

IN THE HIGH COURT OF SWAZILAND

WONDER FULAYI MAHLALELA

Applicant

And

UMBUTFO SWAZILAND DEFENCE FORCE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Civil Case No. 3292/2006

Coram: S.B. MAPHALALA – J

For the Applicant: MR. M SIMELANE

For the Respondents: MR. P.S. DLAMINI

JUDGMENT

25th May 2007

[1] The Applicant who is a soldier in the Umbutfo Swaziland Defence Force has filed an application in the long form for an order in the following terms:

1. Directing and ordering the Respondents and to reinstate the Applicant forthwith.
2. Directing and ordering the Respondents to pay forthwith the Applicant his salary from time to time he was unlawfully dismissed to the date of reinstatement together with increase to the salary in terms of pay-rises afforded to his colleagues and/or at inflation rate.

3. Alternatively:

3.1. Directing and ordering the Respondents to pay the Applicant his terminal benefits maximum compensation for unfair dismissal calculated as follows:

(a) Notice pay	E2, 145-08
(b) Additional notice pay	E1, 145-00
(c) Severance allowance	E2,864-00
(d) Leave pay	E4,308-16
(e) Maximum compensation for unfair dismissal	<u>E25. 848-96</u>

E36. 320-20

4. Cost of this application.

5. Any further and/or alternative relief.

[2] In support of the above-cited application the Applicant has filed a Founding affidavit stating his case. A number of annexures accompany the said application.

[3] The Respondents oppose the granting of the said application and to this end an answering affidavit of the Commander of the 1st Respondent Major General Sobantu Dlamini is filed thereto.

[4] In turn the Applicant has filed a replying affidavit to the above affidavit by the Respondent.

[5] The background of the matter is that on or about the 3rd March 2001, whilst stationed at Mhlangatane in the Hhohho district the Applicant shot a South African national outside the borders of Swaziland. Applicant was detained by the Ubutfo Defence Force and later handed over to the police where he was charged with murder at the Piggs Peak Magistrate's Court. The matter could not proceed because of the Magistrate's Court lack of jurisdiction as the shooting occurred outside the Kingdom's boundaries.

[6] This matter had to involve high levels of diplomatic engagement to maintain the cordial relationship between the Kingdom of Swaziland and the Republic of South Africa.

[7] In the Answering affidavit the Respondents have raised a point of law *in limine* in paragraph 2 as follows:

Prescription of the claim

2.1 I submit that the proceedings have lapsed in terms of Section 33 of the Umbutfo Swaziland Defence Force Order No. 10 of 1977 (hereinafter referred to as the USDF Order) the application having been launched after a period of six (6) months from date on which the cause of action arose. Section 33 provides as follows:

No civil action shall be capable of being instituted against the Government or any person in respect of anything done or omitted to be done in pursuance of this Order, if a period of six months (or where the cause of action arose outside Swaziland, two years) has elapsed since the date at which the cause of action arose and notice in writing of any such civil action and of the cause thereof shall be given to the Defendant on month at least before the commencement thereof. 2.2. And or alternatively the proceedings have been instituted after the lapse of a period of 24 months from the date on which payment became due as provided by the Limitation of Legal Proceedings against the Government Act No. 21 of 1972.

[8] In arguments before me it was contended for the Respondents that the point of law *in limine* is conceded by the Swaziland Government.

[9] I shall proceed therefore to mention the point of law *in limine* for historical purposes and it appears to me that the Applicant's argument in this regard is correct that the Applicant in *casu* was granted special leave by the High Court on the 10th June 2005. In the said order leave was granted to the Applicant to sue the 1st Respondent and lift the time bar imposed by Section 33 of the Umbutfo Swaziland Defence Force. The said leave was granted in terms of Section 4 (1) of the Order which provides that "**the High Court may on application by persons debarred under Section 2 91) (a) from instituting proceedings against the Government grant special leave to him to institute such proceedings if it is satisfied that...**"

[10] It appears to me that it is only the Umutfo Swaziland Defence Force Order No. 10 of 1977 which is applicable in the Applicant's case and not the Limitation of Legal Proceedings against the Government Act No. 21 of 1972. Even if the Act is said to apply on the facts, it cannot be made to apply because of a number of reasons. Firstly, there is no debt that has been created which may be said to have prescribed. A dismissal of an employee under the Umutfo Swaziland Defence Force Order No. 10 of 1977 does not create a debt but a cause of action. For example, a dismissed employee may be redressed, should the court find such dismissal to be unfair, with a reinstatement, which illustrates that a dismissal does not create a debt.

[11] On the merits of the matter it is contended for the Applicant that the principles of *audi alteram partem* were not observed by the Respondent in that it is common cause that the Applicant was employed by the Respondents and that the Applicant was never afforded an opportunity to be heard before being dismissed. The decision to discharge therefore the Applicant was unfairly and unilaterally taken in violation of the principle of natural justice that says "**hear the other side**". The Respondents have failed to justify their action if same is justified by the enabling statute so as to justify the departure from the rule "**hear the other side**". In this regard the court was referred to the South African case of *Gemi vs Minister of Justice 1993 (2) S.A. 276* at page 288 where Packer AJ said:

"An official entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly the decision maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision ...".

[12] Finally it is contended for the Applicant that since he was not afforded an opportunity to make representations as regards the insinuations that founded the discharge/dismissal or challenge the veracity of any charge or reasons for his dismissal that the reasons contained in the replying affidavit cannot be allowed to stand in light of the best evidence rule.

[13] The Applicant further contends that the circumstances of the case are such that Applicant conducted himself within the nature and scope of his employment as a reasonable soldier in the circumstances. This has not been proved otherwise by the Respondents.

[14] The Respondents in answer to the above-cited argument is that an opportunity was given to Applicant by the Board of Inquiry to present his case. What Applicant lacked or still lacks is a defence. That the certificate of discharge issued in terms of Section 20 (a) of the Ubutfo Swaziland Defence Force Order-in-Council No. 10 of 1977 was lawful and regular.

[15] I have considered the parties' arguments as stated above and I am inclined to agree with the Applicant's contention that he was unlawfully dismissed without lawful procedure and later Respondent undertook a disciplinary hearing which they later discredited and said it was irregular. Indeed, this clearly indicates arbitrariness on the part of the Respondent in dealing with this matter. It appears to me also that *in casu* that there was no hearing but an inquiry which was a fact finding mission. In these proceedings, the Applicant was afforded no right to be formally charged, his rights were never explained to him and he never defended himself because it was only a fact finding mission.

[16] In the result, for the afore-going reasons the application is granted in terms of prayers 1,2 and 4 of the Notice of Motion.

S.B. MAPHALALA

JUDGE