



LESOTHO

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/APN/442/16**

In the matter between:

**NO. 73559 PRIVATE LIEKETSO MOKHELE**

**1<sup>ST</sup> APPLICANT**

**NO. 73743 PRIVATE 'MASAULE LETIMA**

**2<sup>ND</sup> APPLICANT**

**NO. 73752 PRIVATE 'MASINE NTSOHA**

**3<sup>RD</sup> APPLICANT**

And

**THE COMMANDER OF LESOTHO DEFENCE  
FORCE**

**1<sup>ST</sup> RESPONDENT**

**MINISTER OF DEFENCE AND  
NATIONAL SECURITY**

**2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**CORAM:**

**T.E. MONAPATHI J.  
S.N. PEETE J.  
S.P. SAKOANE J.**

**HEARD:**

**11 DECEMBER, 2017**

**DELIVERED:**

**14 FEBRUARY, 2018**

## SUMMARY

Review – decision to discharge pregnant soldiers from the army –whether the decision falls within the purview of Commander’s power to discharge a soldier if it is in the best interests of the Lesotho Defence Force – decision based on a Standing Order which conflicts with Regulations prescribing grounds on which a soldier can be discharged – pregnancy not a prescribed ground for discharge – decision reviewed and set aside – Lesotho Defence Force Act, 1996 s.31 (b). Defence Force (Regular Force) (Discharge Regulations 1998 and Defence Force (Regular Force (Other Ranks) Regulations 1998.

## ANNOTATIONS

### CITED CASES:

#### LESOTHO:

Khalapa Lia Buseletsana Multipurposes Cooperative Society And Another v. Vodacom Lesotho (Pty) Ltd And Others LC/APN/50B/2014

#### CANADA:

Brooks And Others v. Canada Safeway Limited [1989]1 S.C.R. 1219

#### ENGLAND:

Kruse v. Johnson [1989]2 Q.B. 91

#### EUROPE:

Brown v. Rentokil ECJ Case C-394/96

#### UNITED STATES OF AMERICA:

Crawford v. Cushman 531 F.2d 1114 (1976)

### STATUTES:

Lesotho Defence Force Act No.4 of 1996

Defence Force (Regular Force) (Discharge)

Regulations, 1998

Defence Force (Regular Force) (Other Ranks) Regulations, 1998

TREATIES:

The 1967 Declaration on the Elimination of Discrimination against Women

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The 2000 ILO Maternity Protection Convention No.183

BOOKS:

Schlmeter D.A. (1996) Military Criminal Justice: Practice And Procedure 4<sup>th</sup> Edition (Virginia: Michie)

Wade H.W.R. & Forsyth C.F. (2000) Administrative Law SA Edition (OUP)

# JUDGMENT

SAKOANE J:

## I. INTRODUCTION

“When the military man approaches, the world locks up its spoons and packs off its womankind.”

So wrote George Bernard Shaw in 1903 in his book **Man and Superman**.

[1] More than a century since Shaw so wrote, womankind has progressively moved out of the patriarchal world of being chattels to be packed off when the military man approaches into the evolving world of non-sexism, gender equality and equal opportunities in all public institutions. These principles of non-sexism, gender equality and equal opportunities are international standards for protecting and supporting women in their efforts to scale back the tides of patriarchy<sup>1</sup>.

[2] The struggle for migration from the world of patriarchy to the modern world of full citizenship is supported by the international community

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<sup>1</sup> Patriarchy is defined as a belief in the inherent superiority of males over females and which maintains that men can determine the standard of sexuality for everyone. (See “Faith can promote rape culture” in Mail & Guardian 15 December 2017)

through the efforts of the United Nations which has adopted the following Conventions:

2.1 The 1967 Declaration on the Elimination of Discrimination against Women.

2.2 The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

2.3 The 2000 ILO Maternity Protection Convention No.183.

[3] These international legal instruments enjoin States to prevent discrimination against women on account of, inter alia, marriage or maternity by taking legal measures to prevent their dismissals from employment in the event of marriage and maternity and to provide paid maternity leave.

[4] This case is, therefore, about the applicability and observance of the values espoused by these international instruments in relation to the laws governing military service in the Kingdom. Although, in form the case is about the legality of the decision of the Commander of the Lesotho Defence Force to discharge pregnant soldiers, it is in substance a challenge to the culture of patriarchy in the military and an assertion of sexual and

reproductive rights in military service. What is being contested is the idea that female soldiers are incapable to bear arms and babies at the same time and, on that account, are not fit for military purpose.

[5] The applicants are all female soldiers discharged from the army by the Commander of the Lesotho Defence Force on the ground of pregnancy. The letters of discharge of the applicants are dated 22 March 2016, 22 December 2015 and 1 December 2015 respectively. The reason for the discharge is that the applicants fell pregnant after being enlisted and thereby contravened the army's **Standing Order No.2 of 2014** dated 3 March which reads thus:

- “7. The female members or member of Lesotho Defence Force, upon completion of Recruitment Course and promoted to the rank of Private Soldier, shall not be pregnant before the expiration of five (5) years of service in the Lesotho Defence Force.
8. Notwithstanding the provisions of paragraph 7 above, the female member or members may get married within the stated period of time, but must not be pregnant within such prohibited time.
9. The female member or members of Lesotho Defence Force, who are enlisted while already married, shall not be pregnant before the expiration of five (5) years of service in the Lesotho Defence Force.”

## **Marital Status**

[6] The applicants enlisted in the army in October 2013. The first applicant was already married with one child. The second applicant got married after

enlistment. She was granted permission to marry on 17 June 2015. The third applicant is not married.

## Show cause notices

[7] The process that started and ended in the applicants' discharge was triggered by the following contents of a letter written to each applicant on 8 March 2016, 1 December 2015 and 1 December 2015 respectively by the Army Commander:

### **“SHOW CAUSE NOTICE – YOUR DISCHARGE FROM THE DEFENCE FORCE”**

1. **WHEREAS** on the 3<sup>rd</sup> March 2014 the General Standing Orders of 2014 was issued, and Standing Order No.2 therein prevented the pregnancy of female soldiers of your category within the prescribed period of time in the Lesotho Defence Force.
2. **AND WHEREAS** the contents, as well as the rationale, of the Standing Order No.2 therein were explicitly detailed on 28<sup>th</sup> March 2014 during your pass out parade in the presence of your parents or *loco parentis*.
3. **AND WHEREAS** you fell pregnant in reckless disregard of the prohibitory clauses of the Standing Order No.2 therein including the verbal orders issued during the pass out parade regarding the contents of the Order.
4. **AND WHEREAS** in Lesotho there are lawful means at your disposal which you were obliged to utilize in observance of the Order; such means include but are not limited to abstinence or contraceptives readily available within your reach at numerous Health Centers in Lesotho, including Thomas Wellness Center (Potter Camp) situated with (sic) Makoanyane Barracks premises.
5. **AND WHEREAS** you had trembled (sic) and violated the Order with impunity in disregard of the abundant availability of means used to prevent unplanned pregnancy.

6. **BE INFORMED THEREFORE THAT**, in the given circumstances, the Lesotho Defence Force command is of the view that you are not a fit and proper person to continue serving in the Defence Force lest your presence might render the Sanding Order No.2 a toothless bull dog and a mockery. Basically, your presence might hamper detrimentally towards the discipline of other female soldiers of your category within the Defence Force. That is, your pregnancy may be used by others as a 'testing tool' (as it has already been done by others) towards the Standing Order No.2 and administration at large. As you know, military life is orderly life and, therefore, a soldier who is not ready to obey lawful orders duly issued by the lawful authority is not fit to continue serving as the member of Disciplined Force.

7. **NOW THEREFORE**, on the basis of the preceding information, it has been extremely (sic) considered that your unlicensed pregnancy had detrimentally prejudiced the interests of the Lesotho Defence Force given the fact that others had already copied such prohibited behaviour. Thus, it has been carefully considered that, it is not in the best interest of the Defence Force for you to remain in the Force.

8. **AND NOW THEREFORE**, you are required to show cause, if any, why you may not be discharged from the Defence Force on the provided information and reasons pursuant to **Section 31 (b) of Lesotho Defence Force Act No.40 of 1996**. Your written representation must reach the Office of Commander of Lesotho Defence Force within **seven (7) days** of the receipt of this letter.

9. **AND**, if no such representation is filed within the stipulated time frame, such failure will leave the Commander of Lesotho Defence Force with no option but to proceed with your discharge.”

## Responses

[8] The first applicant responded by letter dated 12 March, 2016:

“Dear Sir

**RE: SHOW CAUSE NOTICE –YOUR DISCHARGE FROM THE DEENCE FORCE**

The above matter refers, and I wish to response (sic) as follows:

**PARAGRAPH 1 AND 2**

The contents of these paragraphs are herein noted. The said Order was issued and read to us during our pass out on the above mentioned date.



**PARAGRAPH 3 AND 4**

I do not deny that I fell pregnant, but I must indicate that the said pregnancy was not deliberate or done in reckless disregard of the Standing Order. I must indicate that the said pregnancy came as a shock to me as well as my husband because I have been using contraceptives way back even before I joined LDF. What happened is that, after our pass out, immediately thereafter, I started using contraceptive like I did before, and I must indicate that, a month before I went to Patrol Quthing Ha Peete, I went to a clinic called Thusanang Clinic which is based at Both Bothe to check whether everything was still normal because, after using contraceptives again after our pass out, I discovered that my menstrual circle was fluctuating. And after consulting with the Nurse and after tests were taken, and I was informed that everything was still normal, and the Nurse told me that maybe the cause of fluctuation is caused by veins which were not properly functioning.

I must further indicate that, at that time, I was told that I was not pregnant, and everything was fine and thereafter I proceeded to Patrol at Quthing in May 2015. Three months later, I became sick and I was ordered to come to Makoanyane Hospital to see a doctor; and to my surprise and dismay, I was told that I was pregnant after tests were taken. Moreover, the nurses told me that, I was no my seven months pregnancy, which I could not understand because there was never a time I stopped using contraceptives after our pass out.

**PARAGRAPH 5**

I admit that my pregnancy has violated the Order, however, I must indicate once again that, I had been using contraceptives ever since, and I could not (sic) stopped using same because we were told after our pass out that we are not expected to fall pregnant before a period of five years. Again, I am a married woman, and we had already had our first child, so we were not ready to have a second child as yet. All I can say is that, what happened is beyond my control because if I knew or I was informed on time I could have changed and opted for another means of contraceptives.

**PARAGRAPH 6 AND 7**

My pregnancy came as (sic) shock to myself as well as to my husband and family because it was never planned like I have mentioned in the above paragraphs, therefore I humbly request and pray that the LDF give me another chance to prove mi (sic) worth because it is the first misconduct I have committed ever since I joined the Force. I had never been before any disciplinary hearing or whatsoever. Therefore, I am still fit and proper to serve LDF because what happened was absolutely beyond my control.







































