CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/01

MINISTER OF DEFENCE	Appellant
versus	
ANDRIES DIPHAPANG POTSANE	Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Amicus Curiae

Case CCT 29/01

LEGAL SOLDIER (PTY) LTD	First Applicant
SOUTH AFRICAN SECURITY FORCES UNION	Second Applicant
MOSUWA SAMUAL HLONGWANE	Third Applicant
NORMAN YENGENI	Fourth Applicant
LINDIWE WELCOME MATI	Fifth Applicant
JOHANNES SOMENDI MAHLANGU	Sixth Applicant
versus	
MINISTER OF DEFENCE	First Respondent
CHIEF: S A NATIONAL DEFENCE FORCE	Second Respondent
DIRECTOR: MILITARY PROSECUTIONS	Third Respondent
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent

Heard on : 23 August 2001

Decided on : 5 October 2001

JUDGMENT

KRIEGLER J:

[1] The first case (*Potsane*) is an appeal by the Minister of Defence (the Minister) against a judgment and order in the Free State High Court upholding a constitutional challenge to an aspect of disciplinary proceedings in a military court.[1] The other case (*Legal Soldier*), presenting a similar challenge, started in the High Court in Pretoria by way of motion proceedings. These were then stayed to allow an application to this Court for direct access to pursue the constitutional complaint here.[2] Although there are differences between the two cases, there is an

1 In terms of s 172(2)(d) of the Constitution "[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court . . .".

2 Section 167(6)(a) permits such access in the following terms: "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court . . . to bring a matter directly to the Constitutional Court".

underlying constitutional point common to both and for this reason they were argued together in this Court.

[2] The common constitutional point is whether the provisions of the Military Discipline Supplementary Measures Act 16 of 1999 (the Act) conferring authority on military prosecutors to institute and conduct prosecutions in military courts are to be struck down for their inconsistency with the provisions of section 179 of the Constitution (section 179). This section creates the office of the National Director of Public Prosecutions (the NDPP) and governs its powers and functions. The respondent in *Potsane* and the applicants in *Legal Soldier* (collectively referred to as "the soldiers") contend that section 179 invests the NDPP with exclusive prosecutorial authority, which is infringed by the competing authority conferred on military prosecutors by the Act. According to the argument, prosecutions in military courts should be conducted by or under the authority of the NDPP. The learned judge in *Potsane* encapsulated the point thus:

> "The applicant's case is that the wrong agency is prosecuting him. He claims that the director of military prosecutions has no constitutional authority to prosecute him."

[3] There is a second point. It is whether the provisions of the Act that are impugned for inconsistency with section 179 are not also to be struck down by reason of their unjustifiable

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Rule 17 of the Rules of the Constitutional Court prescribes the ways in which such an application can be brought before the Court.

infringement of the equality rights guaranteed by section 9 of the Constitution. This point is not raised on behalf of the applicants in *Legal Soldier* and was only peripherally considered by the High Court in *Potsane* as an additional ground for invalidating the impugned provisions. It presents its own discrete questions and can best be addressed after considering the primary question relating to section 179.

[4] The narrow focus of both of these points should be noted. It is not the principle of a separate military justice system with jurisdiction to try soldiers and punish them (for both military and civilian transgressions) that is being questioned; nor is it the hierarchical structure of military courts and appellate tribunals created by the Act. The soldiers do not contend that it is constitutionally impermissible to establish such military courts. It should therefore be remembered that the constitutional challenge here is directed at only one component of the military justice system, namely the prosecuting branch. Indeed, counsel for *Legal Soldier* accepted in argument that there could be a separate structure to deal with military prosecutions and having the power to prosecute offences both inside and outside South Africa. The only issue was whether this structure should be answerable to and follow the directives of the NDPP or those of the director: military prosecutions. Even within that restricted context the enquiry is limited. It is whether the sections of the Act conferring prosecuting authority on the military prosecution system are constitutionally offensive because they (a) trespass on the jurisdictional terrain of the NDPP and (b) unjustifiably deny soldiers their equality rights guaranteed under section 9 of the Constitution.

[5] In *Potsane* the High Court found that sections 13(1)(b), 14(1)(a) and 22 of the Act

conflicted with the Constitution to the extent that they permitted military prosecutions for civilian offences committed by soldiers in South Africa. The court accordingly struck down these provisions and stayed a part-heard military prosecution against Rifleman Potsane on disciplinary charges.[3] These sections in essence establish the military prosecuting authority, provide that it be headed by a director: military prosecutions and vest the latter with the power to institute, conduct and discontinue military prosecutions on behalf of the state and to determine and direct prosecution policy. To the extent here relevant they read as follows:

> "**13. Assignment of functions.** — (1) Only an appropriately qualified officer holding a degree in law and of a rank not below that of colonel or its equivalent, with not less than five years appropriate experience as a practising advocate or attorney of the High Court of South Africa, or five years experience in the administration of criminal justice or military justice, may be assigned to the function of —
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> (a) . . .
>
> (b) Director: Military Prosecutions.
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> . . . .
>
> **14. Minister's powers in respect of assignment.** — (1) The Minister shall assign officers to the functions —
>
> (a) at the level of Director referred to in section 13_(1).

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[3] It is a matter for comment that the prosecution in the military court concerned three peculiarly military offences, namely disobeying a lawful command, insubordination and conduct to the prejudice of military discipline. The power to prosecute in a military court for civilian offences (styled "public offences" by the learned judge) was therefore not directly in issue before the High Court. Nor is it clear how the finding that military prosecutions for *civilian* offences were constitutionally forbidden, could result in an order staying the prosecution for *military* offences. Inasmuch as this Court is concerned with the broader issue of the constitutionality of the impugned provisions in relation to all military prosecutions, the effect of this ostensible anomaly need not be pursued.

. . . .

22. Functions, direction and control of military prosecution authority. — (1) Prosecutions in any military court shall be conducted, and the prosecuting authority shall be exercised, on behalf of the State.

. . . .

(3) The Director: Military Prosecutions —

(a) shall institute and conduct prosecutions on behalf of the State;

(b) shall carry out all necessary functions incidental to instituting and conducting prosecutions, including the determination of whether or not investigations are complete; and

(c) may discontinue prosecutions.

. . . .

(6) The Director: Military Prosecutions shall, subject to the approval of the Chief of the South African National Defence Force and after consultation with the Secretary of Defence, determine prosecution policy and issue policy directives which shall be observed in the prosecution process, and shall exercise the powers and perform the duties in respect of prosecution policy that may be determined in this Act or any other law."

[6] On appeal in this Court, the Minister supported by the NDPP as *amicus curiae*, contended for the constitutional validity of the Act and disputed the findings in the High Court.

[7] *Legal Soldier* started in the High Court as a challenge to the constitutionality of all military prosecutions under the Act. The third to sixth applicants are soldiers who have come up against the military justice system on charges of both military offences and ordinary common law crimes. They are policyholders of the first applicant, a short term insurance broker brokering legal assistance to members of the South African National Defence Force (SANDF), and members of the second applicant, a trade union. While the case was still pending the applicants became aware that substantially the same constitutional challenge was due to be argued before

this Court in *Potsane*. They therefore decided to apply for direct access so that the two matters could be heard simultaneously. Although the application was brought late, the applicants were granted leave to file their papers; the Minister responded and a consolidated hearing was held. The question of direct access being bound up with the prospects of success on the substantive constitutional challenge, the argument in *Legal Soldier* concentrated on the merits of the case.

[8] This procedure was both convenient to the parties and helpful to the Court. The circumstance that the two cases reached this Court along materially different lines was of no consequence; nor was the fact that the order in *Potsane* related specifically to civilian offences whereas *Legal Soldier* concerned both civilian and military offences. On the contrary, as the cases turn on the same underlying constitutional point the additional argument presented on behalf of the applicants in *Legal Soldier* added significantly to the debate.

[9] As for the intervention by the NDPP as an *amicus*, the argument presented on his behalf was helpful, not only for adding to the debate but for contributing a different perspective. This was particularly important. The basic contention on the part of the soldiers in both cases was that the Act, in breach of the Constitution, purported to authorise military prosecutors to trespass on the exclusive domain of the NDPP. Although the contention was one of constitutional law on which this Court would have to arrive at its own conclusion, it was valuable to hear from the NDPP what the attitude of that office was – the more so as oral argument in support of the submissions on behalf of the NDPP was presented by his national deputy, Dr D'Oliviera, who has extensive managerial experience in the country's civilian prosecution establishment.

[10] The Act, containing not only the statutory authority for the impugned powers of military prosecutors but a whole new system of military justice, was enacted in order to harmonise the country's military justice system with the new culture of constitutionalism. While it was being drafted, a full bench of the Cape High Court[4] struck down key provisions of the previous system of military justice.[5] Foundational to the judgment was that courts martial lacked the essential attributes of independence and legal training necessary for them to pass muster as "ordinary courts" for the purposes of a fair trial as required by section 35(3)(c) of the Constitution.[6] Mindful of these strictures, the drafters of the Act made a clean break with the past, establishing a radically different military court system "to provide for the continued proper administration of military justice and the maintenance of discipline".[7] The emphasis shifted sharply from an essentially military system with forensic trappings to a system far closer to the ordinary criminal justice process. Whereas previously the judicial and prosecutorial roles in military prosecutions and reviews had been fulfilled by military officers, without their necessarily having any legal training and acting as soldiers within their lines of command, the Act introduced an hierarchical system of courts staffed by legally trained military officers and, at the higher levels, presided over and even wholly staffed by fully fledged high court judges.

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4 See *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (C); 1999 (3) BCLR 261 (C).

5 The Defence Act 44 of 1957 and the First Schedule thereto, the Military Discipline Code (MDC) governing the system of courts martial. The provisions found to be unconstitutional were ss 104 ─ 112 of the Defence Act, ss 56, 57, 59, 60, 67, 71, 73 of the MDC and rules 38 ─ 96 of the MDC's rules.

6 Section 35(3)(c) provides as follows: "Every accused person has a right to a fair trial, which includes the right . . . to a public trial before an ordinary court".

7 Section 2 of the Act.

[11] Although the statutory provisions currently subjected to constitutional challenge are those introduced by the Act, the challenge assails not only its particular provisions but would strike at any statutory enactment that vested prosecuting authority in military prosecutors. Such authority already existed under the previous system. It was therefore not the shift in emphasis heralded by the Act that gave rise to the objection but the very existence of a system whereby cases in military courts are conducted by prosecutors that are not under the control of the NDPP. Technically, however, the challenge is correctly couched as targeting the enabling sections of the Act.[8]

[12] The source of the challenge is the bland statement with which section 179(1) opens:

> "There is a single national prosecuting authority in the Republic . . . consisting of . . . [the NDPP]".

The learned judge in the Free State High Court subjected these words to careful analysis, identifying and then dissecting a range of possible meanings semantically, contextually and teleologically. He ultimately concluded that the correct construction to put on the

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[8] It is a matter for debate whether ss 13(1)(b) and 14(1)(a) are really part of the enabling statutory machinery. Is it not s 22 alone that is in contention? This is the section that prescribes the powers, functions and control of the military prosecuting authority said to conflict with those of the NDPP. For reasons that will become apparent later, it is unnecessary to come to any firm conclusion on this point.

words used was a straight-forward one. Moreover, on that plain reading the conclusion was really ineluctable. This was the core of the learned judge's reasoning. The words "There is" are in the imperative voice, i.e. they command that "there shall (or must) be"; and "single" means "sole" or "one and only". Thus the subsection demands no more and no less than that there be one and only one prosecuting authority in the land namely the NDPP. In establishing a military prosecution structure empowered to prosecute independently of the NDPP, the impugned provisions of the Act are therefore in conflict with these opening words of section 179(1). What they purport to authorise, the Constitution expressly forbids.

[13] This line of reasoning is essentially echoed in the arguments on behalf of the soldiers in both cases, although the specific sections of the Act targeted by counsel in *Legal Soldier* include some not struck down by the learned judge in *Potsane*.[9] Nothing turns on this difference however. The basic contention remains that on a plain reading of section 179(1), the very system of a separate military prosecuting authority is constitutionally unacceptable. Consequently Parliament, in passing the offending statutory provisions creating a military prosecuting authority functioning parallel to but separate from and independent of the NDPP, exceeded the limits imposed on its legislative powers by the Constitution. Moreover, section 4(1) of the Act, which provides that in the case of a conflict between the Act and the provisions of any other law the Act prevails, means that policy decisions of the director: military prosecutions purportedly trump the exclusive authority afforded the NDPP by section 179(1).

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9 The additional provisions challenged are s 4(1), 13(2)(d) and 14(3)(a). It is unnecessary to quote them.

This, so the argument runs, is clearly impermissible.

[14] The argument on behalf of the soldiers then looks at the rest of section 179 and its role within the framework of the Constitution as a whole. The section reads as follows:

> "**179. Prosecuting authority.** — (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of —
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> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
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> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
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> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
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> (3) National legislation must ensure that the Directors of Public Prosecutions —
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> (a) are appropriately qualified; and
>
> (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
>
> (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
>
> (5) The National Director of Public Prosecutions —
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> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
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> (b) must issue policy directives which must be observed in the prosecution process;
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> (c) may intervene in the prosecution process when policy directives are not complied with; and
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> (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the

following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation."

[15] Counsel for the soldiers submit that the very inclusion of this section in the Constitution is significant; it ensures that at the head of the country's prosecuting authority there is a single, non-partisan presidential appointee with the power to institute prosecutions on behalf of the State and responsible for formulating prosecution policy. Therefore it is unthinkable that there can be another, entirely independent organ of state with authority to formulate policy and institute prosecutions on behalf of the State, even if only in the context of military courts. The consequence is that there are two separate prosecuting authorities with overlapping and possibly conflicting jurisdictions in respect of offences committed by soldiers. Members of the SANDF can be tried in the civilian courts for both common law crimes and for military offences.[10] They can also be tried in military courts for military offences and for most common law crimes.[11] Consequently there is a possibility that the civilian and military prosecuting authorities may vie for precedence in prosecuting the same suspect for the same crime. This, so the Free State High

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10 In terms of the Defence Act 44 of 1957 read with the First Schedule thereto and the Military Discipline Code (MDC), a large number of military offences is created, offences relating to maintaining a disciplined military force, typically mutiny, absence without leave, desertion, disobeying lawful commands and the like. There is protection against double jeopardy as between the two court systems.

11 The exceptions are treason, murder, rape and culpable homicide.

Court held and counsel for the respondent in *Potsane* argued in this Court, was a significant pointer to the conclusion that the impugned provisions were inconsistent with section 179.

[16] Also, counsel pointed out, there was a clear conflict between section 179(5) of the Constitution and section 22(6) of the Act, the one vesting the NDPP with the power to formulate prosecution policy and the other vesting such authority in the director: military prosecutions. Moreover, when exercising this power the NDPP had to consult the Minister of Justice while his military opposite number had to consult the Chief of the SANDF and the Secretary of Defence. Once again, so it was submitted, the anomaly showed that there could not validly be an authority such as contemplated by the impugned sections.

[17] The Minister and the NDPP, for their part, also contend for a plain — but entirely different — construction of the opening sentence of section 179(1). According to their interpretation of section 179 — as a whole and the vexed opening sentence in particular — it has nothing to do with the establishment of a separate prosecuting authority for military courts. They, too, found their argument on a plain reading of the opening sentence that "[t]here is a single national prosecuting authority in the Republic . . .". According to their interpretation, however, the sentence should be understood in its broader historical and textual context. They submit that the purpose of including section 179 in the Constitution and the meaning of the opening sentence must be seen against the historical backdrop of the large number of attorneys-general serving in the country in the apartheid era of balkanisation. On their reading, section 179 was intended to cut down the number of existing attorneys-general, to bring order and direction to the national prosecutorial authority in a structured professional hierarchy. It does not regulate

the exercise of other prosecutorial functions outside that authority. "Single" is therefore to be contrasted with the multitude of attorneys-general existing when the Constitution came into force. Attention was drawn to a number of analogous expressions of a desire to bring together under a single umbrella several organs of state that had been in existence under the previous regime, for instance for "a single Public Service Commission",[12] "a single defence force" and "a single police service".[13] Seen in the context of these parallel provisions with the same unifying intention, the meaning of section 179 is, they submit, clear. Whereas before there were many prosecuting authorities for diverse jurisdictions, now there will be one.

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12 See s 196(1) of the Constitution.

13 Section 199 of the Constitution, headed "**Establishment, structuring and conduct of security services**", commences as follows:

> "(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
> (2) The defence force is the only lawful military force in the Republic.
> (3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation."

[18] The point of departure of the argument on behalf of the Minister and the *amicus* is the regime under the Attorney-General Act[14] which was introduced in 1992 to replace sections 3 and 4 of the Criminal Procedure Act.[15] This Act and the criminal codes that previously governed the role, function and powers of attorneys-general, provided for an attorney-general for each of the then provincial divisions of the Supreme Court in "white" South Africa[16] while each of the "independent" or "self-governing" territories also had an attorney-general. In terms of section 5 of this Act attorneys-general conducted prosecutions in the name of the State in their respective jurisdictions. They enjoyed substantial independence, though they were accountable to the Minister of Justice who annually tabled their reports in Parliament.[17] It is evident that the drafters of section 179 had the Attorney-General Act before them. Several of its provisions are echoed and the basic structure is mirrored.

[19] The most important change brought about by section 179 — and one crucial to the argument for the Minister — is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various attorneys-general, whose activities such Minister coordinated and to whom they reported. What section 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the

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14 Act 92 of 1992. It was repealed by the National Prosecuting Authority Act 32 of 1998, which gave effect to the requirements of subsections 179(3), (4)and (6) for national legislation.

15 Act 51 of 1977.

16 Section 5(1) envisaged attorneys-general being appointed to designated areas of jurisdiction. These in practice corresponded with the jurisdictional boundaries of the several divisions of the Supreme Court. The Witwatersrand, although not a provincial division, had its own attorney-general.

17 Section 5(6) of the Attorney-General Act.

head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President. This change, so it is argued, is what the opening words of section 179(1) describe.

[20] The argument on behalf of the Minister also relies on the use of the word "national". It does so in two ways. First it is pointed out that this word tends to support the construction that the intention was to do away with the multitude of "national" heads existing in the various "independent" and "self-governing" territories. There is only one nation now, as proclaimed in the opening words of section 1 of the Constitution,[18] and there is a single head of its prosecuting authority. In the second place the argument is that the use of the word "national" recognises and preserves the pre-constitutional arrangement whereby there could be private prosecutions and prosecutions by municipalities and other organs of state under special statutory authority.[19] Therefore, in contradistinction to these other specially authorised prosecutors, the words "national prosecuting authority" denote this authority empowered to prosecute generally and nation-wide in the name of the State.

[21] The Minister and the *amicus* also draw attention to the demand of section 200(1) of the Constitution that ―

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18 "The Republic of South Africa is one, sovereign, democratic state . . .".

19 See ss 7 and 8 of the Criminal Procedure Act.

"[t]he defence force must be structured and managed as a disciplined military force."

This, they say, inevitably contemplates the existence of a military discipline code and a mechanism for enforcing its prescripts ─ without these a disciplined military force is unattainable. And a mechanism for enforcing a military code of conduct necessarily entails a prosecutorial component. Counsel for the soldiers counter that this argument misses the point. Their objection is not to military discipline, its enforcement or a prosecutorial enforcement arm. What they object to and see as in conflict with section 179 is the circumstance that the authority controlling the prosecutorial arm is someone other than the sole wielder of such power designated by section 179. They emphasise that it does not follow that because the Constitution requires defaulting soldiers to be prosecuted, there is any justification for creating a competitor for the NDPP. The requirement that the SANDF be a disciplined force does not necessarily imply that there should be a separate military prosecuting authority apart from and independent of the NDPP. Such discipline can be effectively maintained even if the NDPP exercises control of the military prosecuting authority.

[22] The argument on behalf of the Minister goes further, however, identifying as "the principal weakness in the judgment of the court *a quo*", a perceived resort to literal interpretation and a failure to read sections 179 and 200 of the Constitution cumulatively and purposively. Counsel mounted a forceful argument that the SANDF could not fulfil its constitutional obligations without the requisite capacity, competence, discipline and professionalism. These

qualities, in turn, demand that military commanders at all times have ready access to services for the investigation and prosecution of crimes and MDC transgressions by soldiers. Such an effective service necessarily entails expedition both in deciding questions of policy and in implementing them. Priorities have to be chosen, consistency has to be maintained and speed is often essential.

[23] Counsel for the Minister also underlined that military justice is concerned not so much with the prosecution of crime but with the maintenance of discipline. For that reason alone it was essential to read section 179 together with section 200 so as not to undermine the capacity of the SANDF, through its military discipline system, to perform its primary constitutional obligation, which is expressed as follows in section 200(2) of the Constitution:

> "The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."

Relying on dicta of this Court in *South African National Defence Union v Minister of Defence and Another*[20] regarding the unique nature of military service and on more expansive remarks on the topic in *R v Généreux*,[21] *King v Sekoati and Others*[22] and in *Mackay v R*[23], counsel stressed the great importance, not only for the SANDF but more

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20 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 24.

21 (1992) 88 DLR (4th) 110 SCC.

22 2000 (12) BCLR 1373 (LesCm).

23 [1978] 1 F.C. 233 at 235 – 6.

pertinently for the country, that the system of military justice be permitted to function optimally. The conditions in which the SANDF must operate in times of war ― and in which its soldiers must therefore be trained in peacetime ― are such that quick and efficient investigation of infractions must be possible, as well as prompt decisions on and institution of prosecutions. Because of these exigencies a proper reading of section 179 in the light of section 200 of the Constitution contemplates a specialised military prosecution service.

[24] In similar vein counsel for the Minister point to the anomalous situation regarding extra-territorial military offences that is inherent in the interpretation placed on section 179 by the judge in *Potsane* and supported on behalf of the soldiers in this Court. In terms of section 179(1) the authority of the NDPP is confined to the borders of the Republic. Extra-territoriality is, however, essential to the functioning of military discipline, the jurisdiction of the SANDF over its members extending to wherever in the world they may be serving. It follows that there would have to be some agency clothed with the requisite authority to investigate alleged offences by South African soldiers abroad and to prosecute them if it deems it appropriate. This could not be the NDPP, whose powers extend only to the borders of the country.[24] Once there has to be recognition of the need for a military prosecuting authority to deal with such cases, it makes little

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[24] At common law and in terms of special legislation the courts exercise extra-territorial jurisdiction in respect of certain unusual offences, e.g. treason. They are not in issue here, however.

sense to argue that section 179 is an absolute bar to the existence of such authority.

[25] With regard to the possibility of conflict between the civilian and military prosecuting authorities by reason of their concurrent jurisdiction over offences committed by soldiers within the country, there is no direct answer to be found in the Constitution or the Act. But this potential has not arisen because of the adoption of either. It has existed for as long as there was this co-extensive jurisdiction, i.e. at least since the coming into operation of the current Defence Act and Criminal Procedure Act. Dr D'Oliveira informed the Court that there has to his knowledge always been liaison and cooperation between the civilian and military police services and the respective prosecuting agencies. Depending on the nature and circumstances of the case, the one defers to the other. Since the advent of the Constitution this would not only be sensible administrative cooperation between kindred government agencies, but would be an obligation by reason of the principles of cooperative government demanded by chapter 3 of the Constitution. The history of cooperation is hardly surprising. The interests of the two sides would at all times largely correspond notwithstanding that the one exists to combat and prosecute crime while the other aims primarily at maintaining military discipline. The commission of a crime by a soldier inherently involves both elements, as is recognised by section 105(2) of the Defence Act, which enjoins a civilian court when considering sentence for an offence under that Act or the MDC to "take cognizance of the gravity of the offence in relation to its military bearing . . .".

[26] Although the matter is by no means free from difficulty, I ultimately have little doubt that there is no inconsistency between the impugned provisions and section 179. I subscribe to the basic contention on behalf of the Minister that section 179, when speaking of a "single"

authority, does not intend to say "exclusive" or "only" but means to denote the singular, "one". Where there used to be many, there will now be a single authority. That is consistent with the historical context as well as with the corresponding provisions of the Constitution where the diffused powers of state under the previous dispensation were to be brought under one single umbrella.

[27] It is also instructive to see how the interim Constitution[25] dealt with the topic of prosecutions. Section 108 of the interim Constitution retained the existing system of attorneys-general, each with an area of jurisdiction prescribed by national legislation and continuing to function in terms of the transitional arrangements in sections 235(1)(c) and 236(1) and (2). The interim Constitution made no specific reference to military prosecutions and counsel for the soldiers accepted that the Act would not have been inconsistent with the interim Constitution. Against that background the question is whether the purpose of section 179 was limited to changing the constitutional order to consolidate the multiplicity of civilian prosecuting authorities under a single national authority, or whether it had the additional purpose of changing the system of military justice by subjecting military prosecutions to the authority of the new national head of civilian prosecutions.

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25 The Constitution of the Republic of South Africa, Act 200 of 1993.

[28] There are two provisions of the Constitution itself which render the former interpretation substantially more attractive than the latter. In the first place, where the Constitution contemplated that a "single" national institution would be the only lawful institution with authority in its particular field, it said so, e.g. section 199(2) which provides that the SANDF is the only lawful military force in the Republic. Secondly, the language used by the Constitution where exclusive authority is vested in a particular institution is different to the language used in section 179. The words used to vest exclusive authority in the legislature, the executive and, the judiciary are: "is vested in".[26] The words used in section 179 are different and more consistent with a concern to centralise the national public prosecuting service, rather than to transfer the authority for military prosecutions to the NDPP. It is concerned with the creation of a national authority responsible for public prosecutions. This term, like "public prosecutor" and "public prosecution service" is used to denote those who conduct prosecutions in the civilian courts. It does not refer to military prosecutors. Indeed, at the time the Constitution came into force there were no military prosecutors in the country. Under the MDC as it read at the time military prosecutions were conducted by ordinary military officers appointed *ad hoc*.

[29] The word "national" in the context of the phrase "single national prosecuting authority" should also be given due weight. It denotes more clearly that the multiple national prosecuting heads that formerly existed were to be merged into one. Moreover, by qualifying the authority thus, it is made clear that the statement does not extend to lesser or other prosecuting authorities.

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26 See for instance ss 44, 85 and 165.

The sentence speaks of the national authority, not those involved in conducting prosecutions on behalf of municipalities or prosecutions in departmental, police or prisons disciplinary proceedings.

[30] More pertinently, section 179 also does not speak of military prosecutions. Indeed, it is difficult to accept that the system of military discipline could be so radically altered without being mentioned directly or by necessary implication. If the legislature of the Constitution were to do away with the existing and time-honoured system whereby the prosecutors before military tribunals were soldiers subject themselves to military discipline, it seems unlikely that it would be done in this veiled manner. It is equally difficult to accept that a radical change to the country's existing system of military justice would be effected by a subsection contained in a section and in a chapter dealing with a different topic — and without anything being said about it in the section or chapter governing the future SANDF, its nature and purpose.

[31] My basic difficulty with the learned judge's interpretation is, however, more fundamental. It is that such interpretation seems to overlook the realities of military service, military life and military discipline. Soldiers live and work in a subculture of their own. This is recognised and accepted by acknowledging the constitutional validity of a separate military justice system with its own unique rules, offences and punishments. The system of military justice as such is not challenged in these proceedings. We are concerned with one component only of a system that functions according to its own rules. Although the overarching power of the Constitution prevails and although the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features. For instance, what would be acceptable in another

employment relationship is not only impermissible for a soldier but may be visited by punishment as severe as deprivation of liberty for several years.

[32] That being so, what purpose could be served by the prescript read into section 179 by the learned judge? Why should military prosecutions be conducted by civilians? Why should decisions regarding military discipline be taken by outsiders? Why should the Constitution at one and the same time establish a disciplined military force and impose upon it a system of civilian control of its internal disciplinary prosecutions? Why should a soldier who transgresses while on duty just outside our borders be prosecuted militarily but under the aegis of the civilian prosecutorial authority of the NDPP if the offence is committed inside the border?

[33] It has been suggested that the purpose behind section 179 was to ensure civilian control over the military, to prevent abuses within the confines of this closed society. More specifically the purpose is seen to be to prevent victimisation of former liberation fighters who have been absorbed into the SANDF and now have to serve under their former enemies, who are in charge of the investigation, prosecution and adjudication functions within the armed forces. Civilian control of the prosecutorial arm of the military justice system under the terms of section 179 would keep in place a moderating influence as a prophylactic to counteract this dangerous possibility. This construction seems doubtful, however.

[34] In the first place, there was no evidence to such effect. Nowhere in the papers is such a suggestion made, nor was it mentioned in either case by counsel for the soldiers. And none of the references mentioned in their written submissions suggest the existence of circumstances

sufficiently notorious to qualify for judicial notice that could found such a construction. It would not be unreasonable to expect some basis to be laid for such an important proposition in either the evidence or the argument presented on behalf of informed litigants.

[35] In any event, there is evidence in the Constitution itself that appropriate measures were put in place to combat this mischief perceived to be targeted by section 179. They are to be found, logically, not in chapter 9 of the Constitution which deals with the judiciary, but in the chapter establishing and governing the security services of the Republic. Chapter 11 of the Constitution, a healthy blend of democratic aspiration and practical safeguards, first enunciates governing principles for the country's security services and then provides the bulwarks:

> "National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life."[27]

And:

> "National security is subject to the authority of Parliament and the national executive."[28]

And:

> "To give effect to the principles of transparency and accountability, multi-party

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27 Section 198(a).

28 Section 198(d).

parliamentary committees must have oversight of all security services . . ."[29].

[36] Chapter 11 goes on to make explicit and detailed provision for civilian control of the SANDF by the national executive and Parliament. The more salient provisions read as follows:

> "**201. Political responsibility. —** (1) A member of the Cabinet must be responsible for defence.
> (2) Only the President, as head of the national executive, may authorise the employment of the defence force
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> . . . .
>
> (3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail
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> . . . .
>
> (4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.
> **202. Command of defence force. —** (1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.
> (2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.
>
> . . . .
>
> **204. Defence civilian secretariat. —** A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence."

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29 Section 199(8).

This Court has held that

> "Members of the Defence Force remain part of our society, with obligations and rights of citizenship."[30]

[30] Above n 20 per O'Regan J in *South African National Defence Union v Minister of Defence and Another* at para 12.

[37] In the light of these safeguards against abuse of military authority provided by the Constitution and this retention of status as part thereof, there does not seem to be much purpose in extending the powers of the civilian NDPP to include control over the prosecutorial arm of the military justice system in order to attain this end. Furthermore, if the purpose of section 179 had indeed been to protect soldiers against misuse by their officers of the military discipline system, it does seem strangely ineffectual that the protection should be provided at the prosecutorial and not at the adjudicatory level of the system. The NDPP is part of the executive branch of government, not the judiciary, which is the recognised protector of the private individual against abuse of state power. Indeed, in *De Lange v Smuts NO and Others*[31] Ackermann J identified as one of the purposes of judicial independence under the doctrine of separation of powers and an important bulwark against abuse of power by the executive that independent judges are "well-placed to curb possible abuse of prosecutorial power". Although other issues traversed in my colleague's judgment elicited dissent, nothing said by any other members of the Court in that case suggests any doubt about the soundness of this observation. There could hardly have been as it is a restatement of an elementary feature of the separation of powers doctrine. It is therefore not reasonable to infer that section 179 serves to set the fox to guard the coop.

[38] Lastly and in itself virtually dispositively, it is hard to see how control by the NDPP of the prosecution function in the military justice system could possibly work. The prosecution of crime on behalf of the State and the development and maintenance of military discipline and its

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[31] 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 63.

enforcement by means of the MDC may have features in common, but they serve two fundamentally different public objectives. Military discipline is not about punishing crime or maintaining and promoting law, order and tranquillity in society. Military discipline, as chapter 11 of the Constitution emphasises, is about having an effective armed force capable and ready to protect the territorial integrity of the country and the freedom of its people. The unique nature of a military force in a democracy and the role discipline plays in establishing and maintaining it are not central to the present discussion and need not be discussed at any length. Suffice it to quote with approval and add a gloss to the following apt summation of the essentials cited by counsel for the Minister:

> "The ultimate objective of the military in time of peace is to prepare for war to support the policies of the civil government. The military organization to meet this objective requires, as no other system, the highest standard of discipline . . . [which] can be defined as an attitude of respect for authority that is developed by leadership, precept and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not the characteristic of the civilian community. It is the ultimate characteristic of the military organization. It is the responsibility of those who command to instill discipline in those who they command. In doing so there must be the correction and the punishment of individuals . . .".[32]

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32 James BV, *Canadian Military Criminal Law: An Examination of military justice* (1975, 23) Chitty's Law Journal 120 at 123.

[39] Modern soldiers in a democracy, those contemplated by chapter 11 of the Constitution, are not mindless automatons. Ideally they are to be thinking men and women imbued with the values of the Constitution;[33] and they are to be disciplined.[34] Such discipline is built on reciprocal trust between the leader and the led. The commander needs to know and trust the ability and willingness of the troops to obey. They in turn should have confidence in the judgment and integrity of the commander to give wise orders. This willingness to obey orders and the concomitant trust in such orders are essential to effective discipline. At the same time discipline aims to develop reciprocal trust horizontally, between comrades. Soldiers are taught and trained to think collectively and act jointly, the cohesive force being military discipline built on trust, obedience, loyalty, *esprit de corps* and camaraderie. Discipline requires that breaches be nipped in the bud ─ demonstrably, appropriately and fairly.

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33 See section 199(5) of the Constitution.

34 See section 200(1) of the Constitution.

[40] The most common form of disciplinary proceeding against a soldier is a summary and relatively informal appearance before the commanding officer of his or her unit. This swift and purely internal disciplinary procedure is retained in the Act,[35] which also creates courts of first instance staffed by military judges with more extensive punitive jurisdiction.[36] The decision whether to investigate particular conduct by a soldier, then whether to prosecute and, if so, the charge(s) to be preferred and the forum in which to proceed, are questions to be decided by the prosecution. In the case of military prosecutions much more than in the case of civilian prosecutions, such decisions must take into account policy considerations, interpersonal relationships, *esprit de corps*, morale, efficiency and possibly many other considerations. For a civilian prosecutor, even one attached to the particular military unit but not forming part of the command structure, to have to take such decisions would be unfair to both the prosecutor and the accused. For such decisions to have to be debated at a more senior level by or with the officials of the NDPP, who have no knowledge of and little feel for the local circumstances would be even more problematic. In either event the effect on military lines of authority and command would be potentially disastrous.

[41] This could not be what section 179 dictates and it not surprising that counsel for the soldiers were unable to find any precedent for such a vicarious system of military prosecution in any exemplary or comparable country in the world.

[42] The conclusion is therefore that the learned judge in *Potsane* erred in holding that the

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35 See s 11 of the Act.

36 See ss 9 and 10 of the Act.

impugned sections of the Act are inconsistent with section 179.

[43] It remains to make brief mention of the alternative basis upon which the learned judge found the impugned provisions of the Act to be inconsistent with the Constitution, namely as a breach of the equality guarantee of section 9 of the Bill of Rights. This basis for invalidating the sections in question was not raised on Rifleman Potsane's papers in that Court and it is not clear what bearing this finding had on the eventual outcome of the case in that Court. Nor is it clear whether reliance was placed on subsection (1), equality before the law and the right to equal protection of the law, or the ban on unfair discrimination under subsection (3). The latter seems the more likely, however. The challenge was expressly not directed at the fact that the system of criminal justice under the Act provides for separate courts for the hearing of military prosecutions, but at the locus of control of the prosecution service functioning within that system. There was therefore no suggestion that the forensic benefits enjoyed by an accused under the military system were in any way inferior to that afforded in the civilian courts. In *S v Ntuli*[37] Didcott J concluded that it was a breach of the forerunner in the interim Constitution to section 9(1)[38] that a distinction was drawn by the Criminal Procedure Act between prospective appellants in prison who had legal representation and those who did not. No analogous objection

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37 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at paras 18 ─ 25.

38 Section 8(1).

as to inequality of treatment by or before the courts arises here.

[44] If the reliance on the Constitution's protection of equality is based on section 9(3) it is clear that the High Court's finding of unconstitutionality on this ground was inextricably bound up with its finding as to the meaning of section 179. In this Court counsel for Rifleman Potsane supported the learned judge's reasoning, albeit faintly, but his colleague in *Legal Soldier* did not. The approach in a case of alleged unfair discrimination has been clearly set out by this Court in *Harksen v Lane NO and Others*[39] and needs no elaboration here. We can proceed directly to the successive steps of the enquiry as to the presence of unfair discrimination, applying them to the circumstances of the instant case. The impugned sections of the Act differentiate between soldiers and other people. Such differentiation is rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable military justice system. The ground of differentiation is not one specified in section 9(3) of the Constitution; it applies equally to all members of the SANDF in their capacity as such. This basis of differentiation can have no adverse effect on their human dignity or have any comparable impact on them. It has not been suggested that it is unfair to apply the machinery of the military justice system, including the prosecution regime created by the Act, to people who voluntarily join the SANDF in the knowledge that it is a disciplined force with its own disciplinary rules and enforcement machinery. The differentiation is therefore not unfair discrimination within the meaning of section 9(3) of the Constitution.

[45] The order in the Free State High Court declaring these sections invalid therefore cannot

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39 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53.

stand. The appeal by the Minister must be upheld and the consequential relief ordered has to be set aside. At the same time and for the same basic reason the application for direct access on behalf of the soldiers in *Legal Soldier* has no prospect of success and must accordingly be refused.

[46] Counsel for the Minister did not press for the costs of the proceedings in either case should their client succeed. This was a proper attitude to adopt. The soldiers were legitimately pursuing what they perceived to be their constitutional rights — in the case of *Potsane* initially successfully — and nothing in their conduct justifies an award of costs against them in this Court. The order in the High Court directing the Minister to pay the costs of those proceedings can however not be allowed to stand in the face of the reversal of the substantive order on which it was based. In view of the Minister's attitude no order as to the costs in that court will be made, however.

[47] The following orders accordingly issue:

A. Potsane:

(1) The appeal by the Minister of Defence is upheld.

(2) The order made in the High Court is set aside and for it the following is substituted: (a) The application is dismissed.

(b) There will be no order as to costs.

(c) The military judge at Tempe, Bloemfontein is authorised to resume the disciplinary proceedings against Rifleman Andries Diphapang Potsane that are part-heard before him.

B. *Legal Soldier*:

The application in terms of rule 17 of the Constitutional Court Rules for direct access is refused.

Chaskalson P, Langa DP, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Kriegler J.

A. Potsane:

For the appellant: JJ Gauntlett SC and N Bawa instructed by the State Attorney, Pretoria.

For the respondent: IV Maleka and P Mokoena instructed by PL Samuels Attorneys, Johannesburg.

For the *amicus curiae*: Dr JA van S D'Oliveira SC, E Matzke and A Collopy instructed by the National Director of Public Prosecutions.

B. Legal Soldier:

For the applicants: DI Berger instructed by Rudolf Kuhn Attorney, Pretoria.

For the respondents: JJ Gauntlett SC and N Bawa instructed by the State Attorney, Pretoria.