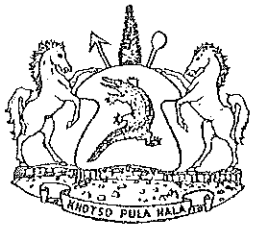


LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/442/16

In the matter between:

NO. 73559 PRIVATE LIEKETSO MOKHELE	**1ST APPLICANT**
NO. 73743 PRIVATE 'MASAULE LETIMA	**2ND APPLICANT**
NO. 73752 PRIVATE 'MASINE NTSOHA	**3RDAPPLICANT**

And

THE COMMANDER OF LESOTHO DEFENCE FORCE	**1ST RESPONDENT**
MINISTER OF DEFENCE AND NATIONAL SECURITY	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD 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 4th 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[1].

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

[1] 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 on17 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 3rd 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 28th 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.

PARAGRAPH 8
It is on the basis of the above mentioned reasons I am begging and praying that I be given a second chance to serve the Force like I have been doing previously. I promise that I will never do anything in power which might not call for discharging me from the Force. Again, I must indicate that I have a family which solely depends on me; in other words, I am the bread winner in my family. My husband is not working, and we have a four year old son who is dependable (sic) on me as well. So (sic) I be discharged from the Force, we (sic) all going to suffer in as far as human basic needs are concerned.

Your usual corporation shall highly be anticipated.

Yours faithfully,

Lieketso Mokhele
No.73559 Private Mokhele"

[9] The second applicant's response by letter of 15 December, 2015 reads:

"RE: SHOW CAUSE – DISCHARGE FROM THE DEFENCE FORCE

On the 28th March 2014 the standing order was read during a pass-out parade where we were told not to fall pregnant within the period of five years in the Lesotho Defence Force.
I tried my best not to fall pregnant as I was using the contraceptives in form of pills and condoms but unfortunately they didn't go as expected. When using this (sic) contraceptives (pills) I started to have irregular menstruation cycle which I was told that it is normal. Still, that did not stop me from using then.

It scared me when I took three months without seeing my periods that is when I bought a pregnancy test and it was positive.

My pregnancy came to me as a shock as I even thought of an abortion but at the same time I thought otherwise. As a soldier I have to lead by good examples, so abortion is not one of them, again my conscience did not allow me to (sic) so that is why I then decided to keep the baby. I also realized that if I go for an abortion I would have broken a law.

It was not my intention to break the standing order No.2 Sir. After discovering that I was pregnant I immediately reported to 2 lt Moloi who was working at the operations and training by then.

So, please do not discharge me from the Lesotho Defence Force.

No.73743 Pvt Letima
M. Letima"

[10] The third applicant's response in her letter of 4 December, 2015 was this:

"Sir,

REASONS WHY I CANNOT BE DISCHARGED FROM THE DEFENCE FORCE

1. I have received the letter from your good office dated 1st December 2015 that shows cause notice in which I cannot be discharged from the Defence force. I have read all the items written on it and I truly agree with it.

2. I remember clearly that, I was under the influence of alcohol when this happen, (sic) I later discovered that I was pregnant. As this is my first time offence I have learned from it and I will never commit such offence or any offence arising out of any laws or regulations of Lesotho Defence Force.

3. Firstly, I am the bread winner whereby I have to look after my younger sisters and brother who are still in a tender age. I have to make sure that they attend school their responsibility is all on my shoulder.

4. Beside I have to look after my sick mother who had since suffered from stroke. It is with these reasons that I would like not to be discharged from the defence Force because all this would be hard for me to handle without this work.

I remain your obedient servant Sir,

.....
No 73752 Pvt Ntsoha"

Commander's reaction

[11] The Commander reacted by way of letters discharging all the applicants.

Apropos the first applicant, the Commander said, among others:

"**BE INFORMED** that it is common cause that use of contraceptives is never 100% safe. So your conduct of engaging in sexual activity with that knowledge is an indication that you undertook to suffer the consequences. While (sic) is realized that your are married, it was upon you as a person subject to the Standing Order to ensure that apart from contraceptives you were using, additional preventive measures were employed. Failure on your part to do so is an indication that you were prepared to live with the consequences of your conduct."

[12] With regard to the second applicant, the Commander wrote, among others:

"**AND NOW THEREFORE** the usage of pills for contraceptives is not a reason persuasive enough more especially when it is known, as a common cause, that contraceptives are not 100% safe. So, your act of having indulged into sexual activity with that knowledge informs the Command that you clearly undertook a risk which now you have to endure its unpalatable consequences. Ordinarily, you were ready to take up the result of that calculated risk. You were not barred from abstaining from such activity in recognition and respecting the Standing Order."

[13] The Commander wrote back to the third applicant to say, among others:

"But, it defeats imagination to find a young soldier surrounded by such vital family responsibilities found herself entangled in such irresponsible drinking which lead (sic) to unfortunate influence of alcohol resulting in her peril. The Command considered that, all such circumstances ought to have come into your mind prior to the disastrous drinking. It is worthy of reiteration that, in circumstances of this nature, what takes precedence is the interests of Lesotho Defence Force over individuals' interests. Conduct of this nature, if allowed to prevail in the Defence Force contrary to the governing laws, would breed indiscipline. The fundamental obligation to uphold good order and military discipline would be under siege."

Relief

[14] The applicants are not happy with their discharge. They have launched these proceedings seeking the following relief:

"(a) That the decision of **THE COMMANDER OF THE LESOTHO DEFENCE FORCE (1ST RESPONDENT)** of discharging **APPLICANTS** from **THE LESOTHO**

DEFENCE FORCE be reviewed, corrected and set aside as being irregular and unlawful.

(b) That it be declared that the **STANDING ORDER NO.2 OF 2014 of THE COMMANDER OF THE LESOTHO DEFENCE FORCE (1ST RESPONDENT)** is contrary to public policy and the common law principles of reasonableness, legality and rationality and hence unlawful.

(c) That **APPLICANTS** be reinstated back to the positions and ranks in **THE LESOTHO DEFENCE FORCE** without any loss of benefits arising therefrom.

ALTERNATIVELY TO PRAYER (C) ABOVE:

(d) That each of the applicants be compensated in an amount to the tune of **FIVE HUNDRED THOUSAND MALOTI (M500 000-00)** for their unlawful discharge from the **LESOTHO DEFENCE FORCE.**

(e) Costs of the suit in the event of opposition.

(f) Further and or alternative relief as the Honourable Court may deem fit."

II. MERITS

Legal frameworks

[15] The statutory and policy frameworks pleaded are the **Lesotho Defence Force Act No.4 of 1996** and **Standing Order No.2 of 2014**.

[16] Section 31 (b) of the **Lesotho Defence Force Act, 1996** is pleaded as the statutory basis for discharging the applicants. It provides that:

> "A soldier of the Defence Force may be discharged by order of the Commander of the Defence Force at any time during the currency of the term of engagement on the grounds that –
>
> (a) .....

(b) it is not in the best interests of the Defence Force for the soldier to remain in the force".

[17] The section provides for what in military parlance is called an administrative discharge. This forms part of non-punitive optional measures available to the Commander to punish violations of military standards through means other than the cumbersome court-martial processes: Schlueter D.A. (1996) **Military Criminal Justice: Practice And Procedure** 4th Ed. (Virginia: Michie) p.40

[18] For regulating the exercise of powers of discharge, the Minister has promulgated regulations in terms of section 192 of the Act. These regulations are the **Defence Force (Regular Force) (Discharge) Regulations, 1998**. Although reference is made to section 186 as the empowering section for their promulgation, I believe that is in error as that section deals, among others, with discharge of persons from the Reserve Force and not the Regular Force.

[19] A discharge from the Regular Force can only be made upon any of the grounds listed in the Schedule to the Regulations. None of the prescribed grounds therein has pregnancy as a ground for a discharge.

[20] Understandably, pregnancy could not be prescribed as a ground for discharge because a female soldier is entitled to paid maternity leave not exceeding 90 days grantable by the commanding officer of the member's unit: vide regulations 20 (2) and 28 of the **Defence Force (Regular Force) (Other Ranks) Regulations, 1998**.

[21] It stands to reason that in exercising the powers to discharge a soldier, the Commander must do so having regard to the **Defence Force (Regular Force) (Discharge) Regulations, 1998** and the **Defence Force (Regular Force) (Other Ranks) Regulations, 1998**. They constitute the legal parameters within which section 31 (b) powers should be invoked.

[22] I say so because the conferred powers that a soldier can be discharged if "it is not in the best interests of the Defence Force for the soldier to remain in the force" is couched in objective and not subjective terms. The personal opinion and interest of the Commander is not relevant and should not be conflated with the institutional interest of the Defence Force. Decisions must be reached on the basis of objective facts which are prescribed in the Regulations.

[23] The reason put forward by the Commander for invoking section 31 (b) powers to discharge the applicants is that they fell pregnant and thereby contravened **Standing Order No.2 of 2014**. This to me says that the Commander's view is that it is not in the best interests of the Defence Force for pregnant soldiers to remain in service. If that be the motivation behind the Commander's decision as I discern it to be, it flies in the face of the Regulations which nowhere prescribe pregnancy as a ground for discharge. On the contrary, pregnant soldiers are entitled to paid maternity leave. This can only be so because the law-giver does not adjudge pregnancy to be a threat to "the best interests of the Defence Force".

[24] The Commander is, therefore, not entitled to use section 31 (b) powers to undermine the protective scheme for the benefit of pregnant soldiers provided for under the Regulations. If Parliament and the Minister had wanted to ban pregnant soldiers from the military, there is no reason for the Act and Regulations to be conspicuously silent about such an important matter. Whatever powers the Commander has under the Act to make a standing order with such effect – which powers I don't find anywhere – such powers would be *ultra vires* the Act and Regulations.

[25] The Commander says the following about the Standing Order:

> "19.3 I must state further that the Standing Order is a strict liability Standing Order. Whether its provisions were flouted intentional (sic) or reckless is irrelevant. What is material is to abide by the provisions of the order. The army relies on command and discipline not consensus so as to run in an effective and efficient (sic) in discharge of its core military functions."

Effect of the Standing Order

[26] The inflexible operation of the Standing Order and its profound effects on the reproductive rights, freedoms and careers of the female soldiers are these:

26.1 It operates on the presumption of unfitness to serve even in other non-combative duties.

26.2 It deprives the Commander of any discretion to make an individualized determination of fitness to serve during the early stages of pregnancy.

26.3 It encourages use of contraceptives that are admittedly not 100% safe and yet penalizes soldiers for falling pregnant despite their use.

26.4 It cultivates an environment of involuntary sexual abstinence, involuntary birth control, sterilization and abortion.

26.5 It violates the right to respect for private and family life by suspending the female soldiers' procreative function for an arbitrary period of five years.

26.6 It penalizes the female soldiers' decisions to bear children even if the soldiers' general mobility and combat readiness would not be reduced in the early months preceding birth and after birth.

26.7 It is counter-productive in that the army may not be able to attract sufficient number of females of child bearing capacity. (See **Crawford v. Cushman** 531 F.2d 1114 (1976) (United States Court of Appeals, Second Circuit).

[27] Medical science tells us that pregnancy is not a medical condition but a temporary physical disability. It is for this reason that labour laws and international human rights treaties enjoin employers – be they private or public – to gender-sensitize the workplace environment by prohibiting dismissals on the grounds of pregnancy, marital status and denial of

maternity and paternity leave. The Regulations chime with these human rights standards: Section 30 (b) of the Constitution; Article 11 of the **1979 Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW) which Lesotho ratified in 1995 and acceded to its Optional Protocol in 2004.

Scope for review

[28] The stance of the Commander is that the Standing Order encapsulates the interests of the army which override the rights of its members. The restriction of such rights is geared towards meeting "certain overriding demands of discipline". Therefore, so goes the argument, the sexual desires of the applicants to engage in procreative sex dare not outweigh the army's interests.

[29] What is being asserted is that there is a causal link between the applicants' contravention of the Standing Order and their discharge on the basis of section 31 (b) of the **Lesotho Defence Force Act, 1996.** In other words, it is suggested that pregnancy is subsumed under the omnibus ground of being "not in the best interests of the Defence Force for the soldier to remain in the force". In my respectful view, the phrase "it is not in the best interest of" is an unruly horse that should be bridled by the Regulations. It is not a license for the Commander to roam far and wild.

[30] I have hereinbefore indicated that neither Parliament nor the Minister have prescribed pregnancy as either a ground for discharge or a disciplinary offence. On the contrary, pregnant soldiers are entitled to paid maternity leave. There is nothing in the Regulations which authorizes selective entitlement or enjoyment of the benefit of paid maternity leave. The Standing Order stands in violation of the prescripts of the Regulations.

[31] The Standing Order is not legally authorized and is, for this reason alone, unlawful and condemnable as an illegal trigger for the exercise of the power to discharge under section 31 (b). It follows that the Commander wrongly invoked the contravention of the Standing Order as a dischargeable misconduct "not in the best interests of the Defence Force".

[32] The contention by the Commander that pregnant soldiers must be discharged because they compromise the army's operational capacity and jeopardize military discipline is not only an argument in *torrorem populi* but a throw-back to the patriarchal view that pregnant women are not fit to work and, therefore, are a disposable workforce. The view that soldiers need permission to be pregnant – which permission is obtainable after five years' service – is merely mentioned to be rejected.

Comparative jurisprudence

[33] The international jurisprudence sets its face firmly against such antiquated views. In **Brooks And Others v. Canada Safeway Limited** [1989]1 S.C.R. 1219, the Supreme Court of Canada held:

> "It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious that to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for surgery – which sort of comparison the respondent's argument implicitly makes – is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason."

[34] In **Brown v. Rentokil** ECJ Case C-394/96 (30June 1998) the European Court of Justice laid down the following principles which I adopt:

34.1 The dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy affects only women and therefore, constitutes direct discrimination on grounds of sex.

34.2 The principle of equal treatment serves three purposes:

(1) it protects a woman's biological condition during and after pregnancy;

(2) it protects the special relationship between a woman and her child over the period which follows pregnancy and childbirth;

(3) it prevents the harmful effects dismissal may have on the physical and mental state of pregnant women and those who are breastfeeding including the particularly serious risk that pregnant women may be prompted to voluntarily terminate their pregnancy.

34.3 To allow dismissal from work on the ground of pregnancy would be to deprive legal protection to women who are able to comply with the terms of their employment contracts and thereby render ineffective the principle of equal treatment for men and women as regards access to employment and working conditions.

[35] In **Crawford v. Cushman** (supra), the Second Circuit of the United States Court of Appeals reversed the lower court's decision that had upheld a rule of mandatory discharge of pregnant Marine Corps. Among others, the Second Circuit said:

> "The Marine Corps may have a legitimate interest and important interest in insuring the general mobility and readiness of its personnel, but the mandatory discharge rule here is simply not constitutionally tailored to promote this interest by ridding the Corps of all members whose physical condition makes them potentially unable 'to respond to an emergency assignment at a station without proper attention to (his or her) physical well-being'.... The regulation as a tool for insuring mobility and readiness is applied in a manifestly underinclusive fashion.
>
> The Marine Corps regulation establishes a presumption of unfitness for work at all posts, in appellant's case as a clerk typist, as of the earliest possible date of pregnancy diagnosis and forever more. This classification of presumed unfitness is patently overinclusive since it operates to expel not only those marines who are suffering the limited period of disability in the days or weeks surrounding the date of childbirth but also many Marines who, given an individualized determination of their fitness to serve would undoubtedly be found capable of continued service for several weeks more before giving birth and possibly years after."

[36] If the proposition is accepted that pregnancy *ipso facto* constitutes unfitness to serve in the army, it would mean that the Lesotho Defence Force is an institution beyond bounds for pregnant soldiers. The absurdity of the proposition is accentuated by the arbitrary imposition of the five years pregnancy moratorium. This goes to show that it cannot be true or right to contend, as the Commander does, that pregnant soldiers undermine the army's discipline and combat readiness. What about those soldiers who fall pregnant post the pregnancy moratorium? Are they exempted from combat duty? Why could the applicants not be deployed in non-combat duties during their pregnancy? The Commander does not provide an answer or rational explanation. This only goes to prove that the Standing

Order rests on a fallacy and constitutes an unreasonable exercise of section 31 (b) powers.

[37] A useful survey of military codes from other jurisdictions put before us in the submissions by Mr. *Rasekoai,* for the applicants, show that pregnancy in the army is managed in a manner that cares for the pregnant soldier's condition by excusing her from duties with possibility of damage to the unborn child at different stages of pregnancy until the soldier qualifies for paid maternity leave. This is the so-called "reasonable accommodation principle"[2].

[38] The impugned Standing Order is oblivious of this principle. It is a blunt instrument used to whip female soldiers into line. It operates on the principle of "no accommodation: once pregnant you are out". By any civilized standards and human decency, this is unreasonable and unacceptable. In the 21st century there is no justification to fire working women who fall pregnant.

[39] It is significant that when the applicants enlisted in 2013, the Standing Order had not been issued by the Commander. It was issued on 3rd March

[2] Australia, England and United States of America

2014 and only read to them on the 28th during the pass-out parade. The applicants were, therefore, not made aware of it during enlistment and throughout their training. They were not given an opportunity to consider to disenlist and leave training if their reproductive and sexual rights would be restricted in the manner of the Standing Order. This is important because section 27 (1) enjoins the army to have given them prior notices and all the necessary information. It reads:

> "A person to enlist in the regular force shall be given a notice set out in the Second Schedule specifying the information required to be provided by that person and stating their general conditions of the engagement to be entered into by that person, and a recruiting officer shall not enlist any person in that force unless satisfied by that person that he has been given such notice, understands it, and wishes to be enlisted."

[40] By introducing the Standing Order and reading it to the applicants at the occasion and in the manner that he caused it to be done, without them being given the opportunity to declare their views, the Commander was impermissibly adding information and conditions of service not prescribed by Parliament. This, the Commander had no powers to do. He acted *ultra-vires* his powers. It is even very doubtful whether the violation of the Standing Order would be a military offence under section 53. I, however, express no firm view on this.

[41] In the circumstances, it is misplaced to contend, as the Commander does, that the applicants were *volens* and waived their rights by enlisting in the

face of the Standing Order. Waiver of rights must be informed, unequivocal, clear and not impelled by an illegality or exercise of *ultra-vires* powers: **Khalapa Lia Buseletsana Multipurpose Cooperative Society And Another v. Vodacom Lesotho (Pty) Limited And Others** LC/APN/50B/2014 para 23 (28 August, 2017); Wade & Forsyth, **Administrative Law** 8th Ed. P.245

III. DISPOSITION

[42] I find that the Standing Order fails the tests of legality, rationality and reasonableness and is thus invalid: **Kruse v. Johnson** [1898]2 Q.B. 91.

Order

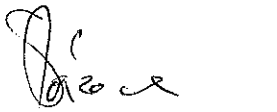
[43] In the result the following order is issued:

1. The decision of the Commander of the Lesotho Defence Force discharging the applicants from the Lesotho Defence Force is reviewed and set aside.

2. The Standing Order No.2 of 2014 issued by the Commander of the Lesotho Defence Force is declared illegal and invalid.

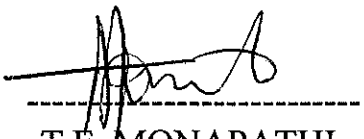
3. The applicants are reinstated back to their positions and ranks in the Lesotho Defence Force without any loss of benefits arising therefrom.

4. Applicants to be paid costs of the suit.



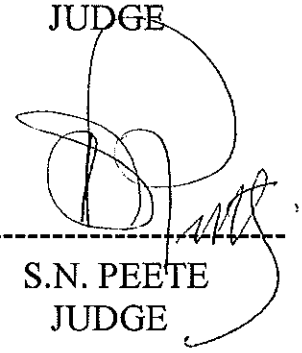
S.P. SAKOANE
JUDGE

I agree:



T.E. MONAPATHI
JUDGE

I agree:



S.N. PEETE
JUDGE

For the Applicants: M.S. Rasekoai (with M.J. Rampai)

For the Respondents: T. Nqcukaitobi (with F. Hobden) instructed by K.J. Nthontho Attorneys, Maseru)