IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No: 27/13

In the matter between

THE ATTORNEY GENERAL	**1ST APPELLANT**
THE ARMY COMMANDER-UMBUTFO SWAZILAND DEFENCE FORCE	**2ND APPELLANT**

And

MASOTSHA PETER DLAMINI	**RESPONDENT**

Neutral citation:	*The Attorney General & Another v Masotsha Peter Dlamini 27/13*) 2013 [SZSC] 44 (30 July 2013)
Coram:	**M.M. RAMODIBEDI CJ, M.C.B. MAPHALALA JA AND E.A. OTA JA**
Heard:	**23 July 2013**
Delivered:	**30 July 2013**

Summary: **The Cross-appellant who was Applicant a quo is a military officer. He was tried by the Court Martial for offences of disobedience and desertion. He was found guilty of disobedience and absence from duty without permission. The Court Martial sentenced him to 6 months imprisonment, 2 months of which were suspended. The Cross-appellant was immediately arrested and incarcerated by the Force. He escaped from the Military Detention cell and launched an application in the High Court for a review and setting aside of his sentence and payment of his arrear salary which had been suspended. The High Court issued an interim order staying execution of the sentence. The Appellants who were Respondents a quo, launched an application in limine on the non-exhaustion of domestic remedies by the Cross-appellant before approaching the High Court. The point in limine was dismissed. The Appellants appealed against the dismissal of the point in limine, as well as certain pronouncements of the Court a quo in the process of its decision which were alleged to have pre-determined the review application. The appeal was subsequently deemed abandoned by the Supreme Court. The Cross-appellant, still as applicant, commenced a fresh review application in the High Court premised on the same grounds. The Court a quo dismissed the review application but granted the order for the Appellants' to**

pay Cross-appellant's arrear salary. The Appellants appealed to this Court against the order for payment of arrear salary. The Cross-appellant cross-appealed on the order dismissing the review application on the grounds that it was res-judicata the abondment of the appeal at the Supreme Court. Held: pronouncements of the Court a quo made obiter incompetent to found res-judicata. Order of the Court a quo dismissing the review application upheld. The Common Law principle of "no work no pay" inapplicable. The Cross-appellant tendered his services which was emasculated by the Appellants' self help conduct. The decision of the Court a quo for arrear salary to be paid to the Cross-appellant upheld.

Judgment

THE COURT

THE PARTIES

[1] The 1st Appellant is the Attorney General of the Kingdom of Swaziland cited in his capacity as the Principal legal advisor to all Government

Departments whose offices are situate on the 4th Floor, Usuthu Link road, Mbabane (1st Respondent a quo).

[2] The 2nd Appellant is the Army Commander Umbutfo Swaziland Defence Force, having his principal place of business at Bethany USDF Headquaters (2nd Respondent a quo).

[3] The Respondent is Masotsha Peter Dlamini an adult Swazi male employed by the Umbutfo Defence Force (Applicant a quo). He also Cross-appealed *in casu* (Cross-appellant).

[4] It is convenient for us to refer to the parties as Appellants and Cross-appellant respectively.

CHRONOLOGY

[5] The common cause facts of this case are as follows:-

[6] The Cross-appellant who is a member of the Umbutfo Swaziland Defence Force (the Force), was attached to the Phocweni Army

Barracks. On or about the year 2004 the Cross-appellant was part of a demo platoon taken to Mbuluzi Army Barracks. At the end of the duty at the Mbuluzi Barracks, the members of the demo platoon were redeployed back to their mother units. The Cross-appellant refused to return to his mother unit at Phocweni Barracks.

[7] In consequence of this disobedience, the Cross-appellant's salary was stopped and he was subsequently charged before a Court Martial on two counts of offences namely:-

1) Contravening Section 19 (1) of the Military Discipline Code, in that while at Mbuluzi Army Barracks (Training Battalion) on the 5th October 2004, the Cross-appellant (then accused), did wrongfully, unlawfully and intentionally disobey a lawful command given to him personally by his platoon sergeant in the execution of his lawful duties ordering him to go back to Royal Guard Unit.

2) Contravening Section 13 of the Military Discipline code, in that the Cross-appellant did wrongfully desert the army by absenting himself for a period of 36 days with an intention to remain away thereof permanently.

[8] At the conclusion of the trial, the Court Martial pronounced the following verdict

> **"The accused is found guilty on count one. On count two the accused is not guilty on the charge of desertion but guilty on the charge of absent without an official leave".**

[9] Consequently, the Cross-appellant was sentenced to detention for a period of six (6) months without an option of a fine. Two (2) months of the sentence were suspended. He was thus to serve detention for a period of four (4) months in the army detention cell.

[10] The Cross-appellant was immediately incarcerated by the Force pursuant to the aforegoing sentence.

[11] He however escaped from the military detention cell and disappeared without serving the imposed sentence.

[12] Subsequently, on the 21st of December 2004, the Cross-appellant launched an urgent application in the High Court contending for a review and setting aside of the decision of the Court Martial committing

him to goal. He also sought an order for the payment of his arrear salaries pending finalization of the matter.

[13] On the 24th of December 2004, the High Court per **S. B. Maphalala PJ,** issued an interim order returnable on the 21st of January 2005, directing the judgment by the Court Martial to be stayed pending the application for review and setting aside of same.

[14] On the 20th day of January 2005, the Appellants filed a notice to raise points of law on the non-exhaustion of the domestic remedies available to the Cross-appellant in terms of Section 104 and 113 of the Umbutfo Swaziland Defence force Order No. 10/1977.

[15] It appears that on the 21st January 2005, another rule nisi issued per **Nkambule J**, staying the decision of the Court Martial and directing the Appellants to pay the Cross-appellant's salary pending finalization of the application.

[16] It is this rule nisi that learned counsel for the Appellants, Mr T.L. Dlamini, contends is unauthentic on grounds that there is no record of

any proceedings on the 21st January 2005 that gave birth to same. Appellants contend that the Court *a quo* premised on these facts refused to countenance the said order.

[17] We are at pains to comprehend the basis for this contention, regard being had to the fact that the Appellants raised no grounds of appeal on this issue. They lack the competence to raise it in the way and manner they have proceeded.

[18] In any event, even if we were to countenance this line of argument and to perceive the interim order as unauthentic,, this does not detract from the potency of the earlier interim order granted by **Maphalala PJ** on the 24th of December 2004, which remained valid and subsisting all through the proceedings *a quo* and thus binding upon the parties.

[19] The foregoing said and done, the record reveals that on the 10th of February 2005, **Nkambule J**, dismissed the point taken *in limine* on non-exhaustion of domestic remedies.

[20] The Appellants immediately noted an appeal against the decision of **Nkambule J** on the following grounds:-

> **"1) The learned judge misdirected himself and erred in law in disregarding the provisions of the Umbutfo Swaziland Defence Force order No. 10 of 1977 and has thereby created a precedent that renders the provisions of the order obsolete.**
>
> **2) The learned judge erred and misdirected himself both to (sic) the facts and in law in coming to the conclusion that by declining to hear the review the court would be assenting to the Respondents (Appellants herein) violation of the rules of natural justice and rendering the maxim *audi alteram partem* rule useless".**

[21] The Appellants did not prosecute this appeal. They failed to file the record of appeal as required by the rules. On the 21st of November 2011 this Court declared the appeal abandoned in terms of Rule 30 (4) of the Court of Appeal rules.

[22] It appears that thereafter, the Cross-appellant launched a fresh application by way of Notice of Motion contending for the following reliefs:-

> **"1. That the judgment of the Martial Court committing the Applicant to goal be and is hereby reviewed and set aside.**
>
> **2. That the 2nd Respondent be and is hereby directed to pay Applicants salary arrears from November 2004 to current date**
>
> **2.1 Interest at 9% per annum from November 2004 to date of final payment.**
>
> **3. That the Respondents pay costs of the application.**
>
> **4. Such further and or alternative relief".**

[23] The application is founded on a 24 paragraph affidavit sworn to by the Cross-appellant. It is on record that on the 13th of July 2012, the Court *a quo* ordered the Appellants to file an answering affidavit in opposition, which they duly filed.

[24] Suffice it to say that the matter proceeded in the Court *a quo* per **M Dlamini J,** culminating in a comprehensive judgment rendered on the 3rd of May 2013, wherein Her Ladyship ordered as follows.

"1.1.1 1st Respondent to ascertain as to which month beyond February that applicant's salary was stopped.

1.2 Respondent is ordered to pay as salary applicant from that month.

2. Applicant's review application is dismissed.

2.2 The rule nisi granted on 10th February 2005 is hereby discharged.

3. No order as to costs".

[25] Dissatisfied with the aforegoing orders, the Appellants have now approached this Court for redress by way of an appeal predicated upon the following grounds.

"1. The judge erred and misdirected herself in fact and in law in holding that the Respondent cannot be properly held to have been absent from work and therefore should be paid salaries when in actual fact the Respondent is not at work since December 2004 up to present day.

2. The judge erred, misdirected and misconceived the facts in finding that whenever the Respondent attempted to return to work he was threatened with arrest on the basis of the Court

Martial's decision as that finding is not supported by the facts of the case.

3. **The judge erred and misdirected herself in law in holding and directing the Appellants to pay the Respondent his salary from the time it was stopped after February 2005 without specifying the time period or duration in respect of which the salary payments are to be made hence compelling the Appellants to pay salaries to the Respondent in perpetuity whilst nothing compels Respondent to be at work to earn the salary.**

4. **The judge erred and misdirected herself in law in directing that the Respondent should be paid salaries that in actual fact exceed salaries for a period of twenty four (24) months."**

[26] The Cross-appellant for his part, Cross-appealed on the following grounds

"1. The learned judge erred in law by re-hearing the review application as the same was res-judicata. The Supreme Court having declared abandoned the appeal noted by the appellants in 2005 under Case No. 6/2005. It was no longer competent for the High Court to revisit the matter.

2. The learned judge erred by approaching the issue of res-judicata in relation to the interim order issued by Nkambule J

(as he then was). The plea of res-judicata related to the Appeal (noted in February 2005) having been declared abandoned by the Supreme Court in November 2011.

3. The learned judge erred in law by allowing the Appellant herein to file an answering affidavit, 7 years later

(a) without a formal application for condonation setting out the reasons for the default.

(b) And in total disregard of an order of Court issued on 10th February 2005, specifically directing the Appellants to file their answering affidavit within fourteen (14) days.

4. The matter came before the learned judge only to enforce payment of the Appellant's salary as the Appeal had been declared abandoned, and the 1st Respondent (Attorney General) insisted on a specific order of Court to that effect. The learned judge erred by dismissing a review application that had been concluded in Appellants favour.

5. The learned judge erred by refusing to grant the appellant costs. Upon the appeal being declared abandoned, the Respondents should have complied with the orders sought in the notice of application".

[27] It is convenient for us to approach this decision from the tangent of the Cross-appeal, which raises two issues namely:-

1. Whether the review application is res-judicata the Supreme Court.

2. Whether the order for the Appellants to file answering affidavit *a quo* was wrong in law.

[28] ISSUE 1. Whether the review application is res-judicata the Supreme Court.

The Cross-appellant's stanze is that **Nkambule J** in deciding the point taken *in limine* by the Appellants on the non-exhaustion of domestic remedies went beyond the point *in limine* to make a definitive finding, that the Cross-appellant's rights of natural justice were not adhered to by the Court Martial. The Appellants noted an appeal against the decision of **Nkambule J,** both on the point *in limine* and the findings on the merits. This appeal was deemed abandoned by the Supreme Court.

[29] Mr M.P. Simelane who appeared for the Cross-appellant therefore contended in his heads of argument, that the inescapable result of the abandonment of the appeal, is that the findings of **Nkambule J** on the review application remained valid and subsisting. This state of affairs divested **Dlamini J** of the competence of re-opening the matter for decision on the merits as same is res-judicata. Counsel further contended that **Dlamini J** also lacked the competence to issue any other finding that would contradict **Nkambule J,** who was another judge of

concurrent or co-ordinate jurisdiction, as the High Court had become functus officio.

[30] The Appellants on the other hand argued in their heads of argument, that an appeal lies against the order of a Court and not the reasons for the order. The order that was made by **Nkambule J,** was that the point of law was dismissed. Therefore, the declaration of the Supreme Court deeming the appeal abandoned related to issues that were raised in a point of law.

[31] Now, a successful plea of res-judicata is a veritable ground for the termination of any proceedings *in limine*. The learning is that parties having canvassed an issue before a Court of competent jurisdiction, resulting in a valid and subsisting judgment, are precluded by law from re-opening and re-canvassing that issue on the same subject matter, except on appeal or review. These are the requisites of a successful plea of res-judicata. See **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa (4th ed) pages 249-250.**

[32] There is no doubt that the trial Court per **Nkambule J** in the process of its decision on the point taken i*n limine* on the non-exhaustion of domestic remedies by the Cross-appellant, made pronouncements on the substantive review application as demonstrated in that Court's decision on pages 29 and 30 of the record, where the following appears:

> **"From the foregoing it is clear that applicant's rights to natural justice were not adhered to by the tribunal -------**
>
> **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".**

[33] It is the aforegoing pronouncement that elicited ground (2) of the appeal which the Appellants launched against that decision, as we have hereinbefore demonstrated. This appeal was subsequently deemed abandoned by the Supreme Court. It is the fact of this pronouncement and the appeal against same which was deemed abandoned, that the Cross-appellant contends constitute a final determination of the review application on lack of fair hearing thus rendering that issue res-judicata.

[34] The question here is: if the Court in determining an application *in limine* verred off to make observations or pronouncements on the substantive matter, can those observations amount to a pre-determination of the substantive matter as to constitute issue estoppel or *estoppel per rem judicata.*

[35] A proper determination of this poser will entail a re-statement of what will constitute the ratio and the *obiter* in a judgment and its relationship with the application of the doctrine of *estoppel per rem judicata.*

[36] Commenting on these two principles of law, Blacks Law Dictionary states as follows:-

> **"ratio decidendi—[latin "the reason for deciding] 1. The Principle or rule of law on which a court's decision is founded. 2. The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided.**
>
> **'The Phrase' the ratio decidendi of a case is slightly ambiguous. It may mean (1) the rule that the judge who decided the case intended to lay down and apply to the facts or (2) the rule that a later court concedes him to have had the power to lay down.**
>
> **There are – two steps involved in the ascertainment of the ratio decidendi—First, it is necessary to determine all the facts of the case as seen by the judge, secondly it is necessary to discover which of those facts were treated as material by the judge---''**
>
> **"Obiter dictum—[latin something said in passing] A judicial comment made while delivering a judicial opinon, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).**
>
> **'strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause 'by the way'--- that is incidentally or collaterally and not directly upon the question before the court or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, anology or suggestion--- in the common speech of lawyers, all such extrajudicial expressions of legal**

opinion are referred to as dicta or obiter dicta, these two terms being used interchangeably"

[37] It follows from the above that the ratio of a judgment is the reason for the decision which is determined by the issue in dispute. Such issue at the trial *in limine* before **Nkambule J**, was whether or not the Cross-appellant was required to exhaust domestic remedies available to him within the Umbutfo Swaziland Defence Force before approaching the High Court.

[38] It follows that the ratio would be the decision determining that issue. So any part of the decision not determining or dealing with the issue in dispute or which is not necessary to be determined in deciding the point, operates in the form of an embellishment, a mere addendum. Such observation constitutes *obiter dictum.*

[39] Applying this principle to this case, it is beyond controversy that any part of the decision of the Court dealing with the application *in limine* that did not decide the issue in dispute, but which is merely in support of the decision of the issue in dispute, is to our mind an *obiter dictum.*

[40] There is no doubt that some courts in the phraseology of their judgments may make observations that are so intertwined with the ratio that it may lead one to think that they constitute part of the reason for the decision. That is clearly understandable in this circumstance. But clearly on legal doctrines, however supportive of the reasons for the decision they may be, such observations are not strictly speaking

regarded as the *ratio* because they do not deal directly with the question in dispute.

[41] The trial Court that heard the point *in limine*, clearly misunderstood the issue of non-exhaustion of domestic remedies and the deprivation of a right to fair hearing. Non-exhaustion of domestic remedies postulates that there are internal mechanisms for seeking redress but that a party has not used them and has rather come straight to Court. Deprivation of a right to fair hearing postulates that a party was deprived of his right to fair hearing or was not given reasonable opportunity to exercise his right to be heard during the proceedings before a forum. These two situations are entirely different.

[42] In an objection *in limine* on grounds of non-exhaustion of domestic remedies, it is not an appropriate answer to say that one exhausted the remedies but was not given a fair hearing during the proceedings. The answer should be restricted to showing that one exhausted those remedies. As to what happened during the trial of those proceedings, is a different matter for the substantive case to be dealt with by the Court upon being satisfied that the domestic remedies have been exhausted or that it can take the matter even if the domestic remedies have not been exhausted. The issue of the fairness of the Court Martial proceedings is therefore not a question that the Court needed to determine in order to come to a legitimate or rational pronouncement on the point *in limine* on non-exhaustion of domestic remedies. It is a pronouncement made *obiter*. The ratio here is the decision that domestic remedies have been

exhausted or they do not need to be exhausted before approaching the Court. Anything outside that amounts to *obiter.*

[43] Having re-stated this position, we now turn to the relationship of this concept to the doctrine of *estoppel per rem judicata*.

[44] We will straightaway say that it is trite law, that needs no belabouring, that, the only part of a decision that can constitute a valid basis for issue estoppel or *estoppel per rem judicata*, just like judicial precedent, is the ratio and not the *obiter.*

[45] It follows from the aforegoing that the views expressed by the trial Court on the deprivation of the right of fair hearing of the Cross-appellant in the process of dealing with the point *in limine* cannot constitute issue estoppel.

[46] Similary, the appeal launched against these pronouncements which was subsequently deemed abandoned cannot constitute such res-judicata. This is because the appeal itself was a misconception on the part of the Appellants. Being reasons given *obiter* such pronouncements are not appealable. In any case, it is a cardinal principle of law in this jurisdiction, saluted by a plethora of case law, that an appeal does not lie against the findings or reasons for judgment but only against the substantive order made by a Court. See for example **Gugu Prudence Hlatshwayo v The Attorney General Civil Appeal No. 2/2006, para [3], Ntombifuthi Magagula v The Attorney General Civil Appeal No. 11/2006.** Similarly, the appellants could not in law appeal against

the patently interlocutory ruling on a point *in limine* without first seeking and obtaining leave of court. Such a procedure flouts Section 14 of the Court of Appeal Act**.**

[47] The inescapable conclusion is that whether the appeal was abandoned or not, these pronouncements cannot found res-judicata.

[48] Therefore, the Court *a quo* per **Dlamini J**, was right to dismiss the point raised on res-judicata and proceed in dealing with the review application on whether the Cross-appellant was deprived of his right of fair hearing or not.

[49] <u>THE REVIEW</u>

The Court *a quo* correctly summarized the grounds upon which the review application was predicated as: (1) the Cross-appellant's contention that he was not given sufficient time to prepare for his case; (2) he was not afforeded an opportunity to cross-examine respondents' witnesses; (3) crucial witnesses such as the complainant were not called; (4) the evidence of the witnesses called was contradictory in material terms.

[50] The Court *a quo* very carefully and meticulously juxtaposed these allegations with the record of the proceedings before the Court Martial and found that the Cross-appellant's right of fair hearing had been adhered to in all material respects.

[51] The Court concluded as follows in paragraph [30] of the impugned decision:-

> **"I must mention that the chair was vigilant on the rights of applicant. Not only did he postpone the matter at the instance of applicant after enquiring whether he was ready, on the trial date he actually asked the applicant whether he had any objection to the constitutional of the Court that was to try him after reading out the names of the members. He also advised applicant of his right to legal representation. This is commendable of the chair".**

[52] Having carefully perused the entire record, we cannot fault the findings of the Court *a quo* and the conclusion reached. The Court in our view, correctly relied on the record of the proceedings before the Court Martial in making its deductions.

[53] It is obviously the above findings of fact that led the Court *a quo* to dismiss the review application and discharge the rule, thereby effectively affirming the order of committal by the Court Martial.

[54] In so doing, the Court *a quo* failed to advert its mind to the automatic review of such sentences imposed by a board or council of review of the Force, as statutorily prescribed by Section 104 of the second schedule to the Umbutfo Swaziland Defence Force Order 10/1977. (the Order). This is the section upon which the Appellants' point *in limine* was predicated and ground (2) of the subsequent appeal which was eventually deemed abandoned..

[55] Even though this point was not taken before the Court *a quo*, nor does it form any part of the grounds of appeal or cross-appeal *in casu*, it is however a crucial point of law which it is trite that this Court can raise *mero motu*. We have jurisprudential backing for this legal proposition from the neighbouring Kingdom of Lesotho, where the Court of Appeal in the case of **A Malebo v Attorney General, LAC (2000-2004) 872 AT 875 para C to H**, propounded as follows:-

> **" The correctness and limitations to the proposition that a point of law may be raised even if not specifically pleaded can be stated and explained by a quotation from a leading South African case in which the matter is discussed. The case is Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) . At page 23D it is said as follows:**
>
> > **'It is clear that 'the duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it' (per Innes J in Cole v Government of the Union of SA 1910 AD 263 at p. 272). For this reason the raising of a new point of law on appeal is not precluded, provided certain requirements are met:**
> >
> > **If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by**

> **a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.' (per Innes, J in Cole's case, supra at pp 272-3.' "**

[56] Since the facts relating to this section of the order are common cause, the Appellants in our view stood to suffer no prejudice by the Court dealing with the legal point in question.

[57] Now, Section 104 of the Order provides as follows:-

> **"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 of a non-commissioned rank or of 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".** (emphasis added)

[58] The aforegoing is a mandatory command. It makes a sentence of imprisonment of 3 months or more imposed by a board or tribunal within the Force subject to an automatic review by a reviewing board or council before execution.

[59] The 4 months period of imprisonment imposed on the Cross-appellant by the Court Martial is perceived by this category of sentences and is subject to such automatic review. The Appellants failed to comply

with the clear mandate of this law. They failed to set up structures to review the sentence imposed on the Cross-appellant before execution of same.

[60] The uncontroverted facts are that immediately after the imposition of the sentence by the Court Martial, the Appellants proceeded to its execution. Consequently, they placed the Cross-appellant in the military detention cell from where he escaped. They re-arrested him at some point and again incarcerated him.

[61] The Cross-appellant, it is on record, staged a second successful escape. Even in the face of the application for review and the interim order the Appellants relentlessly pursued execution of the committal order, in afront of the automatic review prescribed by law. The Appellants acted in flagrant disregard of this mandatory law. Their application *in limine a quo* on this law was a stale call, as they had already proceeded to execution of the sentence. In any case, the application *in limine* does not constilute such review as anticipated by law. Appellants' non-compliance with the automatic review prior to execution of the committal order, foreclosed the right of the Cross-appellant pursuant to that review process. This is wrong in law.

[62] ISSUE 2: Whether the order for the Appellants to file answering affidavit *a quo* was wrong in law.

[63] We have no wish to belabour this issue, as it is inexorably apparent from the impugned judgment, that the order for the filing of answering affidavit by the Appellants was by consent of the parties. This is exant from paragraph [10] thereof, where the Court declared thus:

> **"I must point out that on the 13th July 2012 the applicant represented by Mr C. Motsa and respondent by Mr P. Dlamini approached the Court and took a consent order to have the matter set down for hearing and respondent to file its answering affidavit and record of proceedings. It was by consent of both parties that pleadings should be closed by 24 October 2012. This is tantamount to a waiver by applicant of his rights to raise the point on bar. This Court cannot encourage applicant to approbate and reprobate at the same time".**

[64] The Cross-appellant has not challenged the finding that the order was by consent of the parties, neither is there any part of the record pointing to the contrary. This ground must fail in the circumstances. We now turn to the appeal.

[65] <u>THE APPEAL</u>

We have hereinbefore demonstrated the grounds upon which the appeal is predicated. They need no re-statement.

[66] The enquiry is, did the Court *a quo* commit any material misdirection in making the impugned findings? We say this because, it is trite law that an appellate Court will generally not interfere with findings of a trial Court in the absence of a material misdirection. As **Ramodibedi JA** (as he then was) postulated in **Gugu Prudence Hlatshwayo v The Attorney General (supra) para [19]**

> **"This is so because a trial Court enjoys advantages which an appellate Court does not have. It is steeped in the atmosphere of the trial and as such it is in a position to see and hear witnesses as well as observe their demeanor and thus draw its own impression of them".**

[67] Having carefully scrutinized the record, we fail to see any misdirection on the part of the Court *a quo*. We say this because, notwithstanding the uncontroverted affidavit evidence in support of the above findings, which we will come to anon, the Court *a quo* out of the abundance of caution, called for *viva voce* evidence to further interrogate this issue before drawing its conclusions.

[68] In this exercise, the Cross-appellant testified and called no witnesses. The Appellants on the other hand led the evidence of four witnesses, namely, Daniel Dumisani Masuku, the Station Commander at Mbuluzi Army Barracks at the relevant time; Zenzele Mehluli Dlamini who was the Commander of Military Police at the Force headquarters at the material point in time; Mfanawenkhosi Valentine Khumalo who was the Captain of the Royal Guard based at Phocweni

at the material time and Makhosi Goodman Dlamini a staff of the Force personnel department.

[69] A summary of the evidence of these witnesses, was in our view correctly captured by the Court *a quo* in the following paragraphs of the assailed decision :-

> **"[35] ----Applicant gave evidence as follows:**
>
> **[36] On the 20th November 2004 he instituted the present proceedings. He was granted an interim order returnable on 21st January 2005. He attempted going back to work. He went to Mbuluzi barracks as his work station. He was told to serve his sentence and complain later. He then went to Phocweni as his permanent base where he was told the same. He proceeded home.**
>
> **[37] While at home, some five days later officers from the respondent's headquarters arrived and informed him that they were instructed to fetch him so that he could go back into respondent's cell to continue serving his sentence. He refused, showing them a copy of the interim order. They left without him.**
>
> **[38] Sometime ago, early January 2005 while in Manzini City, military officers approached him telling him that they were taking him to the cells at respondent's headquarters. These were five in number. He spent a night in the military cell. The following day, as he was given food, he left.**

[39] **In the same month, he went to respondent's headquarters after having secured an appointment with one Mr. Gwalagwala Dlamini, Chief of Personnel Officer. This officer could not assist. As he was leaving, he met the head of military department who too declined to come to his assistance stating that he feared losing his rank should he allow applicant to resume work without him first serving his sentence. He insisted that applicant serve his sentence. It was his evidence that he left the meeting unceremoniously, running away. He continued to pursue the matter in court.**

[40] **Two months or so, he received a call from the Information Commander who told him that the Army Commander wanted to meet him and discuss the matter. He told this caller that he was afraid to come to the headquarters as military officers would arrest him, contrary to the court order he was armed with. This officer assured him that he will arrange officers to meet him. He duly obliged and was escorted by the officers to the Information Commander's offices. He was informed by this Commander that the Army Commander, together with the top brass have instructed that he should serve the sentence and then go back to work. He should also remove the matter from the civilian court. He declined and left.**

[41] **Again around June 2005, he secured an appointment with one of the top brass of respondent, Sgt. Major Vernon Dlamini. He told Sgt Major that he was willing to report to work pending finalization of the present application in court. This officer informed applicant that he could only advise the Army Commander but could not take a decision on his matter. He promised to revert to him later.**

[42] **He duly did and advised applicant that the Army Commander declined his request on the basis that he did not want to set a precedent. This was his last attempt.**

[43] **The applicant was cross-examined at length. It was indicated to him that he was paid for October, November, December, January and February. The reason he received a zero balance is because he had a loan which impacted on the balance. It did turn out that applicant was not sure of the period upon which his salary was stopped.**

[44] **It was further pointed out that the interim order did not grant the prayer on salary. Applicant conceded to this as well.**

[45] **He was further quizzed on the fact that he could not belong to two units at the same time i.e. Mbuluzi and Phocweni. He stated that it was Phocweni. He indicated that he did go to Phocweni. It was put to him that when he went to Phocweni, he met Mr Zenzele Dlamini at the reception who, when he called him to the office, he skipped the fence and ran away. He refuted this. It was pointed out that as he ran away fron the holding cells, he ran away from this officer.**

[46] **It was disputed that this officer went to Mbuluzi for purposes of reporting but to recharge his cell phone. He denied this.**

[47] **The applicant closed his case.**

[48] **The respondent arraigned the following witnesses.**

[49] **Daniel Dumisani Masuku, who identified himself as the Station Commander at the relevant time. He knew the applicant who was part of the group that joined another on training for recruits at Mbuluzi Army Barracks where he was stationed. He saw the applicant when the trainees were sent back to their respective units. He also saw applicant approaching from Ngalawini, an area adjacent to Mbuluzi barracks. He went to the clinic and his base. He enquired what the applicant wanted from Sgt. Shabangu who was in charge of the clinic. He was informed that the applicant had come to recharge his cell phone.**

[50] **He told the officer to inform applicant that he should not be in that area as it was not his base. He approached the applicant directly and reminded him that he had instructed Sgt. Shabangu to inform him that he should not be at the Mbuluzi barracks. The applicant refused to leave. He instructed Sgt. Msebenzi Zwane who is since deceased to chase the applicant away. That was the last time he saw applicant.**

[51] **He further informed court that applicant never reported for duty at Mbuluzi as the head of that base, he would have received such report. He disputed applicant's evidence in-chief that he reported to him.**

[52] **During cross-examination Counsel for applicant informed this witness that his client wishes to convey that he had been honest in his evidence except to clarify a certain point. He was asked as to the reason for his failure to apprehend and arrest the applicant following his escape from the Army cell. The witness replied that he did not want to be part of the issue**

between applicant and the Court Marshall although he knew that applicant had escaped. It was put to this witness that when applicant went to Mbuluzi, he was ignored by the superior, including this witness. The witness disputed that and pointed out that applicant's assignment at Mbuluzi had been completed.

[53] Counsel ended by pointing out again that this witness testified very well.

[54] Zenzele Mehluli Dlamini. He was based at respondent's headquarters as Commander of Military Police. He knew applicant as a person who came to meet him pertaining work issues. On the 9th of December 2004, he received applicant who had been sentenced to goal. He was put into the holding cell. While they were preparing to transfer him to the respondent jail at Mbuluzi applicant escaped from the holding cell the very same day.

[55] He began to search for him as escaping was a crime. Applicant was sported at Luve on 4th January, 2005. They instructed those officers who saw him to apprehend him. This failed.

[56] He was however arrested on 14th January 2005 at Manzini park. He was taken to respondent headquarters where he was locked up. On the following day he was conveyed to Mbuluzi goal. He received a report that in the night of the 15th January he destroyed the roof of the goal and escaped. Days went by and on 29th January, 2005, this witness found applicant at the reception at respondent's headquarters. He instructed him to follow him to his office. Applicant informed him that he had not come to

him but came to Sikhondze. He informed him that they have been looking for him. He then followed him. When he called the Military officers by the gate to come to his office, he dashed away at a high speed. He used the back door and through the fence, into the nearby bush.

[57] **This witness refuted the applicant's allegation that he informed him to serve his sentence as he could lose his rank. This witness further told the court that the purpose of summoning applicant to his office was to take him back into custody. He maintained this even under cross examination,**

[58] **Under cross-examination Commander Dlamini informed the court that he was not aware of the court order in favour of applicant otherwise he would have respected it. He would not have persisted in arresting applicant in the light of the court order.**

[59] **Mfanawenkhosi Valentine Khumalo, the next witness, was based at Phocweni as Captain in the Royal Guard at the material time. The applicant was working at Phocweni as well. He was assistant to the Head of Phocweni Mr. Anthony Sibandze who is since deceased. He was attached for sometime at Mbuluzi. When applicant's group returned to Phocweni, Applicant did not do so. The officer who was assigned to collect the group from Mbuluzi back to Phocweni reported to him that applicant refused to board the motor vehicle. He enquired from Mbuluzi as to whether applicant was seen. He was informed that applicant was occasionally seen around Mbuluzi. He reported this to his superior Mr. Sibandze who ordered him to stop his salary for being absent from work. He duly complied and this was on 3rd November 2004. He further formulated charges against applicant. He never saw applicant then although he gathered that applicant did**

come to see Mr. Sibandze at Phocweni. He could not state under cross examination as to whether applicant came before respondent's guilty verdict or before. However, he was informed by Mr. Sibandze that applicant came to see him.

[60] The last witness on behalf of respondent was Mkhosi Goodman Dlamini who is attached to respondent personnel department dealing with payment of salaries. He is the officer who wrote a correspondence exhibit "B" stopping applicant's salary. I shall revert to his evidence later in this judgment".

[70] The Court *a quo* after summarizing the *viva voce* evidence as detailed above, approached its analysis in an objective and mature manner. Her Ladyship first and foremost, correctly armed herself with the entrenched principles that must guide the Court in balancing the totality of evidence led as espoused by this Court in **James Ncongwane v Swaziland Water Services Corporation (52/2012] [2012] SZSC 65 at 29**.

[71] Thereafter, she embarked on the delicate task of evaluating and weighing the relevant evidence on a balance of probabilities. It was after this exercise that Her Ladyship drew her conclusions in paragraphs [77] to [93] of the impugned decision as follows:-

"[77] It is my considered view that from the evidence of Mr. Mkhosi Dlamini that he was instructed on the 3rd November 2004 to effect deductions for the month of October from applicant's salary by his superior, that is Mr Mkhosi's superiors at headquarters must have realized that since applicant was

present, in November, 2004 as that is the period he was summoned to appear that he was no longer absent from work in November.

[78] As applicant pointed out in chief, he escaped from custody. According to the uncontradicted evidence of Commander Zenzele Dlamini applicant escaped on 9th December 2004. Mr Zenzele Dlamini testified that this is a crime on its own.

[79] According to the Notice of Motion for review of respondent's decision, applicant instituted proceedings on 21st December 2004. On 10th February 2005 respondent's decision was set aside on interim basis.

[80] Applicant informed the court that he reported at Nokwane, respondent's headquarters for purposes of resuming work after the court order. Commander Zenzele Dlamini confirmed having seen applicant at Nokwane. He informed the court that he instructed applicant to follow him. He duly complied. While they were both in his office, he called the security at the gate. His purpose was to have applicant re-arrested in order for applicant to serve his custodial sentence. It was his evidence under cross-examination that had he been aware that there was a court order setting aside the court marshal's decision, he would not have ordered for applicant's arrest.

[81] Further applicant has stated in chief that he also went to Phocweni to report. Mr Mfanuwenkhosi Khumalo informed the court that his immediate supervisor Sgt. Sibandze informed him that applicant did come at Phocweni.

[82] **<u>I accept the evidence of applicant that whenever he attempted to report, he was threatened with arrest on the court marshal's decision.</u>**

[83] **In the above analysis it is my considered view that the applicant cannot be properly held to have been absent from work from the period Nkambule J.'s ruling".** (underlining mine)

[72] We cannot fault these findings on the record. They are fore-shadowed by the unchallenged averments of the Cross-appellant in paragraphs [19] to [22] of the affidavit he deposed to in support of this application, which appear on page 58 of the record, as follows:-

[19] **Anthony Sibandze of Phocweni Army Barracks also echoed the sentiments expressed by Zenzele Dlamini that I must first go to army jail before my matter can be entertained. I made several attempts to resume my duties but my superior, namely Dumsane Masuku of Mbuluzi Army Barracks who was Deputy Commandant would not entertain me.**

[20] **On the 30th December 2004 he told me that I must go back to the civilian Court not in the army anymore. Eventually I remained at home. Although I was called in by Manyasi Simelane Formation Commander on the 6th April 2005 to persuade me to withdraw the matter from the Courts. It was not possible to do that. He told me that he was acting on instruction of the 1st Respondent.**

[21] In any event the 2nd Respondent has no legal instrument empowering them to suspend payment of my salary. Indeed if the allegation that I have absconded are true, then the 2nd Respondent ought to have properly terminated my services, but did not. They know my home area, they have my contact telephone numbers.

[22] The Respondents have never treated me as a dissertor in which event I would have been summoned for a disciplinary hearing before Court Marshall, instead they wanted me to drop the High Court case, as a condition of resuming work".

[73] The aforegoing allegations of fact remained uncontroverted by the Appellants who failed to challenge same in their answering affidavit. The legal effect of this is that these allegations are deemed admitted by the Appellants and established. See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635, O.K. Bazaars (Kunye) and Another v Sibusiso Derrick Mamba and Others, Case, No. 52/2011.**

[74] This state of affairs puts the findings of the Court *a quo* beyond reproach, effectively knocking the bottom off the Appellants' grouse against same.

[75] Similarly, Appellants' proposition that the impasse created by their attitude which made resumption of work impossible for the Cross-appellant should be treated as constructive dismissal or unfair

dismissal, entitling the Cross-appellant to a maximum compensation equivalent to salaries for a period of twenty four months only, in terms of Section 37 of the Employment Act 5/1980 and Section 16 (6) and (7) of the Industrial Relations Act 001/2000, is unsustainable. This theory finds no application *in casu*. This is because, it is common cause that the Cross-appellant's services were never terminated by the Appellants as to give rise to any claims on dismissal, unfair or otherwise. This would only arise if his services were terminated See **Makhetha and Another v Commissioner of Police and Another [2009] LSCA 4.**

This is not such a case.

[76] The inescapable facts of this case are that rather than terminate the Cross-appellant's services, the Appellants pursued his committal to goal. This venture they persisted in, even in the face of a Court order directing otherwise. They thumbed their noses at the interim order, called upon the Cross-appellant to distance himself from the civilian Courts, return to the military formation and serve the sentence imposed by the Court Martial, before they could countenance him.

[77] The Appellants were most certainly unconscionable in this enterprise. They not only held the valid order of a Superior Court of law in opprobrium, but in their flagrant disregard of same, they exhibited an unsavory attitude of arrogance and impunity, worthy of this court's disapprobation. Ordinarily, under the law this invidious conduct towards the court order should divest the Appellants of any right of audience in this Court in the matter until the contempt is purged.

[78] It remains for us to emphasis, that a Court Martial is a lower tribunal. Sections 151 (3) (b) and 152 of the Constitution Act 2005, clothe the High Court with review, appellate and supervisory jurisdiction over its decisions in the following terms:-

> **"151 (3) Notwithstanding the provisions of subsection (1)the High Court**
>
> **(a) ---------**
>
> **(b) has no original but <u>has review and appellate jurisdiction in matters which a Swazi Court or Court Martial has jurisdiction</u> under any law for the time being in force.**
>
> **152 <u>The High Court shall have and exercise review and supervisory jurisdiction over all surbordinate Courts and tribunals or any lower adjudicating authority</u>, and may, in exercise of that jurisdiction issue orders and directives for the purpose of enforcing or securing the enforcement of its review or supervisory powers" (**emphasis added)

[79] The interim order issued by the High Court was in pursuit of this mandate. It's violation by the Appellants amounts to self-help activity.

[80] It is this attitude of the Appellants that disabled all the Cross-appellant's attempts to return to work, as correctly found by the Court *a quo*. The Common Law principle of "**no work no pay**" finds no application in these circumstances. Appellants are the authors of their own woes. This appeal is unmeritorious. It fails.

[81] In these circumstances we order as follows:-

(1) The appellants' Appeal be and is hereby dismissed save for the following modification:-

The order of the Court a quo as appears in paragraph [1.2] to wit:-

"***Respondent is ordered to pay as salary applicant from that month"*** is modified to read as follows

"Respondent is ordered to pay applicant's arrear salary from that month up untill the date of this judgment".

(2) The Cross-appeal be and is hereby dismissed save for the following modification:-

The order of the Court *a quo* as appears in paragraph [2] to wit:
"Applicant's review application is dismissed" is hereby modified to read as follows:

"Applicant's review application is dismissed but without prejudice to his right in terms of Section 104 of the second schedule to the Umbutfo Swaziland Defence Order 10/1977".

(3) Each party shall bear its own costs.

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M.M. RAMODIBEDI

CHIEF JUSTICE

_____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

_____

E.A. OTA

JUSTICE OF APPEAL

For Appellants:	**Mr T. L. Dlamini**
For Cross-Appellant/Respondent:	**Mr M.P. Simelane**