

IN THE HIGH COURT OF LESOTHO

In the Application of :

THOKO MAKAE

Applicant

and

COMMISSIONER OF POLICE
COMMANDER OF THE ARMED
FORCE R.L.D.F.
DIRECTOR OF PRISONS
ATTORNEY-GENERAL

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 18th day of February, 1991.

On 22nd June, 1990 the Applicant herein filed, with the Registrar of the High Court, a notice of motion in which she moved the court for an order, couched in the following terms:

- "1. That the applicant be granted leave to dispense with notice and forms of service required by the Rules of Court.
2. That 2nd and 3rd Respondents are guilty of contempt of the release Order made by the above Honourable court on 18th day of June, 1990.
3. That in consequence of contempt of the order of court mentioned in prayer 2 above the 2nd and 3rd Respondents be dealt with according to law as the Honourable court may deem fit.

4. That the purported detention order issued on the 19th June, 1990 for the detention of Captain Paul Sebete Mohlaba be set aside.
5. That the above Honourable Court makes such order and directives it may deem just regarding the detention of Captain Paul Sebete Mohlaba at the Maseru maximum prison.
6. The 2nd and 3rd Respondents be made to pay the costs of this application.
7. That the applicant be granted such further and/or alternative relief that the Honourable court may deem fit."

The Respondents intimated their intention to oppose this application and affidavits were duly filed in support of the case for either parties.

In the interest of clarity it is, perhaps, convenient at this juncture, to set out, by way of a background the history of these proceedings. It would appear that at all material times Captain Paul Sebete Mohlaba, a member of the Royal Lesotho Defence Force, lived with the applicant, a widow and Senior Lecturer at the National Teachers Training College, as man and wife. There was, however, no legal marriage between the two.

On 2nd May, 1990 the members of the Royal Defence Force arrested and handed Captain Mohlaba over to the C.I.D. for interrogations on a suspicion that he and two other people who were, however, not members of the Force, had committed a crime of robbery at the Labour Construction Unit (L.C.U.), a project of the Ministry of Public Works of the Lesotho Government. The alleged

3/associates

associates of Captain Mohlaba have already appeared before a court of law on remand and applied for release on bail of which the decision is still pending.

Following his arrest on 2nd May, 1990, Captain Mohlaba was detained at the maximum security wing of the Maseru Central Prison. According to the applicant Captain Mohlaba was a sickly person who required regular medication and a special diet prescribed to him by a medical doctor. When she learned that he had been arrested and detained, the applicant proceeded to the maximum security wing of the Maseru Central Prison to see and give Captain Mohlaba his medication which he had left at home. After some initial problems she was granted permission to see the Captain but certainly not to give him the medication or, for that matter, any special diet. According to her, the applicant was then requested by Captain Mohlaba, whose health condition was clearly deteriorating, to approach the High Court for relief.

On 7th June, 1990 the applicant accordingly moved before me, an urgent application in which she sought against the Respondents, a Rule nisi calling upon them to show cause, if any, why they shall not be directed, inter alia, to permit Captain Mohlaba to receive medication and special diet prescribed to him by the medical practitioner and release him from detention forthwith, or alternatively, bring him before a court of competent

jurisdiction to be dealt with according to law.

A medical report was annexed to the founding affidavit as proof that Captain Mohlaba did, indeed, require regular medication and a special diet for health reasons. I accordingly granted the Rule Nisi and ordered that Captain Mohlaba be permitted to receive the special diet and medication prescribed to him, with immediate effect. The return day was fixed as 18th June, 1990.

It would appear that on the return day the matter was placed before my brother, B.P. Cullinan, C.J. According to the record of proceedings the Respondents, who were represented by a legal practitioner decided not to oppose confirmation of the Rule which was, in fact, confirmed by agreement of the parties.

It is significant that amongst the orders the applicant obtained, by consent of the parties, on 18th June, 1990, was the one clearly directing the Respondents to release Captain Mohlaba from detention forthwith. All the Respondents were admittedly served with the Order on the following day, 19th June, 1990.

According to the applicant, notwithstanding service of the order upon them, the Respondents did not release Captain Mohlaba who is still detained at the maximum security wing of the Maseru Central Prison. The Respondents have, therefore, committed a contempt of court. Hence the present application for an order as aforesaid.

It is not really disputed, from affidavits in the present application, that at about 3 p.m. on 19th June, 1990 the applicant visited and brought to Captain Mohlaba (hereinafter referred to as the detainee) his special diet at the maximum security wing of the Maseru Central Prison. The detainee had not yet been liberated. However, at about 4.30 p.m. on the same day, she returned to the prison and learned that the detained had, in fact been released to go home. He was, therefore, no longer at the maximum security wing of the Maseru Central Prison.

The applicant then first proceeded to P.V.P.S. (Public Vehicle Pool Service) the place where the detainee had been stationed prior to his arrest and detention on 2nd May, 1990. At the P.V.P.S. she learned that the detainee had just left for his house. She went home, and found the detainee, in the company of certain members of the Royal Lesotho Defence Force, waiting outside the house. They had apparently just arrived but could not enter the house as she had locked the door and kept the key thereof on herself.

When she asked the detainee whether he had finally returned home, one of the members of the Royal Lesotho Defence Force accompanying him replied that they had arrested him under the Military Law. The applicant was, indeed, shown a warrant of apprehension dated 19th June, 1990, issued by the Commander of the

Royal Lesotho Defence Force viz. the 2nd Respondent herein, authorising them so to do. According to the members of the Royal Lesotho Defence Force the purpose of their visit at the house was merely to collect the detainee's army firearm.

The applicant then opened the door of the house from which the detainee handed over, to the members of the Royal Lesotho Defence Force, his army firearm together with its rounds of ammunition. Thereafter the members of the Royal Lesotho Defence Force left with the detainee who, as it has already been pointed out earlier, is admittedly kept at the maximum security wing of the Maseru Central Prison.

The Respondents denied the applicant's story that following his arrest on 2nd May, 1990 the detainee was never released from detention. According to the answering affidavit deposed to by Col. Tseliso Metsing when he learned that, following his arrest on 2nd May, 1990 and detention by the police, the detainee was to be released in compliance with the court Order dated 18th June, 1990 he alerted the 2nd Respondent. This is confirmed by the latter.

In the contention of both Col. Tseliso Metsing and the 2nd Respondent, as a member of the Royal Lesotho Defence Force the detainee is subject to the military law. By his involvement in the robbery of the property of the Lesotho Government at the Labour Construction Unit, he has clearly committed an offence under the provisions of

7/Section

Section 49 (1) (a) of Part V of the Royal Lesotho Defence Force Act No. 13 of 1980. The section reads, in part:

"49 (1) Any person subject to military law who -

- (a) steals or fraudulently misapplies any public or service property or any property or any property belonging to another person so subject
- (b)
- (c)
- (d)

shall be guilty of an offence and on conviction shall be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

(My underlinings)

Consequently the 2nd Respondent took the view that notwithstanding his release from the arrest on 2nd May, 1990 and detention by the police in compliance with the court order, dated 18th June, 1990, the detainee could still be arrested and detained for purposes of dealing with him in accordance with the military law. In exercise of the powers vested in him by the provisions of Section 162 of the Royal Lesotho Defence Force Act 1980 (as amended) the 2nd Respondent, therefore, issued the Warrant of apprehension, dated 19th June, 1990,

8/ authorising

authorising the arrest and detention of the detainee at the maximum security wing of the Maseru Central Prison.

Col. Tseliso Metsing further averred that pursuant to the warrant of apprehension issued by the 2nd Respondent he instructed Lt. Col. Maeko to execute the warrant against the detainee. This is confirmed by Lt. Col. Maeko in whose affidavit he averred that he, in turned briefed and ordered Major Molato and Captain Molumo to effect the arrest and detention of the detainee.

The depositions of both major Molato and Captain Molumo are to the effect that following their briefing by Lt. Col. Maeko they became aware that pursuant to the Court Order, dated 18th June, 1990, the detainee was to be liberated on 19th June, 1990. However, the 2nd Respondent had, on the same day, 19th June, 1990, issued a warrant of apprehension against the detainee because of the latter's suspected involvement in the robbery committed at the Labour Construction Unit of the Lesotho Government. Armed with the warrant of apprehension they, therefore, proceeded to Maseru Central Prison to execute the warrant as instructed by Lt. Col. Maeko.

In order to avoid any interference with the execution of the court order, dated 18th June, 1990, for the release of the detainee, the two officers made sure that they waited well outside the prison gate. At about 3.30 p.m. they notice the detainee walking out of the prison premises. As he was

9/ carrying

carrying his personal effects they were convinced that the court order, dated 18th June, 1990, had been complied with and the detainee was released to go home. After he had gone through the prison gate and, was walking in the direction of the Maseru Tennis Courts the detainee was approached by both Major Molato and Captain Molumo who arrested and took him into their custody in compliance with the Warrant of apprehension.

The deposition of Malie Malie, the Director of Prisons, is to the effect that at about 3 p.m. on 19th June, 1990 he found a copy of the court order, dated 18th June, 1990, for the release of the detainee, placed on his desk. He immediately brought it to the attention of the officer commanding the Maseru Central Prison for necessary action. This is confirmed by Lebohang Monyobi, the officer commanding the Maseru Central Prison, who averred that he complied with the court order, dated 18th June, 1990, by releasing the detainee to go back home at 3.20 p.m. on 19th June, 1990.

Notwithstanding the applicant's contention that the Respondents did not release the detainee from detention and, therefore, committed contempt of the court order, dated 18th June, 1990, it seems to me the evidence is simply overwhelming that the detainee, was on 19th June, 1990, released from detention in compliance with the court order. Indeed, the applicant herself did aver that when, at about 4.30 p.m. on the same day, 19th June, 1990, she returned to prison she found that the detainee had already been liberated

from detention at the maximum security wing of the Maseru Central Prison. That being so, I am unable to agree with the applicant's contention that following the court order dated 18th June, 1990 the Respondent did not release the detainee from detention.

The only question that now remains for the determination of the court is whether or not following the release of the detainee on 19th June, 1990, the 2nd Respondent was entitled to authorise his arrest and detention as he did. It is significant that the words "public property" which I have underscored in the above cited section 49 (1) (a) of Part V of the Royal Lesotho Defence Force Act, 1980 are defined by section 2(1) thereof as any property belonging to the Government of Lesotho. Assuming the correctness of the averment that the detainee was involved in the robbery of money belong to the Labour Construction Unit, which is admittedly a project of the Lesotho Government, Ministry of Public Works, there can be no doubt that he had committed a contravention of section 49 (1) (a) of Part V of the Royal Lesotho Defence Force Act, supra, i.e. he had committed a military offence for which he rendered himself liable to be dealt with in accordance with the military law - vide the Royal Lesotho Defence Force Act, 1980 of which the last paragraph of the Explanatory Memorandum reads, in part:-

"Misconduct in action and other serious military offences will be adjudicated

upon by courts - martials"

That being so, it seems to me the 2nd Respondent was perfectly entitled to authorise as he did, the arrest and detention of the detainee, in terms of the provisions of the Royal Lesotho Defence Force Act, 1980 of which Section 162 (as amended) clearly provides, in part:

"162 (1) Notwithstanding any provision of Part V, where the commander is of the opinion that a person subject to Military law is involved with, or is suspected to have committed an offence under Part V, and that it is expedient for the protection and preservation of national security, he may,

(a)

(b) detain or cause to be detained that person for a period not exceeding one year in a prison designated by the commander for that purpose"

From the foregoing, it is obvious that the view that I take is that this application ought not to succeed and it is accordingly dismissed with costs.

B.K. MOLAI

JUDGE

18th February, 1990

For Applicant : Mr. Matsau
For Respondent : Mr. Mohapi.