

# NATIONAL SECURITY AND THE CONSTITUTIONAL RIGHT TO JOIN MILITARY TRADE UNIONS: IS CONSTITUTIONAL AMENDMENT AN IMPERATIVE?

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The unionisation of the South African Military Forces has tested both lawyers and the South African legal system. However, there is very little academic commentary on this important subject. In this article, the policy, which allowed the unionisation of the South African military, the influence of the policy on national security, and the reasons why the policy failed, are discussed. It is argued that, in the South African context, allowing unions in the Defence Force was a big mistake. Such conduct has sacrificed the country's national security at the altar of soldiers' right to form and join labour unions. Unions have polarised the military – their propensity to embark on labour actions or threats to embark on such actions undermines the country's national security.

An analysis is made on whether or not the Constitutional Court erred in interpreting certain provisions of the Constitution, especially section 23(2), which states, "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." This will be done by examining some constitutional and legislative provisions, which deal with the Defence Force. An argument will be made as to whether members of any organisation may really be classified as workers. It will be respectfully argued that the Constitutional Court misdirected itself in interpreting the word 'workers' in section 23(2) of the Constitution to include members of the Defence Force. Lastly, it is argued that in the South African context, allowing unions in the Defence Force has proved to be an Achilles' heel. Recommendations are made about steps the country should take to ensure that military forces are not unionised.

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## Introduction

Before the emergence of democracy in South Africa in 1994, members of the former Defence Force were prohibited from becoming members of trade unions. For instance, section 126B(1) of the Defence Act<sup>1</sup> provided :

A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 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.

The new South African Constitution guarantees the right of every worker to form and join a trade union<sup>2</sup> and to participate in the activities and programmes of a trade union<sup>3</sup> and to strike.<sup>4</sup> With the new democratic dispensation and the coming into existence of the new Constitution things changed and members of the new Defence Force were allowed to form and join trade unions. In 1999, in *South African National Defence Force Union v Minister of Defence and Other*,<sup>5</sup> the Constitutional Court interpreted the word 'worker' in section 23(2) of the Constitution<sup>6</sup> to include members of the Defence Force. As a result, the right to form and join a trade union was extended to members of the South African National Defence Force (SANDF). As a result, military trade unions received full recognition in the Defence Force. However, in some quarters, allowing trade unions in the military was and still is regarded as an affront to national security and military discipline and good order in the Defence Force.

## National security

National security is a broad concept but for our purposes here, it is restricted to raising and maintaining an effective military force to defend the country against external military threats. As in other countries, national security is a constitutional matter in South Africa. The concept of national security deals with our actual survival as a nation. It also deals with those things that as a nation we

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<sup>1</sup> Defence Act 44 of 1957.

<sup>2</sup> S 23(2)(a) of the Constitution of the Republic of South Africa of 1996.

<sup>3</sup> S 23(2)(b) *ibid*.

<sup>4</sup> S 23(2)(c) *ibid*.

<sup>5</sup> 1999 (6) BCLR 615.

<sup>6</sup> The Constitution of the Republic of South Africa of 1996.

must do and those that we must not do in order for us to survive. For this country, to achieve national security objectives, some of the fundamental governing principles is to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.<sup>7</sup> In its restricted form, national security concerns those matters which deal with national defence of our country or refers to the defence and protection of South Africa from any attack or other dangers by having an adequate and coherent military force – the South African National Defence Force. In order to ensure national security, the authors of our Constitution established a single Defence Force as one of the security services<sup>8</sup> with a specific primary mandate or object.

### **The mandate of the SANDF**

Military forces are purposive instruments, which are “rationally conceived to fulfill certain objects the principal of which is to fight and win wars”.<sup>9</sup> These forces have the monopoly of arms.<sup>10</sup> Therefore, one of the highest obligations a country may place on its citizens is the obligation to defend and protect the motherland, its territorial integrity and its people from military threats, which may emanate from either the external or the internal environments. Whether military threats exist or not, states develop national security policies “that are intended to provide security by lowering the probability that the attack will occur”.<sup>11</sup> South Africa did just that. This leads us to the primary object of our Defence Force, “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”.<sup>12</sup> This provision of the Constitution makes the Defence Force one of the primary instruments of national power in ensuring national security and the only instrument of power which may apply coercion to defend and protect the nation. This means that members of the Defence Force are not only expected to fight in defence of the country but to die for it, which is a supreme sacrifice.

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<sup>7</sup> These are some of the governing principles of national security found in s 198 of the Constitution of the Republic of South Africa of 1996.

<sup>8</sup> Ibid.

<sup>9</sup> Finer, SE *The Man on Horseback: The Role of the Military in Politics* (2009) at 7.

<sup>10</sup> Ibid 5.

<sup>11</sup> Baldwin, DA ‘The Concept of Security’ (1997) 23 *Review of International Studies* at 13.

<sup>12</sup> The Constitution of the Republic of South Africa of 1996.

## A disciplined defence force

From the principal purpose<sup>13</sup> of military forces follow centralised command, hierarchy, discipline, *esprit de corps*, etc.<sup>14</sup> without which the army cannot win wars. For the SANDF to execute this constitutional mandate, it has to be a disciplined, credible and coherent military force. The authors of our Constitution realised the importance of the Defence Force in ensuring our national security and placed an obligation that such Defence Force must be structured and managed as a disciplined military force.<sup>15</sup> Without discipline and coherence within the ranks the SANDF, it will not be able to fulfil its constitutional mandate of defending and protecting South Africa, its territorial integrity and its people and in turn of ensuring national security by applying the modern and state-of-the-art equipment the taxpayer may acquire for it. Ill discipline or perceived ill discipline within the ranks of any military force undermines the purpose of establishing it, namely to defend and protect the country when the need arises. Such ill discipline may undermine our national security because South Africa may not have a credible and dependable force on which to rely when needed the most.

There are indicators which show that unionisation of our military undermines coherence within the ranks of the Defence Force, which may in turn undermine the capacity of the Defence Force as an instrument of national power to execute its constitutional mandate. The importance of cohesion within a military force cannot be underestimated. In this regard, Von Clausewitz<sup>16</sup> says:

[I]t would be a serious mistake to underrate professional pride (*esprit de corps*) as something that may and must be present in an army to greater or lesser degree. Professional pride is the bond between the various natural forces that activate the military virtues; in the context of this professional pride they cristalize more readily. An army that maintains its cohesion under the most murderous fire; that cannot be shaken by imaginary fears and resists well-founded ones with all its might; that [is] proud of its victories, will not lose the strength to obey orders and its respect and trust for its officers even in defeat ... such an army is imbued with the true military spirit.

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<sup>13</sup> For the principal purpose of military forces, cf. *Finer op cit* 7.

<sup>14</sup> *Ibid.*

<sup>15</sup> S 202(1) of the Constitution of the Republic of South Africa of 1996.

<sup>16</sup> Howard, M *Carl Von Clausewitz on War* (Princeton 1989) at 187.

Allowing soldiers to form and join unions also undermines the *esprit de corps* among some elements of the Defence Force. That happened in 1999 when South Africa allowed the Defence Force to be unionised. This happened after the Constitutional Court ruled, “soldiers like any other citizens have the right to freedom of expression and to form and join military unions”. It is said, “the unionization of military personnel has been viewed as conflicting with the unique nature of the military and its role in maintaining national security and public order”.<sup>17</sup>

I respectfully submit that through the courts – including the Constitutional Court – South Africa should not have allowed the unionisation of the Defence Force. As the 26 August 2009<sup>18</sup> experience showed us, the unionisation of our Defence Force did not only undermine military discipline and coherence among members of the Defence force; it also led to a tendency of undermining national security. For instance, what will happen when the president as head of national executive declares a state of national defence<sup>19</sup> and members of a military trade union go on strike or organise a march as they did on 26 August 2009? Without any doubt, that will undermine our national security.

To a certain extent, unionisation of the Defence Force has created some divided loyalties. There is a perception that some members – especially those who are members of some trade unions – have divided loyalty. They are loyal to those trade unions and to the Defence Force. Divided loyalties are a recipe for disaster in any military force. No matter how noble the cause, how brilliant the plan and how inferior the adversary’s weapons, an army with divided loyalties cannot defeat even the most inferior adversary. Members of the Defence Force do not have to have divided loyalties. They must be loyal only to the country they serve and the Defence Force of which they are members. For the Defence Force to be a credible military force that is able to execute its constitutional mandate, divided loyalties should be avoided at all cost.

Members of the Defence Force must have undivided loyalty to the people of the Republic. When they join the Defence Force, they forgo one of the most

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<sup>17</sup> ‘Military Unions and Associations’ in *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (2008) Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) available at <http://www.osce.org/odihr/31393?download=true>

<sup>18</sup> When some members of the Defence Force marched to the Union Buildings in Pretoria, which march led to the destruction of property in the area.

<sup>19</sup> In terms of the provisions of s 203(1) of the Constitution of the Republic of South Africa of 1996.

important rights, which is enshrined in the Bill of Rights – the right to life – so that others can enjoy all these rights. For South Africans and others who live in South Africa to enjoy these rights, South Africa must have a sense of national security and the capacity to be protected from possible attacks by potential adversaries. Potential adversaries may create or exploit the existing gaps to undermine coherence among members of the Defence Force thereby undermining the capacity of the Defence Force to defend and protect the country. That, in turn, will jeopardise and undermine the country's national security.

### **Command and control**

In the military, command and control is a domain of military leadership. For any military force to function properly, command and control should therefore never be shared with any organisation including military trade unions. Military trade unions have a tendency of diluting command and control of the Defence Force. For example, in the recent past, South Africa witnessed situations where military trade unions pronounced themselves on issues of command and control. This undermines our national security because no military force can be a credible force if it is not clear from where and from whom soldiers receive their commands. There is also a tendency on the side of the unions to pronounce themselves on operational matters in theatre operations, thereby endangering lives of our troops.

### **Limitation of rights**

What we must ask is whether or not soldiers' right to form and join a trade union may be limited by the constitutional obligation imposed on the Defence Force to defend and protect the Republic, its territorial integrity and its people. Fulfilling this obligation more often than not will lead to loss of lives of some members of the Defence Force. By implication, in executing this constitutional obligation, soldiers' right to life as enshrined in the Constitution is limited by the common good, i.e. the defence of the Republic. The right to life is the most important of all rights and all other rights depend on. If this right (the soldier's right to life) may be limited by sending members of the Defence Force to war in defence or protection of the Republic or in peacekeeping operations knowing very well that some may be killed, why is the soldier's right to form and join a trade union not limited in the interest of national security?

Some rights into the Bill of Rights are not absolute. They may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human

rights, equality and freedom.<sup>20</sup> I submit that the right to form and join a military trade union may be limited constitutionally by the same constitutional obligations placed upon the Defence Force – the defence and protection of the Republic, its territorial integrity and its people as a primary mandate of the Defence Force.

As a nation, it should be in our character and a national habit to avoid or correct those decisions which may have unintended consequences, such as undermining our national security. Therefore, in the interest of our common good – our national security – government should adopt a policy that prevents the unionisation of the country's military forces. Soldiers' right to form and join military trade unions has to be limited by the law of general application. By de-unionising the military, we will be doing our country as much good as we can. The nation must undo the harm, which was caused by the unionisation of the Defence Force which, in some instances, led to the paralysis of command and control.

### **What is the way forward?**

Matters of national security, as they deal among other things with the defence and protection of our country, its territorial integrity and its people, should not be treated lightly. If we as the nation treat these issues lightly, we will wake up one day without a united, credible and formidable Defence Force on which the nation may rely in times of need. In addition, certain elements within the military may one day intervene directly or indirectly in politics of the country thereby threatening our national security. Therefore, South Africans should heed the call to de-unionise the Defence Force in order to prevent such eventualities. Those who do not listen to advice often find themselves in troubles that they should have avoided, i.e. *ngoana mahanajoetsoa o mmona ka dikgapha*.<sup>21</sup>

Of concern to the writer is the ambivalence of South Africans on the issue of whether or not soldiers should be allowed to form and join military unions. For a very long time, this has been left to the leadership of the Defence Force alone. In my view, this should not be a SANDF concern; it should be our collective concern as South Africans. This means South Africans, including the three arms of the State, viz Parliament, the Executive and the Judiciary, should be in unison when it comes to issues of national security.

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<sup>20</sup> S 36(1) *ibid*.

<sup>21</sup> This is a *SeSotho* idiom which, when loosely translated, means that a stubborn person who does not listen when he or she is being advised usually finds him- or herself being hurt and crying.

In the interests on national security, military discipline and good order within the military ranks, we, the people of South Africa, regardless of our political affiliations, should take a brave and decisive decision to de-unionise the SANDF. This can be done by amending section 200 of the Constitution by inserting a new subsection (2) which, in the interest of national security, will forbid members of the Defence Force from forming or joining military trade unions.

Instead of military trade unions, South Africans might consider allowing soldiers to form or join professional associations, which will represent soldiers' interests related to working conditions. The professional associations should not have any political objectives and should not engage in any industrial action.

### **Conclusion and recommendations**

In 1999, the Constitutional Court held that members of the Defence Force may be regarded as workers; therefore, they are entitled to form and join military unions. Allowing soldiers to form and join military trade unions is an affront to national security in that it undermines the constitutional obligation of the Defence Force, which is to defend and protect the Republic, its territorial integrity and its people. Union activities tend to undermine and harm military discipline, cohesion and the professional pride (*esprit de corps*) of our military, and at times interfere with the command and control responsibilities of commanders.

Currently, there is ambivalence on whether the country needs its military to be unionised. In the interest of national security, it is recommended that South Africa should de-unionise the Defence Force. The country should adopt a policy, which prohibits the unionisation of the Defence Force. Then the Department of Defence should consider approaching the Constitutional Court to reconsider its previous decision where it was decided that the word 'worker' in section 23(2) of the Constitution includes members of the Defence Force.

It is my opinion that the Constitutional Court should be able to change its decision on the previous case if the situation in the new case warrants a new finding. This might be the case if the social, political and security situation has changed since the previous decision or if following the previous decision might bring the administration of justice into disrepute or if that might cause untold suffering to the beneficiaries of certain rights in the Bill of Rights. The soldiers' march to the Union Buildings in 2009 and the subsequent destruction of property and other violent strikes by other unions in the country brought about that change. Therefore, there is a compelling case for the Department of Defence to approach the Constitutional Court to revisit its previous decision.



If the Department of Defence fails to convince the Constitutional Court to change its previous decision, the department could approach Parliament to change the decision of the Constitutional Court by amending the Constitution to prohibit members of the Defence Force from forming and joining any trade union. This can be done by amending section 200 of the Constitution by inserting a new sub-section (2) and the current sub-section 2 to become a new sub-section 3. Therefore, the proposed section 200 of the Constitution should read as follows:

(1) The Defence Force must be structured and managed as a disciplined military force.

[(2)] [Members of the Defence Force are prohibited to –

(a) form and join a trade union;

(b) participate in the activities or programmes of a trade union; and

(c) strike.]

[(3)] 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.

Amending the Constitution in this fashion will put to rest the debate on whether or not members of the Defence Force are ‘workers’ as envisaged in the provisions of section 23(2) of the Constitution<sup>22</sup> or put differently, it will answer the question whether soldiers could be members of the Defence Force and workers at the same time,

The proposed amendment may be brought about in terms of section 74(3) of the Constitution.<sup>23</sup> This requires that a Bill amending this provision be passed by the National Assembly, with a supporting vote of at least two thirds of its members. Because this matter does not affect the National Council of Provinces or alter provincial boundaries, powers, etc., the vote of the National Council of Provinces will not be necessary.

The current military leadership is constrained by the shrinking budget allocation of the Department of Defence. The ever-declining defence budget does not only affect the ability of the Defence Force to acquire new and advanced weapon systems but it also negatively affects soldiers’ standard of living. The conditions of service of soldiers are not where the Defence Force would like them to be. South Africa needs to conduct a study to look at the possibility of establishing occupation-specific military professional associations, which must be

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<sup>22</sup> The Constitution of the Republic of South Africa of 1996.

<sup>23</sup> *Ibid.*

affiliated under an umbrella body that will look after the interests of members of the Defence Force, e.g. to bargain for better service conditions for members of the Defence Force.

Soldiers, regardless of rank, do not have time and skills to look after and protect their socio-economic interests. They need an independent body which will lobby for their interests and advise government on what the implications of adopting certain policies will be. Such a body must respect the chain of command. Unlike military unions, such associations must be forbidden to participate in any industrial action or to be affiliated to any federation of trade unions.

It is recommended that the Defence Act<sup>24</sup> be amended to establish and regulate independent and apolitical occupation-specific military professional associations. This will ensure that soldiers' constitutional right to freedom of association<sup>25</sup> is guaranteed and respected at all times without undermining operational efficiency of the Defence Force. This will also remove the need for soldiers to join military trade unions as the guarantors of their constitutional rights.

In 2012, Parliament passed legislation that established the Office of the Military Ombud.<sup>26</sup> The object of the Office is to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner.<sup>27</sup> However, according to its mandate, this office is not proactive in nature in that complaints regarding members' conditions of service have to be lodged for it to investigate.<sup>28</sup> The office is very effective and efficient in dealing with soldiers' grievances but, sadly, it is constrained by its mandate to be reactive.

Military professional associations will be mutually beneficial to both the state and soldiers. On the one hand, there will be efficiency of command and control and of military operations because there will be no trade unions which compete for membership and allegiance of members of the Defence Force. On the other hand, soldiers will have a voice on socio-economic issues that directly affect

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<sup>24</sup> Act 42 of 2002 (as amended).

<sup>25</sup> As guaranteed by s 18 of the Constitution of the Republic of South Africa of 1996.

<sup>26</sup> The Military Ombud Act 4 of 2012.

<sup>27</sup> S 3 The Military Ombud Act 4 of 2012.

<sup>28</sup> S 4 (I) The mandate of Office is to investigate complaints lodged in writing by-

- (a) a member regarding his or her conditions of service;
- (b) a former member regarding his or her conditions of service;
- (c) a member of the public regarding the official conduct of a member of the Defence Force; or
- (d) a person acting on behalf of a member.

them. These associations have to be proactive in nature – they must be a force multiplier to government’s endeavours to improve soldiers’ conditions of serve.

The state needs to pay some serious consideration to the South African soldiers’ standard of living. Soldiers’ quality of life needs to be improved to eradicate the need for them to join military trade unions. Notwithstanding that they are subject to the Defence Act,<sup>29</sup> for salary matters, members of the Defence Force are considered public servants. As a result, their posts or military ranks are equated to civilian posts and they receive the same salary as their civilian counterparts. In order to improve soldiers’ quality of life, government must consider delinking military ranks from civilian posts.

Soldiers are the most important national security asset that South Africa has. Their willingness to fight and die in defence of the country, when the need arises, will depend largely on the way they are led and looked after by those in leadership positions. When they are well led and well looked after, they are an indispensable asset but when they are not, they are just soldiers. Look after them and they will look after your country in times of need.

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<sup>29</sup> Act 42 of 2002 (as amended).