IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 27/15

In the matter between:-

COMMANDER LESOTHO DEFENCE FORCE	**1ST APPELLANT**
DIRECTOR OF MILITARY INTELLIGENCE	**2ND APPELLANT**
MINISTER OF DEFENCE	**3RD APPELLANT**
MINISTER OF JUSTICE AND LAW AND CONSTITUTIONAL AFFAIRS	**4TH APPELLANT**
ATTORNEY GENERAL	**5TH APPELLANT**

And

MATHABO MAREKA	**RESPONDENT**

CORAM: DR. P. MUSONDA AJA
M. CHINHENGO, AJA
P.T. DAMASEB, AJA

HEARD: 30 JULY 2015
DELIVERED: 7 AUGUST 2015

SUMMARY

The appeal against order placing Brigadier Mareka under "open arrest". Brigadier Mareka placed under "close arrest" contrary to Regulation 10 of Defence Force (Discipline) Regulations, 1998 (Legal Notice No.29 of 1998). Challenge of placement under "close arrest". High Court upholding that challenge – whether High Court has jurisdiction to interfere with the Army Command exercise of discretion Proceedings brought by way of Habeas corpus – who bears the onus to justify the detention or lawfulness of the arrest.

JUDGMENT

MUSONDA, AJA

[1] On 8 June 2015, the appellant made an application in the High Court seeking the following orders:-

1. A rule nisi to rule returnable on the date and time to be determined by the Court *a quo* calling upon the appellants who were respondents in the court *a quo* to show cause why:

   (a) An order dispensing with the modes and rules of service should not be made due to the urgency of the matter;

(b) An order directing 1st and 3rd appellants to forthwith produce the body of respondent's husband, Brigadier Thoso Emmanuel Mareka to the court *a quo;*

(c) Appellant's husband should not be granted "open arrest" by the LDF forthwith pending finalization of the application owing to Brigadier's health condition;

(d) Granting leave to the respondent, upon good cause being shown, to approach the court a quo upon the same papers duly supplemented, for additional and/or alternative relief relating to the matters raised in the application or in the order pending finalization of the application;

(e) An order directing 1st and 3rd appellants to order their soldiers not to inflict assaults and/or torture to Brigadier Mareka;

(f) An order directing appellants to facilitate access by respondent's Attorneys to Brigadier Mareka in private for purposes of consultation and taking of instruction;

(g) An order directing appellants to facilitate access by respondent's close relatives to Brigadier Mareka for purposes of visitations and being detailed on family directives within the earshot and supervision of 3rd appellant's personnel;

2. An order declaring arrest and or detention of respondent's husband by the 1st appellant's soldiers unlawful and a violation of the rights to liberty.

3. An order declaring the conduct of Lieutenant Colonel Phaila and Captain Hashatsi of Lesotho Defence Force in arresting Brigadier Mareka as *ultra vires* the LDF Act, 1996.

4. An order declaring the continued detention of Brigadier Mareka at the Military cells or any other place following his arrest on the 5 June 2015 by the 1st appellant's agents, employees and representatives as unlawful and of no legal force.

5. An order directing 1st appellant, including officers subordinate to him to release or cause to be released from custody and set free unconditionally Brigadier Thoso Emmanuel Mareka.

6. Costs of suit on the attorney and client scale in the event of opposition.

7. Further and/or alternative relief.

[2] On 18 June 2015 an interim order granting prayers 1 (a), (b) (e), (f), (g), and (h) was made. The matter was set for inter-parte

hearing on 24 June 2015 and the judgment of the court was rendered on 1 July 2015. Only order 1(c) was granted. Judgment in respect of prayers 2, 3, 4, 5 and 6 was deferred to be handed down together with the judgment in other matters with which it was consolidated.

[3] It is common cause between the parties that the judgment and order of the High Court is appealable in terms of section 16(1) of the Court of Appeal Act 1978 (Act No. 10 of 1978), which is couched in these terms –

> *"(1) An appeal shall lie to the Court:-*
>
> *(a) from all final judgments of the High Court,*
>
> *(b) by leave of the Court, from an interlocutory, an order made ex parte or an order as to costs only."*

[4] Whether or not that judgment is appealable arose in view of the relief sought by the respondent and the court's ruling thereon. Although the respondent had approached the High Court seeking interim relief, pending finalization of the matter in due course, the learned judge, while reserving final determination of the raft of the relief sought in the notice of motion, granted, the appellant

maintains, what is in effect final relief in respect of prayer 1(c) of the notice of motion. Given the final effect of that order, the argument went, the court's order now sought to be impugned is appealable.

[5] We were satisfied that the parties' concessions on the finality of the order of the court *a quo* were properly made because the judgment in the court *a quo* was final in effect as it was made after full argument of the merits with the result that the issue now contested on appeal is no longer open to be re-litigated by the parties in the High Court. In any event the learned Judge *a quo* said that the interim prayers had been made final.

[6] We therefore proceeded to hear the appeal on the remaining issues. The applicant in the Court *a quo* was the wife of detained Brigadier, T.E. Mareka, of the Lesotho Defence Force (LDF). She had *locus standi* to lodge the application in terms of section 22 of the Constitution of the Kingdom of Lesotho which states -

> *"If any person alleges that any of the provisions of section 4 to 21 (inclusive) of this Constitution has been, is being or likely to be contravened*

in relation to him (or, in the case of person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available that person (or that other person) may apply to the high Court for redress.

2. The High Court shall have original jurisdiction –

(a) *to hear and determine any application made by any person in pursuance of subsection (1); and*

(b) *to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3)*

Undoubtedly the High Court had jurisdiction. The prayers related to the right to life, the right to personal liberty and freedom from inhuman treatment pursuant to sections 5, 6 and 8 of the Constitution. Brigadier Mareka appeared before the judge *a quo* on *habeas corpus*. Therefore, the appellants bore the onus to justify the arrest and detention.

[7] It is not in dispute that the English remedy of *habeas corpus* finds its equivalent in the Roman Dutch law. The case of **Rex v. Secretary of State for Home Affairs Ex Parte O' Brien 1023 (2)**

KB at 375 is in point when it comes to the importance of the remedy. In that case **Bankes LJ** said:

> *"The duty of the court is clear, the liberty of the subject is in question whether the order of the internment complained of was or was not lawfully made. The Act is a very drastic one indeed on an individual. Parliament has seen fit to curtail the liberty of an individual in order to protect that of the state: Parliament has seen fit to give to an individual the authority to terminate another individual's liberty is of a certain opinion. The detained person is at the mercy of that individual as to when he will be allowed to regain his liberty… it is the main function of the courts in our Kingdom to protect the rights of an individual. It is equally the function of Parliament. If those rights are infringed or curtailed, however, slightly, and the situation is brought to the notice of the courts, courts will jealously guard against such an erosion of the individual rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, the courts will scrutinize such legal right very closely indeed. If it is an Act of Parliament, the court will give it the usual strict interpretation in order to see whether the provisions of the said Act, have been strictly observed. If the courts come to the conclusion that the provisions of such an Act are not being strictly observed then the detention of the detainee would be illegal and the court will not hesitate to say so."*

[8] Brigadier Mareka was arrested on 5 June 2015 and stands charged with other officers and soldiers of the LDF for allegedly contravening section 48(2) and section 49(b) of the LDF Act, 1996.

[9] In granting the relief sought under paragraph 1(c) of the notice of motion, the learned judge considered the affidavit evidence before

him and interviewed Brigadier Mareka. In reaching his decision the learned Judge in the court *a quo* stated:

> *"(i) In the case before me nowhere is it suggested by the Respondents that any of the circumstances described in (regulation) 10(a), (b) or (c) existed in the case of Brigadier Mareka. The requirements of regulation 10 have not been touched on at all in the answering affidavit of Respondents. This is so despite the fact in this case Applicant squarely pleaded that Brigadier Mareka be placed on "open arrest" at the least. For Respondents to justify placing Brigadier Mareka, under close arrest, they must place facts before court that satisfy me that it is necessary to do so on account of any or all of the circumstances mentioned in regulation 10 (a), (b) or (c). Respondents have not done so. The only conclusion I am able to come to is that no justifiable reasons exist in terms of regulation 10 (a), (b) or (c), why Brigadier Mareka is placed under "close arrest" especially given his poor health and severely limited eyesight.*
>
> *(ii) It is not suggested anywhere that Brigadier Mareka resisted arrest or defied authority of his superiors. I cannot see what security risk Brigadier Mareka poses to the country that respondents cannot be able to cope with given state resources at their disposal. As a court I have power to protect fundamental human rights of any individual pursuant to the Constitution. All institutions of State, including respondents, are subject to the Constitution; they must exercise their powers consistently with the Constitution."*

[10] The learned Judge granted prayer 1(c) and ordered that Brigadier Mareka be placed on "open arrest". He further ordered that Brigadier Mareka surrenders all travel documents and firearms to the provost marshal; that he could not leave his home without the authorization of the 1st appellant; he should not interfere with

witnesses or evidence relating to the charges against him and that he complies with the lawful orders of the LDF Commander, including attending the Court Marshal.

[11] Dissatisfied with the learned Judge's judgment in the court *a quo*, the appellants appealed to this court. The appeal is based on two grounds only, namely, whether the High Court order placing Brigadier Mareka under open arrest was appealable, and whether the High Court had jurisdiction, not sitting as a reviewing court, to order the appellants to place Brigadier Mareka under open arrest when such discretionary power is vested in the Defence Force. I have already indicated that the first ground of appeal was immediately disposed of when both counsel conceded that the order was final and appealable.

[12] The attack on the High Court decision on the remaining issue was two pronged: The first prong was based on the premise that the High Court had no jurisdiction to interfere with the decision of an administrative official, the Commander, unless, on review, that decision was found to be irregular in some respect. In other words,

the argument proceeded, the High court had no jurisdiction to substitute the decision of the Defence Force with its own as only the Defence Force is by law given the discretion to make such decision, in this case placing a person under closed or open arrest. In any event so the objection went, the High Court did not sit as a reviewing court nor did it sit as a constitutional court in terms of section 22 of the Constitution. The latter submission has no merit and stands to be rejected at once. Given the nature of the process brought by the respondent, being a *habeas corpus*, the question of the legality of the continued detention of Brigadier Mareka was squarely in issue before the court *a quo*. The Crown therefore had to legally justify the arrest and continued detention of Brigadier Mareka. Whether the High Court acted under its administrative law review power under the common law exercised in terms of rule 50 of the High Court Rule, or as a court competent to enforce a subject's right to liberty guaranteed under section 5, 6 and 8 of the Constitution of Lesotho is therefore of no moment. In any event, the Crown was constrained to concede that the High Court has power to review decisions of administrative bodies in terms of section 119 (1) of the Kingdom of Lesotho Constitution.

[13] Counsel for the appellant contended that section 9 (1) of the Defence Forces (Discipline) Regulations, 1998 which provides that a member taken into military custody shall, subject to the regulations, be placed under either closed arrest or open arrest and section 12 which gives discretion to the unit commander as to whether a person is given an open arrest or a close arrest, do not support the decision of the court.

[14] I will proceed to consider the submission against the backdrop of the applicable legislative framework. Section 12 (1) and (2) provide that –

> *"(1) Where an accused member is remanded for further investigation, summary trial or for trial by court-marshal, his unit commander shall determine whether, subject to the provisions of Regulation 10 and having regard all the circumstances he should be*
>
> *(a) remanded under open or close arrest;*
>
> *(b) remanded in custody in a detention barracks or civil prison in terms of this Act; or*
>
> *(c) released without prejudice to re-arrest until trial or further orders.*

> *(2) The Unit Commander may change the form of arrest from time to time, as he deems fit, according to the circumstances."*

[15] Augmenting the argument that the learned Judge *a quo* improperly usurped the Defence Force's powers under Regulation 12, counsel for the Crown cited the case of **International Trade Administration Commission v. Scaw South Africa (Pty) Ltd 2012 (4) SA 618 (CC)** where it was held that:

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would be so where the decision in issue is policy-laden as well as polycentric".*

[16] The respondent's counsel argued that Regulation 10 was violated in that General Mots'omots'o did not justify "close arrest". According to that section, a member shall not ordinarily be placed under close arrest unless his confinement is necessary to ensure his safe custody, or for the maintenance of discipline, or to prevent his committing further offences or interfering with evidence relating to the charge against him, or if he defies a lawful command ordering

him into arrest, or if he resists a lawful arrest or the authority of a superior officer.

[17] It was the contention of the respondent's counsel that neither of these preconditions were met in respect of Brigadier Mareka and that the acceptance of this argument was the basis of the decision of the court *a quo*.

[18] We were referred to international instruments on human rights. We acknowledge that international human rights law can aid domestic decision-making in cases of this nature.

[19] The second prong of the appellants' attack on the High Court's decision was based on the argument that the respondent did not place before the court any evidence on the health condition of Brigadier Mareka that would have justified the granting of the order for open arrest. Citing the case of **Pillay v. Krishna and Another 1946 AD 946 at 951-952**, it was submitted for the appellants that the respondent bore the onus to prove that her husband was of

poor health for whom medication and special diet had been prescribed and that she had failed to discharge that onus.

[20] The issues for determination in this appeal, as I see them, are-

(a) what was the basis of the exercise of jurisdiction by the High Court in this matter;

(b) what procedure was to be followed in arresting Brigadier Mareka.

(c) the originating process, having been a *habeas corpus* application-

(i) who bore the onus to justify the detention;

(ii) what factors does the unit commander take into account in exercising his discretion under Regulation 12.

(iii) what is the status of an arrest not compliant with the LDF Act, 1996 and Defence Forces (Discipline) Regulations, 1998.

(d) did the Judge in the court *a quo* interfere with the unit commander's exercise of discretion under Regulation 12.

[21] Under Regulation 9, a member taken into military custody shall be placed under either closed arrest or open arrest. The arrested member shall be so informed. Under Regulation 10, placing a member under "close arrest" is an exception and the placing under "close arrest" should be compliant with conditions set

out in Regulation 10 (a), (b) and (c). The exercise of the discretion whether to place a detainee under "closed arrest" or "open arrest" under Regulation 12 is not unfettered, as section 12 must be read together with Regulation 10. Regulation 10 uses the word "shall" which means it is mandatory and not directory. It follows that Regulation 10 must be complied with. That means that the following must occur for the valid closed arrest:

Regulation 10 provides that:

> *10 A member shall not ordinarily be placed under close arrest unless -*
> (a) *his confinement is necessary –*
> *(i) to ensure his safe custody; or*
> *(ii) for the maintenance of discipline; or*
> *(iii) to prevent his committing further offences; or*
> *(iv) to prevent his interfering with any witness or evidence relating to the charge against him; or*
>
> *(b) he defies lawful command ordering him into arrest, or*
> *(c) he resists –*
> *(i) a lawful arrest; or*
> *(ii) the authority of superior officer*

[22] To say Regulation 12 confers discretionary power is therefore a mischaracterization. It does not. The exercise of the power under Regulation 12 is dependent on the fulfillment of the

conditions/requirements set out in Regulation 10. If those conditions or requirements are not met then the power under Regulation 12 may not be exercised. Thus, only when the prerequisites of section 10 are met would a unit commander exercise the power under Regulation 12. The learned Judge in the court *a quo* found that those requirements or conditions were not met and so the exercise of the discretion could not, and did not, arise. He can hardly be faulted for that finding. No controverting evidence was given by the respondents that Brigadier Mareka had to be put under close arrest either for his safe custody, or for the maintenance of discipline, or in order to prevent his committing further offences or interfering with evidence relating to the charge against him, or that he had defied a lawful command ordering him into arrest, or that he had resisted a lawful arrest or the authority of a superior officer. What little there was by way of evidence was bald and unsubstantiated. Brigadier Mareka was suspected to have committed serious offence justifying his arrest, a matter still to be argued, in the High Court but that alone did not trigger the exercise of the power to place him under closed arrest, a power exercisable only when the requirements of Regulation 10 are met.

[23] There is another argument that supports the conclusion reached by the judge in the court a quo. Section 1 of the Defence Force Act defines a unit as:

> *"(a) any independent portion of the Defence Force which is not higher in the organsation of the Defence Force than a battalion or any equipment formation of troops; or*
>
> *(b) any other body of the Defence Force declared to be a unit."*

[24] Brigadier Mareka, did not belong to any portion of the army below a battalion and so did not belong to a unit. He was answerable to the Army Commander and his deputy, who are not unit commanders because there has been no declaration as contemplated by the definition of "unit" under section 1 of the LDF Act 1996 of the top echelons of the army as a unit for the purposes of Regulation 12 of the Act. That much was conceded by counsel for the Crown. It stands to reason that in the absence of a declaration of the upper echelons of the defence forces as a unit for purposes of the exercise of the power in terms of Regulation 12, which is dependent on Regulation 10, the only reasonable avenue open in effecting an arrest of the Brigadier was to place him under open

arrest. It is trite that at common law the one who arrests must justify the detention in *habeas corpus* proceedings. The case of **R v. Secretary of State for Home Affairs Ex Parte O'Brien** (supra) is a current statement of the law.

[25] As I have already stated, Counsel for the Crown properly conceded that there was no declaration of the section or unit of the armed forces to which the Brigadier belonged. Counsel further conceded that the sections under which the Brigadier was charged, albeit that they are holding charges, do not carry the death penalty as canvassed elsewhere in the appellants' affidavits filed of record. This adds weight to the argument that only an open arrest was feasible in the circumstances. Overall the exercise of the discretion to effect a closed arrest of the respondent's husband was not in consonance with Regulation 10. We agree with that observation by the learned Judge. Compliance with the Defence Act and regulations is not a benevolent act, but mandatory. The Act and regulations must be construed in favour of liberty as far as is reasonably possible.

[26] The jurisdictional facts for the imposition of a closed arrest in respect of Brigadier Mareka were therefore absent. Absent jurisdictional facts for the close arrest and detention of Brigadier Mareka, the Crown failed to discharge the onus such as could have justified his continued detention under close arrest. The judge *a quo* was therefore correct in finding that the close arrest of Brigadier Mareka was unlawful.

[27] The learned Judge in the court a quo analysed Mrs. Mareka's affidavit evidence. He gained further understanding of Brigadier's health condition from him, he was satisfied that he was of poor health. A finding of fact this appellate Court cannot disturb.

[28] We are mindful that every nation has a right to protect itself from those that may be bent on its destruction. In so doing members of the security forces are faced with an extraordinary situation, which must be dealt with proportionately. However, it must be stated that in the Commonwealth family, of which the Kingdom of Lesotho is an active member, and Lesotho being a

constitutional democracy, the principle of constitutionalism is indispensable.

[29] The executive 'may exercise no power and perform no function beyond that conferred upon [it] by law."[1] It is trite that arbitrariness is inconsistent with legality.[2]

[30] The last argument advanced for the appellants hardly require detailed comment. Section 4 of the Constitution guarantees for every person in Lesotho the fundamental human rights and freedom enshrined in Chapter II and these include the right to personal liberty. The right must be jealously guarded and protected and it must be interfered with only to the extent necessary to protect the rights of other persons. That is why the High Court has been clothed with original jurisdiction by section 22 (2) to hear and determine any application made in terms of section 22 (1) and the High Court may, in consequence of such application, make such orders and give such directions as it considers appropriate for the purpose of securing the enforcement of fundamental rights and

[1] Fedsure v Greater Johannesburg Metropolitan Council 199 (1) SA 374 (CC) at para 58.
[2] New National Party of South Africa v Government of the RSA and Others 1999 (3) SA 191 (CC) at para 24. See also President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others 199 (4) SA 147 (CC).

freedoms enshrined in the Constitution. It was no doubt in exercise of this original jurisdiction that the High Court entertained the respondent's application, declared his closed arrest unlawful and instead ordering an open arrest. Although the Crown suggested that it was not competent for the High Court of place a member of the LDF under open arrest the effect of the court finding the closed arrest as having been contrary to Regulation 10 had the result of converting the arrest of the Brigadier Mareka into an open arrest. I would therefore not make any specific order in respect of the condition imposed by the court a quo. The Court will be inclined to lean towards liberty, which in this case is open arrest unless cogent reasons are given to reverse the position.

[31] The Court acknowledge the concept of "minimum curial intervention" meaning the minimal intervention by the courts in the exercise of discretion by public functionaries. Our concluding paragraph epitomizes the sanctity of that concept (emphasis added)

[33] In the result the following order is made:

1. The appeal is dismissed, with costs.

2. The appellants shall pay the costs of one attorney and two advocates, to be taxed in default of agreement.

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DR. P. MUSONDA
Acting Justice of Appeal

I agree:

_____

M. CHINHENGO
Acting Justice of Appeal

I agree:

_____

P.T.DAMASEB
Acting Justice of Appeal

For the Appellants : Advocate M. Moshoeshoe

For the Respondent: Advocate C. Lephuthing with him Adv. K. Ndebele and K. Monate