

The South African Military Justice System

Fair trial rights: Quo Vadis?



Photo by Stefan Els

The South African Military Justice System

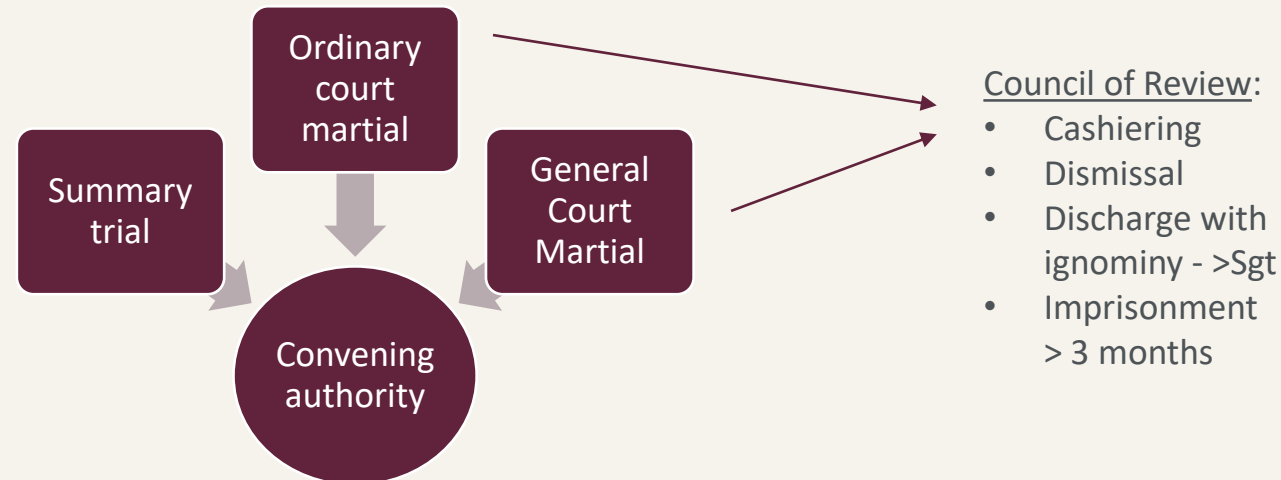


Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

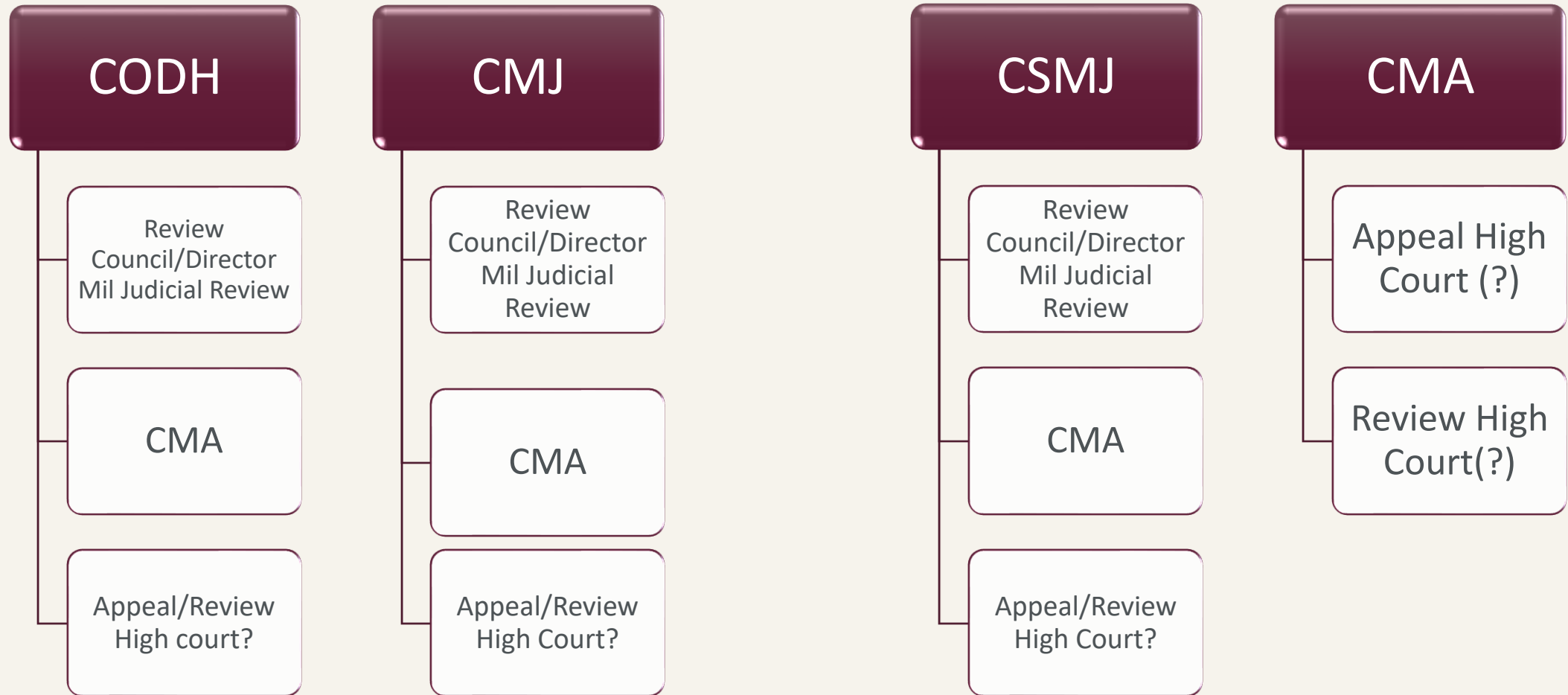
Fair trial rights: Quo Vadis?

- 1996 & 1997 – 2 ordinary court orders made by an Ordinary Court Martial the catalyst for the first significant development in SA military justice since its 1881 British Army Act roots.
- Court martial system:



The South African Military Justice System

Fair trial rights: Quo Vadis?



The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- In spite of 1993 & 1996 Constitutions with BOR it took Constitutional Court decision to constitutionalise SA mil justice system
 - *Freedom of Expression Institute v President Ordinary Court Martial* 1999 (2) SA 471 (CC)
 - “object of military discipline could...be achieved without any restriction at all on constitutionally guaranteed fundamental rights”
- Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA)
- Augmented by Rules of Procedure to MDSMA
- Partial repeal of 1957 Defence Act by Defence Act 42 of 2002.
- Radical change to military court system to ensure military accused receive fair trial with access to High Court of SA, while ensuring the maintenance of military discipline

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- What are fair trial rights?
 - Golden thread through SA Constitution (S 35(3) of the Const), African Commission guidelines relating to military courts, Decaux principles, Yale Draft Principles for Military Tribunals
 - Fair trial rights = wider than those listed in Constitution/documents
 - Includes substantive fairness, consideration of trial as a whole rather than evaluation of any one specific aspect in isolation
- Who are entitled to fair trial rights ito SA Constitution (supreme law)?
 - Only an accused before criminal proceedings
- Is the military accused an “accused before criminal proceedings”?
 - CODH
 - CSMJ/CMJ

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Fair trial rights in CODH
 - Limited jurisdiction
 - Minor disciplinary offences
 - Presiding officer – commanding officer/delegated field officer
 - Only below rank of SSgt
 - Limited punishment:
 - Extra duties max period 21 days
 - Corrective punishment max period 21 days (Pvt)
 - Confinement to Barracks max period 21 days (Pvt)
 - Fine max R600
 - Reprimand
 - Not accused before criminal proceedings. No constitutional fair trial rights but entitled to basic fair procedures.

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Fair trial rights at CSMJ/CMJ
 - To determine whether accused before criminal proceedings look at:
 - Nature of proceedings
 - Not decisive – distinction between disciplinary offences & criminal offences made on ground of penal sanction, not whether military or civil offence
 - CMJ can therefore try criminal or disciplinary offences or combination of both
 - Sanction attached to proceedings
 - Aim of punishment focussed on correcting and enforcing discipline, not punitive *per se* but can result in imprisonment since within jurisdiction to sentence to imprisonment/detention
 - Can therefore deprive the accused of liberty
 - SA courts have found that although loss of liberty does not in itself mean the punishment is a criminal penalty, any individual facing a loss of liberty should enjoy constitutional protection
 - Therefore accused before CSMJ/CMJ entitled to constitutional fair trial rights

The South African Military Justice System

Fair trial rights: Quo Vadis?

- Rights provided:
 - Right to be informed of the charges in sufficient detail to allow accused to answer charges
 - Sufficient time and facilities to prepare a defence
 - The right to choose and be represented by a legal practitioner of choice
 - Right to be presumed innocent
- Two rights deserve close scrutiny:
 - Independence of the military justice system
 - The right to appeal & review to a higher court

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Independence of military justice system
- Constitutional Court held that the uniqueness of military and the need for a disciplined force in the Constitution justifies a SEPARATE military justice system
- 2 matters served before CC:
 - Military prosecution authority
 - Prosecution done on behalf of state
 - Military prosecutors report to Director: Military Prosecutions
 - Must have legal degree
 - Assigned for fixed period/specific deployment
 - CC had to decide whether conducting prosecution on behalf of state was inconsistent with constitutional principle that there is a single National Prosecuting Authority.

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Court held in *Minister of Defence v Potsane* 2002 (1) SA 1 (CC):

“[t]he 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.”

- CC said that removing the authority to make prosecutorial decisions from the auspices of the military prosecution authority would have a “potentially disastrous” effect on the authority and command of the military.

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Judicial independence and impartiality
- Judiciary must be independent and impartial to protect private individuals against the abuse of state power.
- Courts expressed themselves on requirements for judicial independence in civilian court – trite law:
 - Financial security
 - Security of tenure
 - institutional independence
- Considering the CC decision for the need of a separate military justice system as the best means to ensure a disciplined armed force as required by the SA Constitution can the exact requirements for judicial independence of civilian judges be used *mutatis mutandis* for determining the independence of military judges?

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Not arguing that military courts need not be impartial and independent but rather for a more nuanced approach: What does judicial independence look like in the military, considering that the standard is much higher for High Court judges and the military court is seen as an inferior court of the same status as the magistrate's court.
- Institutional independence:
 - For judicial officers to be only subject to the law in the execution of their duties means that judges must have control “over the job they do”.
 - MDSMA provides for judicial independence & states that each military judge must exercise their judicial function independently & subject only to the law – s 19 MDSMA
 - They must apply the law without fear, favour or prejudice and conduct proceedings in a manner befitting a court of justice.
 - MDSMA provides sufficient factual independence for military judges

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- What about perceived independence?
 - The role of the AG?
 - Serving members appointed as judges
- Institutional independence requires judiciary responsible for own administrative procedures but administration lies with AG, at Legsato level the OICs office as representative of the AG. OICs plan & schedule trials but with input from judges. AG involved in scheduling of CMA.
 - BUT his influence limited to administrative functions and cannot influence the decisions taken by military judges
- Even academic critics of independence of military judges in SA concede that military judges remain independent in this context.

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Personal independence
 - Method of their appointment
 - Length of tenure
 - remuneration
- Method of appointment problematic –
 - Not appointed as judges but assigned by the Minister of Defence on recommendation of the AG for a fixed period/specific deployment
 - Executive involved in appointment of the judges
 - Recommend the creation of a military judicial selection committee to recommend officers for appointment in process similar to magistrates appointment process
- Length of tenure
 - Military judges are assigned from the pool of military legal practitioners in the function of military judge, the same as prosecutors, military defence counsel even lecturers, except the assignment where their assignment is done by AG directly, judges are recommended by the AG and assigned by the Minister. Effort to appear more independent?

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Duration of assignment currently 1 year
- Issue articulated by Tshivhase as follows:

“The problem with short-term assignments is that they can compromise judicial independence. *The possibility of a judicial officer working for the renewal of his or her term instead of administering justice cannot be ruled out.*” (emphasis added)
- This argument pervasive in debate dominating the discussion on the influence of short assignments on security of tenure.
- Recently in case of *Lieutenant Colonel KC O’Brien v The Minister of Defence* (Case no 1271/201) [2022] ZASCA 178 (13 December 2022) the court reacted to a similar statement made by Lt Col O’Brien when arguing that the length of tenure is too short:

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

“[O]nce it is accepted that the Minister can assign officers to the function of a military judge and can do so for a fixed period of whatever duration, it is difficult to see why the Minister cannot renew such an appointment. It must be said that there can be little to choose between a series of successive appointments for a fixed period and the renewal of an appointment after it has run its term. Here as well, the case advanced in support of the s 15 challenge is a purely conjectural one. It rests on the assertion that it may be ‘reasonable to anticipate that military judges may be inclined to temper their reviews or adjust their judgments to secure further assignments’. But, once again there is nothing to suggest that any military judge has been put to such a choice. To suggest that a judge may be conscripted to one or other end is a most serious allegation...The insinuation that a judge may ‘adjust a judgment’ to ‘secure further assignments’ is nothing short of scandalous. Absent a proper factual foundation (of which there is none) any apprehension of such possibility can hardly be reasonable.”

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- The SCA did not decide on the independence of the military judges but this statement can be indicative of SCAs approach should the matter serve before them and it may be that short-term assignment may actually pass muster.
- The right to appeal and review
 - Military accused does have the right to review and appeal but the question is whether it actually complies with the provisions of the SA Constitution.
 - Review authority removed from sphere of commanders and now lies with Military Review Counsel and CMA.
 - Review Counsel
 - Every finding made, sentence imposed and court order made subject to review procedures before review counsel (certain exceptions that must go directly to CMA for review)
 - All acquittals and not guilty findings final and not subject to review
 - Review process start with review counsel

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Can confirm finding/sentence but cannot change it – then refer to Director: Military Judicial Reviews
 - Review counsel not required to have any experience in criminal law or military justice & they review decisions of most senior military judges
 - Director: MJR have full appeal & review powers – member of executive therefore in position to set aside the findings of the military judiciary
 - This is untenable & needs attention. Addressed in proposed Military Discipline Bill with creation of a review court but really only a change in name.
 - Few cases reach CMA & review counsel therefore the final stop for the bulk of cases.
- Appeal & review process to CMA however complies with constitutional requirements
 - CMA not court of first instance, is higher than CSMJ/CMJ & therefore fulfils the requirement of review by a higher court.
- What is accused not satisfied with CSMJ/CMJ or CMA decision – can the accused approach the High Court of South Africa for relief?

Appeal

- High court found that CPA does not regard the military court as a lower court for purposes of appeal.
- Accused before military court has no right to appeal to High Court of SA
- To change this requires an amendment of the CPA.

Review from CSMJ/CMJ

- High court inherent jurisdiction to review matters from inferior courts.
- Right to review by High Court from CSMJ & CMJ as court of first instance

Review from CMA

- CMA not court of first instance
- *Zulu v Minister of Defence* (G) – CMA presiding officer a High Court judge & therefore High Court does not have power of review over CMA.
- *Tsoali v Minister of Defence* (Full bench decision G)– judge at CMA does not sit as High Court judge, therefore inferior court and can be reviewed
- Then in Cape High Court found in *Borman v Minister of Defence* that CMA not court of first instance, not inferior court and therefore cannot review
- Military Court not area bound & situation now unclear

The South African Military Justice System



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

forward together
sonke siya phambili
saam vorentoe

Fair trial rights: Quo Vadis?

- Conclusion
 - The SA military justice system has developed significantly in ensuring all members are protected by fair trial rights.
 - The determination whether the military justice system actually now allows for a fair trial should ultimately be judged when considering the trial as a whole and not each right in isolation.
 - Considering the decision by the CC in support of a separate military justice system it would be remis to evaluate fair trial rights compliance purely from a civilian perspective.
 - There are definitely areas of concern in need of attention but minimum compliance is definitely achieved.



**Thank you
Enkosi
Dankie**

Photo by Stefan Els