

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/0170 /2022

In the matter between:

MOLIEHI DLAMINI	1ST APPLICANT
MOKHETHI DAMANE	2ND APPLICANT
LEBAKA MATIEA	3RD APPLICANT
KOPANO RAMOKHORO	4TH APPLICANT
NGAKA LENKA	5TH APPLICANT
MOJELA GUGUSHE	6TH APPLICANT
THABANG MAIME	7TH APPLICANT
LECHESA LEPHEANE	8TH APPLICANT
POLOKO SEKHOHOLA	9TH APPLICANT
REFILOE KHELELI	10TH APPLICANT
MOOROSI KALANE	11TH APPLICANT
SEBONGILE CEKWANE	12TH APPLICANT

And

THE COMMISSIONER OF POLICE	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

JUDGMENT

Neutral citation: Moliehi Dlamini & 11 Ors v Commissioner of Police and Another (No.2) LSHC 172 CIV (29 June 2022).

CORAM: T.J. MOKOKO J
HEARD: 23 JUNE 2022
DELIVERED: 29 JUNE 2022

SUMMARY

*Court Order suspending furnishing of applicants' representations – Whether termination of applicants' training as police recruits justified – Where there was Court Order suspending such termination. **Costs** – Whether costs on attorney and clients scale are justified – requisites, thereof.*

ANNOTATIONS

Cases

1. *Beavan v Carelse* 1939 CPD 323
2. *Bushman v Lesotho Development and Construction (Pty) Ltd and Others (C OF A CIV) NO. 3 OF 2015 [2015] LSCA 4*
3. *Commissioner of Police and Another v Moliehi Dlamini and 11 Others – CIV/APN/0170/2022*
4. *Cooke v Gill* LR 8 CP 116
5. *CIV/APN/0169/2022*
6. *Crieff Investment (PVT) Ltd and Another vs Grand Home Centre (PVT) Ltd and Others, HH 12 of 2018, HC6113 OF 2016 Ref 8895 of 2012 [2018] ZWHHC12*
7. *Department of Transport v Tasima (PTY) Limited* 2017 (2) S.A 622 (CC)

8. *G North and Son v Brewer and Son* 1941 NPD 74 *Khoali v. His Worship Selebeng and Others* C OF A (CIV) NO. 23/2020
9. *Lyon v SAR& H* 1930 CPD 276
10. *Madyibi vs Minister of Safety and Security* 2008 JDR 0505 (TK)
11. *Marabe v Maseru Magistrates' Court and Others* Constitutional Case No.18/2020 [2021] LSHCONST 51
12. *Mokete Mohai and Another v. Lesotho Electricity Company and Others* LAC/CIV/A/13/2013 [2014] LSLAC 3
13. *Nestle South Africa (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)
14. *Public Protector vs South African Reserve Bank*, CCT/107/18 [2019] ZACC 29
15. *Read v Brown* 22 QBD 131
16. *Willem Daniel Knoesen and Another v Izette Huijink-Maritz and Others* Case No. 5007/2018

Statutes

1. Act 22 of 1916

Books

1. *AC Cilliers in the Law of Costs*, 2nd Edition
2. *Herbstein and Van Winsen Supreme Court Practice* 4th Edition

INTRODUCTION

[1] This is an application brought on urgent basis for an order in the following terms;

1. That a rule nisi be issued calling upon the respondents to show cause if any, why;
 - a) The first respondent shall not be ordered to dispatch the record of the proceedings that gave birth to the discharge of the applicants from the Police Training College recruitment programme.
 - b) The decision taken by the first respondent to discharge the applicants from the Police Training College recruitment programme shall not be held in abeyance pending finalisation hereof.
 - c) The decision of the first respondent to discharge the applicants from the Police Training College shall not be reviewed and set aside as irregular thus null and void ab initio and of no legal force and effect.
 - d) An order directing the first respondent to reinstate the applicants back into the Police Training College Recruitment Programme without loss of status and benefits and to pay the applicants any arrear salaries which may have been paid in their absence.
 - e) The respondents to pay costs on attorney client scale.

BACKGROUND

[2] On the 31st May 2022, this court granted the applicants a *rule nisi*, returnable on the 8th June 2022. The matter was ultimately allocated to this court and on the day the parties appeared before court for the selection of the date of hearing, this matter was accompanied by another in **CIV/APN/0169/2022**, which was also allocated to this court. For all intends and purposes the parties in this other

matter were the same parties in *Moliehi Dlamini and 11 Others v Commissioner of Police and Another*¹.

[3] The brief history of the *CIV/APN/0169/2022*, was that on the 24th May 2022, my Sister **Makhetha J** granted an Interim Court Order, and the rule nisi was returnable on the 31st day of May 2022, calling upon the respondents to show cause if any, why;

- a) The first respondent shall not be interdicted and restrained from proceeding to discharge the applicants as contemplated by the letters in terms of which the applicants were invited to make representations for the discharge pending finalisation hereof.
- b) The first respondent shall not be directed and ordered to allow the applicants to continue with the recruitment training pending finalisation hereof.
- c) The first respondent shall not be directed to hold in abeyance the letters in terms of which the applicants had been invited to make representations for discharge pending finalisation hereof.
- d) The first respondent shall not be ordered to dispatch the record of the proceedings if any that gave birth to the decision to refuse to provide the applicants with further particulars to the Registrar of this Court, within ten days hereof.
- e) The first respondent's decision to refuse to provide the applicants with further particulars as delineated in their letters dated the 16th and 18th May 2022 shall not be reviewed and set aside.

¹ CIV/APN/0170/2022

- f) The first respondent shall not be ordered to provide the requested further particulars to the applicants herein within ten days of the service of the order, so as to enable applicants to respond to the show cause letters.
- g) That it be declared that the applicants herein are entitled to the vetting reports that revealed that they are notorious criminal gang to enable them to respond to the show cause letters.

The rule in this matter was returnable on the 31st May 2022. On the 31st May 2022, the rule in this matter was extended to the 13th June 2022. It is worth mentioning that the rule in **CIV/APN/0170/2022** was also extended to the same date of 13th June 2022. On the 13th June 2022 this matter was postponed to the 23rd June 2022 for hearing, and the other matter in **CIV/APN/0169/2022** was also postponed to the 23rd June 2022, to be dealt with on that day.

[4] It is apposite to state that in **CIV/APN/0169/2022**, the First respondent- the Commissioner of Police was interdicted and restrained from discharging the applicants, as contemplated in his letters, in which applicants were invited to make representations. The first respondent- Commissioner of Police was further ordered to allow applicants to continue with the recruitment training pending finalisation hereof. The requirement for the applicants to submit letters of representations on the 25th May 2022, was held in abeyance, pending finalisation of the application. This Interim Court Order was granted on the 24th May 2022. However, on the 25th May 2022, the first respondent terminated applicants' appointment as Police Recruits. It is important to mention that in terms of the Court Order in **CIV/APN/0169/2022**, the first respondent was interdicted and restrained from terminating the applicants' appointment as Police recruits. It is for this reason that this court holds a strong view that the proceedings in **CIV/APN/0169/2022** are connected to the proceedings in this matter-**CIV/APN/0170/2022**. The respondents have also taken *lis pendens* as a

point *in limine*. Having put forward this brief history, I shall now proceed to deal with the point *in limine* taken by the respondents.

LIS PENDENS:

[5] The respondents on the point of *lis pendens* pleaded that the applicants have instituted these proceedings, while there are pending proceedings in ***CIV/APN/0169/2022***. That the same applicants have brought before this court substantially the same issues, between the same parties and that these matters are not finalised. Lastly that the applicants are abusing the court process therefore this matter should be dismissed on this ground alone. To buttress this point respondents submitted that both matters are pending cases between the same parties, concerning the same subject matter, and founded on the same cause of action. In that the applicants are in both cases praying that the decision of the first respondent to discharge the applicants from Police Training College programme shall not be reviewed and set aside as irregular. That the prayer directing the first respondent to reinstate the applicants back into the programme without loss of status and benefits was the common relief in the two cases pending before court.

[6] **Adv. Sehloho** referred this court to the case of ***Bushman v Lesotho Development and Construction (Pty) Ltd and Others***² where **Mosito P** referred to ***Nestle South Africa (Pty) Ltd v Mars Inc***³:

“The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality to litigation. Once a litigation has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion

² (C OF A CIV) NO. 3 OF 2015 [2015] LSCA 4 07 August 2015

³ 2001 (4) SA 542 (SCA) Para 16

before that tribunal and should be replicated *lis pendens*. By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion *res judicata*. The same suit between the same parties, should be brought once and finally.”

[7] **Adv. Sehloho** referred this court to the case of ***Mokete Mohai and Another v. Lesotho Electricity Company and Others***⁴ in which **Mosito P** stated that:

“[3.3] The general principle is that if an action is already pending between the parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, it is open to the defendant to take the objection of *lis pendens*, that is that another action respecting the identical subject matter has already been instituted whereupon the court in its discretion may stay the second action pending the decision of the first.” ***Herbstein and Van Winsen Supreme Court Practice***⁵.

[8] On the other hand **Adv. Setlojoane**- Counsel for the applicants, on the point of *lis pendens* submitted that the present application is between the same parties but constitutes a totally different cause of action and subject matter. That the application in ***CIV/ANP/169/2022*** was meant to compel the Commissioner to furnish the particulars which were sought therein. The cause of action is different as it was based on protecting the right to a fair hearing by way of having the court to intervene at the stage of the show cause. That the present case before court is based on a totally different cause of action. When ***CIV/APN/0169/2022*** was pending the Commissioner proceeded to discharge the applicants thereby shifting the goal posts. That by discharging the applicants the Commissioner ended the hearing process thereby actually making a decision

⁴ LAC/CIV/A/13/2013 [2014] LSLAC 3 27 January 2014

⁵ 4th Edition, Page 249

that was meant to be made at the end of the pre-hearing process. **Adv. Setlojoane** referred this court to the case of *Khoali v. His Worship Selebeng and Others*⁶, where **Chinhengo AJA** said the requirements for a successful plea of *lis pendens* are that;

“[21] The two actions must have been between the same parties or their successors, concerning the same subject matter and founded upon the same cause of action”.

He submitted that the present application is between the same parties but constitutes a totally different cause of action and subject matter.

Requisites for *lis pendens*.

[9] Where a party has taken the plea of *lis pendens*, there are a number of considerations that the court must take into account, in determining this plea. *Herbstein and Van Winsen in the Civil Practice of the Superior Courts in South Africa*⁷, the learned authors say:

“If an action is already pending between the parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or in a court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first.”

[10] Having looked at the requisites for *lis pendens*, the question that this court must ask itself is, what is the cause of action? The phrase “Cause of Action” as found in dictionary, Thasaurus means:

⁶ C OF A (CIV) NO. 23/2020

⁷ 4th Edition at Page 249

“The fact or combination of facts that gives a person the right to seek judicial redress or relief against another. The cause of action is the heart of the complaint, which is the pleading that initiates a lawsuit. Without an adequately stated cause of action the plaintiff’s case can be dismissed at the outset.”

[11] In *Willem Daniel Knoesen and Another v Izette Huijink-Maritz and Others*⁸, **Opperman J** had the following to say:

“[41] The actions of the second defendant that caused the litigation and the “cause of action” is synthesised in the following definitions:

“Cause of action”: was defined by **Lord Esher**, MR in *Read V Brown*⁹ to be “every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved. See also *Cooke v Gill LR*¹⁰. *Act 22 of 1916*¹¹: means “every fact which is material to be proved to entitle a plaintiff to succeed in his claim”. *Lyon v SAR& H*¹²; but it can mean “that particular act on the part of the defendant which gives the plaintiff his cause of complaint.” “A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.” See *G North and son v Brewer and son*¹³; *Beavan v Carelse*¹⁴.

⁸ No. 5007/2018 Free State Provincial Division page 16

⁹ 22 QBD 131

¹⁰ 8 CP 116

¹¹ section 64 (1)

¹² 1930 CPD 276

¹³ 1941 NPD 74

¹⁴ 1939 CPD 323

DISCUSSION:

[12] On the point of *lis pendens* taken by the respondent, it is the respondent's submission that ***CIV/APN/0169/2022*** and ***CIV/APN/0170/2022*** are pending cases between the same parties, concerning the same subject matter and founded on the same cause of action. To substantiate this submission, the respondents, make reference to the prayers sought by the applicants in both matters, to indicate that the applicants are seeking the same reliefs in both cases. At paragraph 3.5 of the opposing affidavit the first respondent says:

“...the applicants are in both cases praying in the Notice of Motion paragraph 1 (d) that the decision of the 1st respondent to discharge the applicants from Police Training College Programme shall not be reviewed and set aside as irregular and wrongful and thus null and void ab initio and of no legal force and effect. Furthermore, applicants are praying in paragraph 1 (e) of Notice of Motion that the honourable court to grant an order directing the 1st respondent to reinstate the applicants back into the Police Training College Recruitment Programme without loss of status and benefits and to pay the applicants any arrear salaries which may have been paid in their absence.”

[13] At paragraph 3.6 of the opposing affidavit, the first respondent goes further to say:

“In paragraph 1(j) of the Notice of Motion the applicants pray the honourable court to review and set aside the 1st respondent's decision to terminate the applicants' appointment without loss of title and all their benefits. These substantive prayers in both ***CIV/APN/0169/2022*** and ***CIV/APN/0170/2022*** are essentially the same. I hereinafter annex Notice of Motion in ***CIV/APN/0169/2022*** for ease of reference as “LMPS 0”.

They are all founded on the fact that applicants were given show cause letter why they cannot be discharged from PTC.”

[14] I have no doubt in my mind that the respondent’s point *in limine* of *lis pendens* is improperly taken because the respondent has lost sight of the fact that, this matter is not based on the same cause of action as in **CIV/APN/0169/2022**. The legal requisites for *lis pendens* are that the two actions must have been between the same parties, concerning the same subject matter and founded on the same cause of action. The respondents’ plea of *lis pendens* is based on the prayers that the applicants are seeking before this court as fully demonstrated above. In the case of **Willem Daniel Knoesen**¹⁵, **Opperman J** quoted with approval the words of Lord Esher, where he defined the cause of action to be every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. This court therefore holds a strong view that the cause of action in this matter, is the discharge of the applicants from the Police Training College. This is the fact on which the applicants claim, or cause of action is founded on. Whereas in the other matter the cause of action in that matter was founded on the fact that the 1st respondent had failed to provide the applicants with further particulars that they had requested, and they approached the court to compel the 1st respondent to provide them with further particulars so requested. It should be stated that when the matter in **CIV/APN/0169/2022** was instituted, the first respondent had not yet discharged the applicants or terminated their appointment as Police Recruits. This difference in the set of facts clearly point to one thing that the cause of action in the present case is totally different from the cause of action in the other

¹⁵ Willem Daniel Knoesen (*supra*) page 16

matter. It is on the basis of these reasons that this court holds that the point *in limine* of *lis pendens* was improperly taken and is accordingly dismissed.

MERITS

[15] Before I deal with the merits in this matter, I would like to deal with the Interim Court Order in **CIV/APN/0169/2022**, and the conduct of the Police in so far as this Interim Court Order is concerned. I have already given the background of this Interim Court Order, especially the orders that were granted by this court and the dates on which the said orders were granted. The court at this stage will deal with the conduct of the 1st respondent, the averments of the Deputy Sheriff in the Return of Service and the supporting affidavit.

RETURN OF SERVICE:

[16] The Deputy Sheriff, namely ‘Makabelo Ntoi records the following in the Return of Service in **CIV/APN/0169/2022**:

“On the 24/05/22 at around 17:10 hours, I made an attempted service at Police Head Quarters to serve the 1st respondent with the copies of Certificate of Urgency, Notice of Motion and Interim Court Order. However, Mr. Nkuatsana who was on duty told me that Legal- Compol (unknown to me) whom he was talking to him telephonically, said he will only receive the Interim Court Order on Friday (27/05/22) since he was already off from work began at 12:30 hrs as his half day. On the 25/05/22 at 13:22 hrs. I talked to Mr. Maiseng (ComPol Legal) telephonically and explained the nature of the Interim Court Order. However, he told me that he was away from Maseru, at rural but he will meet me later afternoon. When I called him again telephonically at around 14:58 hrs he did not pick up my calls for two times. I only served the copies at legal on the 27/05/2022”.

Supporting Affidavit:

[17] The Deputy Sheriff has filed a supporting affidavit in this matter, and she stated as follows at paragraph 1 of her affidavit:

“I am Mosotho female adult and the Deputy Sheriff of this Honourable Court. I was charged with serving the application in *CIV/APN/0169/2022.*”

At Paragraph 3 the deputy sheriff states as follows:

“In particular I confirm that on the 24th May 2022 at around 17:10 hours, I went to Police Headquarters in order to effect service of an interim order and the notice of motion in the above application. When I arrived thereat, I was informed that the process would not be received because the person who could receive it had long gone home because they were a half day at the Police. No one then agreed to receive the process and I was told that it will be received on the 27th May 2022.”

At Paragraph 4 the deputy sheriff states as follows:

“On the following day, the 25th May 2022, I made another attempt to serve the process and I caused to have the contacts of one Mr. Maiseng who I was told works in the legal office as head therein, since I had been informed that legal process is received only in the legal office. I called him and we agreed that he would be at office towards the afternoon and that I would go to the Police Headquarters at that time. At around the agreed time, I called him to confirm that we would be meeting at his office for him to receive the process, but his phones rang unanswered. I tried calling him until late in the afternoon and there was still no answer. I could suspect that had he known when I called that it is me, he would

probably not have picked my call. I confirm that I was not able to serve the order before the 1st respondent made the decision herein challenged.

At Paragraph 6 the deputy sheriff says the following:

“That notwithstanding, I can confirm that the Police service was aware that there is an order that had to be served since the 24th May 2022. Service of the order was frustrated by the legal office and having talked to Mr. Maiseng to whom I explained the nature of the process, I can say in certain terms that the Police knew of the order but they made it impossible for it to be legally served. I was only able to serve the order on the 27th May 2022, only to be told when I submitted the return of service that the 1st respondent proceeded to make the decision which had already been stayed by the order I attempted to serve.”

FOUNDING AFFIDAVIT OF MOLIEHI DLAMINI:

[18] This deponent at paragraph 8.10 states as follows:

“When we arrived in the morning, we were told to wait in the instructor’s room wherein we were further referred to wait in classroom 1. This is where we waited until one instructor, Sir Chitja, came in and asked where our cause letters are. We told him we did not have the letters but rather we have court orders, since approached this court which granted us an order of stay. We showed him the order after which he stood a few paces from us and began making calls. We suspect that he was calling Police Headquarters in relation to an order as the calls would take longer but nothing positive for us was to come from all those calls until he left us.

OPPOSING AFFIDAVIT OF HOLOMO MOLIBELI:

[19] In answering paragraph 8.10 of the founding affidavit, the first respondent said the following at paragraph 31 thereof:

The contents herein are denied, and the respondent wish to highlight the contradiction made by applicants. The applicants are now providing two contradictory versions. On the one hand, the applicants are saying when they arrived at PTC, they were left unattended from the main gate. On the other hand, they are saying they are left in squad 1. It is the respondents' case that the applicants are the ones who denied themselves audi alteram partem by failing to show cause as required. The respondent is duly advised that audi alteram partem is not absolute it can be attenuated by facts as in the present case.

Supporting Affidavit of Semati Chitja:

[20] This deponent says that he has read the supporting affidavit of Commissioner of Police Mr. Holomo Molibeli and he aligns himself with its contents where it relates to him.

ISSUES FOR DETERMINATION:

[21] The first issue that this court wants to deal with is whether the first respondent at any material time became aware of the Interim Court Order in *CIV/APN/0169/2022* granted on the 24th May 2022. This court had an occasion to study the return of service, especially what the deputy Sheriff stated therein. It is a matter of common cause that the deputy Sheriff proceeded to the Police Head Quarters on the stated date and time to effect service of the court order. It is a matter of common cause that the deputy sheriff met one Police officer by the name of Nkuatsana, who duly advised the sheriff that all legal process that go to the Office of Compol should be served on the Office of Compol- Legal. The sheriff in the return of service stated that Mr. Nkuatsana telephonically called Legal officer, who advised him that he would only receive the court

process on the 27th May 2022, as he had just knocked off at work. He stated further that on the 25th May 2022, she explained to Mr. Maiseng the nature of the Interim Court Order, but he told her that he was away from Maseru. The deputy sheriff and Mr. Maiseng then agreed to meet later that afternoon. When the deputy sheriff called him, he did not pick up her calls. Then the sheriff said she served the process on legal office on the 27th May 2022.

[22] This court holds a strong view that the office of Commissioner of Police-Legal became aware of the Interim Court Order that the deputy Sheriff was armed with to serve on the office of the Commissioner of Police. This court is further cognisant of the fact that Police Nkuatsana did draw the attention of Mr. Maiseng to the court order, because Mr. Nkuatsana later conveyed the message to the deputy sheriff that Mr. Maiseng said he would receive the process on the 27th May 2022. Coupled with the fact that the deputy sheriff said that she explained the nature of the Interim Court order to Mr. Maiseng, leaves this court with no doubt that Mr. Maiseng 's attention was brought to the court order. This court strongly holds that since the office of legal is the one that the deputy sheriff was advised, is the office responsible for receiving the court process for Commissioner of Police office, the office of the Commissioner of police, was aware of the court order in *CIV/APN/0169/2022*, on the 25th May 2022, when the first respondent terminated the applicants' appointment as Police recruits.

[23] Applicants have stated that they informed one instructor by the name of Chitja that they did not submit their representations because there was a court order, which directed the first respondent to hold in abeyance submission of the letters of representations from the applicants. Applicants stated that they showed the court orders to Mr. Chitja, who then made a call to someone unknown to the applicants. This court should mention that Mr. Chitja does not deny that the court orders were brought to his attention as one of the instructors.

[24] This court is troubled by the conduct of Senior Superintendent Maiseng. The court should mention that the rank of Senior Superintendent is a very senior rank within the Police Service. This court is further troubled by the fact that after being advised by the deputy Sheriff about the nature of court process that, she was going to serve on the office of the first respondent, Mr. Maiseng simply said that he would receive the court process on 27th May 2022. What his attitude says to this court is that he did not care at all about the court process of this court. He made it very clear to Mr. Nkuatsana and the deputy sheriff, that he would receive the court process on the 27th May 2027. His entire attitude towards the court process, translates into the conclusion that he had no respect for the court process at all. It further says that he put his own personal convenience ahead of the court processes of this Court. This court does not doubt the deputy sheriff's averment that, they agreed to meet the next day, the 25th May 2022, to effect service on him. But that wasn't to be, as he never picked the deputy sheriff's telephone calls as he had undertaken. This attitude further indicates clear disrespect of this court process by this officer, who is supposed to protect and respect the orders of this Court. The conclusion that the office of the first respondent deliberately failed to comply with the Orders of this court cannot be avoided.

[25] This court is further troubled by the fact that the applicants clearly stated that on the 25th May 2022, they brought the Court order to the attention of one officer, they described as Sir Chitja. This court has no doubt in its mind that the officer (Chitja) of the first respondent came to know of the order of this court. Chitja was described as one of the instructors at PTC. This officer knew that the applicants were supposed to submit their letters of representations on that day, that is why he asked them where their letters were. This court holds a view that, Chitja upon realisation of the court orders, picked a phone and made calls. This court strongly believes that he was reporting to his superiors about that state of

affairs. It is for this reason that this court holds that the Court order of this court was not complied with by the first respondent deliberately.

[26] The other issue that is of great concern to this court, is that assuming for a minute that on the 25th May 2022, the first respondent was not aware of the court order, granted on the 24th May 2022. The first respondent says he became aware of the Court Order on the 27th May 2022, when it was officially served. The question that comes to this court's mind, is what has the first respondent done about that court order to date. Has the first respondent complied with the said court order, having come to know of its existence? Having been aware, assuming that on the 25th May 2022, he was not aware of the Court Order, has the first respondent cancelled his decision to discharge the applicants, in compliance with the court order. The answer is unfortunately in the negative.

COMPLIANCE WITH COURT ORDERS:

[27] It is trite that compliance with Court Order is an issue of fundamental concern for society that seeks to base itself on the rule of law.

[28] In the case of *Marabe v Maseru Magistrates' Court and Others*¹⁶ S.P Sakoane CJ had this to say:

“...Disobedience of orders of the courts strike at the very heart of the rule of law and engenders self-help and lawlessness. Hence the Constitution grants power to the courts to punish any private actor or state- actor adjudged guilty of disobeying a court order and so secure compliance with legal obligations.”

¹⁶ CC No.18/2020 [2021] LSHCONST 51 07 June 2021 page 10

[29] In the case of *Department of Transport v Tasima (PTY) Limited*¹⁷, **Khampepe J.** said:

“...Allowing parties to ignore court orders would shake the foundations of the law and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.”

[30] **At paragraph 186 She said:**

“...the legal consequences that flows from non-compliance with a court order is contempt. The essence of contempt lies in violating the dignity, repute or authority of the court. By disobeying multiple orders issued by the High Court, the department and the corporation repeatedly, violated the court’s dignity, repute and authority and the dignity, repute and authority of the judiciary in general.”

[31] There is an existing order in *CIV/APN/0169/2022*, which was served on the first respondent’s office on the 27th May 2022, and to date the first respondent is in non-compliance.

LETTER OF TERMINATION OF SERVICE DATED 25TH MAY 2022.

[32] In the letter of termination of service, dated the 25th May 2022, addressed to all the applicants Sup. S. Marou says the following:

“The Office of the Commissioner of Police (Compol) has requested you per the letter dated 19th May 2022, to make representations through the help of your legal representatives if any, on the 25th May 2022 at 08:00

¹⁷ 2017 (2) S.A 622 (CC) at paragraph 183

hrs. It has come to the attention of Compol that, you failed to furnish the reasons that may persuade him not to effect his intention to terminate your appointment as Police Recruit. The office of the Commissioner of Police has perused and considered the correspondence that you initially made and took into account the fact that **you failed to provide representation at 08:00 hrs on the 25th day of May 2022 as requested. The Commissioner of Police has considered your failure to make a required response as an indication that you waived your right to make representation.**

It is on the basis of the foregoing background that the Commissioner of Police has directed me, as I hereby do, to inform you **that your appointment as a Police Recruit has been terminated with effect from the date of this letter.**”

[33] I have no doubt in my mind that according to the letter of termination, referred to above, the applicants’ appointment as Police Recruits was terminated, on the fact that they failed to furnish the Office of the Commissioner of Police, with the letters of their respective representations on the 25th May 2022 at 08:00 hrs, as instructed to do so, by the first respondent.

[34] It is a matter of common cause that the applicants approached this court on the 24th May 2022, whereby the Court granted a rule nisi, in terms of which in prayer (d) thereof amongst others; the first respondent was ordered and directed to hold in abeyance the letters in terms of which the applicants had been invited to make representations for discharge pending finalisation hereof. This court is cognisant of the fact that; applicants were aware of this court order as they were physical armed with the same. This is evidenced by the fact that on the 25th May 2022, when instructor Chitja asked them about their letters of representations,

they showed him the court order, which suspended submission of the said letters.

[35] The next issue that this court has to determine is whether it can be rightly said that the applicants failed to furnish their representations as requested. This court is of the view that the first inquiry is to ascertain the meaning of the word “failure”. Oxford dictionary defines the word “failure” as the neglect or omission of expected or required action. The word “failure” is similar to the words: negligence, non-observance, non-performance, dereliction.

[36] Having looked at the meaning of the word “failure”, and taking into account that the court had ordered the first respondent to hold in abeyance the letters in terms of which the applicants had been invited to make representations for their discharge, can it be said that the applicants failed to furnish their representations as requested. The answer to this question is in the negative, because the applicants had a valid, reasonable and lawful excuse for not furnishing their representations, simply because there was an order of court (**CIV/APN/0169/2022**) which directed that the furnishing of the requested representations had been suspended. Applicants had approached this court, asking for the suspension of the submission of the letters of their respective representations. Applicants 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 applicants did not fail to submit their representations nor waived 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 termination of the applicants' appointment as Police Recruits was unlawful, because there was an order of court which had directed and ordered the suspension of the submission of the applicants' letters of representations. The court finds that applicants complied with the court 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.

COSTS.

[38] Applicants have prayed for costs on a higher attorney client scale. The issue that this court has to determine is whether applicants are entitled to attorney and client scale. In order to make this determination, this court is duty bound to make an inquiry into the circumstances under which attorney and client scale may be ordered.

[39] In the case of *Crieff Investment (PVT) Ltd and another vs Grand Home Centre (PVT) Ltd and Others*¹⁸, where **Mushore J** had this to say:

“The awarding of costs at a higher scale is within the discretion of the court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors **Herbstein and Van Winsen** in *The Civil Practice of the High Court and Supreme Court of Appeal of South Africa*¹⁹, stated the following:

“The award of costs in a matter is wholly within the discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing

¹⁸ HH 12 of 2018, HC6113 OF 2016 Ref 8895 of 2012 [2018] ZWHHC12

¹⁹ 5th Edition: Vol 2 page 954

the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties...”.

[40] **AC Cilliers in the Law of Costs**²⁰, classified the grounds upon which would the court be justified in awarding the costs as between attorney and client:

- (1) Vexatious and Frivolous proceedings.
- (2) Dishonesty or fraud of litigant.
- (3) Reckless or malicious proceedings.
- (4) Litigant’s deplorable attitude towards the court.
- (5) Other circumstances.

[41] **Mushore J.** in the ***Crieff Investments Case***²¹ continued to say:

“In essence, the cases establish a position that Courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them. Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alternation. In awarding costs at a higher scale, the Courts should therefore exercise greater vigilance.

[42] In the Constitutional Court of South Africa, in the case of the ***Public Protector vs South African Reserve Bank***²², **Mogoeng CJ** had this to say:

²⁰ 2nd Edition page 66

²¹ *Crieff Investments Case* (supra)

²² CCT/107/18 [2019] ZACC 29 page 4

“[8] Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court- “[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium”

[43] At page 14, the Constitutional Court quoted with approval the principles laid down in the case of *Madyibi vs Minister of Safety and Security*²³ in which **Petse ADJP** states that-

“[t]he principle that I have been able to extract from other decisions of our Courts that I have had recourse to... is that our courts have awarded costs on the punitive scale in order to penalise dishonest, improper, fraudulent, reprehensible, or blameworthy conduct or where the party sought to be mulcted with punitive costs was actuated by malice or is otherwise guilty of grave misconduct so as to raise the ire of the court in which event a punitive costs order would be imperatively called for”.

[44] In considering all the circumstances that should be taken into by the court in deciding whether or not to award costs on a higher attorney client scale, this court holds a view that it is only in extraordinary circumstances that the court should justifiably award costs on the punitive scale, that decision requires a deeper reflection on the part of the court, guided by an unmistakably strong sense of justice. And I wish to borrow the words of **Mogoeng CJ** in the case of the *Public Protector*²⁴, where he said after all courts exist not to crush or

²³ 2008 JDR 0505 (TK) at para 31

²⁴ *Public Protector*(supra) at page 15

destroy, but to teach or guide, caution or deter, build and punish constructively. And that ought to be the purpose of the law in the constitutional dispensation. Therefore, this court is of the view that an award on the punitive scale, can rarely be resorted to, to penalise dishonest, improper, fraudulent or vexatious behaviour, or any other reprehensible conduct, or where there is a grave misconduct on the part of such a party. I consequently hold a strong view that, no proof has been placed before this court, to indicate that the conduct of the respondents was clearly and extremely scandalous, vexatious or objectionable so as to justify an award on a punitive scale. This court therefore hastens to say that; no exceptional circumstances were put before this court to justify exceptional award of costs on a higher scale.

ORDER

[45] The court makes the following order.

1. Termination of the applicants' appointment by the first respondent, as Police Recruits at Police Training College is reviewed and set aside as unlawful.
2. The first respondent is ordered to reinstate the applicants as Police Recruits into the Police Training College Recruitment Programme, without any loss of benefits.
3. Costs granted to applicants on an ordinary scale.

T.J. MOKOKO
JUDGE

FOR APPLICANTS: **ADV. R. SETLOJOANE**

FOR RESPONDENTS: ADV. N.C SEHLOHO