IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 119/90

In the matter between:

SWAZI AIR CHARTER LIMITED — Applicant

and

SWAZILAND GOVERNMENT — Respondent

CORAM: Hull, C.J.

FOR APPLICANT: Mr. Smith and Mr. Nxumalo

FOR RESPONDENT: Mr. Wise S.C. and Mr. Dwamena

Judgment
(29/6/94)

This is an application under section 4(1) of the Limitation of Legal Proceedings against the Government Act, 1972 (No. 21 of 1972), whereby Swazi Air Charter Limited seeks special leave to sue the Swaziland Government.

On 23rd November, 1988, the Air Transport Licensing Authority purported to revoke a licence that it had granted to the company on 22nd September, 1988, to operate a non-scheduled air service to Saudi Arabia and India. The authority is a statutory body established by the Aviation Regulations, 1969.

The company promptly challenged the actions of the authority in the High Court. On 6th December, 1988, Hannah C.J. held that the authority had acted unlawfully. What he was saying was that the authority had acted admittedly under the direction of the Minister,

The Minister, who had been a party to the proceedings, gave notice of appeal. This appeal was at first set down for hearing in March, 1989, but the legal representatives for the Minister did not prepare their heads of argument in good time. Accordingly, it was postponed to the next sitting of the Court of Appeal, in October of that year. On 11th October, 1989, it was struck off the court's roll, with costs, the Court of Appeal ordering that it was not to be reinstated without the leave of the court granted on good cause. The reasons for such an order had to do with whether or not the Minister (as distinct from the authority) was the right person to appeal and as to whether any practical purpose would by then be served by an appeal (the licence in question having in the meantime expired, by the passage of time, with 21st September, 1988.) Strictly speaking, the appeal is still outstanding though today, in 1994, it is obviously to be treated for all practical purposes as having been abandoned.

What the company now wishes to do, however, is to prosecute an action against the Government to recover damages of £10,741,504 for loss of income and expenses that it has allegedly suffered.

In order to proceed against the Government, the company must comply with the Act of 1972.

Section 2(1) of that Act provides as follows:

> "2. (1) Subject to section 3 no legal proceedings shall be instituted against the Government in respect of any debt -
>
> "(a) unless a written demand, claiming payment of the alleged debt and setting out the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post:
>
> Provided that in the case of a debt arising from a delict such demand shall be served within ninety days from the day on which the debt became due;
>
> "(b) before the expiry of ninety days from the day on which such demand was served on the Attorney General unless the Government

has in writing denied liability for such debt before the expiry of such period;

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

There are issues here as to what causes of action the company has against the Government, and as to when they arose, but it is common ground that the company did not in any event comply with the time limit of ninety days, stipulated in the proviso to section 2(1)(a), within which it was required to serve a written demand on the Government, claiming payment of the damages and setting out the particulars of the alleged debt and of the cause or causes of action from which it arose.

Hence the company is seeking special leave, under section 4(1), to bring its action. That subsection provides as follows:

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

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

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

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

"Provided that the Court in granting such leave may impose such conditions as it deems fit (including the payment of any costs) and notwithstanding section 2(1)(c) stipulate the date by which such proceedings shall be instituted."

The application for special leave must in my judgment fail.

It is not evident from the papers filed in support of the application that the company has ever served on the Government a written demand that complies with section 2(1)(a). It has not included in this application a draft of its proposed particulars of claim. Although, as a matter of law, neither of these omissions is necessarily fatal to an application for special leave under section 4(1), I do think that it is good practice in a case such as this to take such steps in any event or, at the least, to annex draft pleadings to the application for special leave.

Except in one respect, namely as to the unlawful revocation of the licence by the authority, the founding affidavit in support of the application does not itself disclose,however, the causes of action on which the company intends to rely in its proposed action. Mr. Smith invited me to infer such causes of action from the various facts set out in the affidavit. The immediate problem in doing so is that, save only in respect of the unlawful revocation of the licence, the facts set out in the affidavit are insufficient to justify the inference of any particular cause of action. A further objection, as I think Mr. Smith understands, is that it is not for the court to construct causes of action for the applicant. That would be to descend into the arena, and there is also a real practical risk that, if the court were to take it upon itself to do so, (and even if the alleged facts were to provide some sufficient basis for such inferences), it might come up with causes of action that are different from those envisaged by the applicant. (The company's own founding affidavit, insofar as it clearly sets out any cause of action, appears to regard this as being the unlawful revocation of the licence.) The court will not take such a course. A person seeking special leave under section 4(1) must himself, in the first place, set out the cause or causes of action on which he means to rely.

I do not intend to go into further detail as to why the only cause of action disclosed in the applicant's founding affidavit is the one relating to the unlawful revocation of the licence. I do not consider that it is necessary either, in order to determine this present

own motion to strike out certain portions of the company's replying affidavits. The essential portions of Mr. Geyser's replying affidavit which, if allowed to stand, might be taken as adding further causes of action to theone in the founding affidavit, are in paragraphs 5.2.3.5 and 22.1.2 and 22.1.3. The fresh averrals in these paragraphs do not flow from the contents of the answering affidavits as such and I do not think that it can be said either, even if they are read with the facts set out in the founding affidavit, that they show clearly the bases on which the company would be entitled to or eligible as a matter of discretion for relief in these respects. When the company's papers are read as a whole, these paragraphs in the replying affidavit really do no more than to make bare assertions. In contrast, the cause of action in respect of the revocation of the licence is clearly shown in the founding affidavit and its annexures.

In my view the company has sought, in the replying affidavit by Mr. Geyser, to introduce fresh causes of action. I do not consider that it has been shown there are special or exceptional circumstances why it should be permitted to do so: See Titty's Bar and Bottle Store (Pty) Limited v. A.B.C. Garage (Pty) Limited and Others 1974 (4) SA 362(T) per Viljoen J. at page 365.

The specific paragraphs to which I have referred in that replying affidavit are accordingly struck out.

So, what it comes down to is this, that the company is seeking to bring an action against the Government for damages that allegedly flow from the improper action of the authority, in November of 1988, in purporting to revoke its licence.

It was contended on behalf of the company that, whether rightly or wrongly, the parties all regarded the date of the ruling by the Court of Appeal, i.e. 11th October 1989, as the time at which the cause of action arose. I am not sure that it is correct that all of the parties did take this view. Certainly Mr. Wise did not concede it at this hearing.

I do not think that it is a correct view at all. In this country, the noting of an appeal does not stay automatically the consequences of a

decision at first instance of the High Court: see rule 41 of the Court of Appeal Rules 1971. Although it is not strictly relevant for present purposes to say so, I think that on first principles it is desirable that it should not do so. A decision at first instance is a final judgment. I think that there are very good reasons why it should accordingly stand, unless and until it is set aside on appeal, or unless and until the unsuccessful party satisfies an appropriate court that the consequences of the decision in a particular case should be suspended, pending the outcome of the appeal. The nature of the appellate process is different from that of adjudication at first instance, and I do not consider that it is desirable at all to reduce a decision at first instance, as a matter of course, to one of a provisional nature. To do so, in my view, tends to encourage unnecessarily the prolonging of litigation, as in the event happened here. An unsuccessful party at first instance can be protected quite adequately against the consequences of a mistake at trial by giving him the right to apply - but on his motion - to have execution of a judgment stayed pending the outcome of an appeal.

What happened here was that the Government apparently chose to take the view, while everyone waited upon the outcome of its decision to challenge the judgment of 6th December 1988, that the consequences of that judgment were uncertain. Perhaps it was convenient for it to do so. It is not at all uncommon for unsuccessful litigants to take that view. Sometimes they may be right. Sometimes they are not. In the present case it is my own view, with respect, that the judgment of Hannah C.J., was in the result correct. I am also of the view, notwithstanding the attitude that was said to have been taken by the Government before the appeal was in the event effectively abandoned, that the cause of action that accrued to the company arose on the date when the authority purported to revoke the licence, namely on 23rd November, 1988.

It lay with the company to act accordingly.

In the end, the present application must in my opinion be refused on the facts for two reasons.

The first is that, as Mr. Wise pointed out, the company's licence was

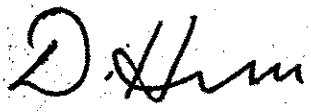
restored to it on 6th December 1988. Any damages that it may have suffered because of the authority's unlawful interference with its licence could therefore have stemmed only from consequences arising in the short interval of 13 days between 23rd November and 6th December, 1988. On the company's own papers, however, no such consequential damage is shown to have arisen as a result of the authority's action. It is apparent, from the company's papers, that for other reasons the company was not in a position to commence its operations under the licence on 6th December. It is also apparent from its papers that the damages that it wishes now to claim also arose from matters which, on a proper view, are unrelated to the purported revocation of the licence, and arose after 6th December.

Accordingly, the company has not fulfilled the condition for special leave in section 4(1)(a). It is not shown that it has a reasonable prospect of succeeding in its proposed claim for damages as such. It has of course already vindicated its position, in the earlier proceedings on review, as to the unlawfulness of the authority's action in revoking the licence.

I must also conclude that the company has not fulfilled the condition in section 4(1)(c). I think that I am bound to sustain Mr. Wise's submission that no good reason has been shown why the company could not have formulated a written demand even within 90 days after 11th October, 1989. The complexities alleged on behalf of the company, i.e. as to the preparation of the claim, really have nothing to do as such with the cause of action described, namely the unlawful revocation of the licence; and on the stricter view that the cause of action arose on 23rd November, 1988, there is clearly no basis for concluding that there were special circumstances why the demand could not have been formulated by the end of 1989.

Some argument was addressed at the hearing as to whether or not, in granting special leave under section 4, the court has jurisdiction to extend the period of 24 months referred to in section 2(1)(c). On the facts, it is unnecessary to decide that question.

The costs must follow the event.



DAVID HULL
CHIEF JUSTICE