



The military legal system and the Military Ombud



Photo by Stefan Els

Scope:

- introduction
- the SANDF as a disciplined force
- the SANDFs responsibility
- the Office of the Military Ombud
- Recommendations



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INTRODUCTION

- Advent of the Constitution brought about significant changes in military legal and labour related instances
- It is against the background of these constitutional changes that the development of both the military legal and labour relations system should be considered and scrutinised
- The SANDF has a separate legal system for members in uniform as well as a separate labour dispensation

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The SANDF as a disciplined force

- SANDF governed by the Constitution
- Sec 200(1) of the Constitution
 - The SANDF must be structured and managed as a disciplined force
- What does discipline mean?
 - It is the system of rules, training and punishment used to maintain control over members as well as the standard of conduct reached by those subject to the system
- There must therefore be a system in place within the SANDF to ensure this standard is reached
- Therefore a separate system exists and is justifiable because of these unique expectations that the SANDF and civil society have of their soldiers

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The SANDF as a disciplined force

- Why do we need discipline?
 - It is a critical requirement for an effective military force
 - The armed forces possess weapons and are highly trained – it is in the best interest of the SANDF and society as a whole if they are highly disciplined
- Discipline therefore requires that soldiers conform to a certain set of rules
- The purpose of the SANDF is to protect the territorial integrity of the country and where necessary to fight in armed conflicts
 - All training and actions therefore focusses on this purpose
 - Consequently, the individual's needs and rights may be treated as subservient to this purpose

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- This does not however mean that soldier's needs and rights can be discarded
- They still have the rights to the Bill of Rights, although it may be limited in certain instances
- In terms of the military justice system the Constitutional Court confirmed that soldiers have those rights reflected by a fair and just legal system
 - *Minister of Defence v Potsane* 2002(1) SA 1 (CC) – the military justice system serves a different purpose than the civilian justice system
 - Its main aim is to enforce discipline in order “to ensure the discipline of its members in a just manner”.
- In a similar vein the Constitutional Court also confirmed that soldiers are entitled to fair labour practices

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The SANDF as a disciplined force

- *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) – held that section 23(2) of the Constitution included members of the SANDF, even though the relationship between the SANDF & its members could not be seen as an ordinary employment relationship
 - Soldiers are seen as “workers” and as such are entitled to constitutional protection.
- Confirmed in *Minister of Defence v Xulu* 2018 (6) SA 460 (SCA) that the SANDF is obliged to comply with the law in its treatment of its soldiers
- This means that on the one hand soldiers have the duty to be disciplined and follow the rules of the SANDF and on the other hand the SANDF has the obligations to look after their soldiers and afford them their constitutional rights, within acceptable limitations which must be justified in terms of the Constitution.

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The SANDFs responsibility towards soldiers and civilians

- The SANDF does not only have a responsibility towards their soldiers but also towards the public for actions by its members that may cause harm – *Minister of Defence v Benecke* 2013 (2) SA 361 (SCA)
 - To ensure that the SANDF complies with their responsibilities – oversight over the military
 - Civil control over the military
 - Parliamentary control over the military
 - Chapter 9 organisations, eg Public Protector, SA Human Rights Commission
- Until 2012 complaints by members of the armed forces were submitted to the Public Protector
 - Partly due to the volumes of complaints received by the PP, the idea of creating the Office of the Military Ombud solidified
 - PP not effective in resolving complaints from and about the military

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The Office of the Military Ombud

- Concept not unique to SA
 - Countries where military ombud integrated into the military (Netherlands, Belgium)
 - Countries where independent military ombud (Germany, Canada, Ireland)
 - Countries where civilian ombud responsible for military complaints (Sweden, Denmark)
- SA = independent military ombud modelled on Canadian model, except for own initiative investigations
- Originally in National Defence White Paper – ombud would be appointed by parliament and report to parliament
 - Main duties to monitor adherence to democratic civil-military relations
 - Function was to allow parliament to oversee & safeguard rights of the military.

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The Office of the Military Ombud

- Office established in 2012 bmo Military Ombud Act 4 of 2012.
- With Military Ombud Complaints Regulations provide legal framework for MO Office.
- In media statement day after launch of MO, SANDF indicated that MO would serve as “an oversight mechanism independent from the military command structures”, providing oversight and ensuring military adheres to principles of good governance.
 - Aim of making the military accountable & responsive as “an instrument of civilian authority as embodied in the country’s Constitution.”
- Military Ombud is appointed by the President ito section 5(1) of the Act.
- Reports to the Minister of Defence and Military Veterans ito section 11 of the Act.

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The Office of the Military Ombud

- The role of the MO as part of wider civil oversight over the military:
 - Receiving and investigating complaints
 - Providing recommendations
 - Reporting to Parliament (via the Minister)

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Receiving and investigating complaints

- Extensive mandate foreseen in 1996 White Paper did not materialise
- Limited mandate into section 4 of the Act:
 - Office of the MO may investigate any written complaint lodged by:
 - Any member of the SANDF pertaining to his/her conditions of service
 - Any former member of SANDF regarding his/her conditions of service
 - Any member of the public regarding any official conduct of a member of the SANDF
 - Any person on behalf of a member
- Therefore have mandate over 2 categories:
 - Complaints by members of the SANDF
 - Complaints by members of the public against members of the SANDF relating to official conduct

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Receiving and investigating complaints

- Complaints by members of the SANDF
 - Narrowly focusses on matters pertaining to service conditions, relegating them to an extension of the DOD grievance process
 - In FY 2023/24 – conditions of service made up 89% of complaints
 - Mostly service benefits, service termination, placement/utilisation
- Complaints by members of the Public
 - Complaints generally received in this context limited to procurement issues, eg non-payment for services rendered
 - Increase in complaints where internal deployments, eg Covid deployment and during KZN unrest
 - What about external deployments, eg SEA cases, serious human rights violations?

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Receiving and investigating complaints

- What is the oversight role of the MO during deployments?
- SANDF deploys internally & externally and one would expect the MO to have the jurisdiction to investigate incidents during deployments
 - Internally Covid-deployment and KZN serves as examples where matters investigated
 - Most prominent – Collins Khosa, but only upon receipt of Ministers instruction
 - Not able to investigate any other role-players other than members of SANDF
 - Unable to initiate own investigations – severely hampers MO in execution of its mandate
 - Fabricius J also brought institutional independence of MO into question, concluding that Office of MO lack the institutional independence to conduct a prompt and impartial investigation.
- External deployments
 - The pervasive opinion that SANDF is unable to meet the requirements for foreign deployment due to, amongst others, lack of logistics creates a danger of neglect by soldiers and human rights abuses.

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Receiving and investigating complaints

- Legislation does not explicitly provide for external jurisdiction of MO in this context, sentiment shared by members of MO interviewed
- Yet example of where they did exercise extraterritorial jurisdiction = SAMIM, so exceptions have been made
- Currently the interpretation of their mandate during external deployments are restrictive
- For all intent and purposes – Office of MO have no oversight role in the context of external deployments where it can be argued, it has potentially a significant role to play

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Providing recommendations

- Once investigations complete, the investigator responsible submits a report to the MO who signs the report
 - Either uphold/dismiss the complaint
 - Recommend alternative dispute resolution
 - Refer matter to different public institution where matter falls outside their jurisdiction
- Report submitted to the Office of the Minister for consideration
- Minister then acknowledges receipt, consider matter and issue directive to C SANDF for implementation where agrees, or informs MO that do not agree with recommendation
- In accordance with Act, MOs involvement complete once report submitted to Minister
- No provision made for ensuring implementation of recommendations

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Providing recommendations

- Numerous court decisions agreed that the recommendations from the MO is not binding on the SANDF
 - MO not part of the chain of command and can therefore not instruct the Minister or the SANDF
 - Recommendations seen as suggestions and not directives
- Highlights the limitation of the oversight role of the MO
- Argument not made that recommendations should be binding – this may interfere in separation of powers, but it should at least have some legal weight/persuasive powers
- MO Office experience further challenges where Office of Minister do not respond to recommendations, ie do not even acknowledge receipt of recommendation

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Providing recommendations

- Creates challenges with members' trust in the Office of the MO
- Office of MO use background channels to Committee to request answers from Minister who then responds due to pressure from Committee. Interviewees expressed importance of Committee in this context for purposes of oversight.

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Reporting to Parliament

- The MO Act do not require the MO to report to Parliament.
- Report to the Minister who must then table the report to Parliament
- Yet, Office of MO sees Committee as integral in supporting their oversight role due to the gaps left by legislation and court decisions

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Recommendations

- MO received permission from Minister of Defence in 2016 to review their founding legislation
 - This matter has been a point raised in all Annual Activity Reports tabled and needs to be actioned
- Most important aspects that requires attention:
 - Institutional independence of the MO
 - Clarity regarding their mandate, especially regarding extraterritorial jurisdiction
 - Providing them with the authority to initiate their own investigations, thereby identifying systemic problems in the military and allowing them to address these concerns timeously.
 - Providing the MO with powers to oversee the finalisation of their investigations, especially regarding implementation of recommendations.



**Thank you
Enkosi
Dankie**

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