

# IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/13/2022

In the matter between:-

**MOLEFI TSHABALALA**

**APPLICANT**

**AND**

**THE COMMISSIONER OF POLICE**

**1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL  
DIVISION**

**2<sup>ND</sup> RESPONDENT**

Neutral Citation: Molefi Tshabalala v. The Commissioner of Police and Another  
[2022] LSHC Civ 109 (10<sup>th</sup> May, 2022)

## **JUDGMENT**

**Coram** : Hon. Mahase J.

**Date of hearing** : 14<sup>TH</sup> March, 2022

**Date of delivery** : 10<sup>TH</sup> May 2022

### **Summary**

*Civil Procedure – Review application – Applicant having been interdicted – Asks Court to review, set aside and declare the interdict as being unreasonable, irrational and unlawful – Exercise of a public official’s administrative powers to be carried out in terms of the law – Applicant seeking an order that he be reinstated to his position in the Lesotho Mounted Police Service, at the RCTS, still retaining his benefits. First respondent making a new case in the answering*

*affidavit – applicant being denied an opportunity to make representations on the new case.*

## **ANNOTATIONS**

### **CITED CASES:**

- **Lebohang Phooko v. J & M Properties, C. of A. (CIV) No. 36 of 2013**
- **Lesojane Leuta v. Basotho National Party – National Executive Committee and Two Others CIV/APN/86**
- **Osman Moosa and Another v. LRA and 4 Others CCA/36/2013 – CCA/37/2013**
- **Thabo Letjama v. Commissioner of Police and Others (unreported) CIV/APN/167/2020**
- **Bathabile Mafa v. Minister in charge of Public Service and Another, CIV/T/ 269/82 [1983] LSHC (October 1983)**
- **Matsoha and Others v. Director of Postal Services and Others, CIV/APN/324B/2001 (NUL) 2005 LSHC 153 (12<sup>th</sup> August 2005)**

### **STATUTES**

- **The Constitution of Lesotho, 1993**

### **BOOKS**

- **Hoffman & Zeffertt:- South African Law of Evidence, 4<sup>th</sup> Edition @124.**

### **[1] INTRODUCTION:-**

The applicant has approached this Court challenging the decision of the first respondent through which the first respondent has interdicted him from performing any duties. He has been so interdicted with pay for almost six months to the date when he filed this application.

### **[2] Factual Background**

Briefly, the facts of this matter are that, the applicant and five other police officers; all stationed at the RCTS Unit were ordered to travel

to Mafeteng Police Station to have certain suspects transferred to this Unit in Maseru. The applicant was in charge over this team. The Mafeteng Police carried out all the necessary procedures to effect such a transfer. In the like manner, all the necessary procedural steps were carried on by Officers at the RCTA once when the suspects had been brought to Maseru.

- [3] For purpose of this application, only the transfer form of one suspect, one Khethang Moshe is annexed herein in the founding affidavit. Kethang Moshe died later after he had arrived at the said RCTS Police Station. Also annexed herein is a copy of Khethang's detention form.
- [4] In brief, it is the applicant's case that all the lawful necessary procedures were followed to the letter from Mafeteng to Maseru Police Stations in order to effect the transfer of all the said suspects as already outlined above.
- [5] However, on that day, the 13<sup>th</sup> January 2021 at about 14:25; and whilst the other police officers who formed a team over which the applicant was in charge, Khethang complained of chest pains. The applicant offered to take this suspect to the hospital but the suspect declined the offer and he actually said he would be alright.
- [6] According to the applicant's founding affidavit, the rights of all the suspects were explained to them before they were ultimately locked in the police cells for them to be taken to Court on the next day.

- [7] Before he knocked off duty, the applicant had asked Khethang to be frank and to disclose on the detention form, all of his problems. Both the transfer and detention forms are to be found at pages 24 and 25 of the record of proceedings. In the columns written remarks by the detainee, both of which have been or bear the signature of Khethang Moshe; written in Sesotho, it is written “*ke ntse ke le hantle bothata ke ka sefubeng*”.
- [8] The applicant ultimately reported to his senior, one superintendent Motsoetla about all the three suspects (including) Khethang Moshe who had been transferred from Mafeteng to the RCTA. The applicant specifically reported to his senior that Khethang had complained about feeling chest pains and that this suspect had rejected an offer to be taken to hospital for medical assistance.
- [9] The applicant was, later that day at night informed that the said Khethang had died at the Queen ‘Mamohato Hospital wherein he had been taken to at the instruction of him/applicant.
- [10] Subsequent to that, on the 28<sup>th</sup> January 2021, the applicant received a letter from the office of the first respondent. In that letter the applicant has been asked to show cause and invited to make representations, within seven day explaining why he may not be interdicted from duty with full pay in connection with the incident in question. That letter which is marked annexure “TS1” appears at page 26 of the record. Its contents are incorporated herein. As already indicated, and as per annexure “TS3”; the applicant was formally

interdicted from duty on full pay of salary upon receipt of that letter dated the 6<sup>th</sup> July, 2021.

[11] The applicant is challenging that decision made by the first respondent to have him interdict on the ground(s) or reason(s) spelled out in annexure “TS3”.

[12] Counsel herein had, before the 14<sup>th</sup> March instant appeared before my sister, Her Ladyship P. Banyane, before whom and by consent of counsel, only prayer 1 in the notice of motion was granted. However, the record of proceedings in relation to the final decision to have the applicant interdicted has not, to date been dispatched to this Court. There is no such record of such proceedings filed of record in this file.

[13] The matter being opposed, the Court, per my sister P. Banyane ordered and had the file returned to the allocation office for reallocation. Matter was then postponed to the 28<sup>th</sup> February 2022 for mention. On that day, the file was placed before my brother K. Moahloli who once again ordered that the file be “sent for allocation”. He however put parties to terms in respect of filing the pleadings as follows:

*“Respondent will file answering affidavits and applicants their reply if any (before the 14<sup>th</sup> March)”.*

[14] On the above date, in the morning hours, the said file was placed before me. Adv. ‘Musi Mosae appearing for the applicant then informed this Court that Adv. Thakalekoala for the respondents was

on leave but that through a telephonic discussion, it was agreed between them that counsel for the respondents be allowed time to prepare and file his written submissions, by the end of business day on the 15<sup>th</sup> March instant.

[15] Only counsel for the applicant has filed the written submissions in the Civil Registry of this Court on the 14<sup>th</sup> March 2022. Same were duly served upon the respondents' offices on the same date. This is indicated by the date stamp of the office of the respondents affixed at the bottom of the applicant's heads of argument. On this date stamp which has been received by an officer in the respondents' Civil Registry it is clear that it was served upon him/her at 09.12 hours.

[16] This narrative is meant to show that indeed counsel for the respondents was aware of this Court process; hence why he undertook to have filed his written submissions as indicated above.

[17] This Court was also, informed that, and by consent between counsel, once the written submissions have been duly filed by both counsel, the Court should then read through same without both counsel having addressed it as counsel are both of the view that they will have covered everything in those written submissions. They have dispensed with their right to address Court viva voce.

[18] Once again, per the parties' counsels' agreement, the Court allocated the date on which judgment would be delivered. However, and through no fault on the part of anyone, including this Court; all Court

business came to a standstill because the electricity supply of the Judiciary was disconnected by the power utility provider for not having been paid what was owed to it by the Judiciary.

[19] It is worth noting that to date, no written submissions have been filed of record by counsel for the respondents. This is despite the undertaking by counsel for the respondents and also despite that the matter has been filed on an urgent application.

[20] This Court has therefore decided to proceed to write judgment on the basis of the written submissions and the answering and the replying affidavits filed of record. I proceed to deal with the matter on the basis that both have at least filed the answering and the replying affidavit.

[21] The applicant has clearly spelt out the reliefs he seeks before this Court in his notice of motion, the founding affidavit as well as in his written submissions. The respondents' case is contained in their answering affidavits filed of record. To avoid repetition, the contents of the above pleading are incorporated herein.

[22] In short, the applicant is challenging the manner in which this decision was made or arrived at as well as the underlying reasons for this decision. He also demands that he be reinstated to his official position and duty station without any loss of his benefits and emoluments.

[23] The matter is opposed. The crux of the opposition by the first respondent is to be found in the answering affidavit, read together

with annexure “TS1” as well as with annexure “TS3”. In turn, the case of the applicant is clearly spelt out in the notice of motion and his founding affidavit, the replying affidavit as well as in his written submissions; and I may add, as well as in annexure “TS4”.

[24] It is noted that there has not been any response by the first respondent to the contents of annexure “TS4”. As a starting point, it is clear that the decision by the first respondent is premised on the alleged fact that the applicant was somehow (my underlining) involved in an incident which occurred at the RCTS Office, in which one Khethang Moshe died.

[25] This is the only reason indicated in annexure “TS1” as the only one main reason why he may not be interdicted from duties. In his response, the applicant as per annexure “TS2” has not only denied any involvement in the death of the said suspect who died while in police custody.

[26] He also gave a detailed narrative of what transpired until when the said suspects were transferred from Mafeteng to the RCTS Police Station in Maseru. The details of his explanation are an exact replica of the applicant’s founding affidavit.

[27] An outstanding feature which is of common cause is that despite the visible bodily injuries and the fact that Khethang had been coughing out blood and was complaining about chest pains after being hit with an axe, both police officers in Mafeteng and Maseru had all suspects



locked up in police cells without having taken them (suspects) for medical attention.

[28] One Letlotlokoane Bernard Khanyane, who is another suspect herein has, in a very detailed statement filed of record in support of the applicant's case, spelt out in detail the fact that they were assaulted by the Mafeteng police. He has also confirmed that the deceased, Khethang Moshe was hit with an axe at the back by the Mafeteng police after which assault, Khethang started to vomit blood and complained about chest pains.

[29] Nowhere has it been stated that any of the police from Maseru had assaulted them at any stage. The applicant has unequivocally denied ever having assaulted any of the suspects including Khethang.

[30] The incident of the death of Khethang in police custody is the one which prompted the first respondent to write annexure "TS1" and to ultimately have the applicant interdicted from duty – refer to annexure "TS2". Both counsel have spelt out the facts which are of common cause. Same are incorporated herein. The issue which is not of common cause is whether or not the applicant is responsible for the death of the said Khethang.

[31] In the letter "TS1" writer, who wrote it on behalf of the first respondent states as follows:- (I quote)

*".... that you were somehow involved and your actions to the same plunged this organization into disrepute".*

[32] The applicant has filed a review application in terms of Rule 50 of the Rules of this Court. He has asked the Court to review the decision of the first respondent to have him interdicted. Although counsel had by consent asked the Court on the 3<sup>rd</sup> February 2022 to grant prayer, which relates to the dispatch of the record of proceedings which resulted into this interdicted, the first respondent's counsel has to date not dispatched such record to Court.

[33] However, all other relevant pleadings have been filed. The applicant has not made or raised any objection to the matter having been argued without the said record of proceedings having been dispatch to Court. This Court will therefore proceed on the basis that such a record is not in existence.

[34] The reasons in support of the applicant's case are that the interdiction is substantially unfair, unreasonable and unjustified regard being had to his representation to the first respondent. The applicant denies ever having in anyway assaulted any of the suspects including the deceased, Khethang.

[35] As already indicated above, applicant has provided very detailed and clear response to the first respondent's letter(s) interdicting him from duty. These includes "TS4" written by counsel of the applicant to which no response was made by the first respondent.

[36] The foundational basis of the first respondent's decision to have the applicant interdicted from duty is based upon an unsubstantiated and

highly speculative averment tht the applicant is “somehow” involved in an incident which occurred at the RCTS office, in which Khethang died while in police custody.

[37] In that letter, “TS1” the first respondent has not at all mentioned or demonstrate how the applicant was “somehow” involved in the incident in question. On the contrary, the applicant has provided a detailed and clear explanation as to how the said Khethang was injured by or whilst in the custody of the police at Mafeteng.

[38] The first respondent, also alleges that he made his decision based on the conduct of the applicant “*throughout the arrest and detention of the deceased*”. This is also very vague particularly because, there is unchallenged evidence that the said Khethang was initially arrested by the Mafeteng police whereat he and others were assaulted brutally and remained in police cells/custody for a period of two days before they were later transferred to the RCTS in Maseru.

[39] The fact that the deceased had been complaining about chest pains from when he was in the custody at the Mafeteng police station is shown at page 24 of the record. In the form marked “transfer” it is indicated that before being released from the police custody in Mafeteng, the deceased had told the police thereat that he had chest pains. The date stamp affixed to the form entitled “Release of Detainee” signed on behalf of the station commander is that of the Mafeteng police.

- [40] In brief, when the Maseru police had these suspects transferred from Mafeteng Police station to the Maseru RCTS police station, the said Khethang had already been injured and was already complaining of having chest pains. This was repeated and noted down in writing on the detention form at the RCTS offices.
- [41] The first respondent alleges that the applicant has not done all he could to manage the situation and that being a senior officer he should have taken the detainee to hospital without any hesitation and not have negotiated the issue whether or not to take that detainee to hospital for medical assistance with the said suspect.
- [42] He alleges that, in fact, the applicant has been negligent or reckless by his omission to take the detainee to hospital. The first respondent states clearly in his answering affidavit that “the death of Moshe could have been avoided had applicant conducted himself as a reasonable officer. Refer to the first respondent’s answering affidavit.
- [43] No mention is made by the first respondent about or in relation to the fact that, actually, the deceased first alerted the Mafeteng Police about his state of health long before the applicant and his colleagues went to Mafeteng for purposes of having the said suspects transferred to Maseru. The Mafeteng police also ignored the plight of the deceased by not having taken him to hospital for treatment.
- [44] Clearly, the Mafeteng police who assaulted the deceased with an axe should also be made to account, but only the applicant who has never

laid a hand on the deceased is singled out, being blamed for the death of the deceased Khethang Moshe.

[45] The applicant submits that he has conducted himself like a responsible officer of his standing and experience because he has respected the wishes of the deceased in so far as the detainee has a right under the Constitution of Lesotho; section 3 thereof to have expressed his view that he did not wish to be taken to hospital for medical assistance and treatment. This has not convinced the first respondent hence why he ultimately had the applicant interdicted.

[46] The first respondent blames the applicant for somehow having caused the death of this particular detainee but he is not supported by any expert medical opinion to the effect that this death could have been avoided had the deceased been taken to hospital by the applicant.

[47] The first respondent is not a medical doctor of any kind, so that his view that death could have been avoided if applicant had taken the deceased to hospital has no foundational basis. There is no medical report of any kind attached to his answering affidavit backing up his opinion expressed in highly suspeculative ways that this death could have been avoided had the deceased been taken to hospital by the applicant.

[48] This and the fact that the officer commanding or any other senior officer in Mafeteng are not held responsible for this death, is a clear

sign and prove of the malice and bad faith which the first respondent has displayed as against the applicant.

[49] The first respondent has totally ignored the fact that, the root source of the demise of the deceased herein is the injury he sustained whilst at Mafeteng where the police assaulted him with an axe; hence his having been vomiting blood and suffering chest pains.

[50] The fact whether or not the applicant reported to his senior boss about the health of the deceased cannot ever cure the fact that the allegations against the applicant by the first respondent are speculative. They are not based on sound expert or on formal medical observation.

[51] There is no medical report even in the form of a postmortem report showing the cause of death of this deceased person; let alone that indicating with any form of precision that this death could have been avoided had the applicant taken the deceased to hospital at a certain time for medical treatment.

[52] Being a lay person in so far as medical issues are concerned, the first respondent lacks capacity to state with certainty that the deceased herein could not have died in the way that has been explained. It is grossly unfair, unjust, unreasonable, irrational and unlawful for the first respondent to shift the blame for the death of the deceased herein upon the applicant. This I say with the greatest respect.

- [53] The first respondent has completely ignored the fact which is of common cause that the deceased herein was injured by the Mafeteng police. In other words, the root cause of the chest pains and the fact of him vomiting blood was the result of assault upon him by the police with an axe. This fact has been completely ignored by the first respondent.
- [54] In the light of the above, and taking into account all the surrounding circumstances, the applicant's submissions that the first respondent has ignored all relevant facts in deciding to have him (applicant) interdicted from duty were influenced by malice, ulterior motives and so on; cannot be faulted.
- [55] As already indicate above, the first respondent has outlined one and only one reason for having written annexure "TS1" to the applicant through the officer, one Inspector T.C. Majoro. That reason being that the applicant is somehow involved in causing the death of the said Khethang.
- [56] The applicant has responded to that letter. However, in his answering affidavit, the first respondent has alluded to some armed robberies which he links the applicant with. In other words, according to the first respondent at paragraph 16 of his answering affidavit, in his own words the first respondent alleges that (I quote) "*..... It has since been discovered that applicant is linked to many cases involving armed robberies*".

- [57] The first respondent's said allegations against the applicant do not form part of the contents of annexure "TS1". That means that in responding to this annexure, the applicant was not made aware of these fresh allegations which have influenced the first respondent to have him interdicted from duty. there is no doubt that this move is unprocedural and grossly unfair to the applicant. He has been denied an opportunity to respond to these very serious allegations levelled against him.
- [58] The first respondent's allegations in this regard have not only been raised unprocedurally, but this is a step which confirms the applicant's case against the first respondent that he has had him (applicant) maliciously interdicted.
- [59] Initially, the reason for the interdict of the applicant from duty; which interdict is indefinite; centred around his alleged recklessness by the applicant in not having taken the deceased to hospital.
- [60] Now, the first respondent changes goal posts at this stage where he has to answer, and alleges that the applicant has been involved in committing criminal actions of armed robberies. The net effect of this allegation is to perpetuate the interdiction of the applicant from duty. The most salient question is why did the first respondent not again give the applicant a chance to respond to these "freshly discovered events"?



- [61] Bearing in mind that initially the applicant was not even interdicted on the basis of the alleged armed robberies; and also that the applicant was never invited to make representation about these alleged armed robbery cases, it is unprocedural for the first respondent's counsel to make a new case of action at this stage.
- [62] Further on, a proper reading of the first respondent's answering affidavit reveals a lot of inconsistencies with regard to the stage in which the investigations in respect of these armed robberies case are. The first respondent is blowing hot and cold as to this issue. Refer to this answering affidavit at paragraphs twenty etc.
- [63] Be that as it may, the crux of the matter is that the first respondent has not ever afforded the applicant an opportunity to make representation with regard to these armed robbery cases in which, once again, there is nothing in support of these allegations. There is no iota of evidence tendered to show that the applicant was afforded time to make presentation on or about the alleged armed robbery cases. On the contrary, the first respondent's answering affidavit is riddle with inconsistencies as already alluded to above.
- [64] It is not clear at what stage the alleged investigations of these unnamed armed robberies are, nor it is clear what the relationship is between the reasons spelt out in annexure "TS1" and the alleged armed robberies in which the applicant is alleged to have been involved. The nexus of the two incidences has not been established.

[65] The first respondent has relied on the provisions of section 53 of the Police Act No. 7 of 1998 in interdicting the applicant from duty with pay. This section is silent on the time frames or periods within which a police officer in the position of the applicant should be tried either criminally or civilly.

[66] In the instant case, the applicant has been interdicted from duty since the 6<sup>th</sup> July 2021. To date no proceedings of any kind have been preferred by the first respondent against the applicant. The applicant is still being paid his full salary whilst he is not performing any official duties.

[67] It is trite that where no specific Rules or Regulations are provided within which an interdicted officer may be tried criminally or civilly, the said Act must be assumed that Parliament intended any interdict or suspension of a public officer from duty to continue or exist indefinitely.

[68] Since the first respondent has already formed an opinion that the applicant has been negligent, thereby bringing the police service into disrepute, it is incumbent upon him to facilitate any kind of remedial action against by the applicant, particularly because the applicant has been on interdiction from duty for close to nine or ten months to date.

[69] Aside from the fact that an interdict or a suspension is very much prejudicial upon the employee even when suspension is with pay; administrators owe it to members of the public to ensure that all

employees who are paid from public coffers rightly earn what is due to them for serving the public and the country.

[70] The wording of section 53 (3) of the Police Act makes it very clear that police officers who are on interdict from duty for whatever reasons, cease to enjoy certain privileges and benefits of their office but shall be subject to the same duties, discipline and authority as if he had not been interdicted. The applicant is no exception to the above provisions of the Police Act. There is no way in which he can be treated differently and or contrary to provisions of the law.

[71] The first respondent denies these allegations but goes on to say that in fact, the applicant is still benefitting from the opportunity within the Lesotho Police Service, which include a salary and other benefits. He has not been specific about what the other benefits are. This is because the first respondent is very much alive and aware of the drastic limitations place by this particular section in a situation as in the current application wherein the applicant has been interdicted from duty indefinitely.

[72] It has already been indicated above that the first respondent has failed to dispatch to Court the record of proceedings in respect of the deliberations which resulted in the launching of this application. This is despite the fact that prayer 1 in the notice of motion was granted by consent of the counsel herein.

[73] This border on contempt against an order of Court. No reasons have been given as to why that record of proceedings has not at all been dispatched to the Registrar of this Court to date. Counsel for the respondents has also failed to file his written submissions despite his undertaking that he would do so before the end of business day on the 15<sup>th</sup> March 2022.

[74] Now, regard being had to the pleadings filed of record and to the surrounding circumstances of this case, it is the considered view of this Court that the applicant has made out a case which has persuaded this Court to grant his prayers as spelt out in the notice of motion in prayers 2, 3 and 4 in the main reliefs prayed for.

[75] Costs are awarded to the applicant on the ordinary scale.

**M. Mahase**

**Judge of the High Court**

For Applicant: Adv. R. Setlojoane

For Respondents: Adv. T. Thakalekoala