

## Establishing state liability for personal liberty violations arising from arrest, detention and malicious prosecution in Lesotho

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### Summary

*This article seeks to analyse the case law relating to infringements of the personal liberty rights of the individual through the traditional common law actions for damages for wrongful arrest, unlawful detention and malicious prosecution. These rights are often violated by the police – the principal law enforcement agents of government. Sometimes, too, non-law enforcement personnel of the Lesotho army unwittingly get embroiled in law enforcement duties, thereby involving the government in incurring liability in damages for the numerous human rights violations that trail their encounter with members of the public. Although there are provisions in the Constitution of Lesotho of 1993 through which the individual may ventilate his or her entrenched fundamental rights, victims of these breaches tend to enforce their security of the person and human dignity rights in the courts in Lesotho by way of the common law damages in delict. In an attempt to establish the liability of the state in this instance, one witnesses the interplay of the constitutional guarantee of rights, the protections afforded the individual through the Criminal Procedure and Evidence Act of 1981 and the common law cause of action. The present investigation concentrates on the primary problem of establishing the liability of the state first and foremost, as an assessment of the quantum of the damages recoverable is an exercise a court can undertake only after the liability issue has been resolved or ascertained. This contribution, therefore, examines the many instances whereby, in the purported performance of law enforcement duties of the state, the police and army personnel have infringed the rights of the citizens and, in the process,*

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*expose the brutal nature of the injuries the victims have suffered and the role the courts have played in their endeavour to uphold the rights to security of the person and human dignity as well as to maintain the rule of law in Lesotho.*

**Key words:** *personal liberty rights; human dignity; wrongful arrest; malicious prosecution; unlawful detention; state liability for police brutality; military involvement in law enforcement duties; disregard for the rule of law*

## 1 Introduction

A perusal of the fundamental rights provisions in the Constitution of Lesotho of 1993<sup>1</sup> reveals that there are at least three constitutional routes through which a person unlawfully arrested or detained can ventilate such an infringement. To begin, any person who is unlawfully arrested or detained can claim compensation in terms of section 6(6) which guarantees the individual the right to personal liberty.<sup>2</sup> Besides section 6(6), there is the general right of access to the courts to enforce a breach or threatened infringement of any of the rights entrenched in Chapter II of the Constitution embedded in section 22. The complainant is entitled, by virtue of this guarantee, to apply to the High Court for redress.<sup>3</sup> In turn, the High Court is vested with the jurisdiction to enforce the right allegedly infringed or threatened with infringement and, in the process, it is empowered to make such order, issue such process and give such directions as it considers appropriate in the circumstances.<sup>4</sup> In this regard the court is empowered to make a declaratory judgment which states the rights of the applicant, or issues other forms of interdicts (mandatory or prohibitive) when approached to do so.<sup>5</sup> The courts in Commonwealth jurisdictions where similar constitutional provisions exist have interpreted this clause to entitle the applicant to the award of damages for breaches of the guaranteed fundamental rights in appropriate cases.<sup>6</sup>

Apart from the 'compensation' and 'constitutional damages' routes, there is yet a third source derived from the reading together of

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1 Constitution of Lesotho or Constitution.

2 Compare sec 3(6) 1966 of the Constitution of Lesotho.

3 Sec 22(1) 1993 Constitution of Lesotho.

4 Sec 22(2) Constitution of Lesotho.

5 C Okpaluba 'Redress for breach of fundamental rights in Nigeria' (1981) 23 *Journal of the Indian Law Institute* 205-226.

6 *Maharaj v Attorney-General of Trinidad and Tobago* (2) [1979] AC 385 (PC); *Attorney-General of Trinidad and Tobago v Ramanooop* [2005] 2 WLR 1324 (PC) (Trinidad and Tobago); *Simpson v Attorney-General* [1994] 3 NZLR 667 (NZCA); *Taunoa v Attorney-General* [2008] 1 NZLR 429 (NZSC) (New Zealand); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC) (South Africa).

sections 22(1) and (2)(b) which complement each other. Section 22(1) provides that in the case of a detained person, any other person can approach the court on his or her behalf alleging an infringement of the rights of the detained person. In terms of section 22(2)(b), the court can 'issue such process' as it may consider appropriate. This recourse contemplates, among others, a process akin to the common law writ of *habeas corpus*,<sup>7</sup> whereby a court can order that a detained person be brought before it without further delay for the purposes of determining the lawfulness or otherwise of the detention. This process usually is not an action for damages but an application for the immediate release of the person unlawfully detained.<sup>8</sup> It often is a prompt remedial action rather than the action for damages which happens *ex post facto*.<sup>9</sup> This research has shown that, unlike in *habeas corpus* applications, there appears to be no decided case(s) to suggest that litigants in Lesotho have explored the options of compensation or constitutional damages causes of action to ventilate breaches of their personal liberty rights.

However, neither constitutional damages as a cause of action nor the problems inherent in their quantification are dwelt upon in the article. Rather, this presentation critically analyses the wealth of case law where plaintiffs have claimed damages through the traditional common law cause of action with regard to wrongful arrest, detention and malicious prosecution in Lesotho.<sup>10</sup> The inquiry closely follows the process adopted by the courts in the adjudication of these issues. The investigation, in essence, commences with establishing the liability of the defendant which, in turn, involves identifying the rights alleged to have been infringed.<sup>11</sup> In this context, one encounters the interplay of the constitutional rights to personal liberty and security of the person, the dignity and reputation of the individual, on the one hand, and the circumstances in which that infringement occurred, on the other. The origin of the right infringed or the process may be found in the Constitution or the Criminal Procedure and Evidence Act 9 of 1981 (CPEA).<sup>12</sup> Then follows the problematic quantification exercise which is usually the last in the sequence. The inquiry into the quantification aspect is omitted from the present discussion due to

7 See eg *Maseko v Attorney-General* LAC (1990-1994) 13.

8 See eg *R v Governor of Brixton Prison, Ex Parte Armah* [1968] AC 192 (HL); *R v Home Secretary, Ex Parte Khawaja* [1984] AC 74 (HL).

9 See AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 781; HWR Wade & C Forsyth *Administrative Law* (2009) 505.

10 See eg *Nkofi v Ramoreboli* [2014] LSHC 65 (12 August 2014) paras 4-7.

11 *Kopo and Kopo v Commander of Lesotho Defence Force* [2011] LSHC 122 (9 March 2011) paras 29-34; *Kalaile v Commissioner of Police* [2011] LSHC 130 (20 September 2011) para 15.

12 As amended by the Criminal Procedure and Evidence (Amendment) Act 10 of 2002.

space constraints but, owing to its relevance to the subject matter, it is undertaken elsewhere.<sup>13</sup>

It is clear from this study that there is a looming over-intrusiveness of the Lesotho military in the law enforcement sphere in the Kingdom where, in the normal course of things, it does not ordinarily have a role to play.<sup>14</sup> A distinction should be drawn between the military dabbling with mundane law enforcement of its own volition, a territory unfamiliar to soldiers as against their functioning in the more familiar military terrain under the relevant national legislation.<sup>15</sup> This issue recently arose as a challenge to the jurisdiction of the High Court in an application for *habeas corpus* by a detained senior military officer.<sup>16</sup> It was argued that the High Court, not sitting as a review court, lacked the jurisdiction to order the placing of Brigadier Mareka under open arrest when such discretionary power was vested in the defence force.<sup>17</sup> It was further contended before the Court of Appeal that the High Court had no jurisdiction to substitute the decision of the defence force with its own, as only the defence force is by law given the discretion to make such a decision which would place a person under closed or open arrest. In any event, the High Court did not sit as a reviewing court, nor did it sit as a constitutional court in terms of section 22 of the Constitution. The Court of Appeal rejected these arguments for the following reasons: First, not only because the applicant, the wife of the detainee, had *locus standi* to launch the *habeas corpus* application in terms of section 22(1) of the Constitution, but also because the High Court, in terms of sections 22(2)(a) and (b) of the Constitution, has inherent jurisdiction to hear and determine any application made pursuant to section 22(1), or to deal with any question arising in relation to any proceedings under subsection 22(3). The Court was unequivocal in holding that the High Court had jurisdiction to hear and determine issues arising from the present application related to the right to life under section 5; the right to personal liberty in terms of section 6; and freedom from inhuman treatment in section 8.<sup>18</sup> The Court further held, given the nature of the process with which the High Court was concerned, namely, an application for *habeas corpus*, that the question of the legality of the continued detention of Brigadier Mareka was squarely in issue before the court *a quo*, so that the Crown had to legally justify the arrest and continued detention of the Brigadier. Accordingly, it

13 C Okpaluba 'Damages for wrongful arrest, detention and malicious prosecution in Lesotho: The problem of quantum' (forthcoming).

14 See the judgment of Mahase J in the *habeas corpus* case of *Lerotholi v Commander of Lesotho Defence Force* [2007] LSHC 8 (2 July 2007). See also K Ramjathan-Keogh 'Trampling on the rule of law in Lesotho' *Daily Maverick* 30 October 2015.

15 See eg *Commander of Lesotho Defence Force & Others v Rantuba & Others* LAC (1995-1999) 687 discussed below, para 2.2.

16 See *per* Moilola J, *Mareka v Commander LDF* [2015] LSHC 26 (1 July 2015) para 6.

17 See the Court of Appeal decision in *Commander LDF v Mareka* [2015] LSCA 23 (7 August 2015) paras 6, 12 & 26.

18 *Mareka* (n 16 above) para 6.

was totally irrelevant whether the High Court acted under its administrative law review power under the common law exercised in terms of rule 50 of the High Court Rule, or as a court competent to enforce a subject's right to liberty guaranteed under sections 5, 6 and 8 of the Constitution.<sup>19</sup>

From what follows it also appears that even the police, the constitutionally-empowered law enforcement agency of the state, tends to operate in apparent and, sometimes, complete disregard for the rights of the citizen and the rule of law. The cases of torture and brutality encountered in the article abundantly illustrate a total disrespect for due process, which is precisely the opposite of what the Constitution mandates and promotes and the CPEA protects.

## 2 Relevant constitutional guarantees and statutory protections

Although the current Constitution of Lesotho cannot strictly be termed a Westminster model constitution since the Kingdom abandoned her original Westminster Constitution of 1966 and after some two decades of dictatorship and military rule made a new Constitution in 1993. However, both Constitutions are, for the purposes of the protection of fundamental human rights and freedoms, one and the same thing except for minor alterations. For instance, section 4, which lists all the guaranteed rights, and section 6 of the 1993 Constitution dealing with the right to personal liberty literally are similar in terms to the provisions of sections 1 and 3 of the independence Constitution of 1966. One peculiarity of both Constitutions is that in their guarantee of the right to personal liberty, in some instances, they incorporate established common law personal liberty rights<sup>20</sup> and, in other instances, constitutionalise the criminal procedural safeguards embedded in the criminal procedure legislation which pre-dated the independence Constitution. Accordingly, the lawfulness or otherwise of an arrest and detention often tends to depend on what provision of the personal liberty right in the Constitution was violated or the Criminal Procedure and Evidence Act that was contravened.

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19 *Mareka* (n 16 above) para 12.

20 The often-cited speech of Lord Atkin at the Privy Council in *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 670 is a classic illustration of the attitude of the common law under discussion here. Extolling the English common law reference to the liberty of the individual even in the thriving days of colonialism, Lord Atkin emphasised: 'In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.'

## 2.1 Right to personal liberty

Arrest or detention is an exception to the constitutional prohibition that a person shall not be arrested or detained without the authority of the law in terms of section 6(1) of the 1993 Constitution if it was upon reasonable suspicion that the person had committed or was about to commit a criminal offence under the law of Lesotho.<sup>21</sup> In section 6(2) it is provided that any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language he understands, of the reasons for his arrest and detention. In terms of section 6(3)(b) any person who is arrested or detained upon reasonable suspicion that he or she has committed or is about to commit a criminal offence and who is not released

shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within forty-eight hours of his arrest or from the commencement of his detention, the burden of proving that he has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

It is further provided in section 6(5) that if any person arrested or detained upon reasonable suspicion that the person has committed or is about to commit a criminal offence is not tried within 'a reasonable time', then

without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

As one would expect in any fledgling democracy where the military constantly plays the role of neutralising the rule of law and the enforcement of fundamental human rights and freedoms, some of these provisions have come up for interpretation and enforcement in the courts. A few examples will suffice. In *Bolofa v DPP*,<sup>22</sup> the Court of Appeal was considering an appeal on an application for bail which the court rightly observed required it to balance two competing interests, namely, the interests of the criminal detainees in their basic right to liberty, on the one hand, and the interests of the community in criminal suspects being prosecuted, on the other. After deliberating upon the provisions of sections 6(3)(b) and 6(5) (on personal liberty) and 12(1), (2) and (8) (on the right to a fair trial) of the Constitution, Steyn P, who delivered the judgment of a unanimous court, held that the Constitution was not enacted merely for purposes of promoting the Kingdom as a country that expresses a commitment to acceptable international norms and standards of behaviour. Rather, it is a solemn and effective covenant regulating the relationship between the Crown

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<sup>21</sup> Sec 6(1)(e) Constitution of Lesotho.

<sup>22</sup> LAC (1995-1999) 231.

and its citizens.<sup>23</sup> Further, although the Constitution provides for the basic right to personal liberty, as well as the presumption of innocence in criminal matters and speedy trials, in Lesotho delayed criminal trials are unfortunately the rule and not the exception,<sup>24</sup> a state of affairs that is unacceptable in a civilised state. The lengthy detention of suspects without trial is an arbitrary form of punishment which negates the right to liberty and the right to be presumed innocent. An accused person, who is deemed innocent until proven guilty by the Constitution, is entitled, once indicted, to be tried expeditiously.<sup>25</sup> The President of the Court of Appeal observed:<sup>26</sup>

These provisions can only be meaningful if all those involved in the administration of justice perform their duties in a manner consistent with the ethos and the values that underpin them. This obligation rests on those who are part of the cohesive unit that administers criminal justice. Those involved include the following: the police officer that exercises the power of arrest and first detention; the judicial officer who is seized with responsibility to decree the continued detention of the accused or his release on bail in terms and conditions upon which this is to occur and regulates the conduct of the trial; the Director of Public Prosecutions who determines whether and when a prosecution should be instituted and upon which charges and who exercises a discretion as to whether to oppose bail or not; the High Court and this court as final arbiters of the fate of the accused; and ultimately the prison authorities who are obliged to see to the protection of the public by ensuring the secure incarceration of the committed prisoner and to see to his possible rehabilitation. Even the social services that facilitate the reintegration of the released prisoner into society is part of such a unit.

Another illustration which leads us more directly to the issue at hand – establishing liability for the purposes of wrongful arrest and unlawful detention – is *Maseko v Attorney-General*,<sup>27</sup> which reached the Court of Appeal as an application for *habeas corpus* and concerned the validity of the arrest and detention of the appellant in purported compliance with the provisions of section 13(1) of the Internal Security (General) Act 24 of 1984. In order to decide whether the arrest and detention were illegal, the Court of Appeal, *per* Ackermann JA, posed the following three questions: (a) Was the appellant at any time material to his arrest informed by or on behalf of the person arresting him of the reasons for his arrest and, if not, did such failure render the arrest unlawful? (b) Must the arresting officer be the member of the police force to have the reasonable suspicion required by section 13(1) of the Act or would it be sufficient if a second respondent entertained it? (c) Did second respondent, on the facts, discharge the onus of proving reasonable his suspicion that the appellant was a person involved in subversive activity? The Court's

23 *Bolofo* (n 22 above) 247D-E.

24 *Bolofo* 249F-G/H; *Letsie v DPP* LAC (1990-1994) 246 258J-259E.

25 *Bolofo* (n 22 above) 249I/J; *S v Geritis* 1966 (1) SA 753 (W) 754.

26 *Bolofo* 248I/J-249D.

27 LAC (1990-1994) 13.

answers to these three questions are dealt with in the sub-headings below.

### 2.1.1 Reason for arrest

The Court held that an arrested person was entitled to be informed in substance of the reason for the arrest. All along this has been a requirement of the common law,<sup>28</sup> the application of which was not excluded by section 13(1) of the Act.<sup>29</sup> The facts of *Maseko*, however, reveal that the appellant was never adequately informed of the reason for his arrest, thus rendering the arrest and detention illegal. Ackermann JA held, once it is accepted that such reasons have to be furnished to the person being arrested, then it is irrelevant for purposes of determining the extent to which the arrestee must be informed whether the arrest is with or without warrant. In effect, the rules established for determining how fully the reasons have to be explained in the case of an arrest with a warrant are equally applicable to the case of an arrest in terms of section 13(1).<sup>30</sup> It would not have been sufficient merely to have told the appellant that he was being arrested in terms of the Act or on account of the Act, as he could not from such information have determined whether he was being arrested in terms of section 13(1) on a charge of sabotage, or because he was a member of an unlawful organisation, or of unlawfully possessing a dangerous weapon, or for public indecency, or for a breach of the peace, or for intimidation or annoyance. The bare information that he had been arrested in terms of section 13(1) would not have served the purpose mentioned above:<sup>31</sup>

In fact, the position is not far removed from that of a policeman who, in a country where the criminal law is codified, arrests a person and only tells such a person that he is being arrested for breaching the criminal code. It would not even have been sufficient ... to have told appellant that he was being arrested because of a suspicion that he was reasonably suspected of being involved in subversive activity.

The definitions of subversive activities in section 3(1) of the Act cover a wide field. This is greater reason why the arrested person must know in substance the particular acts he is suspected of having committed or conspired to commit.<sup>32</sup>

Granted that at the time *Maseko* was decided the 1966 Constitution of Lesotho had long been suspended, such that the determination of the issues involved in that case could only have been based on the CPEA or the common law or both. As has been observed, it was the common law principle that came to the rescue of

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28 See *Christie v Leachinsky* [1947] 1 All ER 567 (HL) 573A & C-E; *Walker v Lovell* [1975] 3 All ER 107 (HL) 115; *Brand v Minister of Justice* 1959 (4) SA 712 (A) 718B-C.

29 See now sec 6(2) Constitution of Lesotho.

30 *Maseko* (n 27 above) 29F-G.

31 *Maseko* 31B-E/F.

32 *Maseko* 32E-F.



the appellant. In the more recent case of *Kalaile v Commissioner of Police*,<sup>33</sup> the plaintiff could have relied on the constitutional or statutory protection or both, but he preferred to challenge the unlawfulness of his arrest in terms of section 32(4) of the CPEA because he had not been informed of the reason for his arrest.<sup>34</sup> It was for the arrestor to prove that it was lawful.<sup>35</sup> The judge was not convinced by the defendant's version of events, and found that there was 'a malicious ring' to the conduct of the officers who, as it were, approbated and reprobated: They arrested the plaintiff and, at the same time, wanted to let him go. Finally, they rearrested and detained him and, for that matter, beyond the 48 hour limit before taking him to court. There was no doubt that the officers as peace officers arrested the plaintiff for an alleged offence committed in their presence. As Harms DP observed, this power of arrest without a warrant could be used 'to arrest for petty crimes such as parking offences, drinking in public and the like'.<sup>36</sup> Again, even if police officers have the power and discretion to arrest, this power must be exercised within the bounds of rationality.<sup>37</sup> Chaka-Makhooane J accordingly held that the police officers clearly had the discretion and power to arrest which they could have used rationally: They could have warned the plaintiff. Rather, by adopting an attitude whereby the plaintiff either showed remorse or faced arrest and detention, their action smacked of *mala fides*. The police officers thereby acted unreasonably in arresting the plaintiff. They did not use their power and discretion rationally.

Adopting further the South African Supreme Court of Appeal judgment in *Sekhoto*,<sup>38</sup> the learned judge held that the suspected offence was relatively trivial and, consequently, the arrest was unnecessary and any form of detention was certainly irrational and unjustified. Indeed, there was no reasonable explanation for keeping the plaintiff in police cells for that length of time, even if it was still within the 48-hour period, for an alleged offence that was so trivial that the officers themselves were willing to release the plaintiff on warning.<sup>39</sup>

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33 *Kalaile* (n 11 above).

34 *Nqumba v State President* 1987 (1) SA 456 (E); *Thamae v COP* [2001] LSCA 129 (4 December 2001).

35 *Maseko* (n 27 above) 17-18.

36 *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 6.

37 *Sekhoto* (n 36 above) para 14.

38 As above.

39 For a recent South African case on warning, see the Constitutional Court judgment in *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC). Although this case concerned whether in exercising their discretion to arrest a child, the police officers took into consideration the best interests of the child in terms of sec 28(2) of the 1996 Constitution, the Court took the opportunity to emphasise the duty on the part of the police in terms of sec 40(1) of the CPA to consider and weigh all the facts carefully and exercise a value judgment whether an arrest could be justified. In the instant case, they could have issued the child a

### 2.1.2 Who should entertain the suspicion?

As far as this question is concerned, the Court held that it was the police officer effecting the arrest who was required by section 13(1) of the Act to entertain the requisite suspicion. The police officer who arrested the appellant did so because he had the statutory power to effect such an arrest. He was neither an agent, servant nor instrument of anyone in this regard. In exercising his section 13(1) powers he had to satisfy himself that he was entitled to do so. The power of arrest in this instance was not different from an arrest under the CPEA. For, although the Minister of Police may be held liable in delict for the wrongful arrest of a person, the decision to arrest that person remains within the discretion of the police officer.<sup>40</sup> He or she is not compelled to arrest,<sup>41</sup> neither can the arrest be effected in obedience to superior orders<sup>42</sup> nor carried out merely to make a point to colleagues that he or she was not racist.<sup>43</sup>

Thus, in delivering judgment for a full court of the Lesotho Court of Appeal in *Jobo & Others v Commander, Lesotho Defence Force & Others*,<sup>44</sup> Chingengo AJA held that the legislature in enacting the Lesotho Defence Force Act of 1966 had reposed the power on the manner of custody or form of arrest of an accused member of the force remanded for further investigation, summary trial or trial by court martial, on the unit commander. Consequently, a court cannot be called upon to scrutinise the merits of the unit commander's decision, but it may be called upon to scrutinise the manner in which that decision was arrived at. In doing so the court will have regard to the *Wednesbury* principles embedded in the modern concepts of illegality, irrationality and procedural impropriety.<sup>45</sup> Therefore, when in his judgment *a quo* Peete J stated that his court was not sitting to review the decision of the Lesotho defence force (LDF),<sup>46</sup> the Acting Justice of Appeal wondered<sup>47</sup>

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warning and made the father who was present undertake to bring the child to court when requested to do so. See the discussion of this case by C Okpaluba 'The end of the search for a fifth jurisdictional fact on arrest on reasonable suspicion: A review of contemporary developments' (2017) 30 *South African Journal of Criminal Justice* (forthcoming).

40 This is notwithstanding the fact that the officer was armed with a warrant: *Sekhoto* paras 28-29; *Domingo v Minister of Safety and Security* [2013] ZAECGHC 54 (5 June 2013) paras 2-3 & 7.

41 *Maseko* (n 27 above) 33C-H. See also *Minister of Police v Gamble* 1979 (4) SA 759 (A) 765G-768E; *Mhlongo & Another NO v Minister of Police* 1978 (2) SA 551 (A) 556G-567B.

42 *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E) paras 10-11.

43 *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (N) para 41.

44 [2015] LSCA 38 (5 November 2015) (*Jobo* case).

45 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

46 *Jobo & Others v Commander, Lesotho Defence Force & Others* [2015] LSHC 25 (18 June 2015) para 30.

47 *Jobo* (n 44 above) para 35.

on what basis, if not review, one may ask, would he have made the following pronouncements – that the decision to place detainees under close or open arrest must be justified by the circumstances; section 87 was not complied with; the holding charges belatedly communicated to the detainees cured any illegality that may have occurred; and the failure of the LDF to furnish to the applicants before him the remand warrants and signed written reports were antithetical to the rule of law and due process.

Yet the case in hand calls upon the court to scrutinise the decision of the LDF on the basis of illegality and irrationality, as it has been established that a person exercising public power must act within the powers lawfully conferred upon him,<sup>48</sup> and its exercise should not be arbitrary or irrational.<sup>49</sup> In effect the decision of the person placed in authority must not be unreasonable and that no reasonable authority would ever consider making it. In order to avoid falling into such a pitfall, the decision maker, according to the *Wednesbury* unreasonableness principle, must take into account (relevant) factors that ought to be considered and not take into account (irrelevant) factors that ought to be avoided.<sup>50</sup>

### 2.1.3 Proving the reasonableness of the suspicion

Having found the arrest in *Maseko* to be unlawful on other grounds, the court was not compelled to but did find it advisable to deliver an opinion on the issue of reasonable suspicion as it pertained to the case. It was held that the jurisdictional facts justifying arrest under section 13(1) were not dependent on the subjective state of mind of the arresting member of the force, but on an objective criterion, depending on proof by the second respondent that he, as a matter of fact, entertained the requisite suspicion and that such belief was reasonable in all the circumstances. In effect, the existence of the ‘reasonable suspicion’ is objectively justiciable.<sup>51</sup> In any event the court must decide whether the suspicion was entertained and whether it was reasonable. In order so to decide, Ackermann JA referred to the following judgments:

- Lord Devlin said in *Shaban Bin Hussein v Chong Fook Kam*<sup>52</sup> that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove.’ Suspicion arises at or near the starting point of an investigation of which the

48 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56.

49 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa* 2000 (2) SA 674 (CC) para 20.

50 *Jobo* (n 46 above) para 36. See the following English cases: *Holgate-Mohammed v Duke* [1984] AC 437 (HL) 443; *Al Fayed & Others v COP for the Metropolis* [2004] EWCA Civ 1579 (CA) paras 82-83; *Castorina v Chief Constable of Surrey* [1996] LGR 241 (CA) 249. See also the New Zealand cases of *Nielsen v Attorney-General* [2001] 3 NZLR 433 (CA); *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC); *Whithair v Attorney-General* [1996] 2 NZLR 45 (HC); *Fok Lai Ying v Governor in Council* [1997] 3 LRC 101 (PC).

51 *Maseko* (n 27 above) 34C-E. See also *Minister of Law and Order v Hurley* 1986 (3) SA 568 577I-583H.

52 [1969] 3 All ER 1626 (PC) 1628.

- obtaining of *prima facie* proof is the end. Thus reasonable suspicion cannot be equated with *prima facie* proof.
- Scott LJ had held in *Dumbell v Roberts*<sup>53</sup> that the requirement that before arresting the police officer must satisfy himself that there in fact existed reasonable grounds for suspicion of the arrestee's guilt, is limited to the police having nothing near a *prima facie* case for conviction.
  - Wentzel JA of the Lesotho Court of Appeal held in *Solicitor-General v Mapetla*<sup>54</sup> that, although a suspicion may not be equated with *prima facie* proof it must be reasonable: It must be such that a reasonable person in possession of the facts would agree that there was reasonable ground to suspect that the person involved was concerned in subversive activity.<sup>55</sup>

As there was no iota of evidence leading to the ground upon which the arrestors in *Mapetla* based their suspicion that the senior and respectable chief in that case was involved in any subversive activity against the state, so, also, the officer concerned in *Maseko* did not possess the necessary suspicion, thus rendering the arrest and detention in both cases illegal. Accordingly, the allegations by the second respondent against the appellant did not objectively amount to suspicion of involvement in subversive activity, far less a reasonable one, so that the requirements of section 13(1) had not been satisfied. The border line between capricious or arbitrary arrest and the safeguard afforded the citizen is the requirement of reasonableness on the part of the arresting authority. Thus, Ackermann JA held that a bald statement that the appellant had indulged in subversive activities, as defined in the Internal Security Act, was insufficient without supplying the information on which that suspicion was held. It was not sufficient merely to state a conclusion without supplying some information on which such a conclusion or suspicion was based. To begin with, the evidential burden of proof could only be discharged by proof of facts. Again, by not proving facts in support of the conclusion, the court would be precluded from assessing the reasonableness of the conclusion or suspicion and, thereby, precluded from the finding that the onus has been discharged. The reasonableness of the suspicion could only be assessed from the facts shown, not the conclusion drawn.<sup>56</sup>

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53 [1944] 1 All ER 326 (CA) 329.

54 [1985] LSCA 126 (26 July 1985).

55 For more recent South African cases on reasonable suspicion to arrest and the legal justifiability of the detention, see C Okpaluba 'Reasonable suspicion and conduct of the police officer in arrest without warrant: Are the demands of the Bill of Rights a fifth jurisdictional fact' (2014) 27 *South African Journal of Criminal Justice* 325.

56 *Maseko* (n 27 above) 35C/D-F. In *Phiri v Commander, RLDF* LAC (1990-1994) 233 238 B/C-E, Steyn JA held that having regard to the draconian nature of the Lesotho Paramilitary Force Act 13 of 1980 as amended by Order 3 of 1990, departing as it were from the principle that a subject should not be deprived of his or her liberty without due process, and having regard to the nature of the discretion conferred on the commander of the army in the instant case, it was only the commander who could properly dispose of his own mental processes as

## 2.2 Right to legal advice

Following the unrest which had occurred in Lesotho on 15 October 1998, the respondents in *Commander of Lesotho Defence Force & Others v Rantuba & Others*,<sup>57</sup> all members of the LDF, were arrested and detained by the military authorities for allegedly having participated in a mutiny. They were denied access to their legal advisers. Their wives, therefore, made an urgent application for an order directing the appellants to allow the detained persons' access to their legal advisers and an order that they be charged or released forthwith. Two issues arose for determination before the Court of Appeal: (a) the entitlement of a person detained, under the military law of Lesotho, to access to a legal adviser; and (b) whether the order of the High Court directing that the detainee be charged within eight days or released had been correctly granted.

The full court of the Lesotho Court of Appeal held that at common law, there was a fundamental or basic right of access to legal advice,<sup>58</sup> which is a corollary of the right of access to court and is a right that survives incarceration. Such right may exist even where the right to legal representation has been lawfully excluded. Although this right may be taken away or attenuated by legislation,<sup>59</sup> the Constitution has not removed it. In any case, the onus of proving such taking away or attenuation is on the person who so asserts.<sup>60</sup> Section 24(3) of the Constitution did not exempt the military from its provisions since that section is not included in those specifically mentioned as affected by military law. In *Jobo*<sup>61</sup> the full court of the Court of Appeal held that an understanding of the provisions of section 24(3) of the Constitution started by appreciating the essence of section 2 of the same Constitution, which makes the Constitution the supreme law of Lesotho such that any other law that is inconsistent with it, to the extent of the inconsistency, shall be void. With this in mind, it follows that section 24(3) could not have authorised parliament to enact a law that would go against the fundamental premise of the Constitution, that is, a law that does not accord with the principle of constitutionalism. For instance, a court martial cannot lawfully be

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to whether he actually formed the necessary opinion which led to the arrest and detention of the persons concerned and deposed to the facts he relied upon to do so. In other words, the available evidence and circumstances of the case were not sufficient to support the view that the commander relied on evidence and circumstances to form the necessary opinion.

57 LAC (1995-1999) 687 (*Rantuba*).

58 *Rantuba* (n 57 above) 691A-B. See also *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 187; *R v Slabbert* 1956 (4) SA 18 (T) 21G; *Brink v COP* 1960 (3) SA 65 (T); *S v Shabangu* 1976 (3) SA 555 (T) 558.

59 *Whittaker v Roos and Bateman* 1912 AD 92 122-123; *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) 39C-E; *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) 957D-F.

60 *Rantuba* (n 57 above) 691D-F/G. See also *During NO v Boesak* 1990 (3) SA 661 (AD) 673G-H & 674B-C; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (AD) 153D-I.

61 *Jobo* (n 44 above) paras 25-27 & 70-71.

established or vested with powers that 'collide with the principles and the spirit of the Constitution'.<sup>62</sup> The Court of Appeal further upheld *per Maqutu J*<sup>63</sup> to the effect that as much as military law is the basis of discipline in the armed forces, therefore a disciplined force could not be based on the ordinary law applicable to civilians.

However, it does not follow from this that those who join the armed forces should be required to surrender the right to be treated fairly or that they should be expected to waive their human rights. In other words, a member of the force, whatever his or her rank, does not cease to be a citizen so as to lose his or her constitutionally-guaranteed rights. The truth of the matter is that while a member of the armed forces remained subject to the ordinary laws of the state he or she is also subordinate to an 'entirely distinct code of military law'. The LDF Act and Regulations contain a number of provisions designed to procure, secure and ensure the legality of arrests and detention of soldiers suspected of having committed offences and these provisions are consistent with the Constitution. However, because these provisions restrict the ordinary rights of persons affected by them, they must be interpreted strictly.<sup>64</sup> Commenting on the judgment of Hlajoane J in the second of the consolidated *Jobo* appeals, Chinhengo AJA held:

The judge *a quo* was of the view that the appellants contended that the respondents' rights under Chapter II have been taken away by section 24(3) of the Constitution. She could not have been correct. Neither did the appellants hold that the respondents have no rights at all nor could they have validly taken that position, assuming they so contended.

The Acting Justice of Appeal referred to *Mandela v Minister of Prisons*<sup>65</sup> and *Rantuba* for the proposition that a detainee under military law retains his common law rights unless such rights, expressly or by necessary implication, have been attenuated by statute. The same must be the position with respect to rights under Chapter II. As stated in *Rantuba*, the retention of rights guaranteed under Chapter II is not a matter which depends upon the conferral by statute, but rather on whether the statute attenuates (those rights). This means that the rights under Chapter II may be attenuated by military law but not extinguished. 'Attenuate' ordinarily means to weaken or reduce in force or effect; to weaken; to dilute. The rights under Chapter II, therefore, may only be 'weakened' or 'diluted' under a military law in order to align them with the exigencies of the military.

Further, referring to *Sekoati & Others v President of the Court Martial & Others*,<sup>66</sup> the court addressed the issue of judicial independence in

62 Approving *per Maqutu J Rantuba & Others v Commander, Lesotho Defence Force & Others* CIV/APN/418/98; [1998] LSCA 110 13.

63 *Rantuba* (n 62 above) 12-13.

64 *Mbali v Minister of Police* 1954 (2) SA 596 598C.

65 1983 (1) SA 938 (A).

66 LAC (1995-1999) 812 827F-828C & 831H.

the context of section 12(1) as read with section 118(2) of the Constitution, which provides a clear basis for understanding the scope, import and effect of section 24(3).<sup>67</sup> It was held in that case that the framers of the Constitution deliberately enacted the unique section 24(3) in order to define a different legal regime to govern military affairs through military tribunals which are different from civilian courts. In effect,<sup>68</sup>

[t]he Lesotho Constitution creates a particular legal regime for the military in general and courts-martial in particular. The full panoply of fundamental rights is expressly not available to the military. Courts-martial must nevertheless be independent – but in the sense and to a degree appropriate to their inherent nature as military, not civilian, courts.

The Court of Appeal then held that the appellants in *Jobo* could never take the position that members of the military have been stripped of their fundamental rights and freedoms under Chapter II. The rights of military personnel, in terms of section 24(3), are attenuated to the extent provided in the LDF Act and the regulations made thereunder. Section 24(3) provides for the limitation of fundamental rights and freedoms of military personnel by a military law, but only to the extent that the limitation is fair, reasonable and justifiable in a democratic society based on principles and objectives of the Constitution. However, no issue has been raised of the current military law not measuring up to this standard.<sup>69</sup>

In short, the common law right of access to legal advice had not been removed by the Constitution.<sup>70</sup> Nor is there anything in the Lesotho Defence Force Act 4 of 1996 which could be read as having removed the right of access to legal advice in respect of military personnel. The Court further held that the commander of the army did not possess the power to choose to permit or deny access to legal advisers by detainees, as this right has been conferred by the common law and not by statute.<sup>71</sup> Finally, there is no evidence to show that the detainees' access to legal advisers would impact negatively on

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67 Sec 24(3) of the Constitution of Lesotho 1993 provides: '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.'

68 LAC (1995-1999) 812 831H.

69 *Jobo* (n 44 above) para 71.

70 *Rantuba* (n 57 above) 695D.

71 *Rantuba* 695C. Compare *Thornhill v Attorney-General of Trinidad and Tobago* [1980] 2 WLR 510 (PC) where, approving the judgment of Georges J, the Privy Council held that the right of a person arrested and detained as the appellant found himself on 17-20 October 1973, to consult a lawyer of his choice was spelt out in sec 2(c)(ii) of the Constitution of Trinidad and Tobago 1962 and proclaimed by sec 1 to be a right that had existed on the coming into force of the Constitution and had continued to exist. Therefore, if there was a law in force in Trinidad and Tobago, whether written or as part of the unwritten common law which empowered the police to prevent a person in the situation of the appellant from exercising that right, it was for the respondents to prove that it did not infringe that right.

internal stability, more especially because the commander had arbitrarily permitted the detainees' access to their family members while denying them access to their legal advisers.

### 2.3 The charge or release issue

The second issue in *Rantuba* related to the interpretation and application of the provisions of section 6(3) of the 1993 Constitution, which requires arrested and detained persons to be brought to court expeditiously (normally within 48 hours) or to be released. It was held that this principle applied to military personnel save to the extent that they were governed by special legislation, as provided for in section 24(3) of the Constitution.<sup>72</sup> Further, in the prevailing circumstances of instability in the country arising from mutiny by soldiers, there had not been an undue delay in investigating allegations against the detainees and bringing them to trial in terms of the applicable legislation, namely, section 89 of Lesotho Defence Force Act 4 of 1996 and the relevant rules and regulations. In the circumstances, the trial court was wrong to have fixed a period of eight days within which the detainees were to be charged or released.<sup>73</sup>

### 2.4 Torture, inhuman and degrading treatment

Section 8(1) of the Constitution of Lesotho clearly protects everyone from torture or inhuman or degrading punishment or other treatment.<sup>74</sup> These provisions notwithstanding, acts of cruelty are from time to time perpetrated by the Lesotho military, as can be seen in the following cases. For instance, the dastardly and barbaric acts witnessed in *Mohlaba & Others v Commander, Royal Lesotho Defence Force & Another*<sup>75</sup> prompted Leon JA to liken the treatment meted out to the appellants as reminiscent of the exercise of the KGB and the Gestapo, and the treatment meted out to the late Steve Biko of South Africa, which conduct called for the strictest censure in Lesotho.<sup>76</sup> The appellants were held in detention in deplorable conditions for a considerable period. They were tortured and assaulted. The plaintiffs were suspected of misappropriating certain moneys at the Labour Construction Unit; they were detained and taken to the 'torture

72 *Rantuba* (n 57 above) 695G.

73 *Rantuba* 697D-E. As was the case in *Letsie v Commander, Royal Lesotho Defence Force & Another* Civ/T/538/05 (28 July 2009) (*Letsie*) para 26, the defendants in *Mokebe v Policeman Mphats'oane & Others* CIV/T/115/07 (25 February 2009) did not contest liability. Indeed, they did not even plead. Chaka-Makhooane J, therefore, had to assume the facts pleaded by the plaintiff who had been arrested and detained without being charged or brought to court. The plaintiff alleged that he had been unlawfully and maliciously arrested and detained for 58½ hours, which was longer than the 48 hours within which the arresting officer should have brought him before court. According to the judge (para 30), '[i]t is trite that the lawful period of detention is forty-eight hours'.

74 Compare sec 5(1) of the 1966 Constitution.

75 LAC (1995-1999) 184.

76 *Mohlaba* (n 75 above) 191F/G-H.



chamber'. Although the manner of their torture differed, the general conditions of their detention, food and absence of facilities were similar.

The facts of *Mohlaba* were in many ways more or less replicated in *Letsie v Commander, Royal Lesotho Defence Force & Another*<sup>77</sup> with regard to the treatment by the Lesotho military of one of its high-ranking officers. First, the claim was for pain and suffering arising out of torture and assault by members of military intelligence and military police. Second, the defendants admitted liability, and the High Court of Lesotho was called upon to determine the issue of *quantum*. Although the insanitary conditions of detention of the plaintiff in *Letsie* was equally deplorable, it was the torture that appeared more pronounced than in the *Mohlaba* case. In *Letsie*, the plaintiff alleged that he had been insulted, belittled and humiliated before his junior officers. The trial judge had to accept the evidence of the plaintiff, which was not contested by the defendants. The Court of Appeal had to take into account the facts of these two cases, including the version of the torture involved, in quantifying the damages awarded in each case.

#### 2.4.1 Justice Peete on the 'sub-culture of brutality'

In *Kopo and Kopo v Commander LDF*,<sup>78</sup> Peete J addressed what he called 'the sub-culture of atrocity, brutality and inhuman treatment' that appeared to pervade the interaction between the members of the Lesotho military and the community at large. The judge was commenting on the amounts claimed by the plaintiffs as being rather high and that they ought to be reduced, but that 'what remains unmoved or unshakable are the sad and somber facts of the arrest and detention, their unlawfulness, their unfoundedness and absence of just cause'. Recounting the sordid facts of this case, better expressed in the judge's own words, Peete J said:<sup>79</sup>

The first plaintiff, a retired soldier of high standing, was arrested in public – probably in full view of his work mates; was handcuffed and bundled into an army van at gun point and driven post haste to Ratjomose barracks – subjected to rigorous interrogation that was based on misinformation about ABC links. The first plaintiff was continuously kept handcuffed for about 26 hours and not temporarily allowed even a free hand to enable him pass water on his own. An ordinary Mosotho man values his manhood and his 'penis' as one of his most private and precious assets of his body. A youngish soldier, Mofomobe had an unpleasant duty to unzip the pants of the first plaintiff and take out his penis so that he could pass water. This disgraceful humiliation was done twice. One wonders: Having arrested, searched and handcuffed first plaintiff, why was first plaintiff's other hand [not] let free and he be escorted under armed guard to the toilet so that he might be able to relieve himself? The only other motive – beside alleged security reasons – could only be to humiliate first plaintiff where it hurt

77 Civ/T/538/05 (28 July 2009); LAC (2009-2010) 549.

78 [2011] LSHC 122 (9 March 2011).

79 *Kopo and Kopo* (n 78 above) paras 38-39.

most – his private manhood! Humiliation suffered by him was most extreme and hurtful to any reasonable, decent, respectable and right thinking Mosotho man. At any rate, none of the senior army officers thereat could have tolerated the said treatment meted unto themselves. The Biblical advice ‘... do unto others as you would like them do unto yee ...’ still has a moral force even in our courts! The treatment meted to first plaintiff was atrocious, humiliating and shameful as well as unbecoming the serving members of the LDF. Brutality, atrocity and cruelty, besides being wholly uncivilized, dehumanizes other beings. Not only delictual but criminal liability may be attracted. Brutality and inhuman or sadistic treatment have been outlawed by many international instruments, especially the 1948 Universal Declaration of Human Rights. To allow, or to tolerate or to condone acts of cruelty and inhumanity tarnishes both our national image and our very civilization.

The acts of torture, inhuman or degrading treatment have remained unabated in Lesotho for it appears that at the slightest sign of political upheaval, one or other section of the Kingdom’s military would take the law into its own hands, and this recourse finds expression in the arrest, detention and kidnapping of members of the other section or group in the army. Quite recently, while hearing the applications for *habeas corpus* in the case of *Jobo & Others v Commander, Lesotho Defence Force & Others*,<sup>80</sup> Peete J once more reverted to the issue. Several serving soldiers were arrested under section 86 of the Lesotho Defence Force Act 4 of 1996 on charges under sections 48 and 49 of the Act, and the question before court was whether such arrests were unlawful, amounting to kidnapping or abduction. Delivering his judgment, Peete J made the following remarks:<sup>81</sup>

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 civilised 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 overboard to enlighten the ships during ocean storms! Slavery in whatever form or shape is therefore totally outlawed on absolute terms in section 9 of the Constitution of Lesotho ... Sitting through all the *habeas corpus* proceedings, the court has strongly deprecated and bemoaned the manner in which the detainees are publicly brought to court in shackles and chains and handcuffs.<sup>82</sup> 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 civilised

80 [2015] LSHC 25 (18 June 2015).

81 *Jobo* (n 46 above) paras 7-8.

82 *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC), where Manyarara AJ condemned in no uncertain terms the placing of prisoners in ‘leg irons’ as an infringement of their rights to human dignity under art 8 of the Constitution of Namibia 1990. For other cases of cruel and inhuman treatment, see *Namunjepo v Commanding Officer, Windhoek Prisons* 1991 (3) SA 76 (NmS); *Taunoa v Attorney-General* [2008] 1 NZLR 429 (NZSC); *Peters v Marksman* [2001] 1 LRC 1 (St Vincent and the Grenadines).

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.

Commenting further on the said sub-culture, the judge observed as follows:<sup>83</sup>

A sub-culture of atrocity, brutality and inhuman treatment should not be allowed to flourish in the armed forces; besides dehumanizing the victims, it promotes a self-perpetuating desire of revenge and retribution and can manifest itself in terrible and long lasting post-traumatic effects to all persons concerned. It also has a rippling labeling effect throughout the military institution. Very high standards of behaviour and discipline are required from the army personnel and at times these high standards call for high personal sacrifice of life and limb and at the expense of their own human rights.<sup>84</sup> A soldier obeys commands at all times and much has been said and written about the topic 'Obedience to Superior Orders'.<sup>85</sup>

These comments were prompted by a number of incidents. First, the detained soldiers were brought to court in leg shackles and handcuffs and were being escorted by masked and heavily-armed security personnel. Second, each soldier testified in court of having been subjected to cruel treatment and showed the court fresh and deep cuts and bruises on their wrists, probably caused by tightened handcuffs.<sup>86</sup>

### 3 Where liability is conceded

A common feature discernible from these cases can be put as follows: (a) that there is the tale of brutality by the police and army officers on individual citizens on the pretext of enforcing the law; and (b) that the concessions that are made in most of the cases can be baffling. Most often the defendant does not dispute liability and *quantum* remains the only issue for the court to determine.<sup>87</sup> Where this happens one can only ascertain the grounds that led to liability being conceded from the facts upon which the quantification analysis was

83 *Kopo and Kopo* (n 78 above) paras 40-41.

84 Sec 24(3) Constitution of Lesotho.

85 See eg *R v Mokhantso* CRI/95/02; MJ Osiel 'Obeying orders: Atrocity, military discipline, and law of war' (1998) 86 *California Law Review* 938.

86 *Jobo* (n 46 above) para 5.

87 Eg, in *Molise v Officer Commanding Thaba Tseka Police Post* [2013] LSHC 74 (11 March 2013) paras 10 & 13-18, the plaintiff abandoned his claim for unlawful arrest and detention for alleged stock theft because the police had reasonable suspicion to that effect while the defendants did not contest his claim for assault in police custody. Mahase J emphasised that an assault in whatever form is a delict affecting a person's bodily integrity and a breach of the fundamental right to the protection against torture or inhuman or degrading punishment or other such treatment by anybody upon a human being under sec 9(1) of the Constitution of Lesotho. The judge held that as a human being his right to be treated 'humanely and with dignity are protected under the Constitution'. The plaintiff's evidence that he had been subjected to torture, inhuman and degrading punishment for one hour by police officers whose duty it was to uphold the rule of law and to

undertaken by the court. In such a situation the discussion centres on those instances (a) where assaults were committed for no apparent reason; (b) where the plaintiff was detained on no legal basis; and (c) where the parties agree on the terms of settlement, whether one of them can renege on those terms or opt out of the agreement. While the first two issues are discussed below, the latter point is discussed in the context of quantification, the classification where it belongs.

### 3.1 Assault for no just cause

The alleged 'offence' of the plaintiff in *Morobi v Commissioner of Police*<sup>88</sup> was that he was being disrespectful to government officials simply because, when the police officers asked him to stop, he did not get out of the car but merely lowered his window. In the process of barraging the plaintiff with questions the officers spotted an incorrect entry of the expiry date of the plaintiff's learner's licence of which the plaintiff was not even aware. Instead of arresting him, if they had reasonable grounds to suspect that he had committed an offence, they embarked on inflicting a physical assault on him, using pepper spray in his eyes and ears and assaulting him with police sticks. They demanded money, which the plaintiff did not have. They left him waiting at the scene of the incident for several hours as instructed, but they did not return. A medical report confirmed an assault on the plaintiff's ribs with a blunt instrument; a severe degree of force was used causing injury to life, with a 'moderate, degree of immediate disability – moderate degree of long term disability – partial'. The plaintiff used to work at a place where he carried bags of seeds which he could no longer do after the assaults. The assaults took place in public and, as a pastor, his congregation started to look at him differently after the attacks. All these factors caused humiliation and a lowering of his dignity.<sup>89</sup>

The recent case of *Mokaka v Commissioner of Police*<sup>90</sup> is another case of assault involving no arrest or detention.<sup>91</sup> The police officers had ordered the plaintiff, a construction worker, returning from a circumcision school, to drop his stick and raise his hands, which he

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protect him was not contradicted. However, it was more disturbing to find that the cattle allegedly stolen by him were not found in his possession, and it was for that reason that the police released him from custody. Meanwhile, the 'unjustified brutal torture and assault' which the judge found 'shocking and deplorable' and 'clearly criminal offences' had taken place. In other words, the cattle in question had been found but not in the plaintiff's possession, even though the police had already subjected the plaintiff to 'intensive, prolonged brutal assault and torture on a suspicion that it was the plaintiff who had stolen same'.

88 [2012] LSHC 1 (9 February 2012).

89 *Morobi* (n 88 above) paras 20-21 & 27. See also *Raposholi v Commissioner of Police & Another* [2007] LSHC 67 (30 May 2007); *Makhasane v Commissioner of Police* [2011] LSHC 20 (3 January 2011).

90 [2014] LSHC 47 (11 February 2014).

91 See also *Lephatsoe Lebajoa v Commissioner of Police* [2007] LSHC 156 (31 May 2007); *Malatsi Lebajoa v Commissioner of Police* [2010] LSHC 99.

did. One of the police officers assaulted him with the stick and left with it. Medical evidence showed that the plaintiff had sustained a 'deformed left forearm, reduced range of movement at the elbow joint as well as pain and tenderness over the deformed part of the arm'. As a result of the injuries sustained, the plaintiff will 'not be able to do normal work at his place of employment because of the reduced range of movement'. The assault was inflicted in full public view where some villagers had gathered nearby, apparently to watch the incident. The court had no difficulty in accepting the plaintiff's evidence, as corroborated by eye witness testimony, as more probable than the entire afterthought story of the defendant, which Monapathi ACJ described as 'not only riddled of improbabilities and absurdities but also preposterous and laughable. Suffice to say that no reasonable court may accept it.'<sup>92</sup>

### 3.2 Where there was no basis for detention

Although the defendants in *Kopo and Kopo v Commander LDF*<sup>93</sup> admitted that the plaintiff had been taken in for questioning, they conceded that there was no lawful basis whatsoever for detaining him. Even after his release the following day, no further investigation or steps were taken regarding any involvement of the plaintiff in the prevailing insurgency, which was the reason for his arrest in the first instance. Peete J considered 'aggravation and humiliation' and the 'sub-culture of brutality and inhuman treatment'<sup>94</sup> involved in this case before the issue of *quantum*. The trial judge referred to *Mohlaba*,<sup>95</sup> where Leon J described the treatment meted out to the plaintiff as 'barbaric' and 'disgraceful', and observed that the aggravation was very extreme, and detentions very lengthy. The judge also referred to *Letsie*, where Scott JA found the type of treatment received by the plaintiff as 'almost too ghastly to contemplate'.<sup>96</sup> The only difference between these cases and *Kopo and Kopo* was that the officer had neither been tortured nor physically assaulted, but otherwise he was 'grossly humiliated both during the relentless interrogation and when he was caused to urinate with the help of a junior officer unzipping his pants and taking out his penis to urinate'.<sup>97</sup>

## 4 Unlawful arrest and detention

Except in those instances where, as has been observed, police officers have displayed wanton abuse of their powers by inflicting physical

92 *Mokaka* (n 90 above) para 18.

93 *Kopo and Kopo* (n 78 above).

94 *Kopo and Kopo* paras 38-41.

95 *Mohlaba* (n 75 above) 191G & J.

96 *Letsie* (n 73 above) para 14.

97 *Kopo and Kopo* (n 78 above) para 44.

injuries by way of assault on hapless individuals without any provocation whatsoever and without any intention of arresting or detaining their victims and, therefore, the claims did not include wrongful arrests or detentions, most of the cases discussed and those to be discussed later in the article involve claims for wrongful arrest and detention. For instance, there are the cases of *Mapetla v Solicitor-General*<sup>98</sup> and *Kopo and Kopo v Commander LDF*,<sup>99</sup> where there were arrests and detentions for no apparent reason. Similar are the cases on torture: *Mohlaba v Commander, Royal Lesotho Defence Force & Another*,<sup>100</sup> and *Letsie v Commander, Royal Lesotho Defence Force*.<sup>101</sup> Since these cases have already been discussed in the article, it will suffice to limit the present discussion to the case cited below.

Having held in *Lethole v Commissioner of Police*<sup>102</sup> that in terms of section 6 of the Constitution it is every citizen's right to enjoy his or her right to personal liberty and not to be arrested or detained save as may be authorised by law, Majara J proceeded to hold that this right 'is one of the most fiercely-guarded fundamental rights in a constitutional democracy' and any interference with it must be done under very compelling and lawful circumstances, to the extent that even where the subject is detained by law enforcement agents, 'it should only be for the purpose of bringing him to court and for no other reason least of all an unlawful one'.<sup>103</sup> This argument is in line with the reasoning of the South African Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto*,<sup>104</sup> where Harms DP reiterated the purpose of an arrest given the controversy that trailed that case to the Appeal Court. He held, first, that it was clear that the power to arrest was to be exercised only for the purpose of bringing the suspect to justice; however, the arrest was but one step in that process.<sup>105</sup> Second, the arrestee was to be brought before court as soon as was reasonably practicable,<sup>106</sup> and the authority to detain the suspect from that moment on was at the discretion of the court.<sup>107</sup>

98 [1984] LSHC 123 (29 November 1984).

99 *Kopo and Kopo* (n 78 above).

100 *Mohlaba* (n 75 above).

101 *Letsie* (n 73 above).

102 [2014] LSHC 74 (12 August 2014).

103 *Lethole* (n 102 above) para 15. See also *S v Malinga* 1962 (3) SA 377 380.

104 *Sekhoto* (n 36 above).

105 *Sekhoto* para 43.

106 Sec 35(1)(d) 1996 Constitution.

107 *Sekhoto* (n 36 above) para 44. In *Directorate of Corruption and Economic Offences v Dlamini* LAC (2009-2010) 173 para 12, it was held that the respondent's arrest had been unlawful as he had been arrested by officers of the directorate who purported to act pursuant to a warrant of arrest to effect the arrest which was not directed at them but at peace officers as defined in sec 3 of the CPEA, which definition does not include the directorate officers. However, it was held that, when the respondent was taken to the magistrate's court and remanded in custody to await trial on specific criminal charges, the detention that followed was lawful and not tainted by the prior unlawful arrest. See further *Abrahams v Minister of Justice* 1963 (4) SA 542 (C) 545G-546A; *Isaacs v Minister van Wet en Orde* [1996] 1 All SA 343 (A) 351.

## 5 Malicious prosecution

It is universally accepted that there are four well-recognised elements that a plaintiff in an action for malicious prosecution must prove in order to succeed.<sup>108</sup> It is also well known that these requirements originated in English law<sup>109</sup> and were imported into the Australian,<sup>110</sup> Canadian,<sup>111</sup> Namibian,<sup>112</sup> New Zealand,<sup>113</sup> South African<sup>114</sup> and other Commonwealth jurisdictions.<sup>115</sup> The same four elements that are required in those other jurisdictions are to be proved under the Lesotho law of delict.<sup>116</sup> These are that (a) the defendant set the law in motion, that is, initiated, instituted or continued the

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- 108 All four elements of malicious prosecution have recently been analysed by C Okpaluba "'Prosecution" in an action for malicious prosecution: A discussion of recent Commonwealth case law' (2013) 2 *Journal of South African Law* 236; C Okpaluba 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions' (2013) 16 *Potchefstroom Electronic Review* 241; C Okpaluba 'Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth decisions' (2012) 37 *Journal for Juridical Science* 65.
- 109 *Per* Lord Keith, *Martin v Watson* [1996] AC 74 80C; *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524 paras 26-27; *Alford v Chief Constable of Cambridgeshire Police* [2009] EWCA Civ 100 paras 48 & 153; *Howarth v Gwent Constabulary* [2011] EWHC 2836 (QB) paras 130-131; *Qema v News Group Newspapers Ltd* [2012] EWHC 1146 (QB) para 2.
- 110 *Beckett v NSW* [2013] HCA 17 para 4, *A v New South Wales* (2007) 230 CLR 500 502-503;
- 111 *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC) para 42, *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9 para 123, *Miazga v Kvello Estate* [2009] 3 SCR 339 para 3, *NB Real Estate Association v Estabrooks* 2014 NBCA 48 para 22.
- 112 *Meyer v Felisberto* 2014 (2) NR 498 para 22, *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC) 404F.
- 113 *Deliu v Hong* [2013] NZHC 735 para 68; S Todd (ed) *The law of torts in New Zealand* (2009).
- 114 *Minister of Safety and Security NO v Schubach* [2014] ZASCA 216 para 11; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 16; *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 8; *Bayett & Others v Bennett & Others* [2012] ZAGPJHC 9 para 167; *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 (E) 373E-G.
- 115 See eg *Trinidad and Tobago Imran Khan v Attorney-General* Claim CV2012-04559 (17 November 2014) para 46; *Morgan v Attorney-General of Trinidad and Tobago* Claim CV2013-03924 (20 February 2015) para 12, *Wills v Voisin* [1963] 6 WIR 50.
- 116 *Kalaile* (n 11 above) para 21. In addition to these four elements on which the plaintiff must satisfy the court on a preponderance of probabilities, Mamba J would include (a) the fact that the police who arrested the plaintiff was at the time acting in the course and within the scope of his or her employment as servant of the state; and (b) that his or her arrest and detention were both unlawful – *Simelane v COP* [2010] SZHC 67 (22 April 2010) para 9. In Botswana, Sarkodie-Mensah J in *Moleboge v Botswana Police Service* [2006] 1 BLR 430 433G added to the four ingredients (a) that the defendant acted with *animus iniuriandi* – quite apart from being actuated by malice; and (b) that the plaintiff suffered as a result, that is, the damage factor. See also *per* Rannowane J in *Khulumani v Attorney-General of Botswana* [2010] BWHC 297 (24 September 2010) para 28. Compare *Thokwane v Attorney-General* (1998) BLR 221 230 (*per* Aboagye J); *Gaokibegwe v Mokokong* [2009] BWHC 77 (20 March 2009) para 7 (*per* Kirby J) where the five features enumerated included the element of damages but excluded the factor of *animus iniuriandi* as distinct from malice.

proceedings;<sup>117</sup> (b) the defendant acted without reasonable and probable cause;<sup>118</sup> (c) the defendant acted with malice (or *animo iniuriandi*);<sup>119</sup> and (d) the prosecution failed.<sup>120</sup> Although damage is not often included in this list, it is most probably assumed, as in most torts or delict actions, that damage must be proved in order to succeed in such a claim.

That the foregoing applies to Lesotho is garnered from the judgment of Cullinan CJ in *Moloi v Director of Public Prosecutions*,<sup>121</sup> which case arose in the context of contempt of court. In that case the Chief Justice extensively reviewed the law of malicious prosecution from its early beginnings; the misgivings expressed by Professor Lee earlier in the twentieth century; and the absence of reasonable and probable cause in the Roman-Dutch origins of the action.<sup>122</sup> The Chief Justice also made reference to the South African courts embracing the proof of both an indirect or improper motive on the

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117 For a review of recent Commonwealth case law, see C Okpaluba 'Does "prosecution" in the law of malicious prosecution include malicious civil proceedings? A Commonwealth update' (forthcoming) 2017 *Stellenbosch Law Review*.

118 A more incisive deliberation on this element of malicious prosecution was conducted by the High Court of Australia in *A v New South Wales* (2007) 230 CLR 500 (HCA); the Court of Appeal of New South Wales in *State of New South Wales v Quirk* [2012] NSWCA 216, both of which dealt extensively with the burden of proof; and the Privy Council in *Trevor Williamson v Attorney-General of Trinidad and Tobago* [2014] UKPC 29. See C Okpaluba 'Between reasonable and probable cause and malice in the law of malicious prosecution: A Commonwealth update' (2016) 37 *Obiter* 265.

119 *Professor Dlamini v Attorney-General of Swaziland* [2007] SZSC 1 (6 November 2007).

120 In line with this requirement, therefore, a cause of action for malicious prosecution arises when criminal proceedings have been concluded in a plaintiff's favour or when the prosecution authorities decide not to prosecute. So, where there is no evidence to show that the criminal proceedings had terminated in the plaintiff's favour or that the Attorney-General or Director of Public Prosecutions (DPP) had decided to withdraw the criminal charge, the cause of action for malicious prosecution does not arise: *Kolane v Attorney-General* LAC (1990-1994) 73 74G/H-J. See also *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 (E) 375. It has been held that entering a *nolle prosequi* is termination of prosecution in favour of the plaintiff – *Beckett v NSW* 2013 HCA 17 (8 May 2013). Suppose the DPP intimates to the court that he no longer wants to proceed with the prosecution of the case in court, could the trial judge ignore or overrule this information and nonetheless proceed with the trial to judgment? The Court of Appeal answered that question in the negative in *Môsôla v R* LAC (1970-1979) 406 413. It held that the trial judge had no choice but to terminate the proceedings in the circumstances since the DPP was the supreme authority on the question whether a prosecution be discontinued or not as laid down in sec 8(5) of the Criminal Procedure and Evidence Proclamation 59 of 1938. As the dominant litigant, the DPP had the power to withdraw a charge at any stage of the proceedings and no court can prevent him or her from doing so, just as no court can force him or her to prosecute.

121 [1990] LSHC 44 (27 June 1990). This same judgment of Cullinan CJ is also presented in LESLII as [1990] LSCA 105 (27 June 1990) (*Moloi*).

122 *Moloi* (n 121 above) 12; RW Lee 'Malicious prosecution in Roman-Dutch law' (1912) 29 *South African Law Journal* 22.



part of the defendant and of the absence of reasonable and probable cause.<sup>123</sup> In particular, mention was made of the elements of malicious prosecution, as was stated by Wessels JA in *Moaki v Reckitt & Colman (Africa) Ltd*,<sup>124</sup> and the fact that it had been established in *Hart v Cohen*<sup>125</sup> and *Lemue v Zwartbooi*<sup>126</sup> that the plaintiff's remedy was provided by the *actio iniuriarum* and, therefore, he or she must allege and prove that the defendant intended to injure him or her – constituting either *dolus directus* or *dolus indirectus*.<sup>127</sup> Finally, the court adopted the above-mentioned four elements which a plaintiff must prove, as was stated by Jansen JA in *Lederman v Moharal Investments Ltd*.<sup>128</sup>

Cullinan CJ held that the 'first requisite' clearly showed that the proceedings had been instituted by the Public Prosecutor, singled out by the plaintiff in the pleadings, who was acting under the powers delegated to him by the DPP under section 6 of the CPEA.<sup>129</sup>

It is the third requisite which apparently needs to be stated 'in a mould more consistent with the terminology' of the *actio iniuriarum*. I think it sufficient to then simply say that the plaintiff must prove that the defendant acted *animo iniuriandi*.

To that extent, where a defendant has acted without reasonable and probable cause, it does not necessarily imply that he acted *animo iniuriandi* as well, notwithstanding the fact that the want of reasonable and probable cause might at the trial afford evidence of the fact that he acted *animo iniuriandi*. Similarly, proof of want of reasonable and probable cause does not cast upon a defendant the onus of proving that he did not act *animo iniuriandi*.<sup>130</sup> Although there was no express averment that the prosecutor acted *animo iniuriandi*, as was stated in *Moaki*,<sup>131</sup> where the implication of *dolus* necessarily flows from the other averments in the pleadings, that would be sufficient. In the

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123 *Moloi* (n 121 above) 13; *Estate Logie v Priest* 1926 AD 312 315, 323 & 325.

124 1968 (3) SA 98 (AD) 103-104.

125 16 SC 363.

126 13 SC 403.

127 *Moloi* (n 121 above) 18. These principles apply to the institution of legal proceedings generally in Lesotho, for it was held in *Gupta v Holy Names High School* LAC (1970-1979) 129 138C-G that where legal rights have been infringed, the injured party is entitled to set the law in motion against the party who caused the infringement without incurring liability; but when this is done without justification in fact and with intent to injure, he commits an injury for which he is liable in damages. The institution of legal proceedings is justified when there is a reasonable and probable cause for its institution, which means an honest belief founded on reasonable grounds that the institution of civil proceedings was justified. The *actio iniuriarum* is the remedy of a person who claims that he has been injured in this way. Where relief is claimed by this action, the plaintiff must prove that the defendant had the requisite direct or indirect intention to injure.

128 1969 (1) SA 190 (AD) 196.

129 *Moloi* (n 121 above) 20.

130 *Moloi* 21 adopting *per* Wessels JA in *Moaki* (n 124 above) 105 & 106.

131 *Moaki* (n 124 above) 104. See also *per* Van der Heever J in *Foulds v Smith* (1950) 1 SA 1 (AD) 11.

present case there was an averment of malice and thereafter an averment of *iniuria*. From this, the implication that the public prosecutor acted *animo iniuriandi* flows.

In respect of the absence of reasonable and probable cause, the Chief Justice held that, while the public prosecutor's interpretation of the particular passage in *Gardiner and Lansdown*<sup>132</sup> was incorrect, this nonetheless did not affect the plaintiff's liability in the matter, and the prosecutor's view of such liability was correct. It may be said that a difficult question of law was involved here, and it was not evidence of absence of reasonable and probable cause that a mistake has been made as to such question.<sup>133</sup> It was held that there was no evidence before the court that the prosecutor himself did not believe in the plaintiff's guilt. Indeed, he testified that he had intended to make submissions on the law to the learned trial magistrate, but was given no opportunity to do so. As the record indicated the magistrate 'quite irregularly' entered a verdict without reasons and without calling for submissions. Had the proceedings been handled otherwise, it would have been clear that the information before the prosecutor, in all the circumstances, was of such a nature as to lead a reasonable person to conclude that the plaintiff was probably guilty. The plaintiff, therefore, failed to prove want of reasonable and probable cause.<sup>134</sup> Cullinan CJ concluded his judgment in *Moloi* by saying the following:<sup>135</sup>

In any event, as to whether or not the prosecutor acted *animo iniuriandi*, there are two items of evidence which in any way give rise to that aspect. The plaintiff is a well-to-do and well-known businessman. The public prosecutor testified that he knew of the plaintiff, but did not know him personally, that is, before the prosecution. There is the aspect that he knew of the relationship of the police woman to the plaintiff, but that might well be consistent with the remainder of his evidence ... Even if the prosecutor did not tell the truth in the matter ... that [did] not necessarily indicate an intent to injure the plaintiff. The only evidence which could be remotely indicative of any such intention is the aspect that the prosecutor has charge of a further possible prosecution against the plaintiff, that is, in respect of an allegation of occupying land without proper authority, contrary to section 87(1) of the Land Act. No charge had been preferred, however, and it was the prosecutor's position that he had taken instructions from the Director of Public Prosecutions in the matter. In all the circumstances, I cannot say that such evidence establishes that the prosecutor probably intended to injure the plaintiff.

The question in *Director of Public Prosecutions v Mofubetsoane*<sup>136</sup> was whether the respondent had succeeded in proving ownership of the vehicle, the robbery of which he had been justifiably prosecuted for, even though the prosecution was abortive. The fact that the vehicle at one time had been registered in the respondent's name did not materially advance his case. There were many ways in which

132 *South African criminal law and procedure* (1957) 1125.

133 *Moloi* (n 121 above) 30; *Phillips v Naylor* (1859) 4 H & N 565.

134 *Moloi* 31.

135 *Moloi* 31-32.

136 LAC (2009-2010) 79.

registration could be achieved without proper proof of ownership. There were no probabilities that favoured his evidence as against that of the other witnesses, who gave more compelling evidence including convincing documentation and corroborating evidence.<sup>137</sup> The Court of Appeal held that his claim for the return of the vehicle or damages in lieu thereof should have been dismissed by the trial court and that, in order to establish a claim for malicious arrest, detention and prosecution, it would have been necessary for the claimant to prove, *inter alia*, that the police in arresting, detaining and causing him to be prosecuted, acted without reasonable and probable cause and with malice (or *animo iniuriandi*).<sup>138</sup> However, on the information available at the time to the police and the prosecuting authorities, the decision to prosecute the claimant could not have been unreasonable or tainted by impropriety. There was no proof of malicious conduct on the part of the arrestors nor on the part of those concerned.<sup>139</sup>

The plaintiff in *Kalaile v Commissioner of Police*<sup>140</sup> was arrested by the police for having committed an offence in contravention of section 70(6)(j)(10) of the Road Traffic Act 1981. Apparently without introducing themselves, the police officers, who were not in uniform, took the plaintiff's cellular phone and his car keys, leaving his taxi where it was, unattended. Riding in their car, the officers, at some point, wanted to release the plaintiff but the latter refused, whereafter they rearrested him, took him to their station and locked him up from 29 to 31 March 2009 when he was eventually brought to court and was acquitted. Since the lawfulness or otherwise of the arrest and detention in this case has been discussed earlier, all that is necessary to ascertain here is the trial court's judgment on the malicious prosecution aspect of this case.

Chaka-Makhooane J held that the plaintiff had shown that the defendants had set the law in motion and that the criminal prosecution had ended in his acquittal. Therefore, the court had to consider the elements of absence of reasonable and probable cause and malice. With regard to reasonable and probable cause, the judge accepted the popular South African judicial opinion that it means, in the context of malicious prosecution, an honest belief founded on reasonable grounds that the institution of prosecution was justified, and that the concept had both subjective and objective elements.<sup>141</sup> If the police had such an honest belief in the guilt of the plaintiff, would they have been willing to let him go? This evidence cast doubt on the reasonableness of their conduct. They claimed that the plaintiff had parked his taxi in the road, yet they snatched his keys from the

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137 *Mofubetsoane* (n 136 above) para 12.

138 *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 8.

139 *Mofubetsoane* (n 136 above) para 13.

140 [2011] LSHC 130 (20 September 2011).

141 *Kalaile* (n 11 above) para 21. See also *Prinsloo v Newman* 1975 (1) SA 481 (A) 495H.

ignition, ordered him to ride with them, leaving the taxi exactly where they claimed it was obstructing traffic, for another 30 minutes or so. The judge held that this was not the conduct of an objectively-reasonable person who ought to use ordinary care and prudence.<sup>142</sup> By leaving the vehicle in an obstructive state, the defendants failed to objectively exercise reasonable measures as would be expected of police officers in their situation and, thus, the plaintiff succeeded in discharging the onus of proving absence of reasonable and probable cause. It was further held that the police officers had been intent on prosecuting the plaintiff knowing that it would in all probability injure his good name. They foresaw that the course of prosecuting the plaintiff was wrong, but they persisted in order to 'nail' him for daring to refuse to accept his keys and cellular phone. Thus, the detention and prosecution followed in spite of the possibility that they were acting wrongly. The officers as servants of the defendants acted with malice which, in the context of the *animus iniuriandi*, means not only the intention to injure, but also the consciousness of wrongfulness.<sup>143</sup> The plaintiff was also successful in proving that the defendants had acted maliciously.<sup>144</sup>

## 6 Conclusion

As is the case with courts in other parts of the Commonwealth, there is no doubt that the courts in Lesotho regard the right to personal liberty as one of the most fundamental of all constitutionally-entrenched rights. They have said this in so many words, and have striven to demonstrate in the many cases reviewed in the article their disapproval of numerous deprivations of this right every time they have had the opportunity to do so. They have pronounced on cases where persons have been arrested unlawfully, detained without reasonable suspicion and prosecuted without reasonable or probable cause, as well as maliciously. The courts have described the excesses of the police and military personnel as the 'sub-culture of brutality and inhuman treatment', as in *Kopo and Kopo v Commander LDF*<sup>145</sup> and *Jobo & Others v Commander, Lesotho Defence Force & Others*,<sup>146</sup> and as 'barbaric' and 'disgraceful' with reference to the treatment meted out to the plaintiff in *Mohlaba*.<sup>147</sup> The courts, from time to time, have been called upon to adjudicate over acts of indignity perpetrated against alleged criminal offenders who, more often than not, turned

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142 *Kalaile* para 24. See also *Minister of Justice and Constitutional Affairs v Moleko* 2009 (2) SACR 585 (SCA) para 20.

143 *Prinsloo v Newman* (n 141 above).

144 *Kalaile* (n 11 above) paras 25-26.

145 *Kopo and Kopo* (n 78 above).

146 *Jobo* (n 46 above).

147 *Mohlaba* (n 75 above) 191G & J.

out not to have been linked to any offence, or in any way broken the law.<sup>148</sup>

Given the frequent occurrence of acts of torture perpetrated on arrested and detained persons in Lesotho, it appears that the time has come for the government of the Kingdom to honour her international obligations by considering translating into her domestic law the provisions of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,<sup>149</sup> by enacting a comprehensive law to curb torture, cruel, inhuman and degrading treatment and all its ramifications. It is one thing to ratify a convention and another to reduce its contents into municipal legislation<sup>150</sup> in order to make its contents enforceable in the municipal courts. Even though section 8 of the Constitution of Lesotho guarantees everyone the right not to be tortured, inhumanly or degradingly treated, it would appear that this is not enough to restrain the Lesotho military and the police from perpetrating such acts of inherent indignity on human beings at their whims and caprices. Apart from enacting a law to define the various acts of torture, to prohibit, prevent and combat torture and other offences associated with the torture of persons, and to impose adequate punishment against offenders, there is one very important aspect of the Convention which Lesotho must start implementing forthwith. This is the requirement embedded in article 10, which enjoins state parties to<sup>151</sup>

ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention and imprisonment.

It is clear from the case law that the military personnel and law enforcement agents in Lesotho, by their conduct, have displayed abysmal knowledge of the constitutional prohibition of torture. Even if they have been trained in terms of article 10, it is evident that they have not been properly schooled and should be taught again and again to respect the right to human dignity of the individual.

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148 Eg *Morobi* (n 88 above).

149 Adopted by the UN on 10 December 1984 and entered into force on 26 June 1987.

150 Compare the Prevention and Combating of Torture of Persons Act 13 of 2013 (RSA).

151 A Commission of Inquiry into Public Disturbances 1998 131 also recommended 'a comprehensive retraining programme for police and army personnel' in order to achieve 'a gradual phasing out of persons who are unsuitable, particularly having regard to the need for a professional and a political army and police force'.