to 35st applicants' service is reviewed and set aside.
4. The first to 35st applicants are reinstated within seven days from the date of this order in the service of the SANDF with full retrospective effect, with retention of all salaries and benefits as from the date of the unlawful termination of their service.
5. The respondents, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of this application.



AC BASSON

JUDGE OF THE HIGH COURT

Appearances**For the applicants:**

ADV GL VAN DER WESTHUIZEN

Instructed by:

GRIESEL & BREYTENBACH ATTORNEYS

For the respondents:

ADV DT SKOSANA SC

ADV T LUPUWANA

Instructed by:

STATE ATTORNEY