IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.22/2014

In the matter between

THABANG JOSEPH PHAILA **APPELLANT**

And

MINISTER OF DEFENCE **1ST RESPONDENT**

PROSECUTOR, COURT MARTIAL
CONVENED BY FIRST RESPONDENT
ON 12 NOVEMBER 2013 **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

CORAM : SCOTT, AP
FARLAM, JA
LOUW, AJA

HEARD : 09 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Court martial – appellant induced to return to Lesotho by statement by Minister of Justice that he could safely return – appellant arrested and prosecuted after return to Lesotho – prosecution declared to be an abuse of process.

JUDGMENT

FARLAM JA

[1] The appellant in this matter is a second lieutenant in the Lesotho Defence Force, who left Lesotho in September 1998 after SADC military forces intervened in the affairs of Lesotho during the period of political unrest following the September 1998 elections.

[2] He explained in the founding affidavit in the application which forms the subject matter of this appeal that he left Lesotho after he learnt that some senior officers of the Lesotho Defence Force had escaped to Ladybrand and that the SADC forces were engaged in fighting with the Lesotho Defence Force and had called

upon all members to surrender and report at the Makoanyane base, which had been overrun. He states that the reason he escaped from the Kingdom was that he feared for his life. He said that he stayed out of Lesotho for a while, intending to come back once it was clear to him what the fate would be of the members of the Lesotho army. He thereafter learnt that a process was under way to arrest and charge every soldier who was suspected of being involved in the post-election political unrest and that some members of the army had been arrested and court martialled for mutiny and other contraventions of the Lesotho Defence Force Act 4 of 1996.

[3] In 2000 the Government set up a commission under the chairmanship of the **Honourable Mr Justice R N Leon** to investigate a mutiny which occurred on 11 September 1998 and thereafter. In its report the commission recommended that the appellant be charged with sedition, alternatively public violence and the appellant thereafter did not return to Lesotho.

[4] He stated further in his affidavit that he learnt from media reports of a policy announcement by the new coalition Government which took office after the 2012 election to grant amnesty to all persons who had left the Kingdom because of their being implicated in politically connected offences during previous administrations. He annexed to his affidavit what he called one such report which appeared in the Informative newspaper on 21 November 2012. This report reads as follows:

> *'About 4 political dissidents from different political parties were welcomed back home on Thursday after spending years in exile. The Prime Minister Motsoahae Thomas Thabane officially welcomed the dissidents – Litšitso Sekamane, Lefa Ramantsoe, 'Malefa Mapheleba and Thabiso Mahase who had all fled to South Africa and sought political asylum whilst there. In his statement, the Prime Minister said some of the dissidents have fled the country because of political differences where they persecuted. "These people were persecuted by previous governments because they did not think along the same line with leaders at that time," Thabane said. "We have decided to call them to rejoin us here after years in foreign land," he added. He said even those who faced with criminal charges, such criminal records would be struck off from the roll. "These people are free. They will be treated like ordinary Basotho," Thabane said. He said torture of political dissidents has been common in Africa than any where in the world saying in the government that he leads; no one will be persecuted over various political opinions. "In South Africa, the whites persecuted the blacks. Here in Lesotho, it can cause serious problems because we are all black." "Almost every body should express his or her opinions freely even to me," the Prime Minister said. He said Moshoeshoe I, who is the founder of the Basotho nation, gave*

> *Basotho a chance to express their views, a reason that Basotho nation grew tremendously saying the decision to call the political dissidents was reached by all the parties in government. The Prime Minister called on all those who have fled the country due to political reasons to come back home stating that Rethabile Mokete (Mosotho Chakela) is already back in country from exile. "We have closed a chapter of oppression," he said. Thabane said the mutineers should devise means to sustain their living. One of the political dissidents 'Malefa Mapheleba from Basotho National Party said she went out of the country because of the Lesotho Mounted Police Services, National Security Services and military were after them. Mapheleba said they are happy to be back in their motherland and said they are going to work hard to ensure that the economy of the country flourishes. "Lesotho should be our first priority and our interest would follow later," she said.'*

[5] It will be noted that the report does not state in terms that the Government had issued a policy pronouncement to grant amnesty to *'all persons who had left the Kingdom because of their being implicated in politically connected offences'* but I accept that that may well be how the appellant interpreted the report.

[6] After learning of this development the appellant contacted his father and asked him to investigate the matter and to ascertain what he called the implications and details. After he had had an interview with the **Honourable Mophato Monyake,** the Minister of Justice, the appellant's father reported to the appellant that the

minister had assured him that the appellant could safely return to Lesotho as the *'new coalition administration's policy was to detach itself from past conflicts by offering amnesty to all who had left the Kingdom because of these conflicts.'* The appellant then came back to Lesotho on 9 September 2013 *'on the clear understanding'* as he put it, that the past was a closed chapter and to resume his normal life and proceed from where it had stopped in September 1998.

[7] After his return he and his father went to see the Minister to report his presence back in Lesotho. The minister assured him of the coalition government's policy of encouraging exiles to come back to Lesotho without any fear of arrest and prosecution in respect of any politically connected offence allegedly committed before the coming into power of the present administration. A week after the meeting between the appellant and his father and the minister the minister wrote a letter addressed to the Commander of the Lesotho Defence Force, the Commissioner of Police and the Director General of National State Security, with copies to the Government Secretary and the appellant. The letter reads as follows:

'Sirs,

RE: THABANG JOSEPH PHAILA – EX LESOTHO DEFENCE FORCE 2ND LIEUTENANT

You are hereby informed that Mr. THABANG Joseph Phaila who was employed in the Lesotho Defence Force (LDF) as a 2nd Lieutenant and left Lesotho in September, 1998 due to political unrest, returned to Lesotho on Monday 09th September 2013.

Mr. Phaila reported himself to my office and I assured him of the Government's desire for all Basotho who left the country due to political or private reasons to return home.

I therefore introduce Mr. Phaila to your office and request, in line with government's directive, that you afford him and his family all the protection, rights and freedoms enjoyed by every law-abiding citizen of this country.

Your usual cooperation will be highly appreciated.'

[8] On the 5 October 2013 the appellant attended a funeral at Ha Mabote. While he was at the funeral he

was arrested by soldiers in the escort team of the Army Commander and put in military detention. While he was in detention two charge sheets were served on him in respect of charges, the first on 8 October 2013 and the second on 7 November 2013. The second charge sheet was headed *'Final Charge Sheet'* and contained two counts, the first stating that the appellant contravened section 48 (2) of the Lesotho Defence Force Act by taking part in an intended mutiny while the second stated that he had contravened section 54 (1) (2) of the Act by deserting. These were three alternative counts to the first count.

[9] On 12 November the first respondent, the Minister of Defence, who is also the Prime Minister, acting in terms of section 92 (1) of the Act, signed a convening order for the court martial before which the appellant was to appear to face the charges contained in the second charge sheet.

[10] On 7 December 2013 the appellant brought an application, inter alia, for orders:

(a) Reviewing and setting aside the convening order and/or declaring it null and void;

(b) declaring that the appellant was entitled to the benefit of the alleged amnesty policy;

(c) declaring the prosecution of the appellant to be unfair, discriminating and an abuse of process;

(d) interdicting the second respondent, the prosecutor at the court martial who was appointed under the convening order, from proceeding with the prosecution, and

(e) directing the first respondent to cause the release of the appellant from military detention.

[11] The application was opposed by the respondents. Affidavits were deposed to by the first respondent and by the **Honourable Molobeli Soulo**, who is the Minister in the Prime Minister's office and a member of the Cabinet. Both denied that there was any policy pronouncement by the Government to grant amnesty to any category of persons. They stated that the

government would like to see those who fled from the country come back but that that could not be equated to an amnesty of some sort.

[12] The application came before **Makara J** who held:

(a) that the High Court has jurisdiction to review the decision of the Minister of Defence to issue an order convening a court martial.

(b) that it has no jurisdiction under section 24 (3) of the Constitution to declare the prosecution of the appellant to be unfair and discriminatory;

(c) that the appellant had proved that there was a Government Amnesty Policy pronouncement by the Minister of Justice which binds all the ministers, including the Prime Minister, under the doctrine of ministerial responsibility.

(d) that the amnesty was extended to all the people who went into exile as a result of the offences

they had committed during the past political administration;

(e) that the appellant failed to prove that he qualified for the amnesty because he had not disclosed any criminal, civil or military offence which he had committed *'in pursuit of the 1998 political campaign'*;

(f) that he declined to interdict the second respondent from proceeding with the prosecution before the court martial and to direct that the appellant be released from military detention; and

(g) that there would be no order as to costs.

He accordingly dismissed the application.

[13] Mr **Teele KC** who appeared for the appellant, informed us that after **Makara** J's order the prosecution continued before the court martial and that the appellant had been convicted.

[14] The court a *quo*'s finding summarised in para (c) above is clearly incorrect because the doctrine of ministerial responsibility presupposes a cabinet decision, which was not shown to have been made. The actions and pronouncement of the then Minister of Justice, acting without the backing of a Cabinet decision, do not bring into play the doctrine of ministerial responsibility, as appears clearly from the passage at p 144 in Professor Rodney Brazier's book **Constitutional Practice The Foundations of British Government**, 3 ed, which the judge quoted in footnote 14 of his judgment.

[15] The learned judge's basis for dismissing the application, namely the appellant's failure to disclose any offence he had committed *'in pursuit,'* as the judge put it, *'of the 1998 political campaign'*, would not have been a correct basis for dismissing the application if a legally binding amnesty policy had been proved unless such disclosure had been a pre-condition for entitlement to the amnesty but it is not necessary to say anything further on this point in view of my conclusion that the amnesty policy had not been proved.

[16] In his oral argument before this Court Mr **Teele KC** contended that the court a quo should have granted the appellant the orders sought (1) reviewing and setting aside the convening order issued by the first respondent and (2) declaring the prosecution an abuse of process.

[17] In regard to the latter order he relied very strongly on the decision of the Queen's Bench Division in England in **R v Croydon Justices, ex parte Dean** 1993 (3) All E R 129. In that case the committal of the accused, Dean, on a charge of contravening section 4 (1) of the Criminal Law Act 1967 by doing acts with intent to impede the apprehension of another was quashed because of an undertaking given to Dean by police officers that he would not be prosecuted and the fact that Dean proceeded to prejudice his position on the faith of the undertaking.

[18] **Staughton LJ**, with whom **Buckley J** agreed, was satisfied (at 137 g-h) *'that it was clearly an abuse of process for [Dean] to be prosecuted subsequently'*. This was so despite the fact that the undertaking was not given by the Crown Prosecution Service which alone was

entitled to decide who should be prosecuted. On this point **Staughton LJ** said (at 138 f-h) that he could not accept the submission by counsel for the justices that no conduct of the police could ever give rise to an abuse of process. *'The effect on George Dean, or for that matter on his father, of an undertaking or promise or representation by the police was likely to have been the same in this case whether it was or was not authorised by the Crown Prosecution Service.'*

[19] The court's judgment was based on the statement of the law by **Lord Diplock** in **Hunter v Chief Constable of West Midlands** [1982] 3 All ER 727 at 729 where he spoke of

> *'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right – thinking people. The circumstances in which abuse of process can arise are very varied.'*

[20] **Staughton LJ** also referred what **Lord Devlin** said in **Connelly v DPP** [1996] 2 All ER (HL) 401 at 442, viz:

> *'Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer.'*

[21] The court made the order it did even though the trial was to proceed not before it but before the Crown Court: see the judgment at pages 134 e – 135 e.

[22] The **Croydon Justices** case has been cited with approval in the House of Lords (see **Bennett v Horseferry Road Magistrates' Court and Another** [1993] 3 All ER 138 (HL) at 158 b-c) and in South Africa (see **NDPP v Zuma** 2009 (2) SA 277 (SCA) at 295 (footnote 42)).

[23] The decision in **Hunter's** case quoted above was cited with approval by **Streicher JA** in **Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere** 1999

(3) SA 389 (SCA) at 403 E-G. (It is true that this was in the minority judgment but there is nothing in that majority judgment which is to the contrary.)

[24] In my opinion the principle applied in the **Croydon Justice's** case is part of the law of Lesotho and is decisive of this appeal. It was manifestly unfair for the prosecution of the appellant to be instituted where he had been induced to come back to Lesotho by a statement made by the former minister of justice. It is true that he had no authority to make the statement but for the reason given in the **Croydon Justices** case in relation to the undertaking given by the police that is not relevant. It was clearly unfair in the circumstances of this case to take advantage of his presence in Lesotho to arrest and prosecute him and **Mr Motsieloa**, who appeared for the respondents very correctly felt himself compelled to concede that this was so.

[25] I do not think that **Makara J** correctly held that the order sought by the appellant under this head was one he was precluded from making under section 24 (3) of the Constitution. That section reads:

> *'In relation to any person who is a member of a disciplined force raised under a law of Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any provisions of this chapter other than section 5,8 and 9'.*

[26] The basis for the order sought by the appellant on this part of the case is not anything contained in chapter II of the constitution so that the section does not apply.

[27] As far as the prayer for an order reviewing and setting aside the convening order is concerned there is nothing to show that the Prime Minister was aware of the circumstances under which the appellant was induced to return to Lesotho when he issued the order. I am accordingly of the view that this order cannot be granted.

[28] The following order is made:-

1. The appeal succeeds with costs.

2. The order made in the court a quo is set aside and the following order is substituted therefor:

'1. The prosecution of the appellant is declared an abuse of process.

2. The respondents are to pay the costs of suit.'

_____

I.G. FARLAM
JUSTICE OF APPEAL

I agree:

_____

D.G. SCOTT
ACTING PRESIDENT

I agree:

_____

W.J. LOUW
ACTING JUSTICE OF APPEAL

For Appellant : Mr M.E. Teele KC

For Respondent : Mr R. Motsieloa