THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 51/2021

In the matter between:

WILLIAM FRANCE MASINGA	**FIRST APPELLANT**
RIRHANDZU JOY KHOSA AND 33 OTHERS	**SECOND TO THIRTY-FIFTH APPELLANTS**

and

CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**FIRST RESPONDENT**
MINISTER OF DEFENCE AND MILITARY VETERANS	**SECOND RESPONDENT**
SURGEON GENERAL OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**THIRD RESPONDENT**
SECRETARY OF DEFENCE	**FOURTH RESPONDENT**

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

Coram: PETSE AP and MAKGOKA, SCHIPPERS, NICHOLLS and MABINDLA-BOQWANA JJA

Heard: 23 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 05 January 2022.

Summary: Statutory interpretation – s 59(3) of the Defence Act 42 of 2002 – jurisdictional requirements – officers of South African National Defence Force discharged after absenting themselves from official duty – whether they were entitled to hearing – whether discharge lawful.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, Mlambo JP and Francis J concurring, sitting as court of appeal):

1 The appeal against the costs orders in paragraphs 1 and 2 of the order by the court a quo dated 19 June 2020 succeeds, and the costs orders are set aside.

2 Save as aforesaid, the appeal is dismissed.

JUDGMENT

Schippers JA (Petse AP and Makgoka, Nicholls and Mabindla-Boqwana JJA concurring)

[1] The appellants were officers in the South African Military Health Service (SAMHS), the medical branch of the South African National Defence Force (SANDF). They were part of a group of 35 officers selected to study military medicine in Cuba. Of this group 26 were chosen in 2017 (the 2017 group), and nine were selected and commenced studying in Cuba in 2018, pursuant to a memorandum of understanding between the Department of Defence (DoD) and the Cuban military authorities concerning the training of members of various divisions of the SANDF in Cuba (the MOU).

[2] On 26 March 2019 the appellants were informed that they had been dismissed from the SANDF in terms of s 59(3) of the Defence Act 42 of 2002 (the Act), for refusing to attend classes from 11 February to 20 March 2019, in defiance of an order by their commanding officer. Section 59(3) of the Act

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. The appellants were sent back to South Africa. The central issue in this appeal, which is with the special leave of this Court, is whether the appellants' dismissal was lawful.

The facts

[3] The main reason for training the appellants in Cuba is that it has a unique system of training doctors in military medicine. The intake of South African students was dependent on available slots at the University of Ciencias Medicas (UCIMED) in Havana, where, in terms of the MOU, students were required to study medicine. UCIMED is an accredited teaching institution with the relevant Cuban authority which is the equivalent of the Health Professions Council of South Africa (HPCSA). Due to an increase of students registered at UCIMED, it established two satellite campuses in Santiago, namely Ciencia Medicas Facultad 2 Santiago de Cuba and the Inter Arms School General José Maceo (the Inter Arms School).

[4] The Inter Arms School was established in 1980 to train the Revolutionary Armed Forces of Cuba. The School became a higher education centre in 1983 and offers qualifications in Military Science, which includes specialities such as Infantry, Tanks, Military Intelligence, Military Politics, Engineering, Logistics and Military Medicine. The latter qualification is known as General Military Basic Doctor, comprising six years of study. Professors from UCIMED at Santiago and the Dr Joaquin Castillo Duany Military Hospital provide academic training to students at the Inter Arms School. The School provides training to military officers from Venezuela, Angola, South Africa, Congo and Vietnam.

[5] Some of the appellants commenced their studies in Cuba in August 2017 and were enrolled at the Inter Arms School. On 3 April 2018 they raised the following concerns with the third respondent, the Surgeon General of the SANDF (the Surgeon General). The Inter Arms School was not accredited to offer medicine, it had not done so before and the quality of education was unsatisfactory. There was no proof of registration of first year students at the UCIMED campus in Santiago, which was necessary to register those members as medical students with the HPCSA.

[6] These concerns were unfounded. The allegation that students at the UCIMED campus in Santiago had not been registered as medical students was pure speculation: the respondents presented evidence that there were 17 South African students studying medicine at the Inter Arms School in Santiago, 13 of whom were in their second year of medical studies with satisfactory results. The evidence placed it beyond question that UCIMED Santiago, as well as the Inter Arms School, were accredited institutions with the relevant Cuban authority. Despite this, the appellants embarked on protest action and refused to attend classes. Furthermore, as stated earlier, nine of the appellants had been selected in 2018 and would have completed their language studies only in 2019, after which they would have commenced with the study of medicine.

[7] After completing their Spanish and pre-medical courses, the appellants came home for their annual break in July 2018. Before returning to Cuba in August 2018 to commence their medical studies at the Inter Arms School, each of the appellants concluded an agreement concerning a foreign learning opportunity with the national Government, represented by the DoD (the agreement). The agreement was explained to them and they were informed that they could withdraw from the programme if they did not consent to the essential terms and consequences of the agreement.

[8] The salient terms of the agreement were these. The appellants would 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. They undertook to attend every training session and abide by the rules governing attendance of the course as well as any other rules and regulations of the institution. Two of the appellants raised the following queries on the agreements they had signed: there was no clarity on the difference between military medicine and the MBChB qualification; the Inter Arms School was not accredited to teach medicine; and registration with the HPCSA was not mentioned in the agreement.

[9] In terms of the agreement, the DoD undertook to pay the appellants' fees and all related expenses from State funds. This was no small thing. The SANDF had not only paid the appellants' salaries, service benefits, stipends and any additional expenses to facilitate the studies, but had also paid for their studies in full, in advance.

[10] The following facts were not in dispute. The institution at which a South African student studies medicine must be listed on the database of the HPCSA. Upon graduation from the foreign institution, the HPCSA would examine its curriculum and if there is a shortage in hours of training on any aspect of medicine, students are required to complete those hours in South Africa and thereafter do an internship and render community service, after which they may be registered as independent medical practitioners. If the medical institution is not listed on the database of the HPCSA, that institution is required to inform the HPSCA in writing of the health professional body which has granted it accreditation and the requisite training hours. 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.

[11] The 2017 group commenced classes at the UCIMED campus in Santiago in September 2018 because classrooms and logistical arrangements for study at the Inter Arms School were still being prepared. The group was informed that this was temporary and that classes at the Inter Arms School would start in February 2019.

[12] From 11 February to 20 March 2019 the appellants refused to attend classes at the Inter Arms School, in defiance of an order by the principal and their commanding officer in Cuba, Colonel Joel Pavon Lopez. Four members of the 2017 group complied with the order and returned to class. They have since been enrolled at UCIMED in Santiago, as it was not feasible for only four SANDF members of the 2017 intake to continue their studies at the Inter Arms School. At the time 13 members of the SANDF who were part of the 2016 group in their second year, were receiving tuition at the Inter Arms School.

[13] On 20 March 2019 Colonel José Rodriguez, the Head: External Relations of FAR (Revolutionary Armed Forces of Cuba), wrote to Colonel Mokete Thulo, the Assistant Defence Attaché at the South African Embassy in Cuba, and informed him that the appellants had refused to attend classes from 11 February to 20 March 2019. Colonel Rodriguez cited the following examples of their indiscipline. The appellants had absented themselves from classes with no reference to their whereabouts. They refused to participate in activities and created disorder. They put pressure on second-year cadets (the 2016 group) and four students of the 2017 group 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.

[14] The SANDF made numerous attempts to get the appellants back to class. On 16 February 2019 Brigadier General Majola, the South African Defence Attaché to the Republic of Cuba, addressed two of them individually and thereafter all of them as a group. He referred them to the Code of Conduct of the SANDF (the Code) and the agreement between the Cuban Armed Forces and the SANDF, and showed them proof that UCIMED was a registered institution.

[15] On 18 February 2019 the appellants were handed a letter by the Surgeon General (dated 17 February 2019) in which they were informed that he intended to apply to the Chief of the SANDF for their administrative dismissal/discharge and that they had committed an offence of mutiny. They were instructed to make written submissions to the Chief of the SANDF by 21 February 2019 to show cause why they should not be discharged.

[16] In response to the Surgeon General, the appellants referred him to their letter of 13 February 2019 and another undated letter in February 2019. In the former they informed the Surgeon General that they were not willing to study medicine at the Inter Arms School because it was not an accredited medical institution, they were not registered with the HPCSA as medical students studying abroad and their living arrangements were not favourable for the study of medicine. In the undated letter the appellants requested urgent intervention because they had already missed days of lectures, and referred to the same concerns raised in their letter of 3 April 2018.

[17] On 20 February 2019 Brigadier General Majola returned to the Inter Arms School and informed the appellants that their response was unacceptable. By 22 February 2019 the appellants were told to hand in their Cuban uniforms and instructed not to leave the Inter Arms School, because they would be returning to South Africa. On 28 February 2019 Colonel Thulo again instructed the appellants

to return to class and to respond to the Surgeon General's letter of 17 February 2019. They refused to return to class and did not respond to the letter.

[18] On 8 March 2019 a delegation of officers from the SAMHS, headed by Major General Dabula, a medical doctor and the Chief Director: Military Health, Force Preparation of the SANDF, stationed in Pretoria, addressed all the members of the SANDF studying medicine in Cuba. The appellants were once again instructed to attend classes. They refused and informed Major General Dabula that they wished to withdraw from the programme and return to South Africa.

[19] On 9 March 2019 the appellants individually addressed letters to the Surgeon General in which they requested to be registered at an institution that met the standards of the HPCSA, preferably in South Africa. Of course, registration as a medical student in South Africa was never an option and was directly at odds with the purpose of the MOU – the training of members of the SANDF in military medicine in Cuba. The appellants contended that the SANDF had breached the agreement when they were withdrawn from UCIMED in Santiago and registered at the Inter Arms School, which was not an accredited institution. They said that they did not make submissions to the military attaché as to why they should not be discharged because they did not understand the letter and the charge, since they had not committed mutiny.

[20] On 26 March 2019 the appellants were instructed to clear out their units at the Inter Arms School and sent home to South Africa. On the same day they were handed a letter by the Chief of the SANDF (dated 25 February 2019) in which they were informed that they had been dismissed/discharged from the SANDF with immediate effect (the dismissal). The reasons for the dismissal were these. Since 11 February 2019 the appellants had refused to attend classes as instructed by their superiors. Their conduct was akin to mutiny and regarded as a very

serious offence. They were given an opportunity to make written submissions to the Chief of the SANDF to show cause why they should not be dismissed, but had refused to exercise that right.

The proceedings below

[21] In May 2019 the appellants launched an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) for an order declaring that the 'decision to terminate' the appellants' service with the SANDF, was unlawful and invalid. The application came before Basson J who held that the jurisdictional requirements of s 59(3) of the Act had not been met. The court held that the appellants had been dismissed on 25 February 2019, the date of the letter of discharge, when they had not been absent from their posts for a period of 30 days, and that a board of inquiry should have been convened in terms of s 103(1) of the Act, prior to the dismissal.

[22] The high court made an order declaring that the 'decision to terminate' the appellants' service with the SANDF was unlawful and invalid. The decision was 'reviewed and set aside' and the court ordered the appellants to be reinstated 'with full retrospective effect, with retention of all salaries and benefits'. The respondents were granted leave to appeal to a full court.

[23] Subsequently the appellants successfully launched an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 for the enforcement of the high court's order, pending the determination of the appeal by the full court. This was met with an urgent appeal by the respondents under s 18(4)(ii) of the Superior Courts Act, which suspended the high court's s 18(3) order and prevented the appellants' reinstatement. The appeal against the main judgment and the appeal against the s 18(3) order were consolidated for hearing before the full court.

[24] On 19 June 2020 the full court upheld the consolidated appeals and discharged the s 18(3) order, with costs. It held that the appellants' dismissal under s 59(3) of the Act arose by the operation of law, and that there was no decision susceptible to review. The court concluded that the appellants' dismissal was not premature because the operative date of the dismissal was 26 March 2019, when the appellants were informed of it. There was no jurisdictional requirement that a board of enquiry must first be convened under s 103(1) of the Act, prior to a discharge in terms of s 59(3). The appellants, in any event, had been granted a fair hearing prior to their dismissal.

The issues

[25] Two principal issues are required to be determined in this appeal. The first is whether the Chief of the SANDF had taken a decision to dismiss the appellants prior to, and regardless of, any submissions they might make. The appellants contended that the respondents elected to commence an *ad hoc* disciplinary process for an alleged offence of mutiny under the Military Discipline Code (the Code) and gave them a 'semblance of a hearing' in the Surgeon General's letter of 17 February 2019 when they were asked to show cause why they should not be discharged. The so-called election was concluded when the appellants received a letter from the Chief of the SANDF 'confirming' his decision to administratively discharge them for misconduct. I shall refer to this issue as the alleged decision.

[26] The second issue is the proper construction of s 59(3) of the Act, more specifically whether its jurisdictional requirements were satisfied. I shall refer to this as the interpretive question.

[27] The alleged decision is simply unsustainable on the evidence, and an afterthought. The Surgeon General's letter of 17 February 2019 stated that steps

would be taken for the appellants' dismissal/discharge from the SANDF and that they were being given an opportunity to make submissions individually or collectively. That is also how the appellants understood the position. In their response they made it clear that they were not willing to study medicine at the Inter Arms School. There was no hint by the appellants of an *ad hoc* disciplinary process or the semblance of a hearing in their responses to the letter of 17 February 2019.

[28] What is more, the facts show that after the Surgeon General's letter of 17 February 2019, the respondents made further attempts to get the appellants to go back to class, even after they had been informed on 22 February 2019 that they would be returned to South Africa. On 28 February 2019 Colonel Thulo instructed the appellants to return to class. They were again instructed to do so on 8 March 2019 by the delegation of the SAMHS from Pretoria, led by Major General Dabula. On the appellants' version, all of this was a pretence kept up by the respondents because they had already decided to dismiss the appellants in terms of an *ad hoc* disciplinary process: it is fanciful and absurd.

[29] Finally, the alleged decision was denied in the answering papers and it was stated that the appellants' dismissal occurred by the operation of law in terms of s 59(3) of the Act, after they did not report to their official place of duty for 30 days. They were notified of their dismissal in the letter by the Surgeon General dated 9 April 2019. Any factual dispute in this regard had to be determined essentially on the respondent's version. Motion proceedings, Harms DP stated in *NDPP v Zuma*,[1] 'are all about the resolution of legal issues based on common cause facts' and 'cannot be used to resolve factual issues because they are not designed to determine probabilities'. He went on to say:

[1] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26, footnotes omitted.

'It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

[30] It is clear from the letter of 25 February 2019, which was handed to the appellants only on 26 March 2019 after they had returned to South Africa, that they were being dismissed from the SANDF with immediate effect, because they had refused to attend classes since 11 February 2019. They had plainly been absent from their place of duty for a period in excess of 30 days and the high court's conclusion to the contrary, was incorrect. Moreover, it is indisputable on the facts that the operative date of the letter was not 25 February 2019 but 26 March 2019, after the attempts by the respondents to persuade the appellants to return to classes. And it is trite that the operative date of an action by a government functionary is the date on which it is communicated to the affected person.

[31] I come now to the interpretive question. Section 59(3) of the Act reads:

'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.'

[32] The starting point is the language of s 59(3). In this regard, the caution that this Court recently sounded in *Capitec Bank*,[2] bears repetition:

'[I]nterpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[33] The jurisdictional requirements of s 59(3) are straightforward. The members must have: (i) absented themselves from official duty; (ii) without permission of their commanding officer; and (iii) for a period of not less than 30 days. Once these requirements are met, the members, if they are officers (as in this case), are 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.

[34] These jurisdictional requirements are not new. In *Louw*[3] this Court held that a deemed discharge provision comes into effect by the operation of law, and not as a result of an administrative decision, if the person concerned is absent from duty for 30 days. Consequently, the *audi alteram partem* principle which requires affected persons to be heard before decisions are taken affecting their rights, privileges or liberty, has no application. Whether the jurisdictional requirements for a deeming provision have been satisfied is objectively determinable.

[35] That a deemed dismissal comes into effect by the operation of law without a hearing, has been affirmed by the Constitutional Court. In *Grootboom*,[4] a case

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[2] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) para 51.
[3] *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 383 (A) at 388G-H; *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA) paras 9-11; *Minister of Defence and Military Veterans and Another v Mamasedi* [2017] ZASCA 157; 2018 (2) SA 305 (SCA) para 3.
[4] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 37.

concerning a deemed dismissal clause under section 17(5)*(a)*(i) of the Public Service Act 103 of 1994, the Court stated:

'Section 17(5)*(a)*(i) effectively countenances the dismissal of the state employee without a hearing. That implicates the right to fair labour practices enshrined in s 23 of the Constitution. The constitutionality of the section is not attacked; hence it must be interpreted in a manner best compatible with the Constitution.'

[36] Likewise, the Constitutional Court in *Maswanganyi*[5] accepted that the service of a member of the SANDF is terminated by the operation of law in terms of s 59(1)*(d)* of the Act, if he or she is sentenced to a term of imprisonment by a civilian court without the option of a fine.[6] It follows, as was held in *Maswanganyi*, that a deemed dismissal clause must be interpreted in the light of s 39(2) of the Constitution, and that the respondents' submission to the contrary is wrong.[7]

[37] Applying the jurisdictional requirements to the present case, s 59(3) does not refer to a member who is absent – a state or situation of not being present. Instead, it envisages a volitional act – the member must absent himself or herself from duty. In other words, the member must leave the appointed place of duty or not go to it, when he or she is required to be there. The appellants were instructed to report for duty at the place assigned by their commanding officer – the Inter Arms School – and to attend classes in furtherance of their medical studies: the very purpose for which they had been enrolled at the School.

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[5] *Maswanganyi v Minister of Defence and Military Veterans and Others* [2020] ZACC 4; 2020 (4) SA 1 (CC); 2020 (6) BCLR 657 (CC)..

[6] *Maswanganyi* fn 5 paras 39, 41 and 45

[7] *Maswanganyi* fn 5 para 33. Section 39(2) of the Constitution provides:

'39 Interpretation of Bill of Rights

. . .

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[38] Counsel for the appellants however submitted that the appellants did not absent themselves from official duty. They had regularly reported for roll call and were physically present at the Inter Arms School, so it was submitted, despite their refusal to attend classes. They had never left their assigned place of duty and their whereabouts were always known to their commanding officer.

[39] These submissions do not bear scrutiny and have no basis in the evidence. 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 appellant's argument that they had not left their assigned place of duty is plainly untenable. It would mean that members of the SANDF who report for roll call but remain in their living quarters, or sit in a cafeteria, and refuse to attend classes with impunity, or as was put to the appellants' counsel in argument, decline to engage in combat, are nonetheless on official duty. Such an interpretation produces a manifest absurdity.[8] Section 59(3) of the Act lends no support to such a construction.

[40] On their own version, the appellants refused to go to their appointed place of duty without the permission of their commanding officer, until their demands were met. It is beyond question that they absented themselves from official duty, and thus the jurisdictional requirement in (i) has been satisfied.

[41] The appellants openly defied their commanding officer, Colonel Joel Lopez, by refusing to attend classes. It follows that they had no permission to absent themselves from duty and thus the requirement in (ii) was satisfied. The

[8] *Venter v R* 1907 TS 910 at 915; *Smit v Minister of Justice and Correctional Services and others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC) para 121.

fact that their commanding officer was aware of the appellants' whereabouts (on the evidence he was not) or that they were physically present within the precincts of the School of Arms, is irrelevant. In the replying affidavit the appellants denied that Colonel Joel Lopez, a member of the Revolutionary Armed Forces of Cuba, was their commanding officer because he had not been appointed to that rank under the Act. They contended that Brigadier General Majola was their commanding officer and that he had not instructed them to attend classes. Before us the appellants rightly did not persist in this argument – it is opportunistic and contrived.

[42] The appellants absented themselves from their official place of duty without permission for a consecutive period in excess of 30 days and the requirement in (iii) has also been satisfied. They must accordingly be regarded as having been dismissed from the SANDF by the operation of law, but may be reinstated by the Chief of the SANDF on good cause shown.

[43] It was however submitted on behalf of the appellants that they were not absent from duty without permission for 30 consecutive days, because on 22 February 2019 they were ordered to hand over their Cuban uniforms and told not to leave the base because they were returning to South Africa. These instructions, so it was submitted, 'relieved' the appellants of any duty to attend classes, and that their position was analogous to employees placed on suspension.

[44] Again, these submissions have no basis in the evidence. In fact, they are wholly inconsistent with the appellants' own case. First, by 11 February 2019 already, they had taken the decision not to attend classes until their concerns had been addressed. The facts show that they stood by that decision until they were sent back to South Africa. So, they could not have been 'relieved' of the duty to attend classes which they had no intention of carrying out. The appellants were

instructed to hand in their uniforms precisely because they refused to attend classes. Second, the suspension analogy is inapposite: suspension itself precludes employees from performing their duties. And the appellants were never suspended – they elected not to attend classes.

[45] The appellants concede, as they must, that s 59(3) of the Act is an exception to the rule that any contravention of the Code is treated as a criminal matter to be tried in the military courts. But it was argued that even if s 59(3) applied to them, no valid dismissal could take place unless and until a board of enquiry was convened under s 103(1) of the Act, in order to determine that the appellants had been absent without leave for more than 30 days.

[46] Section 103(1) reads:

'Board of enquiry in relation to absence without leave

(1) When any member of the Defence Force has been absent without leave for more than 30 days and is still absent, a board of inquiry must be convened by the commanding officer of the absent member to inquire into such absence.'

(2) If a routine inspection reveals any deficiency in the kit, arms and equipment for any public property issue to the person contemplated in subsection (1), the board of enquiry may also inquire into such deficiency.

(3) If the board of enquiry finds that such has been so absent for more than 30 days and is still so absent, it must record such finding, including the date of the commencement of the absence without leave, and also its finding on any deficiencies of the kit, arms and equipment and any public property issued to him or her and the estimated value thereof.'

[47] The argument is unsound. It ignores the plain wording, context and jurisdictional requirements of s 59(3). The latter is a self-standing provision. It is not rendered subject to s 103(1) or any other provision of the Act. The purpose of s 59(3), as in the case of s 59(1)*(d)* of the Act (which is to safeguard the SANDF against members convicted of serious crimes) is to ensure that the SANDF 'is

structured and managed as a disciplined military force',[9] as required by s 200(1) of the Constitution.[10] Military discipline constitutes the difference between an army and a mob. 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. It is precisely for this kind of conduct that s 59(3) was enacted.

[48] As stated, once the jurisdictional requirements of s 59(3) are met, the member must be regarded as having been dismissed on account of misconduct, by the operation of law and without a hearing. These consequences, affirmed by the Constitutional Court,[11] would be rendered nugatory by any inquiry into the absence of the member under s 103(1). Likewise, the power granted to the Chief of the SANDF to authorise the reinstatement of members deemed to have been dismissed in terms of s 59(3), would similarly be rendered meaningless, *a fortiori*, when a board of inquiry convened under s 103(1) of the Act 'has no power to determine the reasons for the absence without leave'.[12]

[49] The high court thus erred in holding that if a dismissal under s 59(3) were to occur before a board of enquiry was convened and has recorded its findings, this would deprive the s 103(1) inquiry any meaningful purpose. The converse is true: s 59(3), critical to the functioning of the SANDF as a disciplined military force, will be stripped of its efficacy if it is construed as a first step in a s 103(1)

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[9] *Maswanganyi* fn 5 para 38.
[10] Section 200 (1) of the Constitution states:
'**200 Defence force**
(1) The defence force must be structured and managed as a disciplined military force.'
[11] *Grootboom* fn 4 para 37.
[12] *Mamasedi* fn 3 para 11.

board of inquiry procedure. The text, structure and purpose of s 59(3) do not allow for such an interpretation.

[50] For these reasons the decision of the full court that the appellants' dismissal in terms of s 59(3) of the Act occurred by the operation of law, cannot be faulted. What remains is the appellants' alternative argument that they were not given a fair hearing. It can be dealt with briefly. The appellants recognise that in *Louw*,[13] *Phenithi*[14] and *Grootboom*,[15] and the cases that followed, the dismissal occurs by the operation of law and there is no right to a hearing. But they argued that those cases are distinguishable from the present case because the respondents had embarked on an *ad hoc* disciplinary process for an alleged offence of mutiny under the Code. As indicated above, this argument is unsustainable on the evidence.

[51] Finally, there is the question of costs. The appellants sought to enforce fundamental rights under the Constitution and it cannot be said that the main application or the application in terms of s 18(3) of the Superior Courts Act was frivolous, vexatious or in any other way manifestly inappropriate. The full court thus erred in failing to apply the *Biowatch* principle and directing the appellants to pay costs.[16]

[52] In the light of the above the following order is issued:

1 The appeal against the costs orders in paragraphs 1 and 2 of the order by the court a quo dated 19 June 2020 succeeds, and the costs orders are set aside.

2 Save as aforesaid, the appeal is dismissed.

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[13] *Louw* fn 3.
[14] *Phenithi* fn 3.
[15] *Grootboom* fn 4.
[16] *Biowatch Trust v Registrar Genetic Resources and Others* [2009) ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 paras 21-24.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances

For appellants:	G Marcus SC and C McConnachie
Instructed by:	Griesel Breytenbach Attorneys, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For respondents:	D T Skosana SC and T Lupuwana
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein