

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/229/2015

In the matter between:

‘MATHABO MAREKA

APPLICANT

AND

**COMMANDER-LESOTHO DEFENCE FORCE
MINISTER OF DEFENCE
DIRECTOR OF MILITARY INTELLIGENCE
MINISTER OF JUSTICE
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

JUDGEMENT

Coram : Moiloa J.

Date of hearing: : 24 June 2015

Date of Judgement : 01 July 2015

1. Applicant is the wife of detainee Brigadier T. E. Mareka of the Lesotho Defence Force. Brigadier T. E. Mareka was arrested on 5th June, 2015 and stands charged along with other officers and soldiers of the LDF allegedly for Contravening Section 48(2) of the LDF Act 1996 it being alleged that on or about August 2014 until May 2015 and at places and times unknown to the prosecutor he and his co-accused acting in concert held meetings, communicated with each other with intend to arrest and/or kill certain named officers and soldiers of the LDF including its Commander and other

senior officers of the LDF and thereby taking part in an intended mutiny contrary to the provision of Section 48(2) of the LDF Act, 1962.

2. At the time of his arrest and detention Applicant's husband worked in the LDF as Budget Controller and occupied a rank of Brigadier. It is common cause that Brigadier Mareka is severely constrained in terms of his ability to see. It is common cause that he is sighted about a metre away. It is also common cause that he has had a long standing kidney problem on his right side and that he is under prescribed medication for these conditions as well as for being allergic to fish and fish products or utensils that have come into contact with fish. As a result of this health condition of Brigadier Mareka he eats a prescribed diet which over the years of his treatment is being prepared for him by his wife.

3. In her application to court Mrs. Mareka prays (prayer (c)) that her husband be placed under open arrest as opposed to close arrest. "Close arrest" is defined in the Defence Force (Discipline) Regulations 1998 to mean that it

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includes confinement of a member in custody in a detention barracks or civil prison in terms of these regulations.” The term “open arrest” is not defined in the Regulations or in the Act. Applicant's Counsel described it as the opposite of close arrest akin to “a house arrest” in terms of which Brigadier

Mareka will live at his home but his movements restricted to his home precinct and only able to move out on specific authorization of his superiors. Mr. Moshoeshe for Respondents described it akin to bail in normal criminal matters. I think both Counsel are correct regarding the general nature of “open arrest”. It is a hybrid of the usual bail in criminal matters and a relaxed confinement of a person arrested while he awaits his trial. A common feature is that it is designed to assume the presence of the arrested person at the hearing of his charges. It is also designed to ensure that, administration of justice is not prejudicial, while a person awaits trial of charges against him. I am happy to adopt this hybrid description for purposes of my dealing with applicant’s prayer (c).

4. Now, in the application Mrs. Mareka describes the health conditions of her husband and his requirements as a result thereof. On 9 June, 2015 when Brigadier Mareka was produced before court, I gained further understanding of his health condition from him. He is prescribed medication to address his failing sight and health. She also explains that her husband is confined to a special diet of food to address this health problem. As a result he does not eat normal food. She prepares his special diet at home in accordance with his doctor’s prescription. In their Answering affidavit the Respondents do not seriously dispute Mrs. Mareka’s description of the health condition of her husband. All

Respondents say is that they have no knowledge that Brigadier Mareka is prescribed special diet. Significantly they do not deny that Brigadier Mareka's health is poor as described by Applicant nor that as a result of that health condition he is prescribed special diet by his doctors. Respondents do not deny that Brigadier Mareka is severely constrained in terms of sight.

5. Regulation 10 of Defence Force (Discipline) Regulations 1998 prescribes occasions for placing a member under close arrest. It reads as follows:

“A member shall not ordinarily be placed under close arrest unless:-

(a) His confinement is necessary:

- (i) To ensure his safe custody; or
- (ii) For the maintenance of discipline; or
- (iii) To prevent his committing further offences; or
- (iv) To prevent his interfering with any witnesses or evidence relating to the charge against him;

or (b) He defies the lawful command ordering him into arrest; or

(c) He resists:

- (i) A lawful arrest; or
- (ii) The authority of superior officer.”

6. It is clear to me that a member shall not ordinarily be place under close arrest unless any or all of the circumstances described in Regulation 10 (a) (b) and (c) exist. The starting point in my view is that a member who is

suspected of committing an offence contrary to the Act and who the military authorities consider arresting shall be placed under open arrest. Only when circumstances described in 10(a)(b) exist may such member be placed under close arrest. In the case before nowhere is it suggested by Respondents that any of the circumstances described in 10(a) (b) or (c) existed in the case of Brigadier Mareka. The requirements of Regulation 10 have not been touched on at all in the Answering Affidavit of Respondents. This is so despite the fact in this case Applicant squarely pleaded that Brigadier Mareka be placed on “open arrest” at the least. For Respondents to justify placing Brigadier Mareka under close arrest they must place facts before court that satisfy me that it is necessary to do on account of any or all of the circumstances mentioned in Regulation 10(a) (b) or (c). Respondents have not done so. The only conclusion am able to come to is that no justifiable reasons exist in terms of Regulation 10(a) (b) or (c) why Brigadier Mareka is placed under “close arrest” especially given his poor health and severely limited eyesight. It is not suggested anywhere that Brigadier Mareka resisted arrest or defied authority of his superiors. I cannot see what security risk Brigadier Mareka poses to the country that Respondents cannot be able to cope with given State resources at their disposal. As a court I have power to protect fundamental human rights of any individual pursuant to the Constitution. All institutions of State including Respondents are subject to the Constitution. They must exercise

their powers consistently with Constitution. I am satisfied that with suitable conditions attached to his open arrest Brigadier Mareka poses little or no risk. I accordingly grant prayer 1 (c) of Applicant's motion subject to certain conditions. Judgment in respect of prayers 2, 3, 4, 5, and 6 notice of motion are deferred to be dealt with the other consolidated matters.

The conditions attached to admitting Brigadier Mareka to open arrest by Respondents are:-

- (a) That he surrenders all his travel documents and firearm to the Provost Martial
- (b) That he does not leave his home without the authorisation of 1st Respondent or such senior officer designated by him for that purpose. Such authorisation to be exercised by first Respondent or such designated officer reasonably.
- (c) That he shall not interfere with any witnesses or evidence relating to charges against him.
- (d) That he complies with lawful orders of Lesotho Defence Force Commander when called upon to do including attendance before Court Martial, if any, when assembled to try any charges against him.

7. Interim prayers I granted on 9 June 2015 are hereby made final.

J. T. M. MOILOA
JUDGE

For Applicant : Adv. Lephuthing

For Respondents : Adv. Moshoeshoe

