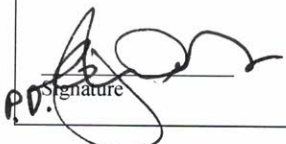




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case No.: **36254/2019**

|                                                                                                 |
|-------------------------------------------------------------------------------------------------|
| (1) REPORTABLE: YES/ <del>NO</del>                                                              |
| (2) OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del>                                             |
| (3) REVISED: Yes ✓                                                                              |
| <br>Signature |
| 13/4/2021<br>Date                                                                               |

In the matter between:

**ALICIA NTOMBIZODWA FONGOQA**  
and  
**MINISTER OF DEFENCE**

Applicant

First Respondent

**CHIEF OF THE SOUTH AFRICAN  
NATIONAL DEFENCE FORCE**

Second Respondent

**CHIEF OF MILITARY LEGAL SERVICES**

Third Respondent

**PRESIDING OFFICER MILITARY COURT  
Lt. Col MOTLOGELWA**

Fourth Respondent

**PROSECUTING COUNSEL: Lt. Col KGAPHOLA**

Fifth Respondent

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**JUDGMENT**

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**SARDIWALLA J:**

[1] The applicants seek to review and set aside the decision made by the fourth respondent concluding that a proper preliminary investigation was conducted in terms of the section 30 of the Military Discipline Supplementary Measures Act No.16 of 1999 before the applicant's trial commenced before the Military. The applicant seeks the following order:

1.1 Reviewing and correcting or setting aside the decision of the fourth respondent that a proper preliminary investigation was conducted in terms of provision 30 of the Military Discipline Supplementary Measures Act before the trial of the applicant commenced at the Military Court;

1.2 That the trial proceedings held under CAS Number 03/07/2016 before the Military Court be declared ultra vires, null and void *ab initio*;

1.3 Costs on the scale as between attorney and client scale against any respondents who oppose;

1.4 And further and alternative relief.

### *Background*

[2] The applicant was charged with two counts for an alleged incident that occurred on 2 July 2016 namely;

2.1 The first charge is for intimidation read with section 1, 48, 50, 51, 45, 88 and 12 of the MDSMA; and

2.2 The second charge is for the contravention of section 17 using threatening insubordinate or insulting language read with section 1, 48, 50, 51, 56, 88 and 12 of the MDSMA.

- [3] On 12 June 2018 Senior Military Court Judge Lt. Col Coetzee directed that a preliminary investigation be completed and remanded the applicant's trial to 20 June 2018. In the same proceedings the Judge appointed Major Sithembele Gcule as a recording officer in terms of MDSMA.
- [4] On 20 June 2018 the applicant contacted the fifth respondent to enquire about the preliminary hearing and was informed that it could not take place as scheduled as the complainant was on leave. As a result, no preliminary was held and the matter was not remanded to another date.
- [5] On 29 October 2018 the applicant was telephonically summoned to the office of the fifth respondent wherein the applicant was advised that the recording officer Major Gcule was on sick leave and would be unable to attend the preliminary investigation and requested the applicant to sign documentation in preparation for court. The applicant signed the documents and Major Gcule signed the documents on 4 November 2018.
- [6] On 6 December 2018 the applicant consulted with her defence counsel Major Mokitli and informed him that no preliminary investigation was held and she was advised that he would raise this in argument at the trial.
- [7] On 7 December 2018 the applicant appeared before the Military court once again represented by Major Mokitli wherein the fourth respondent was the presiding officer. The applicant terminated the mandate of Major Mokitli as she avers that he ignored her instruction that a preliminary investigation was not held as directed.
- [8] The Military Court postponed the trial for 17 January 2019 for the applicant to obtain legal representation.
- [9] On 14 January 2019 the applicant appointed K.P Seabi and Associates as her attorneys

of record was represented by Mrs Ramakgaphola.

- [10] At the hearing of the 17 January 2019 the applicant argued that no proper preliminary investigation was held as directed previously by the Court, however the fourth respondent found that,

*“..at face value a proper preliminary investigation was conducted on the documents that I have just mentioned and the signature of the accused and the recording officer. Therefore, the court take it that there was preliminary investigation conducted on the day in question.”*

- [11] The fourth respondent in his judgment concluded that Major Mokitli’s mandate was terminated for other reasons and not the issue of the preliminary investigation.
- [12] The conduct of the respondents at the hearing of 19 January 2019 initiated the current application to review and set aside the decision of the fourth respondent.

#### *The submissions*

- [13] The applicant submits that no preliminary investigation took place in terms of section 30 of the MDSMA on 29 October 2018 and that the documents that were filed were fraudulent as they present that a preliminary investigation took place in the presence of all the parties. Further that due to the irregularity her right to a fair trial was infringed upon and the trial proceedings should be declared null and void *ab initio*.
- [14] The applicant also relies on the affidavit by Major Gcule who testified that he was approached on 4 November 2018 in his office by Lt. Col Kgapula requested him to sign preliminary documents that were already pre-prepared for him to sign. He further indicated that he signed the documents on the basis that an agreement was reached

between the complainant and the accused wherein the complainant the matter was to be withdrawn and confirms that he had sight of the statement of withdrawal and is therefore surprised that the matter was not withdrawn.

- [15] The respondents contend that this court does not have jurisdiction to adjudicate the matter as the proceedings before the Military Court have not been finalised i.e sentencing. The respondents referred to several cases that it is trite law that an incorrect preliminary investigation procedure constituted a pre-trial irregularity and that such pre-trial irregularity does not vitiate the subsequent trial where it does not result in actual or substantial prejudice to an accused. It therefore submits that the applicant's right to cross-examine witnesses, be legally represented and place her version before the Court at the trial was not prejudiced. Lastly that section 30(8) and 30(10) of the MDSMA affords the prosecuting authority a discretion whether to call witnesses to testify viva voce in order to record their evidence or read over to witness statements of such witnesses and therefore the applicant's inability to cross-examine witnesses results in a gross irregularity is without merit.

#### *Grounds of Review*

- [16] The Applicant's grounds of review:

6.1 The alleged preliminary investigation commenced without her legal representative;  
and

6.2 The applicant was not afforded an opportunity to cross-examine witnesses.

- [17] In *Kwemaya v National Commissioner, Correctional Services and another*<sup>1</sup>, Olsen J referred to the case *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at paragraphs 71 and 72, where it was held that the proper approach for a court confronted with a claim, and an objection that the court lacks jurisdiction to entertain the claim, is to accept that the claim before the court is “a matter of fact”. If a claimant says that the claim arises from the infringement of a right to enforce a contract, then the court must deal with it accordingly. When the claimant says the claim is to enforce a right created by the Labour Relations Act then that is the one before the court, as a matter of fact. When the claim is said to be for the enforcement of a right derived from the Constitution then that as a fact is the claim. The question as to whether the claim is bad is beside the point. The court went on to say that a claim which exists as a fact is not capable of being converted into a claim of a different kind by the mere use of language; and a court cannot under the guise of “characterising” a claim purport to convert the claim placed before the court into a claim of another kind.
- [18] He went on to say that approaching the matter in the light of what was said in *Makhanya supra*, would mean that one should reach an understanding about what a claim is by having regard only to the label attached to it by the claimant; and not by looking to the elements of the cause of action pleaded by the claimant in order correctly to label the claim where the claimant might have done so incorrectly. His view was that *Gcaba v Minister for Safety and Security*<sup>2</sup> illustrates that *Makhanya* should not be read that way and he went on to state the following:

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<sup>1</sup> (13535/2016) [2017] ZAKZDHC 33 at paragraph 27

<sup>2</sup> 2010 (1) SA 238 (CC)

*“[29] Gcaba concerned a policeman who had applied for a position unsuccessfully. He approached the High Court with an application to review the decision not to appoint him. The High Court decided that it lacked jurisdiction to entertain the application because it was an employment matter. Before the Constitutional Court the applicant contended that his claim was from inception one which fell under PAJA, as he sought to vindicate his right to just administrative action. The respondents contended that the applicant’s claim was a labour matter which had to be adjudicated through the “finely tuned mechanisms provided for in the LRA”. The court in Gcaba held that before addressing the issue of jurisdiction, and indeed in order to address that question, the court had to decide whether the conduct complained of by Mr Gcaba was administrative action. (See paragraph 63 of the judgment.) Having found that it was not, the court held (in paragraph 75 of the judgment) that where the court’s jurisdiction is challenged in limine at the outset, the pleadings and, in motion proceedings, also the contents of the supporting affidavits, must be interpreted “to establish what the legal basis of the applicant’s claim is”. If, “properly interpreted”, that enquiry establishes that the applicant is asserting a claim within the exclusive jurisdiction of the Labour Court, the High Court would lack jurisdiction. On that basis the decision of the High Court in Gcaba was found to have been correct.*

*[30] It seems to me that I must follow the same approach as was followed in Gcaba. There (in paragraph 64 of the judgment) it was held that where a grievance is raised by an employee relating to the conduct of the State as employer, and there are “few or no direct implications or consequences for other citizens”, then the conduct complained of is not administrative action.*

*Here, perhaps even more than in the case of Mr Gcaba, the conduct of the department in which the applicant was employed carried no implications and generated no consequences for anyone outside the particular relationship between the applicant (as employee) and her employer, the State. The applicant wrongly pleads in her papers that what happened is governed by PAJA. She erroneously attaches the label "administrative action" to the conduct she complains of. For that reason, following Gcaba, the conclusion must be that this court lacks jurisdiction if the characterisation of the conduct of the State as administrative action is the only basis upon which the applicant asks the court to decide her claim<sup>3</sup>.*"

- [19] It is therefore important to consider the applicants' interest in this matter. In ***Giant Concerts CC v Rinaldo Investments (Pty) Limited***<sup>4</sup> Cameron J dealt with the requirements to establish own interest standing in a legality challenge. The following appears in paragraph 35 of the judgment.

*"Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."*

- [20] The requirement to be established is whether the illegality directly affects his or her rights or interests, or potential rights or interests. The applicants' standing is that she was not afforded the right to be legally represented and cross-examine witnesses at the preliminary investigation by virtue of the fact that she was merely called in to sign the documents and therefore no preliminary hearing was in fact concluded. The denial of her right to legal representation at the alleged preliminary investigation hearing, she claims extinguished her rights and violated her right to a fair trial. The current rights

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<sup>4</sup> 2013 (3) BCLR 251 (CC)

applicant seeks to enforce are directly related to the preliminary hearing and the trial at the Military Court. Ultimately the applicant has come before this court to vindicate her constitutional rights which are protected by the provisions of section 38 (a) of the Constitution, whose task it is to protect those rights.

- [21] In the circumstances I conclude that this court has jurisdiction to determine the present application.

### *The South African Military Court system*

- [22] The Constitution of the Republic of South Africa makes provision for a defence force that is structured and managed as a disciplined military force.<sup>5</sup> Even prior to the Constitution, to ensure discipline in the military, the South African Military Law had been developed and the military court system has been recognised by the Constitutional Court.<sup>6</sup> This military criminal justice system has been created with a separate system of courts hearing matters pertaining to the usual, as well as other special statutory offences; and with a similar, but separate, investigative procedure, prosecuting authority, and court procedure.<sup>7</sup>
- [23] This system of criminal justice is based mainly on the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA) as read with its Rules of

<sup>5</sup> Section 200(1) of Act 108 of 1996 (here after referred to as Constitution).

<sup>6</sup> Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence 2002 1 SA 1 (CC) par 31

<sup>7</sup> For a general discussion on the historic background of military law, see Oosthuizen, MM. 1990. Die geskiedkundige agtergrond van die militêre reg. THRHR, 53:211-224. Oosthuizen (1987:86) refers to the broad and narrow definitions of military law (Oosthuizen, MM. 1987. Militêre reg en tersiêre regsopleiding. Obiter, 82-91). This article focuses on the narrow discipline orientated definition, also referred to as the criminal law for persons in uniform. See also Botha, CJ. 1994. 'Jungle Justice' and Fundamental Rights: Military Courts in a Future Constitutional Dispensation. SA Publiekreg / Public Law, 313-321.

Procedure<sup>8</sup> and the Military Discipline Code (MDC)<sup>9</sup>, and is aimed at the maintenance of discipline essential for a fighting force that is necessary in peacetime as it is in wartime.<sup>10</sup>

[24] The MDSMA defines a “military court” as one of the following: a Court of Military Appeals (CMA), the Court of a Senior Military Judge, the Court of a Military Judge and the Commanding Officer’s Disciplinary Hearing.<sup>11</sup> The finding of a military court is final and subject only to the appeal and review procedures provided for in the legislation to the CMA.<sup>12</sup>

[25] Internal military review and appeal procedures Court of Military Appeal (CMA). The CMA exercises full appeal and review competencies in respect of the proceedings of any case or hearing conducted before a military court. This court may, after due consideration of the record of the proceedings and representations submitted to it or argument heard by it (a) uphold the finding or the finding and the sentence; (b) refuse to uphold the finding and set the sentence aside; (c) substitute for the finding any finding which the evidence on record supports beyond a reasonable doubt and which could have been brought on the charge as a competent alternative verdict

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<sup>8</sup> Government Notice R747 in Government Gazette No 20165 of 11 June 1999 (here after referred to as the Rules).

<sup>9</sup> First Schedule to the Defence Act 44 of 1957.

<sup>10</sup> The provisions of the MDC were amended and the MDSMA promulgated after a challenge to the constitutionality of the previous rules, as contained in the then applicable Defence Act 44 of 1957 and MDC. See President, Ordinary Court Martial v Freedom of Expression Institute 1999 4 SA 682 (CC); and Freedom of Expression Institute v President, Ordinary Court Martial 1999 2 SA 471 (C).

<sup>11</sup> MDSMA (s 1). The Commanding Officer’s Disciplinary Hearing is disregarded for purposes of the article, as is the Board of Inquiries (MDC (s 136)).

<sup>12</sup>

by the military court, or any other law; or (d) if it has upheld the finding, or substituted a finding, vary the sentence.<sup>13</sup>

- [26] This competency of the CMA is in line with section 35(3)(o) of the Constitution which states that every accused person has the right to appeal to, or to be reviewed by a higher court. There is a distinct difference between an appeal and a review as they serve different purposes. A review is generally about an irregularity and based on one of four grounds: absence of jurisdiction of the court; interest in the cause, bias, malice or corruption on the part of the presiding officer; gross irregularity in the proceedings; or an admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.<sup>14</sup> An appeal is generally applied for where the person is dissatisfied with his/her conviction and/or sentence.
- [27] Chapter 6 of the Military Discipline Measures Act (MDSMA), dealing with post-trial procedures, *prima facie* makes provision for both review and appeal procedures with the heading "Appeal and Review". In terms of section 33(7), when a military court has convicted and sentenced an accused, it must inform him of (a) the review authority to whom the record of proceedings will be submitted for review and of the accused's right to submit written representations to that authority within the time limits prescribed in this Act or in a rule of the Code; and (b) his or her right to approach a Court of Military Appeals for relief.

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<sup>13</sup> MDSMA (s 8).

<sup>14</sup> Section 24(1) of the Supreme Court Act 59 of 1959.

- [28] Every person who is convicted and sentenced by a military court has the right to the automatic, speedy and competent review of the proceedings of his or her trial to ensure that any proceedings, finding, sentence or order is either valid, regular, fair and appropriate; or remedied. An offender may also apply for the review of the proceedings of his or her case by a CMA.<sup>15</sup> A convicted person may furnish the reviewing body with written representations, which together with the record of proceedings, must be considered by such review authority.<sup>16</sup>
- [29] In the case of *Mbambo v Minister of Defence*<sup>17</sup> the court found that the CMA has review powers that are wider than that of the High Court when it sits on appeal. The CMA does not only reconsider cases before it on the record of the proceedings, but has a wider power to allow further evidence. The court found that the offender has a right, in terms of the Constitution, to the meaningful reconsideration of his conviction and his sentence by a higher court than the one that convicted and sentenced him in the first place. This was provided for in the procedures contained in the Act.<sup>18</sup> The conclusion was thus that the MDSMA is constitutional in that it allows for both appeal and review procedures as required by the Constitution.
- [30] It should be noted from the outset that the court in *Mbambo* refrained from expressing any view as to whether the High Court has the jurisdiction to review the proceedings of the court of first instance or the CMA.<sup>19</sup> It is submitted that there should be a

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<sup>15</sup> 116 Section 34(5). The request must be made within certain time limits and in the prescribed manner (rule 72). When an offender has been convicted by a military court, the presiding judge or commanding officer must as soon as possible after the completion of the trial submit the record of the trial's proceedings to a review counsel or to the Director: Military Judicial

<sup>16</sup> 117 Section 34(7). These representations must be made within 14 days after the announcement of sentence. This period may be extended to up to 28 days where it is deemed to be impractical

<sup>17</sup> 2005(2) 225 (T) at 233 A

<sup>18</sup> Mbambo 230A-C.

<sup>19</sup> Mbambo 235E-F

possibility that the High Court may be approached with a review application.<sup>20</sup> This submission seems to be supported by the *S v Tsotsi*<sup>21</sup> case where the High Court granted bail to a person pending his review application to the High Court of the decision of the military court.<sup>22</sup> The court noted that the High Court exercised a supervisory jurisdiction over the military courts similar to the supervisory power it exercised over the magistrates' courts.<sup>23</sup>

#### The *Audi Alteram Partem* Rule

[31] It is prevalent in a number of court decisions in South Africa, such as *South African Football Union v President of South Africa (SARFU)*<sup>24</sup> and the *South African Roads Board v Johannesburg City Council*<sup>25</sup> the view was expressed that the *audi alteram partem* rule should not necessarily depend on whether proceedings were administrative, quasi-judicial or judicial.

[32] In *Du Preez and another v Truth and Reconciliation Commission*<sup>26</sup> (*Du Preez*), the court held that the Commission was under a duty to act fairly towards those implicated by the information received during the course of its investigations or hearings. It further indicated that it was instructive that the Committee's findings in this regard and its report to the Commission could accuse or condemn persons in the position of the appellants. The court also noted that, subject to the granting of amnesty, the ultimate result could be criminal or civil proceedings against such persons. The court noted that

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<sup>20</sup> Rule 59(12)(f) makes provision for an approach to the High Court. If this does not refer to an appeal, the only other possibility is a review application.

<sup>21</sup> 2004 (2) SACR 273

<sup>22</sup> 2004 2 SACR 273 (E)

<sup>23</sup> Tsotsi 282 B-C.

<sup>24</sup> 1998 (10) BCLR 1059.

<sup>25</sup> 1991 (4) All SA 722 (AD).

<sup>26</sup> 1997 (3) SA 204 (A).

the whole process was potentially prejudicial to them and their rights of personality. They had to be treated fairly. Procedural fairness meant they had to be informed of the substance of the allegations against them, with sufficient detail to know what the case was all about.

[33] In the case of *SARFU*, *supra*, the question was whether the President, in appointing the Commission, acted in accordance with the principles and procedures which in that particular situation or set of circumstances were right and just and fair. Accordingly, the principle of natural justice should have been enforced by the court as a matter of policy irrespective of the merits of the case. The Commission emphasized that the fact that a Commission is an advisory body does not, detract from the fact that it is likely in the ordinary course of events, to make findings which would cause prejudice to *SARFU*, and its officials.

[34] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment<sup>27</sup>. Peach sums up the *audi* rule as follows:<sup>28</sup>

*“The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the*

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<sup>27</sup> See De Smith, SA (1955) “The right to a hearing in English Administrative Law” 68(4) Harvard Law Review 569-599, 569.

<sup>28</sup> See Peach, VL (2003) “The application of the audi alteram partem rule to the proceedings of commissions of inquiry” Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at <http://hdl.handle.net/10394/58>), 8.

*person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”*

[35] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins. In general terms, the principles of natural justice consist of two component parts, *to wit*; the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter.

[36] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case. The rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process. The application of the principle of natural justice has proved problematic.

[37] The challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this matter seems compelled to respond to the vulnerability of the applicant facing the pervasive power of the Military Court, I am at the same time aware that the court has to avoid a situation where the unconstrained expansion of the duty to act fairly threatens to paralyse its effective administration.

[38] In my respectful view, however the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand, constitute the public and the private aspects of public interest. It seems plain to me that the principles of natural justice are intended to promote individual trust and confidence in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.

[39] In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the applicant to her good name but this cannot have the effect of precluding the Military Court or the CMA from discharging duties and responsibilities exclusively assigned to it by the Constitution. However, such an inquiry may only proceed in a manner which strictly recognises the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.

*Analysis and findings*

- [40] The respondents have correctly averred that the material question to be addressed is whether the pre-trial irregularity caused the accused to suffer prejudice to the extent that he or she will not have a fair trial. It is trite that the internal military review and appeal procedures are only applicable once an accused has been convicted and sentenced as indicated above. It is on this basis that the applicant has approached this Court for an appropriate remedy as indicated in the preceding cases that this Court in terms of its supervisory capacity has the authority to oversee the matters of the Military Court and therefore has jurisdiction to intervene.
- [41] It is common cause between the parties that the applicant has not been sentenced as only the trial has proceedings have been completed and therefore this prevents the applicant from bringing any review for gross irregularity in the Military Court until sentence is handed down. The applicant is challenging the procedural fairness of the proceedings of the preliminary investigation in that she was not afforded an opportunity to state her case which has impacted on the evidence before the Military Court which she alleges has prejudiced her.
- [42] It is also common cause that the presiding officer Lt. Col Coetzee directed that preliminary investigations in terms of section 29(3)(b) of the MDSMA be held. In such hearing it is prudent in a fact finding investigation to inform and interact with a person whose rights may be adversely affected.
- [43] In the present matter the applicant alleges that when she enquired about her preliminary hearing she was informed that her hearing could not proceed as the recording officer

Major Gcule was on sick leave and as such was summoned to sign documents on 29 October 2018 by Lt. Col Kgaphola in his office. However, Lt. Col Kgaphola's version differs from the applicant's but confirms the applicant's version that there was a telephonic conversation and meeting between them on 29 October 2018. What remains then to be determined is if this Court accepts that such interaction on face value can be considered a preliminary hearing as envisaged in section 29(3)(b) of the MDSMA. A preliminary hearing purpose is to establish whether there is sufficient probable for the trial to continue.

- [44] The respondents in their answering affidavit submit that this process was done in accordance with section 3(10) of the MDSMA wherein the witness statements are read to the accused and therefore even though the applicant was unable to cross-examine them she had the opportunity at the trial. They contend that the full record was not provided to the trial court as the applicant pleaded not guilty and therefore it was not necessary. The fifth respondent alleges that he completed this process in the presence of the applicant (the accused in the trial) together with Major Gcule in his office on 29 October 2018. Major Gcule denies this and avers that the documents were pre-prepared for him to sign and that he signed it in his office on 4 November 2018. Upon inspection of the preliminary documents before this Court the documents are dated 29 October 2018. The respondents allege that Major Gcule and the applicant are friends and therefore due to their close relationship he is assisting the applicant. Whilst this Court recognises the respondent's averment there is insufficient evidence before this Court to prove that allegation by the respondents. It is significant to note that if Major Gcule's version were not true, no doubt the Military Court would have instituted disciplinary proceedings against him for perjury. The respondents have not indicated that this is the

case. Major Gcule's testimony is more probable more so because as a Major in the Military I am sure he is well aware of the implications of lying under oath and the consequences it may have legally as well as the bearing it may have on his employment. I am satisfied that Major Gcule reconciled these factors before agreeing to testify to this on affidavit and therefore this Court accepts his version.

- [45] The respondents also aver that the preliminary investigation was in compliance with section 3(10) of the MDSMA even though this provision clearly states that the inability of the accused to exercise its rights in terms of section 30(8) must not be construed in any proceedings that will cause prejudice to the accused. More over the respondent's allegation that they were in compliance with section 30(8) and 30(10) of the MDSMA by reason that these sections afford the prosecution with a discretion either to call a witness *vive voce* or read over the witness statements to record their evidence and the latter does not afford the applicant to cross-examine at the preliminary stage is incorrect. Section 30(4) clearly affords the accused this right and sets out the procedure that must be followed when conducting a preliminary hearing and specifically section 30(4) (e) provides the accused with a right to cross-examine or re-examine any witness called by the state, give evidence or remain silence. Section 30(5) states that the evidence of every witness must be *vive voce* subject to a situation in terms of section 30(10) and (11) where in the event that a witness is unavailable that the statements of the witnesses must be read over to the accused. The respondent's whilst alleging compliance with section 30(10) Lt. Col Kgaphola in his answering affidavit did not set out what witnesses were called, if any, and whether he read those statements to the applicant when he alleges that the preliminary documents were signed in his office on 29 October 2018 which is a requirement in terms of section 30(10). Lt. Col Kgaphola makes no mention in his

affidavit of a statement of withdrawal by the complainant. In fact, his affidavit confirms the Major Gcule's version that the documents were pre-prepared as he states at paragraph 15.2 of his answering affidavit that;

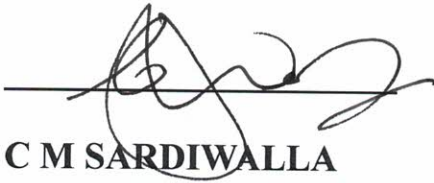
*"I interpose to mention that it is common practice for prosecution counsels to either fill in the detail of the recording officer and the accused prior to the commencement of the PI."*

- [46] I am satisfied that the preliminary investigation procedure is not merely an insignificant process that has no effect on the fairness on the trial. The fact that the investigation was also completed without the applicant's legal representative poses a grave challenge to the fairness of those proceedings. It cannot be disputed that the fifth respondent's failure to read over statements of witnesses that were recorded to the applicant an opportunity and afford her an opportunity to respond to those statements that may adversely affect her threatens the applicant's aforesaid right to natural justice and fair procedures. The respondents are correct in averring that that if the applicant is granted the relief that she seeks that this does not prevent the respondents from instituting the charges *de novo* against her, however the applicant has not challenged the outcome of the trial in these proceedings but rather that the failure to conduct a proper hearing caused her severe prejudicial harm and if she is not afforded a fair hearing before such determination is made. I am satisfied that the balance of convenience favours the applicant and that the applicant will suffer prejudice in that the conduct of the fifth respondent clearly prevented the applicant from having her case fully and fairly determined and thus falls under the purview of gross irregularity. On the other hand, the respondents will suffer a mere delay.

[47] There are prospects of succeeding in the trial wherein the applicant will be granted the opportunity to respond in the preliminary hearing and cross-examine witnesses whilst legally presented. However, should this Court not set aside the decision of the fourth respondent the damage to the applicant's reputation would be irreversible. The applicant in these circumstances has no other remedy except the relief that she seeks. I see no reason why the costs should not follow the result.

[48] **In the result I grant the following order:**

1. **The decision of the fourth respondent that a proper preliminary investigation was conducted in terms of section 30 of the Military Discipline Supplementary Measures Act before the trial of the applicant before the Military Court is set aside;**
2. **The matter is remitted to Military Court to be instituted *de novo*; and**
3. **The respondents shall bear the costs of the application.**



P.P. C M SARDIWALLA

**Judge of the High Court**

APPEARANCES:

For the Applicant: Adv. Hlarane Legoabe

Instructed by: KP SEABI & ASSOCIATES

For the Respondent: Adv. Tinus Kleyn

Instructed by: STATE ATTORNEY

Date of Hearing: 24 August 2020

Date of Judgment: 13 April 2021