THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO: 307/05

In the matter between :

MINISTER OF DEFENCE	First Appellant
THE SECRETARY FOR DEFENCE	Second Appellant
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Appellant
- and –	
SOUTH AFRICAN NATIONAL DEFENCE UNION	Respondent

And in the matter between:

MINISTER OF DEFENCE	First Appellant
THE SECRETARY FOR DEFENCE	Second Appellant
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Appellant
- and -	
SOUTH AFRICAN NATIONAL DEFENCE UNION	First Respondent
SIZWE NOFEMELE	Second Respondent

Before:	**MPATI DP, CAMERON, NUGENT, CONRADIE & JAFTA JJA**
Heard:	**8, 9 & 10 MAY 2006**
Delivered:	**31 AUGUST 2006**
Summary:	**Constitutional validity of various regulations contained in Chapter XX of the General Regulations for the South African National Defence force and Reserve.**
Neutral citation:	**This judgment may be referred to as South African National Defence Union v Minister of Defence & Others [2006] SCA 91 (RSA)**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] This is the second in the trilogy of appeals referred to in argument as SANDU I, SANDU II AND SANDU III.[1] SANDU II concerns two applications that were dealt with together by the court below.[2]

[2] In paragraphs 1.1 and 1.2 of the order that was made in Case No 19211/02 it was declared that the Minister of Defence is under a duty to negotiate with the South African Defence Union (SANDU) and he was directed to negotiate accordingly. In SANDU I we found that no such duty exists. Accordingly, those orders ought not to have been granted.

[3] The remaining relief that was sought in both cases concerns the constitutional validity of certain of the Regulations contained in Chapter XX of the General Regulations for the South African National Defence Force and Reserve. The Pretoria High Court (Smit J) held that all the contested regulations were inconsistent with the Constitution, to a greater or lesser degree, and relief was granted in various forms. This appeal is before us with the leave of that court.

[4] The contested regulations fall into two broad categories: those that are said to limit SANDU's constitutional right to engage in collective bargaining; and those that are said to offend other constitutional rights. I will deal with the various regulations in those categories.

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1 The judgment of the court below is reported at 2004 (4) SA 10 (T).
2 Case No 17687/02 and Case No 19211/02

Infringement of Collective Bargaining Rights

[5] The Constitution does not distinguish between workers or trade unions depending upon the nature of their work or the industry in which they function. All workers have the constitutional right to strike and all trade unions have the constitutional right to engage in collective bargaining.[3] In *South African National Defence Union v Minister of Defence*[4] it was held that members of the Permanent Force of the SANDF are workers for the purposes of s 23(2) of the Constitution.[5] It follows that their trade unions have the constitutional right to engage in collective bargaining and that their members have the constitutional right to strike in furtherance of collective bargaining.

[6] A right to engage in collective bargaining is of little account without an effective means of inducing an opposing party to bargain. We held in SANDU I that the means by which the Constitution has protected collective bargaining is by entrenching the right to strike, thereby excluding a simultaneous right to judicial intervention to regulate the bargaining process.

[7] But the right to strike, like other entrenched rights, is capable of limitation if that can be justified under s 36 of the Constitution. That right has indeed been limited in the military by the prohibition on striking in regulation 6. The prohibition on striking is but one of a number of elements that make

[3] Sections 23(2)(c) and 23(5) respectively.
[4] 1999 (4) SA 469 (CC).
[5] Para 30.

up a labour rights regime in Chapter XX, which includes a process for collective bargaining that culminates ultimately in compulsory arbitration if voluntary bargaining fails. The mechanism of compulsory arbitration is one that is commonly found in industries in which striking is prohibited. As pointed out by my colleague Conradie in SANDU I, the threat of an award being imposed upon the parties can operate as a powerful incentive to bargain, as an alternative to striking, and it plays a pivotal role in the regime that is created by Chapter XX.

[8] The regulatory regime establishes a Military Bargaining Council (MBC) that is entitled to conclude and enforce collective agreements and to prevent and resolve labour disputes.[6] The parties to the MBC are the South African National Defence Force (SANDF) and any military union that exhibits a certain threshold membership.[7] Disputes that the MBC cannot resolve through conciliation must be referred to the Military Arbitration Board (MAB).

[9] The MAB comprises five independent persons who are appointed by the Minister.[8] Any dispute that is referred to it must be dealt with in accordance with the regulations and the Arbitration Act 1965 and must be resolved fairly and quickly with the minimum of legal formalities.[9] The MAB must deliver its

[6] Regulations 62 and 63.
[7] Regulations 64 and 68.
[8] Regulation 73.
[9] Regulation 75(1) and (2).

award, with reasons, which is final and binding on the parties, within 15 working days of the conclusion of arbitration proceedings.[10]

[10] The regulations define the scope of permitted bargaining and, in so doing, they simultaneously circumscribe the jurisdiction of the MBC and the MAB. Clearly the MAB may not make an award that falls outside its jurisdiction, and conversely, it is bound to consider all disputes that fall within its jurisdiction. As in the case of any arbitrator it is for the MAB to satisfy itself that a dispute that is referred to it falls within its jurisdiction before entering upon the arbitration and making an award, though its decision on that issue is not conclusive.[11] The remedy of a party who is aggrieved by the MAB's decision to exercise jurisdiction over a particular dispute, or conversely, to decline to do so, is to have the decision reviewed by a court. The manner in which an arbitration tribunal deals with questions relating to its jurisdiction is dealt with more fully in *Russel on Arbitration* 22nd ed by David St John Sutton and Judith Gill paras 5-075 to 5-089 in relation to the English Arbitration Act, but the principles apply equally in relation to arbitrations in this country, and are consistent with the right of access to courts protected by s 34 of the Constitution.

[11] A trade union does not have a constitutional right to engage in collective bargaining on any issue at large. Counsel for both parties accepted

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[10] Regulation 77.

[11] See, for example, *Harris v SA Aluminium Solder Co (Pty) Ltd* 1954 (3) SA 388 (D&CLD) 388F-G; *Interciti Property Referrals CC v Sage Computing (Pty) Ltd* 1995 (3) SA 723 (W) 727C-E;

that the scope of the right to engage in collective bargaining is limited to bargaining in respect of legitimate labour issues. But the scope of the bargaining right is itself capable of being limited if that can be justified under s 36.

[12] SANDU contends that regulations 19 and 36 purport to limit the scope of that right, by excluding certain issues from the ambit of collective bargaining, and are thus inconsistent with s 23(5) of the Constitution. Those two regulations are foreshadowed by regulation 3(c), which provides that the objectives of the regulations are to provide for, amongst other things, 'collective bargaining on certain issues of mutual interest'. Regulation 19 provides as follows:

'Military trade unions shall not have the right to negotiate a closed shop or agency shop agreement with the employer.'

Regulation 36 is in the following terms:

'Military trade unions may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of –

(a) the pay, salaries and allowances of members, including the pay structure;

(b) general service benefits;

(c) general conditions of service;

(d) labour practices; and

(e) procedures for engaging in union activities within units and bases of the Defence Force.'

[13] The court below held that the three regulations to which I have referred all conflict with SANDU's right to engage in collective bargaining by purporting to restricting the ambit of permitted bargaining. The word 'certain' in regulation 3(c) was declared to be invalid and severed from the regulation. Regulation 19 was declared to be invalid. Regulation 36 was declared to be invalid 'to the extent that it purports to limit the right of military trade unions to engage in collective bargaining to the matters listed in subsections (a) to (e)'.

[14] To the extent that any regulation excludes from permitted bargaining matters that fall within the ambit of SANDU's constitutional right it is invalid unless the limitation on that right is capable of being justified under s 36. Whether any of the regulations to which I have referred indeed have that effect depends upon the proper construction of the regulation concerned.

[15] Regulation 3(c) does no more than set out one of the objectives of the regulations. By itself it does not purport to restrict the ambit of permitted bargaining and is thus not constitutionally objectionable.

[16] Regulation 19 is clear in its terms. The matters that it purports to exclude from collective bargaining (the negotiation of a 'closed shop or agency shop agreement') are undoubtedly legitimate labour issues, in respect of which SANDU is constitutionally entitled to bargain. Counsel for the SANDF sought to persuade us that the exclusion of these matters from

permitted bargaining is justified in a military establishment but was not able to articulate precisely why that is so. Whether a closed shop or agency agreement is antithetical to a military establishment seems to me to depend on the terms of the particular agreement, and in particular on the bargaining unit to which such an agreement applies. While it is not difficult to envisage a closed shop agreement that is incompatible with a military establishment, it is also not difficult to envisage such an agreement that is compatible with it. I can see no reason, in the circumstances, why a total prohibition on negotiating such an agreement is reasonable and justifiable, and in my view the regulation was correctly declared to be invalid. Various constructions of regulation 19 that might avoid the penalty of invalidity were debated but they cannot in my view be sustained.

[17] Regulation 36, in its terms, permits collective bargaining on a wide range of issues that include all general service benefits, all general conditions of service, and all labour practices. The wide terms in which the regulation is framed are capable of including, but being restricted to, all legitimate labour issues, and that is the construction that must be preferred in order to maintain constitutional consistency.[12] On that construction of regulation 36, which in my view is the proper one, it does not purport to restrict the matters on which SANDU is entitled to bargain to anything less than is permitted constitutionally, and accordingly the regulation is not invalid.

[12] *Van Rooyen v The State* 2002 (5) SA 246 (CC) para 88, and cases there cited.

[18] We are not called upon to decide precisely what matters fall within the terms of regulation 36, nor do I think a court is capable of doing so in the abstract. As I have pointed out above, it is for the MBC, and ultimately the MAB, to decide (always, as pointed out, subject to jurisdictional review) whether a particular matter falls within the scope of the regulatory regime, if that is contested.

[19] There is a further regulation, ancillary to the right to engage in collective bargaining, that is also contested. It concerns the composition and the powers of the MAB, which, as I have indicated, plays a pivotal role in the bargaining structure that is created by the regulations. Regulation 73 provides that the MAB comprises 'five independent persons appointed by the Minister' and does not provide for an appeal against its awards. In both respects the regulation is said by SANDU to be invalid. First, it was contended that persons who are appointed by the Minister are liable to be partial towards the SANDF, or at least to be perceived as partial to the SANDF. In my view that submission misconstrues the effect of the regulation. Appointments to the MAB must necessarily be made by the Minister responsible for the department concerned. But the persons whom he appoints must be objectively independent, and seen to be independent, and that is a justiciable requirement. The fact alone that the Minister makes the appointments is in those circumstances not objectionable. Secondly, it was submitted on behalf of

SANDU that the regulation is defective in that it fails to allow for an appeal against a decision of the MAB. Where a tribunal has a membership of five I see no grounds for finding that it is constitutionally impermissible for that tribunal's decision to be final.

The Remaining Regulations

[20] Some of the remaining regulations that came under attack are in conflict with one or other constitutional provision and the dispute in relation to those regulations centred upon whether the limitations were justifiable under s 36. In justification of those limitations the Minister relied on the special nature of a military establishment like the SANDF. Although the nature of that establishment was not fully articulated in the evidence there are certain features of the SANDF which a court is capable of taking judicial notice of, and those features are illuminated further by the constitutional obligations of the SANDF, the provisions of the Defence Act 2002, and the Military Discipline Code.

[21] The SANDF, in common with most standing military establishments, functions within a hierarchical command structure. Strict obedience to lawful orders and professional respect for those in command is required within that structure. Those principles are reflected in s 200(1) of the Constitution, which requires the Defence Force to be 'structured and managed as a disciplined

military force', and in various provisions of the Code. In order to engender public confidence the SANDF must necessarily not be or be seen to be aligned with any faction or special-interest group in society. What also needs to be borne in mind when assessing the validity of certain of the regulations is that the regime for collective bargaining within the military is one that calls for disputes to be settled by rational argument rather than by the assertion of collective force. What might be appropriate in the context of bargaining that allows for collective action will not necessarily be appropriate in the context of military bargaining.

[22] SANDU's objection to regulation 8(b)[13] is that it precludes its members from assembling, demonstrating and picketing in relation to matters concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence. It was submitted that that prohibition offends the right to assemble, to demonstrate, to picket and to present petitions that is entrenched in s 17, offends the right to freedom of expression in s 16(1), and offends the right to participate in the activities of trade unions in s 23(2)(b).

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[13] 'Members have the right to peaceful and unarmed assembly, demonstration, picket and petition, and to present petitions in their private capacity: Provided that such right shall not be exercised –

(a) while in uniform or wearing any part of a uniform or displaying any insignia linked to the Defence force, in a manner which indicates in any other way employment in the Defence force or the Department of Defence; or

(b) in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence.'

[23] Regulation 8(b), properly construed, relates only to public assembling and does not preclude members of SANDU from assembling in private for the purpose of concluding union business. It is antithetical to engendering public confidence in a disciplined military force that there should be public displays of divisions that might exist within the force, and in my view the limitation that the regulation imposes is constitutionally lawful.

[24] Regulation 13(a)[14] is said by SANDU to conflict with the right of every trade union to form and join a federation (s 23(4)(c)) and the right to freedom of association (s 18). The principles of the ILO Committee on Freedom of Association articulate the right of a trade union to join with others as giving 'expression to the fact that workers or employers are united by a solidarity of interests, a solidarity which is not limited either to one specific undertaking or even to a particular industry, or even to the national economy, but extends to the whole international economy.'

[25] Members of the SANDF owe their allegiance to, and only to, the Republic and its Constitution, and the command structure of the SANDF. The regulation aims at preventing the forging of alliances that are in conflict with, or that might be seen to be in conflict with, those allegiances, which in my view is no less than is required in the SANDF. In my view the limitation is

[14] A military trade union shall not affiliate or associate with:
(a) any labour organisation, labour association, trade union or labour federation that is not recognised and registered;

both reasonably and justifiably required to maintain public confidence in the SANDF and the regulation is not invalid.

[26] Regulations 25(a) and (b),[15] and regulation 27, entitle a member of a union to assistance from trade union representatives in disciplinary, grievance and other proceedings, but preclude the right to representation. The exclusion of that right, it was submitted on behalf of SANDU, offends the various rights entrenched in sections 23(1), 25(b), 27(b), and 34 of the Constitution.

[27] Discipline in the SANDF is maintained through the application of the Military Discipline Code,[16] and in accordance with the provisions of the Military Discipline Supplementary Measures Act 1999. Disciplinary offences are dealt with either, at the election of the member, in a disciplinary hearing conducted by a commanding officer, or in a trial before a military court. Where a member is tried by a military court he or she is entitled to legal representation of his or her choice at his or her own expense, or to military defence counsel provided at the expense of the State.[17] In relation to all disciplinary proceedings, including those before a military court, the

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[15] '25. A military trade union representative has the right to:
(a) at the request of a member, assist the member with respect to grievance and disciplinary proceedings, but not to representation;
(b) at the request of a member, assist the member in redressing any alleged unjust administrative action or unfair labour practice through the use of the office channels for redressing such alleged unjust administrative action or unfair labour practice;
'27. Military trade unions may –
(a) assist their members with respect to grievance procedures, including the formulation of grievances; or
(b) assist their members with respect to any disciplinary hearings and military court proceedings,
Provided that such assistance shall not include representation by an official, office bearer or military trade union representative.' ...'

[16] First Schedule to the Defence Act 1957.

[17] Section 23.

regulations allow for assistance by a trade union representative. I do not think the regulation, insofar as it relates to disciplinary proceedings, conflicts with the Constitution. Adequate representation is allowed to members in such proceedings and I see no reason why that should necessarily extend to trade union representation in relation to matters of military discipline. Grievances, on the other hand, are dealt with in writing through the chain of command.[18] The failure to allow representation, as opposed to assistance, by a trade union representative in relation to a process that takes place only in writing, does not seem to me to offend any of the constitutional provisions upon which SANDU relied.

[28] Regulation 37 prohibits trade union activities in the course of military operations or while members are undergoing military training.[19] SANDU contended that these restrictions conflict with the rights of workers and trade unions that are entrenched in s 23. It submitted, in addition, that interference with military operations and training is avoided by the provisions of regulation 39,[20] and that in those circumstances the absolute prohibition on trade union activities being conducted during those times is overbroad. I do not think that

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[18] Section 61 of the Defence Act 2002.

[19] '37 (1) No member may participate in the activities of a military trade union while participating in a military operation including operations in fulfillment of an authorized international obligation as contemplated in section 201(2)(c) of the Constitution or military exercise, undergoing training as an integral part of a military operation or during military training.

(2) No military trade union may liaise or consult with its members whilst such members participate in a military operation or exercise, undergo training as an integral part of a military operation or during military training.'

[20] '39 A military trade union shall not undertake or support any activity which may impede military operations, military exercises, training during military operations or exercises or the preparation for military operations or during military training.'

the rights relied upon by SANDU encompass a right to engage in trade union activities at any time at all. Merely to restrict the occasions upon which members may engage in trade union activities does not seem to me to conflict with their s 23 rights.

[29] Regulation 41 provides for the appointment by the Minister of a Registrar of military trade unions to exercise the powers and perform the duties provided for elsewhere in the regulations. Regulation 53 confers the power on the Registrar to withdraw the registration of a military trade union in specified circumstances. SANDU contended that regulation 41 violates the right to fair labour practices (s 23(1)) and the right to fair administrative action (s 33) insofar as it allows for the appointment to be made by the Minister. Allied to that, SANDU sought an order setting aside the appointment of the incumbent of that position at the time the application was launched.[21] In my view neither of those claims has merit. The Registrar is an administrative official whose powers and duties are prescribed, and whose conduct in carrying out those functions and exercising those powers is subject to judicial review. The appointment of that functionary by the Minister does not conflict with the rights that were relied upon by SANDU, and no proper grounds existed for setting aside the appointment of the incumbent of that position. The objection to regulation 53 was that it was said to authorise the Registrar to de-register a union without first allowing the union to be heard. I do not think

[21] We were informed from the bar that the person concerned no longer holds that position.

that is a proper construction of the regulation. The ordinary rules of natural justice, including the right to be heard, apply to the exercise of the Registrar's powers under the regulation, and in those circumstances the regulation does not conflict with the Constitution.

[30] In summary, only regulation 19, in my view, is constitutionally invalid. It follows that the appeal must succeed except to that extent.

[31] The incidence of the costs of this appeal lies within the discretion of this court. It has for long been held by this court that in general the successful party in an appeal is entitled to his or her costs of the appeal in the absence of circumstances that justify a departure from that general rule. Although the appeal focused on constitutional issues I do not think that that is sufficient reason to depart from the general rule in the present case. Those issues arose in the context of a regulatory regime that is of peculiar interest to the parties and has no broader social significance. I also see no other reason to depart from the general rule. What has been decisive in the exercise of my discretion is that the appellant has been substantially successful, in that my decision (by which I mean my conclusion rather than the reasoning that has led to it) substantially favours the appellant. In view of the fact that the order of the court below is to be altered, which is the basis upon which its decision relating to costs was made, it is open to this court to reconsider the order that was made by that court relating to costs. Bearing in mind the wide scope of the

applications, and SANDU's limited success in those applications, in my view no order should be made in relation to the costs in the court below.

[32] Accordingly the appeal is upheld with costs, including the costs of two counsel. The orders of the court below are set aside and substituted with the following:

> 'Regulation 19 in Chapter XX of the General Regulations for the South African National Defence Force and Reserve, published in Government Gazette 20376 dated 20 August 1999, is declared to be invalid and is set aside. Otherwise the applications are dismissed.'

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R W NUGENT
JUDGE OF APPEAL

MPATI DP)
CAMERON JA) CONCUR
CONRADIE JA)
JAFTA JA)