

SOUTHERN AFRICA LITIGATION CENTRE

PRESS BRIEFING:

LESOTHO RULE OF LAW CRISIS

Johannesburg, 29 January 2016

INTRODUCTION

The Southern Africa Litigation Centre (SALC) is a regional legal human rights organisation, which works to advance human rights and the rule of law in southern Africa. This Press Briefing aims to provide information and context in matters relating to the political and security crisis in Lesotho in order to give context to events anticipated on **Monday, 1 February 2016**. The Briefing relies on information that is publically available and verifiable through, amongst others, court documents, decisions of the Southern Africa Development Community (SADC), and news reports. It is further reliant on information related directly to SALC by lawyers and civil society organisations working in Lesotho and on events witnessed directly by SALC staff members during court proceedings.

SUMMARY

On Monday **1 February 2016**, two important events are scheduled in Lesotho that stand to have important effects on the country's prospects for peace and stability and to indicate the effectiveness of SADC processes and diplomacy.

1. While Lesotho has faced cyclic security and political crises, the seriousness of SADC's interventions and investment over the past two years have come to a head in recent threats of suspending Lesotho from SADC and in efforts to push domestic reforms through the **SADC-initiated Commission of Inquiry** established in late 2015. 1 February marks the deadline given by SADC for Lesotho to publish the Commission's findings and to report to SADC on the government's implementation of its recommendations. The government's repeated efforts at resisting the Commission processes, SADC's strong stance in insisting on the government's cooperation, and the delicate security situation underlying the government's reliance on the support of the Lesotho Defence Force (LDF), indicate that any action taken or refused to be taken by the Lesotho government on this date will have serious consequences.
2. Secondly, 1 February marks the resumption of a **Court Martial** set up by the LDF to try soldiers charged with plotting a mutiny. The arrests and detention of these soldiers and the procedures surrounding the Court Martial have raised serious human rights concerns coupled with the threat that the accused face the death penalty if convicted. In addition, the SADC Commission's Terms of Reference include a requirement to review the mutiny-plot investigations. With the release of the controversial Commission report anticipated on the same day, the future of the Court Martial process stands in question.

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BACKGROUND TO THE CURRENT CRISIS: 2014-2016

The current crisis in Lesotho has its roots in an alleged coup-attempt to unseat the then-Prime Minister Tom Thabane by the then-commander of the LDF, Lieutenant General Kamoli, in August 2014. Following intervention by SADC, early elections were held in February 2015 leading to the instatement of Minister Pakalitha Mosili and Deputy Prime Minister Metsing. Shortly before the elections were held, Thabane removed Kamoli as head of the LDF and replaced him with Brigadier Mahao.

Mutiny allegations and Mahao killed

In May 2015, Mosisili reinstated Kamoli as head of the LDF and removed Mahao. Shortly thereafter arrests commenced of a large number of LDF soldiers on allegations of plotting a mutiny lead by Mahao. On 25 June 2015, Mahao was shot and killed by members of the LDF, who claimed his killing followed his resistance to being arrested. Mahao's two nephews who were with him at the time (and whom have since fled to South Africa) claim he was murdered. The autopsy report released in December 2015 appear to support the version that Mahao was intentionally killed.¹

SADC intervention

SADC intervened once more, at the request of Prime Minister Mosisili, under the regional leadership of South African Deputy President Cyril Ramaphosa. SADC suggested that a Commission of Inquiry be established to investigate Mahao's death and the mutiny plot allegations. With the agreement of the Lesotho Government, the "Phumaphi Commission" was established² (named after the Botswana High Court Judge who chaired the Commission) in August 2015.

Detained soldiers

In the meanwhile, some 23 of the arrested LDF soldiers accused of mutiny remained in detention at the hands of the LDF. A series of court challenges alleged torture³ and abuse of process against the detainees who remain imprisoned under "close arrest" despite a number of court orders requiring their release on "open arrest", a form of military bail.⁴ The SADC Troika had initially issued a decision indicating that no court martial should be initiated on the mutiny charges until the Commission was able to conclude its investigations. Following submissions by Lesotho to the SADC Heads of State, however, SADC issued a decision referring to the complaints made by the detainees to their ongoing

¹ Mohlaboli K, "Mahao autopsy revealed" *Lesotho Times*, 17 December 2015, Available at: <http://lestimes.com/mahao-autopsy-revealed/>.

² Prime Minister Mosisili initially sought to expand the Terms of Reference of the Commission when enacting its domestic legal framework through Notice in the government Gazette. However, following SADC's protestations, a new Notice was issued with the more limited terms of reference as requested by SADC was issued by the Prime Minister.

³ See *Jobo and Other v Commander of the Lesotho Defence Force and Others* [2015] LSGC 24, Available at: <http://www.lesotholii.org/ls/judgment/high-court/2015/25>; *Mareka v Commander of the Lesotho Defence Force* [2015] LSHC 26, Available at: <http://www.lesotholii.org/ls/judgment/high-court/2015/27>; Commander of the *Lesotho Defence Force v Mareka* [2015] LSCA 23, available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/23>; *Jobo v Commander of the Lesotho Defence Force and Others; Commander of the Lesotho Defence Force and Others v Jobo and Others* [2015] LSCA 38, Available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/38>.

⁴As above.

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detention as necessitating a revised position. The LDF interpreted this decision as an agreement to proceed with the court martial process irrespective of the concurrent Commission proceedings.

In the case of *Jobo v Commander of the Defence Force and Others*,⁵ the Court of Appeal raised a number of concerns that further indicate why the investigations into an alleged mutiny plot should be carried out by an independent commission of inquiry. The Court confirmed that the detainees had been subjected to torture and inhuman and degrading treatment; that they were brought to court in shackles, chains and handcuffs; and that provisions of the LDF Act had not been properly complied with. Despite the Court of Appeal ordering the placement on open arrest of one of the detainees, the LDF has declined to comply with the court order. The LDF has similarly declined to release the detainees on open arrest where other courts ordered the placement of the detainees on open arrest pending the convening of the court martial. The fact that court orders have been disregarded by a public institution is a serious indictment on the rule of law in Lesotho.

Phumaphi Commission

During the Commission proceedings, the leadership of the LDF and those implicated in Mahao's killing (including the Special Forces commander Tefo Hashatsi) refused to cooperate with the Commission. When they did appear before the Commission, they refused to answer questions. The LDF further refused to permit the mutiny-accused soldiers in detention to participate in the Commission proceedings, despite the detainees' desire to do so and that the Commission issued subpoenas for their appearance. Towards the end of its term, the Commission heard testimony from political leaders, soldiers and lawyers in Thaba Nchu South Africa, due to the inability of these witnesses to attend proceedings in Lesotho as they had fled the country out of fear for their safety.

Before the Commission's conclusion, it issued a subpoena to Hashatsi indicating evidence against him relating to the killing of Mahao and inviting him to testify before the Commission. Upon the receipt of the subpoena, Hashatsi commenced urgent court proceedings, seeking to set aside the Commission and prevent it from making any findings against him.⁶

Dispute with SADC

The Lesotho government appealed to the SADC Heads of State to withhold the release of the Commission's report in the face of Hashatsi's case. Negotiations ensued and clear frustrations appeared at the end of 2015 between Lesotho and SADC as the Lesotho government's resistance to the report appeared to take hold. On 18 January 2016, the SADC Troika met again to discuss Lesotho. It appeared as if the Lesotho Prime Minister initially refused to receive the Commission report from the Troika. Troika members voiced severe dissatisfaction with the Prime Minister's refusal to accept the report and issued a threat to suspend Lesotho from SADC. Facing suspension, the Lesotho Prime Minister reversed his position overnight and accepted the report. In the SADC Communiqué⁷ published on 19 January, it appears as if the threat of suspension from SADC has been withdrawn in the light of Lesotho's acceptance of the report. The Prime Minister has however since stated in press

⁵ C of A (CIV) 29/2015.

⁶ See below for more information.

⁷ Communiqué, Double Troika Summit of SADC Heads of State and Government, Gaborone, Republic of Botswana, 18 January 2016 (issued 19 January 2016), Available at: http://www.sadc.int/files/7014/5322/7325/Communiqué_19_January_2016_-_0950hrs.pdf.

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conferences⁸ that he intends to only implement and publish those aspects of the report he determines in line with national security interests.

The current crisis is in most part a continuation of a long-standing pattern in Lesotho of military instability subverting political progress, which has recurred cyclically for many years. Long-term reform of civilian-military relations is required if any lasting peace and progress is to be achieved. The SADC Commission report has the prospect of premising long-term reform and establishing the evidential basis for a just process in the wake of the more immediate issues concerning the killing of Mahao and the soldiers in detention under mutiny allegations. In the SADC communiqué, SADC has indicated that Lesotho has until **1 February 2016** to report to the regional body on its implementation of the Commission's recommendations and to publish the report.

THREATS TO LAWYERS AND JUDICIAL INDEPENDENCE

A number of events in the wake of the recent crisis in Lesotho have marked concerns around the independence of the judiciary in Lesotho and the safety of lawyers.

Judge President of the Court of Appeal Kanelo Mosito

In previous years, leadership in the Lesotho judiciary has been strained with infighting between the roles of the Chief Justice and the Judge President of the Court of Appeal. Judicial leadership has also been marred by allegations of impropriety such as those that lead to the impeachment proceedings against the former Judge President, Michael Ramodibedi.

The current Judge President Dr Kanelo Mosito was appointed in early 2015 by former Prime Minister Thabane. Under his leadership at the Court of Appeal and that of Chief Justice Majara, the previous infighting has given way to an independent appellate court, primarily comprised of judges from the southern Africa region. The independence of the Court of Appeal was marked by its judgment in November 2015 dismissing efforts by Deputy President Metsing to prevent the Directorate on Corruption and Economic Offences from investigating corruption allegations against him.⁹

Immediately following the February 2015 elections, however, efforts commenced to unsettle Justice Mosito from his position as Judge President. The first was an attempt by the Attorney General to challenge the legality of the Judge President's appointment. The case was dismissed at both High Court and Court of Appeal levels by judges of international stature.¹⁰

Immediately following the dismissal of the Attorney General's case against the Judge President, a second effort was made to unsettle his security of tenure when Prime Minister Mosisili incorporated into the SADC Commission of Inquiry's Terms of Reference, the requirement to investigate the

⁸ See Mohloboli M "Mosisili defiant over SADC report" *Lesotho Times*, 22 January 2016, available at: <http://lestimes.com/mosisili-defiant-over-sadc-report/>.

⁹ *Metsing v Director General: Directorate on Corruption and Economic Offences and Others* [2015] LSCA 32, Available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/32>.

¹⁰ *Attorney General v His Majesty the King and Others* [2015] LSCA 1; Available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/1>.

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appointment and fitness for office of the Judge President. Following SADC's protestation of the efforts to extend the Commission's mandate, the Terms of Reference were amended, and the references to the Judge President were removed.

On the date on which the amendments were gazetted by the Prime Minister, the Director of Public Prosecutions laid charges against the Judge President for criminal offences relating to a failure to file his tax returns on time in a period prior to his appointment.

Justice Mosito has challenged the legality and constitutionality of the charges brought against him on the basis that, inter alia, they are in effort to interfere with the independence of the judiciary. His case was dismissed in the High Court¹¹ and is now on appeal in the Court of Appeal.

Intimidation in the High Court

In litigation against the Lesotho Defence Force (LDF) in the High Court, soldiers have repeatedly come to court armed with handguns, which they openly bear in gestures of intimidation during court proceedings. This has continued to occur despite requests by opposing counsel to remove the weapons. During May-July 2015, the LDF soldiers appeared in court on a few occasions masked and armed with AK47 weapons when accompanying hooded and shackled detainees into court. In at least one occasion, soldiers were reported as having forced their way into judges' chambers.

While SALC cannot speak to the personal circumstances of any of the members of the judiciary in the face of this intimidating behaviour, and any conduct that the judges may experience outside of the court environment, there can be no doubt that it is grossly irregular for any party to carry weapons in court but for, on rare occasion, police members charged with ensuring security in the court. In the context of the security crisis and lawlessness of which the LDF stands accused, the impact of this intimidation deeply undermines judicial independence and perceptions of judicial independence.

Threats to individual lawyers

Whilst experiencing the same intimidating behaviour of the LDF in court, lawyers representing the detained soldiers accused of mutiny have been subjected in addition to direct threats against their lives and safety as well as being obstructed from representing their clients.

A number of lawyers have related being verbally threatened by LDF soldiers during court proceedings. A prominent military lawyer fled to South Africa following direct threats that his life was in danger due to his work in representing LDF soldiers in *habeas corpus* proceedings.¹²

It emerged in October 2015 that (amongst others) five private lawyers Advocates Haae Phoofolo KC, Christopher Lephuting and Koili Ndebele and Attorneys Khotso Nthontho and Tumisang Mosotho were on an alleged military "hit list" being circulated on social media for their work in legally representing the detained soldiers in court and at the Court Martial and for work representing the wife of the late Brigadier Mahao, Mamphanya Mahao at the Phumaphi Commission. The lawyers

¹¹ *Mosito v the Director of Public Prosecutions and Another* [2015] LSHC 19, Available at: <http://www.lesotholii.org/ls/judgment/high-court/2015/19-0>.

¹² The lawyer has since returned to Lesotho following about 6 months in hiding in order to represent his clients at the Court Martial, where the soldiers stand accused of plotting a mutiny.

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stated publically that the threats were taken seriously in the light of persons cited on previous hit lists having been killed, including a prominent business man and Brigadier Mahao.

In November and December 2015, the offices of one of the lawyers and the home of another were broken into. The lawyers report being followed and having their residences and places of work patrolled by the military in efforts to intimidate them. On multiple occasions when the lawyers have sought to consult with their clients in detention, they have been denied access to their clients, been forced to consult under armed guard (contrary to the right to consult with legal counsel in private), or have had consultation times limited to render effective legal representation impossible.

While many of these lawyers continue to act on a pro bono basis for their clients under these conditions, a number of international organisations have joined Lesotho civil society and the Lesotho Law Society in publically noting grave concerns about the safety and independence of the legal community in Lesotho. This has included SALC, the Law Society of South Africa, Lawyers Rights Watch (Canada), and Lawyers for Lawyers (the Netherlands) amongst others.

SALC is concerned that the current crisis and insecurity in Lesotho is eroding confidence in the rule of law and undermining the independence of the judiciary and the vital ability of lawyers to fulfil their professional and ethical obligations to their clients. Aside from the immediate effects that this has on those whose access to justice is undermined, these phenomena threaten to do long-term damage to the integrity of the legal system and to harm public confidence in the judicial process.

LITIGATION

1. Court Martial

At least 23 LDF soldiers, most of whom remain in detention under close arrest, are facing charges of plotting a mutiny before a Court Martial. The accused face the death penalty.

The Court Martial commenced in late 2015 when procedural objections were raised by the defendants. A number of significant irregularities have occurred in the process, including that the members of the Court Martial and prosecution is comprised of parties alleged to be victims of the crimes of which the soldiers stand accused and / or are junior officers to the accused contrary to the Lesotho Defence Force Act and Regulations. In addition, the prosecution is reliant on accomplice witnesses, many of whom were allegedly tortured to extract confessions. Furthermore, following a prolonged period of unlawful detention where many of the accused have alleged torture and abuse¹³ and been subjected to extended periods of solitary confinement, lawyers of the accused have objected to the physical and psychological fitness of their clients to properly instruct them as lawyers in

¹³ See *Jobo and Other v Commander of the Lesotho Defence Force and Others* [2015] LSGC 24, Available at: <http://www.lesotholii.org/ls/judgment/high-court/2015/25>; *Mareka v Commander of the Lesotho Defence Force* [2015] LSHC 26, Available at: <http://www.lesotholii.org/ls/judgment/high-court/2015/27>; *Commander of the Lesotho Defence Force v Mareka* [2015] LSCA 23, available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/23>; *Jobo v Commander of the Lesotho Defence Force and Others*; *Commander of the Lesotho Defence Force and Others v Jobo and Others* [2015] LSCA 38, Available at: <http://www.lesotholii.org/ls/judgment/court-appeal/2015/38>.

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addition to restraints in their being refused or limited in their access to consult with clients in detention. Thus far, the Court Martial has rejected all procedural objections raised.

On 1 February 2016, the same date on which the SADC report is due to be published, the Court Martial is scheduled to resume in Maseru, having been postponed since December 2015. Should the SADC Commission report (due for release on the same date) indicate that investigations into the charges were problematic, the continuation of Court Martial will be of great concern.

2. *Hashatsi v the Prime Minister and Others*

This is a case initiated by Tefo Hashatsi the Special Forces Commander of the LDF who is implicated in the killing of Brigadier Mahao. The Applicant seeks to have the Phumaphi Commission declared unlawful and set aside and to prevent any findings being made against him.

None of the cited respondents, including the Prime Minister, opposed the application. Mrs Mamphanya Mahao successfully sought leave to intervene as the fifth respondent. SALC¹⁴ is supporting the case of Mrs Mahao¹⁵ to oppose the application to set aside the SADC Commission of Inquiry. The hearing on this case is scheduled to resume on 5 February 2016. Mrs Mahao seeks that the application be dismissed and argues that the applicant is not entitled to the relief he seeks. She seeks that the Commission be allowed to conclude its proceedings so that open justice may be served to independently determine the circumstances surrounding her husband's death.

The Transformation Resource Centre (TRC), a Lesotho non-governmental organisation, successfully sought leave to intervene as *amicus curiae* (friend of the court). They make their arguments in the public interest, arguing that the Commission aims to advance peace and security in Lesotho more broadly than the applicant's interests. At the time, the TRC submitted that the Commission should be allowed to finalise its proceedings and release the Report.

The matter came before Monaphati J on 2 December 2015 for hearing. Monaphati J granted the TRC leave to intervene as *amicus curiae*. Arguments on procedural objections and on the merits were heard in early December and in January. The matter was postponed until **5 February 2016** for further argument on whether the case must be dismissed as moot in the light of a communiqué¹⁶ from SADC indicating that the Commission's report had been received by the Lesotho Government.

3. *Mareka and 22 Others v The Commander of the Lesotho Defence Force and Others*

This is a case in which 23 of the arrested and mutiny-accused soldiers have challenged, amongst others, their ongoing detention under close arrest and the legality of charges brought against them concurrently to the SADC Commission proceedings. On 5 October 2015, the High Court held that the applicant's detention under closed arrest was unlawful, ordering that the applicants be released

¹⁴ For further information: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/lesotho-supporting-access-to-justice/>.

¹⁵ See a statement by Mrs Mahao: Mohloboli K, "I won't rest until I know the truth" *Lesotho Times*, 22 January 2016, Available at: <http://lestimes.com/i-wont-rest-until-i-know-the-truth/>.

¹⁶ Communiqué, Double Troika Summit of SADC Heads of State and Government, Gaborone, Republic of Botswana, 18 January 2016 (issued 19 January 2016), Available at: http://www.sadc.int/files/7014/5322/7325/Communique_19_Janauary_2016_-_0950hrs.pdf.

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on open arrest. The Court dismissed the remainder of the applicants' prayers. That order has not been complied with, despite two separate contempt proceedings against the army commander. The High Court judge who granted the order, Makara J, recused himself from the second contempt application at the insistence of the LDF's legal representatives. The case has been appealed and is awaiting a date for hearing. SALC is supporting the applicants' legal representatives in this matter.¹⁷

TIMELINE

2012	The All Basotho Convention's Tom Thabane is elected Prime Minister.
19 June 2014	Thabane suspends Parliament, avoiding a vote of no confidence. Thabane replaces Lesotho Defence Force (LDF) commander Lieutenant General Tlali Kamoli with Brigadier Maarparankoe Mahao.
30 August 2014	Thabane alleges a military coup d'état was launched against him, led by Kamoli. Kamoli is allegedly backed by the Deputy Prime Minister Mothetjoa Metsing of the Lesotho Congress for Democracy (LCD). Thabane flees to South Africa, alleging fear for his life, calling for peacekeepers
12 September 2014	SADC deadline for Lesotho leaders to reach consensus passes without agreement. South African Deputy President Cyril Ramaphosa takes over mediation efforts. South Africa calls emergency SADC meeting. SADC-led Maseru Facilitation Declaration is signed. Under SADC and Thabane's advice, King Letsie dissolves Parliament and calls election bringing general elections forward by 2-years.
28 February 2015	Peaceful elections are held (army is confined to barracks on election day). No outright majority obtained. Opposition Democratic Congress forms a coalition government with the LCD and 5 small parties. Prime Minister Pakalitha Mosili is appointed with Metsing as Deputy Prime Minister.
May 2015	Kamoli is reinstated as army chief. LDF soldiers are arrested on allegations of plotting a mutiny. A number report being tortured.
25 June 2015	Mahao is shot and killed, allegedly in the course of arrest on mutiny allegations. More soldiers are arrested.
1 July 2015	SADC and Ramaphosa are called in to intervene.
10 August 2015	10 Commissioners are sworn in as part of the SADC Commission.
16 September 2015	High Court hears argument in the case of <i>Mareka and 22 Others v the Commander of the Lesotho Defence Force and Others</i> , before Makara J.

¹⁷ For more information see: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/lesotho-protecting-detainees-against-abuse/>.

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- 16 October 2015 High Court, per Makara J, dismisses an application to hold army commander Kamoli in contempt of court for failure to comply with the court order in *Mareka* case. Makara J holds court order has not been complied with but army commander not in contempt as no intention to disobey order established.
- 6 November 2015 Metsing loses Court of Appeal case, paving the way for the Directorate on Corruption and Economic Offences to investigate his finances following corruption allegations in 2014.
- 2 December 2015 High Court hears arguments in the case of *Hashatsi v the Prime Minister and Others* before Monaphati J. Transformation Resource Centre (a local NGO) is admitted as *amicus curiae* (a friend of the Court.)
- 3 December 2015 Despite agreement that hearing to proceed in *Hashatsi* case, it is postponed at the insistence of the applicant's counsel.
- 15 December 2015 Full bench of the High Court dismisses a challenge by Judge President of the Court of Appeal Justice Kananelo Mosito against efforts to charge him with tax offences (*Mosito v the Director of Public Prosecutions and Others*).
- 16 December 2015 Mosito appeals High Court decision to Court of Appeal.
- 16 December 2015 Millennium Challenge Corporation indefinitely suspends funding to Lesotho citing governance, rule of law and accountability concerns.
- 18 January 2016 SADC Double Troika meets in Gaborone to discuss Lesotho. Troika announces intention to suspend Lesotho from SADC due to Lesotho's refusal to accept the Phumaphi Commission Report.
- 19 January 2016 SADC releases communiqué dated 18 January 2016 released indicating Lesotho government has accepted the Phumaphi Commission report and is expected to report back to SADC on implementation and to publish the report on 1 February 2016.
- 18-19 January 2016 Second hearing in the case of *Hashatsi v the Prime Minister and Others*. Case is postponed until 5 February when further argument will be made on whether the case is moot in light of the SADC Communiqué.
- 21 January 2016 High Court dismisses second contempt application in *Mareka and 22 Others v the Commander the Lesotho Defence Force and Others*.
- 1 February 2016 SADC Troika deadline for Lesotho to report on implementation of the Commission's report and to publish the report. Court Martial scheduled to resume.
- 5 February 2016: High Court scheduled to hear further argument on whether the application in *Hashatsi v the Prime Minister and Others* is now moot.