



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 49002/2021

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

SIGNED:

DATE: 18/09/2025

In matter between:

ANDRIES MPIYANKHE MAROGA

Applicant

and

THE MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

THE SECRETARY OF DEFENCE

Second Respondent

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

Third Respondent

THE CHIEF OF THE SOUTH AFRICAN AIR FORCE

Fourth Respondent

THE CHIEF HUMAN RESOURCES

Fifth Respondent

THE MILITARY OMBUD

Sixth Respondent

In re:

ANDRIES MPIYAKHE MAROGA

Applicant

and

THE MINISTER OF DEFENCE AND MILITARY VETERANS

First Respondent

THE SECRETARY OF DEFENCE

Second Respondent

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

Third Respondent

THE CHIEF OF THE SOUTH AFRICAN AIR FORCE

Fourth Respondent

THE CHIEF HUMAN RESOURCES

Fifth Respondent

JUDGMENT

STONE AJ

[1] The applicant, a Corporal in the service of the South African Air Force (“SAAF”), applies for the joinder of the Military Ombud (“MO”) as a party to a pending application under case number 49002/2021 (“the main application”).

[2] In the main application, the applicant has joined the Minister of Defence and Military Veterans (“the Minister”), the Secretary for Defence, the Chief of the South African Defence Force, the Chief of the South African Air Force, and

the Chief Human Resources, respectively as the first to the fifth respondents (“the respondents”).

- [3] The main application and the joinder application are opposed by the respondents.

The Military Ombud did not oppose the joinder application

- [4] The joinder application was served on the MO. It is stated in the founding affidavit in the joinder application that a cost order would only be sought in such application against the MO in the event of the MO's opposition. The MO did not file a notice to oppose the application. The first to fifth respondents, who do oppose the joinder application, indicated that the State Attorney who acts on their behalf, does not act on behalf of the MO. The MO is therefore not represented in this joinder application.

- [5] It cannot be inferred from the MO's failure to participate that he has waived any entitlement to be joined and to participate in the main application¹. It may well be that he abides the court's decision on the joinder, thus leaving it for the court to decide whether he should be joined in the main application, or not, and then react accordingly.

- [6] Applicant's counsel submitted that the absence of opposition by the MO is dispositive of the joinder application, and that the joinder should be ordered without more. In **International Trade Administration Commission v SCAW**

¹ Rosebank Mall (Pty) Ltd c Cradock Heights (Pty) Ltd 2004 (2) SA 353 (WLD) par [12]; Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 AT 660.

South Africa (Pry) Ltd² an application for joinder was made. Neither of the parties in that matter opposed the joinder application. The Constitutional Court held that, although the attitude of the other parties is an important consideration, it is not the only consideration. The court remains obliged to satisfy itself whether a party should be joined or not, with reference to the facts of the case, and applicable principles discussed below.

Condonation application

[7] The joinder application consists of the applicant's notice of motion and founding affidavit. The respondents did not deliver an opposing affidavit in the joinder application. They rely solely on a notice in terms of Rule 6(5)(d)(iii). The applicant did not file a response in respect of such notice. Its counsel indicated that the reasons for this was that the points would be dealt with in argument.

[8] The Rule 6(5)(d)(iii) notice was filed late. The respondents formally applied for condonation in respect of the late filing thereof. The applicant filed a notice to oppose such application, but he did not file any answering affidavit. The condonation was dealt with in the respondent's heads of argument. In his heads of argument and at the hearing, counsel for the applicant did not oppose the condonation application. In exercising my discretion, condonation for the late filing of the respondent's rule 6(5)(d) (iii) is granted insofar as it is necessary, with no order as to costs.

² 2012 (4) SA 618 (CC) para [11].

The main application

[9] The relief sought by the applicant in the main application is relevant. It is formulated as follows

- “1. A declaratory order that the Department of Defence, by failing to appoint the applicant in the Core Service System (“CSS”) with effective date from 01 March 2013 as approved by the Fourth Respondent, acted unlawful.
2. An order that the Applicant is to be appointed in the South African Air force (“SAAF”) as Aircraft Mechanic in the rank of Sergeant with effective date from 1 March 2013, as approved by the Fourth Respondent.
3. An order that the Respondents pay to the applicant all the benefits, allowances and benefits associated with the position he should have held under the CSS contract with effective date from 1 March 2013, as was approved by the Fourth Respondent. These benefits and payments to included, but not be limited to salaries, annual increases, bonuses, technical incentive payments (TCIP), leave, pension fund and medical contributions; (sic)
4. An order that the Applicant be nominated, get preference and be fast tracked to attend all courses with the SAAF he should have attended from 1 March 2023 to enable the Applicant to get course qualified and promoted in the rank he should have held if not for the unlawful actions by the Respondents.
5. Ordering the respondents to pay the applicant’s costs of this application.
6. Further and/or alternative relief.”

[10] In the main application the applicant *inter alia* relies thereon that he was already informed in February 2013 that he was recommended for a post in the SAAF. He contends that he should have been appointed already from March 2013 and that he should have received the benefits thereof, including career progression, for the period from March 2013 to December 2018.

- [11] He avers that he was however not appointed at the time, due to delays by the SAAF. He avers that, after many attempts to resolve the issue without success, he approached the office of the Minister in 2014 and again in 2016. He says that he then received a letter from the MO with an invitation to submit a complaint. The MO became involved when a complaint about the failure to finalise his appointment was lodged with the MO in April 2016.
- [12] He avers that the matter was investigated by the MO, and a preliminary report was compiled and handed to the Chief of the SAAF. He avers (this also appears from the contents of the MO's report referred to below) that the Chief of the SAAF undertook at a meeting on 12 June 2017 that *"the SAAF would abide by/implement the recommendation to appoint"* the applicant, yet he should still be submitted to a medical assessment.
- [13] He also relies on a final report of the MO, with recommendations contained therein as contemplated in section 6(8) of the Military Ombud Act 4 of 2012 ("the MO Act").
- [14] The applicant's contentions and the effect or status of the MO's recommendations are disputed by the respondents in the main application on various grounds, which include that the Military Ombud's decision is only a recommendation, and has no binding effect on the Minister.

The Military Ombud's Final report and recommendations

- [15] It is not disputed that the MO issued what is on the face of it a final report dated 27 February 2018. The document is attached to the founding affidavit in

the main application. The contents thereof indicate that the MO considered and investigated the applicant's complaint, considered and evaluated evidence, made factual findings and *inter alia* commented on the fairness of an approach followed by the SAAF, and the SAAF's handling of the matter.

- [16] Under the heading "ANALYSIS/ EVALUATION" the final report contains a statement that the preliminary report was handed to the Chief of the SAAF, and that the SAAF has committed itself to recruiting the applicant for appointment as an aircraft mechanic subject to the outcome of a medical examination. The final report also *inter alia* contains the views of the MO regarding the fairness of making the appointment of the applicant subject to a further medical examination, and he submitted that the appointment of the applicant should not be made subject thereto.

- [17] The final report concludes with the following:

"FINDINGS

11. In view of the above, the following findings are made:

- a. The Chief of the SAAF approved the appointment of the complainant vide a submission dated 27 February 2013. However, the appointment was not affected due to administrative delays by SAAF.*
- b. The SAAF is obliged to finalise the appointment of the complainant.*
- c. The appointment of the complainant should not be subject to the outcome of a medical assessment.*

CONCLUSION

12. That the SAAF must finalise the appointment of the complainant.

RECOMMENDATIONS

13. In view of the above the complaint of Mr. A.M. Kgabo³ is upheld in terms of section 6(7)(a) of the Military Ombud Act 4 of 2012.

14. It is therefore recommended that the MOD&MV instruct the CSANDF to finalise the appointment, as promised by the Chief of the SAAF.

15. The Military Ombud office will monitor the SAAF'S implementation of its undertaking to appoint the complainant."

[18] The applicant relies thereon that respondents were obliged, yet failed, to appoint him, and to implement the recommendations of the MO. The applicant *inter alia* contends that the respondents are bound to the recommendations of the MO contained in such report.

[19] The content and effect of the MO's report will be considered and dealt with in the main application. For purposes of the joinder application, the content of such report illustrates the way in which the MO was involved in the applicant's complaint, and the recommendations on which the applicant relies.

The parties have changed their stances on the issue of joinder of the Military Ombud

[20] On both sides, the parties have changed their stances regarding the joinder of the MO. This is relevant to the context of the application and arguments presented on behalf of the parties.

[21] In the main application the applicant proceeded without joining the MO. He was initially advised that it was not necessary to join the MO, as no relief is

³ The applicant explains in his founding affidavit in the main application that he has changed his name, wherefore the reference to "Mr A.M. Kgabo" differs from his name on the papers.

sought against the MO. The applicant however changed his view on the issue of joinder, lodged the joinder application, and now requests the joinder of the MO.

- [22] The respondents now oppose the joinder application, although the non-joinder of the MO was firstly raised by them in the main application, as a point *in limine*. The respondents have still not disavowed reliance on the point of non-joinder in the main application, despite their opposition to the joinder application. I deal further with these conflicting positions below.⁴

The applicant's change of stance

- [23] As the respondents did not file an answering affidavit timeously in the main application, they applied for condonation in respect of such late filing. Condonation was granted by Francis-Subbiah J on 17 March 2023. It appears from the heads of argument of the respondents in such condonation application, that the respondents also raised the non-joinder of the MO in such application, arguing⁵ that the MO should have been joined in the main application. In an *ex-tempore* judgment, Francis Subbiah J *inter alia* mentioned the fact that the MO was not joined as a party in the main application, and that this, amongst other issues, should be fully ventilated. She however did not decide the joinder issue, as she was not called upon to do so.

⁴ From paragraph [28].

⁵ With reference to *Colonel Lambled v Minister of Defense and Military Veterans 2022 JDR 0112 (GP)*, a similar matter, wherein the MO was joined as a party.

[24] In view of the fact that the non-joinder of the MO was raised in the main application and in the condonation application (in the main application), and as it was also mentioned by Subbiah J in her aforesaid judgment, it is not surprising that the applicant subsequently changed his stance regarding joinder of the MO, and decided to launch the present joinder application.

[25] It is evident from the founding affidavit that the applicant proceeded from an abundance of caution when launching the joinder application. The applicant alleges in the founding affidavit (joinder application) that he was advised that the MO was initially not joined as:

25.1 The MO was not approached by the applicant himself, but by the first respondent in particular, who submitted the applicant's complaint to the MO.

25.2 The MO upheld the applicant's complaint based on the fourth respondent's indication that the SAAF still had the intention to appoint the applicant pending a medical assessment.

25.3 The applicant did not and is not claiming relief from the MO.

25.4 The respondents did not take the MO's final report on review. (The MO ruled in the applicant's favour).

[26] In the joinder application the applicant now contends that the MO does have a direct and substantial interest in the subject matter of the application, and that the MO is a necessary party, who should be joined for that reason. In the

alternative he relies on common law grounds of convenience, equity, the saving of costs and the avoidance of a multiplicity of proceedings.

The respondents' conflicting stances

[27] The issue of non-joinder of the MO was raised for the first time in the respondents' answering affidavit in the main application, deposed to by the Chief of the South African National Defence Force. He expressly raised the issue of non-joinder of the MO as follows:

"2.16 I and the Respondents are of the considered view that the Military Ombudsman should have been cited and served with the application, as number of allegations are being said for it and about it by the Applicant. I am advised which advice I accept as correct that a party such as the Military Ombudsman have got a direct and substantial interest on the matter of this nature. Their version, if they would have been served and opted to enter the fray of the proceedings to either discount or fortifies the Applicant's version would have come in the greatest assist, for the Honourable Court. (sic)

2.17 Reliance on the Report of the Military Ombudsman came with a lot of attempts by the Applicant to bolster the content of the report, and in certain fundamental instances, as indirect additions was provided on the findings of the Ombudsman by the Applicant, its version would have been placed before the above Honourable Court, including even just a notice to inform the Honourable Court that it will abide by a Court's judgment.

2.18 In light of the above, the Honourable Court has only the versions of the Applicant on the content of that Report. The Honourable Court should hold that in the absence of the Ombudsman version and/or the story and/or narrative of the Applicant should not stand and simply dismiss the Application with costs"

[28] In the main application, the non-joinder of the MO is raised in the respondents' heads of argument as being *"another challenge which face the applicant in this matter"*.

[29] Notwithstanding their aforesaid contentions in the main application that the MO has a direct and substantial interest and should have been joined therein, the respondents, surprisingly, however proceeded to oppose the joinder application when it was launched. For purposes of such opposition, they did not file an answering affidavit under oath, but a notice in terms of rule 6(5)(d)(iii).

[30] The respondents' stance regarding the joinder of the MO in their answering affidavit in the main application, is at variance with their stance as set out in the rule 6(5)(d)(iii) notice. Whilst on the one hand complaining of the non-joinder of the MO in the main application, as set out above⁶, they voice a contrary view in the rule 6(5)(d)(iii) notice. In response to the applicant's contention in the joinder application that the MO has a direct and substantial legal interests in the application, it is stated in such notice that "*the Applicant is wrong on both factual and legal grounds*".

[31] In the rule 6(5)(d)(iii) notice the respondents *inter alia* complain about the joinder application, on the following grounds:

"1.7 *With this joinder Application, the Applicant is attempting to address and/or deal with one of the plethora of points in limine raised by the Respondents in the main application. Therefore, that litigious conduct is not only improper but have serious repercussions for the judicial process, in that Court can simply be asked to pronounce itself on a point pending before Court, which could potentially destroy the Applicant's case in the main. The Applicant want to do that without expecting any serious consequences, even if that could be by way of a possible appropriate costs order, by Court. (sic)*

.....

⁶ Paragraph [27] *supra*.

1.9 *The Applicant wants the Court to pronounce on the serious and/or fundamental aspect, which is still pending before the Honourable Court, for adjudication, before it can even deal and/or entertain such a contention, in the correct fora, being a hearing, on the main Application of the matter.*

1.10. *In the light of the above the Respondents opposition is intricately interwoven on the involvement of Military Ombud on the Applicant's dispute, and leading and/or authoritative authority in that regard is provided to the Court. Therefore, Applicant must not be allowed, to frog jump that hurdle." (sic)*

[32] The respondents' persistence with the point of non-joinder, despite opposing the joinder application, also appears from the respondents' heads of argument in the joinder application, wherein their counsel complains that the applicant *"seems to be dictating to the Respondents to simply abandon their well taken and/or raised point in limine on non-joinder of the Military Ombudsman, and just move on"*.

[33] It appears from the statements in such notice and argument by counsel for the respondents, that the respondents oppose the joinder application on the basis that no proper case for joinder of the MO has been made out. They contend that the issue of joinder (as a point *in limina*) should be dealt with in the main application. They oppose the joinder application, however still contending that their opposition in the main application *"is intricately interwoven with the involvement of the MO"*.

[34] Although counsel for the applicant argued that the respondents were approving and reprobating, and although the Court also requested the respondent's counsel to clarify his clients' positions in the two applications, the respondent's counsel however did not withdraw the respondents' reliance on the non-joinder in the main application, and he persisted with opposing the

joinder application. Therefore, the non-joinder of the MO remains an issue raised by the respondents in the main application, under oath.

[35] The respondents' contradictory contentions regarding the MO's joinder in the main application and the joinder application are ill-founded, and it calls into question whether the joinder application is *bona fide* disputed. The attempt to prevent the joinder application from succeeding, arguing that there are no grounds for joinder, with the apparent intent at the same time to still raise the issue and have it potentially adjudicated in the main application, is untenable.

[36] The respondents' counsel intimated that the applicant's counsel should not have referred to the main application in dealing with the joinder application. This approach cannot be sustained. In dealing with the joinder application, this court must have regard to the main application, as the contents thereof, the relief claimed therein, and the potential effect it will have on the parties and the MO must be considered⁷. This court cannot adjudicate the joinder application in a vacuum. In considering the joinder application, this court must therefore take contents of the main application into account as well.

[37] There is also no merit in the contention that the issue of joinder should be dealt with only at the hearing of the main application. It is trite that a court can order the joinder of a party at any stage of proceedings, even on appeal and even in the absence of an application⁸. The effect of this contention would be that the joinder would stand over until the main hearing, where the non-joinder of

⁷ SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) paras [9] – [11].

⁸ Vivian and Others v Absa Bank Ltd and Another 2024 JDR 2983 (GP) at para [6].

the MO will evidently be raised by the respondents, and if the point succeeds, the matter will then have to be postponed, so that the MO can be joined. In my view the issue of joinder should expediently and for considerations of convenience and costs, be dealt with in this joinder application, before the hearing of the main application. It is desirable that the parties have certainty about the joinder of the MO before the hearing of the main application. I find that there exists no valid reason why the joinder application cannot and should not be dealt with separately.

- [38] It is against the aforesaid background that the court must now decide whether the MO should be joined in the main application. It has been held that even where parties before the court are *ad idem* that a joinder should occur or not, it still does not relieve the Court from inquiring into the question of joinder, and whether the order it is asked to make may affect a third party⁹. In doing so I have considered the submissions of counsel for the parties, mindful of the aforesaid changes of views and conflicting approaches, based on the facts and considerations before me, and with regard to well-established principles in respect of the joinder.

Further main contentions by the parties

Summary of the applicant's further contentions

- [39] Applicant's counsel strongly relied on the fact that it was the respondents who raised the joinder in this matter under oath in the main application, and that

⁹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649; *Kelp Valves (Pty) Ltd v Saunders Valvo Co Ltd* 1987 (2) SA 1at 39 I – 40 A.

their reliance on the non-joinder had not been withdrawn. He submitted that the joinder application followed upon the fact that the non-joinder of the MO was raised by the respondents, and later by the court. In my view a proper explanation was provided why the MO was not joined from the outset.

[40] He submitted that the MO indeed has a direct and substantial interest in the subject-matter of the main application, and that he should be joined as a necessary party. He *inter alia* relied on authority that a party, who's interests may be affected prejudicially by the judgment of the court, has such an interest, and must be joined of necessity¹⁰. He submitted that the MO is in such a position.

[41] He also referred to the Supreme Court of Appeal's decision in **Dauids v Minister of Defence and Military Veterans and Others**.¹¹ He contended that if the legal position is that the MO's recommendation is not binding on the Minister, as was found in **Dauids**¹², the MO would still have a direct and substantial interest in the matter. I understood him to say that the MO may have something to say about the implementation of his recommendation.

[42] He argued that a review application could well follow in this matter. He referred to the applicant's view expressed in the main application, that the respondents will have to set aside the recommendations of the MO if they dispute his

¹⁰ Old Mutual Life Assurance Co SS Ltd v Swemmer 2004 (5) SA 373 (SCA) AR 381C-D; Transvaal Agricultural Union v Minister of Land Affairs 2005 (4) SA 212 (SCA) at 226F-227F.

¹¹ 2024 JDR 5311 (SCA), discussed *infra* at para [66] *et seq.*

¹² *Id.*

findings. He submitted that a situation may arise in the main application that the court would make an order which would be *res iudicata vis a vis* the MO.

[43] The applicant relies in the alternative on a joinder of convenience.

[44] He also submitted that a duplication of processes will be avoided if the MO is joined. The relief sought by the applicant is in the form of a declarator with ancillary relief. The MO should be involved, as he may wish to make submissions before an order is made in the main application, or before a possible future review of his decision. Referring to the provisions of section 13 of the Military Ombud Act 4 of 2013 (“the MO Act”), which makes provision for the review of a recommendation, he contended that the MO should be afforded an opportunity to respond to allegations in the main application which could be relevant to grounds for a future review.

[45] In this regard, in the main application the applicant inter alia contends that the recommendation of the MO is binding and that it should be carried out. He submitted that the MO may want to make submissions regarding the recommendations.

Summary of the respondents’ further contentions

[46] An analysis of the respondents’ rule 6(5)(d)(iii) notice shows that the matters raised therein do not only include questions of law (for which the subrule provides). It also contains submissions of fact which are not under oath, and submissions regarding the interpretation or credibility of allegations by the

applicant, which are not suited to have been included in such a notice, and which are rather matters for adjudication in the main application.

[47] In argument counsel for the respondents persisted with some points contained in the rule 6(5)(d)(iii) notice. He submitted that the applicant has failed to make out a case in the joinder application for a joinder of necessity or of convenience. He submitted that a proper assessment of the joinder of the MO cannot be done on the application papers, in that the grounds for relief were not sufficiently dealt with therein. The events leading up to the joinder application and the reasons for making the application, are sufficiently evident therefrom. The grounds relied on (a direct and substantial interest in the subject matter of the main application and, alternatively, a joinder of convenience) are set out but not fully elaborated on in the joinder application. The applicant however also refers to the main application in his founding affidavit. The joinder application was evidently compiled on the basis of his explanation of the background as set out in the main application. The joinder application must be read with the main application (which was also placed before the court in the joinder application), which does provide sufficient background, and facts underlying the joinder application, which are sufficient to enable a proper consideration of the question whether the MO should be joined.

[48] The respondents contend that applicant has deliberately misconstrued the judgment of Francis-Subbiah J, in that she did not invite a joinder application. There is no merit in this contention. It is indeed so that she only mentioned the question whether the MO should be joined. The applicant says that the joinder

application followed upon the judgment. However, in my view he did not misrepresent the contents thereof.

[49] On the basis that the applicant says he is applying for the joinder of the MO *ex abundanti cautela*, respondents' counsel submits that caution does not constitute a proper ground for the joinder of the MO. He also contended that the court should not *mero motu* make an order to join the MO. Mere caution would indeed not constitute a sufficient ground for joinder of the MO. The applicant however also relies thereon that the joinder of the MO is necessary and/or convenient, which grounds are discussed *infra*.

[50] The respondents complain that the applicant should not have included the MO as a party on the heading of the joinder application. This contention is not well founded. The MO has an interest in the joinder application. Joining him as a party in the joinder application however did not constitute his joinder in the main application.

[51] Counsel for the respondents relied thereon that the applicant has initially said in his papers in the main application that the outcome of the main application will not have an effect on the MO, as the applicant does not seek relief against the MO. He submitted (contrary to respondents' submissions in the main application) that a direct and substantial legal interest of the MO in the main application has not been demonstrated as the MO will not suffer prejudice if relief is granted in the application. He *inter alia* relied on **Lea tile Construction and Projects CC v Christo Bekker Inc. Attorneys and Another**¹³ and

¹³ 2024 JDR 1226 (GP) at para 34

Judicial Services Commisiion v Cape Bar Council¹⁴, where it was inter alia held that joinder in terms of rule 10 is not a process that must be applied ritualistically, regardless of the circumstances of a case.

Legal position

[52] Counsel for both parties addressed me on the principles applicable to a joinder of necessity, and a joinder of convenience. I refer to some relevant authorities.

[53] In **Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa SA v SABS Commercial Soc Ltd**¹⁵ this court held that:

‘Our law recognises three distinct categories for joinder of parties, being (1) joinder of necessity in terms of the common law; (2) joinder of convenience in terms of Rule 10, and the applicable common law rules and (3) Third-party joinder in terms of Rule 13 of the Uniform Rules’.

[54] In the present application the first two categories are relevant. In **Leatile Construction v Christo Bekker Inc Attorneys and Another**¹⁶ Groenewald AJ expressed the view, with which I concur, that the aforesaid dictum should not be understood to impair the general discretion of the Court, but rather as a summary of the categories of joinder which may apply.

Joinder of necessity

¹⁴ 2013 (1) SA 176I – 177A.

¹⁵ **Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa SA v SABS Commercial Soc Ltd** (10136/14) [2014] ZAGPPHC 998 (19 December 2014) at par 10.

¹⁶ *Supra* n 13, para 35.

- [55] The Court has the inherent power under the common law, to order the joinder of further parties in proceedings. In **Matjhabeng Local Municipality v Eskom Holdings**¹⁷ the Constitutional Court held:

“[91] At common law courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been affected. This is consistent with the Constitution.”

- [56] The primary test when considering whether a party should be joined of necessity, is whether or not a party has a direct and substantial legal interest and in the subject matter of the litigation which may be affected prejudicially by the judgment of the Court.¹⁸ If such interest is shown, such party is a necessary party to the litigation, and should be joined.

- [57] In **Erasmus: Superior Court Practice**¹⁹ issue of non-joinder is discussed in the commentary on Uniform Rule 10. It is explained:

“. . . the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest . . . The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.”

¹⁷ 2018 (1) SA 1 (CC) at 33D-E.

¹⁸ *Hlophe v Freedom Under Law and other matters* 2022 (2) SA 523 (GJ) at para [34]; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para [9]; *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer*, *supra* n10 at 381C-D; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* *supra* n 10 at 226F-227F

¹⁹ Second Edition, (Volume 2) D1 Rule 10-2/3.

[58] In **Transvaal Agricultural Union & Land Affairs v Minister of Agriculture and Land Affairs and Othes**²⁰ the Supreme Court of Appeal referred to two tests to assess whether a party has a direct and substantial interest:

“In Van Winsen, Cilliers and Loots Herbstein & Van Winsen's The Civil Practice of the Supreme Court of South Africa, 4th ed at 172, the learned authors supply a useful summary of the approach of this Court in the Amalgamated Engineering case in determining, by way of two tests, whether a third party had a direct and substantial interest in the outcome of litigation. Concerning the two tests, the learned authors state as follows:

'The first was to consider whether the third party would have locus standi to claim relief concerning the same subject-matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the Courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.'

[59] In **SA Riding for the Disabled Association v Regional Land Claims Commissioner and Othes**²¹ the Constitutional Court articulated the test as follows:

“[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC this principle was formulated in these terms:

²⁰ *Supra* n10 para [66].

²¹ 2017 (5) SA 1 (CC) paras [9]-[11].

*"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests".' [Emphasis supplied.]*²²

[60] In **Hope**,²³ Sutherland DJP held, with reference to the Constitutional Court's formulation of the test for a joinder of necessity, that the possibility of a legal interest is sufficient²⁴:

"The import of the formulation is that a 'legal interest' must be put forward. The possibility of such an interest is sufficient (See Peermont Global (KZN) (Pty) Ltd [2020] 4 All SA 226 (KZP))"

Joinder of convenience

[61] A court can join a third party under common law on grounds of convenience, equity, the saving of costs and to avoid a multiplicity of actions.²⁵ It can do so *Mero motu*, to safeguard the interest of a third party.

[62] The court has a discretion to join a party where it is convenient to do so²⁶. In **Sable Hills Homeowner's Association v Sable Hills Waterfront Estate (Pty) Ltd**²⁷ Vorster AJ held:

"It should further be borne in mind that the rules of Court relating to joinder of convenience were not intended to be exhaustive and that the Court may

²² See also: Judicial Service Commission and Another v Cape Bar Council and another 2013 (1) SA. 170 (SCA) paras [12].

²³ Supra, n 18, para [35].

²⁴ SA Riding, supra, at paras [9] – [11].

²⁵ See for example: Rabinowitz and Another v Ned-Equity Insurance Co Ltd 1980 (3) SA 415 at 419 E; Vitor Akis v Wolf 1973 (3) SA 928 (W) AT 932D-G.

²⁶ AA v BA 2019 JDR 1245 (GJ) paras 2 – 2.8; YB v SB and Others NNO 2016 (1) SA 47 (WCC) para [64]; City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at para [38]; Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) para 11.

²⁷ 2011 JDR 1716 (GNP) para 15.

still exercise its common law power to allow joinder whenever convenience so requires.

[63] In **Economic Freedom Fighters Student Command v Minister of Higher Education, Science & Technology (South African Human Rights Commission Amicus Curiae)**²⁸ the difference between a joinder of necessity and a joinder of convenience was described as follows:

*“As indicated above, the joinder of necessity is where the subject matter cannot be decided in such party's absence, nor can an order be sustained, or carried out without negatively interfering on such party's rights. To the contrary, a joinder of convenience is where on the ground of equity, the saving of costs, or the avoidance of multiplicity of actions, a party is joined to the proceedings.”*²⁹

[64] In **Freedom Property Fund Limited v Stavrides**³⁰ it was held that a third party who has an interest in the subject matter of the litigation, which interest is less than direct or substantial, or who's interest is unclear, may be joined as a matter of convenience.³¹

[65] In **Colonel Lambled v Minister of Defence and Military Veterans and Others**³² the failure of the Minister to implement findings of the MO was in issue. In that matter the applicants applied for an order to review and set aside a failure by the Minister and the Chief of the National Defence Force to implement recommendations contained in a report of the MO, and for a mandamus that the respondents be ordered to implement the MO's

²⁸ 2021 JDR 0902 (GP) para [85].

²⁹ See also for example: *De Beers Consolidated Mines (Pty) Ltd v Regional Manager Limpopo: Department of Mineral Resources & Energy and Others* 2023 JDR 3383 (GP) paras [111].

³⁰ 2018 JDR 1075; [2018] 3 All SA 550 (EGG) paras [15]-[16].

³¹ *De Beers Consolidated Mines supra*, n 29 paras [114] – [115]

³² *Supra*, n 5.

recommendation. The MO was joined as a respondent in that matter. In **Mashabane v Minister of Defence and Military Veterans and others**³³, which is also a matter where the nature of a recommendation of the MO was in issue, and similar relief was claimed, the MO was joined as a party “*solely by reason of having an interest in the outcome of the matter*”.

[66] Counsel for both parties referred me to **Dauids v Minister of Defence and Military Veterans and Others**³⁴ (**Dauids**), which is a matter where the MO had upheld complaints and made a recommendation. The applicants applied for orders to enforce a recommendation made by the MO as contemplated in section 6(8) of the MO Act. The court *a quo*³⁵ found that the MO’s recommendation was not binding on the Minister. On appeal to the Supreme Court of Appeal per Winterhalter JA dealt with the interpretation of the MO Act, in particular sections 6(6), 6(7) and 6(8) thereof. The court upheld the decision of the court *a quo* that the recommendation of the MO was not binding on the Minister. The Supreme Court of Appeal held that there must be appropriate relief, and that such relief had to be implemented. Winterhalter JA explained:³⁶

“[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.

[22] The relief sought by WO Dauids and Major Miles was predicated upon the proposition that the recommendation of the Ombud in terms of s 6(8) was binding on the Minister. That proposition, I have found, cannot be sustained. The Minister has received the recommendations

³³ 2023 JDR 2578 (GP). The MO was also joined in *Mohsen v Minister of Defence and Military Veterans and Others* 2022 JDR 3551 (GP).

³⁴ 2024 JDR 5311 (SCA).

³⁵ *Dauids v Minister of Defence and Military Veterans and Others* 2023 JDR 0749 (GP).

³⁶ *Id* at paras [21] - [23]

of the Ombud in respect of the complaint recommendations. The Minister must consider 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 Davida and Major Miles have had their complaints upheld 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.”

[67] In **Davids** the Supreme Court of Appeal ordered the Minister to decide what appropriate relief should be implemented in favour of the applicants, *“following the recommendations made to the Minister in terms of section 6(8) of the Military Ombud Act 4 of 2012”*.

[68] It appears from the reported **Davids** judgments that the MO was not joined as a party to the proceedings in the court *a quo* nor in the Supreme Court of Appeal.

Should the Military Ombud be joined as a necessary party in the main application?

[69] In **Davids** the focus was on determining the central issue whether the MO’s recommendation in terms of section 6(8) of the MO Act was final and binding. There was no application for the review of the MO’s decision, and no other relief was claimed against the MO. It does not appear from the judgements *a*

quo or on appeal in **Dauids** that there were any disputes for decision regarding the contents or veracity of the MO's findings. In my view, in the circumstances of that case, the MO would not have been a necessary party.

[70] In assessing whether the abovementioned requirements for joinder of the MO have been met in the present matter, the particular circumstances of the main application should be considered. The first consideration is that, as the papers presently stand, none of the parties are claiming any relief against the MO. There is no application for review of a decision of the MO in terms of section 13 of the Military Ombud Act 4 Of 2012 ("the MO Act"). Although counsel for the applicant submits that the respondents should have taken the MO's recommendations on review if they did not intend to act in accordance therewith, no such application has been made, and the respondents have expressed no intention to take such a route. The applicant also indicated that he does not intend to take the MO's decision on review. As the papers presently stand in the main application, the MO is therefore not at risk that relief will be granted directly against him, nor is he seeking any relief. Viewed in isolation, these facts could indicate that the MO is not a necessary party.

[71] In applying the tests for the existence of a direct and substantial interest as set out above, it should further be assessed whether the MO could be prejudiced if he is not joined, or whether a situation could arise in the main application, that if the MO had not been joined, any finding the Court might make would not be *res judicata* against the MO, as well as the possibility that

a future order may be irreconcilable with any order made in the main application³⁷.

[72] It was submitted by counsel that the MO was *functus officio*. If so, the position may be that the MO could not unilaterally withdraw, cancel, or alter his recommendation³⁸. As the effect of the MO's recommendation is an issue that the court hearing the main application may ultimately have to decide on, I refrain from pronouncing upon it. However, in my view the fact that the MO may be *functus officio* in respect of his decision to uphold the complaint is not necessarily conclusive in respect of the enquiry about his potential joinder. Although his recommendation is not the subject of a review application, potentially significant aspects of the final report have been placed in dispute by the respondents, which have a bearing on the question whether the MO has a legal interest in the subject matter of the application.

[73] In the main application the applicant *inter alia* relies on the MO's recommendation, and he contends that it is binding. This point remains in dispute in the main application. The question whether there is scope for such a contention on the facts of the main application in view of **Dauids**, will surely be dealt with by the court in the main application. The relief sought in the main application is however not simply limited to the enforcement of the MO's recommendation, nor is it solely based on the MO's report and recommendations. The applicant seeks a declaratory order that the failure by the Chief of the SAAF to appoint him with effective date from 1 March 2013 is

³⁷ Transvaal Agricultural Union, *supra* n 10.

³⁸ See for example *Tahira v Trustee, Luk amber Trust and Another* 2022 (2) SA 436 (SCA) paras [16] - [28].

unlawful, and the further orders as set out in his notice of motion³⁹. It would appear from the applicant's affidavits in the main application that such relief is *inter alia* based on facts, assessments and findings contained in the MO's final report.

[74] In response to such relief the respondents have admitted the existence of the MO's final report in their answering affidavit (in the main application), but they did not admit the correctness of the contents of the report⁴⁰. As indicated, they contend in the main application that the contents of the report ("*veracity and/or otherwise*") cannot be dealt with in the absence of the MO's version as a party before the court, and that, in the absence of the confirmation of the MO's version and stance, the main application falls to be dismissed. They have not disavowed their complaint in the main application that the MO should be joined so that the MO's reaction to the application can be obtained.

[75] Apart from the aforesaid general denial of the MO's report, there are aspects of the report that are specifically disputed in the respondents' answering affidavit:

75.1 The MO's final report contains a finding regarding administrative delay on the side of the SAAF, which is disputed in the respondents' answering affidavit in the main application.

³⁹ Paragraph [9] *supra*.

⁴⁰ There is no indication in Davids that the contents of the MO's report, findings and recommendations were disputed in fact.

75.2 The respondents dispute that the report “*was ever brought to the Minister, and if it was, whether that was done in the prescribed manner.*”.

75.3 It is in dispute whether the applicant has made “*indirect additions*” to the MO’s report, which I understand to be a dispute regarding the interpretation of the report’s contents.

75.4 The respondents dispute the finding of the MO that the Chief of the SAAF is obliged to finalise the applicant’s appointment. The MO made the findings and recommendations pursuant to an investigation, and communications with respondents.

75.5 The Respondents deny that applicant is entitled to relief as recommended by the MO, contrary to the MO’s findings.

[76] The import of the denials of the MO’s report is firstly that the court may possibly have to make factual and/or credibility findings in the main application regarding contents of the MO’s report on which the applicant relies. Such findings may relate to the MO’s investigations, findings, reasons for its findings, recommendations, and value judgment. I reiterate my assessment of the applicant’s papers in the main application, that he does not simply rely on the enforcement of the MO’s recommendation, but seeks the abovementioned relief based on facts which are at least in part contained in the report. The contents of the report are material to relief claimed. The report *inter alia* relates communications during the MO’s investigations, for example a meeting

whereat (so it is stated in the report) the SAAF accepted aspects of a provisional report for implementation (which is also relied on by the applicant).

[77] The respondent has a legal interest in the veracity, credibility and integrity of the office of the MO, and its investigations, findings and recommendations. As it stands, the report is not confirmed under oath.

[78] One of the powers and functions of the MO, to investigate complaints in terms of section 6(1) of the MO Act, is that the MO “*must promote the observance of the fundamental rights of the members of the Defence Force..*”⁴¹ Where aspects of its report are in dispute (and as the Minister and the other Military heads contend that the MO should be involved and that he could assist the court), the MO may need to respond to aspects in the application, in order to perform his aforesaid mandate, or defend his decision.

[79] If he is not joined in the application, he will be deprived of the opportunity to deal with aspects of his report which are disputed, and he, and the parties, may be prejudiced. It must be borne in mind that the Minister will take the content of the report into consideration when deciding on appropriate relief.

[80] In my view similar considerations apply *in case* as were mentioned in **Mthembu v Mlambo**⁴² where the following was said in the context of the non-joinder of the Master after he has taken decisions:

“In my view, there can be no doubt that the Master has a material interest in the conducting of this case. This is because it is the actions of the Master and the

⁴¹ Section 6(6)(c) of the Military Ombud Act 4 of 2012.

⁴² 2025 JDR 1075 (GJ) at par [24]

decisions that he had allegedly made that lies at the heart of the applicant's case. In particular, the applicant relies on a case of the Master receiving and registering the will of Sivaji at the outset, investigating and then accepting the purported will of Sivaji as being valid, the Master finding that the first respondent had obtained his letter of executorship by way of fraud, and lastly that the Master had decided to cancel the first respondent's letter of authority on that basis. This case of the applicant is disputed by the first respondent. All this considered, I believe the Master has a substantial legal interest in the outcome of this case. Surely it must be patently obvious to the applicant that the involvement of the Master in the case is essential, at least to the extent that the Master can provide his in essence independent views."

[81] In the main application submissions are also made regarding the role of the MO. The respondents deny that the MO has a role in the resolution of disputes. The MO may have a legal interest to address such submissions, insofar as a finding on such submissions may be binding on the MO, in view of the facts in the main application and subsequent proceedings.

[82] In my view the MO has a direct and substantial interest in the subject matter of the application. I find that the MO is a necessary party in the main application.

Alternative contention of the Applicant: Joinder of convenience

[83] In view of my finding that the MO is a necessary party, it is not necessary to consider a joinder of convenience. I have however also considered this as a basis for the MO's joinder. Should I err in my assessment that the MO is a necessary party, I am of the view that he should then still be joined as a matter of convenience, considering the circumstances set out in above, and in view of the following considerations:

- 83.1 The MO recommended, in paragraph 15 of his report⁴³ that his office would monitor the SAAF'S implementation of its undertaking to appoint the applicant. It is not excluded in the main application that the court may make an order such as was made in **Dauids**. It appears from the main application that the Minister may not yet have made a final decision regarding appropriate relief. In principle, the Minister may decide to follow the MO's recommendation in whole or in part. The Minister's recommendation may still require the involvement of the MO. Subsections 6(10) and 6(11) of the MO Act provide that the MO must perform any other function allocated to him under the act, and the Minister may assign to the Ombud any additional function which are not inconsistent with the act.
- 83.2 The content of the MO's report is a central aspect of the main application. Although there is finality that the MO made his recommendation, he may still have obtained valuable information in the course of the investigation⁴⁴, which may be relevant, and which could assist the court.
- 83.3 The MO may wish to make submissions of a legal nature in the main application concerning disputed aspects of his report, which could equally assist the court.

⁴³ See paragraph [17] *supra*.

⁴⁴ In terms of Section 6(6)(a) of the Military Ombud Act 4 of 2012 the MO may in the process of investigating a complaint, summon any person to submit an affidavit or affirmed declaration or to appear before him to give evidence or produce any document that has a bearing on the matter before him.

- 83.4 It is desirable and convenient that the MO be involved at this stage, rather than, for the first time, at a later stage in proceedings which may flow from the main application.
- 83.5 Applicant's counsel argued that a review application is not excluded in this matter. The main application was lodged before the decision in **Dauids**. I agree that if the court decides in the main application to grant relief similar to what was ordered in **Dauids**, a review application by the respondents cannot be excluded, although the possibility is perhaps remote. In that event, issues for consideration in the main application may arise again for decision in a review application, and conflicting decisions vis a vis the findings of the MO cannot be excluded.
- 83.6 I also consider that the MO did not oppose the application for joinder, which may indicate a willingness to be joined.
- 83.7 Finally, I am of the view that in the circumstances of the matter the joinder of the MO will also be desirable and in the interest of justice in view of the fact that the MO is tasked with investigations which pertain to rights protected in terms of section 23 of the Constitution, and considerations of justice and fairness. In **Dauids**⁴⁵ it was held that the role of the MO is to protect and promote the rights of members of the Defence Force who enjoy the right to fair labour practices in section

⁴⁵ *Supra*, n 34 para [5].

23 of the Constitution. In my view a generous approach to the joinder, as was alluded to in **Hope**⁴⁶ is appropriate in this matter.

Conclusion and costs

[84] I therefore conclude that the MO should be joined as a party to the main application.

[85] I am of the view that there is no reason why the costs should not follow the result of the joinder application. The applicant's counsel requested an order for costs on scale B.

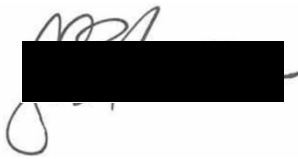
ORDER:

1. The Military Ombud is joined as the sixth respondent in the main application under case number 49002/2021.
2. A copy of this order, together with copies of the main application and the joinder application under case number 49002/2021, shall be served on the sixth respondent (as joined). The applicant's attorney shall arrange for such service by the Sheriff.
3. The sixth respondent (as joined) is directed to deliver his answering affidavit, if any, in the main application under case number 49002/2021 within 21 (twenty) days from date of service on him of this Court order

⁴⁶ Hlophe, *supra* n 18 para [36].

together with copies of the applications mentioned in paragraph 2 of this order.

4. The respondents are ordered to pay the costs of the joinder application, including the costs of counsel, on Scale B.



STONE AJ

ACTING JUDGE OF THE HIGH COURT: GAUTENG DIVISION, PRETORIA

Date of hearing:	8 May 2025
Datte of Judgment	18 September 2025
Counsel for the Applicant:	Adv Venter
Counsel for the Respondents	Adv Mawela