IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE CIV. APPEAL NO. 27/2001

In the matter between

THOMAS MBABANE DLAMINI Appellant

And

UMBUTFO SWAZILAND DEFENCE FORCE 1st Respondent

ATTORNEY GENERAL 2nd Respondent

SWAZILAND GOVERNMENT 3rd Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For Appellant Mr. Gwebu

For Respondents Ms Matse

JUDGMENT

TEBBUTT, JA

The appellant is a soldier employed by the Umbutfo Swaziland Defence Force (the Defence Force), an arm of the Swaziland Government.

In August 1993, while at Siteki Barracks, he absented himself without permission for 31 days. His Commanding Officer ordered that he be confined to barracks for six weeks and fined him E30.00. His salary was stopped and, apparently because of this, he again absented himself from duty from 28 October 1993 to 27 December, 1993. He was then transferred to Nhlangano Barracks where, once more, he received no salary.

In September 1994 the appellant was brought before a Court Martial which on 21 October 1994 gave judgment. In its judgment it found him not guilty of the charge against him and made the following order:-

"The Court Martial now directs that the accused be allowed to earn his salary with effect from January 1994 to date as accused has been working since then without any further charges. "

This judgment was confirmed by the Deputy Army Commander, Colonel N.D. Dlamini.

Despite this, the appellant has been paid no salary since August 1993, notwithstanding that he worked at Nhlangano Barracks from December 1993 to June 1995. According to him, in June

1995 he was told by his two senior officers, Major Masundwini Dlamini and Second Lieutenant Makhaza Dlamini to go home as they were sorting out the issue of his unpaid salary. Nothing has happened since then, in spite of many enquiries by him.

On 17 April, 2001, the appellant's attorney wrote to the Legal Adviser of the Defence Force recording the facts mentioned above and calling for the position in regard to the appellant's salary to be clarified by 19 April 2001, and failing a reply to apply for his reinstatement and for payment of his salary from 1993 to date. No reply having been received to this, the appellant on 4 May 2001 brought an application by way of notice of motion -

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(1) directing and ordering the Defence Force and the Swaziland Government to pay forthwith his salary from August 1993 to May 2001, amounting to E70 002.96;

(2) directing and ordering the Defence Force and the Swaziland Government to pay increases to the salary in terms of pay-rises afforded to his colleagues and/or at inflation rate;

(3) directing the Defence Force and the Swaziland Government to give him his job back;

(4) directing the respondents (including the Attorney General who was cited in his capacity as Chief Legal Adviser of the Defence Force and the Swaziland Government) to pay costs.

The respondents opposed the application and raised the following points in limine:-

(a) that the proceedings had lapsed in terms of Section 33 of the Umbutfo Swaziland Defence Force Order No. 10 of 1977, (to which I shall refer as "the Defence Force Order") the application having been launched after a period of six months from the date on which the cause of action arose.

(b) that one month's notice was not given to respondents before the commencement of the action as required by the Defence Force Order;

(c) that the proceedings had 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 (I shall refer to this herein as "the Act").

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The appellant's response to these points was that neither Section 33 of the Defence Force Order nor the Act apply because the judgment of the Court Martial created a judgment debt, the prescription period in respect of which under the common law was 30 years; that the respondents had waived their right to rely on prescription; and that as appellant was still an employee of the Defence Force there was an ongoing obligation on it to pay him his salary. In the alternative, appellant contended that Section 33 of the Defence Force Order was unconstitutional as it sought to oust the jurisdiction of the High Court as established by Section 104 of the saved provisions of the Constitution as contained in Act 50 of 1968 and that, in regard to the Act, Section 4(1) thereof gave the Court power to condone non-compliance with its provisions, if it was just and equitable to do so.

The application came before Sapire, CJ in the High Court who dismissed it in respect of prayers 1 and 2 of the Notice of Motion but ordered that full argument be heard in respect of prayers 3 and 4. The learned Chief Justice unfortunately gave no reasons for his ruling, but it would seem that

he considered that the appellant's claims were barred by either Section 33 of the Defence Force Order or by the provisions of the Act. Appellant now appeals to this court against that ruling.

Section 33 of the Defence force Order reads as follows:

"Limitation of actions.

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 cause 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 the commencement thereof. "

The relevant portions of the Act read as follows:-

"2(1) Subject to Section 3 no legal proceedings shall be instituted against the Government in respect of any debt -

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(a) unless a written demand, claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post;

Provided that in the case of a debt arising from a delict such demand shall be served within ninety days from the day on which the debt became due;

(b) before the expiry of ninety days from the day on which such demand was served on the Attorney General unless the Government has in writing denied liability for such debt before the expiry of such period;

(c) after the lapse of a period of twenty four months as from the day on which the debt became due,

4.(1) The High Court may, on application by a person debarred under section 2(l)(a) from instituting proceedings against the Government, grant special leave to him to institute such proceedings if it is satisfied that -

(a) he has a reasonable prospect of succeeding in such proceedings;

(b) the Government will in no way be prejudiced by reason of the failure to receive the demand within the stipulated period;

(c) having regard to any special circumstances he could not reasonably have expected to have served the demand within such period:

In considering the varying approaches to this matter of the appellant on the one hand and the respondents on the other as set out above, a convenient starting point is to consider what, if any, debt is due to the appellant.

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For the appellant Mr. Gwebu contended that the judgment of the Court Martial created a judgment debt and that a judgment debt in terms of the Common Law only becomes prescribed after a period of 30 years.

The Swaziland General Administration Act No. 11 of 1905 provides in Section 3 thereof that:-

"The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland."

Prescription is the rendering unenforceable of an obligation and, more particularly, debts. Under the Roman -Dutch common law a debt was prescribed after 30 years and thereafter was not only unenforceable but was completely extinguished. Until then, however, it remained extant (see Standard Bank of S.A. Ltd v Neethling 1958 (2) SA 25(c) at 30). A judgment of a court of law for payment of money is a debt and accordingly a judgment debt, for that is what it is, is not extinguished until a period of 30 years from when it becomes due has elapsed. There is in Swaziland no statute which modifies that. An order of a Court Martial obliging the Defence Force to pay a sum of money creates a judgment debt, its order having the force of an order of a civil court of law, and Ms Matse, for the respondents correctly conceded that. (cf. van Duyker v District Court Marshall and others 1948(4) SA 691 at 694). Appellant was therefore entitled to recover from the Defence Force what was due to him in terms of the order of the Court Martial unless he was barred from doing so by the provisions of Section 33 of the Defence Force Order or by the Act, as contended for by the respondents. A similar provision to Section 33 of the Defence force Order is Section 113(1) of the Defence Act No. 44 of 1957, the wording of which is identical to Section 33. That Section has been held as creating an expiry period, as distinct from any question of prescription, and that a plaintiff who has failed to comply with the time limitation of Section 113(1) is generally debarred from suing (see Pizani v Minister of Defence 1987(4) 592(A) at 602 C - D. See also Hartman v Minister van Polisie 1983(2) SA 489(A) and Brosans v Minister van Verdedeging 1983(3) SA 803(T)). I shall return to what has occurred to Section 113(1) in South Africa later herein. That an expiry period can serve to debar a plaintiff from recovering a debt has also been adverted to in South

Africa in relation to an Act there viz the Limitation of Legal Proceedings (Provincial and Local Authorities) Act No. 94 of 1970, which is similar to the Act in casu . (see Meintjies N.O. v Administrasieraad van Sentraal-Transvaal 1980 (1) SA 283(T) at 289). In that case the difference between a prescriptive period and an expiry period was explained, the latter being regarded as creating a bar to the recovery of a debt after the expiry period in question (see also De Wet & Yeat's, Kontraktereg enHandelsreg 4th edition p275). The learned judge in the Meintjies case held that the limitation contained in the South African case was a prescriptive period rather than an expiry period. That Act is not in part materia with the Act in this case and the decision in Meintjies case is not persuasive authority in this Court. The Swaziland Act provides specifically in Section 4 that a person "debarred" under Section 2(1) (a) can apply to Court for leave to institute his or her claim (my emphasis). I hold therefore that the effect of the Act is that it debars the recovery of a debt from the Government (which would include the Defence Force) after the expiry of the limitation period of 24 months from the date on which such debt became due. The debt created by the order of the Court Martial was for payment of the appellant's salary from January 1994 "to date" i.e. to 21 October 1994. More than 24 months having elapsed from that date, and no application for special leave in terms of Section 4(1) of the Act, having been made, the appellant's right to institute legal proceedings for the recovery of any amount due to him in terms of that Order, i.e. of his salary from January 1994 to 21 October 1994, had become barred by Section 2(1) of the Act.

Despite his claim that he be given his job back, the fact is that the appellant is, however, still employed by the Defence Force. He has not been either dismissed or suspended from its service. There is therefore an ongoing obligation on the Defence Force to pay him his salary monthly under the ordinary common law of master and servant and that obligation has existed since December 1993. It is a debt which the Defence Force, as part of the Swaziland Government, owes him and which has become due at the end of every month since December 1993. In terms of Section 2(1)(c) of the Act his right to institute proceedings for recovery of such debt is barred after the lapse of a period of 24 months from the day on which the debt became due. The appellant instituted his proceedings on 4 May 2001, having made written demand in terms of Section 2(l)(a) for payment on 17 April 2001. His attorney's letter of 17 April 2001, addressed to the legal adviser of the Defence Force, who is the Attorney

General, complies with Section 2(1)(a) of the Act. He was not, however, entitled to bring his proceedings until 90 days had elapsed from 17 April 2001, in terms of Section 2(1)(b) of the Act i.e. before 17 July, 2001. Those proceedings are the ones now before this Court. However, any payments due to him earlier than 24 months from the date of this judgment have lapsed by reason of the provisions of Section 2(1)(c) i.e. prior to June 2000.

He is therefore entitled to payment of his monthly salary, together with any increases of it, from June 2000 to the date of this judgment i.e. 10 June 2002.

As set out earlier herein, appellant contended that Section 33 of the Defence Force Order was unconstitutional in that it sought to oust the jurisdiction of the High Court as established by Section 104 of the saved provisions of the Constitution as contained in Act 50 of 1968. In developing this contention Mr. Gwebu sought to bolster his argument by referring to the fact that the Constitutional Court of South Africa in the case of Mohlomi v Minister of Defence 1997(1) SA 124(CC) had declared Section 113(1) of the South African Defence Act No. 44 of 1957 unconstitutional. The wording of that Section, as stated earlier, is identical to Section 33 of the Defence Force Order. The Constitutional Court held that Section 113(1) was inconsistent with Section 22 of the Republic of South Africa Constitution Act No. 200 of 1993 which provides that "every person shall have the right to have justifiable disputes settled by a Court of Law or, where appropriate another independent and impartial forum". There is no corresponding or similar provision in Swaziland. Section 104 of the saved provisions of the Swaziland Constitution (as far as relevant to this judgment) reads thus:

"(1) The High Court shall be a superior Court of record and shall have

(a) unlimited original jurisdiction in civil and criminal matters. "

Whatever limitations Section 33 of the Defence Force Order may place on a citizen of Swaziland to bring a civil action against the Defence Force (upon which it is unnecessary for the purposes of this case to express any view) it in no way, in my opinion, impinges upon the jurisdiction of the High Court in civil matters whatsoever. The High Court's ability to hear such actions is not affected in any way. All Section

33 does is to lay down a time period in which such an action may be brought. The contention that Section 33 is unconstitutional, for the reasons advanced, cannot be upheld. The constitutionality of Section 33 is, however, not really at issue here. What is pertinently in issue is the expiry period contained in the Act.

In considering this it is instructive to have regard to the ratio of the South African Constitutional Court in the Mohlomi case.

Didcott J who gave the judgment in that case, said the following at pages 129 - 130, paras 11 and 12.

"(11) Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. they thus serve a purpose to which no exception in principle can cogently be taken.

(12) It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not per se dispose of the point, as I view that at any rate. What

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counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open

in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree. "

The Constitutional Court held that viewed against the background of affairs in South Africa, where poverty and illiteracy abound and differences of culture and language are pronounced and where access to professional advice and assistance is often difficult for financial or geographical reasons, an expiry period of six months was too short and the rights of citizens to have their justiciable disputes settled by a court of law were therefore infringed.

I have cited the judgement in the Mohlomi case at some length because, in my view, any strictures on, or criticisms of, Section 33 of the Defence Force Order can certainly not be directed at the Act, providing, as it does, for a 24 month expiry period.

The remarks of Didcott J in paragraph 11 of the Mohlomi case cited above are particularly apposite to the Act. I am also in respectful agreement with what was said by Sapire CJ in regard to the Act in Peter Thomas Forbes v Swaziland Government Civil Case No. 1035/95, unreported, viz:

"The Act has the object of preventing undue delay in the bringing of actions against the Government. The motivation apparently is that the lapse of time between a cause of action arising and the notification and prosecution of a claim relative thereto makes the investigation by the Government difficult

or impossible. Evidence may be lost or not gathered, and witnesses may no longer be available. On the other hand there are cases where mere delay or lapse of time would not have this effect and would be unfair on the injured party to lose his right of action if the delay in bringing the claim does not affect the ability of the Government to defend the same. These are the considerations which gave rise to the legislation. "

It will be appreciated that what has gone before in this judgment is that any restriction on the right of the appellant to claim his arrear salary is not that contained in Section 33 but in the Act, both in so far as the order of the Court Martial is concerned and his monthly salary since December 1993 and that it is the latter restriction that limits appellant's entitlement to payment of his monthly salary from June 2000 to the date of this judgment.

The following order is therefore made:

1. The appeal succeeds, with costs.

2. The order of the High Court is set aside and replaced with the following:-

2.1. First respondent is ordered to pay to appellant his monthly salary, together with any increases during such period, from June 2000 to date of this judgment.

2.2 First, Second and Third Respondents are to pay appellant's costs jointly and severally, the one paying the others to be absolved.

DELIVERED in open court this 10th day of June, 2002

P.H. TEBBUTT,JA

I AGREE

R.N. LEON, JP

I AGREE

C.E.L. BECK,JA