IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, IN GQEBERHA (PORT ELIZABETH)

Reportable

Case no: PA 19/2019

In the matter between:

NATIONAL COMMISSIONER OF SA POLICE SERVICES **First Appellant**

PROVINCIAL COMMISSIONER OF SA POLICE SERVICES **Second Appellant**

MINISTER OF POLICE **Third Appellant**

DIVISIONAL COMMISSIONER OF SA POLICE SERVICES **Fourth Appellant**

and

MESHACK PHOPHO **Respondent**

Heard: (via TEAMS) on 11 March 2021

Delivered: 25 May 2021

Coram: Davis JA, Coppin JA *et* Molefe AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment of the Labour Court (Tlhotlhalemaje J) in terms of which it reviewed and set aside the decision of the first appellant dated 16 October 2015 not to reinstate the respondent and

remitting the respondent's application to the the appellants for reconsideration in terms of section 36(2)*(c)* of the South African Police Service Act[1] ("SAPS Act"). Leave to appeal to this Court was granted by the Labour Court.

The issues

[2] In brief, in terms of section 36(1) of SAPS Act, a member of the South African Police Service (SAPS) convicted, *inter alia*, of a specified offence is deemed to have been discharged from SAPS from the date following the date of the sentence in respect of that offence. In terms of section 36(2)*(a),* if the conviction is set aside on appeal or review, or the sentence of imprisonment is replaced with the alternative of a fine, the person may, within a period of 30 days after such setting aside or replacement, apply to the National Commissioner to be re-instated as a member of SAPS.

[3] There is no express provision in the SAPS that allows for the condonation of an application made beyond the 30 days as contemplated in subsection (1). The main issue in this matter hence, ultimately, turns on the purpose of section 36(2), and what the effect of a late application is, notwithstanding that its 'lateness' had been explained. The power of the Labour Court (and this Court) to deal with the matter as envisaged in section158(1)*(h)*, read with section 157(1)(2) of the Labour Relations Act[2] (the "LRA") was not contested.

[4] Section 36 of the SAPS Act reads as follows:

> 36. **Discharge on account of sentence imposed**.-(1) a member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.
>
> (2) a person referred to in subsection (1), whose –
>
> (a) conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;

[1] Act 68 of 1995.
[2] Act 66 of 1995.

(b) conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or

(c) sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine, may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment without the option of a fine, apply to the National Commissioner to be re-instated as a member.

(3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2)(a), the National Commissioner shall re-instate such person as a member with effect from the date upon which he or she is deemed to have been so discharged.

(4) In the event of an application by a person whose conviction has been set aside or whose sentence has been replaced as contemplated in subsection (2)(b) and (c), the National Commissioner may –

(a) re-instate such person as a member with effect from the date upon which he or she is deemed to have been so discharged; or

(b) cause an inquiry to be instituted in accordance with section 34 into the suitability of re-instating such person as a member.

(5) For the purposes of this section, a sentence to imprisonment until the rising of the court shall not be deemed to be a sentence to imprisonment without the option of a fine.

(6) This section shall not be construed as precluding any administrative action, investigation or inquiry in terms of any other provision of this Act with respect to the member concerned, and any lawful decision or action taken in consequence thereof."

Overview of the arguments

[5] The respondent, whose application had been turned down by the National Commissioner because it was made beyond the 30 day period, contended that the provision should be read as implying that the 30 days commenced only after an applicant acquires knowledge of the order setting aside the conviction, and in the alternative, that if such an interpretation was not legally possible, the provision was unconstitutional, in that it unjustifiably and

disproportionately limited an applicant's constitutional rights, *inter alia*, to fair labour practices';[3] to access to justice and the courts,[4] and to just administrative action.[5]

[6] The appellants had contended that such an interpretation is not constitutionally permissible, and that a failure to make the application within the stipulated time was not condonable, although that did not render the provision unconstitutional, because it was a justifiable and proportionate time-barring provision.

[7] The Labour Court, effectively, rejected both those contentions and found that non-compliance was condonable; that the application, including the reasons given by the respondent for bringing it after the 30 days, 'was substantially compliant for the purposes of attaining the objectives of section 36(2)' of the SAPS Act; to the extent that the refusal to reinstate the respondent, because of its lateness, was predicated on a strict interpretation of the impugned section, it was unreasonable, irrational and procedurally unfair; the reasons given for the refusal were arbitrary rendering 'the entire decision reviewable'; and that in light of the facts, an enquiry into the constitutionality of the section was 'superfluous'. The Labour Court thus, *inter alia*, ordered the respondent's application to be remitted to the Appellants for reconsideration.

[8] While agreeing with the finding by the Labour Court that an enquiry into the constitutional validity of section 36(2) was not called for, the appellants on appeal contend, essentially, that the Labour Court had erred in respect of its other conclusions and ought instead to have dismissed the application of the respondent for lack of merit.

[9] Even though the Labour Court, effectively, gave a decision in his favour, the respondent is not satisfied with it, and has cross-appealled against its order. The respondent contends on appeal, basically, that the Labour Court erred in not upholding the interpretation proffered by him, or, alternatively, by not finding and declaring section 36(2) to be unconstitutional, and by failing to

[3] Section 23(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[4] Sections 9 and 34, respectively, of the Constitution.
[5] Section 33 of the Constitution.

order his re-instatement. The respondent was also critical of the invocation by the Labour Court of the principle of substantial compliance, arguing, in essence, that the Labour Court's reliance on the principle was not permissible because he never proposed it.

Additional submissions

[10] In the heads of argument submitted on their behalf, both sides essentially persisted with the arguments which they, respectively, proffered in the Labour Court. As pointed out earlier, the appellants further contend that the Labour Court ought to have upheld their argument and should have dismissed the respondent's application for declaratory and other relief, including for his reinstatement. On the other hand, the respondent disavows any benefit from the Labour Court's reliance on the principle of substantial compliance and contends that the Labour Court ought to have ordered his reinstatement on the basis of either, the interpretation of section 36(2) he advanced, or because the section was constitutionally invalid.

[11] Before the appeal hearing, the parties were referred to and invited to make additional submissions in light of the recent decision of the Constitutional Court in *Maswanganyi,*[6] which was on appeal from the Supreme Court of Appeal, where section 59(1)*(d)* of the Defence Act[7] was under scrutiny. That section provides, essentially, that the service of a member of the regular Defence Force is terminated if he (or she) is convicted of a specified offence. The question that arose there was whether the termination was effective immediately, or only after the appeal process in respect of the conviction had been exhausted.

[12] The main contention of the appellants regarding *Maswanganyi* was that the provisions that were considered there are materially different from those in the SAPS Act. According to them, unlike section 59(1)(*d)* of the Defence Act, section 36(2) of the SAPS Act was a time-bar that was "operationally necessary because reinstatement is not automatic"; further, that the time-bar

[6] *Maswanganyi v Minister of Defence and Military Veterans & Others* [2020] ZACC 4: (2020) 41 ILJ 1287 (CC); [2020] 9 BLLR 851 (CC) ('*Maswanganyi*').
[7] Act 42 of 2002.

and the requirement for reinstatement in section 36 of the SAPS Act were necessary and unjustifiable, principally, for two reasons.

[13] The first reason advanced is the following: given the nature of its organisation, SAPS "self–evidently requires certainty and finality in respect of whether a person, whose services have been terminated by operation of law, is going to seek re-instatement after the handing down of judgment" or is not going to do so because he or she "has found some other path in life" – and in order for SAPS "to arrange its affairs accordingly."

[14] The second reason is to save money. The latter reason is articulated as follows in the supplementary heads of the appellants: "if there was no time-bar then this would result in unnecessary financial expenditure at state expense because an erstwhile employee would be entitled to apply for reinstatement at any stage and SAPS would have to foot the bill for the delay", in other words "the time-bar prevents fruitless and wasteful expenditure which was a grave concern of the appellants."

[15] In turn, the respondent's legal representative submitted that were this Court, in interpreting section 36, to adopt the same approach as in *Maswanganyi;* "in its present format" section 36 "is draconian in its very nature and in direct conflict with constitutional values", and that the interpretation contended for by the appellants "will clearly lead to impractical, unbusiness-like or oppressive consequences". These submissions, however, did not take into account the rather narrow basis on which the respondent had approached the Labour Court.

The Factual matrix

[16] The respondent, as a member of SAPS with the rank of captain, was based at the Maclear Police Station in the Eastern Cape when he was alleged to have indecently assaulted a lady that assisted at the police station. In that regard, he was not only charged by SAPS with misconduct and subjected to a disciplinary hearing, but also prosecuted criminally.

[17] The disciplinary hearing found that he had not committed the alleged acts and was not guilty of misconduct. However, on 12 November 2010, the Regional Court at Elliot convicted him of the said charges and sentenced him on 25 March 2011 to 8 year's imprisonment, of which 3 years were suspended for a specified period. He appealed to the Eastern Cape High Court (Grahamstown) against the said conviction and sentence.

[18] Notwithstanding an awareness that the respondent was appealing, in a letter dated 5 April 2011, the Provincial Commander: Employee Relations and Life Cycle Management of SAPS, Colonel Ebeya, informed various officials at Head Office, including, at the Directorate of Salary Maintenance, Dicipline Management, and Service Terminations, as well as the Sub-Section Head of Service Terminations in the Eastern Cape and the Station Commander at Elliot, a Lt Col. Billson, of the termination of the respondent's service on 26 March 2011, because of his conviction, as contemplated in section 36 of the SAPS Act.

[19] The letter, *inter alia*, instructed that the respondent's "salary must be stopped immediately" and that he "must not be allowed to perform any further duties". It reiterated the provisions of section 36(2), pertaining to reinstatement, and directed that the respondent "be informed of his dismissal by serving him with this letter". The letter required proof of its service to be forwarded to the office of the Provincial Commissioner: Personnel Services, Eastern Cape.

[20] In a letter dated 14 July 2011 from the Station Commander at Elliot, Lt Col Billson, to Mrs L M Phopho, he confirms that the respondent was "discharged" from SAPS on 26 March 2011. To this letter he had attached 'supplementary documents', which included the letter from Col Ebeya of 4 April 2011. A petition by an advocate, dated 8 September 2011, addressed to the Provincial Commissioner's office, for the re-instatement of the respondent pending the outcome of his appeal to the High Court, was dismissed for being "premature".

[21] On 20 November 2014, the High Court set aside the respondent's conviction and sentence by the magistrate's court.

[22] On 13 February 2015, approximately 55 days after the High Court's decision was handed down , the respondent applied by letter, bearing the letterhead of SAPS, to the office of the Provincial Commissioner of SAPS in Zwelitsha, for re-instatement, as he had 'been cleared' by the High Court in the appeal and by SAPS at the disciplinary hearing.

[23] In this letter', he explains why he only applied some 55 days after judgement in his favour . He mentions that his advocate at the appeal hearing, Adv. JC McConnachie, had 'received' the outcome of the appeal only on 6 February 2015.

[24] On 24 April 2015, when the respondent enquired about the outcome of his application for reinstatement, he was advised that he had to submit affidavits confirming the date of receipt of the judgment of the High Court. Affidavits deposed to by him and the advocate were duly submitted by 28 April 2015. Upon further enquiry by the respondent on 5 May 2015 he was informed that the affidavits had been received and that the Finance Department was still in the process of calculating his back pay.

[25] In the affidavit, which the respondent deposed to on 24 April 2015, he states: 'On Friday 2015-02-06 at 13.32 I received a copy of the judgment from my legal counsel adv, J C MaComachie(sic) at Grahamstown. I made my re-application on Friday 2015-02-13.'

[26] In the affidavit, deposed to on 28 April 2015, the advocate states, *inter alia*, the following:

> '2. I was instructed by the Legal Aid Board to argue the appeal of Meshack Phopho versus the State (case No. CA&R 23/2011) on 3 September 2014.
>
> 3. I duly did so and judgment was reserved by her Ladyship Justice Beshe and his Lordship Jusice Lowe on the same date.
>
> 4. On several subsequent occasions I inquired from the office of the Registrar of the High Court, Grahamstown, regarding the outcome of the appeal but I was advised that judgment had as yet not been handed down and that the court file was still with the judges.

5. I made further inquiries in that connection from the office of the Registrar on or about 6 February 2015 when I was advised that judgment had in fact been delivered and that the outcome of the appeal was that it was successful and that both the appellant's conviction and sentence were set aside.

6. I uplifted a copy of the judgment on the same day and it transpired from a perusal of the judgment that it was delivered on 20 November 2015 [sic]

7. I then made immediate arrangements to inform the appellant of the outcome of the appeal and to furnish him with a copy of the judgment which I did on or about 6 February 2015.

8. The delay in advising the appellant of the outcome of the appeal was therefore due to the misinformation from the office of the registrar of the High Court, Grahamstown, and cannot be attributed to myself or the appellant as I was never advised that the judgment was due to be handed down on 20 November 2015 [sic] or of the outcome of the appeal until I made further inquiries in that regard on/about 6 February 2015.'

[27] When the respondent enquired on 9 June 2015 at the Head Office of SAPS in Pretoria concerning progress with his application for re-instatement, he was informed that the signature of the then National Commissioner, General Phiyega, was still required. Further enquiries by his erstwhile attorneys, which were also addressed to the Minister (the third appellant), produced no response.

[28] By letter dated 1 February 2016, the respondent again requested the Minister (the third appellant) to intervene, and in response was informed that the matter was receiving attention and had been referred to the office of the first appellant (the National Commissioner) "for further attention" and that he would be informed of further progress.

[29] In response to yet another letter addressed by Ms Van Staden of Legal Aid on behalf of the respondent to SAPS and dated 12 July 2016, the Divisional Commissioner: Personnel Management, Lt Gen. L Ntshiea, by letter dated 8 August 2016 intimated that the respondent's application for re-instatement "was duly considered and presented to the National Commissioner after

which a decision was taken that the reinstatement is not approved due to the late submission of the application (non-compliance with 30 day clause as prescribed in section 36(2) of the South African Police Service Act, 1995)." The letter further stated: "Please note that the status quo as per above mentioned minute is maintained."

[30] This letter prompted the respondent, represented by Legal Aid, to institute the application proceedings in the court *a quo* to, *inter alia*, review and set aside the decision not to reinstate him, because he had applied for his re-instatement beyond the prescribed 30 day period.

[31] Presumably the record pertaining to the impugned decision was received by Legal Aid on 13 July 2017, and the respondent subsequently filed an affidavit supplementing his founding affidavit in light of the record that had been filed.

[32] The supplementary affidavit was accompanied by, *inter alia*, a further affidavit by Adv McConnachie and an affidavit by Ms N Mtini who, at the time of the respondent's appeal to the High Court, was employed as High Court Manager, Legal Aid (SA), Grahamstown Justice Centre.

[33] Ms Mtini explains in her affidavit, *inter alia*, that the brief that was given to Advocate McConnachie, to represent the respondent at the appeal, was a "judicare brief", which meant that 'for all intents and purposes' the advocate was responsible "for all issues" pertaining to the matter and that the practice in the High Court in Grahamstown was for the judge's clerk to phone the judicare representative when a reserved judgment was to be handed down. The advocate was then required to appear at court to note the judgment, or to make alternative arrangments in that regard.

[34] The advocate and Ms Mtini confirmed, in their respective affidavits, that none of them had been advised that the judgment would be handed down on 20 November 2014, contradicting the contentions made in a letter by the clerk of Beshe J that he was "sure" that he had notified both parties of the date.

[35] The appellants, who opposed the application, caused an answering affidavit to be filed, to which the respondent replied.

The record of the impugned decision

[36] It is common cause that the record of the decision shows the following: the Provincial Commissioner expressed the view that the application for reinstatement was received late and that the matter was referred to Head Office for reconsideration and condonation; a legal opinion was obtained from the executive legal officer at Head Office and the reinstatement of the respondent was recommended in light of that opinion; a cost calculation was requested from the Financial and Administration Services Division to determine the amount due to the respondent.

[37] It appears further from the record that the respondent's reinstatement was also recommended by the Divisional Commissioner: Human Resources Management, Lieut. Gen. Ntshiea, on 12 August 2015; and by the Deputy National Commissioner: Corporate Service Management, Lieut.Gen. CN Mbekele, on 13 August 2015; but that the National Commissioner (at the time Gen. Phiyega) did not approve the respondent's reinstatement.

[38] It is common cause that the National Commissioner recorded the following reasons for refusing the application: "The reinstatement is not approved. I support the original recommendation by the Province. The late submission is a matter of negligence by the lawyers of the dismissed member. It is therefore not an issue for SAPS. The lateness cannot be proved in any manner. The burden of proof is for the member and can be argued in court. SAPS must comply with the prescriptions and be consistent."

Evaluation

Conclusions in Maswanganyi

[39] It is indeed so that the wording of the Defence Act considered by the Constitutional Court in *Maswanganyi,* is different to that of section 36 of the SAPS Act, in that section 59(1)(d) of the Defence Act merely stipulates that the service of a member of the regular Defence Force is terminated if he, or she, is sentenced to a term of imprisonment by a competent civilian court

without the option of a fine, or if a sentence involving discharge or dismissal is imposed upon him, or her, the under the Code.

[40] Unlike section 36 (particularly section 36(2)) of SAPS Act, the provision in the Defence Act does not (at least) expressly require a member to apply to be reinstated in the Defence Force if her or his conviction (or sentence) is set aside or altered on appeal as contemplated in section 36.

[41] Of importance, in *Maswanganyi* the Constitutional Court held, *inter alia*, that the words "conviction" and "sentence" in section 59(1)*(d)* of the Defence Act, must be interpreted as referring to "valid and final" convictions and sentences where there is an appeal; that once the conviction or sentence of the trial court was set aside (on appeal or by review) there was no longer any lawful conviction, or sentence, and the jurisdictional factors set out in section 59(1)(d) fall away, or are, as a result, absent; that the member of the Defence Force no longer has a criminal record and no purpose would be served by continuing to subject such a member to the penal provisions of the section; further, that if a conviction and sentence have been set aside on appeal (or on review), the fact of the conviction and sentence are "wiped-out"- i.e. "[t]hey are treated as never having occurred."[8]

[42] The Constitutional Court also held that once a conviction and sentence is "wiped –out" there is no longer a connection between the purpose for which section 59(1)*(d)* was enacted in the application of the provision to the Defence Force member; that when the jurisdictional factors of section 59(1)*(d)* fell away, the termination of employment of the Defence Force member "was reversed by operation of law"; and that that was so, because, properly understood, in the absence of a valid conviction and sentence, in the form of a final order confirming the order of the trial court, there was no valid termination of the member's employment since the jurisdictional factors for the operation of section 59(1)*(d)* are absent.[9]

[8] *Maswanganyi* at paras 41 and 42.
[9] Id at para 45.

[43] Significantly, the Constitutional Court confirmed the following principle, which is one common to appeals in all criminal matters: "Once the charges on which the applicant was initially convicted were set aside on appeal, the applicant should have been treated as never having been convicted, nor sentenced."[10]

[44] Of further relevance, the Constitutional Court held further that an interpretation that had been proferred by the Minister of Defence in that matter, which had the effect of terminating the service of the member as soon as the trial court imposed sentence, irrespective of the election of the member to appeal the order of the trial court, "was problematic" – in that it did not factor in the hierarchical functioning structure of other courts, and that if the Constitutional Court were to adopt it "it would be tantamount to saying that any appeal processes and any subsequent decisions by the Superior Courts are of no moment."[11]

[45] More importantly, the Constitutional Court in *Maswanganyi* found that such an interpretation would also be at variance with the provisions of section 35(3)(*o)* of the Constitution which provides, effectively, that every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court.[12]

[46] Critically, the Constitutional Court held in *Maswanganyi* that to allow the Defence Force "to stick to its initial stance, which was based on an erroneous decision of the trial court", irrespective of the outcome of the appeal, "would have the effect of excusing the SANDF from the obligation to comply with the binding orders of appellate Courts."

[47] In respect of the facts in that matter, the Constitutional Court held that M's employment as a member of the Defence Force was never validly terminated because his conviction and sentence by the trial court had been set aside on appeal and that he, accordingly, did not require a reinstatement order.[13] It

[10] Id at para 46.
[11] Id at para 40.
[12] Id.
[13] Id. at para 46.

found fortification for that view in what it held in *Steenkamp,*[14] where it clarified the distinction between unlawful, unfair and invalid dismissals. It held there, *inter alia*, that an order of reinstatement was only required if a dismissal was unfair, and that no order of reinstatement was required if the dismissal was invalid; that if an employee, whose dismissal was declared to be invalid, was prevented by the employer from entering the workplace to perform his or her duties, a court may, in an appropriate case, interdict the employer from doing so and order it to allow the employee to perform his, or her, duties.

The impact of those conclusions

[48] Arguably the principles reiterated by the Constitutional Court in *Maswanganyi* concerning the right of an accused person to appeal in respect of his or her conviction and/ or sentence to a higher court, and the implications, including the effect, of a successful appeal against a conviction (or sentence) by the trial court, cannot, and does not, only hold true for members of the Defence Force, but are equally valid for all accused and convicted persons. Conceivably, there is no basis for excluding persons from the latter category, merely because they happen to members of SAPS.

[49] At least, in respect of all those members who opted to appeal, and particularly those who are completely exonerated of all guilt on appeal (i.e. those contemplated in subsection (2)(a)) and those whose sentence had been altered on appeal (or review) to provide for the option of a fine, section 36, *prima facie*, appears to transgress all of the hallowed general principles which formed the basis of the Constitutional Court's decision in *Maswanganyi* and which are highlighted above.

[50] At least on the face of it, in terms of section 36, a member appears to be deemed to be discharged from SAPS on the strength of a trial court's conviction or sentence, irrespective of whether the member has elected to appeal against such conviction (and/or sentence) to a higher court, and irrespective of the successful outcome of the appeal. A member who was successful on appeal is required, within a tight time-frame of 30 days (which,

[14] *Steenkamp v Edcon Ltd.* [2016] ZACC1; 2016 (3) SA 251 (CC) para 118 ("*Steenkamp*").

at least expressly does not seem to accommodate his knowledge of the outcome of the appeal) to apply to the National Commissioner to be reinstated in SAPS, notwithstanding that his conviction (and sentence) by the trial court have been totally "wiped-out" on appeal and there is (retrospectively) no final order confirming his conviction, and the jurisdictional facts that are required to trigger the deeming provision in section 36(1) have been "wiped-out" on appeal and are to be considered as never having been there in the first place – thus rendering his discharge invalid.

[51] On the face of it, the section does not only seem to undermine the hierarchy of the courts and ignore the efficacy and importance of decisions of courts superior to the trial court, but appears to trample upon an accused member's constitutional right to a fair trial, which includes his right of appeal to, or review by, a higher court. Viewed together, sub-sections 36(1) and (2) (and possibly sections 36(3) and (4)) of the SAPS Act, are open to a meaning which is inimical to and not in conformity with the Constitution.

[52] Even though section 36(2) (and subsections (3) and (4)) literally seem to flow from subsection (1), they apparently also serve to give a more restrictive meaning to that section. Subsection (2), in particular, and for example, requires a member whose conviction and sentence by the trial court has been wholly set aside on appeal to apply for reinstatement.

[53] In that regard, it prima facie and arguably, implies and axiomatically reinforces the notion that the discharge contemplated in subsection (1) is final and is triggered by and predicated upon the trial court's conviction - in total disregard of the member's constitutional right to appeal to a Higher court against that conviction, and irrespective of the outcome of that appeal. But possibly more worryingly, the true effect of the higher court's decision, which, according to the Constitutional Court in *Maswanganyi* automatically "wipes-out" that conviction, is then ignored and undermined and has no retrospective annulling effect.

[54] The fact that in terms of section 36(3) the National Commissioner is not given a discretion, but to reinstate a member who has been wholly exonerated on

appeal, does not seem to make-up for those apparent shortcomings. The discharge is final unless and until the member applies for re-instatement and the National Commissioner re-instates that member.

[55] Consequently, unless subsection (2) (and possibly subsections (3) and (4)) are reasonably capable of being read in conformity with the Constitution, or justified, they would be unconstitutional and invalid and liable to be struck down. In the latter instance, if those subsections are incapable of being cleanly severed from the rest of section 36, leaving the purpose of that section intact, the rest might share the same fate.

Inapposite case for applying *Maswanganyi*

[56] Having said that, it is apparent that the application of the principles reiterated in *Maswanganyi* raises issues that were clearly not foreseen and appreciated by the parties. The case made out by the respondent and which the appellants were required to meet, strictly speaking, did not require a justification of the regime of discharge and reinstatement postulated by section 36. It would be grossly unfair to determine the constitutionality of that regime in those circumstances and that would have to wait for another occasion where those issues have been properly raised and ventilated by the parties at the outset.

[57] For now, the issues raised in this matter possibly requires us, metaphorically speaking, to apply palliative therapy to a limb that may be gangerous and (in the right case) possibly might require amputation, possibly along with other limbs that are equally affected by the same malady.

[58] In this matter we are required to assume that the regime advanced in section 36 of the SAPS Act is constitutionally valid.

[59] Section 39(2) of the Constitution requires courts, when interpreting any legislation, "to promote the spirit, purport and objects of the Bill of Rights." In *Hyundai*[15] the Constitutional Court held that the section required the legislative

[15] *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC) para 22.

provisions that were being interpreted to be read, as far as is possible, in conformity with the Constitution.

Section 36(2)

[60] In *Cool Ideas*[16], amongst other cases, the Constitutional Court summarised the correct approach to statutory interpretation as encompassing the following: (a) the words in the legislation being interpreted must be given their ordinary grammatical meaning, unless it would result in an absurdity; (b) the provision being interpreted must be interpreted purposively; (c) in its proper context; and (d) as far as reasonably possible, the provision must be interpreted consistently with the Constitution to retain its constitutional validity.

[61] Turning to the actual wording of subsection (2) – it requires a member whose conviction has been wholly set aside, or whose sentence has been replaced by a sentence other than a sentence of imprisonment without the option of a fine, to apply "within 30 days" after such setting aside, or replacement, to the National Commissioner to be "re-instated" as a member of SAPS.

[62] There is nothing in the subsection, the section itself or even in the SAPS Act that informs, let alone in clear and certain terms, what the fate of an application that is not brought within the stipulated time period, with the result that the applicants contemplated in subsection (2), who are expected to comply with the provision, would not be able to appreciate, even with reasonable certainty, the consequences of not complying with time period and whether such failure is condonable, and if so, what needs to be done to ensure that the non-compliance is condoned.

[63] Even the National Commissioner is left in the dark, thus creating a veritable opportunity for arbitrariness and irrationality, not countenanced by the Constitution, in particular the principle of legality, that is ensconced therein,[17] and which, *inter alia*, requires reasonable clarity and certainty in such matters.

---

[16] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.
[17] See, inter alia, *Pharmaceutical Manufacturer's Association of South Africa: in re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 17.

[64] The argument put up by the appellants that the 30 day limit is an uncondonable time-bar, and the purpose or justification proffered for it, namely, (in brief) that it is necessary for and ensures finality, and serves to put a cap on the amount SAPS would have to pay the member in back-pay, does not stand up to scrutiny.

[65] It appears unreasonable and constitutionally unpalatable to impose a time limit that neither allows for condonation, nor allows for the possibility that a member may (conceivably) reasonably not be able to comply with the time limit, for example in circumstances where the member was not and could not reasonably have been aware of the date of the judgment of the High Court and only became aware of it later when compliance with the strict time limit was no longer possible. The Prescription Act,[18] which is certainly the pre-eminent vehicle of, *inter alia*, extinctive time-barring in our law, has ample provisions that take into account the creditor's knowledge or lack thereof, including concerning the nature of the debt, the identity of the debtor, etc., and provisions that allow for the interruption of prescription in specified circumstances, to counterbalance its uncondonable, extinctive time-barring provisions.

[66] The time limit, as is contended for by the appellants, is palpably not fair and does not give expression to the values which underpin the Constitution. To uphold their argument would not promote the spirit, purport and objects of the Bill of Rights.

[67] The other purpose advanced by the appellants, namely, that it is intended to save SAPS money, in that it limits the backpay that would be payable to a member who is to be retrospectively reinstated, is not really sound. It fails principally because section 36, or the SAPS Act, as a whole for that matter, does not mention or seek to regulate the time that it should take for the appeal (or review) process to be completed – notwithstanding that such a process may take a significant time to complete, sometimes years – and would indeed be the period that has a marked impact on the amount of the backpay that has to be paid to a member upon re-instatement.

[18] Act 68 of 1969.

[68] The third alleged purpose or justification advanced by the appellants for the time-bar, namely, that it is intended to discourage members from deliberately delaying to be reinstated in order to benefit financially or otherwise, is also not convincing. Such deliberate delays or recalcitrance can effectively be dealt with by means of investigation and discipline in terms of, *inter alia*, section 34 of the SAPS Act, which the National Commissioner has the power to invoke.

[69] On the other hand, the interpretation of section 36(2) suggested by the respondent is also not constitutionally feasible. He contends that it is capable of being read in conformity with the Constitution if the following words are "inserted after the words '30 days' in section 36(2)", namely "or such longer period as may on good cause be allowed". That would be tantamount to a "reading – in" as opposed to a "reading – down". The former is not a form of interpretation, but is a remedy that has to be distinguished from the latter, which may be a mode of interpreting a legislative provision in conformity with the Constitution[19].

"Re-instatement"

[70] Turning to the words "re-instated as a member" in section 36(2) - The ordinary meaning of "to reinstate", as applied to an employee who has been unfairly dismissed, is to re-place that person in the same position from which he or she had been dismissed and so "to restore the status quo ante the dismissal."[20]

[71] In *Equity Aviation Services*[21] the Constitutional Court explained the meaning of the term "to reinstate" as used in the LRA as follows:

> "The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in an unfair dismissal disputes. It is aimed at placing an employee in the position he

[19] See, inter alia, *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) fn 30.
[20] See, inter alia, *Nel v Oudtshoorn Municipality* [2013] ZASCA 31; (2013) 34 ILJ 1737 (SCA) para 8 (and the cases cited there).
[21] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC) para 36.

> or she would have been [in], but for the dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal." (Footnotes omitted)

[72] If the word "re-instate" in section 36 (2) is given that very meaning, it spawns further (theoretical) difficulties, in particular, since that definition of the term implies that there was an unfair dismissal. Read with section 36(3), which obliges the National Commissioner to "re-instate", *inter alia*, the member who has been wholly exonerated on appeal, there would appear to be an acknowledgment, firstly, that there has been a dismissal of that member, which was unfair[22] and, secondly, that section 36(1) permitted an unfair dismissal of that member, which is to be "rectified" by the reinstatement of that member as contemplated in subsections (3) and (4) when that member applies for reinstatement as contemplated in subsection (2).

[73] Such an interpretation, *per se*, would be in breach of the particular member's right, in terms of section 23(1) of the Constitution, to fair labour practices, and the member's right of appeal (or to apply for review) to a Higher Court as contemplated in section 35(3)(o) of the Constitution. The fact that the dismissal is automatic in terms of section 36 (1) and by operation of law, does not alter that fact, and does not justify those breaches.

[74] However, it is possible to avoid such deleterious consequences by giving the word "re-instate" its ordinary dictionary meaning, namely, "to restore to a former position or state ".[23] In context, this would mean to restore the applicant to the state of membership in SAPS that he or she formerly held. Read with subsection (3), in the case of a member whose conviction and sentence has been set aside wholly on appeal, it means that he or she is to be reinstated retrospectively and with effect from the date upon which he or she was deemed to have been discharged. This would mean that any membership in SAPS, salary, wage, allowances, privileges, or other benefits to which he or she was entitled to as a member, and which he or she had

[22] Cf *Maswanganyi* para 46 and *Steenberg* para118.
[23] Oxford English Dictionary.

forfeited as from that date, has to be restored to him or her as from that date.[24]

Substantial Compliance

[75] In essence, the Labour Court seems to have found that section 36(2) was capable of substantial compliance, but also found that the failure to comply with the 30 day time limit prescribed in the section, was condonable at the instance of the National Commissioner, hence its order remitting the respondent's application for re-instatement back to the appellants for reconsideration.

[76] The respondent has contended, in effect, that the finding of substantial compliance by the Labour Court was wrong because he never relied on it. But the submission is not sound since it is open to a court charged with the interpretation of a legislative provision to conclude, as an incident of the interpretation, that it is capable of substantial compliance without a party having invoked that principle.

[77] However, in order to determine substantial compliance the court must first establish the purpose of the provision and then determine whether what was done by the applicant to comply with the provision, satisfied that purpose. If so, the court may find that the action was in substantial compliance of the provision, although it did not comply with the letter thereof.[25]

[78] In this instance, the Labour Court seems to have applied the concept of substantial compliance differently. If what the respondent did was in substantial compliance (properly determined) of subsection (2) that would be the end of the matter – the National Commissioner would be obliged in those circumstances to reinstate the respondent, whose conviction and sentence had been wholly set aside by the appeal court, in the sense contemplated in

[24] Cf section 43 of the the SAPS Act (Act 68 of 1995) which deals with the suspension of members.
[25] *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 646C: *African Democratic Party v Electoral Commission and others* 2006 (3) SA 305 (CC) para 24; *Liebenberg No and others v Bergrivier Municipality* 2013 (5) SA 246 (CC) paras 22-26 (and the cases cited there); and *Allpay Consolidated Investmenyt Holdings (Pty) Ltd v CEO South African Social Security Agency* 2014 (1) SA 604 (CC) ("*Allpay*") para 30.

subsection (3). The Labour Court should merely have made an order to that effect.

[79] Properly construed the purpose of subsection (2) is to get the (discharged) member who has successfully appealed against his or her conviction as is contemplated in that subsection, to apply to the National Commissioner for reinstatement as soon as possible after such an appeal outcome. It does not serve the purposes advanced by the appellants as traversed above. Instead, it appears to be directory and not peremptory.[26] Further, it does not stipulate, at least in clear and unequivocal terms, what the consequence of noncompliance is, further reinforcing its advisory or directory nature.

[80] Nevertheless the time period is not to be regarded as being of no effect; it cannot just be ignored. A failure to comply with it impliedly and naturally requires an explanation, since it is a measure aimed at discouraging laxity and encouraging prompt action. If the National Commissioner is of the view that an applicant has deliberately (or unreasonably) delayed to apply for reinstatement the National Commissioner, despite re-instating that person, is empowered to cause that matter to be investigated as envisaged in section 34 of the SAPS Act, which could result in disciplinary action being taken against that person (section 36(6)).

[81] Subsection (2) is indeed capable of substantial compliance, and in this instance the respondent's application substantially complied with that section, although not with its letter. The law also does not expect anyone to do that which is objectively not possible.The respondent applied as soon as he could reasonably have done so, after becoming aware of the outcome of the appeal.

[82] There was no basis or justification for finding that the respondent's attorney was negligent in establishing the date for the handing down of the appeal judgment, or was negligent in informing the respondent of it, or more pertinently, that such negligence (none of which was established) could be held against the respondent personally. The reason(s) furnished by the

[26]However, this distinction is not useful for determining whether there has been substantial compliance with the provision- see *Allpay* (above) para 30.

respondent for not complying with the 30 day period is objectively reasonable. In any event, nothing precluded the first appellant, i.e. the National Commissioner, from further investigating the reason furnished if he or she was not satisfied with it.

[83] The first appellant did not appreciate and act in accordance with the nature of the discretion accorded the National Commissioner concerning the reinstatement of a member whose conviction and sentence had been set aside on appeal and as contemplated in section 36 - and, acted arbitrarily and irrationally in considering the respondent's application for reinstatement in contravention of the principle of legality in the Constitution.

[84] In the circumstances the appeal must fail and the cross-appeal must succeed to the extent that the Labour Court ought to have ordered the National Commissioner to reinstate the respondent as a member of the SAPS as contemplated in section 36(3).

[85] Neither party has asked for a costs order against the other, and in the circumstances no costs order will be made.

[86] In the result:

86.1. The appeal is dismissed;

86.2. The cross-appeal is upheld;

86.3. The order of the court *a quo* is set aside and is replaced with the following order:

"1. The decision of the First Respondent, effectively, to not re-instate the applicant as a as a member of the SAPS is reviewed and set aside;

2. The First Respondent is to forthwith reinstate the applicant in the SAPS retrospectively to the date of his deemed discharge, with no loss of rank, salary, allowances, privileges or benefits to which he would be entitled as a member of the SAPS.

3. There is no costs order."

86.4. There is no costs order in respect of the appeal and cross-appeal.

_____

P Coppin

Judge of the Labour Appeal Court

Davis JA and Molefe AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANTS: P N Kroon SC
With A Rawjee and A Desi
Instructed by the State Attorney

FOR THE RESPONDENT: Mrs E van Staden
Of Legal Aid (SA)