



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1271/2021

In the matter between:

LIEUTENANT COLONEL K B O'BRIEN N O

APPELLANT

and

**THE MINISTER OF DEFENCE AND
MILITARY VETERANS**

FIRST RESPONDENT

**CHIEF OF SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

SECOND RESPONDENT

SECRETARY FOR DEFENCE

THIRD RESPONDENT

**THE SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

FOURTH RESPONDENT

STAFF SERGEANT DT MOKOENA

FIFTH RESPONDENT

LIEUTENANT PZ MABULA

SIXTH RESPONDENT

Neutral citation: *Lieutenant Colonel KB O'Brien NO v The Minister of Defence and Military Veterans and Others* (Case no 1271/2021) [2022] ZASCA 178 (13 December 2022)

Coram: PONNAN, NICHOLLS, GORVEN and MABINDLA-BOQWANA JJA and CHETTY AJA

Heard: 22 November 2022

Delivered: 13 December 2022

Summary: Review – review of judgments and orders of Military Judge - delay and condonation – whether applicants in review application who were not parties to the criminal proceedings had standing – whether gross irregularity in the proceedings – cross application – constitutional challenge to ss 101 and 102 of the Defence Act 42 of 2002 and ss 15 and 17 of the Military Discipline Supplementary Measures Act 16 of 1999 – abstract or hypothetical.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J, sitting as court of first instance):

Save for setting aside paragraphs 6 and 10 of the order of the high court, the appeal is dismissed.

JUDGMENT

Ponnan JA and Chetty AJA (Nicholls, Gorven and Mabindla-Boqwana JJA concurring)

[1] The Military Discipline Supplementary Measures Act 16 of 1999 (the MDSMA), which came into force on 28 May 1999, established a new military court system that replaced the military court and court martial under the repealed and amended provisions of the Defence Act¹ and the Military Discipline Code.² The objects of the MDSMA are to:

‘(a) provide for the continued proper administration of military justice and the maintenance of discipline;

(b) create military courts in order to maintain military discipline; and

(c) ensure a fair military trial and an accused’s access to the High Court of South Africa’.³

¹ Defence Act 44 of 1957. See *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) and *President, Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC).

² First Schedule to the Defence Act 44 of 1957.

³ Section 2 of the MDSMA.

The MDSMA established a four-tier system of military courts, consisting of the Court of Military Appeals, the Court of a Senior Military Judge, the Court of a Military Judge, and the commanding officer's disciplinary hearing.⁴

[2] For present purposes, the following provisions of the MDSMA are relevant:

'13 Assignment of functions

(1) Only an appropriately qualified officer holding a degree in law and of a rank not below that of colonel or its equivalent, with not less than five years appropriate experience as a practising advocate or attorney of the High Court of South Africa, or five years experience in the administration of criminal justice or military justice, may be assigned to the function of –

- (a) Director: Military Judges;
- (b) Director: Military Prosecutions;
- (c) Director: Military Defence Counsel; or
- (d) Director: Military Judicial Reviews.

(2) Only an appropriately qualified officer holding a degree in law may be assigned to the function of –

- (a) senior military judge or military judge;
- (b) review counsel;
- (c) senior defence counsel or defence counsel; or
- (d) senior prosecution counsel.

(3) Only an appropriately qualified officer or other member who holds a degree in law or who has otherwise been trained in law may be assigned to the function of prosecution counsel.

14 Minister's powers in respect of assignment

(1) The Minister shall assign officers to the functions –

- (a) At the level of Director referred to in section 13 (1); and
- (b) Of senior military judge or military judge referred to in section 13 (2) (a)

On the recommendation of the Adjutant General: Provided that the Director: Military Judges shall be deemed to have been assigned the function of senior military judge.

(2) The Adjutant General shall not recommend any officer for assignment to any function referred to in subsection (1) unless, upon due and diligent enquiry, the Adjutant General is

⁴ Section 6 of the MDSMA.

convinced that the officer is a fit and proper person of sound character who meets the requirements prescribed in this Act for such assignment.

(3) Subject to section 16 and the control of the Minister, the Adjutant General may assign any officer or member to any function –

(a) Referred to in section 13 (2) (b), (c) and (d) or (3); or

(b) Attached to any approved military legal services post other than those referred to in this Act.

(4) Officers and members assigned to functions in terms of this section shall perform those functions in a manner which is consistent with properly given policy directives, but which is otherwise free from executive or command interference.

15 Period of Assignment

An assignment in terms of this Chapter shall be for a fixed period or coupled to a specific deployment, operation or exercise.

...

17 Removal from assignment

The Minister, acting upon the recommendation of the Adjutant General, may remove a person from the function assigned to him or her for the reason of that assignee's incapacity, incompetence or misconduct, or at his or her own written request.'

[3] The appellant, Lieutenant Colonel O'Brien, is a former military judge. In 2014, he took to making remarks in matters that came before him about the brief, renewable assignments of military judges (which was usually for a year at a time) and the implications that held for the institutional independence of military courts. He also supplied the parties with a document headed 'MILITARY JUDGES' CONCERNS REGARDING THE CONSTITUTIONALITY OF THE ASSIGNMENT AS A MILITARY JUDGE', which, inter alia, read:

'8. Court is of the view that Sec 14(1)(b) MDSMA might be unconstitutional based on the following:

a. Fixed term from 19 May 2014 – 31 March 2015, does not meet the requirement that the military judge shall have security of tenure of office.

b. There may have been Executive interference in the functioning of the Military Courts and/or the assignment of the Military Judges for 2014/15:

i. During February/March 2014 all Military Judges were required to provide their court hours for the previous three years to the Adjutant General who in turn provided this information to C SANDF, who in turn provided this information to the Minister. The amount of court hours of each Military Judge could have played a pivotal role in the assignment of the Military Judges for 2014/15.

ii. This was confirmed by the Minister's assignment in mid-April 2014 of Military Judges with satisfactory court hours. Unfortunately, I was only assigned on 19 May 2014, after I had had to provide an explanation for my unsatisfactory amount of court hours for 2013/14 ie. 103 court hours. My explanation being I had only sat as a Military Judge for two weeks in June 2013 and from 15 January – 28 February 2014 due to the fact that I had attended the SAMHS Junior Command and Staff Course from July – December 2013.

9. This court has addressed its concerns in respect of the assignment of Military Judges to both the Director Military Judges and to the Officer in Charge Operations Support Legsato.

10. COURT IS WELL AWARE OF THE PROVISIONS OF Sec 170 Constitution which states that, "Court of a status lower than the High Court may not rule on the constitutionality of any legislation."

11. Purposes of this trial court is bound to accept that the provisions of Sec 14(1)(b) of the MDSMA are constitutional and that we may then proceed.

12. Court wishes to give both Counsel an opportunity to place on record whether they are willing to proceed and if so whether Defence Counsel has any other objections in respect of the jurisdiction of the court or in respect of the charges that they do not disclose an offence?

[4] This appears to have provoked some disquiet in the then Review Counsel, Lieutenant Colonel Kriek. On 6 November 2014, he wrote for the attention of the Director: Military Judicial Reviews:

'1. Upon review of various records of proceedings of cases presided over by [the appellant], review counsel has noticed that [the appellant] . . . has raised concerns regarding the constitutionality of his appointment as military judge.

2. . . . Reference to the concerns regarding the constitutionality of his appointment as military judge is made before plea where after both prosecutor and defence counsel is asked whether they have any objection to the jurisdiction of the court. Up to date no party has indicated any objection in this regard.'

Reference was then made to six matters, whereafter the document proceeded:

'8. It is submitted that the constitutional issue raised by [the appellant] does not fall within the ambit of the procedural course of a court case constituted by the [MDSMA]. It is important that the integrity of the military and senior military judges as well as the integrity of the military court system be without any reproach. Where a presiding judge challenges his/her own appointment in open court, the credibility of the military legal system is challenged. The question must also be raised as to why a military judge who believes his appointment to preside in a military court is unconstitutional would continue with the matters before him even though the trial/s [will] be *ultra vires* and therefore null and void.

9. It is submitted that the appointment of [the appellant] as a military judge was done in accordance with the [MDSMA]. Regard must be had to the fact that [the appellant] implies that he cannot be independent and beyond command influence in his administration of justice, due to the fact that his appointment as military judge does not provide for permanent tenure. Review Counsel is unsure as to the motivation for placing the "jurisdictional" issue on record during every trial. Does [the appellant] feel intimidated by the administrative decision to appoint all functional counsel for a period of one year and wants to place on record that his judicial decisions are directed by his wish to remain a military judge until he reaches retirement? Or may the motivation be to cause his removal from his current assignment because, in effect, all judgments and sentences passed by him are *ultra vires*? It is submitted that the correct course of action for a judge who believes his appointment as a military judge voids his jurisdiction and is unconstitutional, would be to recuse himself from presiding in any military judicial matter.

10. It is submitted that this matter be administratively dealt with in order to resolve this conflict. It is unacceptable to place the military judicial system in disrepute by criticising the very legislation which gives effect thereto.

11. For further action.'

[5] That letter elicited, inter alia, the following response from the appellant on 28 November 2014:

'13. It has never been the member's intention to doubt the validity of the provisions of the MDSMA. The member accepts that he was lawfully assigned to the function of a Military Judge on 19 May 2014 and that this assignment is valid until 31 March 2015.

...

17. The contents of, "Military Judges' concerns regarding the constitutionality of the assignment of a military judge", should be seen in the light of being *obiter dicta* comments and an effort to raise awareness amongst the military legal fraternity of similar situations in foreign military judicial systems.'

[6] On 5 December 2015, the then Director: Military Judges (the DMJ), Brigadier General Slabbert, held a meeting with the appellant to express his concern that in having once again raised the constitutionality of assignments of military judges in open court, the appellant had breached a previous undertaking. In the course of that meeting, the appellant was instructed not to use the military court as a forum for his 'awareness campaigns and constructive criticism'. He was advised to use the proper channels of command and that if he were to persist in his conduct it may impact on his future assignment as a military judge. Following that meeting, the appellant wrote to the DMJ that he:

'... appreciates that the discussion was conducted in an open and honest fashion that the [appellant] was given an opportunity to address concerns raised by the DMJ and [Lieutenant Colonel Kriek].

The [appellant] once again wishes to re-iterate, that it was never [his] intention to do any harm or embarrassment to any member . . . and if any member had perceived [his] response in a way that could have caused them any harm or embarrassment, [the appellant] wishes to apologise unreservedly.'

[7] During August 2016, two matters came before the appellant in which there had been substantial delays caused in large measure, so he suggests, by the failure of the Minister of Defence and Military Veterans (the Minister) to assign military judges. In the first, involving Staff Sergeant Mokoena (the Mokoena matter), there had been a three-and-a-half-year delay. In the second, involving then Candidate Officer (later Lieutenant) Mabula (the Mabula matter), there had been a delay of

some 14 months. Counsel for the defence contended in each that the matter fell to be struck from the roll on account of the unreasonable delay. In his *ex tempore* ruling on that question on 25 August 2016, which was followed by a written judgment delivered four days later on 29 August 2016, the appellant repeated his concerns about the constitutionality of appointing military judges on brief renewable terms and the implications that held for the independence of military courts.

[8] In that regard, the appellant's judgment reads:

'12. An aspect that the Court raised in respect of its concerns regarding the constitutionality of the assignment of military judges was the delay in the assignment of Military Judges in general (including that of the Military Judge) in these particular cases. The fact that for a period of 15 months (01 April 2015 – 30 May 2016), the Military Judge was not assigned could have a bearing on the outcome of whether there had been an unreasonable delay in the proceedings in terms of sec 342A CPA. This 15 month, non-assignment is the longest period since the enactment of the MDSMA, that Military Judges have not been assigned. This Court, in passing, wishes to emphasise that as a Military Judge, I have taken an oath of Office, to uphold the Constitution and I will do this to the best of my ability. It may, however, become more difficult to perform this function independently as required by the Constitution when one is not aware of the objective criteria required for an assignment as a Military Judge. It would seem that different criteria may be used to determine who is assigned or not assigned as a Military Judge. One year, it is court hours, another year, it is that you must be in possession of a secret security clearance and unfortunately there appears to be no semblance of transparency in respect of the recommendation and / or appointment process to be considered as a fit and proper person to serve as a Military Judge. The Court also in Trial Annexure E to the court proceedings, highlighted some of its concerns in respect of the lack of tenure of Office of a Military Judge and referred in particular to the case of *Justice Alliance v President of Republic of South Africa* (2011) ZACC 23 at par 38 and 73.'

[9] The appellant then proceeded to consider whether 'the Military Court [has] jurisdiction to conduct an investigation in terms of sec 342A of the Criminal Procedure Act (the CPA)'. On that score, he concluded that 'the provisions of sec 342A CPA may be considered as best calculated to do justice and shall be utilized in

respect of handling of unreasonable delays in military courts.’ The appellant then stated:

‘In respect of the period 01 Apr 2015 – 30 May 2016, the court finds that there was an unreasonable delay and the authority responsible is the [Minister] who for reasons unknown to the Court did not assign the Military Judge. The Court wishes to indicate that in this case the Court did not consider it necessary to subpoena the Honourable Minister to give evidence to explain her actions, however, in future cases, it may be necessary for the Court to subpoena the Honourable Minister to explain her actions should the circumstances of the case require the Court to subpoena the Honourable Minister.’

[10] Notably, the appellant acknowledged that in terms of s 170 of the Constitution, he had no power to rule on the constitutionality of legislation or conduct and although he recognised that he ‘may be venturing into uncharted waters’, he nonetheless considered that he was ‘constitutionally bound’ to make the following orders:

‘a. In terms sec 342A(3)(e) CPA, it is ordered that the Acting Officer – in – Charge Operations Support Legsato shall serve a copy of the written court ruling, a copy of the Military Judges Concerns in respect of the Constitutionality of the Assignment of Military Judges, a copy of Prosecution Counsel and Defence Counsel’s Heads of Argument, on the Director Military Prosecutions by 05 September 2016 to investigate any possible disciplinary action that may be taken against members of his staff and / or any person who performed the function of Prosecution Counsel at the sec 29 arraignment of the Accused (MOKOENA) on 23 November 2012.

b. In terms of Sec 342A(3)(e) CPA it is ordered that the Acting Officer – in – Charge Operations Support Legsato shall serve a copy of the written court ruling, a copy of the Military Judges Concerns in respect of the Constitutionality of the Assignment of Military Judges, a copy of Prosecution Counsel and Defence Counsel’s Heads of Argument on the Acting Chief Defence Legal Services by 05 September 2016 for his information.

c. In terms sec 342A(3)(e) CPA, it is ordered that the Acting Officer – in – Charge Operations Support Legsato shall serve a copy of the written court ruling, a copy of the Military Judges Concerns in respect of the Constitutionality of the Assignment of Military Judges, a copy of Prosecution Counsel and Defence Counsel’s Heads of Argument on the Commander – in – Chief of the South African National Defence Force, the Honourable

President of the Republic of South Africa by 05 September 2016 to investigate any possible disciplinary action that may be taken against the Honourable Minister of Defence and Military Veterans in respect of her failure to assign the Military Judge over the period of 01 April 2015 – 30 May 2016.

d. The Acting Officer – Charge Operations Support Legsato must provide written confirmation to this Court by 12 September 2016 that the written court ruling, copy of the Military Judges Concerns in respect of the Constitutionality of the Assignment of Military Judges, a copy of Prosecution Counsel and Defence Counsel's Heads of Argument has been served on the abovementioned persons.

e. The Director Military Prosecutions and the Honourable President must provide written confirmation to this Court by 31 October 2016 confirming what actions, if any, have been taken against any of their staff members or against the Honourable Minister of Defence and Military Veterans respectively.

f. The Court declines to strike these cases from the roll and the cases will proceed to trial.'

[11] After delivery of the judgment, and whilst both matters were still pending, the appellant was once again called to a meeting with the DMJ, which took place on 5 September 2016. During the course of the meeting, the DMJ expressed his dissatisfaction that the appellant had repeated his concerns in open court and in his rulings. According to the appellant, the DMJ reiterated that his assignment as a military court judge was at risk, if he continued making those statements and he was asked to furnish a written undertaking that he would not to do so in the future. The appellant's response was that he was uncomfortable discussing the matter as the trials were still ongoing and that he considered the demand for a written undertaking to be unlawful and unconstitutional. In a letter written by the appellant to the DMJ after that meeting, he asserted that if the latter or any other member was of the view that he was incompetent or had committed misconduct then an independent person (preferably a judge of the high court) should be appointed to investigate those claims and make a recommendation. The appellant concluded the letter by reserving his rights to institute contempt proceedings should he be obstructed from carrying out his functions as a judge. The next day the DMJ replied to the appellant; he suggested that if the appellant continued to be concerned with the constitutionality of

the assignment of military judges, then he should simply recuse himself from all matters.

[12] On 8 September 2016, the appellant wrote to both the prosecution and defence counsel in the Mokoena and Mabula matters. He set out details of his meeting with the DMJ and the correspondence exchanged thereafter. The appellant requested a pre-trial conference with counsel. On 15 September 2016, the appellant received a letter from the then Adjutant General, Major General Mmono (the AG) headed 'withdrawal of authority to sit as a military judge', which proceeded to inform the appellant that a Board of Inquiry (the BOI) had been convened in terms of ss 101 and 102 of the Defence Act 42 of 2002 (the Defence Act), and requested him to fully co-operate with the investigation. On 22 September 2016, the appellant responded to the AG's letter; he undertook to co-operate fully with the BOI and requested a copy of the convening order.

[13] On 4 October 2016, the appellant sent an email to the prosecutor and defence counsel in the Mokoena and Mabula matters, as he put it 'to inform both parties of recent developments'. The email continued:

'On 15 Sep 16, I received a letter from the [AG] informing me that as a result of my letter dated 06 Sep 16, he had convened a [BOI]. I was informed that I would not be able to proceed to the DRC, but that I could still conduct cases in SA and I was to make myself available for the Board.

...

I have still not received a copy of the Convening Order as I had requested on 22 Sep 16. At this stage, I have no idea as to the terms of reference of the Board and I am sure that questions will be asked regarding decisions and comments that I have made in these cases as well as other cases.

I wish to advise Counsel that I may be in a predicament in that I am obligated to answer questions at the Board in respect of matters that are sub judice. Failure to answer questions at a Board can constitute an offence. I do not wish to pre-empt the Board, but I thought it wise to inform both Counsel of the latest developments. This correspondence will also form part of the Court record of both cases.'

[14] On 10 October 2016, the appellant was told to present himself the following day for the commencement of the BOI. The next day he attended the first sitting of the BOI, comprising Brigadier General Myburgh (Director, Military Judicial Reviews), as the President and the late Rear Admiral Masutha (Director, Military Defence Counsel). The appellant was furnished with a copy of the AG's convening order, dated 15 September 2016 'to investigate and report on the circumstances and factual issues surrounding the constitutional exclamations made by [the appellant] presiding as a military judge in military court cases in August 2016. Paragraph 3 of the Order provided:

- 'a. To investigate whether [the appellant] acted within the letter and spirit of the Constitution, the [MDSMA], [the Code], the Rule of Procedure and any other relevant legislation whilst presiding in the two cases of *S v Cpl P.Z. Mabula* and *S v S Sgt D.T. Mokoena* (August 2016)
- b. Did his conduct bring the administration of military justice into disrepute.
- c. Whether the member is to be considered a fit and proper person to continue serving as a military judge.
- d. The seriousness and implications of recent events, and consequences that it may have for the DLSD / SANDF.
- e. The action required to prevent a re-occurrence, as well as to ease the results.
- f. Any related matters which may be brought to the board's attention during the inquiry.
- g. Rectification action and corrective measures including disciplinary steps to be taken.'

[15] On 12 October 2016, the appellant contacted both prosecution and defence counsel in the Mokoena and Mabula matters to confirm that they and the accused in those matters would be available at 3pm on 14 October 2016 for a ruling that he intended delivering in open court. It was a lengthy ruling, in course of which the appellant referred to his previous order, proceeded to read into the record the correspondence and recount in detail the events since then. Thereafter, the appellant noted:

'60. I am giving notice to the Honourable Minister of Defence, Chief SANDF, Secretary of Defence, Mmono, Slabbert, Myburgh, Masutha and Mbangatha that amongst other things, I will be requesting the following relief from the High Court on an urgent basis:

- a. An interdict from the High Court to prevent any further "attacks" on me in my capacity as a Military Judge,
- b. To interdict Slabbert from continuing with his instruction to me on 05 September 2016,
- c. To interdict Mmono instructing me that I may not proceed with any new cases,
- d. To interdict Mmono, Myburgh and Masutha from continuing with the DLSD Board of Inquiry under Convening Order no 03/2016,
- e. To interdict Mmono, Slabbert, Myburgh, Mbangatha and Masutha from performing any activities towards myself as a Military Judge which could interfere with the institutional independence of the Court of Military Judge.
- f. Further and / or alternative relief.

61. I am giving notice to the Honourable Minister of Defence, Chief SANDF, Secretary of Defence, Mmono, Slabbert, Myburgh, Masutha and Mbangatha that amongst other things, I will be requesting the following relief from the High Court on the normal Motion Court roll:

- a. To review the Court Orders that in my capacity as a Military Judge, I made on 29 August 2016,
- b. To review the Court Orders that in my capacity as a Military Judge, I will be making today.
- c. To provide guidance to me as a Military Judge as to whether I may make *obiter dicta* comments in respect of the issue of the constitutionality of sections of the MDSMA relating to the assignment of Military Judges during open court.
- d. To provide guidance to the DLSD as to whether any of the provisions in the MDSMA relating to the assignment of Military Judges are constitutional,
- e. To provide guidance to me as a Military Judge as to whether the actions of Mmono, Slabbert, Myburgh, Masutha and Mbangatha *prima facie* constitute contempt of court and furthermore what actions, if any, should be taken against them in respect of possibly having the members charged for contempt of court *ex facie*.'

[16] The appellant then proceeded to issue the following orders:

'a. The Adjutant, Operations Support Legsato (who is also the Acting Court Manager) shall serve a copy of the record of proceedings of these cases at the offices of the General Bar Council of South Africa as well as on the Law Society of South Africa for those bodies to take the necessary steps they deem fit, against Maj General S.B. Mmono, Brigadier General G.I. Slabbert, Brigadier General A. Myburgh, Brigadier General R.M. Mbangata and Rear Admiral (Junior Grade) R.P. Masutha should any of these members be subject to the ethical codes of these organisations.

b. The Adjutant, Operations Support Legsato shall serve a copy of the record of proceedings on the Judicial Service Commission as well as on the Magistrates' Commission for these institutions to take note of the conduct of the aforementioned DLSD members. It should be noted that the Honourable Judge Legodi, who is the Chairperson of the Court of Military Appeals is also the Chairperson of the Magistrate's Commission.

c. The Adjutant, Operations Support Legsato shall serve a copy of the record of proceedings on the honourable Minister of Defence for her to consider whether Maj General S.B. Mmono, Brigadier General G.I. Slabbert, Brigadier General A. Myburgh, Brigadier General R.M. Mbangata and Rear Admiral (Junior Grade) R.P. Masutha still comply with the provisions of sec 54(2)(g) Defence Act, and to make recommendations to the Commander – in – Chief, the Honourable President of the Republic of South Africa in this regard.

d. Although I, as a Military Judge, wish to reassure all Counsel involved in these cases and the accused that I take my Oath of Office extremely seriously and that to the best of my ability I am impartial, and act without fear, favour or prejudice, I cannot guarantee that the accused will receive a fair trial as contemplated in sec 35 of the Constitution due to the fact that objectively the institutional independence of this Court has been targeted, tarnished and severely prejudiced to such an extent that I have no option but to recuse myself as the Military Judge in these cases.'

[17] Following upon the judgment of 14 October 2016, so states the appellant, save for finalising two part-heard matters, he was 'allocated no new matters and was effectively placed on suspension', until his appointment came to an end on 31 March 2017. After the appellant's recusal, both the Mokoena and Mabula matters proceeded to trial before a different military judge. In the former, the accused was acquitted on 1 February 2017 and, in the latter, the accused was found guilty and

sentenced to dismissal from the South African National Defence Force (the SANDF) on 12 December 2017.

[18] The hearing before the BOI resumed on 18 October 2016. On 31 October 2016, the appellant was handed an amendment to the convening order, which expanded the scope of the BOI to investigate his 'constitutional exclamations in all matters, not just his rulings in August 2016'. He was also handed an order requiring his attendance before the BOI on 8 November 2016. The appellant thereafter consulted with his present attorney, who, on 2 November 2016, despatched a letter to the AG. In that letter it was asserted that the convening of the BOI 'to investigate the conduct of a military judge, particularly where those investigations relate to the content and methods of a military judge's judgments and orders was unlawful and unconstitutional'. The letter demanded that the BOI be dissolved with immediate effect. In his response on 7 November 2016, the AG indicated that he 'had convened the BOI in terms of s 101(2) of the Defence Act 42 of 2002 and that he believed this was necessary in the execution of his responsibilities'.

[19] When the BOI resumed on 12 December 2016, the appellant sought a ruling that 'it was not empowered under section 101 and 102 of the Defence Act 2002 to investigate the conduct of a sitting military judge, particularly where that investigation relates to the merits of a judge's judgments and orders'. After hearing detailed argument, the BOI was postponed until January 2017 for a ruling. On 24 January 2017, the appellant and his attorney were informed that the AG had intimated that he needed more time to make a decision on the appellant's submissions. The matter was then postponed to February 2017, when the appellant was informed that the BOI had received an instruction from the AG to continue with the hearing. The BOI concluded hearing evidence on 13 April 2017.

[20] On 11 December 2017, the appellant was called to a meeting, scheduled for the next day, with the new Adjutant General, Major General Mnisi (the new AG). By that stage, the BOI had still not made a recommendation to the AG. The appellant

was informed that the BOI would be held in abeyance until he (the new AG) had decided on an appropriate course. On the 23 February 2018, the appellant's attorney complained in a letter to the new AG that there had been an unreasonable delay in the finalisation of the BOI. The letter demanded that the BOI either be finalised or withdrawn within 21 days. That letter elicited the following response on 6 March 2018:

'The AG is concerned as to whether some of the orders made by [the appellant] can be subjected to administrative review in the form of a [BOI]. The [AG] is of the view that the order in question should be subjected to a judicial review process.

The Office has instructed the Office of the State Attorney (Pretoria) to brief counsel to take some points of [the appellant's] orders under review.

Until the review process is finalised, the BOI is placed in abeyance without any prejudice to the member. For this reason, this Office cannot withdraw as requested in your letter.'

[21] The review application was launched in the Gauteng Division of the High Court, Pretoria (the high court) by the Minister, the Chief of the SANDF, the Secretary of the Defence and Military Veterans and the SANDF, as the first to fourth applicants, (collectively referred to as the Defence Force) in October 2018. The appellant, Staff Sergeant Mokoena and Lieutenant Mabula were cited as the first to third respondents respectively. The latter two did not participate in the proceedings, either in this Court or the one below. The Defence Force, inter alia, sought to review and set aside the majority of the orders handed down by the appellant in the Mokoena and Mabula matters.

[22] The response of the appellant to the review application was, to say the least, curious. In his answering affidavit the appellant stated:

'5. The rulings speak for themselves. I do not intend to defend the substance of those rulings in detail in these proceedings, beyond providing further explanation and context to assist this court.

6. The central issue is not the rulings. Instead, the true issue is the applicants' conduct in response to my rulings. Their conduct reflects disregard for the constitutionally

guaranteed independence of the military courts, which is further evident from the views expressed in the applicants' founding affidavit.'

Despite stating that he did 'not intend to defend the substance of [his] rulings', the appellant proceeded to oppose the application on three grounds: first, that there had been an unreasonable delay in bringing the application, which should not be condoned; second, that the Defence Force had no standing to review his rulings; and, third, the review lacked merit. In addition, the appellant brought a counter application for 'constitutional relief aimed at supporting the institutional independence of the military courts under the existing statutory framework'. As he put it: '[my] core concern is to ensure that the military judges are not subjected to the type of treatment that I have experienced and to ensure that military judges are able to perform their functions in a constitutionally secure environment'.

[23] The notice of motion in the counter application provided:

'First challenge: Boards of inquiry

1 It is declared that, on a proper interpretation of sections 101 and 102 of the Defence Act 42 of 2002, members of the executive are not permitted to convene boards of inquiry to investigate military judges and senior military judges ("military judges") and the content and merits of their judgments and rulings.

2 In the alternative to paragraph 1, sections 101 and 102 are unconstitutional and invalid to the extent that they permit members of the executive to convene boards of inquiry to investigate military judges and the content and merits of their judgments and rulings.

3 It is declared that the board of inquiry convened to investigate Lt Col K.B. O'Brien under convening order no CDLS 1/C/106/29 is unlawful and unconstitutional.

4 It is declared that the proceedings instituted by the Applicants in this Court under case number 76995/18 are unlawful and unconstitutional

Second challenge: Removal of military judges

5 Section 17 of the Military Discipline Supplementary Measures Act 16 of 1999 ("the MDSMA") is unconstitutional and invalid to the extent that it empowers the Minister, acting on the recommendation of the Adjutant General, to remove a military judge and that the

Minister may do so without any independent inquiry into the fitness of the military judge to hold office.

Third challenge: Renewable assignments of military judges

6 It is declared that on a proper interpretation of section 15 of the MDSMA, the Minister, acting on the recommendation of the Adjutant General, is not empowered to assign military judges for renewable periods.

7 In the alternative to paragraph 3, section 15 of the MDSMA is unconstitutional and invalid to the extent that it empowers the Minister, acting on the recommendation of the Adjutant General, to assign military judges for renewable periods.

8 It is declared that the existing practice of assigning military judges for renewable periods of one to two years is unconstitutional and unlawful.

General

9 The declarations of constitutional invalidity sought in paragraphs 2, 5 and 7 above are suspended for a period of 12 months to allow Parliament to correct the defects.'

[24] The review application succeeded and the cross application failed before Van der Schyff J in the high court. Save for paragraph f declining to strike the Mokoena and Mabula matters from the roll, the high court set aside the remaining orders issued by the appellant on 25 and 29 August 2016, and in that regard, ordered each party to pay its own costs. And, save for paragraph d, pursuant to which the appellant recused himself from hearing both matters, the remaining orders that issued on 14 October 2016 were set aside with costs. Each of the constitutional challenges failed, consequently the cross application was dismissed with costs. In each instance, the costs were to include those consequent upon the employment of two counsel. The appellant appeals, with the leave of the high court, against the upholding of the Defence Force's review application, the dismissal of his cross application and the costs orders that issued against him.

[25] Preliminarily, it is perhaps necessary to record that whilst the Defence Force (notionally at least) is not, so to speak, 'an indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a procedure-

circumventing lifeline’,⁵ the unavoidable conclusion in this case is that it may have been poorly advised. The papers filed both in the review application, as also, in opposition to the counter application, were superficial and generally unconvincing; failing, as they did, to meaningfully rise to a host of challenges or to properly engage with many of the issues that called for adjudication. The same holds true for the heads of argument filed on appeal and the oral submissions from the bar in this Court.

The review application

[26] As before the high court the appellant persists on appeal, with the same three grounds raised in opposition to the review application, namely that: (i) there had been an unreasonable delay on the part of the Defence Force in bringing the review application; (ii) the Defence Force lacked standing; and, (iii) the review lacked merit inasmuch as the Defence Force had failed to show a gross irregularity in the proceedings.

As to the first:

[27] It is contended on behalf of the appellant that the delay in launching the review application is so manifestly unreasonable that it should not have been overlooked or condoned by the high court. The delay rule is a principle that flows directly from the rule of law and its requirement for certainty.⁶ The Constitutional Court has held that there is a strong public interest in both certainty and finality.⁷ As it was put by this Court in *Valor IT v Premier, North West Province and Others*:

‘Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a ‘factual, multi-factor and context-sensitive’ enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that

⁵ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.

⁶ *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 16.

⁷ *Khumalo and Another v Member of Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 47.

it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.⁸

[28] It was incumbent on the Defence Force to provide a full explanation covering the entire period of the delay. The explanation, such as it is, for the most part fell far short of that yardstick, consequently the high court took the view that the explanation for the delay is ‘less than satisfactory’. It did, however, weigh that against, amongst other things, the ‘importance of the matter’, ‘the prospects of success’, ‘the administration of justice’ and ‘the absence of prejudice’. Weighing those considerations, the one against the other, the high court arrived at the conclusion that condonation should be granted.

[29] Importantly, we are not simply at large to interfere with the discretion exercised by the high court. In that regard, the distinction as to whether the discretion exercised by the high court in granting condonation was one in the ‘true’ or ‘loose’ sense is important. The importance of the distinction, as the Constitutional Court explained in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, is that it dictates the standard of interference by this court.⁹ However, as the Constitutional Court emphasised, ‘even where a discretion in the loose sense is conferred on a lower court, an appellate court’s power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.’¹⁰

[30] In *Florence*, Moseneke DCJ stated:

‘Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has

⁸ *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30; See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 17; *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) para 46.

⁹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 82–97.

¹⁰ *Ibid* para 82.

preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.¹¹

[31] Here, not only has no warrant been shown to exist for interference with the discretion exercised by the high court in condoning the delay, but as the high court appreciated, because this question is ineluctably bound to the prospects of success,¹² it is necessary, as that court also did, to enter into the merits of the review application. Without in any way seeking to pre-empt the discussion on the merits that follows later, for the present, it is important to record that counsel for the appellant was constrained to concede that paragraph e of the order of 29 August 2016 that ‘the Director Military Prosecutions and the Honourable President must provide written confirmation to this Court by 31 October 2016 confirming what actions, if any, they have taken against any of their staff members or against [the Minister] respectively’, cannot stand and thus falls to be set aside. Absent paragraph e, paragraph a, which required service on the Director Military Prosecutions for him ‘to investigate any possible disciplinary action that may be taken against his staff’ and, paragraph c, which required service on the President for him to ‘investigate any possible disciplinary action that may be taken against [the Minister]’, may well be ‘indeterminate, open ended and irredeemably vague’.¹³ In that, they arguably may also be susceptible to being set aside. To that extent, at the very least, there are cognisable prospects of success in the review application. This must mean that the grant of condonation by the high court cannot be disturbed.

As to the second:

[32] It is contended that, inasmuch as each of the applicants in the review application were not parties to the criminal proceedings before the appellant, the

¹¹ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) para 113.

¹² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).

¹³ *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 13.

orders, such as they were, did not trigger any cognisable grounds of standing to bring review proceedings. It is indeed so that a court 'will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances'.¹⁴ It cannot however go unnoticed that on 14 October 2016 and, in the course of his judgment, the appellant had himself given notice of his intention to bring proceedings to, inter alia, review the court orders made on 29 August 2016, as well as the orders that he was going to make on that day. The appellant also intimated that he would be seeking interdictory relief on an urgent basis and guidance from the high court as to whether he may make '*obiter dicta* comments in respect of the issue of the constitutionality of sections of the MDSMA relating to the assignment of Military Judges during open court'. He evidently thought it important that the high court speak on these matters. It is thus passing strange that in the circumstances the appellant chose to object to the Defence Force's standing. One would have thought that a review application, whether at his or the Defence Force's instance, would be welcome and put to rest the very issues that had caused him such great consternation.

[33] Be that as it may, the high court took the view that:

'If a military judge's conduct is irregular and *ultra vires* and the irregular conduct results in a court order that would otherwise not have been granted or exceeds the jurisdiction of such a military court, applicants with the necessary standing will have recourse to this court to have those orders reviewed and set aside.

The Minister is implicated in the [appellant's] judgment and order of 25 and 29 August 2016. The [appellant] held that the Minister's failure to appoint military judges contributed to the delay in finalising the trials . . . The [appellant] directed the President to investigate any possible disciplinary action that may be taken against the Minister and report back to the court before a stipulated period confirming what actions, if any, have been taken against the Minister. In view of the finding made against the Minister, that her failure to appoint military judges contributed to the undue delay, the necessary *nexus* was established for the Minister to approach this court for the review of the order. The Minister has a direct and substantial interest in the order granted. The same can be said regarding the order granted on 14

¹⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) quoting with approval *Wade Administrative Law* 7th ed (by H W R Wade and Christopher Forsyth) at 342-4.

October 2016. In this instance, the Minister was ordered to investigate whether certain officers complied with the provisions of s 54(2)(g) of the Defence Act and to make recommendations to the President. These orders were made without providing any of the affected persons an opportunity to present their respective cases to the court. The Minister has a direct and substantial interest in the order that obliges her to conduct an investigation. She therefore has the necessary standing in this court to challenge the validity of the order. There is no merit in this point *in limine*.’

[34] What is more, the appellant had issued orders appertaining to a range of senior officers in the SANDF. In each of his covering letters referring ‘the record of proceedings and court rulings’ to the ‘Chairperson of the General Bar Council of South Africa’ (the GCB), the ‘Chairperson of the Judicial Service Commission’ (the JSC), the ‘Chairperson of the Magistrates Commission’ (the Magistrates Commission) and the ‘Chairperson of the Law Society of the Northern Provinces’ (the Law Society), the appellant stated:

‘The Court ruling dated 14 October 2016 provides the factual basis upon which I as a Military Judge am of the *prima facie* view that [the GCB, JSC etc] should investigate whether the conduct of the members as mentioned in paragraph 62 of the Court ruling amounts to unethical and/or unprofessional conduct’.

The appellant identified the members as Major General SB Mmono, Brigadier General GI Slabbert, Brigadier General A Myburgh, Brigadier General RM Mbangatha and Rear Admiral (Junior Grade) RP Masutha and made reference to the identity and force numbers of each. His covering letter concluded:

‘I am *prima facie* of the view that their conduct amounts to Contempt of Court *ex facie* and it would be appreciated if any of these members are subject to your ethical code of conduct that their conduct should be investigated.’

Whilst each of the GCB, JSC, Magistrates Commission and Law Society acknowledged receipt of the appellant’s letter, only the last intimated that none of the persons mentioned are registered with it and as such they were unable to investigate their conduct.

[35] In his letter to the Minister, the appellant went further. He stated:

'The Court ruling dated 14 October 2016 provides the factual basis upon which I as a Military Judge was of the view that the Honourable Minister should investigate whether the conduct of the officers as mentioned in paragraph 63(c) of the Court ruling is of sufficient grounds to request the Commander-in-Chief to withdraw their Officer's Deeds of Commission.'

Once again, he added 'I am *prima facie* of the view that their conduct amounts to Contempt of Court *ex facie*.' It is plain from these letters that were addressed to various professional and institutional bodies, that they were intended to be acted upon and appear to call the lie to the assertion in his answering affidavit to the review application that: 'the effect of my order was simply to bring my ruling to the attention of these individuals and bodies I did not order these parties to take disciplinary action or to conduct further investigations'.

[36] As Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229 B-C:

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714).¹⁵

[37] To that, may be added, that litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them.¹⁶ As it was put in *Minister of Water and Environmental Affairs v Kloof Conservancy*:

'An order or decision of a court binds all those to whom, and all organs of State to which, it applies. All laws must be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law, which is a founding principle of our Constitution. Orders of court must comply with this standard.'¹⁷

¹⁵ Cited with approval in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 17.

¹⁶ *Minister of Home Affairs v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA); [2013] 4 All SA 571 (SCA) para 77.

¹⁷ *Minister of Water and Environmental Affairs v Kloof Conservancy* fn 13 above para 14.

[38] There were only two orders directly relevant to the prosecution and defence in the Mokoena and Mabula matters. The first was the order declining to strike the matters from the roll and the second was the order pursuant to which the appellant *mero motu* recused himself. For the rest, the greater part was pure surplusage and gratuitous. Those orders did not further impact in any meaningful or tangible manner on the prosecution or defence. They would accordingly only have had a passing interest in whether or not the orders withstand further judicial scrutiny. Not so the officers in the Defence Force, who, whilst not parties to the proceedings and without having been heard, found themselves on the wrong side of the appellant's judgments. Those subject to the appellant's judgments (which he has not attempted to justify) may well have grave difficulty in discerning what steps they are required to take to comply with them. They would need to know with a measure of confidence what they are obliged by the order of court to do or not do as the case may be. They have a direct interest in the relief sought. It follows that in according standing to the Defence Force the high court can hardly be faulted. Were it otherwise, the Defence Force would have no machinery to cause the appellant's judgment to be corrected or to reverse any of the orders that are still extant and continue to operate against senior officers in the SANDF.

As to the third:

[39] The contention advanced is that although the Defence Force had alleged numerous irregularities in the appellant's judgments, that was insufficient, inasmuch as it had failed to show a gross irregularity. Thus, so the contention went, even were it to be accepted that the appellant's judgment was incorrect - an incorrect judgment is not an irregularity. An irregularity refers to the method of conducting the trial. And, for an irregularity to be gross, it must be of such a serious nature that the case was not fully and fairly determined. In this regard, reliance was sought to be placed on what was said by Schreiner J in *Goldfields Investment v City Council of Johannesburg*.¹⁸

¹⁸ *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551.

[40] That case dealt with the review of a lower court on the ground of gross irregularity. It held that ‘the term encompasses the case where a decision-maker misconceives the whole nature of the inquiry or his duties in connection therewith’.¹⁹ As Harms JA pointed out in *Telcordia Technologies Inc v Telkom SA Ltd*:²⁰

‘It is useful to begin with the oft quoted statement from *Ellis v Morgan*²¹ where Mason J laid down the basic principle in these terms:

“but an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of the trial, such as for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”

The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. *Goldfields Investment* provides a good example. According to the applicable Rating Ordinance the aggrieved person was entitled to appeal to the magistrates’ court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been ‘manifestly untenable’. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask. In the sense the hearing was unfair. Against that setting the words of Schreiner J should be understood.

‘The law, as stated in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate’s reasons it appears that his mind was not in a state to

¹⁹ *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266; [2007] 2 All SA 243; 2007 (5) BCLR 503 (SCA) para 71.

²⁰ *Ibid* paras 72-73

²¹ *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581.

enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section.* That being so, there was a gross irregularity, and the proceedings should be set aside.²²

[41] The appellant sought refuge in the expression 'obiter dicta comments'. However, that hollow euphemism is neither an accurate nor a fair reflection of what happened. Tellingly, orders of court can hardly attract the appellation 'obiter'. There was no attempt whatsoever by the appellant to justify the orders granted by him. Nor was there any attempt to defend them. That is hardly surprising because none of those orders had been sought by any of the parties before him. He took it upon himself to mero motu raise a range of issues and then to pronounce on them; thus in effect becoming a judge in his own cause. In so doing, he allowed his personal feelings of disquiet to intrude upon the discharge of his judicial duty. Not just that, the reach of his orders went way beyond the strictures of the matters that served before him.

[42] Judges speak through their judgments. For a military judge to say of senior officers in the Defence Force that '[his] court ruling provides the factual basis' upon which he is of the 'prima facie view' that there should be an investigation to

²² *Goldfields Investment Ltd* fn 18 above at 560-561.

determine whether their conduct amounts to 'unethical and/or unprofessional conduct' or 'Contempt of Court' or that their 'Officer's Deeds of Commission' be withdrawn, is a most serious matter. There could however not be any 'factual basis' to speak of, because no evidence had been placed before the appellant. The reference to 'factual basis', which, in truth, is a rendition in the appellant's judgment of his personal views, is thus inapposite and misleading. Had the orders been acted upon, the potential for harm (which would have gone way beyond just reputational harm) to the officers concerned was immense. It is no answer to say, as the appellant does, that his orders were not acted upon. That was purely fortuitous. He obviously intended for them to have force. Why else would he otherwise have issued them?

[43] A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself.²³ It may be said that the appellant breached several canons of good judicial behaviour. He was obliged to conduct the trials before him in accordance with rules and principles that the law requires. He failed. Basic tenets of judicial propriety and fairness were ignored. Language, particularly in the context of the courtroom, is important and in this case, there are several instances where it was been singularly unfortunate. The appellant, by his language, tone and manner, seems to have overlooked the usual disinterested role of a judge in a trial. His preoccupation with issues that had become all-consuming made it difficult for him to objectively and dispassionately decide matters that came before him from a position of relative detachment. This bent or predisposition also meant that he deprived himself of the advantage of calm and dispassionate observation.

[44] As Harms DP pointed out in *National Director of Public Prosecutions v Zuma*:
' . . . in exercising the judicial function judges are themselves constrained by the law. The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive . . . This commendable approach was

²³ *S v Sallem* 1987 (4) SA 772 (A).

unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.

Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments or express their political preferences. . .²⁴

[45] Thus, owing to his erroneous views and his preoccupation with issues that affected him personally, which he impermissibly injected into his judgments, one would have to say that the appellant wholly misconceived the nature of the enquiry and his duties in connection therewith.²⁵ Accordingly, he never truly applied his mind to the issues before him and wrongly decided a range of issues that were not properly before him. Those were issues justiciable on review.²⁶

[46] It follows that the appeal in respect of the review application must fail.

The cross application

[47] The appellant did not seek to review and set aside the various decisions of which he complained. In the cross application, which did not squarely meet the review application, he contented himself with a series of what may be described as 'abstract' or 'hypothetical' constitutional challenges. In that regard what was said by Kriegler J in *Ferreira v Levin NO* bears repeating:

'The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to

²⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) paras 15 and 16.

²⁵ See also *Telcordia Technologies Inc v Telkom SA Ltd* fn 19 above paras 72 – 79.

²⁶ *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) at 598A-D.

say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.²⁷

[48] In a similar vein, in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers*,²⁸ Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded at 930g:

'It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved'.

[49] The constitutional challenge to ss 101 and 102 of the Defence Act 42 of 2002, can be disposed of quite easily. Section 101 is headed 'Convening boards of inquiry'. Subsection 1 provides:

'The Minister, the Secretary for Defence or the Chief of the Defence Force may, at any time or place, convene a board of inquiry to inquire into any matter concerning the Department, any employee thereof or any member of the Defence Force or any auxiliary service, any public property or the property or affairs of any institution or any regimental or sports funds of the said Force, and to report thereon or to make a recommendation.'

[50] At the bar, we were informed that the Defence Force would not be proceeding with the BOI, which had been held in abeyance pending the review application. This

²⁷ *Ferreira v Levin NO & others; Vryenhoek and Others v Powell NO & others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 199.

²⁸ *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* [2000] ZASCA 137; 2001 (2) SA 872 (SCA) para 9.

means that the issue, certainly as between the appellant and the Defence Force, has become moot. And, given the reservations expressed by the new AG himself as to the appropriateness of invoking those provisions for application to a military judge, as well as the unlikelihood of a recurrence of the question in the future, there plainly is no live issue as between the present parties upon which this Court need speak. Thus, however the question is answered, the position of the parties will remain unaltered and the outcome, certainly as far as this case is concerned, will be a matter of complete indifference to them.

[51] The same may be said of the second constitutional challenge. No evidence whatsoever was adduced that the appellant faced removal for whatever reason as a military judge. It was stated by the appellant:

'223 I further submit that section 17 of the MDSMA is unconstitutional to the extent that it places the power to remove military judges in the hands of members of the executive.

224 Section 17 empowers the Minister, acting upon the recommendation of the [AG], to remove a military judge due to incapacity, incompetence or misconduct.

225 As explained above, the [AG] is a member of the executive who is answerable to the Minister and may be dismissed or suspended by the Minister. The [AG] is not an independent actor by any measure.

...

227 As indicated above, it is constitutionally impermissible for members of the executive to hold the power to exercise discipline over judicial officers.

228 This unconstitutional state of affairs is aggravated by the fact that the determination of whether a military judge is fit for office is vested exclusively in the [AG] and the Minister. There is no requirement that this determination be made by an independent body that is separate from the executive.

229 On this basis, section 17 of the MDSMA is an unconstitutional breach of the requirements of judicial independence.'

[52] This constituted the high water mark of the appellant's case. In it, there is not the faintest hint that the AG had even contemplated a recommendation to the

Minister that the appellant be removed, much less that the Minister had ever considered doing so. There is no suggestion in the papers that the invocation of s 17 of the MDSMA had so much as even featured in the thinking of either of them.

[53] Like the second constitutional challenge, the third, too, rested not upon a true factual foundation, but instead an entirely speculative hypothesis. In the document, styled 'Military Judges' concerns . . .', the appellant had initially expressed the view that: 'Sec 14(1)(b) MDSMA might be unconstitutional'; the appointment for a 'fixed term . . . does not meet the requirement that the military judge shall have security of tenure'; and, 'there may have been Executive interference in the functioning of the Military Courts and/or the assignment of the Military Judges for 2014/15'. Subsequently, in his judgment, the appellant touched on aspects 'regarding the constitutionality of the assignment of military judges', which included 'the delay in the assignment of Military Judges in general (including that of the Military Judge) in these particular cases'; a lack of awareness of the 'objective criteria required for an assignment as a Military Judge'; and, the 'lack of tenure of Office of a Military Judge'.

[54] What the quoted excerpts show is not just a manifest inability to properly articulate the complaint, but also a constantly evolving one. It grew from the rather vague assertion that s 14(1)(b) 'might be unconstitutional' or 'there may have been Executive interference', to a challenge the precise contours of which still remain to be clearly defined. Shifting targets, it goes without saying, can hardly conduce to clarity. Thus, by the time that the counter application had come to be filed, the appellant had set his sights on s 15, not s 14 as presaged in his earlier utterances.

[55] Despite the fact that s 15 is an extension of the Minister's powers under s 14, and the two sections being inextricably linked to each other, in the case, as it evolved, the appellant no longer had any quarrel with the power afforded to the Minister by s 14 to assign an officer to the function of a military judge. Nor did he have any quarrel with the power of the Minister under s 15 to make any assignment

contemplated in ss 13 and 14 for a fixed period (whatever the duration of that period may be) or coupled to a specific deployment, operation or exercise (such as by way of example as debated at the bar a foreign deployment). This is hardly surprising because s 15 relates to the assignment of officers to the whole range of functions envisaged in Chapter 3, not just that of a military judge.

[56] Accordingly, the constitutional challenge as it eventually came to be articulated on the papers, was a far more narrowly circumscribed one. In that regard, the appellant stated:

'240 I regard my time as a military judge as the highlight of my career. An appointment and assignment as a military judge is a prestigious event that confers greater status and respect. As a result, it is reasonable to anticipate that military judges may be inclined to temper their reviews or adjust their judgments to secure further assignments. At the very least, it creates a reasonable apprehension that these pressures might be brought to bear on military judges.

...

242 In these circumstances, renewable terms would lead a reasonable person, who is aware of the context, to form the impression that military judges and senior military judges lack sufficient institutional independence.

243 Therefore, I submit that on a proper interpretation of section 15 of the MDSMA, the Minister (acting on the recommendation of the [AG]) is not empowered to assign military judges on renewable terms.

243.1 Section 15 does not give the Minister any express power to make renewable assignments of military judges: It provides that assignments for all officers under Chapter 3 of the Act (included prosecutors, defence counsel and military judges) "*shall be for a fixed period or coupled to a specific deployment, operation or exercise*". No mention is made of renewable assignments.'

[57] However, once it is accepted that the Minister can assign officers to the function of a military judge and can do so for a fixed period of whatever duration, it is difficult to see why the Minister cannot renew such an appointment. It must be said that there can be little to choose between a series of successive appointments for a

fixed period and the renewal of an appointment after it has run its term. Here as well, the case advanced in support of the s 15 challenge is a purely conjectural one. It rests on the assertion that it may be 'reasonable to anticipate that military judges may be inclined to temper their reviews or adjust their judgments to secure further assignments'. But, once again there is nothing to suggest that any military judge has been put to such a choice. To suggest that a judge may be conscripted to one or other end is a most serious allegation. It ill behoves the appellant to raise an allegation such as this, in this vague and unsubstantiated fashion. The insinuation that a judge may 'adjust a judgment' to 'secure further assignments' is nothing short of scandalous. Absent a proper factual foundation (of which there is none) any apprehension of such possibility can hardly be reasonable.

[58] What the appellant really seeks is to have this Court express a view on legal issues that he hopes to have decided, which would not in any way affect his position relative to the Defence Force. No doubt, any future matters (should there be such) will be decided by that court, as this was, on its own peculiar facts. It must also be accepted, as the appellant recognised, that none of the other military judges shared his constitutional concerns. He also appreciated that whatever he said was to raise awareness, had no precedential significance and was thus not binding on his colleagues.

[59] In effect what the appellant is seeking is legal advice from this Court in respect of legal disputes that may or may not arise in the future. But, as Innes CJ observed in *Geldenhuis & Neethling v Beuthin*:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'²⁹

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

²⁹ *Geldenhuis & Neethling v Beuthin* 1918 AD 426 at 441.

'A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'³⁰

[60] It follows that the appeal against the dismissal of the cross application must also fail.

[61] Costs remain: The high court ordered the appellant to pay the costs of the: (a) 'review of the orders granted on 14 October 2016' (para 6); and (b) counter-application (para 10). In arriving at that conclusion, the high court held that there was 'no reason to deviate from the principle that costs follow the result'. However, that was to ignore the well-established principle that 'in general, the courts will only grant a costs order against a judicial officer in a dispute over the performance of their judicial functions where bad faith on their part has been proven'.³¹ The high court did not enter into that enquiry and made no findings of bad faith or other serious misconduct. In respect of the counter application, the high court had no regard to the *Biowatch* principle pertaining to costs in constitutional matters.³² On this basis, those costs orders cannot stand, irrespective of the outcome of the appeal.

[62] In the result, save for setting aside paragraphs 6 and 10 of the order of the high court, the appeal is dismissed.

V M PONNAN
JUDGE OF APPEAL

³⁰ *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 21 at footnote 18.

³¹ *Pangarker v Botha* [2014] ZASCA 78; [2014] 3 All SA 538 (SCA); 2015 (1) SA 503 (SCA) para 39.

³² *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-24.

M CHETTY
ACTING JUDGE OF APPEAL

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