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**PROTECTING THE FAIR TRIAL RIGHTS OF MILITARY
PERSONNEL: DID THE LESOTHO COURT OF APPEAL
GO FAR ENOUGH IN MUTINY ACCUSED SOLDIERS
CASE?**

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Abstract

Section 24(3) of the Lesotho Constitution provides that where persons (members of disciplined forces) are subject to disciplinary law, nothing done under the law shall be held to be inconsistent with the rights in the Constitution, other than their right to life, freedom from inhuman treatment and freedom from slavery and forced labour. Evolving constitutional jurisprudence suggests that a narrow reading of section 24(3) is no longer feasible. In the context of Lesotho, where the military is a significant employer, disciplinary issues do arise which challenge the requirement that courts-martial be independent and impartial and which require, in the interest of fair trial rights, that the civil courts play a more prominent role in prosecuting such cases. In this regard, the case of Mareka and 22 Others v Commander of the Lesotho Defence Force and 7 Others was illustrative of the tenuous legality of the convening of a court-martial for mutiny charges and provided a missed opportunity by the Court of Appeal to firmly assert the need for independent and impartial court processes in relation to military personnel.

INTRODUCTION

In April 2016, the Lesotho Court of Appeal, per Farlam AP, handed down judgment in the case of Mareka and 22 Others v Commander of the Lesotho Defence Force and 7 Others (Court of Appeal CIV No.52/2016). The decision followed the October 2015 High Court decision by Makara J (CIV/APN/322/2015). This article discusses the Court of Appeal judgment and the extent to which it represents a missed opportunity to address the particular vulnerabilities faced by military detainees in accessing justice.

FACTUAL BACKGROUND OF THE CASE

The appellants in the case are all members of the Lesotho Defence Force (LDF) who to date face mutiny charges under the Lesotho Defence Force Act of 1996 (LDF Act). The appellants (the applicants in the High Court) were arrested between May and June 2015, shortly before the murder of then LDF Commander Lieutenant General Maaparankoe Mahao, and have all been released from custody. On 3 July 2015, the SADC Extraordinary Double Troika Summit, held in Pretoria, South Africa, took the decision to establish an “independent commission of inquiry” to, among other things, investigate the death of Lt. Gen. Mahao and “review the investigations into the alleged mutiny plot” (Para 3(1)(a) of Legal Notice No.88 of 2015).

The Terms of Reference (TORs) of the Commission of Inquiry were also carefully framed to incorporate the different versions on the appointment of the commanders of the LDF in 2014 and 2015 respectively. The TORs proposed by SADC was subsequently gazetted in Legal Notice 88 of 2015.

The appellants were charged with mutiny in terms of section 48(1)(a) of the LDF Act read with sections 48(2) and 103(1) of the LDF Act of 1996. The particulars of the offence in the charge sheet indicates that the charges relate to acts that were allegedly committed between September 2014 and May 2015 to arrest, detain and remove from service certain officers of the LDF and later to kill such officers. Paragraph two of the charge sheet dated 7 August 2015, states that “such officers were perceived as being supportive of Lt Gen Kamoli, **who had not stood down** (emphasis added) as Commander of the LDF after the then Brigadier Mahao had been gazetted as Commander on 29 August 2014”.

Lt. Gen. Mahao was appointed as Commander of the LDF in terms of Legal Notice No.64 of 2014, dated 29 August 2014. He was removed from this position through Legal Notice No.60 of 2015, dated 21st May 2015. In terms of the Legal Notice the initial appointment notice of 2014 was repealed. On the

same date, Legal Notice no.61 of 2015 was issued in which Lt. Gen. Tlali Kamoli was appointed as Commander of the LDF, with retroactive effect from 29 August 2014. Even though Lt. Gen. Kamoli's appointment on 21 May 2015 was effective retrospectively, according to the knowledge of the appellants at the time of the alleged mutiny, Lt. Gen Mahao's appointment was effective in the period between September 2014 and May 2015.

The definition of a mutiny indicates that the offence relates to the intention to subvert the lawful authority of the LDF. In the period September 2014 to May 2015, and in terms of Legal Notice No. 64 of 2014, the lawful authority of the LDF resided with Lt. Gen. Mahao, this was disputed on a political level. It is therefore arguable whether the offence of mutiny applies to anyone who allegedly committed any actions against supporters of Lt. Gen. Kamoli, when the charge sheet itself explicitly acknowledges that it was Lt. Gen. Kamoli "who refused to step down" and was possibly subverting the lawful authority of the LDF.

On 13 August 2015, the Minister of Defence and National Security issued a convening order subject to section 92(1) of the LDF Act establishing a court-martial to try the appellants. It was in the light of this convening order that the appellants sought the court's intervention in the Mareka case.

THE PROCEEDINGS BEFORE THE HIGH COURT

The High Court became seized with mainly two issues. The first issue was whether the decision to establish the court-martial and the convening order was unlawful, arbitrary and unreasonable and should be set aside on review. The argument of the applicants was that it was unreasonable to convene the court-martial when a parallel commission of inquiry was taking place which had as its mandate to objectively determine the veracity of the charges against the applicants.

The second issue was whether a decision to place the applicants under close arrest was reached without compliance with the *audi alteram partem* principle of natural justice. The argument of the respondents was that soldiers in the position of the applicants are barred under section 24 (3) of the Constitution to rely upon a violation of any procedural right other than those concerning right to life, freedom from torture and forced work.

The court held that the convening order for court-martial was lawfully made and that the court-martial proceedings could proceed simultaneously with those of the SADC Commission of Inquiry since there were no legal impediments for that. The court further held that the respondents had violated the procedural rights of the applicants since there was no documentary evidence showing that they had given each soldier an opportunity to be heard before a decision to detain each under a close arrest was made, as required by the Regulations (LDF (Discipline) Regulations Legal Notice No. 29 of 1998). The court confirmed that section 24(3) did not exclude the right of a soldier subject to disciplinary law to complain about a violation of his natural right to be heard before an adverse decision could be taken against him.

LEGAL ISSUES ON APPEAL

The appellants' grounds of appeal were focused on the legality of the convening order. Their case was that once the SADC commission of inquiry has run its course, an informed decision could be taken on whether or not they should be charged and arrested. The respondents noted a cross-appeal against the decision to order the release of the appellants on open arrest. There were mainly four issues for determination by the Court of Appeal namely, whether convening order should be set aside as being unreasonable; whether the second respondent was precluded from issuing the convening order because the commission of inquiry was appointed, inter alia, to investigate allegations giving rise to the charges to be dealt with at the court-martial; whether the order impinged on the appellants' rights to a fair trial; and whether the order placing the appellants on open arrest was correct.

COMMENTARY ON THE REASONING OF THE COURT OF APPEAL

Whether the convening order should be set aside as being unreasonable or irrational

The Court of Appeal held that the convening order was not unlawful and irrational. The Court argued that when the Minister made the convening order he had reports, evidence and other materials which compelled him to exercise his statutory powers to establish a court-martial. The court in so finding, used a test for irrationality as provided in Council of Civil Service Union and Others v Minister for the Civil Service where Lord Diplock said:

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

The ‘Wednesbury principle’ finds its application with respect to grounds of judicial review of administrative action. The grounds of judicial review may be subsumed under three main heads, which are: illegality, irrationality and procedural impropriety. Diplock’s decision has however been criticised as being insufficient. Carnwath argues that the Diplock formulation of irrationality fails to supply judges with a suitable conceptual toolkit by which to determine whether a decision is flawed on substantive grounds:

It is hard to see how “outrage” can ever be an appropriate or acceptable part of the judicial armoury? And why “logic”? The hallmark of a sound administrative decision, surely, is not so much logic, as informed judgment, which may take account of all sort of “illogical” factors such as political considerations and a democratic mandate? And how do “moral standards” come into this formulation? There may be many ways in which the conduct of public authorities can be morally objectionable—perhaps bribery, nepotism, even maintaining a public brothel? Such activities may be illegal, but not because they are “irrational”, still less because judges find them outrageous.

The court must be entitled to subject an administrative decision to more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which decision determines. Some factors which ought to be considered in any judicial review of a decision should include whether the decision placed undue weight on a particular relevant consideration and insufficient weight on another relevant consideration; or whether the decision violated an aspect of the rule of law, including the violation of a legitimate expectation.

The Court of Appeal in adopting a narrow test of reasonableness as provided in the ‘Wednesbury principle’ disregarded the fact that detainees’ life was at stake due to the gravity of the offence they are charged with which carries capital punishment. The legality and reasonableness of the decision ought to have been assessed in the light of the power under which the decision is exercised and taking into consideration the current conditions in Lesotho – in particular in the context of the then concurrent operation of the commission of inquiry.

Whether the second respondent (the Minister) was precluded from issuing the convening order because the commission of inquiry was appointed, inter alia, to investigate allegations giving rise to the same charges to be dealt with at the court-martial

The appellants submitted that no reasonable person would have made the decision to convene court-martial in view of the delicately poised security situation in Lesotho. The Court of Appeal held that if the contention was valid, then SADC leaders at the 17-18 August 2015 Summit would have stuck to their earlier decision that the court-martial processes be put on hold. The fact that they did not do so suggest that one cannot say that no reasonable person would have convened

the court-martial on 13 August 2015. This assumption by the Court of Appeal however goes beyond what it was obliged to do, which is look at the rationality of the decision at the time it was taken and not interpret its rationality in the light of subsequent developments which might in any event have been influenced by the decision itself.

The appellants further submitted that the decision to convene a court-martial in the face of the establishment of a commission of inquiry by the Prime Minister was unreasonable. The Court of Appeal on this issue upheld the respondents' submission that the commission of inquiry and the court-martial served two different purposes: the former is an investigative tool of the executive while the latter is a court. Recommendations of a commission are not binding on the executive whereas a court-martial gives binding decisions. Therefore Minister's decision cannot be faulted as irrational. The Court of Appeal's argument however ignores the implications of the decision to convene the court-martial in parallel with the commission of inquiry. A commission's function is in essence to comprise an objective and independent body to investigate facts and make recommendations upon its factual findings in matters of national interest.

The context in which the commission of inquiry was established illustrated a level of infighting, insecurity and instability in the LDF that would potentially make the fair determination of facts in an investigatory process led purely by the military unreliable. By domesticating and establishing the commission the government ostensibly committed itself to the commission process. This decision to establish the commission created a legitimate expectation by the appellants that they would not be prosecuted until the commission's conclusion. Under the common law, an exercise of public power that deviates from a legitimate expectation is subject to review on grounds of illegality.

It is common cause that the commission was a fact-finding mission, as stated by Justice Peter Cory in Phillips v Nova Scotia ([1995] 2 S.C.R 97) (Commission of inquiry into the Westroy Mine Tragedy); one of the primary functions of public inquiries is fact-finding. They are often convened in the wake of public shock, horror, disillusionment, or scepticism in order to uncover "the truth". The Lesotho commission of inquiry was also aimed at the same and the Minister, through the convening order, deprived the commission of necessary witnesses to review the investigations.

Another factor that should have played a more prominent role in the determination by the Court of Appeal in the Mareka matter, is the extent to which allegations of torture has been found to be true in matters related to the appellants in the Mareka matter, thus contributing to a perception of lack of impartiality and fair trial rights and emphasising the need for an independent commission of inquiry to first establish the veracity of the charges against the appellants prior to convening a court-martial.

In the case of Jobo v Commander of the Defence Force and Others (Court of Appeal (CIV) 29/2015), a case relating to the same set of facts, the Court of Appeal confirmed that the detainees had been subjected to torture and inhuman and degrading treatment; that they were brought to court in shackles, chains and handcuffs; and that provisions of the LDF Act had not been properly complied with.

The appellants face the death penalty or 20 years imprisonment if found guilty of the offence of mutiny. The severity of the punishment attached to the offence of mutiny requires that an independent court or tribunal prosecute the case. In the alternative, allowing the commission of inquiry to confirm the charges before proceeding with the convening of the court-martial would have been reasonable.

Whether the convening order impinged on the appellants' right to a fair trial

The Court of Appeal reasoned that the appellants do not suggest that sections 93 and 94 of LDF Act of 1996, which deal with the constitution of courts-martial are unconstitutional. The court martial

as constituted by the convening order complies with those sections. Hence the only objection that can be raised in that regard would relate to alleged bias on the part of members of the court, a matter that can be dealt with under rule 12 of the Court Martial Procedure Rules (Human Rights Committee, General Comment 20, para.11). The Court held that it is not appropriate to consider in *anticipando* whether the court-martial will be unfair. It was further held that appointment of colonel Bulane Sechele, who is described in the charge sheet as one of the targets of alleged conspiracy of which the appellants stand accused, as an assistant prosecutor at the court-martial is severable from the main decision to convene the court-martial and it accordingly does not invalidate that decision.

The right to a fair trial is set out in article 12 of the Constitution of Lesotho. It encompasses a number of principles ancillary to it, including:

- Fair and public hearing - In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body. This resolution was adopted by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session in November 1999. This right is also entrenched in section 12(1) of the Constitution of Lesotho.
- Presumption of innocence - The principle has been held to be one of the elements of a fair trial. In the case of Samoila and Cionca v Romania the European Court of Human Rights considered the statements of the prosecutor which clearly indicated that the defendants are guilty of the crime and the fact that they were brought to court wearing prison uniform violated the presumption of innocence.
- The right not to be found guilty of a criminal offence on account of an act or omission that did not at the time it took place, constitute such an offence (Sec 12(4) Constitution of Lesotho).

Section 24(3) of the Constitution specifically states that where a person is subject to disciplinary law, nothing done under the law shall be held to be inconsistent with the rights in the Constitution, other than sections 5 (right to life), 8 (freedom from inhuman treatment) and 9 (freedom from slavery and forced labour) of the Constitution. This provision has frequently been discussed in the courts in Lesotho to determine the extent to which military personnel are entitled to the rights in the Constitution, and in particular the right to a fair trial.

Section 24(3) is not unique and the same provision is found in many post-independence constitutions of commonwealth countries. The question that arises is whether, in line with current international human rights standards, the section should not be given a very narrow interpretation. This dilemma has been noted in Lesotho courts, where they have increasingly acknowledged that military personnel are entitled to constitutional rights to a much greater extent than a literal reading of section 24(3) would suggest. This makes sense if one considers that the provision dates back to the 1960s and that constitutional principles have evolved since. The courts in Lesotho have repeatedly protected the rights of members of the Lesotho Defence Force (LDF) to approach the court despite the existence of section 24(3).

Another way in which the courts have dealt with this issue is by finding that, despite the curtailment of rights through section 24(3) of the Constitution, military personnel retain their fair trial rights under common law.

In Commander of Lesotho Defence Force and Others v Rantuba, ([1999] LSHC 137) the Court of Appeal considered whether military personnel charged with mutiny offences had a right to access their legal advisor. The Court's reasoning affirmed the applicability of natural law principles of justice to persons accused of military offences: "the inquiry here is accordingly not whether . . . the Lesotho Defence Force Act, 1996 ("the Act") or the Regulations and Rules thereunder, conferred such right, but whether its operation was excluded either expressly or necessarily by

such legislations . . . There is nothing in the Act which purports to remove the right to legal access. Nor do the Regulations or Rules contain any express limitation of the right.”

The Court of Appeal in the Maluke case considered the applicability of section 12(1) of the Constitution in court-martial proceedings. The Court affirmed that even if section 12(1) does not directly apply to accused persons before courts-martial, the right of an accused person to be tried fairly in any court and in accordance with the principles of natural justice does not emanate exclusively from section 12(1): “it has its roots firmly embedded in the common law” The Court cited with authority the dictum of Corbett, CJ in council of Review, South African Defence force & Others v Monnig & Others (1992 (3) SA 482 (AD) at 491 C -E): “Although a court martial is composed of military officers, it is in substance a court of law and its proceedings should conform to the principles, including the rules of natural justice, which pertain to courts of law”.

Shortly thereafter, the Court of Appeal went a step further and declared boldly that “[i]t is important . . . to dispel any notion that fundamental rights and freedoms in Chapter II of the Constitution are not to be observed in relation to soldiers.” (Jobo v Commander of LDF) The Court of Appeal explained that section 24(3) of the Constitution cannot be construed as exempting the military from the provisions of Chapter II, without qualification. The Court of Appeal continued that any Act including the Lesotho Defence Force Act (LDF Act) must be interpreted in line with the principles and provisions of the Constitution and provisions in the LDF Act and Regulations must be strictly interpreted where they restrict the ordinary rights of persons affected by them.

This later approach of the Court of Appeal is in line with the international legal obligations to which Lesotho has subjected itself, which suggest that military personnel should enjoy fair trial rights irrespective of whether they appear before a civilian or military court.

The African Charter on Human and Peoples' Rights provides in article 7 for the right of everyone to have his cause heard, which includes the right to be tried within a reasonable time by an impartial court or tribunal. Lesotho signed the african Charter in 1984 and ratified and deposited the Charter in 1992. Article 26 of the Charter requires States party to the Charter to guarantee the independence of courts.

In its resolution on the right to fair trial and legal assistance in Africa, the African Commission on Human and Peoples' Rights noted:

“In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards”.

The African Commission elsewhere held that military tribunals are subject to the same requirements of fairness, openness, justice, independence and due process as any other process. It is herein argued that serious consideration ought to be given to the extent to which courts-martial potentially infringe on the right to a fair trial and whether they are the appropriate vehicle for prosecutions under disciplinary law in all instances.

Now we turn to the issue of appointment of Colonel Bulane Sechele as an assistant prosecutor. This issue applies also to some members forming Court martial panel. Institutional independence as an aspect of the right to an independent tribunal requires that courts should have adequate institutional safeguards to protect them from political and other interferences. In the context of military justice, it requires that military tribunals must be free from interference, especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function (Principle 4 of the Basic Principles on the Independence of the Judiciary, adopted 6 September 1985; UN Doc).

In R v Généreux ([1992] CanLII 117 (SCC) 1) Chief Justice Lord Lamer emphasised that “it is not acceptable that the convening authority, i.e. the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court-martial, who serve as triers of fact.”

While holding that the appointment of the judge advocate by the Judge Advocate-General undermined the institutional independence of the general court-martial, Chief Justice Lamer observed that the “close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the Executive, is obvious”. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal. He stressed that, in order to comply with the right to an independent tribunal, the appointment of military personnel to sit as judge advocates at military tribunals should be in the hands of an independent and impartial judicial officer.

In Incal v Turkey ((2000) 29 EHRR 449, para. 68), the European Court of Human Rights held that among the issues that made the Izmir National Security Court’s independence questionable was the fact that it was comprised of servicemen who still belonged to the army, which in turn took orders from the executive. The Court was concerned that such members remained subject to military discipline and that assessment reports were compiled on them by the army for that purpose.

The authors submit that the Minister of Defence and National Security, Mr. Ts’eliso Mokhosi, is unlikely to be seen as such an impartial person if, in terms of section 12(3) of the Lesotho Defence Force Act, the Commander of the Defence Force is obliged to report to the Minister on all matters under his charge in the day-to-day discharge of his duties.

Public perception of impartiality is particularly important in courts-martial. In Mönnig and Others v Council of Review and Others (1989 (4) SA 866 (C) 694) it was held:

“Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals — other than courts of law — which have all the attributes of a court of law and are expected by the public to behave exactly as a court of law does. The court-martial is, of course, such a tribunal.”

The Lesotho courts have acknowledged that the independence and impartiality of courts-martial might not always be a straightforward issue, and in this regard there has been a wide acceptance that the civil courts have review jurisdiction over the courts-martial.

The High Court, in the case of Mahale and Others v Director of Public Prosecutions and Others, ([1999] LSHC 70) held that the High Court has the ability to order release on bail before court-martial proceedings have been finalised:

“From the authorities quoted above it is amply clear that a civil court can interfere with proceedings of a martial court. Apart from this, there is no express statement neither in the Defence Force Act, 1996 nor Defence Force (Court-Martial, procedure) Rules, 1998 ousting the jurisdiction of the court to entertain bail application. Bail is a right enshrining a value principle by no means to be whittled down that the subject’s recourse to His Majesty’s courts can be excluded except by clear and unequivocal words.”

“...For the matter to be properly before the superior court or High Court, the applicant is to show prejudice. It can safely be said that in the instant application there is such prejudice shown though even were this not shown, **from the surrounding circumstances there is possibility of prejudice were bail heard by the martial court for some members of this court are none other than colleagues of applicants and officers who may have had brushes with applicants.**” (own emphasis added).

The increasing number of cases relating to the Lesotho Defence Force that has been brought for review to the civil courts however suggest that courts-martial in and of themselves might not always be the most appropriate way to deal with prosecutions in the military, especially in cases of mutiny, where the persons who convene the court-martial are likely to have an interest in its outcome.

Whether the High Court order placing the appellants on open arrest was correct

The Court of Appeal held in favour of the respondents that there was no evidence before the court that appellants 2 to 23 were not informed when they were arrested that they were being placed under closed arrest or of the reasons therefore or that they were not given a hearing. The only affidavit dealing with an arrest was the founding affidavit deposed to by the first appellant, who did not purport to deal with what happened when the other appellants were arrested.

The Court of Appeal took a very different approach on the onus of proof than the High Court. The High Court emphasised that in the absence of documentary evidence showing that the circumstances of each arrested soldier was properly considered, “there is no way in which it can be concluded that the decision was not arbitrarily made”. The High Court confirmed existing case law that a strict interpretation should be adopted in relation to a legislative provision that was intrusive on the rights of a person. In contrast, the Court of Appeal placed the onus on the appellants to prove evidence that they had no access to. In addition, the lawyers of the arrested soldiers struggled to get access to the detainees for the purpose of securing their signatures to endorse their respective supporting affidavits.

CONCLUSION

The authors submit that the Court of Appeal had missed an opportunity to assert the importance of the right to a fair trial for military personnel. In a country where mutiny within the defence force is not uncommon, it is critical for the courts to establish clear rules around the extent to which fair trial rights must be observed in courts-martial. There are serious concerns around the extent to which courts-martial can achieve the principles of a fair trial in the case of mutiny charges, when concerns around impartiality inevitably comes into play. As such, the courts should be clear that a literal interpretation of section 24(3) of the Constitution is no longer feasible, and should in cases where courts-martial could be tainted, be less deferent to the provisions of the Lesotho Defence Force Act and more pro-active in defending an accused’s right to a fair trial before an impartial tribunal.

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About TRC

The Transformation Resource Centre (TRC) is an ecumenical organisation dedicated to the promotion of justice, peace, good governance, and participatory development. Established in 1979, the TRC's main focus is to empower communities and citizens to take the lead in articulating their positions and advocating for development that aims to better their lives.

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