



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/23

In the matter between:

**MINISTER OF DEFENCE AND MILITARY
VETERANS**

First Applicant

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

Second Applicant

**SECRETARY OF DEFENCE AND
MILITARY VETERANS**

Third Applicant

**SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

Fourth Applicant

and

**LIEUTENANT-COLONEL KEVIN
BRUCE O'BRIEN N.O.**

Respondent

and

INTERNATIONAL COMMISSION OF JURISTS

Amicus Curiae

In re:

**LIEUTENANT-COLONEL KEVIN
BRUCE O'BRIEN N.O.**

Applicant

and

**MINISTER OF DEFENCE AND MILITARY
VETERANS**

First Respondent

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

Second Respondent

**SECRETARY OF DEFENCE AND
MILITARY VETERANS**

Third Respondent

**SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

Fourth Respondent

Neutral citation: *Minister of Defence and Military Veterans and Others v O'Brien*
N.O. [2026] ZACC 9

Coram: Mlambo DCJ, Dambuza AJ, Kollapen J, Majiedt J, Mathopo J,
Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage AJ and
Tshiqi J

Judgments: Majiedt J (unanimous)

Decided on: 10 March 2026

Summary: Military Discipline Supplementary Measures Act 16 of 1999 —
Variation of court order — extension granted for military judges
to complete part-heard cases — declaration of invalidity further
extended for remedial legislation to be enacted

ORDER

On application for variation of an order of this Court:

1. The order granted on 20 December 2024 is varied as follows:
 - (a) Paragraph 5(c) of the order is varied by substituting it with the following: “The current 24 serving military judges whose assignments lapse on 31 March 2026 may continue in office until their part-heard matters are finalised, but not later than the extended suspension period.”
2. The period of suspension of the declaration of invalidity in paragraph 5(f) of the order is extended until 30 June 2027.

3. The declaration of invalidity in paragraph 5(f) of the order shall remain suspended during the extended period on the terms of this variation order, read together with the existing court order.

JUDGMENT

MAJIEDT J (unanimous):

[1] On 20 December 2024, this Court made an order in these terms:

- “1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside to the extent that that Court dismissed the applicant’s appeal against the High Court’s refusal to grant the declarations of statutory invalidity sought by the applicant in his counter-application in the High Court.
4. The costs orders made in the Supreme Court of Appeal in relation to costs in that Court and in the High Court are set aside.
5. It is declared that:
 - (a) Sections 101 and 102 of the Defence Act 42 of 2002 are unconstitutional and invalid to the extent that they permit members of the Executive to convene boards of inquiry to investigate military judges and the content and merits of their judgments and rulings. Pending the coming into operation of remedial legislation, the phrases ‘any matter’, ‘any member or employee’ and the ‘affairs of any institution’ in sections 101 and 102 of the Defence Act and section 136 of the Military Disciplinary Code, read with rule 79 of the Military Discipline Supplementary Measures Act’s Rules, must be read as excluding military judges.

- (b) Section 15 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it empowers the Minister of Defence and Military Veterans (Minister), acting on the recommendation of the Adjutant General, to assign judges for renewable periods.
 - (c) The existing practice of assigning judges for renewable periods of one to two years is unconstitutional and unlawful. Pending the coming into operation of remedial legislation, the assignment of a military judge may not be renewed until the lapse of at least two years since that person's last assignment.
 - (d) Section 17 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it empowers the Minister, acting on the recommendation of the Adjutant General, to remove a military judge and that the Minister may do so without any independent inquiry into the fitness of the military judge to hold office.
 - (e) Pending the coming into operation of remedial legislation, the Minister may devise processes for an inquiry into the fitness of a military judge and the composition of the inquiry body, provided that—
 - (i) it is an independent inquiry; and
 - (ii) a military judge may not be removed, except on the recommendation of the independent inquiry.
 - (f) The declarations of constitutional invalidity above are suspended for a period of 24 months to allow remedial legislation to be enacted and brought into operation.
6. The first respondent is ordered to pay half of the costs of the applicant in the Supreme Court of Appeal and the High Court, including the costs of two counsel where so employed.
 7. The first respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel where so employed.”¹

¹ *O'Brien N.O. v Minister of Defence and Military Veterans* [2024] ZACC 30; 2025 (2) SA 613 (CC); 2025 (4) BCLR 460 (CC) (*O'Brien CC*).

[2] The applicants seek the variation of the order and also an extension of the period of suspension (variation application). This variation application is being decided on the parties' papers, and without any written or oral argument. The matter originally entailed the convening of military boards of enquiry and the assignment of military judges. As can be gleaned from the order, this Court declared certain legislative provisions unconstitutional, namely sections 101 and 102 of the Defence Act² and sections 15 and 17 of the Military Discipline Supplementary Measures Act³ (MDSMA). Our order contained various interim provisions pending the coming into operation of corrective legislation, including a provision precluding the renewal of assignment of military judges until a period of two years has lapsed since the last assignment. The first respondent has filed an answering affidavit. While he does not oppose the relief sought, he highlights certain unsatisfactory aspects in the application for variation.

[3] A synopsis of the backdrop to the order is necessary. The case concerned the independence of military courts, in particular two military courts of first instance established under the MDSMA, the Court of a Military Judge and the Court of a Senior Military Judge. The application was brought by Lieutenant-Colonel Kevin Bruce O'Brien of the South African National Defence Force (SANDF), a former military judge employed as an instructor at the School of Military Justice, Pretoria. In a counter-application before the High Court of South Africa, Gauteng Division, Pretoria (High Court), he challenged the constitutionality of the said sections. That counter-application was in response to the main application, a review application by the present first applicant, the Minister of Defence and Military Veterans (Minister), against certain orders made by the applicant in proceedings where he had presided as a military judge, concerning his apprehension about the unconstitutionality of the impugned provisions. The High Court upheld the review relief and dismissed the applicant's counter-application on the basis that the impugned provisions were constitutionally compliant.⁴

² 42 of 2002.

³ 16 of 1999.

⁴ *Minister of Defence and Military Veterans v O'Brien N.O.*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 76995/18 (2 August 2021).

The Supreme Court of Appeal dismissed Lieutenant-Colonel O'Brien's appeal on the basis of mootness.⁵

[4] In declaring sections 101 and 102 of the Defence Act unconstitutional, this Court held that executive control over the convening and conduct of military courts is constitutionally offensive for a variety of reasons.⁶ This Court further found the renewable term of military judges constitutionally deficient, struck section 15 of the MDSMA down and made an interim order that, pending the coming into operation of remedial legislation, the assignment of a military judge may not be renewed until the lapse of at least two years since that person's last assignment.⁷

[5] Lastly, section 17 of the MDSMA was declared unconstitutional and invalid to the extent that it empowers the Minister, acting on the recommendation of the Adjutant General, to remove a military judge and that the Minister may do so without any independent inquiry into the fitness of the military judge to hold office. This Court ordered that, pending the coming into operation of remedial legislation, the Minister may devise processes for an inquiry into the fitness of a military judge and the composition of the inquiry body, provided that (a) it is an independent inquiry; and (b) a military judge may not be removed except on the recommendation of the independent inquiry.⁸

[6] In their notice of motion in the variation application, the applicants seek—

- (a) variation of paragraph 5(b) of the order by adding: “[T]he Minister may assign military judges on the recommendation of an independent inquiry body that is constituted in terms of Court order 5(e)”;
- (b) variation of paragraph 5(c) of the order by substituting it with the following:

⁵ *O'Brien N.O. v Minister of Defence and Military Veterans* [2022] ZASCA 178; [2023] 1 All SA 341(SCA).

⁶ *O'Brien CC* above n 1 at para 108.

⁷ *Id* at paras 110-12 and 119.

⁸ *Id* at paras 121 and 123.

“The existing practice of assigning military judges for renewable periods of one to two years is declared unconstitutional and unlawful. However, pending the coming into operation of remedial legislation, and in order to ensure the continued functioning of the [M]ilitary Courts, the suspension of invalidity is extended beyond 31 March 2026 for a further period of 24 months (or such period as this Court finds just and equitable).”;

- (c) in the alternative to (b) above, that “[t]he current 24 serving [m]ilitary [j]udges whose assignments lapse on 31 March 2026 may continue in office until their part-heard matters are finalised, but not later than the extended suspension period”;
- (d) that “the period of suspension of the declaration of invalidity . . . of Court order 5(f) of the judgment and orders . . . be extended for a further period of . . . 24 months from the date of this order”; and
- (e) that “the declaration of invalidity . . . shall remain suspended during the extended period on the varied Court orders and to be read together with the [existing] court orders”.

The applicants did not seek costs.

[7] The applicants’ founding affidavit in the variation application is deposed to by Major-General Mnisi, appointed as Adjutant-General in the SANDF in terms of section 27 of the MDSMA. In that capacity he is responsible for the overall management, promotion, facilitation and coordination of activities in order to ensure the effective administration of military justice and the military legal services. Major-General Mnisi explains that there are currently assigned 28 military judges, 24 of whom have terms of assignment expiring on 31 March 2026. In a letter to this Court dated 15 April 2025 (incorrectly dated 2024) it was erroneously stated that there are three new SANDF members who have completed the training and processes to be assigned as military judges. Major-General Mnisi says this was a bona fide mistake caused by a misapprehension and an incorrect understanding and interpretation of

information provided internally during consultation with the SANDF legal team. The correct position is that there are no new trained military judges who can replace those whose terms of assignment expire on 31 March 2026. This makes it practically impossible to implement this Court's order.

[8] In amplification of this averment of practical impossibility of implementation, Major-General Mnisi states that the current status of the Defence Legal Services Division (DLSD) only having 28 serving military judges, of whom 24 will reach the end of their assignments on 31 March 2026, presents a number of challenges. These Judges preside over Military Court cases on a daily basis. The majority of them have part-heard matters that will not be finalised by 31 March 2026. According to Major-General Mnisi, absent any remedial legislation, the Department will be unable to renew these assignments without acting in contempt of this Court's order. Conversely, if their terms are not renewed, no military judges will remain in office. Numerous part-heard matters and pending prosecutions before military courts will thus collapse, and that might be in violation of the accused persons' constitutional rights.

[9] Major-General Mnisi states further that this situation creates an impossible conflict of obligations: compliance with paragraph 5(c) renders the military justice system non-functional, while non-compliance exposes the Department to potential contempt proceedings. He says that this is a circumstance that was not reasonably foreseeable at the time this Court granted the order. The applicants consequently seek a narrow variation of paragraph 5(c) of the order, not to alter the substance of this Court's finding of unconstitutionality, but to ensure continuity in the administration of military justice pending the enactment of remedial legislation by Parliament.

[10] According to Major-General Mnisi, this proposed variation preserves the spirit and intent of the original order, while preventing institutional paralysis and ensuring that the rights of accused persons, the interests of justice and the rule of law are maintained. The relief sought is thus necessary to give effect to the constitutional purpose of the order, rather than to subvert or delay its implementation. If the

assignments are not renewed, failure to finalise these matters within the required timeframe will result in some cases having to commence afresh before newly-appointed military judges. This is procedurally undesirable, not in the interests of justice and will result in unnecessary delays. Major-General Mnisi avers that once military judges vacate office, they lose jurisdiction and cannot complete part-heard matters. This will cause systemic collapse in the military justice system.

[11] Relating to the process to have remedial legislation enacted, Major-General Mnisi attaches a copy of the Bill to amend the MDSMA and explains that it has not yet been published for public comment. The Bill is expected to be released during the first term of 2026, after which it will undergo a full public participation process before being submitted to the Parliamentary Portfolio Committee. He says the Bill had been drafted and completed within the Department during July 2025, pursuant to this Court's order of 20 December 2024. He also attaches the Bill to amend the Defence Act, which had also been finalised in the course of July 2025, pursuant to this Court's order.

[12] Both Bills were submitted by the Department to the Office of the Chief State Law Advisor and certified in August 2025. In the course of September and October 2025, the relevant Cabinet Committees and the Cabinet itself approved the Bills for processing in Parliament and they were introduced in Parliament on 20 November 2025. Major-General Mnisi states that the Department has acted diligently and without delay; that correcting the constitutional flaws in the existing legislation is not possible within the period of extension; and that it will cause irreparable prejudice to the administration of military justice should the requested extension and variations not be granted. According to Major-General Mnisi, the extension is essential for the proper administration and assignment of military judges, and it will benefit accused persons whose military discipline and criminal cases are still pending before the military courts. This would further assist the administration of justice at the military courts within the SANDF as military judges will be assigned without any delay.

[13] As stated, the first respondent, Lieutenant-Colonel O'Brien, does not oppose the application and will abide this Court's decision on jurisdiction and the merits. His affidavit is filed to be of assistance to the Court, by making relevant submissions on the law and the facts. He explicates the law relating to extensions and variations of court orders by pointing out that variations of court orders must be done sparingly and only in instances where it is just and equitable.

[14] Lieutenant-Colonel O'Brien contends that the applicants have furnished an inadequate explanation as to why amending legislation cannot be finalised and brought into effect within the next 11 months, before the 20 December 2026 deadline. According to him, there is no supporting affidavit from a representative of Parliament to suggest that Parliament will be unable to complete its legislative work in this period. He suggests that a more detailed explanation is required.

[15] Regarding the tenure of military judges, Lieutenant-Colonel O'Brien does not dispute the need to safeguard the proper administration of military courts during the period of suspension and until amending legislation is in force. He supports any reasonable proposals to prevent unintended disruptions or delays in ongoing cases. However, he submits that the applicants' explanation for the proposed variation lacks essential information necessary to assist the Court. He says there is no explanation why there are no other suitable candidates for appointment as military judges.

[16] Lieutenant-Colonel O'Brien explains that military judges are assigned from the ranks of senior military legal practitioners (MLPs), who are qualified lawyers. According to Lieutenant-Colonel O'Brien, in 2022 there were 197 MLPs, of which about 149 had the rank of major or higher, who would ordinarily be eligible for assignment as military judges. He suggests that the applicants will be able to provide this Court with accurate and up-to-date numbers of the MLPs available for assignment as military judges.

[17] Lieutenant-Colonel O'Brien makes the point that the applicants fail to explain what further training of MLPs is deemed necessary before they can be appointed as military judges. There is no explanation, he says, as to why the applicants failed to provide this training over the last 12 months, since this Court's order. He says that, in his experience as a military judge, no specific training is required before an MLP is assigned as a military judge. There is also no detail of the current caseloads of existing military judges, which would be necessary to allow the Court to assess the need for any further relief to address part-heard matters. According to him, that information ought to be readily available to the SANDF on the military courts' electronic case management system.

[18] Lastly, relating to the need for an independent body to advise on appointments, Lieutenant-Colonel O'Brien contends that the applicants do not explain why this variation of the order is necessary. He says there is nothing in this Court's judgment or order that requires an independent body to advise on appointments, nor does it preclude the creation of such a body. His application challenged the constitutionality of section 15 of the MDSMA and not the constitutionality of the procedures or criteria for the assignment of military judges, which is regulated under sections 13 and 14 of the MDSMA.⁹

⁹ Those sections read:

"13. Assignment of functions

- (1) Only an appropriately qualified officer holding a degree in law and of a rank not below that of colonel or its equivalent, with not less than five years appropriate experience as a practising advocate or attorney of the High Court of South Africa, or five years' experience in the administration of criminal justice or military justice, may be assigned to the function of—
 - (a) Director: Military Judges;
 - (b) Director: Military Prosecutions;
 - (c) Director: Military Defence Counsel; or
 - (d) Director: Military Judicial Reviews.
- (2) Only an appropriately qualified officer holding a degree in law may be assigned to the function of—
 - (a) senior military judge or military judge;
 - (b) review counsel;
 - (c) senior defence counsel or defence counsel; or

[19] It is self-evident that this case engages our jurisdiction. Despite Lieutenant-Colonel O'Brien's justified misgivings of the dearth of evidence and explanations from the applicants regarding the various aspects broached by him, I am satisfied that, save for paragraph 5(b) of our order, a case for variation has been made out. Relevant considerations in this regard include:

“(a) the sufficiency of the explanation provided for failing to comply with the original period of suspension; (b) the prejudice likely to be suffered if the suspension is not extended; (c) the prospects of correcting the defect within the extended period; and (d) the need to promote a functional and orderly state administration for the benefit of the general public.”¹⁰

(d) senior prosecution counsel.

(3) Only an appropriately qualified officer or other member who holds a degree in law or who has otherwise been trained in law may be assigned to the function of prosecution counsel.

14. Minister's powers in respect of assignment

(1) The Minister shall assign officers to the functions—

(a) at the level of Director referred to in section 13(1); and

(b) of senior military judge or military judge referred to in section 13(2)(a), on the recommendation of the Adjutant General: Provided that the Director: Military Judges shall be deemed to have been assigned the function of senior military judge.

(2) The Adjutant General shall not recommend any officer for assignment to any function referred to in subsection (1) unless, upon due and diligent enquiry, the Adjutant General is convinced that the officer is a fit and proper person of sound character who meets the requirements prescribed in this Act for such assignment.

(3) Subject to section 16 and the control of the Minister, the Adjutant General may assign any officer or member to any function—

(a) referred to in section 13(2)(b), (c) and (d) or (3); or

(b) attached to any approved military legal services post other than those referred to in this Act.

(4) Officers and members assigned to functions in terms of this section shall perform those functions in a manner which is consistent with properly given policy directives, but which is otherwise free from executive or command interference.

15. Period of assignment

An assignment in terms of this Chapter shall be for a fixed period or coupled to a specific deployment, operation or exercise.”

¹⁰ *Minister of Cooperative Governance and Traditional Affairs v Speaker of the National Assembly; In re Mogale v Speaker of the National Assembly* [2025] ZACC 22; 2026 (1) BCLR 1 (CC) at para 8.

[20] While there is still some time before the deadline for remedial legislation, it is in the interests of justice that we vary the order. The problem for the applicants is the looming expiry date of 31 March 2026 in relation to the assignment of 24 of the 28 currently-serving military judges. This appears to be an aspect overlooked by Lieutenant-Colonel O'Brien, who focuses solely on the expiry of the period of suspension in our court order on 19 December 2026. However, there is no basis for a further extension for as long as 24 months. As stated, it appears that the Bills have already travelled some distance in the legislative process. In my view, a period of extension until 30 June 2027 is adequate.

[21] The best solution in the circumstances is to grant an order as sought by the applicants in the alternative, that is, that the current 24 serving military judges whose assignments lapse on 31 March 2026 may continue in office until their part-heard matters are finalised, but not later than the extended suspension period. That would be in the interests of justice, in ensuring that part-heard matters are finalised and that accused persons in the military courts do not suffer irremediable prejudice.

[22] But the proposed variation of paragraph 5(b) of this Court's order is different – as Lieutenant-Colonel O'Brien correctly points out, it is unclear why a variation is sought. If the applicants want to have an independent body advise on the appointment of military judges, then they may do so – there is nothing in our order that stands in the way of their doing so. Furthermore, the proposed addition to paragraph 5(b) is not framed as an interim provision during the suspension period, but as a substantive and final change to the order we made in that paragraph. It is therefore not necessary to vary that order.

[23] I make the following order:

1. The order granted on 20 December 2024 is varied as follows:
 - (a) Paragraph 5(c) of the order is varied by substituting it with the following: “The current 24 serving military judges whose assignments lapse on 31 March 2026 may continue in office until

their part-heard matters are finalised, but not later than the extended suspension period.”

2. The period of suspension of the declaration of invalidity in paragraph 5(f) of the order is extended until 30 June 2027.
3. The declaration of invalidity in paragraph 5(f) of the order shall remain suspended during the extended period on the terms of this variation order, read together with the existing court order.