

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C of A (CIV) NO. 32/2022
CIV/APN/0170/2022**

In the matter between

**COMMISSIONER OF POLICE
APPELLANT**

1ST

**ATTORNEY GENERAL
APPELLANT**

2ND

And

**MOLIEHI DLAMINI & 11 OTHERS
RESPONDENTS**

CORAM : DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD : 21 OCTOBER 2022
DELIVERED : 11 NOVEMBER 2022

SUMMARY

First appellant, Commissioner of Police, dismissed respondents from police recruits training programme on finding that they had markings or tattoos characteristics of a criminal gang; Dismissal occurring after High Court had issued interim order stopping first appellant from dismissing the respondent but interim order only served two days after the dismissal; Not established conclusively that first appellant had personally seen the interim court order, though clear that order had been brought to attention of one or two police officers at Police Training College;

On hearing application by respondents to set aside decision of first appellant, High Court finding against first appellant that by the date of hearing he should by then have complied with the interim order and re-admitted respondents into training programme; Further, that first appellant's action was unlawful as done in disregard of interim court order; Court setting aside first respondent's decision and reinstating respondents into training programme;

On appeal, first appellant contending that even with finding that first appellant had disobeyed interim order and his conduct being unlawful, court, nonetheless, in exercise of its discretion, should not have granted relief sought by respondents;

Appeal with costs to be paid by respondents upheld accordingly

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The 1st appellant discharged twelve recruits, including the 1st respondent, Moliehi Dlamini, from a police training programme on 25 May 2022. When he discharged the recruits, the High Court had issued an interim order on the previous day, 24 May 2022, prohibiting him from discharging the respondents from the training programme. The interim order resulted from an urgent *ex parte* application by the respondents in Case No. CIV/APN/0169/2022. In that application the final relief sought was an order setting aside the 1st respondent's decision terminating the respondents' engagement as police recruits.

[2] It is in dispute whether the 1st appellant was aware of the interim court order when he discharged the respondents. First appellant's counsel however did not insist on the resolution of this factual dispute. He was content to argue the appeal on the basis that even if the 1st appellant acted in disobedience of the interim court order, the High Court should, nevertheless, have dismissed the respondents' application in proper exercise of its discretion.

[3] The discharge of the respondents on 25 May 2022 prompted them into lodging the matter now on appeal, Case No. CIV/APN/0170/2022, without pursuing the application in Case No. CIV/APN/0169/2022 to its logical conclusion. The application was on urgency again. The relief in this second application was that the 1st appellant should produce to the court the record of proceedings leading to the decision to discharge the respondents; that the discharge be held in abeyance until the application was finalised; that as final relief the decision to discharge the respondents be set aside as null and void, and the respondents be reinstated into the training programme.

[4] When Case No. CIV/APN/0170/2022 came up for hearing in the High Court, the 1st appellant raised the special plea of *lis alibi pendens* with reference to Case No. CIV/APN/0169/2022. The court dismissed the special plea finding that the cause of action was different in Case No. CIV/APN/0170/2022 from that in Case No. CIV/APN/0169/2022, in that, in the former

application the cause of action arose from the discharge of the respondents, whereas in the latter it arose from the need to provide particulars sought by the respondents from the 1st appellant and to hold in abeyance the process potentially resulting in the discharge of the respondents. There is no need to decide whether the finding of the High Court on this issue was correct. No issue was raised before us concerning that finding.

[5] The High Court considered the question whether the 1st appellant was aware of the court order in Case No. CIV/APN/0169/2022 when he discharged the respondents from the training programme on 25 May 2022. It came to the conclusion that the 1st appellant's office was aware of the interim order. The court did not find, as a matter of fact, that the 1st appellant himself was aware of the order before he dismissed the respondents.

[6] It is common cause that the Deputy Sheriff served the interim court order on 27 May 2022 because he had encountered difficulties in doing so on 24 and 25 May 2022. When the court considered the reaction of the 1st appellant to the interim order on 23 June and delivered its judgment on 29 June 2022, it took the further point that since, admittedly, the interim order was served on the 1st appellant on 27 May 2022, 1st appellant should have taken steps to give effect to that interim order: he did not do so, and to that extent, he was in contempt of the order. The failure to give effect to the interim

order between the date of service on 27 May 2022 and the date of the hearing on 29 June 2022, became the bedrock of the court's finding against the 1st appellant.

1. The court reasoned that when the respondents did not show cause by 8:00 am on 25 May 2022, as earlier required of them by the 1st appellant, they were not at fault: they acted in accordance with the interim court order. In this regard the court said:

[35] The next issue that this court has to determine is whether it can be rightly said that the [respondents] failed to furnish their representations as requested.
....

[36] ... the answer to this question is in the negative, because the [respondents] had a valid, reasonable and lawful reason for not furnishing their representations, simply because there was an order of this court (CIV/APN/0169/2022) which directed that the furnishing of the requested representations had been suspended. [Respondents] had approached this court, asking for the suspension of the submission of the letters of their respective representations. [Respondents] being armed with copies of the court order to that effect, would not reasonably be expected to do what was contrary to the order they were aware of. To expect them to do otherwise,

would be taken to have abandoned the said court order. It is for this reason that this court finds that the [respondents] did not fail to submit their representations nor waive their right to be heard, as they acted in total compliance with the court order in CIV/APN/0169/2022 of Makhetha J.

[37] This court concludes that the termination of [respondents'] appointment as Police Recruits was unlawful because there was an order of court which had directed and ordered the suspension of the [respondents'] letters of representations. The court finds that the [respondents] complied with the order in CIV/APN/0169/2022, therefore it could not rightly be said they failed to furnish the required letters of their representations, therefore waived their right to be heard."

[7] The High Court accordingly set aside the decision to terminate the respondents' engagement as police recruits and ordered their reinstatement "into the Police Training College Recruitment Programme without loss of benefits." Additionally it ordered the 1st appellant to pay the respondents' costs.

Grounds of appeal

[8] The appeal was initially based on five grounds of appeal, four of which the appellant abandoned at the hearing of the appeal. The abandoned grounds of appeal consisted of (a) a

challenge to the court's dismissal of the special plea of *lis alibi pendens*; (b) a contention that the court was erroneously "influenced" by the interim order in CIV/APN/0169/2022 to set aside the 1st appellant's decision when that was "another independent case that the respondents have even filed a Notice of its withdrawal"; (c) a challenge that the court had ignored the fact that the 1st appellant had not been served with the interim order when he discharged the respondents; and (d) a challenge that the court ignored the fact that when the respondents were discharged they had denied themselves the right to be heard by failing to respond to the show cause letter by 8:00 o'clock in the morning on 25 May 2022.

[9] The one ground that survived the abandonment reads:

"The court a quo erred and misdirected itself in granting the application on (sic) the face of salient facts and evidence and a clear position of law which were all in favour of dismissing the application."

[10] In abandoning the other four grounds of appeal, counsel for the appellant was not entirely clear as to whether he was also abandoning professed challenges to certain findings of fact, especially the finding by the High Court that the office of the 1st appellant, and by implication the 1st appellant himself, was aware that an interim order had been issued in Case no. CIV/APN/0169/2022 on the day before he discharged the appellants from the training programme. This was an important

finding of fact because if the 1st appellant was aware of the interim order and proceeded nonetheless to discharge the appellants, he was in contempt of the interim order of court. That would have rendered his decision to discharge the respondents unsupportable at law. It is necessary now to set out the salient facts underlying this appeal.

Background facts

[11] The respondents were drafted into the police recruits training programme commencing on or about 1 May 2022. They contend that they had been subjected to a vetting process which they describe in these terms:

“The vetting process was conducted by members of the [1st appellant] in terms of which all people who had registered their names were vetted. I must disclose from the outset that the vetting process is very critical as it is one of the pre-conditions before a person could be appointed to the Police Service. The vetting process was done by the members of the [1st appellant] who would visit us in our different villages and upon their arrival, they would visit our Headman and/or Chief of the area to interview with the aim of getting all the necessary required information. The vetting process was done around July 2020 to September 2020.”¹

[12] The respondents said that after the vetting they were interviewed on two occasions, in November by way of a ‘written interview’, and in December 2020 by way of an oral interview. Thereafter they underwent medical examination. The medical

¹ Para 6.2 of founding affidavit

examination report indicated clearly that the respondents had tattoos on their bodies, also described as “ visible markings”. The respondents are therefore of the view that the vetting process was completed at the end of September 2020 and that the interviews and medical examinations were not strictly part of the vetting process. I think they were in error on this score. The 1st appellant’s evidence is more on point.

[13] The 1st appellant takes a completely different view of what constitutes vetting. He explains the process in detail at paragraphs 6 to 8 of the answering affidavit. He states that recruits were called to the Police Training College for intensive medical examination by a medical doctor of the Police Service stationed at Katlehong. This was done on 2 May 2022. From that date onward, the respondents were subjected to ‘intensive character vetting’. Responding specifically to the respondents’ paragraph 6.2 quoted above, the 1st appellant states:

“6.1 ... the first stage in the process for hiring police is for the candidates or applicants to sit for the written interview. The process leading to written interview will start by applicants registering their names in Police Stations in their respective districts. The registration of names is only for logistical purposes to determine the number of question papers to be prepared for the written interview.

6.2 The applicant’s version as to when the vetting was done is totally untrue, misleading and also unfounded. The applicants are saying vetting process was done around July 2020 to September 2020. Mysteriously applicants are saying they were vetted at the time when the police [had] not even made

advertisement of a job or calling any person to register in preparation for any interview. Applicants version is not only untrue but amount to perjury which is a criminal offence.”

[14] The 1st appellant states that the call to interested persons to apply for recruitment was made on 8 October 2020. The registration of applicants in preparation for written interviews was between 12 and 16 October 2020. The written test was on 17 October 2020. An oral interview of those that passed the written test then followed. The vetting proper only started after these interviews. The respondents were medically examined by two doctors at different times. First, a government medical doctor examined them and found them to be physically fit individuals. That examination did not mean that the respondents were also fit and proper persons to become police officers. The second medical examination was by the Police medical doctor at Katlehong, a week before the respondents started training.

[15] The 1st appellant emphasized that character vetting is different from medical fitness vetting, and the latter is not relevant to the present case. The medical examination is only relevant to the extent that it disclosed that the respondents had on their bodies tattoos and markings which are characteristics of a notorious criminal group or gang called *Manomoro*. This discovery prompted the 1st appellant to conduct a more rigorous character vetting from June 2021 to 13 May 2022. Arising from the tattoos on the respondents' bodies, the 1st appellant became convinced that the respondents were

not of good enough character and could not be trusted to become honest, competent and reliable police officers.

[16] On 13 May 2022 the 1st appellant sent a letter to each of the respondents calling upon them to show cause why, in light of the results of the character vetting, they should not be discharged or removed from the training programme. The show cause-letter was specific that the vetting process had revealed that the character of each of the respondents “is not satisfactory and as such you cannot become an efficient and effective member of the Police service.” It called upon each of them to give reasons by 16 May 2022 why “your appointment in terms of section 31(1)(a) of the Lesotho Mounted Police Service Act, No. 7 of 1998 read with Regulation 3(1)(c) of the Lesotho Mounted Police Service (Administration) Regulations of 2003” should not be terminated.

[17] The 1st respondent, as did the other respondents, wrote a letter to the 1st appellant on 16 May 2022 requesting for more time, 3 days at least, to consult with his lawyers and respond to the show-cause letter. In the letter he lamented and pleaded:

“I am unable to react issueable (sic) to your aforementioned letter and as such, I respectfully request your good self to provide me with the said vetting report to enable me to seek advice from my lawyers and to make representations as requested.

I am unable to protect my rights in the absence of the vetting report and it would be unfair if the said

vetting report would not be availed to me so as to make an informed representation.

I humbly request the Honourable Commissioner not to proceed to terminate my appointment pending the issuance of the said report and my representation."

[18] He received a response from the Police Human Resources Officer on the same day, 16 May, pertinently responding to the request:

"Re: Letter of Representation for Discharge

The above captioned subject bears reference together with your letter of response dated 16th May 2022. Kindly take notice that the vetting report reveals that you are a member of a notorious criminal gang (Manomoro) and you bear the markings /tattoos characteristics of that gang on your body.

Further note that the vetting report contains sensitive security information, hence classified and as such it cannot be consumed by yourself but only the LMPS.

You are therefore requested to provide your response by 1600hrs on Wednesday the 18th of May 2022."

[19] On 18 May 2022, instead of responding to the show-cause letter, the respondents protested that because they were being accused of membership of a notorious criminal gang, they should be informed clearly how the 1st appellant arrived at that adverse conclusion; "who and what compiled such report" and whether the 1st appellant had analysed the marking characteristics of the criminal gang, and compared the markings with those on their bodies and satisfied himself that

the markings or tattoos are indeed those of the criminal gang. They further protested that other recruits, about twenty altogether, inclusive of themselves, have tattoos on their bodies, and a presumption was made that the markings or tattoos on the other recruits are not related to a criminal gang. They requested for information on how the 1st appellant differentiated between the markings leading to the conclusion that those on their bodies align with those of a criminal gang and the others do not. They insisted on being availed of that portion of the report relating to them and not the entire report. They requested to be given the qualifications of the officers who examined them during training because they believed that the officers concerned were not experts on tattoos. They were thus seeking further particulars to the allegation against them. They also complained that the period of 3 days given to them for carrying out consultations with their lawyers was too short.

[20] The 1st appellant replied to the respondents' letter of 18 May 2022. He gave them another four days, released them from the Police Training College "to go to your respective homes ... for the purpose of adequate and free consultation with the lawyers of your choice and make the required representation, as you initially requested." In the same letter the 1st appellant declined the request for further particulars contending that the

"further and better particulars you requested were duly provided in a clear manner per letter dated 16th May 2022. In the said letter the Commissioner of

Police stated that, the vetting report revealed that you are a member of a notorious criminal gang (Manomoro) and you bear the markings/tattoos characteristics of that group on your body."

[21] The letter again advised the respondents that the vetting report contained sensitive security information and would not be availed to them. It called upon the respondents to "go home from 19th May 2022 until 25th May 2022 at 0800hrs when you will be expected to report back at PTC and furnish your response, if any." It warned the respondents that a failure to make representations in answer to the show-cause letter by 25 May 2022 would be deemed to be a waiver of the right to make representations.

[22] The respondents did not make representations in response to the show-cause letter. Instead, they lodged an *ex parte* urgent application in Case No. CIV/APN/0169/2022, on 24 May 2022 with a return day of 31 May 2022. They asked the court to

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(a) prohibit the 1st appellant from discharging them as signified in the show-cause letter;

(b) order the 1st appellant to permit the respondents to continue with the training and hold in abeyance the show-cause letters;

(c) furnish the court, within 10 days of the order, with the record of proceedings or deliberations which resulted in

the decision refusing to provide the further particulars requested;

(d) find that the 1st appellant's refusal to furnish the particulars requested by the respondents should be set aside;

(e) order the appellant to furnish the particulars requested within 10 days of the order;

(f) declare that the respondents were entitled to the vetting report alleging that they were members of a criminal gang;

(g) set aside or nullify "any processes that may have ensued as a consequence of the ... refusal to furnish the [respondents] with further particulars"; and

(h) set aside the 1st appellant's decision discharging the respondents from the training programme and directing their reinstatement without loss of title and benefits.

[23] The High Court granted, as interim relief, an order interdicting the 1st appellant from discharging the respondents as foreshadowed in the show-cause letters; an order directing that the respondents be permitted to continue with the training; an order directing the 1st appellant to hold in abeyance the show-cause letters; and an order directing the 1st appellant

to produce the record of proceedings resulting in the refusal to provide the further particulars.

[24] The Deputy Sheriff failed to serve the interim order on the 1st appellant on 24 May, late afternoon around 5.30 pm, and in the afternoon of 25 May 2022. He explained the challenges he encountered in serving the interim order. The explanation boils down to a failure on his part to find and pin down a police officer willing to receive or accept service of the interim order, in the absence from work of the police officer entitled to accept service. He was able to serve the interim order on 27 May 2022, after the respondents had been discharged from the training programme on 25 May 2022.

[25] The High Court, as already mentioned, found as fact that the offices of the 1st appellant were aware of the interim order when the 1st appellant discharged the respondents. That awareness was inferable from the fact that the Deputy Sheriff attempted to serve the interim order on 24 May but was advised by a police officer that the officer who was entitled to receive and accept service was not available, and that when he attempted to serve the order on 25 May the officer concerned, who he had spoken to on the phone, was again not available to receive service. It found as fact that when the respondents reported early morning on 25 May 2022, they each were holding a copy of the interim court order which they showed to one of their instructors, Sir Chitja, who had asked for their responses to the show-cause letters. Chitja gave no regard

whatsoever to the interim orders that the respondents held: his interest, and perhaps only mandate, was to receive from the respondents the letters of representation. The court, it seems to me, did not place much stock on its finding that the office of 1st appellant was aware of the interim order arising from the Deputy Sheriff's attempts to serve it on 24 and 25 May 2022. It considered as critical the fact that after service on 27 May 2022, the 1st appellant did not, as it expected him to have done, act in accordance with the interim order. It found that this failure on his part so to act was unlawful and thus negated the validity of his decision.

Issuance of interim orders on *ex parte* and urgent basis

[26] Before dealing with the main challenge to the judgment of the High Court, I am constrained to comment in passing on the issuance by the court *a quo* of the interim order following an urgent and *ex parte* application. This Court requested the registrar to advise the parties that it was inviting them to make submissions on the propriety of proceeding *ex parte* in Case No. CIV/APN/0169/2022. Due to inadvertence, we believed, the registrar did not advise the parties about the Court's request. We therefore did not receive submissions on the issue.

[27] The record of proceedings before us does not show that there was any good reason that the High Court permitted an *ex parte* and urgent application in CIV/APN/0169/2022. The parties had engaged each other from at least 16 May 2022 when the show-cause letters were sent to the respondents. For example,

a request was made by the respondents for an extension of time within which to respond to the show-cause letters and it was readily granted. The 1st appellant could not have been reasonably suspected of possibly taking any furtive or under the table action detrimental to the respondents between the date of the *ex parte* application and 25 May 2022. In my view the 1st appellant should have been given notice of the motion and an opportunity to explain his position for the court's consideration. The appearance of the respondents snatching at an interim order cannot reasonably be disputed.

[28] Courts eschew *ex parte* proceedings unless it is reasonable to hold that a respondent if given notice would act in a manner detrimental to the interests of the applicant and designed to defeat the purpose of the application. I am satisfied that the present is a matter in which the High Court should have refused to hear it on an *ex parte* basis and ordered that the 1st appellant be given due notice of the application. In all likelihood there would have been no reason for the institution of proceedings in Case No. CIV/APN/0170/2022. Some of the developments that compelled this appeal could well have been avoided. Courts must exercise care when entertaining and granting urgent *ex parte* applications.

Sole ground of appeal

[29] In considering the ground of appeal challenging the High Court decision, it is imperative to clearly understand its

articulation by appellant's counsel. He submitted that when the court reached the conclusion that the discharge of the respondents was unlawful because that decision was made in disregard of the interim order, that should not have been the end of the matter. In so submitting, it follows, counsel did not think that it was any longer necessary for this Court to consider whether, as a matter of fact, the 1st appellant was in contemptuous disregard of the interim order. He appeared to accept that there was an unlawful disregard of the interim order especially after the order had been served on 27 May 2022,.

[30] What, however, must not be lost sight of is that CIV/APN/0169/2022, with a return day of 31 May 2022, was already before court having been lodged on 24 May 2022. On 27 May 2022, CIV/APN/0170/2022 was instituted, also with a return day of 31 May 2022. As such there were two applications before court, both seeking, in substance, to set aside the 1st appellant's decision. I think that the 1st appellant was within his rights to await the outcome of the two applications, either of which could result in the setting aside or approval of the decision he had made. It is not clear what happened to CIV/APN/0169/2022 before and on its return day. There is some indication in the 1st appellant's heads of argument that it was withdrawn at the hearing of the other application. In all the circumstances it does not appear to me to have been correct for the court to find that the 1st appellant disobeyed the interim

court order and to use that as a basis for setting aside his decision discharging the respondents from the training programme.

[31] Counsel for the 1st appellant submitted that the decision of the court *a quo* that the discharge of the respondents was unlawful arising from a failure or refusal to obey a court order should not have been the end of the matter: the court was entitled, in exercise of its discretion in such proceedings, to consider other factors before granting the application. He identified the issues for decision on appeal as being ²–

“3.1 ... whether the Commissioner, in deciding as he did to discharge the recruits, committed any reviewable irregularity or acted wrongly as alleged by them.

3.2 Even assuming without deciding there was some reviewable irregularity or wrong committed by the Commissioner, the next question is whether, the review being a discretionary remedy, there were considerations and factors militating against the setting aside of the Commissioner’s decision.”

[32] Having abandoned most of the 1st appellant’s grounds of appeal, counsel did not advance argument relating to the first issue above. He therefore focussed on the second issue only. He submitted that even if the 1st appellant’s decision was irregular or wrong based on non-compliance with the interim order, the court *a quo*’s inquiry should not have ended at that point or finding. A review is a discretionary remedy, and the

² See p 5-6 of appellant heads of argument.

court ought to have enquired into the circumstances of the matter and decided based thereon, whether to grant its final order. In this regard counsel relied on *Manyokole v The Prime Minister*³, a decision of this Court.

[33] In *Manyokole*, the appellant had been unlawfully denied the right to be heard as required by the *audi alteram partem* principle, but this Court held that under our system of judicial review, a finding of unlawfulness of administrative action does not automatically result in the setting aside of the decision concerned: the court retains a wide discretion in the matter. At that stage the issue becomes one of ‘*appropriate remedy*’ in circumstances where the applicant sought discretionary remedies of declarators, review and setting aside. The Court had this to say about the discretionary nature of remedies on review:

“[86] Both declaration and review are discretionary remedies. Thus even if a case has been made out that a public functionary acted unlawfully, the court must still exercise its discretion whether or not to grant the relief sought.

[87] As Baxter writes:

‘With the exception of the interdict de libero homine exhibendo (which is available as of right), the common law remedies of interdict, mandamus and review to set aside or correct are discretionary: they may be withheld by the court even if the substantive grounds for the grant of the remedy have been made out. In

³ (C of A (CIV) 15/2021) [2021] LSCA 9 (14 May 2021).

addition, declaratory orders are specifically stated by the Supreme Court Act to be discretionary. The discretion is a judicial one, in the sense that the court will carefully weigh all the surrounding circumstances, exercising a wide but principled discretion.'

[88] *The South African Supreme Court of Appeal correctly related the principle as follows in Oudekraal Estates (Pty) Ltd v City Council of Cape Town and Others:*

'A court that is tasked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.'"

[34] Counsel for the 1st appellant submitted that having determined that the 1st appellant disobeyed the interim court order, the court should nonetheless, in exercise of its discretion, have considered whether in the circumstances of this case, it should or should not have granted the relief sought. This means that even if the court *a quo* was right that the 1st appellant had disobeyed the interim order it was still open to it, in exercise of its discretion, to consider the surrounding circumstances, and having done so, to decide whether or not to grant the relief sought.

[35] It is evident that the ground of review upon which the court *a quo* found against the 1st appellant is illegality or unlawfulness, in the sense that the 1st appellant acted in defiance of an interim court order. Counsel submitted that the court should have considered that the vetting report showed that respondents, on the face of it, belonged to a criminal gang; the 1st appellant's mandate of maintaining law and order in the country cannot be achieved through persons of questionable character, such as the respondents were suspected to be; there was a public outcry against brutality of police and its ineffectiveness in combating crime; the 1st appellant's decision was on a matter exclusively for his judgment as it was essentially one of assessing character and suitability to become a police officer; no clear basis for interfering with the exercise of 1st appellant's discretion was set out; and that even if the court considered that the respondents had been wronged, rather than order reinstatement, it should have left the respondents to seek damages as may have been appropriate.

[36] At the hearing of the appeal, it seemed to me that counsel for the respondents was caught flat-footed by the 1st appellant's abandonment of most of the grounds of appeal except the one. He had prepared lengthy written submissions on the abandoned grounds of appeal and had not dealt substantively with the unabandoned ground. In response to 1st appellant's submissions deriving from *Manyokole's* case, counsel baldly stated that *Manyokole* is not applicable and that the High Court was correct in its decision.

Discussion

[37] The position of the law as set out in *Manyokole* and the authorities therein referred is clear. This Court has no basis for departing from that view of the law. I now consider whether on the facts of this matter the High Court should have arrived at a different decision.

[38] The recruitment of police officers in any country is a matter of immense public interest. The general public reposes tremendous trust in the police force. As stated by the 1st appellant, the police must recruit within its ranks men and women of impeccable character. Now, in this case, the respondents bear tattoos of a criminal gang. Should the police recklessly admit into its ranks persons with indicia of an unlawful group of criminals. It must not be forgotten that, apart from its mandate of keeping law and order, the Police service is also an intelligence and security organisation. It necessarily becomes aware of any untoward characters, especially those associated with gangsterism.

[39] Upon becoming aware of the characteristics of the respondents and their association with the *Manomoro* gang, the Police advised the respondents that they had to explain their seeming association with the gang and acquit themselves of the accusation that they are members of the gang. They were given ample opportunity to do so. They sought certain further particulars and the vetting report. These were denied to them. The vetting report is a security document. In my view, the further particulars were not necessary to enable the

respondents to answer to the accusation that they faced. Confronted with a not unreasonable denial of the vetting report and further particulars, the respondents approached the court for temporary orders in an urgent and *ex parte* application, without providing a sufficient basis for the *ex parte* procedure.

[40] The accusation that the respondents faced was sufficiently clear to enable them to respond to it: it was alleged they had on their bodies tattoos and markings characteristic of the *Manomoro* criminal group. Even if they thought they were entitled to some further information, they should, at least, have responded in outline. In civil proceedings generally, it is not normally a sufficient ground for delaying a defence that the defendant has sought further and better particulars of the statement of claim. The scope of particulars is limited. They may not be sought to discover the evidence which the other side will call at the trial. In reality, pleadings tell little more than the very basic issues in dispute. Similarly, when the respondents were called upon to explain the tattoos on their bodies they knew, without any basis for doubt, the issue they had to explain. The vetting report, it reasonably can be assumed, contained other information in the nature of evidence on which the 1st appellant relied for proving the accusation. The further particulars sought were not, on any view of the matter, necessary to enable the respondents to answer the allegation against them.

[41] The respondents rushed to court seeking the interim and final relief set out in the interim court order. The interim relief

was granted by the court.⁴ The final relief⁵ was not granted because it was overtaken by the institution of proceedings in Case No. CIV/APN/0170/2022, in which the respondents sought substantially similar relief as set out in the judgment of the court⁶. The interim relief sought in CIV/APN/0170/2022 was granted on 31 May 2022 and the final order on 29 June 2022. The terms of the final order were that the 1st appellant's decision removing or discharging the respondents from the police recruitment programme was set aside and that the respondents be reinstated into the training programme without any loss of benefits.

Critical issue for decision on appeal

[42] The critical issue for decision in this appeal is whether the court *a quo* exercised its discretion judicially in all the circumstances of the case before it. And whether this is a proper case for this Court to interfere with the exercise of discretion by the lower court.

⁴ (a) that the 1st appellant be restrained from discharging the respondents as contemplated in the show-cause letters; (b) that the 1st appellant allows the respondents to continue with the training pending finalisation of the application; (c) that the show-cause letters be held in abeyance pending the finalisation of the application; (d) that the 1st appellant produces the record of proceedings leading to the refusal to furnish further particulars sought by the respondents

⁵ (a) that the decision refusing further and better particulars be set aside; (b) that the 1st appellant provide further particulars within 10 days of the order; (c) that the respondents be availed the vetting report disclosing that they are members of a notorious criminal gang; (d) that the processes ensuing from a refusal to provide further particulars be set aside; and (e) that the decision discharging the respondents from the training programme be set aside and that respondents be reinstated.

⁶Para[1] of judgment to wit, that (a) the 1st appellant produce the record of proceedings resulting in the decision to remove the respondents from the training programme; (b) the decision taken by the [1st appellant] to discharge the [respondents] from the recruitment programme be held in abeyance until the application was finalised; (c) the decision to discharge the respondents from the programme be set aside as irregular and null and void; (d) the 1st appellant reinstate the respondents into the recruitment programme.

[43] I start with the second issue. This Court, being a court of appeal, should not interfere with the exercise of judicial discretion by a lower court except in limited circumstances. In answering this second issue, it is necessary to identify the category of discretion which the court of first instance exercised. Stegman J in *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd*⁷ said:

“... when the exercise of a discretionary power by a court of first instance is taken on appeal, the court of appeal is faced with at least two distinct tasks. The first task relates to the general characterisation of the discretionary power in question in the case. The purpose is to determine whether the function of the court of appeal is to re-examine any aspect which the parties may seek to re-argue on the existing record; or whether such court’s function is limited to an inquiry into the question whether the court below exercised its discretion judicially. When the task of characterisation has been performed, the second task (if it arises at all) relates to the examination of the particular exercise of the discretionary power by the court of first instance, and the decision whether or not to interfere with it. The nature of such a second task varies according to the characterisation of the discretionary power in terms of the first task.

There are at least two categories to one or other of which the discretionary powers exercised by the courts of first instance may be assigned. The first of such categories relates to matters having the character of being so essentially for determination by a court of first instance that it would ordinarily be inappropriate for a Court of Appeal to substitute its own discretionary power for the exercise thereof decided on by the court of first instance. The first matters identified as falling within this category were those discretionary powers that related to a judge’s

⁷ 1989(4) SA 31(T) at 35I – 36H

control of the conduct of the business in his own court. Later the first category was broadened to include certain other discretionary powers.

The second category relates to matters having the character of being equally appropriately determinable by the court of first instance and the court of appeal.

When a particular discretionary power has been found to be of the character which places it in the first category, the court of appeal has no jurisdiction to substitute its own exercise of discretionary power for that decided upon at first instance unless it has been made to appear that the exercise of the power at first instance was not judicial. That can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle or with bias or without substantial reasons.

When a particular discretionary power has been found to be of the character which places it in the second category, the court of appeal has jurisdiction to substitute its own exercise of discretion for that decided upon at first instance without first having to find that the court of first instance did not act judicially. Sufficient reasons for the court of appeal to do so must be shown, but the reason need not reflect on the judiciality of the decision at first instance. The court of appeal may interfere on the simple basis that it considers its own exercise of discretionary power to be wiser or more appropriate in the circumstances."

[44] The position of the law has been expressed similarly in other authorities, which state that it is not enough that the appellate court considers that if it had been in the position of the court of first instance, it would have taken a different course. The authorities show that it must appear that the court of first instance has committed some error in exercising the

discretion. If such court acts upon a wrong principle or allows extraneous or irrelevant matters to guide or affect it or mistakes the facts or does not take into account relevant considerations, then its decision should be reviewed and the appellate court may exercise its own discretion in substitution, provided it has the materials for doing so.⁸

[45] The exercise of discretionary power by the court *a quo* falls, in this case, in the second category because the issue is equally determinable by this Court.

[46] Coming back to the issue whether the court *a quo* exercised its discretion properly in the circumstances of the matter before it, I think it did not. The issue that gave rise to this litigation was the requirement by the 1st appellant that respondents should show cause why they were not to be removed from the police recruits training programme. The reason for this requirement was that respondents had, on their bodies, tattoos or markings depicting that they were members of a notorious criminal gang, *Manomoro*, and it was absolutely essential for the Police to be satisfied that they were not members of that gang. The judgment or assessment as to the persons or characters that the respondents are, is one pre-eminently for the Police Service to make, based on the information before it. The respondent did not make any representations on why they should not be discharged. The concern of the Police service has still not been addressed. If it is allowed to stand, the decision of the court *a quo* would put paid

⁸ Cf *Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S) at 62F-63A, per Gubbay CJ, and *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350.

to any further efforts to get to the bottom of the issue, and the Police Service would be constrained to train and admit into its ranks, persons who they otherwise would not. At the very minimum the court *a quo* should, rather than set aside the 1st appellant's decision and order the respondents' re-instatement, have directed as appropriate and as it saw fit, that either the 1st appellant avail the vetting report and furnish the further particulars, or that the respondents respond to the show-cause letters.

[47] At issue on review in Case No. CIV/APN/0170/2022 was whether the 1st appellant's decision should be set aside and, if so, whether the respondents should be re-instated without loss of benefits. The 1st appellant's decision could not be set aside merely on the basis that it had been maintained in the face of an interim order that not only had been obtained *ex parte* and had not been served before the decision was made, but also that the decision was now before the court for determination. The decision of the 1st appellant was on an issue entirely within its remit because it is concerned with character assessment of persons to join the Police Service. It cannot be disputed that the 1st appellant is the person with the expertise to make such an assessment. He must be permitted to perform this function to its logical end.

[48] Pre-eminent in the inquiry whether the court should have exercised the discretion not to grant the discretionary relief (as contended for by 1st appellant's counsel) is the trite

consideration that a decision maker's choice of action should be validated if it falls within a range of reasonable alternatives open to the decision maker. As I pointed out earlier, the Police Force is the agency of the state whose mandate it is to prevent and investigate crime. In pursuit of that mandate, it is possessed of information that is not available to the judicial branch. What is remarkable in the present case is the choice made by the respondents - faced with an allegation of membership of an organisation whose *raison de'être* is the very antithesis of what the Police Force's mission is - to raise technical defences such as how the investigation was conducted instead of making an unequivocal denial of membership of a criminal gang.

DISPOSITION

[49] Two things are indisputable in this case: The Police's assertion that *Manomoro* is a criminal gang and that it has unique markings. What is a further relevant consideration that should have gone in the scale is the fact that the identified individuals had similar tattoos (a fact also not denied) and that they happened to seek entry into the Police Force (one doubts coincidentally) at the same time.

[50] The appeal should therefore succeed. In the matter of costs, I consider the fact that the Police Service did not play ball when it came to service of the interim order and that contributed to the manner in which this case unfolded. Each party must bear its on costs in the High Court and on appeal.

Order

[51] It is ordered that-

1. The appeal succeeds. The decision of the court *a quo* is set aside.
2. Each party to bear its own costs in the High Court and in this Court.



M H CHINENGO
ACTING JUSTICE OF APPEAL

I agree



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV S T MAQAKACHANE

FOR RESPONDENTS: ADV R SETLOJOANE