

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

## South African National Defence Union v Minister of Defence and Others

CCT 65/06

Date of Judgment: 30 May 2007

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### MEDIA SUMMARY

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*The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The Court today gave judgment on a series of disputes connected to collective bargaining that have arisen between South African National Defence Union (SANDU) and the South African National Defence Force (SANDF).

The application originated in five separate matters initiated by SANDU against the Minister of Defence in the Pretoria High Court between 2001 and 2003, which resulted in three separate High Court judgments. The first of these judgments (SANDU I), held that the SANDF was not obliged to bargain collectively with SANDU, and that SANDF's withdrawal from negotiations with SANDU was reasonable. The second of these judgments (SANDU II), also concerned the duty to bargain as well as an attack on specific regulations passed pursuant to national legislation, relating to labour relations in the military. This judgment held that the regulations violated the union members' rights to participate in union activities as well as their rights to freedom of expression and association; it held that, contrary to the earlier judgment, the SANDF had a duty to bargain with SANDU. In the third case (SANDU III), the court made an order preventing the SANDF from implementing a restructuring programme without first consulting with SANDU.

The decisions in these three cases were appealed to the Supreme Court of Appeal. A single, consolidated hearing was held, resulting in two unanimous judgments. The first judgment held that the SANDF is not obliged by the provisions of the Constitution or any other law to bargain collectively with SANDU. The second judgment dismissed all the challenges to the regulations, save one. SANDU sought leave to appeal to this Court against the large part of the judgments and orders made by the Supreme Court of Appeal.

O'Regan J, writing for the Court, dealt with the history of the relationship between SANDU and the SANDF. She held that where legislation has been enacted to give effect to a constitutional right, a litigant is not entitled to bypass that legislation and to rely directly on the constitutional right. As regulations have been enacted to give effect to section 23 of the Constitution and regulate the bargaining relationship between SANDU and the SANDF, the application for leave to appeal must be determined in the light of those regulations. The Court did not find it necessary, accordingly, to determine whether section 23(5) of the Constitution confers a justiciable duty to bargain collectively on employers and trade unions.

The judgment concluded that the regulations establish a bargaining forum, the Military Bargaining Council (the MBC), where matters of mutual interest to SANDU and the SANDF are to be negotiated. If disputes arise in respect of such matters, those disputes may be referred to arbitration by the Military Arbitration Board. The Court held that on a proper

construction of the regulations, the SANDF may not impose pre-conditions for bargaining or withdraw unilaterally from the MBC. It also found that the regulations do not permit the SANDF to implement unilaterally a transformation policy that is the subject of a dispute at the MBC and that has been referred to the Military Arbitration Board. Finally, the Court held that SANDU is not entitled in terms of the regulations to demand that the respondents bargain over the content of the regulations.

In considering the challenges to the individual regulations, the Court dismissed SANDU's challenge to the regulation that prohibits union members from participating in union activities while undergoing training or participating in military exercises. The SANDF can justifiably limit union activities in instances when such activities may interfere with the military's ability to carry out its constitutional obligation to protect our country. In the same vein, the SANDF has a legitimate interest in preserving the appearance of political neutrality of the military by prohibiting association with other trade unions.

However, the Court held that several of the regulations are unconstitutional. It found that the Minister of Defence, as head of SANDF, cannot appoint the members of the Military Arbitration Board (the body tasked with settling union disputes) because appointment by an interested party (the Minister as the employer) undermines the impartiality and independence of the Board. Furthermore, regulations that prohibit union members from being represented by union members or officials in grievance or disciplinary proceedings offend the right to fair labour practices, because representing its members is one of a union's central tasks. Finally, to the extent that good order and discipline of the military is not jeopardised, the SANDF cannot forbid non-uniformed soldiers from assembling to petition or picket as private citizens.