

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

'MATŠEPANG CHAKA

Applicant

And

COMMANDER –LESOTHO DEFENCE FORCE  
MINISTER OF DEFENCE  
ATTORNEY GENERAL

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monapathi  
Date of Hearing : 28<sup>th</sup> October, 2016  
Date of Judgement: 31<sup>st</sup> October 2016

SUMMARY

*A detained soldier's ill-health is one of the circumstances in which he/she may be released on open arrest in terms of Defence Force (Discipline) Regulations as a guarantee of human rights and freedoms enshrined under the constitution. Primarily in this instance the ill-health of a military man like all citizens impinges on his dignity as a fundamental human right to be protected.*

ANNOTATIONS:

**CITED CASES REFERRED TO:**

*Commander of LDF and 4 Others v 'Mathabo Mareka C of A (CIV) /27/2015.*

**STATUTES REFERRED TO:**

*Lesotho Defence Force (Discipline) Regulations 1998*

**BOOKS REFERRED TO:** - None

[1] The application is primarily that the Applicant be released on open arrest so that he can be nursed (palliative care) by his own family. The Applicant is a spouse of Captain Chaka who is in custody under military law in what is called close arrest. In the notice of motion under (b) what is sought is an order directing the Respondent to allow Captain Chaka to be put on open arrest and be kept home due to illness. There has been a large body of litigation respecting this military men who are now in maximum detention of Lesotho Correctional Service, prison in Maseru (LCS). In all those, they speak about the jurisdiction of the High Court to grant an order for open arrest and some deeper aspects of the LDF Regulations, such as what is the nature of open arrest and the nature of close arrest and what is a unit commander and where and how there could no unit commander. I have been referred to the case of *Commander of LDF and 4 Others v 'Mathabo Mareka C of A (CIV) 27/2015*, ('*Mareka's case*), more especially with regard to the particular circumstances (by comparison) of the Applicant's husband who is a sick man. Otherwise this Court of Appeal case has been instructive on many aspects concerning interpretation of Defence Force (Discipline) Regulations 1998.

[2] I hereby make reference to *Mareka's* judgement in paragraph 24 where the Judges of Appeal Court has referred to the health condition of the Appellant and they were satisfied that the Appellant's husband was of poor health. I am satisfied also that Captain Chaka is of poor health. Having been operated on the 24<sup>th</sup> October 2016, he had surgery for what is called total hip replacement.

[3] I am told that this operation had been anticipated by his authorities as soon after Captain Chaka was incarcerated. On the hand, he had to persuade me that

he is a sickly man as medical reports, also, show including a nine page document called a "guide". An attempt was made to persuade the court that the authenticity of this guide was not proved. I however, had a distinct impression that surely this guide went along with the medical report primarily to show the nature of the operation. I repeat that what they illustrate is that Mr. Chaka is a man in serious ill-health after an operation.

[4] A strong attempt had been made by the Commander LDF to demonstrate that in as much as the patient could regularly be sent in for medical attention in the Queen 'Mamohato Memorial Hospital from time to time, this patient could sufficiently be taken care by the authorities in prison and could be given every assistance. There were comparisons about sleeping, sitting, bathing arrangements and toilet facilities; all which the Respondents say can be adequately provided in prison; as compared to the treatment and care he would receive at his home. I appreciated that ordinarily any person who is in prison is already under great stress. This is worse and it is worsened by the conditions under which he is held in incarceration. I was not persuaded, otherwise.

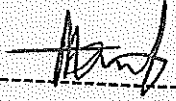
[5] Nothing can compare to where such a sick person he is kept, treated and nursed by his own family. This perhaps is very broadly referred in that case of '*Mathabo Mareka*'. I appreciate that this has to be one of the reasons that Brigadier Mareka was released on open arrest. Mr. Khumalo in his address, not only emphasised the constitutional aspect of respect to human rights and dignity of an individual in a democratic setting; some of which are referred to paragraph 30 and others of the '*Mathabo Mareka*' judgement. I greatly appreciated that import of the judgement in that regard.

[6] I agree that we have reached a time when the constitutional rights, human rights and the dignity of human life is to be elevated to where it belongs. Indeed respect for the dignity of 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 do not pay respect to human dignity and respect of other fellows Basotho. Perhaps it is detained and a man such as Captain Chaka who deserve decent treatment, despite all.

[7] I decide that this gentleman ought to be released on open arrest. The conditions should clearly be that:

- a) He shall report to his authorities two (2) times a day
- b) He shall surrenders his firearm
- c) He shall surrenders his travel documents
- d) He will not do such things that would not worry his superiors in so far as security is concerned because he is still under arrest.

[8] I may remark that the condition of Captain Chaka spoke for itself, especially after his operation that it was a serious health issue. Consequently, the Respondents should pay costs of this application.

  
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**T. E. MONAPATHI**  
**JUDGE**

For Applicant : Adv. M. Khumalo  
For Respondents : Adv. Motikoe