IN THE HIGH COURT OF LESOTHO

CIV/APN/561/2013

In the matter between:

THABANG JOSEPH PHAILA **APPLICANT**

And

THE COMMANDER OF LDF **1ST RESPONDENT**
PRESIDENT-COURT MARTIAL **2ND RESPONDENT**
COURT MARTIAL **3RD RESPONDENT**
MINISTER OF DEFENCE **4TH RESPONDENT**
PRSECUTOR-COURT MARTIAL **5TH RESPONDENT**
ATTORNEY GENERAL **6TH RESPONDENT**

JUDGMENT

Coram : Honourable Mr.Justice E.F.M. Makara
Dates of Hearing : 22 December, 2013
Date of Judgment : 13 March, 2014

Summary

The Applicant who is a 2nd lieutenant in the Lesotho Defence Force has asked the Court to review the decision of the 4th Respondent to convene a Court Martial to try the Applicant on the basis that he has been granted the *amnesty* and to consequently make a declaratory and interdictory orders against the continuance of the Court Martial proceedings. The Respondents disputed the existence of the *amnesty policy pronouncement* by the Government and questioned the jurisdiction of the Court in the matter. Their reasoning being that the remedies prayed for are available before the Court Martial and that the Applicant is disqualified under S 24 (3) of the Lesotho Defence Force Act No.4 of 1996 to have challenged anything done under the *disciplinary law*. The Court resolving that it has a jurisdiction under S 119 (1) of the Constitution and S 2 (1) of the High Court (Amendment) Act No.34 of 1984 to review the decision of the Minister of Defence and

acknowledged that it has no authority under S 24 (3) of the LDF Act to entertain challenges mounted by a soldier against *any discriminative or unfair trial procedures or conduct* done under *disciplinary law.* This holds regardless of any dissatisfaction which this Court might have since the right has been constitutionally taken away. This Court has established that there has been *an amnesty policy pronouncement* by the Minister of Justice Mophato Monyake and the evidence of his conduct demonstrating so. On the other hand, there is no credible evidence proving that the Prime Minister had expressed that policy benevolence. This notwithstanding, the Minister's letter and conduct exhibiting the policy binds all the ministers of the Crown by operation of the concept of *Ministerial Responsibility.* The final verdict being that the Applicant has failed to demonstrate that he is covered by the *amnesty* since he hasn't comprehensively disclosed any politically oriented criminal, civil or military offence for which he would be entitled to *an amnesty.* Resultantly, the Court declined to make the declaratory and the interdictory orders prayed for with no order on costs.

CITED CASES

(AZAPO) and Others v President of the Republic of South Africa & Others 1996 (8) BCLR 1015 (CC)
Makhutla v Lesotho Agricultural Development Bank LAC (1995 – 1999)
Attorney General v Lesotho Preachers Trade Union and Others LAC (1995 – 1999)
Sekoati and Others v President Court Martial and Others LAC (1995 – 1999) 812 @ 830 D.
R v Groydon Justices Ex Parte Dean [1993] e All ER 129 (QB)
National Director of Public Prosecutions v Zuma (Mbeki) and Another (intervening) 2009 (4) BCLR 393 (SCA)
Mda and Another v DPP and Another CRI/T/15/ 04).

STATUTES AND SUBSIDIARY LEGISTLATION

The High Court Act No. 5 of 1978
High Court (Amendment) Act No.34 of 1984
Lesotho Defence Force Act No4 of 1996
The Defence Force (Court Martial) (Procedure) Rules No.24 of 1998
Rules of Procedure (Army) 1972 governing the United Kingdom's Forces
The Constitution of Lesotho 1993
Criminal Procedure & Evidence Act 1981

MAKARA J

Introduction

[1] The Applicant has, through a Notice of Motion and on urgent basis, sought refuge underneath the shelter of the justice of this Court praying for an order that:

1. There be a dispensation with the forms and normal periods of service provided for in the Rules on account of the urgency of the matter.
2. The 1st Respondent's *Convening Order* for a Court Martial to try the Applicant for the alleged contraventions of **Sections 48 (2) and/or 49 (a) and 54 (1) (a) of the Lesotho Defence Force Act No4 of 1996,** be reviewed and set aside and/or be declared as null and void;
3. It be declared that the Applicant is entitled to the benefit of the *amnesty* policy in terms of which all Basotho who left the Kingdom due to political unrest before the May 2012 general elections must return home on the assurance that they would not be prosecuted.
4. It be further declared that the prosecution of the Applicant is unfair, discriminatory and an abuse of process.
5. The 2nd Respondent is interdicted from proceeding with the prosecution against the Applicant on the charges upon which the he stands arraigned before the Court Martial as well as from proceeding with any other prosecution on any other charges which might arise out of the same facts.
6. The 1st Respondent should cause the release of Applicant from a military detention.
7. The Respondents be directed to pay the costs of suit including costs occasioned by the employment of two counsel.
8. Further and/or alternative relief.
9. Prayers 1 and 5 operates with immediate effect as interim relief pending the finalization of the matter.

[2] The Applicant is first and foremost seeking for *a review* against the issuance of the *Court Martial Convening Order* by the Minister of Defence. This is being pursuit on the strength of **Section 119 (1) of the Constitution read in conjunction with Section 2(1) of the High Court (Amendment) Act**[1]. The impression radiated is that

[1]The High Court (Amendment) No. 34 of 1984.

the latter basically reiterates the constitutional mandate entrusted upon the Court and elevates its jurisdiction above all the subordinates or inferior courts including all forums exercising *quasi judicial powers.*

[3] On the 19th December 2013 which was the day on which the application was moved before the Motion Court, it transpired to the Counsel for the Applicant that the Respondents had already filed their Notice of Intention to Oppose. The discovery was made at the time the Counsel insisted that prayers 1 and 5 be ordered to operate with immediate effect. Adv. Motsieloa for the Respondents had vehemently opposed the granting of any Interim Order. His first reasoning was that they had been served with the application and its corresponding papers at *around 4.00 pm on the previous day* and that understandably, they had not been afforded a reasonable time for them to file their counter papers in addition to the Notice of Intention to oppose which had already been filed. Secondly, he argued that the Applicant has not made a *prima facie* case for the immediate operation of the mentioned prayers. He, however, conceded that the dispensation asked for under prayer 1 could be allowed.

[4] The Court having granted the dispensation found it befitting to make an extra ordinary order by fixing the dates for the parties to have filed their corresponding papers and set down the hearing for Monday the 30thDecember 2013. On this day, the hearing did not proceed because according to the Counsel for the Respondents he had encountered a problem in serving the Attorneys for the

Applicant with the answering affidavits. He attributed that to the closure of their offices and to the unavailability of an alternative address for service.

[5] The Court reconvened for hearing on the 14th January 2014 after all the papers had been exchanged between the parties. At the commencement of the hearing, Adv Sakoane KC mounted an application for a joinder of the Commander of the Lesotho Defence Force (LDF), The President – Court Martial and the Court Martial to be the additional Respondents. It was granted by consent and he subsequently interrogated the merits of the case. The development was, however, interrupted by the absence of the Applicant's written Heads of Argument due to what was explained as a computer technical problem. This occasioned an unnecessary postponement for the availability of same in order to facilitate for the promptness of the hearing and ease of reference. It was on account of the already congested schedule of other equally pressing urgent applications before a single Judge who was the only one available at the time. The Court in the circumstances directed that the hearing be rescheduled for the end of January 2014.

[6] Ultimately, following the joinder of the additional parties and the completion of the filling of the papers by both sides in accordance with the directive of the Court, the hearing progressed to a conclusion for two days commencing from the 30th January 2014. The extra day accommodated the Counsel for the Applicant to address the technical problem which had militated against the

availability of his Heads of Arguments and therefore, the expediency in the hearing.

The Common Cause Facts

[7] It is from the onset deserving to be recorded that the parties subscribe to a common view that the factual scenario which has precipitated the proceedings originates form the background that the Applicant is a 2nd Lieutenant in the LDF. He is presently in a Military detention facility and has already been arraigned before a Court Martial against a charge of having participated in an intended mutiny alternatively for failure to prevent it and for desertion[2]. The events are described to have taken place during 1998. It is precisely the convening of the Court Martial and the charges preferred against the Applicant which have occasioned this application.

[8] The Applicant's revelation of the 1998 political landscape has not been contradicted and it, therefore, stands as such. This constitutes a background foundation of his case before the Court. In a nutshell, he has narrated that in sequel to the political episode of that time, the army became entangled in the antagonistic political belligerences in prevalence at the time. This culminated in its division between those who supported a position held by some political parties that the elections had in collaboration with some senior officers been rigged and those who could be

[2]The charges which are characteristically of a military nature are premised on the charges that the Applicant has contravened S 48 (2) in that he had acting in collaboration with some persons listed in the charge, taken part in the mutiny; contravened S 49 (a) for allegedly having failed to suppress the mutiny; and for contravening S 54 (1) (a) on the allegation that he had at all material times deserted Military Service. All these are provisions under the Lesotho Defense Force Act No. 4 of 1996 (The Act).

categorised as having maintained a neutral stance in the matter and remained at all material times subject to the army command irrespective of their personal views. The army was, consequently, divided. Ultimately, he was arrested while he had come to his residence at the Ha Ratjomose Military Barracks. He had come there from the National University of Lesotho (NUL) where he was reading for a Law degree since he was on a study leave.

[9] He was, subsequently, released from the arrest and he returned to school to carry on with his studies. While he was there, he learned about the escape of some senior officers to Ladybrand in the Republic of South Africa and the intervention of the SADC Forces. The latter became engaged in a fight with our Defence Force and called upon the LDF members to report themselves at the Makoanyane Base which they had overrun. **The developments caused him to fear for his life and in response to flee from the jurisdiction.** Some soldiers were afterwards, arrested and court martialed for mutiny for contravening the provisions of the **Lesotho Defence Force Act**.[3]

[10] In 2000 the Government set up a Commission of Inquiry led by Justice Leon to *inter alia*:

> (j) Investigate, appraise and evaluate the bodies or persons who incited, aided, persuaded and summoned members of the Lesotho Defence Force to stage a mutiny against the command of the Force and the lawful established Government of the Kingdom of Lesotho which occurred on 11th September 1998.

[3]The Lesotho Defence Force Act No.4 of 1966.

[11] It should, for the purpose of this case, suffice to be recorded that the Applicant has stated that one 2nd Lt. Mafoea had during the proceedings before the Commission mentioned his name among the Lesotho Defence Force members who were alleged to have incited the mutiny. Nevertheless, according to him, the Commission did not recommend that any charges relating to the mutiny to be preferred against him. It instead, recommended that he be charged with *Sedition or Public Violence* in the alternative. The fact is, however, that he had never while abroad had any military or civilian charge preferred against him.

[12] On the 9th September 2013 the Applicant returned into the Kingdom from exile. This according to him, was in consequence of the interventions made by Minister Mophato Monyake and the *Amnesty Policy Pronouncement* by Prime Minister Thomas Motsoahae Thabane at a *pitso* held sometime during November 2012. He has in support of the assertion that the Prime Minister had in his official capacity expressed the *amnesty statement*, annexed a copy of an Article published in the Informative Newspaper dated Wednesday the 21st November 2012.

[13] The said article doesn't, however, disclose the place of the event. It is therein in essence reported that the Prime Minister had announced the *Government Amnesty Policy* in favour of the political dissidents who had fled the Country due to the persecution mounted against them by the previous governments and gave an assurance that there would be no criminal charges instituted against them. In the same vein, he is quoted as having

cautioned that **the mutineers** would have to devise means to sustain their livelihood. (Emphasis supplied). The statements are reported to have been made at the *pitso* held specifically for the welcoming of the political dissidents who had returned into the Country. The impression sought to be created being that this was pursuant to the explained *Amnesty Policy*.

[14] The Applicant attributes the intervention by Minister Monyake to the coordination which he had initially had with his father Cyprianus Sello Phaila. He explained that the Minister had in that endeavour, articulated the Government's intention for the political dissidents **including in particular the Applicant** to return home from exile and the assurances that he would be safe from persecution or prosecution if he would take advantage of that *policy desire.* To demonstrate his *bona fides* he has referred the Court to a copy of a letter addressed to the Commander - Lesotho Defence Force, The Commissioner of Police and The Director - National State Security on the subject. The correspondence has in summarised and paraphrased terms, informed the three heads of the State Security Apparatus about the return of the Applicant who had due to the 1998 political episode fled the jurisdiction. It highlights that this is on account of the *Government's intention for all the Basotho who had left the Country for political or private reasons to return home.* In conclusion, it appeals to the heads concerned to reciprocate to the directive of the Government, by according the man and his family the *protection, rights and freedoms enjoyed by every law abiding citizen.* The letter had been copied to the Applicant and to the Government Secretary.

[15] Against the backdrop of the narrated undisputed developments, the paradox is that the Applicant was arrested shortly upon his arrival into the Country, detained by the Military, and charged for committing the military offences against which he is presently standing before the Court Martial. The sitting has been authorised by the Minister of Defence who happens to be the Prime Minister. He has, in that capacity done so, through his issuance of *The Court Martial Convening Orde*r acting pursuant to **S 92 (1) of the Lesotho Defence Force Act[4]. (also hereinafter referred to as the Act).** This explains his ongoing prosecution before the Court Martial and the challenge mounted against the Convenor of the Sitting. The underlining consideration is that he has similarly to those in his category been granted the *Amnesty*.

[16] The Respondents have a diametrically opposite view towards the *Amnesty Policy Pronouncement* claimed and relied upon by the Applicant. And, on a transitional note, the parties share a divergence of view on the question of the existence or otherwise of the *Government Amnesty Policy* and incidentally on the credentials of the Applicant to benefit from the said *Amnesty* should the Court find that it exists.

[17] Notwithstanding the divergence of the outlook between the two Counsel on the question of the existence or otherwise of the *amnesty policy* of the Government and its relevance on the

[4]The Lesotho Defence Force Act No. 4 of 1996.

Applicant, they share a convergence of minds that the term *amnesty* has been well captured in the case of **The President of the Republic Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others 1996 (8) BCLR 1015 (CC) at 1035 paras 34 – 35.** This would, in due course, be quoted *in extenso.* And it will form the basis in the determination of the existence of the controverted *amnesty*.

The Issues for Determination by the Court

[18] The centrality of the question for the determination of the Court hinges on the jurisdiction of the High Court to review the lawfulness of the Prime Minister's decision to have, notwithstanding the Applicant's claim that he had been given the *Amnesty,* exercised the powers vested upon him under S 92 of the Act, by convening the Court Martial to try the Applicant. The logically consequent assignment before the Court is to establish from the papers if the Applicant has demonstrated that should the Court find that there is an *Amnesty* as he has maintained, he would qualify for it. There is further a dimensional issue on the *discriminatory treatment to which the Applicant had in contrast to those in his situation* been relegated to.

The Arguments Advanced for the Parties

[19] The Counsel for the Applicant has in motivating his main prayer for the Court to review the decision of the Minister of Defence maintained that it is empowered to do so through the instrumentality of **S 119 (1) of the Constitution and S 2 (1) of the High Court Act.** He elucidated his position by specifically drawing to its attention that the Applicant is principally seeking for the relief

against the **decision of the Minister of Defence to have exercised the powers vested upon him under S 92 (1) of the Act by convening the Court Martial to preside over the military charges preferred against him by its prosecuting authority.** The judicial intervention has been resorted to upon the reasoning that the Convening Authority has by the issuance of the Convening Order *abused the power, acted in bad faith, unfairly* and *contrary to the public interest.* These negative descriptions were ascribed to the Order on the basis that it had been issued contrary to the *Government Amnesty Policy Pronouncement* through which the Applicant together with the others in his class, had been granted the *amnesty.* His Counsel reiterated that the authorship of the dispensation was the said statement made by the Prime Minister at the *pitso*, the diplomatic interventions made by Minister Mophato Monyake and significantly the letter addressed to the three State Security Chiefs by the same Minister.

[20] The Counsel radiated the impression that the *amnesty* was pronounced by the Coalition Government upon its assumption of the reigns of the State power in June 2012. In the same logic, he brought it to the attention of the Court the contradiction introduced by the Minister of Defence. According to him, this is demonstrated by the issuance of the *Convening Order* by the same Minister who is simultaneously the Prime Minister and in that capacity an administrative head of the Government which had authored the *amnesty* to the people who are in the same category as the Applicant.

[21] On the question of the jurisdiction of the High Court to review the matter, it was argued for the Applicant that the Court is qualified to do so since the statute which creates the Court Martial has not given it the authority to entertain the *interdiction proceedings.* Thus, in the view of the Counsel this Court is competent to hear a case in which the *interdiction relief* is being sought in relation to a case before the Court Martial. The proposition was advanced to persuade the Court to *interdict* the 2nd Respondent from proceeding with the hearing.

[22] In an endeavour to demonstrate that the Court has a judicial authority under **S 119 (2) and S 2 (1) of the High Court Act**[5] to review the subordinate courts proceedings *inter alia* those before the Court Martial, the Counsel referred the Court to the Court of Appeal decisions in which this was acknowledged. The cases are **Makhutla v Lesotho Agricultural Development Bank LAC (1995 – 1999) 115 @ 117 C – 118; Attorney General v Lesotho Preachers Trade Union and Others LAC (1995 – 1999) 119 @ 134 C; Sekoati and Others v President Court Martial and Others LAC (1995 – 1999) 812 @ 830 D.**

[23] The Counsel in interrogating the subject further explained that the relief which the Applicant has prayed for is, by analogy, comparable to the case in which the Court has been asked to review the decision of the Director of Public Prosecutions in relation to his exercise of the powers vested upon him by the Constitution and the Criminal Procedure and Evidence Act 1981. The prominence here is on the jurisdiction of the High Court to

[5]The High Court Act No. 5 of 1978

review the decision made by the authority acting pursuant to the powers entrusted upon him by the apposite legislation.

[24] To illustrate the point, there was further reliance upon **R v Groydon Justices Ex Parte Dean [1993] e All ER 129 (QB) @ p 137 a – b; National Director of Public Prosecutions v Zuma (Mbeki) and Another (intervening) 2009 (4) BCLR 393 (SCA) @ p 405 para 39**.

[25] In traversing the disputations presented for the respondents, it would be logical to start with those which are intrinsically of a legal nature. They have substantially been introduced through the *Supplementary Heads of Arguments* which were the initiative of Adv. B. Sechele who is also an officer of a rank of Captain in the Lesotho Defence Force. The Court had reluctantly accepted his contribution on the understanding that he did not have the right of its audience since he was featuring before it as a Military Officer detailed by the Command to simply assist Adv. Motsieloa. The latter and the Counsel for the Applicant asked the Court to welcome them and to allow him to subsequently motivate them. This was in recognition of the fact that the issues raised were as well foreshadowed in respondents' papers. It is worthwhile to acknowledge that the Court found the Heads to have provided it with a valuable and significant assistance.

[26] The primary point raised in the *Supplementary Heads* was in a nutshell that the Court Martial has a jurisdiction to hear the matter and that as such, the case has been brought before a wrong forum. To illustrate that, he maintained that the Applicant could have competently utilised the **Rule 21 (1) of the Defence Force (Court**

Martial) (Procedure) Rules[6] to challenge the jurisdiction of the Court Martial to try him for the offences in consideration on the basis that he has been granted an *amnesty* in connection with them. Alternatively according to him, he was at large to attain the same purpose through **Rule 23 (1)** which permits him to have raised a *plea in bar of trial* on a similar ground. He submitted that this would have been possible on the strength of the broad definition assigned to the meaning of *amnesty* in the case of **Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others *(Supra).*** In this respect, the Court's attention was drawn specifically to the interpretation attached to the corresponding Rules in the **Rules of Procedure (Army) 1972 governing the United Kingdom' s Forces**[7]**.**

[27] In concluding this part of the presentation, it was submitted that the Applicant had not exhausted the domestic remedies which are provided for within the *milieu* of the Court Martial Justice System prior to resorting to the Court of unlimited jurisdiction and that the latter should in that recognition decline to exercise its review powers in this case.

[28] On a different terrain, the *Supplementary Heads* have addressed the material significance of **S 24 (3) of the Constitution of Lesotho 1993.** This was specifically a response to the Applicant's prayer that his prosecution be declared *unfair, discriminatory and an abuse of process.* This appears at prayer 4 of the Notice of Motion. The Section was introduced to alert the Court that *per* its

[6]Rules No. 24 of 1998.
[7]These have been described as Rules 35 and 36 respectively.

dictation the Applicant who is undisputedly a member of the disciplined force, cannot challenge the *Convening Order* or anything done under the authority of the disciplinary law except where this is being mounted against a violation of the *right of life, freedom from inhuman treatment and freedom from slavery and forced labour.*

[29] On the merits it was counter argued by the Counsel for the Respondents that the Government has not pronounced any *amnesty to all persons who had left the kingdom for being implicated in politically connected offences during the reign of the previous administration.* On the contrary, the picture presented was that the Applicant has miscomprehended the expression made by the Government concerning its desire for all the nationals who had left the Country to return home. The Counsel assigned to the statement the interpretation that it did not contemplate the extension of *amnesty* to them or that they were free from arrests and/or the resultant prosecution.

[30] The Applicant's reliance upon the a copy of the article published in the Informative Newspaper was vigorously attacked from the perspective that it didn't prove that what has been reported therein as having happened, was indeed true. This is the article which presents the Prime Minister to have declared the *amnesty* at the *pitso*. The statement according to the publication extended the *dispensation* to all the Basotho who had for **political or personal reasons** left Lesotho during the previous governments. The Counsel contested the admissibility of the copy on the

technical ground that it amounted to *a double hearsay*[8]. This was ascribed to the fact that its writer had not filed any supportive testimony to authenticate it and demonstrated its authenticity. On another note, it was questioned on the reasoning that it had been taken on board in an endeavour to indicate that the assertion therein is true.

[31] It was maintained that the letter which Minister Monyake had executed to the State Security Heads on the subject of the arrival of the Applicant, was not an unequivocal indication of the existence of the *amnesty policy* as he claims. The correspondence was instead described as what could be termed information to the *trio* about the incidence and an appeal for them to provide the Applicant and his family with security. There was emphasis on the absence of the word *amnesty in the text.* The Applicant was thus, blamed for his misinterpretation of the purpose of the letter.

[32] Towards the conclusion of the arguments raised for the Respondents, it was cautioned that should the Court find that there was an *amnesty,* it would remain imperative for it to further determine if the Applicant has satisfied the Court that he is entitled to it.

[8]This suggests that reliance is made on the article in relation to which its author has not through an affidavit attested to its authenticity and correctness to enable the other party to accordingly react to it so that the Court could judge upon a balanced picture. The article is, in the same vein, blamed for having been tendered with the intention of proving that what is stated therein is true and yet its author has, as it has been stated, not presented his affidavit for its scrutiny.

The Findings and the Decision of the Court

[33] A preliminary assignment before the Court is to resolve the question of its jurisdiction to review the procedural correctness of the decision of the Prime Minister to have sanctioned a *Court Martial Convening Order* for the purpose of trying the Applicant despite his position that he had been granted *the amnesty.* The Court regards it logical to immediately traverse the issue of its competency aside from the *amnesty phenomenon* despite the fact that the two have been presented in such a manner that they are inter linked. It has in this task received guidance from Sections **S 119 (1) of the Constitution read in conjunction with Section 2 (1) of the High Court (Amendment) Act[9].** The former provides:

> There shall be a High Court which shall have **unlimited original jurisdiction** to hear and determine any civil or criminal proceedings and the power to review the decisions or the proceedings of any subordinate or inferior court, **court martial,** tribunal, board, or office exercising judicial or quasi – judicial or public administrative functions under any law... *(emphasis supplied)*

While the latter details:

> The High Court of Lesotho shall continue to exist and shall, as a court of record have –
> (a) unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;
> (b) .....
> (c) In its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation notwithstanding that such a person cannot claim any relief consequential upon the determination.

[34] The jurisprudence around the two sections has been developed in **Makhutla v Lesotho Agricultural Development Bank (LAC) (1995 – 1999) 115 @ 117 C – 118 B; Attorney General v Lesotho Preachers**

[9]High Court (Amendment) Act No. 34 of 1984.

Trade Union and Others LAC (1995 – 1999) 119 @ 134 C; Sekoati and Others v President of the Court Martial and Others LAC (1995 – 1999) 812 830 D. It should suffice to indicate that decisions in these cases acknowledge the authority of the High Court to *inter alia* review the proceedings of the Court Martial, boards and tribunals. Where the Court Martial is not statutorily empowered to grant a specified relief, the High Court would have the jurisdiction over the matter. This would dispense with a compliance with the procedure directed under **S 6 of the High Court Act.**

[35] In the instant case, there is a need to revisit the memory lane that the Applicant is foundationally asking the Court to review the decision of the Prime Minister to issue a Court Martial Convening Order. The Court Martial is not throughout the Act, expressly empowered to review the decision of the Prime Minister to convene it. This cannot in the contextual analysis of this Court, be regarded as being impliedly contemplated in the legislation. It would be illogical to think so since it would be inconceivable that the Court Martial could have such the jurisdiction over the authority that convenes it and besides exercises substantial powers over it.[10] Thus, the argument that the Applicant could obtain *the review relief against the authority who has authored the Convening Order through the* ***plea to jurisdiction and/ or the plea in bar*** provided for under Rules 21 (1) and 23 respectively, is a misplaced view point. In any event, the Court Martial is, analogously to all the subordinate courts a creature of a statute and, therefore, its

[10]The Lesotho Defence Force Act has bestowed upon the Minister of Defence substantial powers during the pre trial, trial and post trial stages of the Court Martial proceedings. The most significant is his authority to confirm its decision or to do otherwise.

jurisdiction is circumscribed by its parent legislation[11]. Jurisdiction is not conferrable by Rules but statutorily.

[36] The Court recognises the Court Martial *Convening Authority* entrusted upon the Minister of Defence to be an integral procedural part of the Military Justice System created under the Act. The only distinction is that the Minister performs an executive and preliminary role for this justice system to operate. Thus, his decisions are *in tandem* with **S 119 (1) of the Constitution and S 2 (1) of the High Court (Amendment**) reviewable. It would amount to a dereliction of a constitutional duty if the Court would adopt a position that it had no jurisdiction in the matter and this would create a dangerous precedence. In any event, this Court has an inherent constitutional obligation to check and balance a possible abuse of power by the Executive.

[37] Understandably, if a member of the disciplined forces has come before this Court lamenting that the Minister of Defence has in the execution of the statutory powers vested upon him, acted contrary to its procedural dictates, it should review the procedural correctness of the act. This stands especially in the absence of any alternatively provided mechanism for relief. Otherwise, an aggrieved soldier would be left without a remedy.

[38] An analogous review intervention by this Court was demonstrated in **Mda and Another vs Director of Public Prosecutions (DPP) and Another CRI/T/15/2004(unreported**). Here, it exercised its

[11]The Lesotho Defence Force Act No. 4 of 1996

review powers over the question of the correctness of the statutory powers entrusted upon the DPP and rooted in the Constitution. [12] Where it was held:

> It is crystal clear, in any opinion labelled on the passages I have underlined that any decision of the Director of Public Prosecutions in the exercise of his functions is reviewable.

[39] On the same subject, the Court disagrees with the contention raised for the Respondents that **S24 (3) of the Constitution** prohibits the Applicant from questioning the lawfulness of the decision of the Minister to convene the forum despite what the Applicant perceives as the existing *amnesty* which covers him as well. The Section details that:

> In relation to any person who is a member of disciplined force raised under a law in Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this chapter other than sections 5, 8 and 9.

[40] The chapter referred to under **S 24 (3) of the Constitution** is the one which presents a catalogue of *human rights and fundamental freedoms*. It clearly deprives the soldiers from challenging any compliance of with them while being subjected under the disciplinary law. The provided exceptions would be where that is being mounted against *right to life, freedom from inhuman treatment and freedom from slavery and forced labour.*[13] The challenge against the Minister's use of authority falls outside the purview of the Section and this reinforces the position of the Court that it has a juridical competency to review the decision.

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[12]These powers are entrusted upon the office under S 5 of the Criminal Procedure & Evidence Act 1981. In the background, by the Constitution of Lesotho 1993).

[13]Sections 5,8 and 9 of the Constitution respectively.

[41] Whilst the Court has disagreed with the Respondent that **S 24 (3) of the Constitution** does not have the effect of ousting its jurisdiction to review the exercise of the Minister's authority, it however, acknowledges the fact that it disqualifies the Applicant from asking it to find that he has been discriminated against in comparison to the others with whom he claims that he is similarly situated. This relief has been sought for under prayer 4 in the Notice of Motion. Here, the Applicant is specifically seeking for a pronouncement by the Court that his prosecution is *unfair, discriminatory and an abuse of the process.* The reason is that this falls squarely within the constitutionally excluded bases upon which a person who is a subject of the disciplinary law, can mount a judicial challenge.

[42] After the ascertainment of the jurisdictional issue and its parameters, the next logical assignment would be to ascertain the existence or otherwise of the *amnesty* in consideration. The Court has in this endeavour relied heavily upon the definition referred to by the Counsel for the Applicant and subscribed to by his counterpart. This was authored in **(AZAPO) & Others v President of the Republic of South Africa & Others** (supra). This was in his enterprise to persuade the Court to find that the dispensation is operational and that the man should benefit from it. The conceptualisation unfolds:

> ..... one of the meanings of amnesty ..... is a general overlooking or pardon of past offences by the ruling authority and ..... a deliberate overlooking of the offence.....
> ..... the word has no inherent fixed technical meaning. Its origin is to be found from the Greek concept of *amnesia* and it indicates

> .....an*act of oblivion.* The degree of *oblivion or obliteration* must depend on the circumstances. It can, in certain circumstances be extended also to civil liability.....

[43] The Court in interfacing the above meaning with the facts of the case, determines that for the Applicant to succeed, he would have to prove on the balance of probabilities, firstly that the Prime Minister had on the stated day and place of the *pitso,* made *an amnesty* pronouncement. Secondly, he would on the same scale have to show that the letter addressed to the three security chiefs by Minister Monyake and the circumstances surrounding the incidence, tantamounted to *an amnesty* or could objectively be interpreted as such in favour of all the citizens who had fled the Country for political or personal reasons. *Lastly*, he would have to show that he personally qualifies without any exception to be accorded that political benevolence.

[44] In addressing the controversy around the Prime Minister's *amnesty* speech at the *pitso*, the Court realises that the Applicant has relied upon a newspaper cutting. It observes that the publication has not been supported by the affidavit of its author or by that of an independent person who was at the scene at the material moment. These were in the view of the Court indispensable to attest to the authenticity and the correctness of the article. Resultantly, the article remains hearsay especially when it has been tendered to prove that it is true that the Prime Minister had extended the *amnesty gesture* to the people mentioned including the Applicant in particular. Thus, the Court

decides that the Applicant has failed to prove that the Prime Minister had declared the *amnesty.*

[45] As it concerns the letter written to the security chiefs by Minister Monyake, his conduct and the surrounding circumstances, the Court without any hesitation finds that **they objectively radiate an impression that there is a Government Policy that all the people who were forced to go into exile on account of the political turmoils during the past administrations have been given the *amnesty.*** The fact that others had already returned home and had not been prosecuted reinforces the perception.

[46] The Court has found no need to be legalistic about the content of the Minister's correspondence by strictly looking for the word *amnesty* therein. It has determined that it is sufficient for its content to be interpretable as such. And, *amnesty* as a concept is held to be readable from its text. The understanding of the Court is that it transcended throughout all the citizens regardless of their civilian or military standing. A reasonable minded person would get the same impression. The Minister's conduct excludes any reasonable doubt that this was so.

[47] The attitude demonstrated by Minister Monyake has rendered it inescapable for the Court to consider the Administrative Law concept of *Ministerial Responsibility*[14]. This

[14]According to Prof. Brazier Rodney 2001 Constitutional Practice : The Foundations of British Government, 3rd ed. p144. The doctrine requires all ministers to accept a cabinet decision or dissent from them privately while remaining loyal to them publicly, or resign unless collective responsibility is waived by the cabinet on any given occasion. If a Minister doesn't resign over an issue of policy or procedure , he will be collectively responsible for it..... **It would be no defence or excuse for him to say that the decision was taken without his knowledge ..... The doctrine binds all members of the Government from the lowest to the highest.....(emphasis supplied).**

signifies the collectiveness or the oneness of the Government and that as such, the ministers of the Crown share a united responsibility over the decisions and the actions of one another. During the administration under the late Dr.Leabua Jonathan the ministers' oneness was rhetorically described as a *Khokanyana ea Phiri* (*the united sinews of a hyena).* In the final analysis, this indicates that the Prime Minister despite his *primus inter pares status* in relation to the rest of the ministers is bound by a policy pronouncement or representation made by a Minister. This brings home the position that the representations made to the Applicant by the Minister, has a binding effect on all the ministers including the Prime Minister. Every Minister is a face of the Government of the day.

[48] The last and the more determining task is to examine if *ex facie* the Applicant's papers before the Court, he has satisfied it that he is entitled to the identified *amnesty.* It has already been stated earlier in the judgement that the letter addressed to the three security commanders by Minister Monyake and his conduct around same, represents a foundation of the identified *amnesty.* Nevertheless, the Court remains mindful that the Applicant has from the beginning proceeded from some implied key premise that he was one of the dissidents who went into exile during the 1998 political instability due to his politically related activities at the time. It has to be illuminated that this is interpreted contextually from the circumstances within which he describes his escape into the Republic of South Africa. All that he has clearly articulated in a nutshell is that whilst he was studying at the National University

of Lesotho, he learned about the military intervention by the SADC forces, the escape of some senior officers to Ladybrand in South Africa, a call by those alien forces for the members of the L D F to report themselves at the Makoanyane base and that he then left his studies for exile as he feared for his life.

[49] In the understanding of the Court, the Applicant should exhibit that his exile is somehow connected with his clearly described political activity which could amount to a criminal or civil or a military offence. It was incumbent upon him to have unequivocally taken the Court into confidence by disclosing in few words the politically inspired offences which he had committed during the 1998 political turmoil. He should not as he has done, left that for a conjectural judgement since his case is logically destined to stand or fall on that basic fact.

[50] The paradox is that he himself has averred under oath that despite a recommendation by the Leon Commission that he should be charged with *sedition or public violence in the alternative,* he never had any military or civilian charges preferred against him throughout his absence from the Kingdom. The picture which has been presented is that of a man with a clean record of life with no criminal or military offences which could, in any manner whatsoever, warrant him the *amnesty*. His material explanation is so far clear that he had left the jurisdiction for the fear of his life following the intervention of the SADC military intervention, the escape of the senior officers to the RSA and the call for the soldiers to report themselves at the Makoanyane base. There is no *scintilla*

of any politically oriented reason for his self exile. Had the article on the alleged *amnesty speech* by the Prime Minister passed the admissibility test and accepted as being a reliable testimony, the Court would have been inclined to interpret the words "*or for personal reasons"* therein, in favour of the Applicant. This would have justified a conclusion that he ran away for personal reason(s) and, therefore covered under that description apart from the political account.

[51] On an *obiter dictum* note, the Court in good faith holds a view that it would be strategic for the respondents to consider an alternative road map towards the Applicant. The wisdom behind the suggestion is for the Government to portray its unity and consistency in policy making and implementation.

[52] It would be wise for the Government to create an element of certainty and its commitment whenever the amnesty policy has been promulgated. In future, there could be a pressing challenge for national unity to be achieved through that process.

[53] In the premises, and notwithstanding the *obiter dictum,* the Court summarises its decision as follows:

1. It has a jurisdiction to review the decision of the Minister of Defence to issue a Court Martial Convening Order as it has done;

2. It has no jurisdiction under S 24 (3) of the Constitution to declare that the prosecution of the Applicant is *unfair* and *discriminatory*.
3. The Applicant has satisfactorily on the balance of probabilities proven that there has been *a Government amnesty policy pronouncement* by Minister Mophato Monyake which binds the whole ministership of the Crown including the Prime Minister collectively;
4. The *amnesty* was extended to all the people who went into exile as a result of the offences which they had each or collectively committed during the past political administrations;
5. The Applicant has, nevertheless, failed to prove that he qualifies for the *amnesty* since he hasn't disclosed any offence which could be *criminal*, *civil* or *military* that he has individually or collectively committed in pursuit of the 1998 political campaign;
6. It declines to interdict the 2nd Respondent from proceeding with the prosecution against the Applicant before the Court Martial and to direct that he be released from the military detention;
7. There is no order on costs.

E.F.M. MAKARA
JUDGE

For the Applicant : Adv. S.P. Sakoane KC Instructed by Messrs V.M. Mokaloba& Co.

For the Respondent	**:**	**Adv. R. Motsieloa assisted Adv. B. Sechele (from the LDF Legal Unit) Instructed by the Attorney General's Office.**