IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV)N0.30/2014

CIV/APN/83/2014

In the matter between:

COMMANDER LESOTHO DEFENCE FORCE	**FIRST APPELLANT**
LESOTHO DEFENCE FORCE	**SECOND APPELLANT**
PRESIDENT OF THE COURT MARTIAL	**THIRD APPELLANT**
COURT MARTIAL PROSECUTOR	**FOURTH APPELLANT**
MINISTER OF DEFENCE AND NATIONAL SECURITY	**FIFTH APPELLANT**

and

SECOND LIEUTENANT SETHO MALUKE	**RESPONDENT**

CORAM: SCOTT, A.P.

HOWIE,J.A.

THRING,J.A.

HEARD: 13 OCTOBER, 2014

DELIVERED: 24 OCTOBER, 2014

SUMMARY

Court martial – jurisdiction of High Court to hear appeals against and reviews of decisions of – Non – applicability of s. 12(1) of Constitution to proceedings of courts martial – Nevertheless, courts martial still required to conform to principles of natural justice, to conduct trials fairly and to be impartial, unbiased and independent in the sense and to the degree appropriate to their nature as statutory, military courts – Recusal of court martial on ground of bias – Test for - "Institutional bias" – Permanent stay of prosecution – when granted.

JUDGMENT

THRING,JA

[1] On 2 December, 2013 there was a robbery. On the same day the respondent, a second lieutenant in the Lesotho Defence Force, was arrested on suspicion of complicity in it. He was kept in military detention. A few days later, on 5 or 6 December, 2013 the first appellant, the Commander of the Lesotho Defence Force, called a

parade of the entire defence force. The respondent was paraded before this assembly. The first appellant addressed the parade on the topic of members of the defence force being involved or being suspected of involvement in criminal activities. The respondent says in his founding affidavit that the first appellant went on to inform those present that the respondent was a criminal, that he did not deserve to wear the army's uniform, and that army personnel should observe what is done to criminals in the army. The respondent was then shackled and handcuffed by members of the military police and taken away to a place of detention. None of this is in dispute. It is reminiscent of the treatment meted out to the late Captain Alfred Dreyfus at the hands of the French Military establishment in 1894 – 1895. The fundamental difference between the Dreyfus case and the present one is that when Dreyfus was degraded and humiliated before his fellow-officers he had already been convicted of treason by a court martial, whereas in the respondent's case no finding of guilt of any kind had yet been brought in against him by anybody, except perhaps by the first appellant at the parade.

[2] On 20 December, 2013 the first appellant signed a convening order for a court martial of the respondent on

statutory charges of behaving in a scandalous manner unbecoming the character of an officer in various respects, theft of public property and making away with state property which had been entrusted to his care. The court martial was to be presided over by a colonel and was to consist of the colonel and five other more junior officers. As judge-advocate (prosecutor) the first appellant appointed a certain lieutenant – colonel. It is not disputed by the appellants that all of these officers had been present at the parade on 5 or 6 December, 2013 to which I have alluded.

[3] On 12 February, 2014 the court martial sat. The respondent, through his counsel, objected to the proceedings on the ground, *inter alia*, that all the members of the court martial and the judge – advocate had been present when the first appellant had "labelled" the respondent a criminal at the parade and that they could consequently not hear or deal with this matter fairly. The objection was overruled by the court martial, and its members refused to recuse themselves. The case was postponed to 7 March, 2014.

[4] On 6 March, 2014 the respondent, having approached the Court a quo for urgent relief, was

granted a rule *nisi* by Hlajoane, J. in terms of which, *inter alia,* the court martial was stayed pending the finalization of the respondent's application and the appellants were called upon to show cause why the court martial should not be declared unlawful, why any intended court martial proceedings against the respondent should not be permanently stayed, and why the respondent should not be released from military detention and allowed to resume his duties as an officer. On 13 May 2014 the Court *a quo* made the rule final subject to certain alterations to which I shall return presently, with costs. Against this order the appellants appeal to this Court.

[5] On behalf of the appellants Mr Moshoeshoe relied on the following grounds in attacking the order made by the Court *a quo:*

(a) That the Court a quo lacked jurisdiction to entertain an appeal against the decision of the court martial to refuse to recuse itself;

(b) That the Court *a quo* erred in finding that the court martial was bound by the provisions of s. 12(1) of the Constitution;

(c) That the apprehension of bias claimed by the respondent was not reasonable in the context of this matter; and

(d) That the respondent had failed to meet the requirements for a permanent stay of prosecution.

I shall deal with each of these grounds *seriatim*.

Whether or not the Court a quo had jurisdiction to make the order which it did

[6] The argument advanced by the appellants is that, whilst s. 119 (1) of the Constitution confers jurisdiction on the High Court to review the decisions of, *inter alia*, courts martial, in s.130 jurisdiction with regard to appeals from the decisions of, *inter alia*, courts martial is confined to such jurisdiction as may be conferred by Parliament on the High Court. S. 139 (1) of the Lesotho Defence Force Act, No.4 of 1996 confers jurisdiction in an appeal against conviction by a court martial only on the Court Martial Appeal Court, a military court of appeal created by s.138 (1) of that Act, and not on the High Court. This being such an appeal, so the argument ran, the High Court had no jurisdiction to entertain it.

[7] The fallacy of this argument, in my view, lies in the contention that this was an appeal to the Court *a quo* against a conviction by a court martial. In the first place, there has as yet of course been no conviction: indeed, the respondent's trial before the court martial has not yet commenced. Secondly, and in any event, it seems to me that the proceedings in the Court *a quo* were not, in their nature, appeal proceedings at all, but were, in substance and in essence, in the nature of a review of the refusal of the members of the court martial to recuse themselves. The respondent did not seek to rely only on what was on record in the proceedings of the court martial, but also on the extraneous events which had occurred at the parade before the court martial had even been convened. That is a characteristic of review. See Mőnnig and Others v Council of Review and Others, 1989 (4) SA 866 (C) at 871A. It is true that in his replying affidavit the respondent disclaims an intention to seek a review of the court martial, but his view of the nature of the proceedings could not bind this Court or the Court *a quo.* Mr Moshoeshoe referred us in his heads of argument to the following passage in Commander of the Lesotho Defence Force & Others v Rantuba and Others, LAC (1995 – 1999) 687 at 697:

> "*It is well – established that a right of review by the High Court over courts martial exists at common law … In our view this right also applies in respect of preliminary proceedings to courts martial.*"

See, also Makhele v Commander, Lesotho Defence Force & Others, (CIV/APN/169/1999 unreported). I respectfully agree. In South Africa, where provisions somewhat similar to those in s.138(1) and 139(1) of the Lesotho Defence Force Act are to be found in s. 107 of the South African Defence Act, No.44 of 1957, Conradie, J., as he then was, said in Mőnnig & Others v Council of Review & Others, supra at 875J – 876B:

> *"If a tribunal misdirects itself on the law in refusing to recuse itself, it misconceives the basis of its own jurisdiction. It is, therefore, a mistake of law which, even on the traditional view of the reviewability of mistakes of law, falls to be corrected. I have no doubt at all that the third respondent misdirected itself in assessing whether or not the recusal application should be granted. It failed to ask itself the one cardinal question which it was obliged to consider, namely what a reasonable litigant would think of its*

being seized of the trial having regard to the specific defence raised by the second applicant".

[8] It was further contended on behalf of the appellants that the respondent's application for a permanent stay of the proceedings before the court martial was an appeal against the decision of the court martial in disguise. I disagree. This element of the relief sought by the respondent was merely a corollary of the first element, viz. that the court martial be declared unlawful. In my judgment the latter clearly entailed a review of the refusal of the court martial to recuse itself: it follows that the same applies to the application for a permanent stay.

[9] In my view the jurisdiction of the Court *a quo* to grant the order appealed against was clear and unassailable.

Were the provisions of s 12 (1) of the Constitution applicable to the court martial ?

[10] S.12(1) of the Constitution reads:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall

be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

S.118 (1) and (2) of the Constitution go on to say:

"(1) The judicial power shall be vested in the courts of Lesotho which shall consist of –

(a) a Court of Appeal;
(b) a High Court;
(c) Subordinate Courts and Courts – martial;
(d) such tribunals exercising a judicial function as may be established by Parliament.

(2) The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law".

[11] However, s. 24(3) of the Constitution appears to restrict the application of s.12 (1) as regards the armed forces. It provides that:

"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 of the provisions of this Chapter other than sections 5, 8 and 9".

(S.12 falls into Chapter 2 of the Constitution, the same chapter as s.24. S.118 falls into Chapter 11. Sections 5, 8 and 9 are not here relevant).

[12] On behalf of the appellants it is contended, with particular reliance on s.24(3), that a court martial is not governed or bound by the provisions of s. 12(1) of the Constitution as a civilian Court is, and that the Court a quo misdirected itself in holding that the court martial was bound by these provisions in the same way as a civilian Court would have been. Reference was made to the decision of this Court in Sekoati & Others v President of the Court Martial & Others, LAC(1995-1999) 812, where at 827I – 828A it was held that:

"*In our judgment on a proper construction of s.118(2), read in the context of the Constitution as a whole and*

in particular having regard to s.24(3), a court-martial, in order to comply with s.118, cannot be completely lacking in independence, nor can it be completely subject to outside interference. On the other hand it is not required to have the same degree of independence nor to enjoy the same degree of freedom from interference as is required in the case of an ordinary civilian court".

[13] In the light of the above, and for the reasons given below, it seems to me that the answer to the question posed above must be that s.12 (1) of the Constitution does not require courts martial to have the same degree of independence and freedom from interference as civil courts. First, however, it is not clear that the Court a quo actually held that the court martial was bound by s.12(1) in all respects. The section is not referred to anywhere in the text of Hlajoane J's judgment, although it is referred to in the summary, and she does say that-

"The court martial in terms of the Constitution is the Court like our civilian courts where accused and litigants are entitled to fair trial".

Secondly, and in any event, she was aware of the decision in Sekoati's case, supra and referred to it in her judgment. Thirdly, in Sekoati's case, supra it was held at 831 H-I that:

> "*Lesotho's Constitution creates a particular legal regime for the military in general and courts-martial in particular. The full panoply of fundamental rights is expressly not available to the military. Courts-martial nevertheless must be independent – but in the sense and to the degree appropriate to their inherent nature as military, not civilian courts." (My emphasis)*

In, addition, the right of an accused person to be tried fairly in any court and in accordance with the rules of natural justice does not emanate exclusively from s.12 (1) of the Constitution: it has its roots firmly embedded in the common law. The sense and degree of impartiality and independence which can be said to be appropriate to the inherent nature of courts martial as statutory, military courts, and which is consequently required to be exhibited by them, cannot, in my respectful view, be better expressed than it was by Corbett, C.J. in Council

of Review, South African Defence Force & Others v Mőnnig & Others, 1992(3)SA 482 (AD) at 491C – E:

> *"Although a court martial is composed of military officers, it is in substance a court of law and its proceedings should conform to the principles, including the rules of natural justice, which pertain to courts of law. One such rule is that which postulates that a person should not be tried by a court concerning which there are reasonable grounds for believing that there is a likelihood of bias or there is a reasonable suspicion of bias (whichever test be the correct one); and that, where there are such grounds or such a suspicion, the person concerned is entitled to have the court recuse itself."*

[14] This was laid down before the coming into operation of the South African Constitution, Act No. 108 of 1996 (see s.35(3) thereof for the "fair trial" requirements in its Bill of Rights) or of its predecessor, the (interim) Constitution, Act No. 200 of 1993 (see s. 25(3)): so that it cannot be said that these principles are derived from constitutional sources. Indeed, they are part of the common law (see, Mőnnig's case, supra in the Appellate Division at 491 F-G) and must be observed unless the Legislature "*has by competent legislation, either*

expressly or by clear implication, otherwise decreed" (Mőnnig's case, loc. cit.). In my view it cannot be said that the legislature of Lesotho has otherwise decreed in s. 24(3) of the Constitution. Courts martial are required to conform to the rules of natural justice, to conduct trials fairly and to be impartial, unbiased and independent in the manner and to the extent set out in Mőnnig's case (AD) supra. S.24(3) does not give them a licence to depart from these principles.

Was the respondent's alleged apprehension of bias reasonable?

[15] After a period of some uncertainty the South African Supreme Court of Appeal finalised the applicable test for apprehension of judicial bias as a basis for recusal as follows in S. v. Roberts,1999 (4) SA 915 (SCA) at 924 E-F (paragraph [32]) and 925 C – D (paragraph [34]):

"(1) *There must be a suspicion that the judicial officer might, not would, be biased.*

(2) *The suspicion must be that of a reasonable person in the position of the accused or litigant.*

(3) *The suspicion must be based on reasonable grounds.*

.....

(4) *The suspicion is one which the reasonable person referred to would, not might, have."*

In President of the Republic of South Africa and Others v South African Rugby Football Union and Others, 1999 (4) SA 147 (CC) the South African Constitutional Court stated the test in slightly different words when it said at 177B – E:

"*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel ….[A] judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that*

the judicial officer, for whatever reasons, was not or will not be impartial."

However it is precisely formulated, in my opinion this is the test which must be applied in this case.

[16] In applying the test to the facts certain factors peculiar to this kind of matter must be borne in mind. First there is the nature of the tribunal and its constituent members, who are laymen when it comes to legal matters, but who are required to perform functions which are indistinguishable from the judicial process. The remarks of Conradie, J., in the Mőnnig case (CPD), supra, at 880 E-G are, to my mind, with respect particularly apposite:

"Reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures or to be influenced by anything other than the evidence given before them. The quality of impartiality is not so readily conceded to non-judicial adjudicators.

Since the appearance of impartiality has to do with the public perception of the administration of justice,

it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals – other than courts of law – which have all the attributes of a court of law and are expected by the public to behave exactly as a court of law does. The court martial is, of course, such a tribunal. In fact it is the only tribunal I know of, apart from a court of law, which is competent to impose criminal sanctions. It is, to all intents and purposes, a court which may be presided over by laymen."

Generally speaking, then, courts martial will be more vulnerable to reasonable suspicions of bias than other tribunals such as Courts of law.

[17] Secondly, as Conradie, J. went on to say at 881 H-I of the Mőnnig case, supra:

"*Defence forces the world over function on a very strong loyalty ethic",*

and the officers comprising the court martial can safely be supposed to be strongly loyal to the Lesotho Defence Force. Moreover, bias may not only be conscious, but also subconscious.

[18] Against this background, and with these principles in mind, one must now place oneself in the position of the respondent at the parade. He hears the first appellant formally addressing all those present, including the officers who will later be the members of his court martial, to the effect that he, the respondent, is a criminal who does not deserve to wear the army's uniform, and that the army personnel should observe what is done to criminals in the army. The person making these statements is senior to all the members of the court martial and is in fact the commander or chief of the entire army. Moreover, the first appellant is the officer who will sign the convening order for the court martial, presumably after having chosen who its members are to be. What is the respondent reasonably to think?

[19] In my view there can be no doubt that, in these circumstances, a suspicion would immediately arise in his mind that the court martial might be biased against him. Such a suspicion would, to my mind, be that of any reasonable person in this situation. After having been publicly instructed by their commander that the

respondent was a criminal who should be dealt with accordingly, the strong impression made on any reasonable mind would be that the members of the court martial would thereafter be unlikely, or at any rate less likely, to find him not guilty. An acquittal would fly in the face of the strongly and publicly expressed view of the first appellant, to whom they owed their loyalty and to whom it could be expected that they were, at least to some extent, beholden. Such a suspicion would rest on grounds which, in my view, would be eminently reasonable in the circumstances, and would be one which any reasonable person would have.

[20] It follows that, in my opinion, the respondent's suspicion of bias on the part of the court martial easily passes the test set out above: the court martial ought to have recused itself.

The permanent stay of prosecution

[21] A permanent stay of prosecution is a drastic remedy which will be ordered only where there has either been an unreasonably long delay in the prosecution or where there are circumstances which render the case so extraordinary as to render appropriate this otherwise

inappropriate remedy: see Zanner v. Director of Public Prosecutions, 2006 (2) SACR 45 (SCA) at paragraph [10]. Here of course, there is no question of delay.

[22] The respondent's application for the recusal of the court martial was not based on allegations of personal bias on the part of any of its individual members: it was rather a matter of so-called "institutional bias", inasmuch as the same objection would have been raised against any court martial, whatever its composition, because every member of the defence force of Lesotho, having been present at the parade, was, on the respondent's case, disqualified from sitting on a court martial of the respondent.

[23] A similar situation arose in Mőnnig's case. In that case the same argument was advanced as is put forward in the present matter on behalf of the appellants, viz. that if it were to be held that no court martial was competent to try the alleged miscreant, he would evade justice. In the Supreme Court of Appeal this point was disposed of as follows at 493 B – E:

> "*…in the event of a military court being disqualified by reason of institutional bias, the accused may be brought to trial before a civil court. To my mind, this meets completely the argument raised by appellants' counsel to the effect that it could not have been intended that a ground of recusal based on institutional bias could be raised since it would disqualify all military courts. This argument smacks of the so-called 'doctrine of necessity' described by De Smith, Judicial Review of Administrative Action 4th ed at 276 as follows:*
>
> *'An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice'. In this case because of the concurrent jurisdiction of the civil courts, no such necessity arises".*

The same applies in Lesotho. The situation in this case is extraordinary. In my view a permanent stay of prosecution before a disqualified tribunal as a corollary of a successful review of the court martial's refusal to

recuse itself, was amply justified. There is no merit in this ground of appeal.

[24] There is one respect in which the order of the Court *a quo* in my opinion goes too far, and this was conceded by Mr Molapo, for the respondent. Paragraph 1 of the order, apparently as settled by the Judge *a quo* in collaboration with counsel for both sides on 19 May, 2014 reads:

> "*The court martial proceedings against the applicant by the respondents are permanently stayed.*"

This formulation is notionally wide enough to include any future court martial of the respondent, no matter how constituted. This is clearly not what was intended, and the order should be confined to a court martial consisting of persons who are disqualified from sitting as such by reason of their having attended the parade on 5 or 6 December, 2013. I propose that it be amended accordingly. The alteration is not such, in my view, as to merit a costs order in favour of the appellants.

[25] For these reasons, the appeal is dismissed, with costs, save that paragraph 1 of the order of the Court a quo is amended to read as follows:

> "1. *The court martial proceedings against the applicant by the respondents are permanently stayed, unless the court martial concerned is made up of persons who were not present at the parade which is referred to in paragraph 7 of the applicant's founding affidavit dated 24 February, 2014."*

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W.G. THRING

JUSTICE OF APPEAL

I agree

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D.G. SCOTT

ACTING PRESIDENT

I agree

C.T.HOWIE

JUSTICE OF APPEAL

For appellants : M Moshoeshoe

For respondent : N.S. Molapo