IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 39/2017

In the matter between:

THE COMMANDER, LESOTHO DEFENCE FORCE	**1ST APPELLANT**
THE MINISTER OF DEFENCE	**2ND APPELLANT**
THE ATTORNEY GENERAL	**3RD APPELLANT**

And

JOHN TSOLO MAKHELE	**RESPONDENT**

CORAM: M. A. MOKHESI AJA
DR P. MUSONDA AJA
N.T. MTSHIYA AJA

HEARD: 23 NOVEMBER 2018

DELIVERED: 7 DECEMBER 2018

SUMMARY

Appellant instituted action claiming special and general damages – Prescription raised against special damages claim on account of the summons being issued beyond a two – year period provided for in S.6 of Government Proceedings and Contract Act No.4 of 1965 –

A special plea raised to the effect that Government Proceedings and Contract Act does not govern delictual claims based on action injuriarum- held that all delictual claim by persons against the government are governed by the said Act .

Malicious prosecution – requisites thereof – That the prosecution of which he or she complains was instigated by defendant; that it was terminated in his or her favours; that the defendant acted without reasonable and probable cause; that the defendant had requisite animus injuriandi.

Injuria - Requisites thereof; An intention on the part of the offender to produce the effect of his act; An overt act which the person doing it is not legally competent to do; An aggression upon the right of another; by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.

The power of the Court of Appeal to interfere with the Court a quo's award – Principles – where there has been irregularity or material misdirection; opinion that there is no sound basis for the award made by the Court a quo; where there is a substantial disparity between the award made by the court a quo and the award which the Appeal Court considers ought to have been made.

Costs – Where appellant substantially successful, an appropriate order as to costs is that each party bear its own costs of appeal.

JUDGMENT

M. A. MOKHESI AJA

INTRODUCTION:

[1] The respondent had instituted action proceedings against the appellant in the Court a quo on 22nd May 2005 for payment in the following amounts:

1. M1, 600,000.00 for *contumelia* emotional trauma and hurt.
2. M709,183.00 for arrear salary from November, 1998 to January 2005.
3. M1,023, 916.00 stream salary from February 2005 to April, 2019.
4. M700,000.00 for *injuria*
5. M16,000 costs of defending himself in the Court Martial
6. M155,556.00 for lapsed insurance policies.
7. Costs of suit.

[2] The respondent's claim as can be discerned from the above tabulation is made up of general damages and special damages.

As regards **General damages** the respondent's claims are made up as follows;

> "*1. Contumelia, emotional trauma and hurt – M800,000.00*
>
> *2. Contumelia, emotional trauma and hurt caused by the appellant's alleged malicious prosecution – M800,000.00*
>
> *3. Injuria for the respondent's … dignity, good name and reputation have unlawfully, wrongfully, intentionally and irrevocably tarnished by the conduct of the First Defendant of portraying plaintiff as a criminal, trouble maker, someone who undermines authority and a person whom it is not in the interest of the Lesotho Defence Force to keep in tis ranks. For all this plaintiff claims M700.000.00 for injuria.*"

As regards **Special damages**, the appellant claims are made up as follows:

> 1. Arrear salary from November 1998 to January 2005 – M709,183.00
>
> 2. Monthly Salary from February 2005 to April 2019 – M1,023, 816.00.
>
> 3. For lapsed insurance policies for non-payment of salaries and removal from the Lesotho Defence Force – M155,556.00.

[3] To the claims for general damages, the appellant pleaded specially that the claims have prescribed as they are founded on *actio injuriarum* which prescribes after one year after the cause of action had arisen, and that the current claims had prescribed as the summons were served on the appellants after more than one

year had elapsed. The appellant further pleaded in the alternative that the general damages had prescribed on the basis of section 6 of the Government Proceedings and Contracts Act of 1965, which stipulates that delictual claims against Government prescribe after the expiration of two years from the time when the cause of action or other proceedings first accrued.

FACTUAL BACKGROUND

[4] The factual matrix of this case is quite straightforward. The respondent joined the Lesotho Defence Force (LDF) on the 23rd August 1982, as a Recruit until 5th December 1995 when he was commissioned as a Second Lieutenant. He served until 22nd October 1998 when his commission was terminated in terms of **Legal Notice No.100 of 1998**. The Facts precipitating his dismissal are that; in September 1997 the respondent was charged with disobedience to an order not to wear a maroon beret. Consequent to being charged as aforesaid he was found guilty and convicted by the Court Martial. The Court Martial recommended his dismissal, and consequent thereto, the Commander requested the respondent to show cause why his commission should not be terminated. This, the commander did by way of a letter dated 6th May 1998. The respondent responded to the request on 7 May 1998. Following the respondent's response as alluded to, on 10th September 1998, in terms of **Legal Notice No.100** of **1998(hereinafter 'the Legal Notice')**, the respondent's commission was terminated with effect from that date.

[5] The respondent's commission having been terminated, he launched a review application to the High Court challenging the Court Martial proceedings which resulted in the termination of his commission.

[6] On the 8th August 2003, the High Court (**Peete J**) declared **Legal Notice No.100** null and void on the basis of irregularities. On the same day the respondent's attorneys authored a letter in terms of which they intimated that the respondent wished to tender his service, to the Commander, on 11th August 2003. On the said date the respondent reported for duty but was turned away without any reasons being proffered. The LDF simply declined to accept the respondent into its ranks.

[7] On the 10th September 2003, following the LDF's refusal to take the respondent back into its ranks, the LDF Legal Department wrote to the respondent's attorney to inform them that the LDF management "*... has... decided that it would be in the interests of both 2Lt. Makhele and LDF to consider the possibility of him not being reinstated. That some sort of financial settlement be agreed upon by the two parties in lieu of your client's reinstatement.*"

[8] On 19th May 2004, the Law Office followed up the above-mentioned letter with another letter, in terms of which they advised the respondent's attorneys that;

> *"We have been instructed that it will not be possible to reinstate applicant to the position he held following the restructuring of the Force. We have therefore been instructed to pursue with your office an alternative method which is that of damages."*

The respondent's attorneys did not respond to this letter, and following their non-response, the Law Office made an offer of M71, 324.00.

[9] Being dissatisfied with this offer, the respondent, on 22nd May 2005, instituted action proceedings against the appellants, to which the appellant filed a plea together with a special plea of *prescription*.

[10] Judgment was delivered on the 27th April 2017 in which the Court *a quo* entered judgment for the respondent and issued an order for payment by the appellant of the following sums.

1. M800,000.00 for *contumelia* due to malicious prosecution.

2. M500,000.00 for *injuria* for unlawful dismissal.

3. 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.

4. M13,000.00 for costs of defending the Court Martial proceedings

Total M2,834,060.00.

5. Interest fixed at 18.5% per annum from the date of judgment, plus costs of suit

[11] The appellant has appealed against the judgment of the Court *a quo* on various bases, viz ;

1. That the claims for general damages had prescribed as they were instituted after a year had lapsed after the cause of action had arisen, as per the prescripts of actio *injuriarum.*

2. That the claims for malicious prosecution and unlawful dismissal were instituted more than two years after the cause of action arose.

3. That the award of M500,00.00 for c*ontumelia* and emotional hurt for the unlawful dismissal was a duplication as damages were awarded for unlawful dismissal - alternatively, that the amount of M500,000.00 awarded is grossly excessive for the alleged *contumelia*.

4. That the finding that there was malicious prosecution was not factually based and therefore, incorrect.

5. The finding that the award of M800,000.00 for *contumelia* for the alleged malicious prosecution was grossly excessive.

6. The finding that the Respondent would have been promoted to Lieutenant-Colonel by the time of his retirement from the LDF was not evidentially based.

7. The award of M13,000.00 as costs for defending himself in Court Martial proceedings was not based on evidence and therefore incorrect.

EVIDENCE

[12] The Respondent's evidence was that he was the member of a special force, known as the parabats. This elite group of soldiers had undergone extensive training, as paratroopers. They were trained among other things, to gather intelligence and use of artillery. As part of their garb, the paratroopers wore maroon berets and chest wings. These maroon berets distinguished them from other members of the LDF.

[13] The respondent, testified that during the year 1994 there was a confrontation between factions within the LDF. He said he was in the paratroopers group, while Lieutenant Lefoka was in an antagonistic group. In March 1996, he was transferred to Mokoanyane barracks. What this meant was that the respondent had now been transferred to work with members who were formerly his antagonists. He narrated an incident where Lieutenant Lefoka, while waiting for the bus to take them to Makoanyane, in front of junior members ordered him to put off the maroon beret he was wearing, "*if I was going to where he worked*" and this evidence was not denied by Lefoka. The respondent further testified that he regarded the order by Lefoka to put off his maroon beret as unlawful as other parabats who had been deployed to other units within the Army still wore their maroon berets and chest wings – he made an example of Brigadier Mareka and Major Matamane. This evidence is uncontroverted. He said he regarded Lefoka's order as unlawful for the reason that there

was no Force Order ordering a change in the way the Parabats dressed.

[14] During cross-examination Lieutenant Lefoka, who testified for the defendants/appellants, conceded that only the Commander of the LDF had authority to determine the uniform to be worn by whom and when. The exchange between **Adv. Mohau K.C** (Counsel for the respondent) and Lieutenant Lefoka is illustrative.

> *"**Mr Mohau** (p429 of the Record) No whatever instructions you call it an order the plaintiff in saying you were harassing him by what you have said to him was irregular and unlawful because you had [no] authority to give certain instructions...that is correct my Lady.*
>
> *You did not have authority to determine the uniform of the LDF, isn't it? … I was not the one determining as to how the uniform could be worn.*
>
> *Yes I am not saying.*
>
> *……*
>
> ***Mr Mohau**: (at P 430 of the Record): And I put it to you that the Commander in the Army, the commander and his immediate officers who had authority to determine what uniform was worn by what type of people within the LDF? … That is correct.*
>
> *And I put it to you further that he would not even orally order to that effect, he would not give an order, you not issue an oral order about what uniform to be worn by in the LDF, such order would be given in writing and only in writing? …that is correct*
>
> *Now you will remember that you appeared before the Court Martial as a witness and three other people also testified … correct.*
>
> *And not one of the people who testified against the plaintiff in the Court Martial produced any written order from the Army Commander saying that paratroopers should stop wearing maroon berets, sorry not one of those witnesses including the plaintiff, the witness himself produced an order, it is an order, yes…that is correct my Lady.*
>
> *And I put it to you that, because it didn't exist?... it was there My Lady.*
>
> *And if doesn't exist today?... I don't know."(sic)*

[15] It is common cause that consequent to second confrontation in Lefoka's office where Lefoka again ordered the respondent not to wear his maroon beret, and following the respondent's refusal to obey, the respondent was hauled before the Court Martial and was charged with disobeying lawful orders. The Court Martial proceedings having been reviewed and set-aside by the High Court, the respondent's commission was terminated by means of **Legal Notice No.100 of 1998**. Buoyed by his successful review of the Court Martial proceedings, the respondent returned to work but was turned away. The decision of the High Court was never appealed against, nor was the respondent ever charged again before the Court Martial.

THE ISSUES TO BE DETERMINED ARE:

[16] 1. Whether the prescription period in respect of the respondent's claims based on *actio injuriarum* is one year – in terms of common law – as opposed to two years as provided by Government proceedings and contract Act No.4 of 1965.

2. Whether the award for respondent's claim based *actio injuriarum* had prescribed.

3. Whether the award for *contumelia*, emotion trauma and hurt caused by being turned away amounted to a duplication of damages given that the respondent had been awarded damages for unlawful dismissal. Alternatively that the award of M500,000.00 was grossly excessive in respect of *contumelia* and hurt.

4. Whether there was any reasonable and probable cause for prosecuting the respondent in the Court Martial

5. Whether the M800,000.00 damages awarded for malicious prosecution were excessive.

6. Whether the Court *a quo* erred in holding that the respondent would have retired from the LDF at rank of a Lieutenant Colonel instead of Second Lieutenant.

7. Whether the respondent has proved his claim for *injuria* and if so whether a claim of M700,000.00 was justified.

8. Whether the Court erred in granting the respondent M13,000.00 damages as expenses incurred by him for defending the court martial proceedings.

PRESCRIPTION:

[17] As alluded to earlier in the judgment, the appellants had raised a special plea of prescription against the respondent's claim for general damages, it being alleged the general damages claims had prescribed as the summons were issued more than a year after the cause of action had arisen – in terms of common law as regards claims based on *actio injuriarum.* **Mr Suhr**, for the appellants, argued that common law was governed prescription of delictual claims against the government as against S.6 of **Government Proceedings and Contracts Act No. 4** of **1965 (hereinafter 'the Act')** . He contended that the words; "*any law"* as appear in S.2 of the same Act read with sec. 3 of the Interpretation Act No. 1977 which under the definition of "*any Law*" includes common law

means that common law is applicable to delictual claims against the government as **the Act** provides only for contractual claims against government.

[18] On the one hand, **Mr Mohau KC**, for the respondent/plaintiff, argued that it is not correct that common law govern prescription of claims against the government based on *actio injuriarum*. He argued that prescription of claims against the government is regulated by s.6 of the Act. He argued that what S.2 of the Act does, is to give permission to private persons to sue government when claims are based on wrongs committed by public servants while acting within the scope of their employment subject to legislative limitations.

[19] Although arguments regarding the choice of law on claims based on *actio injuriarum* were addressed in the Court a *quo*, the Learned Judge did not give a reasoned choice of one regime over the other. The only time she makes a cursory mention of prescription was when she approached the conclusion of her discussion on whether the plaintiffs claim/respondent's had prescribed. This is what she said:

> "[*68] 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 of M4, 204, 555.00, the summons were issued or filed one year (1 year 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 different claims, but if we take into consideration the total sum of money which is claimed by the plaintiff against the defendants"

The above notwithstanding, the ensuing is a discussion of the applicable law on the claims based on *actio injuriarum*. The argument by **Mr Suhr** that claims against government based on *actio injuriarum* falls to be determined by reference to common law is outrightly rejected, as will be demonstrated by the ensuing discussion.

[20] **Government Proceedings and Contracts Act No.4** of **1965** provides:

"*2. Any claim against Her Majesty in Her Government of Basutoland which would, if that claim had arisen against a subject, be the ground of an action or other proceedings in any competent court, shall be cognizable by any such court, whether the claim arises out of any contract lawfully entered into on behalf of the crown or out of any wrong committed by any servant of the crown acting in his capacity and within the scope of his authority as such servant:*

Provided that nothing in this section contained shall be as affecting the provisions of any law which limits the liability of the crown or of the Government of any department thereof in respect of any act or omission of its servants, or which prescribes specified periods within which a claim shall be made in respect of any liability or imposes conditions on the institution of any action.

.....

6. Subject to the provisions of sections six seven, eight, nine ten, eleven twelve and thirteen of the Prescription Act, no action or other proceedings shall be capable of being brought against Her Majesty in Her Government of Basutoland by virtue of the provisions of section two of this act after the expiration of the period of two years from the time when the cause of action or other proceedings first accrued."

[21] In terms of S.2 (above) the state consents to being sued in respect of contract or wrongs committed by its public functionaries acting within the scope of their employment subject to limitations which may be provided by any legislative enactment. The notion that the government should legislate its consent to being sued is steeped in historical context. It is rooted in the principle of Immunity of Sovereignty from suit. **Roger V. Shumate**[1] describes the principle as follows:

> *"There is an old and well-established principle in Anglo – American jurisprudence that sovereign cannot be sued without its own consent. This principle is said to be derived from the ancient doctrine that "the king can do no wrong," and that he, as author of all law, cannot be held accountable for his acts. This doctrine would seem to reflect the actual practice in all of the early absolute or divine-right monarchies, but as a rationalized principle of law, it seems to stem from Roman Jurisprudence…Originally, the immunity of the sovereign from legal process applied to the person of the king, since all acts of government were assumed to be his personal acts. As the king lost his personal sovereignty, however, the immunity passed to the government, which then became sovereign…"*

[22] Historical context of 'consent clause' aside, the discussion now should focus on whether the words "*provided that nothing in this section contained shall be construed as affecting <u>the provisions</u>*

[1] Roger V. Shumate "Tort Claims Against State Government", Https; //scholarship.law.duke.edu>cgi>(accessed of 23 November 2018)

of any law…" as appear in s.2 of the Act should be interpreted to refer to common law as well. Merriam-Webster's Law Dictionary defines the word "*provision*" as "a stipulation (as a clause in a statute or contract) made before hand." Jowitt's Dictionary of English Law (2nd Ed.) by John Burke, defines the word *'provision'* thus, "provision also means a clause in a legal document."

[23] It is clear therefore, based on the definition of the word '*provision*' that the phrase "provisions of any law" refers to legislative enactments as opposed common law as was contended for **Mr Suhr**. In fact, as was correctly pointed out by **Mr Mohau K.C**, this jurisdiction is replete with judgments where the invocation of **the Act** to delictual claims against Government has been done axiomatically (see; **Kolane v Attorney General LAC (1990 – 94) 73** – malicious prosecution case - ; **Moru v Attorney General LAC (2000-2004) 374 A** – case about damages for unlawful assault by the police). These are, but, a few examples that delictual claims against government are subjected to the prescription requirements of the provisions of **the Act**. Lehohla J (as he then was) in **Putsoa v Attorney General (CIV/T/363/860**(unreported) rejected the conclusion made by learned author Palmer in his book*"The Roman – Dutch and Sesotho law of Delict" (Morija, 1970)* wherein he had written that extinctive prescription on delictual claims in Lesotho, based on *actio injuriarum* are subject to a prescriptive period of one year. The learned Judge rejected this conclusion and said *"… it appears the learned author Palmer was labouring under a*

misconception when he said the question of extinctive prescription is not governed by statute but by Common Law. Any argument based on this view cannot hold for it disregards the existence of the 1965 Acts (supra)"

I am in full agreement with the views expressed above. The ineluctable conclusion therefore, is that the prescription period in respect of claims based on *actio injuriarum* is two years as provided for in the **Act.**

[24] The next question is whether the respondent's claims based on *actio injuriarum* had prescribed. The respondent had claimed damages under three heads, viz,

1. For *contumelia*, emotional trauma and hurt. There seemed to be confusion as to which specific incident the respondent was referring to, which he says was contumelious. The appellants' Counsel seemed to think the respondent was referring to the time when he was turned away after he had reported for duty following his successful review of the Court Martial proceedings. My considered view is that this claim is related to the events of the 22nd October 1998 when he was served with the Legal Notice terminating his commission, and this is confirmed by what the respondent said during his testimony wherein he said the following ;

(at p. 145 of the record)

"Uh-huh…the Government Gazette it's a, a publication. Of what date? … It is; it is dated, Thursday the 8th October 1998.
And, to what effect is it? What does it say?…The Lesotho Defence Force removal of Officers, Notice 1998.

> *And, it would be legal Notice Number 100/1998? … That is correct."*
> *(at P 146 of the Record)*
> *"**Mr Mohau**: As the Court pleases **Mr Makhele**, how did you take all this in, when you were read this information? How did you feel? … I was shocked, disappointed, and angry. I am sad, humiliated and betrayed.*
> *Betrayed, So, you, you had a mix of emotions, if I any put it that way?... I was deeply hurt. Beyond imagination. My sore to this, was beyond words."*
> *(and at p.148 of the Record, line17)*
> *"**Mr Mohau:** You are for the contumelia suffered, this and that of your dismissal from the Lesotho Defence Force, you have, and you are claiming M800,000.00? …That is correct, my Lady.*
> *…*
> ***Mr Mohau**: You, you have been describe how you were feeling, the hurt, your dignity was by this curtailment of your military Career … That is so, my Lady.*
> *And it is for this that you are saying you, you're claiming M800,000.00? That is correct.*" (sic)

These extracts from the respondent's testimony puts it beyond doubt that the claim for *contumelia* occasioned by being dismissed from the army on the 22nd October 1998 is what the respondent is claiming under this head. Undoubtedly, when the respondent issued summons on 22nd May 2005 the claim had long prescribed as the cause of action arose on the 22nd October 1998 when the Legal Notice terminating his commission was read out to him. The summons were only issued six years later. In the light of this conclusion it is unnecessary to determine whether indeed there was duplication of claims.

2. A CLAIM FOR MALICIOUS PROSECUTION.

[25] The cause of action in respect of this claim arose on the 8th August 2003, when the High Court reviewed the proceedings of the Court Martial. Therefore, when the summons were issued on the 22nd May 2005 the claim was still within the two years period within which he was permitted to sue. What falls to be determined is whether the respondent succeeded in proving his claim under this leg. For the plaintiff to succeed in a suit for malicious prosecution the following requirements as outlined in the case of **Lesupi v The Director of Public Prosecutions and Others C of A (CIV) No.50/2016 [2017] LSCA** (12 May 2017) have to be shown to exist, namely;

> "*1. That the prosecution of which he or she complains was instigated by the defendant;*
>
> *2. that it was terminated in his or her favour;*
>
> *3. that the defendant acted without reasonable and probable cause; and*
>
> *4. that the defendant was actuated by* ***malice***."

[26] Regarding the last requirement, it is respectfully submitted that "*malice*" is not the requirement as some authorities seem to suggest, but rather *animus injuriandi.* This is confirmed by the learned authors Neethling et al, "*Law of Delict*" (3ed Butterworths) p 352. Regarding the element of *animus injuriandi,* Neethling et al (ibid) at p352 fn. 225 said the following:

> "*Animus injuriandi* in this regard means that the defendant, while being aware of the absence of reasonable grounds for the prosecution, directs his will to prosecuting the plaintiff. If no reasonable grounds exist but the defendant honestly believes either that the plaintiff is guilty, or that reasonable grounds are present, the second element of *animus*

> *injuriandi*, namely consciousness of wrongfulness, will be lacking. His mistake, reasonable or unreasonable, thus excludes *animus injuriandi* and consequently liability."

[27] Regarding the element of 'absence of reasonable and probable cause', the court in **Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A)** at 136 A – B stated the test as follows:

> "*When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause*,"

[28] The anomaly of this case, at least, in relation to this claim is that the prosecutor was not called as a witness to enable the Court to determine or gauge the subjective element of the requirement for acting 'without reasonable and probable cause.' In relation to the objective element of the same requirement, it is common cause that when Lieutenant Lefoka gave the respondent orders to put off his maroon parabats beret he was doing so as his senior. However, this notwithstanding, it is common cause as demonstrated earlier in the judgment that the maroon beret that the respondent was ordered not to wear was still being worn by other parabats who were deployed in other units within the Army. It was uncontroverted evidence that Brigadier Mareka still wore his maroon beret without any problem. It is common cause that there was no written Force Order directing that maroon berets should

no longer be worn in the LDF. The way this Court sees it the decision by Lefoka to order the respondent to put off his maroon beret was his own decision motivated by ill-feelings towards the members of the parabats against whom in the recent past they had violent confrontation with. Objectively speaking the prosecution of the respondent, in view of the above discussion, could not have been based on reasonable and probable cause. All this I am saying keeping in mind that the Court did not have the benefit of gauging the subjective element of the requirement 'without reasonable and probable cause' as the person or persons who decided to prosecute the respondent were not called as witnesses. Only Lieutenant Lefoka was called as a witness. In my considered view, the prosecutors' not being armed with a Force Order discontinuing the maroon berets but nevertheless continuing to charge the respondent with disobedience of lawful orders satisfied the requirements of of *dolus eventualis*. Since the lawfulness of the order not to wear a particular item as part of uniform could only come from the Commander of LDF, the prosecutors foresaw that they were acting wrongfully but nevertheless reconciled themselves with that reality and went ahead to charge the respondent, caring less about the consequences of their acts. (See: **Radolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA)** at para. 18. In my considered view the respondent has succeeded in proving a claim for malicious prosecution.

[29] However, the matter does not end here as the Court has still to determine the quantum of damages. The Court *a quo* had awarded damages in the amount of M800,000.00. It is trite that the determination of quantum falls within the discretion of the trial Judge. But, as the correct measure of damages is not an exact science, the Court of Appeal will only interfere with the amount awarded as damages where the following jurisdictional facts are found to exist,*viz*,

a). Where there has been irregularity or material misdirection

b). where the Court of Appeal is of the opinion that there is no sound basis for the award made by the Court *a quo.*

c) where there is a substantial variation or a striking disparity between the award made by the Court *a quo* and the award which the Appeal Court considers ought to have been made. (**National University of Lesotho v Thabane (C of A (CIV) No.3/2008) [2008] LSCA 26** (17 October 2008) at para. 22.

[30] Although the award of damages lies within the discretionary powers of the trial Judge, he or she is guided by the principle of ensuring fairness to both parties (**Pitt v Economic Insurance Co. Ltd 1957 (3) SA** 284 (D) at 287 F. The Court, in its exercise of discretion, is encouraged to seek guidance in previous awards in comparable cases in its quest to determine what is fair in the circumstances of each case. My view is that the award of M800, 000.00 by the court a *quo* is excessive. My research in this

jurisdiction did not yield a comparable case on the issue of malicious prosecution.

[31] In South Africa, the Supreme Court of Appeal in December 2014 in the case of **Minister of Safety and Security No. v Schubach (437/13) [2014] ZASCA 216** (1 December 2014), a Colonel within the South African Police Service had been found to have been maliciously prosecuted on charges of unlawful possession of firearms and ammunition. The trial Court had awarded him damages in the amount of M120,000.00. On appeal the award was reduced to M10,000.00. In my view the Court *a quo*'s award of M800.00.00 was excessive as there is striking disparity between what this court would have awarded and what was awarded by the court a *quo*. The award which is fair and appropriate in the circumstances of this case would be M20,000.00.

[32] **3. INJURIA**

No award was made by the Court *a quo* on this claim and it is not clear why that is so. This issue was argued in the court a *quo* and on appeal. The question which exercised our minds was whether this court, should determine the quantum despite the fact that the court *a quo* did not do so. This notwithstanding, this Court is in as good a position as the trial Court, to determine whether the claim has been proved, and to award damages. Remitting case for this issue to be dealt with by the court a *quo* would occasion unnecessary costs and delays on the litigants. I am fortified in the

approach I take of this issue by the decision in **Media24 Limited v Du Plessis (127/2016) [2017] ZASCA 33** where in an analogous situation the court said the following, at para. [36];

> *"The appeal against the award must accordingly be upheld. I did not understand counsel to be averse to this court itself determining the quantum of damages rather than remitting the case to the High Court for that purpose.(See for example Neethling v Du Preez at 302 A-J) where this court said the determination of the award of damages by itself might have been an expeditious course than remitting the case for damages to be fixed by the trial court. And that such a course would avoid further delays and additional costs and eliminate the possibility of a second appeal to this court following upon a determination of damages by the trial court."*

I am in full agreement with the views expressed in this case.

Under this head the respondent had claimed an amount of M700,000.00 as compensation for *injuria* occasioned by the appellants in the following ways *"… dignity, good name and reputation have been unlawfully, wrongfully, intentionally and irrevocably tarnished by the conduct of the First Defendant of portraying plaintiff as a criminal, a trouble-maker, someone who undermines authority and a person whom it is not in the interests of the Lesotho Defence Force to keep in its ranks. For all this plaintiff claims M700,000.00 for injuria."*

The incidences related to this claim intertwined, but what is abundantly clear is that the straw that broke the camel's neck as regards this claim was the incident when the respondent was

turned away when he reported for duty in August 2003 and it became clear that the 1st appellant would not take him back even after launching a successful review against his dismissal. Viewed in this light, the claim for *injuria* had not prescribed when summons were issued.

[33] **The Requisites for Injuria.**

In ***Delange v Costa (433/87) [1989] ZASCA*** *6* the three essential requirements to establish when claiming for *injuria* were stated as follows;

> *"I. An intention on the part of the offender to produce the effect of his act;*
>
> *II. An overt act which the person doing it is not legally competent to do; and which at the same time is*
>
> *III. An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other".*

At p11-12 the Court said:

> "Logically in an action for *injuria* one should commence by enquiring into the existence of the second of these requisites, viz, whether there has been a wrongful overt act….. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. Once the wrongfulness of such act has been determined *animus injuriandi* will be presumed (citations omitted) it would be open to the defendant to rebut such presumption by establishing one of the recognised grounds of justification. If the defendant fails to do so the plaintiff, in order to succeed, would have to establish the further requirement that he suffered an impairment of dignity. This involves a consideration of whether the plaintiff's subjective feelings have been violated, for the very essence of an injuria is that the aggrieved person's dignity must actually have been impaired. It is not sufficient to show

> that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities."

[34] In determining whether the act complained of is wrongful the Courts apply reasonableness "test," "*this is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful…*"(*Delange v Costa* above). The respondent had just successfully challenged his dismissal, and prosecution. This success should have brought him joy, but alas it spelt the beginning of a difficult time for him. He reported for duty but was turned away. It instantly became clear that the 1st appellant would not take him back despite the court having reviewed his dismissal. No reasons were proffered for not taking the respondent back except vague assertions such as it would not be in the 'interest' of both the respondent and the LDF for the former to resume his duties. This country is a Constitutional democracy, and the LDF operates within the same space where its actions should be guided by Constitutional principles. The respondent was simply thrown out of the LDF, to put it bluntly, without being afforded the benefits of the *audi alteram partern* principles. When a person is treated in this manner his dignity and a sense of worth is undermined. The right to be heard and to be told why a particular decision is taken against oneself"…*express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one*" (**Matebesi v Director of Immigration and Others C of A (CIV) 2/92** (unreported) at p.9.

No justification was ever provided as to why the respondent should at all costs be jettisoned out of the LDF. The behaviour of the 1st appellant viewed in this light is wrongful. The society cannot reasonably expect disciplined forces to treat its members in the manner in which the respondent was treated.

[35] Subjectively, the respondent said he felt portrayed as a criminal and trouble-maker and that his dignity, reputation and good name has been tarnished by the treatment he suffered at the hands of the LDF. I cannot fault the respondent for having felt this way as the conduct of the 1st appellant is reprehensible. As already said, no justification was proffered for treating the respondent this way. In the result I find that the respondent has proved the requisites of *injuria*. There being no comparable cases on the subject matter and taking into account the considerations of fairness to both parties, and the economic conditions of the Kingdom, a fair award would be M20,000.00.

CLAIMS FOR SPECIAL DAMAGES

[36] Under this head the respondent had claimed for:

1). Arrear salaries and future salary from November 1998 to April 2019, the latter date being the date on which he would be obliged to retire, at the age of 55, for which he claimed M1,023,816.00. The Court *a quo* awarded an amount of M1, 564, 283.00 and,

2). Costs for defending himself in the Court Martial.

[37] (1) **Loss of past and future salary**.

In relation to this head the parties had concluded an agreement couched in the following terms:

> *"IN CASE CIV/T/210/05. JT MAKHELE VS LDF*
>
> ***AGREEMENT***
>
> *1. The parties hereto agree that, insofar as the plaintiff's claim as set out in prayers 2 and 3 of paragraph 25 of Plaintiff's Declaration are concerned, the agreed amounts are M413, 090 on the basis that the plaintiff would remain a 2lt up until the time he reached the age of 55 years or M1,564 282.00 on the basis that the PLAINTIFF was a 2lt up until January 2005 and thereafter was promoted to Lt Colonel with effect from February 2005 up to the time he reached age 55 (in 2019)*
>
> *2. Accordingly, if the Court finds that it is proven that plaintiff would have remained a 2lt up to the age of retirement, the plaintiff is entitled to M413 090 for past and future loss of earnings.*
>
> *But if the Court finds that it is proven that plaintiff would have been promoted to Lt Colonel with effect from February 2005, the plaintiff is entitled to M1,546, 282.00 for past and future loss of earnings (prayers 2 and 3).*
>
> *THUS AGREED AND SIGNED AT MASERU ON THIS THE 27TH DAY OF MAY 2013*
>
> *SIGNED* — *SIGNED*
> *Plaintiff's Counsel* — *Defendant's Counsel*

[38] The Court *a quo* opted for the latter position in terms of the agreement (above) and had awarded damages in the amount of M1,564.283.00. It held that there were no reasons (at para.127 of judgment) advanced that the respondent would not have naturally progressed and rose through the ranks like other commissioned

officers. With all due respect, this conclusion overlooks the full factual mosaic of this case.

[39] It is evidence of the respondent that the parabats of which he was a member was not liked by a powerful grouping within the LDF, and this is shown by the manner he was hounded out of the army. During cross-examination, **Mr Viljoen S.C**, for the appellants, the respondent whether he would have been prepared to remain working his entire life as a soldier in the same position as Second Lieutenant. His answer initially was in the negative, but when the question was asked for the second time the respondent changed his stance. This exchange between him and **Mr Viljoen** is worth quoting: (at p 260 of the Record).

> "*You have avoided my question, I'm just going to repeat that question and I will repeat it until I am quite sure that you are not prepared to answer my question. It's quite simple I am saying is there anything you could have done to avoid the decision of the LDF command if they have decided we have taken this man back but we don't really want him we are…(inaudible) against him and we will not promote him beyond his present rank of second lieutenant. My question to that was what would you have done. Now I am going to add a suggestion to it, would you not have then if they didn't promote left the army? … Not at all, I 've learned to persevere*
>
> *You were in other words and I understand this to be a change from your earlier answer but I now understand you to say I would have been prepared to remain a second lieutenant until I was 55?....No you are wrong, you've got it wrong.*"

At P. 263 of the Record the following transpired;

"**Mr Viljoen**: *That is exactly contradictory to what the record would show your answer was when you were still answering in English but let me ask you now, are you saying then that you would have been prepared to stay in the army from 1998 until your retirement on 55 taking the salary of a second lieutenant if that is what happened? … Let me say my Lady there is no one would like to stay more than 10 years without promotion and as well there is no one who can force his office to promote him."*

[40] These questions were asked in relation to the prospects of the respondent remaining within the LDF until he reached retirement age, in the context of what was clearly a hostile environment for him, the issue being whether he would have been prepared to stay on regardless. The respondent gave contradictory responses to this question. It has to be understood that the respondent endured quite a torrid time at the hands of a powerful hostile group within the LDF, to the extent of even considering early retirement. And this is evidenced by the following exchange between himself and his legal Counsel **Mr Mohau K.C** during his testimony.

(at p 169 of the Record)

*"**Mr Mohau**: 11 September 1997. Why, why couldn't, why did you have to seek protection from the South African High Commission, and the US Embassy, why couldn't you seek protection from the commander of the Army?... I tried all the effort, to talk to him and he turned me off.*

…

***Mr Mohau:** And, in connection with what you writing him?...Because of those Court Martial proceedings and atrocities and these coup-plots, and fear of my life, I said to him and, and he was not able to talk to me, he*

was unable, he didn't want to talk to me. I said to him, he better, better retire me than to continue assaulting my life."(sic)

[41] Upon the conspectus of the circumstances surrounding the respondent at the time, it is highly improbable that he would have stayed on in the LDF, and even if he did, it is highly is improbable that he would have been promoted to the rank lieutenant Colonel given the hostility towards him by a powerful group within the army. To further demonstrate how vulnerable and helpless the respondent was, he intimated that the Commander could not talk to him when he sought his intervention against his tormentors. Given the situation, it is unfathomable how the respondent would have 'naturally' progressed in such environment.

It is common cause that the respondent mitigated his losses by finding an alternative employment. He worked at Woolworths Stores where his combined salary was M43,229.00. In the result the award of M413,090.00 less M43,229.00, is the appropriate one in the circumstances.

CLAIM FOR COSTS OF DEFENDING HIMSELF IN THE COURT MARTIAL

[42] The respondent had claimed an amount of M16, 000.00 as expenses incurred in defending himself in the Court Martial;

a) M3 000.00for 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.

The Court *a quo* made a conclusion that the respondent had failed to produce evidence that he in fact incurred the above expenses, but despite this conclusion went on to award the amount of M13,000.00.

During argument, **Adv. Mohau** submitted that the authority of **Lesotho Bank v Khabo LAC (2000 – 04) 91**, supports the position that "…if it is certain that pecuniary damage has been suffered, the court is bound to award damages" The **Lesotho Bank v Khabo** (ibid) quoted with approval the remarks in the case if **Stolte v Tietze 1928 SWA 51** where it was said:

> *"[I]f there is evidence that some damages have been sustained, but it is difficult or almost impossible to arrive at an exact estimate thereof, the Court must endeavour with <u>such material as is available</u>, to arrive at some amount, which in the opinion of the case*." (my emphasis).

[43] It is common cause that the respondent recorded proceedings in the Court Martial and even went to the extent of transcribing the record with his own machine as the appellants could not dispatch the record of the proceedings for review application, on account of the same being destroyed in the 1998 political riots. The respondent testified that he bought the transcriber machine solely for the purpose of transcribing Court Martial proceedings, at an amount of M3000.00. And this evidence is uncontroverted. He testified that he bought a tape recorder and cassettes for this purpose as well at a combined cost of M509.00, but could not produce receipts as they got destroyed during the riots. The respondent has failed to prove expenses related to seeking legal

opinion. I my considered opinion an amount of M3, 509.00 (being for a purchase of transcriber machine, tape and recorder) will meet the justice of this case.

COSTS

[44] The respondent was successful in the Court *a quo* and was justifiably awarded costs. The problem with the judgment of the court a *quo* was the excessive awards the Court had made. These awards had to be challenged on appeal, and on appeal, the appellants were substantially successful in reducing the exorbitant awards made by the court a *quo*, and consequently in the circumstances of this case an appropriate order as to costs is to order that each pay bear its own costs of appeal (see**; Advertising Standards Authority v Herbex (Pty) Ltd (902/2016) [2017] ZASCA 132 at para.16**).

ORDER

The appeal succeeds to the extent of reducing damages awarded for malicious prosecution; for loss of past and future salary judgment; expenses associated with respondent defending himself in the Court Martial; and further, the appellant succeeded in proving that unlawful dismissal was hit by prescription.

[45] In the result the following order is made:

a) The appellant pay to the respondent an amount of M20,000.00 for malicious prosecution

b) The appellant pay to the respondent an amount of M20,000.00 for *injuria*.

c) The appellants pay to the respondent an amount of M369,861.00 for lost and future salary .

d) The appellants pay to the respondent an amount of M3,509.00 for defending himself in the Court Martial.

e) Each party to bear its own costs of appeal

f) The appellants to pay interest at rate of 18.5% per annum from the date of this judgment.

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M.A. MOKHESI
ACTING JUSTICE OF APPEAL

_____

DR P. MUSONDA
ACTING JUSTICE OF APPEAL

N.T. NTSHIYA
ACTING JUSTICE OF APPEAL

For Applicants : Adv. R.A. Suhr

For Respondent : Adv K Mohau K.C