THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case no: 514/2013

In the matter between:

THE MINISTER OF DEFENCE	**First Appellant**
THE SECRETARY FOR DEFENCE	**Second Appellant**
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**Third Appellant**

and

SOUTH AFRICAN NATIONAL DEFENCE UNION	**First Respondent**
LYNDON ERIC FREDERICKS	**Second Respondent**

Neutral citation: *Minister of Defence v SANDU* (514/2013)[2014] ZASCA 102 (28 August 2014)

Coram: BRAND, MAYA, WALLIS AND SALDULKER JJA and SCHOEMAN AJA.

Heard: 19 August 2014

Delivered: 28 August 2014

Summary: Defence Act 42 of 2002 – disciplinary proceedings against soldiers in terms of s 59(2)*(e)* – whether precluded by absence of regulations – whether procedure adopted fair.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Du Toit AJ sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Brand, Maya and Saldulker JJA and Schoeman AJA concurring)

[1] This Court[1] previously described the events leading to this appeal in the following terms:

'On 26 August 2009 many members of the South African National Defence Force gathered at the precincts of the Union Buildings in Pretoria to demonstrate their grievances. In doing so they contravened military orders and a court order that had been issued that morning. Some amongst them were armed with pistols, pangas, knobkerries and petrol bombs. The conduct of at least some of them provoked a confrontation with the police, who found themselves compelled to use a water cannon, and to fire rubber bullets, in an attempt to bring things under control, and police and military vehicles were damaged.'

Since 26 August 2009 the South African National Defence Force (the SANDF) has tried to discipline the participants in that demonstration. It

[1] *The Minister of Defence v SA National Defence Force* [2012] ZASCA 110 para 1.

was the third of those attempts that gave rise to the present appeal. At the instance of the respondent, the South African National Defence Union (SANDU), the high court (per Du Toit AJ) held it to be unlawful and unconstitutional. This appeal is with his leave.

[2] Initially the SANDF sought to discipline the soldiers under s 59(2)*(e)* of the Defence Act 42 of 2002 (the Act). It gave them notice of their intended administrative discharge from the Defence Force in terms of that section; informed them that they had been provisionally discharged; and invited them to show cause why their provisional discharge should not be confirmed. In an article published in a widely read newspaper the then Chief of the Defence Force said that he had persuaded the then Minister of Defence that 'the only sanction this deserves is summary dismissal or imprisonment of the soldiers'. Not surprisingly this was held to have prejudged the issue and the procedure was accordingly set aside as unlawful by the high court. The SANDF appealed but abandoned its challenge to that part of the order.

[3] All the affected soldiers had been placed on special leave pending the outcome of those legal proceedings. The final paragraph of the letter of suspension, signed by the acting chief of the SANDF, read as follows:

'You are therefore ordered not to report for work until a further express order has been given to you in writing by me.'

On 6 August 2012, shortly before the previous appeal was to be heard, and apparently because the challenge to the order declaring the earlier disciplinary proceedings unlawful was to be abandoned, fresh letters were addressed to the soldiers. These were headed 'INSTRUCTION TO REPORT TO YOUR UNIT' and were signed by the Acting General Officer Commanding Defence Works Formation. They instructed the

soldiers to report to their headquarters on 16 August 2012 at 08:00 for the sole purpose of being warned of the charges preferred against them and to be arraigned for conduct relating to the incident that took place on 26 August 2009 in Pretoria. The apparent intention of the SANDF was to charge the soldiers in terms of the Military Discipline Code. The notice was given widespread coverage in the media in an endeavour to bring it to the attention of all the affected soldiers many of whom had returned to homes in far-flung parts of the country. In the later radio broadcasts that occurred after the deadline of 16 August 2012 had passed they were informed that nonetheless they should report to their units for the same purpose.

[4] Notwithstanding these efforts it does not appear that the instruction came to the attention of all the soldiers. Some 300 soldiers reported to their bases in terms of the notice, some even as late as 10 September 2012. They resumed their duties and preliminary investigations were commenced in regard to their conduct on 26 August 2009. However, a number did not return. Many of them appear to have acted on the advice of SANDU, which quite wrongly, and as the high court held obstructively, advised its members that they should not obey the order because of a perceived inconsistency with the order placing them on special leave. This stultified the efforts of the SANDF to pursue proceedings under the Military Discipline Code against these members of the force.

[5] Some correspondence between attorneys representing SANDU and various persons within the SANDF followed upon these notices. It is unnecessary to traverse that correspondence because on 5 November 2012 the SANDF once more changed its approach to disciplining the

soldiers who had not reported to their bases. On that day they were sent letters in the following terms:

'NOTICE OF INTENDED ADMINISTRATIVE DISCHARGE/DISMISSAL: MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) WHO PARTICIPATED IN AN ILLEGAL MARCH ON 26 AUGUST 2009 IN PRETORIA.

1. You were placed on special leave for participating in an illegal march on 26 August 2009, conduct unbecoming for a professional soldier. You further disobeyed an order to report to your unit on 16 August 2012 for warning and arraignment.

2. Based on the above you are hereby called upon to provide reasons or show good cause, within ten (10) days of the service of this notice, as to why I should not discharge or dismiss you from the SANDF in terms of section 59(2)(e) of the Defence Act 42 of 2002, as amended, and the common law. You may submit your response to the following address or fax number …

3. Unless I receive your response on or before 19 November 2012, 12:00, you shall be confirmed to be administratively discharged or dismissed from the SANDF.'

The letter was signed by the Chief of the SANDF.

[6] In addition to those letters a notice was published in the *Sowetan* newspaper on 14 November 2012 and in the *Daily Sun* newspaper the following day. The notice read as follows:

'NOTICE OF INTENDED ADMINISTRATIVE DISCHARGE: MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE WHO DISOBEYED A DIRECTIVE TO RETURN TO THEIR HOME UNITS

In terms of Section 59(2)(e) of the Defence Act, Act 42 of 2001, the Chief of the South African National Defence Force (C SANDF) has issued a notice of intended administrative discharge to all members who failed to report to their home units as he directed in August 2012. In execution of his Constitutional responsibility to manage the SANDF as a disciplined military force, the C SANDF issued a directive that all members of the SANDF who were placed on Special Leave following their participation in an illegal march at the Union Buildings in 2009 should report back to their home units.

Some members responded to the directive as expected of military personnel to obey orders, some did not respond as required by military discipline. The SANDF is also mindful of the fact that the South African National Defence Union (SANDU) advised some members not to heed the instruction.

The members are required to provide reasons or show good cause as to why the C SANDF should not discharge or dismiss them from the SANDF on or before 19 November 2012. The response is to be forwarded to the above address.'

Below that there is a further heading preceding a list of 664 names. This heading, like that on the letter, reads:

'**NOTICE OF INTENDED ADMINISTRATIVE DISCHARGE/DISMISSAL: MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) WHO PARTICIPATED IN AN ILLEGAL MARCH ON 26 AUGUST 2009 IN PRETORIA.'**

[7] The sending of these letters and the publication of this notice precipitated an urgent application by SANDU on 19 November 2012 seeking a declaratory order that this procedure was unconstitutional and unlawful. Whilst the relief originally sought was far-reaching the only orders ultimately made by Du Toit AJ were the following:

'1. Declaring that the procedure adopted by the first respondent as reflected in the first respondent's **'NOTICE OF INTENDED ADMINISTRATIVE DISCHARGE/DISMISSAL: MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) WHO PARTICIPATED IN AN ILLEGAL MARCH ON 26 AUGUST 2009'** dated 5 November 2012 ('the Notice'), is unlawful and/or unconstitutional.

2. Declaring that the procedure adopted by the first respondent as reflected in **'NOTICE OF INTENDED ADMINISTRATIVE DISCHARGE: MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE WHO DISOBEYED A DIRECTIVE TO RETURN TO THEIR HOME UNITS'** appearing in the *Sowetan* newspaper on 14 November 2012 and the *Daily Sun* newspaper on 15 November 2012 ('the Advertisement') is unlawful and/or unconstitutional.'

The appeal lies against the grant of those orders.

[8] Section 59 of the Act deals with the various circumstances in which the services of a member of the SANDF may be terminated. Section 59(1) covers resignation; the termination of a fixed term contract of employment; reaching the prescribed age of retirement; being sentenced to a term of imprisonment by a competent civilian court without the option of a fine or having a sentence of discharge or dismissal imposed upon him under the Military Discipline Code; or if the surgeon-general certifies the member to be unfit to serve in the SANDF. Section 59(3) deals with a member absenting himself or herself from official duty for a period exceeding 30 days. In that event they are treated as having been automatically dismissed.

[9] Section 59(2), which the SANDF sought to invoke in the present case, reads as follows:

'The service of a member of the regular force may be terminated in accordance with any applicable regulations –

(a) As a result of the abolition of such member's post or any reduction or adjustment in the post structure on the Department of Defence;

(b) If for reasons other than the member's own unfitness or incapacity, such discharge is likely to promote efficiency or increased cost-effectiveness in the Department of Defence;

(c) On account of unfitness for his or her duties or inability to carry them out efficiently, irrespective of whether such unfitness or inability is caused by such member's ill-health not amounting to a condition referred to in subsection (1)(e);

(d) If, after serving a period of probation in terms of this Act, his or her appointment is not confirmed; or

(e) If his or her continued employment constitutes a security risk to the State or if the required security clearance for his or her appointment in a post is refused or withdrawn.'

[10] It is common cause that no regulations have been promulgated under this section. In those circumstances the first point argued on behalf of SANDU was that it was impermissible for the SANDF to use this section in order to dismiss these soldiers, or indeed anyone. It sought to rely on the principle that where a statute provides that something be done as a condition precedent to an exercise of a lawful power, non-compliance with the condition precedent, or jurisdictional fact as it is frequently called, is fatal to the exercise of the power.[2] In addition it contended that as the decision to terminate the services of a member of the SANDF involved the exercise of a discretion, it was necessary for regulations to be promulgated in order to circumscribe the scope of that discretion.[3]

[11] The first question is whether in accordance with the established principles of statutory interpretation[4] the exercise of the powers conferred by s 59(2) is dependent on the existence of regulations. In my opinion neither the language of the section nor its context points to that construction. As to language, the section refers to 'any applicable regulations'. That language is not indicative of the need for regulations to have been promulgated in order for the powers conferred by the section to be exercised. It might have been different if the section had read 'in accordance with regulations' or 'in accordance with the regulations', but it does not. It is only 'any applicable' regulations that must be followed and, if there are no applicable regulations, whether because none have

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[2] *Democratic Alliance v President of the RSA* 2012 (1) SA 417 (SCA) para 118; *Paola v Jeeva NO* 2004 (1) SA 396 (SCA) paras 11-14.

[3] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47.

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12.

been promulgated or because those that have been promulgated do not touch on the exercise of the particular power under s 59(2), then there are simply no regulations for the functionary to follow.

[12] Reference to the context supports that linguistic analysis. Subsection *(e)*, which the SANDF wishes to invoke, is one of five subsections and the reference to regulations applies to all of them. If regulations are required in order to exercise the power under subsection *(e)*, then they must also be required in order to exercise the powers under the other subsections. But it is difficult to see why, if a member's post has been abolished or there has been a general reduction in posts as a consequence of budgetary cuts at a time of financial stringency, regulations are necessary in order to terminate the services of those who have become redundant. All that would be required in those circumstances would be that a fair retrenchment procedure be followed, but that would flow from the soldiers' right to be fairly treated not the existence of regulations. Similarly if the security clearance of a senior serving officer were withdrawn, the termination of their services would seem to follow as a matter of course from the fact that they could no longer perform their duties.

[13] What puts the matter beyond doubt is that under subsection *(d)* a soldier's services may be terminated if, after serving a period of probation, their appointment is not confirmed. If a probationary soldier does not have their appointment confirmed then, unless they were on probation from some other post in the SANDF, the fact that their appointment was not confirmed would necessarily mean that they would have to be discharged. If they could not be discharged in the absence of regulations, they would in effect obtain confirmation of their appointment

to the probationary post even though they had not been confirmed in it. That cannot be correct. In the result I reject this argument.

[14] SANDU also advanced an argument based on the contention that the SANDF had 'repeated precisely the same forms of conduct which were held to be unlawful and unconstitutional by the high court in October 2010 and in respect of which the Department abandoned its appeal'. It said that this was an abuse of process or was barred by an application of what counsel referred to as issue estoppel. In support of both arguments counsel relied on certain cases that were discussed by this court in *Caesarstone*.[5] I doubt whether the argument is sound, because while the SANDF again sought to invoke s 59(2)*(e)* and intended to afford the soldiers a hearing by way of representations, there were also differences between the previous situation and the present. Not least among those was that it could no longer be said that the soldiers were facing a *fait accompli* because their fate had been predetermined. I can see no basis for rejecting the statement on oath by the current chief of the SANDF that all representations would have been considered and that no final decision with regard to the soldiers' administrative discharge/dismissal had been taken when the current letters were issued and the current notices were published. However, as I am clear that the procedure that the SANDF adopted in the present case was unfair and a breach of the soldiers' rights it is unnecessary to express a final view on this.

[15] It is likewise unnecessary to express a final view on the contention by SANDU that the conduct of the soldiers, both that on 26 August 2009

[5] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) paras 45 and 46.

and their subsequent conduct in not reporting to their bases in terms of the instruction given on 6 August 2012, was incapable of constituting a security risk to the State and, therefore, that the attempt to invoke s 59(2)*(e)* against them was without foundation. In considering this submission I am mindful that in our past security risks to the State were invoked to justify oppressive conduct or to conceal misconduct. Our history teaches us therefore that it is right to approach claims of a risk to the security of the State with healthy scepticism. Certainly the case on behalf of the SANDF in this regard was extremely thin. It never identified the nature of the security risk that concerned it, nor was any apparent from the fact that on a single occasion, now five years ago, some soldiers disobeyed orders and behaved outrageously in order to bring to the attention of the authorities their perceived grievances. Their colleagues who reported in response to the instruction of 6 August 2012 are apparently back performing duties without any apparent impact on national security. In addition s 59(3) of the Act tells us that being absent without leave for 29 days on its own is not a ground upon which the SANDF may treat the soldier as automatically dismissed. Why then should absence on a single day to participate in a demonstration pose a threat to the security of the State? But, against these considerations must stand the additional factor of their failure to report after 6 August 2012 in the light of SANDU's incorrect advice that the orders they had given were conflicting. The attitude of each soldier to the need to obey lawful orders may have had a bearing on the central question of whether their continued employment as a member of the SANDF posed a risk to national security. It is accordingly not possible on these papers to rule that conclusion out definitively.

[16] That clears the way for a consideration of the central question whether the procedure adopted by the SANDF to discipline the soldiers who had not returned to their bases in terms of the instruction of 6 August 2012 was fair. The parties were agreed that any disciplinary procedure adopted by the SANDF was required to be fair. SANDU put this on two bases, namely that the disciplinary proceedings constituted administrative action in terms of PAJA[6] and, alternatively, that the soldiers were entitled in the absence of any other statutory source to rely directly on their constitutional right to fair labour practices in terms of s 23(1) of the Constitution. I do not think that the first ground is correct in the light of the Constitutional Court's decision in *Gcaba*,[7] where the court said that generally employment and labour relations issues do not amount to administrative action within the meaning of PAJA. In view of the concession on behalf of the SANDF that it was obliged to follow a fair procedure in disciplining the soldiers it is unnecessary to determine whether that obligation flows directly from the constitutional guarantee of fair labour practices or whether this is one of those cases where rational decision-making in the exercise of a public power not amounting to administrative action calls for procedural fairness.[8] What matters for present purposes is whether the procedure initiated by the SANDF complied with that obligation of fairness.

[17] The proceedings against the soldiers were disciplinary in nature. Without seeking to be either comprehensive or definitive, a fair procedure in disciplinary proceedings against an employee requires as a minimum

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[6] The Promotion of Administrative Justice Act 3 of 2000.
[7] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 64.
[8] *Albutt v Centre of the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) paras 50-51; *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 12; *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) paras 67-72.

the following. The employee must be told what they have done that is said to constitute misconduct with sufficient clarity to understand the nature of the alleged misconduct. Where, as here, the employer seeks to say that conduct is of a particular character it must set out why the alleged conduct has that character. The employees must be given an adequate opportunity to address the charges raised in a manner that protects their own rights. To that end they will ordinarily be entitled to the assistance of any trade union of which they are a member, whether in formulating their response or by way of representation at a disciplinary hearing. The Constitutional Court has confirmed the entitlement of soldiers to be assisted and represented by their trade union in disciplinary proceedings.[9]

[18] In my view the procedure adopted by the SANDF was defective in all of these respects. I deal with each in turn. Reading the letters, the terms of which are set out in para 4 of this judgment, it was said that participation in the events of 26 August 2009 was conduct unbecoming a professional soldier and in addition it was said that the soldiers disobeyed an order to report to their unit on 16 August 2012. In the letters there were therefore two elements to the alleged misconduct. However, the advertisement in the two newspapers referred only to the soldiers having disobeyed a directive to return to their home units. It is true that immediately above the list of names there was reference to their having participated in an illegal march on 26 August 2009, but there was nothing to indicate that this was to form a ground for their possible discharge. In the result the two notices were contradictory. As the soldiers whose names appeared on the list in the advertisements were also sent letters they would not have known what charges were being levelled against

[9] *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) paras 89-95.

them and indeed it is by no means clear from the affidavits filed on behalf of the SANDF whether the complaint related to the events of 26 August 2009, or those following upon the order of 6 August 2012, or both of those. The procedure was therefore unfair because it left the soldiers in doubt as to the charges they faced.

[19] The procedure was also unfair because it did not disclose to the soldiers why it was said that their conduct, even assuming that it encompassed both participation in the events of 26 August 2009 and the failure to report to base pursuant to the directive of 6 August 2012, constituted a security risk to the State. In para 14 I drew attention to the difficulties that confront the SANDF in advancing that contention. How were the soldiers to know the reasons for the SANDF taking that view, albeit provisionally, unless they were told? A soldier might after all have responded to the letter by saying that he or she had participated in the march and demonstration on 26 August 2009 out of a sense of grievance and refused to return in response to the directive of 6 August 2012 on the advice of their trade union. How would they know whether that response would be adequate to avoid their discharge? Unless they were told why any conduct in relation to the march and demonstration, or the failure to return to their base to receive disciplinary charges and be arraigned, posed a threat to the security of the State, they would be shooting in the dark in their attempt to make meaningful representations in response to the charge against them.

[20] I accept that in certain circumstances it may be fair and appropriate for an employer to follow a procedure similar to that which the SANDF adopted in this case, of informing the employee of the nature of the alleged misconduct and asking for representations in that regard, both as

to whether the conduct occurred and constituted misconduct and as to an appropriate sanction. However, the employee must be afforded an adequate opportunity to respond and to obtain the assistance, if required, of a trade union of which the employee is a member. Here the letters afforded the soldiers ten days from the date of receipt thereof, but the newspaper advertisements, published on 14 and 15 November 2012, required them to respond in writing to a private bag address in Pretoria by 19 November, that is, within four days. Manifestly that afforded the soldiers insufficient time to obtain advice and assistance from their trade union, of whose existence the SANDF was well aware, and to make adequate representations, especially if one bears in mind that they were scattered across the length and breadth of the country.

[21] For those reasons the procedure adopted by the SANDF was not fair and the court below was correct to grant the declaratory orders that it did. The appeal is accordingly dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	J H Dreyer SC Instructed by: The State Attorney, Pretoria and Bloemfontein
For respondent:	Gilbert Marcus SC (with him P Jara, the heads of argument having been prepared with Steven Budlender) Instructed by: Griesel & Breytenbach, Pretoria Phatshoane & Henney Attorneys, Bloemfontein.