



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 359/22

In the matter between:

MOLEFI JONAS MAMASEDI

Applicant

and

**CHIEF OF SOUTH AFRICAN NATIONAL DEFENCE
FORCE: GENERAL SOLLY ZACHARIA SHOKE**

First Respondent

MINISTER OF DEFENCE AND MILITARY DEFENCE

Second Respondent

CHIEF OF ARMY: LIEUTENANT-GENERAL YAM

Third Respondent

Neutral citation: *Mamasedi v Chief of South African Defence Force and Others*
[2024] ZACC 17

Coram: Zondo CJ, Bilchitz AJ, Chaskalson AJ, Madlanga J, Majiedt J,
Mathopo J, Mhlantla J, Theron J, and Tshiqi J.

Judgments: Zondo CJ (unanimous)

Heard on: 6 February 2024

Decided on: 21 August 2024

Summary: [Defence Act, 42 of 2002] — [Section 59(3)] — [Computation of
days] — [Calendar days or official duty days]

[30 days referred to in section 59(3) of the Defence Act is a reference to those days on which a member of the Regular Force is obliged to be on official duty]

ORDER

On appeal from the High Court, Gauteng Division, Pretoria:

1. “Leave to appeal is granted.
2. The appeal against the decision of the High Court refusing to declare that Saturdays, Sundays and public holidays were not to be included in calculating the 30 days referred to in section 59(3) of the Defence Act, where a member of the Defence Force was not obliged to work on those days, is upheld.
3. The respondents are ordered to pay the applicant’s costs in this Court and in the Supreme Court of Appeal jointly and severally, the one paying the other to be absolved, including the costs of two Counsel where two Counsel were employed.
4. The High Court’s failure or refusal to:
 - (a) declare that the reference to 30 days in section 59(3) of the Defence Act, 2002 did not include days on which a member of the Regular Force was not obliged to work;
 - (b) to declare that the applicant was not to be regarded as dismissed or discharged as contemplated in section 59(3) of the Defence Act, 2002; and
 - (c) to order the payment of the applicant’s arrear remuneration since 3 January 2012 is hereby set aside and replaced with the following:
 - (i) It is declared that the reference to 30 days referred to
“ in section 59(3) of the Defence Act is a reference

those days on which a member of the Regular Force is obliged to be on official duty.

- (ii) It is declared that for the period from 3 January 2012 to date the applicant has been and continues to be a member of the Regular Force of the South African National Defence Force.
- (iii) The respondents' conduct in regarding the applicant since 3 January 2012 as having been dismissed or discharged was unlawful. The applicant must report for duty within 7 calendar days from the date of the handing down of this judgment or at the latest within 7 days after the payment to him of his arrear remuneration in terms of this order.
- (iv) The first, second and or third respondents' refusal or failure to pay the applicant his remuneration and other benefits since January 2012 to date is unlawful.
- (v) The applicant is entitled to payment of his remuneration for the period 3 January 2012 to the date of the handing down of this judgment.
- (vi) The respondents are ordered, jointly and severally, to take all such steps as may be necessary to ensure that the applicant is paid his remuneration for the period 3 January 2012 to the date of the handing down of this judgment within thirty (30) calendar days from the date of the handing down of this judgment.
- (vii) The respondents are to pay the applicant's costs, including the costs of two Counsel where two Counsel were employed."

5. For the avoidance of doubt, the words “from the date of the handing down of this judgment” in 4(vi) above shall be deemed to refer to the date of the handing down of this Court’s judgment.

JUDGMENT

ZONDO CJ (Bilchitz AJ, Chaskalson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, and Tshiqi J concurring):

Introduction

[1] Section 59(3) of the Defence Act, 2002¹ provides:

“(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 a member on such conditions as he or she may determine.” (Emphasis added)

[2] This provision is to the effect that, if a member of the Regular Force absents himself or herself from official duty for a period exceeding 30 days without the permission of his or her commanding officer, he or she is to be regarded as having been dismissed or discharged, as the case may be, on account of misconduct. However, the Chief of the Defence Force has power to authorise that such member be reinstated if good cause is shown for his or her absence from official duty for more than 30 days without the permission of his or her commanding officer. The provision serves the same purpose that is served by deeming provisions that are quite common in the public service which are to the effect that, if an employee or official is absent without

¹ 42 of 2002 (Act).

permission for a certain specified period, such employee or official is deemed to be discharged but may make written representations for his or her reinstatement.²

[3] This is an application brought by Mr Molefi Jonas Mamasedi, the applicant, for leave to appeal against a judgment and order of the Gauteng Division of the High Court by Kollapen J. This case revolves around the interpretation of section 59(3) of the Defence Act. Specifically, it is about whether or not the 30 days referred to in the provision are days on which the member concerned would have been obliged to be on official duty. However, before I deal with it, it is necessary to set out the factual background.

Background

[4] The applicant, Mr Molefi Jonas Mamasedi, was a member of the Regular Force of the South African National Defence Force (SANDF) in 2011. He held the rank of a sergeant. Section 59(3) of the Defence Act was applicable to him. The applicant was not obliged to work on Saturdays, Sundays and public holidays. His working week was from Monday to Friday.

[5] The applicant was absent from official duty for the period 29 November 2011 to 2 January 2012 without the permission of his or her commanding officer and he returned to work on 3 January 2012. That was a period of more than 30 calendar days. If the 30 days referred to in section 59(3) included Saturdays, Sundays and public holidays, then the applicant's absence from official duty was in excess of 30 days in which case section 59(3) was triggered. However, if weekends and public holidays are not to be included in the 30 days, then the period of the applicant's absence was less

²*Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); *Masinga v Minister of Justice Kwazulu Government* 1995 (3) SA 214 (AD); *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA); *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 383 (AD); *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council and Others* 2014 (5) SA 59 (SCA); *Du Toit v Minister of Safety and Security and Another* 2009 (12) BCLR 1171 (CC); *Mbatha v University of Zululand* 2014 (2) BCLR; *Maswangayi v Minister of Defence and Military Veterans and Others* 2020 (4) SA 1 (CC).

than 30 days. If the applicant's absence from official duty was for a period of 30 days or less, then section 59(3) would not be triggered because it is only triggered if the period of absence exceeds 30 days.

[6] It is to be observed that section 59(3) does not confer on anybody the power to dismiss a member of the Regular Force who absents himself in the manner contemplated by section 59(3). It simply provides that such a member must be regarded as having been dismissed if he or she is an officer or discharged if he or she is of another rank. That means that the relevant officials must reflect him in the records as dismissed or discharged, as the case may be.

[7] When the applicant returned to work on 3 January 2012, the third respondent, namely, Chief of Army: Lt-General Yam, set up a Board of Inquiry to inquire into and investigate the circumstances surrounding the applicant's absence from work. This Board of Inquiry was set up early in 2012. This may be referred to as the first Board of Inquiry because in 2018, there was another Board of Inquiry that was set up which will be referred to herein as the second Board of Inquiry.

[8] The applicant's explanation for his absence from work from 29 November 2011 to 3 January 2012 was that he had been kidnapped and taken to an initiation school against his will. However, that version was disputed. Apparently, his father had given a version to the effect that the applicant had gone to the initiation school voluntarily. It is not necessary to pronounce on whether the applicant had a valid reason for his absence because the case has been argued on the footing that the question is whether or not section 59(3) was triggered. The idea is that, if section 59(3) was triggered, then the respondents had correctly regarded the applicant as having been dismissed or discharged. If, however, section 59(3) was not triggered, the respondents were wrong to have regarded him as dismissed or discharged as he was not dismissed or discharged.

Findings and recommendations of the first Board of Inquiry

[9] There is a list of findings that were made by the first Board of Inquiry but mostly those findings relate to the credibility of certain witnesses. I find those findings completely unhelpful. They do not tell us what the mandate of the first Board of Inquiry was nor do they tell us in any meaningful way what evidence each witness gave. Those findings do not include any finding as to whether there was a valid reason for the applicant's absence from work for the period concerned. If the mandate of the Board was to inquire into whether section 59(3) had been triggered, the set of findings of that Board do not reflect that.

[10] The first Board made the following recommendations, namely:

“Recommendations of the first Board of Inquiry

1. This board recommends the following:
 - (a) The administrative discharge of Sgt TJ Mamasedi from the SANDF is supported and should remain effective with effect from 29 November 2011.
 - (b) The member is to be paid all his pension contributions / fund (employer and employee) plus investment growth (if applicable) due to him.
2. No disciplinary action should be taken against anyone.”

The respondents accepted these findings and recommendations of the first Board of Inquiry. They, therefore, regarded the applicant as dismissed or discharged and gave effect to that position. The first respondent, Chief of the SANDF, General Solly Shoke, did not reinstate the applicant as contemplated in section 59(3).

Applicant's first approach to the High Court

[11] The applicant was aggrieved by the recommendations of the first Board of Inquiry. He then launched an application in the Gauteng Division of the High Court to have the recommendations reviewed and set aside. The applicant also

sought to have the decision of the Chief of the SANDF not to reinstate him reviewed and set aside. That application was opposed.

[12] The matter came before Wentzel AJ. The Court found in the applicant's favour. It reviewed and set aside the Chief of the SANDF's decision not to reinstate the applicant and ordered that the applicant be reinstated as a member of the SANDF "with full benefits including his salary from 15 December 2011 to the date of the judgment and order." This was on 4 August 2016. In his judgment Wentzel AJ did not consider whether the reference to 30 days in section 59(3) included days on which the applicant was not obliged to be on official duty such as weekends and public holidays. That means that he did not consider whether section 59(3) had been triggered.

[13] Wentzel AJ's order was based on his conclusion that the first Board of Inquiry had failed to accord the applicant procedural fairness before it made the findings and recommendations that it made. Furthermore, Wentzel AJ pointed out that the first Board of Inquiry had failed to comply with various of its obligations under the Act relating to the proper conduct of a Board of Inquiry.

First approach to the Supreme Court of Appeal

[14] The respondents appealed to the Supreme Court of Appeal against Wentzel AJ's judgment and order. The Supreme Court of Appeal took the view that the appeal involved two issues. It said that the one issue was whether the decision not to reinstate the applicant was vitiated by a failure of procedural fairness in that the applicant was not given an oral hearing before the Board of Inquiry made its recommendations to the Head of the SANDF. It said that the second issue was whether reinstatement was competent relief in the circumstances.

[15] The Supreme Court of Appeal held that the first Board of Inquiry had failed to afford the applicant procedural fairness. As a result of that, it dismissed the appeal against the order of the High Court reviewing and setting aside the decision not to

reinstate the applicant but it upheld the appeal against the order of the High Court ordering the applicant's reinstatement. The Supreme Court of Appeal concluded that the High Court had erred in ordering the applicant's reinstatement and set that order aside. It ordered each party to pay its own costs on appeal.

[16] The judgment of the Supreme Court of Appeal meant that the Chief of the Army had to consider the matter afresh and, acting in a manner that is procedurally fair towards the applicant, make a fresh decision on whether to authorise the reinstatement of the applicant in accordance with section 59(3) of the Act.

The Second Board of Inquiry

[17] Subsequent to the judgment and order of the Supreme Court of Appeal, the third respondent established another Board of Inquiry (the second Board of Inquiry) on 13 February 2018. That Board of Inquiry, like the first one, was headed by Colonel Modisane. It was required to investigate the circumstances of the applicant's absence from work during the period in question.

[18] The second Board of Inquiry made the following findings:

- “1. The member was absent without leave (AWOL) from his unit as from 29 November 2011 till 31 December 2011 and never applied for leave.
2. The Regiment discharged its responsibility in compliance to the SANDF Policies and Regulations pertaining to the administration of roll call as well as the administration of administrative discharge of a member on AWOL longer than 30 days.
3. Witness 2 (Cpt Moaneno) and witness 7 who were roll call keepers appointed by means of duty sheets performed their duties accordingly.
4. The evidence of witnesses 3 and 5, despite the fact they were friends of Sgt Mamasedi, their statements were contradicting each other. According to witness 3 in his evidence, he indicated that Sgt Mamasedi was taken from G-Club. In his evidence witness 5

alluded to the fact that Sgt Mamasedi was taken from his home by his uncles by force. Both witnesses depended on hearsay evidence.

5. Witness 4 (WO Mokhutle) carried out his duties and responsibilities as Workshop Foreman (Supervisor) of all LWT members under his command and control befitting the expectation of the Regiment and the SA Army.

6. The material evidence provided by witness 6, 8 and 9 were found to be accurate and complete.

7. Witness 10 (Sgt Mamasedi's father) was found to be evasive witness, gave brief answers and avoided to answer direct questions put to him. He didn't seem to have eagerness to take responsibility towards his son.

8. The evidence of witness 11 (Sgt Mamasedi) leave much to be desired, for instance the issue of the daughter doesn't exist as he mentioned it to the alleged kidnappers, and secondly, if he was unhappy about his kidnapping he could have opened the case with SAPS after the ceremony. The fact that the school only existed during his capture and ceased with him remain questionable, as is not traceable.

9. The member was brought before the Officer Commanding on the 04 January 2012 and was instructed to clear out with immediate effect from the Regiment."

[19] The second Board of Inquiry made the following recommendations:

“(a) The administrative discharge of Sgt TJ Mamasedi from the SANDF is supported and should remain effective with effect from 29 November 2011.

(b) The member to be paid all his pension contributions / fund (employer and employee) plus investment growth (if applicable) due to him.”

From the above, it can be seen that the second Board of Inquiry understood the position to be that what it called an “administrative discharge” had taken place in respect of the applicant. It is clear from the context that the administrative discharge to which the Board referred was a discharge that would have occurred if section 59(3) had been triggered. In other words, it is the discharge contemplated in section 59(3).

[20] The above outcome of the second Board of Inquiry meant that the second Board believed that the applicant had been absent from work without the requisite permission for more than 30 days as contemplated in section 59(3) and that, therefore, section 59(3) had been triggered. There was no reasoning showing the Board's basis for believing that the 30 days referred to in section 59(3) included days on which the applicant was not obliged to work, including weekends and public holidays. I mention this because the second Board of Inquiry could only have made its first recommendation if it took the view that the 30 days to which reference is made in section 59(3) included days on which the applicant was not obliged to be on official duty including weekends and public holidays.

[21] If it had taken the view that weekends and public holidays or days on which the applicant was not obliged to be on official duty were excluded from the 30 days referred to in section 59(3), it would have concluded that section 59(3) had not been triggered and there was, therefore, no "administrative discharge." The Board should have asked and answered the question whether the reference to 30 days included days on which the officer was not obliged to be on official duty. It was a gross irregularity that it did not do so.

The applicant's second review application: High Court

[22] The applicant was aggrieved by the outcome of the second Board of Inquiry. He launched a second review application in the Gauteng Division of the High Court. The respondents opposed that review application. Part of the applicant's case was that his absence from work from 29 November 2011 to 2 January 2012 did not trigger section 59(3) because he did not work weekends and public holidays and that, therefore, those days should not be included. He pointed out that, if weekends and public holidays were not counted, his absence from work without permission did not exceed 30 days.

[23] The matter came up before Kollapen J. In considering whether or not the reference to 30 days in section 59(3) included weekends and public holidays, the High Court stated that there was “no suggestion in the text of [section 59(3)] that the 30 days are to be confined to working days only”. The High Court then referred to, and quoted extensively from, the judgment of Pretorius J in the same Division of the High Court in *Mogapi*³. In *Mogapi* Pretorius J held, relying on section 4 of the Interpretation Act,⁴ that the calculation of the 30 days referred to in section 59(3) required the inclusion of the first day and the exclusion of the last day unless the last day fell upon a Sunday or public holiday in which case the first day would be excluded and exclusively of every Sunday or public holiday. In the present case the High Court concluded that the contention that the reference to 30 days in section 59(3) excluded weekends and public holidays was not sustainable.

[24] The High Court also concluded that the second Board of Inquiry, like the first Board of Inquiry, had failed to act in a procedurally fair manner to the applicant. It referred to the earlier judgment of the Supreme Court of Appeal and quoted passages in that judgment in which the Supreme Court of Appeal had criticised Wentzel AJ’s order that the applicant be reinstated. The Supreme Court of Appeal had pointed out that a review Court could only make a substitution order in exceptional circumstances. The High Court regarded Wentzel AJ’s order of reinstatement as a substitution order. The Supreme Court of Appeal had held that there were no exceptional circumstances justifying such an order. In the present case the High Court also concluded that no exceptional circumstances existed which justified the making of a substitution order.

[25] The High Court then set aside the proceedings and recommendations of the second Board of Inquiry the third respondent’s decision not to reinstate the applicant as a member of the SANDF and ordered the respondents to pay the costs of the application jointly and severally, the one paying the others to be absolved.

³ *Mogapi v Minister of Defence* (case no 8961/203) [2015] ZAGPPHC 112 (9 March 2015).

⁴ Act 33 of 1957.

Second approach to the Supreme Court of Appeal

[26] The applicant was aggrieved by the outcome of his application in the High Court. He then applied to the High Court for leave to appeal to the Supreme Court of Appeal against the decision of the High Court not to order his reinstatement. The High Court dismissed his application for leave to appeal. He then applied to the Supreme Court of Appeal for leave to appeal against the decision of the High Court not to order his reinstatement. The Supreme Court of Appeal dismissed his application on the basis that there were no reasonable prospects of success for his intended appeal and there were no compelling reasons why his appeal should be heard.

[27] The applicant then applied to the President of the Supreme Court of Appeal in terms of section 17 of the Superior Courts Act⁵ for a reconsideration of his application for leave to appeal. The President of the Supreme Court of Appeal dismissed the application for reconsideration with costs. Both the Supreme Court of Appeal and the President of the Supreme Court of Appeal appear not to have considered the question whether, as the applicant did not work on Saturdays, Sundays and public holidays, those days should not be included in counting the 30 days referred to in section 59(3). This was a critical issue which the applicant had raised in his papers in the High Court.

In this Court

Jurisdiction

[28] After the President of the Supreme Court of Appeal had dismissed the applicant's application for reconsideration, the applicant applied to this Court for leave to appeal against the judgment and order of the High Court⁶ in terms of which the High Court

⁵ Act 10 of 2013.

⁶ Although the applicant said in his application for leave to appeal that he sought leave to appeal against the order of the Supreme Court of Appeal, in term of *Mabaso v The Law Society of the Northern Provinces and Another* 2005 (2) SA 117 (CC), this application is regarded as effectively an application for leave to appeal against the judgment and order of the High Court for the reasons explained in *Mabaso*.

refused to order the applicant's reinstatement. I emphasise that that was the issue in this appeal.

[29] This Court has jurisdiction in respect of this matter because this matter raises an arguable question of law of general public importance which deserves to be determined by this Court. The question of law is whether the "30 days" referred to in section 59(3) of the Act includes days on which a member of the Regular Force is not obliged to work or to be on official duty or whether it only refers to the days when the member is obliged to work or is obliged to be on official duty⁷.

[30] If the position is that the days on which a member is not obliged to work are not included in the 30 days referred to in section 59(3), that will mean that the applicant's absence from official duty in the present matter did not exceed the 30 days referred to in section 59(3) and that, therefore, section 59(3) of the Act was not triggered. If section 59(3) was not triggered, it means that the applicant should not have been regarded as having been dismissed or discharged. In such a case we will not have to deal with the question whether the member should or should not have been reinstated. This is because an order of reinstatement will not be competent in the absence of a prior dismissal. If, however, this Court concludes that the 30 days referred to in section 59(3) includes days on which a member is not obliged to work, that will mean that section 59(3) was properly triggered in this case. In such a case the next question will be whether the High Court erred in refusing to order the applicant's reinstatement.

Leave to appeal

[31] This Court grants leave to appeal if granting leave would be in the interests of justice. In this regard some of the factors the Court takes into account in determining whether it would be in the interests of justice to grant leave are the importance of the issue that must be determined on appeal if leave to appeal is granted, whether the issue

⁷ The constitutional validity of section 59(3) was not an issue before us.

to be decided on appeal is only of interest to the parties before the Court or whether the issue goes beyond the parties before the Court and will affect a substantial number of other people who are not before the Court and whether the applicant has reasonable prospects of success.

[32] [The question to be decided by this Court on appeal if leave to appeal is granted is of great importance. The issue does not affect only the parties before Court but affects all members of the SANDF who are members of the Regular Force. It will also affect persons who will join the Regular Force as members in the future. Lastly, there are reasonable prospects of success for the applicant. In the circumstances it is in the interests of justice to grant the applicant leave to appeal.

The appeal

[33] In considering the appeal, it is convenient to quote section 59(3) again. It reads:

“(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 in good cause shown, authorise the reinstatement of such a member on such conditions as he or she may determine.”

[34] Counsel for the applicant submitted that the 30 days referred to in section 59(3) are 30 days on which the member of the Regular Force was obliged to be on official duty. Counsel for the respondents disputed the correctness of this contention and submitted that the 30 days referred to in section 59(3) refer to 30 calendar days

irrespective of whether the member concerned was obliged to work or not on some of those days.

[35] The determination of the issue in this appeal calls for the interpretation of section 59(3) of the Defence Act. Section 39(2) of the Constitution deals with the interpretation of legislation. It enjoins every court, tribunal or forum, when interpreting any legislation, to “promote the spirit, purport and objects of the Bill of Rights”. In *Hyundai*⁸ this Court explained the purport and objects of the Bill of Rights thus:

“[22] The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.”

[36] An important feature of the interpretation of any legislation is the mischief that is sought to be addressed through the legislation as well as the purpose of the legislation. In considering this matter, it is necessary to understand the purpose of section 59(3). The purpose of this provision is to enable the SANDF to, without any disciplinary enquiry, treat any member of the Regular Force, as guilty of misconduct and as dismissed or discharged if he or she has absented himself or herself from official duty for more than 30 days without the permission of his or her commanding officer. The SANDF is able to dispense with procedural fairness requirements and yet treat such a member as dismissed or discharged if section 59(3) has been triggered. This alone tells us that we are here dealing with a piece of legislation that governs the discipline of members.

⁸*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC).

[37] In the present case the High Court held that there was nothing in section 59(3) to suggest that the period of 30 days is confined to working days. In my view, the High Court erred in this regard. There are three features of section 59(3) which suggest that the reference to 30 days in section 59(3) is a reference to 30 days on which a member was obliged to be on duty or to work and not days on which he or she was not obliged to be on duty or at work. The first one is made up of the words “*absent from official duty*” in the first line of section 59(3). The first line talks about a member of the Regular Force being “absent from official duty.” The second feature is constituted by the words: “must be regarded as having been dismissed or discharged.” The third feature is constituted by the words: “on account of misconduct.” The second and third features are made up of the words “must be regarded as having been dismissed” and “on account of misconduct” in section 59(3) in the line that is to the effect that a member of the Regular Force must be regarded as “dismissed” if he or she is an officer, or “*discharged*” if he or she is of another rank, “on account of misconduct” in section 59(3).

[38] Section 59(3) provides that a member of the Regular Force who absents himself or herself from official duty without his or her commanding officer’s permission 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 work or the last day of his or her official leave . . .” That such a member is to be regarded as dismissed on account of misconduct means that the member’s absence from work constituted a breach of the contract between the member and the SANDF. Such absence could not conceivably be regarded as misconduct if it did not constitute a breach of contract. The absence from official duty could not be a breach of contract unless there was an obligation on the part of the member to be at work or to be on official duty on the days in question.

[39] A critical feature of the conduct prohibited by section 59(3) is the absence of the permission by the commanding officer of the member for his absence from work. A member does not need the permission of his or her commanding officer to be absent from work or official duty on a Saturday or Sunday or public holiday if those are not working days for him or her. Therefore, a member cannot be disciplined for his or her absence from work or duty on a day when he or she is not obliged to be at work or to be on official duty. I say this because it is clear from section 59(3) that disciplinary action is imposed on the member by operation of law if he or she is absent from official duty for 30 days without the permission of his or her commanding officer. Section 59(3) also makes it clear that the dismissal or discharge is “on account of misconduct.”

[40] Section 59(3) enjoins that a member of the Regular Force who is absent from official duty without the permission of his or her commanding officer for 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.*” This emphasised portion of section 59(3) reveals that the absence from official duty referred to at the beginning of the provision is absence from official duty that constitutes misconduct. The only absence from official duty that can constitute misconduct is absence from official duty when there is an obligation to be at work or to be on official duty. An employee cannot be disciplined for being absent from duty when he or she is entitled not to be at work or on official duty.

[41] In *Mogapi* the High Court relied upon section 4 of the Interpretation Act⁹ to reject the submission that the period of 30 days referred to in section 59(3) was limited to working days and did not include Saturdays, Sundays and public holidays. Section 4 reads:

“Reckoning of number of days

⁹33 of 1957.

When any particular number of days is prescribed by the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.”

[42] In *Mogapi* the judgment of the High Court does not reveal whether Mr Mogapi did disclose the basis for his submission that Saturdays, Sundays and public holidays were excluded from the period of 30 days in section 59(3). So, we do not know whether it was that on those days Mr Mogapi was not obliged to work, as is the case in the present case. To the extent that Mr Mogapi may not have disclosed the basis for his submission that Saturdays, Sundays and public holidays were to be excluded from the 30 days in section 59(3), the High Court was correct to rely on section 4 of the Interpretation Act to conclude that Saturdays, Sundays and public holidays were included. In the present case the High Court relied on *Mogapi* to support its decision that the period of 30 days in section 59(3) includes both the days on which the employee was obliged to work and those on which he is not obliged to work.

[43] I, therefore, conclude that the reference to 30 days in section 59(3) is a reference only to the days on which the member is obliged to be on official duty. Weekends and public holidays cannot be included in calculating the 30 days if such days are not days on which the member is obliged to be on official duty. Of course, if weekends and public holidays are days on which the member is obliged to be on official duty, then those days would be counted in determining whether a member was absent from official duty without his or her commanding officer’s permission for a period exceeding 30 days.

[44] The interpretation of 30 days advanced by the respondents would, if accepted, result in members of the Regular Force being dismissed for not being on duty on a day they were not obliged to be on duty. This would happen, for example, if a member was

away from work without permission for 28 days if you do not count three other days on which he or she was not at work but was not obliged to be at work. He or she would have exceeded the 30 days on that approach by one because two of the days which would be counted would be days on which he or she was not obliged to work. That is the interpretation that says the reference to 30 days in section 59(3) is a reference to calendar days irrespective of whether or not the member was obliged to work on those days or on some of those days. This interpretation does not promote the spirit, purport and objects of the Bill of Rights. The interpretation I have adopted in this judgment promotes the spirit, purport and objects of the Bill of Rights.

[45] The second part of section 59(3) confers upon the Chief of the Defence Force power to authorise the reinstatement of the member if good cause is shown. This is good cause for the member's absence from official duty for a period of more than 30 days without the requisite permission. The Chief of the Defence Force's power to authorise the reinstatement of the member can only be exercised if section 59(3) has been triggered. Of course, section 59(3) is triggered if a member of the Regular Force is absent from official duty without the permission of his or her commanding officer for a period exceeding 30 days during which the member was obliged to work. It is not triggered where a member of the Regular Force is absent from official duty without his or her commanding officer's permission for 30 days or less if during those days the member was obliged to work.

[46] Where section 59(3) is not triggered, the power of the Chief of the Defence Force to authorise the reinstatement of the member does not apply because in such a case the member is not regarded as having been dismissed or discharged. In such a case the member remains in the service of the SANDF. Nevertheless, such a member may still be subjected to a disciplinary process for being absent from official duty without his or her commanding officer's permission for a period of 30 days or less. In other words, although such a member may not be dealt

with under section 59(3) if he or she is absent from official duty for 30 days or less, nevertheless, he or she may be dealt with in terms of other disciplinary processes.

[47] Where section 59(3) was not triggered but a member was absent from official duty without the commanding officer's permission for a period of 30 working days or less, reinstatement is not competent because the member will not have been dismissed or discharged. The result thereof is that, to the extent that the respondents would have erroneously regarded such a member as having been dismissed or discharged in terms of section 59(3) and, thus, did not allow the member to work or resume his or her official duties after the absence from official duty, he or she would be entitled to his or her remuneration for all the time that he or she was erroneously prevented from working or not allowed to render his or her services.

[48] In the present case the applicant's period of absence from official duty without the permission of his commanding officer was for less than 30 working days. Accordingly, the first and second Boards of Inquiry and the respondents were wrong in adopting the position that the applicant was regarded as having been dismissed or discharged. It was from early in 2012 when the applicant was regarded as having been dismissed or discharged. That position has been maintained by the respondents to date. This means that the applicant has been prevented by the respondents from rendering his services and, thus, from being paid his remuneration since then. The respondents had no valid reason in law to have regarded the applicant as having been dismissed or discharged for all these twelve years.

[49] The applicant did not just sit back and do nothing to vindicate his rights when he was regarded as having been dismissed or discharged. He fought in the courts to be allowed to continue in the SANDF. In my view, he is entitled to an appropriate declaration that he has not been dismissed or discharged and is entitled to be paid all his arrear remuneration from January 2012. This means that the applicant will have to be paid his remuneration covering a period of about twelve years and seven months.

Naturally, whatever the amount may be, it may seem a big amount but the applicant is not to blame for this. It is the respondents who are to blame for this. They wrongly thought section 59(3) was triggered but in fact section 59(3) had not been triggered.

[50] The applicant instituted two review applications in the Gauteng Division of the High Court over the twelve-year period. He was completely successful in the first one but the respondents appealed to the Supreme Court of Appeal. The Supreme Court of Appeal concluded that the High Court had erred in ordering the applicant's reinstatement in the first review application. After the Supreme Court of Appeal had handed down its judgment, a second Board of Inquiry was set up which like the first one, dealt with the matter of the applicant's absence from work in a manner that was procedurally unfair to him.

[51] The second Board of Inquiry also made findings adverse to the applicant and the applicant was forced to institute another review application to have the recommendations of that Board of Inquiry reviewed and set aside. He was partially successful before the High Court but the High Court declined to order his reinstatement. He appealed to the Supreme Court of Appeal against its refusal to order his reinstatement. The Supreme Court of Appeal erroneously refused him leave to appeal. He applied to the President of the Supreme Court of Appeal for the reconsideration of his application for leave to appeal. That application, too, was refused. When all else failed, the applicant approached this Court in his quest for justice and sought leave to appeal against the High Court's judgment.

[52] This Court has concluded that both the High Court and the Supreme Court of Appeal were wrong not to have concluded that section 59(3) had not been triggered by the applicant's absence from official duty without the requisite permission in this case.

[53] This Court cannot comment on whether the applicant had a valid reason for his absence from official duty for the days when he was not at work. However, what can be said is that he did the right thing by fighting for his rights the way he did for over twelve years against the position taken by the respondents and the courts below that section 59(3) had been triggered. Accordingly, his appeal should be upheld in part.

[54] Although I say that the applicant's appeal must be upheld in part, in substance his appeal is wholly successful. This is so because his real complaint and appeal related to the High Court's conclusion that Saturdays, Sundays and public holidays – which were days on which he was not obliged to be on duty – were included in the 30 days referred to in section 59(3). His appeal against that conclusion is upheld in its entirety. The applicant believed that, if he was right that Saturdays, Sundays and public holidays were excluded from the 30 days, if a member was not obliged to work on those days, the appropriate remedy was an order of reinstatement. In this connection he was mistaken. Since section 59(3) was not triggered, he was not to be regarded as dismissed or discharged. Since he was not dismissed and was not to be regarded as dismissed or discharged, an order that he be reinstated would be incompetent since there would have been no dismissal or discharge in the first place. Although the applicant may not be granted an order of reinstatement, he may be granted an order declaring that, since 29 November 2011 up to now he has remained a member of the Regular Force. So, although he does not get an order of reinstatement, the order he gets means that he still has his job. I consider this success to be, for all intents and purposes, total success. With regard to costs, I consider that the respondents should pay the applicant's costs in all the courts.

[55] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal against the decision of the High Court refusing to declare that Saturdays, Sundays and public holidays were not to be included in calculating the 30 days referred to in

section 59(3) of the Defence Act, where a member of the Defence Force was not obliged to work on those days, is upheld.

3. The respondents are ordered to pay the applicant's costs in this Court and in the Supreme Court of Appeal jointly and severally, the one paying the other to be absolved, including the costs of two Counsel where two Counsel were employed.
4. The High Court's failure or refusal to:
 - (a) declare that the reference to 30 days in section 59(3) of the Defence Act, 2002 did not include days on which a member of the Regular Force was not obliged to work;
 - (b) to declare that the applicant was not to be regarded as dismissed or discharged as contemplated in section 59(3) of the Defence Act, 2002; and
 - (c) to order the payment of the applicant's arrear remuneration since 3 January 2012 is hereby set aside and replaced with the following:
 - “(i) It is declared that the reference to 30 days referred to in section 59(3) of the Defence Act is a reference those days on which a member of the Regular Force is obliged to be on official duty.
 - (ii) It is declared that for the period from 3 January 2012 to date the applicant has been and continues to be a member of the Regular Force of the South African National Defence Force.
 - (iii) The respondents' conduct in regarding the applicant since 3 January 2012 as having been dismissed or discharged was unlawful. The applicant must report for duty within 7 calendar

days from the date of the handing down of this judgment or at the latest within 7 days after the payment to him of his arrear remuneration in terms of this order.

- (iv) The first, second and or third respondents' refusal or failure to pay the applicant his remuneration and other benefits since January 2012 to date is unlawful.
 - (v) The applicant is entitled to payment of his remuneration for the period 3 January 2012 to the date of the handing down of this judgment.
 - (vi) The respondents are ordered, jointly and severally, to take all such steps as may be necessary to ensure that the applicant is paid his remuneration for the period 3 January 2012 to the date of the handing down of this judgment within thirty (30) calendar days from the date of the handing down of this judgment.
 - (vii) The respondents are to pay the applicant's costs, including the costs of two Counsel where two Counsel were employed."
5. For the avoidance of doubt, the words "from the date of the handing down of this judgment" in 4(vi) above shall be deemed to refer to the date of the handing down of this Court's judgment.

For the Applicant:

G Marcus SC, C McConnachie and D Mutemwa
instructed by Griesel Van Zanten Inc.

For the Respondents:

R Tsele and M Mojapelo instructed by
State Attorney, Pretoria