



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 11012/2022

In the matter between:

CHARLES HENRI EMILE MACHARD

Applicant

and

MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

CHIEF OF THE SANDF

Second Respondent

SECRETARY OF DEFENCE

Third Respondent

ADJUDANT-GENERAL: LEGAL SERVICES

DIVISION OF THE SANDF

Fourth Respondent

THE SURGEON GENERAL OF THE SOUTH

AFRICAN NATIONAL DEFENCE FORCE

Fifth Respondent

THE COURT OF MILITARY APPEALS

Sixth Respondent

HONOURABLE MADAM JUSTICE E.M. KUBUSHI

Seventh Respondent

COL (RET) E.O. STEP

Eighth Respondent

COL R.E. COMBRINK

Ninth Respondent

THE COURT OF THE MILITARY JUDGE

Tenth Respondent

COMMANDER W.P. VENTER

Eleventh Respondent

Coram: Justice VC Saldanha

Heard: 31 October 2024

Delivered electronically: 30 January 2025

JUDGMENT

SALDANHA J:

[1] The applicant, a commissioned officer in the South African National Defence Force (the SANDF) and professional nurse with the rank of Captain in the South African Military Health Services Unit at the South African Naval College, Beach Road, Gordons Bay, was during February 2021, charged for having committed various sexual offences and misconduct and convicted before a Court of a Military Judge in terms of the Military Discipline Supplementary Measures Act No. 16 of 1999 (the Act).

[2] The applicant was sentenced to a reduction in rank to that of Lieutenant, a period of imprisonment of 12 months and cashiering from the SANDF. The period of imprisonment and cashiering were wholly suspended for a period of 3 years on condition that the applicant was not convicted of sexual assault committed within the period of suspension.

[3] In these proceedings, the applicant initially sought to have his convictions and sentences declared unlawful, alternatively, reviewed and set aside on various grounds including, amongst others, that the Court of the Military Judge was not properly constituted in as much as he contended that the Act prescribed that a Court of a Military Judge must sit with assessor(s) in the trial proceedings. The trial court did not sit with any assessors. Nonetheless, the parties agreed that the sole issue for determination in the application was the contested interpretation of various provisions of the Act relating to whether it is peremptory for military assessor(s) to be appointed in terms of various

provisions of the Act or whether the Act provides for no more than an election by an accused person to have two assessors appointed one of which, may on a further election be of the military rank of Warrant Officer.

[4] At the commencement of proceedings before this court, counsel for both the applicant and the respondents accepted that the issue for interpretation before the court was whether the Act made provision for the election of military assessor(s) to be appointed as opposed to what the applicant repeatedly contended for in his affidavits, in the various iterations of the Practice Notes prepared by his counsel and in the heads of argument filed on his behalf, that the issue related to whether the applicant was entitled to waive the appointment of military assessors in terms of the provisions of the Act. Moreover, the applicant expressly abandoned all of the other relief that he initially sought in his notice of motion.

[5] In light of the issue being no more than that of the interpretation of the provisions of the Act I give no more than a brief background to the proceedings and the nature of the charges preferred against the applicant as part of the overall context and purpose in which the interpretation of the relevant provisions of the Act are to be considered.

[6] The applicant was subject to the Military Discipline Code by virtue of Sections 104(5)(a)¹ of the Defence Act 44 of 1957 as amended and Sections 3(1)(a)² of the Defence Act 42 of 2002 and Sections 3.2 (a)³ of the Act. The applicant participated in the extensive pre-trial investigative proceedings provided for in the Act.

¹ (5) The Military Discipline Code shall to the extent and subject to the conditions prescribed therein, apply –
(a) to all members of the Permanent Force.

² **3 Application of Act**

(1) Unless the context indicates otherwise, this Act applies to

a) all members of the Defence Force and any auxiliary service, and all employees, whether they are posted or employed inside or outside the Republic;

³ 2) For the purposes of the application of this Act and the Code, '**person subject to the Code**' includes, to the extent and subject to the conditions prescribed in this section and in the Code:

a) all members of the Permanent Force;

[7] The first charge of sexual assault preferred against the applicant related to the contravention of Section 5 (1)⁴ of the Sexual Offences Act 32 of 2007, in that he was alleged on 16 January 2018, at or near Gordons Bay to have unlawfully and intentionally sexually violated Seaman (sic) Ms. M.M.M an adult female⁵ in that he hugged and or stroked the head of the complainant without her consent,. The alternative to the charge was the contravention of Sections 45A⁶ of the Military Discipline Code (MDC) of riotous or unseemly behaviour in respect of the allegations relating to the first charge.

[8] The second charge likewise related to the contravention of Sections 5(1) of the Sexual Offences Act, where on 19 January 2018 at Gordons Bay, the applicant was alleged to have unlawfully and intentionally sexually violated Seaman(sic,) Ms. M.I.K an

(b) every member of the Reserve Force

i) while rendering any service, undergoing any training or doing any duty in terms of the Defence Act, 1957; or

(ii) when liable or called up therefor, fails to render that service or to undergo that training or to do that duty;

(c) all persons, other than members of a visiting force, lawfully detained by virtue of or serving sentences of detention or imprisonment

imposed under the Code or this Act;

(d) every member of the auxiliary services established in terms of section 80 of the Defence Act, 1957, being on service as defined in

the Code;

(e) every person attached to the South African National Defence Force in terms of section 131 of the Defence Act, 1957;

(f) all students under instruction at a military training institution, in accordance with section 77 (3) of the Defence Act, 1957;

(g) every person not otherwise subject to the Code who, with the consent of the commanding officer of any portion of the South

African National Defence Force, is with or accompanies or performs duty with that portion of the Defence Force which is (

i) outside the borders of the Republic; or

(ii) on service:

Provided that any person who is subject to the Code by virtue of any consent given under this paragraph shall be so subject (

aa) where that consent has been given in writing, on the basis indicated in that consent; or

(bb) where consent has not been given in writing, on the basis on which he or she has been accepted and treated for living and

messing facilities; and

(h) every prisoner of war as contemplated in Articles 4 and 33 of the Geneva Convention Relative to the Treatment of Prisoners of War

of August 12, 1949, or by customary international law, and who is in the power of the Republic and detained by the South African

National Defence Force.

⁴ . (1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.

⁵ Despite the complainants being female, they were in my view, anachronistically referred to as "Seaman" in the charge sheet.

⁶ At any time behaves in a riotous or an unseemly manner.

adult female, in that he rubbed the breast of the complainant without her consent. As with the first charge, the alternative likewise related to the contravention of Section 45A of the MDC.

[9] So too, did the third charge relate to the contravention of Section 5(1) of the Sexual Offences Act in that the applicant on the 24 January 2018 at or near Gordons Bay allegedly sexually assaulted Seaman (sic,) Ms. M.M.M. in that he unlawfully and intentionally violated her, by having touched her buttocks and/or her thighs and/or kissed her on the neck and/or had taken her hand and rubbed it against his penis and/or hugged her without her consent. The alternative to the third charge was likewise the contravention of Sections 45A of the MDC. The offences were competent due to the provision of Section 56 of the Military Disciplinary Code which provides;

“A person subject to this Code may be tried by a military court having jurisdiction for any civil offence (other than treason, murder, rape or culpable homicide committed by him within the Republic), and may in respect of such offence be sentenced to any penalty within the jurisdiction of the court convicting him.”

[10] The applicant was represented in the trial by a Major in the SANDF and pleaded not guilty to all of the charges. The transcribed record of the proceedings before the military court a quo formed part of the record in the application.

[11] The conviction and the sentence imposed on the applicant were subject to automatic review by a Court of Military Appeals in terms of Section 34(2)⁷. On 17 September 2020, the Court of Military Appeals presided over by Justice EM Kubushi and two others upheld the convictions of the applicant and by a majority of two to three, set aside the sentences of the court a quo and substituted it with one of cashiering.

⁷ (2) Every sentence of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge shall be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed.

[12] On 28 July 2021, the applicant instituted proceedings in which he sought an interim interdict to prevent the first respondent from giving effect to the cashiering pending the outcome of an application to challenge the lawfulness of the trial proceedings and convictions. On 29 July 2021 an order was taken by agreement between the parties suspending the implementation of the sentence of cashiering pending the finalisation of the application for an interim interdict. The applicant successfully obtained interim relief in that the first respondent was interdicted from implementing the sentence handed down by the Court of Military Appeals pending the challenges and the review of the decisions of both the Court of the Military Judge and the Court of Military Appeals.

[13] In an endeavour to provide the context to these proceedings and the relief now sought, the initial relief sought by the applicant in the notice of motion dated 30 June 2021 provides:

1. 1.1 Declaring that the Court of the Senior Military Judge (the court *a quo*) was irregularly constituted when it sat on 19 March 2019 in that it was not constituted in the manner prescribed in Section 9 or Section 10 of the Military Discipline Supplementary Measures Act 16 of 1999 (“the Act”) in that there was no military assessor;
 - 1.2 Declaring that the sentence purportedly handed down by the court *a quo* (“the Sentence”) does not comply with the principles of legality and is void alternatively unlawful;
 - 1.3 Remitting the matter to the Court of the Military Judge so that the trial may be commenced *de novo*.
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2. In the event that the relief sought in paragraph 1 above is not granted, an order:
 - 2.1. Declaring that the Court of Military Appeal (the court *ad quem*) was irregularly constituted when it sat on 17 September 2020;

- 2.2 Declaring that the sentence purportedly handed down by the Court of Military Appeals on 17 September 2020 (“the Sentence”) therefore did not comply with the principles of legality and is void alternatively unlawful;
3. In the event that the relief sought in paragraphs 1 and 2 on page 2 is not granted, an order:
 - 3.1. Reviewing and setting aside and/or otherwise correcting:
 - 3.1.1 The decision taken by the Court *ad quem* to interfere with the sentence handed down by the Court of a Senior Military Judge (the court a quo) on 19 March 2019.
 - 3.1.2 The sentence handed down by the Court *ad quem* on 17 September 2020;
 - 3.2 Reinstating the sentence imposed by the Court of a Senior Military Judge presided over by Commander W.P. Venter namely:

“Reduction to the lower commissioned rank of Lieutenant and imprisonment for a period of twelve (12) months and Cashiering from the South African National Defence Force (SANDF). The whole period of imprisonment and Cashiering from the SANDF is suspended in whole for a period of three (3) years on condition the accused is not convicted of Sexual Assault committed within the period of suspension”.
4. Granting the Applicant leave to subpoena Regimental Sergeant Major Alexander so that he may testify *viva voce*;
5. Exercising its discretion in terms of Uniform Rule 35(13) so as to make the rules relating to the discovery and production of documents applicable to these proceedings insofar as the arrangements for the cashiering parade which was to have been held on or about 29 July 2021 are concerned.

6. 6.1 Declaring that Section 12(1)(b)(i) of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid;

6.2. The declaration of invalidity is suspended for 24 months from the date of this order to allow Parliament to rectify the defects as identified in this judgment.

6.3. During the period of suspension of the operation of the order of invalidity Section 12(1)(b)(i) of the Military Discipline Supplementary Measures Act 16 of 1999 shall read as follows:

Cashiering, the execution of which is to take place in an office.

7. Directing the First Respondent to pay the costs of this application.

8. Further and/or alternative relief.

It should be noted that the applicant was in fact tried before a Court of a Military Judge in terms of the Act and not as erroneously referred to in the notice of motion by a Court of a Senior Military Judge.

[14] The matter initially came before this court on 31 January 2024. It was apparent to the court that the relief sought in the heads of argument on behalf of the applicant was inconsistent with that provided for in the Practice Note filed with the court. The applicant abandoned the challenge in respect of the relief under paragraph 2 of the notice of motion relating to the Court of Military Appeals. The applicant sought a postponement of the matter in order for the parties to file a proper Practice Note that aligned with the revised relief sought. The applicant tendered the wasted costs occasioned by the postponement of the hearing.

[15] In a Joint Practice Note subsequently drafted by counsel for the applicant, the applicant indicated that "...the only constitutional issue, namely whether the cashiering is unconstitutional is not being proceeded with". The Practice Note indicated that the issues

for determination remained that in paragraph 1 (1.1, 1.2 and 1.3 of the Notice of Motion). The Joint Practice Note also provided for the determination as to whether the provisions of the Act “visited the aforesaid non-compliance with invalidity”. It also required for determination by the court “...whether the decision and the judgment of the court a quo was reasonable and in accordance with the law, if not, whether this court should exercise its inherent wide review powers and substitute the court a quo’s decision with another decision.” It was apparent to the court that the parties had not properly applied their minds to what exactly had to be determined as set out in the Joint Practice Note *vis-à-vis* the notice of motion and the various contentions made in the affidavits filed by the parties. By agreement between the parties the matter was postponed to 31 October 2024 for hearing. The respondents also indicated that they would seek to institute a conditional counter-claim and tendered the wasted costs occasioned by the postponement of the application.

[16] On 24 October 2024 counsel for the applicant filed a revised Practice Note in which he described the central issue in dispute as the validity of the proceedings before the Court of the Military Judge, in particular as to what he regarded as the mandatory prescript of the presence of an assessor(s) in the proceedings in terms of the Act. The applicant contended that the failure to comply with that requirement invalidated the proceedings before the Court of the Military Judge. The applicant contended that the right to an assessor “cannot be waived” and that the statutory requirement was a mandatory safeguard meant to ensure the integrity and the fairness of military justice. The applicant recorded the respondents’ position as being that the appointment of an assessor was discretionary under the Act and that the applicant had been informed of his right to be tried by assessors and that he expressly elected to proceed without any. The applicant’s counsel contended that the respondents’ position on the interpretation of the Act made the appointment of assessors discretionary and could be waived by an accused person. He recorded his disagreement with the position adopted by the respondents.

[17] The applicant nonetheless contended that the parties had identified that the central and only issue for determination was that of the statutory interpretation of the provisions

of the Act relating to the composition of a Court of a Military judge as provided for in the Act.

[18] The Practice Note also referred to the question as to whether the right to have an assessor could be waived. It set out in general terms, the approach by the applicant to the interpretation of the provisions of the Act as that of a literal interpretation of the various provisions of the Act together with both the contextual and the purposive approach to the interpretation of the relevant provisions of the Act. The applicant contended that any deviation from the mandated structure of the composition of the Court of a Military Judge was both impermissible and unlawful. Counsel for the applicant also recorded that the respondent, on the other hand, favoured a more contextual and purposeful approach and that the structure of the military court system allowed for flexibility, in particular with regard to the presence of assessors.

[19] Counsel for applicant further stated in the Practice Note that “...there were no constitutional issues that required adjudication by the court.”

[20] Counsel for the respondents filed their heads of argument on 11 October 2024, while counsel for the applicant filed his heads of argument on 18 October 2024 and in doing so also took the opportunity of specifically addressing and refuting the submissions made by counsel for the respondents in their heads of argument.

The Scheme of Military Justice as Provided for in the Act.

[21] Importantly and notwithstanding the position adopted by counsel for the applicant in the final Practice Note, this court is enjoined by the Constitution of the Republic of South Africa Act of 108 of 1996 (the Constitution) that, when interpreting the provisions of

legislation it must promote the spirit, purport and objects of the Bill of Rights⁸. Central to this injunction is that every accused person before a military court enjoys the rights, amongst others, to a fair public hearing in accordance with the provisions of Sections 34 and 35 of the Constitution.

Section 34 provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

So too, Section 35 (3) provide as follows;

- (3) Every accused person has a right to a fair trial, which includes the right—
- (a) to be informed of the charge with sufficient detail to answer it;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;
 - (j) not to be compelled to give self-incriminating evidence;
 - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

⁸ When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; Chapter 2: Bill of Rights 16;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”

[22] By way of no more than a brief background to the institution of military justice and discipline in the South African military the following is no more than a truncated background⁹. Prior to 1932, military justice and discipline was dealt with in accordance with the provisions of the British Imperial Army Act of 1881. Discipline was thereafter dealt with in the Union Military Discipline Code which came into being as a result of the 1932 amendments to the Defense Act and Dominion Forces Act. The Defence Act 44 of 1957 was to a large extent repealed by the Defence Act 42 of 2002 that consolidated the various defense laws and introduced the Military Disciplinary Code (the MDC). Captain Aifheli Enos Tshivase in the SANDF and a law lecturer at the University of Cape Town, in a well-researched and motivated paper titled “Military Courts in a Democratic South Africa: An Assessment of Their Independence” published in 2006, HeinOnline, expresses the view that the MDC introduced a fairly comprehensive system of military justice that closely resembled that of the British military justice system. The Code provided for numerous military offences which were also supplemented by offences under the South African criminal law.

⁹ The background to the South African system of military courts are dealt with by Captain Aifheli Enos Tshivase a lecturer in law at the University of Cape Town in an a paper titled MILITARY COURTS IN A DEMOCRATIC SOUTH AFRICA; AN ASSESSMENT OF THEIR INDEPENDENCE, 2006 downloaded HEINONLINE.

[23] The provisions of the new Act which are the subject of these proceedings provided for a new military court structure. Prior to its enactment there existed six types of courts-martial which included a general court martial, an ordinary court martial, the summary trial courts of a Chief of Staff, a convening authority, a commanding officer deriving powers from a convening authority and a commanding officer with delegated powers. These courts were convened on an *ad hoc* basis and the presiding officers were appointed by the convening authority on such basis. Various provisions of the 1957 Defence Act were challenged for its constitutionality, and particularly the independence of the judges appointed under the Defence Act. In *Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others* 1999 (2) SA 471 (C) the constitutionality of the composition of the ordinary court-martial provided by Section 73 of the Military Disciplinary Code was challenged. The court-martial consisted of no less than three members all of who had to be officers of the SANDF that held a commissioned rank other than a temporary commissioned rank and for no less than three years, provided that the president of an ordinary court martial was not below the rank of Captain or its equivalent. There was no statutory requirement that the members of the court martial be legally trained and qualified persons. Hlophe, ADJP (as he then was) writing on behalf of the full court of Traverso J (as she then was) and Gihwala AJ, found that to the extent that neither the Defence Act nor the Code required that members of the ordinary court-martial be legally qualified was unconstitutional. Sections 174(1) of the Constitution provided that a judicial officer must be “appropriately qualified women or men who is a fit and proper person.” Reliance was placed on the dicta of Conradie J in *De Lange v Smuts and Another* 1998 (1) SA 736 (C). In as much as the ordinary court martial enabled lay members to convict and imprison accused persons, it was unconstitutional. The court also found, on other grounds, the unconstitutionality of the composition of the ordinary court-martial. It held that “...a court-martial was so lacking in the basic essentials of an ordinary court that it could never be properly described as an ordinary court as provided for in the Constitution.” At best, it was to be regarded as no more than a military court which the court found could not have been constituted within the meaning of Sections 35(3)(c) and Section 34 of the Constitution. The court also found that the ordinary court martial did not

comply with the requirements of Sections 165¹⁰, 174¹¹, 176¹² and 177¹³ of the Constitution all of which were provisions that had their main aim as the promotion of the independence of judicial officers. In its findings that the ordinary court martial lacked the essentials of independence of a judicial officer, the court referred to the plethora of oft-quoted cases relating to the independence of the judiciary and with reference to comparative international law. Extensive reference was also made to Ackerman J's erudite discussion of the Canadian case law dealing with the independence of ordinary courts and that of judicial officers with reference to the international standards on the independence of the judiciary to which South Africa is bound.

¹⁰ **Judicial authority**

- (1) The judicial authority of the Republic is vested in the 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
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

¹¹ **Appointment of judicial officers –**

- (1) Any appropriately qualified woman or man who is fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
- (4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
 - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.
 - (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with the reasons, if any of the nominees are unacceptable and any appointment remains to be made.
 - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
- (7) Other 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) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Scheduled 2, that they will uphold and protect the Constitution.

¹² Section 176 – deals with the term of office and remuneration.

¹³ Section 177 – deals with the removal of judicial officers.

[24] Prior to the confirmation of the invalidity of the various provisions of the 1957 Defence Act and the various provisions of the Code, a whole new system of military justice was being considered and enacted by parliament in order to harmonise the country's military justice system with the new culture of constitutionalism. Kriegler J, in *Legal Soldier (Pty) Ltd v Minister of Defense* 2002 (1) SA 1 (CC) held that parliament in its consideration of the new legislation would have been mindful of the strictures of the judgment in *Freedom of Expression Institute and Others* and sought to make a clean break with the past by which it established a radically different military court system to provide for the continued and proper administration of military justice and the maintenance of discipline. The Constitutional Court was therefore of the view that it was not necessary to confirm the order of unconstitutionality by the High Court. The preamble to the new Act provided for a new system of military courts with a view to the improved enforcement of military discipline and incidental matters. In this regard, the emphasis had shifted sharply from an essential military system with forensic expertise to a system far closer to an ordinary criminal justice process under civilian law. Whereas, the judicial and prosecutorial roles in military prosecutions and reviews had been fulfilled by military officers without necessarily having any legal training and acting as soldiers within their lines of command, the new Act introduced a hierarchical system of courts staffed by legally trained military officers and at the highest level was presided over by a fully-fledged judge of the High Court. In, *Legal Soldier*, the court dealt with the constitutionality of the prosecutorial system under the new Act and importantly found that the new Act, in introducing a hierarchical system staffed by legally trained military officers supported its constitutionality. Admittedly, the court in that matter was not seized with the question as to whether the appointment of assessors in military courts were mandatory as contended for by the applicant in this matter. Nonetheless, the court was satisfied that the composition of a military court of legally trained officers and/or experienced lawyers undergirded its constitutionality.

[25] The hierarchy of the new military courts provided for the jurisdiction of a commanding officer as dealt with in section 11¹⁴ which provides that every officer subordinate in rank to such commanding officer and of a rank not less than field rank, authorised in writing by the commanding officer shall have jurisdiction conferred upon her/him. The commanding officer has limited penal jurisdiction. The composition and jurisdiction of the Court of a Military Judge relevant to the determination of this matter provides as follows:

“10. (1) A court of a Military Judge shall consist of-

- (a) An officer of not less than field rank and with not less than three years experience as a practicing advocate or attorney of the High Court of South Africa or three years experience in the administration of criminal justice or military justice, assigned in terms of section 14(1)(b) to act as a military judge; and
 - (b) Subject to sections 20 and 30(24), a military assessor.
- (2) A Court of a Military Judge may try any person subject to the Code, other than an officer or field or higher rank, for any offence, other than murder, treason, rape or culpable homicide, or an offence under Section 4 or 5 of the Code, and may on conviction sentence the offender to any punishment referred to in section 12, subject to a maximum sentence of imprisonment for a period of two years.”

[26] Section 9 of the Act deals with the composition and jurisdiction of the Court of a Senior Military Judge which unlike a Court of a Military Judge in Section 10 is comprised of an officer of a higher ranking and with a higher penal jurisdiction. The fourth and last category in the structure of the military courts is that of a Court of Military Appeals (CMA) which is the highest court, and its decisions are binding on all the other lower courts.

¹⁴ Every commanding officer and every officer subordinate in rank to such commanding officer and of a rank not less than field rank, who is authorised thereto in writing by such commanding officer, shall have the jurisdiction conferred by this section.

[27] The approach and discipline to the interpretation of the provisions of legislation and contracts by courts have developed over several decades and have been the subject of rigorous application and more so in the dynamism of a modern democracy founded on a transformative Constitution. In the oft-quoted decision of Wallis, JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), he stated;

“[18]. Interpretation is a process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence...

The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alerted to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to statute or statutory instruments is to cross the divide between interpretation and legislation; ...

The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provisions and the background to the preparation and production of the document.”

The profound and forceful tenet of that decision was elaborated on by Majiedt, AJ in the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) where he stated as follows:

“[28]. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provision should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

That, with respect, in my view, encompasses the simple yet complex exercise of modern constitutional interpretation.

So too, did the Constitutional Court in *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) restate:

“[47]. In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of words in question...in legal interpretation, the ordinary understanding of words should serve as a vital constraint on the interpretive exercise unless this interpretation would result in an absurdity. As this Court has previously noted in *Cool Ideas*, this principle has three broad riders:

- (a) the statutory provision should always be interpreted purposively,
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity...”.

The Court stated further:

“Thus statutory interpretation is a unitary exercise to be approached holistically-simultaneously considering the text, context and purpose. Consideration of the entire constitutional architecture is necessary in this interpretive exercise.”

In my view, the injunction could not have stated any clearer, grounded in the transformative imperative of the Constitution and in ever evolving legislative objectives and purpose.

[28] Counsel for the applicant appropriately cautioned that the decision in *Endumeni* and its progeny does not give the court license to rewrite legislation nor to substitute its own preferences for that of the legislature. He pointed to the caution stated in *Capitec v Coral Lagoon* 2022 (1) SA 100 (SCA) where at paragraph 49 the following is stated:

“[49] Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni*, nor its reception in the Constitutional Court,

most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.”

[29] In the context of these judgments it is clear that this court is enjoined by high authority, that when interpreting legislation and contracts, a purposive approach and the context of the provisions in the legislation and contract must be considered and in doing so must take into account the entire legislative scheme and contract, its import and crucially the actual and literal words used by the legislature in the statute or the parties to the contract.

[30] As already alluded to, the new Act heralded a new military system of justice and discipline from a past in which military justice failed to maintain the most basic of constitutional protections of fairness. The issue before this court relates very specifically to whether the scheme of legislation, the new Act, provides in its crudest, that an accused person must to be tried by a Military Judge sitting with assessor(s) or whether an accused under the Act may be tried by a Military Judge sitting alone and that the accused enjoys the right to elect that the court be further constituted of two assessors of which one may, on further election, be of the rank of Warrant Officer. In this regard it is necessary to consider the relevant provisions of the Act in order to accord a proper interpretation to them. The Act must also be read together with the Rules of procedure which were promulgated in terms of the Act. I should at this stage record that counsel for the applicant in argument vacillated, as was also evident in his heads of argument, as to whether the Act mandated the appointment of one or two assessors. He contended though, that a proper reading of Sections 20 and 30(24) indicated that two assessors were intended to be appointed as opposed to the reference in Section 10 where reference is made to “...an assessor.” I have therefore used the reference to assessor in both the singular and plural “assessor(s)” purely to reflect the position of the applicant.

[31] Section 1 of the Act deals with definitions and provides under 1(x)(v)(ii) that a “military assessor” means a person referred to in Sections 20(1) of the Act.

Sections 20(1) of the Act provides:

“20. (1) When military assessors have to be appointed in terms of this Act, the Director: Military Judges, or an officer referred to in section 13(2)(a) appointed by him or her for that purpose, shall appoint, subject to section 30(24)(a)(ii), two assessors from the register of military assessors maintained by the local representative of the Adjutant General.

The definition section also provides that a Court of a Military Judge means a person referred to in Section 10(1)(a) of the Act.

[32] Section 2 under Chapter 1 sets out the objects of the Act and provides:

“(2) The objects of this Act are to –

- (a) provide for the continued proper administration of military justice and the maintenance of the discipline;
- (b) create a military courts in order to maintain military discipline; and
- (c) ensure a fair military trial and an accused’s access to the High Court of South Africa.”

[33] Section 3, 4 and 5 deal elaborately with the application of the Act, conflict with other acts and extra-territorial application, respectively.

[34] Section 6(1) of Chapter 2 deals with military courts and disciplinary structures. As indicated this Chapter provides for a four-tiered system of military courts of the commanding officer as the disciplinary forum, a Court of a Military Judge, a Court of a Senior Military Judge and the Military Appeal Court as the military courts as set out above.

[35] Sections 6(2) provides that “every military court contemplated in subsection (1) shall exercise the jurisdiction and powers conferred on it by this Act”. Section 6(3) provides that a “court of appeals shall be the highest military court and a judgment thereof shall bind all other military courts”. Section 7 deals with the composition and jurisdiction of the court of military appeals and Section 8 deals with the powers of the Court of Military Appeals.

[36] Section 9 deals with the composition and the jurisdiction of the Court of the Senior Military Judge. As already stated, notwithstanding the relief sought by the applicant in paragraph 1.1 of its notice of motion Section 9 does not apply to this matter. The applicant appeared before a Court of a Military Judge as provided for in Section 10 of the Act. Section 10 appears to be at the heart of the applicant’s claim that the Court of a Military Judge had not been properly constituted as provided for in the Act. As already stated, the Section provides:

“10. (1) A court of Military Judge shall consist of –

- (a) an officer of not less than field rank and with not less than three years experience as a practicing advocate or attorney of the High Court of South Africa or three years experience in the administration of criminal justice or military justice, assigned in terms of section 14(1)(b) to act as a military judge; and
- (b) subject to sections 20 and 30(24) a military assessor”.

[37] Sections 10(1)(a) provides for the provision of a military judge and importantly Sections 10(1)(b) provides that the composition of the court is subject to the provisions of Sections 20 and 30(24) of the Act which deal with the appointment of military assessors. Counsel for the applicant contended that the reference to “a military assessor” in Section 10(1)(b) meant that a military assessor was mandated in the composition of the court by the Act and for which the appointment of assessor(s) were dealt with subject to the provisions of Sections 20 and 30(24). This construction was challenged by counsel for the respondent who pointed out that paragraph (b) of Section 10(1) subordinated the

requirement for the appointment of a military assessor to Sections 20 and importantly Sections 30(24) which amongst others provided for an election by an accused person for the appointment of two military assessors by the Military Judge. Counsel for the respondents contended that Section 10(1) cannot be read in isolation of Sections 20 and Sections 30(24.) As already alluded to, counsel for the applicant in his heads of argument and in his oral submissions contended that the provisions under Sections 20 and 30(24) in fact provided for the appointment of two military assessors as opposed to one. In an attempt to reconcile the contradictory position adopted by the applicant he contended that the election by an accused was for no more than two assessors of which one assessor may on election be a warrant officer and that the appointment of only one assessor was what he referred to as “the default position.” Needless to say, in my view the contention of a so called “default position of one assessor” is not borne out by a literal reading of the actual words and construction of the relevant provisions,

[38] Inasmuch as Section 10(1)(b) subordinates the requirements for the appointment of a military assessor to not only Sections 30(24) but also the entire provisions of Section 20 it is necessary to consider those provisions in their proper context and the reading of Section 20 together and with that of Section 30(24).

[39] Section 20 of the Act is headed Military Assessors and deals elaboratively with the appointment and what should be taken into account in the appointment of assessors in the registrar of military assessors. Importantly, the section also deals with the role and functions of assessors. It further deals with the stage at which the assessors are appointed in the proceedings, which in the scheme of the Act is at the conclusion of the pre-trial investigative process. Section 20 also sets out in detail the manner of participation by assessors in the proceedings and also with the recusal of an assessor(s) and the consequences to the proceedings where an assessor has recused him/herself, becomes unavailable or is disqualified from sitting as an assessor.

Sections 20 (1) to (4) provides as follows:

- “(1) When military assessors have to be appointed in terms of this Act, the Director: Military Judges, or an officer referred to in section 13(2)(a) appointed by him or her for that purpose, shall appoint, subject to section 30(24)(a)(ii) two assessors from the register of military assessors maintained by the local representative of the Adjutant General.
- (2) When the assessors contemplated in subsection (1) are appointed, the person who does the appointment shall take into account-
- (a) military, cultural and social environment of the accused;
 - (b) the educational background of the accused; and
 - (c) The nature and seriousness of the offence in respect of which the accused is to stand trial.
- (3) Each register of military assessors contemplated in subsection (1) shall consist of the names and parties of –
- (a) appropriately qualified officers: and
 - (b) warrant officers who can be made available for such duty.
- (4) A military assessor shall in the performance of his or her duties in terms of the Act-
- (a) be independent and subject only to the Constitution and the law;
 - (b) be impartial and without fear, favour or prejudice;
 - (c) participate in a trial or proceedings in a manner befitting a member of a court of justice: and
 - (d) not express any opinion whatsoever on any matter relating to any trial or on the finding or any sentence except in the prescribed course of the proceedings as may otherwise be required by law.”

[40] Crucially, Section 20(1) provides that; “When military assessors have to be appointed in terms of this Act... “in my view is a clear indication that there is no obligation to appoint assessor(s) when a Court of a Military Judge sits as the section provides in the clearest of language that only “when” assessors “have to be appointed...”.

Again, it is important to note that the plural of assessor is used as a clear reference to the two assessors referred to in Section 30(24) where the elections by the accused are provided for. What is even more clear is the reference to Section 30(24)(a)(ii) which provides for the appointment of two assessors from a register of military assessors. Once again, reference is made very specifically to two assessors being appointed from a register that is maintained by the local representative of the Adjudant General.

[41] So too, Section 20(2) provides “When the assessors contemplated in subsection 1 are appointed...,” which, in my view again reinforces that the appointment of assessors is subject to Section 30(24) where an election is made by the accused. Importantly, the Director: Military Judge or the officer referred to in Section 13(2)(a)¹⁵ shall take the various criteria set out in 20(2)(a)(b) and (c) into account when making the choice of assessors.

[42] Section 20(8) provides as follows:

“The record of any proceedings where a presiding judge has been assisted by military assessors shall –

- (a) in respect of the evidence adduced at the proceedings, include any explanation or instruction given to the assessors by the presiding judge in respect of any applicable rule of evidence or any other matter; and
- (b) in respect of the judgment, indicate clearly whether the findings in the respect of each material aspect of the evidence –
 - (i) are the unanimous findings of the members of the court; and
 - (ii) in the event of any member of the court making a finding of fact different to that of the other members, set out the reasons for that different finding.”

¹⁵ Only an appropriately qualified officer holding a degree in law may be assigned to a function of a senior military judge or military judge.

[43] Once again these provisions are in my view indicative that, “where a presiding judge has been assisted by military assessors”, the very appointment of assessors are not mandatory.

[44] Subsections 9, 10, 11 and 12 deals with the recusal of assessors or where an assessor becomes unavailable or is disqualified to act.

[45] Sections 20 (12) provides:

“If an assessor dies, becomes unable to act, is absent or for any reason, has been ordered to recuse himself or herself, or has recused himself or herself at any stage before the completion of the proceedings, those proceedings shall continue before the remaining members of the military court and if the finding or decision of the presiding judge differs from that of the remaining assessor, the finding of that judge shall be the finding of that court.”

[46] Once again, the indication that where one or more assessor(s) are unable to continue then the proceedings continue with the remaining members of the military court. If the finding or decision of the presiding judge differs from that of the “remaining assessor” the findings of the judge prevails. The significance of this provision is that if any or both of the assessors becomes incapacitated the proceedings continues to finality before the presiding judge without having to begin *de novo*, despite what the applicant maintained are the mandatory participation of assessors in the trial proceedings. Curiously, no challenge was brought by the applicant against these provisions. Further, it is apparent from the subsection that it is contemplated that if assessors are to be appointed, it must be two. Nowhere in Section 20 is there provision for the appointment of merely one assessor. Moreover, the appointment of only one assessor would in my view be meaningless as the views of the presiding Military Judge on all matters of fact would prevail where there is no consensus with the only appointed assessor, as with the “remaining assessor” in the event of a recusal or disqualification.

[47] Section 30 relates to proceedings in a preliminary investigation and culminates with the crucial section 30(24) that provides that upon the completion of a preliminary investigation, the presiding commanding officer must inform the accused of her /his right of election and importantly must explain the provisions of Section 20(1)(2)(3) and (4) to the accused.

[48] The proviso in Section 10(1)(b) with regard to the composition of the military court besides that of Section 20, is crucially that of Sections 30(24) which provides:

“Upon the completion of the preliminary investigation, the presiding judge, commanding officer, or recording officer shall-

- (a) inform the accused of the accused right to elect –
 - (i) to be tried by a military court consisting of a presiding judge and two assessors;
and
 - (ii) that one of the assessors shall be a warrant officer; and
- (b) explain section 20(1), (2), (3) and (4) to the accused.

[49] Counsel for the applicant contended that Section 30(24) provided no more than that an accused is to be tried by two assessors of which the election is no more than to elect that one shall be of the rank of Warrant Officer.

Section 30(24) must in my view be read in the context of the entire Section 10 and its proviso in particular subsection (1)(b) where reference is made to the appointment of “an assessor” subject to the provisions of Section 20 and Section 30(24) as part of a military court. In doing so, the legislature would, in my view, have been mindful of the provisions of Section 20 where provision is made for the recusal, or disqualification of any one of the two assessors provided for in the section. Section 10(1)(b) therefore in my view accords with an election by an accused to have two assessors of which one could very well be recused or disqualified in terms of Section 20 as a result of which one may remain (see Section 20(12)). In my view the reference to “an assessor” is entirely consistent with the provisions of sections 20 and 30(24) in the context of an election having to be made by

an accused for the appointment of two assessors (one of which could be a Warrant Officer). Contrary to the submissions by counsel for the applicant reference to “an assessor” in Section 10(1)(b) need not be “ignored” nor simply be construed as two assessors other than with reference to section 30(24) and the various subsections of section 20 that refers to assessors in the plural as opposed to a singular assessor.

[50] In my view, the provisions of Sections 30(24) with regard to the election afforded to an accused person is manifestly clear and without any ambiguity. It provides clearly that upon the completion of a preliminary investigation, the presiding judge or the commanding officer or the recording officer “shall” (or “moet” if Afrikaans is to be preferred,) peremptorily inform the accused of his right to an election – the first of which is to be made under 30(24)(1,) the right is to be tried by a Military Court consisting of a presiding judge and two assessors. In my view, the provision is crystal clear as that is where the first election arises as opposed to the imposition of two mandatory assessors into the trial proceedings. If the election is made by an accused person to be tried before a court with two assessors, the accused enjoys a further election as to whether one of the assessors should be of the rank of Warrant Officer. Moreover, sections 30(24)(2) peremptorily require of the military judge to explain the provisions of Sections 20(1), 20(2), 20(3) and 20(4) to the accused.

[51] The Rules of Procedure insofar as they relate to assessors as contemplated in Section 20(1) of the Act are found in Rule 15. Significantly Rule 15(3) provides:

“When the Director: Military Judges, or a Senior Military Judge or Military Judge appointed for that purpose by such Director appoints assessors in any particular case under section 20(1) of the Act, that Director or judge shall supply the local representative of the Adjutant General with a certificate containing the particulars of the appointed assessors.”

[52] The significance of the rule relates to the reference to the appointment of assessors in any particular case under Section 20(1) of the Act. Importantly, the rule does not provide for the appointment of assessors in **all** cases as the applicant contends for.

[53] Chapter 5 of the Rules provides for pre-trial procedures before a presiding judge. Rule 30 provides for proceedings of a military court in closed court. Rule 30(1) provides:

“A military court shall at the time and place specified in the notice of enrolment assemble in closed court and the presiding judge shall satisfy himself or herself that the assessors and other senior military judges, if any, are present and qualified to serve.”

[54] Counsel for the respondent contended, and correctly so in my view, that the rule makes it clear that the presiding judge shall satisfy him or herself that the assessors and other senior military judges, if any, are present and qualified to serve. Counsel for the respondent sought to contend that the qualification “if any” related only to the appointment of other senior military judges. That contention, in my view, was untenable as “if any” referred to both the assessors and the other senior military judges and the punctuated structure of the sentence makes that clear.

[55] Rule 36(3) provides:

“Where the accused objects to be tried by a particular judge or assessor, the judge or assessor in question shall withdraw while the objection concerned is being determined and the remaining judges shall thereupon hear the objection and any argument or evidence that may be advanced or tendered in support of or against the objection: Provided that in a case in which only one military judge is presiding, that military judge shall determine the objection.”

[56] This rule deals with where objections are raised by an accused to be tried by a particular judge or assessor and the consequences thereof.

[57] Rule 36(6) provides:

“If the objection against an assessor is upheld, the assessor shall withdraw.”

[58] Counsel for the respondent correctly submitted that Rule 36(6) accords with the provisions of Rule 30(24) where if an objection to any one of the assessors is upheld the assessor withdraws and the trial continues with “the remaining assessor” which in my view also accords to the provisions of Section 10(1)(b) where reference is made to “an assessor.”

[59] In oral argument, counsel for the applicant repeatedly contended that an accused person under the Act had no more than what he referred to as a “narrow election” as to whether or not one of the two assessors that had to be appointed should be of the rank of Warrant Officer. In support of the contention that the appointment of assessor(s) were mandatory counsel for the applicant by analogy sought to rely on the provisions of Sections 168 of the Constitution read together with that of the Superior Courts Act, 10 of 2013 relating to the composition of the bench in the Supreme Court of Appeal. Sections 168 of the Constitution provides:

- (1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.
- (2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

The relevant provisions of the Superior Courts act provides;

“Section 5(1)(a):

- (1) (a) The Supreme Court of Appeal consists of-
 - (i) the President of the Supreme Court of Appeal;
 - (ii) the Deputy President of the Supreme Court of Appeal; and

- (iii) so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President.

and Section 13(1):

- (1) Proceedings of the Supreme Court of Appeal must ordinarily be presided over by five judges, but the President of the Supreme Court of Appeal may-
 - (a) direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges; or
 - (b) whenever it appears to him or her that any matter should in view of its importance be heard before a court consisting of a larger number of judges, direct that the matter be heard before a court consisting of so many judges as he or she may determine.

Counsel for the applicant contended that the parties to an appeal in the SCA cannot choose to have their case determined by a single judge as that would be in direct violation of the constitutional and statutory mandates governing the composition of the court. He contended that in the same vein, the Act prescribed the composition of the military courts which he contended prescribed the requirement for the appointment of assessors. He submitted that it would be impermissible for parties before the Supreme Court of Appeal to waive the requirement of a panel of multiple judges and so too was it impermissible for an accused in the military court to waive the statutory requirement of the presence of assessors. He contended that safeguard ensured military justice was administered in accordance with the law rather than at the convenience of the parties concerned. Moreover he contended that the composition of a panel in the Supreme Court of Appeal was not shaped by the “whims of preferences” of the parties to an appeal and so too was the composition of a court of a military judge not a matter that could be left to the discretion of either the accused or the prosecution save in one very limited respect in that an accused could elect to have a Warrant Officer as one of the military assessors. He submitted that adherence to the statutory prescript was vital for “the integrity of the court” to be preserved and ensured that the trial process was not only fair but also perceived as such by all concerned. In that vein he contended that the presence of military assessors

like the presence of multiple judges in the Supreme Court of Appeal served what he referred to as the crucial purposes of:

1. “It ensures a diversity of perspectives and expertise in decision-making.
2. It safeguards the integrity and fairness of the judicial process.
3. It upholds the structural requirements of the justice system as envisioned by the legislature.”

[60] In effect, counsel for the applicant sought to contend that to allow the accused the election of a trial without assessors would be what he referred to “as tantamount to be permitting appellants to select a single judge of the Supreme Court of Appeal to hear its case”. He added that such a departure will strike at the very heart of the judicial process and would fundamentally alter the character of the court. In rather strange terms he contended that would “not merely bend but break the legislative intent that lay behind the prescribed composition of the court as the composition was not a mere procedural nicety but the safeguard of justice itself.” He added that the presence of assessors was not a mere convenience or choice insofar as it was a mandatory structural requirement laid down by the legislature and not open to waiver by an accused person or left to the discretion of the court. He contended that interpretation was entirely consistent with a principled approach to “court composition” seen throughout our constitutional framework and the legislation governing Superior Courts.

[61] The composition of courts under the Constitution is dealt with under Chapter 8 thereof. It specifically provides for the constitution of the Constitutional Court as consisting of a Chief Justice, a Deputy Chief Justice and nine others. Section 2(2) of Section 167 provides that a matter before a Constitutional Court must be heard by at least eight judges. As already referred to Section 168 provides that the composition of judges of the Supreme Court of Appeal must be decided by the number of judges determined in terms of an act of parliament such as is provided for in the Superior Courts Act. The composition of the High Court is likewise dealt with by the Superior Courts Act and in criminal matters in both the Superior Court’s Act and the Magistrates Courts and too in the Criminal

Procedure Act. Importantly, the appointment of assessors in criminal trials in the High Court and in the Magistrates' Courts are not entirely mandatory. In that regard it is to be noted that a Regional Court and High Court may impose the highest form of punishment on an accused person of life imprisonment without the court having, of necessity, being constituted also of assessors. The fairness of the outcome of convictions or sentences are not tainted by the lack of assessors where neither an accused person nor a court has elected to sit without assessors.

[62] Significantly, the Act provides in Sections 20(2) that "when the assessors contemplated in subsection 1 are appointed, the person who does the appointment shall take into account" the military, cultural and social environment of the accused, the educational background of the accused and the nature and the seriousness of the offence in respect of which the accused is charged. Counsel for the applicant sought to contend that the nature of the military court required an assessor to bring a military background to the proceedings. That contention simply ignored the fact that the legislature as provided for in Section 10(1)(a) for the appointment of a military judge who is an officer of not less than field rank and with not less than three years' experience or an practicing advocate or attorney of the High Court or an officer of not less than field rank and with three years' experience in the administration of criminal justice or military justice assigned in terms of Sections 14 (1)(b) to act as a military judge. Sections 14 deals with the power of the Minister in respect of assignment and 14(1)(b) provides "the Minister shall assign officers to the function.....(b) a senior military judge, military judge referred to in Sections 13(2)(a) "only an appropriately qualified officer holding a degree in law may be assigned to the functions of a senior military judge or military judge (b)(c) ...(d) ... In effect the legislature provides for an appropriately qualified military judge as an officer with a degree in law as its most basic requirement. More importantly, the accused enjoys an election to have two military assessors appointed in addition to the legally trained military judge. There is, in my view, nothing in the election that would detract from the fairness to the legal proceedings either in terms of section 35 or sections 34 of the Constitution. The election in itself, in my view, enhances the fairness afforded to an accused person in a

military court and the exercise of that election, more importantly arises only after the accused has peremptorily been informed of the right of election under Section 30(24)(a) by the military judge.

[63] More importantly, in my view is the fact that it is the accused himself or herself that enjoys the election for the appointment of assessors which in the words of counsel for the applicant would “ensure a diversity of perspectives and expertise in decision- making” if, in my view, the accused person so elects. In addition, the trial is presided over with the expertise of a qualified military judge. The choice(s) given to an accused person in my view enhances the integrity and the fairness of the judicial process contended for by the applicant.

[64] In support of the applicant's contention that the appointment of assessors was mandatory, counsel for the applicant also sought to rely on the Afrikaans text in respect of the relevant provisions of the Act.

[65] The English text of the Act was signed by the President and Sections 82 of the Constitution provides that it is conclusive evidence of the provisions of the Act.

[66] Section 82 provides:

“The signed copy of an Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.”

In this regard, counsel for the applicant referred to the views expressed of LM Du Plessis in LAWSA Volume 25(1) 2nd edition at 354 with reference to the subject of “**Constitutional Jurisprudence on Multilingualism.**” The writer contends that inasmuch as Sections 82 makes no reference to a possible inconsistency of various versions of the Act “it simply states one version of an Act (out of a possible of 11), namely the one signed by the

President will be conclusive evidence of the provisions of the Act. The explicit exclusion of an inconsistency mechanism he argued was “an implicit recognition of the intrinsic occurrence of the different versions of legislated texts. It therefore opens the door to the fullest possible development of the principles of the case law as it stands”.

[67] In his heads of argument counsel for the applicant extensively set both the English and Afrikaans versions of Sections 10, 20 and 30(24). In fact, he sought to rely on more on the provisions of the English and Afrikaans text in respect of sections 10(1) and sections 30(24). In respect of Section 10(1) he highlighted that the Afrikaans text in 10(1) refers to “‘n hof van ‘n militêre regter bestaan uit...” as opposed to the English text as “a court of a military judge shall consist of...”(my emphasis) In this regard he contended that the reference in the Afrikaans version to “bestaan uit” directly translates to “consist of” which he submitted implied an established fact about the composition of the court. He contended that inasmuch as the composition of the court was treated “as an existing and unchangeable fact” the Afrikaans wording left no room for deviation. He contended that the English version of “shall consist of” although typically understood as a mandatory directive still introduced the “possibility that compliance is something that must be achieved rather than something that inherently exists”. He therefore contended that the use of the word “shall” in English whilst prescriptive was potentially less rigid than the Afrikaans version with reference to “an existing structure.”

[68] In my view whatever nuance counsel for the applicant sought to give to the words “bestaan uit” simply ignored the fact that Section 10(1)(b) both in the English and Afrikaans texts made the composition of the court of a Military Judge , “subject to Section 20 and Section 30(24) and a military assessor” which read equally in Afrikaans “behoudens Artikel 20 en 30(24), ‘n militêre assessor”. Both the English and Afrikaans versions of the Sections 10(1)(b) qualified the composition of the court as being subject to Sections 20 and 20(24). On the contention of counsel for the applicant, the reference to the proviso in Section 10(1)(b) in either of the texts would simply have to be ignored. In my view, such an approach would be wholly impermissible and subversive of the actual

provisions of the Act. In my view the reliance on the Afrikaans wording “bestaan uit” in Sections 10(1) does not assist the applicant in his interpretation of the Act as mandating the appointment of military assessor(s).

[69] Moreover, the words “consisting of” in Sections 30(24)(a)(1) in the English text compared to that of the Afrikaans text provides the equivalence of “bestaande uit” which defeats the argument of the applicant as an “existing” composition of the court as a *fait accompli*.

[70] Counsel for the applicant also sought to rely on the Afrikaans word of “moet” in the heading in Section 30(24). He contended that the Afrikaans “moet” carried a “stronger tone of compulsion compared to “shall” as it posited an unavoidable requirement. He contended that “moet” is closer to the meaning of “must” than “shall.” and must was a strong indication that the provision was peremptory. Counsel for the applicant failed to appreciate that the direct translation of the English word “shall” into Afrikaans is that of “moet”¹⁶. In my view counsel for the applicant’s reliance on the Afrikaans version was strained and a vain attempt to find a peremptory injunction to the appointment of assessors in a military court. Moreover, other than relying on the bilingual school dictionary -Afrikaans (Pharos 2016) with regard to the meaning of the words “bestaan” there was simply no linguistic expertise provided to assist him in any of his contentions.

[71] Regrettably, in my view the reliance on the Afrikaans version was no more than a red herring to the proper interpretation of both the English and Afrikaans versions of the provisions that the applicant sought to rely upon.

[72] A further contention that counsel for the applicant sought to make in support of the interpretation preferred by the applicant of a mandatory assessor(s) was what he

¹⁶ Bilingual School Dictionary -Eng/Afr. (Pharos 2016).

regarded as the more limited election afforded to an accused person in Section 30(24)(b) as no more than one of the assessors may by choice be a Warrant Officer. That interpretation in my view, simply ignores the literal wording of the section and moreover ignores the very election given to an accused person of having two assessors participating in the proceedings.

In respect of the contention made in the heads of argument by counsel for the applicant relating to that of “waiver” and the provisions of section 30(24), he sought to rely on the maxim “*expressio unius est exclusio alterius*.”¹⁷ In oral argument he sought to suggest that the maxim was a construct of interpretation. In that regard he sought to rely on a decision of Beadle, J in an old “Rhodesian” judgment of *Taylor v Prime Minister* 1954 (3) 956 (SM), which in my view, he incorrectly contended was “on all fours” with the present matter. The core issue dealt with in that matter revolved around the proper interpretation of statutory provisions as to whether an individual had legal authority to waive a procedural safeguard established by the statute. In my view, counsel for the applicant, hopelessly failed to appreciate that the central issue dealt with in that matter was whether and when the doctrine *audi alteram partem* applied to an administrative act with regard to the issuing of a notice to have prohibited an immigrant from entering Rhodesia. In that matter, the applicant who had arrived from Derbyshire, England was detained at Salisbury on the basis of a decision taken by the Minister of Internal Affairs that refused him entry into Rhodesia as a prohibited immigrant in terms of the Immigrants Regulations Act, Chapter 16. The applicant’s contention in that matter, was that he had not been afforded an opportunity of making representations in his defense prior to the order being made and served on him and was therefore a violation of an elementary principle of justice. Despite the court remarking, that it was a rule of law that was well established in the administration of justice that administrative action should not deprive a subject of “his(sic)” liberty without giving the subject an opportunity of making representations, the court in utter deference, found that parliament had by express words or by necessary implication deprived the subject of that right. The court found though, that he could exercise that right after the decision was made. Moreover, the court dealt with the application of the maxim

¹⁷ That the mention of one thing amounts to the exclusion of another.

“expression unius est exclusio alterius” to the factual circumstances of that matter. In that regard it stated that courts of law frequently laid down that the maxim had to be applied with extreme caution and scope (the scope of the maxim had been dealt with by Innes, JA (as he then was) in the case of *Ponty v Cran* at 965). The applicant’s reliance on the application of the maxim in the decision of *Taylor*, which decision in my respectful view represented the pre-Constitutional South African jurisprudence and was rather restrictive was hopelessly misconceived and was most certainly not “on all fours” with this matter nor with our progressive constitutional jurisprudence.

[73] In his heads of argument counsel for the applicant also contended that Section 10(1)(b) of the Act “clearly stipulated” that a Court of a Military Judge “...must include two military assessors: two military assessors must be appointed for trials in a court of a military judge”. He contended that the Act “does not say there can be one assessor. There cannot be one as opposed to two assessors for a trial in a military Court of Justice. The Act is very specific and requires the appointment of two assessors.” Clearly that is not what Section 10(1)(b) states other than with regard to it being subject to the elaborate provisions of Section 20 and that of Section 30(24).

He added that, “in other words the fact that reference has been made to only one assessor and not two must be ignored”. He contended that, based on that interpretation the requirement that two military assessors had to be appointed was unambiguous and had to be followed. In his debate with the court, he accepted that the appointment of only one military assessor, if provided as such in Sections 10(1)(b), would be of little or no consequence and would amount to no more than an absurdity. The appointment of only one assessor would defeat the very purpose of the role of assessors where the Act makes provision that the findings of the presiding military judge would prevail over a “remaining assessor” where one has been recused or disqualified. Moreover, in the same breath, counsel for the applicant contended that the court “may not ignore any words” in the construction of legislation as that would defeat the intention of the legislature and submitted that none of the authorities relied upon, such as *Endumeni* provided the court with any such latitude. However, the court has not sought to ignore any of the words

preferred by the legislature in Sections 10(1)(b) other than to read it in the proper context of the entire sentence and with reference to the provisos in sections 20 and 30(24).

[74] The interpretation afforded to the provisions of the Act that the appointment of military assessors is at the election of an accused as opposed to a mandatory requirement accords with that of the authors M Nell, S Els and VE Sibiya in a recently published handbook entitled **Applied Military Justice for Practitioners**, Juta 2024. The authors preface the book as a culmination of many decades of experience in the practice and teaching of military law. Each of them occupy the rank of Lieutenant Colonel in the SANDF, are all legally qualified with extensive experience in military justice and have taught at various universities around the country. In setting out in detail the various stages of the preliminary investigation, they point out that the fifth stage "...election of assessors requires "...the recording officer must inform the accused that he will be tried by a military court consisting of a presiding judge, and that he *may* elect to have two assessors appointed, one of whom can be a warrant officer, (author`s emphasis)". In this regard they make specific reference to Sections 30(24) of the Act¹⁸. They also point out that the recording officer must explain the duties and the functions of the assessor to the accused and that the accused will be provided with the opportunity of both reading and acknowledging the election made by signing what the authors refer to as a "Section 30(24) Act MDSMA certificate"¹⁹. They refer to the MDSMA certificate as an Annexure which has arisen in practice and is similar to that which the applicant signed as evidenced and attached to the founding affidavit (Annexure FA1);

¹⁸ Chapter 4: Pre-Trial Procedure and the Gathering of Evidence, 4.6.4.1.

¹⁹ Applied Military Justice for Practitioners, M Nel et al, Section (v) Stage 5: Election of assessors. "See s 20(1) – (12) of the MDSMA read with rule 15 of the Rules of Procedure. See the overleaf of Annexure 4-9. The recording officer can read from this document when explaining the right to choose assessors."

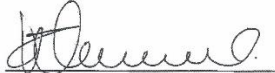
CERTIFICATE ITO SECTION 30(24) MDSMA

1. I, the undersigned, 97019186MC LIEUTENANT (SA NAVY) NELISIWE PATIENCE MOAGI, NAVAL BASE SIMON'S TOWN, the recording officer in the preliminary investigation against the accused 81046567MC CAPTAIN CHARLES HENRI EMILE MARCHARD, SAMHS, SA NAVAL COLLEGE certify that I have informed the accused of his/her rights of election in terms of Section 30(24)(a) MDSMA as read with Section 9(1) or 10(1) MDSMA.

2. The accused elects:

☐	To be tried by a military court consisting of a presiding judge and two assessors
☐	That one of the assessors shall be a Warrant Officer
Nf X	To be tried by a military court consisting of a presiding judge alone

3. Section 20(1), (2), (3) and (4) MDSMA were explained to the accused.


SIGNATURE OF ACCUSED

05/06/2018.
DATE


SIGNATURE OF RECORDING OFFICER

05/06/18
DATE

The authors also point out that “in the event when an accused elects to have assessors at a military trial the person who does the appointment with reference to the legislation must consider the military, cultural and social environment of the accused, the educational background of the accused and the nature and the seriousness of the offences in respect of which the accused is to stand trial.”²⁰ Importantly, they also highlight that a military assessor must perform her/his duties in an independent and impartial manner. They further point out that the role of the military assessor is similar to that of an assessor in lower civilian courts with reference to the provisions of Sections 93 tier 1 (1)(a) of the

²⁰ See above.

Magistrate's Court Act 32 of 1944²¹ . They point out that a military accused may elect to have assessors in any matter before a military court where a preliminary investigation was held. That, they contend is very different from a civilian accused in a lower court who will only have such a right in the event of being charged with the offence of murder²².

[75] Counsel for the respondents referred to the decision of Ranchod, J (writing on behalf of the full court) in *Minister of Defence and Others v Power Mandla Mbambo* 2017 SA Case No: A358/2015. The matter related to an appeal against the decision in which the court a quo granted the respondent condonation for the late bringing of a review application and in which the application was upheld on the merits. In that matter the respondent likewise held the rank of Captain in the South African National Defense Force and had been dismissed after a hearing before a military judge on a charge of intimidation as well as assaulting a superior officer. The proceedings were conducted in terms of the Act.

[76] Amongst the issues to be determined in the matter were; whether condonation should have been granted for bringing of the review application some eleven years out of time, and whether a preliminary investigation as contemplated in the Act had been held prior to the trial in the military court. Importantly, the third issue identified by the court for determination was whether the fact that the military trial judge sat without assessors was permissible under the Act, alternatively, whether the military trial without assessors was per se unfair.

²¹ See above. Magistrate may be assisted by assessors -

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-
(a) before any evidence has been led; or

²² See above. See s 93ter(1)(a) of the Magistrates' Courts Act 32 of 1944. However, the military accused may elect to have assessors in any matter before a military court where a PI was held. This is very different from the civilian accused in lower courts that will only have such a right in the event of a murder case.

[77] Of relevance to this matter was the findings of the court at paragraph 40 where it stated:

“In terms of s32(4)(d) of the Act military assessors are appointed only ‘where applicable’ and not inevitably. Hence, in the military context, a different set of values inspired by the imperative for military discipline apply and therefore trial before assessors is not a condition or requirement for a fair or just trial”. (footnotes omitted as it referred to paragraphs dg 84 of the decision of the Constitutional Court *Legal Soldier (Pty) Ltd v Minister of Defence* already referred to above).”

[78] In respect of its contention with regard to the appointment of military assessors the Court held that it was common cause that the trial had taken place without the assistance of military assessors. It was also apparent from the respondent's founding papers in that matter that it was not his case that he had been deprived of his right to have had assessors preside with the judge in the trial nor was his case based on a complaint that his trial was unfair because it took place without the assistance of military assessors. Those were not the issues in the case that the SANDF had been called upon to meet.

[79] However, the Appeal Court pointed out:

“[49] The respondent simply alleged that his military trial took place without a military assessor, apparently on the supposition that such a trial of an officer with the rank of Captain was a nullity per se. His complaint on the papers was not, as the court a quo assumed, that the military judge had the legal duty but failed to inform him of his right to elect to be tried before a court composed of a judge and assessors. In this, the court a quo, with respect, departed from the wrong premise.”

[80] Counsel for the applicant contended that the issue in that matter really related to what was said by the court in paragraph 49. To the contrary, however, it is clear in my view that the court, albeit only having dealt with the provisions of Section 32(4)(d) of the

Act arrived at the view that military assessors did not inevitably have to be appointed, but only “where applicable.” In this regard, Section 32(4)(d) provides;

“A notice of enrolment contemplated in subsection (3) shall state the particulars-

- (a) ...
- (b) ...
- (c) ...
- (d) Where applicable, of the military assessors.”

[81] In my view the finding of the court even on that very limited basis was correct and remains persuasive authority for this court.

[82] In the paper by Captain A.E. Tshivhase, referred to above²³, he critically examines whether the courts of military judges meet the standards of independence. As a Captain in the SANDF who was also formerly a member of the regular force where he served as a military defence counsel and previously as a part-time military counsel, he proffered some very interesting insights with regard to the operations of the court and his concerns with regard to its independence and makes various suggestion with regard to dealing with the concerns raised. In dealing with the Court of a Senior Military Judge and the Court of a Military Judge in Sections 9 and 10 respectively, he remarks in a footnote²⁴ in respect of Section 9(1)(a) “military assessors are generally appointed at the instance of an accused person. The military assessor system is rarely used in practice.” Likewise, in respect of the provisions of Sections 10 he pointed out that a Court of a Military Judge is comprised of a judge of less seniority and experience and is composed of an officer of not less than field rank having appropriate legal experience, “in addition to a military

²³ The paper by Captain A.E. Tshivhase is also referenced in the bibliography in the Handbook by Nel and Others.

²⁴ Military Discipline Supplementary Measures Act [No 16 of 1999] (SA) s 9(1)(a). Military assessors are generally appointed at the instance of an accused person. The military assessor system is rarely used in practice.

assessor if the accused request one” and here specifically referred to the provisions of Sections 10(1)(a), and (b) of the Act²⁵.

[83] In his heads of argument, counsel for the applicant contended under the heading “Constitutional Values and Public Policy” that the appointment of assessors were not merely procedural safeguards, but were critical to upholding the constitutional right to a fair trial. In this regard, he referred to the decision of *Beadica 231 CC v Trustees for the Oregon Trust* 2020 (5) SA 247 (CC) where reference was made to *Barkhuizen v Napier* 2007 (5) SA 323 (CC), that courts must balance the various constitutional rights and values to ensure that proper procedural justice is not sacrificed for expediency. He contended that the respondent’s “flexible interpretation” would erode these fundamental rights by depriving military personnel of the expertise that assessors contribute to trials. In this regard he appears to be referring to the provisions of Section 39(2) of the Constitution which provides that when interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and the objects of the Bill of Rights. That, notwithstanding the applicant’s disavowal of raising any constitutional issue with regard to the interpretive determination in the matter. Nonetheless as already stated, the court is bound by the provisions of the Constitution in section 39(2). The applicant however made no serious contention that the provisions of Sections 34 under the Constitution of access to the courts were violated in that an accused person will not receive a fair public hearing before “a trial or where appropriate another independent and impartial tribunal or forum.” The applicant does not contend that a trial without the appointment of military assessors would violate his right to a fair trial. Nor, do I think could he do so with any seriousness or merit in as much as he enjoyed the election to the appointment of assessors which as a matter of fact he

²⁵ Less Seniority and experience are required for the Court of a Military Judge. It is composed of an officer of not less than field rank having appropriate legal experience, in addition to a military assessor if the accused requests one. As in the case of the Court of a Senior Military Judge, the appointee must hold a degree in law, be appropriately qualified and fit and proper. The Court of Military Judge has jurisdiction to try any person subject to the MDC other than an officer of field or higher rank and may not try murder, treason, rape, culpable homicide, or any offence under sections 4 and 5 of the MDC. It may, on conviction, sentence the offender to any punishment referred to in Section 12 of the MDC, subject to a maximum sentence of imprisonment for a period of two years.
Military Discipline Supplementary Measures Act [No 16 of 1999] (SA) s 10(1)(a)(b).

exercised. Moreso, neither is there any serious contention that the trial before a military judge sitting without assessors is in violation of Section 35(3) of the Constitution. There is, in my view, nothing, per se, unconstitutional about a military judge sitting alone without assessors that would lead to the conclusion of an unfair trial. More importantly, given the very fact that the accused person enjoys a discretion under Section 30(24) to make an election as to whether she or he would want the appointment of two assessors at the trial and also an election that one should be of the rank of Warrant Officer. in my view, fortifies the fairness of the proceedings. The contention by the applicant also ignores the very firm injunction to the Military Judge at the end of the pre-trial investigation to explain to an accused his right of election and, importantly, the role of an assessor as set out in Section 20(1), (2), (3) and (4) all of which would properly inform of him or her of the right of election and the role and responsibilities of assessors in the proceedings .

[84] Counsel for the applicant further contended that a contextual reading of the Act and in particular Section 20 that outlined the procedures for the appointment of assessors as to what he regarded was the emphasis of the integral role of assessors in military trials. He pointed out that inasmuch as the context had to be considered when interpreting the statutory provisions he sought to rely on the views expressed by Khampepe, J in *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) in support of the contention that the system of military justice confirmed that assessors were not merely optional, but were a critical component to ensuring a fair trial. As already indicated no case had been made by the applicant in support of the interpretation that a court sitting without military assessors at the election of an accused person amounted to an unfair trial. If anything, the option provided to an accused, fully informed on the record by a Military Judge of his/her rights and the nature of the role of assessors and so certified by the accused her/himself, in my view, enhanced the fairness of the election to appoint, military assessors and an affirmation of an accused's right of choice.

[85] In reliance on the decisions of the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) at [39] counsel for the applicant contended that the interpretive exercise of the relevant provisions required of the Court to consider the underlying goals of the statute. He contended that the purpose of Section 10 of the Act was to ensure that military justice benefited from the expertise of military assessors who he claimed, brought vital insights into specific military issues. Interestingly, in this matter, there were no specific military issues at hand other than the fact that the applicant had been charged with and convicted of having sexually abused young female recruits in the South African Navy, more so, that he had conducted himself with impunity and with the abuse of his position of authority and as a senior male nurse at that. Counsel for the applicant further contended that if a trial proceeded without assessors, it would undermine the purpose of the provisions of Section 10 which he contended safeguarded fairness and informed decision making in military proceedings. That, in fact, is in my view, exactly what Sections 10 read together with the proviso's of Section 20 and importantly Section 30(24) provided for in as fair a procedure as possible, through an informed decision-making process and importantly an election by an accused person as to the composition of the military court.

[86] Counsel for the applicant further contended that a purposeful interpretation did not license "judicial overreach" and in this regard referred to the decision of the Supreme Court of Appeal in *Capitec Bank Holdings Ltd v Coral Lagoon Inv 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) where at paragraph 26 the following is stated:

"Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."

[87] In support of this contention, counsel for the applicant contended that a court should not alter the clear wording of the statute under the guise of a purposive interpretation and more importantly the court was bound to interpret the text "as it stands

without reconstructing it to fit a perceived or desirable outcome". In the same breath he contended that Section 10(1)(b) explicitly required the presence of military assessors and the court "cannot interpret this requirement away in the interest of expediency and perceived fairness". In my view counsel for the respondent again failed to appreciate the full context of the interpretive process and the giving of expression to the election of an accused person in a military trial, which in my view does not in any way amount to expediency nor a reconstruction of the provisions of Section 10 to fit what he referred to as a perceived or desirable outcome. In my view, the wording of the statute in Section 10(1)(b) is perfectly clear and does not allow for any ambiguity other than a reading of it in its proper context with the very provisions referred to therein, Section 20 and Section 30(24).

[88] Again, counsel for the applicant resorted to the claim that the respondents had failed to adopt what he referred to as a "unitary exercise of interpretation" in that an assessor could be dispensed with by an accused and claimed that the respondent had simply misread the interplay between text, context and purpose and again referred to the authorities of *Capitec* and *Endumeni*, (above). Counsel for the applicant yet again incanted that the text "mandated two assessors" and contended that the context supported the necessity of assessors for fairness in military courts which he claimed, the purpose was, to ensure justice within the unique framework of military discipline. In this regard, he again contended that an interpretation that allowed for an accused to proceed without an assessor(s) undermined the unitary approach and defeated the purpose of the legislation where he contended that the purpose of Section 10 was to ensure that military justice benefited from the expertise of military assessors. In my view, there is nothing in the interpretation sought by the respondent that the appointment of assessors was other than through an informed election by an accused that in any way undermined the purpose of the legislation, nor that the framework of military justice, could not be achieved where an accused person elected not to have military assessors preside in the proceedings over him or her. In my view and consistent with the expressed views in both the matters of *Freedom of Expression Institute* and *Legal Soldier*, referred to above, both

the structure and content of military justice must conform to the rigours of the Constitution and does not create a separate system of justice. History, in my view, is replete with a well-founded skepticism and experiences of many countries of unique forms of “military justice” and the expediency of its use. The new Act harmonizes justice in the military context with that of justice under the Constitution.²⁶

[89] Counsel for the applicant in his heads of argument also dealt at length with what he contended were the broader implications and significance of the court’s interpretive ruling on military justice. The court is particularly mindful of the implications of any interpretation a court prefers in the interpretation of statutory legislation and what its consequences might or could be. The law makes adequate provision therefore. The interpretation of provisions of a statute is arrived at by a court after having considered the text and in application of the relevant law, the application of the canons of interpretation such as the text, the context and purpose of the provision(s) within the overall statute and importantly that the interpretation must promote the spirit, purport and objects of the Bill of Rights.

[90] In my determination of the interpretation, I am more than convinced in upholding the preferred interpretation sought by the respondent, having considered, and regrettably, in almost tedious detail, the provisions of the Act which in my view supports the interpretation that an accused person in military court proceedings pre-eminently enjoys an election for the appointment of assessors.

[91] Having determined the interpretive issue, the application to set aside the proceedings of the military court must fail. The applicant has in such event reconciled himself to his fate in the findings of the Court of Appeals, which confirmed his conviction

²⁶ See the useful and very insightful views expressed by the authors Nel and Els in the first chapter headed INTRODUCTION TO SOUTH AFRICAN MILITARY JUSTICE SYSTEM of the Handbook on meaning of military justice and military law, pages 1-45 .

and sentenced him to cashiering²⁷. I am acutely mindful that the challenge raised about the constitutionality of the sentence of cashiering was abandoned by the applicant and specifically where such sentence takes place in an open and ceremonial parade that could lead to a violation of the dignity of a convicted person. Moreover, the court had not heard any substantive argument on the issue. I must, however, record that I tentatively share the concern raised by the applicant. A public cashiering before his unit in the military context harkens, in my view, to some of the most backward practices of medieval England and has no place in a modern constitutional democracy. It does not, in my view, vindicate nor bring any solace to the victims of a convicted person and most certainly does not enhance the esteem and discipline of a modern Defence Force. In my view, the concerns initially raised by the applicant on that score were not entirely without merit. This view does not detract from the seriousness of the offences of which the applicant was convicted of, nor from the fact that he abused his position with impunity and more importantly the considered censure imposed by the Court of Military Appeals. Nonetheless, I expect that the respondents would in carrying out the sentence of cashiering, do so with due regard to the dignity of the applicant.

[92] In the result and save for the concerns raised by the court about the sentence of a public and ceremonial cashiering, the following order is made:

The application is dismissed with costs, including the costs of two counsel where so employed, save for the costs tendered by the respondents for the postponement of the hearing of 30 May 2024. All costs of counsel are to be recovered on scale C.

VC SALDANHA

JUDGE OF THE HIGH COURT

²⁷ No doubt in doing so the respondent is enjoined by the Constitution to ensure that such sentence takes place without undermining the dignity of the accused, while at the same time ensuring that military justice and discipline is maintained.