NESTER CHIDEMBO
and
EMMANUEL MASENDEKE
versus
COMMANDER ZIMBABWE NATIONAL ARMY
and
COMMANDER ZIMBABWE DEFENCE FORCES
and
MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 18 & 29 May 2017 & 28 June 2017

Opposed Matter

N.Y. Motsi, for the applicants
E.T. Muradzikwa, for the respondents

FOROMA J: This is an application for a review of the first respondent's decision to discharge both first and second applicants from the Zimbabwe National Army (ZNA) on account of the decision having been based on an irrelevant provision – in other words the applicants' content that the discharge was illegal. The applicants also are aggrieved:

'(i) that no notice was served on them of the initiated discharge

(ii) that the decision to discharge them defied the principle of natural justice namely the *andi alteram pertem* rule.

(iii) that the respondents applied the law retrospectively.

The applicants are wife and husband both members of ZNA. The first applicant is a Lance Corporal in 4 Ordinance Coy and the second applicant is a lieutenant at the School of Signals. The first applicant was a member of the Zimbabwe Women Service in terms of a short service contract commencing on 1 March 2010 and due to expire on 28 February 2013. She was discharged in terms of letter dated 4 March 2013 signed by Major N Jagadu on behalf of the Commander ZNA. The letter reads in the relevant part as follows:

'1. Authority is granted to discharge the above mentioned member (first applicant) from ZNA in terms of s 16 of Statutory (172/1989) of reference C above with effect from 28 February 2013.

2. Cancel authority for alteration of class of engagement on para 2 of July 2012.

The second defendant was dismissed in terms of letter dated 14 July 2014, which reads as follows:

"Cancellation of Commission and Discharge from the Army IRO ZNA Officers.

Refs
A. Defence Act [*Chapter 11:02*]
B. Defence (Regulation Forces) Officers) Regulations 1988
C. MOD letter Def 3/2 dated 04 July 2014."

1. In terms of the provisions of s 18 (1) of Ref "A" above as read with s 10 (1) of Reference "B" above His Excellency The President and Commander In Chief of the Zimbabwe Defence Forces has cancelled the commissions of the below listed officers who had a Board of Suitability convened against them after having after having found responsible for impregnating ZWS members who were still serving during their initial engagement.

2. In terms of s 10 (2) of the Ref B above are officers who has his Commission cancelled shall be discharged by the Commander from the Defence Forces and shall have no right of appeal. Accordingly the Commander has discharged the officers with effect from 31 July 2014.

3. In light of the foregoing the following actions are to be taken ……..

4. Action accordingly

   B.C Maraire

   Col.

   For Commander ZNA."

It is to be noted that the first applicant only challenged her discharge in the joint review application filed on 30 July 2014 way after the expiry of the 8 weeks within which the application ought to have been filed in terms of order 33 r 259 of the rules of this court. There was thus no application before the court in her case as no condonation had been sought or granted in respect of the late application for review. The respondents in their opposition to the joint application for review did not raise the issue i.e that the first applicant's application was out of time and that in the absence of a condonation her application was not properly before the court. The issue was only raised at the hearing as a point *in limine* orally raised from the bar. The first applicant in response indicated that she had been taken by surprise and considered the respondents as having ambushed her. The applicant's counsel applied for leave to file an application for condonation of the late filing of the application for review which the court granted by consent.

As I considered that it would be prejudicial to the second applicant that the entire application be postponed *sine die* to enable the first applicant to file the proposed application

for condonation I directed that the applications be separated so that the second applicant's review application could be heard immediately and without awaiting the outcome of his spouse's application. The second applicant's case was argued and this judgment is in respect of the second respondent's application.

I give below the relevant factual background which to a large extent is common cause between the first applicant and the second applicant and shall call the first applicant's application HC 6431/14 A and the second applicant's application HC 6431/14 B. I will however continue to call the first applicant and the second applicant as they appear in the joint application to avoid confusion. The facts recounted are as recorded in the second applicant's statement in response to the allegation of impregnating the first applicant.

In September 2008 the second applicant fell in love with the first applicant and he paid lobola for her to her parents in 2009. He then persuaded the first applicant to join the Army which she did in 2010. After fulfilling his in-laws' demands for the bride price (lobola) he and the first applicant were granted permission to wed and he settled for a Civil Court wedding in terms of [*Chapter 5:11*] which took place on the 11 February 2011 a few weeks before the applicant completed her first year in the army having signed her short service contract for the period 1 March 2010 to 28 February 2013.

At the time of the applicants' marriage a member of the Zimbabwe Women Service by regulation was not allowed to fall pregnant before completing one year of her initial engagement. This was in terms of The Adjutant General Standing Orders Chapter 26 (5) (i) and 3 which provided that a member of the Zimbabwe Women Service could marry on attaining the age of 18 years and that she would only be entitled to maternity leave after serving a year of her short service engagement also referred to as initial engagement in terms of s 5 (a) of the Defence (Regular Force Non Commissioned Members Regulations 1989 SI 172/1989).

The applicant obtained couples accommodation on production of proof of their marriage.

On 28 February 2011 the Zimbabwe National Army (ZNA) amended the regulations relating to prohibition of pregnancy during the initial engagement period. The new regulation became that

> "Any member who falls pregnant during the initial engagement shall be allowed to proceed on maternity leave as outlined in the preceding paragraphs but will have her contract not extended at the expiry of the initial three years engagement."

On 20 July 2012 the first applicant and others were granted authority to "alter their class of engagement from short service engagement to medium service engagement in terms of s 8 of SI 172 of 1989." At that time the first applicant had not fallen pregnant. She only fell pregnant between September and October 2012. It is this pregnancy which resulted in her being dismissed from the ZNA and consequently the second respondent being charged with impregnating her (a member who was still serving her initial engagement).

It is clear that the Board of Inquiry inquired into allegations of impregnating a ZWS (short for Zimbabwe Women Service) who was still on probation. In questioning the second respondent the Board of Inquiry addressed the following two questions÷

> "Q7 – The offence is not that you married her but that you impregnated a ZWS who was still; on probation because you were supposed to wait for these three years – A Sir
>
> Q8 – You played a pivotal role in her committing an offence. – A Sir."

It is clear that the Board considered that the second applicant's wife (first applicant) had committed an offence by falling pregnant at the time she did.

Two issues arise –

(1) Whether second applicant's wife was still on probation at the time she fell pregnant and

(2) Whether despite her being authorised to alter her class of engagement from short service engagement to medium term engagement the second applicant's wife remained a member serving an initial engagement period?

The provisions of s 8 (1) and (2) of SI 172 (1989) i.e. Defence (Regular Force) (non Commissioned Members Regulations) are as clear as day light. They provide as follows –

> "8 (1) A member may, with the approval of the Commander elect to change his class of engagement involving a longer period of service
> (2) Where a member's class of engagement has been changed in terms of sub section (1) the member concerned shall be deemed to have been engaged on the longer period of engagement from the date of his attestation."

Clearly therefore when the first applicant was authorised to alter her class of engagement she became for all intents and purposes a member engaged on the medium service engagement from her date of attestation and could not have remained a member on the short service engagement. I do not accept the suggestion by respondents counsel that administratively she was required to complete the initial engagement before she could assume

her new rank/class as clearly that view does serious violence to the unambiguous provisions of s 8 (2) *supra*.

Once the first applicant became a member serving on the longer period of engagement in terms of s 8 (2) *supra* she could not remain on the initial engagement period at the same time. Therefore as a person in the long period of engagement she was not subject to the rigorous conditions of service applicable to those in the initial engagement period who are required to serve 2 years probationary period in terms of s 7 of the Regulations introduced by S.I. 172 of 1989.

In opposing the application respondents raised a point *in limine* namely that the second applicant had not exhausted domestic remedies and thus could not be heard by this court. The point *in limine* was couched as follows-

> "Firstly the applicants overlooked the internal remedies provided to them in terms of the Defence Act Chapter 11:02 Section 26 (4) and 5. In terms of this Act matters of suitability of Defence Force members should be appealed or reviewed by the Defence Forces Service Commission established by section 217 of the Constitution. In any case this provision clearly states that the decision of the Defence Forces Service Commission shall be final. This application should therefore be dismissed and that the applicants adopt proper procedures."

On the merits respondents argued that the approval for re-engagement was made during the subsistence of the initial engagement and that therefore when the applicant fell pregnant before the expiry of the initial engagement she breached the regulations which apply to initial engagement thereby rendering her approval null and void.

I will deal with each of these points in turn. The point *in limine* in so far as it relates to the second applicant overlooks that he has no right of appeal. Firstly the letter of dismissal clearly informs the second applicant that he had no right of appeal. Secondly as the dismissal of the second applicant is a consequence of the stripping of the second applicant's commission by the second respondent who by reason of the second respondent being the highest authority for the ZNA his decision cannot be subject of appeal to or review by the Defence Service Commission.

As for the defence on the merits I have demonstrated herein above that charging the second respondent was ill conceived. For the avoidance of doubt it was improper to charge the second applicant's wife and consequently the second applicant for her falling pregnant.

In the circumstances I find that the second applicant has satisfied the first ground of review and in the result it will not be necessary to deal with the other grounds of review.

I therefore make the following order:

It is ordered that

1. The proceedings that led to the cancellation of the commission and consequence discharge of 2nd applicant from the ZNA be and are hereby set aside.
2. That 2nd applicant be reinstated to his position as Lieutenant School of Signals.
3. That respondents jointly and severally the one paying the others to be absolved.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners