DISTRIBUTABLE (54)

Judgment No. SC 75/04

Crim. Appeal No. 203/03

(1) GOODWILL MUPAMBWA (2) FRANCIS PINTU

v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, SEPTEMBER 14, 2004

N P Goneso, for the appellants

R K Tokwe, for the respondent

SANDURA JA: The appellants were charged with contravening para 39(2)(a) of the First Schedule to the Defence Act [*Chapter 11:02*] ("the Act"). The allegation against each appellant was that on thirty-three occasions during the period extending from December 1999 to August 2002 he defrauded the State by withdrawing a pension from the war veterans fund, well knowing that he was not entitled to it as he was not a war veteran. Both appellants were regular members of the Air Force of Zimbabwe.

On 16 January 2003 the appellants appeared before a General Court Martial and pleaded not guilty to all the thirty-three counts of fraud. They were, however, found guilty as charged after a trial had been conducted, and were sentenced to, *inter alia*, one year's imprisonment with labour. Aggrieved by that result, they

appealed to this Court against conviction and sentence.

On 13 September 2004, the day before the appeal was due to be heard, I requested the registrar of this Court to contact both counsel and inform them that at the hearing of the appeal they would be required, first of all, to deal with a preliminary point, which was whether the appeal was properly before this Court, in view of the provisions of ss 78 and 79 of the Act, as amended by Part XIII of the Schedule to the Magistrates Court Amendment Act, No. 9 of 1997 ("the Amendment Act").

When the appeal was called on 14 September 2004 Mr *Tokwe*, who appeared for the respondent, handed in the respondent's heads of argument on the preliminary point, in which he submitted, quite correctly in my view, that in terms of s 79(1) of the Act as amended the appeal should be heard by a Court Martial Appeal Court consisting of such judges of the High Court, not being less than two, as the Judge President of the High Court may appoint. Ms *Goneso*, who appeared for the appellants, agreed with that submission. Consequently, as we were in full agreement with counsel's submission, the appeal was struck off the roll. I now set out the full reasons for that decision.

Before the Act was amended by the Amendment Act, which was promulgated and came into effect on 10 October 1997, the words "Appeal Court", "appellant" and "judges" were defined in s 78 of the Act as follows:

> "'Appeal Court' means the Court Martial Appeal Court established in terms of section seventy-nine;
>
> 'appellant' means a person who has been convicted by a court martial and desires to appeal under this Part;
>
> 'judges' means the Chief Justice and the other judges of the Supreme Court".

And, before it was amended by the Amendment Act, s 79(1) of the Act read as follows:

> "There shall be a Court Martial Appeal Court which shall consist of such judges, not being less than two, as the Chief Justice may from time to time appoint."

Consequently, before 10 October 1997 any person appealing against the judgment of a Court Martial appealed to a Court Martial Appeal Court, consisting of such judges of the Supreme Court, not being less than two, as the Chief Justice appointed. See *S v Mugoni* 1994 (2) ZLR 184 (A) at 186E.

However, the Amendment Act altered the definition of "judges" in s 78 and the composition of the Court Martial Appeal Court established in terms of s 79(1) of the Act. In addition, it introduced a new section, s 88A.

The definition of "judges" in s 78, as amended, is as follows:

> "'judges' means the Judge President and the other judges of the High Court".

Section 79(1), as amended, in terms of which the Court Martial Appeal Court is established, now reads as follows:

> "There shall be a Court Martial Appeal Court which shall consist of such judges, not being less than two, as the Judge President may from time to time appoint."

Section 80(1), which deals with appeals from a Court Martial, and which was not altered by the Amendment Act, reads as follows, in relevant part:

> "Subject to this section, an appellant may appeal against conviction to the Appeal Court …".

As already indicated, "Appeal Court" means the Court Martial Appeal Court established in terms of s 79(1).

Finally, s 88A, which makes provision for appeals from the Court

Martial Appeal Court to this Court, reads as follows:

> "An appeal shall lie to the Supreme Court from any judgment, decision or order of the Appeal Court in all respects as if the judgment, decision or order were given in a criminal appeal before the High Court."

Thus, after 10 October 1997 any person intending to appeal against the judgment of a Court Martial would appeal to the Court Martial Appeal Court consisting of such judges of the High Court, not being less than two, as the Judge President of the High Court may from time to time appoint.

If such a person felt aggrieved by the judgment, decision or order of the Court Martial Appeal Court and intended appealing against it, he would appeal to this Court in terms of s 88A of the Act.

In the circumstances, since s 79(1) as amended provides that the Court Martial Appeal Court shall consist of such judges of the High Court as the Judge President of the High Court may from time to time appoint, this appeal was not properly before us and had to be struck off the roll.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Goneso & Associates, appellants' legal practitioners