

IN THE HIGH COURT OF SWAZILAND

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MANDLA KHUMALO

Vs

ATTORNEY GENERAL SWAZILAND GOVERNMENT COMMISSIONER OF POLICE

Civ. Trial No. 2987/97

Coram S.W. Sapire A C J

For Applicant Mr. Mnisi

For Defendant Ms Gama

JUDGMENT

(5/02/97)

The applicant has come to court as a matter of urgency. The matter was heard on the 28th of November 1997 and I have reserved judgment thereon . This is a long time to reserve a judgment on a matter of urgency but in fact having regard to the relief sought by the applicant there was no urgency at least not such that it required to be decided before now. The intervening court vacation, and my own unavailability to deal with the matter have resulted in judgement being given, at this, the first opportunity...

The relief claimed by the applicant is that the 21 day period granted by this Court on the 31st October 1997 for the institution of proceedings by the applicant be extended to Friday the 27th of February, 1998 or such further date which this Court may deem appropriate. This application arises out of a previous application made on the 14th October, 1997 as a result of which the applicant was granted special leave to institute a damages claim against the Government of Swaziland arising from an alleged

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assault perpetrated on the applicant while he was in detention at the Malkerns Police Station and also arising out of his arrest and detention at the Zakhele Prison for a period of one year.

The relief granted was in terms of Section 4 of The Limitation of Legal Proceedings Against the Government Act The period within which notice of the proposed action was to have been instituted in terms of the order, was within 21 days. It is this period of 21 days which the applicant sought to have extended and now seeks to have further extended There are two different requirements under the act with which an intending plaintiff must comply. Firstly notice of the intended action must be timeously given by way of a demand on the Attorney General, and thereafter the plaintiff is to issue and serve his summons instituting the action within two years of the date on which the debt arose.

The applicant appears to be oblivious of the requirements of the Act in question, and has failed to distinguish between the institution of an action, and the giving of notice by way of demand which is obligatory before an action can be instituted against the government.

Before I proceed any further with this judgment I must observe that it is a matter of grave concern that a person should be held awaiting trial for a period of one year before the crown discovers that it hasn't got a case. This does not of course necessarily mean that the original arrest was unlawful. The officer who effected the arrest may well have had the necessary reasonable suspicion that an offence had been committed. What does strike me as quite unacceptable is that for a year this man was held in custody and at the end of that period the crown discovers that it has no evidence. In this I have every sympathy with the applicant

The allegations on which the claim for damages for assault are if true also shocking. It would be in the public interest to have these claims investigated and the applicant given an opportunity of bringing his actions to trial.

Before however I am permitted to grant the order sought I would have to be satisfied that the extension sought is permitted by the provisions of the Limitations of Legal Proceedings against the Government Act No. 21 of 1972. The Act provides that

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subject to certain exceptions which are not applicable in this case, no legal proceedings shall be instituted against the Government in respect of any debt unless a written demand claiming payment of the alleged debt and setting out the particulars of such debt and the cause of action from which it arose has been served on the Attorney General by delivery or by registered post. The Act provides that in the case of a debt arising from delict as in this case such demand shall be served within 90 days from the day upon which the debt became due. A second requirement is in terms of Section 2(1) (b) is that the summons commencing action may not be served before the expiry of 90 days from the day on which such demand was served the Attorney General, unless the Government has in writing indicated that it did not admit the claim.

Thirdly no legal proceedings may be instituted after the lapse of 24 months as from the day on which the debt became due.

It is common cause that the necessary demand was not served on the Attorney General timeously or at all and no summons has been issued or served.

In terms of Section on 4 of the Act the High Court may on application by person debarred under Section 2(1)(a) from instituting proceedings against the Government grant special leave to him to institute such proceedings subject to being satisfied as to certain matters. It is to be noted that a granting of special leave is only applicable to a person debarred under Section 21 (a) of the Act.

Section 21 (a) of the act is the section which provides that a written demand has to be made and that in terms of Section 2(1)(b) summons may not be issued before the expiry of 90 days from the date on which such demand is served on the Attorney General. Nothing is said in Section 4 or anywhere else, which would give the Court the power to condone the failure to institute an action within 24 months as from the day on which the debt became due. It is for this reason that I am of the view that the Court did not have the power to make an order that it did on the 31st of November. I cannot sit as a Court of Appeal and overrule the previous judgment but I am obliged not to extend the period provided for if I am satisfied that the relief granted in the first instance was incorrectly granted.

The plaintiff was arrested on the 20th November 1994. If that arrest was illegal the cause of action arose on that day. The subsequent detention for a period of a year has not been shown to be otherwise than in accordance with the law, that is on warrant

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or on remand by a Magistrate. That cause of action therefore arose in 1994 and the summons in respect of that claim had to be issued before the 19th of November, 1996. I have no power to extend the period of prescription as is not provided for in the act. As far as the assault was concerned that too took place in November 1994 and the cause of action arose then. I therefore cannot accede to the request of the applicant despite whatever sympathy I may have for him and the application is therefore refused with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE