CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/98

SOUTH AFRICAN NATIONAL DEFENCE UNION — Applicant

versus

MINISTER OF DEFENCE — First Respondent

CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE — Second Respondent

Heard on: 25 March 1999

Decided on: 26 May 1999

JUDGMENT

O'REGAN J:

[1] This case concerns the question whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. On 25 November 1998, Hartzenberg J made an order which in substance declared section 126B of the Defence Act, 44 of 1957, to be unconstitutional and invalid to the extent that it prohibits members of the South African National Defence Force from participating in public protest and from joining trade unions. He referred the order to this

Court for confirmation as it would have no force unless confirmed by this Court.[1] The full terms of Hartzenberg J's order are the following:

> "1. Section 126B(1) of the Defence Act, 44 of 1957, is declared unconstitutional and invalid.
>
> 2. Section 126B(2) of the Defence Act, 44 of 1957, is declared unconstitutional and invalid to the extent that it refers to acts of public [protest].[2]
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> 3. Section 126B(3) of the Defence Act, 44 of 1957, is declared unconstitutional and invalid to the extent that it refers to section 126B(1).
>
> 4. Section 126B(4) of the Defence Act, 44 of 1957, is declared unconstitutional and invalid.
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> 5. The orders in paragraphs 1 - 4 above are referred to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution.
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> 6. The respondents are ordered jointly and severally to pay the costs of the applicant including the costs of two counsel.
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> 7. The effect of the orders in 1 to 4 above is suspended until 31 December 1999."

[2] Section 126B of the Defence Act provides as follows:

> "(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 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.
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> (2) Without derogating from the provisions of sections 4(h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2)

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1 Section 172(2)(a) of the Constitution.

2 The original order read "acts of public violence" but the parties before this court submitted, correctly, that this was a manifest error and that the word "violence" should be read as "protest".

serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act.

(3) A member of the South African Defence Force who contravenes subsection (1) or (2), shall be guilty of an offence.

(4) For the purpose of subsection (2) –

'act of public protest' means any act, conduct or behaviour which, without derogating from the generality of the aforegoing, includes the holding or attendance of any meeting, assembly, rally, demonstration, procession, concourse or other gathering and which is calculated, destined or intended to influence, support, promote or oppose any proposed or actual policy, action, conduct or decision of the Government of the Republic of South Africa or another country or territory or any proposed or actual policy, action, conduct or decision of any public or parastatal authority of the Republic or another country or territory or to support, promote, further, oppose or publicise any real or supposed private or public interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage or to indicate, demonstrate or display real or supposed private or public support for, opposition or objection to, dissatisfaction, sympathy, association or solidarity with, or concern or outrage regarding any such policy, action, conduct, decision, interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage, or to do so in relation to any event or occurrence of national or public concern or importance or significance, or eliciting national or public concern or interest, in such manner as to attract or direct thereto, or be calculated, destined or intended to attract or direct thereto, the attention of –

(i) any such Government or authority;

(ii) any other country, territory or international or multinational organization, association or body; or

(iii) the public or any member or sector of the public, whether within or outside the Republic;

"strike" means any strike as defined in section 1 of the Labour Relations Act, 1956."

[3] The South African National Defence Force (the Defence Force), which includes

the South African army, navy and air force, is divided into the Permanent Force[3] which consists of the core of military personnel who are enrolled in the Defence Force, the citizen force[4] and commandos.[5] There is also a Reserve, which for the purposes of the Defence Act is not considered to form part of the Defence Force.[6] It is clear from section 126B(1) that the prohibition on joining a trade union applies to members of the Permanent Force only. Section 126B(2), however, applies to those members of the Defence Force who are bound by the terms of the Military Discipline Code. All members of the Permanent Force are bound by its terms, as are members of the citizen force, the commandos and the Reserve while they are rendering services in terms of the Defence Act, or when they are liable for rendering such service but fail to do so.[7] The scope of the two substantive provisions under attack is therefore not identical.

[4] The South African National Defence Union, the applicant, was represented before this Court. It acted in its own interest and in the interests of its members. It also sought to act on behalf of those Defence Force members who were not members of the applicant but who wished to join. It asserted that the criminal sanction for which members of the Permanent Force would be liable if they joined the applicant deterred many potential

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3 See section 5(a) read with chapter III of the Defence Act.

4 See section 5(b) read with chapter IV of the Defence Act.

5 See section 5(c) read with chapter V of the Defence Act.

6 See sections 5 and 6 as well as chapter VI of the Defence Act.

7 Section 104(5) of the Defence Act.

members from joining. It also sought to act in the public interest. As the applicant had sufficient standing to seek relief in this matter based on its own interest and that of its existing members, it is not necessary for the purposes of this case to determine whether or not it was entitled to act in the public interest and on behalf of non-members who wished to become members.

[5] Counsel for the applicant argued that the order made by Hartzenberg J should be confirmed. The Minister of Defence and the Chief of the Defence Force, the respondents, were also represented. They only opposed the confirmation of the order of invalidity in respect of section 126B(1), that is the prohibition on joining trade unions. They did not oppose the confirmation of the remainder of the order. It is necessary, however, for this Court to satisfy itself that the prohibitions contained in section 126B(2) read with section 126B(4) are indeed unconstitutional before it can make an order confirming that part of Hartzenberg J's order. I will deal with this aspect of the matter first, and thereafter turn to the question of the constitutionality of section 126B(1).

Prohibition on participation in acts of public protest

[6] The applicant argued that section 126B(2) read with 126B(4) is a breach of the right to freedom of expression entrenched in section 16 of the Constitution. These provisions prohibit members of the Permanent Force as well as members of the citizen

force, commandos and Reserve (while rendering services in terms of the Defence Act) from performing acts of public protest. Contraventions of the prohibition constitute criminal conduct in terms of section 126B(3). Determining what precisely is prohibited by the challenged provisions is no easy task. Indeed, it may not be possible at all.[8] The difficulty arises because of the breadth of the definition of "an act of public protest" in section 126B(4). The 255-word definition defies simplification. Its grammatical structure is clumsy. Its overall meaning is elusive. It is clear that a wide range of conduct is prohibited. Attending any meeting whose purpose is to criticise or support any government policy or action, whether it be the South African government or another government, or the policy or action of any public authority or parastatal organisation, whether South African or not will constitute public protest. So too will attending any meeting to demonstrate public or private support for or opposition to any principle, demand or interest, whether public or private. For the purposes of the definition, no distinction is drawn between whether a Defence Force member is on or off duty at the time of the public protest. Nor is any distinction drawn between a public meeting and one held in the privacy of a home. It is further irrelevant, for the purposes of the definition, how many people attended the meeting or "other gathering" – two people may well suffice. The effect of the provisions, the applicant argued, was a manifest

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[8] It is not necessary in this judgment to consider whether and in what circumstances a criminal prohibition, the meaning of which is so vague as to be incapable of clear meaning or definition, will constitute a breach of the Constitution on the ground that it renders criminal a range of conduct which cannot be determined. In Canada, a criminal prohibition which provides no intelligible legal standard constitutes a breach of the right of article 7 of the Canadian Charter of Rights and Freedoms: the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. See *R v Nova Scotia Pharmaceutical Society* (1992) 10 CRR (2d) 34 (SCC) at 52-3; *R v Lucas* (1998) 50 CRR (2d) 609 (SCC).

infringement of soldiers' freedom of expression which is entrenched in section 16 of the Constitution.

[7] Section 16 provides that:

> "(1) Everyone has the right to freedom of expression, which includes –
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> (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.
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> (2) The right in subsection (1) does not extend to –
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Freedom of expression lies at the heart of a democracy.[9] It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.[10] The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

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[9] See the judgment of Hefer JA in *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207I - 1208F; 1999 (1) BCLR 1 (SCA) at 9G - 10C.

[10] See Cameron J's discussion in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608G - 609A; 1996 (6) BCLR 836 (W) at 854I - 855C.

[8] As Mokgoro J observed in *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (3) SA 617 (CC);1996 (5) BCLR 609 (CC) at para 27, freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.

[9] Section 126B(2) read with 126B(4) clearly infringes the freedom of expression of those members of the Defence Force who are bound by it. They are, for example, prohibited from attending all meetings which may support or oppose any government policy. A meeting to support or oppose the NATO military intervention in Kosovo, or

the Indian and Pakistani governments' testing of nuclear warheads would constitute a criminal offence, even if they attended such a meeting in civilian clothing when they were off-duty and said nothing at the meeting. Their right to hear and express opinions on a wide range of issues, whether in public or private gatherings, is clearly curtailed by this prohibition. The question that then arises is whether the provisions are justifiable limitations of the right, as contemplated by section 36 of the Constitution.

[10] Section 36(1) provides as follows:

> "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."

As the respondents did not oppose the confirmation of the order of invalidity in respect of section 126B(2) read with 126B(4), no evidence was placed before us regarding the purpose of the limitation.

[11] It can be accepted, however, that it is important that members of the Defence Force act in a manner which encourages confidence and trust in their dispassionate observation of their duties. To do so, members of the Defence Force may not, in the performance of

their functions, act in a partisan political fashion. This is recognised by section 199(7) (which applies to the Defence Force) of the Constitution which provides that:

> "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."

Ensuring that members of the security services observe this constitutional injunction is of course not only constitutionally legitimate, but constitutionally imperative. Section 126B(2) read with 126B(4), however, goes far further than is necessary to ensure this end. Members of the Defence Force are prevented, whether they are in uniform or not, or whether they are on duty or not, from taking any action at all to support or oppose almost any purpose or object.

[12] The scope of the prohibition under challenge suggests that members of the Defence Force are not entitled to form, air and hear opinions on matters of public interest and concern. It suggests that enrolment in the Defence Force requires a detachment from the interests and activities of ordinary society and of ordinary citizens. Such a conception of the Defence Force cannot be correct. Members of the Defence Force remain part of our society, with obligations and rights of citizenship. All section 199(7) of the Constitution requires is that they perform their duties dispassionately. It does not require that they lose the rights and obligations of citizenship in other aspects of their lives.

[13] Section 126B(2) read with 126B(4) contains a sweeping prohibition, whose consequence is a grave incursion on the fundamental rights of soldiers. The provisions cannot be justified by reference to the need to ensure that uniformed military personnel do not engage in politically partisan conduct. I find, therefore, that the provisions of section 126B(2) read with (4) are inconsistent with the Constitution.

[14] I have considered whether it is possible to achieve a constitutional result by severing either the whole or part of the definition of "an act of public protest" from the remainder of the Act while retaining the prohibition on the performance of acts of public protest in section 126B(2). However this cannot be done. As described above, the definition itself is clumsily worded and its meaning is opaque. An attempt, under these circumstances, to sever the good from the bad is both linguistically and notionally difficult, if not impossible. Even if it were linguistically possible through severance to produce a coherent definition, about which I have grave doubts, there could be no certainty that the remodelled definition would bear any resemblance to whatever the original legislative purpose might have been. Therefore, the definition does not lend itself to a constitutionally acceptable truncation. Severance of the provision as a whole would leave the prohibition on "acts of public protest" in the principal subsection, 126B(2), without any legislative explanation as to the intended ambit of the phrase. Even if its ambit were to be restrictively interpreted, it is clear that it would be wide enough to proscribe in some respects the freedom of speech of members of the Defence Force

which, for the reasons already mentioned, would be constitutionally impermissible.

[15] The offending provisions, however, can be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of section 126B. It is quite possible to sever the various references to "acts of public protest" from section 126B(2) entirely as well as the definition of "act of public protest" contained in section 126B(4). The challenged provisions would then remain only as a prohibition against strike action and the incitement of strike action, something which the applicant did not seek to challenge.

[16] This order differs from that made by Hartzenberg J in that it opts for the severance of specific words, whereas his order opted for a notional severance. It provided that:

> "Section 126B(2) of the Defence Act, 44 of 1957, is declared unconstitutional and invalid to the extent that it refers to acts of public [protest]."

Although there can be no doubt that notional severance is permissible in terms of section 172(1)(a) of the Constitution,[11] where actual severance can achieve the same result, it is generally to be preferred. The omission of words or phrases from a legislative provision

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[11] Section 172(1) provides that:

> "When deciding a constitutional matter within its power, a court –
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid *to the extent* of its inconsistency;" (my emphasis)

See also section 98(5) of the Constitution of the Republic of South Africa, Act 200 of 1993 which contained a similar provision. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), this Court held that the provisions of section 98(5) empowered it to declare a statute unconstitutional to the extent of its inconsistency not by actual severance (which was not possible in that case) but by an order of notional severance in that the court indicated the extent to which the statute was unconstitutional. See para 131 of the judgment.

leaves it with clear language subject to the ordinary rules of interpretation. Notional severance leaves the language of the provision intact but subjects it to a condition for proper application. At times, such an order is appropriate in order to achieve a constitutional result. It should, however, not be preferred to an order of actual severance where such is linguistically competent.

[17] Before leaving this aspect, it is necessary to consider the approach to the question of unconstitutionality adopted by Hartzenberg J in his judgment. Hartzenberg J found that the scope of the prohibition on public protest was extremely broad. He concluded that it would include some forms of conduct which did not constitute public protest, such as the complaint by a uniformed member of the Defence Force to his partner about conditions of service in the Defence Force. Hartzenberg J held that because private acts may constitute acts of public protest the provision was overbroad and unconstitutional and that no consideration of the limitations analysis was therefore necessary.

[18] In my view, this approach is not correct. The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well-tailored to that purpose. At both stages, the use of the term

"overbreadth" can be confusing, particularly as the phrase has different connotations in different constitutional contexts.[12] Care should therefore be taken when employing the term. In this case, the provisions of section 126B(2) read with 126B(4) are unconstitutional because they constitute an unjustifiable limitation upon the right to freedom of expression of uniformed members of the Defence Force. It may be that a different, narrower legislative prohibition enacted to restrict the rights of freedom of expression of uniformed military personnel may be held to be a justifiable infringement of the freedom of expression. Whether or not that is so, will depend on the nature of such a provision, its purpose and the extent of the restriction it imposes on the freedom of expression.

Prohibition on membership of trade unions

[19] Section 126B(1) of the Defence Act provides that no member of the Permanent Force may be or may become a member of a trade union as defined in section 1 of the Labour Relations Act, 28 of 1956. That Act has now been repealed. Its definition of trade union was as follows:

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[12] In the USA, overbreadth is, effectively, a doctrine of standing. It permits litigants whose own constitutional rights are not affected by a legislative provision, to rely on that provision's infringement of the rights of others. See Gunther and O'Sullivan *Constitutional Law* 13th ed (Foundation Press, 1997) p 1326-7. It is a doctrine which finds application primarily in the context of First Amendment jurisprudence. See, for example, *Village of Schaumberg v Citizens for a Better Environment* 444 US 620 (1979). On the other hand, in Canada, the term "overbreadth" is a matter which applies at the limitations stage of constitutional analysis to determine primarily whether a legislative provision has an appropriate fit between means and ends, what the Canadian Supreme Court has referred to as "the minimal impairment" leg of the limitations analysis. See, for example, *R v Heywood* (1995) 24 CRR (2d) 189 at 208; *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 at 50.

> "'trade union' means any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and their employers or some of their employers".

The applicant argued that the prohibition on membership of a trade union was in breach of section 23(2) of the Constitution which provides that:

> "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."

It seems manifest, if members of the armed forces are "workers" as contemplated by section 23(2), that the provisions of section 126B(1) constitute a limitation of their right to join a trade union. Accordingly, the respondents argued first, that members of the Permanent Force do not constitute workers as referred to in section 23 of the Constitution; and secondly, that even if they do constitute "workers" the consequent infringement of their rights is one which is justified in terms of section 36(1).

[20] Can it be said then that members of the Permanent Force are "workers" as contemplated by section 23(2) of the Constitution? Section 23 provides that workers have the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. These rights are important to all workers. Black workers

in South Africa were denied these rights for many years.[13] Indeed, it was only in the 1980s that rights to form and join trade unions, to bargain collectively and to strike were afforded to black workers. The inclusion of these rights in our Constitution is a clear recognition of their significance to South African workers. In this case, we are concerned with the first of these rights, the right to form and join a trade union.

[21] What does the Constitution mean by "worker" in section 23(2)? In order to determine this, it may be useful to set out the full text of section 23:

> *"Labour relations*
>
> (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 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

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[13] The first labour legislation in South Africa to facilitate collective bargaining was the Industrial Conciliation Act, 11 of 1924, which followed on the Rand Revolt of 1922. Its provisions were expressly not extended to black workers. Despite a range of subsequent legislative initiatives relating to black workers, they were, in effect, only afforded full rights to form and join trade unions, to bargain collectively and to strike following on a series of amendments to the then Industrial Conciliation Act, 28 of 1956 (subsequently the Labour Relations Act) which commenced with the Industrial Conciliation Amendment, Act 94 of 1979.

> bargaining. To the extent that 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)."

[22] These provisions are primarily concerned with the complementary rights of workers and employers, and trade unions and employer organisations. It is clear from reading section 23 that it uses the term "worker" in the context of employers and employment. It seems therefore from the context of section 23 that the term "worker" refers to those who are working for an employer which would, primarily, be those who have entered into a contract of employment to provide services to such employer. Members of the Permanent Force do not enter into a contract of employment as ordinarily understood. They "enrol" in the Permanent Force. Enrolment carries with it certain legal consequences.

[23] All citizens who have achieved the prescribed age are eligible for enrolment in the Permanent Force.[14] They must have achieved a standard 6 or equivalent examination and must pass the medical fitness test. Once enrolled in the Permanent Force, they will receive the salaries, payments and allowances determined by the Public Service

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[14] The following discussion has benefited from JJ Henning and RJG Nieuwenhuis' contribution on Defence Volume 7 of *LAWSA* (Butterworths, 1995) at 312 para 365.

Commission.[15] In addition to salaries and allowances, members are entitled to a range of benefits including leave,[16] medical and transport benefits and certain mess expenses. The manner of termination of membership of the Permanent Force varies to some extent depending upon whether a member is a commissioned officer or not. In general terms, however, termination of membership of the Permanent Force may occur on the basis of misconduct or by retirement when a member reaches retirement age. It may also be terminated at the request of the member concerned. Misconduct, while a member of the Permanent Force, is punishable in terms of the Military Disciplinary Code which provides that members are criminally liable for specific forms of misconduct and may be sentenced to imprisonment.

[24] Clearly, members of the armed forces render service for which they receive a range of benefits. On the other hand, their enrolment in the Permanent Force imposes upon them an obligation to comply with the rules of the Military Discipline Code. A breach of that obligation of compliance constitutes a criminal offence. In many respects, therefore, the relationship between members of the Permanent Force and the Defence Force is akin to an employment relationship. In relation to punishment for misconduct, at least, however, it is not.

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15 See section 82*bis* of the Defence Act. This provision has been amended by section 35(1) of the Public Service Laws Amendment Act, 47 of 1997, but at the time of writing this legislation had not yet come into operation. In terms of the new provision, the salaries and allowances of Permanent Force members will be determined by the Minister for the Public Service and Administration.

16 See section 87(1)(f) of the Defence Act.

[25] Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of "worker" as used in section 23 of our Constitution.

[26] Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948, the first major Convention of the ILO concerning freedom of association, which South Africa ratified in 1995, provides that:

> "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."

Article 9(1) of the same Convention provides:

> "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 and regulations."

It is clear from these provisions, therefore, that the Convention does include "armed forces and the police" within its scope, but that the extent to which the provisions of the Convention shall be held to apply to such services is a matter for national law and is not governed directly by the Convention. This approach has also been adopted in the

Convention on the Right to Organise and Collective Bargaining, 98 of 1949,[17] which South Africa also ratified in 1995. The ILO therefore considers members of the armed forces and the police to be workers for the purposes of these Conventions, but considers that their position is special, to the extent that it leaves it open to member states to determine the extent to which the provisions of the Conventions should apply to members of the armed forces and the police.

[27] If the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of "worker", it should be interpreted to include members of the armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship. The peculiar character of the Defence Force may well mean that some of the rights conferred upon "workers" and "employers" as well as "trade unions" and "employers' organisations" by section 23 may be justifiably limited. It is not necessary to consider that question further now. All that need be said is that if the government wishes to limit the rights afforded to members of the armed forces by section 23(2), it may do so, as long as that limitation is reasonable and justifiable in an open and democratic society as provided for in section 36 of the Constitution.

[28] In previous cases, it has been said that at times the interpretation of rights should

[17] See article 5(1) of that Convention. See also article 1(2) of the Collective Bargaining Convention, 154 of 1981.

be generous[18] and such as to accord individuals the full protection of the rights, although it has also been said that a purposive interpretation of rights will not always require a generous one.[19] In my view, this is a case in which a generous interpretation of the right is appropriate. For all that members of the Permanent Force may not be employees in the full contractual sense of the word, their conditions of enrolment in many respects mirror those of people employed under a contract of employment. In reaching this conclusion, I have not lost sight of the importance of discipline and obedience in the Defence Force. As L'Heureux-Dube J stated in her dissenting judgment in *R v Genereux* 88 DLR (4th) 110 (SCC) at 156-7:

> "[T]he armed forces depend upon the strictest discipline in order to function effectively ... . Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peace-keeping objectives would be unattainable."

[29] It does not seem to me that the requirement of strict discipline will necessarily be undermined by holding, however, that members of the Permanent Force constitute "workers" for the purpose of section 23(2), because in appropriate circumstances rights may be limited. Any limitation on the rights of such members must comply with the

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[18] See, for example, *S v Zuma and others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 14 where Kentridge AJ cited with approval Lord Wilberforce's judgment in *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) at 319 where he said: "a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to...".

[19] It has also been held that, at times, a purposive interpretation of the rights will require a restrictive rather than a generous interpretation of the rights. See *S v Makwanyane and another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 325; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 17.

requirements of section 36.

[30] As I have concluded that members of the Permanent Force constitute "workers" for the purposes of section 23(2) of the Constitution, it must follow that the provisions of section 126B(1) of the Defence Act infringe their right to form and join trade unions. The next question that arises is whether such infringement is a justifiable limitation of the right in terms of section 36.[20]

[31] Before I consider that question, one further matter needs to be addressed. In argument, the question was raised whether section 36 can have application at all in this case, as we are concerned here with a complete denial of section 23(2) rights to members of the Permanent Force. It was suggested that this complete denial did not constitute a "limitation" of rights as referred to in section 23. In the light of the conclusion to which I have come, that the provisions of section 126B(1) in this case are not justifiable in terms of section 36, nothing turns on this argument and I consider the matter no further.

[32] In order to determine whether section 126B(1) is a justifiable limitation of section 23, it is necessary to consider its purpose. The respondents relied on section 200(1) of the Constitution which provides that:

> "The defence force must be structured and managed as a disciplined military force."

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[20] See para 10 above.

The respondents argued that the Defence Force could not be a "disciplined military force" if its members belonged to a trade union and wished to exercise all the rights conferred by section 23. They argued that a trade union as defined would be constitutionally entitled to bargain collectively on behalf of its members and to conduct strike action. If this were so, they argued, the disciplined character of the Defence Force, as required by the Constitution, would be undermined. They argued further that if the Defence Force were to be weakened in this way, it would have grave consequences for the security of the South African state.

[33] The applicant responded that it did not assert the right to strike on its behalf or on behalf of its members. Indeed, it opposed the constitutionality of section 126B(2) which prohibits not only the participation in public protest, but also participation in strikes, only in relation to the prohibition on public protest. It did not seek to argue that the prohibition on participation in strikes was unconstitutional in relation to the relevant members of the Defence Force. It argued that a trade union can function and can assist and further the interests of its members without participating in strike action. Accordingly, it disputed the respondents' assertion that affording members of the Permanent Force the right to form and join a trade union would inevitably lead to a decline in discipline and a weakening of the combat readiness of the Defence Force.

[34] Annexed to one of the affidavits filed by the respondents was a research

memorandum which explored the position of trade unions and the armed forces in a variety of democratic countries. The applicant did not dispute the contents of this memorandum. In some of the countries considered in the memorandum, such as England, the United States of America and France, no trade unions at all are permitted in the Defence Force. In none of these countries, however, is there an express constitutional right to form and join trade unions. On the other hand, in other countries, the Netherlands, Germany and Sweden, for example, trade unions are permitted. In those countries where trade unions are permitted, they are often not afforded rights to negotiate on behalf of their members, but are only afforded rights of consultation and representation. In my view, this research, like the ILO conventions, suggests that a range of different responses to trade unions in the armed forces exists. It does not seem to support the view espoused by the respondents that members of armed forces cannot join trade unions without putting the discipline and efficiency of the armed forces under threat.

[35] This case is concerned primarily with the right to form and join trade unions. Section 126B(1) constitutes a blanket ban on such a right. There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints,

discipline may be enhanced rather than diminished. Whether this proves to be the case will depend, of course, on a variety of factors including the nature of the grievance procedures established, the permitted activities of trade unions in the Defence Force, the nature of the grievances themselves and the attitudes and conduct of those involved.

[36] It is not necessary for the purposes of this case to determine whether a trade union representing members of the Permanent Force may object constitutionally to its being prohibited from involvement in activities engaged in by other trade unions, such as negotiating terms and conditions with employers. It seems to me that the nature of the Defence Force would require a different approach not only in relation to the subject matter appropriate for discussion and consultation with a trade union. It may also require a different approach to the nature of the relationship between the trade union and the Defence Force. The respondents informed us that the question of labour relations in the Defence Force was receiving attention from the legislature and from the Department of Defence. It would be inappropriate, therefore, to say more than this: to the extent that the legislature or the Department of Defence wishes to limit any of the rights conferred on members of the Defence Force by section 23, it must do so in terms compatible with section 36. It would be premature at this stage to consider the matter any further. I conclude, therefore, that the total ban on trade unions in the Defence Force clearly goes beyond what is reasonable and justifiable to achieve the legitimate state objective of a disciplined military force. Such a ban can accordingly not be justified under section 36

and section 126B(1) is accordingly inconsistent with the Constitution and invalid.

Suspension of orders of invalidity

[37] I therefore reach the same result as Hartzenberg J. It is necessary now to consider whether it is appropriate to make an order suspending the declarations of invalidity made. Hartzenberg J held that the orders of invalidity should be suspended until 31 December 1999. I do not agree with this order, for the following reasons.

[38] In relation to the order concerning section 126B(2) read with section 126B(4), the prohibition on acts of public protest, neither party argued that the declaration of invalidity should be suspended. Indeed, the applicant argued that it should not be suspended. It argued that any lacuna arising from the invalidity of the provisions, would be filled by the prohibition contained in section 46 of the Military Discipline Code. Section 46 of the Code provides that any person who "causes actual or potential prejudice to good order and military discipline" shall be guilty of an offence. The respondent expressed no disagreement with the applicant's submission. It seems to me, therefore, that there is no reason why an order of invalidity concerning section 126B(2) read with section 126B(4) should be suspended.

[39] The order of invalidity will have effect only from the date of this judgment. The

applicant did not identify any persons who had, since the Constitution came into force, been unconstitutionally convicted of the offence established by section 126B(2) read with section 126B(4). Given the scope of the prohibition and the absence of proof of any unconstitutional reliance on the provisions, it is not appropriate in the circumstances of this case to make an order with retrospective effect.

[40] I also disagree with Hartzenberg J's order of suspension, until 31 December 1999, of the declaration of invalidity in relation to section 126B(1) which contains the prohibition on membership of trade unions. The respondents argued that such an order should be suspended because it would be important, prior to the abolition of the ban, to establish procedures to regulate trade unions in the Defence Force. Regulation is necessary particularly in relation to questions such as access by trade union officials to military premises, the provision of facilities to deduct trade union subscription fees, the provision of leave for trade union activities, and the establishment of procedures and institutions to deal with grievances. It may also be necessary for regulations to address the question of multiple trade unions. The respondents therefore argued that the order of invalidity should be suspended until 31 December 1999 as Hartzenberg J had ruled.

[41] The applicant, on the other hand, pointed to the long delay that had already occurred, the repeated undertakings by the Defence Force to address issues relating to labour relations and the urgent need for the matter to be resolved before the Defence

Force commences a retrenchment exercise in the near future. It also pointed to the Minister's power in terms of section 87(1)(rB) of the Defence Act, read with section 126C, to make regulations concerning "the rights of members of the Permanent Force in connection with all matters concerning labour relations". Accordingly, it was argued, there was no need for new legislation in this area, which would be time-consuming. Labour relations could be the subject matter of regulation by the Minister of Defence (the first respondent) which would take far less time. Indeed, it was common cause between the parties that the Department of Defence had been working on drafting legislation and regulations concerning labour relations in the Defence Force for some time. In the light of all these considerations, the applicant argued that no suspension of the order of invalidity was warranted.

[42] There can be no doubt that it is desirable for the matter of labour relations in the Defence Force to be the subject of regulation prior to the ban on trade unions being lifted. Such regulation should assist in avoiding the disruption to discipline feared by the respondents and to ensure that labour relations develop in an orderly and constructive manner. On the other hand, the Defence Force has already had five years since the new constitutional order commenced to address this matter, during which time members of the Permanent Force have been deprived of their constitutional rights. What is more, during that period, the applicant has actively sought to assert the rights of Permanent Force members to no avail. During 1997, they launched an application for direct access to this

Court in which they sought relief similar to that sought in the current litigation. That application was refused on procedural not substantive grounds. Thereafter the respondents indicated that they were drafting legislation and regulations to address the applicant's complaint. That legislation did not eventuate and the applicant once again sought relief in the courts. The respondents' delay in attending to this matter cannot be excused. Members of the Permanent Force are entitled to their constitutional rights. However, despite the clear importance and urgency of affording members of the Defence Force their constitutional rights, I am persuaded by the respondents that it would be potentially harmful were the rights to be afforded without an appropriate regulatory framework. That framework must be established as soon as possible. The promulgation of regulations in terms of the current Act should not take long, particularly as the matter has already been receiving attention for some time. Accordingly, it is my view that the order of invalidity should be suspended for a period of three months from the date of this judgment to give the first respondent an opportunity to make the necessary regulations. If either the applicant or the respondents can establish that the period of three months' suspension ordered will cause them substantial prejudice, they may approach this Court for a variation of its order.

Costs

[43] In this case, the applicant has had to launch litigation twice in order to achieve

recognition of the constitutional rights of its members. Having been successful before the High Court, it was obliged to approach this Court for confirmation of the order of invalidity as the order will have no effect unless this Court confirms it. It has been successful before this Court and it is therefore entitled to its costs.

[44] Finally, I agree broadly with the conclusions reached by Hartzenberg J. For reasons given in the text of this judgment, the form of order adopted differs slightly from that proposed by Hartzenberg J. After the severance proposed above and ordered below, section 126B(2) will read as follows:

> "Without derogating from the provisions of sections 4(h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike ... or participate in any strike ... or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike ...or to participate in a strike....".

[45] *The Order*

1.1 It is declared that section 126B(1) of the Defence Act, 44 of 1957, is unconstitutional and invalid.

1.2 The order in paragraph 1.1 above is suspended for three months from the date of this order.

1.3 In the event of the order in 1.2 above causing any party substantial prejudice, such party is granted leave to apply to this Court for a variation of the order.

2. It is declared that, with effect from the date of this order, the following words in section 126B(2) of the Defence Act, 44 of 1957, are unconstitutional and invalid: "or perform any act of public protest", "or act of public protest", "or to perform such an act" and "or such an act" and such words are severed from the subsection.

4. It is declared that, with effect from the date of this order, the words "(1) or" in section 126B(3) are unconstitutional and invalid and they are severed from the subsection.

5. It is declared that, with effect from the date of this order, the definition of "act of public protest" contained in section 126B(4) is unconstitutional and invalid and it is severed from the subsection.

6. The respondents are ordered jointly and severally to pay the costs of the applicant, which costs shall include the costs of two counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J and Yacoob J concur in the judgment of O'Regan J

SACHS J:

[46] I concur in the judgment and the orders made by O'Regan J. I wish, however, to make two qualifications, one an addition and the other a subtraction.

[47] First, the addition. I would complement O'Regan J's eloquent articulation of the centrality of freedom of expression in our constitutional democracy with the following consideration: a blindly obedient soldier represents a greater threat to the constitutional order and the peace of the realm, than one who regards him or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the Constitution. The Constitution proclaims that national security is not simply directed towards the maintenance of power but "must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life." [Section 198(a)]. It goes on to require that "[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, . . ." [Section 199(5)]. It provides expressly that no member of any security service may obey a manifestly illegal order [Section 199(6)] and declares

that the primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people ". . . in accordance with the Constitution . . ." [Section 200(2)]. These provisions clearly contemplate conscientious soldiers of the Constitution who can be expected to fulfil their constitutional duties more effectively if the values of the Constitution extend in appropriate manner to them and infuse their lives in the armed forces.

[48] Secondly, I agree that, important though a communal *esprit de corps* may be for the armed forces, the mystique that any military force requires cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service. In my view, however, the freedom of association that ‹everyone' has [Section 18], and the right to fair labour practices that ‹everyone' has [Section 23(1)], clearly entitle soldiers to set up a body such as SANDU to look after their employment interests. I therefore do not consider it necessary to go as far as O'Regan J has done in examining the complex question of whether soldiers qualify as ‹workers' entitled to the panoply of workers' and trade union rights set out in Section 23 (2), (4) and (5). Nor do I find it necessary to consider whether defining soldiers as workers entitled to form trade unions, and then denying them the right to strike, to organise in the full sense of the term, to engage in meaningful collective bargaining, or to join trade union federations, might only, in the words of Jackson J, result in ". . . a promise to the ear to be broken to the

hope, a teasing illusion like a munificent bequest in a pauper's will".[21] Nor, conversely, do I feel it appropriate in this matter to grapple with the possible implications of what would at first sight seem to be the relative ease with which some or all of these rights could be subjected to extensive limitation, thereby suggesting that they could be imbued at their core with a fragility and relativism out of keeping with their hard-won, resilient and firmly entrenched character. Persuasive though O'Regan J's judgment is on these questions, I retain my doubts, and prefer to leave them open.

[21] *Edwards v California* 314 US 160 (1941) at 186

For the Applicant:	GJ Marcus SC and M Chaskalson instructed by Jacobson, Rosin and Wright.
For the Respondents:	HJ Fabricius SC, SM Lebala and D van Wyk instructed by the State Attorney, Pretoria.