IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. **1540/2015**

In the matter between:

BONGANI SHABANGU		**Plaintiff**
And		
THE ARMY COMMANDER - UMBUTFO SWAZILAND DEFENCE FORCE	**1st**	**Defendant**
THE PRINCIPAL SECRETARY IN THE MINISTRY OF DEFENCE N.O.	**2nd**	**Defendant**
THE ATTORNEY GENERAL	**3rd**	**Defendant**

Neutral citation: **Bongani Shabangu v The Army Commander – Umbutfo Swaziland Defence Force & 2 Others (154/2015) [2017] SZHC 257 (14th December 2017)**

Coram: **M. Dlamini J**

Heard: **23rd November, 2017**

Delivered: **14th December 2017**

Civil law - Pleadings – pleader must do so with precision and clarity – if he fails to do so he might be precluded from proving a fact not pleaded

- Prescription – purpose thereof – stale claims disallowed

Summary: Plaintiff claimed against the first defendant reinstatement, arrear salaries and interest thereof together with costs of suit. The first defendant has excepted on two grounds, namely, that the particulars of claim fail to disclose the cause of action and the claim has prescribed.

The parties

[1] The plaintiff (Mr. Shabangu) described himself as an adult male Swazi of Mafutseni, District of Manzini.

[2] The first defendant (Army Commander) is in charge of the Umbutfo Swaziland Defence Force (USDF) and is so cited in his official capacity.

[3] The second defendant is the legal representative of the Government.

Mr. Shabangu's case

[4] Mr. Shabangu has asserted that on 16th January, 2006 his "*services from USDF were unfairly terminated it being alleged that he fiddled [sic] with, sold and/or misplaced a service pistol.*" It is apposite to quote from the particulars of claim following the nature of the special plea raised on behalf of the Army Commander. Mr. Shabangu proceeded as follows:

"(5)The said termination of Plaintiff's service, was not precedented by a disciplinary hearing whatsoever as he was told to go and stay at home while he nursed his injuries and would be called back but he has to date not been called to work.

(6) It was the direct actions of the Plaintiff direct supervisor that led to the disappearance of the said service pistol in that the Plaintiff was made to work overtime as his supervisor had taken with other officer who had to substitute the Plaintiff in the second shift. The border line is not to be left unattended to at any point in time, so the Plaintiff had to do double shift and was extensively exhausted.

(5) On or about May 2013, the said service pistol was found at the same spot where the Plaintiff place it, fully loaded with the same number of bullets/live rounds of ammunition as they were when the pistol got misplaced in the forests. This is evidence enough that the Plaintiff never at any stage fiddled with the pistol or sold it, but simply that he could not remember where he hid it as he was extensively exhausted.

(6) Pursuant to the location of the service pistol in the state in which it was before it got misplaced by the Plaintiff, he has tried, to no avail, to engage the army officials to allow him back to work.

(7) The Plaintiff has to date not been paid his terminal benefits which should have arisen from the contract of employment.

(8) Despite lawful demand having been made to the Defendants, they have failed, neglected and or refused to comply with the law and/or pay the Plaintiff all his dues and/or re-instate him to work."

[5] The Army Commander's Exception

The Army Commander raised two special pleas. Firstly, that Mr. Shabangu failed to allege in his particulars of claim that there was a contract of employment and that it was a material term of the contract that a disciplinary hearing be conducted.

[6] The second exception is based on prescription both in terms of section 33 of the USDF Order 1977.

Failure to disclose nature of contract.

[7] Counsel on behalf of Mr. Shabangu conceded that in as much as the body of the particulars of claim does not explicitly reflect that there was a contract of employment, paragraph 7 refers to terminal benefit arising from contract of employment and that prayer (a) refers to reinstatement. The defence therefore ought to have appreciated that there was a contract of employment.

Rules relating to pleading generally.

[8] Rule 18(4) reads:

> *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

[9] **De Villiers JP**[1] clarified on pleadings**:**

> *"[A] claim for relief must be supported by the allegations of fact or the statements of law which are contained in the declaration"*

[10] **Fannin J**.[2] referred to *Byrd v Nunn*[3] and stated that it:

> *"[E]mphasises the need for clarity and precision in pleading, and which points out the possibility that where a material fact*

[1]Transvaal Cold Storage Co. v South Africa Great Expert Co. Ltd 1917 TPD 413
[2] Nyandeni v Natal Motor Industies Lts 1974(2) SA274 at 278
[3] (1876) 5 Ch..D 781

is not pleaded, the pleader may be precluded from proving such fact.

[11] In the present case, the plaintiff simply stated that the Army Commander terminated his services unfairly. He failed to state whether there was a contract and the nature of the contract that was unfairly terminated. In fact a cursory reading would suggest that the Army Commander terminated a contract of service.

[12] I appreciate that a party does not have to use a specific phrase or particular term. However, this does not detract from the duty imposed by Rule 18 (4) that he must state his case with precision and conciseness in order to enable the other party to plead. The submission on behalf of Mr. Shabangu that from paragraph 9 the Army Commander ought to have inferred that the services that were unfairly terminated emanated from a contract of employment is not consistent with the requirement under Rule 18(4).

Prescription

[13] Section 33 of the USDF Order No. 10 of 1977 on prescription reads:

> *"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 arose outside Swaziland, two years) has elapsed since the date on 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 one month at least before the commencement thereof."*

[14] Counsel on behalf of the Army Commander submitted that there was no notice in writing served to the Army Commander. Further, Mr. Shabangu's cause of action as can be deduced from paragraph 4 of his particulars of

claim arose on 16th January 2006. A period of six months long elapsed following that summons were first instituted 11th February 2015.

[15] Mr. Shabangu's legal representative pointed out that their cause of action is regulated by Section 2 of the Limitation of Legal Proceedings against Government Act 1972. She disputed that the cause of action arose on the date of dismissal (16th January, 2006) but on the averments outlined at paragraph 7 being the date upon recovery of the service pistol which was the subject of his dismissal from work. This date is reflected as May 2013.

[16] With due respect to Counsel on behalf of Mr. Shabangu, the arguments advanced cannot hold water on the following reasons:

[17] Firstly and glaringly from Mr. Shabangu's prayers, he claims for orders of *inter alia* reinstatement. This reinstatement emanates from his dismissal from work. The reason he demands reinstatement from the Army Commander is that he alleges that he was dismissed without a pre-hearing. The question is, "When was he dismissed and when was a pre-hearing ought to have taken place. The answer lies in his paragraph 4 *viz,* in January 2006. In other words, the Army Commander, would have to go back in time, almost eleven years back and dig deep into the archives in order to answer to Mr. Shabangu's assertion on whether a disciplinary hearing was held or not before his dismissal. This would be a tall order against the Army Commander. The wisdom of the Legislature, whether under Section 2 of the Limitation of Legal Proceedings against Government Act 1972 or Section 33 of the USDF Order 1977 protects the Army Commander against this tall order. To say that the date of the action commenced when the firearm was recovered defeats the principle of our law that a debt is due once the creditor has knowledge of the facts from which the debts arises.

No doubt that Mr. Shabangu as the creditor had knowledge of the facts giving rise to the debt - which are that he was dismissed without a hearing - in January 2006.

[18] Why such protection? It is because the Legislature took a leaf from the Holy Scriptures that in this world there are moths and thieves. Files whether in a form of paper or electronic gadgets are exposed to moths and thieves. Similarly, human beings who are expected to give evidence in such actions might be here today and gone tomorrow. The words of **Marais AJ**[4] provide an insight on this aspect of the law:

> "*Whatever the true **rationale** for the doctrine of prescription or the limitation of actions may be, it cannot be denied that society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all. But that does not mean that the law positively encourages precipitate and needless law suits. It is quite plain that both at common law, and in terms of the Prescription Act of 1943 and 1969, a creditor may safely forebear to institute action against his debtor if the debtor has acknowledged liability for the debt*." (my emphasis)

[19] **Van der Westhuizen J**[5] summed as follows:

> *"This Court has repeatedly emphasized the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for*

[4] Cape Town Municipality v Allie NO 1981(2)SA 1 at 5
[5]Road Accidents Fund v Mdeyide [2010]ZACC 18 [2011] (2)SA 26 (CC) para 8

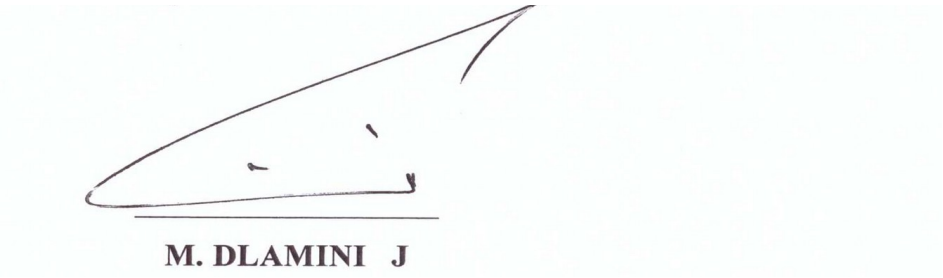
indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by Courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the Law to be respected, discussions of Courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence"!!

[20] I must point out from the onset that the Army Commander is established by the USDF Order 1977. His functions and responsibilities are prescribed in terms of the Order. It is therefore erroneous for a party to ignore the provisions of the Order where he seeks to challenge the Army Commander in his official capacity.

[21] In the final analysis, the claim by Mr. Shabangu has prescribed both in terms of Section 33 of the USDF 1 Order 1977 and the Limitation of Legal Proceedings against Government Act 1972. I therefore enter the following orders:

(1) Plaintiff's cause of action is hereby dismissed.

(2) Plaintiff is ordered to pay 1st and 2nd defendants costs of suit.



M. DLAMINI J

For Plaintiff: **Z. Mkhonta of M.P. Simelane Attorneys**

For Defendant: **V. Kunene and N. G. Dlamini from the Attorney General's Chambers**