IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.50/13

In the matter between

THE PRIME MINISTER **1ST APPELLANT**

THE ATTORNEY GENERAL **2ND APPELLANT**

And

MADAM JUSTICE MASEFORO MAHASE **RESPONDENT**

CORAM: SCOTT AP
HOWIE JA
THRING JA
LOUW AJA
CLEAVER AJA

HEARD: 2 APRIL 2014

DELIVERED: 17 APRIL 2014

SUMMARY

Interpretation of section 118 (3) of the Constitution – the "dignity" referred to in the section is the institutional dignity of the judiciary – not the personal dignity of an individual judge.

JUDGMENT

SCOTT AP

[1] On 7 May 2010 the Prime Minister of Lesotho, then Mr Pakalitha Mosisili, tabled in Parliament a report of a commission of inquiry. The report contained material critical of a judgment of the respondent who is a judge of the High Court. On 1 June 2011 the respondent launched motion proceedings against the Prime Minister, the Speaker of the National Assembly, the President of the Senate and the Attorney General in which she sought an order in the following terms:

"[1] Declaring:

1.1. First respondent's exercise of statutory powers to set up a Commission of Enquiry (the Steyn Commission) on 13 January 2010 to investigate the conduct of the Judiciary relating to the release on bail of accused persons charged with offences of treason, sedition and other crimes as unconstitutional and null and void;

1.2. Acts of the fourth respondent (the Attorney General) and/or officers subordinate to the fourth respondent in the nature of assisting the Steyn Commission in investigating the conduct of the Applicant as a breach of duty to protect Applicant and the Judiciary in accordance with the Constitution.

1.3. The tabling of paragraph 6.1.1. (xiii) of the Report of the Steyn Commission for the debates and/or proceedings of Parliament as a breach of the Government's duty to maintain the authority, independence and dignity of the Judiciary in accordance with the Constitution'

1.4. That Parliamentary privilege does not attach to paragraph 6.1.1(xiii) of the Report of the Steyn Commission;

2. Directing first, second and third respondents to cause the expunging of paragraph 6.1.1 (xiii) and pages 85 to 87 of the Report of the Steyn Commission from the official records of Cabinet and Parliament;

3. Directing first and fourth respondents to pay the costs of this application, such costs to include those occasional by the employment of two counsel;

4. Alternative and/or alternative relief."

[2] The appellants opposed the relief sought in prayers 1.1, 1.2 and 3 but consented to orders in terms of prayers 1.4 and 2. With regard to prayer 1.3, they consented to an order reading as follows:

> *"Declaring:*
>
> > *The tabling of paragraph 6.1.1 (xiii) of the Report of the Steyn Commission for the debates and proceedings of Parliament is a breach of the provisions of section 13 (1) of the Public Inquiries Act."*

The respondent did not accept the concessions and persisted in all the prayers in the Notice of Motion.

[3] The application was argued before the Constitutional Court. All three judges were in agreement that prayers 1.1 and 1.2 were to be dismissed. All three were agreed that a costs order in terms of prayer 3 be granted. The majority **(Musi and Moshidi AJJ)** found in favour of the respondent on prayers 1.3 in its unamended form and on the conceded prayers, 1.4 and 2. **Potteril AJ** in a minority judgment,

differed from the majority only in respect of prayer 1.3. She indicated that she would have granted an order in terms of prayer 1.3 in the form proposed by the appellants subject only to the reference to section 13 (1) of the Public Inquiries Act 1 of 1994 being substituted by a reference to section 8 (3), counsel having agreed at the hearing that the reference to the latter was the more appropriate. Section 8 (2) of the Act required the Prime Minister to table a copy of the Commission's report in the National Assembly and the Senate within 15 days of receiving the report. In terms of section 8 (3) he was afforded a discretion *"not to table any portion of the report where, in his opinion, the public interest in disclosure of that part of the report is outweighed by other considerations such as national security, privacy of an individual or the right of a person to a fair trial."* The order to which the Prime Minister consented amounted to a concession that in the exercise of his discretion he ought to have refrained from tabling paragraph 6.1.1 (xiii) of the report.

[4] The appeal is accordingly directed solely against the granting of prayer 1.3 in its unamended form and the order

as to costs. There is no cross appeal against the dismissal of prayers 1.1 and 1.2.

[5] On 21 April 2009 a group of some 15 dissidents attacked the Makoanyane Military Base, the State House and some Maseru residents. One of the ringleaders was Mr Makotoko Lerotholi. The group succeeded in penetrating the base and capturing vehicles and weapons. Thereafter, they drove to the State House where they were given access. That they were able to do all these things was a matter of grave concern and indicative of a serious breach of security. Accordingly, on 13 January 2010, pursuant to section 3 of the Public Inquiries Act, the Prime Minister appointed a Commission of Inquiry comprising five members headed by a former President of this Court, Mr Justice Jan Steyn *("the Commission")* to investigate the issues surrounding the incident. The terms of reference required the Commission to *"inquire, probe into, examine and analyse the precise nature, circumstance and factual setting of the attacks"* and to establish what security measures were in place and what role the overall security structures of the Defence Force played in the preservation

of law and order. It was also *"to inquire, probe into and examine any other issue relevant and which may impinge on the foregoing".* Finally, it was required to make such recommendations as to what action could be taken to prevent a recurrence of such events as occurred in April 2009.

[6] No reference was made to the judiciary, whether in relation to the granting of bail or otherwise. The only reference to the Attorney General was in a statement that the Commission was to be assisted in the performance of its functions *"by a legal practitioner engaged, or a law-officer assigned, by the Attorney General."* In the circumstances, the Court a quo correctly dismissed prayers 1.1 and 1.2 of the Notice of Motion.

[7] In the course of its investigations the commission learnt that Lerotholi (one of the ringleaders in the April 2009 attack) had been arrested by members of the Lesotho Defence Force sometime in June or July 2007 in connection with violence and armed attacks, but had been

released from police custody by order of the High Court on 7 July 2007. Lerotholi had thereafter fled to South Africa where he had joined forces with others to plan the attack on the Makoanyane Military Base and State House.

[8] The facts relating to the July 2007 court proceedings are set out in the application and are not disputed. They are as follows. Lerotholi and his co-detainees appeared before the Chief Magistrate on 4 July 2007. They were represented by their counsel, Mr E.H. Phoofolo. The Crown was represented by the Director of Public Prosecutions, Mr L.L. Thetsane. It was brought to the attention of the Court *"by way of an agreed synopsis of facts"* that the detainees had been arrested and detained by the military for a period in excess of 14 days. Mr Phoofolo argued that the arrest and detention for that period was unlawful and on that account the detainees should be granted their liberty. In view of the nature of the charges however, the question was raised whether the Magistrates' Court had jurisdiction to remand them. The magistrate was undecided and referred the question to the High Court for determination but ruled that in the meantime the detainees were to remain in

"*protective custody*". An appeal was lodged which came before the respondent on 7 July 2007. The detainees and the Crown were again represented by Mr Phoofolo and Mr Thetsane respectively. The respondent declined to entertain the appeal with regard to the question of jurisdiction because she considered that it raised an issue of constitutional law. She accordingly referred it to the Constitutional Court. Nonetheless she found that the arrest and detention of the detainees had been unlawful and ordered their release forthwith.

[9] On 19 November 2007 the referral of the matter by the Chief Magistrate was heard by the Chief Justice (sitting alone) who found that the Magistrates' Court did have jurisdiction and that the Magistrate should have released the detainees. By this time, of course, they had long since been released.

[10] On 16 April 2010 the Commission released its report. It ran to some 95 pages and dealt fully with incident on 21 and 22 April 2009 and the question of

security in relation thereto. In paragraph 6 it made various recommendations, one of which was the need to tighten up the provisions relating to bail, as had been done in South Africa. In paragraph 6.1.1 (xiii) it dealt *inter alia* with the release of Lerotholi some three years earlier in July 2007, being a matter which presumably it regarded as one which impinged on the issue of security. It noted with regret that the facts which were before the Court were not clear and proceeded:

> *"Proceedings were initiated in the Magistrate's Court for their release from the custody of the police. The proceedings were conducted in an informal manner. No affidavits were filed by the detainees and according to the record their version of the facts was presented by statements made by their attorney from the bar. No evidence was led. This informality had the predictable result of producing an unintelligible record and ultimately a deeply flawed process.*
>
> *The Magistrate's judgment is incomplete. However, from the record of the proceedings in the High Court on appeal, it would appear that he referred the matter to the High Court to determine whether he had jurisdiction to "entertain the lawfulness of their detention". In the interim he ordered that "they be kept in protective custody".*
>
> *On appeal the High Court held that it could not hear the matter because the appeal raised a Constitutional issue. The Court*

ordered that the record of the proceedings be typed and sent back for the attention of the Constitutional Court.

Without due process being observed Mahase J. then intervened and granted an order releasing Lerotholi and his four co-detainees from the custody of the police. There was no proper application before her to do so, and no affidavits or oral evidence were placed before her. No real opportunity was given for the police or the military to depose as to why they had been arrested or why their detention was justified. These issues had in no way been canvassed and no conventional due process was observed.

We repeat. The appeal that was before the Court had been disposed of. It was awaiting the preparation of a record for submission to and a ruling by the Constitutional Court. Without a proper hearing the Judge of her own initiative decided to release all five detainees. Her concern for their human rights was extensively addressed and recorded. However, she never considered that hearing the other side was necessary or important otherwise she would have given them a proper opportunity to do so.

As a result, Lerotholi was released and fled across the South African border. On the evidence before us he joined forces with Ramakatane, planned and executed the insurgency described in this report.

Due process is a non-negotiable requirement of every judicial hearing. In paragraph (xii) above we commented on the need to have a proper inquiry before the granting of bail. In like mode, the failure to observe the tried and tested principles and procedures constituting due process can only lead to unforeseen and often undesirable outcomes. This travesty is an example of

what can happen if they are ignored. We would urge that due process be rigorously observed by the Courts before releasing persons held in custody. It is particularly important to do so when the security of the citizens of Lesotho is at stake."

[11] The passage quoted reveals that the Commission was not in possession of the full facts relating to the 2007 court proceedings. It is perhaps also unfortunate that the procedural aspect of the proceedings was somewhat tersely stated in the respondent's judgment. For the sake of completeness I quote what the respondent had to say in this regard.

"When the application was brought before this court, it was accompanied by the partly typed record of the proceedings from the Court a quo.

This Court declined to entertain that appeal for the simple reason that according to the learned Chief Magistrate's order, the issue he had raised was a constitutional law issue. It was ordered by this court that the record of the proceedings therein be returned to the learned chief Magistrate so that he could have the record typed and later sent back to the office of the Registrar of the High Court for the High Court to deal with the issues therein raised pursuant to the Constitutional Rules.

This court was, however, successfully persuaded by counsel for the appellants to deal with the order of the learned Chief Magistrate that even though the suspects had not been formally charged nor remanded in whatever way, they be detained in police custody for an unspecified or for an indefinite period presumably until the issue which had been referred to the High Court had been determined."

[12] It is apparent that the procedure adopted which culminated in the release of the detainees was most unusual. In the absence of the full facts it is clear that the Commission misconstrued what had occurred and overstated its criticism of that procedure in a manner that was unfair to the respondent.

[13] As indicated above, it was conceded on behalf of the Prime Minister that he should have exercised the discretion afforded to him in terms of section 8 (3) of the Public Inquiries Act and refrained from tabling chapter 6.1.1 (xiii) of the report. It was also conceded that having regard to its findings and comments in chapter 6.1.1 (xiii) the Commission was obliged, but failed, to afford the respondent an opportunity to make representations to the Commission or otherwise deal with the allegations

regarding her conduct as required by section 13 (1) of the Act.

[14] It follows that apart from the question of costs, the only issue for determination is whether the Prime Minister's tabling of chapter 6.1.1 (xiii) of the report (or more correctly, the failure to excise that chapter from the report) amounted to *"a breach of the government's duty to maintain the authority, independence and dignity of the Judiciary in accordance with the Constitution"* or whether it was no more than a failure on his part to properly exercise the discretion afforded to him in terms of section 8 (3) of the Public Inquiries Act. The issue is largely academic in view of the concession that an order be granted in terms of prayer 2 of the Notice of Motion which seeks the expunging of the impugned chapter from official records.

[15] The provisions of the Constitution which it is contended the Prime Minister had breached were sub-sections 118 (2) and (3). They read:

"118 (1)…

> *(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.*
>
> *(3) The government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law."*

[16] Neither sub-section is aimed at protecting judgments of the courts from criticism. Judges are accountable for the manner in which they perform their duties. They are not immune from criticism. As observed by Mr Justice Anthony Gubbay, a former Chief Justice of Zimbabwe, in the course of delivering the fifth M.P. Mofokeng Memorial Lecture (see MP Memorial Lectures 2002-2011 ed K A Maope KC MP at 58):

> *"We live in an era of greater public demand for accountability of the Judiciary. It is no longer considered a sacrosanct and inviolable haven of its occupants."*

[17] The judgments of lower courts are frequently the subject of trenchant criticism by courts exercising appellate jurisdiction. Criticism is, however, by no means limited to judicial criticism. Law journals throughout the free world contain notes and articles written by academics and practising lawyers which are sometimes highly critical of the judgments of both high courts and courts of appeal. Judgments are also frequently criticised in the press, often severely so. In the course of the same lecture, Mr Justice Gubbay had this to say with regard to the question of accountability and criticism of judges:

> *"Accountability is also secured through a vibrant media and critical academia. Law academics and well-informed journalists often provoke comments and criticism on judgments delivered by the Judiciary. They act as watchdogs, anxious to ensure that the judicial process moves in the right direction and serves the needs of the community. Thus, wherever a judgment is delivered which is contrary to constitutional values and adverse to the interests of society law academics and journalists must criticise it strongly and point out how the judiciary failed to discharge its accountability to the people. Of course, the criticism should be in temperate language and directed at the judgment and not against the judge, for the credibility of the judge must not be affected."*

[18] It is undoubtedly so that criticism is not always valid or for that matter informed. Indeed, media criticism is often uninformed. But whether valid or otherwise, criticism directed at a particular judgment or at the procedure adopted by a court in a particular case does not impinge upon the independence or effectiveness of the courts, nor, as I shall show, upon the dignity of the courts. As to judicial independence, Dickson CJC in **The Queen in Right of Canada v Beauregard (1986) 30 DLR (4th) 481 (SCC)** at 491 summarised its essence as follows:-

> *"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: No outsider – be it government, pressure groups, individual or even another Judge – should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."*

The above passage was quoted with approval by the South African Constitutional Court in **De Lange v Smuts and Others 1998 (3) SA 785 (CC) at para 70**. A similar view was expressed by this Court in **Sekoati and Others and**

Others v President of the Court – Martial and others LAC (1995-1999) 812 at 826:

> *"The generally accepted core of the principle of judicial independence is the complete liberty of individual judges to hear and decide cases that come before them without interference from any outsider."*

[19] Quite clearly criticism of a particular judgment does not interfere in any way with the liberty of the courts to hear and decide cases, nor could such criticism in any way interfere with or obstruct the effectiveness of the judgments of a court.

[20] It is no doubt so that criticism of a judgment, especially if it is severe, will inevitably impinge to a greater or lesser degree upon the personal dignity of the individual judge whose judgment is criticised. But the dignity which section 118 (3) of the Constitution imposes on the Government a duty to accord assistance to protect is not the dignity of the individual judge; it is the dignity of "*the courts".* In other words, it is the institutional dignity of the

judiciary that must be protected, not that of the individual judge. If the position were otherwise, no criticism of a judgment could be permitted. That is not, nor could it ever have been, what was intended. The dignity that must be protected is the dignity of the courts that would be impaired by, for example, the Government requiring judges to work in demeaning conditions or remunerating them at a rate which results in their standard of living being wholly inappropriate for their status in society or permitting their judgments simply to be ignored. Similarly, the Government would be obliged to intervene in the event of an attack on the honesty and integrity of an individual judge which is of such a nature as to reflect upon the judiciary as a whole. (See eg **S v Heita and Another 1992 (3) SA 785 Nm HC**). But the criticism of a particular judgment previously given, whether justified or not, does not impact upon the dignity of the judiciary as a whole. Such criticism is fundamental to the democratic process and judges must accept that their role in society is such that just as they criticise litigants and witnesses their judgments, too, will from time to time be the subject of criticism. If they consider it necessary, they are free to pursue their ordinary civil remedies.

[21] To return to the present case, paragraph 6.1.1 (xiii) of the Commission's report contains material that is highly critical of the respondent's judgment and the procedure she adopted in granting the detainees their liberty. But that criticism is no different from the criticism that one might expect to find in the judgment of a court of appeal or in a law journal or, for that matter, in the media, particularly having regard to the ultimate consequence of the judgment. The fact that the criticism was tabled when it should not have been, would no doubt have added to the impact on the respondent's personal dignity and one can sympathise with her for any embarrassment she might have suffered. But her personal dignity is not the dignity the Government is enjoined to protect in terms of section 118 (3) of the Constitution and the Prime Minister accordingly had no constitutional duty to protect it.

[22] It follows that in my view the appeal must succeed.

[23] There remains the question of costs. As indicated above, subsequent to the concessions being made by the appellants in their answering affidavit, the sole issue that remained was the interpretation of section 118 of the Constitution. The general approach in constitutional matters is not to make an order as to costs. (See **Baitsokoli and Another v Maseru City Council and Others C of A (CIV) NO 4/05; Biowatch Trust v Registrar, Genetic Resource 2009 (6) SA 232 (CC)**). Counsel for the appellant did not seek an order as to costs and I propose to make no order as to the costs incurred subsequent to the date on which the appellant's answering affidavit was filed. Respondent is entitled, in my view, to her costs incurred prior to that date.

[24] In the result, the following order is made.

(1) The appeal is upheld.

(2) The order of the Court a quo is set aside and the following substituted in its stead:

"An order is made:

(1) Declaring that:

(a) the tabling of paragraph 6.1.1 (xiii) of the report of the Steyn Commission for the debates and proceedings of Parliament is a breach of the provisions of section 8 (3) of the Public Inquiries Act;

(b) Parliamentary privilege does not attach to paragraph 6.1.1 (xiii) of the report of the Steyn Commission;

(2) Directing the first, second and third respondents to cause the expunging of paragraph 6.1.1 (xiii) and pages 85 to 87 of the report of the Steyn Commission from the official records of the Cabinet and Parliament;

(3) Directing the first and fourth respondents to pay the costs of the applicant up to and

including the date on which the respondents' answering affidavit was delivered to the applicant's attorneys, such costs to include the costs of two counsel to the extent that one or two counsel were employed."

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D.G. SCOTT

ACTING PRESIDENT

I agree _____

C.T. HOWIE

JUSTICE OF APPEAL

I agree _____

W.G. THRING

JUSTICE OF APPEAL

I agree _____

W.J. LOUW

ACTING JUSTICE OF APPEAL

I agree _____

R.B. CLEAVER

ACTING JUSTICE OF APPEAL

For the appellants: H.P. Viljoen SC and P.B.J. Farlam

For the respondents: Z. Mda KC and S.P. Sakoane KC