IN THE DISCIPLINARY ENQUIRY HELD AT SOUTH AFRICAN ARMY

GYMNASIUM, HEIDELBERG

In the matter between:

SOUTH AFRICAN NATIONAL DEFENCE FORCE UNION	**APPLICANT**
And	
SOUTH AFRICAN NATIONAL DEFENCE FORCE	**RESPONDENT**
In *Re*	
SOUTH AFRICAN NATIONAL DEFENCE FORCE	**EMPLOYER**
And	
509 SANDU MEMBERS	**EMPLOYEES**

HEARD ON **14 MARCH 2016**
HANDED DOWN ON **25 APRIL 2016**

R U L I N G

INTRODUCTION

1 These proceedings arise out of a march by members of the South African National Defence Force (SANDF) that occurred in Pretoria on 26 August 2009. They concern some 509 members of the SANDF who are represented by their trade union, the South African National Defence Union (SANDU). Since that date, the SANDF has made two attempts to discipline these members. Each attempt was met with a successful legal challenge on procedural grounds by SANDU. These attempts have been the

subject of two High Court decisions and two SCA decisions.[1] The members have been on special leave since 10 September 2009 following this long-drawn litigation.

2 The SANDF has convened this disciplinary enquiry in a further attempt to discipline these members.

3 SANDU has launched a legal challenge to this attempt too. First, it is contending that this disciplinary enquiry lacks jurisdiction to try these members under the Military Discipline Code (the MDC); second, that these proceedings are unlawful and unfair because they constitute a breach of the requirement of equal protection and benefit under the law; and third, that there has been an unreasonable delay in initiating these proceedings.

4 The SANDF is resisting this legal challenge.

5 In the view I take of the first point *in limine*, it will be convenient to consider this point first. But first, do I have the power to even inquire into whether I have jurisdiction or not?

CAN I INQUIRE INTO WHETHER I HAVE JURISDICTION OR NOT?

6 The parties are agreed that I have jurisdiction to inquire into whether I have jurisdiction to conduct this disciplinary enquiry or not. In this regard, I was referred to the decision of the SCA in *Radon Projects*.[2] In that case, and in the context of an arbitrator, the SCA held that "[w]hen confronted with a jurisdictional objection an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction."[3] It further held that an arbitrator is not precluded "from enquiring into the

[1] *Minister of Defence and Another v South African National Defence Force Union* (161/11) [2012] ZASCA 110 (unreported judgment); and *Minister of Defence and Others v South African National Defence Force Union and Another* 2014 (6) SA 269 (later referred to as SANDU I and SANDU II, respectively – see paras 11 and 16 below).
[2] *Radon Projects v NV Properties* 2013 (6) SA 345 (SCA) *(Radon Projects)*.
[3] Id at para 28.

scope of his [or her] jurisdiction, and even ruling upon it, when a jurisdictional objection is raised."[4]

7 The rationale for this view appears from the English case of *Christopher Brown Limited*[5] which was cited with approval by the SCA:

> "It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties."[6]

8 While all this was said in the context of an arbitrator, I can see no reason in principle and logic why these considerations should not apply to a disciplinary enquiry of the kind that I am seized with. I consider that I am entitled to inquire into the merits of the issue to determine whether I have jurisdiction or not to go on with this enquiry. It follows that the attitude of the parties to this issue is sound in law.

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[4] Id at para 29.
[5] *Christopher Brown Limited v Genossenschaft Oesterrechischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft Mit Beschrankter Haftung* [1953] 2 All ER 1039 at page 1042.
[6] *Radon Projects* at para 30.

9 With that out of the way, I now turn to the merits of the jurisdictional issue. But before doing so, I propose to set out the relevant background facts; the contentions of the parties; the applicable legislative framework; and then evaluate the contentions of the parties.

FACTUAL BACKGROUND

10 On 30 August 2009 the Chief of the SANDF, General Ngwenya, addressed letters to the members alleging, among other things, that by participating in the march on 26 August 2009, they had engaged in unlawful and criminal activities; threatened the security of the Republic; rendered themselves guilty of mutiny under the MDC; and shamed the nation. He further alleged that their "continued employment with the SANDF constitute[d] a security risk." As a consequence, these members were informed that "in terms of Section 59(2)(e) of the Defence Act, 2002, read with the Constitution [their] service[s] with the SANDF [were] provisionally terminated." They were given 10 days to show cause why the provisional termination should not be made final.

11 SANDU successfully challenged the provisional termination of the services of its members in the High Court on the ground that the procedure followed by the SANDF was unlawful. In addition, SANDU was granted an interdict preventing the SANDF from terminating the services of the members pending the finalisation of the dispute that SANDU had referred to the Military Bargaining Council. Although the SANDF launched an appeal against both orders of the High Court, it subsequently abandoned the appeal against the declaratory order, but persisted in the appeal against the interdict. That appeal was successful in the SCA[7] in a judgment that was delivered on 30 August 2012. For convenience, the decision of the SCA in this appeal will be referred to as SANDU I.

12 On 6 August 2012, shortly before the hearing of the appeal in SANDU I, the SANDF addressed letters to members instructing them to report to their headquarters by 16 August 2012 "for the sole purpose of being warned of the charges preferred against [them] and arraigned for conduct related to the incident that took place on 26 August 2009 in Pretoria." Approximately 300 members complied with this instruction. They were subsequently

[7] SANDU I, see footnote 1 above.

charged under the MDC and were brought before the military courts. Four separate trials were held. These members were either acquitted or had charges against them withdrawn. They have since returned to work.

13 A further 32 members who only reported to their units after the deadline, were subjected to pre-trial procedures under the Military Discipline Supplementary Measures Act, (MDSMA).[8] These pre-trial procedures were only completed in early 2014. Charges against these members were eventually withdrawn in May 2015. These members too have since returned to work.

14 Some 600 members did not comply with the instruction to report to their units. It is these members who are the subject of these proceedings. SANDU is representing 509 of these members. The remaining members are not involved in these proceedings.

15 On 5 November 2012 the SANDF addressed letters to these members and published notices in two newspapers calling upon them to provide reasons within 10 days why they should not be discharged from the SANDF in terms of section 59(2)(e) of the Defence Act, 2002,[9] and the common law. These members were accused of participating in an illegal march and disobeying the instruction to report to their units. They were warned that if they did not respond by 19 November 2012 their administrative discharge or dismissal from the SANDF would be confirmed.

16 Not surprisingly, SANDU challenged these notices in the High Court on the grounds that the procedure adopted by SANDF was unlawful and unconstitutional. They sought and obtained a declaratory order to that effect. The SANDF's appeal to the SCA was unsuccessful. The SCA[10] held that that the procedure adopted by the SANDF was not fair. The decision of the SCA in this regard will be referred to as SANDU II.

[8] 16 of 1999.
[9] 42 of 2002.
[10] SANDU II, see footnote 1 above.

17 In SANDU II, SANDU had also challenged the SANDF's reliance of section 59(2)(e) of the Defence Act, 2002. It contended that the conduct of the members, both on 26 August 2009 and their subsequent conduct of disobeying the instruction to report to their bases by 16 August 2012, was incapable of constituting a security risk as contemplated in section 59(2)(e). While the SCA considered it unnecessary to express a final view on this contention, it nevertheless expressed the view that "the case on behalf of the SANDF in this regard was extremely thin."[11]

18 It explained its view as follows:

> "[The SANDF] 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?"[12]

19 However, this view was not without qualification, for the SCA went on to say:

> "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."[13]

[11] SANDU II at para 15.
[12] Id.
[13] Id.

20 As it will appear below, the view expressed by the SCA on section 59(2)(e) may very well have influenced the approach that the SANDF subsequently adopted in its further attempt to discipline the members.

21 On 5 March 2015, the SANDF addressed a letter to SANDU's lawyers. informing them that it "will be convening an inquiry into the conduct of the… members." The letter goes on to say the "issues in the inquiry will be whether [members] have made themselves guilty of misconduct within the scope of their employment, and, if so, what the appropriate sanction should be".[14] SANDU was further informed that "[t]he exact nature of misconduct alleged against the members will emerge from the charges currently being framed"[15] This letter said nothing about the provisions of section 59(2) of the Defence Act, 2002.

22 The charge sheets were only issued on 1 September 2015 and sent out under cover of a letter dated 31 August 2015.[16] The charge sheet contains two charges. The preamble to the charge sheet alleges, among other things, that members were employed by the SANDF in terms of employment contracts; and that they were required to observe the standard of conduct and behaviour expected and required of a member of the SANDF and, in particular, to observe the standards of conduct and behaviour embodied the Schedule 1 to the Defence Act, 1957.[17] This is a reference to the MDC. In paragraph two, the preamble lists sections 14, 17, 19, 25, 45 and 46 of the MDC which, it alleges, embody acts of misconduct committed by the members.

23 The preamble is then followed by the two charges framed as follows:

> **"FIRST CHARGE**
> RELEVANT ACTS OF MISCONDUCT
> 3. In the period leading up to the events more fully described below:
> 3.1 The South African National Defence Union, of which you were a member or with whose aims and aspirations

[14] Index Bundle 2, page 198 (at para 2 of the Letter).
[15] Id (at para 3 of the Letter).
[16] Id at pages 142 – 148.
[17] 44 of 1957.

you identified, applied for and was granted permission to conduct a protest march throughout the streets of Pretoria;

3.2 At the instance of the SANDF, an order of court was sought and granted prohibiting participation in such march and the contents of such order were communicated orally to members of the SANDF, yourself included;

3.3 In the course of communicating the order, the SANDF made it clear that such leave as may have been granted to members of the force enabling them to participate in the march was revoked with immediate effect.

4. On 26 August 2009:

4.1 A march of some one thousand members of the SANDF took place that culminated in or around the grounds of the Union Buildings;

4.2 Among the members who participated in the march were personnel who armed themselves with sticks, pangas or stones and, by means of these instrumentalities or otherwise, threatened and/or intimidated members of the public and damaged property by stoning or torching, motor vehicles not least;

4.3 You participated in the march in the knowledge that it was unlawful, in terms of the said order of court and/or by reason of its threatening or violent nature, and that you enjoyed no permission to be absent from service in order so to participate;

5. You failed to take reasonable steps to:

5.1 Disassociate yourself from the march when it commenced alternatively when it became violent or unruly;

5.2 Prevent participants in the march from continuing with their participation or committing acts of a violent or unruly nature.

NATURE OF FIRST CHARGE

6. By reason of your conduct you committed acts:

6.1 Amounting to absence without leave within the contemplation of clause 14;

6.2 Amounting to insubordination within the contemplation of clause 17;

6.3 Amounting to disobedience of an order within the contemplation of clause 19;

6.4 Amounting to unlawful damage to public property within the contemplation of clause 25;

6.5 Amounting to riotous or unseemly behaviour within the contemplation of clause 45;

6.6 Amounting to conduct to the prejudice of military discipline within the contemplation of clause 46.

7. In consequence you are guilty of a breach of your contract of employment that justifies disciplinary action against you, which may include the termination of your employment summarily or upon notice. (Underlining added)

SECOND CHARGE

MATERIAL FACTS

8. Persons who participated in the march, yourself included, were placed on special leave in consequence of their conduct.

9. By order dated 3 August 2012, repeated on 22 August 2012, such persons, included yourself, were required of you, failed to report for duty.

NATURE OF CHARGE

10. By reason of your conduct you committed acts:

10.1. Amounting to absence without leave within the contemplation of clause 14;

10.2. Amounting to insubordination within the contemplation of clause 17;

10.3. Amounting to disobedience of an order within the contemplation of clause 19;

11. In consequence you are guilty of a breach of your contract of employment that justifies disciplinary action against you, which may include the termination of your employment summarily or upon notice." (Underling added)

24 It is apparent from the underlined portions of the charge sheet that the SANDF now relies on a breach of contract of employment as the basis for seeking to discipline the members. Neither the charge sheet nor the covering letter accompanying the charge sheet makes any reference to section 59(2) of the Defence Act, 2002.

25 Pursuant to a request for particulars, the SANDF provided two documents, the one is titled "APPOINTMENT IN SA NATIONAL DEFENCE FORCE: CORE SERVICE SYSTEM (CSS)" and the other is titled "SERVICE CONTRACT FOR THE SERVICE IN THE CORE SERVICE SYSTEM OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE."[18] As will appear more fully below, these documents reiterate that the terms and conditions of service of the members of the SANDF including the termination of their services are governed by the Defence Act, 2002 read with the MDSMA and the MDC. What emerges from these documents is that the authority of the SANDF to enrol, appoint and discharge members of the SANDF is regulated by the Defence Act, 2002, the MDSMA and that members of the SANDF are "subject to the Military Discipline Code".

26 It is against this background that the contentions of the parties must be understood.

[18] Index Bundle 2 at pages 168 – 172.

THE CONTENTIONS OF THE PARTIES

27 SANDU contended that the task of adjudicating alleged breaches of the MDC falls exclusively on the military courts and the ordinary criminal courts. In support of this contention SANDU advanced four main submissions.

28 Firstly, it submitted that on a proper construction of the Defence Act, 2002, and the MDSMA read in the light of section 200(1) of the Constitution, only two institutions are expressly authorized to exercise jurisdiction over the breaches of the MDC. These are the military courts established under section 6 of the MDSMA and the ordinary criminal courts in terms of section 105 of the Defence Act, 1957.[19] There is no provision, SANDU maintained, for a member of the SANDF to be tried for a breach of the MDC in a disciplinary enquiry of the sort now being invoked. Secondly these proceedings are inconsistent with the provisions of section 29(2) of the MDSMA[20] and section 60 of the MDC.[21] These provisions contemplate that any member of the SANDF who is charged with an offence under the MDC would be tried through the criminal process established by the military justice system to maintain discipline within the military.[22] Thirdly, *ad hoc* proceedings would frustrate the rights of members of the SANDF to choose the forum in which they would be tried for alleged breaches of the MDC, as contemplated in section 11 of the MDSMA.[23] Finally, in terms of section 4(1) of the MDSMA, where there is a conflict between the provisions of

[19] The provisions of section 105 of the Defence Act, 1957, have been preserved under the Defence Act, 2002.
[20] Section 29(2) of MDSMA provides: "Any person warned in terms of a rule of the [Military Discipline] Code in respect of an offence shall be brought before a military court as soon as possible after receipt by the adjutant of that person's unit or by a prosecution counsel of the written signed account of offence prescribed in a rule of the [Military Discipline] Code."
[21] Section 60 of the MDC as contained in the First Schedule of the Defence Act, 1957, provides: "Any person charged with an offence…shall within the prescribed period be brought before a prescribed officer who shall try the accused summarily or direct that a preliminary investigation be held."
[22] Index (Applicants Heads of Argument) pages 14 – 23.
[23] Section 11 provides: "(1) Every commanding officer and every officer subordinate in rank to such commanding officer and of a rank not less than field rank, who is authorised thereto in writing by such commanding officer, shall have the jurisdiction conferred by this section. (2) A commanding officer may conduct a disciplinary hearing of any person subject to the Code, other than an officer or warrant officer, who has elected in terms of this Act to be heard by a commanding officer, for any military disciplinary offence and may on conviction sentence the offender to any punishment referred to in section 12(1)(*i), (j), (k), (l) and (m),* subject to a maximum fine of R600, 00."

MDSMA and any other law, its provisions will prevail except where the other law is the Constitution or a statute which expressly amends the provisions of the MDSMA.[24]

29 For its part, the SANDF contended that the military courts and the civilian courts processes are not exhaustive of the processes for disciplining members of the SANDF. The argument in support of this contention went as follows: There are two processes by which members of the SANDF could be called to account for their conduct: The one is by what the SANDF called the neo-criminal process that produces criminal sanctions including discharge from service; the other is through the conventional process by which the SANDF, as an employer, asserts its contractual rights to terminate the employment relationship. The MDC provides the structure and sets the normative standards of good conduct under which the criminal process operates. The employment relationship provides the structure for disciplinary action under which the conventional process operates. But the MDC, said the SANDF, is also relevant to the conventional process to the extent that it articulates some of the normative standards of good conduct against which the conduct of members can be measured.[25]

30 The SANDF submitted that in these proceedings it does not seek to invoke the criminal process, but is invoking its contractual rights to terminate the members' contracts of employment for their alleged breach of the normative standard of good conduct expected of them under their respective contracts of employment. The reference to the provisions of the MDC in the charge sheet is not an invocation of the criminal process contemplated by the military justice system, the SANDF maintains. It is, rather, an appeal to the normative standards of good conduct that are embodied in the MDC, which "being in the uncontested MDC, are indisputable and being criminally directed, are the [baseline]." The SANDF has therefore initiated this enquiry to discipline the members for breaches of the MDC. The invocation of its contractual rights permits it "to submit the SANDF to an appropriately constructed process", such as the present one. In effect, the SANDF is contending that it is

[24] Section 4 provides: "(1) If any conflict relating to any matter dealt with in this Act arises between this Act and the provision of any other law, save the Constitution or any Act expressly amending this Act, the provisions of the Act shall prevail. (2) Subject to the subsection (1) and the sections 43 and 44, the provisions of the Defence Act 1957, and the Code shall remain in force and shall be applied subject to the changes required by the context."
[25] Index (Respondent's Heads of Argument) pages 3 – 4.

permissible to try breaches of the MDC outside of the criminal process envisaged by the military justice system where it is asserting its contractual rights.[26]

31 In the course of oral argument counsel for the SANDF submitted, somewhat faintly, that the SANDF is also relying on the provisions of section 59(2) of the Defence Act, 2002. It will be convenient to dispose of this point at once.

DOES THE SANDF RELY ON THE PROVISIONS OF SECTION 59(2)?

32 Neither the charge sheet nor the covering letter accompanying the charge sheet makes any reference to section 59(2) of the Defence Act, 2002. None of the allegations in the charge sheet remotely warn the members that the SANDF intends to rely on the provisions of section 59(2) in disciplining them. Nor do the letters announcing the intention to convene a disciplinary enquiry and enclosing the charge sheet warn the members that the SANDF is invoking the provisions of section 59(2) in disciplining them. If the SANDF had sought to rely on the provisions of section 59(2) in these proceedings, one would have at least expected the SANDF to say so in order to warn the members of the case they will be called upon to meet.

33 On the contrary, what is clear from both the SANDF's answering affidavit and its written argument is this: it is relying on a breach of contract of employment as the basis for initiating the present disciplinary enquiry against the members and it is invoking the normative standards of good conduct set out in the MDC as the standard that members of the SANDF must comply with under their contracts of employment. Any doubt on this score, is immediately removed by the concluding paragraphs under each charge, which states:

> "In consequence you are guilty of a breach of your contract of employment that justifies disciplinary action against you, which may include the termination of your employment summarily or upon notice."[27]

[26] Id at pages 4 – 6.
[27] See para 23 above.

34 It is not without significance that when the SANDF was specifically requested to specify the clause of the contract that empowered this disciplinary enquiry to adjudicate the alleged breaches of the MDC, it responded as follows:

> "The SANDF position is *not* that there is contractual provision made for the discipline of members for breach of their contractual obligations; its position is that the concerned members have breached the terms and conditions of their employment contract and that, in order to give effect to members' right to fair labour practices, they are given an opportunity to respond to allegation of breach in a disciplinary enquiry of the sort now convened."[28]

35 It is true, the SANDF referred to the provisions of sections 59(2)(c) and (e) in its written argument. But it did so not as the foundation for the present disciplinary proceedings against the members. It referred to these provisions in order to illustrate the distinction between its statutory and the contractual relationships which, it contended, exists. Had the SANDF sought to invoke these provisions as the foundation for the present enquiry, it would have been an easy matter for it to say so expressly as it did in its previous attempts to discipline the members.

36 For these reasons, the submission advanced during oral argument that the SANDF is relying on the provisions of section 59(2) in initiating this disciplinary enquiry must fail. In any event, the SANDF's basic submission is that the members have breached the standard of good behaviour embodied in the MDC and that it is entitled to discipline them for these breaches through the present disciplinary enquiry. Whether or not it is entitled to do so, is a matter for determination in these proceedings. This issue must be determined in the light of the legislative framework for military discipline.

THE LEGISLATIVE FRAMEWORK FOR MILITARY DISCIPLINE

37 Section 200(1) of the Constitution envisages a defence force that is "structured and managed as a disciplined military force." This provision contemplates the existence of a system of military discipline enforced through a military discipline code, which prescribes

[28] Paragraphs 7 and 11 of the charge sheet. Index Bundle 2 at page 166.

standards of good conduct expected from members of the SANDF and a mechanism for its enforcement. Without these, a disciplined military force envisaged by the Constitution is unattainable.[29] A mechanism for enforcing a military discipline code of conduct necessarily entails establishing a military justice system with a prosecutorial component as well as an adjudicatory component.

38 To set the standards for military discipline, the legislature enacted the Defence Act, 2002, read with the provisions of the Defence Act, 1957, which establishes the MDC.[30] All members of the SANDF are subject to the MDC.[31] The MDC sets the normative standards of good conduct and discipline that is expected of members of the SANDF. It builds on the constitutional demand for a disciplined military force. A breach of the MDC constitutes a criminal offence and penalties for its breach include a sentence of imprisonment. The criminalisation of breaches of the MDC as well as the sentence of imprisonment that a guilty verdict carries, illustrates the importance that the legislature attaches to the MDC as an instrument to maintain military discipline.

39 The legislature has enacted the MDSMA, which provides a mechanism for the enforcement of the MDC. Its declared purpose is to "provide for a new system of military courts with a view to improved enforcement of military discipline".[32] The objectives of the MDSMA are to (a) "provide for the continued proper administration of military justice and the maintenance of discipline;"[33] (b) "create military courts in order to maintain military discipline;"[34] and (c) ensure that the accused have a fair trial and access to the High Court.[35] In terms of section 3(1)(a) members of the SANDF are subject to the MDC.

40 The MDSMA creates the military prosecuting authority, which is vested with the power to prosecute breaches of the MDC. This includes the power to institute, conduct and

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[29] *Minister of Defence v Potsane and Another: Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC) at para 21 (*Potsane)*.
[30] Section 104(1). The Military Discipline Code was established by the Defence Act, 44 of 1957, and is contained in the First Schedule of that statute. The Defence Act, 2002, preserved sections 104, 105, 106, 108, 109, 111 and 112 of the Defence Act, 1957.
[31] Section 104(5)(a).
[32] Preamble to the MDSMA.
[33] Section 2(a).
[34] Section 2(b).
[35] Section 2(c).

discontinue prosecutions, and determine and direct prosecution policy as part of the enforcement mechanism for the MDC.[36] It creates a hierarchical system of military courts,[37] presided over by legally trained military officers as judges and assessors,[38] and, at its apex, presided over by three High Court judges who sit with two legally trained and experienced military officers. In addition, it prescribes penalties for breaches of the MDC, which include dismissal or discharge from the SANDF, fines and imprisonment.[39]

41 The MDSMA also makes provision for pre-trial,[40] trial[41] and post-trial procedures, which include automatic right of review of dismissal and discharge from service by the Court of Military Appeal[42] and a review of any other sentence by a review counsel.[43] In addition, there are procedural safeguards that are put in place to ensure a fair trial including the right to legal representation.[44]

42 The Defence Act, 1957, confers jurisdiction on criminal courts to try offences under the MDC,[45] while it also confers jurisdiction on the military courts to try any offence under the Act "as if the offence were an offence under Military Discipline Code" subject to jurisdictional limitations on penalties that they may impose.[46] It enjoins criminal courts, when considering sentence for an offence under the MDC or the Act, to "take cognisance of the gravity of the offence in relation to its military bearing and have due regard to the necessity for the maintenance in the South African Defence Force of a proper standard of military discipline".[47]

43 This legislative framework therefore establishes the principle of a separate military justice system. It defines the structure of the military justice system as well as its pre-trial, trial and post-trial procedures. As part of the military justice system, it establishes the MDC,

[36] Sections 13(1)(b), 14(1)(a) and 22(1) – (6).
[37] Section 6 of the MDSMA.
[38] Sections 9 and 10.
[39] Sections 7 and 8.
[40] Chapter 4.
[41] Chapter 5.
[42] Section 25 read with section 34 (2).
[43] Section 34 (3).
[44] Section 23.
[45] Section 105(1).
[46] Section 108.
[47] Section 105(2).

which sets the standard of behaviour that is expected of members of the SANDF, and puts in place a mechanism for its enforcement. The importance of the MDC to the military justice system is evidenced by the criminalisation of the breaches of the MDC. The MDC is therefore foundational to the maintenance of military discipline, which the system of military justice seeks to achieve. And it gives effect to the constitutional demand for a "disciplined military force".[48] Significantly, the principle of a separate military justice system recognises the realities of military service, military life and the role of discipline in maintaining a disciplined military force. Consistently with this, what would be a misconduct punishable by a written warning in an ordinary employment relationship, for a member of the SANDF, the same misconduct may be visited with severe punishment, including imprisonment.

44 What is apparent from this system of military justice is that it creates a military justice system, which is far closer to the ordinary criminal justice process[49] in order "to provide for the continued proper administration of military justice and the maintenance of discipline".[50] The MDC, the penalties prescribed for breaches of the MDC and its enforcement before military courts and criminal courts are an essential foundation of the military justice system. What distinguishes the position of the members of the SANDF from that of other workers is that misconduct by a member of the SANDF "is punishable in terms of the Military Discipline Code which provides that members are criminally liable for specific forms of misconduct and may be sentenced to imprisonment."[51] While "[i]n 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."[52] (*Underlining added*) Misconduct, which involves a breach of the MDC must therefore be tried as a criminal offence before military courts or ordinary criminal courts through the military justice system.

45 It is within this legal framework that the issues raised by the contentions of the parties must be considered and evaluated.

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[48] Section 200(1).
[49] *Potsane* at para 10.
[50] Section 2(a) of the MDMSA.
[51] *South African National Defence Force Union v Minister of Defence, and Another* 1999 (4) SA 469 (CC) at para 23.
[52] Id at para 24.

46 The SANDF contended that a breach of the MDC affords it a choice; it can either treat the breach as a criminal offence and then deal with it under the military justice system, *or* it can treat it as a purely contractual matter and deal with it outside of the military justice system. The choice of the process to be followed is determined by the SANDF's concerns. If its concern is to terminate the contractual relationship, as in this case, it need not invoke the criminal process. "All that needs to be done is to submit the SANDF members to an appropriately constructed process," which includes the present process.[53]

47 Reduced to its essence, the contention by the SANDF is that it is permissible to try breaches of the MDC outside the criminal process envisaged by the military justice system. The issue for determination is whether or not the criminal process envisaged by the principle of military justice is the exclusive process for trying breaches of the MDC.

IS THE CRIMINAL PROCESS ENVISAGED BY MILITARY JUSTICE SYSTEM THE EXCLUSIVE PROCESS FOR TRYING BREACHES OF THE MDC?

48 The basic contention of the SANDF is premised on two propositions: first, it has a dual relationship with its members, the one is statutory and the other is contractual; and second, the contractual relationship permits it to discipline its members for breaches of the MDC through the conventional process by which the SANDF, as an employer, disciplines a member for a breach of contract. The contractual component and the ensuing employment relationship, says the SANDF, provides the structure for disciplinary action against its members outside the criminal process envisaged by the military justice system. In other words, the contractual relationship provides another process through which members could be disciplined for breaches of the MDC.

49 But there are difficulties with this line of argument.

50 Members of the SANDF do not enter into contracts of employment as understood in the ordinary employment relationship. In *South African National Defence Force Union v Minister of Defence, and Another*, the Constitutional Court considered the position of

[53] Index (Respondent's Heads of Argument) at page 5.

members of the SANDF as workers and commented on the uniqueness of their employment relationship as compared to other workers. It held, "[m]embers of the Permanent Force do not enter into a contract of employment as ordinarily understood"[54] but they enrol in the Permanent Force.[55] And this enrolment has certain legal consequences, which include being subject to the MDC as well as the criminal process that has been put in place to enforce the prescripts of the MDC.[56] As noted above, the Court concluded that while the relationship between the SANDF and its members may be somewhat similar to an employment relationship, when it comes to punishment for misconduct, it is not.[57]

51 The relationship between the SANDF and its members is fundamentally statutory. The process of enrolment, appointment, discipline and discharge of a member of the SANDF is regulated by statute. Indeed this is confirmed by the "APPOINTMENT LETTER" and the sample contracts "SERVICE CONTRACT" attached to the replying affidavit of Mr. Johannes George Greef.[58] These documents make it clear that members of the SANDF are subject to the MDC and that they are appointed in terms of section 52 of the Defence Act, 2002, and that their terms and conditions of service are prescribed by the statute. In particular, clause 4 of the sample SERVICE CONTRACT confirms that members of the SANDF are subject to the provisions of the Defence Act, 2002, the Military Discipline Supplementary Regulations and the MDC.

52 It is apparent from this that the authority of the SANDF to discipline its members for breaches of the MDC must be exercised in accordance with the statutory process prescribed for that purpose. The distinction between the statutory and contractual relationships contended for by SANDF is therefore artificial.[59]

53 In *Reinecke*, a magistrate sought to rely upon the contractual element of the relationship and disregard the statutory elements governing his appointment and the basis upon which he could be discharged from his post. The SCA held that this was impermissible.

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[54] *South African National Defence Force Union v Minister of Defence, and Another* at para 22.
[55] Id.
[56] Section 3 and Chapter 2 of the MDSMA.
[57] *South African National Defence Force Union v Minister of Defence, and Another* at para 24.
[58] Index Bundle 2, page 168-172.
[59] *Logbro Properties v Bedderson NO and Others* 2003 (2) SA (SCA) 460 at para 12-13; *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA) at para 16 (*Reinecke)*; *Mustapha v Receiver of Revenue, Lichtenburg and Others* 1958 (3) SA (A) 343 at 356G-357C, per Schreiner JA dissenting.

Its reasoning is instructive. First it dealt with the artificiality of drawing the line between the exercise of statutory powers and the resultant contract and held that:

> "The correct view is that one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its background. Sometimes the contractual aspects will be crucial and sometimes the statutory. Which are the more important will depend upon the facts giving rise to the dispute."[60]

54 Here it is conceded by the SANDF that the statutory relationship that it has with its members is pervasive.

55 Dealing with the question of whether the magistrate could rely on the contractual remedies and disregard the statutory remedies, the SCA said:

> "Such conduct on the part of the employer in a conventional situation of employment is a repudiation of the contract of employment. It was argued on behalf of Mr. Reinecke that it was equally the case in regard to his employment as a magistrate. There are however a number of difficulties with this argument. In the same way as his appointment had followed a statutory process with advertisement and interview leading to a recommendation by the Commission accepted by the Minister, the process for the discharge of a magistrate from service is a statutory one."[61]

56 And after referring to the statutory provisions that dealt with the discharge of a magistrate, the ground for discharge as well as the process to be followed in discharging a magistrate, the Court concluded:

> "It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable) at the instance of the magistrate by resort to the high court. It would, for example, have been open to Mr. Reinecke to apply for an interdict restraining Mr. Booi from implementing his decision to remove him from relief work and to prevent the removal of the allowance or any deductions being made from his salary by way of recoupment of past payments of the allowance. But

[60] *Reinecke* at para 16.
[61] Id at para 20.

these are public law remedies appropriate to the resolution of a public law dispute. They are not contractual remedies, which are not appropriate to such a dispute."[62]

57 Here, the process of the enrolment, appointment, and discharge of members of the SANDF is regulated by sections 52 and 59 of the Defence Act, 2002. In terms of section 11(a)(iii), members of the SANDF serve until they are, among other events, "discharged from the Defence Force in accordance with the law". In terms of section 52(3)(d), members serve "until [they] has been officially discharged". Section 59 deals with the circumstances under which services of a member may be terminated. These include a situation where "a sentence involving discharge or dismissal is imposed upon [a member] under the [Military Discipline] Code".[63] Members of the SANDF are subject to the MDC. In terms of the MDSMA, breaches of the MDC are to be tried as criminal offences before military courts or ordinary criminal courts. Upon conviction, a court may impose sentence of imprisonment, discharge or dismissal. Where a sentence of discharge or dismissal is imposed, this constitutes a ground for terminating the services of a member of the SANDF under section 59(1)(d).

58 It follows from this that the process terminating the services of the members of the SANDF for breaches of the standard of behaviour embodied in the MDC is a statutory process and must be dealt with through the statutory process established for that purpose; it is not a contractual matter. The process prescribed by the MDSMA for dealing with breaches of the MDC cannot be avoided by characterizing the breach of the MDC as a breach of contract. It may well be that it is a breach of contract, but it is a breach, which involves the violation of the MDC, and as such, it attracts the criminal process that has been put in place for dealing with breaches of the MDC. To my mind, to hold otherwise would undermine the scheme for military justice envisaged by the Defence Act, 2002, read with the MDSMA, which builds on the foundation of the Constitution. On this basis alone, the contention by the SANDF must fail.

59 In contending for the contractual process, the SANDF submitted that it need not invoke the criminal process if its concern is to terminate the employment relationship. It says

[62] Id at para 21.
[63] Section 59(1)(d).

that all that is required to do is to submit the member concerned to "an appropriately constructed process". But the SANDF is mistaken in submitting that if it wishes to terminate the employment relationship, it is not required to use the criminal process. The criminal process leads to sanctions which include discharge or dismissal. And a sanction of discharge or dismissal, which may be imposed pursuant to the criminal process, constitutes a ground for terminating the services of a member as provided for in section 59(1)(d) of Defence Act, 2002. It follows, therefore, that if the SANDF wishes to terminate the services of one of its members based on a breach of the MDC, it is obliged to follow the criminal process envisaged by the military justice system.

60 All of this indicates that the legislature intended the criminal process envisaged by the military justice system to be the exclusive process for trying breaches of the MDC.

61 But there are further reasons why the contention must fail.

62 The question whether the military justice process is the exclusive process for dealing with breaches of the MDC is a matter of construction; the inquiry is whether the scheme for military justice excludes, expressly or by necessary implication, the process contended for by the SANDF. The SANDF has not drawn attention to any express provision in the MDSMA or the Defence Act, 2002, read with the Defence Act, 1957, which expressly permits it to try breaches of the MDC outside the military justice system. If any such power exists, it can only exist by implication. To my mind, the proposition that breaches of the MDC can be tried outside of the military justice system is inimical to and is inconsistent with the scheme for military justice. It cannot be implied.

63 The point of departure of the legislative scheme for military justice is that breaches of the MDC will be tried as criminal offences before military courts established for that purpose. Where the legislature intended to confer jurisdiction on other tribunals, such as the criminal courts, it said so expressly, as section 105 (1) of the Defence Act, 1957, does. It did not just end there; it also issued an injunction to criminal courts that when they impose any punishment for breaches of the MDC or the Defence Act, 2002, they must *"take cognisance of the gravity of the offence in relation to its military bearing and have due regard to the*

necessity for the maintenance in the South African Defence Force of a proper standard of military discipline."[64] Similarly, when the MDSMA sought to provide members of the SANDF with an option of being subjected to a disciplinary hearing before a commanding officer, it said so expressly.[65] But for this to happen, the legislature requires the consent of the member concerned.[66]

64 The silence of the legislature on whether or not the SANDF may try breaches of the MDC outside the military justice system indicates that the military justice system was intended to be the exclusive process for trying breaches of the MDC.

65 In support of its contention that the criminal process envisaged by the principle of military justice is not an exclusive remedy for breaches of the MDC, the SANDF sought support from two High Court decisions[67] in which the court held that the civil remedy of an interdict is presumed to be available unless the statute excludes it expressly or by necessary implication. The presumption referred to in those cases must be understood in the context of the issues raised and considered in those cases. Both cases dealt with the question whether or not the jurisdiction of the court to grant an interdict had been excluded. In *Knoetze and Sons*, the court held that the power of the court to protect a right by an interdict is presumed to exist unless it is excluded expressly or by necessary implication. [68]

66 The Court based this presumption on the English rule that where a statute provides a particular remedy for the infringement of a right, the jurisdiction of the court to protect the right in question by an interdict is not excluded unless the statute expressly or by necessary implication excludes it.[69] The presumption must be understood in the context of the general rule that the legislature is not to be presumed to have taken away the jurisdiction of courts to protect rights by way of an interdict unless the statute says so expressly or by necessary implication. Here we are concerned with a different question; whether the criminal process

[64] Section 105(2) of Defence Act, 1957.
[65] Section 11 of Defence Act, 2002.
[66] Id.
[67] *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) (*Knoetze and Sons*) *and Johannesburg City Council v Bernard Lewis Construction (Pty) Ltd and Another*1991 (2) SA 239 (W). (*Bernard Lewis Construction*)
[68] *Knoetze and Sons* at 154B-F. See also *Bernard Lewis Construction* at 245A-246C.
[69] Id 154B-E

envisaged by the military justice system is the exclusive process to try breaches of the MDC. Far from taking the jurisdiction of ordinary courts to try breaches of the MDC; the scheme for military justice expressly confers jurisdiction upon criminal courts to try breaches of the MDC.

67 To my mind, the presumption is the other way. Where, as here, the statute establishes a code of conduct, criminalises breaches of the code and puts in place a separate military justice system to try and punish breaches of the code of conduct, the general rule must be that the military justice system is the exclusive process for trying and punishing breaches of the code unless the statute provides otherwise. The reasoning in *Knoetze and Sons* is instructive in this regard.

68 In *Knoetze and Sons* the Court had to consider also whether or not the criminal sanctions and the mandatory order for the payment, upon conviction, were exclusive remedies for non-payment of such fees.[70] The Court reasoned as follows:

> "It is immediately obvious that the liability to pay registration and licence fees does not exist at common law; it is created by the Ordinance, which at the same time prescribes…remedies for non-payment. That in itself gives rise to a *prima facie* inference at the outset that the lawgiver intended to exclude civil proceedings for their recovery. In the English cases the same initial approach is adopted by saying:
>
> '*Where a new obligation not previously existing is created by a statute which at the same time gives a special remedy for enforcing it, the initial general rule is that the obligation cannot be enforced in any other manner*'.''[71]

69 Here the legislature has prescribed a code of conduct for members of the SANDF, it has criminalized breaches of the MDC, has prescribed penalties for breaches of the MDC, which include a sentence of imprisonment, dismissal or discharge from the service and has created a special military justice system to prosecute and punish breaches of the MDC. The imposition of criminal sanctions for breaches of the MDC emphasises that the obligation to comply with the standard of behaviour embodied in the MDC is fundamental to the

[70] *Knoetze and Sons* at 149H.
[71] Id at page 150F-G

maintenance of a disciplined military force, and that the breaches of the prescripts of the MDC are not a private matter between the SANDF and its members; they are matters of public importance. In *Potsane,* the Constitutional Court emphasised that "[m]ilitary discipline, as chapter 11 of the Constitution emphasises, is about having an effective armed force capable and ready to protect the territorial integrity of a country and the freedom of its people."[72]

70 In these circumstances, the presumption is that the legislature intended that the military justice system will be the exclusive process for trying breaches of the MDC, unless, the statute indicates otherwise. For reasons set out above, the existence of the contractual process contended for by the SANDF cannot be implied.

71 But there are further considerations that support this conclusion.

72 The contractual process contended for by the SANDF would be in conflict with the principle of a separate military justice system. In the first place the military justice system requires breaches of the MDC to be treated as criminal offences while the contractual process does not require the criminalisation of breaches of the MDC. In the second place, military justice prescribes the penalties for breaches of the MDC, which include imprisonment. The contractual process cannot lead to a sentence of imprisonment and, indeed, the disciplinary enquiry would have no power to impose a prison sentence.

73 Furthermore, the existence of the process contended for by the SANDF would lead to the development of two streams of jurisprudence under the MDC - one under the military justice system with emphasis on development and maintenance of military discipline, and another by *ad hoc* disciplinary enquiries with emphasis on the breach of contractual relationships. Yet the legislative scheme for military justice contemplates that the military courts and the criminal court will develop a coherent system of military jurisprudence under the MDC, informed by the objective to maintain discipline within the military. That this is so, is apparent from the statutory injunction to criminal courts to take cognisance of the gravity of the offence in relation to its military bearing, and the necessity to maintain proper

[72] *Potsane* at para 38. See also Section 2(b) of the Defence Act, 2002, which sets out the principles.

standard of military discipline when sentencing members for breaches of the MDC. Uniformity and consistency in military justice jurisprudence under the MDC is essential in the development and maintenance of discipline within the military.

74 It is inconceivable that the legislature intended to perpetrate the inconsistencies and conflicting approaches to breaches of the MDC that are likely to result from the process contended for by the SANDF. Indeed the legislature, mindful of any potential conflict between the provisions of the MDSMA and other laws other than the Constitution or a law that expressly amends the MDSMA, enacted the provisions of section 4(1). That section provides that "[i]f any conflict relating to any matter dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisons of this Act shall prevail." This is a strong indication that the legislature intended the military justice process to be the exclusive process for trying breaches of the MDC.

75 Finally, the contention of the SANDF does not take sufficient account of the realities of military service, military life and military discipline as well as the purpose of the principle of separate military justice system established under the MDSMA. As the Constitutional Court pointed out in *Potsane*, "[s]oldiers live and work in a subculture of their own".[73] The Court recognised that "the relationship between the SANDF and its members has certain unique features…what would be acceptable in another employment relationship is not only impermissible for a soldier but may be visited by punishment as severe as deprivation of liberty for several years."[74] For this reason members of the SANDF are subject to a separate military justice system with its own unique rules, offences and punishments.[75]

76 The Court, went on to emphasize the importance of discipline within the military and said:

> "Modern soldiers in a democracy, those contemplated by chapter 11 of the Constitution, are not mindless automatons. Ideally they are to be thinking men and

[73] Id at para 31.
[74] Id at para 32.
[75] Id at para 31.

> women imbued with the values of the Constitution; and they are to be disciplined. Such discipline is built on reciprocal trust between the leader and the led. The commander needs to know and trust the ability and willingness of the troops to obey. They in turn should have confidence in the judgment and integrity of the commander to give wise orders. This willingness to obey orders and the concomitant trust in such orders are essential to effective discipline. At the same time discipline aims to develop reciprocal trust horizontally, between comrades. Soldiers are taught and trained to think collectively and act jointly, the cohesive force being military discipline built on trust, obedience, loyalty, *esprit de corps* and camaraderie. Discipline requires that breaches be nipped in the bud — demonstrably, appropriately and fairly." [76] (Footnotes omitted)

77 The military justice system recognises this. It recognises that members of the SANDF "live and work in a subculture of their own." They require a separate military justice system with its unique rules, offences and punishments. Members of the SANDF who have breached the MDC must be subjected to a military justice system that understands this subculture. The military justice system is better able to ensure that the SANDF's constitutional obligation to maintain discipline is fulfilled, and is better suited to judge the seriousness of offences in the military context.[77] Accordingly, the trial of breaches of the MDC through a military justice system that ensures military discipline better fits the constitutional demand for a disciplined military force. Treating breaches of the MDC as mere breaches of contract and processing them outside the military justice system does not.

78 In my view, the principle of a separate military justice system with jurisdiction to try members of the SANDF and punish them for both military and civilian transgressions established by the Defence Act, 2002 and the MDSMA; the establishment of a separate prosecuting authority to prosecute both the civilian transgressions and the transgressions of the MDC; the creation of the hierarchical structure of military courts and appellate tribunal to try transgressions of the MDC and other civilian transgressions; putting in place procedural safeguards to ensure a fair trial of members of the SANDF, including the right to legal representation and an automatic right of review and appeal; and conferring jurisdiction on

[76] Id at para 39.
[77] Compare what was said in *Mbambo v Minister of Defence,* 2005 (2) SA 226 (T) at 233G-I in the context of military courts.

criminal courts to try breaches of the MDC as well as the injunction to these courts to have regard to military discipline when imposing sentence, irresistibly point to the conclusion that the legislature intended the criminal process envisaged by the military justice system to be the exclusive process for trying with breaches of the MDC.

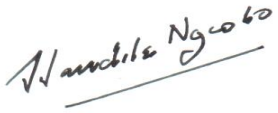
79 In the light of all this, and as the SANDF is merely a creature of statute whose powers to discipline members of the SANDF can ordinarily only be derived from the MDSMA and the Defence Act, 2002, it is unlikely, to my mind, that the legislature intended that breaches of the MDC should be dealt with otherwise than through the military justice system. If the legislature had intended otherwise, the MDSMA and the Defence Act, 2002, would undoubtedly have said so expressly. The absence of any such express provision points ineluctably to the conclusion that that was never the intention of the legislature.

80 I conclude that the military justice system is the exclusive process for trying members of the SANDF for breaches of the MDC. In the event, this disciplinary enquiry has no jurisdiction to try breaches of the MDC. In the light of this conclusion, it is unnecessary to deal with the remaining points *in limine*.

RULING

81 In the event, I make the following ruling:

> This disciplinary enquiry has no jurisdiction to try the breaches of the Military Discipline Code.



CHAIRPERSON
JUSTICE SANDILE NGCOBO
25 April 2016