


REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA

11/11/2014
CASE NO: 45970/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
11/11/2014	
DATE	SIGNATURE

In the matter between:

LEHLOHONOLO EDWARD CASSEL KHONGOANA

Applicant

and

MINISTER OF POLICE

First Respondent

NATIONAL COMMISSIONER OF THE SAPS

Second Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Third Respondent

JUDGMENT

LAZARUS AJ:

Introduction

1. This matter concerns the constitutionality of section 36 of the South African Police Service Act 68 of 1995.
2. This section and in particular subsection 36(1) deems to have been discharged from the South African Police Service ("SAPS"), any member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine.
3. The section was invoked against the applicant who had been employed as a member of the SAPS since May 1986. On 26 January 2010, the applicant was convicted of assault with intent to do grievous bodily harm by the Magistrate's Court. He was sentenced to a five-year term of imprisonment, without the option of a fine. He did not appeal the conviction or sentence nor did he challenge his conviction in review proceedings. He served part of his jail sentence and was released on parole on 25 November 2010.
4. Upon his release on parole the applicant wrote a letter to the first respondent requesting that he be reinstated as a member of the SAPS. On 28 March 2011 the applicant was advised by letter from the Acting Head: Human Resource Practises and Administration of the SAPS that –

"According to this office's records you were dishonourably discharged from the South African Police Service (SAPS), and due to this, it disqualifies you from being considered for re-enlistment within SAPS."

5. Having been advised by his attorney that he had been unfairly dismissed the applicant initially sought relief in terms of the Labour Relations Act 66 of 1995 ("the LRA") from the Safety and Security Sectorial Bargaining Council and, later, from the Labour Court. The application to the Labour Court, however, was withdrawn by the applicant. The applicant pleads that he did so upon his legal representatives' realisation that his discharge from the SAPS did not occur pursuant to the provisions of the LRA, but rather by operation of section 36 of the South African Police Service Act ("the Act"). The applicant alleges that it was this realisation that then led to a "common understanding" amongst the legal representatives of the parties to this litigation. This "common understanding", with the applicant having elected to withdraw his application, was not considered or pronounced upon by the Labour Court.
6. The applicant now seeks relief from this court. In essence, he seeks an order that section 36 of the Act be declared inconsistent with the provisions of sections 10, 23 and 33 of the Constitution of the Republic of South Africa ("the Constitution") and with the common law principle of *audi alteram partem* and thus invalid. The applicant further seeks an order that he be reinstated into the services of the SAPS.

7. Section 36 of the South African Police Service Act, entitled "*Discharge on account of sentence imposed*" provides as follows:

(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;

(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 reinstated 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 reinstate 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 any 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) reinstate 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 reinstating 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."

The parties' contentions

8. According to the applicant, members of the SAPS who have been convicted of an offence without the option of a fine (such as the applicant in the present matter) have no remedy to ameliorate the consequences of their deemed discharge in terms of section 36(1). This is so, the applicant

contends, for two reasons: Firstly, because the discharge provided for in the section operates as a consequence of law and does not constitute administration action thus providing potential relief by way of review proceedings. Secondly, although section 36(6) does not preclude any administrative action, investigation or inquiry in terms of any other provision of the Act, these remedies are only available to members who have appealed or reviewed their conviction or sentence as contemplated in sections 36(2) – 36(5).

9. Providing no remedy (in particular a hearing) to members who have been discharged pursuant to section 36(1), the applicant contends, offends the right to dignity, fair labour practice and fair administrative action enshrined in sections 10, 23 and 33 of the Constitution and is further inconsistent with the common law principle of *audi alteram partem*. While mechanisms to discipline errant members of the SAPS are clearly necessary, the applicant contends that there are other less restrictive and more appropriate means to achieve the objects of section 36, namely the dispute resolution procedures contemplated in the LRA and the judicial review procedure contemplated in the Promotion of Administrative Justice Act, 2000. Accordingly, the applicant contends, section 36 is neither reasonable nor justifiable in an open and democratic society and thus falls to be declared invalid.

10. The respondents deny that section 36 deprives members of the SAPS of a remedy and in particular of a right to a fair hearing. The respondents

contend that a member against whom the deeming provision operates remains entitled to approach the SAPS, following their conviction, and present evidence to rebut the deeming provision. According to the respondents, the provisions of section 36(1) only operate on a temporal basis; i.e. until evidence to the contrary is submitted. When that evidence is submitted, the respondents contend, the SAPS is obliged to consider it. For this proposition, the respondents rely on section 36(6), which, the respondents' contend, precludes any interpretation of section 36(1) as excluding a hearing and investigation of the circumstances surrounding a member's conviction or sentence. Should the SAPS refuse to entertain such a member's request for a hearing or his or her submissions tendered to rebut the deeming provision, such refusal, according to the respondents, is reviewable.

11. The respondents' further contend that even if section 36(1) of the Act impermissibly limits certain rights in the Bill of Rights, the clause constitutes a reasonable and justifiable limitation as contemplated in section 36 of the Constitution. This is so, the respondents contend, for numerous reasons including the fact that the SAPS cannot afford to keep the post of a member who is serving a sentence vacant until such time as the sentence has been served, the public trust and confidence in the SAPS which depends largely on the conduct of its members and which could be breached by the re-appointment of members who have committed serious offences and the important role the section plays in deterring criminal conduct within the SAPS.

The interpretation of section 36 of the South African Police Service Act

12. In considering the interpretation of section 36 of the Act, I am required by virtue of section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.
13. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*¹ it was said of this section that it requires courts “to prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”. In *National Credit Regulator v Opperman and Others*² the Constitutional Court added that “If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen”.
14. As stated in *Hyundai*, however, there is a limit to this principle. Courts may only give effect to the principle where a constitutionally compliant interpretation would not be unduly strained.³ The constitutionally compliant interpretation contended for must be a plausible interpretation or one that

¹ 2001(1) SA 545 (CC) at paragraph 23.

² 2013 (2) SA 1 (CC) at paragraph 42.

³ *Investigating Directorate* (supra) at paragraph 23.

can reasonably be given to the legislation in issue.⁴ Any such interpretation must remain faithful to the actual wording of the statute.⁵

15. The first question that requires consideration in this matter is whether a member who falls within the ambit of section 36(1) of the Act has a remedy to address the consequences of the deeming provision containing in the section. As mentioned above, the respondents contend that this remedy is contained in section 36(6). It is thus in the interpretation of this subsection that the question of whether a constitutionally compliant interpretation is plausible. Should I find that section 36(1) indeed does deprive a member of a remedy and that subsection (6) does not assist, the further question that arises is whether the failure to provide a remedy to a member in the circumstances constitutes a limitation of the member's fundamental rights as contained in the Bill of Rights. If so, the final question I need to consider, is whether a limitation of the rights of a member affected by the provision of section 36(1) is reasonable and justifiable in an open and democratic society as contemplated in section 36 of the Constitution.

16. It is correct, as the applicant contends, that the discharge contemplated in section 36(1) arises by operation of law. It is not dependant on an administrative decision which may be challenged in review proceedings.

⁴ *National Credit Regulator* (supra) at paragraph 42.

⁵ *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paragraph 22.

17. I base this conclusion on the judgment of Mpati DP in *Phenithi v Minister of Education and Others*⁶ which considered the constitutionality of section 14(1) of the Employment of Educators Act 76 of 1998, which section is similar, in certain respects, with section 36(1) of the South African Police Service Act.
18. Section 14(1)(a) of the Employment of Educators Act provides that “*An educator appointed in a permanent capacity who is absent from work for a period exceeding 14 consecutive days without permission of the employer; shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct ...*”.
19. In considering whether the appellant’s discharge constituted administrative action, Mpati DP, referring to *Minister van Onderwys en Kultuur en Andere v Louw*,⁷ stated that where the employee is informed in a letter of discharge that he or she has been discharged in terms of such a provision “*it is not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law*”⁸.
20. The fact that the deemed discharge of a member of the SAPS may not be an administrative act does not automatically mean, however, that the member has no remedy.
21. In the case of the Employment of Educators Act, section 14(1) the operation of the deeming provisions of section 14(1)(a) may be lifted or

⁶ 2008 (1) SA 420 (SCA).

⁷ 1995 (4) SA 383 (A).

⁸ *Phenithi* supra at paragraph 9.

revoked by the employer directing otherwise. An educator may also be reinstated in terms of section 14(2), which provides that *"If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine"*.

22. On this basis it was found in *Phenithi* that section 14(1) of the Employment of Educators Act is not in conflict with the Constitution as *"the educator is not precluded from placing before the employer material or facts that may move the latter to 'direct otherwise', i.e. to direct that the operation of the provisions of s 14(1)(a) be lifted or that the section shall not take effect"*.⁹ Furthermore the Court found that section 14(2) *"also affords an educator an opportunity to be heard and to be reinstated, provided he/she is able to show good cause as to why the employer should reinstate. The fact that s 14(2) provides for a hearing only after an educator has been deemed to be discharged in terms of s 14(1)(a) does not mean that the latter subsection is in conflict with the Constitution"*.¹⁰
23. The same, however, cannot be said of section 36 of the South African Police Service Act.

⁹ *Phenithi* supra at paragraph 21.

¹⁰ *Phenithi* supra at paragraph 21.

24. Unlike section 14(1) of the Employment of Educators Act, section 36(1) does not provide for the employer to “direct otherwise” pursuant to the submission of material or facts by the members deemed to have been discharged. There is also no provision for a hearing at any stage as in the case of section 14(2) of the Employment of Educators Act.
25. I do not agree with the respondents that section 36(6) of the Act provides an opportunity for a member who has been discharged to make representations to the SAPS to rebut the deeming provision of section 36(1) and to request a hearing for this purpose. In my view to read in such a remedy is to ignore the explicit language of the section.
26. Section 36(6) provides no such remedy. It serves to ensure that the operation of any administrative action, investigation or inquiry in terms of any other provision of the Act (i.e. apart from section 36) is not precluded in respect of a member who is deemed to have been discharged in terms of section 36(1).
27. I am nevertheless not satisfied that the failure to provide a remedy to a member affected by the deeming provision in section 36(1) of the Act constitutes a limitation of that member’s fundamental right to fair labour practices enshrined in section 23 of the Constitution. I am, however, willing to assume this point in the applicants’ favour, without deciding it. My assumption makes it unnecessary for me to make a finding as regards a violation of the right to dignity. Furthermore, since the discharge

provided for in section 36(1) arises by operation of law and is not consequent upon an administrative decision, the section cannot offend the right to reasonable, lawful and procedurally fair administrative action as contemplated in section 33 of the Constitution. In any event, any so-called 'decision' would take place in the context of public sector employment. Such decisions, as held by the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*,¹¹ are generally not administrative action:

"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action."

28. If I assume, as I have above, that a limitation of section 23 of the Constitution has been established by the applicant, then the next question that arises is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution.

¹¹ 2010 (1) SA 238 (CC) at para 64

29. In making this determination, *"it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose."*¹²

The extent of the limitation of the right

30. The applicant was convicted of a criminal offence. On his own version, he was convicted on the basis that he elected (even poorly or incorrectly advised to do so by his legal representative(s)) to plead guilty to the charge. Moreover, as I have said further above, the applicant's employment was terminated by operation of law almost four years ago. During that time he completed part of his custodial sentence and he has now been released.
31. I have assumed in favour of the applicant that the termination of his employment with the SAPS constitutes a violation of his right to fair labour practices, however, the applicant has not pleaded how it is that his rights under the LRA have been limited. He has not attached his contract of employment to the pleadings. He asserts a right to have been heard prior to his discharge but aside from citing the relevant constitutional provision, he has not advanced a case for constitutional invalidity. That being so, it

¹² *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 50 fn 55.

seems to me that he cannot show that the extent of the alleged violation is constitutionally suspect. This is so for at least the following reasons.

The purpose, importance and effect of the limitation

32. Under section 205(3) of the Constitution as well as the preamble to the Act, policemen are vested with statutory and constitutional duties of immense societal importance. The SAPS has a constitutional obligation to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.¹³

33. In *K v Minister of Safety and Security*,¹⁴ O'Regan J, for a unanimous Court, held as follows:

"Our Constitution mandates members of the police to protect members of the community and prevent crime. It has an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community ... [C]ourts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed."

34. A practical justification for the provision is that the SAPS cannot afford to keep the post or position of a member who is serving a sentence vacant

¹³ Section 205(3) of the Constitution.

¹⁴ 2005 (6) SA 419 (CC) at para 51

until such time he or she has served their term of imprisonment. This would negatively hamper the service delivery and the constitutional obligations of the SAPS.

35. In order to achieve this constitutional mandate the SAPS relies fully on the conduct of each individual member. By becoming a member of the SAPS, one is vested not only with authority to uphold the law but also with the public's confidence and trust that each member will uphold the law.
36. There is accordingly a high level of trust placed on each member both by the SAPS and the public. A breach of that trust not only destroys the confidence of the SAPS in that member but it also destroys public confidence in the SAPS in general.
37. The interpretation contended for by the applicant would necessarily permit the reinstatement of a person convicted (on a standard of proof that requires proof beyond reasonable doubt) of precisely that which he is constitutionally and statutorily obligated to prevent. That is self-evidently at odds with the purpose and objects of the SAPS.
38. In amplification of the above, it seems to me that a provision that removes from the SAPS, members who have been found guilty of serious criminal offences, is not only appropriate but indeed necessary. It is necessary for the control and rooting out of criminal elements within the SAPS and it serves as a deterrent to would be offenders in that they know that should

they commit a serious offence they risk not only being punished criminally but they also risk their employment. Given the present level of crime and corruption in our society, in respect of which the SAPS is not immune, I am further of the view that section 36 of the Act is necessary to maintain the public's trust and confidence in the SAPS.

Conclusion

39. I find therefore that the limitation of the rights of members of the SAPS, occasioned by the provisions of section 36(1) of the Act, to be reasonable and justifiable in an open and democratic society as contemplated in section 36 of the Constitution.

40. The applicant's challenge to the constitutionality of section 36 of the Act must thus fail. Since the applicant's discharge in terms of the section is constitutionally unassailable his application for reinstatement must also fail.

Costs

41. Turning to the question of costs, as a general rule an unsuccessful party in constitutional litigation against the State ought not to be ordered to pay the costs.¹⁵ Since it cannot be said of the applicant that his conduct has been


¹⁵ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at paragraph 139.

vexatious, frivolous, professional unbecoming or in any other similar way abusive of the processes of the court,¹⁶ I see no reason to deviate from this general rule.

42. I accordingly make the following order:

42.1. The applicant's application is dismissed.

42.2. Each party is to pay its own costs.


P LAZARUS
ACTING JUDGE OF
THE HIGH COURT

CASE NUMBER: 45970/13

HEARD ON: 11 AUGUST 2014

COUNSEL FOR THE APPLICANTS: MR A MOABA

INSTRUCTED BY: MOABA ATTORNEYS

COUNSEL FOR THE RESPONDENTS: ADV. BR TOKOTA SC

INSTRUCTED BY: STATE ATTORNEY, PRETORIA

DATE OF JUDGMENT: 11 November 2014

¹⁶ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paragraph 18.