IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 8961/2013

Date: 9 March 2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between:

ANTHIPUS KAGISO MOGAPI

APPLICANT

And

MINISTER OF DEFENCE

FIRST RESPONDENT

THE CHIEF OF THE SOUTH AFRICAN DEFENCE FORCE

SECOND RESPONDENT

THE CHIEF OF SA ARMY

THIRD DEFENDANT

THE SECRETARY OF DEFENCE

FOURTH DEFENDANT

S.W.O. LEKOKO

FIFTH DEFENDANT

W.02.I.I VIZINITIN

SIXTH RESPONDENT

JUDGMENT

PRETORIUS J,

[1] In this application the applicant seeks an order that the decision by the third respondent of 4 June 2012 to terminate the services of the applicant as a member of its staff be reviewed and set aside and that the respondents be ordered to reinstate the applicant to his position with the third respondent retrospectively. The court is not requested to review the decision of the Chief of the Army not to reinstate the applicant.

[2] It is common cause that the applicant, who was a sergeant in the Defence Force, was absent from work from 2 May 2012 until 18 June 2012 without permission or consent from his supervisor.

[3] The applicant was employed as a sergeant and stationed at Air Force Base, Waterkloof as an apprentice carpenter. There had been

numerous complaints on 13, 21 and 23 June 2011 that the applicant was absent without consent.

[4] Ultimately he appeared in front of a Military Court Judge and was convicted of being absent from work without permission and fined an amount of R750 on 6 December 2011. He was absent from work once more on 2 May 2012. He remained in absence until 18 June 2012.

[5] The provisions of section 59(3) of the Defence Act, no. 42 of 2002 ("the Act") were invoked and the applicant was administratively discharged from his duties on 4 June 2014. On 2 November 2012 a Board of Inquiry was convened in order to investigate the circumstances of the applicant's absence and to decide whether he had supplied good cause for his absence. The Board found that the applicant had not submitted a reasonable explanation for his absence and that he had been absent for 30 days.

[6] The applicant had alleged that he was attending a spiritual healer as a result of problems he had had. He did not attach any documents to the founding affidavit from a representative of the church nor from his mother confirming this version. It was only in his replying affidavit that he attached a letter from the traditional healer and an affidavit from his mother. His mother set out:

"During the month of May 2012 I had a problem with Kagiso being my son. He indicated he was not feeling well and that he is not happy at work" (Court's emphasis)

[7] According to her she had phoned Mr Lokoko, on 8 June 2012 to inform him that her son was not well and that he was at a church for spiritual healing. Mr Lekoko visited the church and found that nobody knew the applicant or knew that he had been there for more than a month. An affidavit by the spiritual healer declared that the applicant had been staying at her place of spiritual healing from 4 May 2012 until 13 June 2012. It is trite law that an applicant has to make out its case in the founding affidavit and not in the replying affidavit. It is curious that the applicant's mother only phoned his division after he had already been discharged from the Defence Force. The letter from the spiritual healer was only faxed after the applicant had been discharged.

[8] On 7 January 2013 the applicant launched an application that he should be reinstated to his position as sergeant and that his salary should be paid retrospectively. On 26 July 2013 the applicant, assisted by his attorneys made a written representation to the third respondent in terms of section 59(3) of the Defence Act 42 of 2002, which provides:

> *"(3) a member of a regular force who absent him or herself from official duty without permission of his or her Commanding Officer for a period of 30 days must be*

regarded as having being dismissed if he or she is an officer 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 last day of his or her official leave but the Chief of Defence may on good cause shown, authorise the reinstatement of such a member on such condition as he or she may determine"

[9] On 25 September 2013 the third respondent responded to the applicant's application for reinstatement setting out, *inter alia*

"2. *In considering the member's application for reinstatement into SANDF, the following were taken into account:*

(a) The member was absent from 2nd May 2012 until 18th June 2012.

(b) There was no attempt on the part of the member to comply with SANDF policies and prescripts regarding his absence from his place of work.

(c) During the absence of L cpl Mogapi, members of his unit visited the place it was alleged he was at, however persons at the premises had not knowledge of him being there.

(d) On his own version of events he has admitted that he lied to F SGT Niewenhuis regarding his reasons for

his absence.

(e) The member was lawfully discharged from the SANDF by operation of law.

3. Based on the aforementioned this office is of the opinion that good cause was not shown by the member for his reinstatement into the SANDF therefore this application is unsuccessful."

[10] On 27 June 2014 the applicant amended his pleadings requesting the current relief of review of the decision of the second respondent. The main submission the applicant tenders is that he was only absent for 29 days as Saturdays and Sundays should not be included when calculating the days he had been absent; and furthermore that the first day of his absence should be excluded and the last day included.

[11] On 2 November 2012 a Board of Inquiry was convened in order to investigate the surrounding circumstances regarding the applicant's absence and found that there was no acceptable explanation for the applicant's unauthorised absence. It was recommended that the administrative discharge be confirmed. Section 59(3) of the Act provides that a member must have been absent from official duty without the consent or permission of the Commanding Officer for a period of 30 days.

[12] Section 4 of the Interpretation Act 33 of 1957 provides:

> *"Reckoning of number of days when any particular number of days is prescribed for doing any act, or for any other purposes, the same shall be recant exclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall recant exclusively of the first day of exclusively also of every Sunday or Public holiday"*

Nothing is contained in the provisions of section 59(3) of the Defence Act which would suggest that the application of section 4 would lead to an injustice justifying a departure from the method prescribed in the Interpretation Act. This court accepts that section 4 of the Interpretation Act applies. The applicant had been absent for 33 days from 2 May 2012 until 4 June 2012, when he was discharged.

[13] Review:

In this case administrative action was taken on 4 June 2012 when a letter was sent to the applicant discharging him on account of misconduct in terms of section 59(3) of the Defence Act. There was thus nothing to review as he was discharged after 30 days of absenteeism without permission from his commanding officer as provided for in section 59(3). It is clear that neither the third Respondent nor any person under his command had taken a decision to dismiss the Applicant. The dismissal took place by operation of law

in terms of section 59(3) of the Defence Act.

[14] In **Minister van Onderwys en Kultuur en Andere v Louw 1995(4) SA 383 (A)** at 388G-J the court finds:

> *"In casu is die respondent in die afdankingsbrief in kennis gestel dat hy ontslaan was. Dit was nie die uitvloeisel van 'n diskresionêre besluit nie, maar slegs 'n mededeling van 'n gevolg wat volgens die appellante se beskouing van regsweë ingetree het.*
>
> *Daardie beskouing was inderdaad juis. Anders as wat Basson R bevind het, was dit nie in geskil dat die respondent vir meer as 30 opeenvolgende dae van diens afwesig was nie, en dat hy nie die nodige toestemming gehad het nie."*

[15] The same conclusion was reached in **Mkhwanazi v Minister of Agriculture and Forestry 1990(4) SA 763 (D and CLD)** at 768 C-G where it was held:

> *"The section in terms of which the respondent acted has already been cited in full. The South African Public Service Act 111 of 1984 has an almost identical provision (although cast in slightly different form) in s 16(5).*
>
> *As far as I am aware, neither of these provisions has been the topic of a reported judgment.*

It is significant that both sections employ the phrase 'absents himself', which clearly imports an element of volition.

When an employee has been absent from work for more than a month without leave or permission the employer is placed in the invidious position of not knowing (a) why the employee is absent and (b) how long he will remain absent.

The section comes to the employer's rescue by deeming a discharge, so enabling the post to be filled and the work to continue."

This court could dismiss this application solely on the ground set out in the abovementioned decisions.

[16] His mother had phoned a member of the applicant's unit for the first time on 8 June 2012, according to her. This call was made 4 days after the applicant had been discharged by operation of law. She only faxed a letter from the spiritual healer on 16 June 2012 – 12 days after the applicant had been discharged. The court finds that on 4 June 2012 the applicant had already been absent for a period of 30 days without good cause.

[17] In this instance Warrant Officer Vizintin attempted to contact the applicant to determine the reason for his continuous absence from work, but could not do so. Mr Lekoko's evidence was that he and Warrant Officer Mampane had gone to the Church and found that

nobody at the address had ever seen the applicant. The fact that the affidavit from his mother and the spiritual healer were only disclosed when the applicant served the replying affidavit lends much less weight to the veracity of these statements. The applicant had failed to make out a case for reinstatement.

[18] The court finds that the applicant had failed to demonstrate good cause for his absenteeism. The decision not to reinstate the applicant was correct when all the circumstances are taken into consideration. However, he was discharged in terms of section 59(3) of the Defence Act on 4 June 2012. There is no decision in this regard to review.

[19] Therefor I make the following order:

The application is dismissed with costs.

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Judge C Pretorius

Case number	: 8961/2013
Application heard on	: 23 February 2015
For the Applicant	: Mr Mkanzi
Instructed by	: MESSRS MKANZI ATTORNEYS
For the Respondent	: Adv D Mtsweni
Instructed by	: STATE ATTORNEY
Date of Judgment	: 9 March 2015