may be part of a wider knowledge and may disclose the source of or the interpretation placed on the information by the SADF.

Relying on his view that all military information is potentially sensitive, second applicant is unrepentant and persists in submitting that:

> " ...sou ek as militêre offisier en soldaat waarskynlik steeds geneig het om die inhoud van daardie paragraaf as sensitief te beskou in omstandighede waarin ek wel van die bestaan van die 2 ingehandigde dokumente geweet het."

Our law recognises that there are special circumstances in which it becomes necessary to administer justice behind closed doors. Where a court is faced with an application to close its doors to the public and to conduct its proceedings *in camera* because the facts with which it must deal are proved to be such that their disclosure will harm the security of the State, the court will be loathe to refuse the application. In reaching the conclusion that the disclosure of facts will indeed prejudice the security of the State, a court must perforce rely heavily on the views of those senior officers of the defence and security forces who are charged with and are directly responsible for the maintenance of the security of the State. There is lettle, if anything, that the court or the opposing party can do to gainsay what a senior officer characterises as sensitive of classified information. The views of senior officers are not binding but, by reason of the circumstances will usually have to be relied upon by the court. That places a heavy obligation on the officers concerned to ensure that they express their views to the court in a highly responsible

manner and with care and, that where possible they support their views with facts.

In this matter the court was presented with the opinion of the second applicant. He is a very senior officer. He was authorised in this matter to represent the first applicant, the Minister of Defence. What is most important, is that second applicant not only expressed an opinion, but he informed the court that much of the information in issue had, as a fact, been classified as secret in terms of the relevant SADF procedures. In so doing he was wrong. His *bona fides* are not the determining factor. It is his negligent statement that must be focussed upon.

It is clear to me that the applicants were intent on trying to ensure that the main application would be heard *in camera* and that the contents of the affidavits would remain secret. All attempts by first and second respondent to meet the applicants' specific complaints were ignored or avoided.

It was only at the eleventh hour that the second applicant specifically drew attention to the so-called secret information allegedly contained in the affidavit of Luitenant General van Loggerenberg and he did so on a fallacious basis. His explanation that as a military man he views all information relevant to the SADF as sensitive is disingenuous. His attempt to justify his action avoids the real issue, namely, that his statement that the information was formally classified as secret was erroneous. This error raises a large question mark over the reliance which I can

place upon second applicants opinion that any other information contained in the record in the main application is truly such that its disclosure will cause any prejudice to the security of the State. The fact that the applicants agreed to the *rule nisi* being discharged - albeit subject to the establishment of a "secret file" - rather dilutes the second applicant's attempts to justify that a hearing *in camera* with a total ban on the publication of the court record was necessary for the proper administration of justice or in the interests of State security.

The *rule nisi* was discharged and the costs of the application ought to be awarded against the applicants and in favour of the first and secoind respondents. Third respondent did not take any active part in the proceedings. He remained passive and as behoves his position he abides the Court's order.

The question to be decided is whether - as requested by the first and second respondents - the applicants should be ordered to pay the costs on a scale as between attorney and client.

The words of Gardiner JP in the oft-cited and well approved passage in *In re Alluvial Creek Limited* 1929 CPD 532 in relation to costs as between attorney and client are apposite here:

> "Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and thing like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should

> be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear." (at p. 535)

Even if I were to accept that second applicant was sincere in his belief that the affidavits contained militarily sensitive information I can, nevertheless not ignore the fact that his actions in informing the Court that much of the information was formally classified secret was, at the very least, negligent. In addition, the attitude of non-cooperation which the applicants adopted when faced with the offer by first and second repondent to reach consensus on a flexible approach so as to ensure that sensitive information was not publicised forced the first and second respondents into "unnecessary trouble and expense". By pursuing their application after receipt of the letter of 28 March 1988, the applicants acted vexatiously.

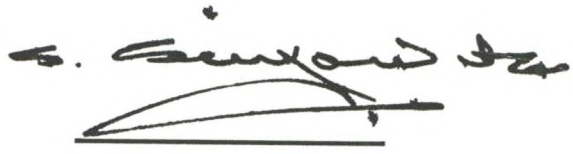
I am satisfied that when applicants launched the application they did so reasonably on the basis that the court martial judgment was subject to a lawful secrecy order issued in terms of the Military Discipline Code. However, when they received the letter of 28th, which was delivered on the same day, the applicants ought to have reconsidered their stance and sought to reach agreement with first and second respondents along the lines suggested in the letter. They did not. Instead they agreed to the substitution of the founding affidavit and thereafter persisted in their argument that there remained sensitive items - which they did not at once identify - in the applicants' papers.

Second applicant's unrepentent attitude as set out in his latest affidavit reinforces my conclusion that the Court should register its disapproval at the applicants' conduct.

Second applicant acted in the ancillary application with due authority, on behalf of both applicants and first applicant must therefore, share the responsibility for his actions.

In the result the order which I make is as follows:

> That the first and second applicants are jointly and severally to pay the costs of the application. Such costs are to be paid on a scale as between party and party up to and including the 28th March, 1988 and thereafter on a scale as between attorney and client. The costs of first and second respondents shall include the costs of employing two counsel.



SELIKOWITZ J

ADVOCATE S.W. KENTRIDGE S.C.

CASE NO: 2870/1988

END CONSCRIPTION COMMITTEE
AND DR C. OLVER

v

MINISTER OF DEFENCE
AND A.K. DE JAGER, N.O

SEPARATE FILE RELATING
TO PARAGRAPH 39 OF J.P.B
VAN LOGGERENBERG'S AFFIDAVIT