CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/23

In the matter between:

LIEUTENANT COLONEL K B O'BRIEN N.O.	Applicant
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Second Respondent
SECRETARY OF DEFENCE AND MILITARY VETERANS	Third Respondent
SOUTH AFRICAN NATIONAL DEFENCE FORCE	Fourth Respondent
and	
INTERNATIONAL COMMISSION OF JURISTS	Amicus Curiae

Neutral citation:	*O'Brien N.O. v Minister of Defence and Military Veterans and Others* 2024 ZACC 30
Coram:	Zondo CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Majiedt J (unanimous)
Heard on:	8 August 2024
Decided on:	20 December 2024

Summary: Military Discipline Supplementary Measures Act 16 of 1999 — Defence Act 42 of 2002 — military judges — judicial independence — boards of inquiry — renewable terms — removal without independent oversight

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ORDER

On appeal from the Supreme Court of Appeal, hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria (High Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside to the extent that that Court dismissed the applicant's appeal against the High Court's refusal to grant the declarations of statutory invalidity sought by the applicant in his counter-application in the High Court.
4. The costs orders made in the Supreme Court of Appeal in relation to costs in that Court and in the High Court are set aside.
5. It is declared that:
    (a) Sections 101 and 102 of the Defence Act 42 of 2002 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. Pending the coming into operation of remedial legislation, the phrases "any matter", "any member or employee" and the "affairs of any institution" in section 101 and 102 of the Defence Act and section 136 of the Military Disciplinary Code, read with rule 79 of the Military Discipline Supplementary Measures Act's Rules, must be read as excluding military judges.

(b) Section 15 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it empowers the Minister of Defence and Military Veterans (Minister), acting on the recommendation of the Adjutant General, to assign judges for renewable periods.

(c) The existing practice of assigning judges for renewable periods of one to two years is unconstitutional and unlawful. Pending the coming into operation of remedial legislation, the assignment of a military judge may not be renewed until the lapse of at least two years since that person's last assignment.

(d) Section 17 of the Military Discipline Supplementary Measures Act 16 of 1999 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.

(e) Pending the coming into operation of remedial legislation, the Minister may devise processes for an inquiry into the fitness of a military judge and the composition of the inquiry body, provided that:

(i) it is an independent inquiry; and

(ii) a military judge may not be removed except on the recommendation of the independent inquiry.

(f) The declarations of constitutional invalidity above are suspended for a period of 24 months to allow remedial legislation to be enacted and brought into operation.

6. The first respondent is ordered to pay half of the costs of the applicant in the Supreme Court of Appeal and the High Court, including the costs of two counsel where so employed.

7. The first respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel where so employed.

JUDGMENT

MAJIEDT J (Zondo CJ, Madlanga ADCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] Military justice was previously dispensed in this country by way of *ad hoc* (for a particular purpose) courts martial, but that system was declared unconstitutional by the Full Court of the Cape Provincial Division of the High Court in *Freedom of Expression Institute*.[1] The courts martial system was abolished when Parliament enacted the Military Discipline Supplementary Measures Act[2] (MDSMA). In place of that system, the MDSMA established what this Court referred to as a system which "shifted sharply from an essentially military system with forensic trappings to a system far closer to the ordinary criminal justice process".[3]

[2] This case concerns the independence of military courts, in particular two military courts of first instance established under the MDSMA, the Court of a Military Judge and the Court of a Senior Military Judge. The applicant, a Lieutenant-Colonel in the South African National Defence Force (SANDF) and a former military judge, challenged, in a counter-application before the High Court, Gauteng Division, Pretoria (High Court), the constitutionality of sections 101 and 102 of the Defence Act[4] and sections 15 and 17 of the MDSMA (the impugned provisions). The applicant is

[1] *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C); 1999 (3) BCLR 261 (C) at para 19: "The law as it stands invites arbitrariness as it allows executive interference into judicial process."

[2] 16 of 1999.

[3] *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence*, [2001] ZACC 12; 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) (*Potsane*) at para 10.

[4] 42 of 2002.

currently employed as an instructor at the School of Military Justice, Pretoria. The main application was a review application by the first respondent, the Minister of Defence and Military Veterans (Minister), against certain orders made by the applicant in proceedings where he had presided as a military judge, concerning his apprehension about the unconstitutionality of the impugned provisions. The High Court upheld the review relief and dismissed the applicant's counter-application on the basis that the impugned provisions were constitutionally compliant.[5] The Supreme Court of Appeal dismissed the applicant's appeal on the basis of mootness.[6]

[3] The applicant now seeks leave to appeal in this Court. The application for leave to appeal is confined to the applicant's counter-application; the applicant has no issues with the Supreme Court of Appeal's judgment and order pertaining to the review application brought by the respondents.

[4] There are three constitutional challenges against the impugned provisions:

(a) first, in respect of sections 101 and 102 of the Defence Act, whether it is constitutionally permissible for members of the Executive to have the power to initiate and control boards of inquiry to investigate judicial officers' fitness and the conduct of their cases, as occurred in the applicant's case;

(b) second, whether the power under section 15 of the MDSMA, permitting the Minister and the Adjutant General to make renewable assignments of military judges, for short periods, at their sole discretion, and without any objective criteria, passes constitutional muster;

(c) third, relating to the constitutionality of section 17 of the MDSMA, which empowers members of the Executive – the Minister and the Adjutant General – to remove military judges for alleged misconduct or

[5] *Minister of Defence and Military Veterans v O'Brien N.O.*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 76995/18 (2 August 2021); [2021] ZAGPPHC 520 (High Court judgment).

[6] *O'Brien N.O. v Minister of Defence and Military Veterans* [2022] ZASCA 178; [2023] 1 All SA 341 (SCA) (Supreme Court of Appeal judgment).

incapacity, without the involvement or oversight of any independent body.

Parties

[5] The applicant and first respondent have already been described. The second respondent is the Chief of the SANDF; the third respondent is the Secretary of Defence and Military Veterans; and the fourth respondent is the SANDF. All four respondents oppose the application for leave to appeal. They are represented by one legal team. The International Commission of Jurists (ICJ) was admitted as an amicus curiae and was permitted to present written and oral arguments. The ICJ was also given leave to adduce as evidence the Ministerial Task Team Report on Sexual Harassment, Sexual Exploitation, Sexual Abuse and Sexual Offences within the Department of Defence (Ministerial Task Team Report). The applicant did not oppose the ICJ's admission. However, the respondents objected thereto on the basis that they have dealt with foreign and international law in their submissions, and that the introduction of information about sexual crimes in the military constitutes the introduction of fresh evidence which is inappropriate for amicus curiae to raise.

The legislative framework

[6] It is useful, for a better understanding of the factual backdrop and the legal issues, to set out first the relevant legislative framework. Subsections 165(2) to (4) of the Constitution guarantee the independence of all courts:

> "(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[7] As will be explained later, military courts fall within the definition of "courts" in section 166 of the Constitution, since they are "any other court established or recognised in terms of an Act of Parliament" envisaged in section 166(e). Section 174(7) of the Constitution further requires that all judicial officers "must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice".

[8] Section 175 of the Constitution, headed "Appointment of acting judges", provides:

> "(1) The President may appoint a woman or man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).
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> (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve."

[9] The assignment of military judges occurs under sections 13 and 14 of the MDSMA and the duration of such assignments is regulated under section 15 of that Act. Section 13, headed "Assignment of functions", reads:

> "(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—
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> (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."

[10] Section 14, headed "Minister's powers in respect of assignment", provides:

"(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 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."

[11] Section 15 of the MDSMA, headed "Period of assignment", reads:

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

[12] Section 17, with the heading "Removal from assignment", reads:

"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."

[13] Section 19 of the MDSMA is an important provision in the context of the central question of the independence of military courts. It provides in relevant part:

"Every military judge and every senior military judge shall in the exercise of his or her judicial authority under this Act—

(a) be independent and subject only to the Constitution and the law;
(b) apply the Constitution and the law impartially and without fear, favour or prejudice;
(c) conduct every trial and proceedings in a manner befitting a court of justice."

[14] In summary, sections 101 and 102 of the Defence Act are concerned with the convening of boards of inquiry and the attendance of persons at boards of enquiry and witnesses respectively. Subsections 101(1) and (2) provide:

"(1) The Minister, the Secretary for the 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.

(2) Despite subsection (1), a Chief of a Service or Division may at any time and place convene a board of inquiry to investigate any matter concerning the Service or Division . . . . or any member or employee . . . . and the affairs of any institution of the said Service or Division, and to report or to make a recommendation thereon."

[15] Importantly, section 102 sets out the procedure before a board of inquiry which is similar to that of a civilian criminal court.[7] Section 104(21) makes non-compliance

[7] Section 102 of the Defence Act headed "Attendance of persons at board of enquiry, and witnesses" reads:

"(1) The president of any board of inquiry may summon any person in the Republic to attend such board of inquiry and to give evidence thereat.

(2) The president of any board of inquiry may administer the prescribed oath or affirmation to witnesses, interpreters and stenographers at such inquiry.

(3) (a) Any person giving evidence before a board of inquiry may be compelled to answer any question or to produce any article if the president of the board of inquiry so orders.

(b) No incriminating answer or information obtained or incriminating evidence directly or indirectly derived from a question in terms of paragraph (a) is admissible as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law, except in criminal proceedings where the person is arraigned on a charge of perjury or a charge contemplated in section 104(21).

(4) Subject to subsection (5), the evidence of every witness called by a board of inquiry must be given orally and on oath or affirmation and must be recorded by or under the supervision of the president.

(5) A board of enquiry may admit a sworn statement by a witness as evidence where, with due regard to the exigencies of the service—

(a) by reason of his or her illness, the witness cannot attend;

(b) undue expense would be incurred by the attendance of the witness; or

(c) the evidence of the witness is of a purely formal nature.

(6) Where the evidence is of such a nature that it is likely that the findings or recommendations would seriously affect the professional reputation of a person who is subject to the Code or a person who is in the employ of the Department, or that any disciplinary or other legal steps might be taken against such a person—

(a) the witness concerned must, despite subsection (5), be called to give evidence orally if the person who is likely to be affected, so requests;

(b) the person who is likely to be affected may be present at every meeting of the board where such evidence is led, to cross-examine any witness giving such

with a summons or warning to appear in terms of section 102(1) an offence, punishable with the sanction of a fine or imprisonment.[8]

Factual matrix

[16] I confine the factual narrative to the bare minimum, that is, the facts necessary to understand how the central issues arose. The applicant was assigned as a military judge for fixed periods during 2013, 2014, and 2016. During his time of service, the applicant started to reflect on the constitutionality of consecutive fixed-term appointments of military judges. He formed the view that consecutive fixed

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evidence, to give evidence himself or herself, even if otherwise called as a witness by the board, and to call witnesses.

(7) The president of the board must timeously notify a person contemplated in subsection (6) of the time and place of every such meeting and advise that person of the rights conferred upon him or her by that subsection.

(8) Any person contemplated in subsection (6) may at any stage of the proceedings determined by the board, address the board on the evidence referred to in that subsection and may—

(a) in the exercise of his or her rights under that subsection be represented by a legal representative of his or her own choice at his or her own expense; or

(b) if the person so requests, be assigned military defence counsel at State expense.

(9) Before the record of proceedings is submitted to the person who convened the board, the relevant findings and recommendations of a board of inquiry must be communicated to each person who is adversely affected by such findings and recommendations and that person has the right to make written representations to the person who convened the board of inquiry within 14 days of receipt of the relevant findings and recommendations.

(10) Subsections (6) and (7) do not apply in relation to any board of inquiry convened under section 103."

[8] Section 104(21) of the Defence Act reads:

"(a) A person is guilty of an offence if he or she—

(i) having been duly summoned or warned to attend as a witness before a board of inquiry, fails to attend or to remain in attendance until authorised to leave;

(ii) being present at a board of inquiry after having been duly summoned or warned to attend as a witness, fails or refuses to be sworn or to affirm;

(iii) uses threatening or insulting language at a board of inquiry or wilfully causes a disturbance or interruption thereat or wilfully commits any other act likely to bring the board of inquiry into contempt, ridicule or disrepute; or

(iv) having been duly notified of his or her call-up for service by way of a call-up order issued in terms of section 53(3A), fails to present himself or herself at the time and place specified in the call-up order.

(b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine or imprisonment for a period not exceeding three months."

appointments might impact on the independence of the Judiciary. The applicant subsequently, of his own accord, began placing on record, at the commencement of matters in which he presided, his concerns regarding the constitutionality of the appointment of military judges. He also made brief *obiter* (in passing) remarks, expressing concerns about renewable terms and their impact on the structural independence of the military courts. The applicant claimed that his views were based on this Court's case law, and he stated thus in these *obiter* remarks.

[17] In 2014, the applicant's superiors requested that he cease this practice, on the basis that he was bringing the credibility of the military legal system into disrepute. The applicant relented and undertook not to raise his views in this manner in future cases before him.

[18] In 2015, the Minister did not assign military judges, except for one or two reserve force military judges. In 2016, after he was again assigned to the Bench, the applicant presided in the two matters that ultimately resulted in the current litigation (the Mokoena and Mabula cases). The applicant once again reiterated his view regarding the constitutionality of the appointment of military judges and enquired from the parties whether they accepted the Military Court's jurisdiction. The applicant was concerned in both matters that the accused's trials were unduly delayed to the point that it might have impacted their right to a fair trial. He requested the legal representatives to address him on whether he could conduct an investigation as provided for in section 342A of the Criminal Procedure Act[9]. That section deals with unreasonable delays in criminal trials. Both legal representatives argued that he (the military judge) was entitled to have regard to and implement the provisions of section 342A of the Criminal Procedure Act.

[19] Without the knowledge of and participation in the proceedings by the Minister, the applicant, relying on what he considered to be "public knowledge" and information in the public domain, concluded that the undue delay in prosecuting the respective

[9] 51 of 1977.

matters was in part attributable to the Minister's failure to appoint military judges for the period 2015–2016, and in part to the prosecuting authority. He subsequently ordered that "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',[10] and a copy of Prosecution Counsel's and Defence Counsel's Heads of Argument" be served respectively on the Director, Military Prosecutions (Director) and the President of the Republic of South Africa (President) in his capacity as Commander-in-Chief of the SANDF. The applicant regarded the Director and the President as the appropriate authorities to conduct an administrative investigation and consider possible disciplinary

[10] In relevant part, that document reads:

> "8. Court is of the view that section 14(1)(b) MDSMA might be unconstitutional based on the following:
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> 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:
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> 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.
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> 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 i.e. 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.
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> 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.
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> 10. Court is well aware of the provisions of section 170 [of the] 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 section 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?"

action against the prosecutorial staff and the Minister, respectively, for their part in causing the delay.

[20] The applicant postponed the finalisation of the Mokoena and Mabula cases after holding that the delays incurred were more prejudicial to the prosecution than to the defence. Both the Director and the President were ordered by the applicant to provide written reports to the Military Court, by 31 October 2016, setting out what actions, if any, had been taken against any of their staff members and the Minister, respectively.

[21] The applicant's superiors were, to put it mildly, startled by this development. The concerns were expressed in a letter by then Review Counsel, Lieutenant Colonel Kriek, on 6 November 2014 to the Director: Military Judicial Reviews. Those concerns were that the constitutional issue raised by the applicant "does not fall within the ambit of the procedural course of a court case constituted under the [MDSMA]". The upshot of the concerns was that the applicant as a presiding military judge was in effect challenging his appointment in open court, thus challenging the credibility of the military legal system. In that letter the question was also 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 trials would then be invalid and null and void.

[22] On 5 December 2015, the then Director: Military Judges, Brigadier General Slabbert, held a meeting with the applicant to express his concern that, in having once again raised the constitutionality of assignments of military judges in open court, the applicant had breached a previous undertaking. In the course of that meeting, the applicant was instructed not to use his 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.

[23] A board of inquiry (Board) was then constituted (presumably in terms of sections 101 and 102 of the Defence Act) to investigate whether his conduct brought the military legal system into disrepute. The applicant was informed that no new cases would be assigned to him pending the finalisation of the matter by the Board. The applicant objected to not being assigned new cases, and he was again assigned matters within the borders of South Africa pending the investigation by the Board.

[24] Subsequent to the commencement of that investigation, the applicant was informed that the mandate of the Board was extended to investigate all matters previously heard by him. The applicant convened a court in October 2016 and summoned the accused, the prosecutor, and defence counsel in the Mokoena and Mabula matters to appear before him. After explaining what had transpired since the matters were postponed, he recused himself from hearing both matters because, in his view, the interference in his judicial functions gave rise to a reasonable apprehension of bias. Without any of his superiors or the officers involved in the Board having been notified of the procedure, he ordered that a copy of the record of the proceedings be served on the Minister to consider whether the officers named in the order had complied with the provisions of section 54(2)(g) of the Defence Act,[11] and to make recommendations to the Commander-in-Chief, the President, in this regard.

[25] The Mokoena and Mabula cases were assigned to new military judges, and both matters have since been finalised. The applicant was not subsequently assigned as a military judge after his fixed-term appointment lapsed. He was the only military judge who did not receive a consecutive assignment as a military judge. Litigation ensued, culminating in this application.

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[11] Section 54(2)(g) of the Defence Act, headed "Commissioned officers in Defence Force", provides:

> "(2) In order to qualify for a permanent commissioned appointment in the Defence Force, a person must—
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> . . .
>
> (g) be a fit and proper person to serve and must have a trustworthy and exemplary character."

Litigation history

High Court

[26] In 2018, the present respondents instituted review proceedings in the High Court to review and set aside the judgments and orders handed down by the applicant in his capacity as a military judge on 25 and 29 August 2016 and 14 October 2016. The applicant, in turn, instituted a counter-application challenging the constitutionality of sections 101 and 102 of the Defence Act, and sections 15 and 17 of the MDSMA. The respondents decided to suspend the Board pending the finalisation of the review proceedings and counter-application.

[27] As stated, the applicant's counter-application raised three principal issues concerning the constitutionality of sections 15 and 17 of the MDSMSA and sections 101 and 102 of the Defence Act. The High Court considered the three challenges in the following sequence. The first issue was the section 15 of the MDSMA challenge: whether the Minister's power to reassign military judges for consecutive fixed periods of service is consistent with the principle of judicial independence.

[28] The second issue the High Court had to determine was whether section 17 of the MDSMA, to the extent that the provision empowers the Minister, on the recommendation of the Adjutant General, without any independent inquiry into the fitness of the military judge to hold office, to remove military judges for alleged misconduct, is consistent with the principle of judicial independence and thus constitutional. Lastly, the third issue for determination was whether sections 101 and 102 of the Defence Act empower the Executive (Minister and Adjutant General) to appoint boards of inquiry, staffed with non-judicial officers, to investigate military judges, their judgments, and the conduct of their cases. If they do, the High Court had to enquire into whether the provisions are consistent with the principle of judicial independence and thus into whether they are constitutional.

[29] In respect of the first issue, the section 15 challenge, the High Court pointed out that a military judge's term of office and reassignment relates to security of tenure. The High Court held that an assignment as a military judge does not affect a person's employment in the SANDF. A military judge's security of tenure as a military officer of a specific rank, and their financial position, are not dependent on their assignment as a military judge. The Court held further that military courts enjoy limited jurisdiction and their decisions are subject to appeal and review. In light of all of these findings, the Court held that there are sufficient safeguards in the MDSMA, and related statutes, to render the risk posed to judicial independence, by the power to make reassignments, negligible. Consequently, the Court dismissed this constitutional challenge.

[30] On the second issue, the power to remove a military judge upon the recommendation of the Adjutant General found in section 17 of the MDSMA, the High Court accepted that the MDSMA does not explicitly provide for a procedure in terms of which a preliminary, or any, investigation must be conducted or that a charge be brought against the military judge concerned. But, said the High Court, a proper interpretation of section 17 in the context of the MDSMA, read with the Military Discipline Code (Code), the MDSMA Rules and the rules of natural justice, implies that the Adjutant General has an obligation to convene a board of inquiry to investigate alleged misconduct, incapacity or incompetence before recommending a military judge's removal from the function assigned to them. The investigation by a board of inquiry serves to ensure that the Adjutant General's recommendation is an informed recommendation as opposed to one based on their own whim. The High Court thus held that, if section 17 is read within the legal matrix created by the MDSMA, MDSMA Rules and the Code, this constitutional challenge must fail.

[31] On the third and last issue, that is the issue of whether, properly interpreted, sections 101 and 102 of the Defence Act empower the Minister and/or the Adjutant General to appoint boards of inquiry to investigate military judges and the related issue of whether such a power is consistent with the principle of judicial independence, the Court held thus: The substance of sections 101 and 102 of

the Defence Act are repeated in the Code and the MDSMA Rules. A board of inquiry can thus be convened without reliance on the Defence Act. According to the Court, military judges should not be removed from their assignment unless their incapacity, misconduct, or incompetence has objectively been determined. Such a determination cannot be made without an investigation, and a board of inquiry is the appropriate mechanism to conduct such an inquiry.

[32] The High Court held that to grant the order sought by the applicant would be to incapacitate the Minister from removing a military judge in accordance with section 17. To prevent a board of inquiry from convening before a military judge's fixed appointment lapses will defeat the purpose of section 17. In the premises, the Court held that sections 101 and 102, properly interpreted, empower the Minister and/or the Adjutant General to appoint boards of inquiry to investigate military judges and that this power is consistent with the principles of judicial independence and is therefore constitutional.

[33] In light of the above, the High Court dismissed the applicant's counter-application with costs. With the leave of that Court, the applicant appealed to the Supreme Court of Appeal.

Supreme Court of Appeal

[34] The Supreme Court of Appeal dismissed all three constitutional challenges on the basis of mootness. The first challenge – directed at section 15 of the MDSMA, (the power to renew term of office) – was moot, according to that Court, on account of the absence of a real and live dispute. The Court held that "the case advanced in support of the section 15 challenge is a purely conjectural one". The Court held further that the applicant sought to—

> "have [it] express a view on legal issues that he hope[d] to have decided, which would not in any way affect his position relative to the Defence Force. . . . . [and that the

> applicant, in effect, was seeking] legal advice from [the Court] in respect of legal disputes that may or may not arise in the future".[12]

[35] The second challenge aimed at section 17 of the MDSMA, the power to remove military judges, had become moot, according to the Supreme Court of Appeal, because the applicant was not facing, nor had he ever faced, removal from the position of military judge. The Court held that there was not the faintest hint that the Adjutant General had ever contemplated a recommendation to the Minister that the applicant be removed from office, nor was there a hint that the Minister herself had ever contemplated doing so.

[36] And lastly, the Supreme Court of Appeal held that the third challenge concerning sections 101 and 102 of the Defence Act, the power to appoint boards of inquiry, had become moot by reason that the SANDF had decided to collapse the Board established to investigate the applicant's conduct, which had been held in abeyance pending the finalisation of the review application in the High Court. The Supreme Court of Appeal held further that, given the reservations expressed by the new Adjutant General as to the appropriateness of invoking those provisions in a case involving a military judge, and the unlikelihood of a recurrence of the question in the future, there was no live issue between the present parties that the Court needed to resolve.

[37] In light of the above, the Supreme Court of Appeal dismissed the applicant's appeal against the dismissal of his counter-application in the High Court. As stated, this application for leave to appeal is directed at that order.

[12] Supreme Court of Appeal judgment above n 6 at paras 58-9.

In this Court

Applicant's submissions

[38] With regard to jurisdiction, the applicant submits that the matter is a constitutional issue as it concerns the constitutionality of national legislation and the judicial independence of military courts and military judges. The applicant submits that the matter is not moot and it is in the interests of justice to grant leave to appeal. That is so because, according to the applicant, "a constitutional challenge to legislation that is in operation is a live issue and the orders of this Court would have practical effect". In the event that the Court finds that the matter is moot, the applicant submits that it is nevertheless in the interests of justice to hear the appeal, because this case raises important, complex legal questions about the independence of military courts and military judges. The applicant further submits that it would be in the interests of justice to hear the matter notwithstanding it being moot because of the broader practical impact that the order of invalidity would have. In addition, the applicant submits that this Court has the benefit of the High Court judgment on these issues.

[39] In respect of the merits, on the first issue, the power to renew terms of office in terms of section 15 of the MDSMA, the applicant submits that this power is inconsistent with the principle of judicial independence for two main reasons. First, because "non-renewable terms are a core requirement of structur[al] independence" and renewable terms of office are inconsistent with the core guarantee of security of tenure. Second, renewable terms leave judges open to threats and inducements or, at the very least, a reasonable apprehension of that. In further support of his argument, the applicant submits that section 15 is out of step with the trend observed in foreign jurisdictions such as Canada, New Zealand and the United Kingdom.

[40] On the second issue, the power to remove a military judge upon the recommendation of the Adjutant General according to section 17 of the MDSMA, the crux of the applicant's submissions is this: it is impermissible for members of the Executive to hold the power to exercise discipline over judicial officers without any

independent assessment of cause. According to the applicant, this includes the unfettered power to remove judicial officers for misconduct or incapacity.

[41] As to the third and last challenge, the power to appoint boards of inquiry in terms of sections 101 and 102 of the Defence Act, the applicant submits that this power interferes with a military judge's freedom to hear and decide cases without interference from government, pressure groups, or individuals. The applicant submits that this power compromises military judges and judicial independence as it places judicial officers in a subordinate position in relation to the Executive.

[42] The applicant further submits that the composition of boards of inquiry is also inconsistent with the principle of judicial independence. According to the applicant, the boards are often composed of individuals who are not judicial officers, and this is inconsistent with the principle of judicial independence. Lastly, the applicant submits that the members of boards obey the Adjutant General and Minister's orders and are not independent. Consequently, they cannot be considered to be an independent check on the exercise of the powers of the Minister and Adjutant General.

Respondents' submissions

[43] The respondents submit, without motivation, that this Court does not have jurisdiction to entertain the matter. They submit that the matter is moot and it is not in the interests of justice to entertain the application. That submission is primarily based on the Supreme Court of Appeal's reasoning. On the merits, the crux of their case is that this Court should not declare the impugned provisions unconstitutional, because those provisions apply to a number of groups in the SANDF and not just military judges and, as a result, a declaration of constitutional invalidity will affect the "entire [SANDF]" and "the Country".

[44] The respondents argue that military judges do not fall within the definition of "judicial officers" as outlined in section 174(7) of the Constitution. They point out that the MDSMA does not categorise military judges as "judicial officers". While military

courts hold jurisdiction over criminal matters, this jurisdiction does not extend to civilians. The respondents make the point that only a Senior Military Judge can preside over cases involving serious offenses such as murder, treason, rape, or culpable homicide, and, even then, only if such crimes occur outside the country's borders. Moreover, the respondents assert that military courts already possess sufficient judicial independence. They refer to *Potsane*,[13] which, they contend, suggests that the MDSMA was established to align the country's military justice system with the principles of constitutionalism.

[45] Regarding the first challenge, the respondents contend that the legislation does not explicitly state that a board of inquiry is authorised to investigate military judges, their rulings, or the handling of their cases. They assert that no constitutional arrangement can achieve a total separation of powers. They cite *Van Rooyen*,[14] where the inclusion of members of Parliament and the Executive on the Magistrates' Commission was held to be acceptable.

[46] In respect of the second challenge, the respondents argue that section 15 does not solely pertain to the assignment of military judges but applies to various categories of military personnel. They assert that if section 15 were deemed unconstitutional, it would impact the deployment of all types of military personnel. With reference to *Van Rooyen* the respondents cite this Court's decision in the *First Certification judgment*,[15] that the appointment of Judges by the Executive, or in collaboration with Parliament, does not undermine the impartiality and independence of the Judiciary. They emphasise that military judges already have security of tenure. Additionally, they point out that there are relatively few cases for military judges to handle, and permanent appointments might hinder efforts towards transformation.

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[13] *Potsane* above n 3.

[14] *Van Rooyen v S (General Council of the Bar of South Africa intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*).

[15] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[47] Regarding the third challenge, the respondents assert that section 17 does not specifically address the removal of "a military judge" but rather the removal of "a person", indicating that military judges are not strictly categorised as judicial officers but as members of the SANDF. They point out that countries like New Zealand, Australia, and Canada have removal provisions involving both the Legislature and Executive. In contrast, in South Africa it is ultimately the President and the National Assembly who remove a Judge upon the recommendation of the Judicial Service Commission, which is a composite body.

ICJ's submissions

[48] The ICJ makes submissions on our country's obligations under international law to ensure that courts and tribunals, including military courts, are competent, independent, impartial, and afford litigants a fair and public hearing. Concerning the importance of the country's international obligations, the ICJ refers to sections 39(1) and 233 of the Constitution.

[49] In addition, with reference to the Ministerial Task Team Report, the ICJ emphasises the necessity for military courts to exhibit independence and impartiality in handling cases involving sexual offences committed by members of the SANDF. The ICJ points out that military courts have jurisdiction over all domestic sexual offences, except rape, and also have jurisdiction over cases of rape committed extraterritorially. According to the ICJ, given that SANDF members are engaged in peacekeeping operations outside South Africa, notably in the Democratic Republic of Congo and Mozambique, this underscores the significance of ensuring the independence and impartiality of military courts.

Analysis

The Ministerial Task Team Report

[50] It is convenient to commence with brief reasons why the ICJ was permitted to introduce the Ministerial Task Team Report. In directions issued by this Court, the ICJ was authorised to adduce that report in the following terms:

> "The ICJ is granted leave to file the [Ministerial Task Team Report] of December 2020 . . . . as evidence, provided that, in regard to complaints of sexual offences or other sexual misconduct recorded in the report, the report is admissible not as evidence of the truth of the complaints but only as evidence that such complaints were made and that they were investigated, addressed and resolved (where applicable) in the way summarised in the report."

[51] Thus, at a procedural level, we cannot now reject that report as inadmissible. In any event, it is of significant relevance and assistance in determining the central issue: the independence of military courts. In essence, the ICJ is placing reliance on the report to show that complaints of sexual offences are widespread in the SANDF and that the scourge of gender-based violence in the SANDF makes it all the more important that military courts should be truly independent. Plainly, the ICJ's contentions provide important context in the sense of the urgent and crucial need for military courts to be truly independent, against the backdrop of sexual offences and sexual misconduct that are said to go largely unreported in the military out of fear of retaliation of not being promoted to the next rank in their military career. It must also be said that the ICJ effectively relates the report to the impugned sections.

[52] Furthermore, the ICJ makes useful submissions on international law and jurisprudence. The ICJ correctly makes the important point that international law and standards – both binding and non-binding – are important interpretative tools in constitutional South Africa.[16] It is well-established that, when interpreting the

[16] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 96.

constitutional guarantee of judicial independence and the impugned provisions in this matter, interpretation must happen within the context of the Constitution and its values as a whole, to which international law is relevant.[17] The ICJ submissions in relation to international law and jurisprudence were based on what appeared in the report. For these reasons, that report was allowed as evidence.

Jurisdiction and leave to appeal

[53] This matter engages both this Court's constitutional and general jurisdiction. The first constitutional issue is the challenge to the constitutionality of the impugned provisions. The second constitutional issue concerns the judicial independence of military courts, which is constitutionally guaranteed under section 165(2) to (4) and section 174(7), read with sections 1(c) and 35(3) of the Constitution. The matter also engages this Court's general jurisdiction, raising, as it does, arguable points of law (the role of military courts and military judges) of general public importance which affect not only all SANDF members, specifically military judges who must exercise their authority independently and subject only to the Constitution and the law, but also the general public whom the SANDF is constitutionally enjoined to protect.

[54] Regarding the interests of justice, it is plainly desirable that this Court should hear this case to resolve the complex, important legal questions raised here. The issues are novel, since this Court has not as yet considered and decided the question of the independence of military courts and military judges. Lastly, and importantly, we are dealing here with questions of law only and, inasmuch as factual considerations may arise, they are mostly common cause on material aspects. There is also the mootness aspect which loomed large in the Supreme Court of Appeal, to the extent that it was central to that Court's dismissal of all three constitutional challenges.

[17] *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (*Justice Alliance*) at para 37.

[55] Leave to appeal must therefore be granted. It is convenient to deal first with mootness.

Mootness

[56] The Supreme Court of Appeal was plainly wrong in its mootness findings. I agree with the applicant that a constitutional challenge to existing and fully operational statutory provisions can never be considered moot. Constitutional validity enquiries are always objective.[18] Here, moreover, the specific facts relating to the case fortify the applicant's constitutional challenge in the sense that they bear out his constitutional invalidity complaints. The challenges brought by the applicant plainly raise an existing or live controversy between the parties over the constitutionality of the impugned provisions and their proper interpretation. Any orders declaring the legislation to be constitutionally invalid would also have an immediate practical effect or result not only for the applicant, but also for all members of the SANDF and the broader public.

Military courts and judicial independence

[57] This discussion commences with a consideration of the question whether military courts are "courts" within the meaning of section 166(e) of the Constitution. At the outset it must be said that the respondents' submissions are, regrettably, not very helpful. The respondents seek to persuade us that military courts are not "courts". I disagree – there can be little doubt that military courts fall within section 166(e).[19] First, regard must be had to what these courts do – they deal with criminal matters, follow the procedures for criminal matters in Magistrates' Courts and High Courts, impose sentence after conviction, and they operate under their own rules of court.[20]

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[18] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) at para 156 and *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (3) BCLR 249 (CC); 2007 (4) SA 97 (CC) at para 39.

[19] In *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 230A-C the Court held that military courts are inferior courts with a similar status as Magistrate Courts.

[20] Although the United States of America has a constitution and court system that differs from ours in several important respects, it is noteworthy that there, in *Ortiz v United States* 585 US 427 (*Ortiz*), the majority in the Supreme Court opined that the courts-martial system "closely resembles civilian structures of justice" and that

[58] Secondly, and importantly, one must consider section 19 of the MDSMA, read with section 165(2) to (4) of the Constitution, which afford these courts independence guaranteed by the Constitution and the statute. Thirdly, when persons appear in these courts charged with offences under the Defence Act, the Code, or the MDSMA, they must plainly fall within the category of "accused persons" with all the rights and protections afforded to them in section 35(3) of the Constitution. Lastly, it is of some significance that even in pre-constitutional times a court martial, the predecessor of a military court, was regarded as a court.[21] All these factors and considerations lead to the ineluctable conclusion that military courts are courts as envisaged by section 166(e).[22]

[59] The respondents contend that military judges are not "judicial officers" within the meaning of section 174(7) of the Constitution. They are wrong – military judges deal with criminal matters with wide territorial jurisdiction (even beyond our borders) and substantial sentencing competence: up to two years' imprisonment in the case of a court of a military judge, and anything up to life imprisonment in the case of the court of the senior military judge.[23] When one examines how the military courts operate,

"the judicial character and constitutional pedigree of the court-martial system enable that Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex" (referring to the CAAF, the United States Court of Appeals for the Armed Forces). The majority opinion defended the judicial nature of the military courts by citing examples where the military system is similar to civilian justice, that is, due process protections, an appellate review system, a stable body of case law and the *res judicata* (a matter judged) effects of its decisions. *Ortiz* is useful insofar as it acknowledges that even in the United States, there is a recent tendency towards harmonization between the standards that apply to military and civilian courts rather than an attempt to preserve their *sui generis* (of their own kind) nature.

[21] *Council of Review South African Defence Force v Monnig* [1992] ZASCA 64; [1992] 4 All SA 691 (A). See also *Freedom of Expression Institute* above n 1.

[22] Recently, at their meeting during November 2022, Commonwealth Law Ministers mandated the Commonwealth Secretariat to produce Commonwealth Military Justice Principles. These principles record, amongst others, that there is a need to "ensure that military courts, when they exist, are part of a state's general judicial system under the authority of the constitution or statute, respecting the principle of separation of powers and reflecting the rule of law and the obligations of international law" (Article 1(a)).

[23] The court of a senior military judge may try a member of the SANDF for any offence committed in South Africa other than murder, treason, rape or compelled rape (as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) or culpable homicide. Such a court may try a member for the latter serious crimes if they were committed extraterritorially. The effect of section 12(1) of the MDSMA

their rules and powers, and the ultimate effect of their orders, the inescapable conclusion is that military judges are indeed judicial officers. Furthermore, as required by section 174(7) of the Constitution, military judges are appointed in terms of an Act of Parliament, namely, the MDSMA. There can therefore be little doubt that military judges qualify as "judicial officers" under section 174(7).

[60] Flowing from these conclusions that military courts fall within the ambit of section 166(e), and that military judges are judicial officers, the requirement of independence is stark. It bears repetition that the court of a military judge and the court of a senior military judge have wide criminal jurisdiction to try members of the SANDF for serious offences committed under the Code, the common law, and statute.[24] They also have the power to impose substantial sentences of imprisonment for these offences.[25] They wield exceptional, extraterritorial powers that are not available to ordinary criminal courts. Military courts are the only criminal courts in South Africa that have jurisdiction over serious crimes – including murder, rape, and other sexual offences – committed by members of the SANDF beyond South Africa's borders. They may also sit anywhere in the world.[26]

[61] Reference has already been made to sections 166(e), 165(2) to (4), and 174(7) of the Constitution.[27] These provisions guarantee the independence of military courts. Furthermore, judicial independence is an essential component of the right to a fair trial.[28] Members of the SANDF who are on trial in military courts are accused persons under section 35(3) of the Constitution with all the rights that flow from that, including

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is that the court of a senior military judge may impose any competent sentence that an ordinary court could impose for the same crime.

[24] Sections 9 and 10 of the MDSMA.

[25] Sections 9 and 10 of the MDSMA. The Court of a Senior Military Judge may impose any unlimited sentence of imprisonment. The Court of a Military Judge may impose imprisonment for up to two years.

[26] Id read with section 5 of the MDSMA.

[27] Above, in [6] and [7].

[28] *Van Rooyen* above n 14 at para 35.

the right to a fair, public trial in an ordinary court.[29] This Court held in *Potsane* that without essential safeguards of independence, military courts cannot qualify as "ordinary courts".[30] Judicial independence is foundational to, and indispensable for, the rule of law as guaranteed under section 1(c) of the Constitution.[31] The principle of judicial independence is fundamental to the ethos of the Constitution, and it is not subject to any limitation.[32]

[62] The principle of the independence of military courts enunciated in section 19 of the MDSMA has been highlighted.[33] All military judges are required to swear an oath or affirmation in terms of section 18 of the MDSMA, read with rule 83 of the MDSMA Rules.[34] There are thus intended to be guarantees of the independence of military courts, both in the Constitution and statute. What bears consideration is whether these guarantees in the legislation do in fact exist in relation to military courts.

[63] Notionally, independence consists of both subjective and institutional (or structural) independence. As was pointed out in *Sonke*, "this distinction has been most clearly expressed in relation to the independence of individual judges and the

[29] Section 35(3)(c) of the Constitution.

[30] *Potsane* above n 3 at para 10.

[31] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) (*De Lange*) at para 59.

[32] *Van Rooyen* above n 14 at para 10:

> "[I]t must be kept in mind that judicial impartiality and the application without fear, favour or prejudice by the courts of the Constitution and all law, as postulated by section 165(2) of the Constitution, are inherent in an accused's right to a fair trial under section 35(3) of the Constitution. One of the main goals of institutional judicial independence is to safeguard such rights. However, institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights. The provisions of section 36 of the Constitution dealing with the limitation to rights entrenched in the Bill of Rights are accordingly not applicable to it. Judicial independence is not subject to limitation."

[33] Above in [13].

[34] The oath or affirmation reads:

> "I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law of the Republic of South Africa, and will perform my duties to the best of my ability. So help me God."

independence of the courts as institutions".[35] In that regard, this Court cited *Van Rooyen*, where it had highlighted the distinction between individual and institutional independence.[36] It was described thus in *Van Rooyen*:

> "This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference."[37]

[64] In *Van Rooyen* this Court relied on the minority judgment of O'Regan J in *De Lange*, who cited the following passage from *Valente*[38] with approval:

> "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the Executive and Legislative branches of government. . . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal."[39]

[65] This Court in *McBride* acknowledged the challenge of "attempt[ing] to define the precise contours of a concept as elastic as [independence]".[40] Subjective independence is generally understood to entail an impartial state of mind.[41] In this

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[35] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (*Sonke*) at para 72.

[36] *Van Rooyen* above n 14.

[37] Id at para 19.

[38] *Valente v The Queen* [1985] 2 SCR 673; (1986) 24 DLR (4th) 161 (SCC) (*Valente*).

[39] Id at para 171 as cited in the minority judgment of O'Regan J in *De Lange* above n 31 at para 159.

[40] *McBride v Minister of Police (Helen Suzman Foundation as amicus curiae)* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (*McBride*) at para 31.

[41] *De Lange* above n 31 at para 71 citing Le Dain J in *Valente* above n 38 at 169-170.685(g).

matter, we are primarily concerned with institutional independence. The test for institutional independence is objective – whether a court "from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence".[42]

[66] Institutional independence has to do with the way in which the institution is structured. This Court has pointed out that institutional and operational independence are often discussed alongside each other as they are closely linked.[43] In *Glenister II*, this Court noted that the question is not whether an institution has "absolute or complete independence", but whether it enjoys "sufficient structural and operational autonomy so as to shield it from undue political influence".[44] Testing the independence of a structure does not require actual evidence of violations or undue influence – the real possibility of it occurring is sufficient.[45]

[67] There are core requirements (referred to in *Van Rooyen* as "essential conditions"[46]) for institutional independence. These include: freedom from any outside interference (especially from the Executive), security of tenure, and non-renewable terms.[47] In *De Lange*, this Court cited three seminal Canadian cases – *Beauregard*,[48] *Valente*,[49] and *Généreux*[50] – regarding what constitutes an independent and impartial court. Reliance was placed in particular on *Beauregard*, where Dickson CJ stated:

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[42] *Van Rooyen* above n 14 at para 32 citing *R v Généreux* [1992] 1 SCR 259; (1992) 88 DLR (4th) 110 (SCC) (*Généreux*) at 433E–G.

[43] *Sonke* above n 35 at para 76.

[44] *Glenister II* above n 16 at paras 121 and 125. See also *McBride* above n 42 at paras 32-3.

[45] *Sonke* above n 35 at para 76.

[46] *Van Rooyen* above n 14 at paras 32-5.

[47] Id at para 29 and *Justice Alliance* above n 17 at para 73.

[48] *The Queen in Right of Canada v Beauregard* [1986] 2 SCR 56; (1986) 30 DLR (4th) 481 (SCC) (*Beauregard*).

[49] *Valente* above n 38.

[50] *Généreux* above n 42.

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider, be it government, pressure group, individual or even another judge: should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."[51]

[68] In *Généreux* the Canadian Supreme Court held that the military status of military judges does not violate the provisions of section 11(d) of the Canadian Charter of Rights and Freedoms (Canadian Charter).[52] It was acknowledged in *Généreux* that the place of military judges in the military hierarchy detracts from absolute judicial independence, but it also confirmed that section 11(d) does not require absolute judicial independence, or a sort of truly independent military judiciary that could only be assured by civilian judges. Absolute independence is not the constitutional standard endorsed in the Canadian Supreme Court's jurisprudence. *Généreux* is authority for the proposition that, whatever concerns might arise as a result of Parliament's choice to require that military judges be military officers, that model is not inherently unconstitutional under section 11(d).

[69] An assessment of whether a particular court has the institutional protection that it requires to function independently and impartially will consider the core protection given to all courts by our Constitution, to the particular functions that such court performs, and to its place in the court hierarchy.[53] Recently in *Makana* this Court confirmed that "[e]ven within the judicial hierarchy, there are degrees of independence".[54]

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[51] *Beauregard* above n 48 at 491.

[52] *Canadian Charter of Rights and Freedoms*, section 11, Part I of the *Constitution Act* 1982, being Schedule B to the Canada Act 1982.

[53] *Van Rooyen* above n 14 at para 23.

[54] *Makana People's Centre v Minister of Health* [2023] ZACC 15; 2023 (5) SA 1 (CC); 2023 (8) BCLR 963 (CC) at para 169.

[70] Crucially important in an assessment whether independence in fact exists is the perception of independence as adumbrated by this Court in *Van Rooyen* where reliance was placed on the following *dictum* (pronouncement) of Le Dain J in *Valente*:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."[55]

[71] In *Glenister II*, this Court said:

> "[I]f Parliament fails to create an institution *that appears from the reasonable standpoint of the public to be independent*, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence . . . . Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."[56] (Emphasis added).

[72] Before considering South Africa's international obligations, it is instructive to have regard to the position in Canada, New Zealand and the United Kingdom. In 2011, following *Leblanc*,[57] the Canadian Parliament amended Canada's National Defence Act[58] to provide that military judges are now appointed until a maximum retirement age of 60, or until their release from the Canadian Forces, and may only be removed for cause. These amendments were introduced by the Security of Tenure of Military Judges Act 2011.

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[55] *Van Rooyen* above n 14 at para 32 citing *Valente* above n 38 at 172.

[56] *Glenister II* above n 16 at para 207.

[57] *Leblanc v The Queen* 2011 CMAC 2 (*Le Blanc*).

[58] R.S.C. 1985.

[73] In *Leblanc*, the appellant had been tried and convicted of having negligently performed a military duty. The appellant then challenged the legality of the guilty verdict and the constitutionality of the relevant statutory provisions. The Canadian Military Appeal Court upheld the challenge to the renewable appointment of military judges. That Court held that the appointment of military judges on five-year renewable terms was in breach of section 11(d) of the Canadian Charter, which gives an accused the right to a hearing before an independent and impartial tribunal.

[74] The following passages in *Leblanc* bear directly on the central issues in this case as far as renewable terms of military judges are concerned:

> "It seems inconceivable to me, and I say this with all due respect for the contrary view, that *military judges, who exercise the same functions and have essentially the same powers as superior and provincial courts of criminal jurisdiction, should be subject to the whims, the unknowns, the uncertainty and anxiety of having their positions come up for renewal every five years. In fact, they are the only judges with such jurisdiction to be subject to short, renewable terms of employment.*
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> . . .
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> Judicial independence is 'for the benefit of the judged': . . . . *It is important for the accused person that the judge not be, and not appear to be, beholden to these five members of the chain of command, that his or her security of tenure is not subject to reappointment and that his or her institutional independence provides the accused with the assurance of a fair and equitable trial.*"[59] (Emphasis added).

[75] Recently, the Canadian Supreme Court in *Edwards*[60] had to consider an appeal from the Court Martial Appeal Court of Canada. The central issue in the case was whether the military status of military judges violates the constitutional guarantee of judicial independence and impartiality to which persons tried before courts martial are entitled. The nine accused were members of the Canadian Armed Forces who were charged with service offences under Canada's Code of Service Discipline (CSD),

[59] Id at paras 47 and 52.

[60] *R v Edwards* 2024 SCC 15 (*Edwards*).

which forms Part III of their National Defence Act, and were brought before courts martial. Under the CSD, members of the Canadian Armed Forces may be charged with service offences, which are serious and encompass offences specific to military personnel, and offences under Canada's Criminal Code or other Acts of Parliament. Service offences are tried before a court martial, which is a military court that has the same powers, rights, and privileges as a superior court of criminal jurisdiction. Courts martial are presided over by military judges.

[76] The nine accused challenged the statutory requirement that the military judges presiding over their courts martial be military officers, alleging that it violates their right to a hearing by an independent and impartial tribunal under section 11(d) of the Canadian Charter. In the courts martial, which were held separately, some of the military judges held that they lacked judicial independence by reason of their dual status of judge and officer, and therefore that the respective accused's section 11(d) rights were infringed. On appeal to it, the Court Martial Appeal Court held that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that military judges meet the minimum constitutional norms of impartiality and independence even though they are military officers, and therefore that the accused's section 11(d) rights were not infringed.

[77] The majority in the Canadian Supreme Court upheld the decision of the Court Martial Appeal Court. The Supreme Court held that the status of military judges as officers under the National Defence Act is not incompatible with their judicial functions for the purposes of section 11(d) of the Canadian Charter. Accused members of the Canadian Armed Forces who appear before military judges are entitled to the same guarantee of judicial independence and impartiality under section 11(d) as accused persons who appear before civilian criminal courts, but this does not require that the two systems be identical in every respect.

[78] The Court held further that, as presently configured in the National Defence Act, Canada's system of military justice fully ensures judicial independence for

military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining discipline, efficiency and morale in the Armed Forces and public trust in a disciplined military. Accordingly, the requirement that military judges be officers pursuant to sections 165.21 and 165.24(2) of the National Defence Act does not infringe section 11(d) of the Canadian Charter.

[79] The majority in the Supreme Court confirmed its earlier decision in *Généreux* where the Court had held that the military status of military judges does not violate the provisions of section 11(d). The Court held that there was no reason to depart from the settled precedent enunciated in *Généreux*. The Court also referred to the three essential requirements for judicial independence enunciated in the leading decision of *Valente*.[61] It held that those "three essential conditions of judicial independence for military judges are met through the provisions of the [National Defence Act]".[62] In respect of security of tenure, the Court held that the National Defence Act provides that military judges are appointed by the Governor in Council and that, unless they are removed for cause, they hold office until they are voluntarily released from the military or resign from the position of military judge, or until they reach the age of 60. Military judges can only be removed from office by the Governor in Council, for cause, upon a recommendation of their judicial peers properly convened as the Military Judges Inquiry Committee (MJIC).

[80] Regarding the second requirement of financial security, the Canadian Supreme Court held that it is amply met, as military judges have their own remuneration scheme and their compensation is fixed through a process that centres on an independent committee. In respect of the third requirement, military judges, including the Chief Military Judge, are responsible for the decisions that must be left to military judges in order for there to be sufficient administrative independence, such as assigning military judges to preside at courts martial and establishing procedural rules.

[61] *Edwards* above n 60 at paras 27, 40 and 47 citing *Valente* above n 38 at 673.

[62] *Edwards* above n 60 citing *Généreux* above n 42 at 259.

These matters are insulated from non-judicial interference by the chain of command. The majority thus concluded that the Court Martial Appeal Court was correct in holding that the appellants' section 11(d) rights were not infringed.

[81] In New Zealand, the Court Martial Act of 2007, particularly sections 16 and 19, introduced sweeping reforms, abolishing *ad hoc* courts and creating a permanent court martial, comprising judges with secure, non-renewable tenure. Judges are now appointed until reaching the age of 70 and may only be removed for cause or by resignation. Renewable terms have been abolished.

[82] Under the United Kingdom Armed Forces Act, both the Judge Advocate General and judge advocates are appointed on non-renewable terms, until retirement. That Act provides that judge advocates (the equivalent of military judges) including the Judge Advocate General, temporary assistants to the Judge Advocate General, and *puisne* judges (ordinary or lower ranking judges) of the High Court in England and Wales, following a request by the Judge Advocate General, are nominated by or on behalf of the Lord Chief Justice of England and Wales to sit as judge advocates.[63] Both the Judge Advocate General and judge advocates are drawn from the general Judiciary. They have security of tenure and are appointed on non-renewable terms, until retirement.

[83] The respondents' reliance on the renewability of terms of military judges in Australia and the United States of America is misplaced. In Australia, courts martial are not considered to be "courts" and are excluded from constitutional guarantees of judicial independence.[64] This peculiarity of Australian constitutional law led to legislative reforms to the Australian military justice system, introduced in 2006,[65] being

[63] Section 362 of the United Kingdom's Armed Forces Act of 2006.

[64] *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518.

[65] Defence Legislation Amendment Act 2006 (Cth).

struck down by the High Court of Australia on the grounds that military courts could not be given "judicial powers of the Commonwealth".[66]

[84] In the United States, the Supreme Court in *Weiss*[67] upheld the renewable appointment of military judges due to historical peculiarities of the constitutional text and context. Article 1, Section 8, Clause 14 of the US Constitution grants to Congress the power to "*make rules for the Government and Regulation of the land and naval Forces.*" Exercising this authority, Congress enacted the Uniform Code of Military Justice (Uniform Code). In *Weiss*, the US Supreme Court reasoned that because of these wide constitutional powers, judicial deference is "at its apogee when reviewing congressional decision making in this area"[68] and that only "extraordinarily weighty"[69] considerations would overcome the balance struck by Congress, which, in enacting the Uniform Code, had not specified fixed terms. It would be fallacious to apply this sort of reasoning to the South African context. Here, we have strong constitutionally entrenched guarantees of judicial independence for all courts, without exception. The United States is therefore an improper comparator.

International obligations

[85] International law imposes obligations on South Africa in the international sphere.[70] This Court stated in *Law Society* that international law "enjoy[s] well-deserved prominence in the architecture of [South Africa's] constitutional order".[71] Our Constitution requires that we must have regard to international law. Section 39(1)(b) enjoins a Court when interpreting the Bill of Rights to consider

[66] *Lane v Morrison* [2009] HCA 29; (2009) 239 CLR 230.

[67] *Weiss v United States* 510 US 163 (1994).

[68] Id at 177 citing *Rostker v Goldberg* 453 US 57, 67 (1981) at 70.

[69] Id at 179.

[70] *Glenister II* above n 16 paras 90-1.

[71] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) at para 4.

international law.[72] Section 231 sets out the status of international agreements.[73] And section 233 states that, when interpreting legislation, a Court must prefer any reasonable interpretation of legislation that is consistent with international law over an alternative, inconsistent, interpretation.[74]

[86] The interpretation of the constitutional guarantee of independence and the impugned provisions in this matter must be considered within the context of the Constitution and its values as a whole, to which "international law is relevant".[75] In *Justice Alliance*, this Court recognised the importance of international law in relation to judicial independence, noting that judicial independence in democracies is recognised internationally and that "the international community [including South Africa] has subscribed to basic principles of judicial independence through a number of international legal instruments".[76]

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[72] Section 39(1)(b) provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> . . .
>
> (b) must consider international law."

[73] Section 231 headed "International agreements" reads:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[74] *Glenister II* above n 16 at para 179.

[75] *Justice Alliance* above n 17 at para 37.

[76] Id at para 38.

[87] Our international law obligations inform the internationally accepted standard of judicial independence. That is the standard by which we ought to assess the guarantee of judicial independence provided for in the Constitution, which includes that such a guarantee must be afforded to military courts. Judicial independence in section 165 of the Constitution must be contextually interpreted in light of the rights in the Bill of Rights, including the fair trial rights under section 35(3), of which judicial independence is an essential component; the rule of law in section 1(c) of the Constitution; and the obligation on the State in section 7(2) to promote, protect, fulfil and respect the rights in the Bill of Rights, which obliges the State to ensure that the military courts which hear, amongst others, cases of sexual violence, including assault and rape, are adequately independent.[77] Furthermore, our international law obligations must inform this Court's interpretation of the impugned provisions.[78]

[88] International and regional instruments recognise that these core protections for independence must extend to all courts, including military courts.[79] According to the African Commission on Human and People's Rights (African Commission), "military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process".[80] This is echoed in the "Decaux Principles"[81] on the administration of justice in military courts, which have been cited with approval by the European Court of Human Rights. Principle 13, headed "Right to a competent, independent and impartial tribunal", specifically emphasises that the "independence of judges vis-à-vis the military hierarchy must be strictly protected,

[77] In this regard, the Ministerial Task Team Report provides useful insight. See [50] above.

[78] Section 233 of the Constitution requires a court to prefer an interpretation that aligns with international law standards, rather than that which is inconsistent with such standards. See also *Glenister II* above n 16 at para 179.

[79] See, among others, Tshivhase "Military Courts in a Democratic South Africa: In Search of their Judicial Independence" (PhD Thesis, UCT 2012) chapter 5.

[80] *Civil Liberties Organisation v Nigeria* (Communication 218/98) [2001] ACHPR 30; (2001) AHRLR 75 (ACHPR 2001) at para 44.

[81] Draft Principles Governing the Administration of Justice Through Military Tribunals (2006) (Decaux Principles), UN Doc. E/CN.4/2006/58 at 4.

avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges".

[89] South Africa's binding primary international treaty obligations pertaining to judicial independence are set out in the International Covenant on Civil and Political Rights[82] (ICCPR) and the African Charter on Human and People's Rights[83] (African Charter), both of which contain guarantees of judicial independence and impartiality. Furthermore, there are the UN Basic Principles[84] and the Bangalore Principles of Judicial Conduct (Bangalore Principles) that bear consideration.[85]

The ICCPR

[90] Article 26 of the ICCPR guarantees equality before the law and equal protection of the law. Article 14(1) requires that, in the determination of any criminal charge or of rights and obligations in a suit of law, every person shall "be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". That Article has been interpreted by the UN Human Rights Committee in

[82] International Covenant on Civil and Political Rights, 16 December 1966. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998.

[83] African Charter on Human and Peoples' Rights, 27 June 1981. South Africa acceded to the African Charter on 9 July 1996.

[84] Basic Principles on the Independence of the Judiciary (1985) (UN Basic Principles), endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[85] Bangalore Principles of Judicial Conduct (2002) (Bangalore Principles), endorsed by the Economic and Social Council in resolution ECOSOC 2006/23. Although non-binding, it bears reference that the Commonwealth Military Justice Principles (see above n 23) in Article 2 seek to—

> "[e]nsure that proceedings in military courts are presided over by independent, impartial and legally qualified judges who have security of tenure and are free from:
>
> (a) command interference;
>
> (b) executive or political influence or interference;
>
> (c) improper career consequences;
>
> (d) perceived or actual bias; and
>
> (e) personal interest in the proceeding."

General Comment No.32.[86] The Committee's conclusions were: first, the provisions of Article 14 apply to all courts and tribunals within the scope of the article, whether ordinary or specialised, civilian or military. Trials conducted in military courts must be "in full conformity with the requirements of Article 14 and its guarantees cannot be limited or modified because of the military or special character of the court concerned."[87]

[91] Second, the requirement of competence, independence and impartiality of a tribunal is absolute and not subject to any exception.[88] Independence refers, amongst others, to "guarantees relating to security of tenure" and "the actual independence of the judiciary from political interference by the Executive branch and Legislature".[89] States should take specific measures to guarantee independence, including the adoption of laws establishing clear and objective criteria for the "appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."[90] A situation where the Executive is able to control or direct judicial functions is not compatible with the notion of an independent tribunal.[91]

[92] Third, Article 14(1) in relation to a fair hearing by a tribunal refers to a hearing by a "body, regardless of its denomination, that is established by law, is independent of the Executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".[92]

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[86] United Nations Human Rights Committee, General Comment No.32 on Article 14: Right to equality before courts and tribunals and to fair trial, UN Doc CCPR/C/GC/32, 23 August 2007 (General Comment No.32).

[87] Id at para 22.

[88] Id at para 19.

[89] Id.

[90] Id.

[91] Id.

[92] Id at para 18.

[93] Fourth, to ensure independence, judges may only be dismissed on serious grounds of misconduct or incompetence. The "dismissal of judges by the Executive, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary".[93] Finally, the requirement of impartiality is twofold: the first is subjective – the judges themselves must not allow their judgements to be influenced – and the second is objective – "the tribunal must appear to a reasonable observer to be impartial".[94] This requirement is the individual (subjective) and institutional (or structural) independence alluded to earlier.

The African Charter

[94] Article 7 of the African Charter provides that every person shall have the right to have his cause heard. This consists, amongst others, of the right to be tried "by an impartial court or tribunal",[95] which encompasses the principle of independence. The requirement of an independent and impartial tribunal in Article 7 extends to military tribunals.[96]

[95] Article 26 of the African Charter provides that State parties shall have the duty to guarantee the independence of the Courts. This requires states to guarantee the

[93] Id at para 20. See *Pastukhov v Belarus* (Communication 814/1998) UN Doc CCPR/C/78/D/814/1998 (UN Human Rights Committee 2003) at para 7.3, where the dismissal of a judge prior to the expiry of the term for which he had been appointed, and in circumstances where no effective judicial protections were available to him to contest his dismissal by the executive, was said to constitute "an attack on the independence of the judiciary".

[94] General Comment No.32 above n 86 at para 21.

[95] Article 7(1)(d) of the African Charter above n 83.

[96] See *Civil Liberties Organisation v Nigeria* above n 80 at para 44 where the African Commission emphasised that "a military tribunal per se is not offensive to the rights in the Charter. We make the point that military tribunals must be subject to the same requirements of fairness, openness, justice, independence, and due process as any other process". See also: *Wetsh'Okonda Koso v Democratic Republic of the Congo* [2008] ACHPR 94; (2008) AHRLR 93 (ACHPR 2008) (*Koso*) at para 77.

independence of the courts and national institutions established for the promotion of African Charter rights.[97]

[96] In *Constitutional Rights Project v Nigeria*,[98] the African Commission held that where a military tribunal is composed of persons belonging largely to the Executive branch of government, it cannot be said to be impartial. Regardless of the character of the individual members, "its composition alone creates the appearance, if not actual, of lack of impartiality. It thus violates Article 7(1)(d)."[99] The right to an impartial tribunal, therefore, requires the absence of bias, actual or perceived.[100]

[97] The African Commission has, in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa[101] (African Principles), set out relevant principles to give content to Articles 7 and 26 of the African Charter. Principle 1 of the African Principles reiterates that "[i]n the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body". Principle 4 gives content to the concept of an independent tribunal.[102]

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[97] *Civil Liberties Organization v Nigeria* (Communication 129/94) (2000) AHRLR 188 (ACHPR 1995) where the Commission held that this provision "speaks of the institutions which are essential to give meaning and content to the right". It held further that this "clearly envisions the protection of the courts".

[98] *Constitutional Rights Project in re: Lekwot and Others v Nigeria* (Communication 87/93) [1995] ACHPR 6 (22 March 1995); (2000) AHRLR 183 (ACHPR 1995) (*Lekwot*).

[99] Id at para 14.

[100] Naluwairo "Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights" (2019) 19 *African Human Rights Law Journal* 43-61.

[101] African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) (African Principles).

[102] In this regard the African Principles above n 101 recommends:

> "(a) The independence of judicial bodies and judicial officers must be guaranteed in a country's constitution and laws.
>
> (b) A military tribunal that does not use the duly established procedure of the legal process may not displace the jurisdiction of ordinary judicial bodies.
>
> (c) Decisions by judicial bodies should not be subject to revision except through judicial review.
>
> (d) All judicial bodies shall be independent from the executive branch and any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

[98] Principle 5 addresses the concept of an impartial tribunal and emphasises that judicial officers "shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason".

The United Nations' Basic Principles on the Independence of the Judiciary

[99] The UN Basic Principles, which were endorsed by consensus by the UN General Assembly, reiterate the established guarantees of judicial independence, including security of tenure; appropriate safeguards for the appointment and removal of judicial officers; dismissal only on just cause; the finality of judicial decisions (save for further judicial review); and the ability of judicial officers to make decisions without improper influence from any quarter.[103]

The establishment of an independent body for the process of judicial appointments is encouraged.

(e) Judicial independence includes security of tenure for judges or members of judicial bodies and judges should not be appointed under fixed-term contracts.

(f) The removal or suspension of judges should only be on account of gross misconduct incompatible with judicial office, or for mental incapacity.

(g) Judicial officers facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing, including legal representation, and to an independent review of decisions of disciplinary, suspension or removal hearings. The procedures for the discipline of judicial officers shall be prescribed by law."

[103] Of relevance for present purposes are these principles from the UN Basic Principles above n 84:

"(a) Judicial independence shall be guaranteed by the state and enshrined in the country's constitution or laws.

(b) All governmental and other institutions have the obligation to respect the independence of the judiciary.

(c) Judicial decisions should be made without improper influences, pressures, threats or interference and they shall not be subject to revision, save through judicial review.

(d) Everyone has the right to be tried by courts or tribunals using established procedures.

(e) Ordinary courts or judicial tribunals shall therefore not be displaced by bodies which do not use duly established legal procedures.

(f) Any method of judicial selection shall safeguard against judicial appointments for improper motives.

(g) The term of judges, their independence, security and conditions of service shall be adequately secured by law.

Bangalore Principles of Judicial Conduct

[100] The Bangalore Principles were adopted at the Round Table Meeting of Chief Justices held in The Hague on 25 and 26 November 2002.[104] Our courts have cited these Principles and they are seen as a benchmark for judicial independence in our law.[105] The Bangalore Principles lay particular emphasis on judicial independence and require that the exercise of the judicial function is free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. It also requires that judges are free from influence by the Executive and Legislative branches of government and "must also appear to a reasonable observer to be free therefrom".[106]

[101] The Commentary on the Bangalore Principles notes the following in respect of judicial independence. Judicial independence refers to both the individual and the institutional independence required for decision-making. To establish whether the Judiciary can be considered independent of the other branches of government, regard is usually had to, among others: the manner of appointment of members, their term of office, their conditions of service, the existence of guarantees against outside pressures, and the question whether the court presents an appearance of independence. Judges must not be perceived to be subject to improper external influence. Lastly, judges

(h) Judges shall have guaranteed tenure and they shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

(i) A charge or complaint made against a judge in their judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure.

(j) The judge shall have the right to a fair hearing.

(k) All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

[104] Section 1.1 of Bangalore Principles above n 85.

[105] See, among others, *Hlophe v Judicial Service Commission* [2022] ZAGPJHC 276; [2022] 3 All SA 87 (GJ) at paras 125-6.

[106] Bangalore Principles above n 85 at Value 1 para 1.3.

should be answerable for their decisions regarding the merits of a case solely by way of judicial review or appeal.[107]

[102] For present purposes, the second important principle under the Bangalore Principles is that of impartiality. Judges must perform their judicial duties without favour, bias or prejudice. A judge who is not independent (on an institutional basis) cannot be impartial, and impartiality must exist both in fact and perception. The latter is measured by the standard of a reasonable observer.

Summary and conclusions on international obligations

[103] To sum up:

(a) South Africa has binding international obligations to ensure that legal proceedings are conducted before a competent, independent and impartial judicial body, and—

(i) where such body is a military court, the same principles of competence, independence, and impartiality ought to apply; and

(ii) independent and impartial tribunals require, among others:

(aa) security of tenure for judicial officers;

(bb) procedures for the appointment and removal of judges that safeguard independence;

(cc) removal of judges only on just cause;

(dd) fair trial rights afforded to judges being disciplined or removed;

(ee) actual independence from the Executive;

(ff) the ability of the judicial officer to make decisions without improper influence, inducements, pressure, threats or interference; and

[107] Commentary on the Bangalore Principles of Judicial Conduct (Bangalore Commentary) (2007).

(gg) objective impartiality.

(b) South Africa has further committed to the principle of judicial independence by agreeing to adhere to principles set out by international bodies. These include the principles set out by the Africa Commission in the African Principles and by the Human Rights Committee in General Comment No.32, set out earlier.

[104] The inescapable conclusions to be drawn from international law and jurisprudence are these: the guarantee of judicial independence ought also to be afforded to military courts. This is particularly so where the military courts have jurisdiction over criminal cases, including cases such as rape and sexual assault. These courts must be given the same independence guarantees as ordinary courts determining such matters.[108] The internationally accepted standard of independence that must be afforded to these courts requires independence in relation to the Executive,[109] and in relation to the military hierarchy.[110] There must be safeguards against actual and perceived partiality,[111] and in the appointment of military judges.[112] Security of tenure is key, and this excludes fixed-term contracts.[113]

[105] There must be clear protection against external pressures and an ability to decide matters without any restrictions, improper influence, inducements, pressure, threats or

[108] Article 7(d) read with Article 26 of the African Charter above n 83.

[109] Article 7(d) of the African Charter above n 83, as interpreted by Principle 4(g) of the African Principles above n 101.

[110] Principle 13 of the Decaux Principles above n 81 and Bangalore Commentary above n 107 at para 38.

[111] Article 7(d) of the African Charter above n 83, as applied in *Lekwot* above n 98 and *Koso* above n 96; Article 14 of the ICCPR above n 82, as interpreted in General Comment No.32 above n 86 at para 21; Bangalore Principles above n 85 Value 1 at para 1.3; Bangalore Principles above n 85 Value 2 at para 2.1; and Bangalore Commentary above n 107 at paras 51-2.

[112] Article 7(d) of the African Charter above n 83, as interpreted by Principle 4(h) of the African Principles above n 101; Article 10 of the UN Basic Principles above n 84; and Bangalore Commentary above n 107 at para 26.

[113] Article 7(d) of the African Charter above n 83; Article 14 of the ICCPR above n 82, as interpreted in General Comment No.32 above n 86 at para 19; Article 11 and 12 of the UN Basic Principles above n 84; and Bangalore Commentary above n 107 at para 26(a).

interference, direct or indirect, from any quarter or for any reason.[114] A further key requirement is actual and perceived independence.[115] Judicial decisions must not be subject to revision other than by a superior court.[116] Removal or suspension of judges may only be on account of gross misconduct incompatible with judicial office, or for mental incapacity.[117] Lastly, there must be appropriate suspension and disciplinary procedures for judges, prescribed by law, which includes judicial officers being entitled to guarantees of a fair hearing and provisions for an independent review of decisions of disciplinary or removal hearings.

[106] Against the backdrop then of our jurisprudence and the requirement imposed on our country to take steps to secure the independence of the Judiciary in its constitution or laws, in fulfilment of its international legal obligations, the question is whether the relevant provisions of the MDSMA and Defence Act have succeeded in doing so.

First challenge: sections 101 and 102 of the Defence Act

[107] This challenge relates to Executive-initiated and Executive-driven boards of inquiry. These sections, as formulated, are not specifically targeted at military courts and military judges, but their wide language on its face could be applied to them. To that extent, the challenge must be upheld. It is not permissible under our Constitution for the Executive to have the power to initiate and control boards of inquiry to investigate judicial officers' fitness and the conduct of their cases, as occurred in this case. The involvement of officials of the SANDF in making decisions relating to boards of inquiry, insofar as they pertain to military courts and military judges, plainly

[114] Article 7(d) of the African Charter above n 83, as interpreted by Principle 5 of the African Principles above n 101; *Koso* above n 96; Article 2 of the UN Basic Principles above n 84; and Bangalore Principles above n 85 Value 1 at para 1.1.

[115] Bangalore Commentary above n 107 at 42 paras 37-8.

[116] Article 7(d) of the African Charter above n 83, as interpreted by Principle 4(f) of the African Principles above n 101; and Article 4 of the UN Basic Principles above n 84.

[117] Article 7(d) of the African Charter above n 83, as interpreted by Principle 4(p) of the African Principles above n 101; Article 14 of ICCPR above n 82, as interpreted in General Comment No.32 above n 86 at para 20; and Article 17 of the UN Basic Principles above n 84.

offends the principle of separation of powers and subverts the independence of military courts. Boards of inquiry are unquestionably Executive-initiated right from the outset and they are Executive-driven. The boards are convened by the Minister or the Secretary of Defence or the Chief of the Defence Force under section 101 of the Defence Act. Section 101(2) affords the same power to the Chief of a Service or Division. The Executive has wide-ranging powers in convening a board of inquiry under a convening order which will designate the board's members and their orders.[118]

[108] This Executive control over the convening and conduct of military courts is constitutionally offensive:

(a) It is contrary to the central plank of judicial independence, that no external influence to sway a military judge to decide a case fairly, impartially and without fear or favour is permitted.

(b) Exclusive Executive control over the investigating of judicial officers is inherently unconstitutional. The position here is similar to that of Magistrates, in regard to which this Court in *Van Rooyen* ruled that the initiation of an investigation into their conduct should be held under the auspices of an independent body, not the Executive.[119]

(c) There is clear potential for abuse where, as here, officials who fall under the Executive have full control over the composition of a board of inquiry, its terms of reference and the manner in which it conducts its business.

(d) Sections 101 and 102 enable boards of inquiry to be composed in their entirety of members who are not judicial officers – *Van Rooyen* held that this is inconsistent with judicial independence.[120]

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[118] Section 101(4) of the Defence Act provides:

> "A board of inquiry must be convened by means of a written convening order and must consist of so many persons who are in the employ of the Department of Defence as the person convening the board may determine, but where a board is convened by a military officer it must consist of at least one officer and as many warrant officers, non-commissioned officers or civilians who are in the employ of the Department of Defence as the officer convening the board may determine."

[119] *Van Rooyen* above n 14 at para 206.

[120] Id at para 195.

[109] To cure this constitutional defect, reading down is preferable. This can be done by, as the applicant suggests, reading the phrases "any matter", "any member or employee" and the "affairs of any institution" as excluding military judges, and the same should be done in respect of section 137 of the Code,[121] read with rule 79 of the MDSMA Rules.[122]

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[121] Section 137 of the Code, being First Schedule to the Defence Act 44 of 1957, headed "Attendance of witnesses at and composition of boards of inquiry", reads:

> "(1) The president of any board of inquiry convened under section 134 or 135 may, in the prescribed manner, subpoena any person in Namibia, whether or not otherwise subject to this Code, to attend such board of inquiry and, subject to subsection (2), to give evidence or to produce any document or thing in such person's possession or under such person's control.
>
> (2) No witness is required to answer any question or to produce any document or thing at any board of inquiry which such witness could not be compelled to answer or produce in proceedings before a civil court.
>
> (3) The composition of boards of inquiry, the method of convening such boards and the procedure to be followed by such boards are as prescribed."

[122] Rule 79 of the MDSMA rules, headed "Collation of evidence during pre-trial investigation phase", reads:

> "(1) The Prosecution Counsel, Disciplinary Adjutant or military police investigating official must obtain any required statement or evidence, including visiting any person for such purpose, from any person whether subject to this Act or not.
>
> (2) A Disciplinary Adjutant or Prosecution Counsel conducting a pre-trial investigation may—
>
> (a) procure the attendance of witnesses;
>
> (b) have witnesses summoned to give evidence or to produce a document or item thereat;
>
> (c) administer oaths or affirmations;
>
> (d) admit sworn and unsworn statements into evidence; and
>
> (e) collate evidence into the pre-trial investigation in accordance with subsection (3).
>
> (3) A pre-trial investigation must comprise of, if applicable—
>
> (a) a cover sheet reflecting the reference of the pre-trial investigation;
>
> (b) an index with page numbering;
>
> (c) a certified copy of the account of warning or account of arrest;
>
> (d) a certified copy of the certificate of surrender or arrest, in the prescribed form, if applicable;
>
> (e) original statements or certified copies of original statements; and
>
> (f) documentary evidence.
>
> (4) Where an incident leads to a report of misconduct and an account of warning or account of arrest, such incident must be investigated under this Part."

Second challenge: section 15 of the MDSMA

[110] This challenge concerns the brief, renewable terms of military judges. On their own version, the respondents have acknowledged that military judges are appointed, at the Minister's prerogative, for brief, renewable terms. This is a complete answer to the High Court's and Supreme Court of Appeal's quibbling about whether the "reassignment" of military judges in fact amounts to renewable terms – the SANDF itself calls it renewable terms and, on the objective facts, that is exactly what it is.

[111] In *Justice Alliance*, this Court emphasised that non-renewable terms for judges is an essential prerequisite of structural independence.[123] Absent non-renewability, there is the risk that public confidence in military judges is undermined. The Court observed:

> "[N]on-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal."[124]

[112] The assignment of renewable terms is furthermore opaque, without clearly cognisable objective criteria; instead it is premised on the unconstrained discretion and carte blanche of the Minister and Adjutant General, glibly referred to by the respondents as their "prerogative". This unconstrained discretion, coupled with opaque requirements, has been held by this Court to be inconsistent with the central guarantee of independence.[125]

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[123] *Justice Alliance* above n 17 at para 73 and fn 72, citing the Canadian case of *Leblanc* above n 57 at paras 38-9, 43-4 and 59.

[124] Id.

[125] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 92 citing *Justice Alliance* above n 17 at para 65

[113] The Supreme Court of Appeal erred in requiring evidence substantiating the averment by the applicant that "military judges may be inclined to temper their reviews or adjust their judgments to secure further assignments".[126] The applicant merely had to show that a reasonable, well-informed person would not have confidence that military judges are protected from these threats due to their short, renewable assignments.[127] Here, the undisputed (or, at best for the SANDF, the indisputable) facts demonstrate that the applicant was in fact subjected to a variety of threats and pressure. He was the only military judge not to be reassigned in 2017, implementing the threats to do so that started in 2014.

[114] Military judges are the only full-time judicial officers who are appointed for short, renewable terms, notwithstanding their significant geographical and penal jurisdiction. This is constitutionally unpalatable. Lastly, renewable terms for military judges are out of step with recent developments in comparable constitutional democracies, including Canada, New Zealand and the United Kingdom.

[115] In this instance, reading down section 15 by precluding renewable judicial terms is not a satisfactory solution to this constitutionally impermissible arrangement. This is because the difficulty may be that reading down will only preclude "renewable" terms and not "short" terms as well. Conceivably, with a reading-down, a military judge could, for example, be appointed for a non-renewable one-year period. It might be said that, as long as the period is not renewable, it does not matter how short it is, since the prospect of renewal is removed as a perverse incentive. The question is what exactly the term "non-renewable" means. Conceivably, an officer may be appointed as a military judge for a one-year term in year one, and then again reappointed in year three after a lapse of one year from the expiry of their first term. Conversely,

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where this Court stated: "The designation by a member of the Executive in ill-defined circumstances or circumstances that completely lack description does not conduce to a reasonable perception of independence".

[126] Supreme Court of Appeal judgment above n 6 at para 57. In this passage the judgment uses the word "reviews" (as I have quoted it), though perhaps it is a typographical error and "views" was intended.

[127] *Sonke* above n 35 at paras 78-80.

"non-renewable" could mean that the officer can never be reappointed as a military judge.

[116] A further question is whether adequate security of tenure might not also be achieved by relatively long terms, like renewable five-, eight-, or ten-year terms. A reading-down is not permanent, in the sense that Parliament can enact a different regime as long as it is consistent with this judgment, but the problem relates to appointments made during the period of the reading-down. The SANDF might be unwilling to appoint military judges until a specified retirement age, but likewise might be unwilling to have short-term appointees removed permanently from the pool of future appointments, possibly depending on how big the pool is. An interim, temporary solution might be longer renewable appointments; or the right to reappoint after a lapse of a certain period. Those possible solutions cannot be achieved by a reading-down.

[117] Another issue is that in terms of section 15 an assignment is for a fixed period "or coupled to a specific deployment, operation or exercise". If, for example, SANDF members are deployed in a peace-keeping operation in Angola, can the authorities appoint a military judge to preside over a military court in Angola, during the period of that operation, whose assignment as a military judge will terminate when that operation ends? If a military judge is so appointed, may they then not be reappointed when that operation terminates, even if it terminates after only six months? It is conceivable that potential candidates for military judgeships may be reluctant to accept deployment in those circumstances.

[118] A further potential difficulty with a reading-down is that section 15 does not apply only to military judges: it applies also to directors and prosecution, defence and review counsel. Short renewable terms may be acceptable in respect of them and there has been no argument to the contrary at the hearing in this Court. In light of all these difficulties, the only viable solution is a reading-in, not a reading-down. It is not enough, as would be the case with sections 101 and 102 of the Defence Act, to say that the assignments contemplated in section 15 do not include assignments of

military judges. Plainly there is a need for a statutory provision that provides for the term of appointment of military judges, and section 15 is that provision. It is not objectionable that military judges are appointed "for a fixed term" – the problem is renewability. It is consequently necessary to declare section 15 constitutionally invalid to the extent that it does not provide adequate security of tenure for military judges, to suspend the declaration for two years, and to have a temporary reading-in.

[119] The most appropriate way of addressing all these concerns is to allow for a person to be assigned as a military judge for a period not exceeding one year on a non-renewable basis. Further assignment of that person as a military judge may occur only after the lapse of a period of not less than two years since their last assignment. The rationale behind these time-related provisions is to avoid short, renewable terms of appointment. The objection to those type of appointments bears repetition – first, it undermines public confidence inasmuch as non-renewability is an essential component of structural independence; and second, absent cognisable objective criteria it affords the Executive (the Minister and the Adjutant-General) unconstrained discretion in assigning military judges.

Third challenge: section 17 of the MDSMA

[120] The applicant challenges the power of the Executive to remove military judges. As stated, the Minister may remove a military judge for cause on the recommendation of the Adjutant General. The latter is, like the Minister, a member of the Executive. It is unconstitutional for the Executive to have the power to remove military judges without independent oversight or control. Our courts have repeatedly set their face against removal for cause where such cause is not subject to "independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard".[128]

[128] See generally, among others, *De Lange* above n 31 and *Van Rooyen* above n 14 which both cite *Valente* above n 38 at 698.

[121] At present, military judges are the only judicial officers that may be removed in this fashion. This is in stark contrast to the procedure for the removal of judgesjudges of the superior courts and Magistrates. The position here also stands in contrast to that in the United Kingdom, New Zealand, and Canada. It is no answer to say, as the High Court did, that boards of inquiry provide the required independent oversight mechanism in cases of removal. For the reasons enunciated, boards of inquiry lack independence.

[122] It is not possible to cure the constitutional invalidity through a reading down of the provision. The section must therefore be declared unconstitutional and the declaration ought to be suspended for 24 months for Parliament to attend to the constitutional deficiency. In the interim, there must be a reading down of the section until Parliament cures the invalidity through remedial legislation.

[123] It is in my view unobjectionable, as an interim arrangement during the period of suspension, to have the Minister devise their own processes for an inquiry into the fitness of a military judge, on the condition that it is an independent inquiry. There is no harm in leaving the composition of the inquiry body to the Minister, but its independence is crucial. A further important caveat is that a military judge may not be removed except on the recommendation of the independent inquiry.

Conclusion and costs

[124] Leave to appeal must be granted and the appeal against the order of the Supreme Court of Appeal must be upheld. An important consideration regarding costs is that the applicant has only attained partial success. The applicant was unsuccessful in his opposition to the state parties' review application, and he does not appeal that order in this Court. In respect of his counter-application, the applicant has not persisted with some of the relief which was dismissed in the courts below. Those are his prayers declaring that the Board of Enquiry established in respect of him is unlawful, and declaring the proceedings instituted by the state parties in the High Court to be unlawful and unconstitutional. In the premises, a 50/50 allocation is a fair allocation of costs in

respect of the matters where the applicant had won and lost respectively. Thus, the applicant should be awarded 50% of his costs in the High Court and the Supreme Court of Appeal. Based on the trite *Biowatch*[129] principle, in respect of the other 50% of the costs he should bear no liability. The applicant is entitled to all his costs in this Court.

Order

[125] I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside to the extent that that Court dismissed the applicant's appeal against the High Court's refusal to grant the declarations of statutory invalidity sought by the applicant in his counter-application in the High Court.
4. The costs orders made in the Supreme Court of Appeal in relation to costs in that Court and in the High Court are set aside.
5. It is declared that:
   (a) Sections 101 and 102 of the Defence Act 42 of 2002 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. Pending the coming into operation of remedial legislation, the phrases "any matter", "any member or employee" and the "affairs of any institution" in section 101 and 102 of the Defence Act and section 136 of the Military Disciplinary Code, read with rule 79 of the Military Discipline Supplementary Measures Act's Rules, must be read as excluding military judges.
   (b) Section 15 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it

[129] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 21.

empowers the Minister of Defence and Military Veterans (Minister), acting on the recommendation of the Adjutant General, to assign judges for renewable periods.

(c) The existing practice of assigning judges for renewable periods of one to two years is unconstitutional and unlawful. Pending the coming into operation of remedial legislation, the assignment of a military judge may not be renewed until the lapse of at least two years since that person's last assignment.

(d) Section 17 of the Military Discipline Supplementary Measures Act 16 of 1999 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.

(e) Pending the coming into operation of remedial legislation, the Minister may devise processes for an inquiry into the fitness of a military judge and the composition of the inquiry body, provided that:

(i) it is an independent inquiry; and

(ii) a military judge may not be removed except on the recommendation of the independent inquiry.

(f) The declarations of constitutional invalidity above are suspended for a period of 24 months to allow remedial legislation to be enacted and brought into operation.

6. The first respondent is ordered to pay half of the costs of the applicant in the Supreme Court of Appeal and the High Court, including the costs of two counsel where so employed.

7. The first respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel where so employed.

For the Applicant:	G Marcus SC, C McConnachie, M Marongo and M Kritzinger instructed by Griesel Vanzanten Attorneys
For Respondents:	E Tsatsi SC and C Kwinda instructed by State Attorney
For the Amicus Curiae:	E Webber and E Van Heerden instructed by Legal Resources Centre