

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED

27 February 2023

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DATE

Case Number: 28399/2021

EDGAR DAVIDS

Applicant

and

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS
and two others**

First Respondent

Case Number: 13678/2022

ZILTA MILES

Applicant

and

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS
and three others**

First Respondent

JUDGMENT

SC VIVIAN AJ

1. The Applicants in each of these matters seek orders enforcing a recommendation made by the Military Ombud to the Minister of Defence and Military Veterans (“the Minister”).
2. On 6 March 2018, Mr Davids lodged a complaint with the Military Ombud regarding non-promotion and the failure to compensate him for a period when he served in a higher post. On 9 March 2020, the Military Ombud issued a final report in respect of the complaint. The Military Ombud upheld Mr Davids’ complaint. The Minister was requested to request the Chief of the SANDF to ensure that Mr Davids was compensated for the period he served in the higher post. The Military Ombud further recommended that the Minister direct the Chief of the SANDF to instruct that a full audit on Mr Davids’ rank and career progression and that any irregularities be rectified. The Minister did not implement the recommendation.
3. On 3 June 2019, Major Miles lodged a complaint with the Military Ombud regarding the non-rectification of her remuneration. In essence, when the occupational dispensation (“the OSD”) for pharmacists was implemented in 2008/2009, she was incorrectly translated to the level of a normal dispensing pharmacist whereas she should have been translated to the pharmacist supervisor level. On 12 March 2021, the final report of the Military Ombud was

issued. The Military Ombud upheld the complaint and recommended that the Minister (1) direct the Surgeon General to finalise its processes in order to ensure the implementation of the OSD in respect of, *inter alia*, pharmacists and (2) direct the Surgeon General to audit Major Miles' salary and the Directorate Human Resource Service Systems to implement salary adjustments with effect from 1 April 2010. The recommendation has not been implemented.

4. In both matters, the opposing respondents submit that the relief sought is not competent because the recommendations of the Military Ombud are not binding on the Minister. As the same point of law arises in both cases, the parties agreed that the matters be heard together.
5. The office of the Military Ombud was established in terms of the Military Ombud Act (Act 4 of 2012; "the Military Ombud Act"). In terms of Section 5(1) of the Act, the President must appoint a Military Ombud. The Military Ombud's role is to investigate complaints lodged with the office of the Military Ombud.
6. Where a complaint falls within the jurisdiction of the Military Ombud, after investigating a complaint, the Military Ombud must uphold or dismiss the complaint, or issue an alternative resolution (Section 6(7)). If the complaint is upheld, the Military Ombud must recommend the appropriate relief to the Minister responsible for defence (Section 6(8)).
7. The question in these matters is: is the Minister obliged to act in terms of the recommendation and, if she does not, can she be compelled to do so?

8. In **Lembede**,¹ Moosa AJ held that the Minister was not obliged to act in terms of the recommendation of the Military Ombud and could not be compelled to do so. Counsel for the Applicants, Mr Hamman, sought to persuade me that Moosa AJ was clearly wrong. I am not so persuaded. On the contrary, I respectfully agree with Moosa AJ. On a proper interpretation of the Military Ombud Act, the Minister is not obliged to act in terms of the recommendation. The Minister can accordingly not be compelled to do so.

Interpretation of statutes

9. The modern approach to interpretation of statutes was explained by Khampepe J as follows:

“[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity. As this court has previously noted in Cool Ideas, this principle has three broad riders, namely—

- ‘(a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the*

¹ Lembede v Minister of Defence and Military Veterans and others, GD 9642/2020 (15 December 2021)

general principle is closely related to the purposive approach referred to in (a).'

[48] Judges must hesitate 'to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'"²

10. When interpreting legislation, courts are required in terms of Section 39(2) of the Constitution to give effect to the "*spirit, purports and objects of the Bill of Rights.*"³ Mogeong CJ explained that: "... every opportunity courts have to interpret legislation must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself."⁴

The plain, ordinary grammatical meaning of the words in question

11. The words in question are those in Section 6(8): "*... the Ombud must recommend the appropriate relief for implementation to the Minister.*"
12. In the context, the word "*recommend*" is used as a verb. The Oxford English Dictionary lists various meanings of the verb. In context, the most appropriate are: "*To offer counsel or advice to someone (to do something)*"; "*To advise (a person) to do a thing*"; "*To counsel or advise (to do something, that something be done, etc.)*".⁵

² Chisuse and Others v Director-General, Department of Home Affairs and Another 2020 (6) SA 14 (CC)

³ Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) at para 22; Chisuse, *supra* at para 49

⁴ Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others 2020 (2) SA 325 (CC) at para 2

⁵ <https://www.oed.com/view/Entry/159715?rkey=q9n5Jf&result=2#eid> (accessed 20 February 2023)

13. On the plain, ordinary grammatical meaning of the word, the Military Ombud must advise or counsel the Minister on the appropriate relief for implementation.
14. The verb "*recommend*" is usually not peremptory. The legislature could easily have used words to show that the Minister was obliged to implement the relief. For example, Section 174(6) of the Constitution provides: "*The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.*" The legislature instead chose wording that shows the opposite.
15. Accordingly, on the plain, ordinary grammatical meaning of Section 6(8) of the Act, the Minister was not obliged to act in terms of the recommendation of the Military Ombud and could not be compelled to do so.

The chain of command

16. The South African National Defence Force ("SANDF") was created in terms of Section 224(1) of the 1993 Constitution and continues to exist in terms of Section 11 of the Defence Act (Act 42 of 2000; "the Defence Act"). Section 199(2) of the Constitution provides that the Defence Force is the only lawful military force in the Republic.
17. Section 200(1) provides that the Defence Force must be structured and managed as a disciplined military force. The Constitution accordingly recognises that discipline and an effective chain of command are essential to the proper function of the military.
18. Section 202 of the Constitution provides:

“(1) The President as head of the national executive is Commander-in-Chief of the Defence Force, and must appoint the Military Command of the Defence Force.

(2) Command of the Defence Force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.”

19. Section 199(4) provides that the security services must be structured and regulated by national legislation. In the case of the military, that legislation is the Defence Act (Act 42 of 2002).
20. The next level in the hierarchy is the Military Command appointed by the President. Section 4A of the Defence Act prescribes the composition of the Military Command. The chain continues down through commissioned and non-commissioned officers on different hierarchical levels.
21. The Chief of the Defence Force is a member of the Military Command. In terms of Section 14(b) of the Defence Act, the Chief of the Defence Force must comply with any direction issued by the Minister under the authority of the President as contemplated in section 202(2) of the Constitution. The Minister does not form part of the Military Command.
22. As Moosa AJ pointed out in **Lembede**, the Military Ombud is not a member of the Military Command.⁶ Accordingly, the Military Ombud is not part of the chain of command.

⁶ Section 4A of the Defence Act.

23. If the recommendations of the Military Ombud were binding on the Minister, this would mean that a person outside of the chain of command can instruct another person outside of the chain of command to implement appropriate relief. As is seen in both these cases, this would require the Minister to issue directions to those in the Military Command. The Minister is constitutionally mandated to do so, but only under the authority of the President. The interpretation contended for by the Applicants would result in the Minister issuing directions under the authority of the Military Ombud.
24. If the Minister were obliged to implement the recommendation, then the Military Ombud constitutes an alternate chain of command in respect of matters within the jurisdiction of the Office of the Military Ombud.
25. In my view, this is significant and lends support to the interpretation that the recommendations of the Military Ombud are not binding on the Minister. The military cannot have more than one chain of command. There is only one chain of command, with the President as the commander-in-chief at the top.

The context and purpose of the statute

26. The Military Ombud Act exists within a particular context. That context includes the constitutional context in which the military exists. Chapter 11 of the Constitution deals with security services. Section 198 sets out the principles that govern national security in South Africa. Section 199(2) provides that the Defence Force is the only lawful military force in the Republic.
27. Mr Hamman sought to compare the Military Ombud to the Public Protector. Chapter 9 of the Constitution establishes six institutions that strengthen

constitutional democracy in the Republic. These include the Public Protector. The Military Ombud is not a Chapter 9 institution. The Constitution does not refer to the Military Ombud.⁷ These are important distinctions.

28. As I noted above, Section 199(4) provides that the security services must be structured and regulated by national legislation. That legislation is the Defence Act.
29. The Military Ombud Act must be interpreted consistently with the Constitution. Accordingly, where reasonably possible, I must interpret the Military Ombud Act to have a meaning not inconsistent with the Constitution.
30. As the Defence Act was passed before the Military Ombud Act, I must also assume that the legislature was aware of the content of the Defence Act.
31. Part of the constitutional context is that members of the military enjoy rights in terms of the bill of rights.
32. Mr Hamman referred me to the Constitutional Court judgment in **SANDU**.⁸ **SANDU** concerned the question as to whether it was constitutional to prohibit members of the military from participating in public protest and joining trade unions. In the majority judgment, O'Regan J held:

“There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter

⁷ In terms of Section 204, a civilian secretariat for defence must be established by national legislation, but that is not the Military Ombud. This body is established as the Defence Secretariat in terms of Section 6 of the Defence Act.

⁸ South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)

how its activities are circumscribed, will undermine the discipline and efficiency of the Defence 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 enhanced rather than diminished.”⁹

33. Accordingly, the Constitutional Court held that provisions in the relevant statute¹⁰ that prohibited members of the SANDF from becoming members of a trade union were not a justifiable limitation on members' constitutional rights.

34. It is clear, however, that the Constitutional Court recognised the importance of discipline in the SANDF.

35. Subsequently, in **Potsane**, Kriegler J explained:

“Modern soldiers in a democracy, those contemplated by chap 11 of the Constitution, are not mindless automatons. Ideally they are to be thinking men and women imbued with the values of the Constitution; and they are to be disciplined. Such discipline is built on reciprocal trust between the leader and the led. The commander needs to know and trust the ability and willingness of the troops to obey. They in turn should have confidence in the judgment and integrity of the commander to give wise orders. This willingness to obey orders and the concomitant trust in such orders are essential to effective discipline. At the same time discipline aims to develop reciprocal trust horizontally, between comrades. Soldiers are taught and trained to think collectively and act jointly, the cohesive force being military discipline built on trust, obedience, loyalty,

⁹ SANDU, *supra* at para 35

¹⁰ Defence Act 44 of 1957

esprit de corps and camaraderie. Discipline requires that breaches be nipped in the bud - demonstrably, appropriately and fairly.”¹¹

36. In **Potsane**, the Constitutional Court found that the provisions of the Military Discipline Supplementary Measures Act 16 of 1999, which created the Military Prosecutions Authority, were not inconsistent with Section 179 of the Constitution. Kriegler J concluded that if decisions concerning military prosecutions were to be taken by the National Director of Public Prosecutions “... *the effect on military lines of authority and command would be potentially disastrous.*”¹²
37. Accordingly, members of the SANDF do enjoy constitutional rights. However, those rights need to be exercised within the confines of the chain of command.
38. Mr Hamman pointed out that the recommendations of the Military Ombud include matters related to the conditions of service of members of the SANDF. He submitted that this is important because members of the SANDF have Constitutional rights, including rights as workers. However, in terms of Section 2 of the Labour Relations Act (Act 66 of 1995) and Section 3 of the Basic Conditions of Employment Act (Act 75 of 1997), those statutes do not apply to members of the SANDF. Accordingly, Mr Hamman submitted that members of the SANDF needed to exercise their rights as workers through the Office of the Military Ombud.

¹¹ Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC) at para 39

¹² Minister of Defence v Potsane, *supra* at para 40

39. These submissions overlook the provisions of Chapter 9 of the Defence Act. That Chapter deals with employment in the SANDF. Section 61 provides for procedures for the redress of grievances.
40. Pursuant to Section 61, the Minister promulgated the Individual Grievances Regulations Regulations, 2016.¹³
41. Significantly, Regulation 3 provides: “*A member or employee must address an individual grievance through his or her chain of command ...*”
42. Mr Davids mentions in passing in his founding affidavit that he lodged a grievance. He acknowledges that he was in fact promoted to WO2 on 1 November 2018. From the report of the Military Ombud, it appears that the grievance was lodged on 3 August 2012. On 10 March 2017, the Grievance Board considered his grievance and concluded that a WO2 post should be found for Mr Davids. It is accordingly reasonable to infer that the grievance procedure did have a positive outcome, albeit that Mr Davids did not get all he sought.
43. I do not address the findings of the Grievance Board or the enforceability of its decisions because that is not Mr Davids’ case as advanced in his application.
44. However, the existence of the grievance procedure is part of the context in which the Military Ombud Act must be interpreted.
45. Section 82(1)(n) of the Defence Act provides that the Minister may make regulations relating to labour relations between members of the SANDF or any auxiliary service and the State as their employer. In fact, those regulations were

¹³ Published under GN R1263 in GG 40347 of 14 October 2016

already promulgated under the old Defence Act. On 20 August 1999, following the Constitutional Court's decision in **SANDU**, the Minister issued regulations to regulate labour relations in the SANDF by inserting a new Chapter XX in the General Regulations of the South African National Defence Force and the Reserve.¹⁴ Those regulations are still in force.

46. Accordingly, just as the Military Discipline Supplementary Measures Act (Act 16 of 1999) provides for a separate system of Military Courts, the Defence Act and the Regulations promulgated in terms of the Defence Act provide for a separate system of labour relations for members of the SANDF. The reason for this is clear: whilst members of the SANDF have rights in terms of the Constitution, these rights must be balanced with the need for discipline and for maintenance of the chain of command.
47. The Military Ombud Act is accordingly not the primary instrument dealing with labour relations in the SANDF.
48. I can find nothing in the constitutional and legislative context that points to the need for the Military Ombud's recommendations to be binding on the Minister. On the contrary, the Military Ombud Act creates a structure outside the chain of command that is not mandated by the Constitution. That structure is created in the context of structures created by other statutes that exist within the chain of command and that deal with conditions of service of members.

The scheme of the statute

¹⁴ R998 published in Government Gazette 20376 of 20 August 1999. See *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para 4

49. The Military Ombud is a creature of statute. In accordance with the doctrine of legality, the Military Ombud's jurisdictional powers are to be found within the empowering legislation: the correct legal approach under our constitutional dispensation is not to ask what the Military Ombud is prohibited from doing by the enabling statute, but to ask what is authorised or permitted by the enabling statute.¹⁵
50. The long title of the Military Ombud Act records that the purpose of the statute includes providing for the establishment of an independent Office of the Military Ombud and providing for the appointment and functions of the Military Ombud.
51. Section 3 provides that the object of the Office of the Military Ombud is to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner. Its mandate is circumscribed in Section 4. Again, the mandate is limited to complaints. These can be about conditions of service or complaints from a member of the public regarding the official conduct of a member of the SANDF.
52. The powers and functions of the Military Ombud are provided for in Section 6. Essentially the process commences with the lodging of a complaint in writing and is followed by investigation. In the course of the investigation, the Military Ombud may summon a person to submit evidence in writing or by appearing before the Military Ombud or produce a document. The Military Ombud may resolve any dispute by means of mediation, conciliation or negotiations or in any other expedient manner. After investigating a complaint, the Military

¹⁵ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 50

Ombud must uphold or dismiss the complaint, or issue an alternative resolution. The Military Ombud may recommend an alternative resolution to the Minister or may refer the complaint to the appropriate public institution for finalisation if the matter falls outside his or her jurisdiction.

53. As set out above, Section 6(8) provides that if the Military Ombud upholds the complaint, the Military Ombud must recommend the appropriate relief for implementation to the Minister. In terms of Section 6(9), the Military Ombud must inform the complainant and any other affected person of the outcome of the investigation.
54. Section 7 provides for limits on jurisdiction. Section 7(2)(a) provides that the Military Ombud may refuse to investigate a complaint if, the investigation may undermine channels of command, or constitute insubordination in the SANDF. Section 7(2)(d) provides that the Military Ombud may refuse to investigate a complaint if the complaint has not first used the mechanisms under the Individual Grievance Regulations.
55. These limitations show that the legislature was well aware of the need for discipline and for maintenance of the chain of command.
56. Mr Hamman placed reliance on Section 13. This provides that any person aggrieved by a decision of the Military Ombud may apply to the High Court for review against that decision within 180 days of the decision of the Military Ombud.

57. Mr Hamman submitted that “*any person*” includes the Minister. I am prepared to accept for purposes of this judgment that “*any person*” in the context of Section 13 can include the State and accordingly the Minister.¹⁶
58. But even if the Minister can review a decision of the Military Ombud, this does not mean that the recommendation made in terms of Section 6(8) is binding on the Minister. A non-binding recommendation does not become binding merely because the person to whom the recommendation is made may review the decision to make the recommendation.
59. Section 13 refers to the decision of the Military Ombud in terms of Section 6(7). It does not refer to the recommendation to the Minister in terms of Section 6(8).
60. Section 6(7) provides for the various decisions that the Military Ombud is empowered to make. It is only in one scenario – where the Military Ombud decides to uphold the complaint – that the Military Ombud is then obligated in terms of Section 6(8) to recommend the appropriate relief for implementation to the Minister. Another possible decision is to recommend an alternative resolution to the Minister.
61. In any event, it does not follow that merely because the decision may be reviewed that the recommendation must be binding on the Minister.
62. Accordingly, the scheme of the Military Ombud Act does not support the interpretation that the recommendation in terms of Section 6(8) is binding on the Minister.

¹⁶ Director of Public Prosecutions, Cape of Good Hope v Robinson 2005 (4) SA 1 (CC) at para 30; Director of Public Prosecutions, Cape of Good Hope v Robinson 2005 (4) SA 1 (CC) at para 2

Conclusion

63. I agree with the decision in **Lembede**. The Minister is not obliged to act in terms of the recommendation and she cannot be compelled to do so.

64. Counsel were agreed that if I came to this conclusion, then both applications must be dismissed.

65. In respect of costs, I agree with Mr Hamman that the **Biowatch**¹⁷ principle applies. The Applicants in these matters were seeking to assert a constitutionally discernible right against the State.¹⁸ The applications could not be said to be frivolous or vexatious. I shall accordingly make no orders as to costs.

66. I accordingly make the following orders:

66.1. In case number 28399/2021, the application is dismissed.

66.2. In case number 13678/2022, the application is dismissed.

Vivian, AJ
Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE APPLICANTS:

JGC Hamman, instructed by Griessel van Zenten Inc.

¹⁷ Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) at para's 22 to 23

¹⁸ The Helen Suzman Foundation v The Speaker of the National Assembly 2020 JDR 2119 (GP) at para's 112 to 115

FOR THE THIRD RESPONDENT
IN 13804/2022:

YF Saloojee, instructed by the State
Attorney

FOR THE RESPONDENTS
IN 13678/2022

J Daniels, instructed by the State Attorney