IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CIVIL CASES NO.341, 764/2007

In the matter between:

SWAZILAND POLICE UNION **1ST APPLICANT**

SWAZILAND CORRECTIONAL SERVICES UNION **2ND APPLICANT**

and

THE COMMISSIONER OF POLICE **1ST RESPONDENT**

THE COMMISSIONER OF CORRECTIONAL SERVICES **2ND RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS **3RD RESPONDENT**

THE COMMISSIONER OF LABOUR **4TH RESPONDENT**

THE ATTORNEY-GENERAL **5TH RESPONDENT**

THE MINISTER OF ENTERPRISE AND EMPLOYMENT **6TH RESPONDENT**

CORAM : Q.M. MABUZA -J

FOR THE APPLICANT : Mr. T. Maseko and Mr. P. Shilubane of P.M. Shilubane

and Associates

FOR THE RESPONDENT :Mr. Fakudze and Mr. M. Vilakati OF Attorney General's Chambers

DISSENTING JUDGMENT 29/4/08

[1] This matter was heard by a full bench comprising of three judges myself included. The main judgment was delivered on the 31st January 2008. At the time I dissented and stated that I would file my reasons in due course. This unusual derogation from the accepted procedure on not delivering the judgments together was occasioned by a mistaken view on my part. I had believed that we were all ***ad idem*** in that we would grant the applications sought. Be that as it may, I now deliver my reasons.

[2] This application is brought by the Swaziland Police Union and the Swaziland Correctional Services Union. Initially they were brought under different case numbers but because the issues therein are essentially the same between the parties they were consolidated and heard together for convenience. I shall refer to both unions as the Applicants. The Respondents have also likewise been re-assigned different designations.

[3] The Applicants applied to the Commissioner of Labour (the 4th Respondent) to register their respective unions under section 32 of the Constitution of Swaziland 2005 as r^ad with section 27 of the Industrial Relations Act 2000 (IRA). The

Commissioner of Labour declined to register the Unions citing section 3 of the Industrial Relations Act.

[4] It is this refusal that has led to this application in which the Applicants seek a declaration of invalidity of:

- Section 3 (b) and (c) of the Industrial Relations Act No. 1 of 2000 read together with Regulation 19 of the Police Act No. 29 of 1957 as well as section 18 of the Prisons Act No. 40 of 1964 on the ground that these pieces of legislation are inconsistent with the provisions of the Constitution (2005) as the supreme law of the land.

- The Applicants allege that these pieces of legislation deprive them of the right to associate and assemble under section 32 of the Constitution for purposes of enabling them to bargain effectively and collectively urider a trade union yielding good results on negotiating salaries shortage of accommodation and thb general welfare of its members effectively.

[5] The pieces of legislation complained of provide as follows:

(a) Section 3 of the Industrial Relations Act No. 1 of 2000 (as amended)

3. This Act shall apply to employment by or under the government in the same way and to the same extent as if the Government were a private person but shall not apply to:-

(a) any person serving the Umbutfo Swaziland Royal Force established by the Umbutfo Defence Force Order, 1977;

(b) The Royal Swaziland Police Force,; and

(c) His Majesty's Correctional Services established by Prison Act No. 40 of 1964:

(b) Regulation 19 of the Police Regulations promulgated under the Police Act No. 29 of 1957 which reads:

Membership of trade unions forbidden.

19. It shall not be lawful for a member of the Force to become, or after the expiry of one month after the promulgation of this regulation to remain a member of any political association or of any trade union or of any association having for its objects, or one of its objects the control off or influence on the pay, pensions, or conditions of service of the Force:

(c) Section 18 of the Prisons Act No. 40 of 1964 which provides thus:

Prohibition of membership of trade unions.

18. (1) A prison officer who is a member of a trade union, or any other association, the object or one of the objects of which is to control or influence salaries, wages, pensions or conditions of service of prisons or conditions of service of prison officers, or any other class of persons, shall subject to the laws relating to the Public Service be liable, at the discretion of the Minister, to be dismissed from the service and to forfeit any rights to a pension or gratuity.

(2) The decision of the Minister that a body is a trade union or an association to which this section applies shall be final.

(3) This section shall not be deemed to prohibit prison officers from becoming members of a prison officers staff association as approved by the Minister by notice published in the Gazette."

The Police Act and Prisons Act provide for the formation of staff associations. On the other hand section 32 of the Constitution provides as follows:

"A worker has a right to -

(a) freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker; and

(b) collective bargaining and representation."

The Applicants decided to form a union because the present staff association provided for in the aforesaid Acts were not yielding good results on negotiating salaries shortage of accommodation and the general welfare of its members effectively.

[6] The Applicants have given Circular No. 2 of 2007 (SWACU 2) as an example which caused widespread dissatisfaction among the lower ranks of the force. They contend that this circular does

not improve the status of sergeants and constables. They state that this demonstrates that the staff associations which are merely internal structures are not effective for purposes of bargaining for the general welfare of members of the force. They further contend that it is practically impossible to challenge the circular through the presently structured staff associations which are created along discrimatory lines in the form of Senior Ranks Association, Subordinate Rank and Junior Staff Associations. They wish to openly challenge some of the decisions and policies imposed upon them as well as the validity of Circular No. 2 of 2007 but are afraid of being victimised.

[7] This categorisation of workers exposes them to division and makes it impossible to bargain collectively and effectively with the employer being the Swaziland Government. The members who form part of the staff association are not elected by these workers nor do they have any mandate from them. This they allege is demonstrated by the fact that there is no consultation between the workers and members of the staff associations.

[8] The Applicants state that this makes it difficult for members of the force to bargain as a united force because once the seniors have benefited, the subordinate and junior ranks are left to languish on their own. Circular 2 of 2007 (Swacu 2) also deals with the issue of back pay. The senior officers who were negotiating with Government had their back pay backdated to 1 April 2005 while Warder 1 and Sergeants to 1 April 2006. There

was no explanation for this discrepancy.

[9] The Applicants further state that whenever they attempt to hold meetings these are disbanded by officers in charge of the facility wherever the meeting is held. They complain of being subjected to widespread intimidation and threats of all kinds. Some of the Applicants' members have been accused of mutiny.

[10] The objectives of the Swaziland Correctional Services Union (SWACU) are stated in Rule 5 of their Constitutions as follows:

- " Defend, promote, and advance the economic and socio-economic interests of its members.
- To represent its members in dispute and conflict management at the workplace.
- To bargain collectively on behalf of its members.
- To regulate harmonious industrial relations through dialogue wherever possible.
- To open a bank account in Swaziland for professional and safe keeping of the funds of the union.
- To negotiate and establish accessible and affordable broad based social security safety nets for its members.
- To promote the living standards and social welfare of its members.
- To resolve conflict between the employees and employer amicably where possible.
- To organise all workers within its scope and jurisdiction.
- The right to sue and to be sued."

[11] The objectives of the Swaziland Police Union (SWAPU) are stated in Article 2 of their Constitution as follows:

"2.1 To set up an effective negotiation machinery for the purpose of collective bargaining.

2.2. To regulate the relationship and to settle disputes between its members and the employers and between members by amicable agreement wherever possible.

2.3. To provide legal aid in respect of matters arising out of employment to members whose monthly subscriptions or any levy which may have been decided.

2.4. To ensure and improve the standards of living, conditions of service, rates of pay, social security, academic development and general welfare of all police."

The above objectives seem laudable to me.

[12] The Respondents' defence stated in the affidavits of the Commissioner of Prisons, Mr. Mnguni Simelane and the Commissioner of Police Mr. Edgar Hillary is that there is no need for the establishment of a union to deal with the problems of the workers since there is a staff association through which these problems can be ventilated and addressed. Mr. Simelane denies that the grievance handling structures are not effective in presenting work place problems. He has further stated that if the Applicant(s) feel that such structures are not effective it is open to them to make suggestions for their improvement with a view to make them more effective.

[13] He further denies that the categories of the association are not independent. He states that each category deals with its matters independently and without any interference by the Commissioner or any one for that matter. He states that the categorization of the association actually works to the advantage of the members thereof since the circumstances of

the members vary and if they were in one category the grievances of some members would not be adequately addressed. He denies that the categorization of the association exposes its members to division. To the contrary it makes grievance handling much easier and efficient.

[14] To Mr. Simelane's affidavit is attached the interim staff association constitution and rules established under section 18 (3) of the Prisons Act No. 40/1964. In terms of section 3 (1) of this document there is established three bodies forming up this staff association viz.

Senior Ranks Board Subordinate
Ranks Board Junior Ranks Board

The object of which:

(i) shall be to enable members of the service to consider and bring to the notice of the Commissioner and Government matters affecting the welfare and efficiency of the service other than matters of promotion affecting individuals and discipline and politics.

(ii) The Association is entirely independent of and unassociated with anybody outside the Service and its members is confined to Staff of the Correctional Services only.

(iii) Any ambiguous or controversial matter arising from the present rules or not included in the rules shall be referred to the Commissioner whose decision shall be final for the sake of progress in the work on hand. (My emphasis)

Mr. Simelane's response to "Swacu 2" is that it came as a result of an appeal lodged by the Senior officers after the establishment of circular No. 1 of 2005 which had placed them in a disadvantaged position with regard to their counterparts in the other disciplined forces to wit the Royal Swaziland Police and Umbutfo Swaziland Defence Force. The circular (Swacu 2) was merely implementing the results of the appeal. The senior officers in the Correctional Services had been graded lower than their counterparts in the other disciplined forces. Such discrepancy did not exist in the case of junior officers since the junior officers in all the forces had been placed at the same grades without any discrimination. That is why "Swacu 2" only shows an improvement in the senior officers section and not improvement in the junior officers section. He concludes by denying that the apparent lack of improvement in salaries of junior officers is due to lack of effective representation at the negotiating table.

In his replying affidavit Sibusiso Hlatshwayo the chairperson of SWACU states that what is deposed to herein above in paragraph 15 by Mr. Simelane, reaffirms the allegations by the Applicant(s) that not all officers are involved in decision making and in a consultative process. Had junior officers been represented when the appeal was made there would have been improvements in relation to them as well

Mr. Simelane further re-iterates that if the present structure of

the Staff Association is not effective, it is open to the Applicants to make suggestions for improvement of such association to make it more effective. There is no need for the formation of a union when there is room for improving the present framework of representation and grievance handling particularly when there is a law prohibiting the formation of such a union.

[18] The Applicants' response to the contents of paragraph 17 herein above is that it is not interested in being involved in improving a structure which is devoid of independence, a structure which is dominated by senior officers who have no interest in the welfare of junior officers as clearly demonstrated by "Swacu 2".

[19] Mr. Simelane also denies the accusations of charges of mutiny.

[20] The Commissioner of Police, Mr. Edgar Hillary is the deponent to the affidavit responding to the Police Union (SWAPU). His affidavit basically deals with the law forbidding the formation of police unions and the justification in the public interest of the limitation of the impugned sections, locally and internationally. He also deals with the Staff Associations provided for in the Police Act. A pertinent response is found at paragraph 14.2 of his opposing affidavit page 64 which reads:

"14.2 The Constitution recognises that the Royal Swaziland Police is a disciplined force. The RSP, in common with most police forces, depends

> upon the strictest discipline in order to effectively discharge its constitutional mandate of preserving the peace, preventing and detecting crime and apprehending offenders. Unionisation of the Police Force will weaken the rigorous obedience to authority, without which the RSP cannot meet its
>
> constitutional obligations." (My emphasis)

The affidavits of both Commissioners is supported by the affidavit of Mr. Lutfo Dlamini, the current Minister for Enterprise and Employment (The Minister). He basically re-states the declarations adopted by the International Labour Organisation (ILO). The Minister informs us and this is common cause between the parties, that there are two ILO Conventions that deal with freedom of association and the right to collective bargaining. The first, is the Freedom of Association and Protection of the right to Organise Convention, 1948 (Convention 87) and the other is the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98).

The Minister goes on to state that both these Conventions give states a wide margin of appreciation in deciding the extent to which the guarantees provided therein shall apply to the armed forces and the police. That the Committee on Freedom of Association (CFA) which was set up by the ILO to examine complaints about freedom of association has decided that states having ratified Conventions 87 and 98 are not required to grant the guarantees therein to members of the armed forces and police. He further states that the exclusion of members of the Royal Swaziland Police from the application of the Act (Industrial Relations Act 2000) was informed by Conventions 87 and 98 as

well as decisions of the CFA. Both Conventions have been ratified by Swaziland. (My emphasis).

The same affidavit by the Minister supports the affidavit of the Commissioner of The Correctional Services Mr. Simelane. It is worth noting that the Minister only mentions the police and armed forces not members of the Correctional Services in his affidavit. This omission is in my view very significant and informs the Court that the Government is not adverse to the Correctional Services forming a union or a similar organisation. In fact in the "Report of the ILO High Level Mission to Swaziland concerning the application by Swaziland of ILO Conventions on Freedom and Association" ("Annexure Swacu 5") at page 2 thereof in respect of Article 2 of the Convention this is what is said: "The Committee notes the Government's statement that it is considering the question of including prison staff within the scope of application of the Industrial Relations Act (IRA). The report and its contents have not been denied by the Respondents.

[24] I am deliberately isolating the Correctional Services because it seems to me that even though their concerns are similar with those of the Police Force, the attitude of the relevant Government authorities is different to that of the Police. Prima facie its seems that the authorities do not seem to mind the unionisation of the Correctional Services or a similar organisation.

[25] The Applicants argue that the provisions of the Police Act and the Prison Act are draconian colonial and archaic and not consistent with an open just and honest democratic society.

[26] In as much as the arguments were primarily based on section 39 (3) it is obvious to me that there is a general complaint about the arbitrary use of power by the 1st and 2nd Respondent. Perhaps one should address the issue. It is correct that the Police Act and the Prisons Act give the Commissioners certain powers but the exercise of those powers must now find validation in the Constitution. This country has moved from a parliamentary sovereignity where public functionaries exercised virtually unlimited power to constitutional supremacy where such exercise of power is controlled by the Constitution. The Police Act and Prisons Act may be used as a guideline but the real control is now in the Constitution. For a discussion of the control of the use of arbitrary power see the judgment of Sachs J in the **Minister of Health and Another v New Clicks South Africa and 7 Others** Case CCT 59/2004.

[27] The Applicants contend that their rights under the constitution have been infringed and these rights are.

- Equally before the law (section 20)
- The right of freedom of expression and opinion

(section 24 of the Constitution).

•The right to freedom of peaceful assembly and association (section 25 of the Constitution)

•The right of freedom of movement (section 26 of the Constitution)

•The right to freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker (section 32 (a) of the Constitution.

•The right to freedom to collective bargaining (section 32 (b) of the Constitution)

[28] The Applicants contend that the Constitution is now the supreme law of the land and that being so, the legislation complained of must be struck down on the grounds of inconsistency with the Constitution. They further argue that the coming into force of the Constitution places the Kingdom of Swaziland into a position where the fundamental rights of all citizens must be guaranteed, promoted, protected and fulfilled without distinction. The Applicants further argue that the prohibition on members of the disciplined forces to form, join and belong to a trade union of their choice is clearly unconstitutional on the ground that it offends provisions of the Bill of Rights.

It is common cause that in interpreting the bill of rights a two stage approach is used: an enquiry stage and a justification

stage. The parties accept that there is no need to traverse the enquiry stage ***in casu*** and that the only relevant issue is justification. They also accept that the onus is on the Respondents see **Ferreira v Levin N.O. 1996 (1) SA 984 CC** at paragraph 44 per Ackerman J:

> "The task of determining whether the provisions of [an] Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages, first an enquiry as to whether there has been an infringement of the ... guaranteed right; if so a further enquiry as to whether such infringement is justified under the limitation clause ... Concerning the second stage, [it] is for ... the party relying on the legislation to establish this justification ... and not for the party challenging it, to show that it was not justified."

[30] The Respondents have submitted that this limitation or restriction on the disciplined forces to form a union is reasonable and necessary given the provisions of section 39 (3) of the Constitution read with section 39 (6). Section 39 (3) reads:

> "In relation to a person who is a member of a disciplined force of Swaziland, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter."

Section 39 (6) reads:

> "(6) In this chapter, unless the context otherwise requires -
>
> "disciplinary law"' means law regulating the discipline of any disciplined force;
>
> "disciplined force" means
>
> (a) an air, military or naval force;
> (b) the Swaziland Royal Police Service;
> (c) the Swaziland Correctional Services.

[31] It is further submitted that the rights of the Applicants have been limited and or restricted because of their unique professions as disciplined forces and in the public interest. The constitution provides for the limitation of

rights by way of a general limitation clause. This clause is found in section 14 (3). Abridged this clause states:

> **"a person shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter but subject to the respect for the rights and freedoms of others and for the public interest".**

The Respondents further submit that the "public interest" criterion calls for the courts to make a value judgment about which interests are important and protected by the Constitution and which are not. The value judgment so the argument goes is not made on the basis of a judge's personal values and the Court is directed to the dictum of Mahomed C.J. in the case of Ex parte Attorney-General, Namibia: In Re Corporal Punishment by organs of State 1991 (3) SA 76 (Nm SC) at (91 D-E):

> "it is ... a value judgment which requires objectively to be articulated and identified regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the **emerging consensus of values in a civilised international community** which Namibians share. This is not a static exercise. It is a continually evolving dynamic. (Emphasis added by Counsel).

[33] They argue that the issues herein are whether section 3 (b) and (c) of the Industrial Relations Act, 2000 is in the public interest and whether it is reasonably justifiable in a democratic society. They have directed the Court to invoke International Law as an aid to interpretation.

- International Labour Law

  They submit that one of the purposes of the Industrial Relations Act is to give effect to international labour

standards and cite section 4 (1) (j) which states that:

> "the purpose of this Act is to ... ensure adherence to international labour standards".

The relevant International Labour standards are incorporated in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87) and the Right to Organise and Collective Bargaining Convention 1949 (Convention 98)

Article 9 (1) of Convention 87 states:

> " The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations'."

Article 5 (1) of Convention 98 states:

> " The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations'. "

[34] I must point out that these articles do not refer to the Correctional Services nor does the Committee on Freedom of Association in the digest published by International Labour Organisation. The digest deals with freedom of association of the armed forces and police and excludes Correctional Services (see paragraphs 223 to 226 thereof).

[35] The Respondents conclude that the emerging consensus of values in International Labour Law sanctions the complete bar on police officers forming trade unions. They therefore submit that section 3 (b) and (c) of the Industrial Relations Act is in the "public interest" as envisaged by section 14 (3) of the Constitution and therefore constitutionally sound.

[36] I disagree that the emerging consensus of values in International Labour Law sanctions the **complete bar** on police officers forming trade unions. This is not true instead it leaves it within the discretion of each state with the proviso that members of the armed forces who can be excluded from the application of Convention 87 should be defined in a restrictive manner.

[37] The Respondents have helpfully provided resource material of international and comparative law to buttress their arguments for which the court is most grateful. They have done a comparative analysis of various countries where there is a complete bar on trade union activity within police forces namely Botswana, Namibia, Canada and the United Kingdom but not in neighbouring South Africa. They have not provided a similar analysis with regard to the World's Correctional services. It would seem that the quoted countries do not have similar restrictions with regard to their correctional services. The Respondents merely repeat their earlier argument which is based on section 39 (3) of the Constitution as read with section 39 (6) with regard to the Correctional Services.

[38]The argument goes on further to state that section 39 (3) shields a disciplinary law of a disciplined force from constitutional review. They further state that the prohibition on membership of a trade union in the Correctional Services is a disciplinary law of the disciplined force. More so in that it contains the expression "nothing contained in or done under the authority of ... shall be held to be inconsistent with or in contravention of any of the provisions of this

Chapter

Thus they conclude that section 39 (3) is not in conflict with Chapter III rights, it creates a legitimate limit on the rights granted by the Constitution. Therefore, there is no need to harmonise section 39 (3) with constitutional rights whose application it is intended to exclude.

[39] On the justification of the limitation the Applicants have submitted that it is a cardinal principle of constitutional interpretation that where two provisions of a constitution seem to be in conflict with each other, the Court will not declare the offending provision unconstitutional but will apply the principle of harmonization. This principle dictates that the court should lean in favour of the interpretation that will protect the rights as opposed to the restrictive one. To buttress his arguments Mr. Maseko referred us to inter alia the case of **United Democratic Movement v President of the Republic of South Africa** 2003 (1) SA 495 (CC) where it was said: "It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. Where there is a tension, the courts must do their best to harmonize the relevant provisions and give effect to all of them".

[40] The situations are not similar. In *casu* a regulation has been elevated to the status of an entrenched constitutional provision as opposed to two competing constitutional provisions having equal status. I have discussed this anomaly later on in my judgment. Mr. Maseko also referred us to the **South African**

Defence Force Union v Minister of Defence 1999 (4) SA 469 (cc) (Sandu 1). But in Sandu 1, the contentious issues were an **Act of Parliament v the Constitution.** Consequently this Court's hands are tied. It is only Parliament who can reverse this dreadful imposition on the fundamental rights of the Applicants.

[41] The question which remains is whether the Respondent has discharged its onus of justification of the limitation or restriction. Mr. Maseko refers to it as neither a limitation or a restriction but a total bar. During submissions I put a question to Mr. Fakudze who co-represented the Respondents as to whether the Applicants had been informed that their constitutional fundamental rights would be limited or restricted. And whether their rights embodied in section 32 (a) would be totally barred. His response was an emphatic no. Mr. Fakudze was a member of the Constitutional Drafting Committee. The impression conveyed by him was that nobody ever thought that the Applicants would someday claim their constitutional rights at the time. It seemed to be in order for the Constitutional Drafting Committee to arbitrarily interfere with the Applicants rights with impunity by inserting section 39 (3) without any consultation.

Sad to say Parliament did not debate section 39 (3). It would serve no useful purpose to consult Hansard or the relevant Parliamentary tapes. We do not have a limitation clause which freely stands alone in our Constitution. There is no harm in using the South African limitation clause as an aid to analysis. Section 36 (1) of the South African Constitution provides that:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

a) the nature of the right;
b) the importance of the purpose of the limitation,
c) the nature and extent of the limitation;
d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose."

One need not go through each factor. The one most relevant is **what is the purpose of section 39 (3)?** The best that Mr. Vilakati could say was that the limitation, restriction and or bar was justified in the public interest in terms of section 14 (3). The next question is: **what is the meaning of the clause in the public interest** in the context of this case. This aspect was not addressed. Even the framer of the Constitution Mr. Fakudze was not of much assistance in this respect. Nobody seems to know what the purpose of section 39 (3) is or was except that it is safely shielded from a declaration of invalidity. The Applicants further stated that the prohibition was necessary in that if the Unions were allowed to exist, there would be erosion of obedience to authority.

I hold a different view. On the contrary if unions are allowed to exist there will be no erosion or obedience to authority because there would be collective agreements with guidelines on how to conduct themselves as agreed to between themselves and their employer. During February 2008 members of the police union threatened to go on strike. They were stopped by order of court (see Civil Case 341/2007, unreported). A possible revolt by members of the Applicants is totally unnecessary: This was a wake up call for all stakeholders. The fear of strikes by the state could be

a possible reason for depriving the Applicants of their fundamental rights and the insertion of section 39 (3). The Committee on

Freedom of Association of the ILO has stated that member states may prescribe the manner in which such rights may be exercised and that where a member state has decided to preclude the police force from being unionised, such exclusion may be given a restrictive interpretation. This directive rests solely in the hands of the line Ministers as I indicate below.

There is no doubt that the police and members of the correctional services need a strong and effective body to negotiate better living standards and terms and conditions of service. During December 2006 the current Prime Minister, Mr. A.T. Dlamini toured the police stations countrywide. He also inspected the living conditions of the police. His tour was reported widely in the media, radio and electronic media. The living conditions were appalling and shocking to say the least. It is in the public interest that these security forces who serve the public should have access to decent living conditions, fair terms and conditions of service and adequate remuneration. Having their own mouthpiece is long overdue and they should not be deprived of their rights upon a weak excuse that allowing them to excercise their rights would affect discipline and obedience to authority.

[45] There is further no doubt that section 18 of the Prisons Act and Regulation 19 of the Police Act deprive these security forces of their fundamental rights and are repugnant to good governance and the rule of law and particularly that the sanction for joining or forming a trade union is dismissal which is a disciplinary

measure. The subsequent entrenchment in section 39 (3) of these regulations does not lend any credence to the aspirations embodied in the preamble of the Constitution. If the preamble is to be believed these impugned pieces of legislation which are old archaic discriminatory and oppressive should have been excised from our laws. They are inconsistent with the provisions of Chapter III of the Constitution. They should be declared null and void. They have no place in a democratic society.

[46] What then is the way forward? I have in mind three methods:

The **first** method is that of excising section 39 (3) and section 39 (6) of the Constitution as suggested by my brothers Mamba J and Annandale J. The difficulty that I see with this method in the short term is that it is entrenched and obtaining the required majority of both houses of Parliament will be no easy feat.

The **second** route is that section 32 (2) of the Constitution embodies two separate rights namely:

> "(2) A worker has a right to
>
> (a) freely form, join or not join a trade union for the promotion and protection of the economic interests of that
> worker; and
>
> (b) collective bargaining and representation."

[47] The Police Act (regulation 19) and the Prisons Act (section 18) forbid members from joining or forming trade unions. A case on all fours with the issues raised in casu is the case of **South African National**

Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) (known as Sandu 1). The judgment of O' Regan J who wrote for the full bench is most instructive.

[48] That case concerned the question whether it was constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions. The Constitutional Court was adjudicating on an order referred it by the Transvaal High Court, wherein the learned judge had declared certain provisions of the Defence Act 44/1957 to be unconstitutional and invalid. It is important to determine what the Constitution means by worker in section 32 (2). Unfortunately the section is not as inclusive as its South African counterpart, section 23 (2). However, the learned judge in the Constitutional Court used inter alia the Conventions and recommendations of the International Labour Organization (ILO) as an important resource for considering the meaning and scope of "worker" as used in section 23 of the South African Constitution. In their submissions herein Counsel referred us to the same conventions to use as an International Law resource.

This is what the learned judge had to say in Sandu 1 in the following paragraphs:

> "[26] Article 2 of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, the first major Convention of the ILO concerning freedom of association, which South Africa ratified in 1995, provides that:
>
> Workers and employers, without distinction whatsoever, shall

> have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."'

Article 9 (1) of the same Convention provides:

> "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations."

It is clear from these provisions, therefore, that the Convention does include 'armed forces and the police' within its scope, but that the extent to which the provisions of the Convention shall be held to apply to such services is a matter for national law and is not governed directly by the Convention. This approach has also been adopted in the Convention on the Right to Organise and Collective Bargaining 98 of 1949. 17 (17) which South Africa also ratified in 1995. The ILO therefore considers members of the armed forces and the police to be workers for the purposes of these Conventions, but considers that their position is special, to the extent that it leaves it open to member States to determine the extent to which the provisions of the Conventions should apply to members of the armed forces and the police.

> [27] If the approach of the ILO is adopted, it would seem to follow that when section 23 (2) speaks of 'worker', it should be interpreted to include members of the armed forces."

I adopt the above interpretation for purposes of this case. In ***casu*** the interpretation of the word "worker" would include members of the police force and members of the correctional services.

[50] That being so, the Applicants who are "workers" are entitled to the second right of section 32 (2) (b), that of **collective bargaining and representation.** To this end they need not form or join a trade union. The right to collective bargaining and representation is not prohibited by the Police Act and Prisons Act. To enable the Applicants to freely pursue this aspect of their rights this Court would have to declare section 3 (b) and (c) of the Industrial

Relations Act No. 1 of 2000 inconsistent with the Constitution and invalid. There is no legal constraint or prohibition on this Court from so doing. This would enable the Applicants to pursue measures within the Industrial Relations Act which would best regulate the relations between them and their employer the Government. This would also be commensurate with section 4 (1) (e) of the Industrial Relations Act which provides for the protection of the right to collective bargaining.

[51] The **third** method is to be found in section 268 of the Constitution which provides that:-

> (1) "The existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution"

[52] Section 18 of the Prisons Act and Regulation 19 of the Police Act fall under the disciplinary section of both Acts respectively. They are in the regulation sections of the Acts. Regulations constitute delegated legislation which falls within the purview of the Ministers responsible for either the Correctional Services or the Police Force. The Prime Minister is responsible for the Police Force and the Minister for Justice and Constitutional Affairs for the Correctional Services. These line Ministers are responsible for passing the regulations.

- Regulations are by their nature flexible and amenable to speedy amendment. Not so an Act of Parliament. The reason for delegating regulations to the responsible line Ministers was to avoid having to go to Parliament each time some need arose for amendment. The

> Ministers responsible have powers under the aforementioned regulations which powers have not been removed or revoked by section 39 (3). The Ministers concerned can continue to make regulations, amending, modifying, qualifying or adapting the said regulations in order to bring them into conformity or harmony with the Constitution.

[53] The particular regulation that forbids the members of the Police Force and that of Correctional Services from joining trade unions was deliberately placed under the regulations section to allow for flexibility and easy amendment in order to accommodate modern trends. With regard to the Correctional Services I indicated earlier in my judgment that the International Labour Conventions do not refer to Correctional Services. Even the Honorable Minister Mr. Lutfo Dlamini in his supporting affidavit does not mention the Correctional Services. Both factors indicate that there is no objection in principle to members of the Correctional Services forming or joining unions. This therefore makes it easier for the line Minister to effect the necessary amendments or changes envisaged in section 268 of the Constitution.

[54] Finally, I align myself with the following remarks by O' Regan J in Sandu 1:

> "35: This case is concerned primarily with the right to form and join trade unions ...There can be no doubt of the constitutional imperative of maintaining a disciplined and effective ...force. I am not persuaded, however, that permitting members of the ... force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the ...force. Indeed it may well be that in permitting members to join

> trade unions and in establishing proper channels for grievances and complaints, discipline may be more enhanced than diminished. Whether this proves to be the case will depend, of course on a variety of factors, including the nature of the grievance procedures established, the permitted activities of trade unions in the ... force, the nature of the grievances themselves and the attitudes and conduct of those involved."

[55] I would therefore urge the Prime Minister and the Minister for Justice and Constitutional Affairs to exercise their powers in terms of the Police Act and Prisons Act respectively to amend, modify, adapt and or qualify the regulations therein to conform with the International Labour Organisations Conventions and to conform to modern trends in a democratic society in meeting the Applicants' expectations and fulfilling their constitutional rights.

[56] **Court Order**

I have indicated that I consider section 3 (b) and (c) of the Industrial Relations Act 2000 to be inconsistent with section 32 (b) of the Constitution. The latter section is not included in Regulation 19 of the Police Act nor in section 18 of the Prison Act. Section 3 (b) and (c) is hereby declared to be inconsistent with the Constitution and invalid. Because the Applicants have been partially successful the Respondents are ordered to pay half of their (applicants) costs.

Q.M. MABUZA-J