IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/128/2020**

In the matter between:

MOSEBI SESOANE **APPLICANT**

And

COMMANDER OF LESOTHO DEFENCE FORCE **1st RESPONDENT**

ATTORNEY GENERAL **2nd RESPONDENT**

JUDGEMENT

Coram **: Hon. Mr. T.E. Monapathi J**

Date of Hearing **: 11th August 2022**

Date of Judgement **: 7th September 2022**

SUMMARY

Application for review and setting aside of the Commander's decision to discharge the applicant on the grounds of irrationality and unreasonableness – does it amount to double jeopardy – held; decision was rational and reasonable – held it did not amount to double jeopardy – application dismissed.

ANNOTATIONS

CASES CITED

Albutt v Centre for the Study of Violance and Reconciliation and Others [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 BCLR 391 (CC)

Attorney General v His Majesty the King and Others C of A (CIV) 13/2015

Commander of LDF V Ramokuena and Another LAC (2005-2006) 320

Cusa v Tao Ying Metal Industries And Others (2008) 29 ILJ 2461 (CC)

Pachkodi Gulab Badhai v. Krishnaji and Others [1947] AIR Vol. 34 Nagpur 145

Roma Taxi Association v Officer Commanding Roma Police Station and Others Cof A (CIV) No.20/2015 (unreported)

Sanderson v Attorney General, Eastern Cape 1998 (2) SA 38 (CC)

Selamolele v Makhado 1988 (2) SA 372

Union Government v Sykes 1913 AD 156

STATUTES

Lesotho Defense Force Act No 4 of 1996

Lesotho Defense Force (Regular Force) (Discharge) Regulations of 1998

[1] The Applicant ***in casu*** claims that the conduct and decision of the 1st Respondent for discharging him from the army (Lesotho Defence Force) (LDF) was irrational and unreasonable. He went further to say that it was too harsh.

[2] The other claim was that the dismissal of the Applicant constituted double jeopardy.

[3] The Applicant was discharged from the Lesotho Defence Force (LDF) in terms of section **31 (b) and (c) of the Lesotho Defense Force Act (LDF Act)**[1] read with **Regulation 2 (6) (b) of the Lesotho Defence Force (Regular Force) (Discharge) Regulations**[2] on the 14th day of April 2020.

[4] The Applicant brought a review application before this court for an order that the decision of the 1st Respondent be reviewed and set aside for allegedly being irrational and unreasonable as the Commander had not applied his mind to the Applicant's representations.

[5] The Applicant was a member of the LDF until he was discharged from the service by the 1st Respondent on the 14th of April 2020.The Applicant had been charged and convicted with numerous military offenses dating between

[1] No 4 of 1996.
[2] Of 1998.

the 13th day of November 2010 and the 9th day of December of 2020. On the 25th day of February 2020 the Applicant was served with a letter requesting him to show cause why he should not be discharged from the LDF in terms of the LDF Act section 31 read with Regulation 2 (6) (b) of the LDF Regulations.

[6] On the 4th day of March the Applicant served a letter through his legal representatives to the 1st Respondent in terms of which he sought further particulars regarding his intended discharge as well as requesting an extension of the time to file his answer to the show cause letter.

[7] The Commander replied to the request for further particulars and served further particulars upon the Applicant on the 17th day of March 2020. The Commander further extended the time for the Applicant to file his answer to the show cause letter by further seven (7) days.

[8] On the 24th day of March 2022 the Applicant served the Commander through his legal representatives with the answer to the show cause letter. The Applicant provided numerous reasons why he should not be discharged. One of the grounds was that he was never subjected to any professional rehabilitation. The Applicant further claims that he had already been punished for the transgressions that formed the basis of the show cause letter and as such that amounted to double jeopardy.

[9] The Commander, after consideration of the Applicant's answer to the show cause letter, wrote a letter to the Applicant in terms of which the Applicant was effectively discharged. The Applicant being dissatisfied with the decision to discharge him from the LDF approached this Honourable Court on the 24th April 2020 seeking the review and setting aside the decision as

well as temporary reinstatement and an order interdicting stoppage of his salary. The interim reliefs were refused save for dispensation with the rules.

[10] It is apposite to show that the Applicant herein has passed away during litigation but that notwithstanding this Court shall pronounce itself. The unfortunate death of the applicant came after the matter was argued to finality.

[11] It is common cause that the Applicant was under the employ of the 1st Respondent. It is common cause that the Applicant was given a hearing before being discharged from the LDF and he has not challenged his discharge on the basis that he was not afforded a hearing. It is common cause that the Applicant had been charged and convicted with numerous military offences, which include ***inter alia***, insubordination which is a serious offence to the good discipline of the LDF.

[12] It is disputed that the 1st Respondent made the Applicant undergo professional rehabilitation as a progressive discipline (an alternative to dismissal). It is also disputed that the 1st Respondent applied his mind to the representations of the Applicant.

[13] The issue which this Court is called to make determination on are whether the Commander of LDF's decision to discharge the Applicant was irrational and unreasonable. Put otherwise, whether the Commander, as a repository of power, applied his mind to the Applicant's representations. Whether the 1st Respondent was obliged to accord Applicant rehabilitation as alternative to dismissal. Whether the said discharge amounted to double jeopardy.

[15] The Applicant submitted that the application must succeed with costs on the grounds that the discharge is irrational and unreasonable because the

Commander did not consider and/ or apply his mind to the Applicant's suggested sanction of counseling or rehabilitation hence the decision is unfair and the discharge amounts to double jeopardy as the Applicant will be punished twice for the same offences.

[17] In support of the above, the Applicant maintained that the first respondent did not consider progressive discipline as an alternative to dismissal. The Applicant contends that the first Respondent did not apply his mind to his representations. He further asserted that had the first Respondent exercised his mind to his representations he would have been allowed a chance to undergo professional rehabilitation as an alternative to dismissal. The discharge is unfair.

[18] The conspectus of the Applicant's contentions under paragraph 4.1 to 4.4 is that the first Respondent had the duty to exercise his discretion in good faith and in fairness but the first Respondent did the converse. This is due to, according to the Applicant, the fact that the show cause letter laid a red carpet to negotiations at which he made representations that entailed an alternative which is rehabilitation, which the 1st Respondent should have considered since the show cause letter was "couched in conditional term"[3].

[19] The Applicant further contended that the 1st Respondent failed to set up the measures to minimize the dismissal or the effect thereof. The applicant submitted that the 1st respondent failed to establish that he cannot be rehabilitated. The point that the Applicant was stressing is that the 1st Respondent did not prove that the dismissal was a last resort.

[3] Para 4.4 of Applicant's Heads of Arguments.

[20] The Respondents submitted that the application be dismissed with costs on attorney and own client scale on the following grounds:

[21] The discharge of the Applicant is rational and reasonable as the Applicant is not fit to remain in the LDF as he had been convicted of numerous military offences and is a danger to other members of the LDF. The discharge of the Applicant is sanctioned by law and as such does not amount to double jeopardy.

[22] In response to the issue of the alleged irrationality and unreasonableness of the Respondents laid out the test which should be adopted in assessing whether the decision of a public functionary is irrational from paragraph 19 to 31.[4] The respondents submitted that the discharge does not amount to double jeopardy and backed that contention up by case law to which reference shall be made hereunder.

[23] The expression "onus of proof" is self-explanatory. It simply means the obligation to prove. And the standard of proof required to discharge the legal burden depends upon whether the proceedings are civil or criminal. In the former, the standard required is proof "on the balance of probabilities". Now, the question is, on the balance of probabilities, did the Applicant prove his allegations on the balance of probabilities?

[24] The latin phrase that says ***Ei incumbit probatio qui dicit, non qui negat*** is quite apt. Loosely translated it means this; that **he who asserts must prove.** The law books are replete with authorities on this latin maxim and its meaning. The Indian court in ***Pachkodi Gulab Badhai v. Krishnaji and Others***[5] held that a party that makes an allegation bears the burden of proving it.

[4] Respondent's Heads of Arguments.
[5] [1947] AIR Vol. 34 Nagpur 145.

[25] It appears in the judgment of Van der Spuy, AJ in **Selamolele v Makhado**,[6]

> *"The onus of proof and the legal requirements as to the discharge thereof It is common cause that plaintiff bears the overall onus of proof, ie he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff."*

[26] Through the lens of the standard of proof on the balance of probabilities, this Court is of the opinion that the Applicant has not discharged the burden of proof to the satisfaction thereof. This applies squarely on both central issues of irrationality and unreasonableness and that of double jeopardy.

[27] The relevant provision on which the 1st Respondent based his decision under the LDF Act[7] reads as follows;

> ***Discharge by Commander of the Defence Force***
>
> *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) ……*
>
> *(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;*

[6] 1988 (2) SA 372 (V), at 374.
[7] Ibid n1.

(d) ……

(e) ……

The provision outlined above read with Regulation 2 (6) (b) of the LDF Regulations.

[28] This Court takes this opportunity to highlight the significance of the copula. The language of the provisions relied on by the 1st Respondent for the discharge is of great essence. Hence, the meaning of "may" in the provisions may shed some light on and uncover the material aspects of this case. What "may" means is that even though the grounds have been laid down by the Legislature the Commander of the LDF has the discretion. It is with that discretion that the Commander discharged the Applicant. And it needs to be stated here and now that the Court under the umbrella of judicial review shall not usurp the powers of a public functionary. It will set aside the decision of a public functionary only if it breaches the set parameters of law like rules of natural justice, reasonableness, and rationality for instance.

[29] The **Attorney General v His Majesty The King And Others**[8] case, paragraph 12 particularly, that the applicant relied on, lays down a common law notion that was stated in **Union Government (Minister of Railways) v Sykes**.[9] This Court agrees with the contents thereof and reliance thereon is in order in this Court's opinion. But this Court thinks that the Applicant confused himself with the "minimizing the dismissal or the effect thereof" part. How do you minimize a dismissal? The more important question is is there any obligation on the part of the 1st respondent to "minimize the dismissal"? There seems to be none emanating for the papers before this

[8] C of A (CIV) 13/2015.
[9] 1913 AD 156 at 173-4.

Court and the Applicant did not even attempt supporting or adding any form of flesh or even skin to that contention.

[30] This Court is in agreement with the holding of O'Regan in **Cusa v Tao Ying Metal Industries And Others**[10] that;

"it is clear…that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of a right to administrative justice."

[31] But it is misapplied to the facts of the Applicant's case because the Applicant purports to claim that just because the 1st Respondent did not act in accordance with the suggestion of rehabilitation that automatically means that he (the 1st Respondent) failed to apply his mind to the issues that were then before him. The Commander of LDF did not have to follow the suggestions in the Applicant's response to the show-cause letter for him to be said to have applied his mind. The 1st Respondent decided that based on the facts and incidents that included military offenses and convictions of the Applicant and on the response to the show-cause letter that the Applicant should be discharged.

[32] The military offenses of the Applicant stretch over a period of ten years, a decade. It only makes sense that the 1st Respondent decided to discharge the Applicant after consideration of that and the letter in response to the show-cause letter (Annexure MS4); which in this Court's opinion was just admission by the Applicant admitting to have been breaching the law and

[10] (2008) 29 ILJ 2461 (CC) at para 84.

convicted, asking to be allowed to undergo professional rehabilitation and claiming that being discharged would amount to double jeopardy.

[33] This Court aligns itself with the case of **Roma Taxi Association v Officer Commanding Roma Police Station and Others**[11]wherein the Court of Appeal had this to say;

"The judiciary will intervene in the exercise of administrative power or decision, if such exercise descends into illegality, procedural impropriety, irrationality and disproportionality which has been fashioned as a new ground…"[12]

[34] The Court of Appeal went further to state at paragraph 34 that;

"Unless the four grounds exist, namely, illegality, procedural impropriety, unreasonableness and disproportionality any "crucial intervention" will be impermissible. Constant judicial intervention may grind the wheels of government to a halt."

This case outlines the test for ascertaining whether judicial intervention is warranted. It is that test that shall be used in this case. The Applicant contends that the decision of the 1st respondent is irrational. The case that outlined the test for whether a decision (the exercise of public power) is rationally related to the purpose for which it was given, as correctly cited by the Respondents, is **Albutt v Centre for the Study of Violance and Reconciliation, and Others**.[13]

[35] The court said the following at paragraph 51;

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[11] C of A (CIV) No.20/2015 (unreported).
[12] Ibid at para 32.
[13] [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 BCLR 391 (CC).

"…where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be archived. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means which could have been used, but whether the means selected are rationally related to the objective sought to be archived…"

[36] The Applicant seems to be of the opinion that if there were other means which could have been used (the professional rehabilitation as suggested by Applicant) then the discharge was irrational. The aura of this contention bursts from their papers throughout this application. The phrase "alternatives to dismissal" is repeated through their papers and it seems like the Applicant thinks that the test for rationality has "alternatives" as one of its factors. That is more evident when one looks at the Applicant's contentions that the dismissal should have been "of last resort".

[37] One of the most obvious objectives sought when the Commander of the LDF was given the powers he has under section 31 (b) and (c) is to maintain discipline in the LDF. Looking at the facts of this case, one can easily see that for ten (10) years the Applicants was trampling on and wiping his muddy shoes on the discipline of the LDF (metaphorically).This means that the means selected are rationally related to the objective sought to be achieved. This Court finds that the 1st respondent's decision to dismiss the applicant is not irrational.

[38] The Court of Appeal in **Commander of LDF v Ramokuena and Another**[14] summed up the purpose for the power as follows;

[14] LAC (2005-2006) 320 at para 328F.

"It is clear, as it seems to me, that this section gives the commander wide-ranging powers to dismiss soldiers for indiscipline. Having regard to the fact that the Force is essentially an organization which depends entirely on good discipline, it is hardly surprising that the legislature in its own wisdom deemed it fit to confer these wise powers on the commander."

[39] The court agrees with the Respondents that this case is on all fours with the Ramokuena case[15] in all material aspects. Therein, the Court of Appeal, settled the issue of whether discharge in terms with section 31 of the Act amounts to double jeopardy. The apex court held that it does not, and this court shall not dwell on this issue.

[40] In **Sanderson v Attorney General, Eastern Cape**[16] Kriegler J, who gave the judgement of the court, was of the view, that the if the Applicant's complaint "was a genuine complaint on a point of substance it should therefore not be visited with the sanction of a costs order.[emphasis added][17] The facts reflect that the Applicant herein had a genuine complaint on a point of substance. Hence, it would be improper for this court to make an order as to costs against such a party. That coupled with the fact, this could not beat a deadman with costs.

[41] I therefore make the following order:

(a) The decision of the 1st Respondent to dismiss the Applicant is rational and reasonable. Hence, it shall stand; and

(b) The decision of the 1st Respondent to dismiss the Applicant did NOT amount to double jeopardy.

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[15] Ibid.
[16] 1998 (2) SA 38 (CC).
[17] Ibid at para 33.

(c) Each party shall bare its own costs.

[42] As a result this application is dismissed.

T.E. MONAPATHI

JUDGE

For Applicant : Adv. Mafaesa (Noted by Adv. Makara)

For Respondents : Adv. M. Moshoeshoe