

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEHLOHO MOKAPELA

APPLICANT

and

MINISTRY OF HOME AFFAIRS

1ST RESPONDENT

COMMISSIONER OF POLICE

2ND RESPONDENT

DEFENCE COMMISSION

3RD RESPONDENT

R.L.M.P. DISCIPLINARY BOARD OF OFFICERS

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

RULING

Delivered by the Honourable Acting Justice Mrs K.J. Guni  
on the 14th day of July, 1995

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The applicant in this matter is MR. SEHLOHO MOKAPELA, who is a member of the Police force.

At the time of this application MR. MOKAPELA was stationed at PTC where he worked. On 14th September 1994 there at P.T.C. the applicant was charged and convicted before a board of 4 officers. The applicant was charged and convicted of misconduct or indiscipline under the regulations made in Legal Notice No.72 of 1994.

The applicant is challenging the validity and/or legality of this instrument, Legal Notice No.72 of 1994. The challenge is based on the ground that the body which made the said instrument claims to be acting in pursuant to section 145 (4) of the constitution. It is section 145 (1) of our constitution that created the defence commission. Subsection (2) of section 145 makes the list of Responsibilities of the defence commission.

Subsection (4) of section 145 of our constitution, from which the defence commission claims to have derived the power to make regulations and procedures it has enacted in Legal Notice No. 72 of 1994, reads as follows:

"(4) The Commission may by regulation or otherwise regulate its own procedures and may delegate any of its functions under subsection (2) to any public officer."

The responsibilities of Defence Commission listed in section 145 (2) are: (1) appointment

(2) discipline and

(3) removal of members of the police force. By giving Defence Commission these responsibilities, does it necessarily follow that Defence Commission has been given power and authority to perform those responsibilities. The duty or obligation to carry out certain actions goes hand in hand with the authority to carry-out those actions. Section 30 Interpretation Act 1977. (Presumption of lawful exercise of power).

How does defence commission carry out those

responsibilities? There is no special provision in the said constitution which describes the methods or mode or manner in which the defence commission is to carry out those responsibilities conferred upon it by section 145 (2) of the constitution. It is silent. It is upon this silence that reliance is placed to challenge the authority of the defence commission to make the regulations it has made by instrument, Legal Notice 72 of 1994. This Legal Notice was promulgated pursuant to section 145 (4) constitution. In the preamble of the R.L.M.P. Regulations Legal Notice No.72 of 1994, it is abundantly clear that Defence Commission being mindful of its responsibilities in terms of section 145 (2) and having carefully considered to carry out those responsibilities, decided to promulgate these regulations with express intention of remedying the evil created by the repeal of sections 5 (2) 12 to 22 of Order No.26 of 1971. When construing the meaning of the words used in the statute attention must be paid to the declared intention and the obvious evil which it is designed to remedy. *Jaga v Donges, N.O. and Another* 1950 (4) SA 653.

There appears to be no problems with regard to the delegation of the responsibilities to the board of officers-to discipline this particular member of the police force. The applicant questions the legality and\or validity of the regulations under which he was disciplined. The Defence Commission is a creature of statute. Its powers, responsibilities or functions must necessarily come from the statute which created it. To determine the legality of its action

this court must read the enabling statute under which the action is taken together with the terms of the instruments complained of. The Royal Lesotho Mounted Police regulations will be found to be a law with authority and force of law because and only because they are a legislative pronouncement of a competent law-giver vested with the authority to legislate - (The interpretation of statute by Lourens M du Plessis page 139 - chapter 6) Authority and validity of an actments"

The provisions in the constitution as in ordinary Acts or orders of that size and nature, are in skeleton form. Flesh is to be added by delegated enactments which usually regulate in greater detail matters provided for by original enactment in an outline form. The constitution is a main statute which dealt with a variety of specialised complex matters. It has just provided frame work within which various legal issues are dealt with. How the entities created by the constitution carry out their responsibilities may be up to them. The practice of statutory bodies is to carry out their duties by issuing circulars, giving directive and making regulations, this is most desirable "modus operandi" by statutory bodies. Defence commission is such a body. Can it carry out its responsibilities by issuing circulars directives and enacting regulations? The answer to this question must be found in the enabling statute. Every power lawfully used by the defence commission must be derived from that enabling statute from which its authority emanates.

It was argued quite strenuously by counsel for the applicant

that defence commission in terms of, "section 145 (4) may by regulation or otherwise regulate its own procedures". In terms of this section the defence commission according to the applicant, has no power and/or authority to make the regulations it enacted in legal notice 72 of 1994.

What seem to be the problem is the reading and understanding of the enabling statute. In order to understand appreciably the meaning of the words used in section 145 (4), the section or the words in it must not be read in the vacuum. This point of view was expressed by Schreiner J.A in *Jaga v Donges*, N.O and another 1950 (4) SA (A.D) page 653 at page 663 where he quoted Lord Greene then Master of the Rolls in *Re bidie* (1949, ch. 121).

"The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing that, I myself prefer is not to take out particular words and attribute to them a sort of prima facie meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: "In this statute, in this context, relating to this subject-matter, what is the meaning of this words?"

In our present case we may not face just two possible meanings. Both the constitution and the R.L.M.P. Regulations in Legal Notice 72 of 1994, are written by Basotho. Although both instruments are written in English when translated they may add a further connotation to our understanding. That is why it is most important that this court in order to determine the true

meaning of the section in question, it must look at the whole statute or at least, the relevant parts to this subject matter before it. That is, sections 145, 147 and others relating particularly to the police force. This the court must do bearing in mind the evil the Regulations are designed to remedy: Jaga v Donges N.O and Another supra.

One of the most relevant section that must be read with section 145 is section 147 which created the Police Force. Section 147 (2) vested the power of command of the Police Force in the commissioner of Police and subject to any direction of the defence commission. (My underlining). The defence commission remains as the ultimate authority in the Police Force. The Police commissioner's actions with regard to his responsibilities for administration and discipline are all subject to the direction of the defence commission. How does the defence commission give the directions to the commissioner of police? In the performs of this duty the defence commission may act as it sees fit. It may issue out directives, circulars or make regulations. All these methods are within its competency as the flesh that is added to the skeleton form of the main statute from which it derives its power to take action.

Reasonableness may be used as a yard stick measure in determining the validity of the Regulations.. That is to say, that the court without usurping the powers of the legislature, may declare the regulations invalid because of their unreasonableness. R v Seedat and another 1957 (1) page 34. As

the History of Police Force shows, these regulations subject matter of this complaint - are a replica of the previous ones. The regulations may be described as unreasonable and therefore invalid on that basis according to Lord Russell in *Kruse v Johnson* cited in *Seedat and Another Supra* at page 34. First of all if they are "found to be partial, secondly" if they are "unequal in their operation" thirdly if they are manifestly unjust and disclose bad faith; fourthly if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the mind of reasonable men". Regulations in Legal Notice 72\94 in no way fit any of these descriptions. They were part III of Order No.26 of 1971. They were in the previous proclamation 27 of 1957. Prior to the coming into force of the present constitution, these were the operating Regulations in the Police Force.

Sub-section (2) of section 145 vested the power to discipline the members of the police force in the defence commission which in terms of section 145 (4) may delegate that power to any public officer. The defence commission has power to give directions to the commissioner of police when he carries out his responsibility to discipline the members of the police force. Can the defence commission have the power to give direction to any public officer to whom it has delegated the responsibility to discipline the members of the police force? Defence commission supervises the commissioner of police by giving him directions; can it not supervise such public officer in the same way? Making regulations to direct them in carrying

out of those responsibilities seems practical and desirable. Could it have been the intention of the legislator to give the defence commission the power and authority to make regulations in order to be able to carry out effectively and efficiently its responsibility to discipline the members of the police force? There is no doubt in my mind that this is the intention of the legislature of the constitution in respect of sections 145.

There has always been the Regulations that were used for the proper administration and discipline of the force. Proclamation 27 of 1957 provided for enrolment, discipline and administration of the then Basutoland mounted police. It appears from its humble beginnings that the police force was built with mechanisms of discipline. This proclamation was repealed and replaced by ORDER NO 26 OF 1971. This order was enacted to consolidate the laws providing for the establishment, organisation and control of the Lesotho mounted Police. At all times there was some control exercised over the police force.

When the new constitution came into force, there were similar provisions which gave power and authority to somebody or entity that was to exercise some control over the police force, this time the authority was given to a newly created body, the defence commission.

By proclamation 27 of 1957 the Police Force was not only organised but was also disciplined. By order No 26 of 1971, the same spirit of organization, discipline and control prevailed



with the legislator. All these statutes were not by Parliament. Nevertheless there should have been some sort of debate to highlight the purpose of those statutes. The preamble of both statutes spell out in no uncertain terms the whole purpose of the making of proclamation and the order no.26 of 1971. I have already made a mention that the spirit and letter of both those instruments, was to built and maintain order and discipline in the force. The powers that are questioned in this application, the respondent claims that they are derived, as they must, from the constitution. There is no preamble from which search for the intention of the legislator can be made. Recourse to preliminary deliberation as a prime source of legislator's intention, in regard to this shift of power of control, may have assisted if those deliberations were available. This is the constitution that has brought about the constitutional order in the whole country. This is the constitution which has heralded and brought about democracy in Lesotho. It is intended to bestow legitimacy to the Government and all its organs. How can it be interpreted to have been intended to bring anarchy particularly in the police force? The answer is most certainly in the negative. The constitution must have been intended to re-establish the rule of law and order. The constitution merely transferred the powers and authority over the members of the police force from the minister to the defence commission. Police may have wanted to be in control of themselves - But certainly not to be out of control. The commissioner of police subject to the direction of the defence commission is still in control of the members of the police force at least according to the spirit and letter of the

constitution. There might be a wrong impression that the police are out of control. That is a very wrong impression because according to the supreme law of this land, there is someone who should exercise those controls. In terms of our supreme law, the constitution, it is the defence commission. The history of the force clearly shows that at all times, there was somebody with authority and power to discipline members of force. There is nowhere I find an indication or inclination to remove such authority altogether. The police force remains a disciplined force. The defence commission cannot be denied the power and authority to carry-out its responsibilities in the manner it chooses as long as it does so within the framework of those responsibilities. BINDURA TOWN MANAGEMENT BOARD V DESAI & CO. 1953 (1) SA 370. The Legal Notice No.72 of 1994 was lawfully promulgated by a competent body.

This application is dismissed with costs.

K.J. GUNI

(ACTING JUDGE)

For Applicant: Mr. Mosito

For Respondent: Mr. Makhethe