



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

Case No. 147/2017

In the matter between:

**Henry Mswidi Magagula**

**Applicant**

**And**

**Umbutfo Swaziland Defence Force**

**1<sup>st</sup> Respondent**

**The Attorney General**

**2<sup>nd</sup> Defendant**

**Neutral citation:** *Henry Mswidi Magagula vs Umbutfo Swaziland Defence Force and Another (147/2017) [2019] SZHC 37 (28 February 2019)*

**Coram : T. L. Dlamini J**

**For Applicant : Mr M. Ndlangamandla**

**For Respondents : Mr V. Kunene**

**Summary:** *The applicant is a member of the Eswatini Defence Force – In July 2011 he was arrested and charged with the offence of Rape – In October 2011 he was convicted and sentenced for the Rape to 7 years imprisonment without the option of a fine – In November 2011 the army then suspended the payment of his salary – The applicant stated that he spent 8 months in prison while seeking the services of attorneys – He thereafter filed a review application before the High Court – On the 20<sup>th</sup> July 2012 the High Court admitted him to bail pending the review – Before this court he seeks an order directing the army to pay him arrear salaries in the sum of **E745 527.60** and that his salary be reinstated.*

**Held:** *That the army was entitled to suspend the applicant's salary in November 2011 because the applicant was no longer providing service to the army but was serving time in prison following his conviction and sentencing for the rape charge.*

**Held Further:** *That the army was entitled to suspend the salary as the applicant was no longer discharging any duty for the army as required by their employment relationship.*

**Held further:** *That the applicant's evidence is inconsistent and contradictory. The application accordingly dismissed with costs.*

## JUDGMENT

- [1] The applicant is a member of the Defence Force for the Kingdom of Eswatini (the army). According to the founding affidavit, he became a member of the army on the 20 March 2009. It is common cause that his salary from the army was stopped in November 2011. In February 2017 he filed an application before this court wherein he seeks the following orders:
- (a) That the army be directed to pay him his salary arrears in the sum of **E745 527.60** dating back from November 2011, up to and including the months to the date of judgment;
  - (b) That the army be directed to reinstate his salary as from the date of the judgment to be issued by this court; and
  - (c) That costs of this application be granted in his favour at the scale of attorney and own client.
- [2] The facts as set out in the papers before court are that the applicant was on 25 July 2011 arrested by the police and charged with the offence of Rape. He was admitted to bail the following day and was therefore released from custody.
- [3] The court has, unfortunately, not been adequately informed by the applicant about the timeline of the events that followed thereafter. A confirmatory affidavit deposed to by Corporal Msizi Dlamini was attached to the

respondents' answering affidavit. It confirms that the applicant reported to him (Corporal Msizi) at work during the time of his trial. Corporal Dlamini was the first person, in terms of the army command structure, to whom the applicant had to, and did report to. Corporal Dlamini deposed in the confirmatory affidavit as quoted below:

*"... May I further state that during the trial involving the Applicant, the Applicant was always reporting to me that he was attending trial up to the time that he was convicted and sentenced."* (paragraph 3 of the confirmatory affidavit at p.36 of the Book of Pleadings)

- [4] In the month of November 2011, the applicant's salary was stopped whilst he was awaiting trial and was still executing his duties, according to the applicant's founding affidavit. (paragraph 9 thereof at p.6 of the Book of Pleadings). This was done without any written notice being given to him or at least a hearing.
- [5] As I have mentioned above, the court is not properly informed about the timeline of the events that took place. It appears from the papers however, that the applicant was tried by the Magistrate's Court for the offence and was convicted and given a custodial sentence of 7 years without the option of a fine. Pursuant to the conviction and sentence, the applicant was in prison for a period of 8 months. He then challenged the conviction and sentence through a review application that he filed to the High Court. He states in the founding affidavit that he viewed the sentence as being wrongful, unlawful and tainted with irregularities.

- [6] On the 20 July 2012 the applicant was granted bail in sum of **E10 000.00** by the High Court pending review of the Magistrate Court's judgment. A copy of the High Court's order admitting the applicant to bail was attached to the founding affidavit and is marked "A", and is dated 20 July 2012. He duly paid the bail and was released from custody.
- [7] The applicant contends that subsequent to his release on bail, he reported for work at Phocweni Army Barracks since he had not been suspended and was still a member of the army. He was attended by Captain Comentanyeni Magagula who was responsible for the Royal Guard department where the applicant was deployed by the army. He was, however, informed by Captain Magagula that his seniors instructed him to inform the applicant to wait at home until they call him back to the army.
- [8] Since July 2012, the applicant states that he has been waiting in anticipation of being advised to report back to work but that call is seemingly not forthcoming. It is against this background that the applicant has approached this court for the relief set out in paragraph [1] above. He contends that his employment relationship with the army has not been terminated nor suspended, and that he has not been charged with any misconduct that may necessitate the stoppage of his salary.
- [9] The Army Commander, General S.S. Dlamini, deposed to the answering affidavit on behalf of the army. Before answering the merits, he raised a

point of law to the effect that the applicant's claim is time barred in terms of **section 33 of the Ubutfo Swaziland Defence Force Order No. 10 of 1977.**

[10] On the merits, the Army Commander stated that the applicant's salary cannot be reinstated because the applicant is absent from work without official leave. He also stated that since 2011 up to present day the applicant is absent from work and that his whereabouts are unknown by the defendants.

[11] The Army Commander denies that the applicant ever reported for duty in July 2012. If he did, he was to report his return to Corporal Msizi Dlamini, who would then report to Senior Simuka (now deceased). Senior Simuka would then report to higher authorities in terms of the army hierarchy structures. The higher authorities include the commanding officer and the second in Command, up to the Chief of Personnel at the Army Headquarters.

[12] The Army Commander also stated that Captain Comentanyeni Magagula to whom the applicant claims to have reported is not part of the command structure that had to deal with the applicant's case. He stated that Captain Magagula is the applicant's blood relative (his uncle) as he is a brother to the applicant's father. Whatever happened between Captain Magagula and the applicant was a result of their family relationship, and is not allowed in terms of ethics of the army, contended the Army Commander.

[13] According to the Army Commander, all that the army knows about the applicant is that in October 2011 he was convicted and sentenced to 7 years without the option of a fine in respect of the Rape charge. This information was furnished to the army by the police through a report to the Unit as per the procedure. The Army Commander concedes that the applicant is still a member of the army but states that until the applicant reports back to the army, there is no obligation to reinstate his salary.

[14] I must first deal with the point of law that was raised on behalf of the respondents. Below I quote verbatim, the respondent's deposition:

*"5.1 CLAIM TIME BARRED*

*5.1.1 It is humbly submitted that the Applicant's claim is time barred. This is in terms of section 33 of the Umutfo Swaziland Defence Force Order no. 10/1977. The Applicant's claim has been launched after the lapse of more than six (6) months from the date on which the Applicant was discharged from the USDF." (own emphasis)*

[15] I wish to point out that the point of law is premised on an incorrect factual information. The applicant has not alleged that he was discharged from the army. Instead he maintains that he is still a member of the army and that the employment relationship between him and the army is still in existence. The Army Commander conceded that the applicant is still a member of the army

except that his whereabouts are unknown. Below I quote what the Army Commander deposed in paragraph 10.6 of the answering affidavit:

*“10.6 As such the army is still looking for Mswidi and is not aware of his whereabouts except that in October 2011 he was convicted and sentenced to seven (7) years without the option of the fine for rape and this information was provided by the police through a report to the Unit as per the procedure. As it is today the Applicant is at home on his own free will.” (own emphasis)*

[16] It is clear from the papers before court, that the applicant was not discharged from the army. The essence of the point of law is that the applicant’s claim is time barred because it was launched after the lapse of six (6) months from the date on which the applicant was discharged from the army. For the foregoing, the point of law fails because it is premised on an incorrect factual information that was not even stated on the papers and is accordingly dismissed.

[17] There is another relevant legislation, *viz.*, the **Limitation of Legal Proceedings Against the Government Act of 1972**, which makes provision regarding the institution of legal proceedings against the government and all her departments in respect of a debt. For the benefit of future litigants against the government of Eswatini which the army is a part of, the payment of a monthly salary is an ongoing obligation (of the government where she is the employer). **Section 2(1)(c) of the Limitation of Legal Proceedings Against the Government Act, 1972**, provides that *“no legal proceedings shall be instituted against the government in respect of any debt after the lapse of a period of twenty-four months as from the day on which the debt*

*became due*”. This provision is not absolute in respect of claims for the payment of monthly salaries. The only monthly payments that lapse are those outside the period of twenty-four months from the date that judgment is granted by the court.

- [18] As authority for the above position, I wish to quote **P.H. Tebbutt JA** in the case of **Thomas Mbabane Dlamini vs Umbutfo Swaziland Defence Force and Others (27/2001) [2002] SZSC 27 (10 June 2002)**, paragraph 7, where he stated the following:

*“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 common law of master and servant ...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.... In terms of Section 2 (1)(c) of the Act his right to institute proceedings for recovering of such debt is barred after the lapse of a period of 24 months from the day on which the debt become due... However, any payment 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. (own emphasis)*

*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 10June 2002.”*

- [19] The next question to be decided is whether or not the army was entitled to suspend the applicant’s salary without notice to him or a hearing. It is common cause that the applicant’s salary was suspended in November 2011.

[20] The Army Commander deposed in the answering affidavit, paragraph 10.6 thereof, that the applicant was in October 2011 convicted and sentenced to seven (7) years imprisonment without the option to pay a fine.

[21] In paragraph 13 of the replying affidavit, the applicant admits that in October 2011 he was convicted and sentenced as stated in the paragraph above. Below I quote what the applicant stated:

“AD PARAGRAPH 10.6

*Save to again point out that 1<sup>st</sup> Respondent sometimes say my whereabouts are unknown and herein points out that I am at home, the rest of the allegations herein are admitted.” (own emphasis)*

[22] On the basis of the above stated facts which are undisputed, it is my finding that when the applicant’s salary was suspended in November 2011 the applicant was already serving time in Prison pursuant to the custodial sentence of seven years that was imposed by the Magistrate’s Court.

[23] It is my considered view and finding that the applicant could not be given any hearing by his employer whilst he was serving time as His Majesty’s guest in a correctional facility. The army was entitled to suspend his salary as the applicant was no longer discharging any duty for the army as required by their employment relationship.

- [24] The applicant stated in his founding affidavit, paragraph 11 thereof, that pursuant to being sentenced, he was in prison for a period of eight (8) months during which he was seeking the services of an attorney who would challenge the sentence. Eight months in prison is a long period and the applicant must count himself lucky that he was not dismissed from work.
- [25] The last issue which I must determine is the question of whether or not the applicant reported for duty after his release from prison, and whether or not he reported to work as per the army protocol and procedure.
- [26] The applicant contends that he reported for work but was informed by Captain Magagula that the army superiors have ordered that he remains at home until they contact him again. The respondents refute this allegation and contend that the applicant never reported to work. They submitted that there is a structure of command in the army that the applicant was required to follow when reporting back to work. They also contended that Captain Magagula is not part of that command structure as he is a blood relative of the applicant, and that the army ethical code does not permit Captain Magagula to be involved in such issues when they relate to the applicant.
- [27] On the totality of the facts placed before court, I find inconsistencies and contradictions on the facts alleged by the applicant. In paragraph 17 of the replying affidavit, the applicant states that his salary was stopped in November 2011 while he was still executing his duties and awaiting a trial

date for the criminal charge of Rape. Below I quote what the applicant states:

“AD PARAGRAPH 12

*...I reiterate contents of paragraph 9 of my founding affidavit, that my salary was stopped in November 2011 while I was still executing my duties and awaiting a date for trial.”*

[28] As pointed out in paragraphs [20] and [21] above, the applicant was convicted and sentenced in October 2011. His salary was suspended in November 2011. I therefore find that the applicant is dishonest and untruthful when he states that his salary was stopped while he was still executing his duties. He was already in prison serving his sentence at the time the salary was stopped.

[29] In the founding affidavit, the applicant states that subsequent to his release from prison in July 2012, he reported for duty at Phocweni Army Barracks where he was attended to by Captain Magagula. Below I quote what he deposed in paragraphs 13 and 13.1:

13

*“Subsequent to my release on the aforesaid date, I duly reported for work by submitting myself for duty at Phocweni Army Barracks since I was and remain not under suspension and further to that I remain a member of the 1<sup>st</sup> Respondent.*

13.1

*In the course of submitting myself to work, I was attended to by the captain responsible for the Royal Guard department one Comentanyeni Magagula, who informed me that his seniors instructed him to advise me that it would be best that I wait at home for them to tell me when to submit myself to work again.”*

[30] In the replying affidavit the applicant tells a different story concerning the place where he met Captain Magagula. He now states that he met him at Nokwane Headquarters. Below I quote what he deposed in paragraph 12:

*“ ... I submit that, Captain Comentanyeni Magagula is a Captain responsible for the Royal Guard Department at 1<sup>st</sup> Respondent, having been met by him at Nokwane Headquarters upon my return to report for work in 2012 was sufficient.”*

[31] The inconsistency and contradiction renders the applicant’s evidence unreliable, and he did so under oath.

[32] According to the founding affidavit, the duty stations for the applicant were three Royal Residences that I opt not to mention. It boggled the mind why the applicant did not go to any of those duty stations if he was truly reporting for duty. It is common cause that during his trial the applicant was constantly reporting to Corporal Msizi Dlamini whenever attending trial until the time when he was convicted and sent to prison. No explanation was ever given why the applicant decided to breach the reporting protocol that he honoured and followed during the time of his trial. There is also no explanation given why the applicant did not report for duty at his work stations but decided to go to places where his duty was not executed from.

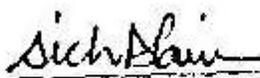
[33] In view of the observations made in the above paragraphs, I find on a balance of probabilities that the applicant is dishonest and untruthful that he reported for work after his release from prison in July 2012.

[34] In paragraph 15 of the replying affidavit the applicant states what I quote below:

*“ ... In any event, the issue before court is the unlawful withholding of my salary and not the fact that I was advised by the Captain of the Royal Guard department to wait at home after he had consulted his seniors who I believe include the said Chief Personnel.”*

[35] I have already pointed out in paragraph [23] above that the army was entitled, in my view, to suspend the applicant's salary. I find nothing unlawful by suspending the salary as the applicant was no longer executing his duties but was serving time in prison.

[36] For the foregoing the application is dismissed with costs.

  
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T. L. DLAMINI  
JUDGE OF THE HIGH COURT

