

SOUTH AFRICAN NATIONAL DEFENCE UNION v MINISTER OF DEFENCE AND CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE

CCT 27/98

Explanatory Note

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

This case concerned the question of whether it was constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. Justice Hartzenburg in the Transvaal High Court, declared that a provision of the Defence Act, 44 of 1957 (the Act), which prohibited members of the Defence Force from becoming members of a trade union or engaging in any “protest action”, as defined in the Act, was unconstitutional. To have any force and effect, however, the declaration of invalidity had to be confirmed by the Constitutional Court.

The Minister of Defence and the Chief of the Defence Force (the respondents), opposed confirmation of the order of invalidity only in respect of the prohibition on joining trade unions. The South African Defence Force Union (the applicant) accepted that strike action was inappropriate in the military context, but argued that this should not prevent members of the Defence Force from joining a trade union.

Public Protest

In a majority judgement delivered by Justice O’Regan, the Court decided that prohibiting participation in acts of public protest violated the right to freedom of expression of Defence Force members. This curtailed the right of Defence Force members to receive and express opinions on a wide range of issues, whether in public or private gatherings. This amounted to a grave infringement on the fundamental rights of soldiers. The Court determined that this infringement constituted an unjustifiable limitation upon the right to freedom of expression of soldiers, and was consequently unconstitutional. However, the Court indicated that a different, narrower legislative provision, may be constitutionally justified but that this question was not before this Court.

Trade Union Membership

The applicant argued that prohibiting membership of a trade union infringed the constitutional right of “every worker”, “to form and join a trade union”. Referring to the International Labour Organisation’s construction of “worker”, Justice O’Regan interpreted the term “every worker” to include members of the armed forces, even though their relationship with the Defence Force is unusual and not identical to an ordinary employment relationship. The Court decided that this is a case in which a generous interpretation of the right is appropriate, for although members of the Defence 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.

The respondents contended that any infringement of the right was justified by the constitutional

imperative to structure and manage the Defence Force as a “disciplined military force”. They maintained that a Defence Force could not be such a “disciplined military force” if its members belonged to trade unions and wished to exercise their rights to collective bargaining and strike action. The applicant argued that a trade union can function and further the interests of its members without participating in strike action. The Court decided that the requirement of strict discipline would not necessarily be undermined by permitting Defence Force members to join a trade union, as the structure and scope of such a trade union might differ given the military environment. It stated that in appropriate circumstances, the constitutional right to join a trade union may be limited, provided that such a limitation were constitutionally justifiable.

The Court decided that the order of invalidity in respect of trade union membership would only come into force three months from the date of judgement. The Court added a proviso that if the delayed order would cause either party substantial prejudice, such party may approach this Court for a variation of the order.

In a separate and concurring judgement Justice Sachs made two qualifications to the judgement of Justice O'Regan.

Public protest

First, reinforcing the centrality of freedom of expression in our constitutional democracy, he added that a blindly obedient soldier represented a greater threat to the constitutional order than a constitutionally conscientious one who regarded him- or herself as a citizen in uniform.

Freedom of association

Secondly, since the Constitution guarantees freedom of association and fair labour practices soldiers are entitled to form a body such as SANDU to look after their employment interests. Therefore it was unnecessary to decide whether soldiers qualified as ‘workers’. To do so might give them a promise of full workers and trade union rights that turned out to be empty, and also suggest that hard-won workers’ rights could easily be limited.