IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 69441/11

In the matter between:

MONWABISI TIMAKWE	Applicant
and	
PRESIDENT OF COURT OF SENIOR MILTARY JUDGE	First Respondent
CHAIR OF THE COURT OF MILITARY APPEALS	Second Respondent
MAJOR GENERAL SB MMONO	Third Respondent
THE DIRECTOR OF MILITARY PROSECUTIONS	Fourth Respondent
THE MINISTER OF DEFENCE	Fifth Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Sixth Respondent
THE MINISTER OF JUSTICE	Seventh Respondent
THE SECRETARY FOR DEFENCE	Eighth Respondent
THE CHIEF OF THE DEFENCE FORCE	Ninth Respondent

DELETE WHICHEVER IS NOT APPLICABLE

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

19/04/2018
DATE SIGNATURE

19/4/18

JUDGMENT

Murphy J

1. The applicant was a Lance Bombardier in the Defence Force until he was dishonourably discharged after being convicted on 3 June 2005 by a Court of a Senior Military Judge ("CSMJ") of various offences, including the murder of his colleague while deployed in Burundi, and sentenced to 23 years imprisonment. His conviction and sentence were confirmed on appeal before a Court of Military Appeals ("CMA") on 29 March 2006.

2. Almost six years later, on 5 December 2011, the applicant launched this application seeking the setting aside of the decisions of both the CSMJ and the CMA - the review application. In addition, the applicant challenges the constitutionality of various sections of the Military Discipline Supplementary Measures Act[1] ("the MDSMA") and the Defence Act[2] ("the DA") – the application for constitutional relief. Since the bringing of the application, the applicant has been released on parole.

3. The applicant has cited nine respondents, being: the President of the CSMJ, the Chairperson of the CMA, the Adjutant General of the Defence Force, the Director of Military Prosecutions, the Minister of Defence and Military Veterans, the Minister of Correctional Services, the Minister of Justice and Constitutional Development, the Secretary for Defence and the Chief of the Defence Force ('the respondents"). All the respondents oppose the application.

4. The respondents contend that the delay in launching the review application is excessive and has no prospects of success. The application for constitutional review, the respondents contend, is moreover without a proper legal foundation.

5. The applicant correctly submits that this court has inherent common law power to review the proceedings of military tribunals.[3] However, review proceedings must be brought within a reasonable time.[4] A determination of whether they were so instituted involves a factual inquiry and a judicial value judgment which depend on the circumstances of the case and the delay. The question is what constitutes a reasonable time after the applicant became aware of the decision for the taking of all

[1] Act 16 of 1999
[2] Act 44 of 1957
[3] *Council of Review South African Defence Force and Others v Monnig and Others* 1992 (3) SA 482 (A) 487 C-E
[4] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 28

steps reasonably required prior to and in order to institute the proceedings.[5] If there is an unreasonable delay, the court must consider whether the delay should be condoned, taking into account relevant circumstances including: i) the length of the delay; ii) the degree of non-compliance; iii) the adequacy of the explanation for the failure; iv) the prospects of success; v) the importance of the case; vi) the avoidance of delays in the administration of justice; vii) the absence of prejudice to the respondents; and viii) the convenience of the court.[6]

6. Despite bringing the review almost six years after the CMA handed down its judgment, the applicant failed in his founding papers to seek condonation for the delay. The respondents took the point in their answering affidavit that the delay was in fact unreasonable. The applicant then sought condonation in his replying affidavit. His explanation for the delay is inadequate. He explains that he had difficulty communicating form prison, but eventually contacted his attorney, Mr Bembe. He does not mention when that happened. He then had problems securing funds and was only able to give instructions to Mr Bembe on 3 November 2006, that is, some 7 months after his appeal was dismissed by the CMA. A year passed without any steps being taken to advance the review application. During November 2007, the attorney prepared a notice of appeal, an application for condonation and a request for reasons for judgment. These papers were not issued.

7. In 2008 Mr Bembe informed the applicant that his funds would soon become exhausted. Between 2008 and 2010, the applicant made various attempts to obtain legal assistance. He was ultimately assisted by the Pretoria Justice Centre and consulted with counsel for the first time in June 2010. He offers no satisfactory explanation for why it took a further 18 months before the review application was launched other than mentioning that the papers were drafted over that period. He offers no reasons for why the drafting process took so long.

8. In the result, there is no adequate explanation for the almost 6 year delay, which self-evidently was excessive. However, given the importance of the case, it is necessary to have regard to the prospects of success in order to consider if they are

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[5] *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N)
[6] *Gqwetha v Transkei Development Corporation* 2006 (2) SA 603 (SCA) para 26-28; and *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) para 7

sufficiently strong to outweigh the weakness of the explanation for the excessive delay.

9. The applicant alleges three review grounds with regard to the proceedings of the CSMJ. Firstly, he contends that the CSMJ was irregularly constituted. Secondly, he claims the CSMJ lacked jurisdiction because it failed to ascertain if a preliminary investigation had been completed. Thirdly, he submitted that the CSMJ irregularly applied the provisions of the Criminal Procedure Act[7] and incorrectly assessed the evidence against him.

The composition of the CSMJ

10. The challenge to the composition of the CSMJ is to the effect that its President also served as the Director Military Judges ('the DMJ") and that she failed to disclose that fact. The applicant's complaint is that the President had an interest in assessing the performance of the other judges, who accordingly could consciously or unconsciously defer to her opinions, resulting in a loss of independence, undue influence and a reasonable perception of bias.

11. Section 9 of the MDSMA defines a senior military judge as an officer of a rank not below colonel or its equivalent and with not less than five years' experience as a practising advocate or attorney or in the administration of criminal or military justice who has been assigned by the Minister to act as a senior military judge on the recommendation of the Adjutant General. In terms of section 9(3) of the MDSMA, where, as in the present case, the charge against the accused is one of murder committed beyond the borders of the Republic, the CSMJ must consist of three military judges sitting together under the presidency of the senior of those judges.

12. The respondents explain in their answering affidavit that the performance of senior military judges is indeed assessed by the DMJ. However, it must be kept in mind that in terms of section 14(1) of the MDMSA the DMJ is deemed to be a senior military judge and is thus bound by oath to uphold and protect the Constitution and to perform her functions in a manner free from executive or command interference. The

[7] Act 51 of 1977

performance appraisal system is based on agreed criteria not open to arbitrary amendment and subject to third party scrutiny against constitutional and legislative imperatives. The benefits or prospects of a senior military judge are not linked to his or her functional performance as a judge.

13. In any event, the DMJ is normally not responsible for the allocation of judges to military courts. In this case the judges were allocated to the court by the Director Legal Support Services.

14. There is a presumption that judicial officers are impartial in adjudicating disputes, based on the recognition that legal training and experience prepare judges for determining where the truth lies. One may expect judges to carry out the oath or duties of their offices. Before it may be held that an accused person had a reasonable apprehension of bias, there must be cogent evidence demonstrating conduct on the part of the judge that confirms that.[8] There is no evidence of any kind in this case which shows that the other judges were unduly brought under the influence of the President to act venally in their own interests or supporting the claim of a reasonable apprehension of bias.

15. Moreover, in the present case counsel for the applicant knew that the President was the DMJ but raised no objection when specifically asked by the President at the commencement of the proceedings if there was any objection to the composition of the CSMJ. It is not in the interests of justice to permit a litigant, where that litigant has appropriate knowledge, to wait until an adverse judgment before raising the issue of recusal on the grounds of a reasonable apprehension of bias.[9] The same principle applies to the assertion made for the first time in the applicant's heads of argument that the President was beholden to the Adjutant General. An applicant must raise the issues upon which he would seek to rely in the founding affidavit by defining those issues and setting out the relevant evidence. It is not permissible to do so for the first time in the heads of argument.[10]

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[8] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 40-41
[9] *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) para 69-75
[10] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) 323

16 There is accordingly no merit in the ground of review regarding the composition of the CSMJ.

The preliminary investigation

17. The applicant's second ground of review relates to the conduct of the preliminary investigation. Section 29(3)(e) of the MDSMA permits a military court to direct that a preliminary investigation be held in respect of misconduct. A preliminary investigation was conducted into the alleged offences committed by the applicant in terms of section 30 of the MDSMA by Lt Col Botha. The evidence admitted during the preliminary investigation consisted of sworn statements by the relevant witnesses.

18. In his founding affidavit the applicant alleges that the CSMJ was "statutorily barred" from exercising its jurisdiction unless a lawful preliminary investigation had been completed. He cites no statutory provision or judicial authority in support of that proposition. However, I assume (on the basis of the case made out for the first time in the replying affidavit) that he relies on section 29(3)(g) of the MDSMA which provides that when a person is brought before a military court it may "try that person either summarily, or upon completion of a preliminary investigation".

19. The applicant's essential objection under this ground is that in the trial proceedings the prosecutor only handed in the record of the preliminary investigation to the CSMJ at the close of the prosecution case, and thus at the commencement of the trial the CSMJ was not in a position to ascertain whether or not a preliminary investigation had been completed, the "statutory bar" to exercising jurisdiction had been removed and if it was necessary to take remedial steps to remedy any irregularity. The applicant alleged further that the CSMJ acted irregularly by failing to require compliance with the rules of procedure requiring the "pre-trial distribution" of the record of the preliminary investigation. He fails in his founding affidavit to refer to any provision of the MDSMA or any other statutory instrument which requires such. However, in his replying affidavit he refers to the requirement in Rule 17 of the Rules of Procedure that the Adjutant General should provide the presiding judge with the record of the preliminary investigation before the commencement of the trial. Finally, he complains that no witnesses gave oral evidence at the preliminary investigation with the result that "the preliminary examination had not been lawfully completed".

20. The respondents annexed to their answering affidavit a certificate issued in terms of section 30(19) of the MDSMA. This provision provides that upon completion of a preliminary investigation, the relevant functionary shall sign and date the record and deliver it without delay to the relevant prosecution counsel and shall inform the presiding judge or commanding officer who directed the investigation to be held of the completion of the proceedings. The respondents aver that a notice of enrolment of a case before the CSMJ only gets issued after verification that a preliminary investigation has been completed.[11] This happened and thus the CSMJ was aware of the preliminary investigation before proceeding with the trial. The respondents state in the answering affidavit that the record is usually handed in at the end of the prosecution case so as to minimise any pre-judgement of the evidence of the prosecution witnesses. They do not deal with the allegation that the Rule 17 obliges the Adjutant General to furnish the record to the presiding judge before the commencement of the trial. That is not surprising considering that the point was made impermissibly for the first time by the applicant in the replying affidavit.

21. Moreover, the applicant was well aware that no witnesses gave oral evidence at the preliminary investigation. Section 30(5) of the MDSMA provides that subject to the provisions of subsections (10) and (11), the evidence of every witness called at a preliminary investigation shall be given *viva voce* and on oath. Section 30(10) provides that when any witness cannot attend a preliminary investigation to give evidence, because of *inter alia* the exigencies of the service or for any other reason deemed fit, a sworn statement of the witness may be admitted. The applicant signed a section 30(10) notice in respect of each witness whose sworn statements were admitted for the purposes of the preliminary investigation. He was also legally represented during those proceedings.

22. The applicant fails to make out any cogent case of how he might have been prejudiced by the admission of the record of the preliminary investigation at the close of the prosecution case. All parties and the CMSJ were aware of the preliminary investigation which had been certified as completed. The applicant does not allege that he was not in possession of the record when the prosecution witnesses testified.

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[11] Section 32(3) of the MDSMA provides that where a preliminary investigation has been completed, any case to be tried by the CSMJ must be placed on the roll by means of a written notice of enrolment by the relevant functionary.

But even had that been the case, once it was admitted into evidence he could have requested the court to recall any prosecution witnesses for further cross examination. He did not do that. There is accordingly no evidence of any procedural irregularity which materially and adversely affected the applicant's rights arising from the manner in which the record of the preliminary investigation was dealt with. Nor do I consider Rule 17 to impose a mandatory and material requirement that the record be given to the CSMJ before the commencement of the proceedings. The provision is directory in nature and exists for the convenience of the court. The applicant and his representative were aware of the completed preliminary investigation, had access to the record and did not face any obstacle in using it during the trial. There is accordingly no reviewable irregularity on this score.

23. In his heads of argument, Mr Smart, the applicant's attorney, sets forth several submissions in relation to the preliminary investigation which illegitimately add to the case pleaded in the affidavits. Thus, he argued that not all the charges were dealt with at the preliminary investigation, the proceedings were not properly recorded, and no reasons were given for the non-attendance of witnesses at the preliminary investigation. Again, the adjudication of these issues is precluded by the well-established elementary principle, known to most legal practitioners: an applicant must raise the issues upon which he would seek to rely in the founding affidavit.[12]

The merits of the prosecution

24. The applicant's third ground of review is that the CSMJ acted irregularly when evaluating the evidence and determining the various counts. The grounds are misconceived for two reasons. Firstly, they are almost entirely grounds of appeal rather than grounds of review. And secondly many of the issues were raised for the first time in the heads of argument. The matters were properly matters for the appeal to the CMA. It is unnecessary to traverse all of the issues (taking up more than 50 pages of the applicant's heads of argument of 216 pages). Suffice it to say that like the CSMJ and the CMA I am satisfied that the prosecution adduced cogent evidence which established beyond reasonable doubt that the applicant committed the offences with which he was charged and that in the process of evaluating the

[12] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) 323

evidence the CSMJ committed no reviewable irregularity. The various inferences drawn by the CSMJ in relation to the probabilities and the credibility of the applicant were consistent with the facts. The CSMJ was aware of the applicable onus and evidentiary burdens and applied the law to the facts correctly.

The oath of the members of the CMA

25. Lastly, the applicant challenges the composition and functioning of the CMA. In terms of section 7 of the MDSMA, in murder cases the Minister shall appoint a CMA composed of five members being: i) three judges or retired judges of the High Court, of whom one shall be the chairperson; ii) one appropriately qualified officer of the Permanent Force who holds a law degree and has not less than 10 years' experience as a practising advocate or attorney or in the administration of criminal or military justice; and iii) one person who has experience in exercising command in the field in the conducting of operations. In this case the CMA was constituted by Ngoepe JP, Husain J, Mailula J, Brigadier General de Lange, and Colonel Kolbe.

26. The CMA shall exercise full appeal and review competencies in respect of the proceedings with powers to affirm, set aside or vary the decision of the lower tribunal.[13]

27. The applicant contends that the participation of the military officers in the CMA was not in accordance with the requirements of section 174(8) read with Schedule 2 item 6(3) of the Constitution. Section 174 of the Constitution is concerned generally with the appointment of judicial officers. Section 174(8) of the Constitution provides that before judicial officers (including judicial officers who are not judges of the ordinary courts) begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution. Item 6(3) of Schedule 2 provides that judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation. Neither the MDSMA nor other legislation requires a CMA member to take an oath or affirm before he or she performs functions as a member of the CMA. The three judges on the CMA undoubtedly have taken an appropriate oath. The applicant however is concerned

[13] Section 8 of the MDSMA

with the military members of the CMA. There is no legislation in place for them to take an oath. Thus, the applicant submits, their participation was not in accordance with the requirements of the Constitution and the decision of the CMA consequently unconstitutional and unlawful.

28. Although the military members of the CMA are voting members of the CMA,[14] they are not judicial officers as contemplated in section 174 of the Constitution. Indeed, the one military member need not be legally qualified. The military members are experts with specialist knowledge who support the judges of the CMA with regard to military culture and standing operating procedures. But even were it to be held that such members by virtue of their voting power were indeed judicial officers, it is unlikely that the constitutional deficiency would be cured under section 172(1)(b) of the Constitution by a retrospective order vitiating the conviction and sentence of the applicant. A just and equitable order would probably take the form of an order suspending or limiting the retrospective effect of the declaration of constitutional invalidity to allow the legislature to correct the defect. The applicant has no prospect of success of overturning his conviction and sentence on this basis.

29. Once again, the applicant in his heads of argument raises grounds of review in relation to the CMA that were not presaged in the affidavits. In particular, he complains that the CMA did not provide full reasons for its decision. For the reasons explained above, this court is precluded from adjudicating issues in the heads of argument not raised in the affidavits.

The constitutionality of Chapter 3 of the MDSMA

30. The applicant seeks several declarations of constitutional validity. He firstly contends that the MDSMA fails to secure an adequate degree of independence for the Adjutant General and military judges (including senior military judges) in that such officers are in the same position of other military officers regarding their terms and conditions of employment including: remuneration, promotion, assessment of performance, discipline, transfer etc. In addition, military judges enjoy inadequate

[14] Section 89 of the Military Code

security of tenure. For these reasons, the applicant submits that Chapter 3 of the MDSMA dealing with the appointment of military judges and the Adjutant General is inconsistent with the Constitution and invalid; and the exercise by senior military judges of the jurisdiction conferred by section 9 of the MDSMA to try the applicant for murder and other offences is consequently also unconstitutional and invalid.

31. The applicant misconstrues the role of the Adjutant General. In terms of section 28 of the MDSMA he or she is responsible for the overall management, promotion, facilitation and co-ordination of activities in order to ensure the effective administration of military justice and legal services. The role of the Adjutant General is therefore one of management and administration of the military legal system. The Adjutant General does not perform a judicial function and there is accordingly no requirement for him or her to observe the strictures of judicial independence and impartiality.

32. The requirements of judicial independence vary depending on the nature and function of the particular institution.[15] The respondents maintain that the military courts established in terms of the MDSMA are sufficiently independent for the functions assigned to them. The Minister appoints military judges for a fixed period or specific deployment[16] on the recommendation of the Adjutant General who must be convinced upon due and diligent enquiry that the officer is a fit and proper person of sound character.[17] In terms of section 13(2) of the MDSMA only an appropriately qualified officer holding a degree in law may be assigned to the function of a senior military judge or military judge. Section 14(4) of the MDSMA requires that officers assigned as military judges perform their functions "in a manner which is consistent with properly given policy directives, but which is free from executive or command interference". The Minister, acting on the recommendation of the Adjutant General, may remove a military judge on the grounds of incapacity, incompetence or misconduct.[18]

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[15] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 22
[16] Section 15 of the MDMSA
[17] Section 14(1) and (2) of the MDSMA
[18] Section 17 of the MDSMA

33. Section 19 of the MDSMA includes a number of provisions aimed at ensuring the independence of military judges. They are required in the exercise of their authority under the MDSMA, *inter alia*, to: i) be independent and subject only to the Constitution and the law; ii) apply the Constitution and the law impartially and without fear, favour or prejudice; iii) conduct every trial and proceedings in a manner befitting a court of justice; and iv) ensure fairness to an accused by affording appropriate assistance. Moreover, the military courts are courts of first instance subject to appeal and review before the CMA and the High Court, which will protect them from undue interference with their independence and supervise the manner in which they discharge their functions. While military judges are assigned for a fixed period or for a specific deployment, section 17 of the MDSMA protects them from arbitrary removal and they remain in establishment posts where they enjoy the ordinary legal protections against unlawful or unfair dismissal. No military commander may remove a military judge from assignment.

34. While it is undoubtedly true that military judges do not enjoy the protection afforded to ordinary judges, the Constitutional Court has recognised that judicial independence can be achieved in a variety of ways and that the most rigorous and elaborate conditions of judicial independence need not be applied to all courts. It is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.[19] The fact that the Minister and the Adjutant General, members of the Executive, have a strong influence in the appointment of the military judges does not mean that the military courts lack institutional independence.[20] As indicated above, all military judges are required to exercise impartiality and independence in the discharge of their duties and take an oath of office in terms of section 18 of MDSMA requiring them to do so. It is relevant, as intimated earlier, to keep in mind the core protection given to all courts by the Constitution, to the particular function that the military courts perform and to their place in the court hierarchy. The greater the protection given to the higher courts, the greater is the protection enjoyed by the military courts.[21]

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[19] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 27
[20] *Ibid* para 71
[21] *Ibid* para 23

35. The provisions of the MDSMA therefore ensure sufficiently that the military courts are independent and the constitutional challenge on that ground is without merit.

The constitutionality of section 119 of the Military Code

36. The applicant challenges section 119 of the Military Code[22] on the basis that it empowers the Adjutant General to order that any sentence of imprisonment be served in detention barracks. Section 119 reads:

> "The whole or any portion of any sentence of imprisonment or field punishment imposed by a military court may by order of the Adjutant General, and any sentence of detention shall, be served in a detention barracks."

37. The applicant's objection is that this provision allows the warrant of committal and judgment of the military courts to be disregarded, the Defence Force to retain control over a prisoner who is no longer a Defence Force member and the Adjutant General to exercise a judicial competence. This, he says, is inconsistent with section 165 of the Constitution which provides that organs of state must protect the independence of the courts and that no person may interfere with the functioning of the courts.

38. This challenge cannot succeed for two reasons. Firstly, the issue is not ripe. The Adjutant General did not order the applicant to serve his sentence in detention barracks. Nor does the applicant identify any prejudice or disadvantage which such a hypothetical order by the Adjutant General might have entailed. Courts should avoid premature adjudication of hypothetical disputes. There is no real, concrete, live or existing controversy in relation to this question and the applicant can obtain no tangible advantage from a ruling on it. Secondly, were it to be in the interests of justice to rule on this issue, despite it not being ripe, there are sound policy reasons for conferring such a power on the Adjutant General. The legitimate purpose of the provision is to enable the Adjutant General to act in instances where it is not practicable to enforce a sentence of imprisonment, for instance where there has been deployment in a foreign country. Proportional safeguards exist for an accused person subjected to such action by the Adjutant General in the administrative law

[22] The First Schedule of the Defence Act 44 of 1957

remedies under the Constitution, the Promotion of Administrative Justice Act[23] or the common law.

The constitutional challenge to section 3(2)(c) of the MDSMA

39. The applicant further maintains that section 3(2)(c) of the MDSMA is inconsistent with section 200 of the Constitution.

40. Section 3(1) of MDSMA provides:

> "This Act shall, subject to subsection (2), apply to any person subject to the Code irrespective whether such person is within or outside the Republic."

The "Code" is defined in section 1 of the MDSMA to mean "the Military Discipline Code referred to in section 104(1) of the Defence Act, 1957". Section 3(2) of the MDSMA, the impugned provision, reads:

> "For the purpose of the application of this Act and the Code, '**person subject to the Code**' includes to the extent and subject to the conditions prescribed in this section and in the Code-
>
> (a)....
>
> (b)....
>
> (c) all persons, other than members of a visiting force, lawfully detained by virtue of or serving sentences of detention or imprisonment imposed under the Code or this Act."

41. The applicant contends that section 3(2)(c) of the MDSMA is inconsistent with section 200 of the Constitution because once he was discharged from the Defence Force on being sentenced to imprisonment he became a civilian and thus should not be subject to the Code. Section 200 of the Constitution provides:

> "(1) The defence force must be structured and managed as a disciplined military force.
>
> (2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with Constitution and the principles of international law regulating the use of force."

[23] Act 3 of 2000

42. The applicant complains that his "continued subjection" to military law has nothing to do with the current managing of the Defence Force as a disciplined force, the preparing of the Defence Force to discharge its primary object, or the promotion of the operational efficiency of the Defence Force. Thus, he argues, subjecting a prisoner who is no longer a member of the Defence Force to the Code is inconsistent with section 200 of the Constitution and invalid.

43. This challenge cannot succeed for two reasons. Firstly, once again the issue is not ripe. There is no evidence of any kind indicating that the applicant was subjected to any provision of the Code during his imprisonment. The issue he raises is not a live or concrete controversy and he can obtain no tangible advantage from a ruling on it. But even if it were in the interests of justice to make a ruling, section 3(2)(c) of the MDSMA is consistent with the Constitution because the very purpose of extending the operation of the Code to members who have been imprisoned by a military court and discharged is to enforce strict discipline as envisioned in section 200(1) of the Constitution.

Imprisonment with compulsory labour

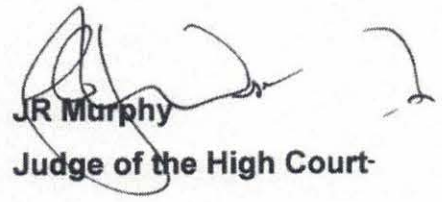
44. Lastly, the applicant challenges the definition of imprisonment in section 1 of the Code which is defined to mean "imprisonment with or without compulsory labour". This he contends is inconsistent with section 13 of the Constitution which provides that no person may be subjected to slavery, servitude or forced labour. There is no allegation or evidence that the applicant has been compelled to work while in prison. The issue is thus once again not a real or live controversy and it is not possible to perform a limitations analysis in the context of a concrete dispute. This issue too is not ripe.

The order

45. In the premises, in light of the excessive delay, the wholly inadequate explanation for the delay and the exceptionally weak prospects of success of the application, the applicant has failed to show good cause to condone the unreasonable delay in bringing the application. The application must be dismissed for that reason. There is no reason why costs should not follow the result. Given the

nature of the wide-ranging issues and the potential implications of a favourable ruling, the use of two counsel was justified in the circumstances.

46. The application is dismissed with costs, such costs to include the costs of employing two counsel.



JR Murphy
Judge of the High Court

Date heard:	17 May 2017
For the applicant:	Mr CHD Smart / Dunstan Smart Attorneys
For the respondents:	Adv W Trengove SC and Adv F Karachi
Instructed by:	The State Attorney
Date of judgment:	19 April 2018