

MEDICAL RELEASE

MATSEPANG CHAKA V COMMANDER LESOTHO DEFENCE FORCE  
CIV/ APN 379/ 2016(Unreported)

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## Introduction and brief facts of the case

- The applicant's husband( the patient) is a member of Lesotho Defence Force (LDF) and has been incarcerated in maximum prison on the charge of mutiny and or failure to suppress mutiny in that he and other 22 members of LDF were on a mission to kill some high ranking officers within LDF who at the time were viewed as being sympathetic to the then lawfully dismissed army Commander Lt General Kamoli. They were abducted and tortured before they could be sent to the maximum prison. The said abductions, tortures and subsequent arrests took place around May / June 2014.
- The said Twenty Three (23) army members were first abducted and taken to a military base in the outskirts of Maseru called ***Setibing*** where they were tortured and forced to implicate other members. The *modus operandi* in the torture was such that they were suffocated with tubes and exposed to extreme cold conditions by being tied to a pole and water applied to their bodies, they were also made to stand in a small pond for a considerable period or actually suffocated by the water from the pond.
- The family members of these soldiers then approached the High Court for *harbeus corpus* applications and those abducted soldiers were brought before Court wherein they then narrated the illtreatment and torture that they were subjected to.
- At the time of the patient's arrest he was already limping and / or had restriction of movement due to an illness on his right hip.
- At first it was very difficult for the detainee to see a doctor because the army command refused to allow him to go to see a doctor.
- We then had to seek the intervention of Court to order and direct the command of LDF to allow him to go and see the doctor of his

own choice, the application was initially opposed but the court directed that the patient should go and see the doctor.

- After a number of visits to the doctor for checkups and still while in prison, it was found that the patient had to undergo an surgical operation in order to replace his affected hip.
- The patient was ultimately operated after a lot of dily daling by the LDF command and **Immediately** after the operation he was taken to prison by the LDF command where there were no proper facilities provided for a person who had undergone an operation. It was evident that the patient will not be properly cared for due to the absence of proper facilities, (such as the proper bed, proper chair, and toilet just to mention a few) in prison. It was also clear that the patient would not be in a position to hygienically take care of himself, and will have to depend on other inmates to bathe him and even propably taking him to the toilet.
- These circumstances then necessitated a launch of urgent application in the High court seeking the release of the patient from prison on open arrest so that he can be properly taken care off by his family while he recuperate from the operation.

***The approach adopted by the applicants counsel was two pronged:***

- a) Firstly the objective or the aim was to enjoin the court to consider the matter as urgent, and in so doing the applicant's moved the court to consider the manner akin to bail proceedings, which are urgent in nature. Furthermore the court ought to take to consideration that the operation itself on the applicant's husband, warranted exceptional circumstance that may assist in considering the matter as urgent.( *this is because the application for release on*

*open arrest had already been denied by the appellate Court of Lesotho)*

- b) Secondly the Applicant's counsel sought to persuade the court to release the applicant's husband basing themselves extensively on Human Rights law. Indeed this approach worked well to persuade the Court.

The main focus here was to invoke the Constitution of Lesotho, especially the **freedom from inhuman treatment** as encompassed in **Chapter II, section 8, the right to human dignity**, as well as International Human Rights law brought in a broader perspective especially the on **the rights of prisoners**.

Some of the international instruments that were solicited in advancements of the arguments before Court were:

- a) UN HUMAN RIGHTS COMMITTEE, ICPR GENERAL COMMENT NO. 20 ARTICLE 7 (which talks about prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)
- b) African Commission on Human and people's Rights , Report of 31<sup>st</sup> October 1988
- c) We were also able to invoke a number of international cases on human and degrading treatment.  
e.g. Malawi African Association & others v Mauritius where the denial of food and **medical care** were in themselves held to infringe the prohibition of torture, inhuman and degrading treatment.
- d) Laprykowski v Holland 23052/05, 3 February 2009  
where the court held that the lack of adequate **medical treatment** placed the applicant in a position of dependency and inferiority *vis-à-*

*vis* his healthy cell mates, and this undermined his dignity as a human being.

### **The Respondent's Defence on the case**

On the other side the state case was based more on the procedural irregularity of the proceedings.

- Urgency: their main focus was on the urgency of the matter, arguing that the matter was not urgent but more importantly they argued that the patient prisoner will be taken to the doctor whenever the need arises. Further that he ought to have exhausted local remedies in terms of the military law to the effect that he was supposed to apply for an open arrest through rank and file of the command and structure within LDF, and further that the patient still posed a security risk based on the nature of the crime he was alleged to have committed.

### **STRATEGIC THINKING BEHIND THE LEGAL ARGUMENT AND REMEDIES**

- SALC was very helpful in advancing the legal argument, applicants counsel concentrated on Human Rights which bordered on the constitution of Lesotho.
- Applicant's Counsel knew that it would be very difficult for the Respondent's counsel to counter the arguments on Human Rights especially when requesting the court to interpret our constitution in view of the glaring abuse of human rights such as the one before court.
- This was evidenced by the *ex tempore* judgement of the Court in which the Honourable Judge opined as follows: “ *Nothing can*

*compare to where a sick person is kept, treated and nursed by his own family. This perhaps is very broadly referred in that case of Mathabo Mareka. I appreciate that this has to be one of the reasons that Brigadier Mareka was released on open arrest. Mr Kumalo in his address, not only emphasized the constitutional aspect of respect to human rights and dignity of an individual in a democratic setting...”*

- A number of medical reports evidencing the seriousness of the illness of the detainee were annexed to the application. They came in handy in persuading the court to find in favour of the applicants husband.

## CHALLENGES

- The main challenge faced by the applicant’s counsel was that even the doctors and or medical practitioners were afraid to write down on their report explicitly the seriousness of the patient’s illness in view of the unavailability of the proper facilities or that they recommend the release on the patient to be cared for is family in the face of glaring illness.
- Applicant’s counsel tried everything to show them the need to put in writing the for the patient to go and be cared for by his family instead of being kept in prison but to no avail. The attempt to secure the written down recommendation from the Doctors was done in anticipation of the authoritiveness of such a document in attempting to convince the court otherwise. (**the medical Doctors in my country are not aware of the power they have in assisting in the preservation and endorsement of Human Rights**) The Doctors were afraid to write down the fair situation of the patient’s illness because of the army. One of the reasons that the Doctors

were afraid of the army was that the army personnel who were accompanying the detainee and or patient to the Doctor on his visits basically entered the consulting room during the patient examination and where he had to stay over he was chained to the bed, he was also immediately hand cuffed the patient upon release after being examined. In general the attitude of the army personnel was very intimidating to the hospital staff.

**It is our contention that there is a need to involve and conscientise the medical fraternity with issues of Human Rights issues.**

- Another challenge was that there were review cases launched in the High Court launched for purposes of reviewing the administrative decisions by the LDF Command to refuse to put the detainees under open arrest.
- Indeed the prosecution raised the same issue and in anticipation this issue was already addressed by putting forward the special circumstances in view of the recent operation and in this regard the Court agreed with us.
- Another challenge that counsel for the applicant was faced with was that the respondents invoked the military law and the procedure alleged the detainee should have followed before approaching the courts of law (exhausting the local remedies).
- This point was easy to deal with because a precedent was already set to the effect that the detainees had already attempted to utilise the local remedies by representing to the LDF authorities the reasons to be put on open arrest and they had not succeeded.

- It was also not easy to access the clients in prison due to the stringent conditions imposed, for example the clients were not free to give all the information in fear of being reprimanded, especially because there was always a guard who was within the hearing vicinity , we as lawyers were subjected to long routines before we could meet our clients given the limited time to approach the Court for relief.
- Therefore we could only gather the facts for purposes of application from the detainee`s wife, hence why we had to cite her as the applicant acting on behalf of her husband. This was done in anticipation of the Respondents raising the issue of hearsay evidence.
- In the same vein the issue of hearsay evidence propped up but we were able to overcome it by having cited the wife of the detainee as the 1<sup>st</sup> Applicant, and averring that she has direct contact with the husband, especially when she was the one responsible for booking his visits to the doctors.

## **ETHICAL LESSONS**

- This case highlighted the need for our courts to start considering the importance of the constitutional imperatives, and we were successful in this regard. The court had this to say:

*“I agree that we have reached a time when constitutional rights, human rights and the dignity of human life is to be elevated to where it belongs. Indeed respect is the dignity of the man is the essence of democracy, perhaps more should be done because I dare say, and openly , we are in a critical turn of our political life. We are doomed if we do not pay respect to human dignity and respect for other fellow Basotho. Perhaps*

*it is detained and a man such as captain Chaka who deserve decent treatment: despite all.”*

- Secondly in cases of this nature it is very important to frame the applications and or summons in such a way that the pleadings anticipate the possible reply from the Respondents so as to leave no loopholes on which the respondents can rummage through or at least be in a relatively better position to counter them.( ***try and know the possible strategies of your foe***)
- It is further important for other fraternities such as medical Doctors are sensitized on the need to uphold the human rights in their work ethics.
- It is also important in cases of this nature to seek solidarity and working together by lawyers instead of going alone.
- One must also be very brave to face those who perpetrate who in authority and do not observe the Human Rights.
- Upon his release we immediately informed the media and in no time it had spread across the country, this was done with a view to put on more pressure on th LDF authorities to immediately release him, and in this respect we also succeeded because once they were served with the Court order He was released to his family.

## **CONCLUSION**

- We we sucesful in managing to secure the release of Captain Chaka on open arrest on the basis of his ill health, and a lot of credit must be given to SALC who assisted in research of the relevant authorities on Human Rights.

THE END  
THANK YOU