



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 854/2023

In the matter between:

EDGAR DAVIDS

FIRST APPELLANT

and

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

FISRT RESPONDENT

SECRETARY FOR DEFENCE

SECOND RESPONDENT

**CHIEF OF THE SOUTH AFRICAN
NATIONAL DEFENCE FORCE**

THIRD RESPONDENT

and

ZILTA MILES

SECOND APPELLANT

and

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

FIRST RESPONDENT

SECRETARY FOR DEFENCE

SECOND RESPONDENT

**CHIEF OF THE SOUTH AFRICAN
NATIONAL DEFENCE FORCE**

THIRD RESPONDENT

**SURGEON GENERAL OF THE SOUTH
AFRICAN NATIONAL DEFENCE FORCE**

FOURTH RESPONDENT

Neutral citation: *Edgar Davids v The Minister of Defence and Military Veterans and Others and Zilta Miles v The Minister of Defence and Military Veterans and Others* (854/2023) [2024] ZASCA 171 (12 December 2024)

Coram: MOLEFE and UNTERHALTER JJA and MOLOPA-SETHOSA AJA

Heard: 13 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 December 2024.

Summary: Military ombud – Military Ombud Act 4 of 2012 – complaints upheld – section 6(8) – the recommendation of appropriate relief for implementation – is the recommendation final and binding or advisory – the power of the Minister of Defence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Vivian AJ, sitting as court of first instance):

1 The appeals are dismissed, save only for the relief set out in 2.

2 The order of the high court is set aside, and replaced with the following order: ‘The Minister of Defence is ordered, within 60 days hereof, to decide what appropriate relief should be implemented in favour of the applicants in case no. 13678/2022 and case no 13808/2022, following the recommendations made to the Minister in terms of s 6(8) of the Military Ombud Act 4 of 2012.’

JUDGMENT

Unterhalter JA (Molefe JA and Molopa-Sethosa AJA concurring):

Introduction

[1] The appellants, Warrant Officer (WO) Davids and Major Miles, served as members of the National Defence Force. WO Davids submitted a complaint to the Military Ombud (the Ombud) on 6 March 2018. The Ombud is an office established under the Military Ombud Act 4 of 2012 (the Act). WO Davids complained that he was unfairly denied promotion and was not compensated for the period he had served in a higher position. Major Miles served as a registered pharmacist in the South African Military Health Service. On 3 June 2019, she submitted a complaint to the Ombud. Her complaint was that she had been incorrectly classified as a normal dispensing pharmacist, rather than a pharmacist supervisor, which carried higher remuneration. Consequently, she was not remunerated at a higher level.

[2] On 9 March 2020, the Ombud upheld WO Davids' compensation complaint (WO Davids having received his promotion in November 2018), and recommended appropriate relief in terms of s 6(8) of the Act, in particular, to compensate WO Davids for the period he had acted in a higher position, within 30 working days. On 12 March 2021, the Ombud upheld Major Miles' complaint, and recommended appropriate relief in terms of s 6(8), and in particular, to implement the occupational specific dispensation (OSD) in respect of pharmacists, and audit Major Miles' salary to institute salary adjustments with effect from 1 April 2010. I shall refer to these recommendations as the 'the complaint recommendations'.

[3] In terms of s 6(8) of the Act, if the Ombud upholds the complaint, the Ombud must recommend the appropriate relief to the Minister responsible for defence (the Minister). The Minister did not take steps to implement the complaint recommendations. WO Davids and Major Miles then brought proceedings in the high court to compel the Minister to implement the Ombud's complaint recommendations. The Minister opposed this relief on the basis that the recommendations of the Ombud are not binding upon the Minister.

[4] The high court (per Vivian AJ) dismissed both applications. The central issue before the high court was the interpretation of s 6(8) of the Act. Section 6(8) reads as follows:

'If the Ombud upholds the complaint, the Ombud must *recommend* the appropriate relief for implementation to the Minister.' (My emphasis.)

The high court held, upon marshalling the well-known principles of statutory interpretation, that s 6(8) was advisory, and did not oblige the Minister to act in terms of the recommendation of the Ombud, nor could the Minister be compelled to do so.

With the leave of this Court, WO Davids and Major Miles appeal the order of the high court dismissing their applications.

The interpretation of s 6(8)

[5] The principles of statutory interpretation are now so well established as to require no elaboration: a holistic consideration of the triad of text, context, and purpose; in a manner that preserves constitutional validity; and, in the face of more than one constitutionally compatible meaning, to privilege the meaning that best protects and promotes constitutional rights. WO Davids and Major Miles submit that the use of the word ‘recommend’ in s 6(8) does not oust from consideration the meaning that to recommend is to inform or to notify. This construction is bolstered by the following. First, the powers and functions of the Ombud are to resolve disputes. That requires finality, and finality is brought about by interpreting the power of the Ombud in s 6(8) to recommend appropriate relief as having obligatory force. Second, the Ombud performs an adjudicative function, and this function is best understood on the basis that the Ombud’s remedial power is not merely to suggest appropriate relief. Third, the role of the Ombud is to protect and promote the rights of members of the Defence Force who enjoy the right to fair labour practices in s 23 of the Constitution. Finally, s 13 of the Act provides that any person aggrieved by a decision of the Ombud may apply to the high court to review that decision, within 180 days of the decision. If any person includes the Minister, it is difficult to understand what purpose such review would serve if the Minister ‘was otherwise entitled to disregard or ignore the recommendations (of the Ombud) without going to court’.

[6] The proposition that the interpretation of s 6(8) requires a binary choice between the power of the Ombud having binding force or being merely precatory

does not reflect the correct interpretation of the provision. Section 6(8) must be read with the other relevant provisions of s 6. They provide as follows:

‘6. Powers and functions of Ombud and Deputy Ombud

- (1) The Ombud must investigate complaints lodged with the Office in accordance with this section.
- (2) A complaint must be lodged in writing with the Office in the prescribed manner.
- (3) On receipt of a complaint the Ombud must register the complaint as may be prescribed.
- (4) The Ombud must investigate a complaint fairly and expeditiously without fear, favour or prejudice.
- (5) The Ombud may not investigate a complaint unless the Ombud –
 - (a) has in writing informed every other interested party to the complaint of the receipt thereof;
 - (b) is satisfied that all interested parties have been provided with such particulars that will enable the parties to respond to the complaint; and
 - (c) has afforded all interested parties the opportunity to submit a response to the complaint.
- (6) For the purpose of subsection (1), the Ombud –
 - (a) may summon any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or produce any document that has a bearing on the matter before him or her;
 - (b) may resolve any dispute by means of mediation, conciliation or negotiations or in any other expedient manner; and
 - (c) must promote the observance of the fundamental rights of the members of the Defence Force.
- (7) After investigating a complaint, the Ombud must –
 - (a) uphold or dismiss the complaint, or issue an alternative resolution;
 - (b) recommend an alternative resolution to the Minister; or
 - (c) refer the complainant to the appropriate public institution for finalisation, if the matter falls outside his or her jurisdiction.
- (8) If the Ombud upholds the complaint, the Ombud must recommend the appropriate relief for implementation to the Minister.

(9) The Ombud must immediately after finalisation of the investigation, and in writing, advise the complainant and any other affected person of the outcome of the investigation. . . .’

[7] The powers and functions of the Ombud set out in s 6 fall into different categories. There are certain things that the Ombud must do, others she must refrain from doing, and yet other matters in respect of which she enjoys a power, but the Ombud decides whether or not to exercise the power. By way of example, in terms of s 6(1) the Ombud must investigate complaints lodged with the Office of the Military Ombud; in terms of s 6(5) the Ombud may not investigate a complaint unless interested parties have been notified in writing and afforded an opportunity to respond; and in terms of s 6(6)(b) the Ombud may resolve any dispute by means of mediation, conciliation or negotiations. It is important to understand the nature of the particular power conferred upon the Ombud in order to determine the consequences of its exercise.

[8] The Ombud must follow a particular sequence of decision-making. After investigating a complaint, the Ombud has a choice: to uphold the complaint, dismiss the complaint, or issue an alternative resolution. If the Ombud dismisses the complaint, such a decision may be reviewed by the high court in terms of s 13, but short of a successful review, the decision is final and binding. The Ombud may issue an alternative resolution to the complaint. The Ombud is not required to do so, but if she does, that decision, subject to the outcome of a s 13 review, if brought, also constitutes a final and binding resolution. If the Ombud should find that a matter falls outside her jurisdiction, for example by reason of one of the limitations placed upon the jurisdiction of the Ombud, set out in s 7, then the Ombud must refer the complaint to the appropriate public institution for finalisation in terms of s 6(7)(c).

[9] If the Ombud decides to uphold the complaint, then s 6(8) is of application, and the Ombud must recommend the appropriate relief to the Minister. The Ombud is under an obligation to do so. The Ombud must formulate appropriate relief, but it is for the Ombud to decide what that relief should be. And then the critical question: in so doing, is the Ombud's recommendation to the Minister a final and binding decision or does it simply recommend relief that the Ombud considers appropriate, but it is for the Minister finally to make the decision?

[10] The high court was correct to observe that to recommend, in its usual connotation, is to support or endorse an outcome for the consideration of another who is charged with taking the final decision. So, for example, the recommendation of a restaurateur of a dish on the menu is a suggestion, not a command. To recommend someone for promotion is usually to endorse a decision that is to be taken by another. I observe however that these examples do not depend upon an intrinsic or invariable meaning that the word recommend may be said to have. Rather its meaning depends upon the relationship between the parties, and the conventions that inform this relationship. We understand the recommendation of a restaurateur in a particular way because, in that setting, it is for the guest to decide. There are other settings in which a person making a recommendation is simply a polite way of conveying that what they recommend must be followed. A recommended price, for example, may in fact be a required price.

[11] An important feature of s 6(6) and (7), as I have sought to illustrate, is that certain of the decisions of the Ombud are indeed final and binding. That is the case of a decision of the Ombud to uphold a complaint, dismiss it, or issue an alternative resolution. However, the scheme of these provisions distinguishes a decision of the Ombud to dismiss or issue an alternative resolution, and what follows upon a

decision to uphold a complaint. When the Ombud dismisses a complaint, that is the resolution of the complaint, it is final and binding. So too, when the Ombud issues an alternative resolution. When the Ombud upholds a complaint, this decision is also final, but the relief that follows is given distinctive treatment. Section 6(8) provides that the Ombud must recommend the appropriate relief for implementation to the Minister.

[12] I observe the following of s 6(8). First, that the Ombud is obliged to recommend is not decisive as to whether the recommendation has binding force. Logically, once the Ombud has upheld a complaint, the issue of appropriate relief must be considered and determined. How that is to be done and by whom is the issue that we must decide. Second, the provision introduces the Minister. To do what? Significance attaches to the text of s 6(8). The Ombud must recommend the appropriate relief for implementation *to* the Minister, and not *by* the Minister. The Minister's function, on this language, is not simply to implement what the Ombud has decided upon as appropriate relief. Were that the Minister's function, the provision would have referred to 'appropriate relief for implementation *by* the Minister'. The formulation of s 6(8) is that the Ombud recommends appropriate relief for implementation *to* the Minister. This connotes that the recommendation of the Ombud must traverse what is appropriate relief for implementation. But it is a recommendation made to the Minister so as to permit and require the Minister finally to decide what relief should be given. That is the ordinary meaning of such a formulation.

[13] Second, it would have been straightforward for the legislature to have framed s 6(8) to read: 'If the Ombud upholds the complaint, the Ombud must determine the appropriate relief for implementation'. The legislature did not do so. Rather, it

introduced the Minister as the recipient of the Ombud's recommendation. It would have been an oddity to have done so simply to make the Minister the executive functionary of the Ombud to implement what the Ombud had determined. If the Ombud was to make the final and binding determination as to appropriate relief for implementation, it would have sufficed simply to give the Ombud the power to make such orders.

[14] Third, s 6(7) accords the Ombud the competence, after investigating a complaint, to issue an alternative resolution (s 6(7)(a)). The Ombud may, alternatively, recommend an alternative resolution to the Minister (s 6(7)(b)). These decisions have the same subject matter, but it is difficult to understand these provisions to confer the same competence. If the power of the Ombud, in s 6(7)(b), to recommend is final and binding, it would replicate the power already conferred on the Ombud in s 6(7)(a). Such redundancy is not an attractive feature of statutory interpretation. These provisions may be understood in a more coherent way if the Ombud enjoys the competence to issue an alternative resolution, alternatively to make a recommendation to the Minister for the Minister's final decision.

[15] These considerations conduce to the conclusion that the obligation of the Ombud to recommend in s 6(8) is not a final and binding determination by the Ombud as to appropriate relief for implementation. WO Davids and Major Miles placed some emphasis upon s 13, the provision that permits any person aggrieved by a decision of the Ombud to apply to the high court to review such decision. Their counsel correctly submitted that our administrative law is generally hostile to the review of administrative actions that are not final, and, they submit, that is an indication that the decision of the Ombud to recommend in s 6(8) is indeed final so as to fall within the remit of the review contemplated in s 13. Section 13 would also

permit the Minister who considered the Ombud to have fallen into reviewable error to have recourse to s 13.

[16] These submissions cannot do the work required of them to sustain the interpretation advanced on behalf of WO Davids and Major Miles. If a s 13 review is confined to the final decisions of the Ombud, I have observed that the Act confers powers upon the Ombud to make such decisions and these decisions can be reviewed under s 13. If s 6(8) does not confer a power upon the Ombud to make a final and binding decision as to appropriate relief, the Ombud's decision would not be reviewable under s 13, if s 13 is given a restrictive interpretation. But that would not mean that, when the Minister makes a final decision, the Minister's decision would not be subject to judicial review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). If, however, all decisions of the Ombud, including the exercise of procedural powers such as those conferred upon the Ombud in s 6(6)(a), are reviewable in terms of s 13, then so too would the recommendation of the Ombud in terms of s 6(8), whether such recommendation is final and binding or simply advisory.

[17] I do not apprehend that to interpret the recommendation of the Ombud as advisory is inimical to the purpose of the Act. Members of the Defence Force enjoy the right to fair labour practices in terms of s 23 of the Constitution. Members are excluded from the protections of the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997. Their conditions of service are governed by the Defence Act 42 of 2002 and the Individual Grievance Procedure Regulations.¹ The Act was passed as an adjunct to the need to provide additional redress for complaints concerning conditions of service and other complaints that are not

¹ Individual Grievance Procedure Regulations GN 572 in GG 33334 of 30 June 2010.

excluded under s 7 of the Act, which limits the Ombud's jurisdiction. That the Ombud's recommendation is not final and binding does not mean that the purposes of the Act are frustrated or impeded. It simply means that it falls to the Minister to decide, in light of the recommendation made by the Ombud, upon the appropriate relief for implementation.

[18] Some analogical support for the interpretation of s 6(8) advanced by WO Davids and Major Miles, it was submitted, is to be found in the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (EFF)*,² where the Constitutional Court found that the Public Protector's powers to take appropriate remedial action must be suitable and effective, and to be so, such action 'often has to be binding'.³ The Public Protector is a constitutional office, and like other chapter 9 institutions, it was created, as s 181 of the Constitution makes plain, to strengthen constitutional democracy. The Ombud is an important office established in terms of the Act. But it does not play the same structural constitutional role as that of the Public Protector, and hence the conclusions reached in the *EFF* case have modest analogical linkages to the resolution of the problem before us.

[19] Much was made in the court below, and in some measure in argument before us by the respondents, that the Ombud falls outside the chain of military command recognised in s 202 of the Constitution. The judgment of the high court reasoned that if the recommendations of the Ombud were binding on the Minister, this would mean that a person outside the chain of command, the Ombud, can instruct the Minister to implement appropriate relief. This would require the Minister to issue directions to

² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

³ *Ibid* para 68.

those in the military command. While the Minister also falls outside of the chain of command, the Minister enjoys the authority in terms of s 202(2) of the Constitution, under the authority of the President, to give directions by way of command of the defence force. But that authority of Ministerial direction cannot issue from the Ombud, which would, in effect, by-pass and usurp the constitutional order of command that has its source in the President. Counsel for WO Davids and Major Miles counter that the recommendations of the Ombud do not engage the chain of command because the Ombud is primarily concerned with complaints arising out of conditions of service. In addition, s 7 of the Act limits the jurisdiction of the Ombud so as to respect the chain of command and requires the Ombud to refer a complaint to the appropriate public institution if a complaint falls outside of the Ombud's jurisdiction.

[20] I am unpersuaded that this debate takes the question of statutory interpretation much further. Section 6(8) introduces the Minister as the office to which the Ombud makes the recommendation. The narrow but important question for us is whether that recommendation is final and binding. Neither the Ombud nor the Minister form part of the chain of command. On either interpretation as to whether the recommendation of the Ombud has binding force, the appropriate relief for implementation will issue from an office bearer falling outside the chain of command. The constitutional powers of the Minister to give directions that issue from the President and their relationship to the duty of the Minister, when a recommendation is received from the Ombud, raise distinctive, substantive issues that it would be unwise to venture upon.

[21] I conclude rather on the basis of the interpretation of s 6(8) and its place in the statutory scheme that I have explored above. The Ombud's recommendation as to

the appropriate relief to be implemented is not a final and binding decision, but rather a recommendation in the sense that it advises the Minister as to the appropriate relief that the complainant should be afforded.

Conclusion

[22] The relief sought by WO Davids and Major Miles was predicated upon the proposition that the recommendation of the Ombud in terms of s 6(8) was binding upon the Minister. That proposition, I have found, cannot be sustained. However, the Ombud has upheld the complaints of WO Davids and Major Miles. The Act requires that there must be appropriate relief, and that relief must be implemented. That is plain from the clear wording of s 6(8). The Minister has received the recommendations of the Ombud in respect of the complaint recommendations. The Minister must give consideration to these recommendations. But since there is finality that the complaints of WO Davids and Major Miles have been upheld, the Minister is now required to decide what appropriate relief must be implemented. The Minister is not bound to follow the recommendations of the Ombud. The Minister may decide, on a reasoned basis, that different relief is more appropriate and require that such relief is implemented. What the Minister may not do is simply reject the recommendations of the Ombud, and do no more. Nor may the Minister simply ignore the recommendation of the Ombud. These powers and duties of the Minister follow from the scheme of the Act that I have analysed above.

[23] It was submitted to us that if WO Davids and Major Miles cannot secure the principal relief that they sought (requiring the Minister to implement the recommendations of the Ombud), we should nevertheless order the Minister to decide what appropriate relief should be implemented. This, it appears to me, to be warranted relief. WO Davids and Major Miles have had their complaints upheld by

the Ombud. That decision is final. The Minister has a duty now to make a final decision as to the appropriate relief they should enjoy. That should be done without undue delay, given the time it has already taken for WO Davids and Major Miles to obtain satisfaction. I did not understand counsel for the Minister to demur.

[24] The appeal thus falls to be dismissed, save for the relief I propose to grant that requires the Minister to come to a decision on appropriate relief. The appeals raised an important issue as to the powers of the Ombud, of no small importance, and of some broad public significance. As in the high court, there is no warrant to burden WO Davids and Major Miles with the costs of this appeal.

[25] In the result:

1 The appeals are dismissed, save only for the relief set out in 2.

2 The order of the high court is set aside, and replaced with the following order: ‘The Minister of Defence is ordered, within 60 days hereof, to decide what appropriate relief should be implemented in favour of the applicants in case no. 13678/2022 and case no 13808/2022, following the recommendations made to the Minister in terms of s 6(8) of the Military Ombud Act 4 of 2012.’

D N UNTERHALTER
JUDGE OF APPEAL

Appearances

For the appellant: Adv G J Marcus SC with C J C McConnachie

Instructed by: Griesel van Zanten Inc, Pretoria
Phatshoane Henney Attorneys, Bloemfontein

For the respondent: Adv Y F Saloojee

Instructed by: The State Attorney, Pretoria
The State Attorney, Bloemfontein.