CIV/APN/173/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO HUMAN RIGHTS ALERT GROUP	1ST APPLICANT
LIMAKATSO CHAKA	2ND APPLICANT
MAMOTUBA LEROTHOLI	3RD APPLICANT

AND

THE MINISTER OF JUSTICE & HUMAN RIGHTS	1ST RESPONDENT
THE DIRECTOR OF PRISONS	2ND RESPONDENT
THE ATTORNEY GENERAL	3RD RESPONDENT

JUDGEMENT

Delivered on the 14th day of June, 1994, by
the Honourable Mr. Justice W.C.M. Maqutu

This is largely a *postea* to an order that this Court made after hearing argument in an application brought by First Respondent.

This Court had on the 30th May, 1994 made the following order:-

> "1. Application is amended by Court *mero motu* as follows:
>
> (a) Lesotho Human Rights Alert Group shall be First

/...

Applicant

(b) Limakatso Chaka Second Applicant

(c) Mamotuba Lerotholi Third Applicant

2. The application of Lesotho Human Rights Alert Group (First Applicant) is dismissed with costs.

3. The Respondents application for filing of Security by the First Applicant is dismissed with costs.

4. Judgment is reserved in respect of Second and Third Applicants' Application to the 14th June 1994 when judgment will be given and reasons filed for judgment generally."

Reasons that were to follow later for my order of 30th May, 1994 are being given as part of this judgment. The Court had reserved judgment in respect of Second and Third Respondents who had made supporting affidavits to First Applicant's application. The view I took was that this was a matter of human rights. The Second and Third Applicants as close relatives had in my view a title to sue and a specific interest of their own in what was happening to the prisoners and because of their right to have access to the detainees, therefore they were joined *mero motu* by the Court as Respondents. There was no point in dismissing this application because it had been brought by the wrong

person only to have it brought within hours by Second and Third Respondents. For this reason in the body of the judgment First Applicant is referred to as the Applicant in most of the judgment.

This application had been brought *ex parte* on a certificate of urgency for an order in the following terms:

"That a Rule Nisi be and it is hereby issued returnable on the ... day of ... 1994 calling upon the respondents to show cause if any, why:-

1. (a) The periods of notice requires by the Rules of Court should not be dispensed with on account of urgency of this application.

(b) Declaring the further detention of the awaiting trial prisoners mentioned in Annexure "C" of the Applicant's founding affidavit, and any other such prisoners in Lesotho's ten gaols who ought to have appeared before the Magistrates for further remands from 11th May 1994 to the date of this application, illegal and that they be released forthwith.

/...

(c) Declaring the failure and/or refusal of the second respondent's officers to bring prisoners mentioned in annexure "D" of the Applicant's affidavit to court for their trials, and any other such prisoners in Lesotho's ten gaols who ought to have been brought to the courts for their trials between the 11th May to the date of this application; illegal for being a violation of their rights to a fair hearing within a reasonable time.

(d) Declaring as illegal the refusal of the officers of the first respondent to permit awaiting trial prisoners their normal visits by civilians from outside, from the 11th May to the date of this application.

(e) Directing respondents to pay the costs of this application.

(f) Granting applicant such further and/or alternative relief as this Honourable Court may deem fit."

While the Court was in no doubt that the application

was urgent, it took the view that the types of orders sought could not be granted *ex parte*. Consequently:

> It ordered that Respondents be served and that they should file opposing affidavits if they intended to oppose this application by the 27th May 1994. Application would be heard on the 30th May 1990 at 9.30 a.m.

This judgment was written between the 30th May, 1994 and the 1st June, 1994. The narration and summary of events in the judgment is in the tense in which it was written during those days.

Opposing papers were filed in a great hurry. Respondents thereupon filed a Notice that Applicant file security in terms of Rule 48 of the High Court Rules of 1980. The ground for their application was that the proceeding is reckless and vexatious. This was opposed by Applicant when applicant filed replying papers.

The Court directed the Registrar on the 27th May, 1994 to write to the parties inviting them to address it on whether or not Applicant has a title to sue in the matter.

On the 27th May, 1994 Respondents filed their heads of argument while Applicant filed theirs on the 30th May, 1994

/...

which was the day of hearing.

Applicant was represented by Mr. E.H. Phoofolo, an Attorney, while the Respondents were represented by Mr. Tampi, the Deputy Attorney-General.

The events which are the core of this application of such a nature that the Court was obliged to take judicial notice of them. They began in January 1994. The sequence of events is as follows:

1. At the beginning of January there was an announcement that the army wanted a 100% pay increase. Before long two factions of the army (one at Makoanyane and the other at Ratjomose) began to go about heavily armed. They would not listen to Government. There were clashes in which some soldiers were killed.

2. On or about the 22nd January 1994 the two factions fought a pitched battled the whole day. None of the sides gained the upper hand. The government was not able to do anything about the matter as it was not being listened to.

3. It was through the mediation of a delegation of

the Commonwealth and the churches that both sides of the army laid down their arms. Lesotho was visited by he Presidents of Zimbabwe and Botswana following this incident. Disciplinary action has not been taken against anybody.

4. In April 1994 a section of the army one morning raided the homes of five Ministers. During that raid the Deputy Prime Minister (who is also the Minister of Finance was killed) and four Cabinet Ministers seized and detained at the Makoanyane barracks. The army released them after a few hours. That was the end of the matter, there have been no arrests and the government has done nothing. To put it in the Prime Minister's words, "Who will bell the cat?"

5. On the 10th May 1994 the police stopped doing their normal police duties armed themselves heavily and drove around in government vehicles declaring they were on strike. At the time the matter was argued (30th May 1994) the strike was still continuing. They were demanding a 60% pay increase.

6. On the 11th May 1994 the prison warders stopped

/...

bringing awaiting trial prisoners to court, armed themselves with semi-automatic rifles and closed the prison gates. They also declared they were on strike. What happened to prisoners no one knows. They also were claiming a pay increase. The strike of the prison warders is continuing.

7. Government has been negotiating with both the police and the prison warders.

8. The police and the prison warders sometimes fire their arms for no apparent reason causing tension and uncertainty about what is happening in the country.

9. Government in response to the pay demand of the army had offered a 10% salary increase to all public servants at the end of March 1994.

10. Prison warders proceeded to the Ministry of Justice headquarters heavily armed and seized Ministry of Justice's motor vehicles and have been using them without authority.

11. The Prime Minister issued a statement in which he informed the nation that the police had incited

/...

people to commit crimes and as a result of this business premises had been broken into, property stolen in Leribe, Maseru and Mafeteng. Some business premises had actually been burnt down in Mafeteng.

12. The Prime Minister had urged the public to co-operate with the army in the maintenance of law and order and the protection of property. The army is patrolling the streets.

Mr. E.H. Phoofolo, who appears for the Applicant, is also the duly authorised deponent of the Applicant's founding affidavit. Whether he ought to be Counsel (and so to speak be the person who makes the affidavit for Applicant) is not important. Cullinan CJ (as he then was) frowns on that way of doing things because he has always felt Counsel is an officer of the Court, but if these duties are merged, (one of the two) namely, the Court or the client will suffer. There is a lot to say for this but nothing in the law prevents Counsel from being his own client, the obvious impediments notwithstanding.

Mr. Phoofolo then narrated what happened to him when he went to appear for Tšeliso Nthabi before the magistrate's Court. The magistrate's Court could not

/...

function because the police were refusing to allow the Clerk of Court to have access to the Court keys that were kept at the Police Central Charge Office where they were kept. Awaiting prisoners all over the country could not be brought for remands and for their trials.

Mr. Phoofolo then says:

> "I, as President of the Human Rights association in Lesotho became concerned that prisoners and victims of crime were being denied justice and the prisoners constitutional rights were being violated."

There can be no doubt that Mr. Phoofolo was not the only one who was concerned. It was not only the prisoners' rights that were violated because some roads in the Maseru city were closed by the police merely because they passed near the police station. Some Government departments could not properly function because of the actions of the heavily armed police and prison warders. Government was powerless in the face of the armed might of the police and prison warders. It cannot therefore be surprising that heavily armed prison guards pointed guns at Mr. Phoofolo and pointed to him a sign on which was written the following words "No services are being offered from 11th May 1994".

It goes without saying that Mr. Phoofolo's allegations that prisoners had been ill-treated, fired upon and assaulted cannot be disputed and that, information cannot be obtained. There is no doubt that what prison warders are doing is illegal. There is no doubt that these crimes are being committed by the Ministry of Justice personnel. There is however, no allegation that the Ministry of Justice authorised these crimes against prisoners and the breaches of the law and the violations of rights of prisoners and those of their relatives.

What is clear beyond doubt is that there is an insurrection by the police and the prison warders. Government is legally and politically responsible for the maintenance of law and order. It is also obliged to defend the rights and liberties of all the people whose rights are being violated by the police and the prison warders.

It is trite law that prison warders, the police and all the other public servants do not have the right to strike. It is also obvious to all that government is being coerced by force of arms by the police and the prison warders. It is a notorious fact that the police seized by force of arms the Minister of information who is also acting Minister of Finance and the Principal Secretary of Information. They detained them at their pleasure until

they condescended to release them. This state of insurrection by the prison warders and the police, Mr. Phoofolo avoids mentioning in Court. It was only during argument that he conceded it existed.

Questioned by the Court whether he knew whether the army would co-operate with government to coerce the police and the prison warders so that they could stop their insurrection, Mr. Phoofolo said he did not know. He had to concede that having regard to what happened and how the army behaved between January and April 1994 when the army killed he Deputy Prime Minister, the reaction of the army in this situation was unpredictable. The only fact that was a certainty is that the army is patrolling the streets to stop hooligans from looting and destroying property.

Mr. Leqele who made an affidavit on behalf of the Second Respondent, challenged the *locus standi* of Applicant to bring an application on behalf of any prisoner. There is no dispute of the fact that Director of Prisons told the striking prison warders that their strike was illegal.

It is also clear that Second Respondent did his best for the prisoners who might have not been fed or could even have been released illegally. The prison warders were persuaded to continue with their other duties except allow

visitors, escort prisoners to attend court hearing and allow them to do any labour in terms of their convictions and sentences.

The upshot of this illegal strike was that the prisoners rioted and they were suppressed with severity. The lawlessness of the prison warders had spilled over to the prisoners. I am a bit puzzled by the fact that the Director of Prisons was able to suppress the prison riot but was not able to maintain law and order among prison warders. The allegation of the failure of the Director of Prisons to see that the rights of prisoners to attend court are observed are not persuasive. He does not deal with the fact that the prison warders are armed to further their strike action and thus coerce government and the general public.

It seems as if Mr. Leqele is accepting the *fait accompli* of the illegal action of the striking prison warders when he says

> "It would be impossible to allow any visitors to visit the prison amidst this welter of confusion. Moreover it would be an act of total irresponsibility on the part of prison management to allow such visits."

This is not how a person who is not in control would react. The question I ask myself is whether or not this strike is not being directed. There seems to be method in this apparent chaos.

The failure to produce prisoners before the courts is excusable, Mr. Leqele says. He further adds the frustration of the administration of justice is being brought about by reasons beyond the control of the State. The embarrassment of the State and its impotence in the face of this insurrection is obvious.

I have therefore to assume in his favour that he has reached some compromise with the prison warders to maintain some semblance of orderly existence for the prisoners. This comes from paragraph 6 of Mr. Leqele's affidavit where he says the prison warder refused to appoint a committee of five to negotiate with the authorities about their grievances and adds:

> "They declined to take any advice. After a long discussion they finally said they would carry out their normal duties except the following
>
> (1) They will not allow visitors to enter the prison premises

(2) They will not escort prisoners to the courts of law

(3) They will not allow prisoners to go out for labour."

The first Respondent has not made an affidavit. I do not know what action is being taken by First Respondent. I consider it to be very necessary for the determination of this application. The impression that this silence has left me with is that First Respondent is doing nothing to resolve this dispute, he has left every thing to Second Respondent. That being the case this situation will continue indefinitely. I am left with the impression that government is impotent and doing nothing.

All that the Respondents have done is to rely on a technicality that Applicant has no *locus standi*. They have been vague on facts even those that they were obliged to put on record. In this case they should consider themselves fortunate that this national catastrophe that has paralysed the administration of justice, this Court is obliged to take judicial notice of unless it wants to play games with a serious situation that affects the lives of many people.

Applicant puts the Respondents' case even better that

the Respondents in the following words:-

> "It is a damning admission by respondent that he and the Government are unable to contain a situation which affects the rights of innocent persons while they still call themselves authorities with powers and duties. The inability of the respondents' management to fulfil their legal duties for whatever reason cannot be visited on the prisoners. It is not true that no security force was available to escort prisoners. It is not true that no security force was available to escort prisoners. It is a known fact that the soldiers are not part of the strike and they are looking after security matters int he country. They are there to escort prisoners to court. The rest of the contents are unknown to me."

From this passage Mr. Phoofolo, as the deponent in the Applicant's replying affidavit, has now personalised this application. I asked him if he really knows what he claims as true in his affidavit. He had to admit he was uncertain about some of the facts. It is common knowledge that the army is still virtually mutinous and that, in fact after it killed the Deputy Prime Minister who was also the Minister

/...

of Finance, nothing has been done. I then asked Mr. Phoofolo whether in the circumstance, he knows for certain that the army can be relied upon to neutralise this strike of the police and prison warders. Mr. Phoofolo admitted he does not know. The only thing he was aware of is that the Prime Minister had told the people that they should co-operate with the army in the maintenance of law and order during the strike of the police and the prison warders. It therefore became clear that he had read more into the Prime Minister's words than the Prime Minister probably meant.

Mr. Tampi, the Deputy Attorney-General who was acting for the Respondents, pointed out that what the First Applicant has brought before the Court is application intended to protect or serve the public interest. Only the Attorney-General, as a protector of the general interest, may of his own accord or on behalf of a private individual, lodge an application in the form of a prohibition or an application for a declaration preventing an organ of Government from exceeding its powers. This English tradition must be understood in line with the Southern African tradition that is not wedded to the historic position that the Attorney-General is the sole presentative in the courts of public rights in his capacity as *parens patriae* and protector of its subjects. See the case of City Council of Johannesburg v Gerget 1939 WLD 87 at page

91. Despite the obsoleteness of the *actio popularis* Wessels CJ in Roodeport-Maraisburg City Council v Eastern Properties Pty Ltd 1933 AD 87 at page (101) said:-

> "But in our law any person can bring an action to vindicate a right which he possesses (*interesse*) whatever the right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely an interest which all citizens have."

Therefore it is established that undoubtedly no one can bring an action and allege that he is bringing it in the public interest.

In my view this application amounts to the same thing, the only difference being that this Court is being asked to direct Government to govern in a situation in which (so far as the rights of prisoners are concerned) the Government is unable to assert its authority over prison warders who have taken up arms against government in furtherance of their strike. Marinus Wiecher's Administrative Law at page 275 says:

> "Our law does not recognise the *actio popularis* of Roman Law whereby every person's right in the due performance of government activities was acknowledged."

/...

The history of the *actio popularis* is dealt with in Director of Education Transvaal v McCagie & Others 1918 AD 616 at 621 per Innes CJ where he says:-

> "The *actio popularis* of Roman law...became obsolete more than two centuries ago... The principle of our law is that a private individual can only sue on his own behalf, not on behalf of the public."

In this case First Applicant sues on behalf of prisoners in the ten districts of Lesotho. Mr. Phoofolo is in Maseru. He knows what has happened to the prisoners he was supposed to appear for and what was happening in Maseru. The First Applicant, the Human Rights Alert Group (of which Mr. Phoofolo is President) claims the right to act for prisoners who may never have heard of it. It is so to speak claiming the right to act for the Cabinet Ministers who may have been taken by force as happened to the Acting Minister of Finance. The motives of First Applicant viewed from this angle may be noble. The good Samaritan helped a definite victim who was in front of him. I am not sure the principle of *negotiorum gestor* can be extended to cover people a do-gooder has never seen, but merely hears of. Mr. Phoofolo and his group have never seen or even heard of most of the prisoners they are purporting to act for in the ten districts of Lesotho. I am sure those people would say the same if they were to be asked.

The case of Wood And Others v Ondangwa Tribal Authority 1975 (2) SA 294 on which Mr. Phoofolo relied upon is in many respects different from this one. It cannot be taken beyond its facts. Its importance lies in spelling out the Court's discretion in a fitting case to accord *locus standi* to those who for the best of motives felt obliged to move court to protect those who are detained and cannot have access to the court. In Bozzoli v Station Commander John Voster Square 1972 (3) SA 934 the Principal of Witwatersrand University had brought a *habeas corpus* application (*interdictum de homine libero exhibendo*) on behalf of students of the university. Snyman J at page 935 said:-

> "Now I was not impressed by the way the matter was set out in his affidavit, but one realises this is an urgent application and legal advisers who have to draw up such a document have not much time to do so... I am prepared, therefore, in the circumstances to accept what Mr. Unterhalter has said from the bar, that is that, as Principal of the Witwatersrand University, he has an interest as I understood it, in regard to the students of the university."

The case of Wood and Others v Ondagwa Tribal Authority should be read as a culmination of a process in which powers of detention by the police in the days of Apartheid in South Africa were becoming an irritant. In this case a tribal authority was a vigilante group arresting and

/...

applying corporal punishment to suspected SWAPO members as a form of political victimisation or intimidation. In so doing they were purporting to apply African custom. The State was not only indifferent but was impliedly encouraging this flagrantly illegal behaviour by tribal authorities. The Appellate Division confirmed the liberal extension of *locus standi* in case of wrongful detention ad abuse of human rights and deplored the narrow interpretation of the Courts' discretionary powers in according *locus standi* to legitimately concerned citizens. Rumpff CJ at pages 310 and 311 put what the Courts attitude should be as follows:-

> "Nevertheless, I think it follows from what I have said above, that although *actio populares* generally have become obsolete in the sense that a person is not entitled 'to protect the rights of the public' or 'champion the cause of the people' it does not mean that when liberty of the person is at stake, the interest of the person who applies for the interdict *de libero homine exhdibendo* should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order... "It would seem to me, however, that if a person who has neither kith nor kin in the world is illegally deprived of his liberty, and a person who comes to hear of this were to apply for an interdict *de libero homine exhibendo*, he could hardly be fail to be considered the prisoner's friend, unless, of course, one holds the view that the good Samaritan did not have the attributes of a friend."

My understanding of Rumpff CJ's remark is that the extension of *locus standi* in Wood v Ondangwa Tribal Authority were actuated by the protection of "the very foundation of a society based on law and order". Secondly the court has to consider whether there is a person with a better title to bring an application geared towards the protection of a prisoner's rights. If there is indifference by those who should act, the court might feel obliged in its discretion to accord a good Samaritan *locus standi* where those who should take action give the prisoner a wide berth.

There are matters which, in our present Constitutional Order and in our tradition, are matters which must be dealt with by people as a whole in the political arena. In Dalrymaple and Others v Colonial Treasurer 1910 TPD 372 applicants had caused a *Rule Nisi* to be issued which operated as an interim interdict, calling upon the Colonial Treasurer to show cause why he and the Clerk of the Legislative Council and Legislative Assembly should not be restrained from making out payments to members of the Legislative Assembly in respect of the particular session as it had been an extra-ordinary session. Innes CJ at page 379 made the following points:

"The general rule of our law is that no man

> can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law. This principle runs through our whole jurisprudence... Just as no man can claim damages in a civil action unless he himself has been injured, so no man may bring a private prosecution unless he has been affected by the crime. And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals."

Innes CJ then proceeded to show that between a municipality and the central government there is a fundamental difference:

> "The ordinary taxpayer certainly does not occupy the same position in relation to the Executive Government that a ratepayer occupies in with regard to an incorporated council. He does not elect the Ministers: they are appointed by the Crown, and are responsible to the Crown as well as to Parliament. They can in no sense be taken as occupying positions analogous to those of directors of a company. ... The control of Parliament and the concurrence of the Crown - these are the balancing forces in the Constitution which govern the expenditure of public money." See <u>Dalrymple & Others v colonial Treasury</u> at page 385.

It is precisely because Government is answerable to Parliament, but governs in the King's name that an individual can not bring an action against Ministers and officers of the Crown directing them how and how not to govern. The difficulties connected with their right to sue

were apparent at the outset. Consequently, I directed the Registrar to invite both sides to address me on this point before I realised Mr. Tampi for Respondents had taken this point.

It has to be borne in mind that organisations such as First Respondent are numerous and have assisted in many ways in the vindicating of human rights of individuals. They always give moral and financial assistance to individuals with the necessary title to sue and a specific interest. They never interpose themselves as litigants as applicant has done in this case. The public interest and human rights in general are promoted through litigation by appropriate litigants. What the courts decided in respect of those people (of necessity) applies to the public in general. There is no reason why Limakatso Chaka and Mamotuba Lerotholi were made to provide supporting affidavits when they had a specific interest of their own in these proceedings. There are no grounds from departing from the present tradition which has served in this country well and is still followed in countries such as the United States of America. I am of the view that the public interest should continue to be protected by actions and application brought by individuals with a specific interest and unchallengeable *locus standi*.

Here I do not see this application as geared towards helping the prisoners as such. From what I discovered during argument it is meant to highlight the government's state of prostration in the face of the insurrection against it from several quarters. This emerged from the way this application was argued. This court is being indirectly asked to direct the government how to run the country. It must according to Mr. Phoofolo order Government to tell the army to bring prisoners to courts. Another point that emerged during argument was that Counsel for Applicant was not impressed that government could not afford the pay increases salaries demanded. I was left with a feeling that the declaratory order sought was a means of making the Court to descend into the arena of government and politics.

Courts of justice are unable to dispense justice because prisoners are not being brought for their trials and extension of periods of detention for awaiting trial prisoners. Courts rely on Government to see that normality is restored and this targeting of the strike towards the administration of justice stops. Therefore the courts cannot be indifferent that this strike is directed at the courts as well. The reality is that the courts are on the receiving end of this strike.

Government is a sort of trinity. Montesqiueu has said it has three branches, all of which converge in the King. These are the legislative, executive and judicial branches. In the olden days, the King exercised all three. That is why the laws are said to be made by the King-in-Parliament. The Ministers who execute laws and govern the country in the King's name. The King's Courts dispense justice in the King's name. Ministers and the whole public service in giving effect to the judgments of the courts are in effect executing the King's own judgments. When courts interpret the laws, apply them, and dispense justice according to law, they are in effect applying the King's laws. In other words in Lesotho the King personifies both the State and Government subject to law.

The legislature must exercise its function independently of government up to a point. The Courts must similarly exercise their function of adjudication independently without fear, favour or affection. The courts and the legislature (Parliament) cannot exercise their functions without the executive arm of government which must see to it that lives and property are secure in an environment in which law and order are maintained. The Courts are just as obliged to see that there is law and order as the executive arm government is. In this they provide judgments for the executive arm to put into effect.

Parliament is obliged to support and strengthen executive arm of Government with whatever laws government may need and authorise taxation and expenditure to ensure that there is government.

To treat the executive legislature as if they are totally separate is to misconstrue the doctrine of separation of powers. The President of the Court of Appeal Mr. Justice Schutz in the case The Law Society v The Honourable The Prime and Two Others C of A (CIV) No.5 of 1985 (unreported) dealing with the doctrine of separation of powers concluded:

> "I think there is a danger of speaking too airily about something that is in reality somewhat a compounds of statute law, convention and aspiration."

This doctrine to which all modern states aspire to, is really perceived as an anti-dote to despotim, oppression and arbitrariness that creeps into the State and its organs when all these powers are concentrated in the same hands. That does not mean the courts should be indifferent to the existence and survival of other branches. The reason being that offenders cannot be brought to justice without Government. Civil judgments and criminal judgments cannot be given effect to without the existence of an effective

government.

Even assuming that the army could be relied upon to carry out Government orders, in order to neutralise the strike, the prison warders are threatening to use force and maintaining a warlike posture to prevent access to the prisoners. Does Mr. Phoofolo want the army to go and shoot the prison warders in order to put an end to that insurrection? Surely Governments with loyal and reliable police and armies all over the world have been obliged to negotiate with people who are holding hostages although the balance of force is preponderously in favour of those Governments. It is the job of government to work out options and choose the least bloody. With the greatest respect to Mr. Phoofolo's judgment, I think he ought to think again.

During the Papal visit, it is a notorious fact that the Lesotho army was faced with four armed people who abducted a bus full of passengers and held them hostages outside the British High Commission. The Military Government of the day negotiated with the armed group until almost a quarter of the passengers were released. Such a step met with the approval of all people. The Lesotho army was unable or unwilling or incapable of dealing with the situation. The result was that Government called in the

South African army or police to deal with the situation. The South Africans shot up the armed group and thereby causing an unacceptably high casualty rate of 25% among the hostages although fatalities were relatively few. It never was said the Government had ceased to have a right to be called an authority or to use Mr. Phoofolo's words:

> "the Government are unable to contain situation which affects the rights of innocent persons while they still call themselves authorities."

Calling outsiders was "a damning admission" of failure by the Military Government of the day - Mr. Phoofolo's words were not used against it by anybody.

It is true this case unavoidably brings a collision between human rights and politics. Statements like those which imply that the Government of the day is a government in name only ought to be made on a party political platforms not in Court proceedings. The Court has to be careful not to be used to further objectives other than those that are the court's duty under the guise of vindication of human rights.

Mr. Phoofolo did not help things by suggesting in argument that the strike could easily be brought to an end

if the prison warders were paid M1200.00 instead of the present M300.00. If salaries were increased by 300% for prison warders, then the entire public service would be entitled to the same increase. The current budget would have to be probably trebled or doubled to meet such an increase. Lesotho is certainly not a rich country. I concluded that Mr.Phoofolo had not thought this matter through. As Mr. Phoofolo was wearing both the mantle of litigant and that of Counsel, it became very difficult to ignore what he said in argument and what was his brief.

What was this? A *habeas corpus* application or an application for a declaratory order. If it was an *habeas corpus* application, according to Baxter in his Administrative Law at page 660 to 661, the Applicant could only have *locus standi* if close relatives of the detainees who had a specific interest were not available. I will briefly deal with *habeas corpus* applications before I proceed to the discretionary remedy of a declaratory order.

Voet 43·1·2 (Gane's translation) dealing with interdicts emphasises that:

> "interdicts embrace the cause of quasi-proprietorship when issued...as to the production of children or of freedmen on whom the patron wishes to lay a task, in as much as these latter are said to have been provided

/...

> for the purpose of protecting one's own rights. Of course an interdict for the production of a freedman embraces neither the cause of possession nor of proprietorship since it was only brought in with the object of protecting freedom, and is set in motion as a matter of duty."

By this I understand that where a person has close relatives he needs no patrons to help him. If they are not prepared to help then others may help but their motives in my view must be to secure the release of the person that is illegally detained and nothing else. To quote what Rumpff CJ said in Wood and Others v Odangwa Tribal Authority and Another 1975 (2) SA 294 at 311GH:

> "The Court would, of course require to be satisfied, that applicant had good reason for making the application and that the detained person would have made this application himself if it had been in his power to do so. In this sense an applicant, would act in a way not dissimilar to the way in which a *negotiorum gestor* would act in our law, or a person would be permitted to act as a *curator ad litem* to an unknown, absent or inaccessible person."

In this case there is little doubt that many of the detainees would have applied for their release if they were able to. Nevertheless *locus standi* though liberally interpreted to protect liberty Rumpff CJ at page 312 GH of Wood and Others v Ondangwa Tribal Authority (supra) added:

> "I think that interest a person may have in the liberty of another may arise not only through family relationship...express or implied, relating to a matter of common interest. I am thinking here of a partnership, or a society, or a church, or a political party."

In other words not everybody can lodge application for *habeas corpus*. In Christian league of South Africa v Rall 1981 (2) SA 821 L.C. Steyn J refused to accord a title to sue to a Christian League that purported to bring an application on behalf of an unborn child whose birth was about to be prevented through an abortion.

It became clear that Applicant could have supported the two relatives of Limakatso Chaka and Mamotuba Lerotholi who were obliged by blood relationship to act for the detainees. The two relatives had the further right of their own in the matter in that their own right to visit the detainees was being violated by the prison warders. They had made supporting affidavits to Applicant's application. I asked Mr. Phoofolo why Applicant did not support these relatives with means and advice when they had an unassailable title to sue. I did not get a clear answer. Mr. Tampi, Counsel for Respondents, conceded they had a far better right to sue although he doubted they had a title to bring the declaratory order they were seeking.

/...

The Court *mero motu* decided to join them as Second and Third Applicants in order to be able to proceed with the application. The Court was afraid lest it throw out the baby with the bath water. It merely wanted the matter to be fully ventilated and not prejudice the ventilation of the detainees' plight because of the doubtful title of First Applicant to sue in this particular case. The view I took was that in this particular case First Applicant had no title to sue when close relatives of the detainees were available. Whatever I ordered for the relatives of the Second and Third Applicant would of necessity apply to the rest of the detainees. I was nevertheless mindful of the fact that this was not a matter of *habeas corpus*.

Coming to the declaratory order sought I noted that the High Court Act of 1978 at Section 2(1)(c) that the High Court shall have

> "in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination;"

In the case of Rienecke v Incorporated General Insurers Ltd 1974 (2) SA 84 at page 93 AB Wessels JA said a case of declaration of rights should be dealt with in two stages:

> "Firstly, the appellant must satisfy the Court hearing the matter that he is a person "interested" in an "existing, future or contingent right or obligation". If satisfied on that point, the Court decides upon the further question, namely, whether the case is a proper one for the exercise of the discretion conferred on it."

Dealing with the first leg, Applicant has a serious problem to establish a specific interest of his own that would qualify him for the status of an interested person. I have to be satisfied that the order sought by applicant would not be of merely academic interest to Applicant and would afford him a tangible advantage. See Rienecke v Incorporated General Insurers Ltd (supra) at page 93E. To put it in the words of Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27 at pages 32 to 33:

> "Clearly the interest of an applicant must be a real one, not merely an abstract or intellectual interest."

Fagan CJ in Todd v Minister of Public Works 1958 (1) SA 328 at page 335 clarified the position further as follows:

> "In common parlance once may speak of being interested in a thing in a purely sentimental or academic way... We are here dealing with legally enforceable rights to which a money

value can be attached."

Voet 47:23 reinforces this by saying

> "By our customs however no private person can proceed by a popular action as such though he can certainly proceed for his private interest."

This was really the main thrust of Mr. Tampi Deputy Attorney-General who appeared for the Crown. To put it in another way Juta AJA in Director of Education Transvaal v McCagie and Others 1918 AD 616 said:-

> "The *actio popularis* does not lie in our law, but every person can sue *interesse*... That is the basis of our law, and the question is whether the person coming to court is doing so *pro suo interesse*. ... The general rule is that no person can sue in respect of a wrongful act unless it constituted a breach of a duty to him by the wrong doer or unless it causes him some damage."

A tax payer was found to be without a title to sue for an order restraining the Cape Government from allowing the importation of goods free of duty when such goods were dutiable. See Bagnall v Colonial Government 24 SC 470. This is so in respect of the Central Government.

It will be observed that the actions that form the

/...

basis of prayers 1(b), (c) and (d) are illegal on the part of the prison warders. The prison warders have no right to prevent or render it impossible for prisoners to appear before Magistrates for remands or to come for trial before Courts of law. Similarly it is common cause between Applicant and Respondents that the denial of relatives of prisoners the right to visit them is just as illegal. Their whole act of going on an illegal strike and coercing government is just as illegal. Mr. Tampi and Mr. Phoofolo are in agreement on these points.

It is trite law that the Court will not make an order unless it can be enforced or it will achieve some purpose. The Court will not issue an order which is a *brutum fulmen.* An order is *brutum fulmen* if it is an order that will be unenforceable. In other words the Court will not allow itself to be used to issue, a vain, idle threat. See Trilingual Legal Dictionary by Hiemstra and Gonin. The timing of the declaratory orders that Applicant seeks are meant to put the Court in a position of making loud idle threats. The Court is entitled to refuse to use its discretion of making declaratory orders to expose itself to ridicule.

Fleming J in SPDC (Trading) Ltd v Immelman 1989 (3) SA 506 at 509A said:-

> "The Court does not lend itself to declaring rights where there is no dispute."

In this case there is no dispute about the illegality of the coercion to which the Director of Prisons and the Government are being subjected by armed prison warders. To declare the obvious is unnecessary. To borrow the words of Fleming J on <u>SPDC (Trading) Ltd v Immelman</u> (supra) at page 511 I:-

> "If the order is merely declaratory of what already has come about, the requisite extent of dispute, before a court issues a declaratory order is absent and, secondly there is no need in the interests of justice for such a decree."

The Court has extensive powers to order authorities to justify the arrest or detention of people by the authorities. In this case we are faced with a situation that is unprecedented. Law and order are on a precarious footing because the lawlessness that started in the army has spread to the police and prison warders. None of the illegal acts complained of are or were authorised by government nor could they be said to be actions of the Director of Prisons or any arm of Government.

In the case of <u>re Willem Kok and Another</u> 1879 Buch 45 at page 66 in a *habeas corpus* application was made where

government were now holding people illegally after the rebellion had been quelled and there was no war in respect of which they could be regarded as prisoners of, De Villiers CJ could boldly say:-

> "The disturbed state of the country ought not in my opinion to influence the court, for its most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country... The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of consequences which may ensue."

When these words were said, the acts complained of were actions of government. These are actions of lawless prison warders. Is it a responsible thing to do to order the release of all prisoners merely because the government is not in full control of its armed forces and its law enforcement agencies?

I have already said the Court has to have an executive arm of government in order to administer the law and give effect to the decree that is being sought.

On the 30th May, 1994 I made the following orders:-

(a) I joined Limakatso Chaka as Second Applicant and Mamotuba Lerotholi as Third Applicant.

(b) I dismissed the application of the Lesotho Human Rights Alert Group (The First Applicant) with costs.

(c) I also dismissed the counter application of the Respondents with costs.

(d) I reserved the judgment on the matter in respect of the Second and Third Applicants.

There can be no doubt that the application in so far as it affected them was actuated by good motives. Even the First Applicant the Lesotho Human Rights Alert Group in making this application was not being frivolous and vexatious.

I am unable to finalise this application in respect of the Second and Third Applicants without the answering affidavit of First Respondent. I remarked somewhere that its absence gives the impression that First Respondent is not showing concern or doing anything to see that the rights of the prisoners and those of their relatives are not violated.

Consequently I had decided that the Minister of Justice, the First Respondent be directed to file an

/...

answering affidavit to enable me to determine the merits of the application of Second and Third Applicants.

Events have since moved quickly towards the resolution of the strikes. The police strike ended on the 1st June, 1994. The prison warders strike ended two days later. There is therefore no need to pursue the matter further.

I have already held that the Court has a discretion to grant or refuse a declaratory order.

The Declaratory Order which is impliedly sought by Second and Third Applicants is refused because it is no more necessary. There is no order as to costs in respect of this portion of the application.

W.C.M. MAQUTU
JUDGE

For Applicants : Mr. H. Phoofolo
For Respondents: Mr. K.R.K. Tampi