IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/241/2008**

In the Matter Between:-

MOKITIMI SENEKANE **PLAINTIFF**

AND

COMMANDER OF LESOTHO DEFENCE FORCE **1ST DEFENDANT**

MINISTER OF DEFENCE AND NATIONAL SECURITY **2ND DEFENDANT**

ATTORNEY GENERAL **3RD DEFENDANT**

JUDGMENT

CORAM : MOKHESI J
DATE OF HEARING : 10th .03.20 and 31st.08.2020
DATE OF JUDGMENT : 15th OCTOBER 2020

SUMMARY

ADMINISTRATIVE LAW: *Plaintiff seeking a review of the Commander's decision to discharge him, by issuing summons, not through motion proceedings as enjoined by Rule 50 of the High Court Rules- Propriety of the procedure dealt with- The court found that there is nothing wrong with seeking to review an*

administrative decision through issuance of summons- Discretionary powers- Exercise of discretionary powers to discharge a soldier in terms of s.31 (c) of the Lesotho Defence Force Act dealt with- The motive, and its relevance, for the exercise of public power considered- Held, that because the Commander had weaponized his discretionary power, the exercise thereof was unlawful- The plaintiff's claim succeeds with costs.

ANNOTATIONS

STATUTES:

HIGH COURT RULES 1980

Lesotho Defence Force Act No. 4 of 1996

Defence Force (Regular Force) (Discharge) Regulations of 1998

CASES:

S v Baleka AND Others 1986 (1) SA 361 (T)

Jockey Club of South Africa v Forbes 1993 (1) SA 649 (AD)

Federated Convention of Namibia v Speaker, National Assembly of Namibia & Others 1994 (1) SA 177 (NM)

Steenkamp and Others v Edcon Limited 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC)

Commander of the LDF and Others v Ramokuena and Another LAC (2005 – 2006) 320

Mokhele and Others v Commander LDF CIV/APN/442/16 [2016] LSHC (14 February 2018)

Roberts v Hopwood 1925 AC 578

Susannah Sharp v Wakefield 1891 AC 173, 179; ALL ER Rep 651 (HL)

Highstead Entertainment (PTY) ltd t/a 'The Club 'v Minister of Law and Order 1994 (1) SA 387 (C)

Beaver Marine (PTY) Ltd v Wuest 1978 (4) SA 263(AD)

Mustapha v Receiver of Revenue, Lichtenberg 1958 (3) SA 343

Chief Constable of the North Wales Police v Evans [1982] 1 W.L.R 1155

Shidiack v Union Government (Minister of Interior) 1912 AD 642

MOKHESI J

[1] *INTRODUCTION*

This matter represents a classical example of an age-old adage that justice delayed is justice denied. This matter was filed in 2008 and pleadings were closed in 2009, only for it to be heard eleven (11) years later in 2020. I must make it plain that I was only allocated this matter in 2019 after being confirmed as a permanent Judge of this Court. The plaintiff had approached this court seeking the following relief (in trial proceedings):

> *a) That it be declared that the purported discharge of the plaintiff by the first defendant from the L.D.F is set aside as being invalid and /or malicious and of no force and effect.*
> *b) That the plaintiff be reinstated unconditionally and without loss of benefits*
> *c) Costs of this suit.*
> *d) Further and/or alternative relief.*

As it is apparent from the reliefs sought, the plaintiff (despite the wording used) is essentially seeking a review of an administrative decision by issuing summons and not on notice of motion as decreed by Rule 50(1)(a) of the rules of this court. I return to this aspect in due course as there was much confusion from counsel as to what kind of proceedings we were dealing with. It must be made plain that plaintiff's counsel, Mr Nthontho, is not the original

counsel of record. For reasons better known to him, the plaintiff changed counsel and, in turn, instructed Mr Nthontho.

[2] ***FACTUAL BACKGROUND***

The factual background to this case is a bit loaded, but for purposes of this judgment I will only confine myself to those facts which I consider germane for its resolution. Even though the plaintiff had issued summons against the defendants, the facts of this case are common cause. On the 16th February 1997 a military operation was carried out at the Police Headquarters to quell a police strike which had been going on at the time. On duty on that day was the plaintiff's brother, a police officer by the name of Monyatsi Senekane. During that operation Monyatsi was killed, and, naturally, the plaintiff was aggrieved by this.

[3] On 08th August 2006, after nine years of the death of Monyatsi Senekane, an Inquest into his death was held, presided over by the learned Magistrate Tśeliso Bale (Inquest No. 26/2006). During the proceedings when it transpired that Leutenant General Makhula Mosakeng, Major Mafoea, Colonel Matobakele, Second Leutenant Nkeli and Leutenant Phaila were the likely suspects, the learned Magistrate decided to summon them so as to give them an opportunity to participate in the proceedings. The Prosecutor informed the Court that the above men had communicated their decision not to participate in the proceedings. At the conclusion of the Inquest, the learned Magistrate recommended that all the five

men be charged with Monyatsi's murder. The Inquest was held in June 2007.

[4] In 2004, the plaintiff was charged before the Court Martial for disobeying orders and was given two months confinement as a sentence. After the plaintiff had served his two-months confinement sentence, he continued to serve in the army (LDF) until 16 November 2007 when he gave an interview to the Local newspaper, Public Eye. He was interviewed by one Nthakeng Selinyane. In that interview Mr Selinyane interviewed the plaintiff at length about his brother's death, his quest for justice for his death and other incidental matters. This would turn out to be a proverbial straw that broke the camel's back, because consequent to this interview, on the 23rd November 2007 he was served with a letter from the then Commander of LDF – Leutenant General E.T Motanyane, requesting the plaintiff to make representations as to why he could not be discharged from the Lesotho Defence Force.

[5] The basis of this letter was the Public Eye interview alluded to above, and was in the following terms (where relevant):

> *"YOUR LIKELY DISCHARGE FROM LESOTHO DEFENCE FORCE.*
>
> *1. The above matter refers.*
>
> *2. WHEREAS you were interview by a weekly newspaper by the name of Public Eye on the 16th November 2007 the title*

of the interview which reads "Senekane soldiers on for justice".

3. *WHEREAS during the said interview you made some highly derogatory statements about the Lesotho Defence Force and its officers. Page 10 to 11 of the same paper you mentioned some LDF officers before a Magistrate in relation to the death of your brother and that they did not address the Court and you were later told that they decided "to make it known they had nothing to say". You went on to say that the said officers "are enjoying their lives and multiple promotions, and freely posting on international missions and scooping lucrative benefits," while you are laboring under pain.*

4. *FURTHERMORE, you claim (page 11) that during the funeral of your father in 2003 you publicly made a statement that "one cause of his death was the unresolved murder of his son by the army." Then you claim that thereafter you were called to resume duties and you served under "Mofolisa" (Brigadier) whom you told that "the army is not his mother's house" "sesole ha se sa 'ma'e" where he alone can enjoy the comforts of life. A soldier who has the audacity to utter such words to his superior is an abomination to the military establishment.*

5. *FURTHERMORE, You admit to be maintaining close contact with notorious convicts such as Phakiso Molise, Monau and Makateng.*

6. *BE INFORMED that the view of the command is that you are in essence proclaiming yourself a judge who has established that some officers of LDF have killed your brother. In your boundless wisdom you have also found it not proper that they are still serving and being promoted. To make matters worse you are insulting the officers of the organization you serve. You have been informed more than is necessary that legal conclusions surrounding the death of your brother can only legitimately be reached by the judiciary in terms of the Constitution and other laws of this country.*

7. *BE INFORMED therefore, that it is the Command's view that it is no longer in the interests of the LDF for you to remain as a member. As such you are required to show cause, if any, why you may not be discharged from the service in terms of section 31(b) and (c) of the Lesotho Defence Force Act NO. 4 of 1996 in that it is no longer in the organization's interest for you to be retained as a member, and that you were convicted of two military offences in 2004 whereby*

you have disobeyed particular orders. The circumstances of the referral of the referred trial are somehow related to your continuing misconduct. You are even admitting to have deliberately disobeyed orders.

8. *BE INFORMED further that you cannot continue to serve an organization while at the same time displaying the above-mentioned despicable conduct. You are requested to make an answer to this letter within seven 7) days of receipt of this letter. Failure on your part to comply will entitle the Commander LDF to effect the discharge without further reasons.*

SIGNED AT MASERU This 23rd DAY OF NOVEMBER 2007

_____

LEUTENANT GENERAL E.T MOTANYANE
THE COMMANDER LESOTHO DEFENCE FORCE."

[6] The plaintiff made representations as requested and admitted being interviewed by the Public Eye Newspaper. Crucially, he indicated that he had a right to comment on the death of his brother as the findings of the Inquest were common knowledge

(are in the public domain). Obviously, the Commander of LDF was not satisfied with the plaintiff's representation, and on the 17th December 2007, discharged the latter from the LDF on the basis of the allegations contained in the "show cause" letter(above).

[7] *ISSUES FOR DETERMINATION*

A) Whether the plaintiff was bound to seek review of the Commander's decision through the instrumentality of rule 50(1)(a) only and not through issuance of summons.

B) Whether the Commander of LDF's decision to discharge the plaintiff from LDF in terms of section 31 (b) and (c) of the ***Lesotho Defence Force Act No. 4 of 1996 (****hereinafter 'the Act')*, was invalid and/or malicious.

[8] *PROBLEM OF CHARACTERISING THE PROCEDURE.*

Before, and during argument, both counsel seemed to struggle grappling with the issue of characterizing the plaintiff's claim. This is important because, Attorney Nthontho did not originally represent the plaintiff and was not responsible for initiating the proceedings. The relief being sought is a declarator that the Commander LDF's decision to discharge the plaintiff from the army be set aside as being invalid and/or malicious, and for his reinstatement as a consequential relief. This apparent confusion was engendered by the fact that the plaintiff instituted these proceedings by way of summons instead of an application for

review, but in my view, nothing turns on this, as it is demonstrated below.

[9] Rule 50(1)(a) of the Rules of this Court would seem to oblige every review of the decision of the tribunals or Subordinate Court or administrative decision, be on Notice of motion. But if this rule is to be read with together with rule 8(14), I do not find it to be saying that even where it is foreseeable that disputes of fact will arise that the party should proceed by way of Notice of Motion. So, the use of the word 'shall' in the rule is not decisive as to whether it is peremptory to invoke this Rule even where circumstances require that summons be issued. The purpose for which this Rule was designed must be properly understood. The purpose for which this rule was created, as has been said in the context of similarly worded rule 53 of the South African Uniform Rules of Court was stated in ***S v Baleka AND Others 1986 (1) SA 361 (T)*** at pp 397I-398A where the court said:

> " The second procedural question is whether the applicants are not confined to review proceedings under Rule 53 of the Rules of Court should they wish to question the validity of the order issued by the Attorney-General under s 30, as indeed they do. I do not think so. Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential

material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked."

[10] These views were endorsed in ***Jockey Club of South Africa v Forbes 1993 (1) SA 649 (AD) at 661E-F*** where Kriegler AJA opined that the peremptory nature of the Rule must be understood 'conceptually and contextually', and that its main purpose is to:

> "….facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly- and pointlessly- adhere to its provisions…."

See also the same views expressed in ***Federated Convention of Namibia v Speaker, National Assembly of Namibia & Others 1994 (1) SA 177 (NM)*** at 192 I–193 D**.** In view of the above discussion, in my judgment it was well within the plaintiff's choice whether to proceed by way of an application for review or in the manner he did if he felt that the factual matrix of his claim will be contested. It was a prudent way of approaching this matter.

[11] ***THE MERITS:***

As regards the lawfulness of the Commander's decision, the way I understood the plaintiff's case is not that he was not given a hearing, but rather, that when the Commander exercised his powers under section 31 (b) and (c) of the Act, he did so for malicious or *ulterior* motives. This speaks to the question of motives, should the court really concern itself with the motives for the exercise of public powers so long as the power was exercised by the public functionary within the parameters allowed by the empowering law?

[12] At common-law, some courts showed reluctance to delve into the exercise of determining the motive for the exercise of public power, for the reason that motives are irrelevant, as long as the power was authorized by the law : One such decision is ***Feinstein v Baleta 1930 AD 319*****,** where at 326, the court said:

> *"Apart, therefore, from an enquiry where a charge of bad faith or corrupt motive is laid, a court of law should not investigate the reasons actuating or the purpose impelling the municipality in exercising powers undoubtedly conferred on it."*

But, Schreiner JA in ***Mustapha v Receiver of Revenue, Lichtenberg 1958 (3) SA*** *343, at 348*, saw matters differently: He argued that an investigation into motives is relevant where the court uses the underlying motive for the exercise of power to

determine whether that power was duly exercised, in other words, to determine whether the power was exercised for the purpose for which it was conferred on the public functionary : At 348 G – H he said,-commenting on ***Feinstein v Baleta*** (above)-:

> *"Whatever this passage was intended to convey, it clearly was not meant to rule out investigations into the motive underlying the exercise of the power where the motive is, according to well settled principles, relevant to the question whether the power has been duly exercised. The passage was referred to in Van Eck, NO. and Van Rensburg, NO. v Etna Stores, 1947 (2) S.A 984 (AD) at p. 997, and it was said that an abuse of a limited power amounts to bad faith. The latter expression in this connection means no more than a motive which in relation to the enabling provision is wrong. Where the power was granted to be used only for a particular purpose it is an invalid exercise of the power to use it for another purpose. That was the position in Van Eck's case. But it follows that where the power is given generally, although it may be used for any permissible purpose, it may not be used for a purpose that is not permissible unless expressly or impliedly authorized by the enabling provisions…."*

With the greatest of respect to the court in ***Feinstein(supra),*** the correct position of the law is that stated in ***Mustapha (ibid)***. I turn to the issue of motive in due course.

[13] ***LEGALITY OF INVOKING S. 3(B) OF THE ACT.***

Section 31 of the Act provides:

"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 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; or

e) the public interest so requires."

In terms of Regulation 2 of the ***Defence Force (Regular Force) (Discharge) Regulations of 1998(****hereinafter* ***'the Discharge Regulations'):***

" 2. A soldier may be discharged from the Regular Force at any time during his service in such Force upon any of the grounds set out in the first column of the Schedule, subject

to the Special Instruction appearing in relation thereto in the second column."

In terms of the same Regulations, the Commander may discharge a soldier on the following grounds:

1) *Having been attested, but finally approved: applies to a recruit who has been attested pending reference to his employer, or attestation by the medical officer, and to a recruit who misstated his age on enlistment.*

2) *A soldier having been improperly attested*

3) *A soldier having made a false answer on attestation*

4) *A soldier may be discharged on compassionate grounds*

5) *Having been convicted by a civil court during his service for offences committed before enlistment*

6) *For misconduct – this applies to a soldier who has been sentenced either by a court-Martial or Civil Court*

7) *On grounds of medical unfitness*

8) *On reaching retirement age*

9) *On failure to successfully complete officer cadet course.*

[14] Before I turn to marry the facts to the law, it is apposite to remember what was said by Ramodibedi JA when he warned the courts when 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 these institutions:

> *"[22]…. [c]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 4 of 1996] was enacted precisely to remedy this mischief. Approached in this way, it follows that the interpretation of s. 31 by the 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."* (***Commander of the LDF and Others v Ramokuena and Another LAC (2005 – 2006) 320 at 329 para. 32***)

[15] There cannot be an argument that section 31 of the Act enjoins an objective approach on the part of the Commander when discharging a soldier on the basis that it is not in the interest of the LDF to have him or her in its ranks. What should loom large are the objective interests of the LDF and not those of the Commander. The basis of objectivity is provided under the Discharge Regulations which provides for instances upon which the Commander may discharge a soldier, as seen above. The context of objectivity is provided by these Regulations read together with the Act.

"[21]…in exercising the powers to discharge a soldier, the Commander must do so having regard to the Defence Force (Regular Force) (Discharge) Regulations, 1998 and the Defence Force (Regular Force) (Other Ranks) Regulations, 1998. They constitute the legal parameters within which section 31 (b) powers should be invoked.

[22] I say so because the conferred powers that a soldier can be discharged if "it is not in the best interests of the Defence for the soldier to remain in the force" is couched in objective and not subjective terms. The personal opinion and interest of the Commander is not relevant and should not be conflated with the institutional interest of the Defence Force. Decisions must be reached on the basis of the objective facts which are prescribed by the Regulations." (***Mokhele and Others v Commander LDF CIV/APN/442/16 [2016] LSHC (14 February 2018) per*** *Sakoane J****.***

[16] I fully agree with the sentiments expressed above. It will be observed that section 31 (b) and (e) uses phrases, "not in the best interests of the Defence Force" and "public interest so requires". There cannot be any doubt as to vagueness of these phrases. It is this attribute which can potentially lend itself to being abused by the Commander at his subjective whims. And so, to give the exercise of power in terms of these subsections an element of objectivity, the lawgiver, in its wisdom promulgated the *Discharge*

Regulations to condition the exercise of power under this section. In short, the lawgiver sought to rein in the exercise of the Commander's power to discharge a soldier, and to make provision for him to exercise this power only within the instances enumerated under the Discharge Regulations read with s.31. The conditioning to which the exercise of power is subject relates only to when the Commander uses his powers to discharge on the basis of grounds such as: 'it is not in the best interest of the Defence Force…'s.31(b);a soldier has been convicted of a civil or military offence, s.31 (c):'the public interest so requires' s.31(e). In these instances, the Commander's exercise of power is restricted to the scenarios enumerated under the *Discharge Regulations*, otherwise, it will be the easiest thing to parrot any of these phrases as forming the basis of the decision to discharge the soldier.

[17] The Commander may not discharge a soldier on any basis other than those enumerated in the Discharge Regulations read with s.31 (a) and (d). These two subsections have been singled out so that harmonization of s. 31 and the Discharge Regulations is achieved, for, it will be observed, the power to discharge in terms of these two subsections is not provided for in the *Discharge Regulations*, whereas in respect of the rest of the instances, the Commander's power of discharge is conditioned by the *Discharge Regulations*. And so, at the risk of being repetitious, the instances in terms of which the Commander may discharge a soldier are those enumerated under the *Discharge Regulations* read with the

s. 31 of the Act to the extent that those listed under the latter section are not covered by the Discharge Regulations. *Expressio unis est exclusio alterius* ***(Beaver Marine (PTY) Ltd v Wuest 1978 (4) SA 263(AD) 277b-d)***. I am alive to the fact that this maxim is not absolute, but on a closer scrutiny of the Act read together with the *Discharge Regulations*, I do not see how the Commander can exercise these discharge powers upon any ground other than in the manner articulated above.

[18]Under Part VII, the Act lists military offences and their punishments, and all these military offences are punishable on conviction by the Court-Martial or consequent to summary trial. The scheme of the Act in relation to military offences, read together the powers of the Commander to discharge a soldier under section 31 of the same Act, read together with the *Discharge Regulations* paint a picture which clearly shows that the power of the Commander to discharge a soldier on the basis of commission of a military offence is consequent upon that soldier being found guilty and sentenced. That power is not antecedent to the decision of the Court-Martial or summary trial. The power to discharge a soldier outside a conviction and sentence by a Court-Martial or Civil Court or on a summary trial, is restricted to the incidences listed under the Discharge Regulations read together with s31 of the Act.

[19]Reverting back to the "show cause" letter, it is clear that under paragraph 4 thereof, the Commander accuses the plaintiff of

insubordinate behavior which is an offence under s 50 (1) (b) of the Act. By discharging the plaintiff on the basis of insubordinate behavior- that is, insulting his superior Brigadier Mofolisa- the Commander unlawfully by-passed the clear scheme of the Act which enjoins first to charge a soldier before a Court-Martial or to summarily try him, and then for the Commander to exercise his discretionary discharge powers once the soldier has been convicted and sentenced.

[20]The other grounds such as that the plaintiff, during an interview with the Newspaper made assertions that certain senior LDF officers were called before the Magistrate Court in relation to the plaintiff brother's death, and that they decided not to participate in the proceedings. This is not the ground upon which the Commander is empowered to discharge a soldier in terms of *Discharge Regulations* read with s. 31 of the Act as already seen above.

[21]The plaintiff was further discharged on the basis that he admitted *"to be maintaining close contact with the notorious convicts such as Phakiso Molise, Monyau and Makateng"*. This ground suffers the same fate as the above. Given further, that the accusation under paragraph 6 of the letter relates to the plaintiff's insulting behavior, if this constituted misconduct, the Commander could only discharge once a verdict and sentence will have been

pronounced by the Court-Martial or upon being summarily tried, not of his own accord.

[22] ***THE MOTIVE FOR INVOKING S.31(C) OF THE ACT.***

As a general rule when the Legislature bestows power on any public functionary, it is only that functionary who should exercise it. When the courts are approached to review an administrative act, they should defer to those functionaries when it comes to the decision itself. The reviewing court is only concerned with the decision-making process and not the decision itself **(**see Lord Brightman's opinion in ***Chief Constable of the North Wales Police v Evans [1982] 1 W.L.R 1155 para. 13).*** Interference with administrators' decisions on review will be justified where the decision was actuated by bad faith or was made for *ulterior* and improper motives-among others. These grounds of interference were aptly spelled out in famous decision of ***Shidiack v Union Government (Minister of Interior) 1912 AD 642*** at 651-2, thus:

> *"There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute- in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of*

discretion, even if it considered the decision inequitable or wrong."

With these principles in mind I turn to consider whether the Commander's decision to discharge the plaintiff in terms of s.31(c) is reviewable. It is common cause that the plaintiff was convicted and sentenced for two military offences, for disobedience of orders, in 2004. He was sentenced to two (2) months confinement. It is also common ground that the plaintiff served his sentence and returned to work. He continued to serve in the army for close to three years without demur from the Commander, only for the latter to raise the issue of his conviction and sentence after he had given an interview about his brother's murder, ostensibly, at the hands of LDF members. Was the Commander entitled to keep quiet and not to exercise his discretion to discharge the plaintiff promptly after his conviction and sentence? The answer to this is in the negative, as I demonstrate below.

[23] The Commander is given a discretion whether or not to discharge a soldier, and no formality is provided as to how he should communicate his decision in case he decides not to discharge. The purpose for which the Commander is given the discretion to discharge a soldier after conviction is so as to give him an administrative opportunity to exercise his value judgment whether the latter's retention, in spite of his conviction, will be in the interests of the army. The discretion to discharge a soldier must

be exercised promptly, without any delay. This important principle is provided for under s. 29(1) of the Act, which states:

> *"29(1) Except where otherwise provided by this Act, every soldier of regular force upon becoming entitled to be discharged,* ***shall be discharged as soon as possible…..****"(emphasis added)*

The purpose for promptness of decision in this scenario, is to curb arbitrary use of the discretion to discharge. Failure to discharge a soldier promptly, if the Commander is so minded, creates a situation where a conviction is turned into a noose around the soldier's neck which the Commander can tighten at his own convenience and whim. This section, clearly, demonizes weaponization of discretionary power, as it obliges the Commander to act promptly if he decides to discharge a soldier. When the Commander exercises his powers of discharge, that is public power. The exercise of public power should not be subjected to the whims of the repository of such power, otherwise the public trust in the repository of same will be undermined.

[24] To my mind, when the Commander – despite allowing the plaintiff to serve for almost three years post sentence – activated his powers under section 31 (c), he was actuated by a desire to foreclose plaintiff's military career for daring to give an interview about circumstances surrounding his brother's death. This is not the purpose for which the discretion to discharge the soldier

consequent upon being sentenced, was conferred upon the Commander. He was well within his legal powers, as already stated, to discharge the plaintiff, but he waited to exercise that discretion until private considerations, for which that power was not bestowed, came into the picture. The Commander was weaponizing his discretionary power to end the plaintiff's military career for reasons not connected to the purpose for which the power was bestowed. This is not an honest exercise of public power. Even though the Commander is endowed with the discretion to discharge, the manner in which that discretion was exercised *in casu*, sullied or coloured the entire decision. The invocation of discretion to discharge under section 31 (c) was coloured by *ulterior* motives and was used for dishonest purposes. In law, a decision though legitimate but was coloured by *ulterior* motives and purposes, is regarded as unlawful:

> *"[T]he attainment of a legitimate object cannot negative or neutralize the fact that an improper, ulterior motive has at least in part been influential in the exercise of the official's discretion." (**Highstead Entertainment (PTY) ltd t/a 'The Club 'v Minister of Law and Order 1994 (1) SA 387 (C) at 395 A – B)***

[25]*In casu*, the presence of the *ulterior* motive, on the part of the Commander, leads one to an unescapable conclusion that the power conferred on the Commander in terms of section 31 (c) was

not duly exercised for the purpose for which it was granted. Comments of Lord Wrenbury, regarding exercise of discretionary powers are worth reproducing:

> *"A discretion does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason dictates." (**Roberts v Hopwood 1925 AC 578, ibid)***

Further, and more importantly, Lord Halsbury's views are apposite:

> *"Discrection means when it is said that something is to be done within the discretion of the authority that something is to be done according to the rules of reason and justice, not according to private opinion…. According to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself…." (**Susannah Sharp v Wakefield 1891 AC 173, 179; ALL ER Rep 651 (HL)***

[26] *WHETHER REINSTATEMENT AUTOMATICALLY FOLLOWS DECLARATION OF INVALIDITY.*

There is one issue which I would like to clarify before concluding this matter: And that is the issue whether, when a decision to

dismiss an employee is declared invalid or unlawful, can competently be followed by order of reinstatement. This is crucial between because it goes to the distinction between an invalid or unlawful and unfair dismissal. In *casu* the plaintiff is seeking to impugn the decision to discharge him from the army on the basis that it is unlawful or invalid, and consequently prays for his reinstatement. This cannot happen, because:

> *[188]…. [A]n order of reinstatement is not competent where the dismissal is invalid and of no force and effect. To speak of an order of reinstatement in that case is a contradiction in terms.*
>
> *[189]. An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer….*
>
> *[190] When a dismissal is held to be unfair, one can speak of reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal. An employer against which an order has been made declaring the dismissal of its employees invalid and who does not want to continue or cannot continue the employment relationship with those employees will have to dismiss them again. Otherwise, they*

*tender their services or are prevented from performing their remuneration." (**Steenkamp and Others v Edcon Limited 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC))***

The above excerpt highlights two points which are crucial in this case: And they are that, in this case we are concerned about the lawfulness of the Commander's decision, and that in the event that the challenge is successful, this court will not order reinstatement of the plaintiff as prayed for, but would expect the employer to heed the declarator and allow the plaintiff to discharge his duties upon reporting back for work.

[27]In the result:

a) The discharge of the plaintiff by the Commander from the LDF is declared unlawful/invalid and of no force and effect and is accordingly set aside.

b) The plaintiff is awarded the costs of suit.

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MOKHESI J

FOR THE PLAINTIFF : Mr NTHONTHO FROM K.J NTHONTHO ATTORNEYS

FOR THE DEFENDANTS: ADV. L.P MOSHOESHOE FROM THE ATTORNEY GENERAL'S CHAMBERS