

CONSOLIDATED
CIV/APNS/189/194/198/199/203/2015

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MATLHOKOMELO JOBO	APPLICANT
NTSOAKI MOLEFI	APPLICANT
HAPE KOALI	APPLICANT
MALEHLOHONOLO MAKARA	APPLICANT
MAMOJELA EVODIA MOKHOBO	APPLICANT
MAMATEBELE SEMAKALE	APPLICANT

vs

COMMANDER - LESOTHO DEFENCE FORCE	1 ST RESPONDENT
DIRECTOR –MILITARY INTELLIGENCE – LDF	2 ND RESPONDENT
MINISTER OF DEFENCE	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT

Summary

***Arrest – Writ of Habeas Corpus (interdictum de homine libero exhibendo). –
Serving soldiers arrested under section 86 of the Lesotho Defence Force
(LDF) Act No.4 1996 on charges under section 48 and 49 of the Act –
Whether such arrests unlawful and whether amount to kidnapping or
abduction.***

*Whether non-compliance with formalities and procedures under **section 87 (1) and (2) of the LDF Act** invalidates arrest and continued detention. Dispute of fact whether soldiers kidnapped or arrested.*

***Held:** Where serving soldiers are arrested in terms of **section 86** of the **LDF Act**, regardless of their rank, no one has the right or authority to order such soldier to be tortured or to be subjected to inhuman or degrading punishment or other treatment*

***Held:** Where serving soldiers are arrested in terms of the provisions of the **Lesotho Defence Force Act**, such arrests – despite their **modus operandi** in execution and despite non-compliance with the formal requirements of **section 87** of the Act – do not amount to kidnapping.*

***Held:** Prayers for release founded on kidnapping cannot in the circumstances succeed where lawful arrest is proven. In law “**kidnap**” and “**lawful arrest**” have different meanings and connotations that are exclusive to each other.*

***Held:** Prayers for release of serving soldiers founded on allegations of “**kidnapping**” may be fatally flawed if to the answering affidavit is attached a valid “**holding charge**” under **section 48 and 49 LDF Act**, because then there exists “**some legal foundation**” antithetical to kidnapping.*

***Held:** The Courts of law in Lesotho will forever and without hesitation deprecate in strongest possible terms and as totally unacceptable any torturous, callous and inhuman treatment meted to any arrested serving soldier.*

***Held:** When produced before court upon writ of **habeas corpus**, arrested serving soldiers should have any handcuffs and shackles removed.*

Held: All formalities and procedures required under the LDF Act, Regulations and other Rules must be strictly complied by all Commanding Officers of all ranks.

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

DATE OF JUDGMENT: 18TH JUNE 2015

Annotations

Statutes

- *Constitution of Lesotho 1993*
- *Lesotho Defence Force Act 1996*
- *Lesotho Defence Force Regulations 1998*

Cases

- *Bulane v Commander LDF – (1995-2000) 686*
- *Rantuba v Commander LDF*
- *Maketsi & Moiloa v Compol – CIV/APN/550/2011*
- *Sello v Commissioner of Police*
- *Kader – 1991 (1) SA 41*

Cur adv vult

Postea 18 June 2015

Peete J.:

The Background

[1] The five applicants are the wives of serving members of the *Lesotho Defence Force* who have recently been taken into military custody on the following dates:-

- (i) *Lance Corporal Jobo* : 14th May 2015
- (ii) *Seaargent Motlatsi Mokhobo* : 15th May 2015
- (iii) *Lance Corporal Pitso William Molefi* : 18th May 2015
- (iv) *Lance Corporal Lineo Simon Koali* : 21st May 2015
- (v) *Lance Corporal Jane Makara* : 29th May 2015

They have been serving soldiers in the *Lesotho Defence Force* each for differing periods. They are presently at Maximum security Wing of the Central Prison. They are all citizens of the Kingdom of Lesotho.

[2] Because of the ambush – like *modus operandi* upon their arrest and a total silence about their then immediate whereabouts, their wives genuinely believed that their husbands had been kidnapped – hence the use of the word “*kidnap*” and “*abduct*” in the prayers of the *Notices of Motion* and in their respective founding affidavits; and even in their replying affidavits.

[3] Urgent *habeas corpus* applications were made by the applicants having on their own account briefed different attorneys. These applications were moved on an urgent basis before “*Judges on Duty*” on the following dates:-

1. *Jobo – CIV/APN/194/2015* - *15th May 2015*
2. *Molefi – CIV/APN/194/2015* - *20th May 2015*
3. *Koali – CIV/APN/189/2015* - *26th May 2015*
4. *Makara – CIV/APN/199/2015* - *27th May 2015*
5. *Mokhobo - CIV/APN/203/2015* - *27th May 2015*
6. *Semakale* - *29th May 2015*

- [4] A feature common to all prayers in these applications is that it has been alleged that the soldiers had been “*kidnapped*”, “*abducted*” or “*captured*”. This is very significant because it foundationally affects the relief which this Court can give. More about this later.

Consolidation of Application

- [5] All six applications *in casu* having been consolidated at the instance of their counsel it is not necessary to discuss each application in any detailed fashion save to state that the detained soldiers were produced before Court on different dates and all were in leg-shackles and had their hands handcuffed and were being escorted by masked and heavily armed escort personnel. On being asked in open Court, each of the detainees complained of having been subjected to certain cruel treatments and most showed the Court, fresh and deep cuts and bruises on their wrists probably caused by tightened handcuffs.
- [6] Though not sitting as Court Martial, the Court *mero motu* orders that if any cruel or inhuman treatment continues to be perpetrated upon been

meted to these detained soldiers after their detention, that such cruel or inhuman treatment should cease forthwith as being unlawful and clearly in violation of the provision of *Section 8 (1)* of the **Constitution**. It reads:-

“8. (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

This freedom is universally recognized by all civilised nations of the world as an **“absolute human right”** – a right that has not even been attenuated by *section 24* of the **Constitution of Lesotho** which in turn reads:-

“24. (3) In relation to any person who is a member of a disciplined force raised under a law of 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 section 5,8 and 9.” (my underline).

[7] Today, we live in a democratic Lesotho and it is imperative that all institutions and organs of state – without exception – must discharge their functions according to the Constitution, to the law and in a civilized manner; Brutality, cruelty or sadism cannot be countenanced by this Court because all such are evil acts against our human nature as Basotho and are acts that violate even the will of God. Foot shackles – this Court observed – indeed remind one of the days of slavery when men and women in West Africa were tightly shackled and shipped across the Atlantic Ocean to North America. During some of these perilous journeys, some slaves were often thrown over board to enlighten the ships during ocean storms! Slavery in whatever form or shape is therefore

totally outlawed on absolute terms by *section 9* of the **Constitution of Lesotho**. I repeat my order that the Minister of Defence, Commander of LDF and Director of Military Intelligence stop forthwith.

- [8] Sitting through all the habeas corpus proceedings, the Court has strongly deprecated and bemoaned the manner in which the detainees are being publicly brought to court in shackles and chains and handcuffs. Whilst the Lesotho Defence Force authorities have – and the Court thanks them for this – dutifully and correctly complied with and respect *habeas corpus* orders, all detainees regardless of rank should be treated and escorted in a humane and civilized manner that accords with human dignity and respect. This is not negotiable because its repetition will tarnish the reputation of Lesotho in the international landscape and perhaps irreversibly so.

- [9] After all detained soldiers had been produced before court, the respondents were afforded opportunity to file their answering affidavits along with their respective Heads of Argument. The Court is fully conscious of the extreme urgency which these matters involve.

Consolidation of Applications

- [10] Because of the commonality of the relief sought and of the charges faced by the several detainees hitherto produced before Court, both counsel agreed that the Court consolidate the five applications for the sake of their expeditious finalization and for avoidance of risking conflicting orders; this consolidated was acceded to by the Court. The legal issues identified

by all counsel for the five applicants were focused on one point i.e. whether the arrests detentions of the detainees were unlawful in that important provisions of the *Lesotho Defence Force (LDF) Act No.4 of 1996* and the *LDF Regulations 1998* were not complied with, and the applicants maintained throughout that their husbands had been “kidnapped” this stance was stuck to despite attachment of the “*Holding charges*”¹ to the answering affidavits of Respondents.

The Constitution of Lesotho 1993 and the Law

[11] ***Section 146*** of the ***Constitution of Lesotho 1993*** a(as amended) reads:-

“Defence Force

146. (1) *There shall be a Defence Force for the maintenance or internal security and the defence of Lesotho.*
- (2) *The command of the Defence Force shall be vested in the Commander and, subject to any direction of the Defence Commission, the Commander shall be responsible for the administration and discipline of the Defence Force.*
- (3) *The power to appoint a person to hold or act in the office of Commander of the Defence Force and the power to remove him from that office shall vest in the Defence Commission.”*

[12] ***Section 4*** of the ***Lesotho Defence Force Act No.4 of 1996*** reads:-

“Composition and Maintenance of the Defence Force

4. (1) *There shall be maintained in Lesotho a force, not exceeding such strength as may be determined from time to time, by the Minister, to be known as the Lesotho Defence Force, which shall consist of –*

¹ These charges were served on detainees between 20th and 28th May 2015.

- (a) *the regular force;*
- (b) *the reserve force, and*
- (c) *the volunteer element.*

(2) *The Minister may,*

- (a) *establish such units of the Defence Force as he may deem necessary;*
- (b) *determine the style and designation of any unit; and*
- (c) *disband any unit.*

Employment of the Defence Force

5. *The Defence Force shall be employed –*

- (a) *in the defence of Lesotho;*
- (b) *in the prevention or suppression of*
 - (i) *terrorism;*
 - (ii) *internal disorder;*
- (c) *the maintenance of essential services including maintenance of law and order and prevention of crime,*

and such other duties as may, from time to time, be determined by the Minister.”

[13] Under the democratic **Constitution of Lesotho**, the Lesotho Defence Force is therefore an important organ created and established under the Constitution to serve important functions of protecting the lives and property of the people of Lesotho. As an organ, it also has a duty to function according to the Lesotho Defence Force Act, Regulations and

other laws relating to command, discipline and court-martial processes. Above all “*rule of law*” and due process must be upheld at all times. Rule of law means the constitution and the law is supreme and must be respected by all and that all law must be applied fairly.

[14] *Section 12 (1)* of the *Lesotho Defence Force Act* reads:-

“Commander of the Defence Force

12. (1) *The King, acting in accordance with the advice of the Prime Minister shall –*

(a) *appoint an officer to be the Commander of the Defence Force in whom the command and inspection of the Defence shall vest, and*

(b) *determined the rank and title of the Commander of the Defence Force.”*

[15] These powers and functions vested by the Constitution and by the LDF Act are very important indeed and in any army, command and discipline are pivotal pillars of the military institution. **Part VII** of the **LDF Act** lists “**military offences**” and punishments (*Sections 41 – 85*). *Section 86* – provides for the arrest and *section 87* deals with post arrest formalities. **The LDF Act** and **LDF Regulations** provide for court-martial process.

[16] Mutiny is one of the most serious offences listed under Part VII of the **LDF Act**. It is defined thus:-

“Mutiny

48. (1) *Any person subject to this Act who –*

- (a) *takes part in a mutiny involving the use of violence or the threat of the use of violence, or having as its object or one of its objects the refusal or avoidance of any duty or service against, or in connection with operations against, the enemy, or the impending of the performance of any such duty or service; or*
 - (b) *incites any person subject to this Act to take part in a mutiny, whether actual or intended,*
- commits an offence and shall, on conviction be liable to suffer **death**.*”

Failure to suppress mutiny

49. *Any person subject to this Act who, knowing that a mutiny is taking place or is intended –*
- (a) *fails to use utmost endeavours to suppress or prevent it; or*
 - (b) *fails to report without delay that the mutiny is taking place or is intended,*
- commits an offence and shall, on conviction be liable –*
- (i) *if the offence was committed with intent to assist the enemy, to suffer **death**;*
 - (ii) *in any other case, to imprisonment for a term not exceeding 10 years.*”

[17] Not only are these statutory sections important because they create military offences but mainly because their compliance is strictly required because any statutory provisions that impinge on rights of soldiers as “*persons*” must be strictly interpreted and compliance thereto insisted –

notwithstanding the provisions of *section 24* of the *Constitution of Lesotho* with its limiting effect on the Bill of Rights in matters of military discipline. Again *Section 24* of the Constitution reads:-

“24. (3) *In relation to any person who is a member of a disciplined force raised under a law of 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.*” (underlining mine)

[18] It therefore stands to reason that the provisions of the *Lesotho Defence Force Act 1996* and the **Regulations** must be strictly interpreted and complied with in so far as they impinge on the rights of soldiers under the disciplinary law. Indeed the *LDF Act* is also a fine piece of legislation, well drafted and one which embodies principles of natural justice fairness and justice. For example, the Court martial provisions embody procedures fairness and due process throughout. In the main *section 8 (1)* and *(2)* accord with natural justice that every person who is lawfully arrested must be informed of the reason for his arrest.

[19] As *Adv Nthotho* aptly quipped “...if the provisions of the *LDF Act* and *Regulations* had been strictly complied with, perhaps there would have been no need for habeas corpus applications...” I agree whole heartedly.

Law on Military Arrest

[20] As already alluded to, any serving member of the LDF who commits any military offence or offences listed under the *LDF Act* is “liable to be

arrested” in accordance with the provisions and procedures of the *LDF Act*. For example *section 86* reads:-

Arrests

“(1) *Any person subject to this Act found committing an offence against any provision of this Act or reasonably suspected of having committed any such offence may be arrested and taken into military custody in accordance with the provisions of this section.*

(2) *An officer may be arrested only by an officer of a superior rank or if engaged in a quarrel or disorder, by an officer of any rank.*

(3)”

Upon subscription into military service every soldiers take all oath to obey

the Constitution, the Military law and lawful command.

[21] *Section 87 (1) and (2)* further state:-

“87. (1) *A superior officer or a commanding officer or officer commanding may issue a **remand warrant for the custody** in any detention barracks or civil prison of any member awaiting trial for an offence in terms of this Act.*

(2) *The officer or soldier or other person who commits a person who commits a person into custody under this section **must deliver at the time of committal or as soon as practicable and in any case within 24 hours**, to the officer or soldier into whose custody that person is committed, **a signed written report why the person so committed is to be held in custody.***” (my underline)

[22] Before any court-martial proceeding can be instituted, it is important that regardless of the nature or seriousness of the military offence committed these provisions must always strictly complied with because the “*remand warrant*” and a signed written report under *section 87 (1) and (2)* are in

my view “...a *foundation of legality...*” for military arrest, and subsequent detention upon a clear charge under the Act. “*That is the essence of the rule of law!*”

- [23] Upon being lawfully arrested, a soldier must be told **why** he is being arrested and detained lest allegations of illegal kidnapping come to the fore or at worst resisting to the arrest. Indeed, a detained soldier “**must**” be told the reason for his detention “*within 24 hours.*” Thus detaining a soldier indefinitely and *incommunicando* is not sanctioned under the LDF Act. It is the soldier’s right even to be furnished with or be shown a **remand warrant** and is entitled to see a “**signed written report**” made by a unit commanding officer as provided under *section 87* of the Act. To deprive him these can amount to gross injustice and unlawful regardless of the heinousness of the military offence he has committed!

Military Regulations 1998

- [24] Subsequent to arrest under *Section 86* of the Act, a remand warrant under *section 87 (1)* thereof and whether the arrest and detention is to be closed or open must be justified by the circumstances of the case and not be ordered for any sinister punitive purpose incompatible to *Regulation 9* made under the **LDF Act**.

- [25] ***The Court of Appeal of Lesotho*** in the case of ***Bulane v Commander – LDF (1995-90) LAC 686*** is a ***classicus locus***. The Full Court laid down the following guiding principles:

- (1) *That although the Court will not intervene in matters of administration or discipline in the LDF, where the provisions of the LDF Act and Regulations have been “flouted” and not complied with the court can intervene on an application for review to determine whether the military authorities have complied with the law or procedural requirements.*
- (2) *In passing, the Court should explain that judicial review of the court martial processes should never be misunderstood as improper **interference by courts in matters military or matters in the executive domain** – because all organs and institutions must operate under the Constitution and under relevant law, Regulations and Rules.*
- (3) *As regards a soldier’s right to legal advice and to visitation by spouse and family, the inquiry is not whether such rights are permitted by LDF Act but whether the Act or Regulations attenuates (prohibit) such right.²*

[26] Upon the Commander and other commanding officers, the Constitution of Lesotho and the LDF Act have reposed certain powers and functions, these must be exercised and should never be flouted or sidelined for spurious expediency. Public power must always be exercised for the public and not for personal or sectoral interest.

[27] From the time immemorial, there has existed a *plethora* of decided cases and of jurisprudence relating to arrest under common law and under statute. In law, arrest has principle purpose: to subjugate and bring a person who has allegedly committed a crime in order to appear before court or tribunal and there to answer charges under common law or under statute. A person to be arrested is not to be tortured or assaulted. A person effecting a military arrest must be authorised under *LDF Act (section 86)*. All formalities under law and statute strictly must be complied with. Post-

² *Rantuba supra para*

arrest, all detention, remand procedures must also be strictly observed because all such acts and decisions likely to impinge on the liberties of the detainees as soldiers; all must be sanctioned by law. That is the essence of “*the rule of law!*”

[28] In all the five cases, non-compliance with *section 87 (1)* of the **LDF Act** occurred under different circumstances in that seemingly no “*Remand warrants*” were ever issued justifying their detention in military custody; non-compliance with *section 87 (2)* of the Act occurred in that seemingly no “*signed Written Reports*” were ever made “*within 24 hours*” in all cases regarding the reason why each detainee was to be detained in military custody. Times frames as set down in the Regulations were not complied

With despite the mandatory provisions of the law and of the Regulations. The Court should emphasise that compliance with military rules and regulations ensures the rule of law, fairness and justice. Malice arbitrariness are abuse power are thereby excluded.

Legality of arrests and detentions

[29] Where the legality of the arrests or detentions is questioned as in this consolidated case, the evidential burden is on the respondent to prove that the arrest of the each detainee was lawful under the Act³. “*holding charge...*” have been attached to the answering affidavits of **Major General Motšo-motšo** in which it is alleged that each detainee had plotted with others to commit acts of mutiny in the LDF in contravention of

³ Mamokhele Mohatla v Commissioner of Police & 2 others – C of A No.6 of 1983.

sections 48 and 49 of the Act. This redeems or vindicates the process from otherwise being classified as a kidnap and not an arrest.

[30] The Court concludes therefore having regard to the circumstances under which and the way in which the detainees were arrested for interrogation and despite the non-compliance with formalities such as Remand Warrant provision and for Written Report, that these non-compliances *per se* do not render the arrest illegal. All arrests were executed under *section 86* of the LDF Act for purpose of investigation of offences under *section 48 and 49* of the **LDF Act**. This Court is not sitting as a Court-Martial Tribunal and it is not going to inquire fully into the merits and veracity of the mutiny charges. Of course, it would do so if the court is sitting as a review court – which is not the case.

[31] The Court is not convinced that the detainees were “*kidnapped*” or “*captured*” or “*abducted*” as alleged by the applicants in their notice of motion prayers. ***Kidnapping*** is itself a serious crime⁴ under our **Penal Code**⁵ or it is a term used colloquially to mean taking by surprise and by force into detention for a sinister and unlawful purpose. The answering papers show that what occurred not kidnappings but arrests without warrant or notice under *section 86* of the **LDF Act**.

[32] The production of detainees before this Court on different dates bears testimony to a raw fact that the detainees had not been kidnapped but had been arrested under 86 albeit by surprise and without notice. If they had

⁴ **Maketsi v Compol** (see para 54 *infra*)

⁵ See section 47 of the Code.

been kidnapped, why then did respondents produce them? By no means, this does not mean that this Court condones the brash manner of their arrests or the deplorable or ungodly treatment seemingly meted to them in detention and the flagrant flouting of the **LDF Act** and the **Regulations**.

[33] It is rather unfortunate that the prayers in *habeas corpus* notices of motion are couched in sensational terms “*kidnap*”, “*capture*” “*adduct*” which words have their own meanings and connotations and which by no stretch of imagination or semantics or ingenuity can be taken to mean “*arrest*”. Persistent usage of words “*kidnap*”, “*capture*”, “*abduction*” affected adversely the nature of the relief which this Court can grant; and in principle, the Court cannot grant relief not sought but as only couched in the papers.

[34] After receiving answering papers explaining that the soldiers had not been kidnapped, or captured or abducted but had been arrested in terms of *section 86* of the **LDF Act** for commission of offences under *section 48* and *49* of the **LDF Act**, the applicant’s counsel should have realised or recognised that a material dispute of fact existed and that the respondent’s version would hold the sway.

Holding charges – effect of

[35] The holding Charge Sheets attached to the answering affidavits and though belatedly communicated to the detained soldiers and not within 24 hours as required by *section 87 (2)* of the Act, show that the soldiers were not being kidnapped or abducted but were being arrested under *section 86*

and it is clear that this constitutes “*some lawful justification*” as described by **Wessels J.** in *Principal Immigration Officer and Minister of Interior vs Naraysamy 1916 TPD 274 at 270*⁶. Though seemingly and roughly executed and highhanded, the arrests were not illegal *per se*. That however is a legal issue for the Court-Martial trial.

[36] As they stand, the prayers which clearly state that the detained soldiers should be released forthwith upon a sole ground that they have been unlawfully kidnapped or abducted or captured cannot be granted because valid “*holding charge*” under *sections 48 and 49* of the **LDF Act**, have been belatedly annexed to the answering affidavit .

[37] Furthermore, the non-compliance with or flouting of the formalities and procedural requirements under *section 87(1) and (2) – remand warrant* and “*24 hours rule*” and under *Regulations 9* of the *Act* do not render the original arrest illegal. For example, a private person cannot ordinary be arrested by a soldier; such arrest may be illegal *in toto*. Of course, police have powers of arrest and can seek assistance of soldiers if circumstances so require.

[38] The sudden operation and melodramatic and large scale *modus operandi* of the apprehension of the soldiers were unprecedented in Lesotho and ambush-like arrests seemed as though the soldiers were being *kidnapped*.

⁶ *Kader* – 1991 (1) SA 41

[39] In this case, the provisions of *section 6* of the **Constitution of Lesotho** (*right to liberty*) is excluded by *section 24* of the **Constitution**; and there was however *prima facie* proof that the arrest and detention were lawful and it has not been shown that they were unlawfully kidnapped or abducted because their arrest though so highhanded and forcibly done, was executed lawfully under the **LDF Act** – merits/demerits of the alleged mutiny aside!

[40] The Court repeats to categorically declare that any acts of violence being perpetrated upon these soldiers by whomsoever for whatever reason are *per se* unlawful and totally unconstitutional. The Court has no hesitation to deprecate in strongest possibly terms. Civil remedies can be claimed civil courts by the victims.

[41] It must be made clear to those in command that the **Lesotho Defence Force**, an important organ created by the **Constitution of Lesotho** is not at all immune from operations of constitution, of the LDF Act and of the rule of law because Lesotho is not a military state but a democratic Kingdom and a member of comity of nations of the world. Certain minimum standards of civility apply universally – no one can exercise military power to cause torture or inhuman treatment in or out of the barracks. This can bring in the International Criminal Court.

[42] Above all else, all such gross acts of brutality and inhuman treatment and abuse during military detention tarnish the reputation of the Lesotho Defence Force and of Kingdom of Lesotho internationally, continentally and on the sub-continent sooner or later turning it into a pariah state

shunned by all right-minded people. The damages that can be done may be irreversible with drastic consequences. Lesotho exists in a global village.

[43] Procedural formalities laid down in the **LDF Act** – an Act of Parliament of Lesotho – must always be complied with notwithstanding the pressing exigencies of the situation and *modus operandi* necessary due to demanding circumstances of each case.

[44] The legality of the detention of the soldiers could have been challenged not as kidnappings but as illegal arrests because formal requirements under *section 87 (1) and (2)* had been grossly flouted, and this flouting being clear to all observe. Provisions of *section 87 (1) and (2)* were not complied with – no remand warrant or signed written report were attached even to the answering affidavit.

[45] *Section 6* of the **Constitution of Lesotho** legally speaking is not helpful to applicants' case because *section 24* of the very **Constitution of Lesotho** excludes its operation in matters of military discipline and the legal formalities provided in the LDF Act and Regulations.

[46] In all the applications as consolidated and looked at holistically, the following facts are common and clear that:-

(1) *the husbands of the applicants were all serving members of the*

Lesotho Defence Force established under section 146 of the Constitution; and that

- (2) at different times and places, some of the serving soldiers (husbands of Applicants) were arrested under circumstances as if they were being kidnapped; and that*
- (3) the arrests of the serving soldiers was executed under the provisions of section 86 of the LDF Act; and that*
- (4) the investigation were for military offences under section 48 and 49 of the LDF Act; and that*
- (5) despite clear provisions of section 87 (1) and (2) of the LDF Act regarding remand warrant, 24 hour rule regarding communication of charges and of **Written Reports**, these were not complied with or were disregarded; and that*
- (6) during their military custody, the detainees were handcuffed and their ankles were in chained; and that*
- (7) all detainees complained to the Court of maltreatment cuts on the wrists and of body pains and unhealthy conditions; and that*
- (8) court martials have not been instituted and the court was informed court- martials must be instituted with 42 days. This must be complied without fail.*

[47] Legality of the arrests is being strongly being challenged by **Adv Nthotho** and **Adm Lephuthing** and **Adv Phoofole KC** as being unlawful kidnapping and that these arrests and detentions and were unsanctioned under LDF Act; secondly, that if they were arrests, provisions of *section 87 (1) and (2)* had been so flagrantly flouted by the LDF authorities and the detainees and all have been so brutalised that these cried and called for their release of the detainees from military custody.

[48] Under common law, a legal arrest is an act of causing of person who has committed an offence punishable under law to be detained till he appears before a court or a tribunal to face trial. A person arresting must exercise power vested in him by law. A person arrested must be shown to have committed a punishable offence or there should be reasonable belief that he has or is about to commit such act. No punishment whatsoever can be inflicted upon the arrested soldier.

[49] A legal arrest is always founded or justified upon the commission of an offence. The commission of an offence is a “*sine qua non*” of a lawful arrest. Despite the restrictive provisions of *section 24* of the Constitution upon their rights, soldiers in the LDF should enjoy the right no be subject to cruel and inhuman treatment. This right is not negotiable.⁷

[50] On the otherhand, a kidnapped person has committed no offence and it is the kidnapper who commits a crime of kidnapping for which he can or should be arrested. A kidnapper is a criminal who should be arrest to for his evil and criminal acts.

[51] The applicants allege their husbands have been kidnapped despite a formal “*holding charges*” being attached to the answering affidavits or being communicated to the detainees within 24 hours of their arrest. I make no comment about the wisdom of this relentless approach.

⁷ Rantuba v Commander LDF – LAC 199

- [52] The gross failure on the part of the LDF authorities to furnish “**Remand warrants**” and “**signed written report**” which under law could state “...*why the detainees were being detainees custody...*” (section 87 (2)) was clearly antithetical to the “*rule of law*” and of due process.
- [53] How could the detainees guess why they were being held in military custody if not told? The military commanders or any had no authority to deny the detainees the information they were entitled to under the **LDF Act**. They openly denied giving this information even to the wives of the detainees. This was totally unacceptable because it flouted the clear rule of law and the provisions of the LDF Act.
- [54] This is reminiscent of the apartheid South Africa where suspects, could disappear mysteriously – some to later reappear grossly maimed, some dead and some have never to be seen again by their kin and relatives. Lesotho to today will not countenance that!

- [55] In the case **Maketsi Moiloa vs Compol CIV/APN/550/2011**, My brother **Makara J.** had an occasion to analytically discuss concepts of kidnapping and of arrest and how each can be pleaded in contrast. In particular the learned Judge noted that while arrest was a lawful act, “...*kidnapping being intrinsically a criminal act, is predominantly committed in pursuit of some illegal object and the methods employed in that endeavour are corresponding unlawful...*” I agree *in toto*.

[56] Kidnapping can never be lawful because it is a crime *per se* whereas arrest is usually an act⁸ authorised by law and it was unwise for applicant's to found their applications upon an assertion of kidnapping and to have persisted in this approach despite the answering affidavit annexing "*holding charges*" – belated as they were. The production in court of the detainees occurred before the answering affidavit were filed and when the replying affidavits were filed, the applicants and their counsel knew as a fact that the detained had been arrested under military law and had been placed in military custody at places undisclosed.

[57] No doubt the arrests of the detainees were effected without notice and detainees were kept *incommunicando* until urgent *habeas corpus* applications were made by their anxious wives. This ambush-style *modus operandi* did not however affect the validity of their arrests under *section 86* of the **LDF Act**.

[58] Whether they were arrested or kidnapped was and is a material question of fact over which a "*clear dispute*" existed. Upon the **Plascon** principle and the fact that the authenticity of the attached "*Holding Charges*" have not been impugned issuably, the court comes to a finding that the five detainee had been arrested and had not kidnapped as alleged in the applicant's papers.

⁸ Arrest brings an offender to justice.

[59] On the 16th June 2015, **Adv. Hae Phoofolo KC** appeared as counsel for the wife of *Sgt Semakale* a serving soldier – a platoon sergeant. The Prayers in his Notice of Motion read:-

- “(a) That the Commandeer of the Lesotho Defence Force (**1ST RESPONDENT**) be ordered and directed to present the body of **REFILOE SEMAKALE** before the Honourable Court pursuant to the provisions of the law.*
- (b) That the Commander of the Lesotho Defence Force (**1ST RESPONDENT**) and the Commissioner of Police be directed to see to it that **REFILOE SEMAKALE** is charged with any crime with which he is suspected within 8 days of the date of this judgment.*
- (c) That the Commander of the Lesotho is directed to allow **REFILOE SEMAKALE** access to an attorney or counsel forthwith; in private for purpose of consulting and taking instructions.*
- (d) That **REFILOE SEMAKALE** be released forthwith by the agents of **L.D.F.***
- (e) Declaring **REFILOE SEMAKALE**’S “**abduction**” by the **1ST RESPONDENT**’S agents unlawful and violation of his right to liberty.*
- (f) Directing that **REFILOE SEMAKALE** be taken for medical examination to a medical practitioner of applicant’s choice forthwith.*
- (g) Costs of the suit in the event of opposition.”*

Sgt Semakale had previously appeared before Court on the 29th May 2015 and the Court had observed injuries on his wrist and that he had a heart problem.

[60] It will be seen that these Prayers are almost similar to the Prayers in the consolidated applications and the Court is of the view that consolidation of this application into the other consolidated applicative was necessary save to the extent that **Adv. Phoofolo** sought a special relief that Sgt Semakale be placed “*on open arrest*” in terms of *Regulation 10* of *LDF regulations*. **Adv Phoofolo KC** was at *consensus ad idem* and reiterated the submissions that the arrest was unlawful because of the non-compliance with *section 87 (1) and (2)* of the **LDF Act** especially because the unit commander has not been shown to have applied his mind to the issue of “*closed*” or “*open arrested*” and he gravely for leave of court to order the Unit Commander to submit supplementary affidavit in terms of *Regulation 9* and *10* of the **LDF Act**.

[61] In this regard, Court has a judicial discretion whether to require supplementary affidavit to which the Respondent have the right to answer.⁹ Rule 8 (12) reads:-

“No further affidavit may be file by any party unless the Court in its discretion permits further affidavit to be filed”

[62] For the just decision over the issue of “*open or closed*” arrest, the affidavit of the Unit Commander is necessary in order to place before court circumstances that justify close arrest. The court ordered **Adv. Phoofolo** to move the Court formally on this issue regarding his Semakale.

⁹ 1980 High Court Rules

- [63] As already stated in this judgment, strict compliance with the provisions of *section 87 (1)* and *87 (2)* is required and this is no matter of anyone's discretion. If at all, there seems to be two types of military detentions and unit commanders must justify circumstances necessitating closed and not open arrest. All the court is doing is not to intervene in matters military, but to ensure compliance that accord with the rule of law. Period.
- [64] When a Unit Commander orders – as he is entitled to do – an open arrest or a closed arrest, he must exercise his discretion according to law and justify his order. The **LDF Act** has been enacted by the Parliament of Lesotho to create a Lesotho Defence Force army for the Kingdom of Lesotho and the nation and not for the benefit of any person or person; but for performs its pivotal role of maintaining peace and protecting everyone's life and property in the King impartially efficiently and professionally.
- [65] The concept of "*the rule of law*" is universally accepted and recongised by all civilized nations it applies to all organs and it transcends to all organs of state – **Legislature**, the **Executive** the **Judiciary** and to all organs and institutions create by the Constitution. Rule of law is inviolable and applies to all citizens of Lesotho regardless or rank, status or power. Anyone who disrespect or disobeys the rule of law, and exercises public power and at his own discretion does so at his own risk.
- [66] Constitutionally the LDF is under the civilian control – namely, the Minister of Defence who advices the King on the appointment of the Commander of LDF as the commander in chief Governments which last for five years the army lives for ever.

- [67] **Final Order:** (a) Having perused all the papers filed of record and having heard strong arguments of counsel for the six applicants and of counsel for respondents, the prayers for the release of detained in so far as they assert kidnapping (and not arrest) are not granted.
- (b) The 1st 2nd 3rd Respondents are ordered to take immediate steps stop forthwith any acts or conduct that is torturous, inhuman or degrading or any slavery- like treatment [*section 8 and section 9 of the Constitution of Lesotho.*]
- Causa brevitatis*, release of the detained soldiers can ordered only if their assets were unlawful in the sense of being inconsistent with *section 86* of the **LDF Act** and chapter on military offences.
- (c) Orders authorising access to their spouses and legal advisors is to continue between 10 am and 3 pm on week days– each visit to last 90 minutes.
- (d) All time schedules formalities are procedures must strictly according to **LDF Act**, Regulation and Court- Martial Rules and practices.
- (e) No order as to costs.

I must also take this opportunity to thank all counsel on both sides for professionalism in handling what were indeed delicate proceedings.

S.N. PEETE

JUDGE

For Applicants : *Adv. Phoofolo KC, Adv. Mosotho, Adv. Nthotho,
Adv. Lephuthing*

For Respondents : *Adv. Moshoeshoe, Adv. Lebakeng, Adv. Motikoe*