IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 50/2022

CIV/APN/325/2019

IN THE MATTER BETWEEN:

LEHLOHONOLO ALOTSI **APPELLANT**

AND

COMMANDER OF LESOTHO

DEFENCE FORCE **1ST RESPONDENT**

PRESIDING OFFICER- SUMMARY TRIAL PROCEEDINGS OF LDF **2ND RESPONDENT**

MINISTRY OF DEFENCE **3RD RESPONDENT**

MINISTRY OF FINANCE **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

CORAM: K.E MOSITO P

P MUSONDA AJA

N.T MTSHIYA AJA

HEARD: 19 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

Punishment meted out by the LDF Disciplinary inquiry - whether punishment was commensurate with the alleged offence – Discretion of Commander of the Defence Force to discharge a soldier from the Army in terms of Section 31 (b) and (c) of the

Lesotho Defence Force Act 1996, upon such a soldier having been charged, convicted and sentenced for the offence – whether discharge dismissal amounts to double jeopardy- Commander of Defence Force properly using his/her discretion- appeal dismissed.

JUDGMENT

MTSHIYA, AJA

Introduction

[1] The appellant served in the Lesotho Defence Forces (hereinafter 'LDF') as a 'Private' for close to 10 years. On 29 December 2018, he was charged and convicted for 3 military offences. He was sentenced to detention for 80 days. He did not immediately contest the conviction and sentence. Following his conviction and sentence, he was later dismissed from the LDF.

The appellant then approached the court a quo on Notice of Motion for a review of the LDF disciplinary proceedings.

On 31 August 2022, Khabo J, in the High Court, dismissed his application.

[2] Aggrieved by the decision of the High Court, the appellant then filed this appeal.

Background

[3] Appellant's case arose as a result of offenses he committed when he was still employed as a 'Private' in the LDF.

On 25 December 2018, the appellant, together with 9 other soldiers, was in patrol at Ha Peete Military Base. They went to a local bar and ended up exceeding 22:00hrs, which is the prescribed time for military members to be outside the barracks. A fight broke out at the bar between members of the military and civilians. Members of the military went back to the barracks and ordered their superior, one Corporal Thabi to hand over riffles to them. Thereafter there was a shootout at the bar leading to the death of a civilian. Some other civilians were also injured in the shootout.

[4] On the 31 December 2018, the appellant and his co-accused appeared before Presiding Officer, Major Lekoatsa, for summary trial relating to military offences they had committed at Ha Peete Military Base. They all pleaded guilty to the charges laid against them.

For his part, the appellant was charged with the following offences;

a. Disobedience to Directive No 1 of 2004 an offence arising out of military service, contrary to Section 53(1) of the Lesotho Defence Force Act No 4 of 1996.
b. Acting in a disorderly manner, an offence arising out of military service contrary to Section 77(2) (a) of the Lesotho Defence Force Act No 4 of 1996.
c. Using insubordinate language to a superior officer, an offence arising out of military service contrary to

> Section 50(1)(b) of the Lesotho Defence Force Act No 4 of 1996.

[5] The appellant pleaded guilty to the above three charges laid against him. The presiding officer, in the summary trial proceedings, Major Lekoatsa, found him guilty and sentenced him to 80 days in detention. He also severely reprimanded the appellant. Upon conviction and sentence the presiding officer informed the appellant that he had 14 days within which to appeal against the sentence. As already stated under paragraph 1 above, he did not challenge both the conviction and sentence.

However, notwithstanding the fact that he pleaded guilty to the 3 charges, and did not immediately challenge both conviction and sentence, in his review application, the appellant reversed his position and started asserting that he was coerced into confessing yet he was not involved in the commitment of the crimes.

[6] After his detention, the appellant was, on 28 February 2019 discharged from the military. In discharging him from the army, the Commander of the Lesotho Defence Force, the 1st respondent herein, acted in terms of section 31 of the **Lesotho Defence Act 1996** (the Act) which provides as follows:

> *A soldier of the Defence Force may be discharged by order of the Commander of the Defence Force at any time during the currency of the term of engagement on the grounds that –*
>
> *a. the soldier cannot carry out his duties efficiently;*

b. *it is not in the best interests of the Defence Force for the soldier to remain in the force;*
c. *the soldier has been convicted of a civil or military offence;*
d. *the soldier engages in active politics;*
e. *or the public interest so requires. (My own underlining)*

[7] I hasten to say that, *in casu*, the 1st respondent was of the view that, with the appellant having been convicted of the three military offences referred to in paragraph 4 of this judgment, it was no longer *"in the best interests of the Defence Force for the soldier to remain in the force."*

It is important, at this stage to note that the relevant part of the law quoted above does not refer to sentence. It merely states *"the soldier has been convicted of a civil or military offence*;". That tells me that, depending on the gravity of the offence, the 1st respondent may, even in a situation where a soldier is pardoned, still proceed to discharge him or her in terms of section 31 of the Act. All the 1st respondent has to ensure is that he or she is proceeding on the basis of a proven offence (i.e conviction upon trial). There is no dispute that the offences committed were serious and obviously offended the standing ethics of the force.

[8] Prior to discharging the appellant from the army, the 1st respondent had asked him to show cause why he should not be discharged from the army in view of the offences he had committed. In the show cause notice dated 12 February 2019, the 1st respondent, upon having cited the 3 offences for which

the appellant was charged, convicted and sentenced, then, in part, wrote:

> *"4. AND WHEREAS as the result of the above, the Lesotho Defence Force Command is of the view that you may not be a fit and proper person to continue serving in the Defence Force lest your presence would render deterioration of discipline within the _Defence Force;*
>
> *5. YOU ARE THEREFORE required show cause, if any, the Chief of Defence Staff in exercising powers vested in him pursuant to. Section 31 (b) and (c) of Lesotho Defence Force Act No. 4 of, 1996 may not discharge you from the Defence* force."

[9] On 20 February 2019 the appellant responded to the show cause notice in a manner wherein he was mainly apologizing and begging for lenience. Part of his response read as follows:

> *"Here, with all the remorse in mer I humbly apologise truthfully to have broken the law of the Military that at the tenth hour in the night all soldiers should be where they are stationed in law. Indeed this mistake I did not make intentionally. My intention was still to make it back in time but being human, I got carried away. With this, I humbly apologise on my behalf.*
>
> *General Sir, here I give a full account of the truth. There was a fight that broke out at a bar where I, Pvt Alotsi, have no idea how it started, how the fight ended with us soldiers, we ran back to the Military Base where we all going to ask for guns to rescue Pvt Ramarou. I, Pvt Alotsi, was never given a gun, the guns were given to Private Teolo and Private Khoaisanyane.*

> *Commander Lesotho Defence Staff, General Sir, I yet again implore you for mercy as I had been in an unwarranted exchange with Corporal Tlhabi, where it appears that I insulted him, I am not a vulgar person at all. I am a soldier who respects a lot, I follow orders. Corporal Tlhabi was ordering me to not go back with the soldiers to go get Private Ramarou. I indeed stayed behind, this is evident that if I spoke to him in an improper manner, it was not intentional therefore I deeply apologise General Sir."*

[10] To me, the show cause notice was yet a second chance given to the appellant to move away from the supposedly forced confession that led to conviction and sentence. As we have already seen, he had earlier on been given the opportunity to challenge both conviction and sentence within fourteen days. He did not avail himself that opportunity. My view is that his response to the show cause notice did not constitute a possible change of plea. Instead, his response confirms the findings in the summary proceedings.

[11] The appellant's apology/ explanation was rejected by the 1st respondent. He was then discharged from the army through a letter dated 28 February 2019. The discharge letter read, in part, as follows:

4. AND WHEREAS you were invited to show cause, if any, why Chief of Defence Staff in exercising the powers pursuant to Section 31 (b) and (c) of LDF Act NO, 4 of 1996; may not discharge you from service.

5.AND WHEREAS on the 20th February 2019 you wrote your response to the show cause notice whereby you do not dispute the conviction by a military court for acting in a' disorderly manner and tarnished the image of LDF but indicate that you were not part of the alleged assault incident.

6. TAKE NOTE however, that The Chief of Defence Staff has carefully considered your response but does not accept your request not to be discharged on the basis of reasons stated in the show cause notice. Be informed, therefore, that you have been discharged from the Defence Force pursuant to the abovementioned provision of law and your discharge shall be effective upon receipt of this letter."

[12] The appellant challenged his dismissal/discharge mainly on the ground of unfair treatment. He then approached the court a quo on a notice of motion seeking the following reliefs:

1. *That the applicant be granted condonation for the late filing of review in the event of the court finding the review to have been filed out of time.*
2. *That the 1st and 2nd respondents be ordered to file with court and in terms of Rule 50 of the High Court Rules 1980 a record of proceedings of the summary trial proceedings of the applicant.*
3. *That the summary trial proceedings against the applicant be reviewed, corrected and set aside.*
4. *The 1st respondent be ordered to file the record that he based his decision on to determine and decide that the applicant should be discharged from the Lesotho Defence Force.*

5. *The 1st respondent's decision to discharge the applicant from the Lesotho Defence Force be reviewed, corrected and set aside.*
6. *That the applicant be reinstated to his position in the Lesotho Defence Force without loss of emoluments and seniority on the rank of initial rank of Private.*
7. *That the respondents be ordered to pay costs of this application.*

[13] On 31 august 2022, the court a quo dismissed his application.

On 1 September 2022, the appellant filed this appeal citing the following grounds:

i. *The learned judge a quo erred and thus committed a misdirection by not upholding the appellant's version that he was subjected to double jeopardy.*
ii. *The learned Judge a quo erred and misdirected herself in dismissing the application as the appellant was subjected to severe punishment against the appellant which punishment was not commensurate to the alleged facts.*

Issues for determination

[14] My view is that the above grounds of appeal can be considered together under one main issue namely: whether discharge from the army after a sentence of 80 days in detention and severe reprimand, constituted double jeopardy and was therefore not commensurate with the crime(s) committed.

The Law

[15] Rule 4 of the Defence Force (Discipline) Regulations 1998, allows for summary trials in the LDF. The rule provides:

> *"A charge reported in terms of this regulations shall be investigated by the presiding officer to whom it is reported, and, subject to these regulations, be disposed of by-*
> *a)*
> *b)*
> *c) summary trial; or*
> *d)--*
> *e)—*

Section 1 of the Act defines *"military court" as "court-martial or a court of summary jurisdiction".* The rules also say *"summary trial" means a summary trial held in terms of the Act;"*

The appellant herein was subjected to a summary trial and of the 3 charges placed before him, the most serious one was that of insubordination. In terms of the act the sentence attaching to that charge should not exceed 3 years. The relevant section provides, in part, as follows:

> *"Insubordinate behaviour*
> *50. (1) Any person subject to this Act who—*
> *(a) –*
> *(b) uses threatening or insubordinate language to a superior officer, commits an offence and shall, on conviction be liable-*
> *(i) if the offence was commuted on active service to imprisonment for a term not exceeding 3 years.*
> *(ii)—"*

[16] The above provision does not provide for discharge/dismissal. That can however, be done under s.31 which we have quoted under paragraph 6 of this judgment. We have, in quoting the relevant law, underlined the portions of that law that are applicable to this case. Under that section special discretionary powers are given to the 1st respondent for the purposes of ensuring discipline in the army. In the exercise of that power, the 1st respondent is empowered, where

necessary, to discharge a soldier from the army if satisfied that the character of such a soldier does not render him fit to remain in the army. That section, in my view, provides for a special form of punishment dictated by the character of a soldier serving in the army. The 1st respondent is granted discretion to use his/her power under that section to ensure the maintenance of discipline in the army. Generally, the available punishments for offences committed by soldiers/ officers serving in the army are spelt out under section 82 of the Act.
The above are the provisions of the law that will guide us in the determination of this appeal.

Appellant's case

[17] The appellant alleges that he was coerced to plead guilty in the disciplinary proceedings. He avers that he was threatened by Major Lekoatsa that if they pleaded not guilty, they were going to appear before the court martial. He states that this prompted him to plead guilty when he was not. It is his assertion that the evidence during the summary trial proceedings was not sufficient to prove him guilty. That, however, is despite the fact that he pleaded guilty to the charges.

[18] Not only that, he also alleged that the dismissal amounted to double jeopardy because he had served his sentence, namely: 80 days in detention and being severely reprimanded.

[19] The appellant further complained that that there was discrimination in that another co-accused was not dismissed from employment. In that regard he mentions Private Mariti who was also charged at the summary trial but was pardoned and is still in the employ of the LDF. He argues that the counts of misconduct were not grave enough to warrant a discharge from the military.

Respondent's case

[20] The 1st respondent, in my view, correctly argues on the contrary that the dismissal was within the ambit of the law as provided under Section 31 (b) & (c) of the Act. Under that section, the 1st respondent is authorised to dismiss/discharge a soldier in the event that he/she is convicted of a military offence and thus exhibiting conduct which is not in the best interests of the force.

[21] The respondent further argued that the appellant committed serious offences, one of them being the use of insubordinate language towards a superior. That kind of misconduct undermines the employment relationship as it is a clear sign of indiscipline. Given the gravity of the appellant's misconduct, the 1st respondent is of the firm view that the punishment accorded to the appellant is commensurate with the act of misconduct and does not therefore constitute double jeopardy. I agree.

Analysis: whether discharge from the army after a sentence of 80 days in detention and severe reprimand, constituted double

jeopardy and was therefore not commensurate with the crime(s) committed.

[22] The appellant alleges that his dismissal from the LDF was not proportionate to the misconduct committed. He tends to belittle the 3 crimes he committed and yet for one of them, namely insubordination, the trial officer was permitted, under the law, to imprison him for a period of not less than 3 years. That in itself tells us the seriousness with which the offence is viewed under military law. If we were, *in casu*, faced with a situation where the trial officer had imposed a sentence of dismissal, that would obviously have been against the law that we have quoted above. In the circumstances of this case the power of discharge/ dismissal is exercisable by the 1st respondent who is responsible for the maintenance of discipline in the army. In proceeding to discharge the appellant, the 1st respondent, guided by the ethics of the army, in my view, followed the law to the letter. The court a quo properly acknowledged this fact and I therefore have no reason to fault its finding on that issue.

[23] We have before us a situation where the appellant, an adult and trained soldier, pleaded guilty to the 3 charges in issue, but later wanted to claim coercion. I reject the purported reversal of his plea. He had ample opportunity, in what I believe to have been a fair trial, to change his plea and face a court martial, if he so wished. Upon sentencing him, the trial officer advised him: *"You have a chance of 14 days for appealing the sentence to the reviewing authority".* Furthermore, in response

to the Show Cause Notice, all he could do was to apologise and ask for leniency. There was, in my view, no denial by him of having committed the offences. I therefore find no evidence to the allegation that the appellant was subjected to an unfair trial to the extent that his constitutional rights were violated. That did not happen *in casu*.

[24] In discharging the appellant from the army, the 1st respondent, in my view, correctly applied the provisions of s. 31 of the Act 1996. I have no doubt that, faced with the appellant's convictions on the three military crimes he was charged with and given the need to maintain discipline in the army, what then dictated action on the part of the 1st respondent was: "it *is not in the best interests of the Defence Force for the soldier to remain in the force;"*.

I am accordingly persuaded to go along with the respondents' following submission on the issue:

> *"Looking at the present case, the appellant was charged and convicted of various military offences, the Commander invoked section 31 (b) and (c) of the Act as a means to protect its objects with regard to maintaining discipline in the army. Appellant used distasteful language towards a superior, which in itself alone is such a grave offence in the military context where members of the military are expected to be the epitome of discipline. In the case of Senekane v Commander LDF and Others [ll] His Lordship quoted with approval the sentiments passed by the late Ramodibedi JA as he then was, when he warned the courts dealing with matters relating to discipline of members of the disciplined forces, to always be alive to the*

> *negative impact ill-discipline can cause in those institutions.*

In agreeing with the sentiments expressed by the late *Ramodibedi JA in Senekane* ***v Commander LDF and Others [2020] LSHC21,*** the respondents quoted the following:

> *Courts should not be insensitive to the evil that indiscipline can cause to the force and indeed to the Basotho nation, as history will show. One must remember therefore that, the Act [Lesotho defence Force Act no 4 of 1996] was enacted preciously to remedy mischief. Approached in this way, it follows that the interpretation of section 31 by a court a quo to the effect that the Commander has no power under the section to discharge a member following disciplinary convictions and consequent punishment thereof is insupportable."*[1]

[25] Given the above submissions, which I agree with, and the need to maintain military discipline, I am satisfied that the 1st respondent used his discretion judiciously in defence of discipline in the army. The conduct of the appellant rendered him unfit to remain in the army. Accordingly, the argument that the punishment was harsh and constituted double jeopardy, cannot be used to defeat the need for discipline in the national army.

[26] It should further be noted that the relevant part of the law under which the 1st respondent acted does not concern itself with sentence, but conviction. Once there is a conviction, as provided under the law, the 1st respondent can safely proceed to use his discretion on determining whether or not a person of the character exhibited by the appellant can still remain in the

---

[1]

force. To that end, the Show cause Notice cannot be equated to a second trial. That said, the issue of double jeopardy cannot arise. Generally, Justice demands that no one should be tried twice for the same offence. It is basically all about fairness and emanates from the principle that it is unfair to ***"jeopardise"*** a person twice for the same offence.

[27] The right to be protected from double jeopardy is a constitutional right. It is provided for in section 12 (5) of the Constitution, which states that:

> *"no person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall be tried again for that offence or for any other criminal offence, of which he could have been convicted at the trial for that offence save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal".*

In casu, the above provision in our law was not violated.

[28] In addressing the issue of punishment *in casu*, we must always bear in mind that every profession has a standard of discipline and conduct that is accorded to it. The army is no exception and as long as it follows the law in meeting out punishments to offenders, it should be supported. That is precisely what is called for in this case.

[29] I fully embrace the manner in which the issue of double jeopardy was addressed in ***Commander LDF and Others, supra.*** That case, in my view, serves to confirm that it is the conduct and indeed the character of the soldier that informs the mind of the Commander when, in enforcing discipline in the army, he resorts to discharge. The Act clearly sets out the circumstances under which the Commander can proceed to discharge a soldier.

[30] *In casu*, the appellant committed military offences which clothed him with a character that made him unfit to remain serving in the army. The double jeopardy principle could therefore not be invoked in the circumstances. There was no issue of him being tried twice. Two separate procedures were undertaken as provided for under the law (i.e summary trial and Show Cause Notice). The 1st procedure was for the purposes of proving criminal offences committed whilst the second procedure was anchored on the need to ensure that the army is manned by men and women of good character.

[31] All in all, the action of the 1st respondent *in casu*, was a simple affirmation of what type of conduct is expected in the army. I would therefore not find it unreasonable for the army administration to regard a person of the character of the appellant as someone not fit to remain in the army. The 1st respondent was therefore not wrong to find that the appellant had offended the expected conduct of a soldier in the army.

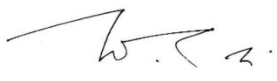
[32] Finally, in the circumstances of this case, I also find that there was no discrimination in the decision reached by the 1st respondent. The court a quo rightfully noted that Private Mariti had two charges against him unlike the appellant who had three charges. Accordingly, the weight of their offenses was different, hence the differences in judging their characters.

Disposal

[33] Given the foregoing, where, in the main, the 1st respondent acted in terms of the law, this appeal cannot succeed.

Order

1. The appeal is dismissed with costs.



N T MTSHIYA

ACTING JUSTICE OF APPEAL

I Agree:

K.E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I Agree:

P. MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: M.W. MUKHAWANA

FOR RESPONDENTS: ADV R. MAKHOALI- BOROKO