MAJOR CHRISTOPHER AARON NDLOVU

and

PRIVATE XOLANI

versus

THE MINISTER OF DEFENCE N.O.

and

COMMANDER OF THE DEFENCE FORCES

and

COMMANDER OF THE NATIONAL ARMY

and

LIEUTENANT COLONEL S MADZIRO OF HEADQUARTERS, HARARE DISTRICT

HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 18 & 25 JULY 2002

N Sigola for the applicants

P Ncube and Ms P Dube for the respondents

Urgent Chamber Application

KAMOCHA J: The applicants appeared before the General Court Martial on 27 and 28 May 2002 and were convicted at the end of the trial and sentenced to custodial sentences. They brought the matter for review on the following grounds:

1. That the third respondent acted in a manner that was grossly irregular in issuing or causing to be issued convening order number 01/2002 on 7 May 2002, ordering the trial of the applicants to commence on 27 May 2002 when in terms of section 46(4) of the Defence Act [Chapter 11:02], a military court had ceased to have jurisdiction over

the matter as the alleged offence was allegedly committed on 11 May 1999, which is more than three years after the commencing of the intended trial.

2. The General Court Martial presided over by the fourth respondent committed a gross irregularity in commencing the trial of the applicants more than three years after the alleged commission of the alleged offence, as such court had ceased to have jurisdiction to try the matter by operation of the peremptory provisions of section 46(4) of the Defence Act. That court proceeded to try, convict and sentence the applicants to an effective one and half years and one year imprisonment with labour respectively.

Accordingly the applicants sought an order:

(a) declaring the trial of the applicants null and void for want of jurisdiction;
(b) setting aside the entire proceedings of the trial of the applicants including the verdict and sentence following therefrom;
(c) re-instating the applicants in the service of the Zimbabwe National Army in the ranks they held at the commencement of their trial without loss of benefits including pay and seniority;
(d) that the first respondent shall pay the costs of this application from the Consolidated Revenue Fund.

At the hearing the respondents made two pertinent submissions. The first being that the applicants should have exhausted all their domestic remedies before approaching this court. The Defence Act [Chapter 11:02] ("the Act") provides for review of court martial proceedings by a confirming authority. Section 62 of the Act reads:

> "62. Review of Proceedings of Courts martial
>
> (1) If a court martial finds an accused guilty of any offence, the record of proceedings of the court shall be transmitted to a confirming authority for review in terms of section *sixty-three*.
> (2) Sub-section (1) shall not affect the operation of any sentence of a court martial, other than a sentence of death."

The confirming authority is enjoined by section 63, with the powers to quash the finding and sentence of a martial court if it appears that the proceedings were not in accordance with real and substantial justice. Quite clearly what the applicants sought from this court is something that is already provided for by the Act and reposed on the confirming authority. The applicants' reason for bringing the matter to this court was that it takes a long time for the record to be submitted to the confirming authority. But that problem would not arise in this case since the applicants have prayed in their interim relief that the 3rd respondent be ordered to produce the record of proceedings within twelve days of the service of this order.

The second submission of the respondents relates to the interpretation of section 46(4) of the Act. It was argued that the phrase "unless the trial is commenced within three years" must be interpreted to mean that the judicial process for the determination of the guilt or otherwise of the accused, must be started within the 3 year period. *In casu* the applicants stated in their grounds for review that convening order number 01/2002 was issued on 7 May 2002.

The word trial has been interpreted in these courts. YOUNG J in the case of *R* v *Sibanda* 1968(3) SA 559 when dealing with section 30 which is now section 27 of the Mental Health Act [Chapter 15:06] had this to say at page 559H:

> "In my view, the expression 'trial' in section 30(1) ought, because of the history of the provision, to be interpreted as including arraignment."

The word "arraignment" is defined by *Gardener and Landsdown* 3rd edition at page 359 as the calling upon the accused to appear in court. The informing him and the demanding of him whether he be guilty or not. The applicants were arraigned by issuing convening order number 01/2002 on 7 May 2002. That was within the 3 years period which was only going to expire on 11 May 2002.

The applicants in their interim relief sought to be released forthwith and warrants of their liberation be issued. Even if their application had been successful it would not have been competent to release them pending review in the light of section 62(1) *supra* since they

were not sentenced to death.

My finding is that the applicants should have exhausted their domestic remedies by taking this matter for review by the confirming authority in terms of the Act. Their complaint about the matter being brought before the court martial is without foundation.

In the result the application fails and is hereby dismissed.

The applicants shall pay the costs of this application.

Nkiwane Khuphe & Partners, applicants' legal practitioners
Coghlan & Welsh, respondents' legal practitioners