# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Case No: 467/07

**W A L DU TOIT** Appellant

and

**THE MINISTER OF SAFETY AND SECURITY** 1st Respondent

**THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE** 2nd Respondent

**Neutral citation:** *Du Toit v The Minister of Safety and Security* (467/07) [2008] ZASCA 125 (30 September 2008)

**Coram:** STREICHER, MTHIYANE, CLOETE JJA BORUCHOWITZ and MHLANTLA AJJA

**Heard:** 12 SEPTEMBER 2008

**Delivered:** 30 SEPTEMBER 2008

**Summary:** Section 36(1) of South African Police Service Act 68 of 1995 – appellant deemed to have been discharged from SAPS because of conviction and sentence to imprisonment – deemed dismissal not undone by extinction of conviction by granting of amnesty – s 20(10) of Promotion of National Unity and Reconciliation Act 34 of 1995 does not operate retrospectively – s 36(2) of SAPS Act does not entitle person to whom amnesty had been granted a right to be reinstated.

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**ORDER**

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On appeal from: the Pretoria High Court (Mynhardt J sitting as court of first instance)

The appeal is dismissed with costs including the costs of two counsel.

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**JUDGMENT**

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STREICHER JA (MTHIYANE, CLOETE JJA BORUCHOWITZ and MHLANTLA AJJA concurring)

[1] The Pretoria High Court dismissed an application by the appellant to be reinstated as a member of the South African Police Services ('the SAPS') but granted him leave to appeal to this court.

[2] The appellant used to be the National Commanding Officer: Technical Support Services with the rank of Director in the SAPS. On 14 June 1996 he was convicted on four charges of murder and on 27 June 1996 he was sentenced to 15 years' imprisonment. As a result and in terms of s 36 (1) of the South African Police Service Act 68 of 1995 ('the SAPS Act'), he was deemed to have been discharged from the SAPS with effect from the date following the date of the sentence. The section reads as follows:

'36(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.'

[3] The appellant appealed against his conviction but his appeal was postponed pending the finalisation of his application for amnesty, in respect of the offences of which he had been convicted, in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Amnesty Act'). Section 20 of the Amnesty Act provided for the granting of amnesty in respect of offences associated with a political objective and committed in the course of the conflicts of the past. Pending the determination of his application for amnesty the appellant, on 22 December 1999, wrote to the National Commissioner of the SAPS in the following terms:

'4 Ingevolge artikel 20(10) van die Wet op die Bevordering van Nasionale Eenheid en Versoening sal, indien die hersieningsaansoek[1] suksesvol is, ek ge-ag word nooit skuldig bevind te gewees het aan die betrokke misdryf nie. Ek is geadviseer dat ingevolge hierdie bepalings ek onmiddellik regtens terugwerkend in my pos as Nasionale Bevelvoerder Tegniese Ondersteuningseenheid ge-ag te word.

5 Ek is voorts ge-adviseer, dat aangesien voormelde pos `n sogenaamde skema-pos en die eenheid 'n spesialis-eenheid is, ek nie in diens by enige ander vertakking geplaas kan word nie.

6 Ek het ook kennis geneem dat Direkteur TLA Steyn nie meer soos aanvanklik in `n waarnemende hoedanigheid hierdie pos beklee nie.

7 Vanselfsprekend hou u besluit in hierdie verband vir myself en my gesin `n wesenlike finanasiële implikasie in.

8 Ten einde my en my gesin se toekomsplanne te bepaal, word u dringende uitsluitsel om my posisie in die SA Polisiediens, indien my hersieningsaansoek suksesvol sal wees, verlang.'

[4] In terms of s 20(10) of the Amnesty Act a conviction in respect of which amnesty had been granted 'shall be deemed to be expunged from all

[1] The appellant's application for amnesty was initially dismissed but such dismissal was subsequently reviewed by a full court of the Cape High Court and set aside.

official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place'.[2] Section 36(2) of the SAPS Act provides that a person who is deemed to have been discharged in terms of s 36(1) because he was convicted and sentenced to a term of imprisonment without the option of a fine, and whose conviction is set aside 'following an appeal or review' and not replaced with a conviction for another offence, 'may, within a period of 30 days after his or her conviction has been set aside . . . apply to the National Commissioner to be reinstated as a member.'[3]

[5] On 29 December 1999 the National Commissioner replied to the appellant's letter of 22 December as follows:

'Die Regsafdeling van die Suid-Afrikaanse Polisiediens is ook van mening dat indien u suksesvol met u hersieningsaansoek is, u geag sal word nooit skuldig bevind te gewees het nie, en u gevolglik nie ontslaan kon gewees het uit die SAPD nie, en u posisie sal terugwerkend herstel word.

In so`n geval sal u uiteraard in u vorige pos, of `n soortgelyke pos waarmee u akkoord gaan, in die SAPD geakkomodeer word.'

[6] The appellant's application for amnesty was ultimately successful and on the day that the proclamation granting amnesty to him was

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[2] Section 20(10) reads:
'Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

[3] Section 36(2) reads
'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) . . .
(c) . . .

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.'

published, namely 23 December 2005, he wrote to the National Commissioner:

'I would urgently need to negotiate my re-instatement in the SAPS in terms of section 36 of the Police Act (68/1995) and section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995. In this regard I would like to draw attention to the fact that due to my technical specific qualifications my employment in the SAPS was post specific. In order to protect the interest of the SAPS and myself my employment history should subsequently be taken into consideration. In the event that re-instatement has been approved but continuation of service poses a practical obstacle, it is requested that an adequate, mutually agreeable, severance package be negotiated.'

[7] The Chief of Staff of the SAPS replied as follows:

'[Y]our situation is not one contemplated in section 36 of the South African Police Service Act . . . nor does section 20 of the Promotion of National Unity and Reconciliation Act . . . provide for re-instatement of employees discharged in terms of section 36.

Your request for negotiation of your reinstatement can therefore not be acceded to.'

[8] The appellant thereupon applied to the Pretoria High Court for an order declaring that he was entitled to be reinstated in his employment with the SAPS in terms of the provisions of s 20(10) of the Amnesty Act alternatively in terms of the provisions of s 36 of the SAPS Act, and further alternatively in terms of an agreement with the National Commissioner of the SAPS, constituted by the Commissioner's letter of 29 December 1999. I shall deal with each of these grounds in turn.

[9] The court a quo held that s 20(10) extinguished the appellant's conviction and sentence but that it had not undone the consequences of such conviction and sentence. The appellant submitted that the court a quo failed to give effect to the section in so far as it provides that the conviction

of a person, to whom amnesty had been granted, should be deemed, 'for all purposes, including the application of any Act of Parliament', not to have taken place. The deeming provision in s 36(1) is contained in an Act of Parliament therefore the effect of the provision is, so it was submitted, that because appellant is deemed never to have been convicted and sentenced, he was never discharged from the SAPS by operation of the deeming provision in s 36(1). The submission amounts to this: Section 20(10) provides that as at a past date the law shall be taken to have been that which it was not, ie s 20(10) operates retrospectively.[4]

[10] There is a presumption that a statute was intended to operate prospectively and not retrospectively. In *Bellairs v Hodnett and another* 1978 (1) SA 1109 (A) at 1148F-G the court formulated the rule as follows:

'There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation . . ..'

The same principle is recognised by the law of England. In *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 at 938 Lord Reid said:

'Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that . . ..'

The presumption 'may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration'.[5]

[11] The appellant submitted that the fact that the deeming provision is said to be applicable 'for all purposes' indicates that it also applies to

[4] *West v Gwynne* [1911] 2 Ch 1 (CA) 11-12.
[5] *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424G-H.

consequences that have already materialised. I do not agree. 'For all purposes' may in theory mean for past and future purposes but applying the presumption against retrospectivity, it must be interpreted as meaning for all future purposes, unless it can be said that the intention of the legislature was that the section should be applied retrospectively so as to impose different rights and obligations in respect of events that had already taken place. The phrase is therefore of no assistance in determining whether s 20(10) was intended to operate retrospectively.

[12] But, submitted the appellant, s 20(10) would be totally superfluous and of no effect unless it is interpreted to have retrospective effect. He submitted that s 20(7) and (8) fully provide for the effects of amnesty with reference to future situations. I do not agree with this submission. Sections 20(1) to (6) deal with applications for amnesty and the granting of amnesty whereas ss 20(7) to 20(10) spell out to what extent civil and criminal proceedings would be affected by the granting of amnesty. In terms of subsection (7) the person to whom amnesty has been granted shall not be criminally or civilly liable in respect of the act in question. Subsection (8) deals with persons against whom criminal proceedings are pending and persons who have been sentenced and who are in custody for the purpose of serving such sentences. It provides that such criminal proceedings would forthwith upon publication of the proclamation of the granting of amnesty in respect of the relevant offences, become void and that such sentences should upon such publication lapse. Section 20(9) provides that if any person has been granted amnesty in respect of an act which formed the ground of a prior civil judgment, the granting of amnesty shall not affect the operation of that judgment in so far as it applies to that person. Subsection (10) deals with the expungement of the conviction for the act in

respect of which amnesty has been granted, from official documents and provides that the conviction shall be deemed not to have taken place.

[13] The appellant submitted that s 20(9) indicates that in so far as the legislature did not intend s 20 to operate retrospectively, it expressly stated that to be the case. In my view the section indicates no more than that the legislature, having stated that no person would be criminally or civilly liable for an act in respect of which amnesty had been granted, and having stated that sentences imposed in respect of people who were in custody would lapse, wanted to make it clear that it had no intention of undoing the civil judgments referred to in the section. The section affords no indication of an intention that the deemed extinction of criminal convictions was intended to operate retrospectively.

[14] A fourth ground advanced by the appellant as a basis for interpreting s 20(10) to operate retrospectively is that s 20 is remedial in nature and should for that reason be construed generously. In this regard he referred, amongst other authorities, to *Looyen v Simmer & Jack Mines Ltd and another* 1952 (4) SA 547 (A) at 554B-C where Schreiner JA said:

'[T]he provision was certainly aimed at making the legal position more equitable, or at least clarifying it so as to avoid some apparently harsh results. It seems to me, therefore, that use may properly be made of Lord Kenyon's statement in *Turtle v Hartwell* 6 TR 426 at 429, that:

"In expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit."'

No basis for considering s 20(10) to be remedial in nature was however suggested. The section was not enacted to make the existing legal position more equitable or to avoid harsh results. Convictions are in terms of the section deemed to have been expunged from official documents and not to have taken place, not in order to correct inequitable or harsh results but in

order to promote national unity and reconciliation. See in this regard the preamble to the Amnesty Act in which it is stated that the Act is enacted, amongst other reasons:

'[S]ince the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;

And since the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation;

And since the Constitution states that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past.'

[15] Lastly it was submitted by the appellant that it would be absurd to deem the conviction not to have taken place but still to saddle the appellant with the negative results of such conviction. The absurdity escapes me. The intention of the legislature was to provide a mechanism for forgiving transgressors for what they had done in the past - not to undo what had happened in the past. The appellant was not wronged in any way by having been convicted and discharged from the SAPS as a result of that conviction. To reinstate him and to treat him as if he had not been discharged can therefore make no contribution to the object of the Act namely, to achieve reconciliation.

[16] In my view the Amnesty Act contains no indication that the legislature intended s 20(10) to operate retrospectively so as to undo consequences that came into effect before the granting of amnesty. To interpret the section to be retroactive would have far reaching financial and other effects as is illustrated by the present case where the appellant had not rendered any service to the SAPS for years and where another person had been appointed in his post. Such an interpretation would probably affect

many other contracts and statutory relationships to the potential detriment of people who had not committed any wrong. It seems to me highly unlikely that the legislature intended such a result in legislation aimed at improving future relationships.

[17] I therefore conclude that s 20(10) does not affect consequences that came into effect before the granting of amnesty. In the result the discharge of the appellant from the SAPS was not reversed by the granting of amnesty to him.

[18] In respect of the appellant's reliance on s 36(2) the court a quo held that the section deals with the reinstatement of a member as a result of the setting aside of a conviction 'on appeal or review', that the appeal and review processes are not analogous to the process in terms of which amnesty is granted and that there was therefore no basis for interpreting s 36(2) so as to entitle a person to whom amnesty had been granted, to reinstatement.

[19] The appellant submitted that the interpretation of the court a quo is grossly unjust and absurd. He submitted that if appeal or review in the phrase 'conviction is set aside following an appeal or review' is interpreted so as to include amnesty, effect will be given to the intention of the legislature. In my view there is no merit in this submission. Appeal and review proceedings are judicial proceedings whereas amnesty proceedings are administrative in nature. In the case of an appeal or review a conviction is set aside by reason of the fact that the accused should not have been convicted, either because his guilt had not been proved or because his conviction was not in accordance with justice, ie because he should in the circumstances not have been convicted. When amnesty is granted the

conviction is deemed not to have taken place but that is not because the accused should not have been convicted. It is, as stated above, in order to achieve a future objective. The procedure, result and object of appeal and review proceedings on the one hand and amnesty proceedings on the other hand are therefore not analogous at all. There is consequently no basis whatsoever for finding that the legislature intended that 'appeal or review' should be interpreted so as to include amnesty. On the contrary, the Amnesty Act gave effect to a requirement of the Interim Constitution which preceded the SAPS Act and both the SAPS Act and the Amnesty Act were enacted during 1995. The Amnesty Act is numbered 34 and the SAPS Act, 68. The granting of amnesty would therefore have been foremost in the mind of the legislature when it enacted the SAPS Act and had it intended s 36(2) to apply to amnesty as well it would have worded the section accordingly.

[20] Dealing with the third ground advanced for reinstatement the court a quo stated that the National Commissioner, in his letter of 29 December 1999, simply adopted a position on the basis of legal advice that he obtained and considered to be correct but which turned out to be incorrect. The court a quo added that it was not the appellant's case that the SAPS was bound to reinstate him if the advice was found to be incorrect and concluded:

'Gevolglik kan die onderneming, of ooreenkoms, nie teen die twee respondente afgedwing word nie.'

[21] Before us the appellant submitted that the National Commissioner entered into an agreement with the appellant as set out in his letter. The appellant conceded that he is relying on a written agreement with the result that the evidence of the author of the letter, as to what his intention was, is irrelevant and inadmissible. The affidavit of the National Commissioner

annexed to the appellant's papers setting out what he intended therefore falls to be disregarded.

[22] The letter of 29 December 1999 was written in response to the letter by the appellant dated 23 December 2005. In that letter the appellant informed the National Commissioner that according to his advice he would be deemed to be reinstated in the event of his application for the review of the decision refusing him amnesty succeeding, but that some other person had been appointed in his post. He accordingly wanted to know what would happen to him upon his return. The National Commissioner replied that he had received similar advice and that in the event of the review succeeding the appellant would naturally be reinstated in the post that he used to occupy or in a similar post acceptable to him. In my view the National Commissioner was simply stating what he understood the legal position to be. He was not asked to bind himself contractually and the letter does not evince an intention to do so. In any event the statement by the National Commissioner did not constitute an acceptance of an offer and if it were to be interpreted as an offer it was never accepted by the appellant. Confronted with this problem the appellant submitted that his letter of 23 December 2005, some 6 years later, constituted an acceptance of what he contended to be an offer. However, in that letter the appellant did not claim to be entitled to reinstatement in terms of an agreement; he claimed to be so entitled in terms of s 36 of the SAPS Act and s 20 of the Amnesty Act. It is therefore apparent that not even the appellant interpreted the statement so as to constitute an offer with the intention to contract. In short no contract to reinstate the appellant was concluded.

[23] The appeal is accordingly dismissed with costs including the costs of two counsel.

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P E STREICHER
JUDGE OF APPEAL

Appearances:

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| For Appellant: | J G Cilliers SC<br>M D du Preez<br><br>Instructed by<br>Wagener Muller, Pretoria<br>Bezuidenhouts Inc, Bloemfontein |
| For Respondent: | T J Bruinders SC<br>B L Makola<br><br>Instructed by<br>The State Attorney, Pretoria<br>The State Attorney, Bloemfontein |