Reportable

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 15721/2007

In the matter between:

SIYAKUDUMISA MLUNGUZA **Applicant**

and

LEON SMIT **Respondent**

JUDGMENT DELIVERED ON 12 FEBRUARY 2009

HJ ERASMUS, J:

Introduction

[1] The applicant was convicted and sentenced by the respondent, in his capacity as senior military judge presiding over a senior military court, on seven counts pertaining to absence without leave and disobeying lawful commands.

[2] The decision was in terms of sections 25 and 34(3) of the Military Disciplinary Supplementary Measures Act 16 of 1999 ("the MDSM Act") reviewed by a review counsel who recommended that the findings in respect of counts 1, 5, 6 and 7 be upheld and that the findings in respect of counts 2 and 4 be set aside.

[3] The applicant applied in terms of section 34(5) of the MDSM Act that the matter be reviewed by the Court of Military Appeals. On 11 October 2007 this Court, chaired by Ngoepe JP, found:

> After perusal of the record and hearing argument by counsel for defence and prosecution, this court is satisfied that the findings on charges 1, 3, 5, 6 and 7 are in accordance with real and substantial justice and they are accordingly upheld.
>
> The findings in respect of charges 2 and 4 are not in accordance with justice and are accordingly not upheld.

In respect of sentence, the Court was "of the opinion that the sentence imposed by the court *a quo* was lenient and not shockingly inappropriate". The Court corrected the wording of the sentence to read as follows:

> Reduction in seniority in rank with forfeiture of rank and seniority in his corps and in the South African Navy as if his appointment as Leading Seaman was dated 15 August 2005; and detention for a period of 270 days and reduction to the ranks. The whole period of detention and reduction to the ranks are suspended for a period of three years on condition that the accused is not convicted of committing Sections 13, 14(a), 19(1) 0r 19(2) MDC within the period of suspension.

The course of the proceedings

[4] On 2 November 2007 the applicant launched the current review application. In the Notice of Motion, the following relief is sought:

1. Reviewing and setting aside the decision of the Respondent of convicting Applicant on charges set in annexure "A" taken on or about 15 August 2005.

2. Directing the Respondent to disclose to the Applicant the reason for the decision referred to in prayer 1, supra;

3. Directing the Respondent to take all necessary steps to ensure that he reconsiders his decision.

4. Directing the Respondent to pay costs of this application in case he opposed it.

The applicant, who is now a qualified attorney, acted for himself throughout the proceedings. When the incompatibility of the prayers was pointed out to him, the applicant indicated that he would abandon prayers 2 and 3.

[5] The course of the proceedings after launch was beset by oversight and error. The Notice of Opposition, dated 23 November 2007, though duly served on the same day at the applicant's appointed address for receipt of process, was in error filed at the Labour Court. This necessitated an interlocutory application for condonation. The founding affidavit in the interlocutory proceedings was deposed to by Ms Mantame, the respondent's attorney.

[6] On 18 December 2007 in terms of a Notice in Terms of Rule 53(1)(b) (the Notice bears the date 14 December 2008), addressed to the Registrar and the applicant, the respondent despatched the record of the proceedings sought to be set aside to the Registrar of this Court. The despatch of the record at that date is

confirmed in the founding affidavit of respondent's attorney in the interlocutory proceedings adverted to in the preceding paragraph.

[7] In a letter dated 11 April 2008 the applicant acknowledges that he received the Notice in Terms of Rule 53(1)(b), but complains that he had not received the record and that the record was not to be found in the Registrar's office. In the letter, the applicant accordingly demands proof that the record had been despatched, and also, under threat of an urgent application, that it be dispatched "again as they are not in the court file". He further demands that the respondent uplift his answering affidavit filed on 10 April 2008 –

> as it is premature because I have not yet received the records which will determine whether I amend my Notice of Motion and supplement my [founding] affidavit.

[8] The applicant's demands are misconceived. The respondent complied with Rule 53(1)(b) by despatching the record to the Registrar. The Registrar must thereupon make the record available to the applicant. If the record is not to be found in the Registrar's office, the respondent cannot be held responsible, and despatch of a further copy by the applicant cannot simply be demanded as of right. It is, moreover, not clear why the applicant complained only on 11 April 2008 that he had not received a copy of the record: the applicant acknowledges receipt of the Notice in Terms of Rule 53(1)(b) dated 14 December 2007 that the record was despatched to the Registrar.

[9] On 3 June 2008 the applicant delivered a supplementary affidavit in which he raises additional grounds of review; that is, additional to the grounds raised in the founding affidavit. When taken to task on the first day of hearing for filing the supplementary affidavit without the leave of the Court, the applicant relied on Rule 53(4) which provides as follows:

> The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice accompanying the affidavit, amend,

> add to or vary the terms of the notice of motion and supplement the supporting affidavit.

In terms of the sub-rule, the applicant was entitled to amend, add to or vary the terms of the notice of motion and supplement his founding affidavit without the consent of the respondent or the leave of the court.[1] An applicant's right to deliver such an affidavit is not unqualified: the affidavit must be delivered within ten days after the record has been made available to the applicant. The respondent despatched the record to the Registrar on 18 December; the applicant acknowledges receipt of the Notice recording the despatch of the record. In the normal course, in accordance with the assumption that official acts are presumed to have been duly performed until proof to the contrary be adduced (*omnia preasumuntur rite esse acta donec prohibetur in contrarium*), the Registrar will deliver the record to the applicant upon receipt thereof in his office. Delivery of the supplementary affidavit six months after the record was delivered to the Registrar may be due to either (i) failure on the part of the Registrar to make the record available to the applicant, or (ii) failure on the part of the applicant to deliver the supplementary affidavit within the period prescribed in Rule 53(4). In either event, an explanation had to be placed before the Court and, in the case of failure on the part of the applicant to deliver the affidavit with the period prescribed in the Rule, condonation for the late delivery of the affidavit had to be obtained. Despite the absence of (at least) an explanatory affidavit, we received the applicant's supplementary affidavit as an affidavit properly filed under the provisions of Rule 53(4).

[10] The demand in the applicant's letter of 11 April 2008 that the respondent uplift his answering affidavit filed on 10 April 2008 is misconceived. The respondent, having complied with Rule 53(1)(b) in December 2007, was by April 2008 entitled to accept that no additions or amendments under Rule 53(4) would be forthcoming. A respondent cannot be expected to await an applicant's further affidavit under Rule 53(4) for an indefinite period. If in fact the record was not available in the offices of the Registrar, a much earlier indication from the applicant (who had knowledge of the Notice that the record had been despatched to the registrar in December 2007) that the

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[1] *Pieters v Administrateur, Suidwes-Afrika en 'n Ander* 1972 (2) SA 220 (SWA) at 225G.

record was not available would have contributed to a more orderly and more expeditious course of events.

[11] Prior to the hearing on 28 November 2008, the respondent, by notice dated 11 November 2008, brought an application for leave to file a further answering affidavit in response to the applicant's supplementary affidavit. We granted the application but afforded the applicant the opportunity to deal with such further answering affidavit in a further replying affidavit.

[12] In the supplementary affidavit, the applicant raises a number of grounds of review not raised in the founding affidavit. Upon closer examination, it becomes clear that in the supplementary affidavit no ground of review is raised of which the applicant was unaware at the time of the launch of the application. In other words, in the supplementary affidavit, no ground of review is raised, the existence of which only came to the knowledge of the applicant when he gained access to the record. This is apparent from what the applicant states in the founding affidavit. In paragraph 13 of his founding affidavit, the applicant says:

> In order not to prolix (*sic*) the documents before this court I will refer this honourable court to my head of arguments (*sic*) attached as annexure "D" and "E" as the grounds for my application for setting aside conviction on charges one, three, five and seven.

Annexure "D" and "E" are the applicant's heads of argument in the proceedings before the Court of Military Appeals. We leave aside this novel way of raising grounds of review in a founding affidavit.[2] In those heads, every ground of review raised in the supplementary affidavit is canvassed at some length. The only new matter in the supplementary affidavit are a few page references to the record of the proceedings before the respondent.

[13] After the first day of hearing on 28 November 2008, the matter was postponed to 5 December 2008. On that date, the matter was further postponed to 28 January

[2] The applicant in the answering affidavit could do no more that say that he is "not able to respond properly as the specific grounds for review have not been set out …"

2009 and the parties were requested to be ready to address the Court on the questions of joinder raised on the papers.

The citation of the respondent

[14] Before dealing with the issue of joinder, it is necessary to deal briefly with the manner in which the respondent is cited. The respondent is cited in person and described as follows in the founding affidavit:

> The respondent is Leon Smit and adult male employed as a military judge by the Department of Defence with a military rank of lieutenant colonel and attached at the Cape of Good Hope Castle, Military legal service division, Cape Town.

It is further alleged that –

> [t]he Respondent was presiding officer during the trial of my case.

[15] Rule 53(1) of the Rules of Court provides as follows:

> Save where any law otherwise provides, all proceedings to bring under review the decisions or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected – ….

The respondent should have been cited in his capacity as the presiding officer of the military court which heard the charges against the applicant.

Joinder: The Minister of Defence

[16] The respondent is an officer in the Defence Force who holds a commission in terms of the Defence Act 42 of 2002. He presided over the proceedings currently under review in his capacity as a military judge. The applicant did not cite the Minister of Defence as a respondent. In his answering affidavit, the respondent says that the Minister and the Director: Military Prosecutions should have been joined as respondents.

[17] It is customary to join the Minister of Defence in proceedings of this nature[3] and Ms Mangcu-Lockwood, on behalf of the respondent, submitted that in law the Minister of Defence was a necessary party who should have been joined as a respondent by virtue of the provisions of the State Liability Act 20 of 1957 and the MDSM Act.

[18] Section 1 of the State Liability Act 20 of 1957 provides that a claim would lie against the State where the claim arises out of a contract entered into on behalf of the State or out of a wrong committed by a servant of the State acting in his capacity and within the scope of his authority. Section 2 provides that in such cases the Minister of the department concerned may be cited as nominal defendant or respondent.

[19] There is no provision in the MDSM Act which deals explicitly with the joinder of the Minister of Defence in proceedings of this nature. Ms Mangcu-Lockwood, however, submitted that the Minister of Defence has a substantial interest in this matter and should have been joined. She pointed out that in terms of the MDSM Act, the Minister of Defence is responsible for appointing the Court of Military Appeals[4] and that the Minister is responsible for assigning officers[5] to the

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[3] Recent examples include *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence* 2002 (1) SA 1 (CC); *Mbambo v Minister of Defence* 2005 (2) SA 226 (T); *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T); *Borman v Minister of Defence* 2007 (2) SA 386 (C).

[4] Section 7 of the MDSM Act read with the definition of "Minister" in section 1.

[5] In terms of section 1 of the MDSM Act, "officer" means and officer as defined in section 1 of the Defence Act 44 of 1957, that is, a person on whom permanent or temporary commission has been conferred and who has been appointed to the rank of officer.

functions of senior military judge and military judge.[6] Such assignment is only for a fixed period or coupled to a specific deployment, operation or exercise.[7] The Minister of Defence may remove judges from their assignment for reasons of incapacity, incompetence or misconduct.[8]

[20] The answer to these submissions is probably to be found in section 19 of the MDSM Act which provides, *inter alia*, that a military judge shall in the exercise of his or her judicial authority –

(a) be independent and subject only to the Constitution and the law;
(b) apply the Constitution and the law impartially and without fear, favour or prejudice;
(c) conduct every trial and proceedings in a manner befitting a court of justice.

Military judges are, accordingly, judicial officers whose position is, *mutatis mutandis*, analogous to that of magistrates who are appointed by the Minister of Justice "after consultation" with the Magistrates Commission.[9] In regard to reviews of proceedings in military courts, the position of the Minister of Defence would seem to be analogous to that of the Minister of Justice in relation to the review of proceedings in magistrates' courts. In neither case does the Minister incur any vicarious liability for the acts of omissions of a judicial officer, magistrate or military judge, acting in his or her judicial capacity. It would seem that the interest the Minister of Defence may have in this matter is not "substantial" so as to render obligatory his joinder as a necessary party. However, I prefer not to express a firm view on the issue in view of the fact that the application falls to be dismissed on the grounds set out in paragraphs [21] to [27] below, and on the ground that the application is in any event without substance and merit.

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[6] Section 14(1)(b) of the MDSM Act.

[7] Section 17 of the MDSM Act.

[8] Section 17 of the MDSM Act.

[9] Section 10 of the Magistrates Act 90 of 1993; section 9 of the Magistrates' Courts Act 32 of 1944.

The Court of Military Appeals

[21] The proceedings of the Military Court of Appeals are subject to review by the High Court.[10] The applicant alleges in paragraph 14 of the founding affidavit:

> The court of military appeals purported to have given reasons to upheld (*sic*) charge one, three, five, six and seven but on closer scrutiny it has not given reasons at all (see copy of the reasons marked as annexure "F").

This is a ground of review which pertains to the proceedings before the Court of Military Appeals. When asked at the hearing whether the Court of Military Appeals, and its Presiding Officer, should not have been joined as a party, the applicant pointed out that in the Notice of Motion he was not seeking any relief against the Court of Military Appeals. The question arises: why then make such allegations in the founding affidavit?

[22] The applicant confined his attack to the proceedings in the lower court. When asked at the hearing what the practical effect would be if the decision of the respondent is set aside upon review, the applicant at first suggested that the decision of the Court of Military Appeals (which confirmed the decision of the respondent) would fall away. In subsequent argument, he submitted that the order of the Court of Military Appeals would remain and that it would be up to the applicant to take whatever further steps he considered appropriate.

[23] The approach adopted by the applicant is fundamentally flawed. Section 6(3) of the MDSM Act provides:

> A Court of Military Appeals shall be the highest military court and a judgment thereof shall bind all other military courts.

The powers of a Court of Military Appeals are set out in section 8 of the MDSM Act which in section 8(1) provides, *inter alia*, as follows:

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[10] *Mbambo v Minister of Defence* 2005 (2) SA 226 (T); *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T); *Borman v Minister of Defence* 2007 (2) SA 386 (C).

> A Court of Military Appeals shall exercise full appeal and review competencies in respect of the proceedings conducted before any military court and may, after due consideration of the record of the proceedings of any case or hearing and of any representations submitted to it or argument heard by it in terms of this Act –
>
> (a) uphold the finding and the sentence;
> (b) refuse to uphold the finding end set the sentence aside;
> (c) …..
> (d) if it has upheld the finding, or substituted a finding, vary the sentence.

[24] Upon review of the respondent's findings and sentence, the Court of Military Appeals upheld the findings in respect of counts 1, 5, 6 and 7, set the findings in respect of counts 2 and 4 aside. The Court of Military Appeals also varied the sentence by altering the wording. Ms Mangcu-Lockwood submits, rightly in my view, that there is now a new operational decision, that of the Court of Military Appeals, which differs from that of the senior military court.

[25] The proceedings of the senior military court, which the applicant endeavours to bring in review before this Court, have already been reviewed by the highest court within the military hierarchy. The applicant cannot be permitted to bring a second review in this Court of the proceedings of a military court which have already been the subject of review by another court with applicable and competent review jurisdiction.

[26] The applicant has exercised his right under section 25 of the MDSM Act to a –

> ….. speedy and competent review of the proceedings of his …. trial to ensure that any proceedings, finding, sentence or order is either valid, regular, fair and appropriate, or remedied.

The right of appeal to or review by a higher court within the military court hierarchy enshrined in the MSDM Act fulfils the right to meaningful reconsideration of the conviction and sentence in accordance with section 35(3) of the Constitution which

states that the right "of appeal to, or review by, a higher court" is included in the right to a fair trial.[11]

[27] As has been pointed out above,[12] the proceedings of the Military Court of Appeals are subject to review by the High Court. This is in line with the object of the MDSM Act to ensure a "fair military trial and an accused's access to the High Court of South Africa". The applicant chose not to pursue this avenue of relief.

[28] The application falls to be dismissed for the reasons set out in paragraphs [21] to [27] above. It will, however, be convenient, should the matter be taken further, to express our views on the merits of the grounds of review on which the applicant relies

The grounds of review

[29] I preface consideration of the grounds of review raised by the applicant with two observations in regard to the proceedings before the respondent. The first is that the matter was postponed on thirteen occasions from 11 November 2002 to 12 March 2004 in order to enable the applicant to find legal representation of his liking. The second is that after the evidence of three witnesses had been led, the applicant, who had in the meantime obtained his LL.B degree, chose to represent himself and terminated the mandate of his attorney. The respondent, out of concern for the applicant's inexperience as a lawyer, suggested that he speak to Lieutenant Mokoena who might be able to assist him if he wished. The applicant chose to represent himself but to have Lieutenant Mokoena assist him.

[30] I now turn to consideration of the grounds of review raised in the supplementary affidavit.

[30.1] It is alleged that the respondent during an adjournment retired with the prosecutor and a state witness and that they had coffee together. This, the applicant

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[11] *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229E—230B, 233H—I; *Borman v Minister of Defence* 2007 (2) SA 388 (C) at 392D—393A.

[12] See above para [21].

says, at the least creates a reasonable suspicion of bias on the part of the respondent. The applicant did not raise this objection before the Court of Military Appeals. The respondent denies having retired with the prosecutor or any witness to discuss the applicant's case. The respondent points out that the proceedings were held on the second floor of a building in Simon's Town. When approaching the court room, one passes the prosecutor's office. The prosecutor was responsible for the administrative arrangements for the court to sit in Simon's Town. The respondent admits that it is possible that he might have spoken to the prosecutor in this regard. I can find no reason to doubt the respondent's testimony, and in any event, his version is to be accepted in the light of the principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[13]

[30.2] The first charge against the applicant was that he had contravened section 14(a) of the Military Discipline Code ("the MDC").[14] The section reads as follows:

> 14. Any person who –
>
> (a) Absents himself without leave;
>
> (b) fails to appear at a place parade or duty or any other place appointed by his commanding officer, or leaves any such place without good and sufficient cause
>
> …..
>
> Shall be guilty of a offence and liable on conviction to imprisonment for a period not exceeding one year.

The applicant says that it was not proved that Naval Base Simon's Town was his unit. Section 14(a) deals with absence without leave ("AWOL") generally and does not specify a place or unit from which a person is absent. It is not disputed that the applicant was required to attend at Simon's Town Naval Base from 17 October to 31 October 2002 and that he failed, without leave, to do so. The applicant knew that he was to attend at the Simon's Town Naval Base, and it is not disputed that a signal was sent arranging for the applicant to attend at Waterfall barracks while his ship the

[13] 1984 (3) SA 623 (A) at 634E—H.

[14] Shedule 1 of the Defence Act 44 of 1957.

Drakensberg was away. What the applicant is in effect doing, as counsel for the respondent points out in her heads, is to claim that a unit is not his unit when he fully knows that he is required to report there.

[30.3] The seventh count was also one of contravention of section 14 of the MDC in that he was absent without leave from his unit SAS ADAM KOK from 11h25 on 20 July to 07h30 on 21 July 2004, the period of absence being nineteen hours and fifty-five minutes. The applicant says that it was not proved that he absented himself at 11h25 on the day in question and that he was absent through the entire period. Lieutenant Pringle said in evidence that the applicant at 11h05 requested permission to drop off some paperwork, stating that he would be back in fifteen minutes. He was reminded that the ship was sailing at 12h00 and was requested to return at 11h25. He returned by 13h20 by which time the ship had sailed. He reported to the ship the following morning upon its return to the Naval Base. The applicant raised various defences: the submission of the paperwork took longer than the 15 minutes he had anticipated; that he had been given 50 minutes and not 15; he was back by the time the ship returned after 19h00; he did not know the ship was sailing because it was a surprise sailing; his defence of impossibility was ignored. The respondent reached a reasoned conclusion on the basis of all the evidence before him. He did not ignore the defence of impossibility; he rejected it. Within the conspectus of all the evidence before the respondent, his decision was not so unreasonable that no reasonable judge would have come to that decision.

[30.4] The third charge was also one of contravention of section 14 of the MDC in that the applicant was absent without leave from his unit SAS Drakensberg for a period of five days. The applicant did not dispute that he was absent for this period. His complaint is that he did not know that AWOL is a continuing offence which counted against him even on days on which he was not required to work, and that the respondent did not consider his defence of ignorance of military law. This is a rather strange complaint on the part of a person who has a degree in law and who terminated the mandate of his legal representative to conduct his own case. The Court of Military

Appeals,[15] presided over by Hussain J, has held that contravention of section 14(a) of the MDC –

> ….. is a continuous offence and the offence is committed from the moment a person absents him- or herself until he or she is arrested or surrenders him or herself.

In the circumstances of this case, ignorance of military law might at best have been a factor to be considered in mitigation of sentence. The Court of Appeals found that the sentence imposed by the respondent was "lenient and not shockingly inappropriate".

[30.5] In the supplementary affidavit, the applicant complains that on counts 2, 4 and 5 he raised infringement of his constitutional right to education as a defence, and that in dealing with this defence, the respondent exceeded his jurisdiction by indulging in interpretation of the Constitution. The applicant seems to have lost sight of the fact that the Court of Military Appeals did not uphold the respondent's findings in respect of counts 2 and 4. On count 5 the respondent was charged with contravention of section 19(2) of the MDC in that on 17 February 2004 he had disobeyed a lawful command given by a superior officer by neglecting to stay on board the SAS ADAM KOK after hours, after being ordered to do so.

[30.5.1] Section 29 of the Constitution provides as follows:

> (1) Everyone has the right –
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

The concept "basic education" in sub-paragraph (a) is open-ended,[16] but within the South African context certainly does not include tertiary or university education. The applicant at the time was in the final year of study for the LL.B degree. Sub-paragraph

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[15] In Case Number 04/2002.

[16] See Cheadle Davis Haysom *South African Constitutional Law: The Bill of Rights* 2nd ed 24.2.

(b) does not support a right to further education *per se*, but a right to reasonable state measures that make further education progressively available and accessible.[17] The sub-paragraph is accordingly not applicable to the defence the applicant raised.

[30.5.2] A complaint that a fundamental right entrenched in the Constitution has been infringed must have a factual basis. The facts in this case are:

1. The applicant at the time was engaged upon university studies for a degree in law – he was not involved in basic education.

2. The reason for his transfer from his ship, the SAS Drakensberg, to the Simon's Town Naval Base was to give him the opportunity to study – this the applicant admitted during argument at the hearing of the application.

3. The charge in count 5 related to a solitary incident when on 17 February 2004 he was ordered to stay on board the SAS ADAM KOK after hours.

4. During 2004 the applicant completed his studies for the LL.B degree.

The respondent's finding that there was no evidence to show that the applicant's right to education was infringed, cannot be faulted. In making that factual finding the respondent was not indulging in constitutional interpretation beyond his jurisdiction.

[30.6] It is alleged in the supplementary affidavit that the respondent "curtailed and/or interfered with the cross-examination by the defence, to such an extent that his impartiality could be doubted". In support of this contention, the applicant relies on two short passages in a record that runs to 624 pages. The applicant relies on the following passage in support of an allegation that the respondent put words into the mouth of a State witness (record 126/17-29):

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[17] See Chaskalson *et al Constitutional Law of South Africa* 38.1; Cheadle Davis Haysom *South African Constitutional Law: The Bill of Rights* 2nd ed 24.5.

> Accused: I am going to the third charge now. And that on the 30th December 2002 in Simon's Town I unlawfully and intentionally absented myself without leave (indistinct).
> Kirchner: Which dates?
> Accused: 30th December 2002. Do you agree with that, that I was absent on the 30th December 2002.
> Kirchner: The 3rd?
> Accused: 30th.
> Kirchner: Of December?
> Judge: Yes, 30. 30 December until 2 January.
> Kirchner: Yes, I agree.
> Judge: Sorry, 4 January.

I do not understand the complaint. The third charge pertains to alleged AWOL during the period 30 December 2002 to 4 January 2003. The applicant did not dispute that he was absent during that period.[18]

The applicant relies on the following passage as being illustrative of the respondent's partiality (record 136/10-34):

> Assistant Defence Counsel: (indistinct) ….. (intervention)
> Judge: Well, I do not want to hear too much because you are not supposed to, you are not defence counsel officially but … (intervention)
> Assistant Defence Counsel: No I am just, it is … (intervention)
> Judge: But you are assisting, so I will let you, yes, I will let you.[19]
> Assistant Defence Counsel: Yes I understand that the Court is helping in this matter, but I would say amongst the three of us the Court, the prosecutor and myself as an assistant defence counsel I would humble request the Court that in reprimanding the accused when he is conducting his defence, if maybe the Court can do it is a very softer way so that he does not feel intimidated.

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[18] See paragraph [30.4] above.

[19] It will be recalled that when the applicant insisted to conduct his own defence, the respondent offered him the assistance of Lieutenant Mokoena.

> Judge: Yes, I was not really reprimanding. I apologise if it came over that way, I was not reprimanding. I was, the Court does make the odd comment now and then. The Court feels that sometimes a little bit of a lighter way of putting thing might be of assistance in the relieving of the possible tension that there might be, but I was not reprimanding as such, I was merely trying to assist. So, yes, thank you for that Mr Defence Counsel, but the Court was certainly not doing that.

The remark that elicited the intervention of the assistant defence counsel reads as follows:

> Prosecutor: Judge, objection, I really do not see the relevance of … (intervention)
> Judge: Sorry, sorry, Killick, Killick, yes I think maybe sound does not travel well or something, but it seems that you are not understanding what the Warrant is saying. It seems to me that what he is saying is this now. I am trying to assist you with this. What he is saying is, when you are a defaulter, in other words when you are an offender and you have been charged for an offence, then you are instructed to salute. But any other scenario, it seems Warrant it includes I suppose where you might have done something wrong but you have not been formally charged for it and then you salute. Okay, that is what the Warrant is saying. So in other words where you have not been formally charged, he is saying that you must then salute. And that is his point now and then I think we should not go on indefinitely with that point. Yes, Lieutenant.

There was some debate between the applicant and the witness he was cross-examining about the protocol as to saluting an officer by a person who has been charged with an offence. The prosecution objected to the relevance of the cross-examination, and the respondent attempted to explain the situation to the applicant. I do not understand how all this, including the respondent's response to the objection by the assistant defence counsel, can be taken to reflect adversely on the respondent's impartiality. It seems to me that the respondent was trying to be helpful in compliance with the injunction in

section 19(d) of the MDSM Act that a military judge shall in the exercise of his or her judicial authority –

> (d) ensure that the accused whether represented or unrepresented, does not suffer any disadvantage because of his position as such, or because of ignorance or incapacity to examine or cross-examine or to make his defence clear and intelligible, or otherwise.

[30.7] The applicant complains that the proceedings were conducted in a "hostile terrain" up to the point of harassing and intimidating him. In support he refers to the objection raised by the assistant defence counsel cited in the preceding paragraph. The words do not bear out the applicant's contention. The proceedings were conducted in a military environment, an environment no more intimidating and hostile than a magistrate's court would be to an accused facing serious charges and a battery of State witnesses.

[30.8] The applicant says that the respondent addressed him as "killick" instead of his military rank as leading seaman, and that by doing so the respondent was "belittling" him, and that the respondent did so "with the purpose of upsetting" him. In this regard I can do no better than cite the respondent's response in his further answering affidavit:

> "Killick" is the naval form of address used to refer to a sailor holding the rank of Leading Seaman. It was inherited from the Royal Navy, where it has been in use for centuries. To the best of my knowledge the word "killick" is Celtic and means "stone", and became a synonym for "anchor" in the era where stones were used as anchors. As the rank insignia for a Leading Seaman is an anchor, this became a form of address predating the establishment of the South African navy. I am surprised that Applicant experienced this term as derogatory, as it is not only firmly established in naval tradition, but is in fact promulgated as the official form of address when referring to Leading Seamen in the South African Navy. I attach hereto ….. the relevant section of the official chart of SANDF ranks published by the Department of Defence's Corporate Communication Directorate.

The applicant's complaint is without merit.

[30.9] The applicant complains that the respondent identified himself with the State in that he wore military uniform during the proceedings with rank equivalent to the State. In terms of section 10(1)(a) of the MDSM Act only an officer with at least field rank may be appointed as a military judge. An officer is defined in section 1(1) of the Defence Act 42 of 2002 as "a person on whom permanent or temporary commission has been conferred by or under this Act, and who has been appointed to the rank of officer". The respondent rightly contends that his status a uniformed soldier is a statutory prerequisite of his appointment as military judge.

[30.10] It is further alleged that the respondent's position as a military judge is temporary and that he was –

> … susceptible to do anything which will please his employer in order to secure his re-appointment as a military judge and further promotions.

It is correct that military judges are assigned by the Minister of Defence for fixed periods and that their assignment may be renewed at the Minister's discretion. Section 19(a) of the MDSM Act provides that a military judge shall in the exercise of his or her judicial authority –

> (a) be independent and subject only to the Constitution and the law.

That the respondent would do anything to secure his re-appointment as military judge and his further promotion, is a scurrilous attack on the respondent's integrity for which no factual basis is furnished.

[30.11] The impartiality of the respondent is further questioned on the ground that the prosecutor and the respondent fall under the control of a single authority, the chief of military legal services. In *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence* [20] the Constitutional Court held that it was

[20] 2002 (1) SA 1 (CC).

not unconstitutional to have a prosecutorial function specifically for the SANDF in the military justice system.

[30.12] Finally, the applicant complains that the respondent did not hold an assignment as military judge during the full course of the proceedings before him. The complaint was justified to the extent that annexed to the respondent's answering affidavit was a copy of his assignment for 2005. The position was rectified in the respondent's further answering affidavit in which proof is furnished of the respondent's assignments for the period 2002 to 2006. The applicant's case was first enrolled during 2003 and after a number of pre-trial postponements, commenced in 2004 and ran to completion in 2005.

[31] The grounds of review on which the applicant relies are without merit.

[32] In view of the foregoing, the following order is made:

The application is dismissed with costs.

HJ ERASMUS, J

I agree. **LE GRANGE, J**

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

15721/2007

In the matter between:

SIYAKUDUMISA MLUNGUZA

Applicant

and

LEON SMIT

Respondent

JUDGE	**:**	**H.J. Erasmus** **A. Le Grange Agrees:**
FOR THE APPELLANT	**:**	**In Person**
FOR THE RESPONDENT	**:**	**Adv. M. Mangcu-Lockwood**
INSTRUCTED BY	**:**	**State Attorney: B. Mantame**
DATES OF HEARINGS	**:**	**28 November 2008** **28 Januarie 2009**
DATE OF JUDGMENT	**:**	**12 Februarie 2009**