

THE PRESIDENT OF THE ORDINARY COURT MARTIAL, LIEUTENANT-COLONEL MARDON N.O AND OTHERS V THE FREEDOM OF EXPRESSION INSTITUTE AND OTHERS.

CCT 5\99

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The case arose out of charges relating to certain military intelligence source reports preferred against two members of the South African National Defence Force who appeared before an ordinary court martial. During the proceedings, the President of the ordinary court martial made an order that the entire proceedings of the ordinary court martial should be held in camera and that the entire proceedings and the record thereof be classified as secret. The Freedom of Expression Institute and the Mail and Guardian Newspaper also made an application to have access to the military source report. The application was refused on the basis that they do not have standing before an ordinary court martial. They challenged this refusal by relying on the constitutional right to freedom of expression. The parties then approached the Cape of Good Hope High Court (the High Court) for relief.

The main constitutional challenge before the High court was in relation to the legislative framework in terms of which an ordinary court martial was constituted and the manner in which it operated under the Defence Act 44 of 1957 (the Defence Act) and the military Discipline Code (the Code). The High Court declared certain provisions of the Defence Act and the Code, which gave effect to the ordinary court martial, unconstitutional and of no force or effect for, amongst others, the following reasons:

- (a) The court martial and its members are not independent and impartial as required by the constitution.
- (b) The judicial officer and prosecuting counsel are not legally trained and qualified as required by the Constitution.
- (c) There is an interference of the executive in the proceedings of the court martial.

In terms of the Constitution, an order of constitutional invalidity made by the High Court has no force unless it is confirmed by the Constitutional Court. The President of the ordinary court martial, the Prosecuting Authority in the ordinary court martial and the Minister of Defence (the appellants) opposed an application for confirmation. They, however, accepted that the relevant provisions of the Defence Act and the Code violate certain provisions of the Constitution, but they justified the existence of the court martial on the basis of its maintenance of discipline in the military force as required by the Constitution.

During the hearing two issues were raised, namely:

- (a) The attorney for the appellants claimed that one of the judges in the High Court proceedings, Gihwala AJ, was a partner in the firm which was the Cape Town correspondent for the respondent's attorney (called Hofmeyr, Herbststein, Gihwala and Cluver Inc.) and that the failure to disclose this fact before or during the High Court proceedings raised a reasonable

suspicion of bias in respect of the composition of the High Court.

(b) New legislation called the Military Discipline Supplementary Measures Act 16 of 1999 (the new Act) was passed and was to come into force on 28 May 1999.

The new Act repeals and amends those provisions of the Defence Act and the Code, including those which had been challenged in the High Court and establishes a new military court system which replaces the military court and the court martial established in terms of the Defence Act and the Code. It also provides for minimum legal qualification and other experience in respect of members of the military court and prosecuting counsel and contains provisions intended to protect the military court from undue executive interference. It also makes provision for pending cases before an ordinary court martial, appeals and reviews, to be dealt with in terms of the new Act.

In a unanimous judgment delivered by Justice Langa, the Court decided that the new Act has overtaken the challenged provisions of the Defence Act and the Code. The basis upon which the parties had approached the High Court had disappeared and the grant of the relief claimed would serve no practical purpose. Because of this finding, the Court found it unnecessary to go into the merits of the appeal, to deal with the declaration of invalidity or to decide the issue relating to Gihwala AJ.

24 August 1999