

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3178/2002

In the matter between:

MOKONE PETRUS NYAPHULI

Applicant

and

THE MINISTER OF DEFENCE

Respondent

CORAM: RAMPAL, J

HEARD ON: 5 SEPTEMBER 2002

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 12 SEPTEMBER 2002

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[1] The applicant, Mr Mokone Petrus Nyaphuli, was a member of the South African National Defence Force. He was a corporal by rank attached to the

Tempe Military Base here in Bloemfontein. He is a married man and a father of a two year old child.

[2] On Tuesday 27 August 2001 he was convicted on eight counts of fraud in Bloemfontein by Major A.S. Venter, the military judge in the Tempe Military Court.

[3] On the same day he was sentenced to 18 months direct imprisonment. Moreover, he was discharged from the South African National Defence Force. The sentence was suspended pending the outcome of his appeal to the Military Court of Appeal.

[4] His appeal was heard by the Military Court of Appeal in Pretoria on 14 April 2002 in terms of section 34(2) of The Military Discipline Supplementary Measures Act No. 16 of 1999. The Military Court of Appeal confirmed the conviction and sentence.

[5] The applicant was subsequently admitted to Grootvlei Prison in Bloemfontein. It does not appear when he was jailed. At present he is still detained there. The applicant was aggrieved by his conviction as well as sentence. He intends to appeal against both.

[6] On Thursday 5 September 2002 he launched this application for his release on bail pending his appeal to the Free State High Court. I deem it unnecessary to dwell on the merits now. I shall confine myself to the three points raised *in limine*.

[7] Mr Möller, counsel for the respondent, raised the following points *in limine* at the beginning of these proceedings: Firstly, that there was a glaring non-joinder of two interested parties; secondly, that there was no measure of urgency and, thirdly, that the provisions of section 35 of the General Laws Amendment Act No.62 of 1955 were not complied with.

[8] Mr Stander, counsel for the applicant, challenged all the submissions advanced on behalf of the respondent. He contended that there was no misjoinder or non-joinder; that there was a measure of urgency and that the court had the power to condone non-compliance with the provisions of section 35 of the General Laws Amendment Act No.62 of 1955.

[9] The application was postponed to Friday 6 September 2002. On that day I extended an invitation to the Director of Public Prosecution in the Free State to make an input as to whether the director of public prosecutions or the director of military prosecutions has jurisdiction in this matter. The matter stood down until Monday 9 September 2002.

[10] On Monday 9 September 2002 the Deputy Director of Public Prosecution was represented by Ms Giorgi. She submitted that the National Director of Public Prosecution had no interest or jurisdiction in the matter and that the director of military prosecution was correctly cited as the respondent in the application. I then reserved judgment and postponed the case to Thursday 12 September 2002 for judgment.

[11] It was contended on behalf of the respondent that the respondent was wrongly cited as a party. Mr Möller argued that the applicant lost his status as a soldier on 27 August 2001 when he was discharged or dismissed from the South African National Defence Force. With that loss of status the argument developed further that the respondent lost jurisdiction over the applicant. I am not persuaded. The applicant was not charged as a civilian in a civilian court by the civilian prosecuting agency. He was charged as a soldier in a military tribunal by the military prosecuting agency. He intends appealing against the decision of the Military Court of Appeal in an attempt to have his military status restored. In my view the respondent was correctly cited. Notwithstanding the said dismissal and the subsequent detention of the applicant in a civilian prison, the provisions of the Defence Act No.44 of 1957 and the Military Discipline Supplementary Measures Act No.16 of 1999 still applied to him. For instance section 104(5)(c) of the Defence Act No. 44 of 1957 provides that the military discipline code applies to all persons lawfully detained by virtue of sentences imposed under the military discipline code. The applicant is not detained in terms of the public criminal code, but the military discipline code, which is why the Director of Public Prosecution declines to get involved, in my view correctly so. The submission of Mr Stander has merits in my view. He is in good company of Ms Giorgi.

[12] It was not necessary at all to join the minister of correctional services. His department has no direct and substantial interest in these proceedings or any order the court may grant. Almost every day the courts throughout this country hear countless bail applications. The honourable minister is hardly ever cited as a party. I can see no compelling reason why he should have been cited in this instance. Ms Giorgi has contended that the National Director of Public Prosecution does not desire to trespass on the terrain of the director of military

prosecution. Neither the minister of correctional services nor the minister of justice are likely to be adversely affected by whatever order may emanate from these proceedings. They were in my view not necessary parties to be joined. I am aware of the decision in AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR 1949 (3) SA 637 AD. My ruling does not do violence to the principle laid down in that case. Should the court order the release of the applicant in this matter, I do not suggest that it will, such order will not negatively and automatically mean that he should be released even if there are two or more other warrants on the strength of which he was received and detained in jail. The cancellation of one warrant of detention does not mean the cancellation of all the other warrants of detention. As Mr Stander correctly pointed out this is way our justice criminal system operates.

[13] The applicant's wife has been hospitalised. She apparently has a cardiac problem. Her condition is said to be deteriorating. Mr Venter, the applicant's attorney, has struggled to put together the military court record. *Prima facie* a two year old child's welfare is at stake. I accept that the matter is urgent.

[14] The provisions of section 35 of The General Laws Amendment Act No.62 of 1955 are peremptory. They are cast in very strong commandative or imperative mood - no court shall grant a rule *nisi* against an organ of the state. There is no question that the respondent is indeed an organ of the state. The respondent deserved to be given at least 72 hours notice of this application. It was not done. No attempt was made to request a waiver from the respondent. No application for condonation was made. No reference to this important statutory provision was made in the applicant's papers. I uphold this point *in limine*. The steps taken on behalf of the applicant to bring this matter to court were procedurally unfair to the respondent.

[15] But the reality of the situation is that somewhere out there there is a child who is in desperate need of care. Though I decline to condone non-compliance with section 35 of The General Laws Amendment Act No.62 of 1955 I urge the respondent in its free and absolute discretion to bear the plight of the aforesaid child in mind and deal with the matter in a humane and compassionate manner by, among others, waiving the right in terms of the said enactment.

[16] Accordingly I make the following order:

16.1 The application is removed from the roll.

16.2 The applicant is granted leave to amend or amplify his papers and thereafter serve the application upon the respondent afresh if he still wishes to pursue the matter having due regard to the provisions of section 35.

16.3 The applicant is ordered to pay the wasted costs of this application including the cost relating to the postponements of 5, 6 9 and 12 September 2002.

M.H. RAMPAL, J

On behalf of Applicant: Mr H. Stander instructed by: Stander, Venter & Kleynhans
Bloemfontein

On behalf of Respondent: Adv. M.J. Möller instructed by: Director: Public
Prosecution