



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1035/95

In the matter between:

PETER THOMAS FORBES

Applicant

and

THE SWAZILAND GOVERNMENT

Respondent

CORAM:

S.W. Sapire A.J.

FOR THE APPLICANT

Mr. H. Fine

FOR THE CROWN

Mr. Wise/Masuku

Judgment

(14/9/95)

The applicant seeks an order condoning his failure to comply with Section 2(1) of the LIMITATION OF LEGAL PROCEEDINGS AGAINST THE GOVERNMENT ACT, No. 21 of 1972, and the grant to him of special leave to institute proceedings against The Swaziland Government in which the applicant proposes to claim an amount of E59,318,000.00.

The applicant has described in his founding affidavit how as a Swazi citizen, he was wrongfully arrested in 1977 and thereafter detained for successive periods of 60 days totalling some nine months in all. Attached to the papers however is a judgment of this court in which the validity of the arrest and detention was confirmed.

He was during this period deprived of his citizenship and apparently declared a prohibited immigrant. In short he was exiled from this country in which he and had his forbears had been domiciled and resident, as citizens for about one hundred years. His exile did not end until, in applicant's words he was assisted to re-enter the

country by HUMERUS a local Human Rights Society. How this assistance was given and the form it took are not described by the applicant.

He apparently returned to Swaziland on foot and was promptly arrested at the border. The criminal charges brought against him arising from an alleged illegal entry to Swaziland were not proceeded with. Although he appeared in court the day following his re-entry, the case was postponed for a month to enable the authorities to investigate the basis of the charges, more especially the question of his citizenship.

The applicant took advantage of this period to approach this court. On applicant's application which appears to have been unopposed an order was made declaring the order depriving the applicant of his citizenship to be invalid and setting the same aside.

This order does not touch on the validity of the orders for his arrest and detention in 1977, which would seem to have been confirmed by order of this court in 1978.

The applicant was on his uncontradicted evidence undoubtedly treated harshly as result of the malice of influential individuals who he had crossed or had reason to fear his public accusations of corruption. It is not necessary however for me to deal with these allegations or to make any finding thereon.

The applicant then proceeds to state that "as a result of my unlawful and illegal detention and deprivation of my Swaziland Citizenship I have suffered damages in the following amountt"/

He then proceeds to list claims in sub paragraphs 37(a)-(f) of the founding affidavit totalling some E59,318,000.00 which are the subject matter of the action he intends bringing against the Swaziland Government.

Proceedings against the Government are subject to THE LIMITATION OF LEGAL PROCEEDINGS AGAINST THE GOVERNMENT ACT NO. 21 of 1972 which in Section 2 provides as follows:

- (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.

- (2) For the purpose of subsection (1) -

(a) legal proceedings shall be deemed to be instituted by service on the Attorney General of any process of a court (including a notice of an application to court, a claim in reconvention, a third party notice referred to in any rules of court and any other document by which legal proceedings are commenced) in which the claimant of the debt claims payment thereof;

(b) a debt shall, if the Government prevents the claimant thereof from coming to know of its existence, not be regarded as due before the day on which such claimant becomes aware of its existence;

(c) a debt not arising from contract shall not be regarded as due before the first day on which the claimant thereof has knowledge that the debt is due by the Government or the

first day on which he could have acquired such knowledge by the exercise of reasonable care, whichever is the earlier day;

(d) a period prescribed in such sub-section shall, in the case of a debt of which the due date is postponed by agreement between the Government and the claimant, be calculated afresh as from the day on which the debt again becomes due.

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.

(2) The High Court may, on application by the Government, and if it is satisfied that Government has a reasonable prospect of succeeding in such proceedings, on good cause shown, grant special leave to extend the period of ninety days referred to in section 2(1)(b):

Provided that the Court in granting such application, may impose such conditions as it deems fit (including the payment of any costs), and at the same time shall extend the period of twenty-four months referred to in section 2(1)(c) to such extent as it may deem fit.

The Act has the object of preventing undue delay in the bringing of actions against the Government. The motivation apparently is that the lapse of time between a cause of action arising and the notification and prosecution of a claim relative thereto makes the investigation by the Government difficult or impossible. Evidence may be lost or not gathered, and witnesses may no longer be available. On the other hand there are cases where mere delay or lapse of time would not have this effect and would be unfair on the injured party to lose his right of action if the delay in bringing the claim does not affect the ability of the Government to defend the same. These are the considerations which gave rise to the legislation and the provisions to which effect is to be given in this application.

The Government as respondent opposes the granting of relief and seeks the dismissal of the application. No replying affidavit has been filed. The respondent relies on a point of law on the interpretations of the sections above quoted, and on inadequacies in the founding affidavit.

The point of law is formulated in a notice filed by the respondent in terms of Rule 6(12)(c) and reads as follows:-

1. Section 4(1) of the Limitation of Legal Proceedings Against the Government Act, 1972 empowers the Court to condone a failure to comply with the provisions of section 2(1)(a) only of the said Act and not the whole of Section 2(1). Applicant is accordingly not entitled to the relief sought.
2. Applicant has also failed to comply with the provisions of section 2(1)(c) of the said Act and there is no provision for condonation of a failure to comply with that section.

For the purpose of his argument Mr. Wise who appeared for the respondent assumed that "the day on which the debt became due", was the date of the judgment declaring the deprivation by the Government of the applicant's citizenship null and void. This was a generous but incorrect basis. In listing his various claims the applicant has given no indication, let alone particularity, of the date on which each loss occurred. It would be seen as if these losses must have been sustained sometime during the past thirteen or more years while the applicant was out of the country. It is impossible on the information in the founding affidavit to establish a date on which "any one or more debts became due."

One thing is clear however in respect of each category of loss enumerated by the applicant his claim in respect thereof arose more than ninety days before the application. Ninety days is the period prescribed by Section 2 as the period within which a written demand in respect of a delict of claim has to be made. It is also common cause that more than twenty four months have passed since the cause or causes of action arose.

It follows in the words of Section 2(1)(a) of the Act that no legal proceedings may be instituted against the respondent as no written demand claiming payment of the alleged debt, setting out the particulars of such debt and the cause of action from which it arose, has within the specified period or at all been served on the Attorney General.

I observe that the founding affidavit itself would not comply with the requirements for the demand as the cause of action is not properly described.

Section 4 however makes it possible for a person such as the applicant debarred under Section 2(1)(a) from instituting proceedings against the respondent, to obtain leave to institute such proceedings if certain requirements are met. It is this special leave which the applicant now seeks.

The question of law raised by the respondent is whether leave may be granted to an applicant who is debarred not only by the provisions of Section 2(1)(a) but by the provisions of Section 2(1)(c) as well. In other words is leave available only to a person who having failed to sue his demand within the prescribed period makes his application for special leave before the elapse of the period of twenty four months referred to in 2(1)(c).

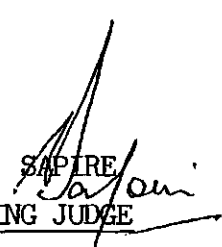
Mr. Fine who appeared for the applicant argued that the legislation must be interpreted in case of doubt favourably to the applicant. He referred to the provisions of Section 4 which empowers a Court granting special leave to stipulate the date by which the proceedings are to be instituted "notwithstanding the provisions of Section 2(1)(c)". I do not see this proviso as giving the court power in these circumstances to extend the period of two years after the same has elapsed.

In Section 4(2) which deals with the situation where the Government applies to extend the period of ninety days referred to in 2(1)(b), the court is expressly given power in granting an application to extend the period by twenty four months referred to in 2 (1)(c).

The inference to be drawn from comparing Section 4(1) and Section 4(2) is that if the legislature had intended to empower the court to extend the period of twenty four months as one of the conditions imposed in granting leave, such powers would have been expressly mentioned as was done in Section 4(2). On a proper reading of Section 4(1) the court may impose conditions attaching to the grant of special leave requiring the proceedings to be instituted within a period shorter than twenty four months from the accrual of the cause of action.

I was referred to two judgments of this court namely WALTER SIPHO SIBISI vs THE WATER AND SEWERAGE BOARD and another Civil Case No. 504/87 and ZWANE AND OTHERS vs ATTORNEY GENERAL Civil Case No. 1263/92 in which Hannah C.J. and Dunn J. respectively place the same interpretations on the relevant sections of the Act as I have done. This being so and there will be no reason for me not to follow the

precedents, the result must be the same. The point of law raised is answered in favour of the respondent and the application is dismissed with costs.


S.W. SAPIRO
ACTING JUDGE