

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/370 /2021

**In the matter between:
MASEELE KHOABANE
APPLICANT**

And

**THE COMMANDER LESOTHO DEFENCE FORCE
RESPONDENT**

1st

**ATTORNEY GENERAL
RESPONDENT**

2nd

CIV/APN/385/2021

**In the matter between:
MASEHLOHO
APPLICANT**

MOTHIBELI

And

**THE COMMANDER OF LESOTHO DEFENCE FORCE
RESPONDENT**

1ST

**MILITARY TRAINING INSTITUTE COMMANDER
RESPONDENT**

2ND

**DIRECTOR HUMAN RESOURCE (LDF)
RESPONDENT**

3RD

**PRINCIPAL SECRETARY MINISTRY
OF DEFENCE
RESPONDENT**

4TH

**ATTORNEY GENERAL
RESPONDENT**

5TH

Neutral citation: Maseele Khoabane v The Commander LDF [2022] LSHC 83
Civ (12 January 2022)

EX TEMPORE JUDGMENT

Coram : Hon. Mr. Justice E.F.M.Makara
Date of Hearing : : 12 January 2022
Date of Judgment : 12 January 2022

MAKARA J

[1] At the commencement of the proceedings, the afore cited applications were consolidated by consent and therefore, heard simultaneously.

[2] At the onset, it is worthwhile to project the reliefs sought for in the respective application. In CIV/APN/370/21, the Applicant sought for the intervention of this court by ordering in rule nisi terms as follows;

1. That the normal rules pertaining to periods of notice and modes of service shall not be dispensed with on account of urgency of this matter.
2. That the decision by 1st Respondent and or his subordinates namely Commandant Naha Kolisang, Human Resource Officer Major General Poqa Motoa to remove Applicant from training shall not be stayed pending finalization of this matter and Applicant be allowed to resume training course.
3. That the record of proceedings or process that led to the decision taken by 1st Respondent and or his subordinates to remove Applicant from the training course shall not be dispatched to this Honourable Court within 7 days of the granting of this order.
4. That a rule nisi shall not be issued returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause if any why the following orders shall not be made final:

- a) That the decision by 1st Respondent and or his subordinates to remove Applicant from the training course shall not be reviewed, corrected and set aside.
- b) That Applicant shall not be reinstated into the training course to finality without interference by 1st Respondent and or his subordinates unless it is by due process of the law.
- c) That the 1st Respondent and or his subordinates shall not be compelled to comply with Applicant's medical directives as recommended by the Doctor during the training course and subsequent employment in the Lesotho Defence Force and desist from assigning Applicant duties interfering with her health and condition.

ALTERNATIVELY;

- d) That in the event that the recruitment training has been completed upon finalization of this application, 1st Respondent and or his subordinates shall not be directed and compelled to promote Applicant to the position of 2nd Lieutenant in terms of her seniority within the Lesotho Defence Force.
5. That the Respondents pay costs of this application.
 6. That prayers 1, 2, 3 and 4 operate with immediate effect as interim orders of this Court.

In CIV/APN/385/21, the court was asked to order as follows:

1. That the rules of court pertaining to the modes of service and form be dispensed with on account of the urgency of this matter.
2. That a rule nisi be issued returnable on the 12th day of November 2021, calling upon the Respondents to show cause if any why:

- a. The 1st to 3rd Respondents shall not be ordered to reinstate the Applicant with immediate effect into the training course intended to fill the vacancies of the ranks of Second Lieutenant in the LDF Corps pending final determination hereof.

ALTERNATIVELY;

- b. The 1st to 3rd Respondents the commissioning and passing out of the Officer Candidates in the training course intended to fill the vacancies of the ranks of Second Lieutenant in the LDF Corps shall not be stayed pending final determination hereof.
3. The 1st to 3rd Respondents' decision to remove the Applicant from the training course intended to fill the vacancies of the ranks of Second Lieutenant in the LDF Corps shall not be declared unlawful and of no force and effect *ab initio*.
 4. The 1st to 3rd Respondents shall not be ordered to reinstate the Applicant with immediate effect into the training course intended to fill the vacancies of the ranks of Second Lieutenant in the LDF Corps.
 5. The Respondents shall not be ordered to pay the costs of this application.
 6. The Applicant shall not be granted such further and/or alternative relief.

7. That prayers 1, 2(a) and/or (b) operate with immediate effect as interim orders.

[3] It emerged from the papers with special reference to the prayers sought for, that both matters warranted for an urgent intervention by the Court, the counsel recognized the imperativeness for the interim prayers to be dispensed with in favour of considering the reliefs which are applicable to the determination of the merit related issues. Resultantly, the legal points raised were interrogated simultaneously with the merits.

[4] Counsel for the Respondents made comprehensive addresses. He, from the onset, cautioned the Court that it did not have jurisdiction to review the decision made by the Commander to terminate the promotional training which involved the Applicants in these cases. To elucidate their point, he advised the court that Section 119 of the Constitution does not contemplate the exercise of the reviewing powers under the Section over the commanding decisions of the commander. In the same logic, he emphasized that a distinction should be drawn between the command decision as opposed to the administrative decision. In direct terms, he categorized the impugned decision as a command and consequently, beyond the preview of this Section.

[5] On the statutory terrain, the counsel drew the attention of the Court to Section 12 and 18 of the LDF Act 1996. In this respect,

he contended that Section 12 (2) makes a clear delineation between the two terms / concepts. According to him, Section 119(1) of the Constitution is restricted to the administrative related decision and not the commanding one. The impression he created was that a command decision is a prerogative of the LDF Commander since it addresses the specific exigencies within the military and that Courts are disqualified from censuring such a decision.

[6] The Court interjected by expressing its gratitude to the learned assistance given to it by the counsel for the Respondent and decided that the picture he has presented enables it to interface same with the pleadings tendered by his counter parts for the Applicants. The same applied to the latter's counter submissions on law.

[7] It should suffice to state that the counsel subscribed to the approach adopted by the Court for the expeditious conclusion of the case. This notwithstanding, the counsel for the Applicant in CIV/APN/385/21 sought for an indulgence to caution the Court that the heading of Section 12 bears the wording 'command and administrative'. The impression he created is that the terms are inter-related and not mutually exclusive. Consequently, the suggestion is that command denotes administrative decision and vice versa.

The decision

[8] The initial assignment presented to the Court is to determine its jurisdictional competency over the matter. The answer here is expressly articulated under Section 119 of the Constitution¹ which is resonated under Section 2 of the High Court Act² and for their practicalisation under Rule 50 of the High Court rules³. Section 119(1) states:

There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.

[9] The pertinent wording for the purpose of this case is the one in terms of which this Court is entrusted with the powers to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law.

[10] In the context of this case, the Court classifies the impugned decision as of a quasi-judicial nature, effect and consequence. This is attributable to the fact that the decision of the Commander to remove the Applicants midstream the training course has

¹ Constitution of Lesotho 1993

² Act No. 5 of 1978

³ LN No. 9 of 1980

already impacted upon their legitimate expectation to be promoted at the end of the course. This said, it emerges that the decision would be categorized to be of a *quasi judicial* nature and effect. This was well elucidated in the case of **Thabo Fuma v The Commander, Lesotho Defence Force and Others**⁴ where the court defined the applicability of quasi-judicial concept in these terms:

The nature of the powers bestowed upon the Commander under Section 24 are interpreted by this court as being characteristically quasi-judicial in nature and in effect. This is because he has the authority to determine a soldier who on account of his health condition, warrants him to make a recommendation to the Principal Secretary that he be examined by the Medical Board for its finding on the soldier's fitness to be retained in the Force or to be discharged. A dimension of significance here is that the Commander accompanies the recommendation with his own representations in the matter. This is understandable particularly when he is the one who has ground knowledge about the daily military challenges facing a soldier. The Court recognizes that the Commander is a repository of the recommending powers which are of a quasi-judicial nature. This is so in realization of the administrative fact that the recommendation had a potentially adverse consequence on the Applicant's continued employment in the Army and on his future means of earning livelihood for himself and his family. The Commander was by virtue of the quasi-judicial powers which he exercised over applicant, obliged by the dictates of Administrative Law to have followed the said rules of natural justice. This is scheduled to obtain whenever in the exercise of the powers entrusted upon an official in authority, the concerned person could have his existing status, remuneration and legitimate expectation negatively affected by the decision thereof. It has to be repeated that in the instant case, the charge under consideration is at this stage, that the Commander hadn't heard the applicant before he advanced the recommendations and his corresponding representations to the Principal Secretary for the latter to consider constituting a Medical Board for the stated purpose. It is not in dispute that the Commander hadn't done so.⁵

⁴ (CONST/8/2011) [2013] LSHC 68

⁵ *Ibid* @ para 26

[11] The *quasi-judicial* nature and effect already referred to, is justified by the legitimate expectation which the Applicants had developed from the moment they applied for their enrollment into the training course. The expectation is clearly traceable from the advertisement circulated by the Commander of the LDF in which the degree holders were invited to apply for training to fill the 97 vacancies of Second Lieutenant in the military establishment.

[12] The Court realizes that the publication only required degree holders to apply, without in any manner whatsoever, prescribing health fitness as one of the prerequisites for the training and appointment on promotion to the said rank. The understanding created is simply that even those who could have been medically compromised, were eligible to apply for the course and that they will be assigned the military related tasks suitable for the members of such medical conditions. This was acknowledged in the case of *Fuma supra*.

[13] In the circumstances of this case, the Court determined that against the backdrop of the facts that the course has been completed or ended and those who completed it have already been promoted, the standing prayers would have to be considered in that light. This should be considered in the light of the complaint that the participation of the Applicants was terminated before they also completed the training course and therefore, disqualified from being promoted.

[14] Resultantly, both counsel saw wisdom in assisting the Court in the identification and auditing of the prayers which are still of the moment and leaving aside those which have been overtaken by the developments and, therefore, practically inconsequential. In that exercise, it emerged that the prayers which qualify for the attention of the court in CIV/APN/370/21 are prayers:

4(a) That the decision by the 1st Respondent and or his subordinates to remove Applicant from the training course shall not be reviewed, corrected and set aside.

(b) That Applicant shall not be reinstated into the training course to finality without interference by 1st Respondent and or his subordinate unless it is by due process of the law.

(c) The 1st Respondent and or his subordinates shall not be compelled to comply with Applicant's medical directives as recommended by the Doctor during the training course and subsequent employment in the Lesotho Defence Force and desist from assigning Applicant duties interfering with her health and condition.

(d) That in the event that the recruitment training has been completed upon finalization of this application, 1st Respondent and or his subordinates shall not be directed and compelled to promote Applicant to the position of Second Lieutenant in terms of her seniority within the Lesotho Defence Force.

5. That the Respondents pay costs of this application.

While in CIV/APN/385/21, the prayers that are of the moment are:

3. The 1st to 3rd Respondents' decision to remove the Applicant from the training course intended to fill the vacancies of the ranks

of Second Lieutenant in the LDF Corps shall not be declared unlawful and of no force and effect *ab initio*.

5. The Respondents shall not be ordered to pay the costs of this application

[15] In the premises the Court finds it legally justifiable to restore the status *quo ante* by ordering thus:

1. The 1st Respondent and or his subordinates' decision to remove Applicants from the training course is reviewed, corrected and set aside and declared null and void.
2. The costs will follow the event.

**E.F.M. MAKARA
JUDGE**

**For Applicant in CIV/APN/370/2021: Adv. Mokhatholane instructed
by P. Masoabi Attorneys**
**For Applicant in CIV/APN/385/2021: Adv. Rafoneke from Naledi
Chambers Attorneys**
**For Respondents in all Applications: Adv. Thakalekoala from
Attorney General's Chambers**