

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE No. 1314/2022**

In Matter between:

**THEMBUMENZI MATSENJWA – PTE 735563**

**APPLICANT**

And

**ARMY COMMANDER - UEDF**

**1<sup>ST</sup> RESPONDENT**

**ACCOUNTANT GENERAL**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:**

*Thembumenzi Matsenjwa – PTE 735563 v Army  
Commander – UEDF and 2 Others (1314/22)  
SZHC 211 [2022] (2023)*

**CORUM:** Magagula Z

**Date heard:** 18.08.22

**Date delivered:** 07.08.23

*Summary: -Civil Law and Procedure -The applicant was employed by the army in 2002. In 2009 he fell ill and stopped working – the army charged him with absence from duty without leave – His salary was interdicted in March 2010 - [Applicant now seeks inter alia re-instatement of salary – the Respondents took the legal point of prescription in terms of section 33 of UEDF order no. 10/1977.*

*Held: 1. Argument that section 33 does not apply to claim for arrear salary is not sustainable.*

*2. Claim for arrear salary has prescribed.*

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### JUDGMENT

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- [1] This is an application by the applicant, Thembumenzi Matsenjwa, who has described himself in the Founding Affidavit as an adult male liSwati of Kwaluseni, employed by the Ubutfo Eswatini Defence Force (EUDF) and stationed at Phocweni Barracks.
- [2] The respondents are the Army – Commander, cited in his capacity as the commanding officer of the Ubutfo eSwatini Defence Force, [first respondent] the Accountant General, cited in his capacity as the Principal Officer responsible for the payment of salaries for Public Servants, [The second respondent] and the Attorney – General, cited in his official capacity as the legal representative of all departments of the government of eSwatini.
- [3] In his Notice of Motion the applicant is seeking the following substantive orders:
- “[3] Declaring the applicant’s salary stoppage by the 1<sup>st</sup> and 2<sup>nd</sup> respondents inconsistent with paragraph 129 (1) (a) second schedule, of the Ubutfo eSwatini Defence Force order of 1977.*
- [4] Declaring the pending disciplinary proceedings against the applicant to have prescribed in terms of paragraph 58 second schedule (sic), of the Ubutfo Swaziland Defence Force order of 1977.*
- [5] Directing and ordering the 1<sup>st</sup> and 2<sup>nd</sup> respondents to release and reinstate to the applicant his salary since 2009 forthwith.*

*[6] Directing and ordering the 1<sup>st</sup> respondent to reinstate the applicant to his position and work station."*

- [4] According to the applicant he was employed by the Ubutfo eSwatini Defence Force (UEDF) in the year 2002. He was first posted to a place called ka Hhohho and later transferred to Phocweni Barracks in about the year 2006.
- [5] In about the year 2009 he fell sick and would be treated at the Army Clinic intermittently. Due to the seriousness of his illness he was eventually referred to the Releigh Fitkan Memorial Hospital (RFM Hospital) where he was treated and discharged – he was also advised to go recuperate at home for a week.
- [6] At the end of the week, applicant returned to work, but his condition deteriorated and was taken home on the instructions of one Sergeant Ntshalintshali to prevent the possibility of his sickness being passed to his roommates. His condition would not improve for the next four months, but Senior Officers would check on him from time to time and even bring him some groceries.
- [7] After the four months, he reported for duty, but his salary was stopped and he was charged for being absent without leave. His matter is to this day, still pending before the Court Martial.
- [8] The applicant argued that he tried to engage the Army on his matter and in the year 2010 he approached one Jabulani Dlamini to seek his counsel and he was informed that he would have to charge him with the offence of desertion in order to afford him a platform of stating his case before the Court Martial. Jabulani Dlamini had been appointed the commanding officer of the Phocweni Barracks. The applicant was charged with the earlier case of desertion which was then consolidated with the earlier charge of absence without leave. The applicant appeared before the court martial on several occasions, but the matter never proceeded.
- [9] The applicant argued that the interdiction of his salary in 2009 was unlawful as it was done without notice. Concerning the disciplinary proceedings, the applicant argued that in terms of Section 58 of the UEDF order, the offences for which he was charged had lapsed for lack of prosecution within 3 years.

- [10] The first respondent in its answering affidavit raised the following points of law.

### **Jurisdiction**

*The high court does not have jurisdiction to decide the matter in the manner approached by the Applicant. In terms of Section 151 (3) (b) of the Constitution of the Kingdom of Swaziland Act of 2005 the High Court does not have original jurisdiction in matters which the Court Martial has jurisdiction. Section 25 of the King's Order in Council of 1977 gives powers to try and discipline people for breach of military laws including military personnel. [To the Court Martial]*

### **Lack of Urgency**

*The urgency is self-created in that Applicant himself has stated in his founding affidavit that his salary was stopped in around March 2010. Applicant decided to approach the above Honourable Court on grounds of urgency more than 10 years later. Financial constraints do not form part of the grounds for urgency.*

### **The interim Relief Sought has final and definitive Effect.**

*The relief sought is final and definitive of the rights of the parties. Prayers 3,4,5,6 and 7 have final definitive effect. The above Honourable Court cannot grant these prayers without hearing Respondents on the matter. The prayers seek to bring the matter into finality even though they appear to be interim in effect.*

### **PRESCRIPTION**

- [12] The 1<sup>st</sup> respondent couched this point in the following manner:

- (a) *The applicant has instituted civil action against the Government without following procedure as stipulated by section 33 of the Umbutfo Defence Force order 10/1977 on prescription. There was no notice served on the Army commander in terms of sections 33 of the UEDF order of 1973.*
- (b) *The cause of action as can be deduced from prayer 1, of the notice of motion and paragraph 18 of the Founding Affidavit, the claim arose in or around March 2010. The applicant has instituted these proceedings*

*11 years in excess of the prescribed six months within which to institute civil proceedings in terms of section 33 of the UEDF order of 1977. This also goes to show that the applicant deserted his job."*

[3] During arguments the Respondents indicated that they would only argue the point on prescription. The court *mero motu* required that the parties file additional heads of argument on this point which they did, and the court is grateful to counsel for that.

[14] In paragraph 18 of his Founding Affidavit the applicant averred:

*"[18] I have been rendered destitute as my salary was stopped in 2009 without notice by the 1<sup>st</sup> and 2<sup>nd</sup> respondent in concert, an act contrary to the second schedule of the Umbutfo Eswatini Defence order at paragraph 29..."*

[15] This, the Respondents argues, shows that the *Lis* or cause of action accrued sometime in 2009. The Respondents have annexed a copy of a letter written to the 2<sup>nd</sup> respondent, annexure UEDF 4 in which the interdiction of applicants salary is asked for dated 29<sup>th</sup> March 2010 and annexure UEDF3 being a copy of applicant's, pay advice slip showing the pay date to be the 22<sup>nd</sup> March 2010, the respondents argue that this was the last salary received by the applicant this would then mean that the cause of action arose on what would have been the applicant's next pay date, the 22<sup>nd</sup> day of April 2010.

[16] The Respondent's argument on section 33 is two pronged. In the first instance they argue that he has failed to give notice to the Army Commander in terms of the Act. Section 33 of Order-in-Council no.10/1977 provides.

*"[33] 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 course of action 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 commencement thereof"*

- [17] It was the Respondent's argument that the present proceedings were instituted 11 years after the cause of action and that no notice of applicant's intention to institute proceedings was given to the respondents as envisaged by section 33 of the order.
- [18] It is not apparent why the law requires that the respondent be given a months' notice before institution of the proceedings, nor is it necessary for the court to inquire into such, for purposes of this matter. The section is clear and it is couched in unambiguous terms. **"No civil action shall be capable of being instituted against the Government or any persons ... 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."** The respondents are contending that no notice has given to the respondents.
- [19] Secondly, the Respondent's argument on prescription is that the claim has prescribed because the action was instituted after six months has elapsed since the cause of action arose.
- [20] The applicant, per contra argues that he is not bound by the provision of section 33 of the UEDF order because his claim is not founded on delict. Applicant's argument was that his claim is founded on contract and he referred the court to the Industrial Court judgement of Judge Nderi in **Meshack Masuku v The Swaziland Government I.C case no.103/98**. In that case the court was faced with an almost similar scenario – the applicant instituted proceedings to claim a refund of a sum of money that he alleged was unlawfully deducted from a lump sum payment made to him. The applicant was a head teacher at a school and the lump sum was made up of salary arrears occasioned by the fact that he was underpaid for his position. At the time of the proceedings he was still so employed and rendering his services as a Head teacher to the Respondent. The court dismissed a preliminary point taken by the Respondents that the claim had prescribed on the basis that the claim was not founded on delict but on the employment contract.
- [21] To some extent I agree that the applicant's case in the instant case is also based on contract and not delict. But in the Meshack Masuku judgement the objection in *Limine* was based on the limitation of legal Proceedings against the Government Act 21/1972. The proviso to Section 2 (1) (a) makes a distinction between a claim arising from delict and a claim arising from any other cause of action. Section 33 of the UEDF order simply

provides that "No Civil Action shall be capable of being instituted...". It makes no distinction between causes of action.

[22] Another consideration is that by his own admission, the applicant has not rendered any service to the Respondent since he "fell" sick in 2009. The applicant has failed to demonstrate that his absence from work were sanctioned by a medical practitioner or by the Respondent.

[23] In his Founding Affidavit the applicant annexed a raft of documents apparently detailing his illness, but none seemed to suggest that he was excused from duty either by a medical practitioner or his superiors. I am of the opinion that the Meshack Masuku case is clearly distinguishable from this matter.

[24] M.Dlamini J. in **Bongani Shabangu The Army Commander – Umbutfo Swaziland Defence Force and 2 Others (154/2015) [2017] SZHC 257 (14 December 2017)** quoted with approval an excerpt from the South African case of **Road Accident's Fund v Mdeyide [2010] ZACC 18 [2011] 2 SA 26 (cc) para 8** where Van der Westhuizen J said.

*"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 indefinite periods of time bring about prolonged periods of uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have been 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 court 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."*

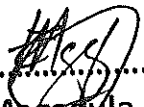
[25] The argument by counsel for the applicant that, applicant is not bound by the provision of Section 33 of the order is to me fallacious. The Umbutfo eSwatini Defence Force is established in terms of the UEDF order 10/1977 and its operations are regulated by the same order. It would not make

sense, at least, legally to then argue that some aspects of the order do not apply to certain of the Army's operations.

[26] The applicant failed to comply with the first and second parts of the requirements of section 33 of order 10/1977. He failed to give notice in writing to the respondents of his intention to institute the proceedings a month before and his action was at least 11 years out of time.

[27] In the result I make the following order.

- a. The point of law on prescription is upheld.
- b. The application is dismissed.
- c. Costs to follow the cause.

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Z. Magagula  
Judge of the High Court

**Appearances:**

For Applicant – Mr M. Mabuza

For Respondent – Mr M. Mashinini