

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/210/2005

In the matter between:-

JOHN TS'OLO MAKHELE

PLAINTIFF

AND

**THE COMMANDER, LESOTHO DEFENCE FORCE
THE MINISTER OF DEFENCE
THE ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : 5TH July 2005
Date of Judgment : 27th April, 2017

Summary

Civil Procedure – Termination of plaintiff's commission as an officer in the Lesotho Defence Force – Court setting aside notice of plaintiff's termination – Plaintiff reporting to work – Defendant refusing to reinstate plaintiff – Defendants offering to compensate plaintiff instead of reinstating him – Whether or not plaintiff's case had lapsed in the interim while issues relating to his reinstatement and negotiations of compensating him were going on – Defendants raising special plea of prescription;

Held:- That plaintiff's claims have not prescribed.

ANNOTATIONS

CITED CASES:

- **Attorney General and Another v. Swissbourgh**
- **Diamond Mines (No. 2) LAC (1995 – 99) 214**
- **Kolane v. Attorney General, LAC (1990-94) 73**
- **ELS v. Miniser of Law and Order and Others 1993 S.A. 12 (c)**

- **Ryan v. Petrus 2010 (1) S.A. 169**
- **Rhodes University College v. Field 1947 (3) S.A. 437**
- **Minister of Police v. Mbilini 1983 (3) S.A.705**
- **Lesotho Bank v. Khabo (2000 – 04) 91**
- **Moru v, Attorney General and Another, LAC (2000 – 2004) 374**
- **National University of Lesotho and Another v. Thabane, LAC (2007 – 08) 476**
- **Pitt v. Economic Insurance Co. LTD 1957 (3) S.A. 284**
- **Commissioner of Police v. Rantjanyana C. of A. (CIV) No. 11 (2000-04)**
- **Motinyanye v. Mochiko, LAC (2000-04)1002**
- **D.P.P v. Mofubetsoane C. of A. (CIV) No. 4 of 2007 page 11 and 12**
- **WBHO Constrution (PTY) LTD v. Mphenetha, LAC (2005-06) 453**
- **Commissioner of Police and Another v. Ntlo-Ts’oeu, LAC (2005-06) 156B**

STATUTES

- **Lesotho Defence Force Act No. 4 of 1996**
- **Government Proceedings and Contracts Act No. 4 of 1965**
- **General Law Proclamation No. 2B of 1884**

BOOKS

- **Nathan – The Common Law of South Africa Vol. III p. 1594**

[1] INTRODUCTION:-

This case has been pending before this Court since the year 2005. It has been dealt with partially by different Judges of this Court and for not very clear reasons to this Court, it was re allocated to it around May 2007. It was first prosecuted before it on the 15/05/2007 and other subsequent dates in different years.

The case emanates from the alleged unlawful dismissal or termination of plaintiff’s commission from the Lesotho Defence Force by the first and second defendants.

The plaintiff’s claim is for general and special damages which can conveniently be divided as follows:-

General Damages

1. Contumelia, emotional trauma and hurt caused by first defendant in turning him away. He claims payment of M800,000.00.
2. Contumelia for emotional trauma and hurt caused by defendant's alleged malicious prosecution, for which he claims payment of M800,000.00
3. Injuria as a result of the tarnishing of plaintiff's dignity, good name and reputation which he alleges were unlawful, wrongful and intentional. He alleges that the conduct of the first defendant described above, portrayed him (plaintiff) as a criminal, a trouble maker who undermines authority and a person whom it is not in the interest of the Lesotho Defence Force to keep in its ranks

Special Damages

1. For payment of arrear salary from November 1998 to January 2005 in the sum of M709,183.00.
2. Payment of monthly salary from February 2005 to April 2019 in the sum of M1,023,816.00
3. For costs incurred as a result of having to transcribe the Martial Court proceedings in the sum of M16,000.00
4. Payment of M155,556.00 for the lapsed insurance policies brought about by the action of the defendant of having unlawfully removed him from the Lesotho Defence Force and the consequent withholding of his remuneration,

[2] **FACTS**

Both counsel have summarized the facts in their written submissions.

Briefly, the facts of this case are that the plaintiff is claiming from the first defendant a total sum of four million, two hundred and four thousand, five hundred and fifty six maloti (M4,204,556.00)

[3] The claim has been broken down or itemized to cover various sums in respect of:

1. Contumelia, emotional trauma and hurt (arising from his malicious prosecution and unlawful dismissed from the employ of the first defendant) – viz M1,600,000.00
2. Arrear salary from November 1998 to January 2005 – viz M709,183.00
3. Loss of salary from February 2005 to April 2019; viz M1,023 816.00
4. Injuria, viz – M700,000.00
5. Costs of defending himself against false charges; M16,000.00
6. Lapsed insurance policies; viz M155,556.00
7. Costs of suit

[4] The plaintiff joined Lesotho Defence Force in 1982, at the age of 18 years. He served in that force until the 22nd October 1998 when his commission was terminated in terms of Legal Notice No. 100 of 1998.

- [5] The plaintiff had attained the rank of second Lieutenant on the 5th December 1995. Before termination of his commission, the plaintiff had been charged and convicted by a Court Martial through the proceedings which were initiated on the 9th September 1997. He was charged with having allegedly disobeyed particular orders given to him.
- [6] The said conviction and notice in terms of which his commission had been terminated were later, on review, set aside by the High Court in CIV/APN/169/99 on the 8th August 2003.
- [7] On the 11th August 2008, the plaintiff tendered his services to the LDF and in fact reported himself to duty. However, and despite the invalidation of Legal Notice No. 100 of 1998, the LDF refused to admit the plaintiff into his former job. Instead it (LDF) offered monetary compensation to plaintiff in their letter dated the 10th September 2003.
- [8] It is apposite to indicate that the review proceedings took an inordinate delay to be prosecuted because of the absence of the court martial proceedings which were reported to have been destroyed during the invasion of the LDF premises by the South African troops in 1998. However, a record was ultimately reconstructed and the review proceedings prosecuted.
- [9] The plaintiff later had a letter of demand issued and served upon the LDF on the 9th February 2005. This was followed by issuance of summons dated the 20th May 2005.

[10] Exhibits “H”, “TM3” and “TM7” refer to the facts this far outlined respectively. Clearly the first defendant in annexure or exhibit “TM3” offered to plaintiff some undisclosed sum of money in lieu of plaintiff’s reinstatement. Subsequently, and through the office of the third defendant, a specific sum of M71,324.00 was offered to plaintiff in lieu of his reinstatement. This was not accepted by the plaintiff, hence the institution of the present proceedings.

[11] The plaintiff’s evidence is briefly that due to the training he had received while a member of the LDF, he had joined an elite platoon and had further underwent training as a paratrooper, trained in the use of artillery and in intelligence gathering. That as such, and according to the LDF procedures, he and all members in this category wore, among others a maroon beret and chest wings.

[12] However, on the 8th August 1997 he was accosted in a confrontational manner in the presence of junior officers; by DW2 Sam Malokotsa Lefoka who said plaintiff should not go to work at the Makoanyane barracks wearing a maroon beret. In his own words, the plaintiff testified that DW2 did not give him a lawful order but attacked him.

[13] He further testified that other than himself, some other paratroopers serving in other companies were still wearing their maroon berets. Most importantly, DW1 was demanding or ordering him to dress improperly as the effect of DW’1 order was that plaintiff should put off part of his uniform. He says that was an unlawful order and also that DW1 had no authority to make upon him such an order.

[14] It is his further unchallenged evidence that at the time DW1 so ordered him to put off the maroon beret, there had been no force order issued by the Commander of the LDF directing members of the LDF paratroopers in his position to stop wearing the maroon berets which is part of the paratroopers' uniform.

[15] What is clear and also unchallenged in his evidence is that there has never been a formal termination of the plaintiff's commission after Legal Notice No. 100 of 1998 was set aside by the High Court. Such a termination should have been issued under the hand of His Majesty the King in terms of section 21 of the Lesotho Defence Force Act No. 7 of 1996.

[16] A careful reading of section 21 of the above Act does not cover, as a reason for termination of an officer from the Lesotho Defence Force, the reason for which the plaintiff was court martialed and ultimately dismissed from the Lesotho Defence Force.

[17] The grounds upon which the commission of an officer of the Defence Force may be terminated are the following:-

- a) The officer is incapable of carrying out his duties efficiently
- b) It is not in the interest of the Defence Force that the officer remains in the defence force; or
- c) The officer has been convicted of a civil or military offence;
- d) The officer engages in active politics; or
- e) The public interest so requires.

[18] According to contents of exhibits “A”, the plaintiff was charged disciplinarily for having disobeyed a particular order. The order being that he had been ordered to wear a green beret instead of a maroon beret. The circumstances under which this incident unfolded have already been alluded to above.

[19] It is apposite to mention that even though the High Court had set aside the court martial proceedings and invalidated Legal Notice No. 100 of 1998; the notice through which the plaintiff’s commission was terminated; the plaintiff was not admitted back into the Lesotho Defence Force. Instead, he was offered monetary compensation although in that letter, annexure “TM3” no specific sum of money was suggested as compensation which was being offered by first defendant in lieu of not reinstating the plaintiff into the Lesotho Defence Force. No other attempts to terminate his commission from the Lesotho Defence Force were made. He was simply barred from resuming duties.

[20] Subsequently a lot of correspondence ensued between the office of the first defendant and plaintiff’s counsel about issues pertaining to the above. Ultimately after a letter of demand; exhibit “TM7” was served upon the defendants summons were issued against the defendants.

[21] The plaintiff’s claims against the defendants have already been summarized above. Suffice it to mention that the defendants have raised a special plea of prescription on plaintiff’s claims based on the

actio injuriarum in respect to claims number one up to four in the summons.

[22] On the merits they deny liability and quantum, although as the trial progressed certain agreements were reached on issue of quantum for loss of income.

[23] This was to the effect that in so far as claims numbers two and three arising out of unlawful dismissal, if successful, the plaintiff would be entitled to the sum of M413,090.00. This was based on the premise that, that would be so if the court were to hold that the plaintiff would have retired still in the position of Second Lieutenant; the position he held in 1998 when he was dismissed; but that should the court hold that plaintiff would have progressed to the position of a Lieutenant Colonel, then he would be entitled to damages of M1,564,282.00.

[24] The evidence adduced by each of the witnesses for plaintiff and the defendants has been ably captured and summarized by respective counsel in their written submissions. Same are incorporated herein.

[25] Each of the actuarial expert evidence is also captured in annexures "TM4" for plaintiff and those for defendants are captured in exhibit "W" and "X". See also a summary of Mr. Seleke's expert evidence filed of record on the 30th May 2011 and see also paragraph 17 of the defendants' written submissions.

[26] In a nutshell, the defendants argue that the plaintiff is entitled to payment on past loss of earning but that interest on such a claim should be payable from the date of judgment; not from the date when the loss was suffered. Plaintiff claims otherwise.

[27] Issues for determination by this Court can be summarized as follows:-

- Whether the plaintiff's claims 1 and 4 have prescribed in terms of the common law as claimed by the defendants; and if not,
- Whether the plaintiff has made out a case in respect of the various claims; and if so, the quantum of compensation he is entitled to.

[28] The first issue for determination by this Court should be responded to bearing in mind that firstly; the first defendant had turned the plaintiff away on the 11 August 2003 when the plaintiff tendered his services after the High Court had invalidated the notice through which termination of his commission was effected. This is the only such notice having been set aside in CIV/APN/169/99. No other subsequent such notice was issued.

[29] Secondly, the plaintiff's delay in instituting proceedings in CIV/APN/169/99 was not due to any delay on his part but was as a result of the none availability of the proceedings of the Court martial which were kept by the office or officers of the first defendant.

- [30] Thirdly, this application was made possible by the plaintiff after he had to transcribe a mechanical recording of the proceedings kept by him. Clearly this involved financial implications on his part.
- [31] Fourthly, subsequent to the first defendant having turned away the plaintiff on the 11th August 2003 (some three years after he had instituted CIV/APN/169/99; it was then that the Lesotho Defence Force offered to pay plaintiff some monetary compensation of an undisclosed amount. This was declined by the plaintiff.
- [32] Fifthly, it was only in May 2004 (some four or five years) after CIV/APN/169/99 was launched by the plaintiff that the defendants, through the office of the third defendant offered in specific terms an amount of M71,324.00 as monetary compensation for plaintiff's unlawful termination of his commission with the LDF.
- [33] The basis for the offer of this amount of money to plaintiff has or was never justified or explained by the defendants. This should at least have been done particularly regard being had to the plaintiff's service of 22 years with the LDF as he had first joined the LDF in 1982.
- [34] Of particular importance too, is the fact that the first and second defendants' termination of the plaintiff's commission had been set aside by a competent court and no appeal was filed against that termination of that commission. So, for all intends and purposes, the plaintiff was entitled to his salary and all attended benefits even if he was not reinstated to his former position by the first defendant.

[35] This is particularly so in the light of the fact that, parties also agreed during trial on the 27th May 2013 that the plaintiff would be entitled to the sums of money M413,090.00 or to M1,564,282.00 for the unlawful dismissal or for unlawful termination of his commission with the LDF.

[36] **The Law**

It is trite that the logical consequence to the setting aside of a dismissal as unlawful is the reinstatement of the dismissed employee; failure to reinstate the employee amounts to another unlawful dismissal. Particularly because the provisions of the L.D.F. Act, to with section 2 were not invoked.

[37] In the instant case once the High Court had set aside and or invalidated the notice through which the plaintiff's commission was terminated the first defendant should have accepted the plaintiff's tender of services referred to above. That he was turned away and barred from resuming duties as he alleges amounted to another unlawful dismissal.

[38] To this extend, the plaintiff should have been paid special damages as claimed from November 1998 to January 2005 and from February 2005 to April 2019 less what he had earned at Woolworths in the 12 years that he has been employed in that shop.

[39] The unlawfulness of the act of barring the plaintiff from resuming duties amounts to self help. It flies in the face of the Rule of Law which is the bedrock of Lesotho's Constitutional Order.

[40] In the instant case, the defendants have allegedly terminated the commission of the plaintiff unlawfully, they have further barred him unlawfully from resuming his duties. This they did without having invoked section 21 of the Lesotho Defence Force Act No. 7 of 1996. At the time Legal Notice No. 100 of 1998 yet been issued because on the 11 August, 2003 they barred him from resuming duties. For removal of doubt, I quote the said section of this Act.

Removal of Officers

2.1 “*The King, acting on the advice of the Prime Minister, may terminate the commission of an officer of the Defence Force on the grounds that:-*

- a) *The officer is incapable of carrying out his duties effecietly;*
- b) *It is not in the interests of the Defence Force that officer remains in the Defence Force; or*
- c) *The officer has been convicted of a civil or military offence*
- d) *The officer engages in active politics; or*
- e) *The public interest so requires”.*

[41] The charge sheet refers to section 51 (1) of the LDF Act No. 4 of 1996. However, this Court has not been referred, in support of the defendants’ case, to any law which empowers the defendants to bar any officer of the LDF from resuming duties even after the High Court or any Court for that matter, has set aside the purported Legal Notice through which the Commander of the LDF has purported to terminate one’s commission; neither has another Legal Notice of termination of commission of the plaintiff from office as contemplated under section 21 (supra) been issued out afresh by the first defendant.

[42] Further on, it is not the defendants' case that the logical consequence of the setting aside by the High Court of Legal Notice 100 of 1998 was the undisclosed unilateral offer of monetary compensation as reflected in exhibit "TM3" at page 31 of the record. The foundational basis for this offer has not been explained.

[43] What is an undisputed fact is that post the setting aside of Legal Notice 100 of 1998; the plaintiff's commission was not re-terminated in accordance with section 21 of the LDF Act (supra). What this entails is that until re-invoked, and whilst the order setting aside Legal Notice 100 of 1998 had not been successfully appealed against by the defendants; then the applicant remained a member of the LDF and should have resumed his duties and be paid all his salary and arrears. Why they took it upon themselves to bar him as they did when he resumed duties is beyond any one's understanding but it amounts to self-help. He was never even afforded any opportunity to say why he should be so barred; also it is not clear as to who actually gave an order to the effect that plaintiff be denied an opportunity to make representations before that unilateral offer to pay him the sum of M72,000.00 damages in lieu of his reinstatement to the LDF was made.

[44] **Special Plea of Prescription**

It has been submitted on behalf of the defendants that the plaintiff's claim in respect of all claims based on *actio injuriarum* have prescribed. It was argued in this regard that claims of this nature prescribe one year after the cause of action has arisen.

[45] Alternatively, it was argued that such claims have prescribed by reason of the provisions of section 6 of the Government Proceedings and Contract Act No. 4 of 1965, as more than two years have elapsed since they arose.

[46] The claims in question are in respect of prayers 1 and 4 respectively in the sum of M1,600,000.00 and M700,000.00. The defendants are in effect relying upon the common law principle and the statutory provisions of Government Proceedings and Contracts Act (supra) in the alternative in denying their liability to the plaintiff.

[47] To this extend, the defendants have referred and relied upon the common law as set out in General Law Proclamation No. 2B of 1884 which reads in so far as it is relevant, as follows:

“In all suits, actions or proceedings, civil or criminal, the law to be administered shall as near as the circumstances of the country will permit, be the same as the law for the time being in force in the cape of the Good Hope”.

[48] Reference has been made to Maasdorp’s “Institute of Cape Law” dealing with the common law of the Cape at the time, where among others it is stated that “the period of prescription differs with respect to different obligations”.

[50] Further reference is made on Nathan, Volume III of the common law of South. Relying on Voet 47.10.21 and Codex Instianus, 9.35.3, it is

stated that: “*The period of prescription of the actio injuriarum, on the other hand, is one year*”.

[51] In a nutshell, the defendants argue that the plaintiff’s present action has long prescribed because when on the 22 May 2005, it was brought, nearly five years after the notice of termination of the plaintiff’s commission and more than one and a half years after the plaintiff reported to duty in August/September 2003, had elapsed.

[52] The above argument is refuted by and or on behalf of the plaintiff whose submission is that a claim for malicious prosecution only arises when the prosecution has been determined in the plaintiff’s favour, or a decision has been made not to prosecute.

[54] Issues for determination by this Court are the following:-

1. Whether the plaintiff’s claims 1 and 4 have prescribed in terms of the common law as claimed by the defendants; and if not,
2. Whether the plaintiff has made out a case in respect of the various claims; and if so, the quantum of compensation he is entitled to.

[55] Mindful of the that fact that after legal Notice No. 100 of 1998 was set aside; that no appeal was ever launched against that order of the High Court, and also bearing in mind that the plaintiff was never recharged by the LDF subsequent to the review and setting aside of proceedings in CIV/APN/169/99 and also further mindful of the fact that, the

defendants elected unilaterally to offer monetary compensation to the plaintiff in lieu of reinstatement, it becomes clear that subsequent to the decision in the above civil application, the plaintiff remained or reverted to his position as a member of the LDF hence this offer by the defendants; otherwise the defendants were at large to recharge the plaintiff.

[56] They elected not to appeal the decision in CIV/APN/169/99 nor did they recharge him. As it is, the plaintiff has not been formally dismissed from the LDF nor has another gazette setting aside or terminating his commission from the LDF been reissued in terms of the LDF Act (supra).

[57] In annexure “TM3”, the unilateral monetary offer which was extended to the plaintiff makes reference to his reinstatement. Why, if the defendants were convinced that the plaintiff was not entitled to reinstatement, do they offer monetary compensation in lieu of his reinstatement to the LDF?

[58] The answer is simple and it is that after the said Legal Notice No. 100 of 1998 and the court martial proceedings against the plaintiff were set aside, the defendants had no leg to stand on but to have the plaintiff reinstated to his position as a Second Lieutenant in the LDF. He had, by order of a competent court been exonerated from any kind of blame. The disciplinary proceedings as appears in exhibit “A” were set aside.

- [59] The fact that the defendants took it upon themselves to bar the plaintiff from resuming duties after the demise of Legal Notice No. 100 of 1998 did not change nor alter in anyway the order of the court, except that it casts a dark cloud over the defendants' attitude towards orders of court.
- [60] That the High Court upon the invalidation of that notice did not necessarily state that it had directed the reinstatement of the plaintiff is, for lack of a better word, self-defeating and is a clear indication that the LDF command was determined lawfully or otherwise in getting rid of the plaintiff from its ranks. What is most disturbing is the fact that, the LDF command did not see it fit to afford the plaintiff any hearing before it decided to bar him from resuming duties after the setting aside by the High Court of the Legal Notice in question.
- [61] The fact of the matter is that, consequent upon the invalidation of that Legal Notice, the plaintiff became a free man with no conviction of any kind hanging over his head.
- [62] In fact, the High Court has effectively set aside the malicious prosecution of the plaintiff, so that his claim for such a prosecution arose in August 2003; the date on which such a decision was made. As a result, no claim for malicious prosecution could be launched before the setting aside of the court martial proceedings or before it became clear that a decision to re-charge or to re-prosecute had taken place.
- [63] There is no evidence that immediately between the 8 August and the 10 September 2003, the LDF recharged the plaintiff. What is clearly

demonstrated is that instead of recharging him, they accepted that they had lost the case in CIV/APN/169/99 and offered unilaterally and if one may say so; voluntarily to offer plaintiff monetary compensation in lieu of his reinstatement to the LDF. This is a gesture which emanated from the LDF itself. They are the ones who, for reasons best known to themselves initiated this offer.

[64] The defendants had themselves taken a period of about two months since they had barred the plaintiff from resuming his duties at the LDF before they offered monetary compensation to the plaintiff. This is aside from the fact that, the defendants were a direct cause of the delay in plaintiff applying for a review of the court martial proceedings which resulted in the termination of the plaintiff's commission in or with the LDF, because the court martial proceedings were not availed to him. It was only after the plaintiff had taken it upon himself to transcribe a mechanical recording of the proceedings kept by him that the review could formally and properly be dealt with.

[65] What this entails is that through no fault on his part, the plaintiff could not timeously approach the High Court by way of review against the court martial proceedings. The court processes through which the plaintiff had to go for him to get redress were obviously not yet over until when he had been availed the court martial record of proceedings as the High Court could not deal with the review application without it being furnished with the record of proceedings from the court martial. It is the plaintiff's right to apply for review of such proceedings as he was obviously aggrieved by its finding. So until that review application

was finally disposed off, and there was a final order of court or judgment, it could not be argued that the cause of action arose prior to the finality of court martial proceedings.

[66] Subsequent to the plaintiff being barred from resuming duties, he filed contempt of court proceedings against the defendants. Unfortunately, the dates when same was filed and finally disposed off have not been disclosed. Be that as it may, it is undeniable that until that application was also dealt with to finality, the plaintiff could not file any action for damages. This latest application had to also be finalized before plaintiff's cause of action for malicious prosecution could be effected.

[67] However, as a matter of common cause, the finality of CIV/APN/169/1999 as well as the barring of applicant from resuming duties occurred between the 8th and 11th August 2003. The letter of demand, exhibit TM7 was issued or written on the 9th February 2005. This is the letter through which the defendants were informed about the claim of damages by the plaintiff against them. In the meantime parties were exchanging correspondence as a way of having the matter for reinstatement of the plaintiff into the LDF finalized. This process cannot be ignored.

[68] Through exhibit TM7, the plaintiff initiated the issuance of summons against the defendants. There is no complaint that this process is flawed in anyway. From the above, it is clear that when on the 20 May 2005, the plaintiff issued summons against the defendants for payment to him of the total sum of M4,204,555.00, the summons were issued or filed

one year nine months (1 years 9 months) before the expiry of the two years prescriptive period spelt out in the Government Proceedings and Contracts Act (supra).

[69] The argument that the claims had prescribed does not hold water; since it was so issued just one month before the two years prescriptive period had expired. This is so if we speak in general terms without breaking down the different claims, but if we take into consideration the total sum of money which is claimed by the plaintiff against the defendants.

[70] Counsel for the defendants has decided to breakdown the claims and has therefore particularized each claim, hence why he has raised the special plea in the main and in the alternative. In doing so, he seems to have ignored the fact that post the review and the setting aside of Legal Notice No. 100 of 1998; the plaintiff was entitled to be paid his salary and arrears as if he had never had his commission terminated by the defendants.

[71] Put differently, post the setting aside of that termination of his commission, in so far as unlawful dismissal is concerned, and as agreed by both counsel during trial, the plaintiff would if successful, be entitled to payment of the sum of M413,090.00 if the court were to hold that he would have retired in the position of Second Lieutenant, which position he held in 1998 when he was dismissed.

[72] However, if the court were to hold that he would have retired a Lieutenant Colonel, then his entitlement as damages following his unlawful dismissal would be in the sum of M1,564,282.00.

[73] These figures are in relation to the plaintiff's claims number 2 and 3. These are claims of payment of salary for the period from November 1998 to January 2005; and from February to April 2019. These facts with regard to the plaintiff's entitlement are of common cause particularly because the plaintiff's alleged termination of his commission was set aside by the High Court, there is no reason advanced as to why he should not succeed on the said claims or at least on one of them.

[74] Regard being had to the above, and to the surrounding circumstances of this case, and in particular, to the unchallenged averments advanced on behalf of the plaintiff at subparagraph 6.9 and paragraphs 7 and 8 of his written submissions it is fair that the plaintiff be awarded damages in the sum of M1,564,282.00. it is accordingly so ordered that, the plaintiff having successfully proved his entitlement of salary from the above periods, and in the light of the fact that there is no countering defence that the plaintiff could not have progressed as he alleges, then he be paid the said sum of M1,564,282.00 as damages for the premature termination of his commission from the Lesotho Defence Force by the defendants one up to three.

[75] As a matter of common cause, the plaintiff mitigated the loss of his salary. To this extend, he worked and was employed at Woolworths

shop for a period of twelve years, earning a total sum of M43,229.00. Therefore the actual sum of money to be payable to the plaintiff is M1,151,192.00. This is comprised or made up as follows:-

M1,564,282.00 less what he earned at Woolworths – Refer to exhibit “U” for what he earned at Woolworths in the twelve years that he has been employed thereat.

[76] **Claims for Contumelia, Emotional hurt, Trauma and Hurt.**

The plaintiff further claims from the defendants the sum of M800,000.00, being for contumelia, emotional hurt, trauma and hurt arising from this dismissal.

[77] The effect and feelings following his dismissal and conduct of the LDF and how they have impacted upon or against the plaintiff have been clearly captured and expressed on his behalf in the written submissions of both counsel. Same need not be reproduced as they speak volumes of how the plaintiff felt and experienced. These have been referred to in his evidence.

[78] Counsel for the defence has not at all denied nor challenged the plaintiff's evidence in this regard. In fact, these are of common cause. Having not denied nor disproved same, it follows, that among others, the defence concedes that it was painful to be castigated as a criminal by the society, in the society, ruining his own career and reputation and his future.

- [79] The Defence only submits without having denied how and why the plaintiff alleges to have tremendously and negatively suffered as he testified, that the amount being claimed in this regard is totally out of proportion to the alleged injury.
- [80] For the defence to submit as it does that plaintiff was not accepted back into the ranks of the LDF because of the restructuring and not because he was branded as being a criminal is a distortion of the facts and the surrounding circumstances which ultimately resulted in the court martial proceedings which were launched by the LDF against the plaintiff. Consequently the said proceedings led into the termination of the plaintiff's commission from the LDF. The above were initiated long before the alleged restructuring.
- [81] The alleged but unconvincing restructuring in so far as it refers to the plight of the plaintiff was done or effected some seventeen (17) years after the plaintiff was served with exhibit A, which is the charge sheet through which the plaintiff was summoned to appear before the court martial being charged with disobedience to particular orders, an offence arising out of military service Etc.
- [82] In this exhibit A, the plaintiff is referred to as an accused. It does nowhere indicate how disobedience, a criminal offence in the military is related to the restructuring. Neither is it the defence case, that those members of the LDF who are affected negatively by restructuring are referred to as the accused.

- [83] Even this alleged restructuring was effected some many years after the LDF had turned the plaintiff away when he reported to work and offered his services to the LDF; after Legal Notice No. 100 of 1998 was set aside by the High Court.
- [84] To be precise this alleged restructuring is just a lame excuse by the LDF in persisting in their quest to carry on with the unlawful dismissal of the plaintiff from the LDF despite the setting aside of that letter of dismissal referred to as termination of commission.
- [85] In fact, the LDF had exhibited their steadfast refusal or negative behaviour towards the plaintiff from as early as when after the court martial found him guilty, they deliberately denied the plaintiff an opportunity to approach the High Court timeously for a review of the court martial proceedings on the pretext that the record of proceeding in the court martial had gone missing.
- [86] It is unthinkable that such a reputable institution could not safely keep records of such proceedings well knowing that those negatively affected by the outcome in that court had a right to pursue their cases by review in a higher court.
- [87] The argument that the LDF could not accept the plaintiff back into the ranks of the LDF when the plaintiff reported back to offer his services only some three or four days after the setting aside by the High Court of Legal Notice No. 100 of 1998 and due to the alleged restructuring is untenable. It is a distortion of the fact and the surrounding

circumstances of the events which resulted in the unlawful dismissal of the plaintiff from the LDF.

[88] The defendants have not disclosed to this Court when exactly in relation to the date when they turned the plaintiff away when he went to offer his services that they carried on with the so called restructuring; neither have they explained why they made no room for the plaintiff in that restructuring exercise as by then, they already knew that the plaintiff had successfully had termination of his commission from the LDF set aside by the High Court.

[89] They already had knowledge that the plaintiff had already been vindicated by the High Court on the 8th August, 2003. To date, and this is a matter of common cause, the defendants have not noted an appeal against the order of the High Court of the 8 August, 2003. That review order is extant.

[90] In any case, the issue regarding this restructuring has not even been pleaded by the defendants in their plea. It is being raised for the first time in their written submissions thereby denying the plaintiff an opportunity to address or respond to this issue.

[91] There is no way in which one can deny that the reasons cited in Legal Notice No. 100 of 1998 (a public document) as reasons for which the plaintiff's commission was terminated as well as the fact that he had been convicted of a civil or military offence etc. are allegations of such

a nature that to any reasonable and to the minds of right-thinking men, members of society, portray the plaintiff in a very bad light.

[92] Also, of great significance is the fact that the plaintiff has alleged that he was treated differently from other officers who were in his platoon and also wore berets of the same colour when he was the only one who humiliated by Lt. S.M. Lefoka in the way that he has described in his evidence in chief. Plaintiff has also demonstrated that he was also discriminated against and treated differently from one LDF officer who had been charged with mutiny but was found not guilty. This officer was reinstated to his job, but he (plaintiff) has not been so treated despite his having been vindicated by the High Court which set aside Legal Notice No. 100 of 1998.

[93] The evidence of the plaintiff that he cracked as a result of the treatment and hurt he was subjected to by the defendants has not been denied by the defence. It is his unchallenged evidence that in frustration he even burned copies of his insurance policies. Surely, no right thinking man of the plaintiff's standing could, for no reasons burn such valuable documents.

[94] Of course, at the end of the day, the amount of money to be awarded on this kind of damages, lies solely with the court which should exercise its discretion judicially/judiciously.

[95] Claim for contumelia for malicious prosecution

The plaintiff claims the sum of M800,000.00 as damages for malicious prosecution against him by the LDF. It is his evidence that the people who laid the charges against him did not honestly believe that there was justifiable cause to prosecute him. He says those people were motivated by revenge.

[96] The plaintiff has explained at length how he infiltrated the coup plotters who had planned to unseat the government. He also had the incident reported to his senior who were colonel Majara and Major Mofolisa.

[97] In fact his unchallenged evidence is that he reacted negatively to the coup plotters who had solicited his support in unseating the government. Having reported this plan to the above named officers, he was handed a micro-tape and the voice recording machine by Colonel Majara for plaintiff to use to record the conversation and whatever would transpire between him and the coup plotters.

[98] Having done the recordings he handed back the tapes and the recording machine to Colonel Majara. According to the plaintiff Colonels Lesitsi and Lebelo are some of the people who were in the same league with the coup plotters. Of course he makes mention of other officers with whom he was on the last day of his interview of the coup plotters.

[99] In his own words, the plaintiff told this Court that for his entire service in the LDF, he had among others, served the LDF and this country with commitment, patiently, respecting human rights; considering the

magnitude of what transpired between him and the coup plotters although nothing was done against them.

[100] He testified further that he felt betrayed by the Commander of the LDF who had preferred flimsy charges against him for his having worn his appropriate uniform. He also explained who he was hurt by the verdict of guilty which he was slapped with by that hostile biased panel of soldiers who had presided over the martial court proceedings which ultimately resulted in the unlawful dismissal or termination of his commission from the LDF.

[101] Further on, he testified that he had actually laid down his life at risk by having interviewed and having infiltrated the coup plotters who were politically influenced although they were soldiers in the national army.

[102] To this extend, his evidence is that the commander of the LDF should have protected him instead of aligning himself with the coup plotters.

[103] It is his further unchallenged testimony that at the time he was accosted by DW2 (Lt. Lefoka) about the fact that he should not wear a maroon beret; there were other soldiers, whose names he has referred to; who were in the f. company who also wore such berets.

[104] The gist of his testimony is that there was never any written communication issued by the then Commander of the LDF which prohibited the wearing of maroon berets by soldiers who were in the same company as him. It is further his unchallenged evidence that such

orders are not only written down by the Commander of the LDF but they are also communicated to junior soliders by their senior officers, not by shouting them out at the parade as LT. Lefoka did. Not only that, LT. Lefoka also singled him out even though other soldiers were still wearing maroon berets.

[105] He testified further that to his knowledge orders are never shouted out in the military, but are communicated out in writing.

[106] The fact that Lt. Lefoka (DW2 had so shouted at the plaintiff in full view of the rest of the soldiers, and singled him out has not been denied. He was adamant that as a commissioned officer and a lieutenant at the time, together with DW2, DW2 should not have shouted any order directed at him as he (DW2) did.

[107] The above evidence especially the manner in which DW2 communicated his order to the plaintiff has not been denied. In fact this Court has not been furnished with a copy of a written force order directed to the plaintiff and in which he was formally ordered not to wear a maroon beret. So also has the plaintiff's evidence that he was in fact being terrorized by DW2 and his group, not been denied.

[108] In the circumstances, the evidence and the submission that at that time there was no written communication from the LDF Commander prohibiting the use of maroon berets in the army remains unchallenged.

[109] Further on, at subparagraph 15.2 of the written submissions, it is submitted on behalf of the plaintiff that in the absence of such a written communication, DW2's conduct and the manner in which that alleged order was communicated was an attack upon him by someone who admittedly had been on opposite sides with him during the factional fight that broke out in the army in the year 2004; followed up with a prosecution on flimsy charges confirmed the plaintiff's feeling that he was being persecuted. This also remains unchallenged.

[110] To this extend, it is the considered view of this Court that the plaintiff has proved that he was not only emotionally hurt by the conduct of the LDF, but that the prosecution which followed immediately thereafter against him was malicious.

[111] This being a civil case, this Court has come to the inescapable conclusion that the plaintiff has; on a balance of probabilities discharged an onus placed upon him in proofing the existence of all the elements of the delict for malicious prosecution based on the *actio injuriarium*.

[112] Counsel for the defendants has ably and correctly outlined the elements which have to be proved by the plaintiff at sub paragraph 12.2 of his written submissions as being the following:- that

- a) The defendants set the law in motion – they instigated or instituted the proceedings;
- b) They acted without reasonable and probable cause;
- c) They acted with malice (or *animo injuriaude*) and

d) The prosecution failed.

[113] It has been conceded on behalf of the defendants that the LDF set the law in motion. However, for reasons spelt out at sub-paragraphs 12.3 to 12.7, the defendants deny the LDF acted with malice, without reasonable and probable cause.

[114] The gist of the defendants' charge preferred against the plaintiff is that the plaintiff had unlawfully disobeyed a command issued to him by Lieutenant S.M. Mofoka (DW2) of the F. Company under whose charge the plaintiff answerable at the time.

[115] It is denied on behalf of the plaintiff that any written communication was ever issued by or from the Commander of the LDF prohibiting the wearing or the use of the maroon berets in the army at the time that DW2 accosted the plaintiff saying plaintiff should not go to his work place wearing a maroon beret.

[116] Indeed no such written communication to this effect was ever issued by the Commander of the LDF. This explains why no documentary evidence confirming this fact was ever produced in the Court martial nor in the High Court.

[117] In addition to the above, the Commander of the LDF has not been called to testify that indeed, and in corroboration of DW2's evidence; he had issued such a written communication. DW2's evidence to this extend remains unsubstantiated.

[118] The plaintiff has not only disputed the existence of such a written communication by the Commander of the LDF, but he has also ably demonstrated that at that time in 1997, other paratroopers, to wit, specifically, Brigadier Mareka were also wearing maroon berets but were never accosted by DW2 in the way that he did to the plaintiff.

[119] In the absence of any such written instruction or communication, the conduct of DW2 and the manner in which he conveyed or communicated with the plaintiff about this issue was an attack upon the plaintiff by someone who admittedly had been on opposite sides with the plaintiff during the factional fight that broke out in the army in the year 2004.

[120] It is further the plaintiff's evidence that the issue of the beret was a small, petty thing because there was no dress code in the LDF at that time, but he was selectively charged before a court martial. This evidence has not been challenged, so it stands unchallenged and therefore, has to be admitted.

[121] In a nutshell, the plaintiff has, on a balance of probabilities, and regard being had to the circumstances of this case, proofed the existence of all the elements referred to above on behalf of defendants as the elements which the plaintiff has to allege and proof in support of the claim of M800,000.00 for contumelia due to malicious prosecution.

[122] One may add, that, the fact that the plaintiff has successfully proofed the existence of such elements in support of this claim is buttressed by

the fact that, firstly, the court martial proceedings against him were ultimately set aside on review by the High Court.

[123] Secondly, the defendants have never had the plaintiff recharged after the proceedings referred to above were set aside. Thirdly, the setting aside of the said proceedings is indicative of the fact that the defendants prosecution of the plaintiff failed.

[124] It is regrettable that, to date the defendants refused to accept the plaintiff's offer to resume his duties in the LDF. Be that as it may, it is the considered view of this Court that in the circumstances, the plaintiff is entitled to a substantial award under this claim.

[125] It is therefore the considered view of this Court that, the plaintiff having succeeded on this claim, fairness and justice demand that he be awarded damages; and is hereby awarded the sum of M500,000.00.

[126] **Claims 2 and 3 on loss of income (Claim for special damages)**

The above prayers have already been alluded to somewhere in this judgment. The basis for the plaintiff's claims for the alleged periods is founded on the premise that, like all of the most seniors including himself and most of the cohorts of soldiers he was commissioned with; he would also have progressed and promoted to higher ranks. That he would have been entitled to attend yearly promotion courses to enable him to move up the ranks.

[127] No reasons have been advanced by and or on behalf of the defendants why the plaintiff would not have progresses and not be promoted to the higher ranks in the LDF like the rest of other officers; including those who joined the LDF and were commissioned in the same year like himself.

[128] As a matter of common cause; the plaintiff joined the LDF when he was 18 years old and up until 1997, he had never been charged before a court martial. On the contrary, prior to this date, he had been appointed and selected to attend specialized training courses which he has referred to in his evidence. He was commissioned as a Second Lieutenant on the 15 December 1995.

[129] His employment with the LDF was, unfortunately terminated for no justifiable reasons. There is more than ample evidence that had it been not for this incident, the plaintiff would also have progressed to the rank of Lieutenant-Colonel. The proposition that he would have retired a second lieutenant is indeed not supported in both fact and law.

[130] The issue to be decided by this Court and as submitted by and or on behalf of the defendants at subparagraphs 14.4 (a) and (b) are answered in the affirmative. For this reasons and regard being had to the plaintiff's evidence, this Court has come to the conclusion that in the absence of anything to the contrary, the plaintiff would have retired at least as a Lieutenant Colonel and is therefore entitled to succeed on this claim. To this extend, the plaintiff is entitled to payment of M1,564,289.00 agreed upon with costs. It is accordingly ordered that

he be paid this sum of money with costs. However interest is to be paid from the date of judgment.

[131] Claim for costs of defending court martial proceedings:-

The plaintiff has claimed the total sum of M16,000.00 as costs he incurred in defending himself against the “flimsy” false charges instituted against him by the defendants. This amount of money has been broken down as follows:

- a) M3,000.00 for the purchase of a transcriber machine.
- b) M210.00 for the purchase of cassettes
- c) M299.00 for the purchase of a tape recorder
- d) M12,500.00 for legal costs.

[132] The plaintiff’s evidence that he had to purchase recording equipment, record the proceedings in the court martial and ultimately had to mechanically transcribe the said recording in order to compile a record of the proceedings for purposes of the review application is a matter of common cause.

[133] In fact, the plaintiff saved the day when the court martial proceedings could not be found. Had it not been for the plaintiff’s efforts; the review of the court martial proceedings would never have materialized. It should be recalled that the defendants had failed to dispatch this record to the High Court for review because they alleged that same had been destroyed during the 1998 riots when the defendants’ barracks/offices were invaded by the South African troops.

[134] All of the above facts and evidence remain unchallenged by the defendants. However, and very regrettably for the plaintiff, all of the cash receipts with the exception of one, were lost when he moved from the barracks.

[135] The only receipt which was alleged to have not been lost and so was available is the receipt in relation to item number (a). This is in respect of the purchase of the transcriber machine for the sum of M3,000.00. However, an objection against the handing in of this document was raised on behalf of the defendant because this had not been discovered in terms of Rule 34 of the Rules of this Court. Refer to sub-rule 7 of the said Rules. Indeed, this Court looked for such a document from the record of proceedings but in vain.

[136] In nutshell, not only were the cash receipts in regard to the purchases and payment of legal fees discovered but they were also not in existence. In the circumstances, the plaintiff has failed to prove that he is entitled to the amount of M16,000.00, as he failed to produce acceptable evidence that he incurred any expenses in the sum of M16,000.00 of the expenses claimed.

[137] **Claim for lapsed insurance policies**

The plaintiff claims the sum of M155,000.00 for lapsed insurance policies. He also attributes this as having come about as a direct result or consequence of his unlawful dismissal from work in the LDF by the first and second defendants.

[138] The plaintiff has set out the policies and the amounts on which he relies in support of this claim as being;

- a) 4130280353 taken on the 1st November 1995, maturing on the 1st November 2005 at a value of M8,876.00
- b) 41300280345 also taken on 1st November 2023 at a value of M58,174.00
- c) MKM Funeral policy No. 2000006351, at a value of M17,556.00
- d) A policy with Lesotho National General Insurance Company

The claims in respect of policies (c) and (d) were not pursued

[139] With regard to the policies mentioned in (a) and (b) no cash receipts were handed to Court as proof of payment of same. As has been indicated above, such receipts were burned under the circumstances which the plaintiff has disclosed in his evidence.

[140] Items (a) and (b) are not seriously disputed on behalf of the defendants even though plaintiff was unable to produce any documentary proof of the existence of the said policies.

[141] The only document which has been produced on behalf of the plaintiff as proof that he has been paying some monthly instalments in respect of certain policies are reflected on exhibit 1 and appear as H3 and H4. This document is dated the 16th September 2003. It is a copy of the payslip on which the payment details of the plaintiff are indicated.

[142] According to contents of this document (GOLFIS), the deductions from the plaintiff's salary were M70.00 x 2 on monthly basis. However, there is no evidence indicating the exact maturity pay out on each of the said policies.

[143] In the absence of proof of the above, it becomes impossible for this Court to say how the maturity values in the sum of M8,876.00 and M58,174.00 respectively have been calculated.

[144] This Court is aware that it has been submitted on behalf of the defendants that in the alternative, the lesser of the amounts agreed upon as potential damages should be used as a basis for his entitlement to damages, reduced in the manner submitted herein above. Refer to defendants' written submissions at paragraph 20, page 22.

[145] The Court has not been referred to any agreement as to which of the lesser amounts have been agreed to. One cannot speculate on the above particularly because each one of these policies is independent from each other. In any case, the policy no. (b) would mature some four years after the plaintiff would have retired from the LDF if he were to remain in its employ until 2019.

[146] In the absence of any proof as to how these two sums of money herein claimed from these policies are calculated, it is impossible for this Court to grant same even though it is clear that some monthly deductions were made from the plaintiff's salary to service same.

[147] The plaintiff should have called the Metropolitan personnel to testify on this issue as they would have supported his case from their files as to the projected maturity values of the said policies.

[148] For the above reasons, and regard being had to the surrounding circumstances of this case, the claim under this heading falls to be dismissed. It is accordingly dismissed with costs.

In brief, the plaintiff has successfully proofed his claim against the defendants in the following respects:-

- M800,000.00 for contumelia due to malicious prosecution;
- M500,000.00 for unlawful dismissal;
- M1,564,289.00 as salary he would have earned had he retired as a Lieutenant Colonel, less M43,229.00 he has earned as salary at Woolworths Stores = M1,521,060.00
- M13,000.00 for costs of defending the Court Martial proceedings
- **Total = M2,834,060.00**

[149] Interest is fixed at 18.5% per annum from date of judgment.

Defendants are ordered to pay costs of suit to the plaintiff.

M. Mahase

Judge

For Plaintiff: Adv. K.K. Mohau K.C

For Defendants: Mr. Viljoen S.C