IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.52/2016

In the matter between

BRIGADIER THLORISO E MAREKA	**1ST APPELLANT**
BRIGADIER MOTOA	**2ND APPELLANT**
COLONEL STEMERE	**3RD APPELLANT**
COLONEL KOLISANG	**4TH APPELLANT**
MAJOR MAKHETHA	**5TH APPELLANT**
CAPTAIN CHAKA	**6TH APPELLANT**
SECOND LIEUTANANT	**7TH APPELLANT**
SERGEANT MOKHOBO	**8TH APPELLANT**
SERGEANT SEMAKALE	**9TH APPELLANT**
SERGEANT LEKHABUNYANE	**10TH APPELLANT**
CORPORAL MOKHOBO	**11TH APPELLANT**
CORPORAL LETSILANE	**12TH APPELLANT**
CORPORAL LIPOTO	**13TH APPELLANT**
CORPORAL MANAKA	**14TH APPELLANT**
CORPORAL MOHATLANE	**15TH APPELLANT**
CORPORAL CHELE	**16TH APPELLANT**
CORPORAL MOTSEKO	**17TH APPELLANT**
LANCE CORPORAL JOBO	**18TH APPELLANT**
LANCE CORPORAL MOLETI	**19TH APPELLANT**
LANCE CORPORAL MAKHOOANE	**20TH APPELLANT**
PRIVATE PAMA	**21ST APPELLANT**
PRIVATE BOLOFO	**22ND APPELLANT**
PRIVATE RALITLEMO	**23RDAPPELLANT**

AND

COMMANDER OF LESOTHO DEFENCE FORCE	**1ST RESPONDENT**
MINISTER OF DEFENCE	**2ND RESPONDENT**
COURT MARTIAL	**3RD RESPONDENT**
PRESIDENT – COURT MARTIAL	**4TH RESPONDENT**
PROSECUTOR – COURT	**5TH RESPONDENT**
CHAIRMAN OF THE COMMISSION OF ENQUIRY	**6TH RESPONDENT**
COMMISSION OF ENQUIRY	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM: FARLAM, AP
LOUW, AJA
DR MUSONDA, AJA

HEARD : 15 APRIL 2016

DELIVERED : 29 APRIL 2016

SUMMARY

Court Martial – whether convening order should be set aside as being unreasonable – whether second respondent precluded from making convening order because commission of inquiry appointed, inter alia, to investigate allegations giving rise to charges to be dealt with at court martial – whether order impinged on appellants' rights to fair trial – whether order placing appellants on open arrest correctly made.

JUDGMENT

FARLAM, AP

[1] The appellants in this matter launched an application in the High Court on 31 August 2015 against the Commander of the Lesotho Defence Force, the first respondent, the Minister of Defence, the second respondent, and five other respondents, seeking the following orders.

> '(1) *A rule Nisi be issued and made returnable on the time and date to be determined by this Court calling upon the Respondents to show cause (if any) why the reliefs/orders shall not be granted;*
>
> (2) *An order dispensing with the modes and rules to be made due to the urgency of this matter.*
>
> (3) *That pending the outcome of this case the 2nd Respondent's decision to establish Court Martial by issuing Convening Order dated 13th August 2015 in order to try Applicants for alleged contravention of section 48 (1) (a) read with section 48 (21) and 103 (1) of Lesotho Defence Force Act 1996 be stayed.*
>
> (4) *That pending the outcome to this case the Respondents and any of their subordinates be and are hereby interdicted from executing any terms of Convening Order and from taking any step towards prosecuting the applicants for the alleged crimes.*
>
> (5) *The Respondents and any of their subordinates are hereby interdicted from proceeding with the prosecution against the Applicants on the charges upon which they*

stand arraigned before the "Court Martial" pending the outcome of this case.

(6) That pending the outcome of this case the 1st Respondent's Directive issued on the 10th July 2015 pursuant to terms of Regulation 11 (2) of the Defence Force (Discipline) Regulations N0.29 of 1998 be stayed and suspended.

(7) That pending the outcome of this case the Applicants be afforded an opportunity to personally access the commission on daily basis for purposes of preparing and making representation as interested parties.

(8) Pending the outcome of this case the 2nd Respondent be directed to release from custody the Applicants to enable them to attend and make representations in the commission.

(9) Granting leave to the Applicants, upon good cause shown, to approach this Court upon the same papers duly supplemented, for additional and/or alternative relief relating to the matters raised in the application or in this order pending finalization of this application.

Final relief

(10) The 2nd Respondent's decision to establish Court Martial to try the Applicants for alleged contravention of sections 48 (1) (a) read with sections 48 (2) and 103 (1) of Lesotho Defence Act 1996 be reviewed and set aside.

(11) The 2nd Respondent's convening order for establishing Court Martial to try the Applicants for alleged contravention of sections 48 (1) (a) read with sections 48 (2) and 103 (1) of Lesotho Defence Act 1996, be declared as null and void.

(12) The Respondents decision to charge the Applicants pursuant to the charge sheet issued on the 7th August 2015 be reviewed and set aside.

(13) The Respondents' charge sheet charging the Applicants for alleged contravention of sections 48 (1) (a) read with

sections 48 (2) and 103 (1) of Lesotho Defence Act 1996 be declared null and void.

(14) Respondents be and are hereby interdicted from charging the Applicants for alleged contraventions of section 48 (1) (a) read with sections 48 (2) and 103 (1) of Lesotho Defence Act 1996 and from prosecuting such charges pending the outcome of the commission of enquiry established by the Southern African Development Community (SADC) and authorized by Government Gazette N0.49 of 2015 as amended by Government Gazette N0.55 of 2015.

(15) It be and is hereby declared that pending the outcome of Commission of enquiry the Applicants are free from prosecution and are entitled to have their freedoms and liberties and are entitled to an unconditional release from both close and open arrest.

(16) It be and hereby declared that Applicants are bound by the decisions of Southern African Development Community (SADC) taken in Troika Summit Held in Pretoria South Africa on the 3rd June 2015 and in Gaborone Botswana on the 16th August 2015.

Alternatively

(17) An order reviewing and setting aside the decision to detain Applicant under close arrest as irregular and of no legal force.

(18) The 1st Respondent's directive issued on the 10th July 2015 pursuant to terms of Regulation 11 (2) of the Defence Force (Discipline) Regulations N0.29 of 1998 be declared null and void.

(19) An order directing 1st Respondent, including officers subordinate to him to release Applicants or cause their release from custody and set them free unconditionally.

(20) Costs of suit in the event of opposition on attorney and client scale.

(21) Further and/or alternative relief.'

[2] The factual background to the application instituted by the appellants in this case is fully set out in paras [9] to [20] of the judgment of the court *a quo* and is accepted as correct by both sides in the appeal. The judgment is not yet reported but it is available on the website of the Lesotho Legal Information Institute.

[3] The main facts which are material in this matter may be summarized as follows:

[4] In May and June 2015 a number of members of the Lesotho Defence Force, (which I shall call in what follows the LDF') ranging in rank from Brigadier (the first and second appellants) to Private (the 21st, 22nd and 23rd appellants) were arrested. They were subsequently detained at the Maximum Security Prison in Maseru where they were placed under close arrest. The wives of some of the detained members brought *habeas corpus* applications against some of the respondents so that the court could investigate whether they were being lawfully detained. While these applications were pending mutiny charges were brought against the detainees, some of

whom alleged that they had been tortured during their detention.

[5] On 25 June 2015 Brigadier (formerly Lt General) Mahao, the former head of the LDF, was killed under controversial circumstances by members of the LDF.

[6] The Prime Minister thereafter asked SADC to intervene to assist *inter alia*, in stabilizing the security situation in the Kingdom. The SADC Double Troika met in Pretoria on 3 July 2015 and decided, *inter alia*, to establish an independent commission of inquiry whose terms of reference included a review of the investigations into the alleged mutiny plot. It also decided 'that the Kingdom of Lesotho put on hold the Court Martial processes to allow the Commission of Inquiry' to do its work.

[7] On 28 July 2015, the Lesotho Prime Minister set up what may be called a 'domestic' commission under the Public Inquiries Act 1 of 1994, with terms of reference which deviated to some extent from the original terms set

by the Double Troika but which were subsequently amended to coincide with all the Double Troika terms.

[8] On 10 August 2015, a Directive was issued under regulation 10 and 12 of the Defence Force (Discipline) Regulations, advising the appellants that it had been decided that they were placed under close arrest rather than open arrest, and giving reasons for this decision.

[9] On 13 August 2015, the convening order whose validity is the main subject of these proceedings was made by the second respondent.

[10] On 17 and 18 August 2015 a summit of the SADC Heads of States and Governments met in Gaborone, Botswana. It focused its main attention on the political and security situation in Lesotho. Among other things, it acknowledged that the decision to put on hold the court martial until the commission of inquiry had finalized its work had been overtaken by events and was no longer tenable.

[11] During an early stage of the proceedings in the court a quo the appellants withdrew prayer 16. When the matter was argued in this Court counsel for the appellants stated that the commission of enquiry had finalized its report, which has since been published, and that prayers 14 and 15 are no longer relevant. The court was also informed that the court martial convened by the second respondent has not yet started hearing evidence, but that it has disposed of certain preliminary matters that were raised before it.

[12] The court was also told that at present seven of the appellants have been released on open arrest: nos 1,7,17 and 18 by court order and nos 15, 22 and 23 who have been released by Lesotho Defence Force processes. The remaining appellants are currently under close arrest. The application came before Makara J, who granted an order in terms of prayer 17, but dismissed all the other prayers.

[13] The appellants thereafter noted an appeal against the judgment of the court *a quo* and the first five respondents noted a cross appeal against the granting of

prayer 17. They did so on two grounds, one of which was not persisted in. The ground in which they persisted reads as follows:

> '*The learned judge erred and misdirected himself in granting prayer 17 when the applicant failed to adduce evidence to sustain such relief. It is submitted that no sufficient evidence was tendered to support the holding of the court a quo that the decision to place the "applicants" on close arrest was irregular and therefore ought to be set aside.*'

[14] The main submission of counsel for the appellants was that the decision to set up the court martial should be set aside, the question of the charge sheets being, as it was put, interrelated. If the convening of the court martial is not set aside, counsel continued, the alternative relief will be relevant and in that regard they asked that the cross-appeal against the granting of prayer 17 be dismissed.

[15] Counsel for the respondents pointed out that the appellants sought a number of prayers which can be broadly characterized as prayers for (a) review (prayers 10,12 and 17); (b) declarators (prayers 11,13, 15, 16 and 18); (c) interdict (prayer 14 – which has fallen away); and

(d) an order for their release from detention (prayer 19). They pointed out further that the same conduct was made the subject of both reviews and declarators.

[16] Counsel for the respondents made a further classification of relief sought by the applicants, based on their content. The relief may, they submitted be divided into two related categories. Prayers 10 to 13 are directed at challenging the convening of the court martial and the preferment of charges herein. Prayers 12 and 13 target the charge sheet but this is, they submit, a duplication to the extent that the charge sheet is part and parcel of the process of convening the court martial. This must be so because unless the convening authority has satisfied himself of the charge and the evidence he cannot convene the court martial: see Rule 7 (b) and (i) of the Court Martial (Procedure) Rules 1998 which provide that when a convening officer convenes a court martial he must direct on what charges the accused is to be tried and send the charge sheet to the President of the Court Martial.

[17] The second category by content is constituted by prayers 14 to 16, which, as counsel put it, proceed on the

basis that the commission of enquiry referred to in prayer 14 could lawfully be interposed as a legal justification to stop the proceedings of the Court Martial. In view of the fact that prayer 16 was abandoned in the court a quo and counsel for the appellants told this court that prayers 14 and 15 are no longer relevant it is unnecessary to say anything further about this category.

[18] As far as the first category it is concerned I agree with counsel for the respondents that the prayers relating to the convening order, the decision to charge and the charge sheet overlap. No decision to issue a convening order can be made unless a decision is taken to charge the accused and to prepare the charge sheet.

[19] Counsel for the appellants submitted that the decision to charge the appellant was unlawful and irrational, *inter alia*, because it was made prematurely as, so they argue, it was the intention of the Lesotho Government to establish a commission to enquire into the veracity of the charges laid against the appellant. The charges should only have been instituted, they submit,

after, and if, the commission established that the charges were based on accurate allegations.

[20] Before I consider this submission it is appropriate to consider what the test is for irrationality. In **Council of Civil Service Union and Others v Minister for the Civil Service** [1984] 3 WLR 1174 (HL) (the **CCSU** case) at 1196 D-E Lord Diplock said:

> *'By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1947] 2 ALL ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'*

[21] This passage was cited with approval by Dumbutshena CJ in **Patriotic Front – ZAPU v Minister of Justice** 1986 (1) SA 532 (ZSC) at 548 F-H. The **Wednesbury** case was itself cited with approval in this Court in **Koatsa v National University of Lesotho** LAC (1985-1989) 335 at 339 E-F.

[22] I do not agree with the contention that the second respondent's decision was unlawful and irrational. In his affidavit the second respondent stated that when he made the convening order he had reports, evidence and other materials which in his view compelled him to exercise his statutory powers to establish a court martial. The evidence that the appellants had committed the military offences concerned was, he said, overwhelming. If that is so, and for present purposes it must be accepted (see **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, 1984 (3) SA 623 (A) at 634 E-635C, a decision frequently followed in this court) then the decision was a lawful one and there was no necessity to wait for the commission to establish the truthfulness of the allegations made against the appellants.

[23] I turn now to the appellants' contention that decision to convene the court martial was unlawful, arbitrary and unreasonable.

[24] In the court a quo it was the appellants' case that the decision of the SADC Double Troika of 3 July 2015 that the Kingdom of Lesotho put on hold the court martial

processes to allow for the independent commission of inquiry which the Double Troika decided to establish, inter alia, to review the investigations into the alleged mutiny plot was binding and that the Government had accepted that it was binding and had informed the appellants of this fact. The second respondent specifically denied in his affidavit that the Government gave the undertaking alleged or informed the appellants thereof. In their heads of argument the counsel for the appellants say that their argument 'does not rest on any argument as to the binding nature or otherwise of [the Double Troika's] decision'.

[25] Counsel for the appellants submitted that the decision of the SADC Heads of State on 17 and 18 August 2015 (that the decision taken during the Double Troika Summit to put on the hold the court martial processes to allow for the commission to finalize its work was no longer tenable) had no bearing on the legality of the preceding decisions under review. While it is correct that as general rule, the legality of, e.g., the convening order of 13 August 2015 has to be judged in the light of the facts existing when the decision was made, I cannot agree that the decision of 17-18 August is entirely irrelevant. One of the appellants' main contentions on this issue is that no

reasonable person would have made that decision because in view of the delicately poised security situation in Lesotho at the time the setting up of a court martial to try the appellants could only aggravate the security situation and lead to further insecurity.

[26] If the SADC leaders at the 17-18 August summit had thought that that was the case one would have expected them to dig their heels in and stick to the earlier decision that the court martial processes should be put on hold. The fact that they did not do so goes some way to showing that one cannot say that no reasonable person would have convened the court martial on 13 August 2015.

[27] But there is a further aspect of the matter which indicates that this submission by the appellants cannot be upheld. Counsel for the respondents drew attention to cases where it was held that courts of law should not attribute to themselves superior wisdom in matters entrusted to other branches of government. See **Bato Star Fishing (Pty) Ltd Minister of Environmental Affairs and Other** 2004 (4) SA 490 (CC) at 514 F- 515A

(para [48]) cited with approval in this court in **Tšepe v Independent Electoral Commission and Others**, LAC (2005-2006) 169 at 186G- 187F (para [38]).

[28] Counsel for the respondents also referred to **CCSU** case to which I referred earlier. In that case Lord Diplock said (at 1198 B-C):

> *'National security is the responsibility of the executive government…a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.'*

[29] Counsel for the appellants also contend that the decision to convene a court martial in the face of the establishment of a commission of inquiry by the Prime Minister was unreasonable. The second respondent's answer is that he considered the commission of inquiry and the court martial as serving two different purposes: the former is an investigative tool of the executive while the latter is a court. He considered that the recommendations of a commission are not binding on the executive whereas a court martial gives binding decisions. I do not think that it is possible to say that the second

respondent's decision in this regard can be stigmatised as irrational as explained by Lord Diplock in the **CCSU** case, supra.

[30] Counsel for the appellants also submitted that by what they called 'domesticating' and establishing the commission in terms of the Public Inquiries Act 1 of 1994 the Government committed itself to the commission process to the exclusion of a Court Martial. The inference for which counsel contend cannot be drawn. Indeed the second respondent says in his affidavit that when he decided to convene the court martial he was mindful of the fact that the Government had set up a commission of inquiry for other purposes.

[31] Counsel for the appellants also submitted that the court martial was constituted in a manner which impinged on their prospects of a fair trial.

[32] They do not suggest that sections 93 and 94 of the Lesotho Defence Force Act of 1996, which deal with the constitution of courts martial, are unconstitutional. The Court Martial as constituted by the convening order

complies with those sections. As counsel for the respondents submit, the only objection that can be raised in that regard would relate to alleged bias on the part of the members of the court, a matter that can be dealt with under rule 12 of the (Court-Martial) (Procedure) Rules 1998.

[33] It is also important to bear in mind in this context the as yet unreported decision of this Court in **Commander Lesotho Defence Force and Others v Maluke**, C of A (CIV) 30/2014, delivered on 24 October 2014 (which can be accessed on the Lesotho Legal Information Institute website), in which it was held that courts martial in Lesotho are 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. It is also important to bear in mind that any unfairness in the proceedings in the court martial convened by the second respondent will be able to be dealt with by the High Court in the exercise of its review powers under section 119 of the Constitution: see **Sekoati and Others v President of the Court Martial and Others** LAC (1995-1999) 812 at 830 D. It is not appropriate to

consider *in anticipando,* as it were, whether the Court Martial will be unfair. If the Court Martial is unfair the appellants will be able on the strength of these two decisions to have the proceedings set aside.

[34] Appellants' Counsel also drew attention to the fact that Major, now Colonel, Sechele, who is described in the charge sheet as one of the targets of the alleged conspiracy of which the appellants stand accused, was appointed as an assistant prosecutor in the convening order. Relying on **Porrit and Another v National Director of Public Prosecutions and Others** 2015 (1) SACR 533 (SCA) and **Smyth v Ushewokunze and Another 1998** (3) SA 1125 (ZS), counsel submitted that the second respondent's decision to appoint Colonel Sechele as an assistant prosecutor infringes on the appellants' right to a fair trial, rendering the decision unreasonable and unfair.

[35] I agree with the submission made by counsel for the respondents that Colonel Sechele's appointment as an assistant prosecutor at the court martial is severable from

the main decision to convene the court martial and it accordingly does not invalidate that decision.

[36] In the circumstances I am of the opinion that that appellants' attack on the convening of the court martial must fail.

[37] I turn now to deal with the appellants' submissions regarding their continued detention. On this part of the case they were successful in that the court *a quo* granted an order under prayer (17). This order was made on the basis that the appellants in whose favour it was made were not afforded a hearing before they were placed under closed arrest. It was on this legal basis that the first appellant was placed on open arrest in the separate case brought by him.

[38] Counsel for the respondents contended that the court a quo erred in making the order it did under prayer (17) because there was no evidence before the court that appellants 2 to 23 were not informed when they were arrested that they were being placed under closed arrest or of the reasons therefor or that they were not given a

hearing. The only affidavit dealing with an arrest was the founding affidavit deposed to by the first appellant, who did not purport to deal with what happened when the other appellants were arrested.

[39] In the circumstances it is clear that the court a quo erred in making the order it did under prayer (17) and that the cross-appeal against that order must succeed.

[40] As far as prayer 19 is concerned (that is for an order directing first respondent, including officers subordinate to him, to release the appellants or cause their release from custody and set them free unconditionally), it is enough to say that no case for their release has been made out on the papers.

[42] In the circumstances I am satisfied that the appeal must fail and the cross-appeal upheld. As this is a constitutional matter there will be no order for costs.

The following order is made,

1. The appeal is dismissed.

2. The cross appeal is upheld and the order made in para [98] of the judgment of the court a quo is amended by inserting ‘17’ in the third line of the paragraph and by deleting the last sentence of that paragraph.

I G FARLAM
ACTING PRESIDENT

I agree:

W J LOUW
ACTING JUSTICE OF APPEAL

I agree:

DR P MUSONDA
ACTING JUSTICE OF APPEAL

For Appellants : Advs A M de Vos SC, K Ndebele & C J Lephuthing intructed by Mosotho Attorneys

For Respondents: Advs M E Teele KC & L M Motikoe instructed by Mei & Mei Attorneys Inc