IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A555/02

In the matter between:

CLIVE JAMES BORMAN Appellant

And

MINISTER OF DEFENCE Respondent

JUDGMENT: 24/04/006

VAN REENEN, J:

1] The appellant was convicted of theft by the court of the Senior Military Judge on 19 September 2001 and sentenced to 9 months imprisonment and

ignominious discharge from the South African National Defence Force (SANDF).

2] After the appellant's conviction and sentence, the matter was in terms of section 34(2) of the Military Discipline Supplementary Measures Act, Act 16 of 1999 (the Act) referred to the Court of Military Appeals on automatic review and the execution of the sentence automatically suspended. Written representations made to the Court of Military Appeals on behalf of and by the appellant personally, formed part of the record placed before such court but the right to make oral representations to it was not exercised.

3] On 11 April 2002 the Court of Military Appeals, chaired by Mailula J, found that –

> "After perusal of the record of proceedings the court is satisfied that the findings and sentence are in accordance with real and substantial justice and they are accordingly upheld."

4] The appellant surrendered himself to the commanding officer of the Goodwood Prison on 29 April 2002, in order to commence serving his sentence and on 2 May 2002 i.e. three days later, launched an application out of this Court in which he, inter alia, sought leave to appeal against the sentence imposed upon him by the court of the Senior Military Judge and also to be released on bail pending the finalization of the appeal on such terms as the court wished to impose.

5] On 3 May 2002, the date on which the matter had been set down for hearing, agreement was reached between the legal representatives of the appellant and the respondent in terms whereof the former was granted leave to appeal and/or review the order of the court of the Senior Military Judge within 30 days of the granting of the order and released on warning pending finalization of the "appeal and/or review". At

the request of the parties such agreement was on that date made an order of Court.

6] The appellant, as an annexure to that application, filed a notice of appeal dated 17 April 2002 - accompanied by a Power of Attorney - in which he lodged an appeal to this court "against the sentence imposed by Mr President, Colonel Hendrik Johannes Luus on the 19th of September 2001". The appellant also delivered and filed an amended Notice of Appeal, dated 12 June 2002 accompanied by a Special Power of Attorney, dated 3 June 2002, in which he in the alternative lodged an appeal against "the decision of the Honourable M.L. Mailula, Brigadier General S.L. Mollo and Colonel C.J. Taljaard in the Court of Military Appeals on 11 April 2002, confirming the sentence of the Senior Military Judge, Colonel Hendrik Johannes Luus". There is an obvious discrepancy between the amended Notice of Appeal and the Special Power of Attorney which accompanied it in that the latter is limited to an appeal against the sentence imposed by

the Court of the Senior Military Judge and not also the decision of the Military Court of Appeals. The appellant also delivered, and on 18 June 2002 filed, a notice in terms of Rule 50(4)(a) in terms whereof he gave notification of his intention to prosecute the appeal and simultaneously applied for the assignment of a date for the hearing thereof.

7] The respondent on 19 September 2002 and after the Registrar had allocated a date for the hearing of the appeal - but prior to the hearing thereof - launched an application in this court in which it, inter alia, sought an order: -

7.1 that the order granted by this court on 3 May 2002 in terms whereof the appellant was granted leave to appeal against the sentence imposed by the Court of the Senior Military Judge on 19 September 2001 be set aside; and

7.2 that the appellant's notice of appeal dated 17 April 2002 as well as the notice in terms of Rule 50(4)(a) dated 12 June 2002 be set aside as constituting irregular steps.

8] Although the appellant on 14 October 2002 delivered and filed a notice of opposition to the said application he failed to file any answering affidavits.

9] It is clear that the amended notice of appeal - to the extent that it embodies an appeal against the confirmation by the Court of Military Appeals on automatic review of the sentence imposed by the court of the Senior Military Judge - not only exceeded the ambit of the order of this court in terms whereof it granted leave to appeal but also the power bestowed by the Special Power of Attorney dated 3 June 2002, and clearly is irregular **pro tanto**. That however is not the basis upon which the respondent

contended that the appellant's notice of appeal and the notice in terms of Rule 50(4)(a) constituted irregular steps. That contention is based thereon that there is no right of appeal to this Court against a sentence imposed by a Court of the Senior Military Judge, especially after a Court of Military Appeals has disposed thereof in accordance with the provisions of section 8(1) of the Act and that accordingly this court lacked jurisdiction to have entertained the application and granted the order on which the appellant's appeal to this court has been based.

10] Despite the fact that it has been found in two full bench decisions of the Transvaal Provincial Division of the High Court of South Africa that all courts in the hierarchy of military courts are inferior courts for the purposes of the Supreme Court Act, No 59 of 1959 (See: **Mbambo v Minister of Defence** 2005(2)

225 (T) at 233 A; **Tsoaeli and Five Others v The Minister of Defence and Others: Kholomba v Minister of Defence and Others** 2005 JDR 0912 (T) at 8) and the provisions of Section 19(1)(a)(i) of that act would appear to provide the statutory power required by High Courts to entertain appeals from such courts (See: **S v Pennington and Another** 1997(4) SA 1076 (CC); 1999(2) SACR 329; 1997(10) BCLR 1413 at par 20), the court in **Mbambo's** case, at 233 J, held that no right of appeal lies from the court of a military judge to the High Court. Although Du Plessis J (with whom De Vos and Bosiela JJ concurred) failed to pertinently elucidate why the power of a High Court to entertain appeals from military courts as inferior courts is trumped by the appeal competency provided for in section 8(1) of the Act, it on a holistic reading of the judgment appears that the court was actuated by the following considerations.

It in the first place, considered the competency of the Court of Military Appeals to entertain appeals against the judgments and orders of all other courts in the hierarchy of Military Courts as constituting adequate compliance with the right of appeal to a higher court which is entrenched in section 35(3)(o) of the Constitution. And, in the second place, considered that military courts are better able than civil courts, such as High Courts, to ensure that the SANDF's constitutional obligation to maintain military discipline in accordance with the imperative provisions of section 200(1) of the Constitution which gave rise to the promulgation of the Act and the objects whereof are to: -

> "a) provide for the continued proper administration of military justice and the maintenance of discipline;
>
> b) create military courts in order to maintain military discipline"

In my view, the essence of the court's reasoning in that regard, is lucidly encapsulated in the following

passage at 233 H – I of the judgment of Du Plessis, J:

> "In particular, Military Courts are better suited to judge the seriousness of offences in military context. Accordingly, a military court system that ensures military discipline with the High Court ensuring that it is done regularly and constitutionally better fits into the constitutional scheme of the Defence Force than one whereby the civil courts have full power to interfere on appeal with decisions of the military courts. This even more so if regard is had thereto that the Court of Military Appeals has full review and appeal powers and may be approached by any person convicted in a military court. There is no need for soldiers to have the choice of an appeal forum, a choice which other citizens do not ordinarily have."

11] Such reasoning echoes the views expressed by Kriegler J in **The Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Ohters v Minister of Defence and Others** 2002(1) SA 1 (CC); 2000 (11) BCLR 1137, and in my view, applies with equal force to judgments and decisions of the Court of Military Appeals. As I am in full agreement

with the conclusion arrived at in **Mbambo's** case I incline to the view that the appellant did not have the right to appeal to this court against his conviction and the sentence imposed on him by the Court of the Senior Military Judge on 19 September 2001 or the confirmation thereof, on automatic review by the Court of Military Appeals on 11 April 2002.

12] Is the absence of such a right in any way supplemented by the settlement agreement which was subsequently made an order of Court?

If, as I have already found, the appellant does not have a right of appeal to this court from courts in the hierarchy of military courts, the agreement of the parties could not have conferred appeal jurisdiction in respect of such counts on this Court. Hiemstra J in **Goldschmidt and Another v Folb and Another** 1974(1) SA 576 (T) at 577 A said the following in that regard:

> "Private individuals cannot confer jurisdiction on the courts which they do not possess in terms of the common law or of statute; nor can they impose tasks upon the courts which they are not legally obliged to perform"

Furthermore, as in terms of the provisions of section 19(1)(a)(i) of the Supreme Court Act, this court's power to entertain appeals against judgments and orders made by inferior courts is limited to only such courts as are within its area of jurisdiction and the Court of Military Appeals does not have its seat within this court's area of jurisdiction, the appellant's attempt in his amended notice of appeal to have expanded the appeal to also the confirmation by the Court of Military Appeals of his conviction and sentence, was completely misconceived and ineffectual.

12] As in terms of this court's order the appellant was not only granted leave to appeal but also to institute

review proceedings, what must be considered next is whether the appellant possessed the right of having the conviction and sentence imposed by the Court of the Senior Military Judge and the subsequent confirmation of the sentence by the Court of Military Appeals, reviewed by this court, and if so, whether the proceedings before this court amount to such a review.

13] In terms of the provisions of section 25 of the Act every member of the SANDF who has been convicted and sentenced by a military court has a right of automatic, speedy and competent review of the proceedings. The review authority in the case of a conviction on the more serious offences is the Court of Military Appeals whilst in other cases it is by a review counsel.

Apart from the right of automatic review, such a convicted and sentenced member has a right to apply to a court of Military Appeals in terms of section 34(5) of the Act to have the proceedings of a military court reviewed. Rules of procedure for the prosecution of a review of that kind as well as automatic reviews have been promulgated in **Government Notice R747 in Government Gazette No 20165** of 11 June 1999. In terms of Rule 72(1) thereof the grounds of review must be fully set out. Such a review is not limited to the record of the proceedings as further evidence may be allowed and accordingly, such powers of review amount to the third kind of review referred to in **Johannesburg Consolidated Investment Co v Johannesburg Town Council** 1903 TS 111. It does not appear to be in issue that the appellant has not availed himself of the right of review of the kind provided for in section 34(5) of the Act.

14] As it has been held that military courts of first instance and Courts of Military Appeals are inferior courts for the purposes of the Supreme Court Act, it follows logically that in terms of section 19(1)(a)(ii) of the Supreme Court Act, their proceedings are subject to review by High Courts (See: **Mmbambo v Minister of Defence** (supra) at 223 A and **Tsoaeli and Five Others v The Minister of Defence and Others: Kolomba v The Minister of Defence and Others** (supra) at page 8). In the circumstances I incline to the view that this court possessed the power and jurisdiction to have granted an order authorising the appellant to have his conviction and sentence by the Court of the Senior Military Judge reviewed by this court.

However, as in terms of the provisions of section 19(1)(a)(ii) of the Supreme Court Act a High Court's power of review is restricted to inferior courts within its jurisdiction, such power and jurisdiction did not

extend to the order of the Court of Military Appeals confirming the conviction and sentence on automatic review to it.

15] Do the proceedings before this court amount to a review? An application for a review in terms of section 19(1)(a)(ii) of the Supreme Court Act must be brought in accordance with the provisions of Supreme Court Rule 53 but, High Courts may, in the exercise of their wide discretion to regulate their own proceedings, permit a deviation therefrom.

16] The papers before this court consist of the appellant's application for leave to appeal brought on 2 May 2001; the record of the proceedings before the Court of the Senior Military Judge; the notice of appeal dated 17 April 2002; the amended notice of appeal dated 12 June 2002; the notice in terms of rule 50(4)(a); the respondent's application to have

the order of this court made with the consent of the parties set aside as well as ancillary relief; and the appellant's notice of opposition to the last-mentioned application.

17] Not only is there no application to review the decision of the Court of the Senior Military Judge convicting the appellant and the sentence imposed on him, but the notices of appeal that have been filed state specifically that the appellant thereby lodged or noted an appeal to the Cape Provincial Division of the High Court of South Africa. The format of and the manner in which the notices of appeal have been formulated furthermore, conform with notices of that nature filed in criminal appeals which regularly serve before this court. In addition, the concept "review" does not feature at all other than in the terms of the settlement agreement, on which the court order was based. There further is not even an iota of evidence in

support of a factual basis for reviewing the judgment of the Court of the Senior Military Judge before this court. In the absence of a properly motivated application to review the decision of the Court of the Senior Military Judge, there is no basis upon which this court could apply the review jurisdiction it possesses.

18] Can this court, in the exercise of its inherent powers, review the decision of the Court of the Senior Military Judge and if so, is there a factual basis upon which it could be done?

This court, in the exercise of its inherent jurisdiction, does have the power to review and set aside any decision of an inferior court which is tainted with an irregularity (See: **Kruger v The Master and Another NO** 1982(1) SA 754 (W)). In the absence of such an irregularity this court is not in a position to exercise its inherent jurisdiction to review the

decision of the Senior Military Judge. As on the papers before us no factual basis has been established showing the existence of an irregularity of that nature and no irregularity of such a nature is apparent **ex facie** the papers there is absolutely no basis upon which this court could exercise its inherent jurisdiction to review the decision of the Court of the Senior Military Judge.

19] In view of the aforegoing the following orders are made:-

19.1 prayers 1, 2 and 3 of the respondent's application in **limine litis**, dated 17 September 2002 are granted.

19.2 the appellant's appeal is struck from the role; and

19.3 the appellant is directed to report to his commanding officer within 7 days of the granting of this order in order to undergo, in accordance

with the law, the sentence imposed upon him by the Court of the Senior Military Judge on 19 September 2001, failing which the respondent will be entitled to deal with the appellant in terms of the provisions of Act 16 of 1999.

20] As the appellant's abortive appeal and the respondent's application to have this court's order of 3 May 2002 set aside, flowed from a mutual misapprehension on the part of the parties regarding this court's jurisdiction over military courts, it in my view, would be fair to make no order as regards costs.

21] In conclusion, counsel are thanked for their well-prepared heads of arguments and arguments presented in court, particularly Advocate MacWilliam SC who at the request of the court was appointed by

the Bar Council to act for the appellant on a **pro bono** basis**.**

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D. VAN REENEN

KNOLL, J:

I agree.

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J.V. KNOLL

WAGLAY, J:

I agree.

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B. WAGLAY