REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

IN THE MATTERS BETWEEN

Case Number : 306 / 05

SOUTH AFRICAN NATIONAL DEFENCE UNION	**APPELLANT**
and	
MINISTER OF DEFENCE	**FIRST RESPONDENT**
THE SECRETARY OF DEFENCE	**SECOND RESPONDENT**
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**THIRD RESPONDENT**
MR P MOLOTO, THE ACTING CHAIRPERSON OF THE MILITARY BARGAINING COUNCIL	**FOURTH RESPONDENT**

AND

Case Number : 004/05

MINISTER OF DEFENCE	**FIRST APPELLANT**
THE SECRETARY OF DEFENCE	**SECOND APPELLANT**
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**THIRD APPELLANT**
and	
SOUTH AFRICAN NATIONAL DEFENCE UNION	**FIRST RESPONDENT**
PIETER OERSON	**SECOND RESPONDENT**
LESETJA MACK MALEMELA	**THIRD RESPONDENT**

Coram : **MPATI DP, CAMERON, NUGENT, CONRADIE and JAFTA JJA**

Date of hearing : **8, 9 and 10 MAY 2006**

Date of delivery : **31 AUGUST 2006**

SUMMARY

Military labour relations – whether legally enforceable duty on South African National Defence Force as employer to bargain collectively with military trade union – if such a duty whether the employer unfairly refused to bargain – whether military trade union entitled to interdict to prevent restructuring of defence force pending decision by Military Arbitration Board

Neutral citation: This judgment may be referred to as:
Sandu & v Minister of Defence & Others **[2006] SCA 90 (RSA)**

J U D G M E N T

CONRADIE JA

[1] SANDU I, II and III, to adopt the way counsel referred to them, are appeals in respect of separate applications for relief brought before three different judges in the Pretoria High Court. In each case the parties were the South African National Defence Union (SANDU), a military trade union, and the Minister of Defence representing the South African National Defence Force (SANDF) as well as other persons who were joined by virtue of their interest in the subject matter of the application. In SANDU I the decision by Van der Westhuizen J, reported as *South African National Defence Union v Minister of Defence and Others*,[1] went against SANDU. It is the appellant in respect of that application. The decisions in the other two applications, before Smit J[2] and Bertelsman J, went in favour of SANDU. The SANDF is the appellant in those matters. All appellants are before us by leave of the courts *a quo*.

[2] The appeals were not consolidated but were heard together because of a dispute that is common to them all: whether there is a legally enforceable duty on the SANDF to engage in collective bargaining with SANDU, a military trade union that was recently permitted to function as such by the decision of the Constitutional Court in *South African National Defence Union v Minister of Defence and Another*.[3]

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[1] 2003 (3) SA 239 (T).
[2] Reported as *South African National Defence Union and Another v Minister of Defence and Others* 2004 (4) SA 10 (T).
[3] 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).

A second issue in SANDU I is whether, assuming there to have been a duty to bargain, the SANDF unfairly refused to bargain with SANDU.

[3] In SANDU III interdicts were granted against the continued implementation by the SANDF of a plan for the restructuring of the defence force on the footing that it had a duty to bargain with SANDU and was not entitled to implement the plan until it had done so or at least until the Military Arbitration Board had pronounced upon the matter. Apart from the appealability of the orders, their propriety in the circumstances is considered. In SANDU II there are issues concerning the constitutional validity of regulations made in terms of the Defence Act 42 of 2002 pursuant to the Constitutional Court decision referred to. They are considered in a judgment by my brother Nugent.

[4] In support of its contention that the SANDF is legally obliged to engage in collective bargaining with it, SANDU relies in the first place on s 23 of the Bill of Rights in the Constitution, more particularly on ss (5):

'**LABOUR RELATIONS**

23 (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 -

(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).'

[5] The expression 'right to engage in collective bargaining' in ss (5) is open to more than one interpretation. It may mean that the contemplated national legislation to regulate collective bargaining must provide for an employer or a union called upon to bargain to comply with the demand on pain of being ordered to do so. On the other hand it may mean that the envisaged national legislation must provide the framework within which employers, employers' organisations and employees may bargain; or it may mean no more than that no legislative or other governmental act may effectively prohibit collective bargaining.

[6] Interpretive guidance to provisions of the Bill of Rights is given in s 39. First and foremost, its provisions must be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Having read a provision in that light a court, tribunal or forum must consider international law and may consider foreign law.[4] Section 233 of the Constitution dictates the form that a consideration of international law must take:

[4] 'International agreements and customary international law. . . provide a framework within which [the Bill of Rights] can be evaluated and understood. . . ' (*S v Makwanyane* 1995 (3) SA 391 (CC) at 413-414.

'233 When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

In his contribution to the *Bill of Rights Compendium* edited by Mokgoro and Tlakula, Andreas O'Shea under the title '*International Law and the Bill of Rights*' (page 7A-1) expresses the following view:[5]

'The international character of the norms in the Bill of Rights cannot be over emphasised and in certain respects international law will inevitably have a greater impact on the interpretation of the Bill of Rights that it will on ordinary legislation.' (page 7A-8)

Section 39(2) of the Constitution requires a court in interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. That means that legislation regarding military labour rights must be interpreted to reflect international labour rights, norms and values.

[7] There is much in international law that is helpful in interpreting s 23(5) of the Constitution, starting with the *Freedom of Association and Protection of the Right to Organise Convention, 1948*, a convention of the International Labour Organisation, ratified by South Africa on 19 February 1996. I cite only those articles that appear to me to be relevant:

'Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

[5] At page 7A-8.

Article 3

1 Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2 The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 5

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.

Article 8

1 In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2 The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1 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.

2 . . . . . '

[8] In *South African National Defence Union v Minister of Defence and Another*[6] the Constitutional Court relied in part on the 1948 Convention for its conclusion that the expression 'worker' in the Constitution includes a member of the armed forces. Article 5 of the 1948 Convention exempts this category of worker from its provisions[7] with the result that national legislation might exclude workers of this kind from the protection of the Convention without offending against it. The Constitutional Court, in reviewing the historical denial of labour rights for black workers, concluded that labour rights were considered by the framers of the Constitution to be so important that s 126B(1)[8] of the Defence Act 44 1957,[9] nevertheless had to be struck down. This meant that, leaving aside possible restrictions on their exercise - the legitimacy of which was, subject to compliance with s 36, recognized by the Constitutional Court – military 'workers' were now, as far as organizational rights went, in the same position as workers in the civilian sector.

[9] The International Labour Organisation convention on the right to organise was supplemented a year later by *The Right to Organise and Collective Bargaining Convention 1949*. The text of articles 3, 4 and 5 is important:

'***Article 3***

[6] 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).
[7] So also article 11 of the European Convention on Human Rights and article 5 of part II of the European Social Charter.
[8] Section 126B(1) prohibited any member of the permanent force from being or becoming a member of a trade union. S 126B(3) made a contravention of the prohibition an offence.
[9] Apart from the schedule containing the military discipline code, repealed by the Defence Act 42 of 2002.

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. 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.

2.. . . . . .'

[10] A distinct preference for voluntarism, for a system that functions without reliance on a legally enforceable right to bargain, emerges from these provisions, one that is reinforced by the *Collective Bargaining Convention, 1981*. The relevant articles of the 1981 Convention are 1, 2 5 and 6:

'Article 1

1. This Convention applies to all branches of economic activity.

2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.

3. As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

Article 2

For the purpose of this Convention the term *collective bargaining* extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for--

(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Article 5

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;

(b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;

(c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;

(d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;

(e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

Article 6

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate.'

[11] The voluntarist approach that emerges from these international instruments has characterized our labour dispensation since its liberalization with the amendments to the Industrial Relations Act 1956 when, following upon the recommendations of the Wiehahn Commission, all workers were in 1979 permitted to organise and to strike. Voluntarism does not mean that employers and employees necessarily negotiate voluntarily. Often they negotiate in order to avert the economic pressures brought about by a strike or a lock-out. This pressure is one of the principal driving forces behind the voluntarist system.[10]

[12] The Constitutional Court highlighted the role of industrial action in the first certification judgment, *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), in the following passage:

'It is correct that collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries. However CP [Constitutional Principle] XXVIII does not require that the NT [New Text] expressly recognise any particular mechanism for the exercise of economic power on behalf of workers or employers: it suffices that the right to bargain collectively is specifically protected. Once a right to bargain

[10] There were nevertheless cases in which the Industrial Court in the exercise of its unfair labour practice jurisdiction decided that a failure to bargain amounted to an unfair labour practice. The decisions did not survive the adoption of the Labour Relations Act 66 of 1995 which codified unfair labour practices and eliminated this one from their range. See eg *Entertainment Commercial Catering and Allied Workers' Union v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC) at 1098A - 1099A; *Macsteel (Pty) Ltd v National Union of Metalworkers of SA & others* (1990) 11 ILJ 995 (LAC); *Metal and Allied Workers' Union v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 696 (IC); *Food and Allied Workers' Union v Spekenham Supreme* (1988) 9 ILJ 6289IC); *National Union of Mine Workers v East Rand Gold and Uranium Co Ltd,* 1992 (1) SA 700 (A) (1991) 12 ILJ 1221 (A), a decision of this court which went no further than holding that once parties had agreed to bargain they were obliged to do so fairly. In *South African Society of Bank Officials v Standard Bank of South Africa Ltd* 1998(2) SA 1 (SCA) at 6H - 7F Scott JA approved a dictum by Vivier JA in *Mutual and Federal Insurance Co Ltd v Banking, Insurance, Finance and Assurance Workers. Union* 1996 (3) SA 395(A) at 404C-E affirming that a right to bargain is not absolute. On the approach of the LRA see for example *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 ILJ 1081 (LC) at para 52.

collectively is recognised, implicit within it will be the right to exercise some economic power against partners in collective bargaining. The nature and extent of that right need not be determined now.'

[13] In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*[11] at para 391 the Chief Justice discusses the propriety of having regard to the legislative history of an enactment that does not reveal its meaning sufficiently clearly. He refers to his own decision in *S v Makwanyane* 1995 (3) SA 391 (CC) and after commenting that, while it is not clear whether the majority of the court concurred in the finding, at least none dissented from it, he expresses his continued adherence to the conclusion that 'where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution.'

[14] An important part of the Constitution's legislative history is the interim Constitution of 1994 which entrenched labour rights in s 27:-

> '27 (1) Every person shall have the right to fair labour practices;
>
> (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organizations.
>
> (3) Workers and employers shall have the right to organise and bargain collectively.
>
> (4) Workers shall have the right to strike for the purpose of collective

[11] 2006 (2) SA 311 (CC); 2006(1) BLLR 1 (CC).

bargaining.

(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).'

[15] Subsection (4) tied the right to strike directly to ‘collective bargaining’. This right was given to workers as a means of enforcing the right to ‘bargain collectively’ in ss (3). In addition, of course, workers had the right, by striking, to secure an outcome to any demand whether or not the parties had (inconclusively) bargained about it.

Any disagreement about collective bargaining was considered as a dispute of interest: that is why workers were permitted to strike about it. Like every other 'interest' in the labour relations field (as opposed to a justiciable dispute of right), collective bargaining had to be secured by negotiation prompted by the threat of collective action. In the classic dispute of interest case the parties have no right to enforce; they attempt to establish a right, in the final resort by coercive economic action. Allowing workers to strike 'for the purpose of collective bargaining', firmly puts collective bargaining into the category of interest disputes, excluding any right to judicially obliged collective bargaining.[12]

[16] Van der Westhuizen J in SANDU I, drawing heavily on Brassey and Cooper in Chaskalson and Others, *Constitutional Law of South Africa* 30-30, was prepared to accept that the wording of the 1996 Constitution was deliberately drafted to differ

[12] The Industrial Court in some of its decisions created a hybrid system in which collective action to enforce collective bargaining was supplemented by judicial intervention. The soundness of this approach is open to doubt.

from the wording of the Interim Constitution in order to convey a change in meaning. I do not agree with the statement by Brassey and Cooper that the 'right to engage' in collective bargaining in the final Constitution differs significantly from the right under the interim Constitution which gave workers and employers the 'right' to bargain collectively. They are closer to the mark when they acknowledge that '[T]he distinction between the right to collective bargaining and the right to 'engage' in collective bargaining is a fine one.' If the drafters of the interim Constitution intended to build on what the authors call 'the collective bargaining achievements arising from the industrial court's unfair labour practice regime' and the Constitution then intended to break this edifice down again, it is not likely that its framers would have sought to achieve such a major departure from the previous provision by the use of language differing so slightly from that of its predecessor. I must say that I fail to detect a change of meaning in the change of expression. I suspect that in refining and expanding s 27 of the Interim Constitution, it was decided to use the expression 'collective bargaining' which is not only used in conventions of the International Labour Organisation but is more familiar to and better understood by labour lawyers than the expression 'bargain collectively' which, while it may mean the same, is not labour law parlance.

[17] The primary objects of the Labour Relations Act 66 of 1995 (the LRA) adopted to give effect to s 27 of the interim Constitution are stated in s 1:

> ‘(a) to give effect to and regulate the fundamental rights conferred by

section 27 of the Constitution;

(b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can -

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) and formulate industrial policy; and

(d) to promote --

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the work-place; and

(iv) the effective resolution of labour disputes.'

[18] It is clear from the way in which s 27 was implemented that the legislature interpreted the phrase 'the right to organise and bargain collectively' to mean that it was obliged to provide a framework for collective bargaining and, within that framework, to promote orderly collective bargaining at sectoral level. The LRA emphasises the virtues of collective bargaining but nowhere suggests that the process should be other than voluntary.[13] The furthest it is prepared to go are certain prescriptions relating to a refusal to bargain found in s 64(2)A:

'(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes -

[13] It thereby introduced a decisive break with the line of jurisprudence mentioned in footnote 4.

(a) a refusal --

(i) to recognize a union as a collective bargaining agent; or

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about -

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.'

Advisory arbitration is a compulsory pre-strike procedure in disputes over the 'duty' to bargain. The arbitration is not determinative of the dispute. It binds neither party. It merely helps them find a solution. This is the clearest indication that the LRA does not recognize a duty to bargain enforceable by the courts.

[19] One is entitled to examine the interpretive milieu into which these three very important pieces of legislation, the interim Constitution, the LRA and the Constitution were enacted. They were negotiated during the same period, 1994 to 1996, and are obviously intended by the framers to form a harmonious whole. Where the LRA is stated to give expression to the rights conferred in the Interim Constitution, where the Constitution is then enacted to mould that very labour relations regime – and does so without departing in any major respect from the interim Constitution – where no writer on labour relations has so much as suggested that the LRA's provisions with regard to collective bargaining might offend the Constitution, and where the constitutionality of these provisions has in the eleven

years of their operation not been challenged, one would be hard put not to conclude that they accord, in the words of s 39, with 'the spirit, purport and objects of the Bill of Rights.'

[20] The LRA does not apply to the National Defence Force or to personnel employed in the intelligence community.[14] One would have thought that if there were no duty to bargain derived from the Constitution in the civilian sector there would be none in the military,[15] but counsel for SANDU argue that by eliminating the right to strike in the military sector the lawgiver has removed the most powerful if not the only incentive to the SANDF to bargain: The only way to get the latter to the bargaining table in these circumstances, it is argued, is by judicial compulsion.

[21] There is merit in this contention in so far as it suggests that the right to bargain is meaningless unless it is reinforced by some mechanism to drive the parties to the bargaining table. Ideally, economic retribution should fulfil this function, but in situations where socially it would be too costly or dangerous to permit parties to assail each other economically, the law provides an alternative. The alternative is not for a court (or other tribunal) to compel the parties to bargain. The alternative is compulsory arbitration. That is the device employed to resolve disputes in essential services in the civilian sector. Counsel for SANDU nevertheless maintain that this way of resolving workplace conflicts is so wholly

[14] Section 2.
[15] The international instruments referred to above display a consistent pattern of permitting member States not to extend labour rights to military personnel.

deficient that it cannot replace collective bargaining, and that one cannot from the availability of an arbitration remedy conclude that there is no duty to bargain.

[22] The argument overlooks important considerations. First, the device of conciliation followed by arbitration for settling disputes in essential and maintenance services where striking is prohibited, is well established in our law.[16] In terms of the definition of 'essential service' in s 213 of the LRA, the Parliamentary service and the South African Police Service are essential services; so also is any service which, if interrupted, can endanger the life, personal safety and health of the whole or any part of the population. The Essential Services Committee[17] determines whether a service should be designated as an essential service. It also determines whether a service is a maintenance service, that is to say whether it is of such a nature that the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.[18]

If the parties to a dispute in an essential service fall within the registered scope of a bargaining council, s 74 of the LRA makes provision for the referral of such a dispute to that bargaining council; if no council has jurisdiction, it goes to the Commission for Conciliation, Mediation and Arbitration. The council or the Commission must attempt to resolve the dispute through conciliation. If this fails, any party may request that the dispute be resolved through arbitration by the council or the Commission.

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[16] One of the limitations on the right to strike in s 65 of the LRA is that no person may take part in a strike or lock-out if that person is engaged in an essential or a maintenance service.
[17] Established in terms of s 70 of the LRA.
[18] Section 75 of the LRA.

[23] It was common cause before us that, like the prohibition on strikes in essential services, the prohibition on strikes in the military is not unconstitutional. The permanent force is in this respect like an essential service and its labour relations are structured as though it were. If the labour relations regime for essential and maintenance services is not unconstitutional in proscribing the right to strike without replacing it with judicially enforced collective bargaining, it is difficult to understand why military labour relations which follow the same pattern should be held to fall foul of the Constitution.

[24] Secondly, proceedings before an arbitrator are remarkably akin to a process of bargaining. Each party presents facts and arguments to which the other is at any time entitled to respond by making an offer to negotiate or to settle. Thirdly, the prospect of third-party determination is a powerful incentive to parties to settle. This is a well known phenomenon in the civil courts and other forums flowing from the fact that each party would rather negotiate an outcome that is more or less acceptable to it than be faced with a less acceptable outcome imposed by an outside decision-maker. The incentives to negotiate may in these circumstances be even more powerful than those operating in the case of economic pressure. A weak union might through the process of rational debate before an arbitrator achieve a better result than by exerting such little economic pressure as it is able to bring to bear. On the other hand, a strong union might have a better chance of gaining larger concessions by striking than by resorting to arbitration. But it is certainly not true to

say that the arbitration option is so feeble a remedy that it cannot serve as a substitute for the economic pressure that would ordinarily set the bargaining process in motion.

[25] On this part of the case, my conclusion is that the Constitution, while recognizing 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.

[26] SANDU's counsel raised other, alternative, arguments. The first of these was based on Chapter XX to the General Regulations made under the Defence Act 2002. Chapter XX was written into the General Regulations after the decision by the Constitutional Court in the *South African National Defence Union* case.[19] The General Regulations have the force of statutory provisions[20] and form an important adjunct to the Defence Act 42 of 2002, dealing as they do with the administration of the armed forces. With Chapter XX there is now a complete labour relations system in place for the military, a parallel system to that in the civilian sector with its own bargaining council (the Military Bargaining Council or MBC) and its own arbitration tribunal (the Military Arbitration Board or MAB).[21] SANDU's counsel suggested in the alternative that certain of the Regulations in Chapter XX impose a

[19] Footnote 3.
[20] Section 239 of the Constitution provides that national legislation includes subordinate legislation made in terms of an Act of Parliament.
[21] The LRA in s 2(a) excludes the national defence force from its ambit.

duty to bargain on the SANDF. In part the argument relies on the proposition that by setting up structures for collective bargaining the intention must necessarily have been that the SANDF, the only employer, would be obliged to bargain with military unions: if this were not so the right to bargain would be valueless.

[27] Regulation 3 of Chapter XX states that the objectives of the Regulations are to provide for fair labour practices, the establishment of military trade unions and collective bargaining on certain issues of mutual interest. In this context it is important to note that Regulation 4(1) provides that, subject to the Regulations, a member of the permanent force[22] 'shall be entitled to exercise his or her labour rights as contemplated in section 23 of the Constitution, on an individual basis or collectively through a military trade union.' Under the heading 'Collective Bargaining Rights of Trade Unions', Regulations 36 to 40 set out their limits. Regulation 36 which is headed 'Limitation on collective bargaining rights' but as far as I can see contains no limitation on the usual sort of matters of mutual interest that employers and employees bargain about, provides that -

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

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

(b) general service benefits;

(c) general conditions of service;

(d) labour practices; and

[22] In certain instances also a member of the Citizen Force or a Commando.

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

[28] The limitations are really stated in regulations 37 to 40. My brother Nugent deals with the propriety of these and other limitations on labour rights. My concern with Regulation 36 is SANDU's contention that, read with Regulation 3(c), it obliges the SANDF to negotiate with it. I agree with SANDU's counsel that the intention of the Regulations was that the SANDF would bargain with military trade unions. The SANDF accepted this situation and bargained with SANDU until the insupportable conduct of its negotiator, its national secretary, made sensible bargaining impossible. But this willingness to bargain under tolerable circumstances is very different from the compulsion to bargain which SANDU maintains arises from the Regulations.

[29] 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,[23] be referred to the MAB.[24] There is a remedy whether or not there has been bargaining. Bargaining, whilst desirable, is not essential to the dispute resolution scheme established by Chapter XX.

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[23] Regulation 64(k).

[24] Regulation 71(1) defines 'dispute' as 'any disagreement in respect of a collective agreement, or any other matter which is or could be the subject matter of collective bargaining…'

[30] According to Regulation 64(k), the constitution of the MBC must provide *inter alia* for -

' . . . the resolution through conciliation, and failing conciliation, referral to the Board [the MAB] of any dispute arising between the parties to the Council about matters of mutual interest on which an agreement can not be reached.'

The significance of this Regulation is that the MBC's powers are sufficiently wide to permit the referral of any dispute on a matter of mutual interest on which agreement cannot not be reached. This would include a dispute that cannot be settled because either SANDU or the SANDF refuses to discuss it.

[31] The third source of the SANDF's duty to bargain that was urged upon us, is to be found in the powers of the MBC, more particularly in Regulation 63, one of those dealing with the powers and duties of the MBC:

'63. The powers and duties of the Council include -

(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.'

[32] These powers and duties include the conclusion and enforcement of collective agreements but it does not follow that the MBC's power to broker a collective agreement extends to compelling the parties to bargain. Having regard to the prevailing labour relations philosophy on collective bargaining, it would be

surprising if such bland language were thought sufficient to achieve the suggested object of judicially enforcing collective bargaining.

[33] SANDU III concerns interdicts preventing the SANDF from implementing a wide ranging transformation and restructuring program with, so it is alleged by SANDU, far-reaching effects on the general conditions of service and service benefits of its members.

[34] The *casus belli* for the interdict application was the adoption by the SANDF of the spirit of the framework agreement for the restructuring and transformation of the public service agreed upon in the Public Service Co-ordinating Bargaining Council by way of Resolution 7/2002. Resolution 7/2002 does not bind soldier members of the SANDF although it does bind its many civilian employees. The SANDF nevertheless decided to adopt and implement labour policies in respect of all its members similar to and informed by resolution 7/2002.

[35] Consultations on the implementation of the new measures were held at workshops conducted by the SANDF but they bore little fruit and dragged on for so long that the SANDF decided it could no longer postpone the formulation of its final restructuring and transformation plan. On 19 May 2003 it unilaterally approved revised implementation measures for the plan.

[36] On 28 May 2003 SANDU declared a dispute with the SANDF over its unilateral action and called on the latter to stop its implementation of the revised

plan pending resolution of the dispute by conciliation by the MBC or arbitration by the MAB. The SANDF refused to attend a conciliation meeting under the auspices of the MBC and continued its implementation of the restructuring and transformation plan until it was interdicted from doing so. On the footing that the conduct of the SANDF violated the fundamental right of SANDU to engage in collective bargaining, Bertelsman J granted the relief sought and handed down two orders.

[37] The first order is specific and interim in nature, interim in the sense that it is to fall away on the occurrence of a certain event. It interdicts the SANDF –

' . . . 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 Department 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 under the regulations to the Defence Act and the Military Bargaining Council Constitution.'

[38] The second order is general and final in nature, final in the sense that it is a general prohibition against the implementation of any measure that forms the subject of a declared dispute and is not intended to fall away. It interdicts the SANDF –

' . . . 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] SANDU's contention that the first order is not appealable is misconceived. The order is not interim in the sense that its fate depends upon the final resolution of a dispute by the court that granted it. It is temporary in nature, that is true, intended to fall away on the happening of a certain event, an award by the MAB, but it is not an interim order in the sense that it governs issues that will arise in a pending action and which would entitle the court which granted it to reconsider it.[25]

[40] The finding that no duty to bargain rests on the SANDF does not dispose of the appeal. If either the SANDF or a military trade union refuses to discuss matters in dispute, and assuming there to be a duty to bargain, there would be a breach of that duty and the aggrieved party would be entitled to approach the MBC to arrange a conciliation meeting. If conciliation fails, arbitration by the MAB would be the next step. It would seem strangely unprofitable for the MAB to then order the parties to bargain with each other since the dispute would by that time have been discussed at a conciliation meeting under the auspices of the MBC and would, *ex hypothesi*, have proved to be irresoluble. The function of the MAB is to resolve the dispute by making an award.

[25] *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005(3) SA 1 (SCA) 12 para 22 – 24.

[41] If there were no duty to bargain, precisely the same procedure would be adopted. In this case there would, of course, be no breach of a duty but a dispute that could not be resolved by discussion would follow the same route to the MBC and thence to the MAB. The pertinent question before Bertelsman J was thus not whether there was a breach of a supposed duty to bargain but whether the balance of convenience favoured the grant of an interdict until the MAB had disposed of the matter.

[42] It seems to me that SANDU has failed to demonstrate that the balance of convenience favoured it. No convincing case was made out by it that there would be any relocation or promotion, or failure to promote, any of its members that could not subsequently be suitably adjusted or compensated. *A fortiori,* in regard to the second interdict, it failed to show irreparable harm to it or its members.

[43] On the other hand, the implementation of the restructuring and transformation plan was of critical importance to the SANDF which was burdened with the task of downsizing a defence force that had grown disproportionately large with the integration into the statutory forces of the 'former constituent forces' consisting of military units of liberation movements and of the homelands. A cessation or retardation of the program would affect thousands of soldiers who could not be suitably compensated if, say, their promotion was delayed or benefits to which they might be entitled under the plan were withheld.

[44] Finally, SANDU contended that the conduct of the SANDF during the abortive consultations around the restructuring and transformation plan amounted to an unfair labour practice. Assuming that one could from the welter of conflicting evidence conclude that the SANDF had behaved in a manner that could broadly be characterised as unfair, one must seek the answer in the concept of an 'unfair labour practice'. It is defined in regulation 1 of chapter XX. It encompasses unfair discrimination, unfair conduct of the SANDF relating to appointment, promotion, demotion, training or the provision of benefits; unfair suspension or dismissal or other disciplinary action short of dismissal; or a failure to re-employ a former member in terms of any agreement. It does not include the kind of conduct of which SANDU complains. In so far as SANDU relies on a violation of its and its members' rights to fair labour practices in terms of s 23(1) of the Constitution, I consider that it is impermissible for SANDU to rely on a violation of a constitutional right without first attacking the relevant statutory labour provisions as unconstitutional or demonstrating that they are inadequate to ensure fair labour practices.[26]

[45] If the SANDF's conduct was indeed unfair, SANDU's remedy was to break off consultations and seek redress through the dispute resolution procedures. This is indeed what it did, and since it does not claim an order for the resumption of consultations, one remains rather puzzled by the nature of the relief that it thought an unfair labour practice determination might afford it.

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[26] *NAPTOSA and Others v Minister of Education, Western Cape and Others* 2001 (2) SA 112 (C); 2001 (4) BCLR 388 (C); *National Education Health and Allied Workers' Union v University of Cape Town and others* (2003) 24 ILJ 95 (CC); *Ingledew v The Financial Services Board and Others* 2003 (8) BCLR 825 (CC) para 23; see also *Minister of Health and another v New Clicks (Pty) Ltd and others* 2006 (1) BCLR 1 (CC) para 431.

[46] SANDU I raises important issues of constitutional interpretation that have broad and fundamental significance. In accordance with the usual practice in matters of this kind a departure from the general rule relating to costs is justified. The appeal against the order in case no 306/05 (SANDU I) should therefore be dismissed without an order regarding the costs on appeal Sandu III is rather different. The court *a quo* found that the SANDF was under a duty to bargain with SANDU. That was a major constitutional issue. In this court the issue was argued as part of SANDU I so that not much remained of the issues in SANDU III. The appellant, the SANDF, is accordingly entitled to costs which should include the costs of the SANDU III record but, having regard to the time devoted to those issues peculiar to SANDU III, only one quarter of the appellant's costs in this court.

[47] The appeal against the orders in case no 306/2005 (SANDU I) is dismissed with no order as to costs.

[48] The appeal against the orders in case number 004/05 (SANDU III) is upheld. The order of the court below is replaced by an order dismissing the application with costs. The respondent is to pay the costs of the record on appeal as well as one quarter of the appellant's costs of the hearing in this court.

J H CONRADIE
JUDGE OF APPEAL

CONCUR:

MPATI JA
CAMERON JA
NUGENT JA
JAFTA JA