CIV/APN/418/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MANTSITILE RANTUBA	1ST APPLICANT
TLALANE LEHLOBA	2ND APPLICANT
'MAMAFA MAKHELE	3RD APPLICANT

AND

COMMANDER OF L.D.F.	1ST RESPONDENT
COMMISSIONER OF POLICE	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT
COLONEL R. HARTSLIEF	4TH RESPONDENT
SOUTHERN AFRICAN DEVELOPMENT COMMUNITY	5TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	6TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 27th day of November, 1998

This application was brought by the applicants who are the wives of detained military men suspected of having been involved in a mutiny

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against their senior officers and their commander. They complain that their husbands are denied the right to see their attorney. They were also afraid for the personal safety of their husbands and honestly believed they were being tortured or their human rights were being violated.

The history of this matter, which is common cause, is that some elements in the army led a successful mutiny against their senior officers and their commander. Anarchy followed and law and order broke down. Some young boys and girls began closing government offices, including the courts and seizing Government vehicles. The police, who had previously had a shoot-out with the army in which there were police casualties, stopped maintaining law and order. There was anarchy.

It is also common cause that the mutiny was caused by the fact that the army sympathised with some political parties that had lost general elections recently. Members of these parties had assembled at the Palace gates demanding that the King should dismiss the recently sworn-in government and nullify the elections. They had continued to be at the Palace for several weeks. When the police asked the protesters to disperse, the protesters refused, violent incidents inevitably followed. These culminated in the aforesaid mutiny of some elements in the army which were drawn into these violent incidents on the side of protesters.

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The Government asked the governments of the Republics of South Africa and Botswana to send troops to quell the mutiny and to restore order. It is common cause that Lesotho, Botswana and South Africa belong to the Southern African Development Community, a body which is apparently extending its activities beyond those of economic development to maintaining democracy in member states.

It is agreed by both sides that South African and Botswana military forces did quell the mutiny and restore the Commander of the Lesotho Defence Force and his dismissed senior officers to their commands. During this period, it is not clear who is in overall command between the Commander of the Lesotho Defence Force and the foreign military forces in the country; hence the citation of Colonel R. Hartslief and the Southern African Development Community. Mr. *Makhethe*, who appeared for the Attorney General, crisply stated that the query about the citation of these respondents simply dissolved during argument. Mr. *Phoofolo* conceded that the foreign forces had been invited by the Government, therefore there was no point in making an issue of their presence in the country. He had merely cited them because of the confusion in the chain of command.

This application was brought *ex parte* as a matter of urgency on the

19th October, 1998, for an order in the following terms:

"1. The Rules of this Honourable Court pertaining to service and notice be dispensed with and the matter be heard as a matter of urgency.

2. (a) Respondents should not be directed to allow the applicants' legal representative to have free and uninterrupted access to the prisoners, and to consult with them in secret.

(b) Respondents should not be directed to cause the bodies of the prisoners Gabriel Litile Rantuba, Tholang Lehloba, Khoejane Makhele to be brought to be inspected by the Honourable Judge.

(c) Respondents should not be directed to cease subjecting the above-mentioned prisoners to interrogation without their consent and in the presence of their attorney if the prisoners so wish and request.

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(d) Respondents should not be directed to cause or allow the above-mentioned prisoners to have access to medical treatment whenever the need arises from doctors of their choice.

(e) Respondents should not be restrained from interfering with the liberty of the above-mentioned prisoners except by the due process of law.

(f) Respondents should not be directed to give charges to above-mentioned prisoners forthwith failing which they should cause them to be released from prison.

(g) Respondents should not be directed to allow the prisoner, Gabriel Rantuba to write his J.C. examinations.

The Court dispensed with the normal rules of service and made the following interim order:

"(a) That applicants' husbands should be allowed to meet their

attorney.

(b) That this application be served on the respondents.

(c) That respondents file opposing papers if they intend to oppose this application on or before the 21st October 1998.

(d) Applicants file replying papers before 12 noon on the 22nd October, 1998.

(e) this application will be heard at 2.30 pm on Thursday the 22nd October 1998."

Before there was even a return of service, applicants' attorney, on the 21st October, 1998, was before court *ex parte* seeking an order of committal to prison of the respondents for contempt of court. The reason being that after respondents had been served with the Court Order, he was not allowed to see the detainees who are applicants' husbands. Because the matter was going to be heard the following day, the Court deferred this application for committal.

On the 22nd October, 1998, the hearing of the application commenced. At the end of the hearing, on the 23rd October, 1998, the Court made the following order:

"1. That a *rule nisi* be issued returnable on 17th November, 1998, at 9.30 a.m. calling upon respondents to show cause why:

> Applicants' attorney or counsel should not have access to the applicants' husbands who are military personnel (arrested on suspicion of committing military offences such as mutiny) at the

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investigation stage, before charges are laid.

2. (a) The applicants' attorney or counsel and the Attorney General are authorised to appoint a day on which they shall see the applicants' husbands to ascertain whether or not they have been tortured.
   (b) Applicants and the Attorney General are authorised to appoint their own medical doctors to investigate any allegations of torture or bodily abuse that applicants might have made.

3. Questions of jurisdiction and costs are deferred to be argued on the return date.

4. The parties are directed to file their heads of argument on or before the 13th November, 1998."

On the day of the return day, nothing was said or heard about any allegations of torture or ill-treatment of the detained prisoners. That being the case, I am obliged to conclude that they were not ill-treated. Mr. *Phoofolo* for applicants, however, gave me the impression that asking the detainees questions in that regard was pointless, since the order was that this should have been done in the presence of Crown Counsel.

The weight of the argument of the Director of Public Prosecutions in approaching this application was basically that:

> "Events of the past few months are a bitter reminder of what it is like for there to be no law, order or effective authority; and courts of law are called upon to restore and enforce order and respect for law."—per Mofolo J in *Mochema Mochema v Officer Commanding (Mafeteng) and 3 Others*, CIV/APN/422/1998 (unreported).

As the detained prisoners (so the argument went) were members of the armed forces suspected of mutiny as a result of which the courts had themselves suffered, the courts should among other things, realise they had no jurisdiction in the matter as the Constitution provided for courts-martials to deal with military offences. There were courts-martials and other structures within the army which, in terms of the Constitution are designed for this purpose. It should, of course, be observed that Mofolo J nevertheless in *Mochema Mochema*'s above had quoted with approval the following passage from *Liversridge v Anderson* [1942] AC 206 at page 244 per Lord Atkin:

> "In this country, amid clash of arms, the laws are not silent, they may be changed, by they speak the same language in war as in peace... Judges are no respecters of persons and stand between the subject and any attempted encroachment on its liberty by the executive, alert to see that any coercive action is justified by the law."

At the root of the problem (during the hearing) was that both counsel had no authorities for their submissions. They were making submissions on military law, the jurisdiction of the court and the powers of the court in respect of military personnel and the courts-martial. That called for this court's investigation. What was even worse, even the court's library

had nothing on military law despite the fact that the army is an old institution which is sanctioned by law. The Constitution speaks of human rights in a democratic setting. That being the case, it was obvious that traditionally, military law and courts martial had always existed with a democratic culture of human rights.

The court had given both counsel more than two weeks to look for authorities and case law from Britain and other countries which are known to have a long military tradition within a constitutional system that had observed human rights over the years. Counsel on both sides did what they could to be of assistance to the court despite the constraints under which they operated.

The confusion that characterised the way this case was argued before me is by no means unusual. The reasons being that our courts do not normally come in contact with military law. In the preface of the commentary to the judgment of McCardie J in *Heddon v Evans* King's Bench June 4th 1919, Richard O'Sullivan in *Military Law and the Supremacy of Civil Courts* (1921) said:

> "The judgment...dissolves all the doubts and uncertainties that previously surrounded the constitutional position of the soldier and English law."

This showed that confusion on this aspect is not the monopoly of Lesotho. At pages 56 and 57 of that book enlistment is described as a contract between the person enlisting and the Crown. It imposes special duties. A soldier does not cease to be a citizen. He changes his status in the same way as a married man assumes new liabilities. At page 59 of that book McCardie J said:

> "It seems to me as a matter of principle that the liberty of a soldier should not be infringed, nor should his person be infringed, nor should his person be invaded, save insofar as that infringement or invasion is justified by either the law military or the civil law. The question of justification should ultimately be determined by the ordinary Courts of Law."

With these views I agree and indeed Counsel on both sides, once they understood what military law was about, were of the same view. What the courts will not interfere with is military discipline administered according to law. Courts are not supposed to, nor are they expected to interfere with military discipline provided it is within the confines of the law.

As Lesotho has inherited parliamentary democracy from the United Kingdom, it follows that military law, defence of the realm, disciplinary law and courts-martials should be understood as being of the same conception and meaning as in the United Kingdom. In other words the law of the

United Kingdom is our foundation stone in respect to disciplinary law for disciplined forces. Parliament is empowered by the Constitution to develop or build our law on the military and other disciplined forces such as the police force and the prison service within the parameters of a democratic society as understood in the United Kingdom when Lesotho got its independence. Once this legal premise is understood, Lesotho can safely say it has inherited a centuries old tradition from the United Kingdom. Consequently there is a lot of case law and legal tradition to draw from in interpreting our disciplinary law within the Constitution.

Bradley and Erwing in *Constitutional and Administrative Law* 12 Edition at page 378 crisply state:

> "Military law is the basis of discipline in the armed forces, for a disciplined force could not be run on the ordinary law applicable to civilians. But it does not follow from this that those who join the armed forces should be required to surrender the right to be treated fairly or that they should be expected to waive their human rights."

This applies to Lesotho's armed forces if Lesotho is a democratic country. Going over the *Lesotho Defence Force Act No.4* of 1996 and the *Defence Force (Court-Martial Procedure) Rules* of 1998, I observed that they were fair and were intended to treat those who are subject to military law justly and firmly. Unfortunately because (at places) certain details which ought

to be spelt out were missing, these laws were capable of misinterpretation.

Jurisdiction

The Director of Public Prosecutions had asked to be joined as the sixth respondent. This application, which was unopposed, was granted particularly because he had no intention to file any affidavits. Thereupon he took over the leadership of Crown's team. He instantly raised the question of jurisdiction. The court directed that it should be argued along with the merits because the question of access and military law were closely interwoven with the merits. G. Humphreys and Ciaran Craven in *Military Law in Ireland* (1997) at page 96 say:-

> "A member of the defence forces, whether an officer, non-commissioned officer, or soldier, does not cease to be a citizen of the state nor does he lose the benefit of rights guaranteed under the Constitution. While remaining subject to ordinary laws of the State, he also becomes subordinate to a further, and entirely distinct code of military law."

It will be observed that in terms of Section 127 of the *Constitution*, courts-martial are nothing but specialist courts or tribunals, and "shall subject to the provisions of this constitution, have such jurisdiction and powers as may be conferred on it by or under any law". By this, I understand that courts-martials cannot lawfully be established or have powers that collide

with the principles and the spirit of the constitution. If the legislature were to attempt to establish them contrary to the provisions of the Constitution, this court would be obliged to declare such an act unconstitutional.

Since the case of *Marbury v Madison* 1 Cranch 137(1803) the constitution is regarded as a "superior paramount law". Consequently any law is to be reconciled with the constitution by the courts. Unless this was the case:

> "It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits."—William H. Rehnquist *The Supreme Court* (1987) at page 114.

It goes without saying that courts-martial must act within the statutes that created them, and it is this court that must determine whether their acts are *intra vires*. The British *Manual of Military Law* (War Office) 1914 clearly states that the High Court of Justice has the power to prohibit a court-martial from "transgressing the bounds prescribed to it by law."

It follows therefore that this court has the power to look into the complaint of the applicants that their husbands are being denied access to

their attorney contrary to law. The offence of mutiny (although a disciplinary offence) is the most serious offence that a member of the armed forces can ever be suspected of committing. If an allegation of non-access to an attorney is made in such a case, the court is obliged to investigate the complaint speedily.

Investigation

Section 89(1) of the *Lesotho Defence Force Act* 1996 provides:

> "The allegations against any person subject to this Act who is under arrest shall be duly investigated without unnecessary delay, and as soon as may be, either proceedings shall be taken against him or he shall be released from arrest."

The husbands of applicants have been in detention, under arrest, as suspects for allegedly committing a mutiny for over 35 days. By any stretch of imagination there has been an inconscionable delay. Section 89(1) has been violated. The fact that I asked counsel on both sides to do some research because without any guidance on military law, I was not having the benefit of argument to which I am entitled to (as a court) is no excuse. The military authorities should have not lost sight of the fact that the husbands of applicants were incarcerated, and their right to be charged

or released was being violated. This right is not only spelt out in the *Constitution*, it is also specified in the *Lesotho Defence Force Act* of 1996.

The question arises, how long should a military offence be under investigation? In my view, military offences should be investigated and punished much more speedily than in civilian ones. The army was provided with special procedures to punish insubordination, mutiny and other disciplinary offence connected with dilatoriness in the performance of duties in order to enhance its alertness and effectiveness, should it suddenly be called upon to go into combat duties. When the mutiny had been suppressed, I wonder if failure to deal with mutineers resolutely and timeously is not conduct that could easily fall within "conduct to the prejudice of military discipline". See Section 79 of the *Lesotho Defence Force Act* 1996. Indeed what was lawful arrest has degenerated into an irregular one. See Section 67(1)(a) which provides:

> "Any person subject to this Act who, when another person subject thereto is under arrest - unnecessarily delays the taking of such steps as it is his duty to take for investigating the allegations against that other person commits an offence."

Although time limits are not in Section 67 specified beyond the 24 hours reports on which a charge is to be based, there can be no doubt that

speedy action has to be taken in making a final decision as to the fate of the prisoner. It seems to me in the absence of unusual circumstances, the prisoners should have been charged after an investigation of not more than 48 hours. See Section 6(3) of the Constitution.

One of the reasons this court was obliged to postpone this matter for two weeks and request both counsels to do some research was the submission made on behalf of the respondents to the effect that there was no right against self-incrimination in the *Lesotho Defence Force Act* of 1996 and its *Regulations* of 1998. I have serious problems with this submission, I think it was based on the wrong understanding of the military system of justice. In Lesotho and Britain, the position on the right against involuntary self-incrimination is not clearly spelt out. In the *Uniform Code of Military Justice of the USA* 831 Art 31 there is the following:

"Compulsory Self-Incrimination Prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer of which may tend to incriminate him."

In the British *Manual of Military Law* WAR OFFICE 1914 page 74, it is

clearly stated that for a confession to be admissible, it must be proved that it was freely and voluntarily made. In the *Military Manual of Military Law Ministry of Defence* Part 1 of 1972 page 117 paragraph 86 the question of inadmissibility is put in a slightly different way; in the following words:-

> "Where however, it is represented to the court that the confession was or may have been obtained either by oppression of the person who made it or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render the confession unreliable, it is for the prosecution to prove beyond reasonable doubt that the confession was not obtained in either of these ways."

An examination of the *Defence Force Discipline Regulations of Lesotho* shows clearly that everything is done to see that the prisoner or suspect does not unintentionally incriminate himself. There are avenues open to him to have legal representation in terms of Regulation 19, should he have to appear before a court-martial on a serious offence, or elects so to appear at the conclusion of a summary trial involving a relatively minor offence. Regulation 27(7) also gives the prisoner or accused the right where summaries and records of evidence have to be made in investigations under Regulation 19, a right to be cautioned by the recording officer in the following terms:

"Do you wish to make any statement in your defence? You are not

> obliged to make any statement unless you wish to do so, but whatever you say will be recorded and may be produced in evidence if you are subsequently tried before a military court."

This does not appear to me (insofar as the Lesotho Defence Force is concerned) to be a form of preliminary investigation in which the prisoner or suspect is expected or induced to incriminate himself. It would seem therefore involuntary self-incrimination is not allowed in Lesotho. Lesotho, apart to Regulation 27(7) has a Bill of Rights in the *Constitution* on a model akin to that of the United States of America. I can therefore say the right against self-incrimination also exists in the disciplined forces as well.

In the same Lesotho Defence Force Colonel Sehlabo died in military custody while some offences against him was being investigated. He was the third highest ranking officer in the force. The offences were never specified. There was non-access by his lawyer and family. He was extensively tortured, and burnt, presumably to obtain an incriminating confession. Inquest Number 39 of 1986 revealed that Colonel Sehlabo died from saeptocaemia following infected burns. It is therefore understandable that the applicants must have believed the worst when they could only see their husbands without someone hearing from them in private what had been happening to them. Even their attorney, who normally would have

seen them and interviewed them in private, was denied this right. Although the husbands of applicants were visibly unharmed Mr. *Phoofolo*, their attorney, was not satisfied all had been well. He implied they could not have disclosed what had been happening to them. It creates uncalled for suspicion not to allow a detained prisoner rights of access normally accorded suspects. This cannot be conducive to a feeling that all is well and the suspect has not been tortured. It creates the suspicion that the prisoner is being kept away from the public until injuries inflicted through torture have healed.

Investigations have to be made and reports of events that occurred in the line of duty made. Where suspects are involved, it is legitimate to find out facts from them fairly and within the limits of the law. This is a delicate and risky area. It is not unknown for torture to be used in order to obtain leads in investigations and even confessions that will not be used at the trial. It is for such reasons that lengthy detentions without access are avoided because this puts temptations on investigators to use torture and other suspect means. It is precisely to remove from investigators the temptation of extracting information oppressively or by torture and other suspect means that in our law a detained suspect cannot be detained beyond 48 hours without being given a charge. Nothing in our military law expressly permits investigators to take more than 48 hours without

formally charging the detained suspect.

I agree with Mr. *Phoofolo* that this detention of the husbands of the applicants is based on the interpretation of laws that restrict human rights. In such a situation, more cannot be read in the *Lesotho Defence Force Act* and its *Regulations* than what is expressly stated. Even if the military authorities had been expressly given the power to exceed the customary 48 hours in their investigative detention, such a provision would be strictly interpreted because as Hendler AJ stated in *Mbali v Minister of Police* 1954(2) SA 596 at 598C:

> "It has become an accepted principle that since these provisions restrict the ordinary rights of individuals...they are to be strictly interpreted against the authority in whose favour they are imposed and benevolently interpreted in favour of persons upon whom they are binding."

In reaching this conclusion, I am guided by the clear legislative directive given to the military authorities to avoid delays once a person subject to military law has been arrested. Section 89(1) of the *Lesotho Defence Force Act* of 1996 unambiguously states:

> "The allegations against any person subject to this Act who is under arrest shall be duly investigated without unnecessary delay, and as soon as may be..."

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There is nothing under the law to stop investigations from continuing and other additional charges added after the charge has been preferred. I noted that our Section 89 of the *Lesotho Defence Act* 1996 is based on Section 75 of the *British Army Act* 1955. In the British one, a court-martial has to be assembled within 8 days while in Lesotho this should be done within 14 days.

During argument Mr. *Makhethe* referred me Section 90(6) of the *Lesotho Defence Force Act* 1996 enjoining me to interpret it to mean that investigations can continue beyond 14 days without the detained military suspect being given a charge. The view I take is that investigations can continue even where a charge has been preferred against a suspect. It does not mean a suspect can be held for long periods during which "the Commander of the Defence Force at periods of not more than 14 days" can inquire into the progress being made on the investigation. Such an interpretation would be in serious conflict with the *Constitution.* I have no doubt that Parliament had no such intention. If it had, such a provision would be unconstitutional.

In terms of Section 15 of the *Interpretation Act* of 1977, I have to interpret Section 90 of the *Lesotho Defence Force Act* 1996 remedially and

give it "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Therefore I have to reconcile it with section 89(2) of the *Lesotho Defence Force Act* above which requires a court-martial to be assembled within 14 days, and if this is not done, Commander of the Defence Force and other senior military officers must be given a report on the problems that are confronted every 14 days until either a court-martial is assembled or the offence is tried summarily or the military suspect is released. This provision is substantially fair because there can be all sorts of problems in the way of assembling a court-martial.

This court has a duty to see that the legislature makes all laws (including those affecting the disciplined forces) that are consistent with the provisions of the democratic *Constitution of Lesotho*. Gerard Humphreys and Ciaran Craven in *Military Law in Ireland* page 98 quotes the following passage from Findlay CJ in *C v Court-Martial & Others*, a passage with which I agree:

> "The court can and should pay a particular respect to the fundamental importance of the constitution and under the structure of society the disciplinary machinery and discipline codes of the Defence Forces but...that respect and in a sense a reluctance to intervene can never possibly interfere with a duty of the court to do justice to a member of the Defence Forces...."

In other words, a soldier cannot invoke the ordinary law of the land against military disciplinary action unless he can show a denial of natural justice or a violation of a statutory right. I am of the view that there was a violation of the *Lesotho Defence Force Act* and a denial of a right to a speedy trial through an unduly long impermissible investigation.

This court is aware of what Renquist J (as he then was) said in *Parker & Others v Levy* (1974) 417 US 733 at page 744 to this effect:

> "The army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command or the duty of obedience of a soldier... The military constitutes a specialised community governed by a separate discipline from that of the civilian... The rights of men must perforce be conditioned to make certain demands of discipline and duty."

While noting the special character of the military it should never be forgotten that people with rights voluntarily join it. Even in circumstances in which they do not, it is in a constitutional democracy an arm of democratic state of people with rights. It strikes me as highly probable that this lassitude and disregard of the rights of the husbands of applicants was the result of ignorance and the belief that the law permits this conduct. That is the way this application was argued on behalf of respondents.

Non-access of counsel to detainees

It was vigorously argued that at the investigation stage, the prisoners suspected of mutiny should not have access to their attorney. Even in civilian life during the forty-eight hours of detention the suspect is not expected to be interrogated in the presence of his attorney. This only happens when he says his attorney should be called because he is not prepared to answer questions in his attorneys absence lest he incriminates himself.

What became objectionable was the use of the investigatory machinery to deny the detainees access to legal representation essential for preparation of their defence. If this investigation that followed detention had taken a reasonable period of about 48 hours, this application would not have been reasonable. As I have already said, it has taken 35 days. Indeed as Mr. *Phoofolo* for applicants said the Commander does not say what problems led to this. I have already stated that in argument it was said this long investigation was to extract information and there was no right against involuntary self-incrimination. Even if such respondents had a right to force the detainees to incriminate themselves (which it not the case) the undue delay of their investigation is certainly an abuse of the process of investigation.

In terms of Rule 10 of the *Defence force Court-Martial Procedure* Rules of 1998 the husbands of applicants as detainees or prisoners (suspected of mutiny) were entitled to have long had the service of counsel in the preparation of their defence. This could not happen simply because they were not being charged of the offence with which they had been suspected of committing. They have come to court to enforce the right of access to their counsel so that they can start preparing their defence. These detainees were simply not being remanded for a trial before a court-martial according to law. This failure to charge them was interpreted to be a stratagem to deny them access to counsel. I doubt if this was deliberate (in the light of what I have said above). Nevertheless it denied the suspected prisoners of a right to counsel at a time they should have had one.

It will be observed that Regulation 19 of the *Defence Force (Discipline) regulations* 1998 is a broad regulation intended for a broad spectrum of disciplinary offences. Among these are included minor offences that may be investigated without much formality and be summarily disposed of and punished. There are also serious offences such as mutiny which must go before a court-martial. Regulation 19 combines the investigatory functions of the police, the preparatory examination before a magistrate and the decision of the Director of Public prosecution in finally deciding and actually indicting an offender of a serious charge. Where the offence

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is relatively minor there is no investigation (by way of a hearing before a commanding officer), but rather a summary trial in which no advocate or attorney may appear. If the summary case leads to a finding of guilt, the officer presiding at this summary trial is obliged to advice the accused prisoner to elect to be tried by a court-martial or to have the matter finalised there and there. The accused may within 24 hours change his mind and ask that the matter be finalised even where he had elected to be tried by a court-martial. See Regulations 23(10) and (11). Where an accused prisoner elects to be tried by a court-martial, he has a right to counsel at the court-martial.

For serious crimes such as mutiny, there is no room for summary trial. The investigatory hearing envisaged in Section 19 is part of evidence collection that end with the Commanding Officer who can dismiss charges straight away. This is equivalent to holding an examination hearing akin to the Preparatory Examination in civilian courts. It is on that basis that a final decision on whether to bring a charge against the prisoner before a court-martial can be made. In Ireland, where a charge as serious as mutiny (which carries a death penalty) is being contemplated, the suspected prisoner would be entitled to legal representation in the same way as he would be before a magistrate in a civilian preparatory examination. See Gerard Humphreys & Ciaran Craven *Military Law in*

Ireland at page 114 to 115. While this procedure would be desirable for Lesotho lest a feeling develop that the right to life of military personnel is not equally respected as in civilian life, I need not necessarily take a dim view of the *Lesotho Defence Force Regulations* on this account. I do in this particular case take a serious view of the fact that the investigatory procedure was inadvertently used to deny the detained prisoners (access to their legal represantive) although suspected of a serious offence such as mutiny which carries the death penalty.

Presence of counsel during interrogation or investigation

Mr. *Phoofolo* for applicants initially argued that as an attorney, he was entitled to be present and to see that prisoners do not incriminate themselves when they were asked questions. I have already said, even in civilian proceedings, the presence of attorney is not that automatic, it is conditional. In defence forces it has to be reconciled with the need to deal with all types of minor and not so serious offences which have to be dealt with summarily, with or without formal procedure. This makes the enforcement of discipline speedy and effective to keep the military machine in a high state of readiness and efficiency. As already shown, the accused can always, at the end of a summary trial, elect to have a court-martial and be legally represented before a court-martial.

I think Gerard Humphreys and Ciaran Craven have put what is the position in Lesotho very well at the stage of preliminary investigation of charges where they say:

> "At this investigation, the commanding officer is attended by the adjunct and the accused is accompanied by military escorts of military rank not lower than his own. Neither the accused nor the person preferring the charge(s) is entitled to counsel or representation at this stage. The witnesses are marched in and the accused has the right, and is given full opportunity to cross-examine those whose statements are unfavourable to him... At the conclusion...of the investigation, the accused may, by direction of the officer investigating the charge, be released or retained in custody."—*Military Law in Ireland* at page 113.

At this stage the commanding officer, according to Gerard Humphreys and Ciaran Craven (supra) in an informal way, is merely trying to decide whether there is sufficient evidence to justify a charge. If there is not, the commanding officer has to dismiss the charge. The Chief Justice of Ireland found the prohibition of the right to legal representation at this preliminary stage not to be imperilling a fair hearing to such an extent that it could cause an injustice at a subsequent hearing of the court-martial. See *Scariff v Taylor* 1IR 242 (HC) as quoted in *Military Law in Ireland* page 113.

I have already said (without deciding this point) that in cases where a

soldier is facing a capital charge such as mutiny, it would enhance the appearance of fairness to the accused to have the right to be represented by an attorney or advocate at this investigatory hearing. This could be in the same way as he would be represented in a Preparatory Examination in a civilian court where an accused is charged with a capital offence such as murder.

Contempt of Court

Mr. *Phoofolo* had applied for committal to prison of the Commander Lesotho Defence Force on the ground that he had not obeyed the court Order of the 19th October, 1998.

The Director of Public Prosecutions told the Court that on the 21st October, 1998, at 4.50 p.m. when his attention was drawn to the Court Order, he requested Mr. *Phoofolo* to go with him to see the detained prisoners to ascertain whether they had been tortured. The DPP was of the view that no access was permitted in terms of the *Lesotho Defence Force Act* 1996 and its *Regulations* while they were under detention before they had been formally charged. Mr. *Phoofolo* for applicants told the court that he saw the prisoners but was not allowed to ask them whether they had been tortured. Mr. *Phoofolo*'s complaint was also that he was not allowed

to consult with the prisoners privately.

It will be seen that the Court Order was:

"That applicants' husbands be allowed to meet their attorney."

It will be observed that the detained prisoners were allowed to meet their attorney albeit under restrictions. If we go by the actual wording of the Court Order, it is arguable whether or not the Order was not obeyed. The Court Order had not specified that the attorney should see them in private.

Contempt of court has many categories. The one we are concerned with here is that of wilfully disobeying a Court Order. It is trite law that:

> "the court will commit a person for contempt of court only when his disobedience is due to wilfulness. In *Clement v Clement* 1961(3) SA 861 at 866 it was held that a person's disobedience must not only be wilful but also *mala fide* in disobeying it."—Herbstein & Van Winsen *The Civil Practice of the Supreme Court in South Africa* 4th Edition at page 866.

In the case before me, there is no contumacy. If the respondents with the Order as it stood failed to obey the Court Order because they gave it an interpretation which is by no means unreasonable, there is no wilfulness.

/.....

It seems, also, if they were satisfied that the court's order granted *ex parte* was wrong and contrary to law, they were obliged *bona fide* to come before court immediately to show it was wrong. Respondents were before court within 24 hours to make their submissions on this issue.

This court on *ex parte* orders that are given to the prejudice of parties unheard has shown its reluctance to accept that contempt of court has been committed. *Easterbrook Transport (Pty) Ltd. v Commissioner of Police & Ors.* 1991-96 LLR 141 at page 142. In such cases, the onus of proving absence of wilfulness is on respondents. In *H.G. van Zyl v W.L. Mosiane* 1991-1996 LLR 1701 respondent succeeded to show that he failed to obey the court order because it had a cloud of uncertainties and ambiguities as to what was required of respondent.

I had no difficulty in doubting whether contempt of court had been committed in the circumstances of the case. Mr. *Phoofolo* insisted on being granted access to the prisoners or detainees even before junior officer understood what was required of them and referred to the Commander Lesotho Defence Force. Had the order such as it was not been granted *ex parte*, the court might have felt differently.

I hold therefore that the application for committal of first respondent

for contempt to prison was premature.

Order of the Court

I have already said I have come to the conclusion that the respondent inadvertently abused the reasonable and fair powers of investigation to deny the rights of prisoners on behalf of whom this application is brought. The Director of Public Prosecution saw this omission and undertook to see to it that the Commander of the Lesotho Defence Force sets in motion the procedure that will lead to the bringing of the prisoners before a court-martial immediately.

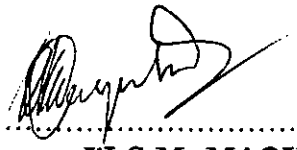
It is ordered:

(a) That the Commander of the Lesotho Defence Force is directed to see to it that Gabriel Litile Rantuba, Tholang Lehloba and Khoejane Makhele are charged with any crime with which they are suspected within 8 days of the date of this judgment or be released from custody.

(b) That the Commander of the Lesotho Defence Force is directed to allow Gabriel Litile Rantuba, Tholang Lehloba, and

Khoejane Makhele access to an attorney or counsel forthwith to enable them to prepare their defence even before the (long over-due) investigatory hearing takes place before him or his appointee.

(c) That First, Second, Third and Sixth Respondents pay the costs of this application.



W.C.M. MAQUTU
JUDGE

For applicants : Mr. E.H. *Phoofolo*
For respondents : Mr. G.S. *Mdhluli*, Director of Public Prosecutions