

IN THE HIGH COURT OF LESOTHO

CIV/APN/325/2019

In the matter between:

LEHLOHONOLO ALOTSI

APPLICANT

and

**COMMANDER OF THE LESOTHO DEFENCE
FORCE**

1st RESPONDENT

**PRESIDING OFFICER - SUMMARY TRIAL
PROCEEDINGS OF THE LESOTHO
DEFENCE FORCE**

2nd RESPONDENT

MINISTRY OF DEFENCE

3rd RESPONDENT

MINISTRY OF FINANCE

4th RESPONDENT

ATTORNEY GENERAL

5th RESPONDENT

Neutral citation : Lehlohonolo Alotsi v Commander of the Defence Force and 4
Others [2022] LSHC, 221 Civ (31 August, 2022)

CORAM : **F.M. KHABO J.,**

HEARD : **13th JUNE, 2022**

DELIVERED : **31st AUGUST, 2022**

SUMMARY

Application for review - Of the decision by the Commander, Lesotho Defence Force to discharge the Applicant from the army in terms of Section 31 of the Lesotho Defence Force Act, 1996 - Applicant further challenging the manner in which the summary trial was conducted - Complaining in essence of a breach of the fundamental right to a fair trial which included non - observance of the tenets of natural justice, discrimination, double jeopardy, charge not supported by evidence, and a sentence disproportionate to the offence - In a case where a member of the Defence Force had been convicted and sentenced following a summary trial and subsequent discharge from the army by the Commander - Court not discerning any irregularity in the manner in which the summary trial was conducted and finding the Commander to have acted within the purview of the Act.

ANNOTATIONS

Statutes and Regulations

Constitution of Lesotho, 1993

Defence Force (Discipline) Regulations, 1998

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

Lesotho Defence Force Act, 1996

Cases cited

Commander Lesotho Defence Force and Others v Ramokuena and Another (C of A (CIV) No. 19 of 2005

Mohlakoane v South African Revenue Services (2018) ILJ, 1034 (LAC)

Nkoebe v Attorney - General and Others 2000 - 2004 LAC, 295

Russell v Duke of Norfolk [1949] 1 All ER, 109

Senekane v Commander of Lesotho Defence Force and Others, CIV/T/241/20
[2020] LSHC 21 (15th October, 2020)

Supreme Furnitures (Pty) Ltd v L.H. Molapo 1995 - 1996 LLR & LB, 377

Thabo v Mohatlane Skills Training Centre and Others CIV/APN/84/2013
[2014] LSHC 56 (31 January, 2014)

Books

Herbstein & Van Winsen - The Civil Practice of the Supreme Court of South Africa 4th ed., Juta, & Co. Ltd, 1997

JUDGMENT

KHABO J.,

Introduction

[1] The Applicant joined the Lesotho Defence Force (LDF) in May, 2009 and occupied the initial Military rank of Private. He was summarily tried on 31st December, 2018 and sentenced to eighty (80) days detention. He was subsequently discharged on March, 2019.

Background to the dispute

[2] Events leading to the discharge are that on or about 25th December, 2018 the Applicant was in patrol at Ha Peete Military Base in the district of Quthing. On the day in question, he together with nine other colleagues went to a local bar during the day where there was some festivity. They were in civvies. It is alleged that they over-stayed and exceeded the time prescribed for members of the Military to be outside the barracks, *viz*, 22:00 hours. Around midnight a fight broke out in the bar. Applicant claims to have been outside the bar then. It is not clear what or who started the fight, but according to the Applicant he saw civilians hitting unarmed soldiers with sticks. He purportedly left the bar and went to the barracks where he found Privates Khati, Khoaisanyane, Kholoane, Sekujoane, Thola, Ts`olo. 2nd Lieutenant Lenka apparently arrived after him.

[3] The latter ordered the Applicant to hand over two rifles to Privates Khoaisanyane and Ts`olo. He duly complied and the pair asked for permission from Corporal Tlhabi to go and find out what was happening. They then went back to the bar, with Applicant remaining at the barracks. Gunshots were apparently heard from the direction of the bar. On the

second gunshot sound, which sounded to be that of a rifle, Applicant was granted permission and he left the barracks to the bar.

- [4] He averred that when he got to the gate he met Private Mariti and together they proceeded to see what was happening. He indicated that upon arrival at the bar they found the owner of the bar, Mr Sefako, and a corpse lying on the floor. Mr Sefako narrated to them that two soldiers got into the bar and fired shots. Having heard what could have transpired, he went back to the barracks with Mr Sefako leaving Private Mariti behind. Applicant presented Mr Sefako to Corporal Tlhabi who decided that he would take Mr Sefako's statement the next day. Applicant then accompanied Mr Sefako back.
- [5] The next day 26th December, 2018, Captain Mofilikoane made enquiries into the incident. Applicant told the Captain his side of the story which the latter was rather sceptical of. He was later taken to the Qacha's nek Military base with other soldiers who were at the bar on that night. The next day on 27th December, 2018, the Military helicopter took them to Maseru, Mejametalana Air-base where the Military Police were waiting for them. They were arrested and detained at Ha Ratjomose Military base, and later ordered to write reports by Seargent Motloli who is a member of the Military Police.
- [6] On 28th December, 2018, they were taken to Makoanyane Military Base where they were once again ordered to write reports.¹ On 31st December, 2018, they were taken to a disciplinary inquiry where charges relating to disobedience to standing orders were read to the Applicant, Privates Kholoane, Khati, Ts`olo, Thoola, Sekujoane, Mariti, Khoaisanyane and Lieutenant Seargent Corporal Mokhatholane. They were charged with counts spelled out in annexure "**LA 2**" attached to the founding affidavit.

¹ Annexed to the Founding Affidavit as "LA 1"

During the hearing Major Lekoatsa pointed out to the accused that if anyone felt that they are not guilty, they should indicate and would then be taken to the Court Martial.

[7] All the charged soldiers admitted that they were guilty of the offences they were being charged with and the punishment that was meted out to them was eighty (80) days' imprisonment sentence, which they served. On 12th February, 2019 the Applicant received a notice requiring him to 'show cause' why he shall not be discharged from the Defence Force, He duly answered the 'show cause' letter trying to justify his actions on the fateful day, He was, however, discharged, an issue that gave rise to the present claim.

The claim

[8] The Applicant instituted an action against the Respondents seeking the following prayers (to the extent relevant to the present proceedings) that:

- (a) The summary trial proceedings against him be reviewed, corrected and set aside;
- (b) The 1st Respondent be ordered to file the record that he based his decision to discharge him from the Lesotho Defence Force on;
- (c) The 1st Respondents' decision to discharge him from the Lesotho Defence Force be reviewed, corrected and set aside;
- (d) That he be reinstated to his position in the Lesotho Defence Force without loss of emoluments and seniority on the rank of initial Military rank of Private;
- (e) That the Respondents be ordered to pay costs of this application;
and

(f) That he be granted such further and/or alternative relief.

Applicant's case

[9] It is Applicant's case that his discharge from the Defence Force was discriminatory, irregular and unreasonable. He pleads discrimination on the basis that Private Mariti had been pardoned and not dismissed when charges that were preferred against them related to the same set of facts. He contends that he has served the Lesotho Defence Force for almost ten (10) years without any tarnish. One of his complaints is that he was subjected to a double jeopardy in that the reasons for his discharge were the same reasons that he was tried with, and that the rules of natural justice were not observed in relation to the enquiries made against him, all these further exacerbated by the discharge. He, therefore, prays that the Commander's decision to discharge him be reviewed and set aside and that he be reinstated to his position.

Respondents' case

[10] Respondents' standpoint is that the Applicant was discharged lawfully. That his discharge was within the bounds of the law regulating the Defence Force. Further that the rules of natural justice were observed. Respondents contend that as a general rule, double jeopardy does not arise in disciplinary cases, and pray that Applicant's claim be dismissed with costs.

Application of the law to the facts

[11] Complaints advanced by the Applicant all boil down to the assertion that the 1st Respondent failed to exercise his discretion judicially and that the summary trial was conducted in an irregular manner. His complaints revolve on discrimination, double jeopardy, non - observance of the tenets of natural justice, that the decision reached by the disciplinary was not

supported by evidence, that although pleaded guilty, evidence did not prove his guilt, that the sentence meted out was not commensurate with the offence, and that the disciplinary process violated his constitutional right to a fair trial in terms **Section 12 (2) and 18 (2) of the Constitution of Lesotho, 1993** (the Constitution). Some of these complaints overlap, and the court shall treat them accordingly.

Discrimination

[12] In discrimination one compares like with like. Private Mariti was charged with two counts when the Applicant had been charged with three counts, including a charge of use of **“insubordinate language to a superior officer”** when he together with Private Kholoane purportedly hurled insults at Corporal Thlabi and demanded that he opens the armoury to enable them to get their rifles, a charge he also pleaded guilty to. The gravity of charges levelled against Private Mariti and himself differed. One can, therefore, not talk of inconsistent application of discipline.

Breach of tenets of natural justice/ right to a fair trial

[13] Applicant avers that tenets of natural justice were not observed in relation to the enquiries made against him in that he was not given sufficient time to prepare himself for the disciplinary hearing including an opportunity to seek legal advice in terms of **Section 12 (2) of the Constitution**. Fair trial rights under this Section are in rhythm with the **audi alterum partem rule**.² The court fully agrees with Applicant’s Counsel that the principle of **audi alterum partem** applies to all persons alike including members of the Lesotho Defence Force.

² CIV/APN/84/2013 [2014] LSHC 56 (31 January, 2014) at para 21

[14] It is a trite principle of the rule that no man shall be condemned unheard as was illustrated in the cases of *Supreme Furnitures (Pty) Ltd v LH Molapo*³ and *Nkoebe v Attorney - General and Others*.⁴ The principle of natural justice has been described in the case of *Thabo v Mohatlane Skills Training Centre and Others*⁵ to imply “a value process system which does not only ensure that the substantive and the procedural prescriptions are adhered to, but that at the end of the day there is objectivity and the exclusion of arbitrariness.”⁶ Trucker J., stated in *Russell v Duke of Norforo*⁷ that the “requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, and the subject matter that is being dealt with,” quoted with approval in *Thabo v Mohatlane Skills Training Centre and Others, supra*.⁸

[15] Applicant himself averred in his Founding Affidavit that he narrated his side of the story before Captain Mofilikoane on 26th December, 2018 about the incident that happened at night, that they were requested to write reports before at Ha Ratjomose, who even shown them how to write such reports, and at the Makoanyane Military Base. The Applicant was taken through a disciplinary process, where he had an opportunity to defend himself. If one may give a brief synopsis of the process leading to the conviction and sentencing-

25th December, 2018 - The fateful night

26th December, 2018 - Enquiry into the incident by Captain
Mofilikoane

³ 1995 - 1996 LLR & LB, 377

⁴ 2000 - 2004 LAC, 295

⁵ at para 21

⁶ Supra 22

⁷ [1949] 1 All ER, 109

⁸ At para 22

27th December, 2018 - Arrested and taken to Ha Ratjomose to write reports before Seargent Motloli

28th December, 2018 - Report writing at Makoanyane Military Base

31st December, 2018 - Disciplinary hearing at Makoanyane Military Base

[16] The Applicant together with his co - accused were asked to plead. He pleaded guilty, to which he says in his Founding Affidavit that he feared being taken to the Court Martial.⁹ He should have pleaded differently and had his case argued if he believed he was innocent, instead of pleading guilty and turning around to complain of being prosecuted unfairly. Nowhere in the record does the Applicant ask for more time to prepare a defence.

[17] This Court is of the view that the principles of natural justice were adhered to in Applicant's case. A person does not plead guilty in fear of going to the Court Martial, only to come back and claim innocence. The procedure followed by Major Lekoatsa during the disciplinary process was in order as they were given an option to go to the Court Martial, and they decided to plead guilty.

[18] In his Founding Affidavit,¹⁰ the Applicant intimated that Major Lekoatsa read out the charges preferred against them, and informed them that they had a right to opt to be taken to the Court Martial if they feel that they are not guilty. This was in terms of Regulation 23 (11) of the ***Defence Force (Discipline) Regulations, 1998*** that give the accused person the option of accepting his verdict and punishment or electing to be tried by a Court Martial. This accords the accused an opportunity to be tried by a court

⁹ Para 34 of his Founding Affidavit

¹⁰ Para 33

where stringent compliance with the law is required especially where one feels he or she is not guilty of the charges preferred against him or her.

Double jeopardy

[19] The principle of double jeopardy entails that a person cannot be charged with the same misconduct that he or she was either found guilty or not guilty of more than once. I tend to disagree with Respondents' Counsel that as a general rule the principle only arises in criminal proceedings and not in disciplinary proceedings. In the common law it does.

[20] The court upheld the principle in *Mohlakoane v South African Revenue Services*.¹¹ Applicant's contention in this regard is based on the fact that the Applicant was discharged despite having served the sentence meted out at the disciplinary hearing. It is his case that the process is tantamount to a double jeopardy, that he is being punished twice for the same offence. It would be prudent at this juncture to consider the letter of the law under which the Applicant was discharged. He was discharged in terms of **Section 31 (b) and (c)** of the *Lesotho Defence Force Act, 1996* (the Act) which provides in part that:

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) ...

(b) it is not in the best interests of the Defence Force for the soldier to remain in force;

(c) the soldier has been convicted of a civil or military offence;

¹¹ (2018) ILJ, 1034 (LAC)

(d) ...

(e) ...

[21] The Act clearly gives the Commander a discretion to discharge a member of the Military who **“has been convicted of a civil or a military offence,”** for which the Applicant has. Part VII of the Act, lists military offences for which a soldier may be convicted of and the attendant punishment. It was held in ***Senekane v Commander of Lesotho Defence Force and Others***,¹² that all these military offences are punishable on conviction by the Court Martial or a summary trial. The powers vested on the Commander to discharge a soldier in terms Section 31 of the Act read together with the ***Defence Force (Regular Force) (Discharge) Regulations, 1998*** paints a clear picture that the power of the Commander to discharge a soldier on the basis of a commission of a military offence is consequent upon that soldier being found guilty and sentenced. The concept of double jeopardy does not arise. The Regulations give him an administrative discretion to exercise his value judgement whether the retention of a soldier who has been found guilty and sentenced will be in the best interests of the army in terms of Section 31 (b) of the Act.

[22] The apex court dealt with this issue in ***Commander Lesotho Defence Force and Others v Ramokuena and Another***¹³ wherein the appellants had challenged their discharge from the army by the Commander. They alleged that they were not afforded a hearing before being discharged and that such discharge amounted to double punishment or double jeopardy in as much as they had already been convicted and served their respective punishments. The court held that the Commander was entitled under

¹² CIV/T/241/20 [2020] LSHC 21 (15th October, 2020)

¹³ (C of A (CIV) No. 19 of 2005

Section 31 of the Act to consider Respondents' convictions and punishments cumulatively in discharging them from the Force and further that it is wrong to equate "discharge" with "punishment" in the context of the Act. The application was dismissed with costs.

[23] The Commander is clothed with very wide powers in respect of soldiers who have been convicted and sentenced. He invoked his powers in respect of the Applicant under Section 31 (b) and (c) of the Act. The charges reflected in the charge sheet annexed to Applicant's papers are of a military nature, and are appear gross in the court's view. Regard is had particularly to Count 4 in which the Applicant was charged with using insubordinate language to Corporal Thlabi demanding that she opens the armoury. He used very foul language. Besides the unsavoury language, the act of ordering a senior officer around is very serious, worse in the military context where discipline is of utmost importance, and any indiscretion is frowned upon. The gravity of the offences the Applicant was charged with are of a very serious nature, his long service notwithstanding. As far as the court is concerned the Commander invoked Section 31 (b) and (c) of the Act reasonably with the aim of protecting its objects in respect of maintaining discipline in the army.

Review

[24] The court does not find any illegality, irrationality or any procedural impropriety in the process followed. In review proceedings, the court does concern itself with the correctness of the decision under review, but with its validity as espoused the renowned authors that:¹⁴

¹⁴ Herbstein & Van Winsen - The Civil Practice of the Supreme Court of South Africa 4th ed., Juta, & Co. Ltd, 1997 at p. 929

Judicial review is in essence concerned, not with the decision, but with the decision - making process. Upon review, the court is in general terms concerned with the legality of the decision, not with its merits.

The court finds nothing untoward in the process followed and finds the Commander of the Lesotho Defence Force to have acted within the purview of the powers conferred upon him by the Act.

ORDER

In the circumstances, the application is dismissed with costs.

F.M. KHABO
JUDGE

For the Applicant : Adv., M.A. Molise
For the Respondents : Adv., R. Makhoali - Borotheo