

**The Minister of Defence v Andries Diphapang Potsane**

Case CCT 14/01

**Legal Soldier (Pty) Ltd & others v The Minister of Defence & others**

Case CCT 29/01

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MEDIA SUMMARY

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

This morning the Constitutional Court ruled on the constitutionality of an aspect of a new system of military prosecutions introduced by the Military Discipline Supplementary Measures Act 16 of 1999. There were two cases. The first was *Potsane*, an appeal from the Free State High Court by the Minister of Defence, supported by the National Director of Public Prosecutions (NDPP) as *amicus curiae*. The second was *Legal Soldier*, an application for direct access in a case against the Minister that started in the Pretoria High Court.

The Free State High Court had stayed a military prosecution against Rifleman Potsane on disciplinary charges. It found provisions of the Act putting military prosecutors under the control of the director: military prosecutions unconstitutional because section 179(1) of the Constitution says that “[t]here is a single national prosecuting authority in the Republic . . . and consisting of . . . a National Director of Public Prosecutions . . . and . . . Directors of Public Prosecution and prosecutors . . .”. The High Court also found that the challenged provisions of the Act unjustifiably infringed the equality rights guaranteed by section 9 of the Constitution.

In the *Legal Soldier* matter the constitutionality of military prosecutions on any charges was challenged on behalf of four soldiers who had been convicted or were charged in military courts with civil offences, i.e. common law and statutory crimes. These applicants also contrasted the sections of the Act which create the military prosecution structure within the SANDF with section 179(1) of the Constitution.

The Minister, supported by the NDPP argued that the challenged provisions of the Act did not infringe the Constitution, which expressly called for a disciplined military force; section 179(1) was not concerned with a separate and independent military prosecution system and did not prohibit it but served to consolidate into one national prosecuting authority the various offices of attorneys-general that existed before. Nor was the equality guarantee infringed.

The Court examined the two competing interpretations of section 179(1) and, noting that it was not the system of military courts that was in issue but only the identity of the authority controlling prosecutions in such courts, tried to ascertain which was correct. It asked whether it was likely that the Constitution would require that the NDPP should be in charge of prosecutions in military courts. Section 179(1) was analysed both in the context of the Constitution as a whole, especially those sections dealing with the SANDF and against the backdrop of the national prosecution system preserved by the interim Constitution and now governed by section 179. It also considered the practical implications of the NDPP controlling military prosecutions.

Kriegler J, writing for a unanimous Court, concluded that the interpretation contended for by the Minister and the NDPP was correct and that the constitutional challenge based on section 179 had to fail. The equality challenge, aimed at the prosecution only, was also dismissed as constitutionally unfounded.