CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 65/06

SOUTH AFRICAN NATIONAL DEFENCE UNION	Applicant
versus	
MINISTER OF DEFENCE	First Respondent
SECRETARY OF DEFENCE	Second Respondent
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Respondent
P MOLOTO, ACTING CHAIRPERSON MILITARY BARGAINING COUNCIL	Fourth Respondent

Heard on : 1 March 2007

Decided on : 30 May 2007

JUDGMENT

O'REGAN J:

[1] This case concerns disputes regarding collective bargaining that have arisen between the South African National Defence Force (the SANDF) and the South African National Defence Union (SANDU), the union that represents between a third and a quarter of all the members of the SANDF. It has its origin in five separate applications, each launched by SANDU in the High Court. Those applications were in turn consolidated into three hearings in respect of which three judgments by

different judges of the High Court were handed down. All three were appealed to the Supreme Court of Appeal which handed down two judgments in respect of which SANDU now seeks leave to appeal to this Court.

Background

[2] Before turning to the facts of the applications before us, it will be useful to describe briefly the background to the dispute. The SANDF includes the South African army, navy and air force. The Permanent Force of the SANDF consists of full-time military personnel. Until 1999 there was a statutory prohibition on members of the Permanent Force being members of trade unions.[1] That prohibition was declared unconstitutional on 26 May 1999 by this Court in *South African National Defence Union v Minister of Defence and Another* (the 1999 *SANDU* decision).[2]

[3] The Court held that the prohibition was inconsistent with section 23 of the Constitution which provides –

> "(1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right –
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.
>
> (3) Every employer has the right –

[1] Section 126B of the Defence Act, 44 of 1957 (the 1957 Act) provides –

> "(1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act No. 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister."

[2] 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right –

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[4] The order of constitutional invalidity made by the Court was suspended for three months to afford the Minister of Defence (the Minister) an opportunity to make regulations to provide for labour relations as a result of the lifting of the ban on trade union membership.[3] Section 87(1)(rB) of the Defence Act, 44 of 1957 (the 1957 Act), empowered the Minister to issue regulations –

> "relating to the rights of members of the Permanent Force in connection with all matters concerning labour relations between them and the State as their employer (including conditions of service, salaries and other benefits) and the administration and management of such matters, including the settlement of disputes and the establishment of mechanisms for such purpose."

[5] On 20 August 1999 following on the 1999 *SANDU* decision, the Minister issued regulations to regulate labour relations in the SANDF, which now constitute chapter XX of the General Regulations of the South African National Defence Force

[3] Id at paras 42 and 45.

and the Reserve (the regulations).[4] The regulations provide for the registration of unions that have a proven membership of 5 000 SANDF members at the time of their application for registration.[5] It should be noted that since the regulations were promulgated, the 1957 Act has been repealed and replaced with the Defence Act, 42 of 2002 (the 2002 Act), but the relevant regulations were expressly preserved.[6] Once a union has a proven membership of 15 000 SANDF members it may apply for membership to the Military Bargaining Council (the MBC).[7] A key function of the MBC is the conclusion of collective agreements between trade unions and the Department of Defence.[8]

[6] The Constitution of the MBC was adopted on 13 March 2001 by the Department of Defence and SANDU. The first objective of the MBC is, in accordance with the provisions of the Defence Act, regulations and the Constitution of the MBC, to –

> "negotiate and bargain collectively to reach agreement on matters of mutual interest between the employer and members represented by admitted Military Trade Unions (MTU) in the Council, and to prevent and resolve disputes between the employer and such Military Trade Unions by means of negotiation, consultation or otherwise, including, but not limited to, the utilisation of procedures for dealing with disputes".[9]

[4] The regulations contained in R998 were published in Government Gazette 20376 of 20 August 1999.

[5] Regulation 43(1)(e).

[6] Section 106(2) of the 2002 Act.

[7] Regulation 68(1).

[8] Regulation 63(a).

[9] Clause 5(a) of the Constitution of the MBC.

The parties to the MBC are the Department of Defence "as employer" and those military trade unions admitted to the MBC in terms of the regulations.[10] Clause 20 of the Constitution of the MBC provides for a procedure according to which disputes between the employer – the Department of Defence – and unions shall be resolved. Once a dispute is declared, the secretary of the MBC shall convene a meeting within five working days to seek to resolve the dispute. If the dispute remains unresolved, the dispute may be referred to the Military Arbitration Board (the MAB) for resolution.

[7] The MAB is also established in terms of chapter XX of the regulations.[11] Regulation 73 provides that it shall be composed of five independent members appointed by the Minister (a matter to which I shall return). Regulation 75 provides that arbitrations are to be dealt with in terms of the regulations and the Arbitration Act, 42 of 1965.

[8] SANDU, having reached the appropriate threshold of representation, was registered as a trade union in terms of the regulations[12] on 30 June 2000 and admitted to the MBC during October 2000. At the time that the applications were launched in

[10] Clause 7(a) of the Constitution of the MBC provides that –

> "The Council comprises of the Department of Defence, as employer, at Departmental level and those Military Trade Unions –
>
> (i) referred to and admitted to the Council in terms of Regulation 67 of the General Regulations; and
>
> (ii) referred to and admitted in terms of Regulation 68 of the General Regulations, upon a decision of the Council, as contemplated in Regulation 68(4) of the General Regulations."

[11] Part 5 of the regulations.

[12] See Part 3 of the regulations which provides for a Registrar of Military Trade Unions designated by the Minister in terms of regulation 41 to register military trade unions.

the High Court, it was one of only two registered military trade unions[13] and the only union admitted to the MBC. According to the Department of Defence, in October 2001, SANDU represented more than 17 000 SANDF members out of a total SANDF membership of just over 60 000, accordingly just under 29% of all members.[14]

[9] Once SANDU had been registered as a military trade union, but before it had been admitted to the MBC, indeed before the MBC was established, it wrote to the SANDF on 24 July 2000 as follows –

> "Until the formal establishment of the Military Bargaining Council, for the interim, the status quo, as on 30 June 2000, should be maintained regarding any and all issues having an effect on the rights and/or interests of our members. Alternatively arrangements should be made between SANDU and the Department of Defence/SANDF whereby procedures and channels of communication, between the parties, need to be established in order to consult and/or negotiate on any and all issues effecting our members' rights and/or interests. . . .
>
> SANDU is aware of the fact that the Department of Defence/SANDF is in the process of unilaterally revising existing personnel policies and/or unilaterally compiling new personnel related policies which are likely to impact negatively on the rights and/or interests of our members once unilaterally implemented.
>
> SANDU therefore places on record that the interim period between 30 June 2000 and the establishment of the Military Bargaining Council should not be regarded . . . as an opportunity to proceed with these actions . . . without consulting and/or negotiating such actions/issues with SANDU first. . . .

[13] The other union was the South African Security Forces Union which represented 11 000 members, constituting approximately 18% of uniformed personnel at the time the applications were launched.

[14] SANDU does not dispute this figure, but notes that it has some members, not included in the membership total furnished by the Department of Defence, who pay subscriptions directly to SANDU and not by way of a deduction from their salaries.

> The Department of Defence/SANDF is hereby requested to cease all and/or any aforementioned unilateral actions and to co-operate with SANDU in establishing interim procedures/structures to deal with these matters, ensuring healthy labour relations within the SANDF."

[10] On 18 August 2000, the following response was sent to SANDU by the Secretary for Defence –

> "2. The Department of Defence is well aware of the fact that your registration affords your organisation certain organisational rights. As far as collective bargaining rights are concerned, your organisation will be consulted on matters of mutual interest, but bargaining can only commence once you are admitted to the Military Bargaining Council (MBC).
>
> . . .
>
> 4. You are furthermore ensured that your organisation, as a registered military trade union, will be consulted on all matters that may affect the rights or interests of your members."

[11] On the same day, the Secretary of Defence wrote to SANDU in respect of the formulation of policy regarding retrenchment packages as follows –

> "2. The Department of Defence is obliged by law to consult with registered military trade unions on all policy matters that would affect their members. Therefore the department will abide by these prescripts and keep your organisation on board as far as these matters are concerned. The formulation of policy is however a managerial responsibility but will nonetheless be consulted with all relevant stakeholders.
>
> 3. The assurance is once again given that as soon as the relevant draft document is ready, it will be distributed to your organisation for input."

[12] The MBC met for the first time in October 2000. Regular meetings began in February 2001. From February to August, approximately thirteen meetings of the

MBC were held. However, although meetings were held regularly, the MBC proved unable to resolve issues placed before it. By September 2001, more than 90 issues were on its agenda of which only one had been resolved. One of the issues tabled early on in the life of the MBC was SANDU's dissatisfaction with certain of the regulations contained in chapter XX. SANDU considered that certain regulations were unconstitutional and required reconsideration. This issue was one of those not resolved by the MBC.

[13] The meeting of the MBC planned for 4 September 2001 was postponed on 31 August by the Department of Defence to 11 September, and on 10 September that meeting was again postponed to 20 September 2001. The meeting scheduled for 20 September was again called off by the Department of Defence on 14 September.

[14] It is clear from the record that both the Department of Defence and SANDU were finding the process of bargaining with one another at the MBC both frustrating and painful. The respondents point to a variety of actions by SANDU which they allege constituted bad faith bargaining. In particular, the respondents refer to a series of articles published in the media during September and October 2001 criticising the manner in which the SANDF handled its internal labour relations. They also refer to a leaflet campaign in which the Minister and senior members of the SANDF were lampooned. SANDU on the other hand was angered by what it saw as the SANDF's failure to address its concerns in any material fashion.

[15] The frustration caused by the failure to resolve issues in the MBC as well as the postponement of the meetings of the MBC led SANDU to write a letter to the SANDF on 17 September 2001 as follows –

> "SANDU has, during the past year of negotiations with the Department, been frustrated by the Department of Defence in effective collective bargaining. Major stumbling blocks preventing various important issues from being addressed properly, are (amongst others):
>
> (a) A total lack of the necessary infrastructure in the SANDF/Department of Defence to respond effectively to legitimate problems/concerns raised by SANDU. To this the Department of Defence has admitted in the MBC;
>
> (b) Actions and/or omissions on the part of the Department of Defence, as negotiating party in the MBC, which casts serious doubt over the credibility of the Employer and its commitment to respecting the rights and interests of soldiers as a matter of urgency; and
>
> (c) Disregard by the Department of Defence/SANDF for the independence and constitutional authority of the MBC.
>
> Unfortunately these factors had come to a point where the general feeling in SANDU membership is that SANDU and its members will no longer be fooled around by the Employer. We have on various occasions warned the Employer that labour unrest could become the result of the Employer's disregard for SANDU and its members' rights and interests, provisions of the General Regulations, MBC proceedings and the MBC Constitution.
>
> Due to the many frustrations encountered between SANDU and the Employer, SANDU is strongly pressured by its members to embark into national labour unrest in order to make known to management, the public, Parliament and Government the treatment SANDU and its members are receiving from the Employer.
>
> In our last effort to avoid SANDU and its members to embark on national labour unrest, we now call on your office to urgently meet with SANDU in order to try and defuse the tension between this union and the Employer."

[16] The Minister responded to SANDU's letter on 19 September 2001. He drew attention to the fact that industrial action by SANDU's members would be unlawful in terms of the 1957 Act and the regulations, and warned SANDU that acts of labour unrest would be treated as mutiny. He called upon SANDU to withdraw its threat of labour unrest unconditionally and stated that negotiations with SANDU at the MBC would be suspended until the threat of labour unrest was withdrawn. He added, however, that negotiations "may" be resumed "with immediate effect" once the threat of industrial action was withdrawn.

[17] On 4 October 2001, the SANDF introduced a new staffing policy without prior consultation or negotiation with SANDU. Indeed, SANDU only became aware of the new policy on 15 October 2001 when the policy document was handed to it by one of its members. The SANDF does not dispute that the policy was introduced unilaterally and assert that they were entitled to do so, despite their undertakings to the contrary in their letters of 18 August 2000 referred to above. The new policy is an interim policy to replace a staffing policy that had, according to the SANDF, been causing difficulties. According to the interim policy, until a new policy had been developed, transfers, secondments, and placements would be decided by commanders and line managers with the assistance of supervisors in accordance with the guidelines "as stipulated in the Defence Review and the Constitution of the RSA." As a result of the implementation of the interim policy, staffing procedures that were already underway in terms of the previous staffing policy would be terminated save for some exceptions.

[18] In the light of the unilateral introduction of the new policy and in consequence of the Minister's letter withdrawing from collective bargaining, SANDU's attorneys responded to the Minister's letter on 18 October 2001 as follows –

> "Our client hereby gives an unequivocal undertaking to your client that it will neither embark upon nor encourage its members to embark upon any labour action that conflicts with the law (by which is meant the Defence Act and the Regulations promulgated thereunder). This undertaking is given against the backdrop of statements earlier made by our client to the effect that it at no time intended to utter any threat suggestive of the intent to either embark upon or encourage such labour action. Our client's attitude is now as it has always been: i.e. that it complies with and operates within the ambit of the law. In making this point, our client takes note of the fact, that your client may have interpreted the remarks in earlier correspondence as constituting a threat. . . .
>
> We request that your client immediately withdraw his instructions as contained in his letter dated 19 September 2001 and instruct the employer's negotiators to resume negotiations with our client without any delay."

[19] The letter requested that, pending a resumption of negotiations, there be no unilateral implementation of the new staffing policy. On the same day, SANDU's attorneys also wrote to suggest that a trained third party be appointed to assist SANDU and the SANDF to resolve their differences. The letter proposed either a full relationship-by-objective process or mediation. A relationship-by-objective process is a lengthy industrial-relations process in terms of which an employer and union meet to discuss and analyse all the aspects of their relationship with one another. The purpose

of such a process is to improve the industrial relations environment and foster a constructive working relationship between an employer and a union.[15]

[20] Despite these letters from SANDU's attorneys and several that followed repeating the undertaking not to participate in industrial action, the Minister did not give instructions for collective bargaining to be resumed immediately. On 31 October 2001, the State Attorney on behalf of the Minister wrote to SANDU indicating that he would be willing to revoke his instruction to suspend negotiations on the following conditions –

> "3.1 SANDU must commit itself to a process of mediation before commencement of negotiations.
>
> 3.2 The parties must negotiate an agreement and reach common ground on at least the '*manner and form*' of collective bargaining within the existing structures created for that process, so that proper and fruitful negotiations can take place without the conflict and complications that are generated by the present style of negotiations. This agreement should also cater for matters such as the procedure for the scheduling of meetings, the procedure for the submission and acceptance of topics for the agenda, rules of conduct during negotiations, and the taking of minutes or the recording of proceedings." (Emphasis in original.)

[21] In relation to the implementation of existing policies and the unilateral implementation of the new staffing policy pending the satisfactory conclusion of the mediation process, the State Attorney continued as follows –

[15] See Alby et al *Labor Institutions, Labor-Management Relations and Social Dialogue* (World Bank, Washington DC 2005) 43, noting the use of the relationship-by-objective process in South Africa. See also Bendix *Industrial Relations in South Africa* (Juta, Johannesburg 1996).

> "6. As far as your request for an undertaking is concerned, my instructions are that:
>
> 6.1 in the absence of a collective agreement affecting or amending any existing policy or instruction, concerning a matter subject to collective bargaining in terms of the relevant regulations, the Department of Defence is entitled (and also constitutionally obliged) to apply and/or implement such a policy or instruction; and
>
> 6.2 if circumstances call for a unilateral implementation of new policies or instructions, or an amendment of existing ones, the Department of Defence is obliged to go ahead and do so in the public interest and in the execution of its constitutional obligations, obviously subject to the right of an individual prejudiced thereby to approach a court of law in the event of an infringement of his or her rights." (Emphasis in original.)

[22] SANDU agreed to participate in the mediation process, but once again reiterated its demand that the new staffing policy should not be implemented until negotiations at the MBC had resumed. Shortly after this exchange of correspondence, but before any mediation took place, the first of the applications which relate to this appeal was launched by SANDU. One further fact needs to be recorded. In May 2003, more than eighteen months after the first of the applications was launched by SANDU, the SANDF sought to implement a transformation and restructuring policy without negotiation with SANDU. This resulted in further litigation as I shall explain in due course.

[23] This background would not be complete without recording the challenge of transformation that has faced the SANDF since 1994. The SANDF has drawn together former members of the South African Defence Force, former members of the

military established in the Transkei, Ciskei, Bophuthatswana and Venda,[16] as well as members of the armed wings of the liberation movements, Umkhonto weSizwe and the Azanian Peoples Liberation Army. Old enmities have been set aside in order to establish a new defence force that is committed to defending our country and upholding our Constitution. According to the Constitution, the primary object of the SANDF is –

> "to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."[17]

[24] The importance of this constitutional object cannot be denied. Nor can we overlook the inherent difficulties of binding together soldiers from different armies with different institutional cultures and values into one institution tasked with an important constitutional mandate. It is necessary now to turn to the issues raised in each of the applications.

The five applications

[25] As stated at the outset, this case originated in five applications launched in the High Court by SANDU. Two of these were consolidated and heard by Van der Westhuizen J; a further two were consolidated and heard by Smit J; and the remaining application was heard by Bertelsmann J. For ease of reference, as was done in the Supreme Court of Appeal, I shall refer to the applications heard by Van der

[16] These four territories which now form part of the Republic of South Africa had been afforded independent status by the former South African government as part of its apartheid policy.

[17] Section 200(2) of the Constitution.

Westhuizen J as *SANDU I*; those heard by Smit J as *SANDU II*; and the remaining application heard by Bertelsmann J as *SANDU III*.

[26] The first applicant in all three matters is SANDU. The other applicants in the individual applications are mentioned below when the applications are individually discussed. Similarly, in each case the first respondent is the Minister; the second respondent is the Secretary of Defence; and the third respondent is the Chief of the SANDF. Other respondents in the individual applications are identified below. At this stage, too, it would be helpful to note that the employer of those employed in the SANDF is the Department of Defence.

SANDU I

[27] *SANDU I* had its genesis in two applications brought in the High Court. The first[18] concerned the introduction of a new staffing policy described in paragraph [17] above. This application became moot between the parties even before the hearing in the High Court as the disputed staffing policy was withdrawn by the Department of Defence. The only issue that remained for consideration, therefore, was the costs incurred in that application, which the High Court ordered to follow the result of the second of the two applications in the matter which came to be known as *SANDU I*.[19]

[18] Case no 23690/2001 launched on 4 October 2001.

[19] *SANDU v Minister of Defence and Others* 2003 (3) SA 239 (T) (*SANDU I*).

[28] The second application[20] sought an order declaring that refusal by the SANDF to negotiate with SANDU, save subject to the preconditions imposed by the Minister in a letter dated 31 October 2001, was unlawful.[21] As described above, the preconditions laid down were that SANDU must agree to mediation; that SANDU

[20] Case no 29868/2001 launched on 13 November 2001. There is a fourth respondent in this second application in *SANDU I*, Mr P Moloto, the Acting Chairperson of the MBC.

[21] Above at paras [20]-[21]. During the proceedings in the High Court, SANDU amended the relief it sought. *SANDU I* above n 19 at 242-243. The relief finally sought by it was the following –

"1. . . .

1.1 Declaring that the refusal of the first and second respondents to negotiate with the applicant in its capacity as the collective representative of its members in the employ or service of the South African National Defence Force (the members), unless, first, the applicant agrees to mediation and/or unless, secondly, it acknowledges that the respondent is entitled unilaterally to amend existing policy and/or to implement new policy when this is considered to be in the public interest and/or until, thirdly, the parties have agreed to the manner and form of collective bargaining within the existing structure created for the process, constitutes an infringement of the provisions of –

1.1.1 reg 36 of "XX" of the general regulations of the South African National Defence Force and the Reserve (the regulations) permitting and entitling the applicant, as a military trade union, to negotiate on behalf of its members on the topic therein stated; and/or

1.1.2 reg 63 as read with the balance of part 4 of the regulations, which confers on the applicant, as a member of the Military Bargaining Council (the council), the right to participate in the attainment of the objects of the council, including the conclusion of collective agreements; and/or

1.1.3 s 23 of the Constitution of the Republic of South Africa, Act 108 of 1996, which enshrines the right to fair labour practices.

1.2 Interdicting, restraining and preventing the first and second respondents from refusing to negotiate with the applicant unless the applicant complies with the conditions referred to in para 1.1 above or with such other conditions as it may, without good cause, elect to impose.

2. . . .

2.1 declaring that the first, second and third respondents' implementation of the staffing policy announced in circular CJSUP/HR SUP CEN/R/101/1/B and CJSUP/HR SUP CEN/R/502/8, dated 4 October 2001, alternatively new or amended terms and conditions of an employer of service, without the applicant's concurrence or without first negotiating with the applicant, representing the members as aforesaid, in good faith to deadlock over them, constitutes an infringement of the applicable enactments;

2.2 interdicting, restraining and preventing the first, second and third respondents from implementing or continuing to implement the staffing policy announced in circular . . . , dated 4 October 2001, alternatively new or amended terms and conditions of employment of service, without first satisfying the requirements referred to in para 2.1 above.

3. Costs of the second application under Case No 29868/01 (including the costs of any day on which costs were reserved) to be paid by the first, second and third respondents.

4. Costs of the supplementary affidavit and further supplementary affidavits filed and delivered by the applicant, to be paid by the first, second and third respondents."

must acknowledge that the SANDF is entitled unilaterally to amend its existing policy or implement new policy when it perceives this to be in the public interest; and that both the SANDF and SANDU must agree to the manner and form of collective bargaining within the existing structures for the process.

[29] The SANDF's answer to the application was first to assert that it bore no legal duty to bargain with SANDU at all; and secondly, that even if it did bear such a duty, it was entitled to withdraw from collective bargaining in the circumstances of the case until its preconditions were met.

[30] The High Court dismissed the application on 27 September 2002. Van der Westhuizen J held that section 23(5) of the Constitution does not impose an obligation upon an employer to bargain collectively with a trade union. He also found that there was no legislative duty which required the SANDF to bargain with SANDU. Having reached this conclusion, however, Van der Westhuizen J continued by reasoning as follows –

> "Furthermore, I am not of the view that my viewpoint that the Constitution and the relevant legislation do not impose a duty to bargain collectively, can be construed to mean that participation in a process of negotiation and bargaining by the employer is so entirely voluntary that the employer could, for no reason at all, capriciously, at its mere whim, or simply because it would be inconvenient or difficult, decide not to negotiate."[22]

[22] *SANDU I* above n 19 at 256I-257A.

[31] Van der Westhuizen J then considered whether it was unreasonable for the SANDF to have withdrawn from bargaining as it had done and to have refused to return until its preconditions were met. He concluded as follows –

> "Therefore, I am of the view that, even if the respondents are legally, morally, or otherwise in principle obliged to participate in collective bargaining in the MBC, the actions of the first respondent to suspend negotiations and to set preconditions for further participation are not unreasonable under the circumstances of this case, or at least not so unreasonable as to justify interference by a court of law to the extent of ordering the respondent to return to the negotiating table."[23]

[32] SANDU then sought leave to appeal to the Supreme Court of Appeal.

SANDU II

[33] Both applications that underpin *SANDU II* were launched in July 2002.[24] The relief sought in both applications was a declaration of invalidity in respect of certain of the regulations forming part of chapter XX of the regulations, mentioned earlier. The following regulations were challenged:

(a) regulations 3(c) and 36 to the extent that they derogate from the right of a military trade union to negotiate over all matters of mutual interest between it and its members on the one hand and the Department of Defence on the other;

(b) regulation 8 insofar as it imposes limits on protest action by members of the SANDF;

[23] Id at 261C-E.

[24] The first application was under Case No 17687/2002 launched on 1 July 2002 and the second under Case No 19211/2002 launched on 12 July 2002. In the second application, there is a second applicant, Mr S Nofemele.

(c) regulation 13(a) in that it prohibits military trade unions from associating or affiliating with trade unions and federations that are not registered in terms of the regulations;

(d) regulation 19 inasmuch as it prohibits military trade unions from negotiating for a closed shop or agency shop agreement;

(e) regulations 25(a) and (b) and regulation 27, to the extent that they prohibit military trade union representatives from representing their members in respect of grievance and disciplinary proceedings, but only permit them to "assist" their members;

(f) regulation 37 to the extent that it imposes a complete ban on the activities of a military trade union during military training and operations;

(g) regulation 41 insofar as it permits the Minister to appoint the Registrar of Military Trade Unions;

(h) regulation 53 insofar as it gives the Registrar of Military Trade Unions the power to withdraw the registration of a registered military trade union without prior notice or reasonable notice; and

(i) regulation 73 to the extent that it empowers the Minister to appoint the members of the MAB.

In addition, in the second case, SANDU also sought a declaration that the SANDF was under a duty to bargain with it at the MBC on the regulations and all matters of mutual interest.

[34] Both applications in *SANDU II* were heard together by Smit J in the High Court. In his judgment,[25] Smit J disagreed with Van der Westhuizen J and held that section 23(5) affords a union a right to engage in collective bargaining with an employer as well as imposing a correlative duty on an employer to bargain with that union.[26] Smit J held that the regulations also impose a duty to bargain on the SANDF. He based this conclusion on the language of regulation 3(c) read with regulation 36.[27] In respect of the duty to bargain, Smit J accordingly made the following order –

> "It is declared that the first respondent is under a duty to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest (including the contents of, and amendments to, the General Regulations promulgated or to be promulgated in terms of the Defence Act) that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other."[28]

He also issued a mandamus directing the Minister to negotiate with SANDU within the MBC.

[35] Smit J also declared the challenged regulations to be inconsistent with the Constitution and invalid.[29] The SANDF appealed the order made by Smit J to the Supreme Court of Appeal.

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[25] 2004 (4) SA 10 (T); 2003 (9) BCLR 1055 (T) (*SANDU II*). Judgment was handed down on 17 July 2003.

[26] Id at 23H-I.

[27] Id at 26G-27B.

[28] Id at 41E-G.

[29] Id at 41-43. Smit J ordered –

> "1. In case No 19211/2002 it is ordered that:
>
> . . . .

SANDU III

[36] This application was launched in the High Court on 10 June 2003.[30] In it, SANDU sought an interdict restraining the SANDF from implementing and proceeding with a transformation and restructuring policy[31] which had been introduced on 21 May 2003 without consultation or negotiation with SANDU. It is common cause that this policy was based on a policy that had been adopted by the Public Service Coordinating Bargaining Council[32] after lengthy negotiations between the public service unions and the State as the employer party to that Bargaining

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1.3 Subsection 8(b) of the regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the regulations;

1.4 Subsection 13(a) of the regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the regulations;

1.5 Section 19 of the regulations is declared to be inconsistent with the Constitution and invalid, and such section is severed from the regulations;

. . . .

2. In case No 17687/2002 it is ordered that:

2.1 Section 41 of the General Regulations for the South African National Defence Force and Reserve published in GN R998 of 20 August 1999 ('the Regulations') is declared to be inconsistent with the Constitution and invalid to the extent that it empowers the first respondent to appoint the Registrar of Military Trade Unions.

2.2 The appointment by the first respondent of Mr D C M Rathebe as the Registrar of Military Trade Unions is set aside.

2.3 It is declared that the power of the Registrar of Military Trade Unions to withdraw the registration of a military trade union in terms of s 53 of the regulations is subject to the requirement of the giving of notice as contained in ss 49(1) and (2) of the regulations.

2.4 The first respondent is ordered to pay the applicants' costs, such costs to include the costs consequent upon the employment of two counsel."

[30] *South African National Defence Union and Others v Minister of Defence* (T) Case No 15790/2003, 14 July 2003, unreported (*SANDU III*). There are two applicants in addition to SANDU in this case: the second applicant is Lance Corporal P Oerson and the third applicant is Pioneer L M Malemela.

[31] The policy was called the "Revised Implementation Measures: Transformation and Restructuring of the Department of Defence", reference number CJSUP/CHRSUP/R/107/16/P.

[32] The Public Service Coordinating Bargaining Council was established in terms of section 36 read with Schedule 1 of the Labour Relations Act, 66 of 1995. It is a central bargaining council that coordinates the various bargaining councils in the different sectors of the public service.

Council. When the Department of Defence introduced the policy, SANDU requested the Department to bargain with it on the issue of the policy. The Department refused. SANDU then declared a dispute in the MBC, but the Department again persisted in its refusal to negotiate. SANDU then referred the dispute to arbitration.

[37] While the arbitration was pending, the SANDF indicated that it intended to implement the policy immediately. Accordingly SANDU launched an application for an interdict to prevent the SANDF from implementing the policy until the arbitration process was complete.[33]

[38] Once again the SANDF argued that it had no obligation to bargain with SANDU over matters of mutual interest and that it was entitled to implement policy unilaterally in the public interest. Bertelsmann J who heard the application in the High Court agreed with Smit J that the SANDF did have a duty to bargain with SANDU in the circumstances of the case. Accordingly the court issued an order restraining the Department from implementing the policy pending the finalisation of

[33] Above n 30 at 1-2. The relief requested by SANDU stated –

> "2. That the first to third respondents be restrained and interdicted from implementing and proceeding with the Revised Implementation Measures: transformation and restructuring of the Department of Defence under reference number CJSUP/CHRSUP/R/107/16/P dated 21 May 2003 pertaining to members of the SANDF pending finalisation of the dispute concerning such implementation referred to the Military Arbitration Board in case number MAB01/2003 in accordance with the dispute resolution procedures as provided for in the regulations to the Defence Act and the Military Bargaining Council Constitution.
>
> 3. That the first to third respondents be restrained and interdicted from continuing with any implementation of any aspect which forms the subject of a dispute which had already been declared in terms of the dispute resolution procedures as provided for in the aforesaid regulations and the MBC Constitution and referred for arbitration to the Military Arbitration Board, pending resolution of such dispute either by means of conciliation or arbitration as prescribed, and in which dispute the issue of collective bargaining is raised."

the dispute concerning the implementation of the policy by the MAB. In addition, the court made an order interdicting the Department –

> "from continuing with any implementation of any aspect which forms the subject of a dispute which had already been declared in terms of the dispute resolution procedures as provided for in . . . the aforesaid regulations and the MBC Constitution and referred for arbitration to the Military Arbitration Board pending resolution of such dispute either by means of conciliation or arbitration as prescribed, and in which dispute the issue of collective bargaining is raised."

[39] This order, too, was appealed to the Supreme Court of Appeal. During argument, this Court was informed that the subject matter of *SANDU III*, the unilateral implementation of the transformation policy, is now moot between the parties, as the SANDF has withdrawn the policy.

Proceedings before the Supreme Court of Appeal

[40] The appeals from the three judgments in *SANDU I*, *SANDU II* and *SANDU III* were heard together by the Supreme Court of Appeal because of one issue that was common to all – the question of whether the SANDF has a legal duty flowing from the Constitution or any other source to bargain with SANDU.[34] Two unanimous judgments were handed down by that court: one dealing with the appeal against the orders in *SANDU I* and *SANDU III* and the issue of the duty to bargain by Conradie JA and the other dealing with the constitutionality of the individual regulations – the issue raised in *SANDU II* – by Nugent JA.

[34] *South African National Defence Union v Minister of Defence and Others; Minister of Defence and Others v South African National Defence Union and Others* 2007 (1) SA 402 (SCA); 2007 (4) BCLR 398 (SCA) at para 2.

[41] Conradie JA, after a consideration of both the provisions of the Constitution and international labour law, concluded that –

> "the Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises."[35]

He also rejected SANDU's alternative arguments that either chapter XX of the regulations or the Constitution of the MBC established a judicially enforceable duty to bargain. He also rejected SANDU's argument that the conduct of the SANDF during the consultations around the transformation policy constituted an unfair labour practice.

[42] In his judgment Nugent JA[36] dealt with the appeals against the orders of constitutional invalidity made by the High Court in respect of the regulations. He upheld all the appeals save for the appeal in respect of regulation 19 which provides that military trade unions shall not have the right to negotiate a closed shop or agency shop with the employer.

[43] SANDU seeks leave to appeal against both judgments of the Supreme Court of Appeal to this Court. It limits its appeal in relation to the constitutionality of the

[35] Id at para 25.

[36] *Minister of Defence and Others v South African National Defence Union; Minister of Defence and Others v South African National Defence Union and Another* 2007 (1) SA 422 (SCA).

regulations to regulations 8(b), 13(a), 25(a) and (b), 27, 37 and 73. The Minister does not seek leave to appeal against the order of the Supreme Court of Appeal in respect of regulation 19.

Issues in this Court

[44] It is important to identify the issues for determination in this Court carefully. The case involves appeals arising from *SANDU I*, *SANDU II* and *SANDU III* and must therefore depend on the relief sought and the facts established in those cases. In my view, the applicant sought the following relief in *SANDU I* and continues to seek that relief in this Court: an order that the SANDF was legally not entitled to withdraw unilaterally from the MBC and impose preconditions upon SANDU for its return. In *SANDU II*, as well as a challenge to the constitutionality of certain of the regulations promulgated in chapter XX, SANDU sought an order that the SANDF was obliged to bargain with it on the content of the regulations and on all matters of mutual interest. In *SANDU III*, SANDU sought an order declaring that the SANDF was not entitled to implement a transformation policy that raised issues that fell within the scope of bargaining topics at the MBC until the MAB had determined the dispute raised by SANDU concerning the unilateral implementation of that policy. All these issues relate to the broader question whether the SANDF bears a duty to bargain with SANDU arising either from the provisions of section 23(5) of the Constitution; chapter XX of the regulations; and/or the Constitution of the MBC. One of the important questions that arises in the case is whether SANDU is entitled to rely

directly on section 23(5) of the Constitution when regulations have been acted to regulate the rights contained in section 23(5).

[45] The second group of issues relates to whether the individual regulations under challenge are inconsistent with the Constitution and therefore invalid. These issues were raised in *SANDU II* and need to be determined in the light of the facts set out in that case. Finally, SANDU has sought to argue that the conduct of the SANDF in failing to consult on the transformation policy in *SANDU III* constitutes an unfair labour practice. For reasons that will become plain during the course of this judgment, this is not an argument that needs to be addressed in this case.[37]

[46] There can be no doubt that the first group of questions raises constitutional issues. It was argued not only in the Supreme Court of Appeal but also in the High Court that these questions need to be answered in the light of section 23(5) of the Constitution. The second group of issues relates to the constitutionality of the regulations and also clearly raises constitutional issues.

[47] There can be no doubt either that it is in the interests of justice for this Court to consider the appeal in this matter. The SANDF is an important institution of state tasked with crucial constitutional responsibilities. It is clear from the record before us that the ongoing disputes between it and SANDU are deep-seated. It is therefore in the public interest that the appeals be determined.

[37] See para [74] below.

Duty to bargain

[48] SANDU based its argument in this Court on three grounds: first, that section 23(5) of the Constitution affords trade unions a right to bargain with employers that imposes a correlative duty on employers to bargain with trade unions; secondly, that chapter XX of the regulations establishes a duty to bargain on the SANDF; and thirdly that the Constitution of the MBC establishes a duty to bargain on the SANDF. The SANDF argued to the contrary that neither section 23(5) establishes a correlative duty upon employers to bargain with trade unions that is judicially enforceable; nor does chapter XX of the regulations or the Constitution of the MBC impose a duty to bargain upon the SANDF.

[49] The three judgments in the High Court as well as the judgment on the duty to bargain in the Supreme Court of Appeal commenced their analysis with the meaning of section 23(5) of the Constitution and whether it confers a justiciable duty to bargain. However, this does not seem to me to be the correct starting point for the following reasons.

[50] Section 23(5) provides –

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

It is clear that at the minimum section 23(5) confers a right on trade unions, employers' organisations and employers to engage in collective bargaining that may not be abolished by the legislature, unless it can be shown that such abolition passes the test for justification established in section 36 of the Constitution.[38] In recognising this, we should remember that in the past, black workers and trade unions that represented them were prohibited from engaging in collective bargaining.[39] Preventing a recurrence of this historical injustice is one of the purposes of section 23(5).

[51] Section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. The question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution. In *NAPTOSA and Others*

[38] Section 36(1) provides –

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[39] Black workers were excluded from the Industrial Conciliation Act, 11 of 1924, which was the first legislation to regulate collective bargaining in South Africa. Its successor, the Industrial Conciliation Act, 28 of 1956, also excluded black workers from its ambit, although workers classified as "coloured" and "asian" under apartheid laws were included within its scope. During the 1950s, the Native Labour (Settlement of Disputes) Act, 48 of 1953, was enacted which provided certain procedures for the resolution of disputes arising between black African workers and their employers. However, black workers were not permitted to join trade unions, nor were they permitted to strike. It was only in 1979, with the enactment of the Industrial Conciliation Amendment Act, 94 of 1979, following on the recommendations of the Wiehahn Commission, that black workers were included within the scope of the labour legislation and permitted to join trade unions. For a useful discussion see Du Toit et al *Labour Relations Law: A Comprehensive Guide* 4 ed (Lexis Nexis Butterworths, Durban 2003) 6-12. See also International Labour Office *Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa* (ILO, Geneva 1992).

v Minister of Education, Western Cape, and Others,[40] the Cape High Court held that a litigant may not bypass the provisions of the Labour Relations Act, 66 of 1995, and rely directly on the Constitution without challenging the provisions of the Labour Relations Act on constitutional grounds. The question of whether this approach is correct has since been left open by this Court on two subsequent occasions.[41] Then, in *Minister of Health And Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*),*[42] Ngcobo J writing a separate judgment held that there was considerable force in the approach taken in *NAPTOSA*. He noted that if it were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation. In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.

[52] Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that

[40] 2001 (2) SA 112 (C) at 123I-J; 2001 (4) BCLR 388 (C) at 396I-J.

[41] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 17; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at paras 23-24.

[42] 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 434-437. Similar reasoning was adopted in that case by Chaskalson CJ. Without reference to *NAPTOSA* Chaskalson CJ held, at paras 95-96, that because the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) is national legislation passed to give effect to the rights in section 33, a litigant cannot avoid the provisions of PAJA and rely directly on the Constitution.

legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[43] The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now.

[53] In this case, legislation does exist in the form of chapter XX of the regulations.[44] There is no constitutional challenge to the regulations in this regard. On the contrary, SANDU has always sought to rely on chapter XX of the regulations as well as on section 23 of the Constitution. Indeed, the primary relief sought in *SANDU I* is an order declaring that the refusal of the SANDF to negotiate with SANDU unless SANDU meets certain pre-conditions is an infringement of regulation 36 of chapter XX, and/or regulation 63 of chapter XX,[45] and/or section 23 of the Constitution.[46] Similarly, in *SANDU II* and *SANDU III*, although the notices of motion did not specify the legal basis for the claims, the founding affidavits relied both upon the provisions of chapter XX of the regulations and the Constitution of the MBC as well as section 23 of the Constitution.

[43] Section 7(2) of the Constitution provides – "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." See also *NEHAWU* above n 41 at para 14.

[44] Section 239 of the Constitution defines "national legislation" to include "subordinate legislation made in terms of an Act of Parliament." The regulations clearly constitute such subordinate legislation as they were promulgated in terms of the 1957 Act.

[45] See para [59] below.

[46] See para [3] above.

[54] Once it is accepted that disputes that arise from collective bargaining in the SANDF should be considered first in the light of the provisions of chapter XX of the regulations rather than section 23(5) of the Constitution, the focus of a court's attention will be different to the focus of both the High Court and the Supreme Court of Appeal in these three matters. A court will start with a consideration of the regulations rather than the constitutional provision. The regulations, of course, must be construed in the context of the Constitution as a whole.[47]

[55] Before turning to the subject matter of the regulations, it should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial, industrial-relations issues. These issues would include questions relating to the level at which bargaining should take place (ie at the level of the workplace, at the level of an enterprise, or at industry level); the level of union membership required to give rise to the duty; the topics of bargaining and the manner of bargaining. These are difficult issues, which have been regulated in different ways in the recent past in South Africa, as the general principles governing labour relations in South Africa have changed several times since the 1980s when the modern trade union movement emerged.[48]

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[47] Section 39(2) of the Constitution provides – "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[48] See above n 39 for a discussion of the history of a dual system of industrial relations law in South Africa. Following upon the recommendations of the Wiehahn Commission, the Industrial Conciliation Act, 28 of 1956, was extended to cover black African workers and an unfair labour practice jurisdiction was afforded to the Industrial Court, which resulted in the development of an unfair dismissal jurisprudence and a duty to bargain. In 1988, controversial amendments to the Labour Relations Act were introduced by the Labour Relations Amendment Act, 83 of 1988. One of the first tasks of the newly elected democratic government was the reform

[56] As I have held, however, it is not necessary to determine the proper interpretation of section 23(5) in this case and we accordingly refrain from doing so. Accordingly, we neither endorse nor reject the approach to section 23(5) of the Constitution adopted by the Supreme Court of Appeal. As the proper interpretation of that section need not be decided in this case, it would be inappropriate to consider the question further.

[57] Chapter XX of the regulations was promulgated, as described above, after this Court held that members of the SANDF did have the right to join trade unions.[49] The objectives of the chapter are described in regulation 3 as being to provide for –

> "(a) fair labour practices;
> (b) the establishment of military trade unions;
> (c) collective bargaining on certain issues of mutual interest;
> (d) to ensure that trade union activities do not disrupt military operations, military exercises and training and do not undermine the Constitutional imperative of maintaining a disciplined military force; and
> (e) generally to provide for an environment conducive to sound and healthy service relations."

The regulations provide for the registration of military trade unions with a military trade union registrar.[50] Registered military trade unions have a range of organisational

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of labour law, which resulted in the enactment of the Labour Relations, Act 66 of 1995. For a useful commentary, see Du Toit above n 39 at 6-20. See also Khoza and Bendix "The Impact of Law on the Nature and Function of Collective Bargaining in South African Industrial Relations" (1994) 14 *Industrial Relations Journal of South Africa* at 5-20.

[49] See para [2] above.

[50] See Part 3 of the regulations.

rights that are provided for in the regulations: the right to recruit members;[51] the right to organise their own affairs;[52] the right of union officials to gain access to information from the employer, subject to certain exceptions;[53] and the right of access to Department of Defence premises, subject to arranging the time with the Officer Commanding in advance.[54] Moreover, members of military trade unions are also afforded organisational and collective rights. They may elect union representatives[55] and they may authorise the deduction of union dues from their wages.[56]

[58] The regulations also specify that military trade unions may engage in collective bargaining on the following issues only –

> "(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."[57]

The regulations also provide that members may not participate in union activities while on a military operation or undergoing training, a matter to which I will return later.[58]

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[51] Regulation 10.

[52] Regulation 11.

[53] Regulations 21 (duty to disclose information) and 22 (classified information).

[54] Regulation 33.

[55] Regulation 23.

[56] Regulations 28-31.

[57] Regulation 36.

[58] Regulation 37. See below n 89.

[59] Part 4 of the regulations establishes the MBC.[59] The powers and duties of the MBC are described in regulation 63 as including –

> "(a) the conclusion of collective agreements;
>
> (b) the enforcement of collective agreements;
>
> (c) the prevention and resolution of labour disputes; and
>
> (d) the promotion of labour relations and training in this regard."

The regulations also provide for the MBC to adopt a constitution.[60] According to the regulations, collective agreements[61] are binding upon the parties to such agreement.[62] Moreover, regulation 69(4) provides that unless a collective agreement provides otherwise, no party may unilaterally withdraw from it.

[60] The regulations also provide for the dispute-resolution functions of the MBC. Regulation 71[63] defines a dispute as any disagreement in respect of a collective

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[59] Regulation 62 provides – "The Military Bargaining Council is hereby established." In this regard, it should also be noted that section 55 of the 2002 Act provides as follows –

> "(1) Members of the Regular Force and Reserve Force must receive such pay, salaries and entitlements including allowances, disbursements and other benefits in respect of their service, training or duty in terms of this Act as may from time to time be agreed upon in the Military Bargaining Council.
>
> (2) If no agreement contemplated in subsection (1) can be reached in the Military Bargaining Council, the Minister may, after consideration of any advisory report by the Military Arbitration Board and with the approval of the Minister of Finance, determine the pay, salaries and entitlements contemplated in that subsection."

[60] Regulations 64 and 67(4).

[61] "Agreement" is defined in regulation 1 as "a binding written agreement concluded between the parties to the Council in respect of matters of mutual interest, and 'collective agreement' shall have the same meaning".

[62] Regulation 69(2).

[63] Regulation 71 provides –

> "(1) In this regulation, 'dispute' means any disagreement in respect of a collective agreement, or any other matter which is or could be the subject of collective bargaining, and the parties to the dispute may include –
>
> (a) parties to the Council;

agreement or any other matter which is or could be the subject of collective bargaining. It provides that the MBC must attempt to resolve a dispute in accordance with its Constitution. If a dispute is not resolved then the regulations provide that the dispute shall be referred for resolution to the MAB.

[61] Part 5 of the regulations establishes the MAB. It is clear that the MAB is the final dispute-resolution agency and all disputes between the parties to the MBC which remain unresolved are to be referred to the MAB.

[62] This brief account makes plain that what is contemplated by the regulations is the establishment of a bargaining council, the MBC, whose members shall be the employer the Department of Defence as employer and any military trade union that has been admitted to the MBC in terms of the regulations. These parties will engage in collective bargaining on matters of mutual interest, as described in regulation 36, with a view to reaching collective agreements. Where disputes arise between the parties, the regulations establish a dispute procedure, which is elaborated upon in the

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(b) military trade unions not party to the Council; and
(c) members.

(2) The Council shall attempt to resolve a dispute between the parties through conciliation in accordance with the constitution of the Council.

(3) A party who refers a dispute to the Council must satisfy the Council that a copy of the referral has been served on all the other parties to the dispute.

(4) The Council may enter into an agreement with an independent agency for the purposes of conducting conciliation in terms of its dispute resolution functions specified in this section.

(5) If an agency contemplated in subregulation (4) is unable to achieve a conciliation within 60 days of referral –

(a) that agency shall issue a certificate to this extent; and
(b) the Council shall refer the matter to the Board."

Constitution of the MBC, and which contemplates that if the dispute is not resolved at the MBC it will be referred to the MAB for final resolution. The regulations neither contemplate that an employer may withdraw from the MBC, nor that either party may unilaterally impose preconditions for participating at the MBC. The regulations also contemplate that where one party raises a matter that is a permissible bargaining topic, and the parties are unable to resolve the matter by bargaining, that matter will be referred to the MAB for determination.

[63] This understanding of the regulations echoes that suggested in the letters written by the Secretary of Defence to SANDU on 18 August 2000, before the MBC had been established, in which it was stated –

> "The Department of Defence is well aware of the fact that your registration affords your organisation certain organisational rights. As far as collective bargaining rights are concerned, your organisation will be consulted on matters of mutual interest, but bargaining can only commence once you are admitted to the Military Bargaining Council (MBC)."[64]

and

> "The Department of Defence is obliged by law to consult with registered military trade unions on all policy matters that would affect their members."[65]

[64] The Constitution of the MBC was adopted in March 2001 after the first meetings of the MBC and signed by the two parties to the MBC at the time: the employer (the Department of Defence) and SANDU. The Constitution of the MBC

[64] See para [10] above.

[65] See para [11] above.

provides that one of the objectives of the MBC is to "negotiate and bargain collectively to reach agreement on matters of mutual interest".[66] Consistent with the regulations, the Constitution of the MBC neither contemplates the withdrawal of the employer from the MBC, nor does it contemplate any unilateral imposition of terms and conditions for participation in collective bargaining. It contains a detailed dispute procedure as contemplated by regulation 71.[67]

[65] Starting with *SANDU I*, it is clear from this analysis that the Department of Defence may not withdraw from the MBC unilaterally without following its dispute procedure, and may not unilaterally impose conditions for its participation in the MBC. It is true that in this case the withdrawal of the SANDF from the MBC was a response to the letter written by SANDU on 17 September 2001, in which SANDU had "warned . . . that labour unrest could become the result of the Employer's disregard for SANDU".[68] One month later SANDU wrote to the SANDF unequivocally undertaking that it would neither embark upon nor encourage its members to engage in industrial action.[69] The SANDF refused to return to the MBC and imposed certain pre-conditions for its return. What is clear from the regulations is

[66] Above n 9.

[67] Above n 63.

[68] See para [15] above. As to the unlawfulness of industrial action by members of the SANDF, see regulation 6 which provides that – "No member may participate in a strike, secondary strike or incite other members to strike or to support or to participate in a secondary strike." See also section 104(13) of the 2002 Act which provides that –

> "Any person who recruits or attempts to recruit any member of the Regular Force for membership of any trade union other than a military trade union which is duly authorised to act as such, or incites or attempts to incite a member of the Defence Force to participate in strikes, demonstrations or protests prohibited in terms of the regulations, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years".

[69] See para [18] above.

that if the Department is aggrieved at the conduct of the union parties at the MBC, it may declare a dispute and pursue that dispute to its end. The Department did not follow this route. Instead it sought unilaterally to withdraw from the MBC and to impose conditions for its return. The regulations do not permit the Department to do this.

[66] SANDU has therefore established that it is entitled to an order declaring that the Department of Defence may not withdraw from the MBC and may not impose pre-conditions on its participation in negotiations with SANDU at the MBC. This is the relief sought in *SANDU I*. It follows therefore that the order made by Van der Westhuizen J cannot stand.

[67] The Supreme Court of Appeal reached the opposite conclusion. It reasoned as follows –

> "In my view, one cannot read an intention to impose judicially enforceable bargaining on the SANDF into the Regulations. If no resolution to a dispute on a matter of mutual interest is reached because the SANDF refuses to bargain, that dispute may, after a failed attempt at conciliation by the MBC, be referred to the MAB. There is a remedy whether or not there has been bargaining. Bargaining, while desirable, is not essential to the dispute resolution scheme established by ch XX."[70] (Footnotes omitted.)

In my view, this passage does not answer the question posed. The question in this case is not whether the regulations require this Court to compel the SANDF to sit at a

[70] Above n 34 at para 29.

table and negotiate with a union. The question is, as has been set out above, whether the employer was entitled to withdraw from the MBC and unilaterally impose conditions for its return. The answer to that question, as is plain from the above analysis of the regulations, is that the employer may not withdraw from the MBC and then unilaterally impose conditions for its return. Accordingly the Supreme Court of Appeal order in this regard must be set aside.

[68] I turn now to the relief sought in SANDU II in respect of the duty to bargain. SANDU sought an order that the SANDF and the Department of Defence are under a duty to bargain with SANDU on the content of the regulations. In my view, this proposition cannot succeed. Although it may be appropriate for a public-sector employer to consult relevant unions on the subject matter of regulations that will affect the collective bargaining relationship between the employer and the unions,[71] it cannot be said that the lawmaker is obliged to bargain over the content of the law with the union. Nor is there any provision in the regulations to suggest otherwise. SANDU could point to no authority to support its contention on this score other than section 23(5) of the Constitution. No matter how broadly the terms "collective bargaining" is construed in section 23(5), it cannot include the right of a union to bargain with a legislator on the content of law.

[71] See *New Clicks* above n 42 in which the Court had to consider whether PAJA applies to the making of regulations. Five judges held that the Act did apply to the making of the regulations at issue in that case; five judges left the matter open; and one judge held that although the PAJA does not apply, the principle of legality requires consultation on the making of subordinate legislation in certain circumstances. See also the approach this Court has taken to public consultation in the making of legislation in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).

[69] It should be emphasised that, in this case, SANDU has not suggested that the content of the regulations promulgated constituted an attempt to bypass or evade the process of bargaining itself. What the legal situation would be should regulations be used to evade the bargaining process need not be decided in this case. In my view, therefore, the argument that the Department had a duty to bargain with SANDU on the subject matter of the regulations must fail. To the extent that Smit J held otherwise, his order must be set aside.

[70] In *SANDU III*, SANDU originally sought an order that the Department of Defence be interdicted from implementing a transformation policy prior to resolution of disputes regarding that policy by the MAB. As stated above, the SANDF no longer wishes to implement the transformation policy that was the subject matter of *SANDU III* and it is accordingly not necessary to make any further order in this regard. The underlying legal dispute between the parties in *SANDU III* relates to the question whether the Department is entitled to implement unilaterally a disputed policy which is being processed through the dispute procedure established by the regulations. One can easily imagine that a similar dispute will arise in the future relating to a different policy or dispute. Accordingly, although the dispute about the particular policy in question in *SANDU III* may be moot, the legal dispute concerning the conduct of the Department of Defence which underlies the dispute in *SANDU III* may arise again between the parties at any time. It is appropriate therefore to consider that legal question.

[71] To interpret the regulations to permit the Department of Defence to implement a disputed policy, prior to the conclusion of the dispute-resolution process provided for in the regulations, would conflict with the overall purpose and effect of the regulations. The objectives of the regulations are to provide, amongst other things, for fair labour practices[72] and "generally to provide for an environment conducive to sound and healthy service relations."[73] The regulations provide for collective bargaining on a range of issues including general conditions of service.[74] Unilateral implementation of disputed policies on matters directly related to conditions of service is not conducive to sound and healthy service relations. In particular, given the potential for conflict that lies within the SANDF and given its history,[75] the unilateral implementation of a disputed transformation policy may well be extremely harmful to healthy service relations in the SANDF.

[72] Despite these provisions, the SANDF argued that the regulations do not impose an obligation upon it to exhaust the procedures set out in the regulations. If this proposition were to be accepted, the result would be that the SANDF could at any stage, despite the institutions and procedures carefully established in the regulations to provide for bargaining and dispute resolution, unilaterally implement its policies over the objections of SANDU. In my view, the very purpose of the regulations is to prevent unilateral action by the SANDF in respect of the areas of permissible bargaining until the procedures provided for in the regulations have been exhausted.

[72] Regulation 3(a) above para [57].

[73] Regulation 3(e) above para [57].

[74] Regulation 36 above para [58].

[75] See paras [23]-[24] above.

[73] I should emphasise that it is not the SANDF's argument that there were urgent circumstances in the present case which required it to ignore the dispute procedures established by the regulations and the Constitution of the MBC. It is not necessary to consider therefore whether in such special circumstances, the SANDF may act unilaterally.

[74] It is clear therefore that SANDU has established that the Department of Defence is not entitled to implement unilaterally a policy which falls within the permissible bargaining topics identified by regulation 36 before exhausting the dispute procedure provided for in the regulations and the Constitution of the MBC. Given that the SANDF no longer intends to implement the transformation policy at issue initially in this case, it is not therefore necessary to make a declaratory order in this regard. Nevertheless the order made by Bertelsmann J is correct in this regard and the Supreme Court of Appeal order setting that order aside cannot be upheld. Finally, it should be noted, that having reached this conclusion, it is not necessary to consider whether the conduct of the SANDF in implementing the transformation policy before the dispute procedure had run its course constituted an unfair labour practice as contemplated in section 23(1) of the Constitution.

[75] Before proceeding to consider the second group of issues raised in this appeal it should be emphasised that both parties to the litigation accept that a third party mediation process would be valuable in order to establish a set of procedures and

understandings that will enable them to go forward in a manner conducive to giving effect to the objectives of the regulations. Given the extent of the conflict and animosity between the parties that is reflected on the record, there can be no doubt that they are correct in this regard. The real nub of the dispute between the parties in this case arose from the employer's insistence on its entitlement unilaterally to adopt and to implement policies in the face of objections from the union. It is not surprising that this attitude gave rise to sharp discontent in the union. Both parties need to seek mutually acceptable ways to establish a constructive working relationship in the interests not only of the SANDF and its members, but of the broader interests of the country as a whole.

[76] It is necessary now to turn to the second group of issues that arise in this case which relate to the constitutional challenges to individual regulations.

Does regulation 8(b) infringe the Constitution?

[77] Regulation 8 provides –

> "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."

[78] SANDU accepts that regulation 8(a) is constitutional but complains that regulation 8(b) constitutes an unjustified limitation of its members' right to freedom of expression.[76] As regulation 8(a) contains a general prohibition on the right of peaceful protest when wearing the SANDF uniform or any insignia to indicate employment in the SANDF, it is clear that regulation 8(b) prohibits peaceful protest by members of the SANDF in their private capacities when not wearing the uniform in respect of certain topics only. Those topics are the employment relationship with the SANDF or any other matter related to the Department of Defence.

[79] In argument, SANDU accepted that item 46 of the Military Disciplinary Code, (the Code) which they did not challenge, prohibits private protest by members of the SANDF which could cause "actual or potential prejudice to good order and military discipline".[77] The scope of regulation 8(b), therefore, they conceded, relates only to acts of private protest against the SANDF or the Department of Defence which could not cause actual or potential prejudice to good order and military discipline. The scope of regulation 8(b) therefore seems to be very narrow.

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[76] Section 16(1) of the Constitution provides –

> "Everyone has the right to freedom of expression, which includes –
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research."

[77] Item 46 of the Military Disciplinary Code, Schedule 1 to the 1957 Act, retained by section 106(1) of the 2002 Act read with the schedule to that Act, provides –

> "Any person who by act or omission causes actual or potential prejudice to good order and military discipline, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year."

[80] To the extent that regulation 8(b) does prohibit conduct that is not otherwise prohibited by item 46 of the Code, it is clear that it constitutes a limitation of the right to freedom of expression entrenched in section 16 of the Constitution.[78] The scope of that limitation is quite narrow. The question that then arises is whether it is a justifiable limitation of that right.

[81] The SANDF argues that the purpose of the limitation is to promote military discipline. It is clear that this is the purpose sought to be achieved by item 46 of the Code which says that members may not, even in their private capacity, act in a manner that might cause potential prejudice to good order and military discipline. Given the clear terms of item 46, it is not clear how section 8(b) can further the goal of promoting military discipline to the extent that it covers a field not covered by item 46. In other words, regulation 8(b) is merely a repetition of item 46 to the extent that it covers the same ground that item 46 covers. SANDU's complaint is therefore that private conduct of the SANDF members that is not harmful to military discipline is nevertheless prohibited by regulation 8(b). To the extent that regulation 8(b) extends beyond item 46 of the Code, it is not concerned with the prevention of actual or potential harm to military discipline. In the circumstances, I conclude that the SANDF has not established that regulation 8(b) is justifiable. The purpose they seek to assert for it is adequately performed by item 46 of the Code, a provision not challenged by SANDU.

[78] The 1999 *SANDU* decision above n 2 at paras 6-14.

[82] In summary, the purpose the SANDF seeks to assert is adequately achieved by the provisions of item 46 of the Code. To the extent that regulation 8(b) extends beyond item 46, it has no justification. In the light of the above, it is concluded that regulation 8(b) is inconsistent with the Constitution and must be declared invalid.

Does regulation 13(a) infringe the Constitution?

[83] Regulation 13 provides –

> "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; and
>
> (b) any political party or organisation."

[84] SANDU accepts that regulation 13(b) is a legitimate limitation on its right of freedom of association. However, it complains that regulation 13(a) prohibits association with other trade unions, a right which is recognised and protected by the International Labour Organisation (the ILO).[79] Accordingly, SANDU argues that regulation 13(a) constitutes an infringement of its right to freedom of association[80] and to form and join a union federation.[81] In considering SANDU's argument in this regard, it is important to note that the relevant ILO Convention does not assert the right of soldiers or other military personnel to join a trade union but leaves the extent

[79] Article 5 of the Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, entered into force 4 July 1950, provides –

> "Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers."

[80] Section 18 of the Constitution provides – "Everyone has the right to freedom of association."

[81] See above at para [3].

to which such workers are entitled to join unions to be determined by national legislation.[82]

[85] Section 23(4)(c) of the Constitution permits trade unions to form and join a federation. To this extent, therefore, it is clear that regulation 13(a) constitutes a limitation of that right. The question that next arises is whether that limitation is justifiable in terms of section 36 of the Constitution.[83]

[86] Section 199(7) of the Constitution demands that the security services, including the SANDF, not act in a politically-partisan manner. It provides –

> "Neither the security services, nor any of their members, may, in the performance of their functions –
>
> (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
>
> (b) further, in a partisan manner, any interest of a political party."

This provision is of profound political importance as it underlines the principle that in a democracy the armed forces and police must act in a manner which is non-partisan and which is perceived by all citizens to be even-handed.

[87] SANDU accepts that, given the constitutional requirement that the SANDF be politically unaffiliated, regulation 13(b) is legitimate but argues that affiliation to and

[82] Article 9(1) of ILO No. 87 above n 79 provides that – "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."

[83] Above n 38.

association with other unions does not prejudice the constitutional requirement of institutional neutrality that the SANDF bears. However, SANDU fails to acknowledge that many unions in South Africa have express political affiliations which would render affiliation to or association with those unions suspect for the same reason that affiliation with a political party would be constitutionally suspect.

[88] SANDU sought to argue that even if they could not establish that the prohibition on affiliation in regulation 13(a) is constitutionally impermissible, the prohibition on association in the regulation is too wide. In my view, this argument too must fail. Given the importance of the constitutional requirement of political neutrality on the part of the SANDF, it is not impermissible for the regulations to impose a limit on military trade unions from associating with other unions. In reaching this conclusion, it is important to note that international labour law recognises that the rights of military trade unions, if permitted to exist at all, may be regulated by national legislation. In reaching this conclusion, it should be emphasised that what constitutes "association" for the purposes of the regulation will need to be considered in the light of the constitutional principle underlying both section 199(7) of the Constitution and regulation 13(a). "Association" should therefore be understood to be a relationship between a military union and another union which might give rise to a suggestion that the SANDF is not politically neutral. The limitation on section 23(4)(c) contained in regulation 13(a) is justified in light of the special circumstances of the military and is not unconstitutional. SANDU's challenge on this score therefore fails.

Do regulations 25 and 27 infringe the Constitution?

[89] Regulation 25(a) provides that a military trade union representative has the right to "assist" members in grievance and disciplinary proceedings but does not have a right to represent members.[84] Correlatively, regulation 27 provides that military trade unions may assist their members with respect to grievance procedures and disciplinary procedures but that such assistance shall not include representation.[85]

[90] SANDU argues that these provisions violate section 23(1) of the Constitution which entrenches the right to fair labour practices, as well as section 33(1) of the Constitution which entrenches the right to just administrative action and section 35(3)

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[84] Regulation 25 provides –

> "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 official channels for redressing such alleged unjust administrative action or unfair labour practice;
>
> (c) report, in writing, any alleged contravention of these Regulations or a collective agreement binding on the employer to –
>
> (i) the registered military trade union;
>
> (ii) the commander or manager of the unit, base, headquarters or head office; and
>
> (iii) failing any action by the commander or manager to remedy or solve the alleged contravention, the immediate superior of such commander or manager be so informed.
>
> (d) perform any other function agreed to in the form of a collective agreement."

[85] Regulation 27 provides –

> "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."

which entrenches the right to a fair trial, to the extent that proceedings before a military court are also affected by these provisions. SANDU also argues that the regulations are in conflict with the principles laid down by the ILO Committee on Freedom of Association.

[91] In their affidavits, the SANDF gave no reason for the limitation. The Supreme Court of Appeal upheld the provisions on the grounds that they do not constitute a breach of fundamental rights. The Supreme Court of Appeal reasoned as follows –

> "Discipline in the SANDF is maintained through the application of the Military Discipline Code, and in accordance with the provisions of the Military Discipline Supplementary Measures Act 16 of 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. In relation to all disciplinary proceedings, including those before a military court, the 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. 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."[86] (Footnotes omitted.)

[92] The Supreme Court of Appeal may be correct that where grievances are pursued only in writing, there is no material difference between "assistance" and

[86] Above n 36 at para 27.

"representation"; however in my view that is not the proper approach to the question. The question is what are the rights of trade unions and their members in respect of grievance and disciplinary proceedings.

[93] One of the most important tasks of trade unions is to represent its members in disciplinary hearings. As the ILO Committee on Freedom of Association has observed –

> "The right of workers to be represented by an official of their union in any proceedings involving their working conditions, in accordance with procedures prescribed by laws or regulations, is a right that is generally recognized in a large number of countries. It is particularly important that this right should be respected when workers whose level of education does not enable them to defend themselves adequately without the assistance of a more experienced person".[87]

It is thus internationally accepted that once trade unions are recognised by an employer, trade union representatives have a right to represent their members in disciplinary hearings. In my view, the right of representation in grievance and disciplinary proceedings forms part of the right to fair labour practices protected by section 23(1) of the Constitution. This right cannot be limited unless it is reasonable and justifiable to do so. The Minister has proffered no reason for limiting this right in the regulations. Accordingly, the regulations must be declared inconsistent with the Constitution to this extent.

[87] *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 5 ed (ILO, Geneva 2006) at para 517.

[94] The unconstitutionality can be rectified by the remedial techniques of severance and reading-in. To achieve this, the words "but not to representation" must be severed from regulation 25(a); and the proviso to regulation 27 must be severed from the regulation. In addition, the words "represent and" must be read in before the word "assist" in regulations 25(a) and (b) and regulations 27(a) and (b). Once the techniques of severance and reading-in have been applied, regulations 25(a) and (b) and regulations 27(a) and (b) will read as follows –

> "25. A military trade union representative has the right to –
>
> (a) at the request of a member, represent and assist the member with respect to grievance and disciplinary proceedings;
>
> (b) at the request of a member, represent and assist the member in redressing any alleged unjust administrative action or unfair labour practice through the use of the official channels for redressing such alleged unjust administrative action or unfair labour practice.
>
> 27. Military trade unions may –
>
> (a) represent and assist their members with respect to grievance procedures, including the formulation of grievances; or
>
> (b) represent and assist their members with respect to any disciplinary hearings and military court proceedings,

[95] It must be emphasised, however, that the right is to representation by a trade union official, office-bearer or military trade union representative. Office-bearers will be members of the SANDF whom have been elected office-bearers of the union and military trade union representatives will similarly be members of the trade union whom have been elected to represent their fellow union members.[88] A SANDU

[88] Regulation 23 provides for the election of military trade union representatives from amongst union members in the SANDF.

member may not ordinarily insist that a union official represent him or her in circumstances where a military trade union representative is available to do so, or where such insistence would unduly delay the disciplinary process.

Does regulation 37 infringe the Constitution?

[96] Regulation 37(1) provides that "no member may participate in the activities of a military trade union while participating in a military operation" and regulation 37(2) provides that no union may consult or liaise with members whilst such members participate in military operations, exercises or training.[89] SANDU argues that regulation 37 violates both section 23(2)(b) of the Constitution which entrenches the right to participate in union activities and section 23(4) which entrenches the right of a union to determine its own programmes and activities.

[97] SANDU argues that regulation 37 must be understood in the context of regulation 39 which prohibits military trade unions from activities that would impede military operations, exercises or training.[90] SANDU argues that regulation 39

[89] Regulation 37 provides –

> "(1) No member may participate in the activities of a military trade union while participating in a military operation including operation in fulfilment of an authorised 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."

[90] Regulation 39 provides –

> "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 exercises or during military training."

provides adequate protection for military operations, exercises and training from any harm that could be caused by union activities.

[98] The Minister responds by saying that to allow trade union activities during military operations, exercises or training would constitute a threat to the safety of all concerned. Counsel for the Minister also argued that it was necessary to have a clear rule so that disputes would not arise concerning its application. In my view, the Minister is correct that allowing trade union activities to continue during military operations, exercises or training might threaten the ability of the SANDF to carry out its constitutional mandate. Given the importance of ensuring that the military is able to perform its constitutional obligations of ensuring the safety of the Republic, and the potential harm that performing union activities might cause during operations and training, I am persuaded that the Minister has established that the limitation of the rights conferred by sections 23(2)(b) and 23(4) is justifiable in the circumstances.

Does regulation 73 infringe the Constitution?

[99] Regulation 73 vests the Minister with the power to appoint the members of the MAB[91] which, as we have seen, is the institution responsible for determining all disputes between the employer and SANDU. As the final arbiter of disputes in an environment in which industrial action is impermissible, both the Department of Defence and SANDU must have confidence in the institutional competence and independence of the MAB. SANDU argued that because the Minister is the political

[91] Regulation 73 provides – "The Board shall consist of five independent persons appointed by the Minister."

head of the Department of Defence, which is the employer, regulation 73 creates the perception of unfairness in that it suggests that the employer has control over the appointment of members of the MAB.

[100] The Supreme Court of Appeal emphasised that the regulations require that even though appointed by the Minister the members of the Board must be independent. The SANDF also relied on this argument. In response, SANDU argued that the Board must be seen to be independent and that in conferring the power of appointment upon the Minister alone, the regulations failed to establish confidence that the MAB would be independent. SANDU accordingly argued that regulation 73 violates both section 23(1) of the Constitution which entrenches the right to fair labour practices and section 34 of the Constitution which entrenches the right to have disputes resolved by courts or other independent and impartial tribunals.[92]

[101] In considering this argument, it is important to realise that the Minister does act on behalf of the Department of Defence as employer in disputes that arise with SANDU. For example, it will be recalled on the facts of this case that it was the Minister who wrote to SANDU on 19 September 2001, suspending negotiations with SANDU at the MBC.[93] Given the role that the Minister performs as an employer, SANDU's argument – that the Minister's power to appoint the members of the MAB without any consultation gives rise to a perception that the MAB is not an independent

[92] Section 34 of the Constitution provides – "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[93] See para [16] above.

and impartial tribunal as contemplated by section 34 of the Constitution – must be accepted. It is not enough to respond as the Supreme Court of Appeal did that the Minister is obliged to appoint independent persons to the MAB. Giving one party to a dispute effective control over the appointment of the persons that will resolve that dispute does not result in a forum that is independent and impartial in the eyes of the other parties to the dispute.

[102] In order for the MAB to be perceived as an independent and impartial tribunal, either its members should be appointed by a body such as the Judicial Services Commission that is perceived to be independent of the Department of Defence, or the members of the MAB should be appointed by the Minister in consultation with SANDU.

[103] There are a variety of ways in which the appointment process could be amended to comply with the provisions of section 34 of the Constitution. In argument, SANDU made clear that they have no objection to the current members of the MAB. Accordingly, it is just and equitable to declare regulation 73 inconsistent with the Constitution and invalid, but to suspend the declaration of invalidity for a period of six months to permit the Minister to amend the regulations appropriately. Pending the amendment of the regulations, the current membership of the MAB will remain unaffected.

Summary

[104] In summary, I have concluded that an order should be made declaring that the SANDF was not entitled to withdraw unilaterally from the MBC and to impose pre-conditions for its return. The order of the High Court made by Van der Westhuizen J and the order of the Supreme Court of Appeal on this issue must accordingly be set aside. Similarly, I have concluded that the order made by Smit J in relation to the duty to bargain on the subject matter of the regulations must also be set aside. The Court has concluded that regulations 8(b), 25(a) and 25(b), 27, and 73 are invalid either entirely or to some extent. The orders of invalidity made by Smit J in respect of these regulations are therefore by and large confirmed. For clarity, however, the order of Smit J is set aside in its entirety and orders of invalidity are made separately by this Court. Finally, we have concluded that the SANDF was not entitled to implement the transformation policy prior to the exhaustion of the disputes process established by the regulations. However, SANDF no longer seeks to impose the disputed policy, so no order is made in that regard, and the order of Bertelsmann J which was set aside by the Supreme Court of Appeal is not reinstated as it is not necessary to do so.

Costs

[105] In the result, SANDU has been materially successful. The ordinary rule in this Court is that where a litigant has successfully defended a constitutional claim, it is awarded costs. A different rule often applies in labour matters. However, neither party argued that a different rule should apply in this case. Accordingly, it is appropriate that the first, second and third respondents in all three matters (*SANDU I*,

SANDU II and *SANDU III*) be ordered to pay the costs of the applicants in all three courts in all three matters.

Order

[106] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is upheld in part and dismissed in part.
3. The order made by the Supreme Court of Appeal (per Conradie JA) is set aside.
4. The orders made by Van der Westhuizen J in the High Court in cases 23690/2001 and 29868/2001 are set aside.
5. The orders made by Smit J in the High Court in cases 17687/2002 and 19211/2002 are set aside.
6. The order made by Bertelsmann J in the High Court in case 15790/2003 is set aside.
7. The order made by the Supreme Court of Appeal (per Nugent JA) is set aside save in respect of the order of invalidity in respect of regulation 19 of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, which stands.
8. It is declared that the Department of Defence may not in terms of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957 unilaterally suspend negotiations at the Military Bargaining Council and may not unilaterally impose pre-conditions on

the South African National Defence Union which must be met before it resumes bargaining at the Military Bargaining Council.

9. It is declared that regulation 8(b) of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, is inconsistent with the Constitution and invalid.

10.1 It is declared that the words "but not to representation" in regulation 25(a) of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, are inconsistent with the Constitution and invalid and the words are accordingly severed from the regulation;

10.2 It is declared that the words "provided that such assistance shall not include representation by an official, officer bearer or military trade union representative" in regulation 27 of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, are inconsistent with the Constitution and invalid and the words are accordingly severed from the regulation;

10.3 It is declared that the omission of the words "represent and" before the word "assist" in regulations 25(a) and (b) and regulation 27 of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, is inconsistent with the Constitution and invalid;

10.4 It is declared that the words "represent and" must be read-in before the word "assist" in regulations 25(a) and (b) and regulation 27 of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957.

10.5 Once the severance and reading-in referred to in paragraphs 10.1-10.4 of this order have been done, regulation 25(a) and (b) and regulation 27 will read as follows:

"25. A military trade union representative has the right to –

(a) at the request of a member, represent and assist the member with respect to grievance and disciplinary proceedings;

(b) at the request of a member, represent and assist the member in redressing any alleged unjust administrative action or unfair labour practice through the use of the official channels for redressing such alleged unjust administrative action or unfair labour practice;

. . . ."

and

"27. Military trade unions may –

(a) represent and assist their members with respect to grievance procedures, including the formulation of grievances; or

(b) represent and assist their members with respect to any disciplinary hearings and military court proceedings."

11.1 It is declared that regulation 73 of chapter XX of the General Regulations promulgated under the Defence Act, 44 of 1957, is inconsistent with the Constitution and invalid.

11.2 The declaration of invalidity made in paragraph 11.1 of this order is suspended for a period of six months from the date of this order.

12. Any appointment made to the Military Arbitration Board under regulation 73 shall not be affected by the declaration of invalidity made in paragraph 11.1 of this order.

13. The first, second and third respondents are ordered to pay the costs of the applicant occasioned by the five applications in the High Court, as well as the appeals to the Supreme Court of Appeal and to this Court jointly and severally, such costs to include the costs attendant upon the employment of two counsel.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J and Skweyiya J concur in the judgment of O’Regan J.

For the Applicant:	Advocate G Marcus SC and Advocate M Chaskalson instructed by Griesel & Breytenbach Attorneys.
For the Respondents:	Advocate P Pauw SC and Advocate N M Oosthuizen instructed by the State Attorney, Pretoria.