

SOUTH AFRICA / JUDGMENT

## Minister of Police v Nkabenyane (A174/2019) [2020] ZAGPPHC 245 (21 February 2020)

[2020] ZAGPPHC 245

COURT

North Gauteng High Court, Pretoria

BEFORE

Mlambo JP, Francis, Hughes

CASE / FILE NUMBER

A336/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case No: A336/2019

27234/2019

In the matter

between:

THE CHIEF OF THE SOUTH  
AFRICAN  
NATIONAL DEFENCE  
FORCE  
1st  
APPELLANT  
THE MINISTER OF  
DEFENCE AND  
MILITARY  
VETERANS  
2nd  
APPELLANT  
THE SURGEON  
GENERAL  
3rd APPELLANT  
THE SECRETARY OF  
DEFENCE  
4th  
APPELLANT  
and

WILLIAM FRANCE  
MASINGA  
1st  
RESPONDENT  
RIRHANDZU  
JOY KHOZA AND 33 OTHERS  
2nd  
to 35th  
RESPONDENTS  
Neutral  
citation: National  
Defence Force v Masinga and 35 Others (A336/2019)  
[2020] ZAGP (19 June 2020)

**Coram:** Mlambo JP, Francis and Hughes JJ

**Heard:** 13 March 2020

**Delivered:** 19  
June 2020

**Summary:** Military Law – appeal against termination of members services- applicability of section 59 and 103 of the Defence Act 42 of 2002 – Item 14 of the Military Disciplinary Code – section 18 (1) and (3) of the Superior Courts Act 10 of 2013.  
**ORDER**  
1.  
The appeal in the main review application succeeds with costs, including the costs of two counsel where so employed.  
2.  
The appeal in terms of section 18(4) (ii) of the section 18(3) order likewise succeeds with costs, such costs to include the employment of two counsel where so employed.

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## JUDGMENT

HUGHES J

### Introduction

- [1] This Court is seized with two appeals which have been consolidated. The main appeal is against the judgment of Basson J emanating from a review application, where she reviewed and set aside the decision of the Chief of the National Defence Force (the first appellant) to terminate the services of the thirty-six respondents with the South African National Defence Force (the SANDF). These respondent's services were reinstated retrospectively from the date of their termination.

- [2] Having been successful in their review application the respondents then sought and were granted an order in terms of section 18(1) and (3) of the Superior Court's Act 10 of 2013, also by Basson J. The second appeal pertains to this order and is referred to in these proceedings as the section 18(3) appeal.
- [3] Leave to appeal the main judgment to the Full Court was granted by the court a quo. Whilst, in terms of section 18(4) (ii) of the Superior Courts Act, the appeal of the order in terms section 18(3) is automatic.
- [4] For easy reference sections 18(1)-(4) of the Superior Courts Act reads as follows:

**'18 Suspension of decision pending appeal**

- (1) Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If the court orders otherwise, as contemplated in subsection (1) –
- (i) the court must immediately record its reason for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (5) ...'

## Background

- [5] The appeal in the main application derives its origin from a diplomatic relationship known as Operation Thusano, involving the conclusion of a Memorandum of Understanding (MOU) between the SANDF and the Cuban Military Department of Defence as regards the training of South African members of the Air Force, Navy, Army and South African Military Health Services (SAMHS). In this specific instance the respondents were medical students of the SAMHS who were sent over to Cuba in order to be trained as doctors, specifically in military medicine. The program comprised of the first year of study being dedicated to learning the

Spanish language in another institution in Santiago, Cuba.

- [6] The next five years were dedicated to the science of medicine, culminating in one qualifying as a General Military Basic Doctor which is equivalent to a MBCHB in South Africa. The respondents' medical studies were to be registered with University of Ciencias Medicas Faculty (UCIMED) which has its main campus in Havana. There were also two satellite campuses, being Ciencia Medicas Faculty 2 and another was at Inter Arms School of Revolutionary Armed Forces of Cuba (Inter Arms School), in Santiago. According to the appellants UCIMED is accredited with the Cuban authorities and is registered on the database of the Health Professionals Council of South Africa (HPCSA).
- [7] The medical academic study terms run from September to July of the following year. The respondents, concluded an agreement with the Department of Defence (DoD). The respondents undertook to comply with the various conditions set out in the memorandum of agreement between themselves and the DoD. These conditions amongst others were, but not limited to, the following:
- (a) For the prescribed period of the agreement the respondents would study military medicine at a Cuban medical facility attending classes within the official hours;
  - (b) DoD undertook to pay fees and all related expenses of the respondents and they would allow the respondents to attend the course;
  - (c) To promptly and loyally comply with all prescripts, rules regulations and orders from the Institution and the DoD for the duration of the course. Failure to adhere to the above will result in termination of one's studies and/or repatriation at the sole discretion of the DoD;
  - (d) The respondents are to attend every session of training and abide fully to the rules and regulations as well as stipulations governing the attendance of the course as well as the institution;
  - (e) 'The member understands that he is a South African soldier and that he is subject to the Republic of South African (RSA) laws, that he is undertaking studies in a foreign country and that his actions reflect on the DoD and RSA. Any conduct that brings the RSA and/or the DoD in disrepute may result in immediate repatriation and/or disciplinary and/or administrative action under the appropriate laws and/or policies.' [1]
- [8] There were two groups of trainees the first consisting of some 26 trainees commenced August 2017 and the second group of 9 trainees in August 2018. The 2017 trainees were enrolled in the Inter Arms School for a Spanish and pre medical courses. In 2018 this very group (2017 group) were due to commence their medical studies at UCIMED, Santiago, whilst, the 2018 group would engage in the Spanish course at the Inter Arms School. According to the 2017 group of respondents, as far back as 3 April 2018, they raised concerns with the Surgeon General Lt Gen AP Sedibe and the Director of Medicine Brig. Gen Badli about the accreditation of the institution they were to study at, the Military Infantry School General Jose Maceo Interamas (the Infantry School), and they required proof that they had

been in fact registered as medical students.

- [9] The respondents state that in 2018 they did not receive a satisfactory response, however, they continued to attend their lectures which were conducted at the University campus. They commenced their second semester on 11 February 2019 and this is when they were informed that they would no longer be attending their lectures at the University but rather at the infantry school with the 2018 group who were busy with pre-med studies. The respondents refused and did not attend their lectures at the infantry school from 11 February 2019 until their date of termination on 26 March 2019.
- [10] To cut a long story short the respondent's attitude persisted that they ought to attend their lectures at the University as they had previously done. As a group they collectively decided not to attend classes until their concerns were addressed and opted to remain at their base camp. On the very same 11 February 2019 they were informed by Colonel Vladimir who is the second in command of the infantry school that they 'either go to class or [we] go back to our country'.
- [11] On 13 February 2019 both groups, the 2017 and 2018 medical students, wrote a letter to Brig. Gen Majola raising the same concerns as they did in April 2018. The students were visited by Brig Gen Majola at the school on 16 February
2019. During the course of this meeting the respondents were appraised of the code of conduct and extracts of the agreement between South Africa and Cuba. Hereafter, the respondents were requested to sign that they had been advised of the code of conduct and the aforesaid agreement between SA and Cuba. The respondents state that they never signed.
- [12] Following up from the above on 18 February 2019 the respondents received correspondence dated 17 February 2019 from the Surgeon General. In this letter they were advised that their conduct of refusing to attend lectures constituted mutiny being a serious offence in the SANDF. As a result, the Surgeon General informed them that he intended to apply for their administrative dismissal/discharge from the SANDF. The respondents were requested to either make submissions individually or collectively before 21 February 2019 as to why they should not be dismissed/discharged. On receipt of the correspondence on 18 February 2019 the two groups of 2017 and 2018 respondents forwarded their letter of the 13 February 2019 yet again in response. This culminated in Brig Gen Majola paying the respondents a visit and they were advised that their letter of the 13 February 2019 was not sufficient. He again requested and encouraged them to either individually or collectively raise their concerns. The respondents stated that they had already responded to the letter from the Surgeon General dated 17 February 2019.
- [13] The respondents contend that on 20/21 February 2019 they were requested to return their Cuban uniforms and not to leave the base camp as they would be departing

for South Africa. Hence, on 25 February 2019 four of the respondents decided to go back to classes. The respondents were requested to return to classes and respond to the Surgeon Generals' request, on 28 February 2019, this time by Col Thulo, the second in command at the military attaché in Cuba. To which request the respondents refused to accede. The respondents were addressed by the delegation of South African Military Health Services on 5 March 2019. Speaking to the respondents, this time Gen Dabula requested of the respondents to return to classes. He also responded to their concerns and allayed their fears that 'The South African Military Health Services will register us as students [the respondents] before June 2019 but if this does not happen we [they] must be patient as it will be done.'<sup>[2]</sup> Lastly, the General advised that the Chief of the SANDF had instructed him to bring back those respondents who did not wish to attend classes any longer. On the very same day, being the 8th March 2019, the respondents advised the Gen Dabula that they were 'desirous to return to South Africa and to be withdrawn from Cuba'.

[14] On 9 March 2019 the Director of Intelligence Brig. Gen Dyantji also requested the respondents to return to classes and the respondents submitted that they decided not to continue with their studies because of the concerns they had raised. On the 26th March 2019 the respondents were transported back to South Africa and handed letters dated 25 February 2019 that they were discharged from the SADF.

[15] As alluded to above the respondents sought to review and set aside the decision of the SANDF. Having been unsuccessful in the Court a quo on 19 July 2019 the appellants sought and were granted on, 10 September 2019, leave to appeal the that Judgement. On 5 December 2019 the respondents brought and succeeded in an application in terms of section 18(1) - (3) for their immediate reinstatement. This resulted in the appellants seeking to appeal that order in terms of section 18(4) of the Superior Courts Act. It is these consolidated appeals that are before this Court.

#### The Letter of 25 February 2019

[16] It is prudent in these proceedings to set out the salient feature of the aforesaid correspondence as it assists in shedding light on the arguments advanced by the parties. This correspondence as is evident is dated 25 February 2019 prior to the respondents return to South Africa and it's addressed to the respondents the 'South African Students'. The subject matter is recorded as: 'Administrative Dismissal/Discharge from the South African National Defence Force of Members who are currently studying in the Republic of Cuba.' In this correspondence the names of the respondents are listed initially and thereafter the following paragraphs appear:

'3. From 11 February 2019 to date you have been refusing to attend classes as required and/or instructed by your superior officers

and/or instructors. On 13 and 16 February 2019, the Defence Attaché (DA) in Cuba Brigadier General N.T Majola personally instructed you to return to classes, but you refused.

4. Your conduct is akin to, if it is not mutiny and is regarded as a very serious offence and or misconduct in many militaries including

SANDF.

5. The Surgeon General (SG) requested the C SANDF to administratively discharge /dismiss you from the SANDF because of this conduct. You were offered an opportunity to make written submissions to C SANDF to show cause why you should not be administratively discharged/ dismissed from SANDF. You have refused to exercise that right.
6. C SANDF is left with no alternative but 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 from the SANDF.

[17] Taking the aforesaid correspondence into account the court a quo concluded that it was common cause amongst the parties that the respondents' services were terminated by the SANDF in terms of section 59 (3) of the Defence Act 42 of 2002.[3]

The appellant's challenge on appeal

- [18] The court a quo having found that the operative date, 25 February 2019, for the termination of the respondent amounts to a misdirection according to the appellants. This they contend cannot be correct in light of the fact that the decision had not been communicated to the respondents by then and was only communicated to them on 26 March 2019. To this end reference was made of *Carlson Investments Share Block (Pty) Ltd v Commissioner, SARS* 2001 (3) SA 210 (W) at 222E-H &225I-J.
- [19] The respondents concede that the decision to terminate their services was only conveyed to them on 26 March 2019, however, they agree with the court a quo's finding that the decision to do so was made on 25 February 2019.
- [20] The second challenge raised by the appellant's is against the finding of the court a quo that the process set out in section 103(1) of the defence Act,[4] that a period of 30 days should have elapsed from the date of the decision (25 February 2019) prior to a termination in terms of section 59(3). This the appellants contend amounts to yet another misdirection by the court a quo as this decision is in conflict with the findings of the Supreme Court of Appeal in the *Minister of Defence & Military Veterans & Another v Mamasedi* case where it was stated that a board convened in terms of section 103 'has no power to determine the reasons for the absence without leave'.[5] Furthermore, the appellants argue that the operation of section 103(1), as regards the formation of the board before the expiration of 30 days or even before a termination in terms of section 59(3), cannot be logical. This is so, as on a proper reading of section 103 it clearly denotes the past tense, meaning one had to be absent for 30 days and is still absent when the board ought to be convened.

[21] The respondents concur with the court a quo's finding that a period of 30 days had not expired and no board was convened and the decision to terminate in terms of section 59(3) was reviewable.

[22] Lastly, whether in fact there was indeed a decision to dismiss by the appellants and whether the jurisdictional prescript of section 59(3) were met.

#### Discussion

[23] The appropriate starting point of this discussion is to address the deeming provision being section 59(3) and what are the legal consequences of such deeming provision. This in turn will shed light on other issues to be addressed in this

#### judgment.

[24] Borrowing from a case of the Supreme Court of Canada, *R v Verrette*

[1978] 2 SCR 838 at 845, Beetz J speaking for that court eloquently provides insight on what a deemed provision is:

'A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word "includes" in certain definitions; however, "includes" would be logically inappropriate and would sound unreal because of the fictional aspect of the provision.'

[25] In a decision closer to home *Phenithi v Minister of Education & Others* 2008 (1) SA 420 (SCA) at para 9 & 10 Mpati DP relied on the dicta of Van Heerden JA in the Louw[6] case referred to herein:

'[9] In *Minister van Onderwys en Kultuur v Louw* this court had occasion to deal with the provisions of s 72 of the Education Affairs Act (House of Assembly), 70 of 1988, which were almost identical to those of s 14 of the Act. Section 72(1) of Act 70 of 1988 provided that a person 'employed in a permanent capacity at a departmental institution and who – (a) is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education...shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct....'. The respondent in Louw's case was a general assistant and in permanent employment at a boarding house of a certain high school in Upington. He failed to report for duty over the period 29 July to 31 August 1992. On 11 September the principal wrote him a letter informing him, in essence, that according to the school governing council he had been discharged (from duty) ('dat u ontslaan is') and that his last day of service was 28 July 1992. Following unsuccessful negotiations between his representatives and the education authorities the respondent instituted application proceedings in the Northern Cape Division seeking, inter

alia, an order setting aside the ‘decision’ to terminate his services with effect from 28 July 1992. In this court Van Heerden JA, reversing the decision of the Northern Cape Division, said (at 388 G-H): ‘The deeming provision [of s 72(1)] comes into operation if a person in the position of the respondent (i) without the consent of the “Head of Education” (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi rule which, liberty of a person.’ The court held further that where, as in that case (and also the present matter) the employee is informed in a letter of discharge that he/she has been discharged in terms of s 72(1) - in this case s 14(1) (a) - it is not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law (at 388 I). in its classic formulation, is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or [10] In my view, the Louw judgment is definitive of the first issue in the present matter, viz whether the appellant’s discharge constitutes an administrative act. (See also *Frans v Groot Brakrivierse Munisipaliteit en Andere* 1998

- (2) 770 (C) 777I-779E.) There was no suggestion that Louw was wrongly decided. There being no ‘decision’ or ‘administrative act’ capable of review and setting aside, the second part of the first prayer in casu, viz that the ‘decision be declared an unfair labour practice’, falls away.’
- [26] Acknowledging that section 59(3) is a deeming provision, that is, once a member absents himself or herself from official duty without permission for more than 30 days, the operation of law kicks in and it is deemed that the member is dismissed. There is no decision taken whatsoever.[7] Notably it is apparent that the Court a quo appreciated the fact that once one is absent without permission for more than 30 days one must be regarded as having been dismissed in terms of the deeming provision, section 59(3).
- [27] Now if there is in fact no decision taken and the dismissal is purely by operation of law, there will most certainly be no decision or administrative act to review as was pointed out in the cases of Louw and Phenithi above. Hence, in these circumstances the dismissal ‘decision’ was not susceptible to review. However, the enquiry does not end here. The Court a quo was clearly misdirected, in light of Louw’s case, in dealing with whether all the jurisdictional factors for the grant of a dismissal in terms of section 59(3) were in place, in that she added an additional jurisdictional fact. This fact being, that a board of enquiry in terms of section 103(1) must have been established where a member is absent for more than 30 days to determine whether a member is absent and the reason for that member’s absenteeism.
- [28] The appellant raised concerns about the section 103 interpretation of the Court a quo in reasoning that there was no merit in their submission that the board of enquiry need not be established in a dismissal in terms of section 59(3). In our view the appellants were correct to point this out to the Court a quo as its reasoning of the applicability of section 103 for the

jurisdictional facts to be at play for the grant of a section 59(3) dismissal was contrary to what the dicta in Mamasedi sets out. The Supreme Court of Appeal highlighted that the establishment of the board in terms of section 103 was solely to verify that indeed the member was still absent and was to establish the whereabouts of that absent member's kit. Evidently, it is in no way constituted to establish the reason for the member being absent[8] as was determined by the Court a quo.

[29] The court a quo reasoned that the 'decision to terminate the services of the applicants was taken by the first respondent on 25 February 2019' and as such she reasoned that this was the operative date. It is noted that the notification of the termination of the respondents is dated 25 February 2019. The court goes on to state that 'The fact that the letter was only handed to the applicants at a later stage (on 26 March 2019) is in my view irrelevant...' This cannot in our view be the case as the

notification to the respondents of their dismissal is pertinent to this case. The Court a quo reasoned that the operative date of the 25 February 2019 is the date that a 'decision' was taken to terminate the respondents

and this culminates in the decision having been taken before the expiration of the requisite 30 days.

[30] Does the letter of 25 February constitute a 'decision'? To this end it is prudent that we examine what a decision entails and how is it effected. It is trite that a decision entails a form of a choice or evaluation.[9] As such, it stands to reason that one must have a choice in order to make a decision or one needs to evaluate a situation in order to decide. If a decision affects an individual's rights it clearly ought to be communicated to that individual for it to become effective. This embraces the principle of fair administrative procedure that dictates that finality is imperative in the decision making process and importance of the *functus officio* rule.[10]

[31] Following on the issue as to whether the letter of the 25 February 2019 constitutes a decision it is pertinent to examine the conduct of the parties. On 11 February 2019 the respondents having been informed that they will attend classes at the infantry school the respondents decided not to attend classes. On 12 February 2019 a first attempt was made by the appellant's informing the respondents that the infantry school was where they would attend classes. The respondents

refused and sent off their own correspondence of 13 February 2019 raising their concerns.

[32] For easy reference the contents of the letter of 13 February 2019 are:

'1. On the 11 February 2019, it has been announced to us the medicine group 2018 by the current head of medicine students at Santiago de Cuba in the Escuela Interarmas General Jose Maceo (which is the Cuban infantry school) where we are currently doing preparations to study medicine in September 2019.

2. The announcement was that we are going to study medicine here at the Escuela Interarmas General Jose Maceo, which is not an accredited medical institution and not a recognized medical university by Health Professionals Council of South Africa (HPCSA) or Cuba as required.
- ...
4. It also came to our attention that our fellow companions (medicines group of 2017) that were doing first at Universidad Ciencias Medicas Facultad 2 are being removed from the university forced to come and study separately as South African students alone in Escuela Interarmas General Jose Maceo in Santiago de Cuba. To be joined by us the group of 2018 (as South Africans alone) in September 2019 as the first class and the only class of medicine and they are currently not registered as medical students studying abroad at HPCSA as required. Additionally, even if it was a medical university recognised by HPCSA, the living arrangements are not favourable for studying medicine or any serious course. The overcrowded bungalow with more than 50 people doing different courses with different programs, lights being switched off at 22h00 daily and being expected to perform well in the end while studying with a foreign language are few of the reasons that are making it more unfavourable for studying.
5. We are therefore not willing to study medicine here and therefore cannot do preparation course if it means we will be studying medicine here at the Escuela Interarmas General Jose Maceo, due to the above mentioned conditions and stipulation conditions on the study contract we signed with the South African National Defence Force (SANDF).'
- [33] A second attempt was made by the appellants on 16 February 2019 when Brig. Gen Majola addressed the respondents individually, but still no joy. On 18 February 2019 correspondence was handed to the respondents dated 17 February 2019 seeking from the respondent's submissions why they should not be administratively dismissed or discharged for not attending classes as required and /or instructed by their senior officers. The respondents responded by sending off their letter of the 13 February 2019 yet again. A third attempt.
- [34] I pause here to highlight that in the letter of 17 February 2019 mention is made of the offence of mutiny, it is clear that the appellants stressed that they had an intent to apply for the respondent's administrative dismissal/discharge. They had not as yet taken a decision and required the respondents to show cause why they should not follow up on their intent.
- [35] On 20 February 2019 the respondents were addressed by Brig. Gen Majola again individually and they were advised that their response of 13 February 2019 was inadequate. Majola even addressed the respondents' individual concerns but the respondents retorted that they had responded to the request set out in the letter of 17 February 2019. This is the fourth attempt.

- [36] On 20/21 February 2019 the respondents were requested to hand in their Cuban uniforms and on 25 February 2019 four of the respondents decided to go back to classes. On 28 February 2019 the respondents were instructed by Col Thulo, the second in command, to return to classes and responded to the letter of 17 February 2019. The respondents refused being the fifth attempt.
- [37] On 6 March 2019 a delegation of the South African Military Health Services arrived and they too requested of the respondents to attend classes and provided the assurance that before June 2019 they would be registered as students. Yet again, the sixth attempt with the requisite assurance that they had been seeking all along.
- [38] On 8 March 2019 the respondents informed the appellants that they were 'desirous to return to South Africa and to be withdrawn from Cuba'. The respondents were advised that if they withdrew they would be discharged. Another attempt to get them to classes.
- [39] On 9 March 2019 the director of intelligence Brig Gen Dyantji yet again requested that the respondents return and that the SAMHS would sort out the accreditation issue, however, the respondents state that 'We as applicants decided not to proceed with our studies because of the concerns.' The final attempt.
- [40] On 26 March 2019 and in South Africa the respondents were handed the letter of the 25 February 2019 advising that they were now discharged for misconduct in that from 11 February 2019 they failed and or refused to attend classes as required and instructed to do so by their superior officers.
- [41] Conspicuously, from 11 February 2019 to 25 February 2019 the appellants had made no less than four attempts to get the respondents back into their classes. From the 25 February 2019 up until the 26 March 2019 was another four attempts made. Ironically, on both the 8 March 2019 and on 9 March 2019 the respondents were reassured as regards to their concerns, but they opted to withdraw and leave Cuba. A further validation that the 25 February 2019 could not be taken as the operative date is the fact that on 28 February 2019 the respondents are addressed by the second in command Col Thulo and he instructs them to return to classes but they refuse.
- [42] It goes against logic that the appellants would have not communicated their decision when they supposedly took it on 25 February
2019. Not when they literally begged the respondents on various occasions thereafter to return to classes, having supposedly taken a 'decision'. Clearly that cannot be the case. Even if one believes the appellants were considering that specific 'decision', it would have only been effective once communicated to the affected parties. So it cannot be that the operative date is 25 February 2019 but rather 26 March 2019 when the affected parties were notified of their dismissal, which by the way was not by way of a decision but operation of law in achieving finality.

[43] In addition, the respondents were given opportunities to make submissions why they should not be discharged, the audi alterum partum principle coming into play, but were dogmatic and dug in their heels relying on their response of the 13 February 2019, even when they were advised that same was not sufficient. Evidently on the respondents in respect of the return to South Africa, the respondents

had by then absented themselves from their classes for more than 30 days, without permission. Critically one needs to acknowledge that attending medical classes was the very purpose for which they had been sent to Cuba and contracted with the SANDF.

[44] It must be stressed that in these circumstances, that is a dismissal in terms of section 59(3), there is no decision per se to dismiss, but merely one is deemed to be dismissed by operation of law in that the requisite time having lapsed.[11]

[45] For the reasons set out above the appeal must succeed as the court a quo clearly misdirected itself in granting the orders that it made.

The section 18(4) appeal

[46] Having succeeded in the main review application the respondents sought an order in terms of section 18(3) of the Superior Court Act. This was granted on an urgent basis that the order of the main review application be put into effect pending the appeal launched in the main application and pending further appeal processes.

[47] The effect of a section 18 (4) appeal is that it is an automatic appeal. Section 18(4) reads as follows:

‘(4) If a court orders otherwise, as contemplated in subsection (1)-

- (i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.’

[48] There was argument whether this full court constituted the next highest court and this was resolved by having regard to the default position that this matter was presided over by a single judge and the next highest Court would clearly be a Full Court of the division.[12] Having settled the issue of the next highest Court I turn to the appeal against the section 18 (3) order which makes the main review

order operative on an urgent basis.

[49] It stands to reason that if the appeal on the main review application succeeds then the order granted in those proceedings falls away and as it follows there is no order to give effect to in terms of section 18(3). This appeal ought to succeed as well and costs in both appeals are to follow the result.

Order

[50] Consequently, the following order is made:

1. The appeal in the main review application succeeds with costs, including the costs of two counsel where so employed.
2. The appeal in terms of section 18(4) (ii) of the section 18(3) order likewise succeeds with costs, such costs to include the employment of two counsel where so employed.

Electronically signed

W Hughes

Judge of the Gauteng

High Court, Pretoria

It is so ordered:

D Mlambo

Judge President of the

Gauteng High Court,

Pretoria

I concur:

J Francis

Judge of the Gauteng High Court, Johannesburg

APPEARANCES:

For the Appellants: Adv. T SKOSANA SC

Adv. T LUPUWANA

Instructed by:

The State Attorney Office, Pretoria.

For the Respondents: Adv. G L VAN DER WESTHUIZEN

GRIESEL & BREYTENBACH Attorneys

[1] Memorandum of Agreement - annexure "WHM3".

[2] Para 64.4 if the respondents founding affidavit in the review application.

[3] Section 59(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.

[3] Section 59(3) -

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[4] Section 103(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.

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[5] Minister of Defence & Military Veterans & Another v Mamasedi 2018 (2) SA 291 (SCA) at para's 9-11.

[6] Minister van Onderwys en Kultuur v Louw 1995 (4) 383 (A)

[7] Minister of Defence and Others v South African National Defence Union and Another 2014 (6) SA 269 (SCA) at para 8; Mamasedi 2018 (2) SA 305 (SCA) at para 3 & 24.

[8] Mamasedi at para 11

[9] Nedbank Ltd v Mendelow and Another NNO 2013 (6) SA 130 (SCA) at para 25: '[25] Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts

within the definition of the PAJA or even under the common law.’

[9] Nedbank Ltd v Mendelow and Another NNO 2013 (6) SA 130 (SCA) at para 25:

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[10] Carlson Investments Share Block (Pty) Ltd v Commissioner, SARS 2001

(3) SA 210 (W) at 222E-H & 225I-J.

[11] Grootboom v NPA 2014 (2) SA 68 (CC) at para 38; Mamasidi at para 3.

[12] Section 17(6)(a) of the Superior Courts Act; MEC of Co-Operative Governance v Mogalakwena Municipality 2017 (2) SA 464 (GP) at 466E-470A.

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