IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2096/95

In the matter between:

JOMO ZWELITHINI DLAMINI Applicant

and

THE COMMISSIONER OF POLICE 1st Respondent

ATTORNEY GENERAL 2nd Respondent

CORAM: S.W. Sapire A.C.J.

FOR THE APPLICANT Mr. Maphalala

FOR THE RESPONDENTS Mr. Shongwe

Judgment

(17/5/96)

The applicant, who is barred from instituting an action against the respondents in terms of Section 2(1)(a) of the LIMITATION OF LEGAL PROCEEDINGS AGAINST THE GOVERNMENT ACT NO. 21/72, (THE ACT), applies to be granted special leave to do so. The application is treated as having been made in terms of Section 4 of The Act despite the inaccurate wording of the Notice of Application which refers to an order condoning the applicant's failure to serve his demand timeously.

The applicant's delictual claim arose out of his allegedly having been wrongfully arrested by the police on 20th January 1995. He was released from custody on 28th January 1995 when the prosecutor withdrew the charges on

which he had been detained. The founding affidavit does not disclose the circumstances of the applicant's arrest but requires the court to infer that because the prosecutor withdrew the charges that there was no case against him in the first place and that he should never have been arrested at all.

That applicant does not give any indication as to why the arrest was unlawful. The inference which has to be drawn on which to base applicant's case; does not flow logically from the scanty facts stated in the affidavit.

In terms of Section 2(1) of The Act, the demand should have been served on the Attorney General within ninety days of the day on which the debt became due.

The debt became due immediately the arrest took place, or at the latest immediately he was released on withdrawal of the charge. It was not however until sometime in June that the applicant instructed his attorney to make a claim and to serve the required letter.

Clearly the letter which was sent following the applicant's instructions was out of time. The applicant knew of his claim Immediately it allegedly arose and no reason is given in the founding affidavit for the

delay.

In terms of Section 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 -

1. he has reasonable prospect of succeeding in such proceedings;

2. the government will in no way be prejudiced by reason of the failure to receive a demand within the stipulated time period; and

3. having regard to any special circumstances he could not reasonably have expected to have served the demand within such period. (the word "been" seems to have been omitted).

While there is reason to believe that the government might not be prejudiced as contemplated in the section, it does not appear that the applicant has reasonable prospects of success in the action he wishes to institute. The unlawfulness of the arrest has not been demonstrated in the papers. But it is not only on this ground that the application must fail.

No special circumstances have been shown to have prevented the applicant from serving his demand within the stipulated period. The applicant's assertion that he waited after his release for some three months to see whether criminal proceedings were to be recommended against him before instructing his attorney can hardly be described as reasonable. There is certainly no logic in this excuse. I am not satisfied that this third requirement has been satisfied. This being so I have no discretion in the matter and must dismiss the application.

The application is dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE