

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 4028/04

In the matter between:

MASOTJA PETER DLAMINI

VS

THE ATTORNEY GENERAL

THE ARMY COMMANDER - UMBUTFO SWD.

DEFENCE FORCE

CORAM:K.P. NKAMBULE - J

FOR APPLICANT:J.W. MASEKO

FOR RESPONDENT: T: DLAMINI

RULING ON POINTS OF LAW 10/2/05

The applicant who is a member of the Umbutfo Swaziland Defence Force seeks an order in the following respect:

1. That the above honourable court dispenses with the normal rules of court relating to time limits, form and the manner of service and hearing this matter as one of urgency.
2. That the above honourable court directs that the committal of the applicant to goal for a period of

six months by the court martial on the 12<sup>th</sup> November 2004 be stayed pending completion of this matter.

3. That the judgement of the court martial committing the applicant to goal be reviewed and set aside.
4. That the 2<sup>nd</sup> respondent be directed to payment of the applicant's salary pending finalisation of this matter.
5. That the respondent's be directed to pay the costs of this application.
6. Further and/or alternative relief.

There is filed of record a launching affidavit by Masotja Peter Dlamini, the applicant. The applicant alleges that on the 1<sup>st</sup> November 2004, whilst at Mbuluzi Army Barracks he was summoned to appear before the court marshal at the Umbutfo Swaziland Defence Force Headquarters at 9.00 a.m. the following day (2/11/04). The message was relayed to him telephonically. The phone call had been made by the regimental sergeant Fana Dlamini.

Upon the court martial chaired by Colonel Mashikilisana Fakudze the accused was charged and convicted of two counts. Count No. 1 was insubordination and count No. 2 was desertion, in that he deserted his workstation being Phocweni Army Barracks. Applicant was sentenced to six months imprisonment. After conviction his salary was stopped.

According to applicant's affidavit, before he was asked to plead, he objected to the short notice he was given to prepare his case and asked for a postponement which was refused by the court. He states that he could not be represented as he had wished.

At commencement of the matter the respondents raised a point of law in the following respect:

That the applicant has failed to exhaust domestic remedies available to him within the Umbutfo Swaziland Defence Force (USDF).

The respondent alleges that in terms of the second schedule to the USDF Order 10/ 1977, paragraphs 104 and 113, the review being sought by the applicant lies with the board or council of review established in terms of paragraph 146 and 147. Respondents states that the intention of the legislature was to oust any other review authority at this stage of the proceeding.

The relevant legislation provides as follows:

"104 Notwithstanding anything to the contrary in the code, a sentence of cashiering or of dismissal of an officer or of discharge with ignominy of a warrant officer or a non commissioned rank or imprisonment for a period of three months or more, shall not be executed although confirmed, unless and until the proceedings of the case have been reviewed by a board of review or the council of review and any such sentence shall not be subject to review by any other reviewing authority."

From the foregoing it is clear that the review is automatic. Should this review be delayed for any other reason paragraph 113 states as follows:

"An officer may within the prescribed time and in the prescribed manner, apply for the review of the

proceedings of his case by the council of review."

### Failure to exhaust local remedies

The right to seek judicial review might be suspended or deferred until the complainant has exhausted domestic remedies which might have been created by the governing legislation. However, this is not automatic. For this proposition see Baxter in his work entitled "ADMINISTRATIVE LAW" 1<sup>st</sup> ed, 1984 at page 720. In GOLUBE V OOSTHUIZEN AND ANOTHER 1955 (3) SA 1 De Vet -J stated:

"The mere fact that the legislature has provided an extra- judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted his statutory remedies."

Paragraph 104 of the second schedule of the Ubutfo Swaziland Defence Force Order No. 10/1977 ousts or restrict judicial review of administrative action of USDF. According to Baxter at page 726, "For administrative action to be valid it must

a) be contemplated by some enabling legislation,

b) be performed by the competent authority,

c) conform, to all the substantive and procedural conditions laid down by the enabling legislation. If any of these requirements are not met the action is ultra vires and may be set aside on review."

From the foregoing it is clear that ouster clauses are designed to preclude review in circumstances where there are no 'manifest defects' in the action concerned.

Coming back to the instant case applicant from paragraph 9 of his founding affidavit points out that before he could plead to the two charges read to him he told the court marshal that he was ill prepared to defend himself as he did not have adequate time to get the services 'of a representative. This was due to the short notice he was given. He also wished to call his witnesses but he could not do so due to the short notice. Despite applicant's plea of ill preparedness and the fact that he would like to call witnesses the chairman ordered that the matter be heard without his witnesses and ill preparedness.

Applicant was further not given an opportunity by the chairman of the tribunal to cross-examine witnesses.

From the foregoing it is clear that applicant's rights to natural justice were not adhered to by the tribunal. In *R Vs Padsha* 1923 AD 281, at 304 INNES CJ had this to say regarding ousting of courts from judicial review proceedings:

"It is competent to parliament to oust the jurisdiction of courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved person to apply to the only authority which can investigate and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what prima facie is their duty, namely, from investigating cases of alleged injustice or illegality."

As the brief history of this matter has been stated it is clear that if this court would decline to hear the review it would be assenting to the respondent's violation of the rules of natural justice and rendering the maxim audi alteram partem rule useless. This court must investigate injustice and illegality no matter where it is found.

For the above reasons and conclusions the point in limine fails. Costs will follow the course.

K. P. NKAMBULE  
JUDGE