IN THE HIGH COURT OF LESOTHO

CONST/8/2011

In the matter between:

THABO FUMA **APPLICANT**

And

THE COMMANDER, LESOTHO DEFENCE FORCE **1ST RESPONDENT**

THE MINISTER OF DEFENCE AND NATIONAL SECURITY **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Coram

Honourable Justice S. N. Peete
Honourable Justice M. Mahase
Honourable Acting Justice E.F.M. Makara

Dates of Hearing : 14 August, 2013
Date of Judgment : 10 October, 2013

SUMMARY

A constitutional application brought by a soldier who had been retired from the Lesotho Defence Force(LDF) on medical grounds in terms of Sec 24 of LDF Act - The Medical Board having diagnosed that he is legally blind due to the HIV sequelae and recommended for his retirement for inability to execute the army duties – The Commander having motivated the Principal Secretary to constitute the Board since he had formed an opinion that the applicant has become

disabled for work and made his own representations – The Commander recommending to the Minister on the basis of the Board's findings and recommendation that the soldier be retired from the Force on medical grounds – The Minister retiring him – The applicant charging that the Commander and the Minister had exercised their quasi judicial powers upon him without having observed the audi alteram partem rule – further complaining that his equality and freedom from discrimination constitutional rights under Secs 18 and 19 have been violated – This being illustrated by reference to the existence of a visually impaired Brigadier, another legally blind Private and a Lance Sergeant with an amputated leg who have all been retained in the establishment and assigned suitable roles and yet he was discharged from work – His understanding being that he was discriminated against due to the HIV dimension in his medical condition – The court finding that the only reasonable conclusion is that he had been discriminated against on that basis, his equality and freedom from discrimination under Sec 18 and 19 of the constitution had been infringed by the Commander and the Minister – Found further that his right to human dignity had resultantly been transgressed by the Commander in particular by having treated a person of his health condition inhumanely and that they had unlawfully denied him a hearing before considering adverse decisions against him – The applicant awarded constitutional damages – Prayer for an Order for reinstatement refused since it was found to have been overtaken by developments.

ANNOTATIONS

CITED CASES

The Attorney General v 'Mopa LAC (2000 -2004) 427, R v Oakes (1986) 26 DLR (4th) 200 (SCC), Sekoati Gert Limo v Lesotho General Insurance Group and Others Const Case No.2/ 2012, The Attorney General v 'Mopa LAC (2000 -2004) 427 (E), R v Oakes (1986) 26 DLR (4th) 200 (SCC), Pheko v Lesotho Revenue Authority L C /13/08, AZAPO and Others v President of The Republic of South Africa S A 1996 (4) 672 (CC), Russel v Duke of Norford [1949] 1 All ER 109, Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999, Koatsa v The National University of Lesotho L L R B 1991 1998, Harsken v Lane 1997 (11) BCLR 1489, Hoffman v South African Airways 2000 (11) BCLR 1211 (CC). N v Minister of Defence ILJ 999 (Labour Court of Namibia), XX v Ministry of National Defence (General Jose' Maria Go'rdova Cadet School), XX v Gun Club Corporation et al; RR v Superintendent of Police & Others (2005) Karnataka Administrative Tribunal, S v Makwanyane 1995 (6) BCLR 665 (CC)

STATUTES

Constitution of Lesotho 1993
Lesotho Defence Force Act No.4 of 1996
The Electricity Act No. 7 of 1969
Constitutional Court of Colombia, Decision SU – 256(1996)
The Indian Constitution

The Public service Act No.2 of 2005
The Labour Code Order 1992
The Labour Court Rules 1994
The Police Service Act. No.7 of 1998

BOOKS

The Bill of Rights Handbook, 2nd edition, Kenwyn Juta & Co, Ltd 1999
UNAIDS (best practice collection) UN Programme on HIV/AIDS

INTERNATIONAL CONVENTION

International Covenant on Civil and Political Rights (ICCPR)
United Nations Convention on the Rights of People with Disabilities (UNRPWD)

MAKARA A.J

[1] This judgment is in consequence of a constitutional case which the applicant has brought before the High Court sitting as a Constitutional Court asking it to:

1. declare that the decision of the 1st and the 2nd respondents to discharge him from the Lesotho Defence Force (LDF) on medical grounds to be inconsistent with Sec 18 and 19 of the Constitution to the extend that other individuals within the Force who have permanent disabilities have not been afforded a similar treatment;
2. directing the 1st and the 2nd respondents to reinstate the applicant to his position within the Force and with the appropriate salary adjustments;
3. directing the 1st and 2nd respondent to pay an amount of Five hundred thousand Maluti (M500 000) as constitutional damages together with the interest at the rate of 18.5% per annum.

[2] The 1st respondent would hereinafter also be simply referred to as the Commander while the 2nd respondent would also be referred to as the Minister.

[3] It should at this stage suffice to be indicated that the respondents filed their intention to oppose the application and duly answered the applicant's founding

papers in support of their opposing stand point and maintained the same attitude throughout.

[4] The Court has, in the circumstances of this case, determined that its sense of prudence dictates that the judgment should throughout avoid any disclosure of the actual names of people or the Army officials whose medical conditions are of relevant significance in this case. The rationale is to protect them from the possible adverse impact upon them together with the members of their respective families. This is calculated at setting a clear example regarding a humanely respect and a special recognition which should be accorded to the people living with HIV, including their families. Their human dignity and esteem will thus, be maintained. It is the hope of this Court that the media community in the country will adopt the same policy. The same approach will incidentally be adhered to concerning mentioning of the names of those who despite the fact that they are not HIV positive, they nonetheless, have serious physiological or visually unhealthy conditions. The background idea is to dispense justice without exposing people's medical predicaments to the world at large.

[5] A foundational basis of the applicant's case is, in a nutshell, that the decision of the 1st and the 2nd respondents to discharge him from the Force, albeit having been made on medical grounds, have contextually violated his equality rights under **Sec 18 and 19 of the Constitution of Lesotho 1993** in that it subjected him to an unfair discriminatory treatment in relation to others in a similar situation. He, on that account, charges that the decision is unconstitutional. A key and pertinent provision for reference would be **Sec 18(2) of the enactment**. It reads:

> subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of the public office or any authority.

[6] **Subsection (6)** when read in conjunction with **Subsection 4 (e)** introduces a limitation to the principal provision under **Sec 18(2)** by providing that the latter shall not apply to anything which is expressly or by necessary implication authorized to be done which, having regard to its nature and special circumstances pertaining to those persons or to persons of any such description, is reasonably justified in a democratic society. The limitations would appreciably, present the Court with a challenge of later exploring the basic ideals in a democratic constitutional State in order to determine the circumstances in which any deviation from the main equality provision could be recognized as being justified in a democratic society.

[7] **Subsection (3)** elucidates the content and the practical meaning of *discrimination.* It defines it as affording to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description, are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[8] The Court of Appeal has in its interpretation of **Sec 18 (3),** particularly regarding the question of the assessment of the constitutionality of a measure

which results in the preferential or advantageous treatment of other people over the other who could be described as being similarly situated, by having adopted from the foreign jurisdictions, the proportionality test. The focus here is on whether or not the discriminating legislative or the administrative measure taken is commensurate and proportional with the legitimate objective which is being contemplated in the scheme. This jurisprudential stride was made in the celebrated case of **The Attorney General v 'Mopa LAC (2000 -2004) 427@434 (E).** Here, the Court of Appeal of Lesotho associated itself with the exposition of the law expressed in effectively similar terms in **R v Oakes (1986) 26 DLR (4th) 200 (SCC).** The measure is intended to be reflective that discrimination is, as far as it could be possibly practical, less intrusive of the equality clause.

[9] It now seems logical to traverse **Sec. 19 of the Constitution** since it is the applicant's basis of his second contestation that the already stated impugned decisions of the 1st and the 2nd respondents, have infringed his constitutional rights under the provision. The section represents the constitutional equality clause. It details that every person is entitled to equality before the law and to the equal protection of the law. This understandably necessitates the interrogation of the term *equality* as employed in the constitution in an endeavour to ascertain its contextual technical legal meaning. The Court adopts *mutandis mutatis* the approach which this court followed in **Sekoati Gert Limo v Lesotho General Insurance Group and Others Const Case No. 2/2012,** in its analysis of **Sec 18 and 19** and its perception of their inter dependence in determining the existence of discrimination and its constitutionality. In that approach, this Court finds that the equality among the humankind and for the equal treatment of all under the law

as provided for under **Sec 19 of the Constitution**, to be a resonation of the Common Law conception of the hypothesis which itself owes its roots from the philosophical postulations on the same subject. It immediately realizes a logical need for the equality of men and women to be comprehended side by side with the notion of discrimination among them. This is because *discrimination* amongst the people represents an antithesis of *equality* amongst them. Thus, discrimination as a social concept should be perceived with reference to *equality* also as a social ideal. This dictates that the two terms should be correspondingly explored with reference to one another since they are complementary to each other.

[10] De Waal and others[1] have defined the Common Law perception of the concept in these terms:

> Equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be treated alike[2]. For example, it is generally thought wrong to deny women the vote. This is because when it comes to voting men and women are in the same position; they are equally capable of exercising political choices. So, if men and women are alike they should be treated alike.

"Discrimination" has in constitutional terms been laboriously defined under **Sec 18 (3) of the Constitution.** The legislature has, in pursuit of the democratic constitutional values enhanced the Common Law jurisprudence by grafting into the constitutional definition the specific grounds upon which different categories

[1] De Waal J and others, The Bill of Rights Handbook, 2nd edition, Kenwyn Juta & Co, Ltd 1999, p188

[2] The definition has its genesis in the most famous expression by Aristotle(384-322BC): equality in mortals means this: those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.

of people may be subjected to discrimination[3]. The definition seeks to provide the basis upon which individual persons or classes of person may not be discriminated against. The specified grounds are, however, not exhaustively provided. This is attributable to the fact that it contemplates rather endless categories of people who might be discriminated against. It has to be over emphasized for the sake of certainty that in principle, the subsection seeks to present basis upon which people may not be discriminated against. This should, nevertheless, be comprehended in full recognition of the constitutionally provided limitations under **Subsections (4) and (5)**[4].

[11] The applicant sought for the shelter of justice underneath the tree of this Court seeking for its intervention on the basis of the common cause facts which culminated into the present application. These originate from the background that the applicant who at the material time held a rank of a Private in the Lesotho Defence Force (LDF), had sometime in 2006, tested positive for HIV and that during the same period his vision started deteriorating rapidly. The situation worsened throughout 2007 and he resorted to the medical intervention by one ophthalmic surgeon Dr. Muller who having examined him, concluded that he was

[3] The specified grounds upon which discrimination may not be made are in terms of Sec 18 (3) are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of any such description are subjected to disabilities or restrictions to which person of other such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[4] These basically circumscribe the principle provision that no law shall make any provision that is discriminatory either in itself or in its effect. The limitations *inter alia* apply to citizenship based discriminations, the application of Customary Law upon the qualifying persons, in the appropriation of State revenue or other public funds or whereby persons of any description referred to under Subsection 3 may be made subject to any disability or restriction or may be accorded any privilege or advantage provided that those would be reasonably justifiable in a democratic society. There is also an exception in relation to situations where there are prescribed standards of qualifications (not being those based upon the specified grounds under Sec 3 of the constitution).

legally blind[5]. This is in contradiction to medical blindness. There is a medical report filed in attestation of that professional determination.

[12] During the same year, the 1st respondent reacted to the applicant's health predicament by instructing him to appear before a Medical Board. The Board released a report that he was blind due to the HIV *sequelae* with cytomegatic virus invasion of the retina and complicated cataracts. It further on that basis recommended that he be retired from the Force since he was permanently unfit to continue with the military duties. The 1st respondent relied upon the report and its recommendations by discharging the applicant from the Army with effect from the 8th February 2008 and by detailing him to vacate the Army house and to return the uniform. In June 2008 the applicant ultimately after he had received threats from the 1st respondent complied with the directives.

[13] It is further undisputed that the applicant was paid his gratuity upon being discharged from the Force basically on account of the Medical Report and its stated recommendations and that he has from then to date been receiving a pension every month. According to him, he has after leaving the Army attended the rehabilitation programmes for the visually impaired persons and that as a result, he is now leading a healthy life such that he could execute any task which a person who is similarly situated can do.

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[5] This is different to a clinical /medical blindness in which case one is totally blind. A legally blind person see at 20 feet (6.09m) What a person with typical vision sees at 200 feet. (60.9m) (American Foundation for blindness @ WWW.afb.org 20 feet – 200 feet.

[14] The applicant subsequently presents a scenario that following his recovery from the physiological and visual health complications and regaining of a relatively healthy life, it transpired to him that his discharge from the Force had been done in violation of his substantive and procedural rights which are provided for in the Constitution. He has in substantiating his lamentation that the 1st and the 2nd respondent have, as a result of their decision to retire him from the Army, transgressed his **Sec 18 and 19** rights by complaining specifically that it was taken without him having been given a prior hearing and that he had been subjected to an unequal treatment.

[15] A specific picture which the applicant has projected is that his right to a fair hearing and to equal treatment was undermined in that the Commander despite being a repository of the authority to recommend his discharge, never gave him a hearing before tendering the suggestion to the Minister to discharge him and that the latter similarly dispensed with same in reaching the final decision. In expounding his case in this regard, he recounted that it had subsequently emerged to him after he had left the military, that the late Lance Corporal *X Xu Makoanyane* had not been discharged from the service despite the fact that he had become permanently blind, but that he was instead deployed to the Stores Department within the Army where he was trained in vocational occupations like sewing. He in the same connection, referred to the other incidence involving Brigadier *X Lu Setibing* whom he explains that he has been made to understand that he has been blind since 2010 and yet he has to date remained a serving senior officer in the L D F. In illustrating his case further, he has stated that Private *Y Hu Ratjomose* had his left limp amputated up to his hip joint but was retained in

the Army until his death in 2006. The impression which the Court gathers from the applicant's comparisons is that the essence of his complaint is that he, unlike the other physiologically or visually impaired soldiers, hadn't been given an opportunity to make his representation concerning a suitable work which he could perform within the Military establishment. He has suggested that he could have, for instance, been considered for being trained for operating a switch board and then assigned that task.

[16] The applicant has in support of his case relied upon the **United Nations Convention on the Rights of People with Disabilities (UNRPWD)**.[6] He maintains that the 1st and the 2nd respondents have also violated its Article 27.[7] The paradox is that his counsel hasn't referred us to any other local or international instrument on specifically the work related rights of the people living with HIV or to any of the plethora of case law decisions from many jurisdictions on the emergent jurisprudence on the subject.

[17] However, his Attorney Mr Mosotho, cautioned from the onset that the applicant is not challenging the constitutionality of any provision in the Lesotho **Defence Force Act 1996** and or any Regulation promulgated thereunder. He consistently maintained that his case is founded exclusively upon the

[6] Lesotho has without any reservation ratified the Convention on the 2nd December 2008.

[7] The section obliges State Parties (including Lesotho) to safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment by taking appropriate steps to, *inter alia,* promote vocational and professional rehabilitation, job retention and return to work programmes for persons with disabilities.

infringement of his rights under **Secs 18 and 19 of the Constitution** for the reasons already advanced.

[18] The parties share a critical divergence of views on the question of whether or not against the backdrop of the basic common cause scenario, the 1st and the 2nd respondents had in the exercise of the powers vested upon them respectively, discriminated against the applicant and relegated him to an inequality treatment contrary to the **Secs 18 and 19 Constitutional provisions.** This is succinctly projected in the respondents' affidavit and elucidated in their heads of argument.

[19] In advancing their defence, the respondents proceeded from the premise that the applicant hadn't been discriminated against but that his case was duly considered on its own merits and that the same had been done in the case of the Private, the late Corporal and the Brigadier. Adv. Lebakeng for the respondents contended with reference to their answering affidavit that in the instant case, the military authorities had, after considering the applicant's medical condition found no alternative engagement for him within the LDF. She explained that there were no training facilities for a switch board operator and that understandably the applicant couldn't be scheduled for that training. She further maintained that in contrast to his health predicament, the medical condition of the three soldiers whom he has referred to in his papers accommodated the possibility of their retention and redeployment to the practically suitable tasks within the Army. The impression given was that the individual conditions of those disabled soldiers did not unlike that of the applicant render them unfit for any of the Army assignments. According to her, it was in recognition of that fact that the 1st

respondent had, acting pursuant to the medical report, recommended in good faith to the 2nd respondent; that he authorizes the applicant's retirement from the Force on medical grounds.

[20] The Counsel drew it to the attention of the Court that the retirement of an officer from the Force on medical grounds is sanctioned under **Secs 24 and 33 of the Lesotho Defence Force Act No. 4 of 1996.** The former introduces a procedure towards that eventuality. The process is initiated by the Commander where in his opinion a soldier is mentally or physically incapacitated to do his work. This is done through a report which is forwarded to the Principal Secretary of the Ministry of Health who if he considers it to have a merit, is empowered to appoint a Medical Board to inquire into the matter and the findings thereof to be submitted to the Minister responsible for Defence. The section empowers the Board to invite the concerned soldier to make representations regarding his fitness for the work. **Sec 33** simply clarifies the fact that the procedure applies exclusively to soldiers.

[21] Adv Lebakeng has further in support of the respondents' counter response to the applicant's case that he has been unconstitutionally discriminated against and relegated to the position of inequality, relied upon the Labour Court decision in **Pheko v Lesotho Revenue Authority L C /13/08** where the Learned President had laid down the three requirements for a discriminatory treatment. The first is that there must be a distinction, exclusion or preference originating in an act or omission which constitutes a difference in treatment. Secondly, there must be a prohibited ground upon which the difference in treatment is based. Thirdly, there must be a negative effect on equality of opportunity and treatment that impacts

adversely on the equality of opportunity or treatment. On the strength of these stated requirements, she submitted that the applicant has not demonstrated their existence and resultantly that his case should be dismissed.

[22] In deciding this case, this Court primarily takes a view that the unreservedly ratified **United Nations Convention on the Rights of People with Disability**, stands not only as an inspirational instrument in the matter but that by default it technically assumes the effect of the Municipal Law in the country. This is attributable to its being in precise consonance with the provisions of **Secs 18 and 19 of the Constitution** inclusive of its instrumentality in the upholding of *a right to human dignity and to life*. In this context, reference is being made to the rights of the disabled persons in particular. The Court has here, in synchronizing the Convention with the Constitution, received guidance from the decision in **AZAPO and Others v President of The Republic of South Africa S A 1996 (4) 672 (CC) @ 6888 – 6889 A,** where it was considered trite that Municipal Law should be interpreted to avoid a conflict with a State's International Treaty obligations.

[23] The Court in addressing the central question concerning the applicant's complaint namely that the 1st and the 2nd respondent have violated his constitutional rights; realized that his case is actually that the two respondents have in exercising their respective powers under **Sec 24** violated his constitutionally provided procedural rights. In our view, his grievance that each of the two authorities had unilaterally taken an adverse decision against him without having afforded him a hearing, basically falls within the province of Administrative Law and interfaces with the Human Rights dimension in Constitutional Law.

[24] Our interpretation of the applicant's case is simply that he is preliminarily aggrieved by the decisions which were arrived at through a procedural violation of the Administrative Law principles of natural justice. For the sake of specifism, he is complaining that the *audi alteram partem rule* had not been observed by the respondents concerned before each could exercise his *quasi* judicial powers entrusted upon their offices respectively under **Sec 24.** The rule is regarded as one of the integral components of natural justice or natural law as it is also referred to. The naturality of the phenomena is ascribed to the understanding that it concerns a special regime of justice which has been sanctioned and ordained by nature itself. A further impression is that it is about the principles of justice which are inscribed in the hearts and minds of the mankind or sucked from nature's own breast. This explains the reason why some ancient two Judges are quoted to have associated this paradigm with God the Almighty and that its recognition transcends all the civilizations of nations and the legal systems.[8]

[25] According to Lawrence Baxter the principles of natural justice are expressed in two Latin maxims: *audi alteram partem* ('hear the other side') and *nemo iudex in propria causa* ('no one may be a Judge in his own cause '). In the present case the relevant aspect concerns the fair hearing *(audi alteram partem* rule).

[26] The nature of the powers bestowed upon the Commander under **Sec 24** are interpreted by this court as being characteristically *quasi judicial* in nature and in effect. This is because he has the authority to determine a soldier who on account

[8] According to Baxter L. Administrative Law Juta p537, the principle was recognized in the ancient Egypt, Greece, and in Germanic and African tribal customs. Its testimony appears in the Scriptures, the Magna Carta, the Roman Law and in English Law.

of his health condition, warrants him to make a recommendation to the Principal Secretary that he be examined by the Medical Board for its finding on the soldier's fitness to be retained in the Force or to be discharged. A dimension of significance here is that the Commander accompanies the recommendation with his own representations in the matter. This is understandable particularly when he is the one who has ground knowledge about the daily military challenges facing a soldier. The Court recognizes that the Commander is a repository of the recommending powers which are of a *quasi judicial* nature. This is so in realization of the administrative fact that the recommendation had a potentially adverse consequence on the applicant's continued employment in the Army and on his future means of earning livelihood for himself and his family. The Commander was by virtue of the *quasi judicial* powers which he exercised over applicant, obliged by the dictates of Administrative Law to have followed the said rules of natural justice. This is scheduled to obtain whenever in the exercise of the powers entrusted upon an official in authority, the concerned person could have his *existing status, remuneration and legitimate expectation* negatively affected by the decision thereof. It has to be repeated that in the instant case, the charge under consideration is at this stage, that the Commander hadn't heard the applicant before he advanced the recommendations and his corresponding representations to the Principal Secretary for the latter to consider constituting a Medical Board for the stated purpose. It is not in dispute that the Commander hadn't done so.

[27] The Court further finds that the Commander had continued to undermine the applicant's *audi alteram partem* rule by not giving him a hearing before

forwarding to the Minister a recommendation that he should be discharged from the Military on the basis of his HIV related blindness which rendered him unsuitable for the assignments within the establishment. The violation has been worsened by the Commander's adamant rejection of the request made persistently by the applicant to have audience with him and by thereafter acting unilaterally in recommending his retirement to the Minister.

[28] It is further found that the Minister had equally transgressed the applicant's right to a hearing before deciding to retire him from work in the exercise of his **Sec 24** powers. The reasoning is similarly that the *quasi judicial* nature and effect of his authority under the section, made it mandatory for him to have heard the applicant to obtain a complete picture before deciding to condemn him.

[29] The end result of the failure and/or omission by the Commander and the Minister respectively, to have observed the natural justice principle in consideration, is that the Court is resultantly, left in a state of uncertainty as to the justifiable decisions which each of them could have taken if they had humanely endured the trouble of hearing the man. **The basic requirement is simply that justice must not only have been done in the case, but must be seen to have been done.**

[30] The rationale behind the *audi alteram partem* natural law principle is to enable the repository of the *quasi judicia*l powers to be well informed for his decision to be in the public interest and to accommodate the relevant values. In the process, the authority who is vested with the powers would have a holistic picture of the relevant and material facts to be considered before reaching the

decision. This would assist to mitigate the potential prejudices, facilitate for fairness and objectivity in decision making. The *audi alteram partem* principle has been comprehensibly explained in the following classical and rather poetic expression:

> If you are a man who leads, listen calmly to the speech of one who pleads;
> don't stop him from purging his body of that which he planned to tell.
> A man in distress wants to pour out his heart more than that his case be won.
> About him who stops a plea one says: "Why does he reject it"?
> Not all one pleads for can be granted, but a good hearing soothes the heart.[9]

[31] Voet describes the *audi alteram partem rule* of natural law to rest on the highest equity least a person be condemned unheard. [10] Vromans have been quoted as having acknowledged the foundational nature of this principle in the administrative affairs of men.

[32] The *audi alteram partem* principle has for ages been recognized in Lesotho as an indispensable procedural requirement to be observed in the *quasi judicial* administrative sittings or where an administrative authority is seized with a case in which the decision which could be arrived at may affect the existing status, remuneration or the legitimate expectations of the person to be so affected. The rule has as a result been incorporated into a number of legislative instruments to facilitate for its observance[11]. On the Common Law terrain, the courts have throughout upheld the principle whenever the facts and the circumstances involved warranted its application. This legal development is principally attributable to the realization that the *audi alteram partem* principle of natural

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[9] Instruction of Ptahhotep, from the 6th Dynasty (2300 – 2150 BC), referred to in Lawrence Baxter, **Administrative Law** Kenwyn : Juta 1984 p 539.

[10] Voet 2.4.1(Gane's translations) referred to in Lawrence Baxter op cit p 537.

[11] Sec. 15 (7) and 16 of The Public Service Act No.2 of 2005, Labour Code Order 1992 Section 66, Rule 17 (3) & (4) of The Labour Court Rules 1994,Sec 31(1) of The Police Service Act. No.7 of 1998

justice is analogously in rhythm with the fair trial rights under **Sec 12 of the Constitution** and that it is procedurally instrumental for the upholding of human dignity. It has in the same vein been regarded as a value process system which does not only ensure that the substantive and the procedural prescriptions are adhered to, but that at the end of the day there is objectivity and the exclusion of arbitrariness.

[33] We acknowledge the fact that the principle is not applicable in all *quasi judicial* sittings such as tribunals or in instances where an administrative authority has to exercise quasi judicial powers. This is so irrespective of its centrality and sacrosanct role in the dispensation of the administrative related justice. Tucker L J elucidated this legal position in **Russel v Duke of Norford [1949] 1 All ER 109** in these terms:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

[34] The stated qualification pertaining to the parameters of the applicability of this Common Law principle was *mutatis mutandis* reiterated by the Court of Appeal in **Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999.** The appellant in this case had unilaterally disconnected the electricity supply to the residence of the respondent since it was found that there had been a tempering with the system. The latter had consequently brought an urgent application seeking for a *rule nisi* directing the appellant to restore *omnia ante* the disconnected power supply on the basis that the act had been done without having followed the *audi altarem partem* rule. The High Court had issued the temporary order prayed for

and ultimately confirmed it on the reasoning that the rule hadn't been complied with. The Court of Appeal set aside the decision on the ground that **Sec 26 (4) of the Electricity Act No. 7 of 1969 read in conjunction with Sec 31 (1) (a) (vii) of same,** empowered the Appellant to do the disconnection without according hearing to anyone where there has been a tempering with the supply system. This is indicative that there are limitations to the application of the rule such as where it has been statutorily excluded.

[35] On the similar subject, the Court of Appeal found in **Koatsa v The National University of Lesotho L L R B 1991 1998** that the application of the *audi alteram partem rule* was in the circumstances of that case indispensible. Here the Council of the respondent had dismissed the appellant who was its permanent employee without having afforded him a hearing before reaching the decision. The Council which had the powers of dismissal had exercised them on the basis of the disciplinary conviction of the appellant by the Disciplinary Committee of the respondent and its recommendation for his dismissal since in its finding he was unfit to continue with his work as a guard. The court in setting aside the decision of the High Court directed that the fact that the appellant was a permanent employee of the University is indicative that he had a legitimate expectation to continue working for it and, therefore, the Council as a repository of the power to dismiss him should have observed the *audi alteram partem rule before* deciding to do so. It has to be realized that in this case there was no legislative provision whether express or implied which sanctioned the Council to dispense with this natural law procedural principle. This is in contrast to the legislative constraint identified in the case of **Lesotho Electricity Corporation v Moshoeshoe (supra).**

[36] The Court finds that there is a merit in the applicant's protestation that the Commander's failure to hear him could have occasioned the already explained unconstitutional discriminatory treatment against him. The respondents' papers before this Court are not persuasive that the man had not been relegated to the constitutionally unjustifiable discrimination in comparison to the others in a comparatively likewise situation. The perception obtains in the midst of consciousness that it is trite that the applicant throughout carries a burden of proof in the matter. It has attracted a special attention of the Court that the respondents have effectively been evasive and equivocal when responding to the applicant's clearly articulated comparative incidences of the soldiers in his situation who were retained in the Force despite their visual and physical disabilities. The perceived common denominator is, understandably, that reference is being made to the disabled serving soldiers regardless of whether the impairment is visual or physiological. In this background, the applicant has already been illustrative that Lance Corporal *Xu Makoanyane* who had become permanently blind, was nevertheless, retained in the Army and transferred to the Stores where he was trained in sewing; Brigadier *Setibing* became blind around 2010 and is still in the Force while Private *W Ju Rasethunya* had despite having had his left leg amputated, remained in the Military up to his death in 2006.

[37] It doesn't require above average intelligence to conjecture that the other physiologically or visually handicapped soldiers were respectively unlike the applicant afforded a hearing. This leaves only one reasonable conclusion that while being basically in the same situation with the other disabled colleagues, he

has simply been treated differently because his visual problem has been occasioned by the HIV element and that as a result, he was regarded as an unwanted element within the Army.

[38] The expectation of the Court was that the respondents would in their defence advance some clearly persuasive grounds upon which the applicant was not treated similarly to the other mentioned disabled soldiers who were kept in the service. Such basis would, in all fairness, have to be premised upon some scientific analysis and credible explanation to demonstrate fairness and objectivity. As for the Brigadier, it would have been sufficient to have simply denied that he is not blind and thereby inviting the applicant to prove otherwise. Instead, the respondents have, paradoxically, proffered an explanation that he is assigned a different work from that of the applicant in that his is an Accountant while the applicant was a brick layer in the Force. The Court finds the explanations to be highly suspicious and indirectly indicative that the Brigadier has to some degree a visual impairment imperceptible to us. Concerning the Private, it has not been denied that he had been kept working though he had his leg amputated. The fact that he could still walk doesn't negate the reality that he was physically disabled. It has further not been denied that the Lance Corporal became permanently blind but was also maintained in the establishment up to his death in 2006.

[39] In the above presented scenario, our immediate assignment is to comprehensively interrogate the applicant's allegation that he has, in the circumstances, been unconstitutionally discriminated against in comparison to

the others in his category. Thus, in seeking to make a determination on that subject, the Court finds that the applicant is not sustaining his case on discrimination on any of the **Sec 18 (3)** specified ground upon which no person shall be discriminated against. He is, instead, basing it on what appears to be a ground which is simply contemplated therein as *the other status* which may constitute the basis for discrimination. The impression is that the listed grounds are not exhaustive. In **Harsken v Lane 1997 (11) BCLR 1489 (CC) para 53** it was directed that a complainant who relies upon an unspecified ground would have to establish the unfairness in the discriminative treatment.

[40] The Court determines that the applicant has on the balance of probabilities proven his *other status* based case that he has, in comparison to the others in his situation, been unconstitutionally discriminated against. The *status* which he has satisfactorily established is that of visually disabled person with HIV. The Court has appreciated the logic and the persuasiveness of his lamentation before it. It commences with a presentation of a broader picture that for the purpose of the assessment of the health fitness of the LDF soldiers, they are classified into two categories. The first one is that of those who on the face of things, are physically and visually or otherwise healthy and the second comprises of those who are physically, visually or otherwise compromised and, therefore, subject to being found unfit for the Military tasks. He in concluding the presentation projects a fascinating specific picture that the 1st and the 2nd respondents have ostensibly introduced **an extra** categorization within those who are physically and / or visually handicapped. His contextual impression is that the latter have been reclassified into those whose condition may be HIV related and those who do not have that

dimension in their disability. In this background, the applicant strongly maintains that the only reasonable conclusion to be conjectured in the circumstances is that unlike the other physically or visually disabled soldiers; he was not given a hearing or considered for an alternative work within the LDF, because he is HIV positive.

[41] The respondents haven't as it has already been stated advanced systematic and convincing reasons in their endeavour to justify their discriminatory decisions against the applicant. The criticisms against the procedural improprieties in the decision of the 1st respondent and that of the 2nd respondent have already been made and there is no need for their revisitation.

[42] It has ultimately transpired to the Court that the Commander and the Minister's identified violations of the applicant's right to the natural law *audi alteram partem rule*, to the *constitutional equality of treatment* and to his *protection against unconstitutional discrimination,* have adversely transcended into his constitutional right to *human dignity*. The Commander's admitted use of threats to have the man evicted from the army residence which he lawfully occupied, marked the epoch of the inhuman treatment to which he had already been subjected. The heartless act should be perceived against the background that at the material time the applicant was under a physiological and psychological devastation in his life. This was aggravated by the then recent disclosure that his legal blindness was associated with the diagnosis that he was HIV positive. It was in that pathetic scenario that he was desperately beseeching for the mercy of his Commander to hear him. Unfortunately for him, his voice was like that of a man shouting in the wildness. The desired interaction could have

generated an atmosphere of mutual understanding and the serenity of mind upon the applicant. He certainly had a legitimate expectation that he would as it had been done to his colleagues who became disabled, be heard by his superior boss so that his particular health condition could be well understood and for the exploration of the alternative work opportunities for him. Even if at the end of the day he would be advised to retire peacefully, he would have been treated humanely, similarly to the others in relatively the same situation, and appreciated that his boss had at least applied his mind to his case and made an informed decision. It should suffice to state in a nutshell that the Commander in particular had treated the applicant in an inhuman manner in which a human being should not treat another human kind.

[43] It is against the backdrop of the HIV status which the applicant has established as the basis of his unequal and the discriminatory treatment by the 1st and the 2nd respondent respectively, that the Court holds that this health condition should be recognized as one of the prohibited grounds for discrimination within the purview of the **Sec 18 (3)** which contemplates *other grounds* other than those specified therein. It is from here found imperative to traverse some selected emergent case law and International Law instruments on the subject. This relates specifically to the *equality* of people living with HIV and their right not to be *discriminated* against on account of that status.

[44] It would appear from the case law jurisprudence developed from different jurisdictions that the HIV status should be recognized as an international human and social problem which has to be addressed rationally and scientifically in such

a manner that those who live with the virus retain their human rights. In this respect, there is emphasis on their right to *equality, human dignity* and *freedom* from being discriminated against because of their status.

[45] A leading case in which the constitutional values of a person living with a HIV status were comprehensively articulated is **Hoffman v South African Airways 2000 (11) BCLR 1211 (CC).** Hoffman had in this case successfully gone through a very stiff competition for appointment to the post of a cabin attendant in the South African Airways (SAA). He was one of the 12 successful candidates out of the original number of 175. The medical examination found him fit and suitable for the employment. Nevertheless, he was subsequently diagnosed as being HIV positive and therefore, by operation of the recruitment policy of the SAA became disqualified for employment as a cabin attendant. He challenged the policy in the High Court where the SAA successfully defended the policy on medical, safety, operational and economic grounds. It had in support cautioned that the HIV status would risk health complications since one who is a cabin attendant has to be periodically vaccinated from yellow fever because of worldwide travelling to avoid spreading the decease to the other crew members or to the passengers. Secondly, it had been contended that a person with that health dimension has a high proclivity to contract opportunistic diseases like tuberculosis and chronic diarrhoea which could be spread to those in the flight. Thirdly, it had been argued that the life expectancy of a HIV person is very limited to justify the R30, 000 training costs for a cabin attendant since the company expected its employee to work for it for at least 10 years.

[46] Hoffman resorted to the Constitutional Court against the High Court decision which had in upholding the stated arguments advanced for the SAA, found the discrimination against him to be justified and refused to order for his re engagement. The Constitutional Court found from the medical expert evidence from both sides that a person who would have health complications when injected with a yellow fever vaccine, would be the one whose CD4+ count has dropped below 350 per microliter and that those who hadn't reached that level wouldn't easily be invaded by the opportunistic diseases. Moreover, it was revealed that the retroviral treatment could prolong one's life up to the normal life expectancy period. Ngcobo J for a unanimous court held that:

> The denial of employment of Hoffmann because he was HIV-positive had impaired his dignity and constituted unfair discrimination and violated his right to equality. The court observed that the discrimination was not based on a legitimate purpose but rather on prejudice against persons living with HIV. We must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interest. The greater interests of society require the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them. They must not be condemned to 'economic death' by the denial of equal opportunity in employment"

The SAA was consequently ordered to reinstate Hoffman from the date of the judgment of the Constitutional Court.

[47] The Namibian Labour Court delivered another landmark case on the rights of those living with HIV in **N v Minister of Defence ILJ 999 (Labour Court of Namibia).** The applicant who was a former combatant in the SWAPO liberation struggle had in this case been refused enlistment in the Namibian Defence Force (NDF) on the basis that he had tested HIV positive. He approached the court seeking for a

declaratory order that the decision violated **Sec 107 (1) of the Labour Act 6 of 1992.**[12] The bedrock of his case was that he was simply being refused the enlistment solely because he is HIV positive. He had in the same vein prayed for an order directing the respondent to process his recruitment into the NDF. The understandable coincidence in this case is that the court propounded almost word by word the scientific analysis made in **Hoffman v South African Airways (supra)** on the relationship between CD4+ count or viral load and the fitness of a person to be employed. The court had arrived at the conclusion on the basis of the representations made before it by the medical experts for the parties. It subsequently determined that the exclusion of the applicant from the enlistment exclusively because of his HIV status amounted to discrimination in an unfair manner in breach of **Sec 107 of the Labour Act.**

[48] Since it had taken a long time after the applicant had been tested for HIV, the court ordered that he should be enlisted provided that his CD4 + count would not be below 200 when he undergoes another testing. The respondent had in any event agreed that there were in the NDF, soldiers who were HIV positive and that there were medical facilities to address the challenge and that where necessary such people are redeployed in less demanding sections within the military.

[49] Whilst the human rights jurists and the activists in Africa and abroad were celebrating the Namibian land mark jurisprudential development in **N v Minister of Defence (supra)** on the rights of the people living with HIV with special reference to the soldiers, the Legislature intervened a fortnight thereafter, by initiating the

[12] The section provides a remedy where "any person has been discriminated or is about to be discriminated in an unfair manner or be discriminated against on the grounds of his disability, in relation to his employment".

Defence Amendment Bill 2001 which culminated into the Defence Amendment Act 2001. The Act has been quoted as having suddenly introduced a requirement for the Defence Force to exclude people with HIV solely on the basis of that status.[13] Incidentally, the Kingdom of Swaziland is similarly recorded as having introduced a new policy in terms of which all the soldiers whom the compulsory testing would reveal them as being HIV positive including pilots, aircraft engineers and traffic controllers would be relieved of their duties and that the new recruits would be accepted only if they test HIV negative.[14]

[50] In Colombia the Constitutional Court presided over the case of **XX v Ministry of National Defence (General Jose' Maria Go'rdova Cadet School), Case No. T -707205, 3rd Appeal Bench of the Constitutional Court (2003).** In that case a young cadet officer, who at material time held a rank of a 2nd Lieutenant, had been excluded from the Military Cadet School because he was diagnosed HIV positive. At the time of his exclusion from the school, he was attending a promotional course to a rank of a Sub – Lieutenant. He then brought an application challenging the legality of his expulsion alleging that the decision violated his right to life, equality, work, privacy, health and the freedom to choose a profession[15]. The Constitutional Court ruled *inter alia* that the institutions of higher learning including those of the Armed Forces were not exempted from the obligation to respect constitutional rights. It then reiterated what it described as its previous decision that different

[13] This has been documented in UNAIDS: Case Studies in Litigating the Human Rights of People Living with HIV Re'seau Juridique Canadien VIH/ sida p 34 @ para 2.
[14] UNAAIDS op cit p34 @ para 3.
[15] It becomes interesting to realize that the court recognized the inter relationship between the discrimination of a person on the ground one's HIV status and the right to life, equality, work, privacy, health and freedom of a person to chose a profession or occupation. This presents a serious challenge to the development of our constitutional development.

and prejudicial treatment of those living with HIV violates the constitution. From there it referred to its earlier case **Constitutional Court of Colombia, Decision SU – 256(1996)** in which it held:

> It is necessary to remember that a person who is HIV positive is a human being and, as such, enjoys, in accordance with Article 2 of the Universal Declaration of Human Rights, all the rights proclaimed in the international human rights instruments without the possibility of being the object of discrimination , nor arbitrary decisions by reason of their status. It would be illogical for a person who has an illness to be treated in a manner harmful for their physical, moral or personal integrity.

[51] The court ultimately set aside the decision of the school, ordered that the applicant be reinstated into the school, his promotion to the rank of a Sub – lieutenant be authorized, he be assigned to a post suitable to his HIV status and that he be provided with the medical care provided for under the **Colombian Decree 1543 of 1997.**

[52] In yet another interesting Colombian constitutional case of **XX v Gun Club Corporation et al; Constitutional Court, Judgement No. SU – 256/96 (1996).** In that case the defendant had terminated the plaintiff's employment contract after he had tested HIV positive. A lawsuit challenging the constitutionality of the decision was instituted. The full bench of the Constitutional Court stated firstly that the standard of civilization a society is among other things measured by the manner in which it assists the weak the sick and in general the needier and the manner in which it permits discrimination against them or their elimination. It then held that:

> It was unconstitutional to discriminate against people living with HIV because human dignity prevents any legal subject from being the object of discriminatory treatment because discrimination is an unjust act *per se* and

> the rule of law is founded on justice, the basis of social order. Secondly, because the right to equality, in accordance with Article 13 (of the constitution of Colombia) places an obligation on the state to protect the weak.

[53] The court described the exclusion of people with HIV from work because of that status as a social segregation in a form of medical apartheid and ignorance of the equality of all citizens and the right to non discrimination. The plaintiff's prayer for his reinstatement to work was on account of the facts before the court refused. Whilst the case is persuasive, this court is, however, alive to the fact that the Constitution of Lesotho has in built limitations to the *right of equality and freedom from discrimination.*[16] Thus, its jurisprudential discourse around the concepts is circumscribed by that fact.

[54] In India a spot on jurisprudence was elucidated in **RR v Superintendent of Police & Others (2005) Karnataka Administrative Tribunal**. Here RR had been short listed for a position of a Police Constable. He subsequently tested HIV positive and as a result, his name was cancelled from the provisional selection. This was by operation of a circular issued by the Director General of Police which detailed that persons with HIV shouldn't be inducted into the Police Force. RR challenged the constitutionality of the circular against **Articles 14 and 16 of the Indian Constitution.**[17] Justice Reddy having referred to the case law in the country and abroad, held that the actions of the Director General were arbitrary, illegal and unconstitutional under **Articles 14 and 16**. He admonished that HIV status alone, is not necessarily indicative that a person is unfit for the job and that he would pose a health threat

[16] These are the stated limitations under Sec 18 (6) read in conjunction with 18(4) (e) of the constitution.
[17] The sections guarantee equality before the law and equality of opportunity in public employment.

to others. The tribunal finally ordered that a vacancy of a Police Constable be created for RR.

[55] It has to be cautioned that in Lesotho the laws and policies which would in any manner, whatsoever, discriminate against people living with HIV, would *prima facie* be unconstitutional since they wouldn't appear to be in keeping with **Sec 18 and 19 of the Constitution.** The authority or a person, who makes the discrimination or relies upon a law which introduces it, would have to prove that the act or the law in question is justifiable in a democratic constitution which is primarily designed to protect and advance *human dignity, equality and freedom.*[18] Thus, **Secs 18 and 19 of the Constitution** would be of a determining significance in such an assignment.

[56] On the International Law terrain, there should be a realization that Lesotho is a party to some of the key human rights oriented international instruments. One of those of great significance is the **International Covenant on Civil and Political Rights (ICCPR)**[19] which under **Article 26** provides for the equality of all persons against discrimination based on the specified grounds or other status which as it has already been stated, would embrace the HIV status. Incidentally, this is a reverberation of the grounds which are in the contemplation of **Sec 18 (3) in the Constitution.** In same vein, the country subscribes to the UN Commission on Human Rights which provides for prohibition of discrimination based on HIV/AIDS status. The ICCPR is in this respect, not only inspirational but is also domestically

[18] These are the trite pillars of the country's democratic constitution which the court is constitutionally enjoined to protect and promote in its dispensation of justice in relation to the allegations of the vertical or horizontal human rights violations.

[19] Lesotho ratified the Covenant in 9 September 1992

applicable to the extent of its consistency with the constitution and other laws of the land.

[57] The applicant was finally discharged from the Army on the basis of the Medical Board's diagnosis of his health condition and its recommendation. This has occasioned a challenge for us to consider the content of the report in order to determine its reliability and fairness as the basis of the recommendation that culminated in the discharge of the applicant. We, with all the respect to the medical professionals who executed the report, find that it lacks the CD4 and the viral load analysis and their implications on the applicant's physical, psychological, visual etc capability to continue working as a soldier in the core or in the supportive military departments or sections. In the **Namibian case of N v Minister of Defence (supra),** the report appears to be sufficiently detailed and persuasive that it could be relied upon. The medical experts had detailed before the court that a person with a CD4 count below 200 and a viral load exceeding 100 000 would probably not qualify for military challenges. The reliability of the report presented in the instant case, is further undermined by the absence of any indication therein as to whether or not the retroviral medication wouldn't ameliorate the intensity of the applicant's health situation. An interesting significant development which has not been denied in this case is that the applicant has now been rehabilitated and that he has regained a normal life. This reinforces the scepticism on the correctness of the findings of the Board, the recommendations thereof and their scientific basis.

[58] The respondents have not persuasively demonstrated to the court that their common decision to have the applicant retired from the Army on the health grounds as a result of his visual impairment associated with the HIV status is constitutionally justifiable in a democratic dispensation which as it has been emphatically stated, is committed to the advancement of *human dignity, equality and freedom.* The Medical Board Report which is the foundation of the ultimate decision by the Minister that the applicant be retired from the Army because of his medical condition, lacks a comprehensive scientific based analysis which has in **Hoffman v South African Airways (supra), N v Minister of Defence (supra)** and in **X X v Minister of Defence (supra)** been described as being *sine qua non* in the medical assessment of the ability of an employee who presents the HIV related health complications to continue with the employment. The Court is convinced that the medical procedures subscribed to by the concerned doctors, is in accordance with its sense of justice in the circumstances. This lends more credence from the fact that the doctors had despite featuring for the parties in the adversarial litigation relationships, unanimously tendered a common expert opinion on the subject. The doctors had in summarized terms detailed that in principle a person who is HIV positive and as a result presents health complications, is not *per se* necessarily indicative of his unfitness to perform the work and or that he is a hopeless case for the purpose being retained in the employment. The medical experts had laid their emphasis on the point that the determining decisive factor would be the level of the CD4 + count or the viral load content such that it has dropped below 200 per 350 microlitre in blood. This should correspondingly include a finding on whether the affected person couldn't have his CD4 count improved through a medical intervention. It is in any event, trite knowledge that people who

religiously take the retroviral tablets as prescribed and lead a recommended healthy regime of life, improve their CD 4 counts gradually and thereby subject the HIV load in the blood under an effective control. They afterwards lead a normal life and become productive as any other person.

[59] The Court acting on the strength of the stated medical opinions, has resolved that there is a vital scientific deficiency in the medical report which constituted the basis of the decisions of the 1st and the 2nd respondent. Nevertheless, it also finds that they had reached their respective decisions in good faith. The problem which remains attributable to them is their attendant failures to have observed the *audi alteram partem* natural law principle before exercising the **Sec 24** *quasi judicial powers* adversely to the applicant. The principle has as it has already been explained, become an Administrative Law procedural right to be accorded recognition in all the deserving cases whenever an administrative *quasi judicial decision* is to be considered against a person. This has resulted in the uncertainty regarding the correctness, the fairness or otherwise concerning the decisions reached by each of the two authorities.

[60] In conclusion, the court holds in a nutshell that the 1st and the 2nd respondents had individually primarily undermined the applicant's procedural right to have had the *audi alteram partem rule* extended to him. They should have done so prior to their decisions which were instrumental to the sudden termination of his employment in the Army. This, subsequently, transcended into the violation of his constitutional based rights. These are the *right to equal treatment and protection under the law and the right of freedom from*

discrimination. The transgressions against these rights have resultantly impacted negatively on the right of the applicant to *human dignity*[20] and incidentally to a *humanely treatment.* It should in this regard be highlighted that the latter human right and the right to life constitute the core human rights onto which the rest of the human rights are anchored.

[61] The foundational existence of a *human right to life* and to *human dignity* in comparison to the other human rights was comprehensively acknowledged in the celebrated constitutional case of **S v Makwanyane 1995 (6) BCLR 665 (CC) @ para 328.** Here, O'Regan J stated:

> Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the ...Bill of Rights.

Chaskalson P in the same case @ para 144, echoed O' Regan's statement of the law in the following more precise terms:

> The rights to life and dignity are the most important of all the rights, and the source of other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

We have found it important to caution that the Sub Saharan Africa has a seventy percent (70%) of the HIV infections in the world.[21] This is self explanatory that wise and constructive strategies should be followed within all the work related environments including the military. There should be consistency in the adherence to the scientific based methods of recruitment and treatment of the

[20] There is no specific provision for a right to human dignity in the constitution of Lesotho. That notwithstanding, the right is logically readable into the text due to its foundational nature in any democratic constitutional dispensation. Otherwise, the constitution would be rendered impotent and rather meaningless.

[21] Found from the summarized version of the Hoffman's case by Prof. Sam Rugege @ p1.

infected people without attaching to them baseless prejudices which emanates from ignorance. Above all, those people should be humanely treated, be provided with the medical interventions and accordingly rehabilitated into the normal life. This is a practical challenge since otherwise; the logical consequence would be that the region stands to lose 70 percent of its intellectual and manpower force which would be an effective recipe for a socio – economic catastrophe. The scientifically rationalized approach which has been advocated for in **Hoffman v the South African Airways, N v Minister of Defence, XX V Minister of National Defence (General Jose' Maria Go'rdova Cadet School), N v Minister of Defence ILJ 999 (Labour Court of Namibia)** and **RR v Superintendent of Police & Others (2005) Karnataka Administrative Tribunal** which have all been cited with the overwhelming approval in this case, should together with the other cases that advances the jurisprudence on this subject, provide a healthy guidance. The injection of the human dignity dimension into the thinking will complement it all.

[62] In the premises, the final judgment of this court stands thus:

1. The court declares that the respective decisions of the 1st and the 2nd respondents to have the applicant discharged from the Lesotho Defence Force on medical grounds was inconsistent with **Secs 18 and 19 of the Constitution of Lesotho 1993** in that he hadn't been accorded equal treatment in contrast to the other soldiers who are analogously and relatively similarly situated in that they are permanently disabled and had unlike those others, not been accorded the hearing before a *quasi judicial* decision could be

taken against him by the Commander and the Minister respectively. and the 2nd respondents to reinstate the applicant within the Lesotho Defence.

2. Notwithstanding the above declaration, the court declines to direct the Commander and the Minister to reinstate the applicant with the appropriate salary adjustments from the time he was retired. This is due to the realistically expected logistical and financial problems to be encountered in reinstating a man who was discharged from the Force in 2008. This could be complicated more by the fact that the Commander is a new person and the changes in the command structures and the strategic plans which are highly likely to have taken place since that time.

3. The prayer that the 1st and the 2nd respondents be directed to pay the applicant the salary which he ought to have earned from the date of his discharge; is refused since that has been overtaken by developments in that he has long received his retirement financial benefits and is already getting his monthly pension.

4. In considering the stated violations of the constitutional rights of the applicant by the Commander and the Minister, the Court found befitting for him to be awarded constitutional damages. He is resultantly given Fifty Thousand Maluti (M50.000) for the purpose. The interest thereon will be on the ordinary scale per annum and not at 18. 5% rate which has been applied for without any justification for a departure from the current

ordinary rate of interest. The interest will operate from the day of the delivery of this judgment.

5. The Registrar is ordered to send a copy of this judgment to the Commander and to the Minister under a confidential covering letter in which he discloses to them the full names and particulars of the applicant to facilitate for its execution.

6. This being a constitution case, there is no order on costs.

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E.F.M. Makara
Acting Judge

I concur:

_____

S.N. Peete
Judge

I concur:

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M. Mahase
Judge

For Applicant : Mr. Mosotho
For Respondent : Mr. Lebakeng