IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) 05/07**

In the matter between:

THE PRESIDING OFFICER N.S.S.
(L. MAKAKOLE) **FIRST APPELLANT**

ATTORNEY GENERAL **SECOND APPELLANT**

AND

MALEBANYE MALEBANYE **RESPONDENT**

CORAM: **RAMODIBEDI JA**
GROSSKOPF JA
SMALBERGER JA

HEARD: 11 OCTOBER, 2007
DELIVERED: 24 OCTOBER, 2007

SUMMARY

Review – Disciplinary proceedings – Appellant absenting himself from duty contrary to section 14. of the National Security Service (Amendment) Regulations 2005 –

Subsections 21 [8] and [9] of the National Security Service Act 1998 read with Regulation 32. [1] [2] [3] and [4] of the National Security Service Regulations 2000 – The powers of the NSS Board of enquiry and those of the Director General on recommendation for discharge contrasted – The court a quo correctly finding that the disciplinary proceedings in question were not irregular – The court, however, led astray by a letter addressed by the Director General to the appellant and inviting him to show cause why he should not be discharged – On appeal such letter held to be inconsequential – Court a quo improperly granting an order not prayed for – Appeal allowed.

JUDGMENT

RAMODIBEDI JA

[1] This appeal essentially raises the question of the validity or otherwise of the respondent's discharge from the National Security Service ("the N.S.S.") The appeal lies against the following background. During the period between 19 December 2005 and 5 January 2006, a period spanning thirteen consecutive days, the respondent, a member of the N.S.S. stationed at N.S.S. Headquarters in Maseru, absented himself from work without leave. In due course, on 7 March 2006 he faced a disciplinary hearing before a board of

enquiry of the N.S.S. ("the Board") on a charge of contravention of Regulation 14 of the National Security Service (Amendment) Regulations 2005. This Regulation reads:-

> *"14 A member who absents himself without leave commits breach of discipline."*

[2] The respondent pleaded guilty to the charge. Acting in terms of Regulation 32 (4) of the National Security Service Regulation 2000 ("the Regulations") as fully set out in paragraph [7] below, the Board recommended that the respondent be discharged from the N.S.S. The recommendation was in these terms:-

> *"The terms of Regulation 32(4) of National Security Service Regulations of 2000, the Board recommends that the defaulter be discharged from the Service."*

[3] Thereafter, the respondent launched a review application in

the High Court. He sought prayers couched in the following terms:-

> *"1. Declaring the disciplinary proceeding (sic) against the Applicant on 7th March 2006 irregular and therefore of no legal force and effect.*
>
> 2. *Reviewing the said proceeding (sic) and setting them aside.*
>
> 3. *Ordering Applicants (sic) re-instatement to his N.S.S post and rank with effect from his date of dismissal.*
>
> 4. *Directing the Respondents to pay Applicant's costs only in the event of opposing this application.*
>
> 5. *Granting Applicant such further and/or alternative relief this Honourable Court shall deem fit and proper."*

[4] The Respondent's grounds of review are set out in paragraph 15 of his founding affidavit. Therein he makes the following complaints:-

> "15
>
> *In summary the decision to discharge me from the office is irregular and stands to be set aside for the following reasons:*

15.0 The composition of the Board included my direct superior.

15.1 My hearing took place well over seven (7) days after I was notified of the complaint against me.

15.2 *I did not admit my guilty in writing.*

15.3 *I was not informed of my right to legal representation.*

15.4 *The Director General did not make his own recommendations to the Minister If he did he failed to provide me with copy of same.*

15.5 *1st Respondent acted both as the presiding officer and as the Director General in this case and could therefore not be seen to be fair and transparent the dealings of this case.*

15.6 *Because the Director General is enjoined to recommend to the Minister, only the Minister can confirm or set aside the Director General's recommendations.*

15.7 *The so called Minister's confirmation was made a secret to me until again 1st Respondent informed me per MM6.*

15.8 *The Board of Enquiry is supposed to make recommendations to the Director General who in turn is supposed to recommend to the Minister who is supposed to either confirm or set aside the Director General's recommendation and in the same breath I am supposed to appeal to the same Minister."*

On 26 March 2007, the High Court (Nomongcongo J) to the following conclusion:-

"*1. I found nothing irregular in the proceedings of the 7th March 2006 and therefore I would not set them aside.*

2. *I found however that the procedures provided for by Regulation 32. (1), (2), (3) and (4) of the National Security Service Regulations 2000 and Section 21 (8) and (9) of the National Security Service Act were not followed in discharging the applicant from service and such discharge was therefore unlawful.*

3. *Prayers 1 and 2 are therefore dismissed.*

4. Prayer 3 is granted as supplemented by prayer 5 for alternative relief i.e. declaring applicant's discharge unlawful although not specifically prayed for, and re-instating him to his N.S.S. post and rank with effect from the date of dismissal.

5. The applicant having only partially succeeded is entitled to only half of his costs."

[6] The appellants challenge the correctness of the learned Judge

a quo's order No.4 reflected in the preceding paragraph. The rely on a single ground of appeal which reads as follows:-

"The learned Judge errered and misdirected himself by declaring as he did that " applicant's discharge was unlawful" thereby granting a substantive prayer and/or order which was not sought in the Notice of Motion and for which no motivation was made in argument."

[7] It is now opportune to refer to Regulation 32 (1) (2) (3) and (4) of the Regulations and Section 21 (8) and (9) of the National Security Service Act 1998 ("the Act") upon which the learned Judge a quo reached for his decision declaring the respondent's discharge unlawful. The Regulation in question reads:-

"32.(1) The Board shall and the Director may, within 5 working days after the Board has issued its decision make recommendations to the Minister regarding the case and shall provide the member with a copy of the recommendations.

(2) The Member may, within 5 working days after receiving

the recommendations, appeal the Board's decision and make his recommendations to the Minister.

(3) The Minister may confirm or set aside the decision of the Board.

(4) The decision may be reprimand, suspension, demotion, salary reduction, transfer or discharge from the Service."

Section 21 (8) of the Act in turn provides as follows:-

"The board of enquiry shall, and the Director General may make recommendations to the Minister regarding the case."

Section 21 (9) reads as follows:-

"The Minister may, after considering the record of the proceedings of the board of enquiry, the recommendations of the board and the Director General if any, and the grounds of appeal, of and representations made by the member, set aside or confirm the decision of the board of enquiry and –

(a) *direct that no further action be taken on the matter;*

(b) *direct that he be cautioned and reprimanded;*

(c) *direct that he be demoted or salary be reduced to such extent as may be recommended;*

(d) *direct that the member be called upon to resign from the Service with effect from a specific date."*

[8] As indicated in paragraph [2] above, the Board duly made a recommendation to the Minister. The learned Judge a quo correctly made this finds on page 13 of this judgment when he said the following:-

> *" I come now to the letter of 26th April itself. It makes very disturbing reading. First of all, why was there need to write such a letter when on the 7th March the Board had made its recommendation and all it had to do was send it to the Minister within five working days and give a copy to the applicant? The first Respondent says in this regard that she was "only communicating the board's recommendations and did not make any decision whatsoever and as such applicant suffered no prejudice". If it is so what was the purport of the letter of the 7th March to the applicant. Further is first Respondent telling us that the recommendations of the Board of which she had been presiding officer was only being dispatched to the Minister on the 26th April – well beyond the 5 working day period stipulated by law?"*

In my judgment that finding decides the matter. The dispute should have ended at that point in favour of the appellants.

Put differently, the finding in question ought to have tipped the scales in favour of the appellants.

[9] With respect to the learned Judge a quo, what seems to have led him astray is a letter written by the first appellant dated 26 April 2006, annexure "MM4." It is addressed to the first respondent in these terms:-

"RE: RECOMMENDATION FOR DISCHARGE FROM THE SERVICE

You will recall that following your appearance before the National Security Service Staff Board sitting as a disciplinary tribunal in early March 2006 it was recommended that you be discharged from the National Security Service. This came as a result of your absenting yourself from duty for thirteen (13) consecutive days with effect from 19th December 2005 to 5 January 2006.

By this letter you are required to give reasons if any, within seven (7) working days, why the recommendations of the disciplinary board cannot be confirmed.

Yours sincerely

Sgd

L. MAKAKOLE
DIRECTOR GENERAL – N.S.S.(a.i)"

In my view, once the Board had made its recommendation to the Minister on 7 March 2006 as it did, it was strictly not necessary for the first appellant to write annexure “MM4”. It is plain from a correct reading of section 21 (8) of the Act read with Regulation 32 (1) that it is the Board which is enjoined to make a recommendation and not the Director General who merely has a discretion whether or not to do so. Nor can there be any doubt from a correct reading of these provisions that such a recommendation is made to the Minister. It follows that the letter in question is, in my view, inconsequential. The learned Judge a quo was with respect wrong to rely on it for his order declaring the respondent’s discharge unlawful. As correctly submitted on the appellant’s behalf, this was in any event not the respondent’s case as pleaded. It was not the respondent’s case for that matter, that the Board’s recommendation in question did not

reach the Minister. Nor was the order granted by the learned Judge a quo prayed for in the notice of motion, a point which he correctly concedes in order No.4 of his judgment as fully set out in paragraph [5] above.

[10] In several of its decisions this Court has deprecated the practice of granting orders which are not sought for by the litigants. See for example **Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354.** In the latter case this Court (per Grosskopf JA) said the following at page 360:-

> "*The appellant's first ground of appeal was that the court a quo erred in making the above order when neither the appellant nor the respondent had asked for it. Counsel for the respondent, on the other hand, submitted that the court a quo was fully entitled to grant such an order since the notice of motion included a prayer for further and/or alternative relief.*

> *I do not agree. The relief which a court may grant a litigant in terms of such a prayer cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent."*

Similarly, this Court has more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation. See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449;**

[11] It remains to point out that the Board's recommendation in

question was fully justified on the facts. The respondent admittedly had a dreadful record of indiscipline. In this regard the record of proceedings merits quotation:-

> "*The prosecutor pointed out that this was not the first time that the defaulter is appearing before a disciplinary board and that he always tenders the same mitigation but he never lives up to his promises. On different occasions in the past the defaulter absented himself without leave.*
>
> *In September, 2004 he was charged and convicted for absenting himself without leave from 21st to 23rd Jul, 2004 and from 5th to 11th August 2004. He was sentenced to seven (7) days forfeiture of pay on the first count and ten (10) days forfeiture of pay on the second count.*
>
> *In January, 2005 he was also charged and convicted of the same offence and convicted (sic) having absented himself with effect from 19th to 24th October 2004. He was sentenced to five days forfeiture of pay. He was also charged and convicted for proceeding to Thaba Bosiu Blue Cross Rehabilitation Centre without permission. He was sentenced to One Hundred Maloti (M100.00) salary reduction and reprimand.*
>
> *In May, 2005 he was again charged and convicted by the Staff Board for absenting himself from 01st to 04th March, 2005 and from 19th to 22nd April 2005. He was sentenced to suspension from duty without pay for two months plus a severe reprimand.*
>
> *Unfortunately these did not act as a deterrent as only two months after he returned from interdiction he absented himself hence the present charge. He therefore asked the*
>
> *Board to impose a sentence that will show the defaulter that his behaviour is viewed in a serious light."*

[12] In this Court counsel for the respondent sought to escape the obvious consequences of the latter's previous convictions by submitting that the respondent was not given an opportunity to address them. No suggestion was made, however, that these previous convictions were incorrect. In any event this submission overlooks two important factors, namely:-

(1) The court quo specifically made a finding that there was "nothing irregular" in the review proceedings in question. There is no challenge to that finding, nor can there be.

(2) The respondent does not deny the previous convictions in question. He was present at the hearing and had ample opportunity to dispute the previous convictions if they were incorrect, but he did not.

[13] As this Court stressed in **Commander LDF and Others v Retselisitsoe Ramokuena and Another C of A (CIV)**

No.19 of 2005, courts should not be insensitive to the evil that indiscipline can cause to an organization such as the NSS. The sensitive nature of this organization in particular may be gauged from section 5 of the Act. It provides as follows:-

"5. (1) The function of the Service shall be the protection of the national security.

(2) Without prejudice to the generality of subsection (1) the Service shall –

(a) protect the state against threats of espionage, terrorism or sabotage which may infringe on national security;

(b) protect that state from activities of agents of foreign powers and from actions of persons intended to over-throw or undermine democracy by political, industrial or violent means;

(c) protect the economic well-being of the state against threats posed by the actions or intentions of persons inside or out-side Lesotho; and

(d) *protect the State against any activity that my tend to operate to undermine national security."*

[14] It is plain then that, in order to discharge its functions effectively as envisaged in the Act, the N.S.S. must be served by highly disciplined men and women who take their work seriously and who do not just absent themselves from duty without leave at the drop of a hat. Otherwise the national security itself would be undermined. Viewed in this way, it follows that the respondent has got only himself to blame for his discharge.

[15] Faced with these problems, counsel for the respondent was then heard to argue that the Minister should have written the letter himself confirming the respondent's discharge. But, it will be seen that nowhere, either in the Act or in the Regulations, does the Minister bear this obligation. It surely suffices that the Director General forwarded the information for the respondent's discharge to him. This, she did by letter

annexure “MM6”dated 30 May 2006 addressed to the respondent. The letter reads as follows:-

> *“Be informed that the Honourable Minister has confirmed both the verdict and punishment recommended by the Board Enquiry upon your disciplinary case in accordance with Section 21(9) (c) of the N.S.S. Act, 1998 read with Regulations 32 (4) of the N.S.S. Regulations, 2000.*
>
> *You are therefore discharged from the Service w.e.f. 1st June 2006. You are instructed to handover to S.O. Accounts all government property that was entrusted to you during your tenure of office.”*

More importantly, it cannot be seriously disputed that the Minister did in fact confirm the respondent’s discharge. In any event, it was not, once again, the respondent’s case as pleaded that the Minister did not make such a confirmation.

[16] For the reasons which I have endeavored to highlight above I am of the opinion that the appeal should be allowed. Accordingly, the following order is made:-

(1) The appeal is upheld with costs.

(2) The judgment of the court a quo is set aside and replaced with the following order:-

"The application is dismissed with costs."

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree ---

F.H. GROSSKOPF
JUSTICE OF APPEAL

I agree ---

J.W. SMALBERGER
JUSTICE OF APPEAL

FOR APPELLANT**:** **Mr T.S. Putsoane**
FOR RESPONDENT**:** **Mr B. Makututsa**