65/92

Case No 610/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

COUNCIL OF REVIEW, SOUTH AFRICAN DEFENCE FORCE	First Appellant
BRIGADIER A K DE JAGER N O (in his capacity as the confirming authority in respect of the Court Martial of Respondents, held at Cape Town in January 1988)	Second Appellant
COLONEL M DEMPERS N O	Third Appellant

and

HEINRICH JOHANNES MÖNNIG	First Respondent
PIETER REINHARD PLÜDDEMAN	Second Respondent
DESMOND WILLIAM THOMPSON	Third Respondent

CORAM: Corbett CJ, Van Heerden, F H Grosskopf, Nienaber, JJA et Preiss AJA.

DATE OF HEARING: 15 November 1991

DATE OF JUDGMENT: 15 May 1992

J U D G M E N T

/CORBETT CJ:.....

In terms of sec 4(1)(b) of the Protection of Information Act 84 of 1982 it is an offence to disclose certain types of documents or information relating to military matters and of a secret or confidential nature to an unauthorized person. And sec 18(2) of the Riotous Assemblies Act 17 of 1956 makes it an offence for any person to conspire with any other person to aid or procure the commission of or to commit an offence, statutory or common law.

On 4 February 1988 the three respondents, who were then rendering national service in the Citizen Force in terms of the Defence Act 44 of 1957 ("the Act"), were convicted by an ordinary court martial of having contravened sec 4(1)(b) of Act 84 of 1982, read with sec 18(2) of Act 17 of 1956; and each was sentenced to 18 months detention. In addition, the third respondent, who then held the rank of corporal, was reduced to the

ranks. The respondents were tried in terms of the Military Discipline Code (which is to be found in the First Schedule to the Act). For this I shall use the abbreviation "MDC". A power to try members of the Defence Force for "civil offences" (i e offences in respect of which a penalty may be imposed by a court of law, not being offences created by the MDC itself) is, with certain exceptions, conferred on a military court by sec 56 of the MDC. The trial was held in camera. The court martial was presided over by the third appellant who held the rank of Colonel. The other two members of the court held the ranks of Lieut.-Commander and Major respectively. A judge advocate was not appointed to the court.

In terms of secs 96 and 98 of the MDC the sentence of a court martial may not be enforced or executed unless and until the finding and sentence of the court have been confirmed by the convening authority.

In this case the convening authority, second appellant, confirmed the convictions and sentences on 4 March 1988.

The respondents thereupon made application under sec 112 of the MDC for the review of their case by a council of review, originally the first appellant. The council of review, constituted as provided for in sec 145(1)(b)(i) of the MDC, heard the review application and decided on 9 June 1988 to confirm the convictions. However it varied the sentences by reducing those imposed on first and second respondents to eight months detention and that of third respondent to six months detention (and reduction to the ranks).

Sec 107 of the Act provides that there shall be no appeal from the finding or sentence of a military court, but that nothing in the Act shall be construed as derogating from the right of any division of the Supreme Court to review the proceedings of a military court. Such a right of review exists at common law (see Union

Government and Fisher v West 1918 AD 556, 572-3; Mocke v Minister of Defence and Others 1944 CPD 280, 284-5). Soon after the announcement of the decision of the council of review the respondents brought such review proceedings in the Cape of Good Hope Provincial Division claiming orders setting aside the decisions of the court martial, the convening authority and the council of review. The review was opposed by second and third appellants, but first appellant (the council of review) did not formally oppose and abided the judgment of the Court.

The application was heard by a full bench consisting of Friedman, Howie and Conradie JJ. The Court allowed the review and ordered that the proceedings and decisions of the court martial, the convening authority and the council of review be set aside and that second and third appellants pay the costs. The judgment of the Court, delivered by Conradie J, has been reported:

see Mönnig and Others v Council of Review and Others 1989 (4) SA 866 (C). I shall refer to this as "the reported judgment". With the leave of the full bench, the appellants appealed to this Court against the whole of the judgment and order of the full bench. Shortly after the appeal was noted first appellant withdrew its appeal and indicated that it abided the decision of this Court.

In the Court a quo a number of review grounds were advanced, but of these only one was successful. It was to the effect that the court martial ought to have recused itself. In order to appreciate the basis for this finding it is necessary to make some reference to the substance of the charges preferred against the respondents, to the evidence adduced in substantiation thereof and to a defence raised by second respondent (who figured as accused no 1 before the court martial).

At the time of the events which formed the basis of the charges against them respondents were

stationed at the Castle, in Cape Town. The first respondent, a trained teacher, was employed there in the Communication Operations Department ("Komops") and his duties entailed writing articles for a magazine published by the Defence Force. (He figured as accused no 2 before the court martial.) The second respondent, also a trained teacher, was employed at the Castle as a storeman in Komops; and the third respondent (accused no 3 before the court martial) was employed there, in Komops, in a clerical capacity.

It appears that the three respondents, together with a fellow national serviceman at the Castle, corporal Swart, were in the habit of meeting during tea-breaks and indulging in what were described as "intellectual" discussions about a range of topics, including politics and current affairs. At a certain stage Swart, who worked in the intelligence section, came to the conclusion that the respondents were radically inclined

to the left and he reported the position to the colonel in charge of his section. The colonel instructed Swart to keep his ear close to the ground and to report to him anything of importance.

It appears that about this time Komops, acting with the sanction of higher authority, was conducting a covert campaign (including the dissemination of pamphlets, stickers and T-shirts and the spray-painting of graffiti on walls) designed to vilify and discredit an organization known as End Conscription Campaign ("ECC"), whose proclaimed objectives were to achieve an end to conscription into the South African Defence Force and to oppose militarization (see End Conscription Campaign and Another v Minister of Defence and Another 1989 (2) SA 180 (C), 184 H). The Defence Force regarded ECC as being a hostile organization and a threat to it: hence the covert campaign.

The various actions taken in the implementation of this campaign and the involvement of the Defence Force therein came to the knowledge of the respondents. According to the second respondent, his reaction was one of "moral outrage" because these acts were aimed at a legitimate organization and the means employed seemed to him to be both illegal and immoral. He and the other respondents and Swart decided to expose the Defence Force's involvement in this campaign to the ECC and to this end to draw up a document setting out the relevant information and describing the Defence Force's intelligence system. Swart was asked to furnish documentary and other Defence Force information to which the others did not have access.

Swart reported all of this to his colonel. A trap was set in the form of an arrangement whereby at a given time and place Swart would hand over to the respondents certain secret Army documents. This was

done. The trap was sprung; and the respondents were arrested with the documents in their possession. This all occurred on 14 December 1987. It was upon this basis that the respondents were charged with having conspired to disclose Defence Force documents and information, classified as secret or confidential, to unauthorized persons.

At the inception of the trial before the court martial counsel representing the second respondent objected to his client being tried by the court on grounds which may be summarized as follows:

(a) Evidence would be presented at the trial of the Defence Force's covert campaign against ECC, which constituted illegal and morally reprehensible conduct.

(b) This campaign was conducted not by individual officers on a "frolic" of their own, but by the Defence Force as a matter of policy.

(c) Second respondent would give evidence that in doing what he did, he had been acting in defence of and in the interests of the ECC; and would contend that this constituted a defence of justification to the charges preferred against him.

(d) The court martial, composed as it was of senior Defence Force officers, would be placed in an invidious position in that in order to decide the issues raised by this defence it would have to pass judgment as to the legality of actions and policies of the Defence Force.

Counsel accordingly asked the court martial to recuse itself. Counsel for the first respondent associated himself with this application for recusal and third respondent, who was represented by a Defence Force law officer, did likewise.

Having considered the application, the court martial dismissed it. The president of the court gave a short judgment setting out the court's reasons. These appear to be summed up in the following two sentences:

> "Hierdie Krygsraad net soos enige burgerlike hof is gebonde aan die heersende burgerlike bewysreëls, en kan slegs 'n beskuldigde skuldig bevind indien hy soos in die geval van burgerlike howe, bo redelike twyfel oortuig is dat 'n beskuldigde skuldig is aan 'n spesifieke misdryf. Dit, soos die geval is in burgerlike howe is die beskuldigde se waarborg van 'n regverdige en onpartydige verhoor."

The trial then proceeded and ended, as I have indicated, with the conviction of all three respondents. In passing, I might mention that first respondent's defence was that he "played along" with the others with the intention of disclosing to the authorities, on his discharge from the Defence Force, how easily its security could be infiltrated; and that he did not believe that the information would in fact be disclosed to the ECC.

The second respondent put up the defence of justification adumbrated in his recusal application. And the third respondent contended that up to the time of his arrest he had not finally decided whether or not to proceed with the planned disclosure.

A substantial portion of the judgment of the Court a quo is devoted to a consideration of what the correct test for recusal is. Conradie J refers to a number of English cases in which two tests have been propounded: the so-called "real likelihood of bias in fact" test and the test which asks whether the lay observer would harbour a reasonable suspicion of bias. He expresses a preference for the latter (see reported judgment at 879 A-B):

> "Our Courts have not, in the last 20 years or so, regarded it as necessary for disqualifying bias to exist that a reasonable observer should suspect that there was a real likelihood of bias; provided the suspicion is one which might reasonably be entertained, the possibility

> of bias where none is to be expected serves to disqualify the decision maker."

The learned judge then points out that the court martial, when considering the application for recusal, misdirected itself by failing to ask itself the one cardinal question which it was obliged to consider, namely what a reasonable litigant would think of its being seized of the trial having regard to the special defence raised by the second respondent. This mistake was one which could be corrected on review (reported judgment at 875 J - 876 B).

In S v Malindi and Others 1990 (1) SA 962 (A), at 969 G-I, this Court summed up the rule as to recusal, as applied to a judicial officer, as follows:

> "The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v Radebe 1973 (1) SA 796 (A) and South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has

> an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judical officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."

It may be that this formulation requires some elucidation, particularly in regard to the meaning of the word "likelihood": whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of "a reasonable suspicion of bias". Suspicion, in this context, includes the idea of the mere possibility of the existence present or future, of some state of affairs (Oxford English Dictionary, sv "suspicion" and "suspect"); but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds.

It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the Court **a quo** was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875 J - 876 B); and that the circumstances were such that a reasonable person in the position of second respondent could have thought that -

> ".... the risk of an unfair determination on an issue such as this was unacceptably high". (See reported judgment at 881H-I.)

The circumstances in question and the issue which the court martial had to decide, as stated by the Court a quo, may be summed up as follows. Second respondent's defence was based upon the contention that he acted as he did in defence of the rights of the ECC against attack thereon by the Defence Force. Crucial to this defence was a finding that the conduct of the Defence Force was

unlawful. The defence, whether good or bad, was not a frivolous one and had sufficient substance to merit the serious consideration of the court martial. This placed the members of the court martial, consisting of high-ranking Defence Force officers, in the intolerable situation of having to decide an issue which required them to pronounce upon the legality of a highly sensitive project, which had been initiated and was being directed by top Defence Force officers. (See reported judgment at 880J - 881F.) Accordingly, applying the above-stated test, the Court **a quo** held that there were grounds requiring the court martial to recuse itself.

On appeal to this Court appellants' counsel pointed out that the application for recusal was not based on an allegation of personal bias on the part of the members of the court martial: the allegation was rather one of "institutional bias" in the sense that the same objection would have been raised against any court

martial constituted in terms of the MDC, whatever its composition. In effect, therefore, the application for recusal was an attack upon the jurisdiction of the military courts provided for by the MDC. If such an attack should succeed, it would mean that the wide general criminal jurisdiction of such courts could be restricted in this respect. Thus, the correct approach, so counsel submitted, was to look at the provisions of the MDC and to ascertain whether the jurisdiction of courts martial was expressly or impliedly limited in this way. He contended further that there was no such express limitation; nor could one be implied. Accordingly, the Court a quo erred in holding that the recusal application ought to have been upheld.

In my view, this submission is ill-founded. Basically it seeks to reverse what, to my mind, is the proper sequence of the inquiry and to put the emphasis in the wrong place. Although a court martial is composed

of military officers, it is in substance a court of law and its proceedings should conform to the principles, including the rules of natural justice, which pertain to courts of law. One such rule is that which postulates that a person should not be tried by a court concerning which there are reasonable grounds for believing that there is a likelihood of bias or there is a reasonable suspicion of bias (whichever test be the correct one); and that, where there are such grounds or such a suspicion, the person concerned is entitled to have the court recuse itself. For convenience of reference I shall call this "the recusal right". I might add that an application for recusal may also emanate from the prosecution; or the court may recuse itself mero motu, i e without there having been any prior application (see S v Malindi and Others, supra, 969 I-J). Here, however, we are concerned with an application for recusal at the instance of the accused.

The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial. Generally speaking such rules, which are part of our common law, must be observed unless the legislature has by competent legislation, either expressly or by clear implication, otherwise decreed. (See and compare Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A), 662 B-G; South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A), 10 F-I.) The correct inquiry in the present case should, therefore, proceed on the basis that the respondents enjoyed a recusal right unless in terms of the MDC, read together with the Act, or some other competent legislation, this right was denied them, either expressly or by clear implication. If no such denial, either express or implied, is to be found in the relevant legislation, then the recusal right must prevail. To

the extent that this may, on the facts of the present case, curtail the jurisdiction of a court martial, it is a necessary consequence of applying one of the rules of natural justice designed to produce a fair trial.

Accordingly, I pose the question as to whether the MDC read together with the Act (it was not suggested that there was any other relevant legislation) expressly or by clear implication excludes or limits an accused person's recusal right. Sec 74(1) of the MDC provides that:-

> "No officer shall be qualified to serve on a court martial as president, member or judge advocate, if he -
>
> (a) convened that court martial;
>
> (b) investigated the charge or any of the charges to be tried by that court martial;
>
> (c) being the commanding officer of the accused, applied for his trial by court martial;
>
> (d) is the prosecutor or defending officer or a witness; or

(e) has personal knowledge of any material fact or evidence relating to the charge or any of the charges."

And sec 75 deals with the accused's right to object to members of the court martial as follows:

"When a court martial has assembled, the names of the members shall be read out to the accused who shall be asked if he objects to be tried by any of them, and any objection by the accused shall be decided by the court martial in the manner prescribed."

Sec 74(1) deals essentially with personal disqualifications which in certain circumstances might at the same time constitute grounds for recusal at common law. At the same time the categories of disqualification clearly do not cover the full range of instances which could give rise to personal grounds for recusal at common law. Take for example the cases of a member of the court who had a direct financial interest in the case, such as being the victim in a charge of

theft preferred against the accused, or who had previously expressed his belief in the guilt of the accused or who was known to be generally hostile to the accused. I, therefore, do not read sec 74(1) as being exhaustive of the circumstances under which an accused may object to a member of a court martial on grounds of personal bias. At the same time secs 74(1)f and 75 appear to indicate that in general the Legislature was conscious of the need to ensure that the accused had a fair trial.

The main point, however, made by appellants' counsel related to what was termed institutional bias, i e a ground of recusal which would, as in the present case, disqualify all courts martial, however composed. He contended that such a situation could never have been intended by the Legislature. He further pointed out that in many cases coming before military courts the court may be called upon to pass judgment on the legality

of actions of officers of the Defence Force (e g was it a lawful command that was disobeyed by the accused?) or on the credibility of the evidence given by other officers or generally in cases where the interests of the Defence Force, such as discipline, are involved. If the principle contended for by the second respondent were to be upheld, so it was argued, none of these cases could be tried by a military court.

In this connection it is important to note that in terms of sec 105 of the Act the "civil courts" of the Republic (i e the divisions of the Supreme Court and the magistrate's courts having criminal jurisdiction) are specifically empowered to try any person for any offence under the MDC and to impose any punishment which may be imposed for that offence under the MDC, including a sentence of detention and an order of reduction to the ranks; and when imposing any such punishment the court is enjoined (by sec 105(2)) to -

> ".... take cognizance of the gravity of the offence in relation to its military

> bearing and have due regard to the necessity for the maintenance in the South African Defence Force of a proper standard of military discipline".

At the same time, as I have indicated, in terms of sec 56 of the MDC military courts have jurisdiction to try members of the Defence Force for "civil offences" (with certain exceptions); and, of course, also for offences under the MDC. The civil offences which are excepted from the jurisdiction of the military courts are treason, murder, rape and culpable homicide committed within the Republic.

Accordingly, apart from these exceptions, the civil courts and military courts enjoy concurrent jurisdiction in regard to both civil and MDC offences. It is not clear why the Legislature decided to confer such concurrent jurisdiction; but what it does mean is that in the event of a military court being disqualified by reason of institutional bias the accused may be

brought to trial before a civil court. To my mind, this meets completely the argument raised by appellant's counsel to the effect that it could not have been intended that a ground of recusal based on institutional bias could be raised since it would disqualify all military courts. This argument smacks of the so-called "doctrine of necessity" described by de Smith, Judicial Review of Administrative Action, 4 ed, 276), as follows:

> "An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice."

In this case, because of the concurrent jurisdiction of the civil courts no such necessity arises.

With regard to the various examples mentioned by appellant's counsel (such as an accused charged with disobeying a lawful command, or a case depending on the credibility of evidence of Defence Force officers or a

case involving discipline), it would all depend on the circumstances of the particular case whether there were reasonable grounds for apprehending bias. Prima facie I do not think that the mere fact that the lawfulness of a command or the credibility of an officer witness or Army discipline were in issue would justify an application for the court's recusal. On the other hand, one can theoretically conceive of a case where the Defence Force in response to orders from "the top" undertakes an operation the legality of which is highly controversial; and a member of the Defence Force is charged with having disobeyed an order to participate in the operation. It may well be that in such a case the apprehension of institutional bias would be a reasonable one and that in the interests of justice the case should be heard in a civil court, not a military one.

As far as the facts of the present case are concerned, the position is very unusual. The issue

raised by second respondent's defence is the legality of the covert campaign against the ECC. If not unique, it is, one imagines, a situation of extremely rare occurrence. A demand that such a case should also not be tried by a military court would not, in my view, make any serious impact on the jurisdiction of military courts; and could certainly not justify a statutory implication that in such a case there was no right of recusal.

Appellant's counsel did not argue that if the principles relating to personal bias were applicable in this case vis-à-vis the court martial as a whole, there were not reasonable grounds for suspecting bias (or the likelihood thereof). And in this regard I think that he exercised a wise discretion.

In all the circumstances I am of the view that the Court a quo correctly held that there were grounds upon which the court should have recused itself and that

it misdirected itself as to the proper approach to the recusal application. Prima facie this would justify the proceedings before the court martial being set aside on review. This brings me to two submissions advanced by appellant's counsel in the alternative and on the basis that the court martial did commit a reviewable irregularity by not recusing itself.

The first submission related to the proceedings which took place before the council of review. The question of the unsuccessful application for recusal was not raised by any of the respondents before the council of review; nor did the council of review deal with it mero motu. Appellant's counsel nevertheless argued that the hearing before the council of review "cured" the failure of justice resulting from institutional bias on the part of the court martial. (Inasmuch as the proceedings before the convening authority - second appellant - were indisputably vitiated by gross

irregularity - see the reported judgment at 874 C-F - no reliance was placed on second appellant's confirmation of the convictions and sentences as having any curative effect.) This general line of argument based upon the hearing before the council of review was rejected by the Court a quo for the reasons which appear in the reported judgment at 882G - 883F. In the course of setting forth these reasons Conradie J referred to the dictum of Megarry J in Leary v National Union of Vehicle Builders [1970] 2 All ER 713 (Ch) at 720h:

> "As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of justice in the appellate body."

This dictum was referred to and adopted by this Court in Turner v Jockey Club of South Africa 1974 (3) SA 633 (A), 658 F-G. Appellants' counsel submitted that this dictum had subsequently been "trimmed and corrected" by the Privy Council and the House of Lords in the cases of

Calvin v Carr [1979] 2 All ER 440 (PC) and Lloyd and Others v McMahon [1987] 1 All ER 1118 (HL); and that, applying "the true principle" as set forth in these cases, it could not be said that after the matter had been considered by the court of review respondents had not had a fair hearing.

I do not propose to discuss these cases and the many authorities referred to in them. I am not persuaded that principles enunciated particularly in the field of the proceedings of the domestic tribunals of an unincorporated association, such as a jockey club, where the member submits consensually to the system of adjudication, are really helpful in a case like the present. In this regard the following remarks of Lord Wilberforce in Calvin v Carr, supra, (a jockey club case), at 449b are instructive:

> ".... it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a

> measure of formal judicialisation. While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency in their Lordships' opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced."

What must be remembered is that in the present case we are concerned with the proceedings of what is in substance a court of law. It is a court which admittedly is composed of laymen, but one which in all other respects has the characteristics of a court of law and which enjoys a wide criminal jurisdiction. And, as I have already observed, the propriety of its proceedings should be judged by the normal standards pertaining to a court of law. If, as I have held, the court martial should have recused itself, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the

cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly there was no basis upon which the court of review could validate what had gone before. The only way the court of review could have "cured" the proceedings before the court martial would have been to set them aside. (Cf. S v Malindi and Others, supra, at 975 J - 976 B; S v Gqeba and Others 1989 (3) SA 712 (A), 717 I - 718 D.) That is what the court a quo did: correctly in my view.

Finally, it was argued by appellants' counsel that even if there was a failure of justice in regard to the second respondent - who raised the defence of justification - there was no such failure in the trial of first and third respondents. Consequently their trial was not reviewable on this ground. A similar argument

was advanced before the Court a quo, which dealt with it as follows (reported judgment at 882 E-F):

> "In my view the proceedings of the third respondent should be set aside. It would not be practicable - or fair - to set aside the proceedings against the second applicant only. Alleged conspirators should be tried together in a joint trial. Moreover, it would not in my view be juridically sound to hold that a tribunal which lacked jurisdiction to hear the whole trial in respect of one accused nevertheless had jurisdiction to hear that portion of it which concerned the prosecution's case against the other accused."

I agree. If, as I have held, the proceedings of the court martial were fatally flawed and constituted a nullity, then it seems to me that this must inevitably enure for the benefit of all the respondents. I cannot subscribe to the strange juridical patchwork inherent in the notion that the proceedings were invalid as regards second respondent, but valid as regards first and third respondents.

It was not disputed that, as held by the Court a quo, setting aside the proceedings of the court martial involved setting aside the proceedings of the convening authority and the court of review as well (reported judgment, 882G).

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

CORBETT CJ

VAN HEERDEN JA:
F H GROSSKOPF JA:
NIENABER JA: CONCUR
PREISS AJA: