

ANNEXURE B  
COURT AND APPEAL PROCEDURE

**1. WHAT IS THE PROCEDURE IN COURT?**

**1.1. Legal representation**

COURT MARTIAL

In terms of the Military Disciplinary Code the arrested conscript may be represented by a legal officer (usually arbitrarily appointed by the legal officer who convenes courts martial). He may also be represented by his own attorney or an advocate appointed by him through his attorney.

Military law and courts martial require a legal representative familiar with the system and experienced in criminal law procedure. The person best qualified for the task will be an attorney or advocate with a few years' experience in private practice. It would be helpful if the representative is an ex-legal officer as well.

MAGISTRATE'S COURT

As indicated above, an arrested person is entitled to the assistance of a lawyer from the time of his arrest. He may also request that a lawyer is present during questioning.

When you are arrested, insist on seeing your lawyer and do not say anything or do anything without first consulting your lawyer. If you plan to give yourself up, arrange for your lawyer to accompany you.

If an objector is unable to pay for a lawyer, he could apply for legal aid, either personally at a Magistrates Court or through his lawyer. If you need assistance, the Conscription Advice Service may be able to help.

## 1.2. Preparatory examination

### COURT MARTIAL

In order to be able to complete the trial of an accused at one session of the court martial the preparatory investigation is undertaken before the matter is put on the roll. The result of this is made available to the arrested conscript's legal representative.

## 1.3. Remand

To remand a court case means to postpone it.

### COURT MARTIAL

A remand is very seldom granted and a Court Martial is usually completed on the first day of a hearing.

This is firstly because the prosecution normally has to stand or fall by the preparatory investigation (See paragraph 1.2). The arrested conscript's representative cannot reasonably ask for a postponement after the prosecution's case is closed, because he will have had ample warning of what the prosecutor's case will be.

### MAGISTRATE'S COURT

The system of preparatory examination can be used in Magistrate's Courts, but is rarely, if ever, used.

### MAGISTRATE'S COURT

If an accused would like to have time to consult a lawyer or to prepare his defence, he may ask the court for a remand.

The state can also ask for a remand. It is possible for the case to be remanded (postponed) many times before charges are put to the objector, or to be remanded during the various stages of the prosecution.

Secondly, court martial members are appointed on a roster basis. If the matter is postponed, the same members of the court martial must be convened at a later stage. As this has proved practically impossible in the past, if the presiding officer is convinced that a remand is necessary, he will probably order the court martial to proceed on the following day.

#### 1.4. Bail

##### COURT MARTIAL

See the discussion of "bail" under paragraph 4.2.3 in the main text of this booklet.

As is described in paragraph 1.3, the preparation for the court martial is aimed at arriving at one final day where the actual trial can be held and be completed. Since a remand is very unlikely, there is no possibility of being freed on bail until the remand date.

##### MAGISTRATE'S COURT

An accused has the right to ask for bail when he appears in Court, if the case is postponed.

He has the right to ask for bail at any time during the proceedings, although his chances of getting bail are less if he has applied before and his application has failed. The Court may refuse to grant bail for the following reasons:

\* if it believes that the accused is unlikely to stand trial (i.e. will not come back to court); and

\* if it believes that the accused poses a danger to society (in a physical sense). This is only a

consideration where the person is accused of a violent crime.

It is likely that bail would be granted to an objector who has given himself up to the police, because this would indicate a willingness to stand trial. Nevertheless his chances of getting bail would still be good, even if he was arrested by the police without giving himself up.

## COURT MARTIAL & MAGISTRATE'S COURT

The rest of the court procedure, the conducting of the case and the rules of evidence, are for all practical purposes the same for the Magistrate's Court and a Court Martial. Both the magistrate and the presiding officer in a Court Martial are referred to as the "presiding officer".

### 1.5. The charge

At the commencement of the trial, the charge has to be put to the objector. This does not necessarily happen the first time he appears in Court - a case can be postponed and the charge put to him at a later stage.

An objector can be charged with the offences discussed in paragraph 2.

### 1.6. The plea

After the charge has been put to the accused by the State Prosecutor, the presiding officer may ask the accused what his plea is. The accused has to plead guilty or not guilty. In the Magistrate's Court the case may also be

postponed before the accused is asked to plead.

If the accused pleads not guilty, the presiding officer will ask the accused what the basis of his defence is. The accused may summarise the reasons for his plea. He can refuse to give these reasons at this stage, and only reveal it after the State has closed its case. It may, however, count against him if he does this.

It is possible for the accused to plead not guilty on grounds that are not valid in law, for example on moral grounds. He could also possibly plead not guilty on the grounds of international law.

If the accused pleads guilty, the presiding officer has to make sure that the accused understands what he is pleading guilty to. If the presiding officer feels that the accused does not plead guilty to all the aspects of the charge (for example when the accused pleads guilty saying that he did not report for duty, but says, for example, that he was never called up) the presiding officer has to change his plea from guilty to not guilty.

If the court accepts the plea of guilty, the next procedural step would be judgement (paragraph 1.9).

### 1.7. The state's case

If the accused has pleaded not guilty, or if the presiding officer has changed his plea from guilty to not guilty, the State Prosecutor has to lead evidence to try to prove that the accused is guilty as charged.

The onus is on the state to prove that the accused is guilty. The state has only to prove that the accused failed to report. As is explained in paragraph 1.9, the Court can then presume that he also refused to serve. If the accused refuses to concede any point, the state has to prove that he did, in fact, fail to report. To do this the state has to prove that the accused

- (a) received a call-up; and
- (b) did not report.

The state often has difficulty in doing so.

The accused's attorney, or if he is not represented, the accused himself, has the opportunity to cross-examine each

of the witnesses which the State Prosecutor calls, to question the witness' version of the facts or to put his own version to the witness.

Once the state witnesses have been called and cross-examined, the state closes its case.

### 1.8. Asking for a discharge

If the state has not proved the charge, the accused does not have a case to answer, and can ask the court for a discharge. If it is granted by the court, the accused is effectively found not guilty and is free to go. If the court refuses a discharge, the case proceeds as is discussed below.

### 1.9. The case for the defence

Defence witnesses are led in the same way as they are during the state's case (see paragraph 1.7). The State Prosecutor can cross-examine each of the defence's witnesses. After all the witnesses have been called, the Defence closes its case.

The accused does not have to give evidence, but his case would generally be much stronger if he does - unless the state has set up a case which is so weak that it does not need an answer. If he has no representation, he should repeat any statements which he has made while cross-examining the state witnesses when he gives evidence. The Court would take much more notice of what he says now because he is now under oath.

**What must the accused prove in court? (What is his onus of proof?)**

On a charge of refusing to serve, it is only necessary for the State to prove that the accused failed to report. The Court may then provisionally presume that the accused in fact **refused to serve**. The Court can make this presumption only if the accused is charged with refusing to serve. If the accused wants to refute this presumption, it is then up to him to give evidence which will prove that he did not refuse to report but just failed to do so.

In other words, the accused then has to prove his innocence as far as the charge of refusing to serve is concerned, if he wants to do so.

#### 1.10. The argument

The state and the defence may each now argue for either a conviction or an acquittal. If the accused wishes to make a statement of his beliefs, he may do so now, if it relates to the reason why he feels he should not be found guilty. This could include arguments based on Moral Law, Natural Law (for example that an unjust law is not valid) or International Law. He could do this even if it is proved that he failed to report and refused to serve.

#### 1.11. The judgement

After the argument, the presiding officer decides whether to find the accused guilty or not guilty. This is called the judgement.

#### 1.12. Mitigation

If the accused is found guilty, the defence may lead further evidence to the Court to show why he is not, or is less, morally blameworthy. This is called "Evidence in Mitigation" and its purpose is to reduce the punishment of the Court or to explain why the accused did what he did.

The court may want to prevent the leading of mitigatory evidence on the grounds that the prison sentence is prescribed, and that the court has no discretion in the matter. It would be important to argue here that the sentence may be suspended, or that the sentence mentioned in the act is a maximum sentence and not mandatory (See discussion under paragraph 2.2 in the main text of this booklet).

More details about possible evidence are discussed under paragraph 4.5 in the main document.

This stage of the court case is ended by argument by the state and the defence on sentence.

### 1.13. Sentence

After the evidence in mitigation, the court decides on the sentence. Details of his options are discussed under paragraphs 2.2 (ii) and 2.3 (ii).

## 2. APPEAL/REVIEW

### 2.1. Appeal

Appeal should be distinguished from review, which is discussed in paragraph 2.3 below. Appeal is a new opportunity where the merits of the case can be considered. In a review, however, the Court will only investigate whether the proceedings of the lower Court were regular.

#### COURT MARTIAL

No provision is made for an appeal in the Military Disciplinary Code. Some authority to reconsider the case is possible, however - see paragraph 2.2.

#### MAGISTRATE'S COURT

If the objector is unhappy with the judgement or sentence of the Magistrates Court, he can appeal to the Supreme Court. There is a **time limit of 14 days** on noting the appeal.

Within 3 days of the sentence the convicted conscript is entitled to make written representations to the reviewing authority concerning the facts and the law of the matter. These written representations may require oral argument before the reviewing authority.

Within three months from the date of his conviction the convicted conscript may apply for a review of his sentence by a body called the "Council of Review". In his application he must explain his reasons for applying for a review.

It is also possible for a council of review to permit a convict to apply for a review after more than three months (but less than two years) have passed since the date of conviction. The convict has to advance good reasons before the reviewing council may grant him leave to apply for a review.

If he was sentenced to more than 12 months imprisonment, he has the right to appear before the Council for argument.

If the Council considers the matter on application by the convicted conscript, the Council may increase the sentence.

An appeal can be lodged if an objector feels that the Court was wrong in its decision about findings in regard to :

- \* the facts of the case; or

- \* the way in which the law should be interpreted.

In practice an appeal against a decision about the facts does not easily succeed, especially when it entails a decision as to the credibility of a witness.

## 2.2. Automatic review

### COURT MARTIAL

#### Internal automatic review:

A number of military authorities have the power to review findings and sentences to ensure that :

1. findings are not invalid;
2. findings not supported by the evidence on record are not allowed to stand; and
3. any patent errors are corrected.

The adjutant-general may also consider a matter on grounds of non-compliance with "real and substantive justice".

If an accused is sentenced to detention of more than three months or, if he is an officer, to a cancellation of rank, the sentence may not be executed before the case has been reviewed by a review commission or a council of review.

The reviewing authority cannot impose a more severe sentence on review and must give reasons for any decision. The convicted conscript has a right to a copy of the reasons.

### MAGISTRATE'S COURT

All sentences of more than 6 months imprisonment or fines of more than R1000 handed down in magistrates courts have to go on automatic review to the Supreme Court. If a magistrate has less than 7 years' experience, sentences handed down by her/him of more than 3 months' imprisonment or fines of more than R500 will also be reviewed automatically. Review means that a judge of the Supreme Court has to read through the record of the case to see whether s/he agrees with the way in which the magistrate applied the law and that the sentence given is fair.

It is best, though, not to depend on this if you feel unhappy with the way in which the case was handled but rather to note an appeal or to take the case on review.

## 2.3. Review by the Supreme Court on application

### COURT MARTIAL & MAGISTRATE'S COURT

Review by the Supreme Court of the proceedings in a Court Martial as well as in a Magistrate's Court is possible. Where a person believes that the proceedings in the case were irregular, he can apply for their review by a higher court. In the case of review, the person does not ask the court to look at the merits of the judgement or sentence, but to ensure that the proceedings of the lower Court were regular. If the proceedings were irregular, the case may not have received a fair, unbiased consideration.

If, for example,

- \* the presiding officer refused to allow the accused to cross-examine the state witnesses; or
- \* the presiding officer has a DIRECT "interest" in the case (he could be a senior officer in the local command and may thus be biased);

the proceedings may have been irregular.

If the Court decides that the proceedings were irregular, this may affect the judgement. He or she may then do one of the following :

- confirm, change or nullify a conviction;
- confirm, change or cancel a sentence; or
- refer the case back for a retrial.

If the judge is satisfied that the proceedings were regular, the matter is at an end.

## ENDNOTES

1. No 8 of 1959.
2. Regulations 119, 131.
3. Sect. 63(1).
4. Sect. 78(2)(b).
5. LAWSA, pp.158-163.
6. See Lawsa pp.167-170.
7. DB Regulations Ch 3.3, 4, 6, 8-13, 15-19, 23-24, 35.
8. DB Regulations Ch 3.14.
9. DB Regulations Ch 3.2.
10. DB Regulations Ch 2.5, 3.3h, 7, 13, 23, 24, 32, 39.
11. DB Regulations Ch 3.31.
12. DB Regulations Ch 4.10.
13. DB Regulations Ch 4.2.
14. DB Regulations Ch 3.5.
15. DB Regulations Ch 2.3d, 7 4.6.
16. DB Regulations Ch 3.21,27.
17. DB Regulations Ch 3.8.2.
18. DB Regulations Ch 3.20,21.
19. DB Regulations Ch 2.2d, 3.34.
20. DB Regulations Ch 3.28 as amended.
21. DB Regulations Ch 4.12,13 as amended.
22. DB Regulations Ch 3.25,26.

23. DB Regulations Ch 3.29.
24. DB Regulations Ch 4.14.
25. DB Regulations Ch 4.4.
26. DB Regulations Ch 3.14 (partly).
27. DB Regulations Ch 3.30.
28. DB Regulations Ch 3.27.
29. DB Regulations Ch 3.25.5.
30. DB Regulations Ch 3.28, as amended.
31. No. 8 of 1959.



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