IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE 6/2/2012 SIGNATURE

CASE NO: 1877/2008

DATE: 9/2/2012

IN THE MATTER BETWEEN

SOUTH AFRICAN NATIONAL DEFENCE UNION	PLAINTIFF
AND	
THE MINISTER OF DEFENCE	1ST DEFENDANT
THE SECRETARY OF DEFENCE	2ND DEFENDANT
THE CHIEF OF THE SANDF	3RD DEFENDANT
MR S B MKHWANAZI	4TH DEFENDANT
MS N PIENAAR	5TH DEFENDANT
PRIVATE A M MVUBU	6TH DEFENDANT
COLONEL PHILLIP DHLAMINI	7TH DEFENDANT

JUDGMENT

KOLLAPEN, J

Introduction and background

[1] Trade unions play a vital role in most democratic societies. Beyond taking up the cudgels on behalf of workers and acting in advancing their rights and interests trade unions play a larger role in the political and economic discourse and debates within society. That this is so is understandable as workplace issues can hardly be insulated from the issues that impact on the broader wellbeing of the society. It is accordingly not uncommon nor may one add undesirable for trade unions to increasingly express themselves forcefully and with principle on a wide range of issues that may relate to economic policy, foreign affairs, poverty, social inclusion and such related matters.

[2] In South Africa trade unions have traditionally and historically played such a broad and encompassing role and accordingly the recognition in section 23 of the Bill of Rights of a right of every worker to form and join a trade union and to participate in its activities and programs is duly and properly given recognition. While section 23 is cast in broad terms the issue of the existence and recognition of trade unions within the Defence Force was not settled until the decision of the Constitutional Court in *South African National Defence Union v Minister of Defence & Another* 1999 4 SA 469 (CC) where the court held that:

> "The total ban on trade unions in the Defence Force clearly went beyond what was reasonable and justifiable to achieve the legitimate state objective of a

disciplined military force. Such a ban could accordingly not be justified under section 36."

This paved the way for trade unions to function within the Defence Force and the plaintiff has over time organised and consolidated itself as the largest trade union within the Defence Force.

[3] However implicit in the recognition of the right of trade unions to exist within the Defence Force was also the recognition that the Defence Force would have to function in a disciplined and efficient manner and therefore the existence and the activities of any trade union operating within the Defence Force would have to take into account that particular context.

[4] It would also be fair to say, both generally speaking as well as in the context of the particular relationship between the plaintiff and the Defence Force, that such relationships are often characterised by adversarial and opposing stances, robust debate and dialogue and considerable public posturing as the parties seek to take and consolidate their various differing positions. Again this is understandable in the context of differing interests that a union and an employer would seek to advance and in a constitutional democracy the challenge would always remain on how to strike the appropriate balance between such interests where they do express themselves in a divergent manner.

The dispute between the parties

[5] The plaintiff has brought this action against the defendants arising out of the publication of an article in a publication of the Department of Defence titled "*South African Soldier*". It is styled as the official monthly magazine of the SA Department of Defence and according to the defendants its broad objective is to inform, share information, encourage dialogue and debate and represent the developments and activities which occur within the South African Defence Force. In the edition of *The South African Soldier* of May 2007 an article was published under the heading "*DOD resuming the management of union stops orders*". It denotes the authors as Private A M Mvubu and Airman D J Daffue. The plaintiff contends that the article written, published and distributed as part of the magazine was defamatory of the plaintiff and in particular the plaintiff cites the following paragraphs of the article to support it's stance:

> "In 2002 the DOD (Department of Defence) requested all military trade unions to submit stop order forms for auditing. The biggest registered military trade union, the South African National Defence Union (SANDU) refused to comply while the small union, the South African Security Forces Union (SASFU) complied with the request.
>
> Non-compliance led to confrontation and litigation resulting in a court order. Consequently SANDU instituted an urgent court application against the Minister of Defence, the Secretary of Defence and the Chief of the SANDF."

[6] The plaintiff also takes issue with the following paragraph that appears in the same article:-

> "0n behalf of the DOD the team found that SANDU had unlawfully deducted over R4 million from its members. The DOD will therefore have to recover all these monies unlawfully deducted from its members and reimburse them."

[7] The plaintiff's stance was that the words, statements and allegations contained in the article were calculated to cause it financial prejudice and were wrongful and defamatory of the plaintiff in that it would be understood by readers of the publication to mean that:

(i) the plaintiff was not willing to comply with the reasonable requests from the Department of Defence;

(ii) the plaintiff was acting unreasonably;

(iii) the plaintiff was not complying with the provisions of the Defence Act and regulations and that this led to litigation;

(iv) the plaintiff was dishonest in that it unlawfully and illegally appropriated over R4 million from its members; and

(v) the plaintiff was not conducting its affairs in an honest and lawful manner.

The plaintiff further contended that it had suffered damages to its reputation and that such damages were computed in the sum of R500 000, 00.

[8] The defendants, while admitting that the article was authored, written and published in *The Soldier* and distributed amongst members of the Defence Force, contended that at the stage that when the article was published there existed no authorisation in law for the plaintiff to have deducted the sum of R4 million from its members and that in the absence of such authorisation from the congress of the plaintiff, the allegations in the article relative to the unlawful deductions were true and in the public interest. It further contends that as an employer it had a duty to publish such allegations in the interests of all the members of the Defence Force and that the article was in the public interest, was true and was executed in the discharge of a duty that the defendants owed to members of the Defence Force including members of the plaintiff.

[9] The defendants further contended that with regard to the allegations relating to the refusal by the plaintiff to submit copies of stop order forms that the plaintiff did in fact refuse to provide defendants with the necessary letters of authorisation and/or the stop order forms requested by the defendant and that the contents of the article in this regard was true and the publication thereof in the public interest.

The law of defamation with regard to non-trading entities

[10] The origins of the actions for defamation is to be found in the *actio injuriarum* which was premised on providing compensation for outraged feelings. In this regard the

focus of the action appeared to have been directed to dealing with the intentional and unjustified hurting of another's feelings as opposed to damage to reputation.

In *Die Spoorbond & Another v South African Railways; Van Heerden & 0thers v South African Railways* 1946 AD 999 SCHREINER, JA dealt with the history as well as the development and changes to this aspect of the law of delict as follows (at pp1010-1011):

> "0ur action for defamation is derived ultimately from the Roman *actio injuriarum* which 'rested on outraged feelings, not economic loss' ..... The particular delict now known as defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused to the plaintiff. Although the remnant of the old delict of *injuria* still covers insults administered privately by the defendant to the plaintiff, the delict of defamation has come to be limited to the harming of the plaintiff by statements which damage his good name. ... It is because of this development in the character of actions for defamation, so it seems to me, that some logical justification can be found for the recognition, even in our law, of such actions at the suit of corporations, although the latter have no feelings to outrage or offend."

In the *Spoorbond* matter the specific question of whether the right to sue for defamation was to be limited to trading corporations or ought to be extended to other corporations which rely on their reputation to win them public support for the conduct of their affairs was left open.

[11] The matter came before the Appellate Division (as it then was) in *Dhlomo NO v Natal Newspapers (Pty) Ltd & Another* 1989 (1) SA 945. In the judgment of RABIE, ACJ he sketched the history with regard to the changing developments in the law of defamation in so far as it affected non-natural persons going back to the decision in *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 where INNES, CJ expressed the view-

> "That the remedy by way of action for libel is open to a trading company admits of no doubt. Such a body is a juridical *persona*, a distinct and separate legal entity duly constituted for trading purposes. It has a business *status* and reputation to maintain. And if defamatory statements are made reflecting upon that *status* or reputation, an action for the *injuria* will lie."

RABIE, ACJ then proceeded to deal with the developments following on the *Fichardt* matter and which included the *dicta* of SCHREINER, JA in the *Spoorbond* case, *supra*, to which reference has already been made.

[12] In the *Dhlomo* case the question for determination was accordingly whether the right to sue for defamation should be restricted to trading corporations or whether such a right should also be extended to non-trading corporations. The court then concluded that there should be no reason why a non-trading corporation should in appropriate circumstances not be accorded the right to sue for an injury to its reputation and in this regard the following appears at p954A-D of the judgment:

> "It seems to me, however, that once one accepts – as one must, in my view – that a trading corporation can sue for an injury to its business reputation, there is little

justification for saying that a non-trading corporation should not, in appropriate circumstances, be accorded the right to sue for an injury to its reputation if the defamatory matter is calculated to cause financial prejudice (whether or not actual financial prejudice results). It is conceivable that in the case of a non-trading corporation such as a benevolent society or a religious organisation – these are but examples – which is dependent upon voluntary financial support from the public, a defamatory statement about the way in which it conducts its affairs would be calculated to cause it financial prejudice in the aforementioned sense. It would in my view be illogical and unfair to deny such a corporation the right to sue for an injury to its reputation, but to grant it to a trading corporation when it suffers an injury to its business reputation. In my opinion we should hold, and I so hold, that a non-trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice."

[13] In the context of the *dicta* that a non-trading corporation could sue for an injury to its reputation if the defamatory matter was calculated to cause financial prejudice, the court did not have to consider the further question namely whether a non-trading corporation can sue for defamation if the defamatory matter of which it complains relates to the conduct of its affairs but is not calculated to cause it financial prejudice.

[14] The distinction is a fine one and it may well be argued that even if a defamatory statement is not calculated to cause financial prejudice but relates to the conduct of the

affairs of a non-trading corporation that such an action should lie if ultimately the reputation of a non-trading corporation is impaired.

While *Dhlomo (supra)* is authority for the broad proposition that a non-trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice the court also expressed the *caveat* that there may well be instances where non-trading corporations on the grounds of considerations of public or legal policy were to be denied the right to sue. Thus not all non-trading corporations may have the right to sue but in the context of that particular case it recognised the right of a political party to sue for defamation.

[15] While political parties may invariably be shaped and defined by personalities and their policies, it is also so that they invariably rely on their reputation for the support that they wish to garner from voters and prospective voters and in this regard rely both on dues that may arise out of membership fees as well as voluntary donations made by members of the public. Accordingly the integrity of the operations of a political party, the conduct of it's office bearers as well as the integrity of its internal systems of functioning are all matters that impact on its reputation and it would accordingly follow that if a defamatory statement about the way in which it conducts its affairs would be calculated to cause it financial prejudice it should not be barred from bringing an action for defamation.

[16] In this action the plaintiff is a trade union, which is a voluntary association whose members are invariably employees who both have the right to associate as well as the

right to dissociate. While their objectives may be narrower than those of a political party trade unions in the modern era involve themselves, and understandably so, in matters beyond the work place and their activities may often relate to the economic and social policies of the day and important events that impact on the well-being of society.

Accordingly, the existence of a trade union, its ability to recruit new members and to retain existing members are in turn dependent on a number of factors which include its policies and the manner in which they are articulated, its leadership and the manner in which the organization is structured and organizes its affairs. In this regard I would imagine a commitment to openness, an internal structure that is transparent and democratic, integrity in the handling of its affairs including its financial affairs all inform the reputation of a trade union and its very existence and sustainability.

[17] There is the added reality that in many of the labour sectors that exist in our society there exists more than one trade union and so potential members have a choice in which trade union they will seek and retain their membership. The reputation of a trade thus becomes important in the choices that members and potential members may make and that reputation ultimately impacts on the ability of a trade union to sustain itself and continue its activities.

It must accordingly follow that a trade union has indeed a reputation which it is entitled to protect and that conduct which unlawfully impairs such reputation should be actionable.

[18] Regard being had to the caution in *Dhlomo NO, supra*, that considerations of public and legal policy may exclude certain non-trading entities from being able to sue for defamation, one cannot conceive of any considerations of public or legal policy in the context of a trade union that should operate to restrict such a right. 0n the contrary the architecture of the Constitution and it's specific recognition of the rights of workers including the right to join a trade union may make recognition of such a right by a trade union to sue for defamation not only constitutionally permissible but also constitutionally desirable.

[19] 0ur law has developed to such a stage where considerations of legal and public policy must mean that a trade union should have the right to sue for defamation and in my view this would be consistent with the spirit of the judgment of the Constitutional Court in *South African National Defence Union v Minister of Defence & Another, supra*, where the court found that the total ban on trade unions in the Defence Force went beyond what was reasonable and justifiable.

If such an action would be available to a trade union in the widest sense of the term there can be no reason why a trade union that operates within the context of the Defence Force should on account of any policy or legal considerations be excluded from being the recipient of such a right and on this aspect one must conclude that having regard to the incremental development in our law of defamation as well as regard to the constitutional values which underpin our constitutional order there can be no reason why a trade union and in particular a trade union such as the plaintiff which operates within the Defence Force should not have the right to sue for defamation under appropriate circumstances.

The background, the facts and the evidence

[20] The plaintiff called a single witness Mr Johannes George Greeff who is the National Secretary of the plaintiff union while the defendant also called a single witness Colonel Phillip Dhlamini, now retired but who during his employ in the Department of Defence worked in the personnel services division and was principally responsible for dealing with the relationship between the Department of Defence and trade unions.

[21] Following the judgment of the Constitutional Court which provided for the recognition and the functioning of trade unions within the Defence Force it was necessary as far back as 2000 to put in place a system that would allow for the deduction of union membership fees by the defendants in respect of members of the plaintiff union.

[22] It appears from the evidence of Mr Greeff, and this was not in issue, that the system that was then put in place largely on account of the lack of capacity experienced by the defendants to deal with the issue of membership fees administratively was that the parties agreed on a mag-tape system to facilitate membership deductions. This would operate on the basis that every month the plaintiff would submit a mag-tape to the defendants which would contain the details of all members of the plaintiff union as well as the amounts to be deducted in respect of membership fees. The defendant would, acting on such a mag-tape instruction, effect the necessary deductions from the salaries of

the plaintiff's members and remit such monies to the plaintiff. The system seemed to work reasonably well for a while but it became apparent that a new and more efficient system had to be put in place and in particular a system that would comply with the letter and the spirit of regulations issued in terms of the Defence Act 44 of 1907 which regulations in the main deal with military trade unions and their relationship with the Department of Defence.

In particular the regulations promulgated in terms of the Defence Act and relevant to the issue of deductions of subscriptions and levies contained certain specific requirements and prescriptions. They provide as follows:

> **"Regulation 28 - Authorised deductions from wages or salaries**
>
> Any member who is a member of a military trade union may authorise the employer in writing to deduct subscriptions or levies payable to that military trade union from the member's wages or salary.
>
> **Regulation 29 - Deductions by employer.**
>
> On receiving the authorisation contemplated in regulation 28 the employer shall make the authorised deduction within thirty days and shall remit the amount deducted to the military trade union by not later than the 15th day of the month following the date when each deduction was made."

[23] It was evident that the mag-tape system that was agreed upon between the parties was done so on account of the defendants not having the necessary capacity to put in

place any other system. It also is apparent that that system would fall short of compliance with the peremptory requirements of regulation 28 and 29 to the extent that the regulations referred to an authorisation in writing by a member to justify a deduction of subscriptions or levies and further that the obligation on the part of the employer to deduct and pay over the authorisation was in turn dependant upon it receiving the necessary authorisation in writing.

None of the parties sought to argue that the mag-tape system that was in place would constitute an authorisation in writing that was conceived by the regulations.

[24] 0n 9 May 2002 the Directorate of Human resources and Policy Management in the Department of Defence forwarded a letter to the plaintiff requesting them to provide copies of all stop order forms signed by members of the plaintiff for audit purposes by the Department of Defence. In that letter the plaintiff's attention was drawn to the necessary regulations in particular regulation 28 (the letter refers to section 28 which is obviously an error and should have been regulation 28). The letter further gives notice that future deductions would only be made in respect of members whose stop order forms have been audited by the Directorate Human Resource Policy Management. Further letters were forwarded by the Directorate Human Resource Policy Management to the plaintiff on 10 May 2002 and 15 May 2002 which sought additional information relating to the plaintiff including minutes of annual general meetings, names and the addresses of office-bearers, list of paid-up membership as well as audited financial statements.

[25] The stance of the plaintiff evidenced from a letter dated 16 May 2002 forwarded by the plaintiff to the Head of Policy and Planning in the Department of Defence was that the defendant had no basis for requesting the information sought and the motives of the drafters of the defendants' letters were questioned. There was a further exchange of correspondence between the parties which did not resolve the issue and it appears from the correspondence that the stance of the defendant continued to remain that it was entitled and in law obliged to receive the information it requested particularly in respect of written authorisations (stop orders) while the stance of the plaintiff was that such a request was not one sanctioned by the regulations and that if there was to be any positive response to the request of the defendants then such would have to be the subject of an agreement which should be preceded by negotiations and discussion.

[26] The testimony of Colonel Dhlamini was that the issue of subscriptions to be deducted from members for union dues had created a problem within the Defence Force as there were numerous complaints from members with regard to deductions that were not authorised or were excessive and that the *rationale* of the Department of Defence in requiring the submission of stop order forms was both to ensure compliance with the regulations as well as to minimise the complaints that members submitted relevant to the validity of deductions as well as the amounts in respect of such deductions which were being made.

It appears that the *status quo* continued for some time without it being resolved.

[27] From the evidence of Colonel Dlamini it appears that while the matter was not pursued for a while, the Department of Defence had not abandoned its desire to ensure compliance with the regulations and in 2006 the matter was so to speak resuscitated when the Department reactivated the request for the stop order forms that it had sought in 2002 and the stance of the plaintiff continued to remain that the department was not entitled to the information that it sought in terms of the regulations.
The department in consequence terminated making deductions which then led to the plaintiff bringing an urgent court application in terms of which relief was ultimately granted.

[28] On the evidence before me and notwithstanding that an *ad hoc* arrangement had come into place between the parties with regard to the mag-tape deductions, the assertion of the Defendants that it was entitled to be placed in possession of written authorisations before making any deductions is supported by the provisions of Regulation 28 and 29 which are clear and which hardly require any explanation. Under those circumstances it must follow that if the plaintiffs wished to be the recipients of such deductions they were obliged to place the defendants in possession of the relevant written authorisations. There is in my view hardly any merit in the plaintiff's stance that the defendant was not entitled to call for the written authorisations as it did so and to that extent it must therefore follow that the allegations contained in the article which is the subject-matter of this dispute that the Department of Defence in 2002 requested all military trade unions to submit all the forms for auditing is correct and is indeed borne out by the uncontested evidence of both Mr Greeff and Colonel Dhlamini. In addition it is evident and it is not

in dispute that the plaintiff refused to comply with the order. The plaintiff's stance is that it's refusal was justified in law as the regulations relied upon by the defendant did not create an obligation on the part of the plaintiff to submit such stop order forms.

[29] I have considerable difficulty with this stance of the plaintiff as it is evident from a reading of regulation 28 and 29 that the obligation on the part of the employer to make the authorised deductions is based upon on it receiving the authorisations and accordingly it can hardly be contended that the plaintiff was under no duty to submit those authorisations. My conclusion on this matter accordingly is that the request by the Department of Defence for submission of stop order forms was valid in law and indeed justified by the legal framework within which the department was operating. In addition I conclude that the refusal to comply was ill advised and the justification offered for the non-compliance was not tenable in the light of the clear wording of regulations 28 and 29.

[30] It is also clear that the impasse which resulted in the plainitff's refusal to comply was what ultimately led to the litigation which resulted in a court order. The fact that the request was made in 2002 and the litigation occurred in 2007 is hardly material in my view. The fact that there may well have been a period of inaction on the part of the defendants in pursuing these requests between the period 2003 onward and that it was resuscitated in 2006 does not affect the validity of such requests. I am of the view that the defendant was not only entitled to make the request it did in 2002 and thereafter again in 2006 but was obliged in law to do so and further that the plaintiff if it wished to be the

recipient of the subscriptions deducted by the defendant was under a duty to place the defendant in possession of the necessary authorisations. In my view the publication in relation to this aspect could hardly be said to be defamatory. If anything the evidence demonstrates compellingly that it was both true and that indeed it was in the interests of the members of the Defence Force and in particular the members of the plaintiff union to be informed of the sequence of events and the details of what transpired relevant to that request and what ultimately led to confrontation and litigation.

[31] I am mindful of the difficult relationship the parties found themselves in and that other factors may well have contributed to the acrimony and the souring of relationships. That, however, is not relevant for the purposes of this judgment. What is relevant and what I have already alluded to is that there was a valid request made in law and there was an unreasonable and I may add unlawful refusal to comply with such request.

That disposes of the first leg of the plaintiff's case.

The allegation that deductions were made unlawfully

[32] The defendants' stance is that at the time the article was written and submitted to the printers the defendant was of the view, following it's own enquiries and research that it had conducted as well as an audit, that deductions of over R4 million made by the plaintiff from it's members was unlawful.

[33] The defendant's stance is that the authority to increase membership fees within the structure of the plaintiff is vested in the National Congress of the plaintiff alternatively it's National Executive Committee or it's Central Executive Committee.
The relevant congress of the plaintiff in the context of the time line of this application was it's National Congress held in November 2004 at the Absa Conference Centre, Montana, Pretoria. From the documents that emerged from that conference including the minutes of the Congress as well as the resolutions that were effected at that Congress it appears that Congress in terms of Resolution 5 of Resolution 1/2004 resolved to increase membership fees as follows:

(a) a R4,00 increment per member per month effective as from 1 February 2005;

(b) a further increment of R3,00 per month per member effective as from 1 January 2006 and yearly thereafter until the National Congress of SANDU decides otherwise at it's next meeting during 2007.

[34] The evidence of Colonel Dhlamini was that prior to this Congress the membership fees of the plaintiff's members was fixed at R18,00 and the effect of Resolution 5 of Resolution 1/2004 was to increase it from R18,00 to R22,00 with effect from 1 February 2005. SANDU's stance was that the membership fees had increased from R18,00 to R47,00 and in support of this SANDU referred to the resolutions of the very same Congress of November 2002 and relied on as justification for the increase from R18,00 to R47,00 the following:

(a) the increase of R4,00 was expressly provided for in terms of Resolution 5(a) which would bring the subscription from R18,00 to R22,00.

(b) The further increase of R25,00 was according to Mr Greeff provided for in terms of Resolution 6(a). Resolution 6(a) in broad terms acknowledges the need for members of SANDU to enjoy certain membership benefits and goes on to provide as follows:

"The extension of the Soldiers Legal Guard (SLG) (legal benefit) as a membership benefit to all members of SANDU and the implementation thereof by the National Secretary at the cost, terms and conditions involved against the members' salaries, with effect from the month in which the members' annual SANDF salary increment during 2005 is effected."

[35] It was the submission of Mr Greeff that Congress had authorised certain membership benefits and in particular the Soldiers Legal Guard and accordingly such an authorisation served as a basis to increase the membership fees to the extent that it would bear comparison to the cost of the membership in respect of the Soldiers Legal Guard. He conceded that the resolution on which SANDU purported to rely had no reference to the amount of R25,00 but his evidence was that at the date of Congress this amount had been determined, was fixed and was known to all within SANDU.

[36] The stance of the defendant was that the only resolution at Congress that effected an increase in membership fees was Resolution 5 which was clear and unambiguous in that it purported to increase the membership fees by R4,00 for the following year and that to the extent that there is no clear resolution that provides the authority for a further increase in membership fees of R25,00 the defendants' stance was that any attempt to deduct any amount from members in addition to the R22,00 would be unlawful. The defendants' stance accordingly was that when it prepared the article for *The Soldier* it was justified in drawing the conclusion that indeed the deduction of R4 million (which roughly represented the R25.00 per month deduction for the Soldier's Legal Guard for 16 000 members for one year) was an unlawful deduction.

[37] It was clear from the testimony of Mr Greeff as well as the various documents filed in this matter in particular the flyer which informed all members of SANDU of the increase in membership fees to R47,00, was that the plaintiff sought to in law justify such increase and locate the authority for such increase in Resolution 1/2004. I do not understand the plaintiff's case to be that the authority for the increase was a subsequent resolution of the NEC or the CEC and indeed Mr Greeff's evidence in this regard confirms that post the Congress of 2004 there was no need for any further resolution and all that was required of him as National Secretary was to implement the resolution of the 2004 Congress which in his view provided a sufficient basis for the R25,00 deduction.

[38] I have difficulty with this proposition. The affairs of SANDU are clearly regulated by it's constitution and it's constitution clearly provides the *locus* for any

decision to increase membership fees. That authority is vested in the National Congress as well as in the NEC and the CEC. For the reasons I have already given the NEC and CEC deliberations, if there may have been any, are irrelevant for the purposes of this hearing as the plaintiff relied exclusively on the deliberations of the National Congress of 2004.

If one has to have regard to the two relevant resolutions namely Resolution 5(a) and Resolution 6(a) then it is evident that while Resolution 5(a) was clear and unambiguous in increasing the membership fees by R4,00 Resolution 6(b) could hardly be said to be clear and unambiguous in respect of increasing membership fees. All the resolution purported to do is to authorise the extension of benefits to members and to some extent to ensure that members pay for such benefits. There is no figure provided for such benefits and the consequence of this would be that the National Secretary then would be entitled to recover from members the amount associated with such benefit. If such an amount was reckoned at R60,00 then on the basis of the evidence before me and on the basis of the authority that the plaintiff seeks to derive from Resolution 6(a) the consequence of this would be that the National Secretary would then be empowered to effectively recover such amounts from members in respect of their membership fees.

[39] Such a situation would be untenable as it would effectively delegate the power of Congress to fix membership fees to the discretion of the National Secretary. That would not accord with the architecture of SANDU's constitution nor would it accord with the authority that is vested in Congress and nor would it accord with the powers that the constitution grants to the National Secretary. It is hardly in dispute that the National

Secretary would not have the power to increase membership fees and the argument of the plaintiff would have the court to accept that the effect of such a resolution would ultimately mean that the power to increase membership fees would be vested in the functions of the National Secretary.

I am unable to agree with such a stance for the reasons given and therefore on this aspect conclude that the authority to effect the deduction of R47,00 did not exist at the conclusion of the plaintiff's National Congress in 2004 from which it must flow that all deductions made subsequent to 2004 which purported to rely on the resolution of the 2004 Congress would have been unlawfully made.

[40] When the article was accordingly prepared in the early part of March 2007 the defendant in doing so hardly could be said to have acted recklessly or without having any regard to the facts which then existed. In particular SANDU's stance was a consistent reliance on the 2004 resolution to justify it's membership fee of R47,00 while the defendants' enquiries resulted in them not being placed in possession of any resolution that authorised such an increase in membership fee and in particular the resolution of the 2004 Congress was unhelpful to the extent that it did not expressly provide for the proposed R25.00 increase in membership fees in Resolution 5(a), nor did it in Resolution 6(a) fix an amount that would necessarily have resulted in an increase in membership fees relevant to the Soldiers Legal Guard benefit. For these reasons I must accordingly conclude that when Colonel Dhlamini prepared the draft of the article in March 2007 and when the article was edited and worked upon by Private Mvubu and Airman Daffue the conclusion drawn that SANDU had unlawfully deducted over R4 million from it's

members was a proper conclusion in law and one supported by the facts. That, however, would not dispose of the matter as events subsequent to the writing of the article and it's submission to the printers in the late weeks of April 2007 would ultimately have a bearing on the plaintiff's claim as well as on the sustainability of the defence raised by the defendants.

The proceedings before Mynhardt J, the judgment in that matter and its effect

[41] The relevance of these proceedings to the current dispute lies both in the timeline of the judgment delivered by Mynhardt J relative to the publication of the article in the Soldier as well as the contents of the judgment relative to the aspect of the authority to increase membership fees to which reference has already been made.
The nub of the dispute in those proceedings was whether the Defendants were obliged to deduct the sum of R47.00 from Plaintiff's members as membership fees. The plaintiff approached Court on the basis that R47.00 was what was authorized by the Congress of the Plaintiff while the Defendants stance was that it was only obliged to deduct R22.00 per month as membership as that appeared to be the amount authorized by the Plaintiff's Congress of 2004. (The difference between the R47.00 and the R22.00 amounts to R25.00 which relates to the Soldiers Legal Guardian benefit).

[42] On the 4th May 2007 Mynhardt J delivered the judgment of the Court and in effect ordered the Defendants to deduct the amount of R47.00 per month from members

of the Plaintiff in respect of whom written authorizations existed. At that stage the article which is the subject of this action was already finalized and had been submitted to the printers but was apparently not printed and distributed by then. The relevance of this was the submission of the Plaintiff that post the Mynhardt judgment, the Defendants had the opportunity of withdrawing the article from print given the finding of Mynhardt J that the deduction of R47.00 was in fact authorized by the structures of the Plainitff.

[43] In assessing this argument one must have regard to the details of the judgment of Mynhardt J as well as the evidence that was placed before him in those proceedings. In my view the stance of the respective parties relative to the existence or otherwise of the necessary authority to increase membership fees to R47.00 was exclusively located in the proceedings of the National Congress of the Plaintiff of 2004.
In the founding affidavit deposed to by Mr Greef in those proceedings and in paragraph 12.16 thereof he says :-

> "The determination in membership fees to R47.00 per member, per month, came about as a result of a duly passed resolution taken by the National Congress of the first applicant in November 2004."

This accords with his evidence in this action that the only basis for the increase in membership fees to R47.00 was the resolution of the 2004 Congress.

[44] In contrast the stance of the Defendants in those proceedings was that if regard were had to the resolutions of the 2004 Congress, there was no resolution to increase

membership to R47.00 . The only authority for an increase in membership fees was that to be found in Resolution 5 which increased membership fees by R4.00 per month bringing the membership fees to R22.00. In the absence of a proper resolution to justify the further increase of R25.00 per month, the Defendants contended that there was no authority for this additional deduction. It denied that resolution 6(a) which dealt with the SLG benefit constituted an authority to increase membership fees by an additional R25.00.

[45] In argument however it appears that the Plaintiff also sought to rely on resolution No 1/2006 of the Central Executive Committee of the Plaintiff to justify the increase in membership fees to R47.00. At page 17 of the judgment the following appears :-

> "The argument of the applicant to counter that of Mr van den Heever, is therefore that it has to be accepted for purposes hereof at least, that the entrance figure of membership fees is R18,00 per month, that that was increased by virtue of resolution 1 of 2004 to R22,00 per month, an increase of R4,00 per month, and because of the contents of the annual report and resolution 1/2006 of the CEC, the membership contribution or fee has now been increased to R47,00 per month with effect from 1 December 2005."

In coming to the conclusion that there was a valid authority for membership fees to be increased to R47.00 per month Mynhardt J appears to have relied not on the resolution of the 2004 Congress, but on resolution 1/2006 of the Central Executive Committee of the Plaintiff . While the CEC does have the authority to increase membership fees, the stance

of the Plaintiff in those proceedings as well as in this action was that it relied on the resolutions of the 2004 Congress as being sufficient to effect the increased membership fees. In his evidence Mr Greef in response to a question by the Court testified that after the 2004 Resolution there was no need for any additional resolution by any of the structures of the Plaintiff to effect the membership fee increase to R47.00. He also did not make any reference to the 2006 resolution as being necessary for such an increase. It is of interest that while Mynhardt J relied on the 2006 resolution if one has regard to the content of that particular resolution it is difficult to come to the conclusion that the resolution could serve as authority for an increase in membership fees to R47.00. The relevant resolution reads as follows:-

> "That the annual report of the acting national secretary of Sandu (J.G. Greef) and the recommendations contained therein, which report and recommendations have been tabled at this meeting, be hereby accepted in so far any matter herein is not already specifically covered in specific resolutions of this CEC."

The annual report to which reference is made says the following :-

> "The inclusion of the SLG membership benefit to all members of Sandu and the subsequent increment in membership fees to R47,00 per month, as part of the membership towards Sandu has been implemented as per resolution of the national congress of 2004 with effect from 1 December 2005. Included herein, is statistics showing the success rate of the soldiers legal guard membership benefit. Undoubtedly this product has proven its worth to our members."

[46] There does not appear any recommendation in this report with regard to an increase in membership fees. It is in essence a report by the National Secretary on the implementation of the resolutions of the 2004 Congress.

Thus even though Mynhardt J found that there was authority for the increase in membership fees to R47.00, he did so on the basis of a 2006 resolution of the CEC and not on the basis of the resolution of the 2004 Congress, which the Plaintiff in this action persists is the only resolution relevant to and which serves as the authority for the increase in membership fees to R47.00.

[47] Arising out of all of this is the result, whose relevance I will return to later, that while Mynhardt J found the additional deduction of R25.00 to be lawful he did so on a basis other than that contended for by the Plaintiff and certainly did not form the conclusion that the 2004 resolution provided the necessary authority in this regard. However in the view of Mynhardt J, if one left aside resolution1/2006 and the clauses of the Constitution that gives the CEC the authority to increase membership fees, he opined 'that there is room for a difference of opinion and that that was sufficient justification for the department to refuse to deduct the additional R25.00 per month as from January 2007, when it had sight of the documentation'. From this the conclusion must follow that based purely on the 2004 resolution, the Defendant was justified in refusing to make the additional deduction of R25.00 and that it was in Mynhardt's view the 2006 resolution that in effect disposed of the dispute.

[48] In consequence of this the question that then arises is whether the Defendant, once Mynhardt J had delivered his judgment on the 4th May 2007, was under a duty to take steps to prevent the printing and distribution of the article or whether it was entitled to persist with the publication on the basis that it continued to be true and in the public interest. Colonel Dlamini in response to a particular question in this regard said that the matter was outside his hands and he thus took no steps to prevent publication; he however did not concede that he should have taken any steps to prevent publication. His further evidence in this regard was that when he had sight of the Mynhardt judgment it did not change his stance on the inadequacies of the 2004 resolution as the judgment did not deal with it as providing the basis for the claim to the authority by the Plaintiff to increase membership fees to R47.00.

In this regard it would appear that the remarks of Mynhardt J that the Defendant would on the basis of the 2004 resolution have been justified in refusing to make the additional R25.00 deduction accords with the stance and the reasoning of Colonel Dlamini.

[49] The effect of the judgment of Mynhardt J was that he found that the increase in membership fees of the Plaintiff's members from R18.00 to R47.00 was authorized and by necessary implication was thus lawful. This obviously changed the context around the article that was at that stage awaiting print and distribution. The effect of the judgment, whose details were known to the defendants and in particular Col. Dlamini, was that at the very least it questioned the conclusion that the deductions made by the Plaintiff were unlawful and that notwithstanding the defendants own audit and investigations conducted it provided a different conclusion on the issue.

That being the case it becomes difficult to sustain the submission that the section of the article that relates to the 'unlawful deduction' was true. While Col Dlamini may well have considered it to be true notwithstanding the judgment, objectively speaking the judgment would have in my view created a duty on the defendants to at the very least make reference to its conclusion. To continue with the publication of the article in its original form and disregarding the judgment of Mynhardt J was not justified and the defendants' reliance on the defence of truth is in my view not sustainable.

[50] That being the case the plaintiff has succeeded in proving the publication of a defamatory statement. It could hardly be disputed that a statement that a trade union has unlawfully deducted a substantial amount of money from it's members is not defamatory. The statement is clear and unambiguous and the ordinary reader would understand it to mean that the plaintiff has outside of it's authority and outside of proper authorization deducted monies from it's members. It certainly would have the effect of questioning the legality of the plaintiff's operations, it's financial operations and the discharge of it's duty towards it's members. I am accordingly satisfied that the plaintiff has proved the publication of a defamatory statement.

[51] The central defence offered by the defendandts was that the statement complained of was true and in the public interest. For the reasons already given and while this defence may have been sustainable until the 4th May 2007, it's ongoing sustainability became questionable once the Mynhardt judgment was delivered. The effect of that judgment was that the statement complained of could no longer be said to be true.

The defendants have accordingly failed to rebut the presumptions of unlawfulness or the absence of *animus injuriandi*. When the statement was published it could not be said that it was at the very least 'substantially true' and from the evidence of Col Diamini, who testified that as principal author of the statement he was aware of the judgment of Mynhardt and elected not to do anything about it in so far as the content of the article was concerned, it is also clear that the defendant has also failed to rebut the presumption that it acted *animo injuriandi*.

For these reasons the plaintiff must succeed in respect of this aspect of it's claim.

The award

[52] Plaintiff has claimed the sum of R500 000.00 and has in support thereof pleaded that the article would be understood by readers to suggest that the plaintiff was dishonest in making unlawful deductions and further that it was not conducting it's affairs in an honest and lawful manner.

[53] In the Law of South Africa (Joubert) Second Edition Volume 7, the authors list the following factors to be considered in the assessment of an appropriate award :-

a) The nature of the defamatory statement

b) The nature and extent of the publication

c) The reputation, character and conduct of the plaintiff

d) The motives and the conduct of the defendant

In this regard the following is of relevance :-

1) The relationship between the parties was hardly cordial or civil. In fact it would not be incorrect to characterize it as adversarial. While it may generally be said that management labour relations are destined to demonstrate an element of adversity, the evidence and the correspondence in this matter suggest an extremely high level of adversity. In those circumstances the exchanges would have been robust and the positions adopted unyielding. Simply by way of example the plaintiff's stance that the defendants' request for copies of stop order forms should become the subject of negotiation is a compelling demonstration of such a stance.

2) While the publication 'The Soldier' was widely distributed within the Defence Force, it appears from the evidence of Mr Greef of the Plaintiff , that it was not highly regarded as a publication from a Union perspective and was seen as largely advocating a management perspective. Given this characterisation of the publication it would not be unreasonable to assume that those readers of the publication that belonged to the Plaintiff Union would in a sense take with pinch of salt what was published of and concerning the Plaintiff.

3) The effect of the publication of the article on the activities, membership and profile of the Union was not significant. It appears that while the Union had to field numerous calls from members enquiring about the article, there was no need for the Union to put out a notice or a flyer or other form of mass communication

to it's members setting out the correct position and in particular the details of the Mynhardt judgment. If the level of discontent and concern was significant, then surely such a step would have been warranted and the fact that it was not may point in the direction of how the article was generally received.

4) There was no evidence that the publication of the article negatively impacted on the Union's membership.

5) Up until the 4th May 2007 when the article was written and ready for publication it's contents would have been factually and legally accurate. It could hardly then be contended that at the time of writing of the article that the defendants were motivated by a desire to defame the Plaintiff.

6) The article suggested that the Plaintiff acted unlawfully but did not go so far as suggesting that the Plaintiff acted dishonestly.

[54] In *Mogale and others vs Seima* 2008(5) S.A p 537 SCA , Harms JA (as he then was) while recognizing the value placed by the Constitution and the common law on human dignity including reputation at the same time pointed out that freedom of expression also enjoyed recognition and protection in the new Constitutional order. That being the case he cautioned as follows:

> ' life is robust and oversensitivity does not require protection; and of *quantum*: too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right '

[55] The court was referred to comparable cases including *Buthelezi v Poorter* 1975(4) p609 (WLD). In this regard however the wisdom in the judgment of Smalberger JA in *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and 0thers* 2001(2) SA 242 at 260E-H, would appear to be apposite

> "Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings."

[56] In all the circumstances and given that the award of damages is in effect to compensate the plaintiff for the damage to it's reputation, which in my view was minimal and hardly had any lasting effect or impact, an amount of R40 000.00 would constitute fair and adequate compensation.

Costs

[57] The plaintiff having achieved substantial success would of course be entitled to it's costs. However the plaintiff was unsuccessful in respect of the first leg of it's claim and a considerable portion of both the documentary and oral evidence led in the trial related to that portion of the claim and it would not be fair to saddle the defendants with those costs. The court has a wide discretion with regard to the award of costs and in my view there is a proper basis to disallow the costs occasioned and incurred in respect of the 1st leg of the plaintiff claim. In my view those costs would constitute approximately 30% of the costs incurred by the Plaintiff in proving it's claim and in the exercise of my discretion, I intend directing the defendant to pay 70% of the plaintiff taxed costs.

Order

[58] In the circumstances I make the following order

1. The 1st to the 6th Defendants are ordered to pay the plaintiff the sum of R40 000.00 jointly and severally, the one paying the other to be absolved.
2. The 1st to the 6th Defendants are ordered to pay 70% of the taxed costs of the Plaintff jointly and severally , the one paying the other to be absolved.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

1877-2008A

HEARD ON: 29 AUGUST 2011 TO 2 SEPTEMBER 2011
FOR THE PLAINTIFF: ADV B SWART SC
INSTRUCTED BY: GRIESEL BREYTENBACH ATTORNEYS, PRETORIA
FOR THE DEFENDANTS: ADV S LEBALA SC
INSTRUCTED BY: STATE ATTORNEY