CIV/APN/94/2012

IN THE HIGH COURT OF LESOTHO

In the matter between:

MPITI LEUBANE **Applicant**

and

THE COMMANDER L.D.F. **1st Respondent**

ATTORNEY GENERAL **2nd Respondent**

JUDGMENT

Coram: **Hon. Hlajoane J**

Date of Hearing: **14th May, 2012.**

Date of Judgment: **22nd May, 2012.**

Summary

Lesotho Defence Force Act No.14 of 1996 – Discharge of soldiers from the Army in terms of section 3 (a), (b) and (c) of the Act – Commander having discharge the Applicant in circumstances where he was just a first offender No record of previous convictions shown – Whether the

decision by the Commander of discharge Applicant was abuse of his discretion – Effect of making a decision without given reasons – Application granted with costs.

Annotations

Cited Cases

Commander Lesotho Defence Force v Ramukuena 2005 – 2006 LAC 320

National Transport Commission & Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726

Statutes

Lesotho Defence Force Act No.4 of 1996

Lesotho Defence Force Act Directive 4 of 2002

Dangerous Medicine Act No.21 of 1973

[1] This is an urgent Application wherein the Applicant sought to be granted the following prayers:

(a) The normal modes and periods of service shall not be dispensed with on the grounds of urgency.

(b) The decision by the 1st Respondent to discharge Applicant from the service of Lesotho Defence Force shall not be reviewed, corrected and/or set aside.

© The Applicant shall not be re-instated to his position within the Lesotho Defence Force without any loss of salary, opportunities and benefits.

(d) The 1st Respondent shall not be ordered to pay Applicant all salary arrears from the date of discharge to the date of the granting of this order within thirty (30) days of the said order.

(e) Costs of suit on attorney and client scale.

[2] There has been no dispute that Applicant has been a member of the Lesotho Defence Force under the 1st Respondent.

[3] That during the night of the 3rd November, 2011 Applicant was arrested by members of Lesotho Mounted Police Service at or near Sefika Taxi rank here in Maseru. When he was so arrested, the time was 1:30 a.m.

[4] After his arrest he was handed over to the Military Police at Mejametalana Air Wing, where he was searched and found to have been in possession of dagga. He was then sent for detention at Makoanyane Barracks.

[5] He was later charged on two counts of disobedience to standing orders in contravention of **section 53 (1) of the Lesotho Defence Force Act**[1] read with **Lesotho Defence Force Directive**[2] and illegal possession of dagga in contravention of **section 79 of the**

[1] No.4 of 1996
[2] No.4 of 2002

Lesotho Defence Force Act[3] which also is a contravention of **section 3 (b) of Dangerous Medicine Act**[4] respectively.

[6] Applicant was summarily tried. He pleaded guilty to both charges and a verdict of guilty on both counts was returned. He was sentenced to a fine of M100.00.

[7] Applicant was later served with some correspondence from the 1st Respondent which invited him to make a representations of why he should not be discharged from the army following his conviction and some other allegations.

[8] In that invitation letter for representation applicant was referred to as a drug abuser in that he was on one occasion found feeding frogs with beer and on the other chasing a goat claiming "*o e thoasitse"*.

[9] Applicant did in fact make his representation and rightly so denied allegations of feeding frogs with beer and "ho thoasa" a goat as they were appearing for the first time in that invitation letter and there was no proof of such.

[10] Applicant therefore considered his discharge after having been convicted as being grossly irregular hence his application for review. He argued that even the sentence that was imposed of payment of M100.00 clearly demonstrated that the offences were not of such a serious nature.

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[3] As in 1
[4] Act No21 of 1973

[11] Applicant mentioned about other army personnel who have been convicted of even more serious offences that his but that no drastic measures as to discharging them were ever taken. What he said has not been substantiated by any form of evidence, for it to carry some evidentiary value.

[12] It has been the Applicant's case that the actions of the 1st Respondent to discharge him were improper and done in bad faith or actuated by ulterior purposes. His reasons for so saying being that there has been no record whatsoever before the 1st Respondent to have called upon him to have taken the steps he took to discharge him.

[13] What Applicant said above would be surprising to say there was no record yet he has not denied that he was charged and convicted on two counts on his own plea and given a punishment. Such copy of the proceedings has been attached to the answering papers.

[14] Though Applicant has denied that he was once confronted about using dagga he has however been in agreement with Respondent's submission that before facing a strict and formal disciplinary measures there would have been some informal reproach where necessary so that there would be no record of those initial informal measures taken.

[15] Applicant has also challenged the decision to discharge him by the 1st Respondent in that 1st Respondent has failed to furnish him with

reasons for having arrived at the conclusion he made to discharge him.

[16] On looking at the letter of discharge the 1st Respondent has shown that he came to the conclusion of discharging the Applicant after reading his response to the letter requiring him to make a representation.

[17] Reading from the 1st paragraph of his letter of representation Applicant has shown that though he could not claim to have been knowledgeable in law, but he had observed that police would arrest people with bags of dagga. That could be interpreted to mean that Applicant considered that it was no offence to be found in possession of small quantities of dagga which in most cases would be for smoking. That in itself would tend to confirm that Applicant's superiors had been discussing with him the issue of him being found in possession of dagga and of course smoking dagga.

[18] The charge sheet clearly reflected the two charges under which the Applicant stood charged. The charges were under both the **Lesotho Defence Force Act**[5] **and the Criminal Law**. To be found in possession of dagga is an offence under both the Lesotho Defence Force Act and **Dangerous Medicine Act**.[6]

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[5] Act No.4 of 1996 supra
[6] Act No.21 of 1973 supra

[19] 1st Respondent in his letter of discharged showed that he invoked the Provisions of **Section 31 (a), (b) and (c) of the Lesotho Defence Force Act**[7]**.** The section reads thus:-

Discharge by Commander of the Defence Force

Section 31: 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 following grounds that –

(a) The soldier cannot carry out his duties efficiently;

(b) It is in the best interests of the Defence Force for the soldier to remain in the force;

© The soldier has been convicted of a civil or military offence.

[20] It becomes evident in the reading of the above section that the powers to discharge have been entrusted on the Commander of the Defence Force. The section has also detailed out grounds upon which a soldier may be discharged.

[21] Applicant has referred to the case of **Commander LDF and Others v Ramokuena and Another**[8] to emphasize his point that though the two cases to a great extent may be similar but what is distinguishable in **Ramokuena** has been that the Respondents had been discharged for several serious offences.

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[7] See 5 above

[8] 2005 – 2006 LAC 320 at 330

[22] The **Ramokuena's** case supra also emphasized the point that the Commander in dealing with the question of discharge of a soldier has to consider previous convictions and punishments.

[23] That may well be so, but each case has to be treated on its own merits. Same offences may appear to be trivial in nature but when giving them a serious thought may turn to be more dangerous. The offence of possession of dagga is determined by the quantity of dagga found with the culprit, which will be a small quantity measured in some grams.

[24] Taking the issue of possession a bit further, will include considerations like who is that person found in possession, where was he found and in our case what time of the day.

[25] We are dealing with a soldier who in terms of **section 5 of the Defence Act** is charged with,

"Maintenance of essential services including maintenance of law and order and prevention of crime."

[26] Like a police officer, a soldier is a person who has to maintain law and order and prevent crimes. Applicant was found drunk at unholy hours of the night when he was expected to be at home sleeping if not on duty. He was found at awkward places and in possession of dagga which is a criminal offence.

[27] 1st Respondent has shown in his answering affidavit that it is specifically imperative that members of the force should not engage in drug use considering the obvious danger that such a

situation poses as regards people like the Applicant, who have abundant access to such an array of lethal weapons.

[28] It cannot be denied as argued by the 1st Respondent that the Force is an organization which entirely depends on good discipline hence why its members will always commonly be referred to as Members of the Disciplined Force.

[29] **Section 53 (i) of the Defence Force Act** under which the Applicant was charged has also been reinforced by making a **Directive**[9] which made it an offence punishable by law for a soldier to be found roaming about at awkward places like the Sefika Taxi rank at about 1:30 a.m.

[30] By his own confession in his letter or representation Applicant has said that he had told his superior that though he was ignorant of Law but he had seen police arrest people with bags of dagga. Meaning that according to him though a soldier there was nothing bad about him being found in possession of dagga, that was only a small quantity and not bags.

[31] **Section 53 (1) of the Defence Force** referred to above is couched in the following words: Disobedience to Standing Orders

"Any person subject to this Act who contravenes or fails to comply with any provisions of orders to which this section applies, being a provision known to him, or which he might reasonably be expected to

[9] Directive No.4 of 2002

know, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding 2 years."

[32] Applicant must consider himself to have been lucky because he was only fined M100.00 yet it was mandatory to have been given a 2 year imprisonment without an option of a fine.

[33] The question then to be asked would be whether the 1st Respondent's decision could be classified or attacked on the grounds of abuse of discretion? Whether there were *mala fides,* ulterior purpose and failure to apply his mind.

[34] Applicant's counsel has described ulterior purpose to simply mean a situation where public bodies are not entitled to deviate from purposes for which power was conferred on them.

[35] 1st Respondent had suggested in the answering papers that it would not be in all transgressions that would be a subject of a formal Court Process. Others would normally be dealt with by verbal informal approach. That charging a member of the force formally would often not be a first step but only a move taken when all less stringent endeavors would have failed, and this was confirmed by the Applicant in his replying papers.

[36] As shown above **section 31 (c) of the Defence Force Act** dictates that a soldier of the force may be discharged by order of the commander where such soldier has been convicted of a civil or military offence.

[37] Applicant has thus contravened the provisions of the section by being found drunk around the taxi rank late in the night at 1.30a.m., and also found in possession of dagga. But a single conviction alone would not suffice.

[38] Looking at the letter of discharge it will be realized that the reasons for discharge are that Applicant has been convicted of a military offence in contravention of **section 31 (a), (b) and (c) of the Lesotho Defence Force Act.** Also that Applicant is considered not fit to carry out military duties efficiently and that it would not be in the best interest of the Defence Force to retain him.

[39] Now looking at the decision in **Commander Lesotho Defence Force and Others v Ramokuena and Another**[10] the Court advised that in the ordinary course of events, the commander in dealing with the question of a soldier's discharge from the force must consider previous disciplinary convictions and attendant punishments.

[40] But in our case it has not been part of the Respondents case that Applicant had any other previous convictions to the present. So that no proof of his previous convictions was ever advanced.

[41] I find it therefore to have been a valid argument by the Applicant to have said in his papers that, if for any offence committed, no matter how minor, a soldier was to be discharged from the army,

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[10] See 8 Supra

then the army would certainly fail to exist as a viable institute. The cure therefore would be a previous record of previous convictions.

[42] Above all, the 1st Respondent has not clearly advanced reasons as to why Applicant was considered unfit to carry out his military duties efficiently or that it was not in the best interests of the force to retain him. The reasons have been given by counsel in argument but were not in the letter of discharge. Conviction alone would not be considered sufficient without giving reasons for such discharge. As was said in **National Transport Commission & Another v Chetty's Motor Transport (Pty) Ltd**[11]**,** that there was failure to apply ones mind to relevant issues in accordance with the behests of the Statutes and the tenants of natural justice.

[43] Applicant was a first offender and the manner of his punishment is proof enough that the offence was considered as a minor offence.

[44] The decision to discharge the Applicant is under the circumstances of this case considered unreasonable to a first offender, and is therefore set aside.

The Application thus succeeds with costs safe to say that payment be made within a reasonable time.

A. M. HLAJOANE
JUDGE

[11] 1872 (3) S.A 726

For Applicant: **Mr Mosotho**

For Respondents: **Mr Mokobocho**