

AIN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 5/2016

In the matter between

TEFO HASHATSI

APPELLANT

And

THE PRIME MINISTER

1ST RESPONDENT

JUSTICE PHUMAPHI

2ND RESPONDENT

PHUMAPHI COMMISSION OF INQUIRY

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

MAMPHANYA MAHAO

5TH RESPONDENT

TRANSFORMATON RESOURCE CENTRE

6TH RESPONDENT

CORAM:

FARLAM, AP

DR MUSONDA, AJA

MOAHLOLI, AJA

HEARD:

17 OCTOBER, 2016

DELIVERED:

28 OCTOBER, 2016

SUMMARY

Appeal – mootness- test for – whether questioning of appellant by chairman of commission involved statement that appellant guilty of crime – whether court should order expungement of relevant passage from record of proceedings of the commission.

JUDGMENT

FARLAM AP:

[1] On 16 October 2015 the appellant in this matter, Tefo Hashatsi, who is a Lieutenant Colonel in the Lesotho Defence Force, brought an application in the High Court for a number of orders in respect of the functioning and proceedings of the Commission of Inquiry appointed under Legal Notice 75 of 2015, as amended by Legal Notice 88 of 2015, by the Prime Minister, pursuant to section 3 (1) of the Public Inquiries Act 1 of 1994, *‘into matters connected with the good government of Lesotho, and being of public concern, arising out of diverse incidents of political and/or security and/or governance nature as set out in the [Commission’s] terms of reference,...which incidents occurred at diverse occasions from about July 2012 to June 2015.’*

[2] The Commission’s terms, as amended, were the following:

- (a) review the investigations into the alleged mutiny plot. The review should also cover the alleged kidnapping of former members of the LDF and alleged killings of members of the opposition;*
- (b) investigate the immediate circumstances that led to the shooting of Brigadier Mahao;*
- (c) investigate allegations that Brigadier Mahao resisted arrest in a manner that merited his fatal shooting;*
- (d) investigate whether the Security forces used excessive force when apprehending Brigadier Mahao;*
- (e) investigate the immediate circumstances that led to death of Brigadier Mahao;*
- (f) investigate the circumstances surrounding Brigadier Mahao's admission to hospital;*
- (g) investigate the alleged mutiny plot and the alleged involvement of Brigadier Mahao;*
- (h) in its investigations, incorporate the report of the pathologist;*
- (i) investigate the legality and the manner of the appointment of Lt. General Mahao in 2014 and his demotion and removal as head of LDF in 2015;*
- (j) investigate the legality and the manner of the removal of Lt. General Kamoli as head of LDF in 2014 and his reappointment in 2015;*
- (k) investigate the allegations by opposition Parties and Civil Society stakeholders that Lt. General Kamoli's reappointment has resulted in divisions in the LDF and has led to political and security instability;*
- (l) investigate the authorization and execution of the LDF operations to arrest Brigadier Mahao;*
- (m) investigate the termination of appointment as the LDF Commander and demotion of Brigadier Mahao;*
- (n) assist in the identification of any perpetrators with a view to ensuring accountability for those responsible for the death of Brigadier Mahao, and*

(o) *investigate any other matters relevant to the inquiry.'*

[3] Paragraph 4 of Legal Notice 75 of 2015 reads as follows:

'Reporting

4. The Commission of Inquiry shall make a written report and submit the same to the Chairman of Southern African Development Community (SADC) Organ on Politics, Defence and Security Cooperation within sixty (60) days of the commencement of the work of the Commission, or such other extended date as the Prime Minister may agree to, upon a written request to the Prime Minister by the Chairman of the Commission.'

[4] Sections 3, 8, 13 and 16 of the Act read as follows:

'Establishment of Inquiry

3. (1) *If the Prime Minister considers that it is in the public interest to do so, he may by notice published in the Gazettee appoint a commission of inquiry consisting of one or more commissioners to inquire into any matters that is connected with the good government of Lesotho or is a matter of public concern.*

(2) *A notice appointing a commission shall specify the subject, nature and extent of the inquiry concerned and may contain directions generally for carrying out the*

inquiry and in particular may contain directions as to the following matters:

- (a) the appointment of a chairman*
 - (b) the date for the termination of the inquiry and the delivery of the report;*
 - (c) whether all the proceedings of the inquiry are to be public;*
 - (d) what coercive power the commission has.*
- (3) If the Prime Minister agrees, a commission may complete and deliver its report although the date specified under subsection 2(b) has passed.'*

Report of a commission

- 8. (1) A commission's report to the Prime Minister must be in writing.*
- (2) Subject to subsection (3), the Prime Minister shall table a copy of the commission's report in the National Assembly and the Senate within 15 sitting days of receiving that report.*
- (3) The Prime Minister need not table any portion of a 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.*
- (4) Where a portion of a report has been deleted under subsection (3), the extent of the deletion and the reasons for that deletion shall be indicated on the copy of the report that is tabled under subsection (2).*

Finding of misconduct

13. (1) *A commission in its report shall not make a finding of misconduct against a person unless the commission*

—

(a) *has informed the person of the facts in its possession or the allegations of misconduct made or to be made;*

(b) *has given the person a reasonable opportunity to furnish relevant evidence to contradict the facts or allegations; and*

(c) *has given the person an adequate opportunity of making representations to the commission.*

(2) *When informing a person of allegations or facts under subsection (1) the commission shall supply sufficient details to allow the person to understand the facts or allegation and to furnish relevant evidence to contradict or explain the facts or allegations.*

(3) *Where a person is entitled under subsection (1) to explain or contradict facts or allegations but will not have a fair opportunity of doing so without cross-examination of the person making the statements that constitute the facts or allegations, the commission must give the person so entitled an opportunity to cross-examine that other person.*

(4) *A commission may comply with this section at any time or times after it is appointed and before it delivers its report.*

(5) *In this section “misconduct” mean conduct that could reasonably be construed as bringing discredit on a person.*

Power to compel testimony and production

16. (1) *A Commission may by summons –*

(a) require any person to appear before it and give evidence under oath or affirmation: and

(b) require any person to produce any document, paper or thing in the custody or control of that person, that the commission consider necessary to be required for the full investigation of the matter into which it is appointed to inquire.

(2) Reasonable travelling expenses shall be paid to any person summoned under subsection (1).

(3) No person shall be bound to incriminate themselves and every person has the same privileges in relation to the disclosure of information and the production of documents, papers and things under this Act as the person has in relation to the disclosure and production in proceedings in the High Court.

(1) A person shall not be summoned by a commission to give evidence about any matter in respect of which he or she has been charged with an offence unless the charge has been finally disposed of.

(2) If a commission considers it advisable because of the distance a person resides from where his or her attendance is required under this section or for any other reason, the commission may authorize a public officer to take the evidence of that person and report it to the commission.'

[5] The relief sought by the appellant included the following:

- (b) Paragraph 4 of Legal Notice 75 of 2015 shall not be declared ultra vires the provisions of the Public Inquiries Act 1 of 1994, and Section 8 in particular;*
- (c) Paragraph 4 shall not be declared null and void of no legal force or effect;*
- (d) Second and Third Respondents shall not be declared to be bound by the provisions of Public Inquiries Act 1 of 1994;*
- (e) The purported sitting and hearing of evidence by Second and Third Respondents in the Republic of South Africa shall not be declared ultra vires Section 3 of the Public Inquiries Act 1 of 1994 and Legal Notice 75 of 2015 and 88 of 2015 that defined the nature and extent of their mandate.*
- (f) The proceedings of the 2nd and 3rd Respondents shall not be reviewed and set aside as having been vitiated by an error of law that they did not have to be conducted according to the Public Inquiries Act except only to the extent of using the provisions for the compulsion of the witnesses under that Act;*
- (g) The proceedings of the 2nd and 3rd Respondents shall not be reviewed and set aside on account of participation of Mr Waly and all those persons who have not been appointed as commissioners in terms of Legal Notice 75 of 2015 in the proceedings as a commissioner and lead Counsel whereas he has not been appointed in the Gazette as such;*
- (h) The commission of the 2nd and 3rd Respondents shall not be declared disqualified from proceeding with the work of the commission for lack of impartiality and failure to conduct proceedings in terms of the Public Inquiries Act 1 of 1994.*
- (i) The 2nd Respondent shall not dispatch the record of proceedings of all evidence and facts relating to the Applicant to the Registrar of this Court;*

- (j) The evidence and facts relating to the Applicant shall not be expunged from the record or proceedings of the commission*
- (k) The 2nd and 3rd Respondents shall not be restrained and interdicted from making any findings in relation to the Applicant;*
- (l) The 2nd and 3rd Respondents shall not be restrained and interdicted from summoning the Applicant before them pending the outcome of this application;*
- (m) The Respondents shall not pay costs in the event of opposition;*
- (n) The Applicant shall not be granted further and/or alternative relief.*

2. *Prayers 1 (a), (i) and (l) shall not operate [as] Interim relief pending the outcome hereof.'*

[6] The commission held a number of hearings both in Lesotho and in South Africa. The appellant testified before the commission on 17 September 2015, having received a summons issued by it requiring him to appear before it the next day and indicating that he was to testify on all the terms of reference.

[7] When he appeared before the commission he was led by counsel. He was thereafter questioned both by the commissioners and counsel representing the commission. He described this questioning as amounting to cross-examination. He stated that the chairman of the

commission, Mr Justice Mpaphi Phumaphi, and another commissioner, Brigadier General Noel Ndlovu, confronted him with allegations that he had been present when Brigadier Mahao was killed and that he was a suspect. He stated further that before Mr Justice Phumaphi commenced what he called ‘this line of cross-examination he had specifically indicated that he would not answer any questions relating to the death of Brigadier Mahao as they *might* (the emphasis is his) tend to incriminate him.

[8] In paragraph 18 of the founding affidavit he set out the questions which Mr Justice Phumaphi asked him and the answers he gave, as follows:

‘Q. I put it to you that you were at the scene?’

A. It is your opinion

Q. I put it to you that he was no longer alive when he was taken to hospital?’

A. Your opinion.

Q. I put it to you that Mahao was loaded onto the back of a vehicle and transported to hospital?’

A. Your opinion.

Q. I put it to you that he did not wield any weapon at all the time he was shot?’

A. Your opinion.

Q. *I put it to you that he was dragged by his legs by two army people from where he had landed on the ground to the truck in front?*

A. *No comment.*

Q. *When he was loaded into the back of the van two men could not put him in they were assisted by a third member of the LDF to put him in that truck.*

A. *No comment.*

Q. *That the vehicle that took him to the Military hospital left on its own, because the evidence is that he was no longer alive?*

A. *No comment.*

Q. *Three vehicles belonging to the army, twin cabs, second vehicle left after sometime, about 20-30 minutes, leaving Mahao's vehicle at the site and the vehicle behind his?*

A. *No comment.*

Q. *The third vehicle and Mahao's vehicle left at the same time following each other?*

A. *No comment.*

Q. *I put it to you that you were there?*

A. *No comment.'*

[9] In paragraph 19 of his affidavit he stated that he had been '*legally advised*' (by which I take it he meant he had been advised by his legal representative) and verily believed that this line of questioning was a deliberate attempt by Mr Justice Phumaphi to depict him as a criminal '*which was a violation of his rights.*' He also stated that he had been advised that it, as he put it, did

not behove a judge to ‘put’ things to a witness and that a judge who does this ‘*descends into the arena and his view gets clouded by the dust of conflict.*’ He continued: ‘*This is what [Mr] Justice Phumaphi appears to have done and lost all impartiality as a judge and trier of fact. This disentitles him from making findings in relation to the matters affecting the death of [Brigadier] Mahao as he has already prejudged the issues.*’ He also stated that the things which Mr Justice Phumaphi put to him were never said by any of the witnesses who testified in public.

[10] The proceedings in which Mr Justice Phumaphi questioned him as set out in the extract from his affidavit which I have quoted, were televised on both local and international networks.

[11] The appellant stated further that some time after his first appearance before the commission he learnt from Liaison Officer S/Lt Moloi that he was to be called back to the commission on 21 October 2015 and said that he feared that the commission would, as he put it ‘*repeat its irregular practice of unfairness and ambush which arise from its lack of impartiality.*’ He alleged that the

commission had acted unfairly by not giving him notice of any facts that it had against him as the law required.

[12] The appellant annexed to his replying affidavit a copy of the summons he received calling him to appear before the commission on 21 October 2015. The material portions read as follows:

‘SADC COMMISSION OF INQUIRY TO LESOTHO

SUMMONS

TO GIVE EVIDENCE BEFORE THE COMMISSION OF INQUIRY

1. *The SADC Commission of inquiry set up to inquire on the death of the late Brigadier M. Mahao is in its final stages, wherein, it is required to make findings. Evidence has been led in the Commission that **Colonel Sechele, Lieutenant Colonel Phaila, Lieutenant Colonel Hashatsi, Lieutenant Colonel Lekhooa, Lieutenant Fonane, Lieutenant Makoe, Sergeant Makara, Sergeant Ramoepane, Corporal Heqoa and Private Phusumane** you acting jointly and in common purpose, shot and fatally wounded the late Brigadier M. Mahao at Ha Lekete approximately 10 kms outside Maseru. Dragged him face down, kicked him and put him on the back of the 4 x 4 truck. Such evidence constitute a misconduct as defined in the Public Inquiries Act because it could reasonably be construed as bringing discredit on your person.*
2. *In terms of the Public Inquiries Act (act No.1 of 1994), Section 13 (1) you are summoned to appear before the Commission **on 21st from 1100 hours to 1700 hours October 2015.***

3. *You are entitled under subsection (1) above to explain or contradict facts or allegations. You are therefore given an opportunity of making representation to the Commission.'*

It will be seen that, contrary to what he had said in the passage in his founding affidavit which has been summarized, it does set out the allegations of misconduct made against him.

[13] On 20 October 2015 the High Court granted an interim order interdicting Mr Justice Phumaphi and the commission from summoning the appellant before it pending the outcome of the application. The following day the commission held its last hearing, after which it left Lesotho without hearing any further evidence from the appellant. It subsequently completed its report, which was signed on 5 November 2015, and submitted it to the chairman of the Southern African Development Community (SADC) Organ on Politics, Defence and Security Co-operation, whereafter the record was handed to the Prime Minister. After the court *a quo* delivered its judgment the Prime Minister tabled a copy in the National Assembly and the Senate in terms of section 8 (2), after he had under section 8 (3) excised portions from the copy he

tabled. The full report remains secret and has not been published.

[14] The court *a quo* heard the application on 19 January 2016 and delivered an *ex tempore* judgment on 8 February 2016. The main point made in the judgment was that the application was premature because, so the judge held, it amounted to a review and a review normally only takes place at the end of a case, not before it is completed.

[15] When the matter was argued in this court counsel for the fifth respondent, Mrs 'Mamphanya Mahao, the widow of the late Brigadier Mahao, contended that the relief sought by the appellant would no longer have a practical effect and that the whole case is moot. In this regard reliance was placed on **Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsraad** 1998 (2) SA 1136 (SCA) at 1141 D-F. That case is not directly of assistance because it is based on section 21 A of South African Supreme Court Act 59 of 1959, which has no counterpart in Lesotho. The test for mootness which should in my view be applied in Lesotho is that stated by Viscount Simon LC in **Sun Life Assurance Co of Canada**

v Jervis [1994] 1 All ER 469 (HL) at 471 A-B, which was quoted with approval by **Plewman JA** in **Coin Security Group v SA National Union for Security Officers** 2001 (2) SA 872 (SCA) at 875 C-E. That test is whether there exists between the parties to an appeal a matter *‘in actual controversy which [the Court] undertakes to decide as a living issue.’*

[16] Counsel for the appellant conceded that most of the relief sought by his client was moot but he contended that the mootness argument failed in relation to the relief sought in prayers 1(c) and (d) (relating to the alleged invalidity of paragraph 4 of the Legal Notice by which the Commission was appointed) and prayer 1(j), modified in accordance with prayer 1 (n) as follows: *‘that the court must declare that the exchanges between the appellant and Mr Justice Phumaphi referred to in paragraph 18 of the founding affidavit were wrong from the side of the chairman’*. He submitted that what Mr Justice Phumaphi had said in the passage concerned had amounted to a public accusation of wrongdoing which fostered the belief that he was guilty of murder and violated his right to the presumption of innocence and that the declaration sought

would diminish the damage done to the appellant's reputation.

[17] In support of his contention that the issue raised by prayer 1 (j), as modified, is still a living issue between the parties and not moot he submitted that the damage to the appellant's reputation still exists.

[18] I agree with the contention advanced by counsel for the fifth respondent that a decision on the issue raised by prayers 1 (c) and (d) (the invalidity of paragraph 4 of Legal Notice 75 of 2015) would have no practical effect and that there is no living issue between the parties on this point. The report has been submitted to the Chairman of the SADC Organ on Politics, Defence and Security Co-operation and passed on to the Prime Minister, who has dealt with it under section 8 (2) and (3) of the Act. A decision of the court on the point will not alter those facts or have any further effect.

[19] In regard to the issue raised by the modified prayer 1 (j) I agree with counsel for the appellant's contention that on the facts that he alleges, i.e., public

allegation that the appellant was a criminal and resultant damage to his reputation, the matter is not moot and a decision must accordingly be made on the question as to whether the appellant has made out a case for the relief sought.

[20] In regard to that issue, counsel for the appellant was asked whether there were any reported decisions which supported his argument. He said there were and undertook to make them available to the court, which he subsequently did. The decisions to which he referred were both decisions of the European Court of Human Rights, which dealt with an article contained in the European Convention for the Protection of Human Rights and Fundamental Freedom which is the counterpart of section 12 (2) (a) of the Constitution of Lesotho.

[21] The first was **Allenet de Ribemont v France**, a judgment delivered on 10 February 1995. That case concerned statements made at a press conference held on 29 December 1976 in the presence of the French Minister of Interior, by the Director of Paris C.I.D, to the effect that Mr Alletnet de Ribemont had instigated the murder of a

member of the French Parliament, Mr Jean de Broglie. At the time of the press conference Mr Allenet de Ribemont had just been arrested by the police. Although he had not yet been charged with aiding and abetting intentional homicide, the court held that his arrest and detention in police custody formed part of the judicial investigation of the case and made him a person '*charged with a criminal offence*' within the meaning of article 6 para 2, the relevant article of the Convention.

[22] Mr Allenet de Ribemont was released on 1 March 1977 and a discharge order was issued on 21 March 1977. He thereafter submitted a claim to the Prime Minister, seeking compensation for the non-pecuniary and pecuniary damage he alleged he had sustained on account of the statements made at the press conference.

[23] After unsuccessfully prosecuting his claim for compensation in the French courts he turned to the European Court, which found that article 6 para 2 of the Convention had been breached because the declaration of his guilt by high ranking officers in the French Police encouraged the public to believe him guilty and prejudiced

the assessment of the facts by the competent judicial authority. In the result the court awarded him FRF 2000 000 as compensation.

[24] The second decision to which counsel referred was the case of **Arrigo and Vella v Malta, decided** on 10 May 2005, which followed the **Allenet de Ribemont** case. The claim was brought by two judges of the Maltese Court of Criminal Appeal, who complained of a breach of their rights by the Prime Minister of Malta who stated at a press conference that *‘it became known’* that the judges were promised thousands of *liri* so that the sentence of a convicted drug trafficker would be reduced and that after judgment had been given, as allegedly had been agreed, *‘it resulted’* that monies were paid to the judges.

[25] The court found that the relevant article of the convention had been disregarded because the Prime Minister’s statement reflected an opinion that the judges were guilty before they had been proved so according to law. *‘It suffices’*, the court said, *‘even in absence of any formal finding that there is some reasoning to suggest that the official regards the accused as guilty.’*

[26] The judges' complaints were, however, dismissed because the Constitutional Court of Malta had found that the judges' rights under the article had been breached and had ordered that its judgment be brought to the attention of the tribunal called upon to determine the criminal charges pending against the judges. *'This measure'* said the court, *'was aimed at providing redress for violations found and at ensuring that all the safeguards contained in the Criminal Code were scrupulously applied. In the Court's view, the highest court in Malta has thus made clear that the applicants' guilt or innocence should be established by the Criminal Court only on the basis of the evidence produced during the trial, and that the declarations of the Prime Minister should not have any influence on the outcome of the criminal proceedings. The court has thus sought to place the applicants, as far as possible in the position they would have been in had the requirements of Article 6 not been disregarded'.*

[27] These two cases do not in my view provide support for counsel's submissions in this case. Section 12 (2) (a) of the Constitution of Lesotho, which, as I have said, is the counterpart of the article of the European

Convention considered in the two cases on which counsel relies, reads as follows:

‘(2) *Every person who is **charged with a criminal offence** – (a) shall be presumed to be innocent until he is proved or has pleaded guilty*’. (My emphasis.)

[28] The appellant in this case had not been charged with any criminal offence when he appeared before the commission and there is no evidence to suggest that he has been charged since. Section 12 (2) (a) and the two cases cited accordingly do not apply.

[29] I also do not agree with counsel for the appellant’s submission that if this Court were to grant the relief sought under this head this would have the effect of diminishing the damage to his reputation allegedly suffered by the appellant. While I agree with the contention that Mr Justice Phumaphi’s way of questioning was inappropriate and calculated to create the impression that he had already made up his mind on certain issues, something a judge or chairman of a judicial commission of inquiry should not do, I do not think that, if we were to grant the relief sought on this point based on a finding to that effect, this would induce members of the public who

were aware of the exchange between the judge and the appellant to change their views on the question as to whether the appellant is guilty of murder or any other criminal offence arising from the death of Brigadier Mahao.

[30] But there is another more important reason for rejecting counsel's submission on the facts. It is not correct that the judge said that the appellant was guilty of any offence. He also did not give reasons why he regarded him as guilty. He said, it will be recalled, that the appellant was on the scene at the relevant time and he then gave a brief account of what happened when Brigadier Mahao was shot and his body was loaded into a vehicle and transported to hospital. A member of the public who was aware of this exchange could only form a view as to the appellant's guilt because he chose to rely on his right to refuse to answer questions that might incriminate him. If the judge had phrased his questions appropriately, without '*putting*' things to the appellant, it is clear that his response would also have been to rely on his right not to incriminate himself, which is preserved by section 16 (3) of the Act.

[31] In all the circumstances I am satisfied that the appellant did not make out a case for relief in respect of prayer 1 (j), even in its modified form. It follows that the appeal must be dismissed. The court a quo made no order as to costs and I think that that approach is appropriate in this appeal also.

[32] The following order is made:

The appeal is dismissed.

I.G. FARLAM
ACTING PRESIDENT

I agree:

DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

K.L. MOAHLOLI
ACTING JUSTICE OF APPEAL (ex officio)

For the Appellants:

Adv M.E. Teele KC

For the 5th Respondent:

Adv A.M. de Vos SC and

Adv E. H Phoofolo KC