THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 161/11
Not reportable

In the matter between:

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

and

SOUTH AFRICAN NATIONAL DEFENCE UNION	**First Respondent**
MOSIMA MONAGENG PAINE FREDERIC MOSIMA	**Second Respondent**

Neutral citation: *The Minister of Defence v SA National Defence Force* (161/11) [2012] ZASCA 110 (30 August 2012)

Coram: NUGENT, LEWIS, PONNAN, CACHALIA and MHLANTLA JJA

Heard: **20 AUGUST 2012**

Delivered: **30 AUGUST 2012**

Summary: **Interdict – whether right established – peremption of appeal – desirability of leaving intact order that ought not to have been granted – costs – duties of government in litigation.**

ORDER

Application for leave to appeal from orders of North Gauteng High Court (Pretorius J) sitting as court of first instance):

The application for leave to appeal against paragraph 2 of the order of the court below is granted. The appeal against that order is upheld and the order is set aside. The applicants for leave to appeal are to pay the costs of the application and of the appeal.

JUDGMENT

NUGENT JA (LEWIS, PONNAN, CACHALIA and MHLANTLA JJA CONCURRING)

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

[2] The military authorities were rightly disturbed at what had occurred. On 30 August 2009 they issued notices to about 1 200 members who had been identified as having participated in the events advising them, amongst other things, that their services were 'provisionally terminated', and calling upon them to show cause within ten days why the 'provisional termination' should not be confirmed.

[3] The South African Defence Union and its President (the respondents in the proceedings before us), acting on behalf of its members who had received such notices, launched an urgent application in the North Gauteng High Court, citing as respondents the Minister of Defence, the Secretary for Defence, and the Chief of the SANDF (I will refer to them as the appellants). The respondents sought, and were granted, two orders in the following terms:

'Declaring that the procedure adopted by the [military authorities] as reflected in the [notices] dated 30 August 2009 is unlawful and/or unconstitutional'

and

'Interdicting and restraining the [military authorities], pending the finalization of a dispute to be referred to the Military Bargaining Council (and, should the matter not be resolved in the Military Bargaining Council, to the Military Arbitration Board) by the [Union], from terminating and/or administratively discharging members of the [Union] pursuant to the [notices], and/or any other similar order, bulletin or memorandum'.

[4] The learned judge refused leave to appeal against her orders and the appellants thereupon applied for leave to the President of this court. The judges who considered the application directed, under s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, that the application be heard by the court, and that the parties be prepared to argue the merits of the appeal should leave be granted. That application is now before us.

[5] The appellants have since abandoned their application for leave to appeal the declaratory order, in circumstances that I come to presently, and persist in their application only in relation to the interdict. Apart from supporting the grant of the interdict the respondents contend that the appellant's right to appeal the order has been perempted. Before turning to that issue I deal first with whether the interdict was rightly granted.

[6] The Military Bargaining Council and the Military Arbitration Board referred to in the order that is sought to be appealed 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, made under the Defence Act 44 of 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'.

[7] The regulations allow for representation of members of the SANDF by registered military trade unions for purposes of collective bargaining and the resolution of labour disputes. Regulation 36 allows for a military trade union to engage in collective bargaining and to negotiate on behalf of its members on selected matters that include 'labour practices'. An 'unfair labour practice', which naturally falls within that category, includes 'the unfair suspension or dismissal of a member or other disciplinary action short of dismissal'.

[8] Collective bargaining and the resolution of labour disputes take place through the medium of the Bargaining Council. The Bargaining Council comprises representatives of the SANDF and representatives of recognized military trade unions. Its powers and duties include 'the

prevention and resolution of labour disputes' (reg 63). Regulation 71(2) requires it to 'attempt to resolve a dispute between the parties through conciliation'. Disputes that cannot be resolved through conciliation may be resolved by arbitration before the Military Arbitration Board.

[9] The application that was brought before the court below was directed at the validity or otherwise of the disciplinary procedure that had been embarked upon by the military authorities as reflected in the notices that had been issued to members. That procedure was said by the respondents to be unlawful for various reasons that need not now concern us. Once the court below declared the procedure to be unlawful that was the end of the dispute that was the subject of the application.

[10] The court nonetheless granted the interdict in addition. The reasons for doing so do not emerge from the judgment of the learned judge, which are directed only to why the procedure was unlawful.

[11] It is trite that for an interdict to be granted the applicant must establish (1) that he or she has a clear right and (2) that the right has been or is expected to be infringed and (3) the absence of similar protection by any other ordinary remedy.[1] Where the existence or otherwise of the right has yet to be judicially determined, whether in those proceedings, or in a related action, a court has a discretion meanwhile to grant an interdict maintaining the status quo pending the outcome of that determination, if the right relied upon is demonstrated prima facie.

[12] In this case the Union intimated in its founding affidavit that it intended referring the dispute that then existed between the parties to the

1 'Interdict' by LTC Harms in *The Law of South Africa* ed WA Joubert 2 ed Vol 11 paras 396-399.

Bargaining Council. The 'right' that it relied upon in the founding affidavit for the grant of the interdict was expressed as follows:

'It is submitted that [the Union] has a prima facie, if not clear, right to have the disputes described immediately above resolved in its favour [by the Bargaining Council or, if necessary, by the Military Arbitration Board].

What were referred to in that passage as 'disputes' that existed between the parties, when seen in the context of the earlier passages, were really no more than various facets of what was in reality a single dispute – the dispute being whether the military authorities were entitled to adopt the procedure that they had embarked upon.

[13] The Union's reliance upon what was said to be a 'prima facie' right was misplaced. The interdict was not directed to restraining the military from acting pending the outcome of pending legal proceedings. It was directed to restraining them from acting until the occurrence of an extraneous event, which is something different. For that relief to be granted it was incumbent upon the Union to establish that it (or the members it represented) had a clear right that would be infringed if the interdict was not granted.

[14] But I say that only in passing. The 'right' relied upon (whether 'clear' or 'prima facie established') did not support the granting of the interdict. No doubt the Union was entitled to refer the dispute to the Bargaining Council, but there is no suggestion that the Union or its members were entitled to halt the proceedings that had been embarked upon until the dispute was resolved. It might have been prudent for the military to await the resolution of the dispute, lest they later be found to have unfairly dismissed the members, but no basis was laid for contending that it was not entitled to proceed until the dispute had been

resolved.

[15] On that ground alone the interdict ought not to have been granted, but there is a further difficulty in the way of the Union. Even assuming that a resolution of the dispute was a prerequisite to discharging the members, that dispute was resolved by the grant of the declaratory order. Once that order was made there was simply no dispute to refer to the Bargaining Council.

[16] In argument before us counsel for the Union submitted that what was yet to be resolved was the procedure to be adopted by the military, and that the military was not entitled to proceed until agreement had been reached on a fair procedure, or it had been determined by arbitration. That was never the case sought to be made out in the court below and there is nothing in the founding affidavit to support it. Indeed, it would be extraordinary if the military was precluded from embarking upon disciplinary proceedings without first having the agreement of the Union or the Board's determination of how it should do so.

[17] No grounds were made out for the grant of the interdict and in the ordinary course it falls to be set aside. But, it was submitted on behalf of the Union, the appellants have foregone any right they might have had to appeal the order. For that submission they rely upon the conduct of the appellants shortly before the matter was heard.

[18] On 26 July 2012, some three weeks before the matter was to be heard, a spokesman for the Minister issued a media release. The release summarised the history of the case, recording that the Union 'took the matter to the High Court and challenged the manner in which the

Department attempted to terminate the soldiers' employment, and that 'the High Court ruled in favour of the [the Union] based on the fact that the procedure in dismissing the soldiers was not fair'. It went on to announce that the Minister 'has decided based on legal advice, and in consultation with the Chief of the [SANDF] to withdraw the case from the SCA and to charge the soldiers under the military court system.'

[19] The military court system referred to in the media release is the system established by the Military Discipline Supplementary Measures Act 16 of 1999. In short, that system allows for members of the SANDF to be tried for military offences by a military court. If convicted the military court is empowered to impose various penalties that include dismissal from the SANDF.

[20] On 31 July 2012 the appellants' attorney wrote to the respondents' attorney advising, amongst other things, that 'we are drafting our notice of withdrawal of the appeal to be served tomorrow'. Curiously, on 2 August 2012, in response to a query by the Registrar of this court, the appellants' attorney wrote to the Registrar advising, without explanation, that 'the appellants are <u>not</u> withdrawing the appeal and as such the matter is proceeding on the 20th August 2012 as set down'.

[21] On 5 August 2012 the Beeld newspaper reported that it appeared that confusion on whether the appeal would be withdrawn had been cleared up: the political adviser to the Minister had said the previous day that the defence force stood by its decision to withdraw the appeal. Yet the confusion continued. Upon enquiring on 6 August whether the statement was correct, the appellants' attorney informed the Union's attorney that he would take instructions from his client, but that 'to date

our instructions are that we are proceeding with the Appeal on the 20th August 2012'. Meanwhile the Union became aware that its members were being recalled to their units. On 8 August 2012 the appellants eventually settled into their present stance. On that day, in response to further enquiry by the Union, the appellants' attorney advised that 'our client is proceeding with its appeal' but that 'our client has instructed us to advise you that the appeal will proceed only in respect of order number 2 and it conceded order number 1 of the judgment'.

[22] A party who acquiesces in a judgment will be taken to have waived his or her right to appeal. As with all cases of the abandonment of rights, acquiescence will not lightly be inferred. What is required to be shown is unequivocal conduct on the part of the litigant that is inconsistent with any intention to appeal, such as to point 'indubitably and necessarily' to the conclusion that he or she intended to abandon the right.[2]

[23] The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice. Bearing in mind the policy underlying the rule it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served. As this court said recently in *Government of the Republic of South Africa v Von Abo*[3], in response to a similar contention that the appeal had been perempted:

'It would be intolerable if, in the current situation, this court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice

2*Dabner v South African Railways and Harbours* 1920 AD 583 at 594 recently reaffirmed in *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 443 E-G.
3*Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) para 19.

followed by the appellants or an incorrect concession made by them'.

[24] In this case, as pointed out by counsel for the Union, the Minister's spokesman said, without qualification, that the appellants, after taking legal advice (the legal adviser has not been identified but it was none of her legal representatives in this appeal), was abandoning the appeal. It may be inferred from its present stance that the appellants, upon reflection and perhaps on sounder advice, have since changed their minds.

[25] There are two reasons why I think it would not serve the ends of justice if the appellants were to be held to their earlier decision. The first is that this is not a case in which the acquiescence by the respondents has had any material consequences. It was for barely a week that the Union was left under the impression that the application was to be abandoned. Confusion remained for another week but by 8 August the appellants' position had become clear. There is no suggestion that the Union or its members acted in any way during that fortnight such that the change of mind caused it prejudice.

[26] The second reason is perhaps more important. The appellants are charged with a constitutional duty to maintain a disciplined defence force. It would be intolerable if an interdict wrongly granted were to impede the discharge of that duty. We were told that the Union accepts that the interdict is not a barrier to proceeding in the military courts, which is the present intention of the appellants, but that is beside the point. The interdict was granted in the context of a specific dispute that has now been resolved. The broad and vague language in which it was framed is capable of restraining the military beyond the purpose for which it was

granted, which would be an abuse. That it is capable of doing so is reason enough not to leave it in place, albeit that no such circumstances are envisaged at present.

[27] There remains the matter of costs. The manner in which this litigation has been conducted is disturbing. The orders were made on 1 December 2010. On 20 December 2010 the appellants applied to the court below for leave to appeal. That application was heard on 3 March 2011 and dismissed two weeks later. This application was launched the following day. It was referred for hearing by the court on 7 July 2011.

[28] The present stance taken by the appellants is sufficient to demonstrate that the response to the judgment of the court below was no more than a knee-jerk reaction. Whatever the merits of the orders granted, the appellants had before them the considered and impartial views of a court as to the fairness of the action they had embarked upon, and they might be expected to have reflected upon the wisdom of pursuing their chosen course, leaving public confidence in the discipline of the SANDF unrestored while the litigation continued.

[29] Meanwhile for 19 months more than a thousand members of the SANDF remained 'provisionally dismissed'. There is no such thing as 'provisional dismissal' – a person is either in employment or he or she is not. It seems that what was meant by the military was only that the members should not present themselves for duty but would continue being paid. The cost to the taxpayer while the matter remained in that state must have been millions and millions of rand when, as its present stance has shown, alternatives that would have avoided that cost were available to the appellants. Eventually there was a scurry only weeks

before the matter was to be heard, and even then there was a fortnight of confusion.

[30] I do not think that is how litigation should be conducted by the government or by public bodies. Unlike private litigants they must conduct their affairs in the public interest, which calls for mature judgment and reflection before commencing or persisting in litigation. I think it proper to record that we are aware that the incumbent of the ministerial office changed only recently, which might account for the commendable change of stance.

[31] It is true, as pointed out by counsel for the appellants, that the Union's continued defence of the interdict, even after the partial abandonment, demonstrates that the appellants were always obliged to bring these proceedings, if only to set aside the interdict, which they have succeeded in doing. Yet it is by no means certain that the Union would have continued its defence had the appellants not sought to appeal the substantive order in the first place.

[32] The Union has asked for costs on the attorney and client scale but I do not think we should accede to that. The Union might itself have abandoned the interdict once the appellants acquiesced in the principal order, but chose to persist for reasons that are not apparent. In my view it should bear part of the blame for an appeal that was unnecessary, albeit that their fault was slight in comparison to that of the appellants.

[33] The application for leave to appeal against paragraph 2 of the order of the court below is granted. The appeal against that order is upheld and the order is set aside. The applicants for leave to appeal are to pay the

costs of the application and of the appeal.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	A Schippers SC
	T Masuku
	Instructed by:
	Xulu Liversage Incorporated, Cape Town
	Lovius-Block, Bloemfontein
For respondents:	G J Marcus SC
	A Friedman
	Instructed by:
	Griesel Breytenbach Attorneys, Pretoria
	Naudés, Bloemfontein