THE APPLICABILITY OF PROCEDURAL FAIRNESS TO ACTIONS BY MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE

by

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Submitted in accordance with the requirements
for the degree of

MASTER OF LAWS

at the

Department of Public, Constitutional and International Law

UNIVERSITY OF SOUTH AFRICA

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JANUARY 2019

DECLARATION

I declare that

> "The applicability of procedural fairness to actions by members of the South African National Defence Force"

is my own work and that all the sources that I have consulted, used or quoted have been indicated and acknowledged by means of complete references.

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ACKNOWLEDGMENTS

I wish to thank my supervisor, Prof Dr HCAW Schulze, for his guidance in the preparation of this dissertation. I would like to thank him in particular for his meticulous and critical comments and advice. Thanks must go to my Chair of Department, Dr DT Mailula, for his support and assistance throughout this journey. It is because of his listening to my stories, giving me advice, words of encouragement and indirect mentorship that I was able to complete this dissertation.

I must also thank my mentor, Prof A Spies for agreeing to step in and assist with guidance to finalize and submit this dissertation when my supervisor was admitted in hospital and unable to finalise the dissertation with me.

Thanks must also go to my family (my daughter, Mmaletsholo, my son, Tshireletso, my husband, Tebogo, and my mother, Josephine) for their love, support and understanding throughout this journey. Their emotional and physical support made this journey bearable and my goal attainable.

My deepest gratitude goes to the Almighty God, who favoured me with a healthy body and mind to be able to complete this dissertation.

SUMMARY

The dissertation examines the applicability of procedural fairness to actions by members of the South African National Defence Forces (SANDF). The research focuses on and uses the *South African Defence Force Union v The Minister of South African National Defence Force* (*SANDU* 2010 judgment) to illustrate how procedural fairness should find application in the SANDF, given the *sui generis* nature of the defence forces. This judgment presented an opportunity to investigate whether the legislative framework that is available in the SANDF is adequate to protect the right to procedural fairness of the members of the SANDF encapsulated in section 33 of the Constitution, 1996.

The dissertation examines the relevant sections of the Defence Act, Military Discipline Supplementary Measures Act, Labour Relations Act (LRA), and the Promotion of Administrative Justice Act (PAJA) read with sections 23 and 33 of the Constitution to determine whether there is a gap that exists in so far as the protection of the right to procedural fairness of members of the defence forces is concerned. It also examines the Military Discipline Code and the rules and regulations of the Defence Forces.

The analysis of the *SANDU* 2010 judgment demonstrates that PAJA could find application in dismissal or employment related disputes within the SANDF. The scenario that is evidenced from the analysis of the defence force legislative framework is that the legislative framework that is available within the SANDF is inadequate to protect and deal with disputes which arise from allegations of infringement of the right to procedural fairness. This scenario is compounded by the fact that the LRA which is the empowering legislation that was promulgated to give effect to the right to section 23 of the Constitution and to deal with dismissal and employment related disputes, does not apply to members of the SANDF.

KEY WORDS

Procedural Fairness
Discipline
Dismissal
Military
Workplace
Administrative Law
Labour Law
Military Law
Administrative action
Substantive fairness
Fairness
Military Administrative Law

ABBREVIATIONS

MAB	Military Arbitration Board
MBC	Military Bargaining Council
CODH	Commanding Officer's Disciplinary Hearing
DOD	Department of Defence and Military Veterans
PAJA	Promotion of Administrative Justice Act
LRA	Labour Relations Act
MDC	Military Discipline Code
MDSMA	Military Discipline Supplementary Measures Act
SANDF	South African National Defence Forces
SCA	Supreme Court of Appeal
HC	High Court
J	Judge
JA	Judge of Appeal
JP	Judge President

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CHAPTER 1

INTRODUCTION

1. CONTEXT OF RESEARCH

In November 2010, the Northern Gauteng High Court handed down an important judgment in the case of the *South African National Defence Force Union v The Minister of South African National Defence Force*.[1] The judgment is critical for the understanding of how and when administrative law principles, as encapsulated in section 33 of the Constitution[2] read with sections 1 and 3 of the Promotion of Administrative Justice Act (PAJA),[3] should be applied to dismissal cases in the context of South African National Defence Force (SANDF); their relevance to the defence legislative framework and defence force legal system and their applicability to disciplinary proceedings within this system.[4] This study seeks to suggest how, with proper application; administrative law principles can enhance and develop "Military Administrative Justice" or Military Procedural Justice, if any,[5] and also further the development of administrative law jurisprudence in general and in particular within the SANDF legal system or Military Justice System.

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1 *South African National Defence Union v South African National Defence Force,* unreported case no 55001/09 (hereinafter referred to as *SANDU* 2010 judgment).

2 Section 33 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) is the just administrative action clause and it states that 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights and must-
(a) provide for the review of administrative action by a court or, where appropriate;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); an independent and impartial tribunal; and
(c) promote an efficient administration'.

3 The Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as the PAJA) was promulgated to give effect to the rights in section 33 of the Constitution.

4 South African National Defence Force (hereinafter referred to as SANDF). SANDF is governed and managed through the legislative framework, which comprises amongst others, the Constitution, the Defence Act 42 of 2002, Military Justice System, the Public Service Act 103 of 1994, the Public Finance Management Act 1 of 1999 and the Rules and Regulations of the Defence. See also Le Roux L "The Post-apartheid South African Military: Transforming with the Nation" in Rupiya M (ed) *Evolutions and Revolutions* (2005) 235 at 235.

5 Heinecken L, Nel M and Van Vuuren JJ "Military Discipline: Where are we going Wrong*" Strategic Review for Southern Africa* (2003) 89. Military justice is a term, which is made up of Military Justice System otherwise referred to as the criminal law of the soldier. The function of Military Criminal Justice is to set out the course of action to follow concerning disciplinary offences and violations of law by military personnel.

For the purpose of this study, Military Administrative Justice[6] means a combination of military justice and administrative justice into a single system. Military justice is described as a system or the criminal law of the soldier which aims to set out the course of action to be followed concerning disciplinary offences and violations of law by military personnel.[7] Administrative justice is explained in PAJA as the promotion of an efficient administration, good governance, the creation of a culture of accountability, openness and transparency in the public administration, or in the exercise of a public power or the performance of a public function by giving effect to the right to just administrative action.[8] To a large extent, the military law system does not embrace the general principles of procedural fairness which are found in administrative law and in constitutional law. In this dissertation, it is argued that, because of its design, military law or the defence force legislative framework does not adequately address issues that are connected to procedural fairness. These issues are still not adequately provided for by the SANDF legal system and its Rules and Regulations which was largely based on the nature and principles of the apartheid system of government.

Being mindful of the *sui generis* nature of the SANDF,[9] it will be shown that, through proper application and interpretation by the courts, administrative law principles are well placed to provide the basis for developing rules and regulations of procedure for disciplinary proceedings before dismissal within the SANDF. These principles may also form the basis for developing procedural requirements to be met within the context of the military law system. Although the field of military law is wide and aimed at fulfilling a specific constitutional mandate, it is submitted that administrative law principles should find application within this system to address issues related to the right to procedural fairness in dismissal cases adequately, thereby providing procedural

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6 Military Administrative/Procedural Justice is a term specifically coined for this study. It is a combination of military justice and administrative justice. Gibson M "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity" *Journal of International Law and International Relations* (2008) 4 at 7.

7 Military Criminal System was created with a separate system of courts, this system is mainly based on the Military Discipline Supplementary Measures Act 16 of 1999 (hereinafter referred to as MDSMA) read with its Rules of Procedure Government Notice R747 in Government Gazette No 20165 of 11 June 1999 (hereinafter referred to as Rules) and the Military Discipline Code as amended First Schedule to the Defence Act 44 of 1957 (hereinafter referred to as the MDC). The terms Administrative justice and procedural justice will be used interchangeably in the research study.

8 Preamble of PAJA.

9 See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) at paras 23 and 31. See also Rowe P *The Impact of Human Rights Law on Armed Forces* (2006) 63.

justice to members of the SANDF.[10] It will further be argued that the fact that the defence force is considered to be *sui generis*, its authorities should not be exempted from acting within the scope of the Constitution in order to enforce discipline.[11]

Because of the wide ambit of military law, this study will be limited to the examination of defence legislative provisions that deal with administrative and procedural requirements which should be applied to disciplinary proceedings before dismissal. This study will also identify omissionsOmissions that seem to exist in the Defence Act, in the Rules and Regulations of Procedure, and in the defence legislative framework in general. The study will, therefore, not deal with military criminal procedural law, the Defence Act in general, the rules and regulations of the defence force in general other than rules of procedure. The focus is to explore the applicability of administrative law principles encapsulated in PAJA to military disciplinary proceedings in cases of labour related transgressions, such as participation in strike actions, misconduct, absenteeism without leave (AWOL), and other matters before dismissal.

In the case of *SANDU,*[12] the CCourt had to deal, amongst other issues, with unfair dismissal based on the ground of procedural unfairness through the application and interpretation of relevant constitutional law, military law, labour law, and administrative law provisions. The Court opted to deal with this issue through the application and interpretation of labour law principles, the Constitution and some of the relevant provisions of the Defence Act. The Court was silent on the provisions of administrative law, particularly the relevant provisions of PAJA, other than to mention section 33 of the Constitution.

2. PROBLEM STATEMENT

The SANDF is a national defence force which like all other military forces around the world, is based on a code of discipline. The defence force legislation, including rules and regulations of the defence force and its framework, was not designed to consist of any labour or administrative law related provisions that directly deal with issues of procedure and other labour related disputes.

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10 Section 200(2) of the Constitution, 1996 mandates the Defence Force to protect the Republic, its territorial integrity and its citizens. In order to achieve this objective, the Constitution prescribes that the Defence Force must be structured and maintained as a disciplined organisation.

11 The Constitution of South Africa is the Supreme law of the Republic; all law and conduct should be consistent with the provisions in the Bill of Rights. See chapter 2 of the Constitution, 1996.

12 *SANDU* 2010 judgment (note 1).

Disputes in the defence force were dealt with through the application and interpretation of military law within the then Military Justice System.

The design of military legislation was influenced by the national mandate which all the military forces have to fulfill, that is to protect the country, its territorial borders and the citizens. In South Africa another factor that influenced this design is the government system that existed before 1994 which was based on parliamentary supremacy.

After 1994, the Constitution, which was based on democratic principles, was introduced in South Africa. The system of government evolved from parliamentary supremacy to constitutional supremacy. All departments, including the defence force, the legislative frameworks and the conduct of all organs of state must now comply with the Constitution. Through the Constitution, human rights also became applicable to the members of the defence force. Some of the rights which were introduced include the right to procedural fairness, the right to just administrative action, and the right to fair labour practices. The design, the development, and application of the provisions of defence legislation and the defence force legislative framework must comply with the principles and values provided in the Constitution.

One of the challenges which the SANDF authorities faces is to amend and repeal some of its legislative provisions contained in the Defence Act and other defence rules and regulations in order to become compliant with the Constitution in terms of section 2.[13] Another challenge is to include other legal disciplines, such as labour and administrative law which were not present in the defence force context and provided for in the defence force legislation. To a certain extent, some of these challenges were overcome. The Defence Act[14] was repealed and replaced by what was known as the New Defence Act.[15] Chapter XX was promulgated to deal with labour related matters, and the Military Discipline Code was amended.[16]

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13 Section 2 of the Constitution provides that the "Constitution is the supreme law of the Republic, and any law or conduct which is inconsistent with it is invalid".

14 Defence Act 44 of 1957.

15 Defence Act 42 of 2002.

16 Chapter XX of the Defence Act 42 of 2002 in Government gazette 20376 of 20 August 1999. More on the circumstances surrounding the promulgation of chapter XX of the Defence Act, see *South African National Defence Union v The Minister of South African National Defence Force* 1999 (4) SA 469 (CC). See also *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC). Chapters 1-20 of First Schedule to the Defence Act 44 of 1957 in Government Gazette 20165 of 11 June 1999, see also MDSMA (note 7).

The problem is the presence of a trail of legal disputes between the South African National Defence Union (SANDU) and the Minister of the SANDF that indicate that, although the processes to amend and repeal some provisions of the Defence Act and other defence force legislation were undertaken, there are OmissionsOmissions that still exist in this legislative structure. This is evidenced in the application of procedural fairness and fair labour practices in the defence force and disciplinary proceedings, as exposed in the *SANDU* trail of cases that took place between 2009 and 2015.

The solution to this problem may be provided by a further development of defence legislation and its legislative framework. This development may be achieved through the ordinary process of legislative review and also when the Courts, upon deciding a legal dispute that involves the defence force, properly apply and interpret relevant provisions of the Constitution, the Defence Act, the LRA, and the Promotion of Administrative Act.

By choosing not to interpret and apply any of the relevant provisions of PAJA to resolve the legal dispute in the *SANDU* 2010 judgment, the Court missed an opportunity to develop administrative law or military administrative law. [17] The approach followed by the Court is not unique. There are a number of Court decisions, such as *Chirwa*[18] and *Sidumo*[19], which indicate the reluctance to apply principles of administrative law to dismissal cases of public sector employees.[20] In most instances, the reasoning of the Courts includes the view that, because public sector employees are currently protected by the LRA,[21] principles and provisions of labour law should find application in all dismissal matters.[22]

There is, however, an essential difference between the reasoning of other Courts which dealt with the application of administrative law to dismissal cases of public sector employees and the reasoning of this Court that has to be noted. Other Courts dealt with dismissal cases of public service sector employees who are included in the scope of application and protection of the

17 *SANDU* 2010 judgment (note 1).

18 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); (2008) 2 BLLR 97 (CC).

19 *Sidumo v Rustenburg Platinum Ltd* 2008 (2) SA 24 (CC); 2007 (12) BLLR 1097 (CC); 2007 (28) ILJ 2405 (CC).

20 *Chirwa* (note 18).

21 The Labour Relation Act 28 of 1956 and the LRA 44 of 1957 excluded public service employees from the scope of application. Both pieces of legislation were repealed and replaced by the Labour Relation Act 66 of 1995 (hereinafter referred to as the LRA).

22 *Chirwa* (note 19) at para 34. The Constitutional Court held that administrative law should not find application to dismissal cases of public service employees.

LRA.[23] The court in the *SANDU*[24] case dealt with the unfair dismissal of members of the SANDF who are expressly excluded from the scope of application and protection of the LRA.[25]

This situation leaves open the question concerning which law should find application when the right to fair labour practices, including the right not to be unfairly dismissed and the right to procedural fairness of members of the SANDF, have been infringed?

3. AIMS AND OBJECTIVES

The aim of this study is to investigate the administrative law requirements which are currently available in the SANDF for disciplinary proceedings before a dismissal can be imposed as a sanction. This is an important component of fair procedure, and it is crucial that, before a dismissal can occur, some or all requirements for fair procedure must be complied with to ensure that administrative justice is achieved. The study will also examine the relevant provisions within the defence force legislative framework that deal with requirements for procedural fairness.

If there are any Omissions in the Defence Force legislation, such as chapter XX, Military Discipline Supplementary Measures Act (MDSMA) and Defence Act Rules and Regulations of Procedure, they will be identified. It will be shown that administrative law should find application in the dismissal cases in SANDF to provide adequately for fair processes before dismissal and to guarantee procedural justice.

Another objective of the study is to analyse the reasoning of the Court in the *SANDU* 2010 judgement.[26] This analysis will indicate that, despite the context of the Defence Forces, the Minister, given his/her duty to maintain discipline, is not excused from complying with the principles of just administrative action provided for in section 33 of the Constitution unless otherwise limited through section 36. In that regard the study will postulate that the principles of

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23 *Chirwa* (note18). See also *Sidumo* (note 19).

24 *SANDU* 2010 judgment (note 1).

25 Section 2 of the LRA is an exclusionary clause. The following categories of employees are excluded from the scope of application, members the South African National Defence Force, the National Intelligence Agency, and the South African Secret Service. Although members of the SANDF are considered public sector employees they are not considered public servants for purposes of the application of Public Service Amendment Act 30 of 2007 (hereinafter referred to as PSAA); they are also excluded from the scope of application of the Public Service Labour Relation Act 105 of 1994 (hereinafter referred to as PSLRA).

26 *SANDU* 2010 judgment (note 1).

administrative law, as captured in section 33 of the Constitution read with the provisions of PAJA[27], should have been applied and interpreted in this case. This study will also postulate that, if the court had opted for this approach, this matter might have been concluded and not escalated to the appeal stage. Another effect of this approach, as will be shown, is that administrative law jurisprudence would be further developed and the SANDF legislation framework will be expanded to include administrative law provisions that form the basis of labour related Defence Force procedural provisions.

The research will further argue that, where the cause of action is procedural in nature in the particular context of defence force, PAJA is the relevant legislation that should be applied, either directly or indirectly. The relevance of PAJA in the context of the defence force is important because members of the defence force are expressly excluded from the application of the LRA which could adequately give protection to their employment rights, if the available defence force legislation is inadequate. Another important aspect of the application of PAJA is that the decision to dismiss members of SANDF can be regarded as an administrative action.

Should the court consider it undesirable to apply the provisions of PAJA directly, the study seeks to suggest that the principles of administrative law should find indirect application in the SANDF through the infusion of of section 33 of the Constitution read with section 3 of PAJA to the relevant Defence Force Rules and Regulations of Procedure or within chapter XX of the Defence Act. In order to achieve the objectives of the study, the following research questions will be answered:

3.1 Research questions

- What was the historical, conceptual and procedural legislative framework of the SANDF before 1994, if any?
- Are there Omissions in the SANDF legislative framework?
- Did the court in *SANDU* 2010 judgment avoid the application of the principles of administrative law or did the court make an omission in its reasoning?
- Are members who are dismissed from the SANDF eligible for the protection of section 33 of the Constitution and section 3 of PAJA?
- How can procedural fairness be applied to members of the SANDF without threatening the culture of discipline which must be maintained because of the unique context of defence?

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27 The PAJA (note 2).

- How has the introduction of the Constitution in South Africa affected the applicability of procedural fairness in the defence force and the relevant legislative framework in that regard?
- What procedural measures were available in the SANDF to deal adequately and fairly with the issues of discipline before and after 1994?
- Is the Minister of Defence entitled to dismiss members of the SANDF summarily without following the appropriate procedures in the interest of maintaining discipline?
- What is the available relevant applicable legislative framework in the SANDF to ensure that the rights of members of the SANDF to procedural fairness and fair labour practices are adequately protected?
- What lessons can be learnt from the *SANDU* 2010 judgment in the context of developing military administrative law?
- Is there a need to amend some of the provisions of the MDSMA, the Defence Force Rules and Regulations of Procedure and schedules dealing with disciplinary procedures within the SANDF and chapter XX of the Defence Act, 2002 which deals with labour disputes?

4. JUSTIFICATION

The study will contribute to the administrative law knowledge that will influence further development of defence force legislation, particularly those provisions which are relevant to issues connected to the applicability of procedural fairness to action by members of the SANDF. The study will contribute to the development of the defence legislative framework by identifying and indicating the omissions which might exist in this framework proposing how administrative law principles might narrow these omissions.

In this regard it is important to understand the development of the defence legislation over the years and why members of the defence force have always been treated *differently*. This will assist in influencing the drafters of defence force policies and white papers to evaluate whether the changes in the current defence force legislative framework which were made after 1994, are merely rehashing age-old concerns still under the influence of parliamentary supremacy and outdated legal frameworks or effecting actual change and complying with the constitutional mandate in the true sense.

It has been stated that not much has been written on military law. This implies that the current legislative framework might still be lacking important aspects such as those which are aimed at

addressing procedural requirements in disciplinary enquiries and processes before a decision to dismiss can be made. Some of these procedural requirements are covered in most cases by legislation such as the LRA which gives effect to the rights in section 23 of the Constitution. Administrative law, on the other hand, deals extensively with the related procedural requirements for process and procedures when public law and power are exercised. The research will, therefore, influence policy on how to develop defence legislation which deals with labour disputes further, in particular, chapter XX and MDSMA which is the code of conduct in the SANDF.

5. DELIMITATION

This study is limited to, and will focus only on, the applicability of administrative law principles to dismissal cases of members of the SANDF. The study will only discuss how PAJA should be applied in the context of the SANDF to protect the right to procedural fairness. The study will not discuss the applicability of administrative law to the dismissal of public service employees in detail. The debate on the applicability of administrative law to dismissal cases of public sector employees has been undertaken by various authors, such as Grogan,[28] Hoexter[29] and others. The reason the study is limited to the dismissal cases of members of the SANDF is to enable an exploration of the possibility of PAJA finding application and, in that regard, narrowing the gap which seems to exist in the SANDF legislative framework.

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28 Grogan J "Administrative law in labour matters" *Annual Survey of SA Law* (2006) 605; Steenkamp A "W[h]ither the labour courts? The superior courts bill and the future of the labour courts" (2006) 27 *ILJ* 18; See also Grogan J *Workplace Law* 10 ed (2009) 434.

29 Hoexter C "Clearing the intersection? Administrative law and labour law in the Constitutional Court" (2008) 1 *CCR* 209 at 210.

6. FRAMEWORK

Structurally, the dissertation will consist of six chapters. Chapter one will be the general introduction in which background information of *SANDU v Minister of South African National Defence Force* will be discussed. The relationship between the applicability of administrative law to dismissal cases and the *SANDU* 2010 judgment will also be briefly discussed in chapter one. In chapter two the nature of a national defence force and military law system will be discussed. This chapter will also look at the historical background of the development of the SANDF military law system and its defence legislative framework. Chapter three will deal with the facts of the *SANDU* 2010 judgment. Chapter three will also look at all the judgments that seemingly led to the *SANDU* 2010 judgment. Chapter four will examine the concepts that the Court had to deal with in the *SANDU* 2010 judgment. Chapter four will discuss discipline and procedural fairness in general and in the particular context of SANDF. Chapter five will analyse the reasoning of the Court in relation to the legislative provisions applied by the court. This chapter will also critically analyse the approach of the court to exclude the provisions of PAJA in its reasoning. Chapter six is the conclusion of the study.

Recommendations will be made which will propose the feasibility of crafting and developing a defence force legislative framework couched in the principles of administrative law, particularly section 3 of PAJA.

7. CONCLUSION

In the preceding discussion, the study was introduced by briefly referring to and explaining the *SANDU* 2010 judgment.[30] The chapter mentioned why this judgment is important for paving the way for PAJA to be applied within the context of SANDF to disputes that involves application of procedural fairness. The chapter also briefly mentioned what the Court in *SANDU* 2010 judgment had to deal with and the approach it followed. All relevant legislative provisions that the court had to interpret and which the research will focus on were mentioned. The concept of Military Administrative Law was introduced.

30 *SANDU* 2010 judgment (note 1).

The problem statement was also discussed. It was indicated that there seems to be an omission in the SANDF legislative framework that must deal with the application of procedural fairness. The design of defence force legislation and the circumstances under which this legislation was promulgated was discussed. The inadequacy of this legislation and the possible cause was also mentioned. It was also discussed that the introduction of the democratic Constitution also contributed to the challenges that were faced by the Minister of SANDF. This chapter looked at how the SANDF dealt with some for the challenges that were introduced by the democratic Constitution.

This chapter also discussed the aims and objective of the research, the arguments that will be advanced, research questions, justification and delimitation of the research.

In the next chapter, the nature and historical background of procedural fairness in the SANDF will be discussed. The chapter will also trace the history of the application of procedural fairness in the SANDF and the relationship between the Minister and SANDU.

CHAPTER 2

NATURE, HISTORICAL BACKGROUND OF SANDF AND THE RELATIONSHIP BETWEEN SANDU AND SANDF

1. INTRODUCTION

In the previous chapter the introduction to the study and the problem statement were discussed. It was indicated that one of the reasons, amongst others, that seemingly gave rise to some of the legal disputes between the SANDF and the SANDU is the introduction of a constitutional democracy in South Africa. Through the Constitution, the system of government changed from that of parliamentary sovereignty which dominated before 1994. Since 1994 the South African government system has been based on the supremacy of the Constitution which demands compliance with its provisions by all laws, organs of state and government departments, including the SANDF.[31]

The Constitution changed the manner in which the actions of organs of state would be accounted for and how functionaries of state departments, including the national defence force, exercised public power.[32] The Constitution, through the Bill of Rights, introduced what can be described as a culture of human rights in the defence force. Included in the Bill of Rights are the fundamental rights to procedural fairness and fair labour practices that are extended to 'everyone', including members of the SANDF.[33] In order to extend those rights to members of the SANDF, the legislative framework of the defence force had to evolve from its traditional military justice system which was based on the culture of discipline informed by principles of parliamentary supremacy,

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31 Section 2 and section 8(1) of the Constitution confirms the supreme status of the Constitution and the consequences of non-compliance with its provisions by any law and conduct of organs of state. Section 2 of the Constitution is the supremacy clause and section 8(1) refers to the application of the Bill of Rights.

32 Section 195(1) of the Constitution, 1996 provides for principles governing public administration and section 198 provides principles governing security services.

33 Sections 23 and 33 (1) of the Constitution provide for the right to fair labour practices and for lawful, reasonable and procedurally fair administrative action.

to the transformed military law system and the legal framework that is founded on the culture of human rights in terms of the democratic principles and values of the Constitution.[34]

One of the landmark developments in the defence force based on the Constitution was the introduction and establishment of a military trade union.[35] This development was necessary, particularly in the light of the political history of South Africa.[36] To this end, the role and approach of the Courts whose function it is to guard and protect the Constitution by interpreting its provisions and the Bill of Rights, with a view to developing the law and promoting the values contained in the Constitution, is crucial. The Courts are encouraged to follow an inclusive approach when interpreting the Bill of Rights.[37]

The Court in the *SANDU* 2010 judgment had to deal with the allegation of an infringement of the right to procedural fairness of members of the SANDF.[38] The court found that the Minister's action of dismissing members of the SANDF was procedurally unfair.[39] While the Court order is acceptable, it could be suggested that the approach followed by the Court in interpreting some of the legislative provisions and constitutional provisions that are relevant to this matter was restricted and that, to some extent, it denied any further development of military administrative law or the applicability of administrative law in the context of the national defence force.

In order to understand the approach adopted by the Court and its reasoning in this judgment, it is important firstly to trace the evolution of a national defence force and the history of the development of a military justice system, military law and, in particular, South African defence

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34 The preamble, sections 1 and 195 of the Constitution firmly establish the values and principles by which South Africa must be governed. Section 1 sets out the values on which the Republic of South Africa is based and section 195 set of the principles and values governing public administration.

35 Heinecken L "Military unionism and the management of employee relations within armed forces: A comparative perspective" *International Journal of Comparative Labour and Industrial Relations* (2010) 401 at 410. The South African National Defence Union came into existence on 2 August 1995.

36 The political history of South Africa is beyond the scope of the research. Suffice it to mention that South African politics before 1994 were such that the introduction of a trade union in the military after 1994 could be justified. See also Heinecken L and Nel M "Military unions and the right to collective bargaining: Insights from the South African experience" *The International Journal of Comparative Labour Law and Industrial Relations* (2007) 23 463 at 468.

37 Section 39(1) of the Constitution states that "when interpreting the Bill of Rights, a Court, Tribunal or Forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

38 *SANDU* 2010 judgment (note 1).

39 Ibid.

force legislation and its legislative framework.[40] Secondly, in order to place this line of reasoning by the Court into context, it is necessary to discuss the kind of relationship that exists between the Minister and the SANDU. The application of military justice through military law and the defence force legislative framework seem to have created an adverse effect on the relationship between the Minister and some members of the SANDF who are also members of the SANDU and its officials.[41]

This chapter will discuss the nature of a National Defence Force including that of the SANDF. The historical background of the development of a Military Law System in general and within the particular context of South Africa from 1800 to 1957, the era of parliamentary supremacy which was dominant from the 1960s to the 1990s and the era of constitutional supremacy which was introduced after 1994 will be traced and discussed. Lastly, the relationship between the Minister of Defence and the SANDU in so far as the introduction of this military trade union into the defence force is concerned, and the subsequent conflicts which led to a number of legal disputes, including the main SANDU judgment, will also be discussed.

2. THE NATURE OF A NATIONAL DEFENCE FORCE AND MILITARY LAW SYSTEM

The rationale for the existence of any military force is two-fold, to protect the state, its territorial borders, its boundaries and its citizens, and to maintain order, peace and stability in the country in times of war and in times of peace.[42] During peacetime, the purpose of a military force is mainly to maintain order, peace and stability in the country and to prevent internal trouble. In wartime, it is to protect the country against foreign violence and invasion.[43] Discipline is the backbone of the

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40 Ibid.

41 The relevant defence legislative framework includes the Defence Act 44 of 2002, the Military Discipline Code, Military Discipline Supplementary Measures Act of 1999 and Chapter XX of the Defence Act read with Rules and Regulations of the Defence Force. See also Heinecken L "South Africa: Facing the challenge of military unionism" *Military Unionism in the Post-Cold War Era: A Future Reality?* (2006) 157.

42 Theron FH "The union defence forces of South Africa" *Royal United Services Institution Journal* (2009) 75 744 at 754.

43 In terms of the South African Defence Policy, the primary role of the SANDF is to defend the country against external aggression. The secondary function is to 'defend and protect its people in accordance with the Constitution and principles of international law', that the SANDF has been most operational since 1990. Most recently the objectives set in the African Union (AU) and the new partnership for Africa's development (NEPAD). See also section 200 of the Constitution 1996, Defence Review and the White Paper on Defence of May 1996.

military force in any particular period. Captain FC Theron sums up the environment of the military force as follows:[44]

> "*[e]ach man in the time of peace trained daily and automatically as a horseman and rifleman, because the Horse was his only means of movement, and Game his principal meat diet. In time of war every male citizen was mobilized, that is commandeered, and had to appear mounted, armed, and carrying three days' provision, all at his own expense*".[45]

The above view may suggest the reason why disciplinary measures for breach of orders, acts of insubordination or ill-discipline were met with harshness and were not tolerated in any given period in the military force.[46] This is mainly because in earlier times the world was often at war. Peacetime was short-lived. For example, the South African Defence Force participated in both the First and Second World Wars as well as in the Korean War.[47] The purpose of protecting the country is viewed by Rupiya as a national mandate which means that members of any defence force must always be ready and prepared to safeguard the country or the Republic's national security.[48] Since the natural characteristic of the military or defence forces is the endowment of national security, the military or defence forces are regarded as symbols of a country's sovereignty and nationhood.[49] It is through this lens that discipline could be viewed as being the pillar of a successful military force. As a result it could not be negotiated or sacrificed in the interest of procedural justice.

Because of the nature and purpose of a national defence force, it can be suggested that administration of the defence force discipline did not place much emphasis on issues related to justice as understood by a civilian. In the context of defence forces, what was regarded as military justice was understood within purpose of the defence force. The circumstances which existed in former times and the method which was used to join most defence forces also gives background to the nature and purpose of the defence forces.

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44 Theron FH (note 42) at 754.

45 Ibid.

46 Schlueter D "The military justice conundrum: Justice or discipline" *Military Law Review* (2013) 215. See also *United States v McCarty* 1960 (29) at para 761, where the severity of punishments during World War II were noted.

47 Le Roux L (note 4) at 243.

48 Rupiya M "Context of study" in Rupiya M (ed) *The Enemy within: Southern African Militaries' Battle with HIV/AID*" (2006) 1-4 at 1.

49 Rupiya M and Simapuka L "Southern African militaries' battle with HIV/AID" in Rupiya (ed) *The Enemy within: Southern African Militaries' Battle with HIV/AID"* (2006) 7-19 at 8.

The usual way of joining the defence force at the time was not voluntary but mandatory, through conscription.[50] Because the main purpose of most national defence forces around the world was to protect their respective countries from foreign invasion and any kind of violence, eligible men were conscripted into the defence forces. In order to achieve the purpose of the defence force, and to maintain and enforce discipline within the force, an instrument that would give powers to commanders had to be developed.[51]

The nature and purpose of most national defence forces formed the basis for developing this instrument which is known as military law. According to Morris, Military Law was a tool that was developed to enforce discipline in the military force.[52] Its primary purpose was to promote military justice, to assist in maintaining good order and discipline in the military forces, to promote efficiency and effectiveness in the military establishment, and to strengthen the national security of the country.[53] It granted powers to the commanders to encourage preserve and administer discipline. In order to maintain and effectively enforce discipline, command powers were concentrated in one person who had the discretion to exercise those powers without necessarily being accountable, and, as a result, these discretionary powers were often subjected to abuse. [54]

The authority to enforce discipline was historically derived from the concept of the *paterfamilias,* who, as head of the household, held absolute power over his family and household.[55] Owing to the circumstances of that period, in most instances, the approach adopted by commanders in exercising the powers to maintain and enforce military discipline could, therefore, be justified and accepted.

Soldiers were also trained to obey commands readily and accept the punishments that were meted out in case of breach of the expected discipline. This implies that, in order to enforce discipline, expedient sanctions were taken and requirements related to procedural justice were neither considered nor complied with. Renn supports this approach and argues that the standards of procedural fairness must of necessity be violated in order to discipline a unit into combat

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50 Theron FH (note 42) at 746.
51 Section 1 of Defence Act of 1912.
52 Morris L *Military Justice: A Guide to the Issues* (2010) at 3.
53 Schlueter D (note 46) at 6.
54 Morgan EM "The existing court martial system and the ansell army article" *Yale Law Journal* (1919) 29 50 at 66.
55 Nel M *Sentencing Practices in the Military Courts* (Unpublished LLD thesis UNISA 2012) at 36.

readiness.[56] He argues further that the slightest form of breach of discipline might have led to grave results not only to the individual soldier but to the country at large.[57] In this regard, military law through a military law system, was considered to be a tool that might properly and speedily enforce discipline in the military forces.[58]

This is because the functional requirements of war or combat efficiency are that the defence force must display unity, group solidarity and inter-dependence, as Downes argues.[59] Other legal disciplines, such as labour law and administrative law, did not traditionally form part of military law. Farnham is of the opinion that this is because, traditionally, labour relations in the defence forces were managed from a unitary perspective and not from the pluralist point of view. [60]

2.1 The SANDF context

The nature and purpose of the Union Defence Force (UDF), as it was known before it changed to SADF and ultimately the SANDF, is no different from the nature of any other national defence force around the world. The SANDF has as its objective two functions. Firstly, it serves to protect the Republic, its territorial boundaries and its citizens from any external attacks. Secondly, it protects and maintains peace and stability in the Republic from internal unrest or civil commotion.

Military discipline is required to achieve the objectives of the SANDF and to maintain an efficient and professional national defence force. In order to regulate, maintain and enforce discipline, South Africa had to develop a tool that would legitimately provide commanding powers. In this regard the main legislation that was promulgated was modelled on the British Army Act[61] was the Defence Act of 1912 which was amended in 1922.[62] The objective of this legislation, amongst other things, was to make it compulsory for white male citizen above the age of 18 years to join the defence force. This objective was in line with the system of government of the time.

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56 Renn E "The dilemma of military discipline and procedural justice" *Student Law Journal* (1971-1972) 15.

57 Ibid.

58 Morris L (note 52) at 3.

59 Downes CJ "To be or not to be a profession: The military case" *Defence Analysis* (1985) 1 147 at 161.

60 Franham D and Pimlott J *Understanding Industrial Relations* (1995) at 46.

61 British Army Act of 1881. South Africa was a British colony and was under the British monarch therefore Britain was the supreme commander of the Union Defence Forces; consequently the British Army Act of 1881 was applied to all matters of the defence forces.

62 Defence Act 1922.

Section 1 of the Defence Act provided that all male citizens between ages seventeen and sixty must render their services during the time of war to defend the Union.[63] This section advanced the purpose of the defence force which was also supported by the defence policy. The main purpose of this legislation was to provide for the statutory enforcement of discipline in both wartime and peacetime. It is unclear whether the disciplinary provisions of this legislation made any distinction with regard to the requirements to be met for disciplinary procedures and processes for breach of discipline in each period. What is clear is that sanctions imposed by the commanding powers were intended for maintenance and enforcement of discipline.

The origins of this legislation come from the British Act referred to above and this legislation continued with the same structure it inherited.[64] The challenge with the crafting of legislation in this manner is that, although its focus is to instil, maintain and enforce discipline which is in line with the purpose and nature of a defence force, it does not evolve as circumstances change. It still retained the previously created harsh punishments for transgressions which do not necessarily currently require such harshness, and it also did not distinguish between minor and major transgressions during the relevant periods.

Since the nature of the defence force laid the foundation for the design of the military law, the design did not include a distinction between punishments meted out for breach of discipline during wartime and for those in peacetime. This is also influenced by the inherent function of the military or defence force. Burroughs states that: [65]

> "*[t]he aim of military law is to enforce the discipline which is deemed essential to military efficiency and victory in battle and to cultivation of high morale*".[66]

This suggests that, generally, the military law system and its legislative framework had a constrictive focus which aimed only at enforcing discipline and providing for the punishment of acts of military criminal offences. Similarly, in the South African context, the political circumstances at the time had an influence on the manner in which the military law system was developed, crafted and administered.

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63 Section 1 of Defence Act 1912. See also Captain Theron FH (note 42) at 746.

64 British Army Act (note 61).

65 Burroughs P "Crime and punishment in the British Army 1815-1870" *The English Historical Review* (1985) 545 at 550.

66 Burroughs P (note 65). See also Nel M (note 55) at 31.

This strict focus did not accommodate changing circumstances. For example, the South African political circumstances began to change during the 1980s until 1994. The effect of this change was that the military law system and its legislative framework, such as the Defence Act, its Rules and Regulations, Defence Policies and the implementation strategies, also changed to accommodate emerging threats and changing circumstances. Although it is noted that the nature of the SADF was to remain intact, some aspects of the organisational culture of the defence force needed to be adapted to these changes. The aim, objective and core function of the defence force would also be maintained and kept intact through the changing military law system.

The rigid and arbitrary command structures which existed within the defence force system required the introduction of a military justice system through the intervention of ordinary courts to ensure some form of accountability.[67] In the case of *O Callahan v Parker* which was decided in 1969, the Court held that there was evidence of procedural injustice and other forms of injustices which made it necessary to separate crimes which are not service-connected from military jurisdiction.[68] It can be deduced from this decision that this was a proposal to introduce some form of distinction between procedural requirements to be complied with for disciplinary processes to deal with transgressions committed in wartime and in peacetime and their related sanctions.

Tshabalala is of the opinion that the rigid military justice system and the organisational culture of the SADF promoted the abuse of power by the apartheid leaders and also the advancement and protection of the apartheid regime. [69] The court, in *SANDU v The Minister of Defence and others,* noted that a change of dispensation warrants a change in the legislation governing the defence force. [70] Post-1994, the drafters of the defence legislation had to pay attention to chapter 3 of the Interim Constitution,[71] which was superseded by chapter 2 of the final Constitution.[72]
There are two important historical eras which could be perceived to have influenced the need to consider an approach that included administrative law in developing the defence force legislative framework. This era is the post-constitutional era. In order to set the scene and to describe the

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67 *O Callahan v Parker* 1969 (395) 258 (U.S.) See also Renn E (note 56) at 15.
68 *O Callahan v Parker* (note 67) at 264.
69 Tshabalala L *Transformation in the Military Police Agency of the SANDF* (unpublished MA dissertation (2004) at 25.
70 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC).
71 Chapter III of the 1993 Interim Constitution provided for the Bill of Rights (hereinafter the interim Constitution).
72 Chapter 2 of the Constitution provides for the Bill of Rights.

development of the military law and the defence legislative framework, however, a brief discussion about the era before the new Constitution is necessary.

3. THE HISTORICAL BACKGROUND OF THE DEVELOPMENT OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE MILITARY LAW SYSTEM AND ITS DEFENCE LEGISLATIVE FRAMEWORK

3.1 Era before 1993

According to Nel the history of the South African military law is based on British military law which was transplanted into South African law after the country's colonisation by the British Empire. [73] This view is different from that of Oosthuizen in so far as the origin of South African military law is concerned.[74] Oosthuizen is of the opinion that the South African military common law is, in fact, based on Roman military law influenced by English military law.[75] Suffice it to mention that the South African military law has undergone minimum development since the time of the Anglo Boer War, 1899 to 1902.

The peace accord which marked the end of the Anglo Boer War was signed in 1902.[76] It also brought an end to the traditional defence structures of the two Boer Republics which existed at the time.[77] According to Nel, in the period between 1903 and 1910, South Africa consisted of four coloniesof the British Empire.[78] Consequently Britain handled all South African military matters, including those of a disciplinary nature.[79] For a number of reasons, apart from the imperial forces, Britain allocated to each colony an independent military force.[80] Because military forces were independent from one another, problems were experienced with regard to the military organisation, training and discipline of the different military forces.[81]

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73 Nel M (note 55) at 36. See also Brand C E *Roman Military Law* (1968) at 3.
74 Nel M (note 55) at 36.
75 Ibid.
76 Nel M (note 55) at 98.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.

This led to a London colonial conference in 1907 which resulted in discussions about those problems and a subsequent proposal for imperial military uniformity.[82] In 1908 a decision was reached in a conference in Durban to create a uniform name for all divisions of the military forces,[83] to have a uniform disciplinary approach, as well as uniform disciplinary procedures and uniform offences and punishments for all military forces.[84] In addition, with a view to unite the colonies and the military forces, the British officers and some citizens began to formulate new defence legislation for the envisaged Union Defence Force.[85]

The Defence Bill was drafted with a view to creating a new structure of the defence force by borrowing some ideas from the defence force structures and legislative provisions of other countries, such as Switzerland, Australia and Norway, amongst others.[86] The structure of the Union Defence Force was, therefore, influenced by these different models.

The crafting of the legislative provisions, processes and procedures to maintain and enforce discipline, related offences and punishments was informed and influenced by the British model.[87] Chapter VII of the Defence Bill made provision for offences and punishments.[88] This chapter was drafted borrowing ideas from the Army Act of Britain and Ireland[89] and from the Defence Act of the Cape of Good Hope.[90]

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82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Nel M (note 55) at 101.
88 Ibid.
89 Army Act of Britain and Ireland Act 25 of 1898. Sections 94 and 123 of the Defence Bill were incorporated and published in an extraordinary Government Gazette 1911 Notice no 1970 of 191 1 of 30 November.
90 Nel M (note 55) at 101.

The establishment of the Union caused the South African authorities to start taking over more responsibilities in the Union Defence Force. The *Zuid Afrika Verdedigingswet* came into operation on 13 June 1912, and it replaced the British Army Act of 1881.[91] The Union government was not under any obligation to renew the Union Defence Force legislation, although this was a requirement with which Britain had to comply.[92]

SADF and military law system in terms of the Defence Act of 1912 under the South African Union Government

The South African Defence Force (SADF) developed from the Union Defence Force which had been established in 1912.[93] It consisted of the army, the air force, the navy and the military health service.[94] The main legislation relative to the South African Defence Force was the Defence Act of 1912. This Act retained the approach of the British Act which distinguished between the navy and the rest of the defence force. Consequently, a different code of military discipline applied to members of the navy.[95]

The strategic position of the SADF was based on the operationally offensive approach.[96] The fundamental principle was that all threats, whether internal or external, must be contained, and, as a result, discipline was of the utmost importance. The executive control of the defence forces resided in the prime minister and his cabinet, and civil control was further enhanced by a civilian Ministry of Defence and a civilian Secretary for Defence.[97] The Defence Act of 1912 remained in force until the promulgation of a new Defence Act on 10 June 1957. This Act created a uniform Military Discipline Code that was applicable to all arms of the military service, including the navy. The distinction between the navy and other defence forces was consequently abolished.[98]

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91 Section 95 of Defence Act 13 of 1912 (as it was known) provides that the British Army Act of 1881 would continue to apply regarding disciplinary matters, which included offences and punishments. See also Nel M (note 55) at 102.
92 Nel M (note 55) at 102.
93 Le Roux L (note 4) at 243.
94 Ibid.
95 Nel M (note 55) at 103.
96 Le Roux L (note 4) at 244.
97 Le Roux (note 4) at 243.
98 Nel M (note 55) at 103.

The Defence Act of 1912[99] was later amended by the Defence Act and Dominion Forces Act of 1932.[100] In terms of this Defence Amendment Act, the set of rules governing the discipline of the Union Defence Force became known as the Military Discipline Code.[101] Chapter VII of the South Africa Defence Act 13 of 1912 provided for matters of discipline, related offences and legal procedure. This chapter was shaped by the provisions of the British Army Act of 1881. Section 95 of the Defence Act of 1912 provided that the British Army Act would still apply to disciplinary matters in the Union Defence Force. Although section 95 was subsequently repealed by Act 32 of 1932, section 2 of the Act of 1932 determined that the law applicable up to the date of the Amendment Act would remain applicable.[102] The Defence Act 44 of 1957 was promulgated, and it retained the MDC as it had been introduced by the Defence Act 32 of 1932.[103] Chapter XI of the Defence Act 44 of 1957 governs military discipline and military legal matters. Provisions of the MDC are still applicable to date.[104]

Before the introduction of the Interim Constitution, the South African National Defence Force (SADF)[105] was administered and governed under military law[106] which had its focus on the discipline of the members of the defence union.[107] Legislative control over the defence forces in this era was vested in parliament.[108]

Dlamini[109] is of the opinion that the focus of the defence system was not necessarily only on military discipline but also on the protection of the apartheid system which had a total disregard

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99 Defence Act of 1912.

100 Defence Act and Dominion of Forces Act 32 of 1932 (hereinafter referred to as the Defence Amendment Act).

101 MDC (note 7).

102 Defence Act and Dominion of Forces Act (note 100).

103 MDC (note 7).

104 Ibid.

105 The South African National Defence Force was established and recognised as the only defence force of the Republic in terms of the section 199 of the Constitution of South Africa, 1996.

106 Morris L J (note 52) at 3 explains that military law is a tool that may properly assist in the enforcement of discipline. See also Nel M (55) at 14.

107 "Military Discipline" in *Defence Review* (2014) 12 at (1-6). The Union of South Africa came into being on 31 May 1910, before the establishment of the Republic. The defence was therefore the defence union before it was South African Defence Force. Discipline is still the primary and important focus of the SANDF; the South African Defence Review states that "Sound military discipline, founded upon respect for, loyalty to, and properly constituted authority is the cornerstone of a professional and functional Defense Force" item 46 (c) 2014.

108 Le Roux L (note 4) at 244.

109 Dlamini S "Towards a new Defence Force in South Africa: The SADF and the problems of transition" *University of Amsterdam* (1991) at 38.

for human rights.[110] Parliamentary supremacy in the pre-democratic era shielded state power and promoted state interests over public interests and human rights.[111]

The main legislation with regard to defence was the Defence Act 44 of 1957, read with its Rules and Regulations.[112] Military law,[113] including the Defence Act was not developed and amended frequently, but from time to time, as and when the need arose.[114] The military law system emphasised the importance of discipline. Section 104 of the Defence Act 44 of 1957 was known as the Military Discipline Code. As already indicated, chapter XI of the Defence Act dealt with military discipline and military legal matters as captured in the MDC.

Military Commanders were empowered to exercise their command discretionary powers to enforce and maintain discipline through the military law system and by the application of the provisions of the MDC in the Defence Act. Because the system of parliamentary supremacy allowed procedures and laws that limited the judicial review of administrative decisions at the time, access to Courts that facilitated Court intervention in cases where the actions or decisions through the exercise of state power by commanders adversely affected individual rights was not available. Discipline was regarded as the most important attribute for any member of the defence without due consideration of his/her individual rights.[115]

Discipline was, and is still, regarded as the most important feature in the military in many countries. Rowe[116] argues, however, that some military discipline uniquely exhibited harsh penalties for relatively non-serious offences.[117] According to Rowe, this disciplinary pattern was mostly prevalent in the periods between nineteen and twentieth century. In South Africa, punishments for offences were regulated under section 104 of the Defence Act 44 of 1957 and regulations. Issues of procedural fairness in enforcing discipline within the existing military justice

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110 Ibid.

111 Monyakane M *An Evaluation of the Transformation of Public Service Delivery through the Development of Administrative Justice in South Africa* (unpublished LLM dissertation, 2007) at 31.

112 Defence Act read with Rules and Regulations of the Defence (note 7).

113 For the history on Military Law see Brand CE *Roman Military Law* (1968). See also Williamson C *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* (2005) at ix. See also Nel M (note 55) at 36.

114 In 1912, the Defence Act was passed, then it was amended in 1922, with another amendment in 1957 (Defence Act 44 1957) and the latest amendment in 2002 (Defence Act 42 2002). For the history of the defence see Theron FH (note 42).

115 Rowe P *The Impact of Human Rights Law on Armed Forces* (2006) 63.

116 Ibid.

117 Ibid.

system were not provided for by the Defence Act. This view is supported by Dlamini who believed that the South African defence legislative system did not consider human rights.[118] Nel is of the opinion that, in order to instil the required discipline on individual soldiers who were unwilling to submit to the disciplined regime, military discipline needed to be harsh.[119] Consequently the main objective for the drafting of the defence legislative framework was to enforce discipline and not to recognise or protect individual rights.

Chapter VII of the South African Defence Act [120] applied to matters of discipline, offences and legal procedure.[121] The legal procedure referred to did not embrace the culture of human rights. As has already been indicated, the Defence Act of 1912 was subsequently amended by the Defence Act and Dominion Forces Act 32 of 1932 that made provisions for the promulgation of Defence Act 44 of 1957.[122] All these Acts shared a similar feature, which was a lack of sections or a chapter dedicated to the protection of human rights.

For the first time in the history of defence forces, a separate Military Discipline Code (MDC) was drafted and included in the Defence Act.[123] The MDC contained certain amendments which are applicable to this day.[124] Discipline and military legal matters were governed by chapter VI of the Defence Act 44 of 1957. Similar to the Defence Act of 1912, the Military Discipline Code consisted of the First Schedule to the Defence Act as well as the rules promulgated in terms of the Defence Act.[125]

Through the promulgation of the MDC, an effort was being made to distinguish between the different types of offences. The MDC distinguished between military disciplinary offences and military criminal offences. Military disciplinary offences were those offences considered to be of a less serious nature for which the prescribed punishment was imprisonment for a period not exceeding one year, for example offences such as drunkenness, absence without leave and

118 Dlamini S (note 109) at 38.
119 Nel M (55) M at 14.
120 Defence Act of 1912.
121 Ibid.
122 Defence Amendment and Dominion Forces Act (note 100).
123 Defence Act of 2002.
124 Section 2 of Act 32 of 1932. At this stage the MDC consisted of the provisions of the Army Act of 1881 of the United Kingdom, as amended there from time to time, up to the commencement of the 1932 Act as well as the Rules of Procedure in terms of the Act. The current MDC is similar in that it consists of the First Schedule of the Defence Act of 1957 as well as the Rules of Procedure in terms of the MDSMA.
125 Section 104 (1) of the Defence Act 44 of 1957.

conduct prejudicial to military discipline.[126] This was an important development in influencing military legislation, such as the Defence Act which had been rigid for a long time.

Historically, the manner in which the SADF was structured played an important part in the manner in which procedural fairness was applied to members of the defence force. Rowe[127] is of the opinion that all soldiers are subject to all the laws of the country, but, owing to the fact that they belong to a distinctive group, certain laws have evolved to address the needs of this group. He admits that some acts and forms of conduct are prohibited in the military that are not punishable in a civilian profession and that the process of punishment is tailored for this group.[128]

For a long time, military law had unique offences and punishments designed for, and focused on, maintaining discipline in a defence force normally consisting of conscripted members.[129] Many defence forces consisted of military conscripts and this was acknowledged at an international level by the European Convention on Human Rights.[130] This mode of recruitment was also used in the South African defence forces.

In South Africa, the apartheid regime developed the concept of the 'independent' 'black homelands' of Transkei, Bophuthatswana, Venda and Ciskei,[131] and the South African defence structures had their own unique rules and regulations tailor-made for the South African context. The SADF comprised of citizens of the Republic who were mainly white males. All males who were between the ages of 16 and 60 were compelled to join the Defence Force and to form part of the South African army, navy or air force.[132]

A revolutionary armed wing of the ACN formed and introduced Mkhonto we Sizwe (MK) which was recognised in 1961.[133] It was composed primarily of black males and a few females who were against the apartheid system of government. It could be suggested that, although the South African military law was not frequently developed in this era, it was still contextually adequate for

126 Sections 46, 33 and 14 of the MDC (note 7).
127 Rowe P (note115) at 63.
128 Rowe P (note 115) at 64. See also Morris L (note 60) at 3.
129 Nel M (note 55) at 14.
130 Ibid.
131 Le Roux L (note 4) at 245.
132 Nel M (note 55) at 90.
133 Le Roux L (note 4) at 246.

the regulation and administration of the main defence force of the Republic as well as the other defence forces, such as MK and other homeland defence forces, within the Republic.

The administration of the defence force was based to a large extent by the system of administration of the Republic, which was parliamentary supremacy. Tshivhase[134] is of the opinion that the system of apartheid also provided the administrators or 'organs of state' of the time, including commanders of defence force, with a safety net to avoid accountability for their actions.[135]

Looking at the historical development of the South African military justice system, a clear pattern of court procedures, offences and punishments that remained static for a number of years can be shown.[136] It is for this reason that military law was intended to accommodate the strong emphasis on discipline, often resulting in procedures and processes that were not always fair according to the views of civilians.[137]

The practice of human rights was not only absent in the South African defence force but in defence forces world-wide. The adjustment that had to be made to introduce human rights into the military was enormous, and it cut through the core of the military tradition and practice.[138] As part of the human rights culture of fairness, fair procedures should be equated to the common law rules of natural justice with the duty on the part of the administrator to act fairly, according to Baxter.[139] The right to just administrative action, which encapsulates procedural fairness, is aimed at ensuring that the requirements of fairness in any disciplinary action are complied with. An adverse inference should not be drawn to suggest that discipline in the military will be eroded if procedural fairness is applied.

In fact it can be argued that, through compliance with fair processes, the most minor matters in the military may be settled without the need to seek recourse to review proceedings. Baxter is of the opinion that these rules are the principles of good administration and he argues that their

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134 Tshivhase A "Military courts in a democratic South Africa: An assessment of their independence" *New Zealand Armed Forces Law Review* (2006) 6 at 83.
135 Ibid.
136 Nel M (note 55) at 132.
137 Nel M (note 55) at 29.
138 Carpenter G "The new South African National Defence Force" (2005) *SAPL* 42-67 at 42.
139 Burns Y and Beukes M *Administrative Law under the 1996 Constitution* 3rd ed (2006) at 213.

enforcement serves as an example for future administrative action.[140] In his view these rules facilitate accurate and informed decision making, and they also ensure that decisions are made in the public interest.[141]

Public interest is especially important within the context of the SANDF because of the expectation of protection which exists within the society at large. The core function of the defence force to protect the republic and its citizens against any internal unrest and external threats also influences public expectation. One way to engender public confidence, and to influence public interest, is to ensure that justice should not only be done, but that it should manifestly be seen to be done.[142]

The rules of natural justice were not only aimed at achieving a minimum standard for fair administrative hearings and enquiries, but also aimed at ensuring that the administrative bodies applied their minds to the matter by adhering to certain procedural requirements, by acting fairly, and by giving an individual an opportunity to be heard.[143]

In terms of the *audi alteram partem* rule, an affected person must be afforded the opportunity to be heard and be granted the full disclosure of the relevant information, which includes the proper notice, reasonable notice, written representation, etc.[144] All of these requirements should be available and practised within the military justice system and not only in the military criminal justice system as each discipline is purpose built.

For example, for purposes of procedural fairness, administrative law could be considered relevant, and for criminal procedural matters, criminal procedural law. This construction is particularly important when it comes to resolving disputes that are related to transgressions which occur in peacetime and which are not classified as military criminal offences but which are, instead, labour related, such as being absent without leave, drunkenness, sleeping on the post and other related minor offences.

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140 Baxter L *Administrative law* (1984) at 538-540.

141 Ibid.

142 See R v Sussex Justices ex parte Mcarthy (1924) 1KB at 259.

143 *South African Road Boards v Johannesburg City Council* 1991 (4) SA 1 (A) and *Administrator Natal v Sibiya* 1992 (4) SA 552 (A).

144 *Adjunk-Minister van Landbou v Heatherdale Farms* (Pty) Ltd 1970 (94) SA 184 (T).

Brand[145] is of the opinion that there is a need for the independent self-efficiency of the armed forces where it may become necessary to protect its operations outside the borders of the country where the state does not have territorial jurisdiction.[146] While Brand's opinion is noted for external matters, it can be argued that, for internal matters, there was no reason for the *audi alteram partem* rule not to find application in the military in South Africa even in the pre-constitutional era. It could be argued that this approach was a protective shield with regard to the accountability of administrators for their arbitrary actions, as suggested by Tshivhase.[147]

In the *SANDU* 2010 judgment[148] judgment, the court quoted from the *Walele*[149] decision where it sought to highlight that the most important component of procedural fairness is expressed in the maxim of *audi alteram partem*, which requires that the parties affected by the decision be given a hearing before the decision is taken.[150]

The court stated further that what gives rise to the right to be heard is the negative impact that the decision will have on the rights of a person claiming that she/he deserves to be heard.[151] This implies that the common law rules of natural justice are not obsolete and that they still ensure procedural justice on the one hand, and, on the other, that the SANDF authorities cannot be exempted from following these rules because of the disciplinary context of the defence.

The court also referred to the case of *Zenzile*[152] where Justice Hoexter found that the fact that an employee may have little or nothing as a defence is a factor which should not be entertained when making an enquiry into whether the employee is entitled to a hearing before a decision is taken.[153] In the *SANDU* case, the Minister emphasised the fact that the members of the SANDF had committed mutiny and, in the process, he had adopted an unfair procedure to dismiss them.

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145 Brand CE (note 73) at X.

146 Brand CE (note 73) at X. See also *R v Genéréux* 1992 (1) SCR 259; see also Morris L (note 52) at 7. See also Smart D "The revision of South African Defence Legislation – A personal view" *African Defence Review* (1994) 29 at 34.

147 Tshivhase (note 134) at 83.

148 *SANDU* 2010 judgment (note 1).

149 *Walele v City Council of Cape Town and Other* 2008 (6) SA 129 (CC) at para 27.

150 *SANDU* 2010 judgment (note 1) at 13.

151 Ibid.

152 *Administrator, Transvaal, and Another v Zenzile and Others* 1991 (1) SA 21 (A) at para 37. See also *SANDU* 2010 judgment (note 1) at 10.

153 *SANDU* 2010 judgment (note 1) at 10.

In the case of *Dhlamini,*[154] the court stated that the purpose of the *audi alteram partem* rule is to effect procedural fairness.[155] It also indicated that there was no single model for its application to all conceivable cases.[156] This implies that, even in the circumstances which do not seem ideal to apply procedural fairness, such as in the context of a defence force, these principles should still be applied, notwithstanding the context.

Hoexter argues that the concept of fairness is flexible and can be adapted from case to case, implying that there is no context or circumstances which justify the exclusion of the application of procedural fairness.[157] The emphasis on the application of the *audi alteram partem* rule is that, in the pre-democratic era, common law rules of natural justice were the mechanisms available to ensure procedural fairness.[158] Administrative law was also applicable to dismissal cases of public servants before they were included in the scope of application of the current LRA.[159]

In the context of the defence force, administrative law was not considered, although the application of military law acknowledged the *audi alteram partem* rule to a minimum extent.[160] This applicable minimum extent depended on the commander's discretion. This aforementioned situation has been changed by the Constitution..

3.2 Era After 1993

The year 1994 with the advent of the Interim Constitution of 1993 was characterised by the election of a new democratic government which resulted in the change of the government system from parliamentary sovereignty to a constitutional supremacy. The government was under reconstruction and it required the transformation of the different departments, policies, and legislative acts. This included the restructuring of the executive levels of the state and the formulation of the proposed policies and positions of new government.

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154 *Dhlamini v Minister of Defence & Another* 2004 (25) ILJ 212 (T) at para J.

155 Ibid.

156 Ibid.

157 Hoexter C "Administrative Action' in the Courts" *Acta Juridica* (2006) 303 at 319.

158 The *Audi Alteram Partem* rule literally means 'to hear the other side'.

159 LRA 66 of 1995 extends its scope of application to the public service employees. However members of the SANDF are excluded from this scope by section 2 of this Act.

160 Section 59(2) of Defence Act of 2002 states that only after the *Audi Alteram Partem* rule or applicable rules has been complied with, then the measures for the SANDF must be applied to terminate the member's service. See also *SANDU* 2010 judgment (note 1) at 19.

The Department of Defence was not spared this process. The new Minister of Defence also embarked on the formulation of a White Paper on Defence in 1995.[161] In the history of South Africa only a number of Defence White Papers had been drafted. The process of developing these white papers was conducted in a closed environment by parliament.[162] In other words, there was no transparency in the manner that these white papers had been developed. Contrary to the previous government, the newly- established government developed a White Paper on Defence through the process that was to be significantly different in two regards, firstly in terms of its content and its inclusivity.[163] After the White Paper on Defence of 1995, the 1998 White Paper on Defence was drafted. Its aim was to define clearly the primary function of the SANDF which is "to defend South Africa against external military aggression".[164]

Whilst the aim of the white paper was in general achieved, there were other important aspects that it did not address, such as the transformation of the military disciplinary code, the mechanisms to resolve labour related disputes, and its procedural requirements for disciplinary processes.

Constitutional democracy in South Africa also presented new challenges for the defence force. One of the many challenges which were faced by the SADF authorities was to align the defence force and the defence legislative frameworks with the Constitution and its Bill of Rights.[165] This meant that the defence commander's discretionary powers were to be exercised within the parameters of the Constitution, which had not been the case before 1994.

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161 Williams R "Defence in a democracy: The South African Defence Review and the redefinition of the parameters of the national defence debate" in Williams R (ed) *Ourselves to Know* (2002) 205-223 at 206.

162 Ibid.

163 Ibid.

164 Le Roux L (note 4) at 243.

165 Section 2 of the Constitution,1996 states that the Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid. All the obligations imposed by the Constitution must also be fulfilled. This section does not exclude the department of defence force, despite its special nature

In addition, the defence legislation empowering the commanders also had to be amended to comply with the Constitution.[166] This means that the SANDF had to adjust not only to a new strategic environment, but also to a new political dispensation that affected almost every aspect of its existence.[167] This also means that commanders could no longer exercise discretion when they apply procedural fairness; instead they must now exercise public power to conduct disciplinary processes in accordance with the Constitution. Section 33 of the Constitution, read with the relevant provisions of PAJA, extends the requirements of natural justice and adequately gives effect to the right to procedural fairness

Some of the challenges experienced in the SANDF were compounded by the fact that the Constitution introduced what seemed to be a clash of provisions in the bill of fundamental rights and other provisions relevant to the defence force, such as section 201.[168] On the one hand, a culture of human rights was introduced in the defence force. This culture was not common in the defence force, and the relevant legislation did not provide for it. Individual soldier's fundamental rights are now protected by the Constitution, unless otherwise limited, and this limitation complies with the Constitution. On the other hand, other provisions of the Constitution give the mandate on what the functions of the defence forces and how a defence force must be structured and managed.[169]

Part of the structural management which is prescribed by the Constitution is that the defence force must be structured and managed as a disciplined force. Chapter two of the Constitution contains the fundamental human rights which are granted to *everyone*, including members of the defence forces. This clash which seems to exist between some constitutional provisions means that all the enabling legislation, including the defence legislative framework, had to describe the application parameters and limitation to give effect to the rights in the Constitution.

This is an exercise which requires harmony in the application of these rights and the related obligations. To a certain extent, some of the *SANDU* judgments illustrate that some provisions in the Defence Act still need to be developed and aligned with the Constitution.

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166 Ibid.

167 Heinecken L and Nel M (note (36) at 468.

168 Chapter 2 of the Constitution, 1996 deals with the Fundamental Bill of Rights, Chapter 10 deals with Public Administration and Chapter 10 deals with security services.

169 The Bill of Rights in the Constitution applies to all law and organs of state. The rights encapsulated in the BoR are guaranteed to everyone, including the members of the defence force although subject to the application of the limitation clause.

Section 104 of the Defence Act 44 of 1957 and its Regulations remained in force until they were repealed and replaced by Defence Act 42 of 2002. Some of the provisions of the Defence Act were challenged for being unconstitutional as far back as 1999.[170] Through the interpretation of the relevant provisions of the Defence Act and the Constitution, the courts granted orders which forced the Minister of Defence to improve the Defence Act further.[171]

Other defence Rules and Regulations were also promulgated to align the defence legislative framework with the Constitution. Some of this newly-promulgated legislation still does not adequately give effect to other provisions in the Constitution, such as section 33, which grants the right to procedural fairness.[172] To this end, the SANDF legislation still needs to be further developed to avert legal disputes between the Minister of Defence and the defence union.

This is despite the fact that the legislative framework of the new SANDF has been amended during the past ten years in order to comply with the Constitution.[173] The Interim Constitution provided for the establishment of a single national defence force.[174] The Interim Constitution of 1993 was superseded by the final Constitution of 1996 which deals with the structure and regulation of the South African National Defence Force in terms of sections 199-204.[175]

The defence force is regulated by sections 199, 200 and 201 the Constitution which provide for a legislative framework and military justice system within the SANDF that espouses and enforces discipline as prescribed.[176] In this regard the relevant legislation is the Defence Act 42 of 2002

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170 *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T).

171 *South African National Defence Union v The Minister of South African National Defence Force* (note 17). In this case the High Court order which declared that some of the provisions of section 126B of the Defence Act 44 of 1957 were unconstitutional was suspended for three months, until the Minister developed Regulations that addressed the labour related issues and issues related to collective bargaining. This led to the birth of the General Regulations and Chapter XX of the Defence Act. The General Regulations for the SANDF were subsequently promulgated and published in the Government Gazette (20 August 1999) and provided for the establishment of Military Bargaining Council (MBC), Military Arbitration Board (MAB) and organizational rights of military trade unions (MTU's).

172 Chapter XX of the Defence Act was promulgated specifically to deal with labour related matters. This chapter is still inadequate for addressing procedural requirements for a fair hearing before dismissal; the defence Act vaguely make reference to the application of the *audi rule.*

173 Le Roux L (note 4) at 253.

174 Section 224(1) of the Interim Constitution superseded by section 199 of the 1996 Constitution provides that *"*National Defence Force is hereby established as the only defence force for the Republic.*"*

175 *SANDU* 2010 judgment (note 1).

176 Nel M (note 55) at 36.

which largely repealed the Defence Act 44 of 1957.[177] Section 104 of this Act lists the military offences, while the MDSMA (as well as the rules of procedure promulgated in terms of the MDSMA) creates the military court system and provides for the relevant court procedures. Chapter XX was promulgated as part of the legislative framework of the defence force to deal with issues related to labour matters and to address labour disputes.[178]

The provisions of the Constitution provided for the integration of all military forces or armies which existed separately from the SADF during the apartheid period.[179] The integration of the military forces will not be discussed in detail in this study.[180] Suffice it to mention that the *new* SANDF was established and included all the defence force arms that had existed before the constitutional era.[181]

The Constitution provides for a single defence force which, according to section 200(1), must be structured and managed as a disciplined military force. Section 200(2) states that:

> "*the primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force*".[182]

Furthermore, the Constitution provides that the President, as head of the national executive, is the Commander-in-Chief of the defence force and must appoint the Military Command of the defence force in terms of section 202(1). The civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.[183]

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177 MDC (note 8)

178 Chapter XX (note 16). The circumstances surrounding the promulgation of this chapter are found in *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC).

179 For detailed information of the integration of different defence forces see Le Roux L (note 4).

180 For more information on the interaction of the military forces into SADF and the ultimate formation of a single SANDF, see Le Roux L (note 4).

181 Wessel A "The South African National Defence Force, 1994-2009: A historical perspective" *Journal for Contemporary History* (2010) 35 131 at 143.

182 The Constitution, 1996.

183 Section 204 of the Constitution, 1996. See also Wessel A (note180) at 143.

The Constitution mandated what is seen as a complete change in the defence force structure and administration. The democratic ideals captured in the Constitution are, however, not easily converted into practice. This would require a radical change of the structure of government at every level, aimed at service delivery, openness and a culture of human rights.[184] This proves to be a difficult process for the defence force which lacked a culture of human rights in the past.

Nel is of the opinion that, although the context of the defence force is such that soldiers' rights may be limited when they join the defence force, they do not waive all their rights.[185] This is an important fact to consider when dealing with issues related to undergoing a disciplinary hearing before dismissal.

This is an indication that the defence legislative framework, including its rules and regulations and the conduct of the Minister of Defence, are not excluded from complying with the demands laid down in section 2 of the Constitution. This constitutional demand applies, despite the nature of defence force, even though the defence force is regarded by some as *sui generis*.[186]

The Constitution indirectly introduced the establishment of a trade union in the defence force. This was foreign to many military forces across the world and, in particular, to the South African defence force. In South Africa, members of the defence force were not allowed to form and join a trade union until 1999.[187] The establishment of the SANDU increased the challenges faced by the defence force authorities. The relationship between the defence force authorities and the newly-established defence trade union, as it was then, started off on a seemingly turbulent note.

The defence union challenged the decisions and conduct of the Minister of Defence in Court on a number of occasions. The number of Court cases which arose between the Minister of Defence and the SANDU (acting on behalf of the members of the SANDF who are also its members) increased over a number of years. Some of these cases mainly dealt with the claims related to the unconstitutional behaviour of the Minister and the unconstitutional provisions in the Defence Act 42 of 2002,[188] which is the main law regulating the defence force.

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184 Le Roux L (note 4) at 238.

185 Nel M (note 55) at 29.

186 *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C) at para 21.

187 *South African National Defence Union v The Minister of South African National Defence Forces* 1999 (6) BCLR 615 (CC).

188 Defence Act of 2002.

The actions of the defence union to challenge some of the decisions of the Minister of Defence and the unconstitutional provisions in the Defence Act echo the view of Carnelley. [189] Carnelley is of the view that:

> "*[w]hatever the practice in former times, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction*".[190]

Some of the issues that prevailed in the *SANDU* main judgment related to the infringement of the rights of the members of the SANDF to fair labour practices and to fair procedure. It should be noted that to require the Minister to grant members of the SANDF a fair hearing in line with section 33 of the Constitution should not be interpreted as implying that compliance with the procedural requirements would erode the effectiveness of the enforcement of discipline or the effectiveness of the related sanctions.

The case of *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* illustrates that discipline within the SANDF is not taken lightly and that the enforcement mechanisms are not weakened.[191] In this case, the court held that, in order to ensure discipline in defence forces, the South African military law had been developed without altering the object of the defence.[192]

The challenge faced by the Minister of Defence was, and still is, striking a balance between the application of some of the provisions of the Defence Act 42 of 2002 and the Rules and Regulation of the Defence Force which deal with the requirements of fair procedure, on the one hand, and those which deal with enforcement and maintenance of discipline, on the other hand. This requires the intricate process of balance and the limitation of these rights in terms of section 36 of the Constitution.[193]

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189 Carnelley M "The South African Military Court System-independent, impartial and constitutional?" *Scientia Militaria* (2005) 2 55 at 55.

190 Ibid.

191 *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC) at para 31.

192 Carnelley M (note 188) at 56.

193 Section 36 of the Constitution is the limitation clause. It lays down the requirements that need to be complied with for any infringement of any right in the Bill of Right.

Tshivhase is of the view that there are good procedural reasons for preferring specialist rules to resolve defence disputes pertaining to labour issues.[194] He provides the example that the specialist rules ensure certainty and avoid the duplication of a dual system of law.[195] He argues that, whilst it might be worth considering the possible application of the just administrative action clause to the Commander of Disciplinary Hearings (CODH) for example, this would not be desirable.[196]

The CODH is one of the internal mechanisms of disciplinary processes in the SANDF. He states that the reason why it would not be desirable to consider the application of the just administrative clause to these proceedings is that the CODH is similar to a criminal court process which requires the application of section 35 of the Constitution.[197] This implies that it would be unnecessary to apply the just administrative action clause to the CODH because a purposive approach would require that all criminal processes or similar proceedings be dealt with under section 35.[198]

It is submitted that the view of Tshivhase might have the effect of limiting the development of the defence force legislation because of its narrow approach. Provisions of specialist rules that relate to labour and administrative matters can be found in both the disciplines of labour law and administrative law. The relevant principles are captured in section 33 of the Constitution, and they are given effect to by sections 1 and 3 of PAJA and by section 23 of the Constitution, whereas section 35 of the Constitution is given effect by the Criminal Procedure Act.[199]

It should be noted that, in this regard, reference is made to procedural requirements which have to be met in the CODH and other internal disciplinary mechanisms in the SANDF that are designed to resolve labour transgressions that might lead to a sanction of dismissal, such as occurred in the *SANDU* judgment.[200] A wider approach to the interpretation of relevant provisions

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194 Tshivhase A (note 134) at 83.

195 Ibid.

196 Commander of Disciplinary Hearings (hereinafter referred as CODH).

197 Section 35 of the Constitution, 1996 deals with the rights of arrested accused and detained persons. See also Tshivhase A (note 134) (note 148) at 83.

198 Tshivhase A (note 134) at 83.

199 Section 33 of the Constitution is a just administrative clause which deals with the right to administrative action that is procedurally fair, reasonable and lawful, amongst other things. Section 33(3) demands that legislation be enacted to give effect to these rights. In this regard, PAJA 3 of 2000 is the law enacted to give effect to the rights. Section 23 of the Constitution deals with the rights to fair labour practices. The law enacted to give effect to these rights is the LRA 66 of 1995.

200 Nel M (note 55).

from both labour and administrative law might have the effect of reducing the lacuna that seems to exist in the Defence Act and its Rules and Regulations of procedure.

This way, the Defence Act will also be adequately developed to deal with defence force labour relations and procedural matters effectively. Consequently, some of the legal disputes between the SANDU and the Minister that could originate from a contravention of the right to fair procedure or fair labour practices will also be averted.

4. THE RELATIONSHIP BETWEEN THE MINISTER OF SANDF AND SANDU

4.1 Establishment of the Defence force trade union

Before the introduction of the democratic Constitution in South Africa, as mentioned above, members of the SANDF were prohibited, in terms of section 126B (1) of the Defence Act, from forming and joining a trade union. [201] The reason is that traditionally labour rights were not extended to the defence forces because the government was primarily in charge of the welfare of the members of the defence forces.[202]

According to Farnham, defence forces in most countries were managed from a unitary perspective.[203] In other words, in these states a defence force was part of government and could not be on the opposing side as compared to states which follow a pluralistic perspective. This unitary approach, which is believed to be in harmony with the military profession, was also followed in South Africa until 1994. After 1994, the International Labour Organisation Convention on the Freedom of Association and Protection of the Right to Organise opened a way for the SANDF to be granted the freedom to create its own labour relations regulations. [204]

The defence force authority had predicted the situation that members of the then SADF might want to form and join a trade union and, in that regard, section 126B of Defence Act 44 of 1957 was ratified. It is to be regretted that this ratification did not prevent the SANDU from coming into

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201 Section 126B of the Defence Act 42 1957.
202 Heinecken L and Nel M (note 36) at 465.
203 Farnham D and Pimlott J (note 60) at 46.
204 International Labour Organisation Convention No 87 of 1948. See also Heinecken L and Nel M (note 36) at 468.

existence.[205] The SANDU was established on 26 August 1994.[206] It complied with all the essential requirements before it could be officially recognised and be able to participate and serve in the Military Bargaining Council.[207] The SANDU is presently an established military trade union that is registered in terms of the provisions of Regulation 67(2) of the General Regulations for the South African Defence Force and Reserve.[208]

As a result of political circumstances in South Africa, labour relationships between employers and trade unions are generally adversarial; this is consistent with the pluralist dispensation adopted post-1994.[209] The SANDU is following the same approach adopted by other trade unions in South Africa. Its main function, like that of other trade unions, is to present a bargaining unit which is in competition with the established authority or leadership, regardless of the special context. It could be argued that this special context is the reason the Minister of Defence opposed the introduction and establishment of a military trade union in the defence force.[210]

4.2 The relationship on opposing sides

The SANDU and the SANDF authorities seem to have had disagreements on almost every labour-related issue. This has resulted in a number of legal disputes and subsequent court judgments. The genesis of some of the legal disputes that arose, which also subsequently culminated in a series of connected judgments, including the main *SANDU* judgment, seems to be the introduction of military union in the SANDF in 1994 and the decisions of the High Court and the Constitutional Court in 1999. [211]

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205 Heinecken L and Nel M (note 36) at 468.

206 Ibid.

207 The General Regulations in Chapter 20 of the General Regulations for the South African Defence Force and Reserve in the Government Gazette of 20 August 1999 provided for the establishment of Military Bargaining Council (hereinafter referred to as MBC), Military Arbitration Board (hereinafter referred to as MAB) and organizational rights of military trade unions (MTU's). A trade union must meet the 5000 member threshold requirement for registration and 15 000 for recognition to serve in the MBC.

208 Ibid.

209 After the introduction of the Constitution, Labour rights were provided for and protected in section 27 of the Interim Constitution and then superseded by section 23 of the final Constitution.

210 Lamberti T "Court overrules ban on soldiers joining union" *Business Day* (1998) (26 November). The then Minister of Defence, Joe Modise, maintained that section 26B (1) of the Act that prohibited members of the defence from forming and joining the union was constitutional.

211 Heinecken L and Nel M (note 35) at 468. The foundation phase refers to the two decisions of courts which led to the members of the defence force to have the right to form and join a trade union. The first decision is the *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T) where the High Court declared that some of the provisions of section 127B of the Defence Act 44 of 1957 were unconstitutional. In order to be valid, an application for the order of invalidity had to be made to the Constitutional Court. The second decision is the *South African National Defence*

In the High Court, Hartzenburg J ruled that the limitations prohibiting members of the SANDF from forming and belonging to trade unions were unconstitutional.[212] This decision was confirmed by the Constitutional Court.[213] The above situations created what seems to be a turbulent relationship between the SANDU and the Minister of Defence.[214]

In the first place, based generally on the nature and history of the national defence force and, in particular, South African political history, the idea of a trade union in the SANDF was inconceivable. Secondly, after its introduction and subsequent recognition as the official trade union in the defence force, the SANDU began to challenge some of the Minister's decisions, his conduct and some provisions of the Defence Act as being unconstitutional or unlawful.[215]

Traditionally military command powers which were exercised by the commanding officers before 1994 were undisputed and not open to either direct or indirect challenges from subordinate members of the defence force.

The SANDU challenged the Minister of Defence on a number of issues. The first challenge was the dispute decided by the High Court (which was then confirmed by the Constitutional Court) that certain parts of section 126B of the Defence Act were unconstitutional.[216] This section prohibited members of the SANDF from joining trade unions and participating in trade union activities.[217] The decision by the Constitutional Court granted members of the defence force the right to form and join a trade union in terms of section 23(2) of the Constitution.[218] It effectively put the members of the defence force into the same category as workers and employees.

Force Union v Minister of the Defence and Another 1999 (6) BCLR 615 (CC) where the court granted the order of invalidity and confirmed the order of the High Court.

212 *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T).

213 *South African National Defence Force Union v Minister of the Defence and Another* 1999 (6) BCLR 615 (CC).

214 Heinecken L and Nel M (note 36) at 473.

215 Defence Act of 2002.

216 *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T). *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC). Full facts of this decision will be discussed in chapter 3 below.

217 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC). See also Section 126B which was ratified by the former SADF in September 1993 to prohibit military personnel from joining or belonging to a trade union, from striking or participating in the activities of the union.

218 Section 23(2) of the Constitution, 1996 provides that every worker has the right to form and join a trade union.

In his/her submission both in the High Court and the Constitutional Court, the Minister of Defence rejected the establishment and presence of a trade union in the SANDF.[219] The SANDF authorities were unprepared and unwilling to recognise or negotiate with any union representing members of the defence force, and the Minister threatened to prosecute members for doing so.[220]

It is submitted that the Minister was not ready to accept what Heinecken calls the 'us-them' situation in the SANDF, which is created by the establishment and recognition of a trade union in the defence force.[221] Heinecken argues that the existence of a trade union can have the effect of driving a wedge in the defence force chain of command and may erode the unit's *esprit de corps*.[222] Hallenbeck concurs with this view, affirming that a military trade union will not only impair combat effectiveness, but will also undermine military discipline and obedience which are regarded as the fundamental basis on which the culture of the military profession rests. [223]

Notwithstanding the Minister's concerns with regard to the establishment and recognition of the military trade union, the Constitutional Court[224] granted military personnel the right to belong to a trade union and to collective bargaining, but it did not grant them the right to strike. In this regard, the Minister had unwillingly to acknowledge and recognise the SANDU. The statement by Lt Gen Pretorius J, Chief of the Army, echoes the sentiments held by the Minister of Defence towards the establishment, existence and recognition of trade unions in the defence force:[225]

> *"Whoever is promoting the idea of a union for soldiers, is not only encouraging soldiers to commit an illegal act, but is also doing a disservice to our country. Unions, he went on to say, 'were undesirable because mass strikes and mutinies would undermine the operational readiness of the armed forces, unions will politicize the forces and divide the rank and file along institutional lines".*[226]

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219 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC). See also Heinecken L and Nel M (note 36) at 469.

220 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC).

221 Heinecken L and Nel M (note 36) at 466.

222 Ibid.

223 Hallenbeck R "Civil Supremacy and the Military Union: The systemic implications" in Taylor W, Arango R and Lockwood R (eds), *Military Unions: U.S. Trends and Issues* (1977) 233 at 244. See also Heinecken L and Nel M (note 36) at 466.

224 *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

225 Pretorius J "Integration, rationalisation and restructuring of the SA Army: Challenges and prospects" *African Security Review* (1995) 4 at 21.

226 Ibid.

For most of the disputes that have arisen between the SANDU and the Minister of Defence, the SANDU approached and relied on the Courts for resolution rather than the internal process of collective bargaining through the Military Bargaining Forum because the issue around the right to collective bargaining was still in dispute. [227] This situation added to the tension that already existed between the SANDU and the Minister of Defence.

The Minister's apprehensions could at times be considered reasonable. The Minister of Defence is appointed by the President of the Republic to be responsible for defence matters in terms of sections 201(1) and 202 of the Constitution respectively.[228] His/her main duty is to ensure that the defence force carries out its constitutional mandate in a manner that is prescribed by the Constitution.[229] The Constitution commands the defence force to defend and protect the Republic, its territorial integrity and its people.[230] The defence force is expected to be structured and managed as a disciplined military force.[231]

The main functions of the SANDU and of the Minister of Defence indirectly foreshadow an adversial relationship. This is not strange since the employment relationships in South Africa in general are based on the adversarial pluralism as opposed to the European employment relationships.
This adversarial stance is not only demonstrated in the relationship between the SANDU and the Minister of Defence, but also in military unions which are similar to professional associations and their employment relationship which is supposed to be based on consultation and cooperation.[232] This is in line with the more social partnership approach to employee relations in the European countries.[233]

Because of this adversarial approach, the relationship between the SANDU and the Minister of Defence is such that, since the introduction of the 1996 Constitution, the SANDU is cited as the

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227 Heinecken L and Nel M (note 36) at 465.
228 Section 201(1) of the Constitution, 1996 provides that a member of the Cabinet is responsible for the defence. Section 202 provides that the President as the Commander-in-Chief of the defence must appoint a Military Command of the defence.
229 Section 199-202 of the Constitution, 1996 lays out the formation, management and structure of the Defence Force.
230 Section 200(1) and (2) of the Constitution, 1996.
231 Ibid.
232 Heinecken L and Nel M (note 36) at 468.
233 Ibid.

applicant on behalf of its members challenging either the defence legislation or the conduct of the Minister as being unconstitutional and/or unlawful, for a number of different reasons, including procedural unfairness. The Minster of Defence, on the other hand, is always cited as the respondent, except in the appeal cases where he attempted to defend the constitutional mandate of the SANDF.[234]

5. CONCLUSION

In this chapter the nature of a national defence force in general, and of the SANDF in particular, was traced and discussed. The historical evolution of the South African military law system and its legislative framework in so far as the regulation, maintenance and enforcement of discipline are concerned also been described. The relationship between the Minister and the SANDU was briefly discussed.

The introduction of the culture of human rights in the defence force that was ushered in by the constitutional democracy after 1994 was discussed. It was stated that, in South Africa, the evolution of the government systems has seemingly contributed to some of the legal disputes that have taken place between the newly-established SANDU and the Minister of Defence. The relationship between the SANDU and the Minster of Defence was explained and analysed.

In the following chapter some of the judgments that seemingly laid the foundation for the actions that led to the *SANDU* 2010 judgment will be discussed briefly. The facts and the decision of the *SANDU* 2010 judgment will be discussed. All other subsequent judgments that have arisen as a result of the court orders that were granted in the *SANDU* 2010 judgment will also be dealt with.

234 Sections 200-204 of the Constitution 1996.

CHAPTER 3

THE GENESIS OF LEGAL DISPUTES IN RELATION TO THE SANDU JUDGMENT

1. INTRODUCTION

In the previous chapter the nature of National Defence Forces, in particular the SANDF, and the history of the military law system was traced. The evolution of the Military Law and Military Justice System from the period before 1994 which was informed by the principles of parliamentary supremacy was also discussed. The chapter also discussed the period after 1994, the Constitutional era, where the culture of human rights was introduced in South Africa and its extension into the Defence Force was discussed. The relationship between the Minister and the SANDU was also discussed.

As already mentioned, the introduction of the democratic Constitution in South Africa changed the way in which defence forces were managed. The Defence Act 44 of 1957 was repealed and the New Defence Act 42 of 2002 introduced labour-related provisions and a Military Trade Union. These changes did not come easily, and fostering a relationship between the Minister and the SANDU was not an easy task. There were a number of legal disputes which arose between the Minister and the SANDU, the most important being the *SANDU* 2010 judgment.[235]

In order to give background to the genesis of some of the legal disputes which arose between SANDU and the Minister, it is important to discuss some of the relevant court judgments which could be regarded as foundations for the *SANDU* 2010 judgment and the subsequent appeal judgments.

This chapter will begin with a discussion of the High Court decision that declared section 126B (1)-(4) of Defence Act 44 of 1957 unconstitutional and invalid. For an order of constitutional invalidity granted by the High Court to have legal effect, it must be referred to the Constitutional Court in terms of section 172(2) of the Constitution for confirmation. In that regard, the confirmation order will also be discussed.

Although the Constitutional Court granted the confirmation order of invalidity and members of the SANDF were granted the right to form and join a trade union, there is evidence indicating that the relationship between the Minister and SANDU as far as labour relations and collective bargaining are concerned did not improve. Instead, some issues related to collective bargaining could not be

235 *SANDU* 2010 judgment (note 1).

agreed upon. This led to more legal disputes which ultimately gave rise to a trail of court decisions including the *SANDU* 2010 judgment and the two subsequent appeal decisions.[236]

The *SANDU* I, II and III judgments will be discussed. These are the judgments representing the evidence of the continuing tug of war between SANDU and the Minister regarding labour related issues and issues connected to collective bargaining. This chapter will conclude with the discussion of the status of the internal disciplinary proceedings that commenced in 2014 and proceeded into 2016.

2. THE GENESIS OF THE LEGAL DISPUTES BETWEEN SANDU AND THE MINISTER

The SANDF includes the South African army, navy and air force.[237] The Permanent Force of the SANDF consists of full-time military personnel.[238] The introduction of a constitutional democracy in South Africa introduced the recognition of equality and human dignity in the SANDF.[239] The responsibility for the protection of the Constitution and the democratic values from both internal and external unrest lies with the Defence Forces (SANDF).[240]

The Defence Force, which was once regarded as an instrument for government aggression in South Africa, is now regarded as the protector of the democracy and its values.[241] In order to fulfill

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236 *South African National Defence Union v Minister of Defence and Others* 2003 (3) SA 239 (T) (hereinafter referred to as *SANDU* I). *South African National Defence Union and Another v Minister of Defence and Other* 2004 (4) SA 10 (T) (hereinafter referred to as *SANDU* II). *SANDU and Others v Minister of Defence and Others* 2006 (90) SCA (hereinafter the Conradie decision), and *South African National Defence Union v Minister of Defence and Others* 2006 (91) SCA. *South African National Defence Union v South African National Defence Force,* unreported case no 55001/09. *The Minister of Defence v SA National Defence Force* 2012 (161) ZASCA 110 (hereinafter referred to as *SANDF* appeal judgment I,2012). *Minister of Defence v SANDU* 2014 (514) SCA 102 (hereinafter referred to as *SANDF* appeal judgment II,2014).

237 Chapter 2 of the Defence Act 42 2002 provides for the composition of the Department of Defence. See also Le Roux L (note 4) at 250.

238 Le Roux L (note 4) at 250.

239 The new post-apartheid South African Department of Defence that consists of the Defence Secretariat and the SANDF came into being on 27 April 1994 with the establishment of the new constitutional democracy in South Africa. This period marked the beginning of constitutionalism in South Africa.

240 Alli C "Mission impossible: Trade Union and the Protest Action Rights in the Military" *South African National Defence Union v Minister of Defence*" 2000 (16) *SAJHR* 324 at 325. See also Chapter 4 of the White Paper on Defence, 1996 which defines the primary function of the SANDF as "to defend South Africa against external military aggression" and determines that the SANDF should be designed mainly around the demands of its primary function.

241 Alli C (note 239) at 235.

this role, the Defence Force needs to be disciplined and loyal to the Constitution. It is in this regard that states often face a challenge of two conflicting values of maintaining a disciplined Defence Force that is necessary for state security and the granting of democratic human rights, including the fundamental right to a trade union that is essential for effective collective bargaining.[242]

The South African situation is not different. One of the challenges faced by the Minister was related to striking a balance between the maintenance of discipline and the granting of some fundamental rights to members of the SANDF, and, in particular, the right to form and join a trade union.[243]

Trade unions are regarded as instruments which assist in bargaining with the employers who are often in the position of power.[244] Instead of acting individually, employees act collectively to negotiate better working conditions and to counter managerial power.[245] In most countries trade unions emerged as a response to exploitation by employers.

The idea of having a trade union in the Defence Force is not easily welcome and acceptable in many countries. The position of the SANDF in this regard is not unique. Heinecken[246] argues that SANDU is not the only military union involved in the fight for the quest for labour rights for members of the Defence Forces. She asserts that there is plenty evidence that indicates that this is also a pressing human rights issue in Europe.[247]

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242 Alli C (note 239) at 327.

243 For a detailed research on the challenges that faced the Department of Defence see Le Roux L (note 4) at 264.

244 Finnemore M *Introduction to Labour Relations in South Africa* 7th ed (1999) at 4.

245 Ibid.

246 Heinecken L and Nel M (note 36) at 481.

247 Examples of countries in Europe which still exclude members of the Defence Forces from the right to form and belong to a trade union include France, Italy, Spain, Greece, Turkey, the UK, and others. See Parliamentary Assembly 'Human Rights of Members of the Armed Forces', 24 March 2006 at 12.

Members of the Defence Forces are in a delicate position in so far as labour relations are concerned. In the South African context; the Minister is in the position of power and members of the SANDF are subservient and in a powerless position. In order to gain some power, and to be in a better position to negotiate better working conditions with the Minister, a trade union is esential. The right to form and join a trade union is a human right guaranteed to *everyone* in section 23 (2) of the Constitution.[248] Members of the SANDF could not, however, exercise this right because of section 126B of the erstwhile Defence Act which prohibited the formation of a trade union in the SANDF.[249]

The first legal dispute which laid a foundation for the *SANDU* 2010 judgment occurred when the SANDU challenged section 126B to be unconstitutional. [250] This legal dispute was heard in the Transvaal High Court in the decision of *South African National Defence Union v Minister of Defence*.[251] This decision led to a Constitutional Court decision in *South African National Defence Union v Minister of Defence and Another* which had, to confirm the order of the Transvaal High Court. [252]

Heinecken is of the opinion that the Constitutional Court could have made certain pronouncements to resolve matters in relation to the activities of a trade union. [253] According to Heinecken, this paved a way for an unsettled employment relationship between SANDU, its members and the Minister, which led to the court battles that ensued.[254]
A second legal dispute that followed was related to the issue of collective bargaining. This legal dispute commenced after the Constitutional Court decision which lifted a ban on trade unions in the Defence Force.[255]

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248 Section 23 of the Constitution guarantees that "every person shall have the right to fair labour practices, including the right of workers to join trade unions, to participate in the activities and programmes of a trade union and to strike".

249 Section 126B of Act 44 of 1957. The entire section dealt with the prohibition of formation and joining of a trade union in the Defence Force and participation in public protest and other related activity such as strike actions.

250 *SANDU* 2010 *j*udgment (note 1).

251 *South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T).

252 *South African National Defence Union v Minister of Defence and Another South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

253 Heinecken L and Nel M (note 36) at 472.

254 Heinecken L and Nel M (note 36) at 473.

255 *South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T). *See* also *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

The main legal questions were whether there is a legally enforceable duty on the SANDF to collective bargaining with SANDU, a military trade union that was recently permitted to function as such by the decision of the Constitutional Court.[256] If the answer to the question above is in the affirmative, the next question was whether the SANDF was unfairly refused to bargain with SANDU.[257]

This legal dispute led to a trail of three different judgments, commonly referred to as *SANDU* I[258], II[259] and III.[260] All of these Court are linked in some way to the *SANDU* 2010 judgment, albeit some of them indirectly.

2.1 ***The High Court decision: SANDU v The Minister of South African National Defence Forces* 1999 (3) BCLR 321 (T)**

Before 1999, there was a provision in the Defence Act 44 of 1957 which prohibited members of the permanent force from joining trade unions, as has already been indicated.[261] This Defence Act was the law that regulated the Defence Forces before it was repealed and replaced by Defence Act 2002, also prohibited members of the Defence Forces from exercising some labour related rights, including the right to belong to a trade union in terms of its section 126B.[262]

This section rendered it a criminal offence to form and join a trade union in the SANDF.[263] SANDU challenged the constitutionality of this section in the Transvaal High Court.[264] In this case, the

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256 *South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T).

257 *Minister of Defence and Others v South African National Defence Union and Others* 2007 (1) SA 422 (SCA) at para 2.

258 *South African National Defence Union v Minister of Defence and Others* 2003 (3) SA 239 (T) (hereinafter referred to as *SANDU* I).

259 *South African National Defence Union and Another v Minister of Defence and Other* 2004 (4) SA 10 (T) (hereinafter referred to as *SANDU* II).

260 *South African National Defence Union and Others v Minister of Defence* Unreported Case No 15790/2003 (T) (herein *SANDU* III).

261 Section 126B prohibited membership of trade unions and participation in strikes and protests; sub-section (1) states that any member of the permanent force shall not be or become a member of any trade union as defined in section 1 of the LRA, 1956 (Act 28 of 1956); provided that this provision shall not preclude any member of such force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister. Subsection (3) criminalises the joining and forming of a trade union in the National Defence Forces.

262 Section 126B (1) and (3) provides that members of the SANDF may not form and join an trade union as defined in the Labour Relation Act (1957) and if they do so they shall be guilty of a criminal offence.

263 Section 126B (3) states that a "members of the SANDF who contravenes subsection (1) and (2), shall be guilty of an offence".

264 *South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T).

legal questions were whether it was constitutional to prohibit members of the SANDF from participating in public protest action, and also from forming and joining trade unions, as provided by section 126B(1)(2) and (4) of the Defence Act of 1957.[265]

Commencing their arguments on the prohibition of membership of trade unions, *SANDU* (Applicant) argued the constitutional invalidity of section 126B (1) on the basis that the prohibition was in breach of section 23(2) of the Constitution.[266] This section provides that every worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union, and to strike. It does not exclude members of the SANDF.[267]

Section 126B(1) prohibited members of the permanent force from forming and joining trade unions as defined in section 1 of the LRA.[268] The Minister (Respondent) argued that this section was a limitation that is acceptable in terms of section 36 of the Constitution.[269]

The Minister further argued that, in any event, the relevant members of the SANDF do not constitute workers as referred to in section 23 of the Constitution.[270] Even if they did, the resultant infringement of their rights is one which is justified in terms of section 36(1).[271]

The Minister also relied on section 200(1) of the Constitution, which provides that the Defence Force must be structured and managed as a disciplined military force.[272] The argument advanced

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265 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 321J, 322A-B, 330C-I.

266 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 322D, 329C-F. See also Section 23(2) of the Constitution, which provides that "every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike".

267 Section 23 of the Constitution is a labour relations clause.

268 The LRA 28 of 1956 has been repealed and replaced by the LRA 66 of 1995. Section 1 of the latter Act defined trade union as follows: "A trade union means any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and their employers or some of their employers".

269 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras' 330B-G.

270 Ibid.

271 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 335A-J.

272 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 322E, 329A-D. See also section 200(1) of the Constitution, 1996.

by the Minister was that the Defence Force could not be a disciplined military force if its members belonged to a trade union and wished to exercise all the rights conferred by section 23.[273]

The Minister further argued that accepting a trade union would mean that SANDU would be constitutionally entitled to bargain collectively on behalf of its members and to be involved in strike action.[274] If this were to be allowed, the disciplined character of the Defence Force as required by the Constitution would be undermined. The Minister also argued that, if the Defence Force were to be weakened in this way, it would have grave consequences for the security of the South African state.[275]

On the invalidity of section 126B (2) *SANDU* contended that it did not assert the right to strike on its behalf or on behalf of its members. It opposed the constitutionality of this section in so far as it prohibits the participation in public protest.[276]

SANDU conceded that the right to strike in the Defence Forces must be prohibited. It did not, therefore, argue that the prohibition on participation in strikes was unconstitutional or invalid.[277] Continuing its arguments on section 126B (2) and (4), which provided for the prohibition of participation in acts of public protest, *SANDU* also argued that section 126B (2), read with section 126B (4) is a breach of the right to freedom of expression entrenched in section 16 of the Constitution.[278] In this regard, the Court ordered the complete severance of sub-section 126B (4) and declared sub-section126B (2) unconstitutional to the extent that it refers to acts of public protest.[279]

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273 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 322E.

274 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 327D-F.

275 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 322E.

276 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 322A-E, 323C, 329G.

277 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 322E.

278 Section 16 provides that "everyone has the right to freedom of expression, which includes , freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research. This section further states that the right in subsection (1) does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

279 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 340G. See also. See section 172(1) (*a*) of the Constitution which authorises a court to order notional severance when deciding a

Hartzenberg J found that the scope of the prohibition on public protest was extremely broad.[280] He concluded that it would include some forms of conduct which did not constitute public protest such as, for example, the complaint by a uniformed member of the Defence Force to his partner about conditions of service in the Defence Force.[281]

On the unconstitutionality of section 126B (3), *SANDU* argued that it is unconstitutional for this section to render it a criminal offence for members of Defence Forces should they form and join a trade union.[282] Contraventions of sub-sections (1) and (2) result in criminal conduct in terms of section 126B (3).[283] In that regard, this subsection read with sub-sections (1) and (2), contravenes section 23 of the Constitution.[284] The Court asserted that the criminal sanction which members of the SANDF would be liable for if they joined the trade union dissuaded many prospective members from joining.[285]

In its final order, the Court completely struck down section 126B (4) of the Act and declared it unconstitutional and invalid.[286] Section 126B (2) was declared unconstitutional and invalid to the extent that it refers to acts of public protest.[287] On the trade union issue, the Court struck down subsections (1) and (3). Section 126B (1) was declared unconstitutional and invalid, and section 126B (3) was declared unconstitutional and invalid to the extent that it refers to section 126B

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constitutional matter within its power and authorise a court to declare that any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

280 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 332A-D.

281 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 322D-H.

282 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 332A.

283 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 338C-E.

284 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at paras 322B-D.

285 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 338C.

286 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 340G-H.

287 Ibid.

(1).[288] All the orders were suspended until 31 December 1999.[289] The order was referred to the Constitutional Court for confirmation.[290]

*2.2 **The Constitutional Court decision: Sandu v The Minister of Defence and Another 1999 (6) BCLR 615 (CC)***

SANDU requested that all the orders of invalidity be confirmed and that none be suspended.[291] The Minister opposed the confirmation of invalidity of section 126B (1), which denied relevant members of the SANDF the right to form and join a trade union.[292] The Minister did, however, not oppose the invalidity of section 126B (4) and parts of subsection (2), which prohibited relevant members of the SANDF from participating in protest action.[293]

The arguments which were advanced by both *SANDU* and the Minister addressed three issues: firstly, whether military personnel can be considered to be *workers*; secondly, what would the impact of allowing trade union membership be on military discipline; lastly, what would the potential consequences of protest and strike action in the Defence Force be considering political neutrality and state security.[294]

The Court had to consider the constitutional validity of the prohibition of the relevant members of the SANDF from participating in protest action as mentioned in section 126B (2) and defined in sub-section (4).[295] The Court also had specifically to consider whether this prohibition violated the right of members of SANDF that is guaranteed in section 16 of the Constitution.[296]

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288 Ibid.

289 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T) at para 341A.

290 *South African National Defence Union v The Minister of Defence South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T at para 340H. See also section 172 (2) of the Constitution, 1996.

291 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC) at paras 5, 38.

292 *South African National Defence Union v The Minister of South African National Defence* Force 1999 (6) BCLR 615 (CC) at para 40.

293 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC) at para 38.

294 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC) at para 6.

295 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC) at paras 6, 7, 8.

296 *South African National Defence Union v The Minister of South African National Defence Force* 1999 (6) BCLR 615 (CC) at para 6.

The Court first dealt with infringement of section 23 of the Constitution. In determining whether, by prohibiting members of the Defence Forces from forming and joining a trade union, section 126B (1), read with section 126B (3), infringed upon the right to fair labour practices contained in section 23 (2) of the Constitution, the Court held that this section indeed violated those rights. In this instance, the Court agreed with the court *a quo*.[297]

The Court had to determine whether members of the SANDF form part of workers as contained in this subsection.[298] In doing so, the Court held that section 23 of the Constitution in its entirety applies to situations where a contract of employment is entered into between parties.[299] The Court indicated that members of the SANDF do not enter into a contract of employment, but rather they register into the Defence Forces as members of Permanent Force.[300]

Notwithstanding this, the Court felt that the relationship between members of the SANDF and the Minister is similar to the employment relationship.[301] It indicated that the difference lies in the consequence for misconduct, because employment in the SANDF carries certain legal consequences. Misconduct by members of the SANDF is punishable in terms of the Military Disciplinary Code.[302] The Court concluded that section 23 extended to members of the SANDF.[303] The Court held that the words '*every worker*' in section 23 of the Constitution should be interpreted to include members of the SANDF.[304] In that regard, the Court then concluded that section 126B (1) infringed the right to form and join the trade union.[305]

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297 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 19.

298 Ibid.

299 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 19,20,21,22.

300 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 22.

301 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 24.

302 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 22, 23, 24.

303 *South African National Defence Union v The Minister of Defence* 1999 (6) BCLR 615 (CC) at para 334H-J.

304 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 26, 30.

305 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 30.

Having found that section 126B (1) amounted to an infringement, the Court had to decide whether the limitation imposed by this section complies with section 36 of the Constitution.[306] In doing this, the Court looked at section 200(1) of the Constitution, which requires that the Defence Forces must be structured and managed as disciplined military forces.[307] The Minister argued that, if members of the SANDF were allowed to exercise their labour rights in terms of section 23, the disciplined character of the Defence Force would be eroded.[308]

The Court disagreed with the submission and held that it was possible to grant members of the SANDF limited and structured trade union rights without challenging the discipline of the Defence Force.[309] The Court further held that section 126B (1) prohibited more than was necessary to maintain discipline in the Defence Force.[310] The Court ordered this section to be unconstitutional and invalid.[311]

In determining whether the order that section 126B (1) section is invalid and unconstitutional and should be suspended or not, the Court held that to invalidate this section without any regulations might be potentially harmful.[312] Regulations would be needed to avoid disruptions to discipline and to ensure that labour relations developed in a constructive and orderly manner.[313] The *SANDU* had requested that the order take immediate effect on the basis that there had already been an extensive delay.[314] They argued that the Minister and Defence Force administrators had already had five years since the new constitutional order had commenced to address this matter, but that they had delayed and that, during that time, members of the SANDF had been deprived of their constitutional rights.[315]

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306 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 27, 29, 30.

307 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 32.

308 Ibid.

309 Ibid.

310 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 32-34.

311 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 45.

312 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 40.

313 Ibid.

314 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 41.

315 Ibid.

In addition, during that period, the SANDU had actively sought to assert the rights of members of SANDF without success.[316] To strike a balance between the two interests, the Court held that the order should be suspended only for a period of three months and not twelve months as was ordered by the court *a quo*.[317] The Court felt that this would give the Minister sufficient time to make Regulations concerning trade union rights. [318]

Finally, the Court turned to deal with the confirmation of the order of unconstitutionality and invalidity of section 126B (2).[319] This section infringed on section 16 of the Constitution according to *SANDU*'s arguments. On the issue of prohibition to participate in protest action in terms of section 126B (2) and defined in 126B (4), the Court determined whether these sections infringed on the constitutional rights to freedom of expression contained in section 16 of the Constitution.[320]

The Court held that freedom of expression is of fundamental importance and lies at the core of democracy. The definition of protest action in section 126B (4) was too extensive and unclear. Its grammatical structure was clumsy and the overall meaning vague.[321] This definition criminalised a wide range of conduct without making a distinction between on- and off-duty periods of members of SANDF.[322] The Court held that section 126B (2), read with section 126B (4), violated the right to freedom of expression and confirmed the order of the Court *a quo*.[323]

The Constitutional Court further held that section 36 of the Constitution could not justify this prohibition as being a reasonable limitation. The Court considered whether it was possible to sever the over broad parts of the definition of public protest from section 126B (4) of the Act or not. The Court indicated that it was not possible to sever parts of the definition, since the definition

316 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 42.
317 *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T) at para 341A.
318 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 42.
319 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 6.
320 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 6-9.
321 Ibid.
322 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at paras 6, 14, 15.
323 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 45, 47.

was too dense. An altered definition by the Court would also have the danger of not bearing any resemblance to what the legislature may originally have intended.[324]

As a result, the whole definition in section 126B (4) was severed. With regard to section 126B (2), only references to public protest were severed.[325] The remainder of section 126B (2), relating to the prohibition of strike action and the prohibition of the incitement to strike action, were left intact. In this way, only certain forms of public protest would be prohibited and section 126B (2) saved.[326]

The Constitutional Court declared section 126B to be unconstitutional and invalid.[327] The Court ordered the Minister to promulgate labour regulations consistent with the constitutional rights of members of the Defence Force within three months. This led to the enactment of Chapter 20 of the General Regulations for the SANDF, which was subsequently published in the Government Gazette of 20 August 1999.

2.3 The subsequent judgments: SANDU I, II AND III

From the time that the High Court decision removed the prohibition of trade unions in the SANDF and the subsequent confirmation of this order by the Constitutional Court, the history of the SANDF has changed. [328] For the first time in the history of South Africa, members of the SANDF are legally entitled to form and join a trade union.

Generally, this change is commendable in a democratic South Africa. It did, however, not improve employee relations in the Defence Force particularly. Instead, the introduction of a trade union in the Defence Force seems to have triggered an adversarial relationship between the Minister and the SANDF employees who are members of SANDU, and SANDU itself. This relationship became more unsettled when the power struggles between the Minister, SANDF and SANDU increased.

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324 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 14-16.

325 Ibid.

326 Ibid.

327 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 45.

328 *South African National Defence Union v The Minister of Defence* 1999 (3) BCLR 321 (T)

On the one hand, SANDU adopted an aggressive style to assert the labour rights of its members by consistently sending out brochures which often insulted senior officers in the SANDF.[329] On the other hand, the Minister found this approach to be unacceptable in a military context because of the view that the Defence Force is founded on respect for rank and higher authority.[330] As a result, the Minister refused to include SANDU in decision-making processes on issues that SANDU considered to be ones of shared interest.[331] This refusal by the Minister to negotiate with SANDU led to delays in the bargaining process.

Collective bargaining became one of the problems in the relationship between SANDU and the Minister. It is suggested that the main reason that gave rise to this problematic relationship is that the Constitutional Court omitted to make a ruling on this issue. [332] This omission seems to have left a gap in the Defence Force Legislative Framework and its Regulations that deal with collective bargaining.

The question which the Constitutional Court should have dealt with was whether or not the Minister had a legal duty to negotiate with SANDU after its official establishment in the Defence Forces.[333] In the absence of this finding, this issue has caused misunderstandings between SANDU and the Minister. As a result, a trail of Court decisions, all of them trying to address this question, were handed down. The Court battles began in 2003 and continued until 2007.

South African National Defence Union v Minister of Defence and Others **2003 (3) SA 239 (T): SANDU I**

In the first decision, which is referred to as *SANDU I,*[334] the application was initiated by SANDU. In this application, SANDU made a request to the Court to answer the question of whether there is a duty on the SANDF to bargain collectively with SANDU. It also made a request to the Court to compel the Minister to negotiate.[335] According to SANDU, the Minister has a duty to negotiate in terms of section 23 of the Constitution. Certain sections of the Defence Act, as well as Chapter

329 Van Niekerk C "Foreword: Enough is enough" (2002) *SANDU Publication*.
330 Heinecken L and Nel M (note 36) at 472.
331 Ibid.
332 *South African National Defence Union v The Minister of Defence and Another* 1999 (6) BCLR 615 (CC).
333 Ibid.
334 *SANDU* I (note 257).
335 Ibid.

20 of the General Regulations for the SANDF and Reserve, provided for collective bargaining in the SANDF.[336]

In her/his arguments, the Minister maintained that no such constitutional or legislative duty to negotiate exists. Furthermore, the Minister argued that, if it did, such negotiations did not extend to policy matters.[337]

Van der Westhuizen J based his judgment on the interpretation of section 23(5) of the Constitution. This section deals with the right to engage in collective bargaining.[338] Van der Westhuizen J decided against SANDU's position. The Judge first distinguished between the wording of the interim Constitution and the final Constitution with regard to collective bargaining. section 27(3) of the Interim Constitution provided for the right to bargain collectively. On the other hand, section 23(5) of the Final Constitution recognises collective bargaining as a freedom rather than a right.

In the Defence Force, this right is encapsulated in Regulation 36 of the General Regulations. This Regulation states that "military trade unions may engage in collective bargaining".[339] According to Van der Westhuizen J, the use of the words "right to engage in and may engage in" as it appears in the regulation, were important in determining whether collective bargaining is a right or a freedom. The Judge found that this emphasis had to some extent a suggestion. He came to the conclusion that section 23(5) of the Constitution simply allows for collective bargaining. According to the Van der Westhuizen J, this suggests that collective bargaining is a freedom rather than a right. As a result, there is no constitutional duty for the Minister to bargain collectively with any military trade union.[340]

336 *SANDU* I (note 257) at 247G. This is also in terms of Chapter XX (note 17).
337 *SANDU* I (note 257*).*
338 Section 23(5) of the Constitution 1996. See also *SANDU* I (note 257).
339 Regulation 36 (note 222).
340 *SANDU* I (note 257) at 942G-I.

South African National Defence Union and Another v Minister of Defence and Others **2004 (4) SA 10 (T): SANDU II**

SANDU was not satisfied with the finding of the Court of first instance in *SANDU I*.[341] It immediately sought leave to appeal the decision in the same Court. In this case, referred to as *SANDU* II, the *South African National Defence Union and Another v Minister of Defence and others,*[342] two issues were raised.[343] The first application was for a declaratory order with regard to the Minister's legal duty to negotiate with SANDU on the contents of the regulations and on all matters of mutual interest.[344] In the second application, SANDU made a request for the setting aside of various Regulations, in particular Regulations 41 and 53 of the General Regulations, on the grounds of their unconstitutionality.[345]

In its findings, the Court, dealing with the first issue, held that the duty to negotiate stems from two sources, the Constitution and the General Regulations.[346] The Court viewed collective bargaining as an integral part of the proper exercise of the section 23(5) right in the Constitution.[347] Contrary to the findings of the Court of first instance in *SANDU* I, the appeal Court held that this confers a right to engage in collective bargaining and imposes a corresponding duty on the Minister in his official capacity as employer to bargain collectively.[348] In addition, the right to collective bargaining must be viewed within the broader context of section 23(1) of the Constitution on the right to fair labour practices. The decision of Van der Westhuizen J in *SANDU* I was overturned in *SANDU* II. In this case the Court decided in favour of SANDU.[349]

The Court's reasoning in the *SANDU II* case was that the duty of the Minister to negotiate in good faith with the union is fundamental to collective bargaining.[350] Because the Constitution confers on SANDU and its members the right to engage in collective bargaining in terms of section 23(5), the conferral of such a right must, therefore, impose a correlative duty on the Minister as the

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341 Conradie decision (note 254) at para 1 and 3.
342 *SANDU* II (note 258).
343 *SANDU* II (note 258) at para 935-J and 936-A.
344 Ibid.
345 *SANDU* II (note 258) at paras 950C-D, 951-G, 952E-F and 953C.
346 SANDU II (note 258) at para 944G.
347 SANDU II (note 258) at para 947A.
348 *SANDU II* (note 258) at para 944D.
349 *SANDU II* (note 258) at paras 958F-J, 953A-J.
350 Conradie decision (note 254) at para 28.

employer. Furthermore, the Minister is bound in terms of section 8(1) of the Constitution.[351] According to Grogan, the parties to collective bargaining must be in agreement and, therefore, should display good faith in how they interact with one another.[352]

The Court held that one may consider it unfair if the Minister as an employer refuses to negotiate with an acknowledged trade union.[353] Smith J further disagreed with Van der Westhuizen J's interpretation of the phrase 'a right to engage in collective bargaining' in SANDU *II*.[354] Smith J found no reason why a right to engage in collective bargaining does not impose a corresponding duty on the Minister as an employer to engage in collective bargaining.[355]

The Court held that the reason for this is that the trade union and its members do not have the right to strike and, therefore, have no other means to enforce this right.[356] The Court stated that a right without a remedy is meaningless.[357] According to Smith J, the remedy is part and parcel of this right.[358] The Court emphasised that the General Regulations, in particular Regulation 3(c) read with Regulation 36, impose a duty on the Minister to negotiate.[359]

***South African National Defence Union and Others v Minister of Defence* (T) unreported Case No 15790/2003: SANDU III.**

SANDU launched another application, where it requested the Court for an interdict to prevent the Minister from implementing a transformation and restructuring policy without consultation through a bargaining process. [360] This application was launched in the High Court in 2003and decided by Bertelsman J in *South African National Defence Union and Others v Minister of Defence.*[361]

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351 Section 8(1) of the Constitution, 1996. This section states that the Bill of Right applies to all law and it binds the Legislature, Executive, Judiciary and all other organs of state.

352 Grogan J "It takes two to bargain: Military unions march forward" *Employment Law* (2004) 20 at 11.

353 *SANDU* II (note 258) at para 935J.

354 *SANDU* II (note 258) at para 940J and 941F.

355 Ibid.

356 *SANDU* II (note 258) at para 941B, 941H.

357 *SANDU* II (note 258) at para 941C-D, 941I-J.

358 *SANDU* II (note 258) at para 944D-E.

359 *SANDU* II (note 258) at para 944B.

360 The policy was called the "Revised Implementation Measures: Transformation and Restructuring of the Department of Defence", reference number JSUP/CHRSUP/R/107/16/P. See also *South African National Defence Union v Minister of Defence* (note 369) at para 36.

361 *SANDU* III (note 259).

The cause of action was the unilateral implementation of the transformation policy by SANDF. When the Department of Defence introduced the policy, SANDU requested that the Department bargain with it on the issue of the policy. The Department refused. SANDU then declared a dispute in the MBC, but the Department again persisted in its refusal to negotiate. SANDU then referred the dispute to arbitration. While the arbitration was pending, the SANDF indicated that it intended to implement the policy immediately.

In this case, the Court agreed with Smith J and the *SANDU II* decision[362] that SANDF did have a duty to bargain with SANDU.[363] As a result, the court made an order to interdict the Minister and prevent him from proceeding with the implementation of the Revised Implementation Measures without consulting with the union.[364] The Bertelsman decision is known as *SANDU III*.[365] The Minister appealed the case to the SCA.

***South African National Defence Union v Minister of Defence and Others* 2007 (1) SA 402 (SCA); *Minister of Defence and Others v South African National Defence Union and Others* 2007 (4) BCLR 398 (SCA):**

The battle over the right to collective bargaining was not settled by the five applications in which three separate decisions were made.[366] As a result, appeals from *SANDU I, II* and *III* were heard in the Supreme Court of Appeal (SCA) in *SANDU v Minister of Defence & Others*.[367] The applications were heard as one application because of the common legal question.[368]

SANDU was the appellant against the *SANDU I* decision.[369] The Minister was the appellant against the *SANDU II* and *III* decisions respectively. The appeals from *SANDU I* and *SANDU III* were decided by Conradie JA in *SANDU and Others v Minister of Defence and Others*.[370] The

362 *SANDU* II (note 258).
363 *SANDU* I (note 257) at para 19 and 21.
364 *SANDU* I (note 257).
365 *SANDU* III (note 259) at para 25.
366 *South African National Defence Union v Minister of Defence and Others* 2007 (1) SA 402 (SCA) (hereinafter referred to as *SANDU* collective bargaining appeal judgment).
367 *SANDU* collective bargaining appeal judgment I (note 365).
368 The legal question was whether the Minister has a legal duty to bargain collectively with the SANDU. Two Judges from the High court came to a different conclusion in SANDU I and II respectively. See *SANDU* I & II (note 235).
369 *SANDU* collective bargaining appeal judgment I (note 365) at para 2.
370 *SANDU* collective bargaining appeal judgment I (note 365).

appeal from *SANDU* II was decided by Nugent J in *South African National Defence Union v Minister of Defence and Others*.[371]

Conradie JA dealt with the interpretation of the right to engage in collective bargaining that was also dealt with in the *SANDU I* by Van der Westhuizen J.[372] Conradie JA also dealt with the interdict that was granted by Bertelsmann J in *SANDU* III.[373] Commencing with issues from *SANDU* I, Conradie JA held that the objective of the General Regulations was to ensure that the Minister should bargain with the trade union.[374] He, however, rejected SANDU's arguments that chapter XX of the regulations or the Constitution of the MBC established a judicially enforceable duty on the Minister to negotiate with the union.[375]

He held that the Constitution does not impose on employers or employees a judicially enforceable duty to bargain and that it does not contemplate that, where the right to strike is removed or restricted but is replaced by another adequate mechanism, a duty to bargain arises.[376] The Court also rejected SANDU's argument that the conduct of the SANDF during the consultations around the transformation policy constituted an unfair labour practice.[377]

Nugent JA dealt with the appeals against the orders of constitutional invalidity of certain regulations that were made in *SANDU* II.[378] He upheld all the appeals, except for the appeal for regulation 19, which provides that military trade unions shall not have the right to negotiate a closed shop or agency shop with the employer.[379]

The two unanimous decisions by the SCA did not resolve the issues of collective bargaining between SANDU and the Minister. It was still unclear to what extent the Minister as employer is obliged even to consult with the unions on matters of shared concern. As a result, SANDU sought leave to appeal the orders made by the SCA to the Constitutional Court.

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371 *SANDU* II (note 258).
372 *SANDU* collective bargaining appeal judgment I (note 365) at para 16.
373 *SANDU* collective bargaining appeal judgment I (note 365).
374 *SANDU* collective bargaining appeal judgment I (note 365) at para 27.
375 *SANDU* collective bargaining appeal judgment I (note 365) at para 29, 31.
376 *SANDU* collective bargaining appeal judgment I (note 365) at para 25.
377 *SANDU* collective bargaining appeal judgment I (note 365).
378 *Minister of Defence and Others v South African National Defence Union and Others* 2007 (4) BCLR 398 (SCA) (hereinafter referred to as *SANDF* collective bargaining appeal judgment I).
379 *SANDU* collective bargaining appeal judgment I (note 365) at para 2.

***South African National Defence Union v Minister of Defence* 2007 (5) SA 400**

SANDU was dissatisfied with the decision made by the SCA particularly the interpretation of section 23 (5) and the analysis of the constitutionality of some regulations. The application for leave to appeal was decided by the Constitutional Court in *South African National Defence Union v Minister of Defence.*[380]

The first ground that SANDU sought leave to appeal on was on the interpretation of section 23(5) of the Constitution by the SCA Court.[381] In terms of section 23(5), all trade unions have the right to engage in collective bargaining.[382] The second ground was on the constitutionality of various regulations and rights regarding labour relations in the military.[383]

The application in the Constitutional Court was heard on 1 March 2007.[384] The Court dealt with two main issues. In the first place, the Court had to answer whether there is a duty on the Minister to bargain with SANDU in terms of section 23(5) of the Constitution, Chapter 20 of the regulations, or the constitution of the MBC.[385] It also needed to determine whether the Minister is lawfully entitled to withdraw from the negotiation in the MBC unilaterally, whether the Minister can be compelled to bargain with SANDU on the content of the Regulations, and all other matters of common interest should it withdraw. In the second place, the Court had to deal with the constitutionality of the challenged regulations.[386]

On the issue raised by SANDU that there is a duty on the SANDF to bargain in terms of section 23(5) of the Constitution, the Court found that SANDU could not rely directly on the constitutional provision.[387] This is generally known as as the subsidiarity principle.[388]The regulations were enacted to give effect to this constitutional right to collective bargaining. It is not, therefore, appropriate to rely on section 23(5) of the Constitution directly and avoid the relevant legislation.[389]

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380 *South African National Defence Union v Minister of Defence* 2007 (5) SA 400.
381 *SANDU III* (note 259) para 44.
382 Section 25 (5) of the Constitution, 1996.
383 *SANDU III* (note 259) para 45.
384 *SANDU* collective bargaining appeal judgment I (note 369).
385 *SANDU III* (note 259) para 44 and 46.
385 *SANDU III* (note 259) para 45 and 47.
387 *SANDU III* (note 259) at para 48 and 52.
388 See Van der Walt AJ "Normative pluralism and anarchy: reflections on the 2007 term" CCR 2008/1. 77.
389 Ibid.

The Court held that the application for leave to appeal should have been brought in terms of the General Regulations and not the interpretation of section 23(5).[390] The challenge of the constitutionality of the relevant regulations should be to determine whether they are in line with section 23(5). The Constitutional Court did not consider this point further.[391] The Court found that there is no legal duty on the Minister to bargain collectively with SANDU on the content of the regulations itself.[392]

On issues relating to the general conditions of service as identified in Regulation 36, however, the Court held that there is a duty to bargain.[393] The SANDF is not entitled to implement any policy unilaterally.[394] Furthermore, the Minister of SANDF cannot unilaterally withdraw from the Military Bargaining Committee without first following the prescribed dispute resolution procedures, and he/she may not unilaterally prescribe conditions for the union's participation in the MBC. [395]
On the second issue, the Court also ruled that several regulations were unconstitutional. For example, there were the regulations that restrict SANDU from representing its members in disciplinary proceedings. This was considered contrary to fair labour practice.[396] The regulation denying SANDU and its members the right to petition or picket as private citizens as long as good order and discipline is not risked was also considered to be unconstitutional.[397]

The order made by the Constitutional Court suggests that once the bargaining process has commenced, it is important that the parties negotiate in good faith.[398] It is submitted that it is this decision that allowed members of the SANDF to assemble and march to the Union Buildings. Events which would later lead to the summary dismissal of members of the SANDF without fair procedures resulted in another court case. The case concerning this dismissal is discussed below.

390 *SANDU III* (note 259) at para 53 and 54.
391 Ibid.
392 *SANDU III* (note 259) at paras 57, 66 and 68.
393 *SANDU III* (note 259) at para 73.
394 *SANDU III* (note 259) at para 74.
395 Ibid.
396 *SANDU III* (note 259) at para 89.
397 *SANDU III* (note 259) at para 97.
398 *SANDU III* (note 259) at para 104.

3. THE *SANDU* 2010 JUDGMENT: SOUTH AFRICAN NATIONAL DEFENCE UNION V MINISTER OF DEFENCE UNREPORTED CASE NO 55100/2009

The legal dispute which resulted in the main *SANDU* judgment[399] began in 2009 when members of the SANDF organized a march to the Union Buildings to submit a petition listing their grievances to the President.[400] Some unexpected and unplanned activities occurred because of some misunderstanding between the SANDF, the SANDU and other stakeholders.[401]

As a result of these misunderstandings and activities, members of SANDF were given notices of administrative discharge from the SANDF.[402] Regulation 6 of Chapter XX of the General Regulations of the SANDF and Reserve in the Defence Act[403] provides that no member of the SANDF may participate in a strike under any circumstances, and that any member of the SANDF who will be found to be participating in a strike will be charged in terms of section 104 (13) and (14) of the Defence Act.[404] Instead of following the procedure recommended in the Defence Act to charge members of SANDF who took part in the strike action, the Minister of Defence directly announced the mass dismissal of more than one thousand SANDF members for their alleged participation in what she termed an 'unlawful protest' or 'mutiny'.[405] The Minister neglected to afford members of SANDF an opportunity to state their side of the story and to present a defence as required by the *audi alteram partem* rule or section 3 of PAJA.

As a result, SANDU on behalf of its members, made an application to the North Gauteng High Court requesting the Court to declare that the procedure adopted by the Minister as reflected in the 'notice of intended administrative discharge/dismissal' was unlawful and unconstitutional.[406] The Minister had authorised the summary dismissal notice and attached to it a list of names of 1500 members of the SANDF who had supposedly taken part in the strike action without following proper disciplinary proceedings or even the *audi alteram partem* rule.[407]

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399 *SANDU* 2010 judgment (note 1).
400 Ibid.
401 Ibid.
402 *SANDU* 2010 judgment (note 1) at p 2.
403 Clause 6 of Chapter XX of the Defence Act 2002.
404 Section 104 (13) and (14) of the Defence Act 42 of 2002 see also http://www.dod.mil.za and http://www.sandu.co.za (accessed 21 November 2014).
405 Ibid.
406 *SANDU* 2010 judgment (note 1) at 2.
407 *SANDU* 2010 judgment (note 1) at p 5-7, 19.

There were allegations that the notice and the list did not reflect the correct information and names of the members of Defence Force. Some of the names which appeared on the list belonged to members of the Defence Force who did not take part in the strike action. Notwithstanding, the Minister effected the dismissal of all the members appearing in the list in terms of section 59(*2*) (*e*) of the Defence Act.[408]

In the main application, the cause of action was the letter from the Minister dated 30 August 2009, which contained a notice of intended administrative discharge or dismissal of the members of the SANDF. [409] The Court was requested to declare that the procedure adopted by the respondents as reflected in that notice was unlawful and/or unconstitutional, and, furthermore, to interdict the Minister from referring the matter to the Military Bargaining Council (MBC), or the Military Arbitration Board (MAB) pending the finalisation of the dispute, to Interdict the Minister from discharging members of the Defence Force pursuant to the notice and/or similar order, bulletin or memorandum, and, finally, to interdict the Minister from administratively discharging members of the Defence Force pursuant to the notice unless a fair hearing with entitlement for parties to lead evidence and make representation is held.[410]

Briefly, the dispute between SANDU and the Minister began when the chief of the SANDF refused to grant members of SANDF leave of absence in order to participate in the organised march. A march to the Union Buildings was organised by SANDU in which members of the SANDF, who were also members of SANDU, would take part on 26 August 2009.[411] The purpose of the march was to hand in a memorandum of grievances at the presidency.[412] All administrative requirements for organising this march had been fulfilled.[413]

On 25 August 2009, however, the respondents informed the Council that all units and divisions of the SANDF had been placed on high security and standby from 25-30 August 2009 owing to

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408 Section 59(2) *(e)* of Defence Act 2002, provides for the termination of service of members of Regular Force in accordance with any applicable regulations "*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"*.

409 *SANDU* 2010 judgment (note 1) at 26.

408 Ibid.

411 *SANDU* 2010 judgment (note 1) at 3.

412 Ibid.

413 City of Tshwane Metropolitan Municipal Council (hereinafter the council). Regulation of gatherings Act 205 of 1993 provides for authorization to embark on strike actions or march. Obtaining authorisation is a prerequisite to embark on a strike action/demonstration/march.

the launch of the Bus Rapid Transport.[414] As a result, the Council then withdrew the authorisation for marching. All the applications for leave that had been submitted were also rejected by the order of chief of the SANDF. The first application was heard on 9 September 2009 on an urgent basis. An agreement was reached between SANDU and the Minister in which the Minister agreed not to dismiss any members of the SANDF who were also members of SANDU. Pending the finalisation of this matter, the urgency to hear the matter was subsequently removed.

Notwithstanding the refusal to approve leave and the withdrawal of the authorisation to march by the Council, members of the SANDF gathered at the Pretoria City Hall on the morning of 26 August 2009.[415] Members were awaiting the outcome of the urgent application that SANDU had re-submitted to the Court. Whilst the matter was in Court, another agreement was reached between SANDU, SANDF and Tshwane Metro Police that the assembled members would be moved to another venue under the supervision of the South African Police Service (SAPS) and the Metro police.[416]

This would be the place where the outcome of the urgent application would be communicated to them.

This, however, did not happen as the members of the SANDF marched to the Union Buildings and stormed the building committing various acts of misconduct and violence.[417] These acts were contrary to the agreement entered into by the SANDU and the Minister. As a result of these actions, members of the SANDF were served with a notice of dismissal on 31 August 2009 and dated 30 August 2009. The aim of the notice was to "administratively discharge or dismiss" members of the SANDF.

The main complaint by the SANDU was that fair procedure before their services of employment was provisionally terminated in terms of section 59 (2) (*e*) of the Defence Act 42 of 2002 was not followed.[418] This section sets out that the termination of the services of employment of a member

414 Bus Road Transportation (hereinafter referred to BRT).
415 *SANDU* 2010 judgment (note 1) at 4.
416 Ibid.
417 Ibid.
418 Section 59(2)(e) provides that the service of a member of the Regular Force may be terminated in accordance with any applicable regulations; 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. See also *SANDU* 2010 judgment (note 1) at 5.

"may be terminated in accordance with applicable regulations". There are no applicable regulations which refer to this section of the Act. The regulations which may be applicable are the General Regulations for the SANDF and the Reserve.[419]

Another complaint was that the acts which members were being accused of, were vague as set out in the notice of administrative discharge or dismissal.[420] There are no particulars set out in the notice which supports the allegations by the respondents regarding acts committed by the members of the SANDF.[421] SANDU made it clear that they did not seek to evade disciplinary action and that they realised that such disciplinary action could lead to the dismissal of its members from the SANDF, and also that possible criminal charges may be laid against those members.[422]

They argued, however, that this disciplinary action should be preceded by a fair process in which the *audi alteram partem* rule has to be applied before any dismissals are made or decisions regarding the conduct of the members of the SANDF are reached.[423]

The Court had to decide whether the letter which was dated 30 August 2009 was illegal and/or unconstitutional, and whether the process followed by the Minister to dismiss members of the SANDF was fair under the circumstances. The Court was not interested at this stage in answering the question of whether the dismissal was fair or not, or in deciding on the merits of the case.[424]

In its findings, the Court found that it was clear that members of the SANDF had had no opportunity to be heard prior to the notice being issued.[425] The incident at the Union Buildings took place on the 26 August 2009. Members received the notice on 31 August 2009, five days after the alleged incident had taken place.[426] The Court could not find any reference in the Minister's papers to show how national security was threatened by the conduct of the members.[427] The Court asked the question of why the SANDF had not suspended members immediately

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419 General regulations for the South African National Defence Force and Reserve, Regulation 1043 of 1999.
420 *SANDU* 2010 judgment (note 1) at 5-7.
421 *SANDU* 2010 judgment (note 1) at 6.
422 *SANDU* 2010 judgment (note 1) at 20.
423 Ibid.
424 *SANDU* 2010 judgment (note 1) at 2.
425 *SANDU* 2010 judgment (note 1) at 12, 25.
426 *SANDU* 2010 judgment (note 1) at 12-13.
427 *SANDU* 2010 judgment (note 1) at 13.

pending the outcome of an investigation, and also why the Minister had not afforded these members the opportunity to state their side of the case. [428]

The Court referred to case law and legislation to address these issues. In its reasoning, however, the Court did not use any provisions of PAJA, which is the legislation that gives effect to section 33 of the Constitution. It could be argued that, although it is not expressed in *SANDU*'s affidavits and heads of arguments, *SANDU* requested judicial review[429] of the Minister's decision on the ground of procedural unfairness. Unfair procedure is one of the grounds for judicial review in terms of section 6 (1) (*c*) of PAJA.[430] One of the functions of judicial review is to encourage administrators to be accountable for their actions when they exercise public power using legislation. Another important function is that it serves as a control mechanism over administrative discretion.[431]

Finally, the the Court granted two orders. Firstly, it gave a declaratory order that the procedure adopted by the respondents had been unlawful and unconstitutional and that those members had to be reinstated.[432] Secondly, the Court granted an interdict that the Minister should not administratively discharge or dismiss those members in terms of the notice.

The Court directed that the members should not be dismissed until the matter has been finalized by the internal process of the Military Bargaining Council (MBC). It also advised that, if the MBC failed to finalise the matter, the solution should be sought from the process of the Military Arbitration Board (MAB).[433] The members were placed on special leave until 2016 when they were recalled for prosecution for the same actions in the military Court system.[434] The military

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428 *SANDU* 2010 Judgment (note 1) at 10-13.

429 Hoexter C "Future of Judicial Review in South African Administrative Law*" South African Law Journal* (2000) 484-500 at 485.

430 Section 6 (1) and 2(c) of PAJA provides that any person may institute proceedings in a Court or a tribunal and the Court or tribunal has the power to review an administrative action which was taken in a procedurally unfair manner judicially.

431 Hertogh M and Halliday S "Judicial review and bureaucratic impact in future research" *Judicial Review and Bureaucratic Impact* (2004) at 277.

432 *SANDU* 2010 judgment (note 1*)* at 26.

433 *SANDU* 2010 judgment (note 1) at 2*.* The Military Bargaining Council and the Military Arbitration Board referred to in the order are the bodies established under regulations 62 and 75 respectively of Chapter XX of the General Regulations for the South African National Defence Force and Reserve, in the Defence Act 44 1957 and kept in force by s 106(2) of the Defence Act 42 of 2002. That chapter of the regulations deals with labour rights.

434 *The Minister of Defence v SA National Defence Force* 2012 (161) ZASCA 110 (hereinafter referred *to as SANDF* appeal judgment I, 2012*)* at para 19.

court system referred to is a system which was established by the Military Discipline Supplementary Measures Act.[435]

4. SUBSEQUENT JUDGMENTS AND EVENTS

4.1 The first appeal (SANDF Judgment I, 2012)

The Minister was dissatisfied with the decision and applied for leave to appeal in the same Court. The application for leave to appeal was denied. (The facts and reasons for the denial of the appeal do not form part of this research and will not be discussed here).

The Minister applied to the SCA , which granted leave to appeal in *The Minister of Defence v SA National Defence Force*.[436] The Minister accepted that the approach which was adopted to dismiss the members of the SANDF had been procedurally unfair.[437] As a result, the Minister abandoned the application for leave to appeal the declaratory order and persisted in the application only in relation to the interdict.[438]

The crux of the appeal was that the Court might have erred in granting this order, and the Minister believed that another Court would reach a different conclusion. The reasons for granting the interdict did not emerge from the judgment of the Court.[439] The reasons which are evident from the judgment are those directed only to why the procedure was unlawful. Furthermore, the Minister was concerned that this decision might affect the management and the administration of discipline in the Defence Force, which would have a negative impact on national security.

Another important reason was that the *SANDU* failed in the first place to establish that there was a clear right and, secondly, that the right had been, or was expected to be, infringed in the absence of similar protection by any other ordinary remedy.[440] The appeal against the orders was, therefore, upheld. As a result, the second order granted by the High Court, an interdict, was set aside.[441]

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435 Section 6 of PAJA 2000.
436 *SANDF* appeal judgment I, 2012 (note 432).
437 *SANDF* appeal judgment I, 2012 (note 432) at para 5.
438 Ibid.
439 *SANDF* appeal judgment I, 2012 (note 432) para 10.
440 *SANDF* appeal judgment I, 2012 (note 432) at para 11.
441 *SANDF* appeal judgment I, 2012 (note 432) at para 14.

The political reshuffling of Ministers, including that of the SANDF, did not make the relationship between SANDU and the Minister courteous or bring the legal disputes to an end. Five years later, this matter has still not been concluded. Continuing from the previous Minister's litigation trail, the current Minister decided to withdraw the case from the SCA . The Minister opted to use the military court to charge the members of the SANDF who had taken part in the march to the Union Buildings in 2009.[442]

It is noteworthy that the current Minister adopted a similar approach to deal with the disciplinary proceedings. The current Minister also failed to follow proper disciplinary procedures to grant members of the SANDF the right to a fair hearing. [443] The current Minister dismissed members by way of notice in a newspaper.[444] This action prompted SANDU to apply to the High Court to request the Court to decide on whether disciplinary proceedings adopted by the current Minister against members of the SANDF in terms of section 59(2) *(e)* of the Defence Act 42 of 2002 were procedurally fair. The court also had to decidewhether the Minister can use unfair processes because of the absence of regulations as mentioned in the relevant section.[445]

Du Toit AJ, sitting in the Court of first instance in this matter, granted the order that the procedure adopted by the current Minister was unfair and unlawful.[446]

4.2 The second appeal (SANDF judgment II, 2014)

The current Minister sought leave to appeal this order to the SCA, which was dismissed with costs in *The Minister of Defence v SA National Defence Force*.[447] The SCA found that the Minister had not met the requirements of procedural justice and fairness over the decision to discipline members of the SANDF.[448]

442 http://www.defenceweb.co.za *(accessed on 20 October 2014).*
443 *SANDF* appeal judgment I, 2012 (note 432) at para 2 and 5.
444 Ibid.
445 *SANDF* appeal judgment I, 2012 (note 432) at para 6.
446 Ibid.
447 *Minister of Defence v SANDU 2014 (514) SCA 102 (hereinafter referred to as SANDF* appeal judgment II, 2014 *(*herein referred as SANDF appeal judgment II, 2014) at para 2.
448 *SANDF* appeal judgment II, 2014 (note 445) at para 21.

The SCA , therefore, dismissed the application for leave to appeal and declared that the current Minister's decision to dismiss 664 members of the SANDF by way of newspaper notices[449] was procedurally unfair and unlawful.[450] It is worth mentioning that, in its arguments, *SANDU* invoked the provisions of PAJA in this case compared to its submissions in the earlier case in the high court in 2009 on the same legal issues. SANDU submitted that the Minister's action might be an administrative action.[451]

5. The current position (2015-2017)

The legal battle between SANDU and the Minister on the disciplinary hearing of members of the SANDF who had taken part in the march to the Union Building in 2009 still continues. SANDU has welcomed the decision of the SCA in 2014 that declared that the current Minister's decision to dismiss members of SANDF by way of newspaper notices[452] had been procedurally unfair, unlawful and unconstitutional.[453]

SANDU is still representing members of the SANDF who took part in the strike action in 2009 in the disciplinary proceedings in the Military Court, in terms of the relevant regulations. More than 780 members of the SANDF who took part in the 2009 strike action have been recalled to work.[454] The tug of war between the SANDU and the Minister still continues, especially on the issues related to the application of fairness by the Minister to members of the SANDF.[455]

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449 *http://www.defenceweb.co.za* (Accessed 20 October 2014) *at 1-3. See also SANDF appeal judgment II* (note 254) at para 6.

450 *SANDF* appeal judgment II, 2014 (note 445) Court order.

451 *SANDF* appeal judgment II, 2014 (note 445) para16.

452 *SANDF* appeal judgment II, 2014 (note 445) at para 6. See also http://www.defenceweb.co.za (accessed 20 October 2014) 1-3 at 1.

453 Ibid.

454 http://www.defenceweb.co.za (accessed 20 October 2014) 1-3 at 1. *SANDF* appeal judgment II,2014 (note 445) at para 1.

455 http://www.defenceweb.co.za (accessed 15 August 2017). The relationship between SANDU and the Minister is still adversarial. From 2015 July 2017 SANDU has taken the Minister to legal task. The Minister still continues to take some decisions without the application of procedural fairness. The Minister's decisions that SANDU considers to be of shared interest without consultation with the SANDU. See http://www.defenceweb.co.za articles published between 09 February, 04 and 15 March, 09 June, 15 November 2015, 04 and 28 April 2016 and 04 July 2017.

6. CONCLUSION

In this chapter, the genesis of the legal dispute and related judgment (High Court Decision of 1999),[456] the main *SANDU* judgment of 2010,[457] subsequent judgments[458] and events, the *SANDF* appeal judgment of 2012, appeal facts and issues, the declaratory order and interdict withdrawal, the *SANDF* appeal judgment of 2014, and the current situation from 2015-2017 have been discussed.

There is evidence of a trail of legal disputes that led to a chain of court decisions that had to deal with the change of the legal landscape that had been introduced by the democratic Constitution in South Africa and, in particular, in the SANDF. Court decisions that are of particular importance to this study are those dealing with the application of procedural fairness to members of the SANDF, in particular Court decisions from 2009-2014.

The competing concepts and their related legislative provisions that the courts had to tackle, which seem to form a thread that runs through all these judgments, are those of procedural fairness and other related fundamental rights versus discipline and dismissal. From the High Court decision of 2010 to the SCA judgment in 2014, SANDU submitted that the conduct of the Minister had infringed on the right to procedural fairness of members of the SANDF.

On the other hand, the Minister argued, that discipline in the SANDF is paramount. This argument was advanced in the 1999 Court decision which removed the ban of trade union in the SANDF. The view of the Minister is that the granting of fundamental rights to members of the SANDF will erode discipline in the SANDF.[459] The inability to balance individual rights to procedural fairness and fair labour practices and the idea of maintaining discipline in the SANDF has led to the Minister and SANDU being tangled in continuous court battles.

In the following chapter the concepts procedural fairness and discipline and the related legislative provisions will be discussed.

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456 *SANDU v The Minister of South African National Defence Forces* 1999 (3) BCLR 321 (T).

457 *SANDU* 2010 judgment (note 1).

458 *The Minister of Defence v SA National Defence Force* 2012 (161) ZASCA 110 (hereinafter referred *to as SANDF* appeal judgment I, 2012). *Minister of Defence v SANDU* 2014 (514) SCA 102 (hereinafter referred to as SANDF appeal judgment II, 2014).

459 *SANDU v The Minister and* Another 1999 (6) BCLR 615 (CC) at para 28-29, 32-36, 42 and 44.

CHAPTER 4

RELEVANT CONCEPTS DEALT WITH IN THE SANDU 2010 JUDGMENT AND LEGISLATIVE PROVISIONS APPLICABLE TO PROCEDURAL FAIRNESS

1. INTRODUCTION

In the previous chapter, it was demonstrated how the dawn of the democratic Constitution introduced fundamental rights to the SANDF, including the right to procedural fairness and the effects thereof. This was done by discussing Court decisions that are relevant to the genesis of the legal disputes between the SANDU and the Minister, which led to the *SANDU* 2010 judgment. The *SANDU* 2010 judgment,[460] subsequent events[461] and related appeal judgments were also discussed.[462] The above-mentionedCourt decisions form part the chain of events which unfolded from 2009 to 2017 and the connected issues regarding the application of procedural fairness.

In order to understand the analysis of the reasoning of the *SANDU* 2010 judgment which follows in the next chapter, it is important to discuss the concepts of discipline and procedural fairness that the Court interpreted together with the applicable legislative and constitutional provisions.

The Court in the *SANDU* 2010 judgment had to interpret the application of procedural fairness in terms of both section 23 and 33 of the Constitution and the importance of maintaining discipline in the SANDF in terms of section 200.[463] Furthermore, the Court had to interpret various legislative and constitutional provisions that are also relevant to the application of procedural fairness, the right to fair labour practices and the maintenance of discipline in the defence force.[464] For example, the Court interpreted sections 23, 33 and 200 of the Constitution.[465] In addition, the

460 *SANDU* 2010 judgment (note 1).

461 The Minister of Defence withdrew the appeal case that was lodged against the High Court judgment of 2010 in 2012 with a view to charge and subject all the members of the SANDF who were involved in the march at the Union Building to the internal disciplinary processes in the Defence Force. The withdrawal was welcomed by the South African National Defence Union.

462 *SANDF* appeal judgment I & II (notes 432 and 445).

463 *SANDU* 2010 judgment (note 1) at 10, 14. Section 200 of Constitution directs the Minister to manage and structure the Defence Forces as a disciplined force.

464 *SANDU* 2010 judgment (note 1) at 6, 10, 14, 22.

465 Section 33 is the just administrative clause, section 23 is the fair labour practice clause and section 200 deal with the structure, administration and maintenance of Defence Forces (note 36).

Court had to interpret section 59(2) of the Defence Act, which deals with dismissals or discharges from the SANDF.[466]

The Court had to strike a balance between the constitutional protection of the right to procedural fairness of members of the SANDF in terms of sections 23 and 33 respectively and the constitutional duty of the Minister of Defence to manage the Defence Force as a structured and disciplined Defence Force.[467] The right to just administrative action includes administrative action that is lawful, reasonable and procedurally fair.[468]

On the other hand, the right to fair labour practices includes substantive and procedural fairness.[469] The Court in the *SANDU* 2010 judgment was concerned with the unfair procedure that the Minister had followed when dismissing members of the SANDF.[470] The Minister raised the duty to enforce and maintain discipline in the SANDF as the defence.[471]

The concept of discipline in the context of Defence Forces is dealt with in various provisions of the SANDF legislative framework, in particular the Defence Act's MDSMA and its Rules and Regulations and also in Chapter XX in Defence Act 42 1957.[472] In general, discipline in the workplace is addressed through the application of the LRA and other relevant employment legislation.[473] The Court in the *SANDU* 2010 judgment had to interpret the relevant provisions of the LRA,[474] the Defence Act,[475] and the Constitution[476] to determine the applicability of procedural fairness to actions by members of the Defence Force.

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466 Section 59(2) of the Defence Act of 2002.

467 The Constitution protects the right to procedural fairness in section 33 and also gives a mandate to the Minister to maintain a structured and disciplined Defence Force in section 200.

468 Section 33 of the Constitution, 1996.

469 Section 23 of the Constitution, 1996.

470 *SANDU* 2010 judgment (note 1).

471 In their response the Minister alleged that the ill-disciplined behaviour of members of the Defence Force affected national security.

472 The SANDF legislative framework includes the Constitution, Defence Act, and MDSMA, read with its Rules of Procedure (note 7).

473 Schedule 8 of the LRA of 1995, Basic Conditions of Employment Act and Code of Good Practice.

474 *SANDU* 2010 judgment (note 1) at pages 10, 14, 23, 24 and 25. The court had to interpret sections 187 and 188 of the LRA of 1995.

475 *SANDU* 2010 judgment (note 1) at pages 9 and 19. The court also had to interpret section 59(2) (e) of the Defence Act of 2002.

476 Section 23 and 33 of the Constitution. See also *SANDU* 2010 judgment (note 1) at 11, 14 and 25.

Sections 23 and 33 of the Constitution and section 59(2) of the Defence Act are of particular importance for the analysis of the reasoning that led to the Court order[477] of the *SANDU* 2010 judgment.[478] It must be noted that, although the LRA does not apply to members of the Defence Force, some of its provisions were interpreted by the Court in its reasoning.[479]

In this chapter, the concepts of discipline and procedural fairness will be described and discussed. General legislative provisions that are applicable to the concept of discipline and procedural fairness will also be addressed. The legislative provisions that are applicable to discipline and to procedural fairness that were specifically interpreted in the *SANDU* 2010 judgment will be described and discussed.

Sections 23 and 33 of the Constitution and other relevant legislative provisions which were raised by both applicants and the respondents respectively will also be dealt with in relation to discipline and procedural fairness. Other legislative provisions, which were not raised by the parties or by the Court, but which are relevant to the applicability of procedural fairness, such as sections (3)-(7) of PAJA, will also be discussed. The effect and influence of the Constitution on the defence legislation, and the application of procedural fairness to members of the SANDF in terms of the Defence Act will be discussed briefly. This chapter will conclude with a summary.

2. DISCIPLINE, PROCEDURAL FAIRNESS AND THE APPLICABLE LEGISLATIVE PROVISIONS

In the *SANDU* 2010 judgment,[480] the Court had to deal with the issue of upholding discipline in the SANDF versus the applicability of procedural fairness to actions by members of the SANDF. According to Grogan,[481] the power of employers to discipline their employees flows from their contract of employment. The employers are entitled to take action against their employees if their misconduct amounts to a breach of contract of employment. [482]

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477 In SANDU 2010 judgment two orders were granted. The first order was that the decision of the Minister to dismiss members of SANDF, declared unlawful and procedurally unfair. The second order was an interdict. For purposes pf this study the court order refers to the first order.

478 Sections 23 and 33 of the Constitution, section 59 of the Defence Act of 2002.

479 *SANDU* 2010 judgment (note 1) at 23 and 24.

480 *SANDU* 2010 judgment (note 1*)*.

481 Grogan J *Dismissal* 2nd ed (2014) at 345.

482 Ibid.

The power of employers to discipline their employees is derived from common law and other statutes, and it must be exercised within the limit and scope of the law.[483] Discipline is enforced through various sanctions or mechanisms, including dismissal. Because dismissal is the most severe penalty that the employer can impose on the employee who is guilty of misconduct or the repetition of failure to perform despite the necessary interventions or any other breach, employers are encouraged to deal with this form of discipline in a legally acceptable manner.

In other words, workplace discipline, its fair application, processes, and fair pre-dismissal procedures should be taken seriously and be adhered to.[484] Sometimes, employers discipline employees and later find themselves in a factual and legal crisis. This is the result of hasty decisions to dismiss employees, as was the case in the matter between the Minister of SANDF and SANDU.

The right to discipline employees by the employers originates from the common law.[485] According to Anderman,[486] the right to give instruction and subsequently to discipline an employee for failure to follow the instruction finds its application in the contract of employment.[487] This right is an implied term in the contract of employment according to the common law of contracts. He argues that this common law right of employers to give instruction is futile if it is not accompanied by the power to discipline employees in terms of contract.[488]

The right of employers to discipline their employees is not only regulated by the common law in the form of the contract of employment but also by various statutes, in particular the LRA and the Code of Good Practice: Dismissal, annexed to the Act as Schedule 8.[489] In terms of common law, the employer may dismiss an employee summarily if the misconduct is serious.[490] Common law requires that, by imposing a penalty on an employee, the employer must comply with its principles.

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483 Grogan J *Workplace Law* 10th ed (2009) at 129.
484 Basson AC *et al Essential Labour Law: Individual Labour Law* 4th ed (2005) at 110.
485 Ibid.
486 Anderman SD *Labour Law: Management decisions and workers' rights* (1992) at 62.
487 Ibid.
488 Ibid.
489 LRA of 1995.
490 Basson AC (note 483) at 110.

The employer's unrestricted powers to dismiss in terms of common law was the foundation of the employer's powers to make rules and enforce discipline.[491] The LRA Code of Good Practice recognises this power. It requires that all employers should adopt disciplinary rules which will capture the disciplinary code and standards that employees must comply with in the workplace. Furthermore, when such disciplinary rules exist, then disciplinary actions against the employees must comply with those rules. Item 3 of the Code of Good Practice: Dismissals sets out the minimum guidelines for discipline in the workplace.[492]

With regard to sanction, item 3 of Schedule 8 of the Code of Good Practice: Dismissals places an expectation on employers to use corrective and progressive discipline in dealing with the misconduct of employees.[493] It is also trite that, in certain circumstances, dismissal for a first time offence may be appropriate where such an offence is of a serious nature.

2.1 Discipline in terms of the LRA 66 1995

In Labour Law, rules that apply to parties when resolving a dispute, differ depending on the nature of the dispute. The starting point when there is a dispute between employer and employee is the contract of employment.[494] This would be followed by the applicable provisions of the relevant statutes.

A dispute related to discipline in the workplace is regulated by a number of statutes, the most important being the Constitution and the LRA.[495] The LRA was enacted to give effect to section 23 of the Constitution which deals with labour related rights including the right to fair labour

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491 Ibid.

492 Item 3 of the Code of Good Practice: Dismissal states that "All employers should adopt disciplinary rules that establishes the standard of conduct required of employees." The form and content of disciplinary rules will obviously vary according to the size and nature of the organisation or employer's business. In general, a larger business will require a more formal approach to discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules and standards may be so well established and known that it is not necessary to communicate them.

493 *Transnet Freight Rail v Transnet Bargaining Council and Others* 2009 case no C644 (LAC) para 28.

494 The relationship between an employer and employee is mainly regulated by the contract of employment. This relationship is still regulated by common law to the extent that legislation is not applicable. See also *Borg-Warner SA (Pty) Ltd v National Automobile & Allied Workers Union* 1991 (12) ILJ 549 LAC at 557G.

495 The Constitution, 1996 and the LRA of 1995.

practices.[496] One of the fundamentals of fair labour practice is that no one should be unfairly dismissed. Section 185 of the LRA deals with an unfair dismissal.[497]

Schedule 8 in the LRA, Code of Good Practice: Dismissals echoes section 185.[498] This schedule provides for disciplinary procedures to be followed prior to dismissal.[499] It forms the most important statutory structure within which employers can ensure fair disciplinary procedures including the dismissal of an employee.

Item 1(3) of Schedule 8 deals with discipline in the workplace and states as the basic principle that employers and employees should treat one another with common respect.[500] Schedule 8 further provides for the procedural elements of a disciplinary hearing.[501] When an act of misconduct occurs, the employer should conduct an investigation to determine whether there are grounds for disciplinary action and subsequent dismissal.[502]

The LRA provides employers with clear guidelines in Schedule 8 of how to manage discipline when misconduct and incapacity in the workplace occur.[503] An important consideration is placed on both employment justice and the efficient operation of business. While employees should be protected from the arbitrary action of employers, employers too are entitled to satisfactory conduct and work performance from their employees.[504] In an instance where an employee fails to adhere to the code of conduct that is required by the employer, the employer can exercise powers to enforce discipline.[505] The employer's powers to discipline extends only to those acts which would be considered a breach of the contract of employment.[506]

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496 Section 23 (1) (5) and (6) (note 36). See also Labour Relations Amendment Act 6 2014.

497 Section 185 of LRA provides for the "right not to be unfairly dismissed or subjected to unfair labour practice. It states that every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice".

498 Schedule 8 is the Code of Good Practice: Dismissals contained in the LRA (note 21).

499 See section 3 Schedule 8 in the LRA of 1995.

500 See section 1 of Schedule 8 in the LRA (note 21).

501 Ibid.

502 Ibid.

503 Section 3 of the LRA of 1995 provides for disciplinary procedures to be followed prior to dismissal.

504 Section 1 (3) of Schedule 8 of the LRA of 1995.

505 Grogan J (note 479) at 129. See also Basson AC (note 483) at 75, 76 77.

506 Grogan J (note 479*)* at 350.

Section 188 of the LRA also sets out the requirements for dismissal for misconduct to be considered fair.[507] The LRA recognises that, according to the concept of progressive discipline, dismissal should be imposed only as the last measure in a chain of punishments available for misconduct.[508] The LRA further sets out two main requirements which must be complied with for a dismissal to be considered fair.[509]

In the first place, it requires dismissal to be both substantively and procedurally fair. In this regard, the LRA demands that, in order to effect discipline, there must be a reason in the form of misconduct or another form of disciplinable conduct, and that discipline be effected in a fair manner.[510] This entails that the procedure for dismissal as a disciplinary device must be fair. Sections 2, 3(4), 4 and 7 deal specifically with fair reasons for dismissal, dismissal for misconduct, fair procedure and guidelines in cases of dismissals for misconduct, which must be adhered to by the employer when contemplating disciplining an employee.[511]

Deviation from the guidelines provided in Schedule 8 in the LRA may be justified in exceptional circumstances. It should be noted that, because there are no concrete principles that have been established regarding when an employee may be fairly disciplined, case law must serve to illustrate and set precedents where the line should be drawn on a case by case basis.[512]

Further, it must be noted that the Code of Good Practice: Dismissals does not replace the employer's own disciplinary code, if it exists.[513] The guidelines provided in the Code are secondary to different guidelines provided in negotiated collective agreements.[514] It is, however, noteworthy that, in certain appropriate instances, the arbitrator or presiding officer may apply the Code of Good Practice: Dismissal instead of the employer's code.[515]

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507 Section 188 of the LRA provides for other unfair dismissals. It states that (1) A dismissal that is not automatically unfair is unfair if the employer fails to prove (a) that the reason for dismissal is a fair reason (i) related to the employee's conduct or capacity; or (ii) based on the employer's operational requirements; and (b) that the dismissal was effected in accordance with a fair procedure.

508 LRA of 1995. See also Grogan J (note 479) at 350.

509 Section 188 of the LRA OF 1995.

510 Grogan J (note 479) at 350.

511 Sections 2, 3(4), 4 and 7 of Schedule 8 in the LRA of 1995.

512 Grogan J (note 523) at 346. See also *NUM v East Rand Gold & Uranium Co Ltd* 1986 (7) ILJ 793 (IC). See also *NEHAWU obo Barnes v Department of Foreign Affairs* 2001 (6) BALR 539 (P), *Visser v Woolworths* 2005 (26) *ILJ* 2250 (CCMA), *City of Cape Town v SALGBC* 2011 (32) *ILJ* (LC).

513 Grogan J *Workplace Law* (2009) 10th ed at 132. See also *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Others* 1998 (19) ILJ 1481(LC).

514 Grogan J (note 479) at 132. See *County Fair Pty Ltd v CCMA & Other* 1999 (20) *ILJ* 2609 (LC).

515 *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Others* 1998 (19) *ILJ* 1481 (LC).

For example, in *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Others*, the commissioner held that the penalty of dismissal at first instance contained in the employer's code was too harsh.[516] The Court later held that the commissioner had erred in his/her finding, because the negotiated disciplinary code did not provide for dismissal at first instance for such an offence as the one in question.[517]

The Court in *SACCAWU and Pick n Pay Hypermarket* held that guidelines in the Code of Good Practice: Discipline are not peremptory, but that codes must be interpreted in a flexible manner.[518] A disciplinary code should not be enforced and interpreted with the strictness of a statute.[519] Care must, however, be taken to ensure the standard required in applying disciplinary measures. The standard of fairness and reasonableness can be found in the common law rules of natural justice.[520] Furthermore, the appropriateness of disciplinary action should be measured against the standard set by international law.[521]

The purpose of the Code of Good Practice is to protect employees from unfair arbitrary actions by employers on the one hand. On the other hand, it protects an employer's right to expect satisfactory conduct and performance from his/her employees in order to achieve the objective of the organisation.[522]

The Code provides employers with guidance on what is required in the policy and implementation of a fair Disciplinary Code and Procedure.[523] It is important that all employers develop rules, policies or standards of conduct in the workplace along with the related punishments.[524] These rules, policies and standards must be communicated clearly to employees.

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516 Ibid.

517 Ibid.

518 *SACCAWU and Pick n Pay Hypermarket* (2004) 25 *ILJ* 1820 (ARB). See also Grogan J (note 525) at 133.

519 Grogan J (note 479) at 134*. See also Hoechst Pty (Ltd) v Chemical Workers Industrial Union & Another* 1993 (14) *ILJ* 1449 (LAC), *Saaiman & Another v De Beer Consolidated Mines* 1995 (16) *ILJ* 1551(IC).

520 Common law rules of natural justice are *audi alteram partem* and the *nemo iudex in sua causa* which is the rule against bias. See Basson AC (note 483) at 77 and 82.

521 The most important source is the conventions and recommendations of the International Labour Organization, to which South Africa is a signatory. See Convention 158 of 1982 and Recommendation 166 of 1982. See Grogan J (note 479) at 134.

522 Basson AC (note 483) at 77 and 82. See also Grogan J (note 479) at 130.

523 Schedule 8 in the LRA of 1995.

524 Grogan J (note 479) at 135.

For example, in *Matshoba v Fry's Metals*, the employer dismissed employees for refusing to work overtime when the employer had never previously acted against employees for refusing to work overtime.[525] In *Fihla & Others v Pest Control Transvaal,* the Court stated that consistency in applying the rules is equally important, because it is possible that employees may know about rules in the Code, but they may also be under a justifiable impression that the rule will not be enforced.[526]

The content and level of formality of such rules is dependent on the nature and size of each employer.[527] Disciplinary Codes and Procedures should place emphasis on corrective discipline in the workplace and not merely on its punitive nature.[528]

2.2 Discipline in the context of defence forces in general

Discipline in the context of defence forces seems to be viewed differently from discipline in the general workplace. This is because of what could be considered the *special* nature of the defence forces.[529]

The *special* nature of the defence forces was noted in the Canadian case of *R V Généreux*. [530] The aim and purpose of the defence forces, which is mainly to protect and maintain security in any country, also has an effect of how discipline is understood.[531] It is, therefore, not surprising that the most severe manner of enforcing and maintaining discipline in the defence force, as

525 *Matshoba v Fry's Metals* 1983 (4) *ILJ* 107 (IC).

526 *Fihla & Others v Pest Control Transvaal* (Pty) Ltd 1984 (5) *ILJ* 165 (IC).

527 See section 3(1) of Schedule 8 of LRA which provides that "the Form and Content of disciplinary rules will vary according to the size and nature of the employers business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules may be so well established and known that it is not necessary to communicate them." See also Grogan J (note 525) at 132-133.

528 Grogan J (note 479) at 133-130.

529 *R v Généreux* (note 145) at 293.

530 The court held that [t]here is a need for separate tribunals to enforce special disciplinary standards in the military. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.

531 See section 200 (1) (2) of the Constitution 1996 which provides that "The defence force must be structured and managed as a disciplined military force. (2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."

opposed to the much acceptable and humane manner found in the ordinary workplace, is applied.[532]

According to Rowe, military discipline should be viewed as, and understood to be, the most severe form of professional discipline.[533] He is of the opinion that other professional bodies, employers or voluntary organisations also possess some form of discipline, which is managed and enforced differently from that of the military.[534] These organisational forms of discipline may range from an employer's oral and written warnings, suspensions and dismissal.[535]
For a serious breach of discipline, an employee may lose his ability to work in that profession again. An employee's opportunity for promotion may also be affected.[536] In contrast to workplace discipline, military discipline is enforced through military law, which is aimed at both dismissal from the military and as a deterrent function.[537]

The idea is to prevent soldiers from behaving in an undisciplined manner. The reason is that, if a soldier behaves in an undisciplined manner, the possible result of this conduct does not only affect the individual soldier as in the ordinary workplace. This conduct is likely to affect the defence force as a whole, and, by extension, also the nation.[538] Such conduct must, therefore, be deterred by criminal sanctions.[539]

Central to the concept of military discipline, and necessary for the achievement of the military order, it is an accepted practice that members of the defence forces submit completely to the superior-subordinate relationship that exists.[540] This situation is different from that in the ordinary workplace, where ordinary laws, which are applicable to workplace discipline, offer protection to

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532 *See R v Généreux* (note 145) at 293-295, where the court held that "the safety and well-being of Canadians depends considerably on the willingness and readiness of military men and women to defend against threats to the nation's security. In order to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and punishment must be more severe than would be the case if a civilian engaged in similar conduct".

533 Rowe P (note 115) at 63.

534 Ibid.

535 Ibid.

536 Ibid.

537 Westmoreland WC "Military Justice-A Commander's viewpoint" *The American Criminal Law Review* (1971) at 6-10.

538 Rowe P (note 115) at 63.

539 Gibson M "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving utility while precluding impunity" *Journal of International Law and International Relations* (2008) 4 (1) at 10.

540 Westmoreland WC (note 535) at 6-10.

the employees. Whilst the relationship between employer and employee is also unequal in nature, employees are allowed to join trade unions, which protect them against unreasonable and harsh disciplinary sanctions by employers.

Military law did not offer this protection until recently. Military law provides for military courts or martial courts, whose primary aim is to enforce military law and maintain discipline in the defence forces. This system is separate and different from ordinary labour laws. In *R v Généreux*, it was held that the purpose of a separate system of military courts is to allow the defence forces to deal with matters that pertain directly to the discipline, effectiveness and self-confidence of the military in a specific manner.[541] This is because special disciplinary standards in the military are required when compared with the ordinary workplace.[542] This is in line with the military demands of ensuring professional, effective and well-disciplined defence forces.

Consequently, it is necessary that defence forces possess an appropriate military justice system within their martial courts. This is considered to be fundamental to the creation and successful operation of defence forces.[543] It is important that a distinction should be made between the use of military courts for political purposes to dominate civilians and the legitimate use of those courts to maintain the discipline in the military.[544]

In order to maintain order in the military, the Court in the case of *United States v McCarty* held that punishment was necessary for the enforcement of military discipline.[545] Schlueter is of the view that in any defence force, discipline cannot be maintained by administering procedural justice. In order to enforce discipline, therefore, the standard of discipline should be different from the ordinary workplace discipline where procedural justice dominates.[546]

It is common knowledge that standards of guilt and innocence in military law are not different from those in civil law, although the objectives of the two systems are different. The objective of the civilian criminal court or ordinary workplace is to mainly reform and rehabilitate and to a certain

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541 *R v Généreux* (note 145) at 293.
542 Gibson M (note 537) at 48.
543 Ibid.
544 Ibid.
545 *United States v McCarty* 1960 (29) 757.
546 Schlueter D "The military justice conundrum: justice or discipline**"** *Military Law Review* (2013) 215 at 35-36.

extent deter the offenders or employees, whereas the objective of the military law is to act mainly as a deterrent.[547]

According to Westmoreland, military law must not only deter improper conduct, but it must also provide a method for the rehabilitation of as many offenders as possible.[548] In his view, the military justice system should encompass the two elements of deterrence and rehabilitation. Other commentators, such as Schlueter, describe the military justice system as, among other things, a rough form of justice and a system that is unable to dispense justice.[549]

Westmoreland, on the other hand, is of the opinion that the military system should be able to rehabilitate a delinquent soldier, and that, if rehabilitation is achieved, and the soldier is returned to duty, a valuable asset would have been preserved.[550] He argues that discipline and justice are two different concepts, each with a particular purpose.[551] Each should, therefore, accomplish its objective. According to him, the essential focus of discipline is to address task accomplishment. On the other hand, justice encompasses fairness to the individual who may be accused of military wrongdoing, and the prosecution of such an accused should only be in accordance with the law.[552]

In any national defence force, discipline forms an important part of management, and its failure might lead to dire consequences. As a result, an effective soldier is proud, tough, disciplined, and displays morale, cohesion, trust, shared soldiering values, and high standards of military conduct at all times.[553] It is not an easy task to balance the two values of discipline and justice in the defence forces.

Westmoreland states that a problem for military codes is to identify and adopt those procedures which ensure fairness and 'due process' while preserving the ability of the forces to achieve their mission, in other words, to maintain and manage a disciplined defence force unit.[554] Historically, it was assumed that the primary purpose of military justice was to enforce good order and discipline. Punishment meted out to maintain and enforce discipline was generally swift and

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547 Ibid.
548 Westmoreland WC (note 535) at 6-10.
549 Schlueter D (note 544) at 5.
550 Ibid.
551 Ibid.
552 Westmoreland WC and Prugh G "Judges in command: The Judicialised Uniform Code of Military Justice in combat" *Harvard Journal for Law* (1980) 3 at 5.
553 *South Africa Defence Review* (2015) at 12-1.
554 Westmoreland W and Prugh G (note 550) at 5.

guaranteed and was sometimes severe or arbitrary.[555] This brought into conflict the commander's responsibility for mission accomplishment and the serviceman's rights.[556]

Military justice demands discipline, in other words, action in obedience to regulations and orders. This is absolutely necessary for speedy, skilled, and decisive handling of multitudes of individuals.[557] In cases of failure to comply with this demand, the court-martial system will supply the sanction. The United States Supreme Court decision in *O'Callahan v Parker* emphasised this requirement for discipline by establishing court-martial jurisdiction over offences that have been committed by service members. [558]

In South Africa, in 1999, certain aspects of the courts-martial system were constitutionally and successfully challenged in *Freedom of Expression Institute and Others v President, Court Martial and Other.*[559] The main challenge against the court-martial system was its lack of proper procedure to dispense justice.[560] The manner in which judicial officers who presided in the court-martial handled matters was questioned as well as how these proceedings were conducted.[561]

Although the system still faces some challenges at different levels, it remains the platform for the enforcement of discipline in the defence forces.[562]

2.3 Discipline in the context of the SANDF: The Defence Act, MDSMA and Chapter XX OF Defence Act 42 2002

The context of the SANDF insofar as discipline is managed, maintained and enforced, is not different from most other countries. Before the democratic Constitution, discipline was maintained

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555 Schlueter D, (note 544) at 6. See also *United States v McCarty* 1960 (29) 757at 757. The court noted severity of punishments during World War II and that sometimes there would be proposals to discipline court members for adjudging inadequate sentences); See also Winthrop W, *Military Law and Precedents* (2nd ed) 1920 at 567.

556 Bishop JW "The Case for Military Justice" *Military Law Review* (1973) 62 215 at 218.

557 Ibid.

558 *O'Callahan v Parker* 1969 395 U.S. 258.

559 *Freedom of Expression Institute and Others v President, Court Martial and Other* 1999 (2) SA 471 (C).

560 Ibid.

561 Ibid.

562 Tshabalala L "Transformation in the Military Police Agency of the SANDF" MA dissertation (2004) at 3.

through a developed system of South African military law within the military court system.[563] Later on, after the dawn of the democratic Constitution, the Constitutional Court, in the case of *Minister of Defence v Potsane and Another,* recognised the Military Court System that enforces discipline.[564]

The Constitutional Court stated that military discipline is the foundation of a professional and efficient defence force.[565] Furthermore, it stated that discipline is founded upon respect for, and the loyalty to, properly constituted authority.[566] What the Court meant by this statement is that military courts or court martials are constituted and specially empowered to ensure that discipline in the defence force is enforced. This is in compliance with section 200(1) of the Constitution.[567]

The power of prosecution in the military court concerns three specific military offences, namely disobeying lawful command, insubordination, and conduct to the prejudice of military discipline.[568] Except for the offence of insubordination, the other offences mentioned above are not found in the ordinary workplace. In the case of *The Minister of Defence vs Potsane and Another*, Kriegler J echoed the requirements for military discipline that are found in the Defence Review.[569] He indicated that the ultimate objective of the military in time of peace is to prepare for war.[570] According to the judge, the defence force requires, as no other system does, the highest standard of discipline, which can be defined as an attitude of respect for authority.[571]

Like Rowe,[572] Kriegler J is of the view that the standard of ordinary workplace discipline and the related sanctions for transgression of discipline differ from defence force discipline.[573] Kriegler J stated that:

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563 Carnelley M (note 188) at 56.

564 *Minister of Defence v Potsane and Another Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

565 *Minister of Defence v Potsane and Another* (note 562) at para 37.

566 *Minister of Defence v Potsane and Another* (note 562) at para 38.

567 Section 200(1)of the Constitution states that "The Defence Forces must be structured and managed as a disciplined military force".

568 *Minister of Defence v Potsane and Another* (note 562).

569 *The Minister of Defence v Potsane and Another* (note 562) at para 31.

570 *The Minister of Defence v Potsane and Another* (note 562) at para 23.

571 *The Minister of Defence v Potsane and Another* (note 562) at para 38. See also James BV "Canadian Military Criminal Law: An examination of military justice" *Chittys Law Journal* (1975) 23 at 123.

572 Rowe P (note 115).

573 *The Minister of Defence v Potsane and Another* (note 562) at para 31.

> "*[f]or instance, 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*".[574]

According to Kriegler J, chapter 11 of the Constitution plays a vital role in the understanding of military discipline.[575] Military discipline, therefore, is about having an effective defence force that is capable of defending, and ready to defend, the territorial integrity of the Republic and the freedom of its people.[576]

There are various pieces of legislation that regulate discipline in the defence force.[577]
The manner in which the provisions of the SANDF legislative framework is applied appears to be different from the application of military law in other countries. This is because of the political history of South Africa.[578] This history has had a great effect on how disciplinary processes are currently applied in the SANDF.

The piece of legislation, which regulated military justice in the SANDF, was the Defence Act 1957.[579] This law contained a Military Discipline Code.[580] The defence legislative framework and the system of military justice changed after the 1996 Constitution was adopted. The prime law is currently the Defence Act of 2002.[581] The provisions of this law and those of the Constitution must be read with some provisions from the Military Discipline Code and the Military Discipline Supplementary Measures with its Rules of Procedure and Regulations which was promulgated in 1999.[582]

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574 Ibid.

575 Section 198(a) of the Constitution provision provides that "National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life". See *The Minister of Defence v Potsane and Another* (note 562) at para 38.

576 *The Minister of Defence v Potsane and Another* (note 562) at para 31

577 Before the final Constitution, the main legislation in the Defence Forces was the Defence Act 44 of 1957, Constitution of RSA, 1910. This Act was repealed and replaced by the Defence Act 42 of 2002. Section 199-202 of the Constitution also deal with South African Defence Forces.

578 The history of South Africa is not part of the study and will not be discussed. Suffice to mention that it is because of the history of parliamentary supremacy changing into constitutional democracy that SANDF also changed.

579 Defence Act of 1957.

580 MDC (note 7).

581 Defence Act of 2002.

582 Ibid.

A new chapter XX was added to the New Defence Act of 2002 in order to deal with matters related to labour law and labour disputes, which is fairly unique to defence force administration.[583] The applicants in *South African National Defence Union v South African National Defence Force* argued that, although section 59(2) of the Defence Act provides that "the services of a member of the Regular Force may be terminated in accordance with applicable regulations", there are no regulations available in the Defence Force legislative framework.[584] Chapter 14 of the Defence Review is another important document that provides guidelines on the maintenance of discipline in the Defence Force.[585]

The Military Discipline Supplementary Measures Act (MDSMA, 1999)

This is a piece of legislation that was promulgated in 1999, after some of the provisions in the MDC were found to be unconstitutional.[586] The aim of this piece of legislation is to facilitate procedures that must be followed to enforce discipline in disciplinary proceedings.[587] Military discipline in a wider sense should be distinguished from military disciplinary measures.[588]

Military discipline is aimed at developing and maintaining an effective military force that is capable of protecting, and ready to protect, the territorial integrity of the country and the freedom of its people.[589] It is not aimed at punishing individual members of the defence force for crimes committed. Neither is it aimed at maintaining and promoting law, order, and tranquillity in the society.[590] On the other hand, military disciplinary measures are aimed at minor corrective measures and the prosecution of criminal offences that are committed by individual members of the defence force who are subject to the MDC.[591] Both the Military Discipline Code and the Military

583 Defence Act of 1957, did not contain any chapter or provisions that dealt with labour issues. This is because members of the defence forces were not regarded as workers or employees, until 1999, where the Constitutional Court declared them workers for purposes of collective bargaining. In 1999 the Minister of Defence was ordered by the Court to make regulations that dealt with labour matters. Chapter XX of the Defence Act 2002 was promulgated along with its Regulations.

584 *SANDU* 2010 judgment (note 1) at 22.

585 Meyer R "Chairperson's overview" *South African Defence Review* (2014) at 5.

586 *President, Ordinary Court Martial v Freedom of Expression Institution* 1999 (4) SA 682 (CC); and *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 (2) SA 471 (C). The provisions MDC were challenged to be unconstitutional.

587 See the preamble of The MDSMA (note 7).

588 Nel M (note 55) at 36.

589 *The Minister of Defence v Potsane and Another* (note 562) at para 10. See also section 2 of the Defence Act (note 16).

590 *The Minister of Defence v Potsane and Another (*note 562*)* at para 28. See also Morris L *(*note 60) at 3.

591 The preamble of MDSMA (note 7).

Supplementary Measures Act have been promulgated specifically to deal with discipline in the defence force.

The MDC deals with discipline in the narrow context, in other words, it sets out the standard of discipline and the related punishments for failure to adhere to those standards.[592] The military disciplinary system exists to uphold good military order and discipline by using statutory powers, such as the provisions of the MDSMA, to achieve certain objectives in the Defence Force.[593] The MDSMA empowers commanders to achieve the enforcement, maintenance, and regulation of discipline in the Defence Force.[594] In addition to the MDSMA, there are Rules of Procedure and some of the provisions in the First Schedule of the Defence Act 44 of 1957 that deal with the procedure and processes to be followed when standards of discipline have been violated.[595]

The current military disciplinary system was developed within a constitutional framework.[596] This is what differentiates the legal framework of the SANDF from the military legal frameworks of other countries. In South Africa, if there is a provision in the Defence Act, the MDC or in the MDSMA that violates any right in the Constitution, such a legislative provision will be challenged for constitutional invalidity, notwithstanding the fact that such legislative provisions are meant to enforce discipline in the defence force.[597]

592 Chapter 17 of the Defence Act of 2002 deals with offences and penalties and offensive behavior. See sections 104 and 105 of MDC (note 7).

593 The South African Defence Review, 2014 at 12-1.

594 The MDSMA (note 7) where its preamble states that the 'aim of the Act is to provide for a new system of military courts with a view to improved enforcement of military discipline, and to provide for incidental matters'.

595 Chapter XX of Defence Act 2002.

596 Section 2 of the Constitution, 1996.

597 *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

Chapter of the Defence Act 42 of 2002 in the General Regulations of Defence Forces and Reserve

Chapter XX[598] was promulgated as a result of a Court decision of 1999.[599] This chapter was promulgated to deal with labour related issues and labour related disputes.[600] The aim was to address the gap that existed in the Defence Force legislative framework.[601]

Before 1999, the legislative framework of the defence force did not contain any rules and regulations that dealt with labour related matters or labour related disputes. This was because, before 1999, members of the Defence Force were not considered to be workers or employees.[602]

Although Chapter XX does not deal with discipline directly, it does indicate the importance of discipline within the labour relations environment of the Defence Forces.[603] In recognition of the importance of discipline in the defence forces, the Constitutional Court, in the case of *SANDU v The Minister and Another,* expressly excluded the right to strike when declaring that members of the defence force are workers for purposes of section 23 of the Constitution.[604]

3. PROCEDURAL FAIRNESS

The Court, in the *SANDU* 2010 judgment, had to deal with the infringement of the right to procedural fairness of members of the SANDF by the Minister.[605] Section 23 of the Constitution read together with section 188(1)(b) of the LRA recognises the importance of ensuring fair labour practices including the application of procedural fairness.[606] The application of procedural fairness

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598 Chapter XX (note 17).

599 *South African National Defence Union v The Minister and Another* 1999 (6) BCLR 615 (CC).

600 The Minister of Defence has an obligation to made the regulations in the Schedule in terms of section 87(1) (rB), read with section 126C of the Defence Act of 1957.

601 Defence Act (note 8).

602 In 1999, the Court declared members of SANDF to be employees. See *South African National Defence Union v The Minister and Another* 1999 (6) BCLR 615 (CC).

603 *South African National Defence Union v The Minister and Another* 1999 (6) BCLR 615 (CC*)* at paras 36 and 42 where the court acknowledged that the nature of the defence forces requires that the court deal with matter of labour relations carefully so as to avoid disruptions in the defence forces.

604 *South African National Defence Union v The Minister and Another* 1999 (6) BCLR 615 (CC) at paras 28, 38 and 42.

605 *SANDU* 2010 judgment (note 1).

606 Section 23 of the Constitution. Section 188 (1) (b) of LRA, 1995 states that 'a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal was effected in

guaranteed in section 23 of the Constitution applies to everyone in the category of workers and employees.[607] This meant that procedural fairness applies only to persons in a labour relationship.[608]

In this relationship, procedural fairness requires that some form of procedure and process should precede the decision of an employer to dismiss an employee.[609] Furthermore, a disciplinary hearing must be held to afford the employee an opportunity to state his or her defence.[610]

Procedural fairness protects employees from arbitrary decisions by employers to dismiss them through the operation of section 188 of the LRA, which gives effect to section 23 of the Constitution.[611] According to the LRA, procedural fairness is an independent requirement for a fair dismissal.[612] The Code of Good Practice: Dismissals, also provides the requirements to be met for a dismissal to be regarded as procedurally fair in cases that involve misconduct.[613]

Item 4 list the following requirement for procedural fairness:

(1) The employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

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accordance with a fair procedure". See also De Vos P and Freedman W (eds) *South African Constitutional Law in Context (*2014) at 636.

607 Section 23 of the Constitution.

608 Members of South African Defence Forces were for a long time not regarded as being in a labour relationship with the Department of Defence Forces. See *South African National Defence Union v The Minister and Another* 1999 (6) BCLR 615 (CC).

609 Grogan J *Dismissal* (note 479) at 263.

610 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 (27) *ILJ* 1644 at 1651.

611 Section 188 of the LRA of 1995 provides that to be fair, a dismissal that is not automatically unfair must be for fair reasons and in accordance with fair procedure.

612 Section 188(1) of the LRA of 1995.

613 Item 4 of Code of Good Practice: Dismissal in LRA of 1995.

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.
(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.[614]

If the employer has its own disciplinary code of conduct, it should adhere to it.[615] The important factor is that fair processes must be available and afforded to an employee who will be adversely affected by the decision of the employer. Employers who do not have their own disciplinary rules must adhere to the principles set out in schedule 8 which is the code of conduct: dismissals in the LRA.[616]

Procedural fairness is concerned with the ideas and rules of natural justice that are of a procedural nature. These rules are expressed in the *audi alteram partem* and the *nemo iudex in sua causa* rules.[617] Procedural fairness in the form of *the audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and, more importantly, giving them a chance to influence the outcome of those decisions.[618] Such participation is a safeguard that not only indicates respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision making and to enhance its legality/legitimacy.[619] In the context of employment, the *audi alteram partem* rule means that employers cannot take disciplinary actions against employees without affording them a fair hearing.[620]

Failure to observe the rules of natural justice renders the decision of the administrator or employer, as in the *SANDU* 2010 judgment, susceptible to judicial review. Since the adoption final Constitution, public power is controlled by the Constitution.[621]

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614 Ibid.
615 Grogan J *Dismissal* (note 479) at 264.
616 Schedule 8 of LRA of 1995). See *Black Mountain v CCMA* 2005 (1) BLLR 1 (LC). See *also Highveld District Council v CCMA* 2003 (24) *ILJ* (LAC) on the roles of disciplinary codes of conduct.
617 *Audi alteram partem* (note 145) and the *nemo iudex in sua causa*. See Grogan J (note 479) at 274. See also Hoexter C *Administrative Law in South Africa* (2012) at 363.
618 Grogan J (note 479) at 274.
619 Ibid.
620 Ibid.
621 Devenish GE and Govender D Hulme *Administrative Law and Justice in South Africa* (2001) 144.

In the *Pharmaceutical* case,[622] the Court stated that judicial review is a manifestation of the separation of powers under which Courts regulate and control the exercise of public power by other branches of the government.[623] This is a protection against the abuse of power. It must be noted that, whilst procedural fairness is regarded as an independent requirement for fair dismissal, the concept of fairness is flexible and open to interpretation and development.[624]

Fairness is applicable according the circumstances of each case.[625] Two judgments are indicative of the flexible nature of the concept of fairness. The first is that of *Van der Huyssteen v Minister of Environmental Affairs and Tourism.*[626] In this case, it was held that the right to administrative justice encapsulated in section 24(b) of the Interim Constitution must be generously interpreted.[627] Procedural fairness, as explained in section 24, was inherently a flexible concept,[628] and its application depended to a significant extent on the circumstances of each case. This gave the Courts the opportunity to act creatively in their duty to develop law. Section 33 of the Constitution also gives the Courts the opportunity to develop the applicability of this concept through section 3 of PAJA.[629]

The Court in the *SANDU* 2010 judgment had to consider the *sui generis* nature of the SANDF, the concept of discipline as understood, applied and enforced in the SANDF, and then balance it with the application of the right to procedural fairness within the context of SANDF.[630] This case could be viewed as one which could have been used by the Court as an opportunity to develop the legislative provisions relevant to the applicability of procedural fairness and those that deal with the enforcement of discipline, particularly in the defence force, because this idea is not common in that environment.

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622 *Pharmaceutical Manufacture Association of South Africa In re: the ex parte application of the President of South Africa* 2000 (2) SA 674 (CC).

623 Ibid.

624 In *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* 1998 (19) *ILJ* (LC) Labour court stated that pre-disciplinary procedures should not be interpreted too strictly. See also *Cornelius & Others v Howden Africa Ltd* t/a M & B 1998 (921) *ILJ* (CCMA).

625 Hoexter C *Administrative Law in South Africa* (2012) at 363.

626 *Van der Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C).

627 The Constitution, 1996.

628 Corder H "Administrative Justice" in Van Wyk, Dugard, De Villiers and Davis et al (eds) *Rights and Constitutionalism* (1994) 399.

629 Section 33 (1) of the Constitution, 1996 read with section 3 of the PAJA of 2000.

630 *SANDU* 2010 judgment (note 1).

According to Corder and Du Plessis,[631] the fact that procedural fairness depends on the circumstances of each case implies that, at the very least, the rules of natural justice must be complied with.[632] The test of a procedurally fair administrative action under section 33(1) of the Constitution is whether the principles and procedures which were followed were right, just and fair.[633] This test is also found in section 3 of PAJA.[634] Section 3 of PAJA provides the requirements to be met for procedural fairness, in order effect to section 33(1) of the Constitution.[635]

In the context of employment, the importance of the concept of procedural fairness and its incorporation in the LRA[636] was indicated in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA.*[637] In the same way as it was under the *audi* rule, there is consequently an obligation on the administrator or employee to act fairly in regard to persons who could be affected by any administrative decision for fear that judicial review would ensue.[638] The Court in the *Avril*

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631 Du Plessis L and Corder H *Understanding South Africa's Transitional Bill of Rights* (1994) 169.

632 Ibid.

633 Section 33 of the, 1996 encourages national legislature to enact legislation that would give flesh to its instructions.

634 Section 3 of PAJA 2000 states the following: section 3(1) administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Sub-section (2) *(a)* A fair administrative procedure depends on the circumstances of each case. Sub-section 2*(b)* In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1):
(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons in terms of section 5.
Sub-section (3) in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to:
(a) obtain assistance and, in serious or complex cases, legal representation;
(b) present and dispute information and arguments; and
(c) appear in person.
Sub-section (4) *(a)* if it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
Sub-section 4 *(b)* in determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including:
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.
(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

635 Ibid.

636 LRA of 1995.

637 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (note 608).

638 Hoexter C (note 622) at 363.

case[639] stated that, in the context of employment, justice for an employee lies in the right to a speedy and independent review of the decision of the employer to dismiss, if the dismissal was found to be defective.[640]

The Court in the *SANDU* 2010 judgment also had to determine whether the action of the Minister in dismissing members of the SANDF, as an administrative action or as an employer, complied with rules of natural justice, in particular the rule of *audi alteram partem*.[641] This could be constructed to be a form of judicial review of the Minister's decision.[642] Compliance with the requirements for procedural fairness by an administrator is not only required by PAJA,[643] which is applicable within the administrative law context; employers also have a duty to comply with the LRA which is applicable within the labour law context for their decision to dismiss.[644]

3.1 Procedural fairness in terms of LRA

The LRA was promulgated to give effect to the rights contained in section 23 of the Constitution.[645] The rights guaranteed in section 23 of the Constitution are for 'everyone'.[646] The concept of 'everyone', however, when explained in a narrow sense, means only those individuals who are in some form of an employment relationship with the other.[647] Section 188 of the LRA gives effect

639 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (note 608) at para 1646.

640 Grogan J (note 479) at 266.

641 *SANDU* 2010 judgment (note 1).

642 Hoexter mentions that courts tends to use review both as a noun and as a verb. For example, a court reviews the decision of an administrator or in other instances it is used as an applicant bringing a matter for review. The appropriate definition or explanation of judicial review is a review process which consists of judicial scrutiny of administrator's decision or action. See Hoexter C (note 622) at 518.

643 Section 1 PAJA of 2000 provides for a definition of administrative action. Section 3 of the same Act provide for the requirements that have to be complied with for an administrative action to be considered procedurally fair.

644 Section 188(1) of LRA of 1995 provides for other automatically unfair dismissals. Section 188(1) (b) states that "a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure".

645 Preamble to the LRA of 1995.

646 Section 23 of the Constitution, 1996.

647 De Vos P and Freedman W (eds) (note 604) at 637.

specifically to the right in section 23 (1) of the Constitution,[648] which includes the right not to be unfairly dismissed. [649]

It must be noted that, before 1999, members of the Defence Force did not fall under the category of 'everyone' in the application of section 23 of Constitution.[650] The reason for this was that the Defence Act 42 of 1957 did not recognise members of the Defence Force as 'employees' or 'workers'.[651] The relationship that was created between members of the SANDF and the Minister was not regarded as being an employment relationship, but rather a membership in the Defence Force.[652]

Section 126(B) of the Defence Act, which regulated the joining of, and existence in, the defence force, was challenged by SANDU to be unconstitutional. As a consequence, members of the SANDF were included in the category of 'employee' and 'worker' for the purposes application of section 23.[653] Although the LRA gives effect to the rights in section 23, this law does not apply to all categories. Section 2 of the law excludes members of the SANDF from the scope of its application.[654]

This means that section 188 of the LRA does not offer protection to members of the SANDF.[655] As indicated above, this case could be seen as one of the most important cases in the development of the defence legislative structure in that it had to interpret the relevant provisions of the Defence Act and its Regulations, if any, together with section 23 of the Constitution, to afford members of the SANDF the full protection of their right to procedural fairness. One of the

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648 Section 188 of the LRA of 1995 states that (1) a dismissal that is not automatically unfair, is unfair if the employer fails to prove:
(a) that the reason for dismissal is a fair reason-
(i) related to the employee's conduct or capacity; or
(ii) based on the employer's operational requirements; and
(b) that the dismissal was effected in accordance with a fair procedure.
(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

649 Ibid.

650 *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC).

651 Defence Act of 2002 defines those who are involved with the Defence Force as members, including officers and another ranks relevant in the SANDF.

652 See definition of member in the Definition clause in Defence Act of 2002. See also reference to 'member' instead of employee or worker throughout Defence Act (note16).

653 *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC).

654 Section 2 of the LRA of 1995 excludes members of SANDF, members of the National Intelligence Agency, members of secrete services form the scope of its application.

655 Section 188 of the LRA of 1995.

crucial arguments that was submitted by the SANDU on behalf of members of the defence force who are also its members was that, the Defence Act, read together with its Rules and Regulations, has a gap in regard to the application of procedural fairness.[656]

For purposes of this research, it is sufficient simply to mention that, whilst the LRA provides protection against the infringement of the right to procedural fairness, this law does not offer that protection to members of the SANDF. Our law rests on the principle of subsidiarity and of avoidance, which require litigants to rely first on the provisions of various pieces of legislation that give effect to the rights in the Constitution before they can rely on the rights contained in the Constitution itself.[657]

In *Fredericks v MEC for Education & Training, Eastern Cape,*[658] the Court emphasised the principle of avoidance and subsidiarity by stating that, if an employee's right can be enforced under one or other of the statutes that give effect to the rights in the Constitution, an employee cannot rely directly on the Constitution.[659] Our law requires that statutory provisions must be interpreted in accordance with the Constitution.[660]

It can be suggested that, because of this principle, members of the SANDF might not have a full protection of their right to procedural fairness, unless Courts are willing to apply PAJA to employment related disputes in exceptional circumstances such as in this case.[661] It must also be noted that where other pieces of legislation, such as LRA regulates an area of law such as labour law PAJA should serve as complimentary law as suggested by Van der Walt.[662] It must be noted that in exceptional cases, however, our law allows members of the SANDF to rely directly on section 23 of the Constitution.[663]

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656 *SANDU* 2010 judgment (note 1) at 23 and 24.

657 *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC). See Van der Walt AJ "Normative pluralism and anarchy: reflections on the 2007 term" CCR 2008/1. See also De Vos P and Freedman W (eds) (note 604) at 635.

658 *Frederick v MEC for Education and Training, Eastern Cape* 2002 (23) *ILJ* 81 (CC). The subsidiarity principle was first decided in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC). See also Brand D, De Vos P and Freedman W (eds) (note 604) at 635.

659 Grogan J "Labour Relations' in De Waal J *The Bill of Rights Handbook* 6th nd ed (2015) 472-515 at 472.

660 Ibid.

661 The PAJA of 2000.

662 Van der Walt AJ (note 388)

663 *Building Bargaining Council v Melmons Cabinets* 2001 (22) *ILJ* 120 (LC). See also Grogan J (note 701) at 475. See also Hoexter C "Just Administrative Action "in Currie and De Waal J (eds) T*he Bill of Rights Handbook* 2nd ed *(*2015) 472-515 at 649.

Van der Walt recognises that in some instances legislations such as PAJA and the LRA apply to the same set of facts simultaneously. [664] In that instance he argues that the subsidiarity principle should be that the competing or complimentary legislation should be applied to optimally give effect to the Bill of Right and to promote the spirit, purport and object of the Bill.[665] It is respectfully suggested that the court in *SANDU* 2010 judgment should have considered the subsidiarity principle and applied PAJA as a complimentary legislation to resolve the matter instead of only considering section 23(1) of the Constitution.[666] This is because applicants in this case were not challenging the constitutional validity of legislation but rather the conduct of the Minister when she dismissed members of the SANDF.[667] This implies that, according to the subsidiarity approach argued by Van der Walt, direct reliance on section 23 of the Constitution is prohibited.[668]

According to Van der Walt the subsidiarity approach offers the courts the opportunity to decide on matters without reaching a constitutional issue.[669] He reasons that this approach resonates with the principle of avoidance as laid in Mhlungu.[670] In his analysis of the subsidiarity principle laid in *SANDU* Van der Walt opines that it is simple and attractive to apply.[671] Whilst Van der Walt is of the opinion that the application of subsidiarity principle is unproblematic, he recognises that its application is attractive and justifiable in straight forward cases.[672] He argues that it would be difficult to decide how far the subsidiarity approach should be justified and applied in other cases. According to him the subsidiarity principle formulated in *SANDU* is for legislation that has been enacted to give effect to the rights in the Bill of Rights.[673] He argues that the subsidiary principle laid down in *SANDU* and justified in the *Clicks* case, prevents two parallel streams of labour law jurisprudence, one under the LRA and another under section 23(1) of the Constitution which is contrary to the principle of one system of law governed by the Constitution.[674]

It is respectufully submitted that unless the applicants in the *SANDU* 2010 judgment were challenging section 2 of the LRA which excludes soldiers from its application or the constitutional validity of the Defence Act which does not adequately protect soldiers right to procedural fairness

664 Van der Walt AJ (note 388) at 111.
665 Ibid.
666 *SANDU* 2010 judgment (note 1*).*
667 Ibid.
668 Van der Walt AJ (note 388.) at 101.
669 Van der Walt AJ (note 388) at 126.
670 Ibid. See also *S v Mhlungu* 1995 3 SA 867(CC) at para 59.
671 Van der Walt AJ (note 388) at 105.
672 Ibid.
673 Van der Walt AJ (note 388) at 106.
674 Van der Walt AJ (note 388) at 102 and 114.

and the right to fair labour practices,then the court should have considered the subsidiarity principle and considered PAJA as a complimentary legislation to give effect to the spirit, purport and object of the Bill of Rights.[675] In *Zondi v MEC for Traditional and Local Government Affairs,* the Court indicated that our law also permits substitution application of statutory provisions such as PAJA.[676]

3.2 Procedural fairness in terms of PAJA

PAJA was promulgated to give flesh to the rights in section 33 of the final Constitution.[677] Section 1 of the PAJA contains a definition of administrative action and some exclusions with regard to what constitutes an administrative action.[678] The PAJA also provides for a procedure to challenge administrative decisions.[679]

Section 33 (2) of the Constitution does not only provide for a lawful and reasonable administrative action, but it also provides that the administrative action must be procedurally fair.[680] Section 33 (2), read together with section 195 (1) (f) of the Constitution, ensures accountability for actions by administrators when they exercise power and when they perform an administrative action.[681] Section 33(2) does not only ensure accountability, but it also extends the ambit of judicial review of other classes of administrative action which might otherwise not be subject to judicial scrutiny.[682]

Section 6 of PAJA provide safeguards for beneficiaries of the right in section 33 of the Constitution against the abuse of power in the form of judicial review.[683] Procedural fairness is listed as one of

675 *SANDU* 2010 judgment (note 1*).*

676 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC). See also *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at 75-76.

677 The PAJA of 2000.

678 Section 1 of the PAJA of 2000.

679 Section 3 of PAJA, 2000. See also Van Zweel M, "The relationship between PAJA and the LRA with specific reference to *Chirwa v Transnet LTD & Others* 2008 (2) BLLR 97 (CC)" (LLM dissertation 2008 Potchefstroom) at 16.

680 Section 33(2) of the Constitution, 1996.

681 Section 33 (2) and section 195, of the Constitution, 1996.

682 Section 195 (1) (f) specifically provides that Public administration must be governed by the democratic values and principles that are enshrined in the Constitution, which includes as a principle an accountable Public administration.

683 Section 6 of the PAJA of 2000.

the grounds for review. Section 6(2) (c) allows a Court to review administrative action on the grounds that the action was procedurally unfair.[684]

In the case of *Mandrasa Anjuman Islamia v Johannesburg Municipality,* the issue of judicial review was dealt with, and the Court stated that, in some instances, special statutory review may operate as an alternative to review under the PAJA.[685] In this way, litigants are provided with a choice of which regime of review to use to challenge a procedurally unfair administrative action.

Section 3 of PAJA is an important legislative provision in so far as the application of procedural fairness is concerned.[686] It essentially explains procedural fairness in our administrative law context. Further, this sectionprovides the requirements which must be met for a procedurally fair administrative action.[687] Failure to comply with one of the requirements listed in section 3 renders the action procedurally unfair, unless the administrator had opted to follow the procedure listed in section 3(5) of PAJA.[688]

In the *SANDU* 2010 judgment, it was important firstly to determine whether the decision of the Minister to dismiss members of the SANDF constituted an administrative action in terms of section 1 of the PAJA.[689] This would ascertain whether PAJA will be applicable in this case.[690] Once it has been established that the action to dismiss constitutes an administrative action, section 6 of PAJA will provide for the review of that action if it were either substantively or procedurally unfair or both and when such action materially and adversely affects the rights or legitimate expectation of any person.[691]

It is important to note that, although procedural fairness is an independent ground for review, PAJA recognises that the concept of 'fairness' is flexible. Section 3 (3) of PAJA provides that an administrator can deviate from the procedures set out in section 3(2).[692] Section 3(2)(a) of PAJA

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684 Section 6(2) of the PAJA of 2000.

685 *Mandrasa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727.

686 Section 3 of the PAJA of 2000.

687 Ibid.

688 Section 3(5) of the PAJA of 2000 provides that "[w]here an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

689 Section 1 of the PAJA of 2000 contains the definition of an administrative action and the exclusions.

690 If the Minister's decision falls under one of the listed exclusions in PAJA (*aa*)-(*ff*), then section 6 of PAJA will not find application.

691 Section 6 of the PAJA of 2000.

692 Section 3(2) and (3) of PAJA of 2000.

states that a fair administrative procedure depends on the circumstances of each case.[693] The recognition that fairness is a flexible concept and should, therefore, be applied according to the circumstances of each case was further illustrated by the SCA in the case of *Metro Project CC v Klerksdorp Local Municipality*.[694]

Section 3 of the PAJA and the content of fairness

A number of South African cases recognise that what makes a hearing 'fair' has always depended on the circumstances of each case.[695] The *SANDU 2010* judgment would not have been an exception to the rule had the Court considered applying PAJA to its reasoning. This flexible approach is further recognised by PAJA in section 3 (2)(a) which echoes the principles of common law in a number of respects. It has already been indicated above that, before section 3 can be considered, it must first be established whether the conduct complained of constitutes an administrative action in terms of section 1 of PAJA.

The Court in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* held that it is important to establish and qualify the conduct as an administrative action because not every exercise of public power constitutes administrative action as indicated in section 1(i) (aa)-(ff) of PAJA. [696]

Section 1 defines administrative action to include any decision or failure to take a decision by an organ of state when exercising public power in terms of any legislation.[697] The exercise of certain executive powers and legislative and judicial functions is excluded from the definition of administrative action. Section 3 applies to all administrative actions not listed under section 1(i) (aa)-(ff). Section 3(1) – (5) of PAJA addresses the issue of the application of procedural fairness, and section 6 attaches the consequences of failure to adhere to section 3.[698]

693 Section 3(2)(a) of PAJA of 2000.

694 *Metro Project CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at para 13.

695 Section 3(2)(a) of PAJA. See also *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231-3, *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 39.

696 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 *(*CC) paras 41-42, *See also Shoprite Checkers (Pty) Ltd v Ramdaw NO* 2000 (7) BLLR 835 (CC) paras 12-13*.*

697 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 *(*CC) paras 41-42.

698 Section 3 and 6 of the PAJA of 2000.

Section 3(5) of PAJA authorises the administrator to follow a different but fair procedure. It allows an administrator to act in accordance with a different procedure when he or she is empowered by law to follow a different procedure. This procedure, however, must still be fair although different and consequently it must comply with section 3(2).[699]

3.3 Procedural fairness in the context of SANDF's legislative framework: the Defence Act, MDSMA and chapter XX of the Defence Act 42 of 2002

The application of procedural fairness in the defence force was viewed differently from a civilian perspective. The reason was the aim and objectives of the defence force. This made the application of procedural fairness problematic. According to Westmoreland, most corrective measures were done outside the system of military justice because of the practice of commanders' discretion that existed in the military.

The commanders maintained discipline by exercising their discretion rather than using the law.[700] He further holds the view that, although corrective measures were done outside military justice, some form of fairness was applied.[701] He is of the opinion that the idea that discipline and justice can be balanced, particularly in the military environment, is a misconception. He reasons that the two are inseparable.[702]

According to him, an unfair or unjust corrective measure could never promote the development of discipline.[703] No matter how an individual was corrected, therefore, fairness or justice has always been a necessary benchmark.[704]

In South Africa, section 102 of the Defence Act makes provision for the appearance of persons at the board of enquiry. [705] Upon close examination, it is evident that section 102 (6)-(8) aims to offer members of the SANDF some form of procedural fairness. Sub-section 6 (a) and (b) provides that the person who is likely to be affected by the decision of the board of enquiry should

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699 *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 All SA 175 para E.
700 Westmoreland WC (note 536) at 6-10.
701 Ibid.
702 Ibid.
703 Ibid.
704 Ibid.
705 Defence Act of 2002.

give oral evidence and must also be present when others are giving evidence which might negatively affect him/her.[706] Sub-sections 7 and 8 deals with notification of the impending disciplinary hearing and the right to legal representation.[707]

To a certain extent, this section resonates with section 3 (1) of PAJA discussed above.[708] It should be noted that, unlike section 3 of PAJA, section 102 is silent on the detailed manner in which this process must unfold.[709] In other words, it could be suggested that section 102 of the Defence Act was drafted vaguely. This may be one of the reasons why decisions of the Minister of Defence are in many instances challenged for not complying with the application of procedural fairness.[710]

For example, in the recent case of *Minister of Defence & another v Mamasedi,* the SCA upheld a High Court decision to set aside the decision of the Minister of Defence and the board of enquiry not to reinstate the respondent (Mr Jonas Mamasedi).[711] This follows from a High Court case in which the Minister of Defence and the board of enquiry were ordered to reinstate a member of the SANDF (Applicant), who had been dismissed in terms of section 59(3) of the Defence Act because he had failed to report for duty and was considered to be absent without leave.[712]
The board of enquiry failed to follow procedures and to apply procedural fairness.[713] The SCA upheld the decision of the High Court. The SCA held that the right to procedural fairness encapsulated by section 3(2) of PAJA applies to the applicant, and that the applicant had the right to give oral evidence, to call witnesses, and to be legally presented.[714] This decision also indicates the gap that exists in the legislative framework of the SANDF. Section 103 of the Defence Act excludes the application of section 102 (7) and (8) from the proceedings of the board of inquiry dealing with absence without leave from the defence.[715]

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706 Section 102 (6) (a) and (b) of Defence Act of 2002.
707 Section 102 (7) and (8) of the Defence Act of 2002.
708 Section 3 of the PAJA of 2000.
709 Section 3(2) (b) of the PAJA of 2000 provide a detailed process for compliance with application of procedural fairness.
710 *Minister of Defence v Mamasedi* 2018 (2) SA 305 (SCA); 2017 622 ZASCA 157.
There are a number of case law which indicates that the Minister acted in a procedurally unfair manner. See *SANDU* 2010 judgment (note 1*). S*ee also *Dhlamini v Minister of Defence & another Dhlamini v Minister of Defence & Another* 2004 (25) ILJ 212 (T).
711 *Minister of Defence v Mamasedi* (note 690). *S*ee also *Dhlamini v Minister of Defence & Another Dhlamini v Minister of Defence & Another* 2004 (25) ILJ 212 (T).
712 Section 59(3) of the Defence Act of 2002 provides for a dismissal of a member of SANDF who absent himself/herself from official duty without permission for a period that exceeds 30 days.
713 *Mamasedi v Minister of South African National Defence Forces* 2013 case no 64308/13. See also *Minister of Defence v Mamasedi* (note 690).
714 *Minister of Defence v Mamasedi* (note 690) at para 21-22.
715 Section 103 of the Defence Act of 2002.

The SANDF's Legislative Framework has been re-worked since the dawn of a democratic Constitution in order to address the difficulty related to the application of procedural fairness.[716] This is not a task that can be completed in one sitting. Events as they occur will guide the development of SANDF legislation, in particular legislation dealing with employment relations, such as Chapter XX of the General Regulations for the South African National Defence Force and the Reserve.[717]

MDSMA is another piece of legislation that was developed with a view to curbing the unconstitutional manner of enforcing discipline in the Defence Force, such as some sections of the Military Discipline Code that existed before the 1996 Constitution were repealed.[718] The MDSMA was promulgated with the aim of creating a new system of military courts, improving military discipline, and providing for matters that are incidental thereto.[719] One of the main objectives of this Act is to ensure a fair military trial so as to enable the accused access to High Courts.[720]

The fairness test and requirements that are applicable in this Act are not relevant to this study because this Act is the equivalent of the Criminal Procedure Act which deals with criminal matters and not labour related issues or administrative actions. Although this Act provides for the creation of the Military Arbitration Board and the Courts Martial, which are the forums that address matters of discipline within the Defence Force, there are no sections that deal with the application of procedural fairness, other than the section that refers to the right to legal representation.[721]

Chapters 4-6 of this Act deals with pre-trial, trial, and post-trial procedures.[722] The Defence Act 1957 contained section 104 which was retained when this Act was repealed and replaced by the

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716 On 8 February 1999, a joint committee meeting on Defence regarding Draft Defence Bill, Military Discipline Code and Military Ombudsman was held. See http://www.pmg.org.za (accessed 07 July 2014). See also https://pmg.org.za/committee meeting (accessed 04 December 2017) on the briefing held on 18 August 1999 regarding the introduction and presentation of General Regulations introducing labour Right in the SANDF to give effect to section 23 of the Constitution,1996.

717 Chapter XX (note 7).

718 Certain sections of Defence Act of 1957 were kept intact and Regulations made in terms of those sections. For example section 87 (1)(rB) read with section 126C.

719 Preamble of MDSMA (note 7).

720 Section 2 of MDSMA (note 7).

721 Section 23 of MDSMA (note 7).

722 Sections 29-32, 33, 34-37 of MDSMA (note 7).

Defence Act 2002.[723] Section 104 is the Military Discipline Code. Labour related offences are not dealt with in terms of the provisions of section 104.[724]

Chapter XX was promulgated with the aim of providing fair labour practices, including the establishment of trade unions, collective bargaining, and the creation of sound and healthy employment/service relations.[725] This Chapter is divided into parts 1-6. Part 4 of Chapter XX provides for the establishment of the MBC, which is the forum to deal with labour related grievances and disputes related to collective bargaining.[726] Part 5 of the chapter provides for the establishment of the MAB.[727] This is a forum or body that deals with labour related disputes by way of an arbitration process.

Regulation 81 provides for the application of review to the High Court in the event that the MAB fails to resolve disputes satisfactorily.[728] The chapter is silent on the procedure for the application of procedural fairness. This is part of the arguments that were submitted by the Applicant in the *SANDU 2010* judgment.[729] This is an indication that there is still a gap in South African National Defence Force Law, particularly in the Regulations dealing with the application of procedural fairness in the Defence Force.

4. EFFECT OF THE CONSTITUTION ON THE SANDF LEGISLATIVE FRAMEWORK, IN PARTICULAR THAT REGULATING THE APPLICATION OF THE RIGHT TO PROCEDURAL FAIRNESS

One of the main effects that the introduction of fundamental rights brought about in the SANDF was the omissions that were created in the legislative framework of the defence force. Some of the laws applicable to the defence force were repealed because they were found to be unconstitutional as they infringed on one or more of the fundamental rights in the Constitution.[730] Some provisions in the Defence Act did not comprehensively give effect to the rights in the Bill of

723 Defence Act (note 16).
724 Section 104 in the Defence Act of 195).
725 Regulation 3 of Chapter XX (note 7).
726 Part 4 of Chapter XX consist of Regulations 62-71 (note 7).
727 Part 5 of Chapter XX consist of Regulations 72-80 (note 7).
728 Regulation 81 in Chapter XX (note 7).
729 *SANDU* 2010 judgment (note 1) at 6 and 9.
730 Defence Act of 1957.

Rights.[731] Some rights in the Bill of Rights in the Constitution were not covered by defence force legislation until a legal challenge ensued.[732]

It is evident from the discussion above that the Minister made great strides to align defence force legislation with the demands of the Constitution.[733] However, there are still omissions that are apparent in the defence force legislation, particularly in the regulations dealing with labour relations and procedural fairness.[734]

Section 2 of the Constitution is the supremacy clause, which should be complied with by all laws and conduct, including the conduct of the Minister and defence force legislation.[735] Section 8 of the Constitution applies to all laws, binds the judiciary, executive, legislature, and all organs of state in the three spheres of government.[736] Neither defence force legislation nor the conduct of the Minister is exempt from the application of section 8 of the Constitution.[737]
This means that when any Court is adjudicating a dispute that involves the Defence Force or its legislation, the court has to interpret and develop such legislation paying attention to sections 2 and 8 of the Constitution.[738] In other words, the Court must assist the Minister in creating regulations that will ultimately bring the defence force legislation wholly in line with the Constitution. The Court in the *SANDU* 2010 judgment was supposed to have considered the *effect* that the Constitution has on the Defence Force when it adjudicated the matter (my emphasis). Furthermore, the Court was supposed to have contributed to the development of the

731 Section 33(3) of the Constitution, 1996.

732 Although a Schedule was included in the Defence Act as Chapter XX to give effect to the section 23 right of the Constitution, this chapter does not adequately address issues related to the applicability of procedural fairness. See *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC).

733 Military Ombud office was created through military Ombud Act 4 of 2012.

734 The applicants argued that, although section 59(3) of the Defence Act states that a member of the defence forces will be dismissed from the forces, this dismissal must be done in accordance with a procedure in applicable regulations; there are, however, no regulations that provide for procedures to apply procedural fairness before dismissal. Another example is the case of *Mamasedi v Minister of South African National Defence Forces* (note 693). See also *Minister of Defence v Mamasedi* (note 690) where section 102 of the Defence Act 2002 was followed to dismiss a member of Defence Forces. This section does not adequately provide the procedure to be followed to ensure compliance with application of procedural fairness.

735 Section 2 of Constitution, 1996.

736 Section 8 of Constitution, 1996.

737 Ibid.

738 Section 39(2) of the Constitution gives direction on how any court, forum or tribunal should discharges its duty when it interprets and develop any law. Section 2 of the Constitution is clear on the consequences of any conduct or law that are inconsistent with it. Section 8(3) (b) explains what the court must do in order to give effects to the rights in the Bill of Rights.

defence legislation, rules and regulations by using the provisions of PAJA, as will be shown in the next chapter.

5. CONCLUSION

In this chapter, the concepts of discipline and procedural fairness, which are relevant to the *SANDU* 2010 judgment case, have been discussed. These are the concepts that were submitted and argued by the Applicants and Respondents respectively. Some of the applicable legislative and constitutional provisions that were interpreted by the Court in its reasoning were also discussed here. Other relevant sections of the LRA, PAJA, the Constitution, the Defence Act's MDSMA and Chapter XX that were not interpreted by the Court were also discussed. The effect of the Constitution on the defence force laws, particularly those that regulate the application of procedural fairness, was briefly discussed.

In the following chapter, the reasoning of the Court in *SANDU* 2010 judgment will be examined. The approach that the Court followed when it interpreted the legislative and constitutional provisions discussed in this chapter will also be examined. The Court did not interpret the provisions of PAJA. Section 3 and other relevant sections of PAJA will, however, be analysed to show how the Court could have contributed to the development of defence force laws, rules and regulations that deal with the application of procedural fairness.

Lastly, the chapter will show why it is justifiable to apply administrative law in the form of PAJA to a dismissal case in the SANDF. In addition, it will be shown how the provisions of PAJA could be used to develop rules and regulations that will regulate the applicability of procedural fairness in the SANDF.

CHAPTER 5

APPLICABILITY OF PROCEDURAL FAIRNESS THROUGH PAJA: AN ANALYSIS OF THE REASONING IN THE SANDU 2010 JUDGMENT

1. INTRODUCTION

In the previous chapter, the conceptual structure of discipline, procedural fairness and dismissal and their applicable legislative provisions were discussed. The previous chapter showed that the task of the Court in *SANDU* 2010 to apply and interpret all relevant legislative provisions was not easy. The two main concepts of discipline and procedural fairness formed the basis of the arguments for both applicants and respondents in this case.[739]

Because of the context of the defence forces discussed in chapter 2, the right to procedural fairness is inadequately provided for by the SANDF legislative framework. Discipline, on the other hand, is emphasized in the applicable legislation. The same legislation does, however, not sufficiently make provision for the standard and requirements to be followed before any action or decision to enforce discipline is taken.

In the *SANDU* 2010 judgment,[740] where the infringement of the right to procedural fairness was the cause of action, the Court did not consider the provisions of PAJA, although sections 23 and 33(1) of the Constitution were mentioned in passing.[741] The common law rule of *audi alteram partem* was also briefly mentioned and interpreted in the light of the conduct of the Minister.[742] This is rather unusual because, in order to review a decision, such as this one on the basis of section 33 of the Constitution, the requirements in section 1 of PAJA have to be complied with.[743]

739 *SANDU* 2010 judgment (note 1).
740 *SANDU* 2010 judgment (note 1) at 1-28.
741 *SANDU* 2010 judgment (note 1) at 6, 11.
742 *SANDU* 2010 judgment (note 1*)* at 10.
743 Section 1 of the PAJA of 2000.

Perhaps this was because the applicants (SANDU) did not mention PAJA in their notice of motion and affidavits. Notwithstanding, PAJA still remains the pathway to rely on section 33 of the Constitution and to judicial review.[744] This suggests that, once section 33 is relied upon, the provisions of PAJA, which is the law enacted in terms of section 33(3) of the Constitution, should be applied, unless the action in question is expressly excluded by section 1.[745] This point was confirmed in the case of *Bato Star v Minister of Environmental Affairs*[746] where it was held that there is no direct access to section 33 of the Constitution other than through PAJA.[747]

The Court, in the *SANDU* 2010 judgment, commendably found in favour of the applicants and ordered the Minister to reinstate all members of SANDF who had been dismissed.[748] The Minister was given an opportunity to subject members of the Defence Forces who were involved in the alleged misconduct to internal disciplinary processes.[749] As was mentioned above, the order of the court is commendable. It is the approach that the court followed when adjudicating this matter that this chapter seeks to analyse.

This chapter will show that PAJA should find application in dismissal cases of members of SANDF notwithstanding the existing views that administrative law should not be applied to dismissal cases of other public servants.[750] To achieve this, this chapter will analyse the *SANDU* 2010 judgment critically and demonstrate why the Court should also have, in addition to the labour law provisions and case law, considered the applicability of PAJA to this case.

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744 Hoexter C *"The completion of Administrative Law"* http://mobile.wiredspace.wits.ac.za/bitstream (accessed 14 January 2015).

745 Definition of administrative action in section 1 of the PAJA of 2000.

746 *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 CC at paras 21-25.

747 Ibid.

748 *SANDU* 2010 judgment (note 1) at page 26.

749 *The Minister of Defence v SA National Defence Force* 2012 ZASCA 110 para 1(herein referred *SANDF* appeal judgment I, 2012). *The Minister of Defence v SA National Defence Force* 2014 ZASCA 102 (herein referred *SANDF* appeal judgment II, 2014) at para 2.

750 Richards S "Administrative Law in public sector employment relationships" 2008 *SALJ* 307 at 307. *Police Union v National Commissioner of the SA Police Service (SAPU*) 2005 (26) *ILJ* 2403 (LC), *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (POPCRU) 2006 (2) ALL SA 175 (E), Grogan J Administrative law in Labour Matters *Annual Review of South African Law* (2005) 605-667, Miscke C Administrative action and employment law: Do employeess in public sector enjoy additional remedies? " *Contemporary Labour Law* (2006) 15.

It will be argued that the court should have at least made an evaluation of the significance of administrative law jurisprudence in relation to public sector employment relationships in general and in particular in relation to the context of the SANDF.[751] This chapter will also argue that the Court could have discharged this adjudicative role with a view to developing a model for addressing matters where different labour related disputes are decided under both labour law and administrative law.[752] The Court could have taken into consideration the applicable provisions of both PAJA and LRA, and the inter-relatedness, interdependence and indivisibility of sections 23 and 33 guaranteed in the Constitution.[753]

The analysis of the approach of the Court will be conducted through the hypothesis that the Court asked and answered four questions to determine whether PAJA should or should not find application in this matter. The first question is: what is the link between the applicability of PAJA to dismissal cases of members of SANDF?; the second question is: what is the relevance of PAJA to dismissal cases of members of SANDF? The third question is: what are the views regarding applicability of PAJA to dismissal cases? And, lastly, the question is whether PAJA should find application to dismissal cases in the context of the SANDF?

To answer these questions, the Court would have dealt with: the available legislative framework which regulates procedural fairness and dismissals in the SANDF; the lacuna that seems to exist in this SANDF legislative framework; the differences between other public service employees and members of the SANDF; different views on the debate and different approaches followed by various judges in dealing with this issue in judgments such as the *Chirwa v Transnet Ltd & Others;*[754] *Gcaba v Minister for Safety and Security & Others;*[755] and other relevant Constitutional Court judgments that dealt with the question of whether administrative law should find application in dismissal cases.

Finally, the Court would have had to interpret sections 1; 3 and 6, read with section 33 of the Constitution, to answer the important question of whether or not PAJA should find application in this matter.

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751 Olivier M "*The inter-relationship between administrative law and labour law: Public sector employment perspectives from South Africa*" (2015) 30 *SAPL* 319-346 at 319.

752 Ibid.

753 Ibid.

754 *Chirwa v Transnet Ltd & Others* 2008 (2) BLLR 97 (CC).

755 *Gcaba v Minister for Safety and Security & Others* 2010 (1) SA 238 (CC).

2. ANALYSIS OF RATIO DECIDENDI (SANDU 2010 JUDGMENT)

Assuming that the court in the *SANDU* 2010 case had asked itself the question, what is the link between the dismissal of members of SANDF and the PAJA, the court would have had to deal with the application of procedural fairness to members of the SANDF through LRA, Rules and Regulations in Chapter XX of the Defence Act, and MDSMA to answer the question.[756]

The legal position of public sector employees who challenge the employment decision taken by the organ of state in its capacity as employer has been a serious challenge for a number of courts.[757] This is despite the fact that a number of Constitutional Court judgments have dealt with the issue of whether employment related decisions in the public sector context do or do not amount to administrative action, and whether administrative law should be applicable to resolve such disputes.[758]

The legal uncertainty around this issue is caused by a number of factors, including the view against forum-shopping; jurisdiction; and the question of whether public service employees enjoy extra protection.[759] According to Grogan, the uncertainty that continues to reign over the possible connection between the constitutional right to fair administrative action in PAJA and labour legislation designed to give effect to those rights has resulted in the emergence of two distinct approaches.[760] He opines that the first approach draws an inflexible distinction between administrative law and labour law, while the second approach regards the two branches of law as being mutually reinforcing.[761]

The ourt could have had to address the fact that the LRA is not applicable to this case and then moved on to interpret the relevant provisions of Chapter XX, MDSMA and Rules and Regulations of the Defence Force.[762] The court addresses the position of the LRA by interpreting the decision

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756 LRA of 1995, Chapter XX and MDSMA (note 7).
757 Olivier M (note 730) at 319.
758 Brandt D and Murcott M "Administrative law" *Annual Survey of South African Law* (2014) 46-74. See also *Masetlha v President of South Africa & Another* 2008 (1) SA 566 (CC).
759 Olivier M (note 730) at 319.
760 Grogan J (note 654) at 605.
761 Ibid.
762 Section 2 of LRA of 1995.

of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation mediation and reconciliation and others*.[763]

The connection of the *SANDU* 2010 judgment to the applicability of PAJA could be inferred from the express exclusion of members of the SANDF from the application of the LRA.[764] Both PAJA and the LRA were promulgated to protect the right to just administrative action, the right to fair labour practices in general, and the right to procedural fairness in particular.[765]

Pillay argues that the common law principles of natural law have leaked from administrative law into labour law,[766] and, furthermore, that the Constitution has injected a new aspect into the relationship between administrative and labour law through sections 23 and 33, both of which protect procedural fairness. Consequently, it now seems possible for the same facts to give rise to causes of action under the Constitution, labour legislation and PAJA.[767]

It is for the above reasons that the Court could have considered the application of PAJA to the *SANDU* 2010 judgment. It could also be argued that, because *SANDU* made an application requesting the Court to review the decision of the Minister judicially, the Court could have considered the interpretation of section 33(3)(a) of the Constitution[768] read with 6 (2) (c) PAJA.[769] The reason is that a review in terms of section 157(2) (a) and (b) of the LRA cannot find application in this instance.[770]

According to Loots, the idea that administrative law and labour law could be applied to same set of facts is supported by the constitutional link of sections 23 and 33 respectively. Both sections protect the right to procedural fairness. She is of the opinion that the two disciplines aim to create

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763 *SANDU* 2010 judgment (note 1) at 12. See also *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Reconciliation and Others* (note 608) at 1651.

764 Section 2 of LRA of 1995.

765 See Grogan J (note 654) at 330.

766 Pillay D "*PAJA v Labour Law*" 2005 (20) *SAPL* 413-426 at 414.

767 Ibid.

768 Section 33(3) PAJA (note 2).

769 Section 6(2) (c) of PAJA (note 2) states that a court or tribunal has the power to review an administrative action judicially if the action was procedurally unfair.

770 Section 157 (2) (b) of LRA (note 21) provides that the Labour Court has concurrent jurisdiction with the High Court in respect of or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and over any alleged dispute on the constitutionally of any executive or administrative act, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer.

a just society and endeavour to bridge the lacuna between law and justice.[771] These interrelated objectives embrace the concept of fairness as the underlying principle of both sections, which is ultimately the idea of constitutional justice. The co-operative character of administrative law as procedural rules functions in combination with substantive rules which are supplied by other areas of law, including labour law.[772]

After the Court had established the connection between the possible application of PAJA to dismissal cases and this particular dismissal case, the Court would then move on to consider the applicable defence force legislation such as MDSMA and Chapter XX.

The challenge posed by the application of these two statutes is that they do not provide for procedural fairness. Chapter XX defines only what unfair labour practices means in its definition clause.[773] It is at this stage that the Court would have realised that there is a lacuna that seems to exist in the SANDF legislative framework, particularly in the provisions that are supposed to regulate the applicability of procedural fairness.

To confirm this position, the applicants argued that, although section 59(2) (e) of the Defence Act states that "the service of a member of the regular force may be terminated in accordance with any applicable regulations", there were no available Regulations in the SANDF.[774] The implication of this submission is that the Minister can impose the sanction of dismissal of members of the SANDF only after any relevant regulations have been applied.

The Minister could, however, not do so, because there are no regulations that provide for the procedure to be followed before a sanction of dismissal. This procedure is provided by section 3 of PAJA discussed above.[775] Following the submissions by the applicants on the issue of the non-availability of regulations, the Court would have realised that the available legislative provisions in the SANDF are inadequate to address the issue of procedural fairness, that LRA does not apply to members of the SANDF, and that the action of the Minister is an administrative action as defined in PAJA, and, therefore, the application of PAJA should be considered.

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771 Loots BE "Public employment and the relationship between labour and administrative law" Unpublished LLD thesis (2011) at 105. See also Chaskalson A "Law in a changing society-the past ten years: balance sheet and some indicators for future" 1989 (5) *SAJHR* 293.

772 Ibid.

773 See definition clause in Chapter XX (note 7).

774 *SANDU* 2010 judgment (note 1*)* at 9.

775 Section 3 of the PAJA of 2000.

2.1 Relevance of PAJA to dismissal cases in the context of the SANDF

The second question that the Court would have had to ask and answer is what the relevance of PAJA to dismissal cases of members of the SANDF is. To answer this question, the Court would have had to deal with the applicability of administrative law to dismissal cases of public servants. Furthermore, the Court would have to deal with the lacuna that seems to exist in the legislative framework that is supposed to regulate the applicability of procedural fairness in the SANDF.

There seems to be an indication emanating from the arguments presented by the SANDU in the *SANDU* 2010 High Court judgment, the SCA appeal judgment I of 2012, and the appeal judgment II of 2014 that there are Omissions in the SANDF current legislative framework.[776] In all three decisions, SANDU, on behalf of its members, submitted that the available mechanisms in the SANDF are inadequate and, therefore, unable to provide and safeguard procedural justice.[777]

It might be argued that some form of 'defence forces administrative regulations' need to be promulgated.[778] In the interim, recourse could be sought from the proper application of the provisions of PAJA to afford members of the SANDF procedural justice as will be shown below. It was important for the Court to rationalise the relevance of PAJA to this matter.

According to Ngcukaitobi,[779] if the main function of administrative law is the regulation of the exercise of public power through which legality, rationality and procedural correctness can be perceived, the argument that the existence of another constitutional right, such as the right to fair labour practices, is sufficient to deny the application of section 33 and PAJA does not have a sound constitutional basis.[780]

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776 *SANDU* 2010 judgment (note 1) SANDU was the applicant. In *SANDF* appeal judgment I and II SANDU was the respondent. All three cases originate from the same set of facts. See chapter 3 on the trail of judgments that originated from the set of facts of *SANDU* 2010 High Court judgment.

777 *SANDU* 2010 judgment (note 1) at 10. *SANDF* appeal judgment I (note 728) at para 10. *SANDF* appeal judgment II (note 728) at paras 9-10.

778 *SANDF* appeal judgment II (note 728) at para 10. See also on the issue of the principle of non-compliance with the jurisdictional fact*, Democratic Alliance v President of the RSA* 2012 (1) SCA para 118 and *Paola v Jeeva NO* 2004 (1) SA 396 SCA para 11-14, see also on the issue of the exercise of discretion *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. Also *SANDU* 2010 judgment (note 1) at 9.

779 Ngcukaitobi T "Life after Chirwa: is there scope for harmony between public sector labour law and administrative law?" 2008 (29) *ILJ* 841-862.

780 Ngcukaitobi T (note 758) at 841 and 846.

The significance of PAJA in the *SANDU* 2010 judgment cannot be over-emphasised. It is submitted that had the Court considered the application of PAJA to this case, the effect would have been that the legal dispute could have been finalised.[781] It is suggested that, if the purpose-built systems for employment disputes provided for by the LRA were applicable to members of the SANDF, the approach that the court adopted would be arguably satisfactory.

This is, however, not the case. There are two persuasive reasons why the Court should have established the relevance of PAJA to this matter. Firstly, there is the fact that the LRA does not apply to members of the SANDF and, even if LRA did apply to members of the SANDF, PAJA the subsidiarity principle should be applied. According to Van der Walt, if more than one statute compete with or complement each other, as is the case with LRA and PAJA, the subsidiary principle should be that competing or complimentary legislation must be applied to promote the spirit, purport and object of the bill of rights, thus giving effect to the Constitution.[782] Secondly, the fact that the available legislative framework in the SANDF is inadequate to regulate procedural fairness. This inadequacy created a lacuna that could have been bridged by the application of the relevant provisions of PAJA read with section 33 of the Constitution.

The Court might have been encouraged to overlook the possible application of PAJA because of the decisions such as *Gcaba, Fredericks* and *Chirwa*.[783] Given the different views and approaches that have been taken in this debate, however, and the distinct context of the SANDF that was not found in any of the aforementioned judgments, it is submitted that the Court missed an opportunity to develop both administrative law jurisprudence in general and, in particular, the legislative structure of the SANDF.

The Court could have followed in the footsteps of both the High Court and the Constitutional Court in *South African National Defence Union v Minister of Defence,*[784] where an important contribution to the development of the SANDF legislative structure was made. The Constitutional Court

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781 From the *SANDU* 2010 judgment (note 1) there were three subsequent judgments, all flowing from the same set of facts. This matter dragged from 2010-2014, and then 2017. The main cause of action was that the Minister had failed to follow proper procedures before dismissals.

782 Van der Walt AJ "Normative pluralism and anarchy: reflections on the 2007 term" CCR 2008/1 77 at 111.

783 *Gcaba v Minister of Safety and Security* (note 734). See also *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* (note 653) and *Chirwa v Transnet Limited and Others* (CC) (733).

784 *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC).

resolved the dispute and afforded the Minister an opportunity to promulgate Regulations that included labour rights.[785]

This was another opportunity for the court to develop a Defence Force legislative structure to include administrative law in the Defence Force. It is trite that debate on the applicability of administrative law to labour matters has been decided in a number of judgments where contrasting and conflicting approaches of the High Courts, the SCA and the Constitutional Court have emerged.[786]

Many judgments understandably follow the approach of the majority judgment of *Gcaba* and *Chirwa* respectively.[787] It is submitted that the Court in *SANDU* 2010 should have preferred the approach followed in *Administrator, Transvaal, and another v Zenzile and others*.[788]

In this decision, the Court held that the principles of administrative law could be used by public servants to challenge a decision terminating their employment.[789] The reason was that labour law legislation of the time could not provide the necessary protection to public servants.[790] This law has since been amended to expand its scope of application to public servants.[791] The status *quo* still remains as far as the application of this law to members of the South African National Defence

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785 Ibid.

786 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151); *Sidumo v Rustenburg Platinum Mines Ltd* (note 20), *Administrator, Natal v Sibiya* (note142), *Muller v Chairman of the Ministers' Council: House of Representatives* 1991 (12) ILJ 761 (C), *Mdingi v Minister of Agriculture, Forestry and Rural Development* 1994 (3) LCD, *Manona v Acting Commander of the Transkei Defence Force* 1994 (3) LCD 204 (T), *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A); 1989 10 ILJ 823 (A), *Simelela v MEC for Education, Eastern Cape* 2001 (22) ILJ 1688 (LC); 2001 (9) BLLR H 1085 (LC), *Transnet Ltd v Chirwa* 2007 (11) BLLR 10 (SCA). *Chirwa v Transnet Ltd* (CC) (note 733).

787 *Gcaba v Minister of Safety and Security* (note 734), *Chirwa v Transnet Ltd* (CC) (note 733). SANDF appeal judgment II (note 728) at para 16. See also *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (note 729). *Police Union v National Commissioner of the SA Police Service* (note 777), *Mbayeka v MEC for Welfare, Eastern Cape* 2001 (1) All SA 567 (T), *Dunn v Minister of Defence* 2005 JOL 15881 (T), *Public Servants' Association obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC), *Hlope v Minister of Safety and Security* 2006 (3) BLLR 297 (LC) and *Simela v MEC for Education, Eastern Cape* 2001 (9) BLLR 1085 (LC).

788 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151). See also *Sibiya v Administrator, Natal* 1991 (note 142).

789 *Administrator, Transvaal, and another v Zenzile and Others* (note 151). In 1990 the court held that the principles of administrative law provide public servants with a platform to challenge a decision terminating their employment, if they could show that the decision was procedurally unfair

790 LRA of 1995.

791 Ibid.

Force is concerned.[792] Various commentators have different views on this issue.[793] The different approaches of Courts and views of commentators will be discussed below.

2.2 The contradictory views and approaches on the idea of application of administrative law to dismissal cases

The third question that the Court in the *SANDU* 2010 judgment would have had to ask and answer in order to reach a conclusion regarding the applicability of PAJA relates to the approaches that were followed by different Courts and the views of various commentators on this matter .

The Court would have had to interrogate a number of High Court, SCA and Constitutional Court judgments, such as the *Zenzile*,[794] *Chirwa*,[795] *Gcaba,*[796] and other relevant judgments, which paved a way for this debate. The Court would also have had to deal with various commentators' views, such as those of Grogan,[797] Pillay,[798] Ngcukaitobi,[799] Stacey,[800] and others.

In order to give context to the application of administrative law to dismissal matters and the views surrounding this debate, it is important to discuss the position before the High Court and the SCA judgments in *Chirwa* were handed down. That is, the common law position and the *Zenzile* judgment and the position before and after *Chirwa,* including the current position after the Constitutional Court judgments of *Chirwa* and *Gcaba*.

Position pre-*Chirwa* judgment: The common law position.

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792 Section 2 of LRA of 1995 excludes members the National Defence Force, the National Intelligence Agency, and the South African Secret Service and South African Police Services are excluded from its the application.

793 Hoexter C *Administrative Law in South Africa* (note 622), Mischke C (note 729), Van Eck S and Jordaan-Parkin R "Administrative, labour and constitutional law - A jurisdictional labyrinth" (2006) 27 *ILJ* 1987, and Pillay D "PAJA v labour law" (note 745).

794 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151).

795 *Transnet Ltd v Chirwa* 2007 (11) BLLR 10 (SCA). *Chirwa v Transnet Ltd* (CC) (note 733).

796 *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC).

797 Grogan J (note 654).

798 Pillay D (note 457).

799 Ngcukaitobi T (note 758).

800 Stacey R "Administrative law in public sector employment" *The South African Law Journal* (2008) 125 307.

In *Boyd v Stuttaford & Co,* the Court described the nature of a contract of employment as *locatio conductio.*[801] In common law, the contract of employment is similar to a contract of letting and hiring.[802] Ngcukaitobi argues that a contract of employment is the same as an ordinary commercial contract where termination can occur on notice or due to breach.[803]

One party, the employee or servant, provides his or her services to the employer or master in exchange for remuneration from the other party. In this relationship, the employee had no common-law right to be heard before the termination of the contract.[804] An employee has no right to continue in employment after the end of the notice period or the expiry date of the contract.[805] Issues related to fairness of termination of the contract are not enquired into. This position was the same in the employment relationship involving public servants.

This common law position changed when the LRA 28 of 1956 was introduced.[806] Employment could no longer be terminated only owing to breach of contract or on expiry of the date of contract. This termination had to be accompanied by fair reasons and fair procedure had to be complied with. The Industrial Court was empowered to order an employer to reinstate an employee where the dismissal was found to be unfair.[807]

Although the change in common law was welcomed, the introduced LRA did not apply to public sector employees. The effect was that the common law position expressed in *Boyd v Stuttaford & Co* applied in respect of public sector employees.[808] Consequently, public sector employees had no common law right to be heard before their dismissals.

The *Zenzile* decision

801 *Boyd v Stuttaford & Co* 2008 (29) *ILJ* 73 (CC) at 150.
802 Pretorius J *The South African Law* of Contract (2010). *Boyd v Stuttaford & Co* (note 830) at 150.
803 Ngcukaitobi T (note 758) at 842.
804 Brassey M “Back off but back up! Administrative law rightly yields to Labour Law” *Constitutional Court Review* (2009) 2 209.
805 Ngcukaitobi T (note 758) at 842.
806 The LRA of 1995. See also Ngcukaitobi T (note 758) at 842.
807 Ngcukaitobi T (note 758) at 842.
808 *Boyd v Stuttaford & Co* (note 779) at 150. Ngcukaitobi T (note 758) at 842.

The decision of *Administrator, Transvaal & Others v Zenzile & Others,* altered the position of public sector employees.[809] In this case, the Court had the opportunity to examine whether, in addition to the principle of *ultra vires*, another basis, namely *audi alteram partem*, could be used to control the exercise of dismissal power by public sector employers.[810]

It found that the principle of *audi alteram partem* applied in respect of dismissals of public sector employees, even though such principles were not specifically incorporated in any statute.[811] The effect of the *Zenzile* decision was that it extended the application of the *audi* principle to public sector employees and that a contract of employment of a public servant comprised two separate and distinct but interwoven branches.[812]

The contract of employment was subject to the requirements of legislation and the common law rule requirements of *audi alteram* partem.[813] The *Zenzile* approach was soon followed by *Administrator, Natal & another v Sibiya & Another,* where the Court had to answer the question concerning the applicability of the *audi* rule to employment matters.[814] The *Zenzile* judgment paved the way for the protection of public servants from unfair labour practices through the application of administrative law.[815]

This contribution was, however, overshadowed by judgments, such as *Chirwa* and *Gcaba*.[816] Brassey is of the opinion that *Zenzile* might have lost its relevance to the law of dismissal in the public service owing to the Courts choosing not to consider it when making decisions.[817] He argues that this approach is institutional and misconceived,[818] and, furthermore, that it will not be known to what extent the *Zenzile* judgment might still be applicable in other areas involving issues or people such as soldiers, for example, who fall outside this complicated debate.[819]

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809 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151). See also Brassey M (note 782).
810 Ngcukaitobi T (note 758) at 842.
811 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151).
812 Ngcukaitobi T (note 758) at 842. See also Brassey M (note 782).
813 The *audi alteram partem* (note 171).
814 *Administrator, Natal v Sibiya* (note 156).
815 *Administrator, Transvaal, and Another v Zenzile and Others* (note 151).
816 *Chirwa v Transnet Ltd & Others* (CC) (note 733). *Gcaba v Minister of Safety and Security* (note 734).
817 Brassey M (note 782). *Administrator, Transvaal, and Another v Zenzile and Others* (note 151).
818 Brassey M (note 782) at 219.
819 Ibid.

It is submitted that Brassey's opinion correctly advocates that the *Zenzile* judgment is still relevant with regard to the applicability of administrative law to dismissal cases.[820] The importance of this opinion is that it demonstrates that the applicability of administrative law in a form of PAJA to dismissal cases in the context of defence forces is not only possible but also desirable or recommended.

According to Ngcukaitobi, the *Zenzile* judgment rendered the contract of employment of a public servant to be compliant with the common-law principles of administrative law.[821]
Other judgments, such as *Fredericks v MEC for Education and Training, Eastern Cap*e,[822] also followed the example of *Zenzile* to allow public sector employees to rely on the right to just administrative action.[823]

The *Chirwa* decision: The Supreme Court of Appeal approach: *Transnet Ltd v Chirwa* 2007 1 BLLR 10 (SCA).

In *Transnet Ltd v Chirwa*,[824] Transnet appealed the High Court decision that held that the dismissal of Chirwa amounted to administrative action.[825] The applicant (Transnet) appealed on the grounds that the High Court did not have jurisdiction and that the actions of Transnet, as the employer, did not amount to administrative action.[826] The matter originated from the High Court where Chirwa challenged her dismissal on the basis that it violated her constitutional right to fair labour practices.[827]

The High Court was requested to review and set aside the dismissal. The High Court decided that the dismissal amounted to administrative action.[828] The Court further found that Transnet failed to comply with the *audi alteram partem* rule.[829] The dismissal was set aside. The SCA in

820 Ibid.
821 Ngcukaitobi T (note 758) at 842.
822 *Fredericks v MEC for Education and Training, Eastern Cap*e (note 653).
823 Ibid.
824 *Transnet Ltd v Chirwa* 2007 (11) BLLR 10 (SCA).
825 Ibid.
826 Ibid.
827 *Chirwa v Transnet Ltd* unreported case no 03/01052 (2005) WLD. See also *Transnet Ltd v Chirwa* (SCA) (note 802).
828 Ibid.
829 Ibid.

Transnet Ltd & others v Chirwa[830] was requested to consider whether or not PAJA applied in the case of a dismissal of an employee of Transnet.[831] The SCA had to answer two questions, whether the dismissal constituted administrative action as defined in PAJA, and whether a dismissal matter should be reviewed exclusively in terms of section 157(1) of the LRA by the Labour Court. Five separate judgments were delivered on this matter.[832]

Mthiyane JA, agreeing with Jafta JA for the minority, held that termination of Chirwa's employment by Transnet was not an administrative action as defined in PAJA and that there was no exercise of public power involved.[833] The judge further held that the decision to terminate employment did not violate any of the constitutional rights in section 33, and that Transnet was not exercising public power nor performing a public function in terms of any legislation when it dismissed Chirwa.

The majority however held further that the *Zenzile* decision could not be followed, because it had been decided before PAJA and that employment contracts of the employees were regulated by the LRA. The decision of Transnet was, therefore, not reviewable under PAJA.[834] The dismissal of Chirwa should have been challenged under the LRA and not PAJA.[835]

Conradie JA delivered a separate judgment from that of Mthiyane JA and Jafta JA.[836] The judge disagreed with the approach followed by the majority to the question of whether the decision was administrative action or not. The judge regarded that the dismissal of Chirwa was administrative action.[837] Conradie JA, however, held a different view when considering whether PAJA applied or not.[838] According to this judge, legislation must be construed to give effect to its purpose. The intention of the legislature behind the LRA is that labour disputes, including complaints about unfair dismissals, must be subjected to its structure.[839] On the relevance of Zenzile, the judge recognised that *Zenzile* had been decided before the Constitution and PAJA.[840] The judge,

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830 *Transnet Ltd v Chirwa* (SCA) (note 802).
831 Ibid.
832 In *Transnet Ltd v Chirwa* (SCA) (note 802) Mthiyane JA, Jafta JA, Murphy JA and Conradie delivered the majority judgment. Cameron DA and Mpati JA delivered a minority judgment.
833 *Transnet Ltd & Others v Chirwa* (SCA) (note 802) at para 14. See also *President of RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC).
834 *Transnet Ltd v Chirwa* (SCA) (note 802) at para 26-29.
835 *Transnet Ltd v Chirwa* (SCA) (note 803) at para 49.
836 *Transnet Ltd v Chirwa* (SCA) (note 8(SCA) 03) at para 53.
837 *Transnet Ltd v Chirwa* (SCA) (note 803) at para 26.
838 *Transnet Ltd v Chirwa* (SCA) (note 803) at para 53.
839 *Transnet Ltd v Chirwa* (SCA) (note 802) at para 27.
840 Ibid.

however, held that promulgation of both the Constitution and PAJA did not render *Zenzile* irrelevant. Instead it seems that both PAJA and the Constitution reinforce its authority.[841]

The minority judgment, delivered by Cameron JA and Mpati DP, agreed with Conradie JA that public sector employment decisions amount to administrative action.[842] Unlike Conradie JA, however, the minority judges held that there is no reason to withhold the protections of administrative law from the subjects of labour dispute matters.[843] The minority judgment focused on two questions: if there were no LRA, would public sector employees bring their claims under PAJA, and, if affirmative, did the LRA take away that protection?[844]

It was held that the existence of a contract between Ms Chirwa and Transnet did not change the public relationship. The reason is that one deals with a public entity created by legislation which exercises public power in the ordinary course of administering the business of Transnet.[152]

The Constitutional Court approach: *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC).

The *Chirwa* matter was escalated for clarity to the Constitutional Court. In this Court, the majority judgment of Skweyiya J, with Moseneke DCJ, Nkabinde J, Madala J, Van der Westhuizen J, Navasa AJ, Ngcobo J, and Sachs J were in agreement in so far as the applicability of PAJA to employment related matters was concerned.[845]

The Constitutional Court was requested to answer the question of whether or not dismissal of public sector employees amounts to administrative action.[846] The Court agreed with Conradie JA's approach in the SCA, although its focus was on jurisdiction.[847] Skweyiya J held that, since he found that the High Court did not have concurrent jurisdiction with the Labour Court, he did not have to decide whether the dismissal in question amounted to administrative action.[848]

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841 *Transnet Ltd v Chirwa* (SCA) (note 802) at para 28.
842 *Transnet Ltd v Chirwa* (SCA) (note 802) at para 56.
843 *Transnet Ltd v Chirwa* (SCA) (note 803) at para 52.
844 *Transnet Ltd v Chirwa* (SCA) (note 803) at para 54.
845 *Chirwa v Transnet Ltd & Others* (CC) (note 733) at para 142.
846 *Chirwa v Transnet Ltd & Others* (CC) (note 733) at para 143.
847 Conradie JA held that the dismissal of Chirwa was an administrative action. That LRA should apply to employment matters and not PAJA. See *Transnet Ltd v Chirwa* (note 823) at para 74. *Chirwa v Transnet Ltd & Others* (note 19).
848 *Chirwa v Transnet Ltd & Others* (CC) (note 733) at para 158.

Ngcobo J filed a separate judgment, in which he emphasised that the application of the labour law regime to public-sector employees removes the need for the application of administrative law to public-sector employment decisions.[849]

The approach of the Constitutional Court did not resolve the issue of whether public sector employment decisions are administrative actions or whether the applicability of labour law through the LRA excluded the application of PAJA and the protections of administrative law for purposes of resolving an employment related matters.

According to Cameron JA in the SCA, there is no suggestion in the Constitution that beneficiaries should be restricted to only one legislative scheme where there is more than one right.[850] This reasoning suggests that one cause of action can give rise to both a dismissal in terms of the LRA and an administrative action in terms of PAJA.[851] The minority held that, without a clear and significant legislative provision to the contrary, PAJA cannot be ignored purely to make way for the LRA.[852] The uncertainty that was created in the *Chirwa* case on the question of whether administrative law should find application in dismissal or employment matters was dealt with in the *Gcaba* judgment.[853]

The position post-*Chirwa*: *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC)[854]

In *Gcaba,* the applicant approached the bargaining council for the resolution of his problem.[855] The applicant was unsuccessful. The applicant sued the Minister in the High Court. Following in the footsteps of *Chirwa*, the High Court held that it did not have jurisdiction to hear labour matters.

In the Constitutional Court, the Court was requested to answer the question of whether employment and labour relationship issues amounted to administrative action within the meaning

849 *Chirwa v Transnet Ltd & Others* (CC) (note 733) at para 142.
850 *Chirwa v Transnet Ltd & Others* (CC) (note 733) at para 175.
851 *Chirwa v Transnet Ltd & Others (*CC) (note 733) at para 148.
852 *Chirwa v Transnet Ltd & Others* (CC*)* (note 733) at para 176.
853 *Gcaba v Minister of Safety and Security* (note 734).
854 Ibid.
855 *Gcaba v Minister of Safety and Security* (note 734). Gcaba sued the Minister for Safety and Security in the High Court, alleging that the decision not to appoint him to an upgraded post was unfair administrative action.

of PAJA and whether indeed the High Court did not have jurisdiction to adjudicate labour matters. Briefly, the Court was requested to answer the question whether the decision by a public service employer not to promote an employee amounted to administrative action.
Just before the *Gcaba* judgment, but after *Chirwa*, the High Court in *Mkumatela v Nelson Mandela Metropolitan Municipality*[856] had held that the applicant could approach the CCMA through the application of the LRA or approach the High Court on the basis of a claim of a right to just administrative action in the Constitution.[857] The Court in *Mkumatela* followed the approach of *Fredericks* and not the approach followed in *Chirwa* to reach its conclusion.[858]

After a long-awaited decision of the Constitutional Court on the question of whether administrative law applies to employment matters, the Court held that public servants could no longer have claims based on administrative law to resolve employment disputes. Public sector employees must resolve their employment related matters in the same way as private sector employees.

In other words, they must base their claim on labour law under the LRA. The *Gcaba* judgment highlighted the differences and similarities between *Chirwa* and *Fredericks*.[859] In determining the issue of whether the decision about the Minister for Safety and Security was an administrative action, the Court followed in the footsteps of *Chirwa* and held that failure to promote and appoint the applicant did not amount to administrative action.[860]

Mupangavanhu[861] is of the opinion that the Court preferred to follow the approach of *Chirwa* because of the principle of *stare decis*.[862] This principle aims at creating legal certainty and equality before the law, and, therefore, the Court must stand by its decisions rather than to

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856 *Mkumatela v Nelson Mandela Metropolitan Municipality* 2008 unreported case 2314/06.
857 *Mkumatela v Nelson Mandela Metropolitan Municipality* (note 835) at para 9-11.
858 *Mkumatela v Nelson Mandela Metropolitan Municipality* (note 835), *Chirwa v Transnet Limited* (note 19), *Frederick's v MEC for Education and Training, Eastern Cape* (note 653).
859 *Chirwa v Transnet Limited* (CC) (note 733); *Frederick's v MEC for Education and Training, Eastern Cape* (note 654).
860 *Chirwa v Transnet Ltd & Others* (CC) (note 733).
861 Mupangavanhu Y and Mupangavanhu B "*Gcaba v Minister for Safety and Security: Concurrent jurisdiction now settled law?*" 2012 (1) *STELL LR* 40 at 45.
862 Lawson G "*Stare Decisis and the Constitutional Meaning: Panel II - The Constitutional Case against Precedent*" 1994 (17) *Harv JL & Pub Pol'y* 23 at 24. The purpose of *stare decisis* is to ensure legal certainty and equality before the law and hence courts ought to stand by their decisions and not disturb settled matters.

overrule itself.[863] The legal effect of overruling a previous decision occurs when the Court corrects a mistake made by the earlier Court, and it is not making the law.[864]

As a result, the Court reinforced the decision in *Chirwa* and decided that the decision not to promote did not constitute administrative action in terms of section 33 of the Constitution.[865] The court in *Gcaba* was expected to clear the confusion that many High Courts have been saddled with when deciding whether administrative law applies to dismissal or employment matters and whether employment-related decisions are administrative actions for purposes of PAJA.[866]

Brickhill is, however, of the opinion that, according to the approach followed in *Gcaba*, the *Chirwa* judgment did not overrule *Fredericks*, but made a comparison only, and that, in addition, *Gcaba* did not overrule *Chirwa* or *Fredericks* but rather showed the similarities and differences of these judgments.[867] Instead of clearing the confusion, the Court left it to the legal representatives and other stakeholders to interpret its judgment.[868] According to Brickhill, the task is left to High Courts, the legislature and academics to decide whether *Gcaba* departed from *Fredericks* or *Chirwa* and, if affirmative, to what extent did it do so?[869]

What appears to be clear from this judgment is that *Gcaba* proclaims its own authority over the earlier judgments.[870] As in *Chirwa* before it, *Gcaba* has been read by different Courts to mean different things. In three subsequent cases,[871] the SCA has seemingly interpreted *Gcaba* to mean that the High Court enjoys jurisdiction in public sector dismissal disputes founded in administrative law.

For instance, in *Tshavhungwa v National Director of Public Prosecutions*[872] Nugent JA held that a claim that a public sector dismissal was an administrative action is justiciable in the High Court.

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863 Mupangavanhu Y and Mupangavanhu B (note 839) at 45.
864 Wille G, Du Bois F and Bradfield G (eds) *Wille's Principles of South African Law* 9th ed (2007) at 88.
865 *Gcaba v Minister of Safety and Security* (CC) (note 733) at para 5.
866 *Gcaba v Minister of Safety and Security* (CC) (note 733) at paras 11, 19.
867 *Gcaba v Minister of Safety and Security* (CC) (note 733) paras 20, 22, 26,44,48,77.
868 Brickhill J "Precedent and the Constitutional Court" (2010) (3) *CCR* 79-109 at 85.
869 Brickhill J "Precedent and the Constitutional Court" *(*note 846) at 86.
870 Brickhill J "Precedent and the Constitutional Court" (note 846) at 87.
871 *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* 2009 unreported 151 (SCA) at para 38. See also *Mkumatela v Nelson Mandela Metropolitan Municipality* (note 835) at para 15; *Tshavhungwa v National Director of Public Prosecutions* 2009 unreported SCA.
872 *Tshavhungwa v National Director of Public Prosecutions* (note 849) at para 22.

In *Sibeko v Premier for the Province of the Northern Cape*[873]*,* on the other hand, the High Court interpreted *Gcaba* to exclude the High Court's jurisdiction in labour matters.[874]

It can be seen above from the decisions of Langa CJ and Ngcobo J that there are different approaches to deciding cases that are related to the application of administrative law to dismissal cases.[875] The main difference in the approaches adopted by Langa CJ and Ngcobo J in the *Chirwa* case is that Ngcobo J follows the Constitution as a basis for the infringement of section 33 only.[876] On the other hand, Langa CJ reasons that a dismissal of a public servant affects both the administrative law and labour rights of an employee.

In that context, a public sector employee has a choice to either challenge the dismissal through administrative law or labour law.[877] These two judges are not the only judges who differ in their approach to dealing the application of administrative law to dismissal cases.[878] It is, therefore, not surprising that the judge in the *SANDU* 2010 judgment also chose an approach which seemingly avoids the applicability of administrative law to dismissal cases.[879]

It is submitted, however, that, in this case, the judge might have followed the approach of Langa CJ in the *Chirwa* case.[880] Procedural fairness can best be dealt with through the application of administrative law, in particular PAJA.[881] This is particularly important in the *SANDU* 2010 case because members of the military are not protected by the LRA as already stated above.[882]

Regardless of the complexities surrounding the applicability of administrative law to dismissal disputes, Ngcukaitobi[883] correctly holds a view that any conduct which impacts on various constitutional rights, such as sections 23 and 33 of the Constitution, should be approached by the

873 *Sibeko v Premier for the Province of the Northern Cape* 2009 unreported 66 (NCHC).
874 *Sibeko v Premier for the Province of the Northern Cape* (note 851).
875 *Chirwa v Transnet* (CC) *(Ltd)* (note 733).
876 Ibid.
877 *Chirwa v Transnet* (CC) *(Ltd)* (note 733).
878 Ibid.
879 *SANDU* 2010 judgment (note 1).
880 *Chirwa v Transnet* (CC) *(Ltd)* (note 733). See also *SANDU* 2010 judgment (note 1).
881 The PAJA of 2000.
882 The LRA of 1995.
883 Ngcukaitobi T "(note 758).

Courts on the basis that these rights are supportive, interdependent, interrelated, and indivisible.[884]

2.3 The applicability of PAJA to dismissal matters in the context of SANDF

To test whether PAJA could be applied in employment related matters, such as the dismissal of members of the SANDF, the Court would have had to answer the fourth question. The questions that the Court in the *SANDU* 2010 judgment would have had to respond to are: 'Does administrative law apply to dismissal matters?'; 'Can PAJA find application in this matter?'; and, 'Was the conduct of the Minister to dismiss members of the SANDF an administrative action in terms of section 1 of PAJA?'

To consider these, the Court would have had to decide to follow some of the conflicting approaches in the judgments discussed above, in particular *Chirwa*, *Gcaba*, *Fredericks*, *SAPU* and *POPCRU*. The Court would also have had to interpret section 1 of PAJA. The requirements of procedural fairness are contained in section 3 of PAJA, and the review procedure is contained in section 6 of PAJA. The Court would have had to interpret both sections 3 and 6 together in relation to section 33 of the Constitution.[885]

It is noteworthy to mention that the Court would have had to deal with the issue of the applicability of PAJA to this dismissal matter regardless of the popular view that PAJA should not be applied to employment disputes. The reason for this popular view is that employment disputes are regulated by a comprehensive framework of labour legislation.[886] Also, there are reasons advanced by academics why PAJA should apply.

This suggestion was endorsed by the Labour Court in *Public Servants Association on behalf of Haschke v MEC for Agriculture & others*[887] and a number of SCA and Constitutional Court judgments. There is also a reasoning that PAJA cannot be excluded from employment disputes

884 Ngcukaitobi T (note 758) at 861. See also *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 23.

885 Section 1, 3, and 6 of the PAJA of 2000. Section 33 of Constitution, 1996.

886 *Chirwa v Transnet* (CC) *(Ltd)* (note 733) at paras 73. Ngcobo J filed a separate judgment where he made reference to the reasons for the enactment of the LRA.

887 *Public Servants Association on behalf of Haschke v MEC for Agriculture & Others* 2004 (25) *ILJ* 1750 (LC).

because of the availability of the LRA.[888] Commentators such as Ngcukaitobi criticizes the approach that was followed by the majority in Constitutional Court decision of *Chirwa*[889] which favoured the exclusion or non-aplication of PAJA to employment disputes, by reasoning that the existence of one right negates the other.[890] According to Ngcukaitobi, the Court's reasoning is not in line/consonant with the principles underlying the Constitution.[891] He argues that section 23 and 33 are mutually reinforcing.

According to Ngcukaitobi and Brickhill the question whether or not PAJA should apply at all in employment disputes which are regulated exclusively by labour law depends on policy reasons.[892] They argue that policy reasons cannot be advanced in some employment relationships such as public sector employment. They hold a view that all public power derives its force from the Constitution. Therefore to argue that PAJA cannot be applied to public sector employment does not have a constitutional basis.[893] They further argue, that whilst it is not desireable that PAJA should not apply to employment disputes in general, in certain specific employment relationships PAJA should apply.[894]

In dealing with the question whether or not PAJA should apply to employment disputes, Ngcukaitobi and Brickhill argue that it is difficult to sustain the argument that PAJA should not apply, because of the current formulation of PAJA.[895] They argue that a sensible approach is not to adopt a blanket approach but to recognise the differences in various decisions which may be taken by public sector employers and to analyse on a case by case basis the nature and impact of those decisions, including the decision by the Minister to summarily dismiss members of the SANDF.[896]

Pillay argues that PAJA could find application to causes of action and relationships akin to employment where the LRA does not apply. For example PAJA could apply to employment disputes involving soldiers, the intelligence and secrete services.[897]

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888 Ngcukaitobi T and Brickhill J "A Difficult Boundary: Public Sector Employment and Administrative Law" (2007) 28 *ILJ* (4) 769.
889 *Chirwa v Transnet* (2008) 29 ILJ 73 (CC).
890 Ngcukaitobi T (note 758) at 841.
891 Ngcukaitobi T (note 758) at 841.
892 Ngcukaitobi T and Brickhill J (note 888) at 789.
893 Ngcukaitobi T and Brickhill J (note 888) at 790.
894 Ngcukaitobi T and Brickhill J (note 888) at 769.
895 Ngcukaitobi T and Brickhill J (note 888) at 792.
896 Ibid.
897 Pillay D 'PAJA v Labour law' 2005 SAPL 413 at 426.

In *Transnet v Chirwa* Cameron JA found that in the Constiution there is no suggestion that, where more than one right, such as section 23 or 33 may be in issue, its beneficiaries should be confined to a single legislatively created scheme.[898] This approach was endorsed by the Chief Justice in *Chirwa v Transnet* stating that "both PAJA and the LRA protect important constitutional rights and we should not presume that one right should be protected before another or presume to determine that the essence of a claim engages one right more than another . A litigant is entitled to the full protection of both rights, even if they seem to cover the same grounds".[899] Plasket J in *Popcru* also warned against formalistic attempts to compartmetalise administrative law and labour law because this is just a classification of convenience.[900] In her analysis of the decisions of *Masetlha*,[901] *Chirwa*[902] and *Sidumo,*[903] Hoexter concludes that although the Constitutional Court was provided with an opportunity to to expound on the relationship between constitutional rights concerned, that is, sections 23 and 33 of the Constitution and their associated legislation, that is, PAJA and LRA, this was a wasted opportunity.[904] She echoes the sentiment of Plasket J in *Popcru* decision against compartmetalising administrative law and labour law.[905]

Hoexter reasons that the dismissal of employees is as much a matter of administrative law as much as labour law. She argues that the *audi alteram* partem principle is well established in general and specifically established in the context of dismissal in administrative law.[906] Therefore to view administrative law and labour law as distinct rather than interdependent as found in *Masetlha* is a retrogressive approach.[907]

This reasoning is endorsed by the SCA in *Rustenburg Platinum Mines v CCMA & others*[908] and in many other SCA and some minority judgments of the Constitutional Court.[909] These are some of the seemingly conflicting precedents that the Court would have had to consider.

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898 *Transnet Ltd v Chirwa* 2006 27 *ILJ* 2294 (SCA) at para 65. See also Hoexter C note 29) at 229

899 *Chirwa v Transnet Ltd* 2008 29 ILJ 73 (CC) at para 175. See also Hoexter C (note 29) at 229.

900 *POPCRU v Minister of Correctional Services* 2006 4 BLLR 385 € at para 61. See also Hoexter (note 29) at 228.

901 *Masetlha v President of the Republic of South Africa & another* 2008 1 SA 566 (CC).

902 *Chirwa v Transnet Ltd & others* 2008 29 ILJ 73 (CC).

903 *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 SA 24 (CC).

904 Hoexter C (note 29) at 234.

905 Hoexter C (note 29) at 228.

906 Hoexter C (note 29) at 231.

907 Hoexter C (note 29) at 234.

908 *Rustenburg Platinum Mines v CCMA & Others* 2006 (27) *ILJ* 2076 (SCA).

909 *Transnet Ltd v Chirwa* (SCA) (note 802), *Chirwa v Transnet* (CC) *(Ltd)* (note 733), *Gcaba v Minister of Safety and Security* (note 734), and *SANDF* appeal judgment II (note 728) at para 16.

The main factor which should have encouraged the Court to consider the applicability of PAJA to this matter is that the LRA does not offer the protection for the deviation of the employer from the procedural standards that must be followed before a decision to dismissal can be taken.[910] The SANDF legislation, such as MDSMA and Regulations in chapter XX on the Defence Act discussed above are inadequate to effectively deal with the issues related to procedural fairness. These pieces of legislation do not espouse the complete standards set in employment legislation such as LRA. The question is whether the PAJA could be a solution to this omission in SANDF as suggested by Pillay.[911]

Could the context of the SANDF be an exception to the popular view that administrative law in the form of PAJA should not be applicable to employment and labour related matters, including dismissal? The Court's first point of departure would be the *Administrator, Transvaal v Zenzile* judgment.

In this judgment discussed above, the Court held that, when dealing with an administrative action, the Court is not concerned only with a mere employment under a contract of service between two private individuals but also with a form of employment which vests the employee with a particular status which the law will protect.[912] In this instance, the employer and the decision-maker is a public authority whose decision to dismiss involved the exercise of a public power.

The Court concluded that the element of public service provided for by the statute means that the respondents were eligible for the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct.[913]

Does PAJA apply?

Section 33 of the Constitution: The threshold requirement

910 Section 2 of the LRA of 1995.
911 Pillay D (note 745) at 417.
912 *Administrator, Transvaal, and Another v Zenzile and Others* (note151).
913 Ibid.

It has already been mentioned that the Court, in the *SANDU* 2010 judgment, mentions section 33(1) in passing, but the Court does not mention the relevant sections of PAJA.[914] It is submitted that the Court's approach not to use PAJA seems to be misguided in this instance because PAJA is a gateway to rely on section 33 of the Constitution.

Pillay correctly argues that relying directly on the Constitution without interpreting and applying the relevant provisions of the enabling legislation, such as PAJA, could distort such enabling legislation.[915] This is also known as the first subsidiarity principle confirmed in *SANDU*.[916] Besides this, the Court in *Bato Star v Minister of Environmental Affairs* confirmed the fact that PAJA is the gateway to relying on section 33. [917] The Court held that there is no direct access to section 33 of the Constitution other than through PAJA.[918]

It is submitted that, even if the applicant's notice of motion did not invoke the provisions of PAJA, it was the Court's duty to interpret section 33 of the Constitution with the relevant provisions of PAJA when reviewing the Minister's decision, for the reason mentioned above. [919] It is suggested that it is the intention of the legislature that, once section 33 is relied upon, the provisions of PAJA should be applied, unless the action in question is expressly excluded by section 1 of PAJA.[920]

In terms of section 33(3), PAJA was enacted to give flesh to the fundamental rights contained therein.[921] The Court in *Bato Star* held that judicial review of administrative action arises from PAJA and not from the common law (*ultra vires, audi alteram partem rule* and *nemo iudex in sua causa*) as it used to be before PAJA was enacted.[922]

In *Zondi v MEC for Traditional and Local Government Affairs,* the Court applied section 33 directly.[923] The Court held that the reason for the direct application of section 33 of the Constitution was that the cause of action was the evaluation of the constitutional provision. PAJA cannot be used to resolve matters relating to the assessment of a constitutional challenge. This assessment

914 *SANDU* 2010 judgment (note 1) at 10.
915 Pillay D (note 745) at 417.
916 *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC).
917 *Bato Star v Minister of Environmental Affairs* (note 726) at paras 21-25.
918 *Bato Star v Minister of Environmental Affairs* (note 726) at paras 21-25.
919 Hoexter C (note 658).
920 Section 33(3) of the Constitution read with the section 1 of the PAJA of 2000.
921 Ibid.
922 *Bato Star v Minister of Environmental Affairs* (note 726) at para 25.
923 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

must be done under section 33 of the Constitution. The Court held that PAJA applies when an administrative action is reviewed.[924]

It is submitted that the matter in the *SANDU* 2010 judgment was a request to the Court to review whether the decision of the Minister to dismiss members of the SANDF summarily was lawful, constitutional and procedurally fair.[925] The Court could, therefore, not correctly interpret sections 23 (3) and 33(1) of the Constitution without interpreting the relevant provisions of laws, such as PAJA and the LRA, which give effect to sections 23 and 33 respectively.

In *The Minister of Health v New Clicks South Africa (Pty) Ltd,* the Constitutional Court held that a litigant cannot seek to rely on the protections of the right to administrative justice in section 33 of the Constitution without relying on PAJA. [926] It is not possible to go behind PAJA and rely directly on section 33.[927]

Pillay argues that sometimes the Constitutional Court, in judgments such as *NUMSA v Bader Bop, SA National Defence Union v Minister of Defence* and *NAPTOSA v Minister of Education Western Cape,* allows that the fundamental rights, including labour rights, and their protection in the Constitution, be relied upon and accessed directly. He, however, views these Constitutional Court judgments be controversial in relation to the attachment of enabling pieces of legislation to fundamental rights in the Constitution.[928]

Section 1 of PAJA: Administrative Action

In determining that the Minister's decision was an administrative action, the court needed to interpret section 1 of PAJA. This section defines administrative action as any decision or failure to take a decision by an organ of state when exercising public power in terms of any legislation.[929]

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924 *Zondi v MEC for Traditional and Local Government Affairs* (note 881) at para 99.

925 *SANDU* 2010 judgment (note 1*)* at 2, 6, and 8.

926 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 96, 436, and 586.

927 *Minister of Health v New Clicks South Africa (Pty) Ltd* (note 884) at para 96.

928 *NUMSA v Bader Bop* 2003 *ILJ* 305 (CC) at paras 62 and 67; *NAPTOSA v Minister of Education Western Cape* 2001 (22) *ILJ* 889 (C) at paras 896D-G. See also Pillay (note 745) at 416. See also Hoexter C "Comparing Administrative Justice across the commonwealth: Administrative Action in Courts" (2006) *Acta Juridica* 303.

929 Section 1 of the PAJA of 2000.

PAJA explicitly excludes some decisions from this definition.[930] It is logical for practical reasons to conclude that PAJA cannot apply to every exercise of public power and to the performance of a public function.

As a result, the exercise of certain executive and legislative powers and judicial functions is excluded from the definition of administrative action.[931] The exclusions are identified by reference to their subject matter and not by the person or organ of state performing the function.[932] The decision to dismiss public servants does not form part of the listed exclusions.[933]

The questions that the Court in the *SANDU* 2010 judgment Sould have asked were, therefore: 'Was the decision of the Minister to dismiss members of the SANDF an administrative action for purposes of PAJA?' and 'Was the Minister exercising public power when making the decision?' The Court, having interpreted the definition of administrative action in section 1 of PAJA, would arguably answer these questions in the affirmative. Having concluded that the Minister's decision was an administrative action, the Court would proceed to determine whether PAJA applied to this matter.

PAJA would apply both where the Minister's conduct was found to be an administrative action and where this decision was exercised as public power authorised by legislation or empowering provision.[934] In the *SANDU* 2010 judgment, the Minister was empowered by section 59(2) (e) of the Defence Act 42 2002 to terminate the employment services of members of the SANDF.[935] The question of whether PAJA applies to employment disputes seemingly remains confusing for many High Courts and the SCA to resolve. This issue seems to be unresolved despite the Constitutional Court judgments of *Chirwa*, *Fredericks* and *Gcaba*.[936] Although these judgments attempted to resolve this issue, different approaches were followed within each judgment.[937] The Constitutional Court judgments of *Chirwa* and *Gcaba* were particularly anticipated to produce a solution to this dilemma.[938] This, however, did not happen.

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930 Section 1 (aa)-(ii) the PAJA of 2000.
931 Pillay D (note 745) at 419.
932 Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) at 53.
933 See section 1 (aa)-(ii) of the PAJA of 2000.
934 Section 1 of the PAJA of 2000.
935 Section 59(2) (a)-(e) of Defence Act of 2002.
936 *Chirwa v Transnet (Ltd)* (CC) (note 733) Minority and Majority in *Chirwa* resulted in different views to the resolution of the matter. *Gcaba v Minister of Safety and Security* (note 734).
937 Ibid. See also *Frederick's v MEC for Education and Training, Eastern Cap*e (note 653).
938 *Chirwa v Transnet (Ltd)* (CC) (note 733), *Gcaba v Minister of Safety and Security* (note 734).

Commencing from an assumption that PAJA is not generally inapplicable in the employment context, it would be necessary for the Court to determine whether any given decision amounts to a reviewable administrative action in terms of PAJA.[939] A key question will be whether the decision to dismiss involves the exercise of public power or the performance of a public function.[940] It was indicated that the Minister was empowered by section 59(2) (e) to take a decision to dismiss members of the SANDF. One of the judgments that the Court could have used as precedence, although for persuasive value, is *POPCRU & others v Minister of Correctional Services & others*.[941]

In this case, the High Court considered the question of whether or not the provisions of PAJA applied to dismissals of government employees. The Court held that provisions of PAJA applied and, as a result, the decision of the Minister of Department of Correctional Services to dismiss its employees was reviewed and subsequently set aside.[942] In interpreting section 1 of PAJA, the court found that the decision was an administrative action as defined.[943] In addition, the Court reasoned that the concept of public power is not confined to the exercises of power that affects the public at large.[944] The Court decided that it was bound by the decision of the Appellate Division in *Administrator, Transvaal & others v Zenzile & others* because that set a precedent.[945]

In terms of the definition of administrative action in section 1 of PAJA, PAJA applies only when the decision was taken when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power, or performing a public function in terms of any legislation.[946] The question of whether a decision was taken in the exercise of public power is, therefore, important. Here the Court in the *SANDU* 2010 judgment would come to the conclusion that PAJA applies because of the presence of section 59(2)(e), which authorised the Minister to make a decision.

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939 Not all decisions are reviewable in terms of section 1 of PAJA, some decision are excluded from review in terms of (aa)-(ii). Section 157 of the LRA 66 of 1995 regulated reviewable decisions of employer, including decisions of the state as an employer.

940 Section 1 of the PAJA of 2000.

941 *POPCRU & Others v Minister of Correctional Services & Others* 2006 (27) ILJ 555 (E); 2006 (2) All SA 175 (E).

942 *POPCRU & Others v Minister of Correctional Services & Others* (note 729) at para 53.

943 Ibid.

944 Ibid.

945 *Administrator, Transvaal, and Another v Zenzile and Others* (note151). See also *POPCRU & Others v Minister of Correctional Services & Others* (note 729) at para 53.

946 Section 1 the PAJA of 2000.

In *Chirwa v Transnet & others,*[947] the Court reconciled the decisions of Cape *Metropolitan* and *Logbro Properties CC*.[948] In reconciling these judgments, the Constitutional Court held that these two decisions established the principle that a decision to terminate a contract concluded by a public authority from a position of superiority is governed by the principles of administrative justice if it is framed by statute.[949]

Section 3 of PAJA: Procedural Fairness

Another issue that the Court would have had to deal with is the standard that is applicable to a decision to dismiss members of the SANDF. For a dismissal, both substantive and procedural fairness are required, as was indicated in the *SANDU* 2010 judgment. These requirements to meet the standard are encapsulated in labour legislation (LRA), read with codes of good practice, and in administrative law in section 3 of PAJA.[950] Actions or decisions of the state as an employer must comply with these standards.[951]

Ngukaitobi and Brickhill argue that, if PAJA were to apply to some employment disputes, it can arguably apply only to decisions where terms of contract, including the terms guiding dismissal, were dictated by the employer.[952] Furthermore, these terms of contract must have been framed by statute in the sense that the public body was empowered by statute to contract. It is submitted that the Minister is in a position of power to dictate the terms of service in the SANDF, including the terms for termination of those services.

These terms are captured in the Defence Act, where section 59(2) (e) dictates the termination of service of members of the defence forces. It is possible to distinguish between dismissals of public sector employees employed and dismissible under statute, such as in the *SANDU* 2010 judgment and *POPCRU*, and other employees, employed and dismissible only under contract, such as in *Chirwa.*

947 *Chirwa v Transnet (Ltd)* (CC) (note 733) at para 20.
948 *Logbro Properties CC v Bedderson NO & Others* 2003 *(2)* SA 460 (SCA).
949 *Chirwa v Transnet (Ltd)* (CC) (note 733) para 20.
950 Section 3 of the PAJA of 2000.
951 Section 3(1) of the PAJA of 2000.
952 Ngcukaitobi T and Brickhill J (note 866) at 792.

It is submitted that, after applying the standard that must be met and requirements for procedural fairness, by interpreting section 3 of PAJA in *SANDU* 2010, the Court would have arguably complied with both sections 33 (3) and 39 of the Constitution. By doing this, the Court would have given effect to the right to procedural fairness of members of the SANDF captured in section 33(1) discussed above, and complied with the mandate for all courts, tribunals and forums in section 39 of the Constitution.

Section 6 of PAJA: Review of administrative action

It was stated above that the actions or decisions of employers, including those of the state in its capacity as employer, must conform to certain standards, including substantive and procedural fairness. Failure to do so renders these decisions reviewable either under the LRA or under PAJA.[953] Sections 158(h) and 157(2) of the LRA deal with the review of employment actions and decisions by the Labour Court or High Court, as the case may be.[954]

Section 158(h) of the LRA empowers the Labour Court to review any decision taken or any act performed by the state in its capacity as employer on such grounds as are permissible in law. Although this section provides for review of decisions of the state in its capacity as an employer, this review is not applicable in the *SANDU* 2010 matter because of section 2 of the same Act (LRA).[955]

One of the main reasons that the Courts, in matters such as *Chirwa* and *Gcaba,* reject the application of PAJA to employment related matters is that the actions and decisions on employees are reviewable under the LRA through the jurisdiction of the Labour Courts.[956] It is submitted that this argument, in view of the relationship between members of the SANDF and the LRA, cannot be supported and relevant.

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953 Sections 157 and 158(h) of LRA of 1995 regulates review of decisions. Section 6 of the PAJA of 2000 regulates reviewable administrative actions. Grounds of reviewable action are listed in s 6(2).

954 Sections 158(h) and 157(2) of the LRA of 1995.

955 Section 2 of the LRA of 1995.

956 *Chirwa v Transnet (Ltd)* (CC) (note 733) at para 20.

Section 6 of PAJA, on the other hand, could and should apply to the labour-related matters in the SANDF. This section lists the grounds for the judicial review of administrative action.[957] These listed grounds emphasise the important constitutional protections given to the exercise of public power, without exclusions, except that the decision to be reviewed must comply with section 1 of PAJA.

Section 6(1) provides that *any* person, including members of the SANDF, may institute proceedings for the judicial review of an administrative action. This section protects any person from the arbitrary decisions by organs of state by requiring that the exercise of public power be authorised by law, be rational and not arbitrary, and be preceded by a fair process.[958] It is submitted that, in interpreting section 6 of PAJA, the Court would have arguably concluded that this section affords adequate protection to the right to procedural fairness of members of the SANDF and is consequently applicable.

3. CONCLUSION

The Court in the *SANDU 2010* judgment might have had its reasons why it was silent on the application of PAJA to this matter.[959] It could be that the Court followed the *Chirwa* or *Gcaba* approach discussed above.[960] In doing this, however, the court missed two important issues with regard to the applicability of procedural fairness to members with regard to actions by members of the SANDF: (1) that the right to procedural fairness of members of the SANDF is not protected by the LRA and even if the LRA did protect members of SANDF, the subsidiarity principle is another point to consider (2) that the legislative framework that is available in the SANDF is inadequate to ensure protection of the right to procedural fairness of members of the SANDF.[961]

The Court might have also missed a number of important considerations when it adjudicated this matter, viz. the fact that administrative law in the form of PAJA is meant to regulate the exercise

957 Section 6 of the PAJA of 2000.
958 Plasket C "Administrative Action: The Constitution and the Administrative Justice Act 3 of 2000" (unpublished paper presented at an LRC Seminar on 23 October 2001) at 10.
959 Stacey R (note 778). Brassey M (note 782). See also *Administrator, Transvaal, and Another v Zenzile and Others* (note 151).
960 *Chirwa v Transnet (Ltd)* (CC) (note 733), *Gcaba v Minister of Safety and Security* (note 734).
961 Chapter XX (note 7).

of public power,[962] and also that, in order to claim the protection to just administrative action in section 33 of the Constitution, the pathway is through PAJA.[963]

Notwithstanding the debate surrounding the applicability of administrative law to employment matters, common law and the administrative law have been applicable to public sector employment relationships and are still relevant.[964] As Partington and Van der Walt argue, if the legislature had intended to exclude PAJA from employment matters, the legislature could have done so expressly when PAJA was enacted to give effect to section 33 of the Constitution.[965]

Pillay correctly argues that relying directly on the Constitution could have the effect of distorting the LRA and other enabling pieces of legislation, such as PAJA in this instance. Pillay also holds a view that it is surprising that the Constitutional Court allows direct access to section 23, but not to section 33, as it was held in *Bato Star*.[966]

It is suggested that the Court, in the *SANDU* 2010 judgment, could interpret this to mean that the Constitutional Court in *Bato Star* correctly advocates a single manner for application of administrative law rather than a parallel system of law, where PAJA and the Constitution could apply independently of each other. The confirmation in the *Bato Star* case that there is no direct access to section 33 of the Constitution other than through PAJA, therefore, remains important for the application of section 33 of the Constitution.[967]

It follows from this judgment that the right to just administrative action may be invoked in labour matters only if PAJA applies. It is submitted, in agreement with Pillay's argument, that in circumstances where section 23 of the Constitution, read with the labour laws, offers no

962 Ngcukaitobi T (note 758) at 841. See also Farina CR "Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power" 2004 (19) *SAPR/PL* 489 at 490 and 503, Pillay D (note 745). See *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* (note 884).

963 *Bato Star v Minister of Environmental Affairs* (note 726) at para 22.

964 Ngcukaitobi T, Stacey R, Brassey M, Mischke C, Pillay D, Partington JP and Van der Walt JA and others.

965 Minority judgment of *Chirwa*, *Gcaba*. See also Partington JP and Van der Walt JA "Does the Promotion of Administrative Justice Act Apply to Dismissals in the Public Sector? *Transnet Ltd v Chirwa* 2007 (11) BLLR 10 SCA *Obiter* 388 at 390

966 *Bato Star v Minister of Environmental Affairs* (note 726) at para 22. See also Pillay D (note 745) at 417.

967 *Bato Star v Minister of Environmental Affairs* (note 726) at para 22.

protection, such as in this case, administrative law amongst other constitutional guarantees can be invoked to fill the lacuna.[968]

It has been shown above that the decisions of *Chirwa* and *Gcaba,* which have been regarded as the solution to the problem that the Courts are faced with when dealing with applicability of administrative law to dismissal cases, have not offered a complete and concrete solution to this issue.[969] The Constitutional Court's tendency to rely on the policy-based reasoning which aims to exclude the application of PAJA from employment related matters has not been effective.[970]

Quinot also has doubts about the helpfulness of these Constitutional Court judgments in so far as this question is concerned.[971] According to Quinot, the overlap between administrative and labour law has not been resolved, and the High Court continues to review public-sector employment issues under administrative principles.[972]

Both PAJA and the LRA apply to public employment, because, in the first place, the employer's action or decision falls within the definition of administrative action in PAJA, and, in the second place, because the LRA expressly permits this duplication in section 158(1) (h).[973] PAJA could also apply to causes of action and relationships that are similar to employment, where the LRA has no application, such as in the case of soldiers, intelligence and secret services.[974]
According to Ngcukaitobi and Brickhill, the argument that PAJA in its current structure does not apply to all employment-related decisions cannot be legally sustained.[975] In their view, a sensible approach is not to adopt a blanket approach, but rather to deal with this question on a case by case basis recognising differences in the context in which decisions may have been taken by public sector employers.[976] Dismissal decisions, which seem to have generated the largest

968 Pillay D (note 745) at 417.
969 *Chirwa v Transnet* (note 19); *Gcaba v Minister of Safety and Security* (note 782). The journey to resolve the question of whether administrative law applies to employment matters begun at the Constitutional Court with *Chirwa*. It seems that, even after the decision of Chirwa, this issue was still not resolved. Many courts hoped that the Constitutional Court in *Gcaba* would provide a clear and permanent solution to this issue.
970 Ngcukaitobi T and Brickhill J (note 866).
971 Quinot G (ed) *Administrative Justice in South Africa: An Introduction* (2015) 92.
972 Ibid.
973 Pillay D (note 745) at 423.
974 Section 2 of the LRA of 1995). See also Pillay D (note 745) at 423.
975 Ngcukaitobi T and Brickhill J (note 866).
976 Ibid.

amount of litigation, seem to meet the requirements of administrative action in PAJA. As a result there is no legally sound reason to exclude the application of PAJA to such decisions.[977]

Although, according to Hoexter, *Chirwa* presented the Constitutional Court with opportunities to pronounce on the intersection of labour law and administrative law in employment matters, and to expound on the relationship between the constitutional rights concerned and their associated pieces of legislation, the Constitutional Court did not clear the intersection as expected.

Furthermore, *Chirwa* raised fundamental questions about the concept of administrative action and the nature of public power, but these questions were not answered in order to offer a permanent solution to the question of whether administrative law should or should not apply to employment matters.[978]

The matter of SANDF 2010 began and continued from this judgment, with the 2012, 2014 and 2017 decisions. Could and should PAJA have found application in resolving this dispute? Tuswa answers this question in the affirmative, arguing that, if the internal remedies are inadequate or inappropriate, then relief can be sought in terms of PAJA.[979] It was shown that the internal legislation in the SANDF, such as MDSMA and Chapter XX and its regulations, are inadequate to regulate procedural fairness.

The answer to the question of whether PAJA should find application with regard to actions by members of the SANDF is, therefore, that PAJA could and should find application only when there are no other specific, appropriate and purpose-built systems to provide relief, or when other exceptional circumstances exist.[980]

977 Ibid.
978 Hoexter C (note 658) at 234.
979 Tuswa Z "To PAJA or not to PAJA" W*ithout Prejudice* (2008) 10-11 at 11.
980 Ibid.

CHAPTER: 6

SUMMARY OF RESEARCH, CONCLUSION AND RECOMMENDATIONS

1. SUMMARY OF RESEARCH

Chapter one of the research study briefly introduced the *SANDU* 2010 judgment.[981] This chapter described the problem statement which described how all military forces including SANDF are based on a code of discipline and that there seem to be an imbalance when it comes to the protection of rights to procedural fairness and the enforcement of the required discipline.[982]

This chapter also looked at the aims and objectives of the study.[983] It explained that the aim of the study has been to investigate whether there is adequate legal provision within the legislative framework of the SANDF which regulates the applicability of procedural fairness when disciplinary actions are taken against actions by members of the SANDF.[984]

The other aim of the research has been to examine whether the Court in *SANDU* 2010 followed the best approach when it chose not to consider the provisions of PAJA when it adjudicated the matter. The objective of the research has been to show that the Court should have considered the provisions of PAJA to resolve the infringement of procedural fairness[985] and that the Court should have answered the question of whether the action of the Minister to dismiss members of the SANDF amounted to administrative action as defined in section 1 of PAJA.[986]

This chapter introduced the concept of "Military Administrative Justice" and also explained administrative Justice.[987] This chapter posed the research questions that the research study sought to answer.[988] The chapter further briefly looked at the *sui generis* nature of the SANDF

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981 Ch 1 at 3.
982 Ibid.
983 Ch 1 (note 939) at 6.
984 Ibid.
985 Ch 1 (note 939) at 7.
986 Ibid.
987 Ch 1 (note 939) at 2.
988 Ch 1 (note 939) at 8.

and the reasons why it could be difficult to incorporate and apply procedural fairness in its pure administrative law form within the SANDF disciplinary processes.[989]

It was submitted, however, that, notwithstanding the nature of the SANDF, the Minister cannot act without observing the requirements of procedural fairness.[990]

Chapter 2 of the study traced the nature and historical background of the South African National Defence Force and the Military Law System in general.[991] This chapter also traced the historical development of procedural fairness in the military context in general and in the particular context of the SANDF.[992] It is evident, from the discussion, that in the military the most important principle is discipline and its maintenance. The chapter discussed the historical development of South African Military Law System and its Legislative Framework, from the Union Defence Force to SADF and to SANDF.[993]

Chapter 2 also traced the history from the era before the enactment of the democratic Constitution and after the introduction of the democratic Constitution in South Africa.[994] It discussed how procedural fairness was understood in the military context in general.[995] There seems to be a difference in the manner in which procedural fairness is applied in the ordinary workplace and in the defence forces. Rowe argues that generally military fairness and military justice cannot not be separated,[996] and that they go together, notwithstanding the fact that stricter forms of punishment for transgression of a Military Disciplinary Code are applied compared to the civilian application of punishment for a similar offence.[997]

Schlueter, on the other hand, argues that military discipline is crucial for the existence of the military, and that commanders of the military had discretionary powers to enforce that discipline. Military justice was, therefore, dependent on the commander rather than on a formalised legal framework. [998]

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989 Ch 1 (note 939) at 2.
990 Ch 1(note 939) at 3.
991 Ch 2 at 2.
992 Ch 2 (note 949) at 2-3.
993 Ch 2 (note 949) at 10.
994 Ch 2 (note 949) at 1, 10, 12.
995 Ch 2 (note 949) at 6, 20.
996 Ch 2 (note 949) at 14, 16.
997 Ch 2 (note 949) at 18, 20.
998 Ch 2 (note 949) at 14, 16.

The opinions of both Rowe and Schuelter are also true within the South African context. In the SANDF, discipline is crucial for the maintenance, management and existence of a disciplined force.[999] This SANDF stance on discipline is also confirmed by the Constitution which requires that the SANDF be managed as a discipline defence force.[1000] This chapter discussed how the introduction of the democratic Constitution affected the relationship between the Minister of the SANDF and SANDU.[1001] This chapter looked how SANDU was officially established and recognised as a Military Trade Union.[1002]

In addition, chapter 2 discussed how the South African political situation before 1994 influenced the way in which procedural fairness was applied in the SANDF. The chapter looked at how the introduction of the Constitution influenced the applicability of procedural fairness in the Defence Forces.[1003]

Chapter 3 focused on the effect of the introduction of the Constitution in South Africa and, in particular, in the SANDF.[1004] The Constitution enabled the SANDF to allow a military trade union in the Defence Forces (SANDU).[1005] This chapter discussed the how the relationship between the Minister and the SANDU together with members of the SANDF who are also members of the SANDU was affected.[1006]

The effect of the Constitutional Court decision to allow a trade union in the defence forces was that SANDU requested the Minister to recognise it as such and allow members of the SANDF to affiliate to it and participate in SANDU's activities. In other words, the Minister had to recognise the existence of SANDU in the SANDF.[1007] This was arguably a difficult transition for the Minister, given the *sui generis* nature of the defence forces, as was evidenced by the extent of litigations that ensued between the Minister and SANDU.[1008]

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999 Ch 2 (note 949) at 24, 25.
1000 Ibid.
1001 Ch 2 (note 949) at 28.
1002 Ibid.
1003 Ch 2 (note 949) at 30.
1004 Ch 2 (note 949) at 2.
1005 Ch 3 at 2.
1006 Ch 3 (note 963) at 3-6.
1007 Ch 3 (note 963) at 7, 11-16.
1008 Ch 3 (note 963) at 16-23.

This chapter further discussed a number of court decisions which originated between the Minister and SANDU (representing its members) owing to a number of allegations of infringements on the fundamental rights of the members of the SANDF.[1009] The court decisions that were discussed were from the period 1999-2017. This chapter also discussed the facts of the *SANDU* 2010 judgment to set the tone for the discussion of the reasoning of the Court in Chapter 5.[1010]

It is suggested that the trail of judgments that began in 1999 between the Minister and the SANDU led to the main judgment of this research. After the SANDU 2010 judgment, the issues between the Minister and SANDU regarding the application of procedural fairness to actions by members of the SANDF were not resolved. This chapter discussed the subsequent judgments which took place from 2012-2015, and the current situation on the matter.[1011] From the discussion of this chapter it is clear that there is a need to promulgate rules and regulations of procedure that are in line with the Constitution which will adequately deal with the application of procedural fairness in the SANDF.

Chapter 4 looked at the main concepts and the applicable legislative provisions that the Court had to interpret and apply in the *SANDU* 2010 judgment.[1012] This chapter discussed the concepts of procedural fairness and discipline and the relevant legislative and constitutional provisions as submitted by both respondents and applicants respectively.[1013] These two concepts seems to be understood differently by both the applicants and respondents.

The applicants alleged that the Minister infringed on the rights to procedural fairness of members of the SANDF who are also members of the SANDU by summarily dismissing them without affording them an opportunity to state their cases. The Minister defended the allegation by asserting that discipline in the SANDF is of paramount importance and, therefore, failure to behave in a disciplined manner warranted summary dismissal. This chapter also looked at how the concept of discipline is understood within the context of defence forces and in the workplace in general.[1014]

1009 Ch 3 (note 963) at 24.
1010 Ch 3 (note 963) at 28-34.
1011 Ch 3 (note 963) at 30.
1012 Ch 4 page 2-3.
1013 Ch 4 (note 970) at 4.
1014 Ch 4 (note 970) at 5-7.

It was shown as Rowe argues that, in the context of defence forces, procedural fairness was as important as discipline, and ought not to be separated or distinguished from it.[1015] The two concepts should not be treated as mutually exclusive, but, rather, he argues should be seen as two sides of the same coin and that, if there is a need to enforce discipline, it must be done in a procedurally fair manner.

This resonates with Grogan's view that, although discipline is enforced through various sanctions, including dismissal, employers must exercise caution when they choose this form of discipline by observing all the processes of fair procedure because of its severity.[1016] This chapter looked at how the Minister emphasized that discipline in the defence force is important and that any member who behaved in an undisciplined manner must immediately be disciplined.[1017]

This chapter further discussed discipline in terms of the relevant provisions of the LRA, Chapter XX of the Defence Act and the Military Supplementary Discipline Measures Act.[1018] The chapter discussed also procedural fairness in general and within the particular context of the SANDF. [1019] This concept was discussed with the relevant provisions of the LRA, PAJA, the Military Discipline Supplementary Measures Act and Chapter XX of the Defence Act.[1020]

It was clear that Chapter XX of the Defence Act does not contain any section which addresses the application of procedural fairness before dismissal. There are also omissions in the Defence Act and MDSMA and the rules and regulations of the defence respectively.[1021]

This chapter also looked at the influence of the Constitution on the application of procedural fairness in general and within the particular context of the SANDF.[1022] It is clear that section 23 and 33 of the Constitution guarantees protection of the right to procedural fairness and the right not to be unfairly dismissed to everyone, including the members of the SANDF.[1023] The challenge that the Court was faced with when interpreting and applying the relevant legislative provisions to the concepts of discipline and procedural fairness is that, although sections 23 and 33 of the

1015 Ch 4(note 970) at 11,16
1016 Ch 4 (note 970) at 5.
1017 Ch 4 (note 970) at 3, 5.
1018 Ch 4 (note 970) at 7-20.
1019 Ch 4 (note 970) at 20, 30.
1020 Ch 4 (note 970) at 20, 25, and 27.
1021 Ch 4 (note 970) at 30, 34.
1022 Ch 4 (note 970) at 34.
1023 Ch 4 (note 970) at 4, 24-27.

Constitution protect everyone, the empowering legislation which gives effect to section 23 does not apply to members of the SANDF.[1024]

The other challenge is that the Minister might have found it difficult to apply procedural fairness to actions by members of the defence forces because there are no rules and regulations in the SANDF that deal with procedural fairness.[1025] Furthermore, the Court was faced with the dilemma that the only empowering legislation that deals with procedural fairness which gives effect to section 33 of the Constitution is PAJA and the fact that there are no rules and regulations available in the SANDF to deal with the application of procedural fairness.

Chapter 5 introduced the idea that PAJA should find application to deal adequately with the issue of procedural fairness with regard to actions by members of the SANDF.[1026] This chapter critically analysed the *ratio decidendi* of *SANDU 2010* Judgment.[1027] This chapter also looked at the nexus between the *SANDU* 2010 judgment and applicability of PAJA to dismissal matters in the SANDF.[1028]

The debate on the applicability of PAJA/administrative law to dismissal cases and employment disputes is regarded as having been settled by the Constitutional Court in the *Gcaba* judgment.[1029] Although the debate could be regarded as closed, it could be argued that the application of administrative law/PAJA to dismissal matters and employment related disputes within the context of SANDF presents a different aspect.

This chapter looked at the relevance of PAJA to dismissal matters or labour disputes in the SANDF.[1030] The main argument for the closing of the debate about whether administrative law/PAJA should be applicable to dismissal matters and labour-related disputes is that the legislature promulgated the LRA with the purpose to of dealing with labour-related disputes including dismissals.[1031] Whilst this legislation is promulgated to deal with labour-related disputes,

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1024 Ch 4 (note 970) at 4.
1025 Ch 4 (note 970) at 18.
1026 Ch 5 at 2, 3.
1027 Ch 5 (note 984) at 4.
1028 Ch 5 (note 984) at 4-8.
1029 Ch 5 (note 984) at 10.
1030 Ch 5 (note 984) at 8.
1031 Ch 5 (note 984) at 10.

it excludes the labour-related disputes that arise within the context of the SANDF the NIA the SASS and SAPS.[1032]

This chapter looked at the views by different commentators on the debate about whether administrative law should find application with regard to dismissal and employment-related disputes as well as the approach chosen by different Courts to address the question of whether administrative law should be applied.[1033] The chapter looked also at commentators such as Ngcukaitobi, Brickhill, Hoexter, and Grogan.[1034] From the discussion of these commentators' views, it is clear that the debate is not completely settled and that this question still needs further deliberation by Courts.

There were many judgments handed down which dealt with the question of whether administrative law should be applied to employment-related disputes.[1035] This chapter discussed only the common law position on this question before the *Chirwa* judgment, and then the *Zenzile* decision, the position in *Chirwa* judgment, and *Chirwa* decisions handed down by both the Supreme Court of Appeal (SCA) and the Constitutional Court (CC).

This chapter further discussed the position after *Chirwa* which is the Constitutional Court decision of the *Gcaba* judgment. These decisions showed the varying approaches that Courts followed when they answered this question. This chapter showed that, despite the current position on this issue, the context of the *SANDU* 2010 decision differed from all the Court decisions discussed above.[1036] Whilst the courts are in favour of the argument that administrative law should not find application to labour related matters, including dismissals, because the LRA was promulgated to deal with labour-related matters including dismissals, this law does not apply to members of the SANDF.[1037]

This chapter looked at the possibility of applying PAJA to dismissal matter involving members of the SANDF.[1038] This chapter also posed four question which it assumed that the Court would have asked to establish whether or not PAJA should find application to dismissal or labour related

1032 Ch 5 (note 984) at 11.
1033 Ibid.
1034 Ch 5 (note 984) at 19, 24, 28, 32.
1035 Ch 5 (note 984) at 11.
1036 Ch 5 (note 984) at 11-21.
1037 Ch 5 (note 984) at 21.
1038 Ch 5 (note 984) at 21-29.

disputes in the SANDF.[1039] This chapter also asked and answered the question of whether administrative law in the form of PAJA should find application in labour-related matters including dismissals, if the LRA does not apply and in the event that the law promulgated to deal with labour-related matters in the SANDF is inadequate to address issues of procedural fairness in the labour related disputes.[1040]

This chapter discussed sections 1, 3 and 6 of PAJA, read with section 33 of the Constitution 1996, to reach a conclusion about the possibility that, had the court in the *SANDU* 2010 judgment interpreted and applied the above mentioned sections of PAJA, it might have come to the conclusion that PAJA could find application to dismissal matters and employment disputes in the SANDF.[1041] This chapter also showed how the court could have developed military administrative law in the Defence Act, particularly Chapter XX which was promulgated specifically to deal with labour-related matters in the SANDF.[1042]

2. CONCLUSION AND RECOMMENDATIONS

The South African Courts[1043] contribute immensely to the development of South African Law. This they do when they adjudicate on a matter. The South African Constitution requires that, when a Court interprets or develops the law in accordance with section 39(2), it must take into consideration the spirit, purport and objects of the bill of rights in the Constitution. [1044] Furthermore, in terms of the Constitution, the role of the Courts is not only confined to the interpretation of the law, but this role also extends to the making or development of a new law or laws in the event that such a law is found to be unjust, inefficient, inadequate or obsolete due to changing circumstances.

This implies that, when the Court is adjudicating a matter, its role is not only to resolve the matter before it, but also to develop the law. The High Court in the *SANDU* 2010 judgment was presented with an opportunity to develop administrative law that would be suitable for SANDF labour relations.

1039 Ch 5 (note 984) at 21.
1040 Ch 5 (note 984) at 23.
1041 Ch 5 (note 984) at 25, 27-28.
1042 Ch 5 (note 984) at 29, 32-33.
1043 Ibid.
1044 Ibid.

It is worthy of mention that South African Courts have come a long way in developing the Law since the apartheid era. Through the adjudication of various matters from different disciplines, the Courts have been able to develop laws and align them with the Constitution. This includes the laws for the South African Defence Forces which arguably could be regarded as being difficult to develop because of the nature of the defence forces.

It was shown in chapter 5 that, had the Court considered the application of administrative law in the form of PAJA to adjudicate the matter, this would have assisted not only in the development of SANDF Administrative Labour Law' but also Defence Forces Regulations. It was also shown that owing to the gap that seems to exist in the Defence Forces legislative framework, PAJA would be appropriate to protect the right to members of SANDF guaranteed in section 33 of the Constitution.

The approach of the court in the SANDU 2010 judgement is not surprising because the issue regarding the applicability of administrative law to labour related matters including dismissal is regarded as having been settled by the Constitutional Court in the *Gcaba* decision, as discussed in chapter 5.

Although several judgments were handed down in favour of the application of LRA in relation to to labour related disputes, including dismissals of public servants as opposed to the application of PAJA to these matters, there is evidence of other judgments which indicate that PAJA can be applicable to dismissal matters of public service employees.[1045]

This suggest that not all Courts are in agreement on the question whether PAJA or administrative law should find application in labour-related disputes or dismissal cases of public sector employees.[1046] Furthermore, as argued by Ngcukaitobi, it is not a good idea for Courts to oust the application of PAJA to employment-related matters only because the LRA is applicable.[1047]

1045 Ch 5 (note 984) at 11-21.
1046 Ch 5 (note 984) at 11-21.
1047 Ch 5 (note 984) at 9.

Whilst the arguments of different Courts are noted with regard to the applicability of administrative law to labour-related disputes, including dismissal cases, it was shown that, in the context of the SANDF, these arguments cannot be sustainable because the LRA does not apply to members of the SANDF.

PAJA was promulgated to give effect to the right to just administrative action.[1048] It was shown in chapter 5 that the Court do not favour direct reliance on the Constitution. If members of the SANDF are not afforded the protection of just administrative action under PAJA, they have to rely directly on sections 23 and 33 of the Constitution to counter the infringement of their right to procedural fairness.[1049]

The idea that PAJA should not find application in labour-related disputes and dismissals, as was held by some Courts, implies that the Courts are prevented from interpreting and applying the provisions of PAJA under the circumstances such as those in the *SANDU* 2010 judgment. As a result of this, the Court missed an opportunity to develop administrative law in accordance with section 39 (2) of Constitution in general and to develop military administrative law in particular, so improving South African National Defence Force administrative labour law.[1050]

1048 Ch 5 (note 984) at 2.
1049 Ch 5 (note 984) at 2-3.
1050 Ch 5 (note 984) at 30.

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