CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/99

THE PRESIDENT OF THE ORDINARY COURT MARTIAL, LIEUTENANT-COLONEL MARDON N.O	First Appellant
THE PROSECUTING AUTHORITY IN THE ORDINARY COURT MARTIAL, LIEUTENANT-COLONEL GENIS N.O	Second Appellant
THE MINISTER OF DEFENCE	Third Appellant
versus	
THE FREEDOM OF EXPRESSION INSTITUTE	First Respondent
M & G MEDIA (PTY) LIMITED t/a THE MAIL & GUARDIAN NEWSPAPER	Second Respondent
STAFF-SERGEANT HERMAN GORDON PHEIFFER	Third Respondent
CORPORAL DAWID DESMOND BOOYSEN	Fourth Respondent

Heard on : 25 May 1999

Decided on : 24 August 1999

JUDGMENT

LANGA DP:

Factual background

[1] Third and fourth respondents, who are members of the South African National Defence

Force (SANDF), appeared before an ordinary court martial[1] which had been convened under the provisions of the Defence Act 44 of 1957 (the Defence Act) and the Military Discipline Code[2] (the Code), on charges relating to certain military intelligence source reports. It is not necessary for present purposes to go into the details of the charges.

[2] The proceedings in that forum were adjourned to enable the respondents to launch an application to the High Court for the review and setting aside of two orders made by first appellant, who presided over the ordinary court martial. The first order, made on 4 December 1996 against third and fourth respondents, was to the effect that the entire proceedings of the court martial should be held in camera and that the proceedings themselves as well as the whole record of the case should be classified as secret.

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1 Before the coming into force of the Military Discipline Supplementary Measures Act 16 of 1999, which will be discussed later, there were two types of courts martial: the general court martial and the ordinary court martial. The latter court did not have jurisdiction to try officers or to impose punishment in excess of two years imprisonment.

2 Section 104(1) of the Defence Act provides that the Code consists of the provisions of the First Schedule to the Defence Act as well as the Rules for Giving Effect to the Military Discipline Code made by the Minister of Defence under section 104(3) of the Defence Act.

[3] The second order was given on 7 April 1997 pursuant to an application by the Freedom of Expression Institute (first respondent) and M & G Media (Pty) Limited (second respondent), both of whom had not been part of the proceedings up to that stage. They approached the court martial, seeking access to the military intelligence source reports and the record of the proceedings, which would enable them to apply for the court martial to be open to the public, including the media. In refusing the application, first appellant ruled that the first and second respondents lacked locus standi to make that application to the court martial and to advance argument in support thereof. The two respondents challenged this refusal, relying on the constitutional right to freedom of expression, which includes "freedom of the press and other media" and "the freedom to receive or impart information or ideas".[3]

[4] The matter was argued before a Full Bench of the Cape of Good Hope High Court (the High Court). The broad constitutional challenge by the respondents in the High Court concerned the legislative framework in terms of which an ordinary court martial is constituted and operated under the Defence Act and the Code. Specific complaints related, amongst others, to provisions concerning the independence of the court martial and of its members, the qualifications of the judicial officers and prosecuting counsel, the power given to members of the executive to interfere in the proceedings of a court martial and the exclusion of an appeal to the High Court from the decisions of a court martial. The respondents contended that the ordinary court martial lacked the basic essentials of an "ordinary court" as envisaged in the relevant provisions of the

[3] Section 16(1)(a) and (b) of the Constitution.

Constitution.

[5] On 18 December 1998 Hlophe ADJP, with Traverso J and Gihwala AJ concurring, declared the challenged provisions of the Defence Act and the Code unconstitutional, invalid and of no force or effect. In terms of section 172(2)(a) of the Constitution, the order made by the High Court has no force unless it is confirmed by this Court.[4] The appellants now appeal to this Court, under section 172(2)(d)[5] of the Constitution, against the judgment and certain of the orders of the High Court.

[6] The appeal was set down for argument before this Court on 23 March 1999. On that day, however, it was postponed to 25 May 1999 to enable the respondents as well as other persons concerned to respond to certain new matter which had been raised in papers lodged by the

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4 Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

5 Section 172(2)(d) of the Constitution provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

appellants on the eve of the hearing.[6] In further papers lodged shortly before the postponed date, the appellants drew attention to new legislation, the Military Discipline Supplementary Measures Act 16 of 1999 (the new Act) which had been passed after the launching of the appeal. The new Act had been published on 23 April 1999 and, as we were informed, was to come into operation on 28 May 1999. It repealed and amended certain of the provisions of the Defence Act and the Code, including those which had been impugned in the High Court proceedings.

[7] At the resumed hearing on 25 May 1999, counsel were invited to address the Court on the effect of the new Act on the current proceedings, in particular, on the question whether the matter had become moot and, if so, what course the proceedings should take. Counsel were in agreement during argument that the dispute had effectively been overtaken by the new Act. On behalf of the respondents, however, Mr Spitz argued that the Court should determine the appeal because there may be persons who have been convicted and sentenced under the impugned provisions to whom the new provisions do not apply. He stated that this category of persons has an interest in the legislation being declared unconstitutional.

[8] The Court was of the view that the matter would indeed be moot if the new legislation were shortly to come into force. It was clear, for reasons that follow, that no useful purpose would be served by deciding the issues raised in the appeal or the declarations of invalidity made by the High Court. We accordingly adjourned the matter sine die and indicated that should the legislation come into force as we had been informed, we would proceed to dispose of the matter.

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6 One of the new issues raised is discussed in paras 20 to 23 below.

The effect of the new legislation

[9] The new Act duly came into force on 28 May 1999.[7] Its objects, set out in section 2, include the creation of military courts and ensuring a fair military trial and an accused's access to the High Court. It establishes a new military court system which replaces the military court and the court martial under the repealed and amended provisions of the Defence Act and the Code. There are provisions on the composition and jurisdiction of the new military courts as well as the independence of the judicial officers. The Act provides for minimum legal qualifications and other experience in respect of members of the military courts and prosecuting counsel, and contains provisions intended to insulate the military courts from undue executive interference.

[10] The provisions of the new Act are clearly applicable to the present proceedings. Section 44, which contains the transitional provisions, provides in relevant part:

> "(1) Every Council of Review established and constituted by the Minister of Defence under section 145 of the Code prior to the commencement of this Act, shall be deemed to have been constituted and established as a Court of Military Appeals under this Act.
> (2) All trials and disciplinary proceedings which immediately before the commencement of this Act were underway or pending before a court martial or a commanding officer shall be terminated and may start afresh under the control of the relevant prosecution counsel in accordance with the provisions of this Act.
> (3) All review and appeal processes which immediately before the commencement of this Act were underway or pending shall proceed in accordance with the

[7] See Proclamation R. 67 contained in Government Gazette No. 20101 dated 28 May 1999.

provisions of this Act."

[11] The case against third and fourth respondents had not been completed at the time when it was adjourned by the first appellant. It was thus still pending before the ordinary court martial when the new Act came into force. The proceedings therefore fall within the terms of section 44(2), which requires that they must be terminated and "may start afresh . . . in accordance with the provisions of the new Act."

[12] The effect of the new provisions has been to terminate the court martial proceedings which were at issue in this case. It remains open to the appellants to determine whether they wish to start proceedings afresh against third and fourth respondents. Should such new proceedings ensue, they may or may not be subject to constitutional challenge. What is clear, however, is that any such challenge would have to be based on the terms of the new legislation and the conduct of a new military court, not on the provisions which have been repealed or amended or the proceedings which have been terminated. In these circumstances, the question arises as to whether this Court should consider the appeal. In this regard it should be noted that at the hearing before this Court, the parties indicated that no dispute existed between them in relation to costs.

The exercise of the Court's discretion

[13] Section 21A of the Supreme Court Act[8] empowers the Supreme Court of Appeal or any High Court sitting as a court of appeal to dismiss an appeal if the circumstances are such that the

[8] Act 59 of 1959.

order it might give will have no practical effect or result.[9] In *Premier, Mpumalanga en 'n Ander v Groblersdalse Stadsraad*,[10] Olivier JA held that the purpose of the rule was to reduce the heavy

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9 Section 21A (1) provides:

> "When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme court the issues are of such a nature that the judgment or order sought will have no practical effect or results, the appeal may be dismissed on this ground alone."

See also: *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998(2) SA 1136 (SCA) at 1143A-C; *Western Cape Education Department and Another v George* 1998(3) SA 77 (SCA) at 84G; *McDonald's Corporation v Joburgers Drive-Inn Restaurant* 1997(1) SA 1 (A) at 14C; *Simon NO v Air Operations of Europe AB and Others* 1999(1) SA 217 (SCA) at 226E-J.

10 At 1141D.

workload of appellate courts and, in particular, the Supreme Court of Appeal. The provision grants an appellate court the discretion to dismiss an appeal where it is persuaded that any judgment or order it gives will have no practical effect.[11] The section does not apply to this Court, nor is there an express provision equivalent to it in the Constitutional Court Complementary Act[12] or the rules of this Court.

[14] The matter comes before us under the provisions of section 172(2) of the Constitution. The question that arises crisply for decision is whether this Court is obliged or has a discretion to decide whether to hear such matter. The answer to that question depends upon a proper interpretation of section 172(2). The subsection does not expressly provide that this Court is obliged to determine such appeals or matters which come for confirmation. It is clear that the function of the confirmation and appeal procedure provided for in section 172(2) and regulated by rule 15 is to provide certainty in circumstances where a High Court has declared a provision of an Act of Parliament (or conduct of the President) to be constitutionally invalid and that generally, therefore, this Court will be required to hear and determine such proceedings.

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11 For a consideration of what may constitute a practical effect, see *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444 - 5.

12 Act 13 of 1995.

[15] However, where the relevant legislative provision has been repealed after the High Court has made the order of invalidity, but before this Court hears the confirmation or appeal proceedings, or before it gives its order, the need for certainty may well fall away. There may, however, be a need for the Court to give a judgment on the appeal or confirmation proceedings, in order to resolve the dispute which gave rise to the litigation between the parties, or for other reasons.

[16] In my view, however, section 172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection. At least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter. In this regard, the Court should consider whether any order it may make will have any practical effect either on the parties or on others.

[17] In this case the new legislation replaces all relevant aspects of the legislative framework upon which the dispute between the parties was based. The basis upon which the parties approached the High Court has disappeared and the grant of the relief claimed, as well as any confirmation of an order of constitutional invalidity, can serve no purpose. The court martial proceedings against third and fourth respondents, which were still pending prior to the commencement of the new Act, have been terminated pursuant to the provisions of section 44(2).

[18] A decision on the constitutional invalidity of the impugned provisions will have no practical effect on the parties to the litigation. Nor, as far as I am aware, are there any

considerations of public policy that come into play. According to section 44(3), matters in respect of which review and appeal processes were pending shall proceed in accordance with the provisions of the new Act.

[19] As pointed out by Mr Spitz, however, the transitional provisions do not deal with situations where proceedings have been finalised and are not subject to appeal or review. This raises the issue of retrospectivity and the question of what orders this Court should make in respect of matters which have already been finalised and where there is no pending appeal or review. This is an issue which has been considered by this Court, inter alia, in *S v Zuma and Others*[13] and *S v Bhulwana;S v Gwadiso,*[14] in the context of the provisions of section 98(6) of the interim Constitution.[15] In *Zuma*, Kentridge AJ referred to the need to "avoid the dislocation and inconvenience of undoing transactions, decisions or actions" taken under provisions which have been struck down. He went on to point out that the -

> ". . . Court's power to order otherwise in the interests of justice and good government should be exercised circumspectly. In some cases (and I believe that this is one of them) the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the

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13 1995(2) SA 642 (CC) at 663E-H; 1995(4) BCLR 401 (CC) paras 43 and 44.

14 1996(1) SA 388 (CC) at 399I-400B; 1995(12) BCLR 1579 (CC) para 32.

15 Section 98(6) of the interim Constitution provides:

> "Unless the Constitutional Court in the interest of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -
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> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
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> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

new."[16]

In *Bhulwana,*[17] O'Regan J states as a general principle, that "an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity." In the light of the above, there is no justification for this Court to go into the merits of the appeal. It is moreover open to a person who has been convicted under an unconstitutional provision, before the commencement of the new Act to approach the Court for relief.[18]

The issue concerning Gihwala AJ

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16 Above n 13 at para 43.

17 Above n 14 at para 42.

18 See *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999(1) SA 6 (CC) at 49G-51J; 1998(12) BCLR 1517 (CC) at paras 93-8.

[20] This result renders it unnecessary to deal with one of the issues raised in an affidavit filed on behalf of the appellants shortly before the original date set for the hearing of the appeal. In the affidavit, the attorney for the appellants made the allegation that Gihwala AJ, who was one of the judges in the High Court proceedings, was a partner in a firm which was the Cape Town correspondents for the respondents' attorneys.[19] She claimed that because this information had been known neither to her nor to counsel, and had not been disclosed before or during the proceedings in the High Court, there was a reasonable apprehension or suspicion of bias because of the composition of the court. Although the appellants sought no relief in consequence of this disclosure, their legal representatives considered themselves duty bound to place this information before the Court.

[21] The issue could not be canvassed fully on 23 March 1999 as it was necessary to afford the respondents as well as other persons concerned the opportunity to place relevant information before the Court and to make such submissions and representations as might be necessary to resolve the issue. Written submissions were received from the parties and, pursuant to an invitation from the President of the Court, the Judge President, and members of the High Court before whom the matter was heard, submitted information to the Court on their understanding of what had happened. Gihwala AJ indicated that he had discussed the matter with his Judge President before the hearing of the case and had been advised that there was no objection to his

[19] Hofmeyr, Herbstein, Gihwala and Cluver Inc. whose name appeared on the record as the correspondent attorneys.

sitting if the parties consented to his doing so. He stated that counsel for the appellant was aware of his connection with the firm that was acting as the correspondent attorneys of record, and that no objection was taken to his sitting in the matter.

[22] The issue was also brought to the attention of the General Council of the Bar and the Law Society of South Africa and they made brief submissions to the Court as to the approach to be adopted. The General Council of the Bar contended that a partner in a firm of attorneys which is the correspondent for a party's attorney, is absolutely disqualified from sitting as a judge in proceedings in which the firm is the correspondent. The Law Society of South Africa contended that there is no absolute disqualification, and if the parties consent, there is no objection to the judge sitting.

[23] This issue has also been overtaken by events and has consequently become irrelevant to the fate of these proceedings. It is accordingly unnecessary for this Court to enquire further into the issue and to embark on an investigation with regard to the exact status of the High Court proceedings.

Costs

[24] During argument, counsel informed us that it had been agreed that the parties would pay their own costs in respect of proceedings in this Court and that consequently, no order should be made. I see no reason to take this aspect any further. We were also informed that the costs in respect of the High Court proceedings would, by agreement, be paid by third appellant.

The Order

[25] In the result the following order is made:

(a) No order is made in respect of the appeal and confirmation proceedings;

(b) No order is made with regard to costs before this Court.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, and Yacoob J concur in the judgment of Langa DP.

For the Appellants : E W Dunn SC, T W G Bester and J Q Hadiaris instructed by the State Attorney (Pretoria).

For the Respondents: D B Spitz instructed by David Dison Norval, Ameer and Ndlovu (Johannesburg).