THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 13 December 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Lieutenant Colonel KB O'Brien NO v The Minister of Defence and Military Veterans and Others (1271/2021) [2022] ZASCA 178 (13 December 2022)

Today, the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal, save for setting aside paragraphs 6 and 10 of the order, against the decision of the Gauteng Division of the High Court, Pretoria (the high court) which upheld an application by the Minister of Defence and other parties associated with the South African National Defence Force (SANDF) to review and set aside certain orders made by the appellant, Lieutenant Colonel O'Brien, a former military judge. In 2014, the appellant took to making remarks concerning the brief renewable assignments of military judges and the implications of this for the independence of military courts. He expressed his views while presiding over matters as a military judge. His remarks caused disquiet within the SANDF, with the independence of the military courts being called into question.

On 5 December 2015, the former Director: Military Judges (the DMJ), Brigadier General Slabbert, held a meeting with the appellant after he raised the constitutionality of assignments of military judges in open court. In the course of that meeting, the appellant was instructed not to use the military court as a forum for 'awareness campaigns and constructive criticism'.

In August 2016, the appellant presided in two trials where the accused encountered substantial delays before their matters could come before the military courts. This prompted an application on behalf of the accused for their matters to be struck from the roll on account of the unreasonable delay. The appellant dismissed the applications but seized the opportunity to repeat his concerns about the constitutionality of appointing military judges on brief renewable assignments, and its implications for the independence of military courts. The appellant issued orders in terms of s342A of the Criminal Procedure Act, directing officers in charge of the SANDF to investigate possible disciplinary action against members of staff, as well as the Minister of Defence in respect of her failure to assign military judges for a specific period. He further directed that his ruling be served on the President, and for the President to indicate what steps he intended taking against the Minister of Defence.

In the aftermath of the ruling and orders, the appellant was counselled by the Director of Military Judges that if he continued on this path, future assignments to him as a military judge, were at risk. It was

suggested to the appellant that he should recuse himself from the pending trials before him, in light of his views. The appellant thereafter informed the parties that he would be recusing himself, but not without first bringing to their attention that the Adjutant-General (AG) had decided to appoint a Board of Inquiry into his conduct as a military judge – described as his 'constitutional exclamations'. The appellant responded by threatening court action if the SANDF proceeded with the Board of Inquiry. He then issued various orders directing the AG and others to serve a copy of his rulings of the General Council of the Bar (GCB), the Judicial Service Commission and the Minister of Defence to consider what steps, if any, they would take against certain named members of the defence force. In the period that followed, the two trials over which the appellant was due to preside were allocated to other military judges for finalisation. The appellant was not assigned further duties as a military judge.

Once the new AG had been appointed, a view was taken that the Board of Inquiry was an inappropriate mechanism to inquire into the appellant's conduct. After a lengthy delay, the Minister of Defence and other respondents brought review proceedings to set aside the orders issued by the appellant, except for those where he recused himself. The appellant opposed the application which sought to set aside his orders. Although he proclaimed not to defend the substance of his rulings, he proceeded to oppose the application on grounds of undue delay, that the SANDF lacked standing to review his rulings and that the review was without merit. He brought a counter application challenging the constitutionality of sections 101 and 102 of the Defence Act on the basis that it allows for a member of the Executive to convene a Board of Inquiry to investigate military judges. In addition, he challenged the provisions of sections 17 of the Military Discipline Supplementary Measure Act 16 of 1999 to the extent that it empowers the Minister, acting on the recommendation of the AG, to remove a military judge. The third challenge was directed at section 15 of the MDSMA which empowers the Minister, acting on the recommendation of the AG, to assign military judges for renewal periods.

The review application succeeded before the high court, which also dismissed the constitutional challenges. It ordered the appellant to pay the costs occasioned by the constitutional challenge, as well as the application to set aside orders which followed his recusal. The matter came before the SCA with the leave of the high court.

The SCA found no grounds to interfere with the decision of the high court to condone the delay in bringing the review proceedings, based in part on the prospects of success in setting aside the offending orders issued by the appellant. The appellant's orders directed a host of bodies, including the General Council of the Bar, the Chairperson of the Magistrate's Commission and the Chairperson of the Law Society of the Northern Provinces to take certain measures against named members of the SANDF. Such orders would remain binding until set aside by a court of competent jurisdiction. The SCA found that respondents could not be faulted for bringing the review application to set aside the offending orders, particularly where orders are issued against persons who were not parties to the litigation.

The Court also found that the appellant, as a judicial officer, sought to give expression to his personal views of the military courts, and the extent to which he considered it lacking in independence. In doing so, he breached several canons of good judicial behaviour. His pre-occupation with these issues blurred

his objectivity. In the result, he did not truly apply his mind to the issues before him and accordingly the orders issued could not stand.

As to the challenges directed at various statutory provisions providing for the establishment of a Board of Inquiry to investigate military judges; the powers of the Minister to remove a military judge and the assignment of military judges to brief, renewable periods – all were dismissed on grounds of being either 'abstract' or 'hypothetical'. The issue pertaining to the Board of Inquiry became moot once the new AG expressed the inappropriateness of this mechanism being applicable to a military judge. There was therefore no live issue between the parties.

Similarly, there was no evidence of any attempt to remove the appellant from his position as a military judge, and no basis to challenge the provisions of s17 of the MDSMA. While the appellant only sought to challenge s15 of the MDSMA allowing the Minister to appoint military judges for fixed, renewable periods, there was no challenge to s14 in respect of the Minister's power to assign military judges. The SCA found that there was nothing to support the contention that military judges may be inclined to adjust their judgments to secure further assignments. Accordingly, the counter application could not succeed.

The SCA set aside the high court's decision in which the appellant was ordered to pay the costs of the failed constitutional challenge and those of the review pertaining to the decision to recuse himself in two trials. The SCA considered that the *Biowatch* principles should apply. Moreover, the proceedings in the high court were instituted against the appellant in his capacity as a judicial officer, without any finding of bad faith on his part. The order of costs against the appellant could not stand.

Accordingly, the appeal against the decision of the high court, except for the issue of costs, was dismissed.

~~~~ends~~~~
~~~~