IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 18/2007

In the matter between:

Paul Mosa Mosuoe	**Appellant**
And	
Judge of the High Court **Mr Justice S.N. Peete**	**First Respondent**
President - Court Martial	**Second Respondent**
Commander Defence Force	**Third Respondent**
Minister of Defence	**Fourth Respondent**
Attorney General	**Fifth Respondent**

Heard : 4 April 2008

Delivered : 11 April 2008

CORAM: Steyn P
Grosskopf JA
Melunsky JA

SUMMARY

There is no right to review the decision of a Judge of the High Court, either by statute or at common law - Appellant cannot abandon an appeal and then reinstate it without leave on completely new grounds at a very late stage.

JUDGMENT

GROSSKOPF J.A.

[1] The appellant had been employed as a soldier in the Lesotho Defence Force (LDF) for over twenty years. In January 2001

the appellant applied for study leave in order to pursue his legal studies at the University of Fort Hare in the Republic of South Africa. His application for admission at the University of Fort Hare was granted. The critical question however was whether he had also obtained study leave from the LDF allowing him to be absent for the period when he attended classes at the University of Fort Hare.

[2] The LDF maintained that the appellant had not obtained study leave and charged him with four counts of absence without leave, one count of resisting arrest and two further counts relating to conduct prejudicial to good order and military discipline. The appellant was prosecuted before a court martial. Several witnesses were called by the prosecution and they were fully cross-examined by the appellant's counsel who applied at the end of the prosecution's case for a discharge on the basis that the appellant had no case to answer. The court martial however ruled that there was prima facie evidence against him, whereupon the appellant's counsel closed his case without adducing any evidence. The court martial then found the appellant guilty on three counts of absence without leave, one count of resisting arrest and one count of conduct prejudicial to good order and military discipline. The appellant was sentenced

to undergo detention for a period of three months, less the time already spent in custody, and he was discharged with ignominy from the LDF. The Minister of Defence, the fourth respondent in this appeal, later substituted a sentence of one month's detention in place of the three months, but otherwise confirmed the conviction and sentence.

[3] The appellant thereupon lodged an application in the High Court asking that the proceedings in the court martial "be reviewed, quashed, set aside and/or declared unlawful". The matter came before Judge Peete, the first respondent in this appeal. The appellant appeared in person. The learned Judge remarked as follows in the course of his judgment in the court *a quo:*

> "The matter cannot legitimately be re-opened on review to investigate the matter afresh. It was only an indulgence afforded the applicant that this court went beyond the parameters of the record and re-visited the matter. Much latitude and benevolence was granted applicant at the hearing because the applicant truly seems to be a very conscientious person who was seemingly brazenly treated despite his over-zealousness to pursue his legal studies; he alleges he was being thwarted and frustrated by the bureaucratic intransigence. Perhaps [he] received a raw deal at the hands of his superior who frustrated his pursuit for further studies. A bitter fact that stands uncontroverted is that he absented himself from the Barracks and proceeded to the University of Fort Hare to pursue his studies when he had not obtained the necessary permission. His motive was indeed very noble and laudable but [i]t infringed his military duties."

[4] The learned judge dismissed the appellant's review application with costs. The appellant then gave "notice of review and appeal" in this court. He applied for an order declaring that "the decision, proceedings and/or judgment of 1st Respondent [Judge Peete] is irregular and must be reviewed, corrected or quashed and set aside". The appellant further lodged an appeal against "the whole of the judgment" of the court *a quo.* In his heads of argument counsel for the appellant abandoned his appeal since "all the matters were adequately covered under the review" in his opinion, but subsequently retracted this abandonment and indicated that the appellant would proceed with the appeal.

[5] At the hearing of the matter in this court we indicated to counsel for the appellant that there were two procedural matters on which we requested argument. The first is whether there is a right to review the decision of a judge of the High Court. The second is whether the appellant required leave to appeal to this Court.

[6] I shall first deal with the question whether the appellant has a right of review. It was held by the Supreme Court of Appeal in South Africa in the case of Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2)

SA 385 (SCA) that there is no right to review the decision of a judge of the High Court either by statute or at common law. Schutz JA in the course of his judgment held as follows at paragraph [38] p. 402 G – 403A:

> "The are good reasons of policy why Judges should not be joined. In the first place there is no need for it. Judges know perfectly well that their decisions may be upset by a higher Court on appeal, ... It is not for Judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of Judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the Court have its time wasted considering invidious applications for leave to sue a Judge under s 25 (1) of the Supreme Court Act 59 of 1959. Thirdly, and most importantly, it is not in the public interest that Judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that Judges should be seen as impartial and, in the kinder sense, aloof."

(See also Gentiruco AG v Firestone SA (*Pty)* Ltd 1972 (1) SA 589 (A) at 601 E-F.)
I am of the view that the same position applies in Lesotho.

[7] I should point out in passing that this court held in the case of Bolofo and Others v Director of Public Prosecutions LAC (1995 - 1999) 231 at 245H that bail proceedings before the High Court are subject to review by the Court of Appeal. It

should however be borne in mind that no appeal lies to this Court from a decision of the High Court refusing bail. This Court therefore held that it does have jurisdiction to entertain review proceedings instituted against decisions of the High Court on bail applications on grounds of gross irregularity or illegality which result in a failure of justice or render such decisions a nullity. This ruling applies strictly to bail applications and should not be seen as granting a general right of review from a decision of a judge of the High Court. We therefore hold that there is no such general right of review and that the "review" in this case should be struck off the roll.

[8] The second question is whether the appellant required leave to appeal to this Court. In view of the circumstances set out below it is not necessary to decide this point.

[9] It appears from the appellant's heads of argument of 18 February 2008 that the appellant abandoned his appeal on the ground that all the matters raised in his appeal were "adequately covered under the review". It is correct that the appellant's grounds of appeal were principally review grounds. The appellant then tried to reinstate the appeal in his supplementary heads of argument dated 27 March 2008 on completely new grounds.

The appellant could not reinstate the appeal without leave and he never asked for leave. What is more important however is that the appellant cannot introduce new grounds of appeal at this very late stage without making an application for condonation. In the circumstances there is no proper appeal before us and the matter should be struck off the roll. (See Rules 4 and 15 of the Court of Appeal Rules, 2006 and compare Metropolitan Life Ltd v Masopha LAC (1995 - 1999) 681 at 686 E.)

[10] There remains the question of costs. In view of the unhappy history of this case we are of the opinion that there should be no order as to costs.

[11] In the result both the "review" and the "appeal" are struck off the roll. There is no order as to costs.

F.H. GROSSKOPF
Judge of Appeal

I agree:

JH STEYN
President of the
Court pf Appeal

I agree:

LS MELUNSKY
Judge of Appeal

For the Appellant : Adv P. Kgoadi

For the Respondent : Adv L. Molokoane