CIV/APN/306/90
CIV/APN/307/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TSELISO TS'EPHE	Applicant
GLADYS 'MAMOOKHO PHIRI	Applicant

and

THE COMMANDER OF THE ROYAL LESOTHO DEFENCE FORCE	1st Respondent
THE OFFICER IN CHARGE OF THE MASERU CENTRAL PRISON	2nd Respondent
ATTORNEY-GENERAL	3rd Respondent

JUDGMENT

The two applications, CIV/APN/306/90 and CIV/APN/307/90 have been consolidated by agreement of the parties. On the 4th December, 1990 Mr. Sello, applicants' attorney, moved these applications ex parte and on urgency certificate. He obtained an order couched in the following terms:

A. That a Rule Nisi be and is hereby granted calling upon the Respondents to produce the person of TS'EPHE TS'EPHE before this Court on Thursday the 6th day of December 1990 at 9.30 in the forenoon or so soon thereafter as the matter may conveniently be heard and there and then to show cause, if any, why:

1. The said TS'EPHE TS'EPHE shall not be released forthwith, from custody.

2. The Respondents shall not be ordred, ad interim, and in the alternative, in the event of prayer 1 above not succeeding;

   (a) to allow the Applicant, a medical doctor and attorney of Applicant's choice, reasonable access to the said TS'EPHE TS'EPHE.

   (b) to allow the said TS'EPHE to receive food parcels, toiletries and other similar necessities, clothes to change and reading material from the Applicant.

   (c) to desist from assaulting or unlawfully interrogating the said TS'EPHE.

3. The Respondents shall not be ordered to pay the costs of this Application jointly and severally.

4. The Applicant shall not be granted such further or alternative relief as the court may deem fit.

B. That paragraph 2 above operate as an interim interdict having immediate effect.

It is common cause that the applicants are members of the Royal Lesotho Defence Force. They were arrested on the 27th November, 1990 and detained in the maximum security section of the Maseru . Central Prison.

In the case of Joseph Tsolo Phiri the founding affidavit was signed and filed by his wife, Gladys 'Mamookho Phiri. She avers that as a result of the information she received she proceeded to the headquarters of the Royal Lesotho Defence Force (R.L.D.F.) on the 29th November, 1990. She was informed of the

detention of her husband and that if she wanted to see him she had to apply for a permit for that purpose from the R.L.D.F. On the 30th November, 1990 she was allowed to see her husband. She saw him at the Maseru Central Prison. She avers that he had wounds on the head and forehead as well as on his wrists and his feet were swollen. He spoke with great difficulty and seemed to be in tremendous distress.

The deponent avers that she requested the officers present to allow her husband's doctor to visit him particularly as he is suffering from stomach ulcers and did not have any medication with him. She was told that only the prison doctor was permitted to see her husband. When she again saw her husband on the 1st December, 1990 his condition had not improved. On the 2nd and 3rd December, 1990 she was not allowed to see her husband on the ground that he was being interrogated and she would be allowed to see him on the following Sunday. She immediately formed the impression that she was denied access to her husband because officers of the 1st respondent required an opportunity to cause him even greater physical harm without fear of detection. It was as a result of fear that more physical harm was going to be done to her husband that she launched the present application.

In the case of Tseliso Ts'ephe the founding affidavit is signed and filed by his father, Tseliso Ts'ephe. He avers that as a result of the ifnormation he had received concerning his son, he went to the maximum security wing of the Maseru Central Prison on the 2nd and 3rd December, 1990. Although the presence of his son was acknowledged by the officers he was not allowed to see him. He was informed that he could see him on the

9th December, 1990. As a result of the information he had received from Mrs. Phiri he had reasonable apprehension that his son would suffer great physical harm unless this Court intervened.

The opposing affidavit on behalf of the 1st respondent has been signed and filed by Colonel Tseliso Metsing. He is a member of the R.L.D.F. and since February, 1990 he has been in the day-to-day command of the R.L.D.F. as Chief of Staff of the Forces. He avers that the detainees are well cared for and kept in custody in extremely humane conditions. He emphatically denies the insinuation and all accompanying allegations or suggestions that the detainees face or have faced any peril to their lives. The fear of the applicants is unreasonable and unfounded. The detainees were arrested on the 28th November, 1990 upon his instructions and orders because the Command of the Force had or has credible information that the detainees along with some members of R.L.D.F. in September, 1989 at Maseru at the office of the Labour Construction Unit, a department of the Ministry of Works committed theft and robbery involving M511,768 the property of the Government of Lesotho. He alleges that the detainees have contravened the provision of Part V of the Lesotho Paramilitary Force Act No.13 of 1980 (the Act).

Colonel Metsing further avers that all the information he received regarding the commission of the above offences by the detainees was brought to the attention and knowledge of the

1st respondent by him. On the 28th November, 1990 the Commander ordered him to arrest the detainees for interrogation in connection with the abovementioned offences. As soon as the investigations are completed the detainees will be court-martialled as provided by the Act. He avers that he attches to his affidavit an order in terms of section 162 of the Act made by the Commander of the R.L.D.F. Consequently the detention of the detainees is lawful in terms of the law.

There are some other affidavits by the officers of the 1st respondent to the effect that the detainees were not assaulted at all while they were in detention. Another affidavit is to the effect that the detainees were told the reasons for their arrest at the time they were arrested.

On the 6th December, 1990 the detainees were produced before the Court in terms of the court Order. I had the opportunity to see them. Joseph Tsolo Phiri had wounds on both wrists and was limping. I did not ask him why he was limping. Ts'ephe Ts'ephe had a large scar on left shoulder. I find it strange that in his opposing affidavit Mayor Matsime does not explain to the Court the circumstances under which the detainees sustained those injuries which I saw and which are confirmed by Dr. Grobelaar of Makoanyane Military Hospital in his report annexed to the opposing affidavits as Annexure "A". His failure to explain the circumstances under which the detainees sustained the injuries is an indication that he is not being honest to the Court. I am satisfied that the detainees were assaulted and were in distress before the present applications were brought to Court. They are, therefore, entitled to costs.

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The respondents oppose the release of the detainees on the ground that the detention is lawful in terms of the law. On the other hand Mr. Sello submitted that the detention is unlawful on the ground that the discretion to detain a soldier under section 162 of the Act is vested in the Commander and that he is the only person who can exercise that discretion. He submitted that the affidavit of Colonel Metsing, made on behalf of the 1st respondent, is hearsay. It is the 1st respondent who has to sign and file an affidavit and aver that he is of the opinion that the detainees have committed the alleged offences and that he is of the opinion that in his opinion it is expedient for the protection and preservation of national security to arrest and detain them.

I agree with Mr. Sello that the ideal situation would be that the Commander himself must make an affidavit to explain what prompted him to cause the arrest of a soldier in terms of section 162 of the Act. However, failure by the Commander to make an affidavit does not necessarily mean that his detention order will be declared unlawful if there is satisfactory evidence that before he signed the order there was information given to him that the soldiers in question were suspected of having committed an offence described in Part V of the Act.

It seems to me that in the present case the 1st respondent formed the opinion that the detainees had committed the prescribed offences and that they were to be arrested and detained after some information had been placed before him by Colonel Metsing. In his

affidavit Colonel Metsing avers that all the information he had received concerning the detainees' involvement in the robbery and theft was brought to the attention and knowledge of the 1st respondent before he made the order of detention. The 1st respondent cannot be accused of having formed an opinion without any information being placed before him; nor can he be accused of having formed his opinion in bad faith. It has not been alleged that the detention order was made with an indirect and improper motive and was consequently not bona fide in terms of the empowering section. As it has happened in some cases it may subsequently be found that the information upon which the 1st respondent acted was incorrect, that would not mean that the order was wrongful or unlawful right from the beginning unless it can be shown that he acted without any information at all being placed before him (Stanton v. Minister of Justice and others, 1960 (3) S.A. 353 (T.P.D.); Mabe v. Minister for Native Affairs, 1958 (2) S.A. 506 (T.P.D.).

Mr. Sello submitted that the 1st respondent has not shown the Court how an ordinary robbery and theft can affect or undermine public safety or endanger state security. In his affidavit Colonel Metsing avers that 'amid this information, there is room for suspecting that the purpose of the commission of these offences was to generate funds in order to subvert the army, by way of staging a mutiny'. If the purpose of the robbery and theft was to generate funds for the purpose stated above it becomes clear how public safety and state security were to be undermined by what appears to be an ordinary robbery and theft.

In the result order A.1 of the Rule Nisi is discharged. Order A.2 is confirmed. The respondents are ordered to pay applicants' costs jointly and severally, one paying the others to be absolved.

J.L. KHEOLA
JUDGE

17th December, 1990.

For Applicants - Mr. Sello
For Respondents - Mr. Mohapi.