IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 55893/19

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

02/09/19 .....
DATE SIGNATURE

In the matter between:

Alicia A. Mdekazi	Applicant
and	
The Minister of Defence	First Respondent
Thaba Tshwane Military Court	Second Respondent
Colonel S.L Nkasana	Third Respondent

JUDGMENT

Baqwa J

1 In this application the Applicant seeks relief on an urgent basis in terms of the Rules of this court in order for her to be granted and released on bail, pending the finalisation of review proceedings which she has lodged with this court.

2 It is common cause that the Applicant has been employed by the Department of Defence as a Senior Staff Officer in the Directorate Human Relations Acquisitions.

3 She was charged on 9 May 2018 with corruption and fraud in a trial presided over by the Third Respondent.

4 She was convicted and the sentence was dismissal from the South African National Defence Force.

5 On 23 January 2019 the matter served before the Court of Military Appeals (CMA) by way of automatic review in terms of the provisions of section 34(2) of Act 16 of 1999.

6 The Second Respondent presided over the proceedings. The CMA re-opened the sentencing process and substituted Applicant's dismissal with one of four years' imprisonment which Applicant is currently serving at Kgosi Mampuru prison.

7 Respondents have filed an answering affidavit which has been deposed to by Major General Eric Zanoxo Mnisi who is the Adjutant General of the SANDF.

8 He submits that this matter should not be heard as one of urgency as the Applicant has failed to place before this court facts which are material to the issue of urgency.

9 Matters of bail pending review or appeal are matters which have to do with the liberty of an individual. There is, however, no entitlement to bail especially where the Applicant has been subjected to the due process of the law. The issue for bail, therefore, is one that stands to be decided on a case by case basis according to the circumstances of each case. It is, however, trite law that an application for bail is inherently urgent and that *ipso facto* this application may be heard on that basis.

10 I agree with the Respondents that insufficient evidence has been placed before this court regarding the medical condition of the Applicant.

11 Having said that and accepting that the charges against her and the subsequent sentence are serious, this court has to examine her personal circumstances in order to determine whether or not she may be granted bail.

12 The Respondents submits and I accept as correct that the overriding principle in considering bail is the interests of justice. In the present case the interests of justice would be served, if it can be established that there are prospects of success in that the review application may avert imprisonment.

13 Applicant submits in support of the irregularities allegation that where a matter serves before the CMA on automatic review, the court may not increase the punishment of the accused except in those instances where the review or appeal

was brought by the accused. He refers this court to the case of *S v Ndizima* 2010 (2) SACR 501 ECG paragraph 4:

> *Section 309(3) of the Criminal Procedure Act 51 of 1977 (the CPA) empowers a High Court to increase a sentence on appeal from a lower court. It is well-entrenched rule of practice that, when a court is of the view that there is a prospect of the sentence being increased on appeal, notice is given to the appellant. Section 310A of the CPA empowers the State to appeal to a High Court against a sentence imposed by a magistrates' court.*

14 Paginated page 23 which had been omitted from the record of the CMA has been brought to the attention of this court. On this page, the CMA gave notice of intention to increase sentence in January 2019 and the matter was postponed to 3 April 2019 for consideration of sentence. Applicant is therefore not assisted by the Ndizima judgment.

15 Counsel for the Applicant also made reference to several cases decided by the CMA. These are referred to in a Doctoral Thesis of *Michelle Nel* (Nel) submitted in January 2012 entitled "*Sentencing Practice in Military Courts*" to the University of South Africa.

16 Nel deals with the matter of "*Powers of CMA on appeal and review*" at page 434 – 436 of her Thesis as follows:

> *"The CMA has full appeal and review powers with regard to any trial conducted by the military court. The court may decide to uphold the finding and the sentence or to change the sentence imposed by the court a quo. Where a matter serves before the CMA on automatic review, the court may not increase the punishment of the accused. The CMA may only increase the punishment in those instances*

where the accused brought the matter on appeal or review. This has also been a long standing practice in the civilian courts.

A civilian court may either increase the sentence mero motu or on application from the prosecutor. In the military only the first instance is applicable. The defence legislation does not allow the prosecution counsel to appeal a sentence. Although it is a rule of practice to inform the civilian appellant of a possible increase in sentence, this is also not done by the CMA.

In light of comments by the CMA regarding sentence imposed by the military courts a quo which are considered to be too lenient, it is submitted that consideration should be given to allowing the prosecution to appeal the sentence of an accused. In S v Nel (CMA 077/2001) the CMA upheld a sentence of dismissal on automatic review from the SANDF which the court regard as "very lenient". They opined that "a more severe sentence would not have been out of order". In S v Kanu (CMA 17/2010) the court regarded the fine and suspended sentence as "shockingly inappropriate" as it was too lenient. The court did not agree that the court a quo had properly considered all the aggravating factors during sentence. As the matter came before the CMA on automatic review the court could not intervene and impose a more severe sentence. The court remarked that "military courts have to remember that they are the guardians of the values and good character in the SANDF. Military criminals can be seen as the "enemy" that destroys the organisation from within. Military courts should not err by being too lenient when they impose sentences for crimes committed in the organisation. By doing so, they actually leave a message to soldiers and offences that the military law has "lost its teeth" and that the guardians of the law will tolerate the ongoing spree of violence against fellow soldiers within the organisation by ensuring military criminals of a continued career in the SANDF".

A R600 fine for the unauthorised use of a military vehicle in S v Ngako (CMA 165/2002) was seen as "lenient in the extreme and cannot be regarded as conductive to military discipline". It is therefore submitted that it would be in the interest of justice to allow the prosecution to appeal sentence in such cases. It should be kept in mind that the court held that the right to a fair trial includes

fairness to society as well. The court should therefore be empowered to rectify a miscarriage of justice, also where a sentence is deemed to be too lenient.

Where the courts is in agreement that the finding or sentence is not in accordance with real or substantial justice, the court may refuse to uphold the finding and set the sentence aside. It may further substitute a finding with any other finding supported by the evidence. It may however not substitute the finding with a more serious one, even if it would have been more appropriate under the circumstances. The CMA may further correct any error in the finding, sentence or the court order or refer a matter back to the trial court to rectify the error".

17 I have quoted in full from Nel's doctoral thesis as it makes reference to all the cases referred to by Applicant's Counsel. It is evident from the quoted section that the CMA cannot intervene and impose a more severe sentence on the basis that the sentence was lenient. It is not empowered to impose a more severe sentence.

18 Bearing in mind that these are decisions of the CMA itself, it is self-evident that there are prospects of success in the review application.

19 It is common cause that the Applicant is a 58 year old former Colonel of the SANDF. There has been no suggestion that she could be a fugitive from justice, if granted bail.

20 I have therefore considered the factors mentioned in section 60(4) of the CPA 51 of 1977 namely:

> *(4) The interests of justice do not permit the release from detention of an accused were one or more of the following grounds are established:*

(a) *Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or*

(b) *where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*

(c) *where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*

(d) *where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or*

(e) *where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.*

21 Even with the paucity of facts regarding the personal circumstances of the Applicant, I do not consider her a flight risk.

Conclusion

22 In the result I make the following order:

THE ORDER

23 Bail is granted to the Applicant in the sum of R3000.00 (THREE THOUSAND RAND).

24 No order as to costs.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:	22 August 2019
Judgment delivered:	22 August 2019

Appearances:

For the Appellant:	ADV MOLOPYANE
Instructed by:	SAMALENGE ATTORNEYS
For the Respondents:	ADV KLEYN
Instructed by:	THE STATE ATTORNEYS