



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Masinga and Others v Chief of the South African National Defence Force and Others (Case no 51/2021) [2022] ZASCA 1 (05 January 2022)

Today the Supreme Court of Appeal (SCA) dismissed the appellants' appeal against their dismissal from the South African National Defence Force (SANDF) in terms of s 59(3) of the Defence Act 42 of 2002 (the Act), but set aside the costs orders granted against them by the court below. Section 59(3) provides that members of the SANDF who absent themselves from official duty for more than 30 days without the permission of their commanding officer, must be regarded as having been dismissed, but the Chief of the SANDF could reinstate a member on good cause shown.

The appellants were officers in the South African Military Health Service (SAMHS), the medical branch of the SANDF, selected to study military medicine at the University of Ciencias Medicas (UCIMED) in Cuba, in terms of a memorandum of understanding between the SANDF and the Revolutionary Armed Forces of Cuba. Each of the appellants concluded an agreement concerning a foreign learning opportunity with the national Government. In terms of this agreement they undertook to study military medicine on a full-time basis at a Cuban medical institution and attend classes during official hours of duty for the duration of the prescribed period of the course (six years); and the SANDF paid for the appellants' studies in full in advance, and paid their salaries, service benefits, stipends and any additional expenses to facilitate their studies.

The majority of the appellants (26) commenced their studies in 2017 and nine of them started in 2018. However, from 11 February to 20 March 2019, the appellants absented themselves from official duty by refusing to attend classes, in defiance of an order by their commanding officer. They refused to participate in activities and created disorder. They put pressure on second-year cadets and other students not to attend classes. They dirtied bathrooms and left taps running with the result that the dormitory ran out of water and other cadets could not shower. The appellants' reasons for breaching their duty were that the Inter Arms School

General José Maceo (the Inter Arms School), a satellite campus of UCIMED at which they were enrolled, was not accredited to offer medicine; there was no proof of registration of first year students at the UCIMED campus in Santiago, which was necessary to register them as medical students with the Health Professions Council of South Africa (HPCSA); and the appellants had not been registered with the HPCSA. These claims were unfounded. The Inter Arms School was an accredited institution, the students at the Santiago campus had been registered, and prior to commencing their studies in Cuba, the appellants were informed that they would be required to pass the HPCSA examination to register as medical doctors.

The SANDF made numerous attempts to get the appellants back to class. On 16 February 2019 the South African Defence Attaché to the Republic of Cuba, requested them to return to class. On 18 February 2019 they were handed a letter by the Surgeon General informing them that he intended to apply to the Chief of the SANDF for their dismissal and they were instructed to make written submissions to the Chief of the SANDF to show cause why they should not be discharged. On 8 March 2019 a delegation of officers from the SAMHS from Pretoria, once again instructed the appellants to attend classes. They refused and were sent home to South Africa.

The appellants were accordingly dismissed from the SANDF for absenting themselves from official duty by refusing to attend classes from 11 February to 20 March 2019. In May 2019 the appellants obtained an order from the Gauteng Division of the High Court, Pretoria (the high court), that the ‘decision to terminate’ their service with the SANDF was unlawful and invalid, and they were reinstated ‘with full retrospective effect, with retention of all salaries and benefits’. This order was reversed on appeal by a full court, which held that the appellants’ dismissal under s 59(3) of the Act arose by the operation of law; that there was no decision susceptible to review; and that the jurisdictional requirements of s 59(3) had been met.

The SCA upheld the decision of the full court. It concluded that the jurisdictional requirements of s 59(3), namely that the appellants had (i) absented themselves from official duty; (ii) without permission of their commanding officer; and (iii) for a period of not less than 30 days, had been satisfied; and accordingly that they were regarded as having been dismissed on account of misconduct with effect from the day immediately following their last day of attendance at their place of duty. The appellants however contended that they had not absented themselves from official duty because they regularly reported for roll call and were within the precincts of the Inter Arms School, despite their refusal to attend classes. The SCA rejected this contention as untenable: a member of the SANDF could just as unlawfully absent himself/herself from official duty without permission by, for example, hiding on a military installation, as another who absents himself/herself by walking away from it. Neither of these individuals is performing his/her duty, and neither has authority for his/her action.

The appellants’ argument that they could not be dismissed until a board of enquiry was convened under s 103(1) of the Act, to inquire into their absence without leave for more than 30 days, was rejected because it is inconsistent with the plain wording, context and purpose of s 59(3). The latter is a self-standing provision aimed at ensuring the SANDF ‘is structured and managed as a disciplined military force’, as required by s 200(1) of the Constitution. Obedience and order are the backbone of any military force. The SANDF simply cannot function properly when its members absent themselves from duty without permission, contrary to the job they agreed to do, and the rules with which they undertook to comply. The appellants’ conduct was a flagrant breach of duty.