IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2067/97

In the matter between

ASIENA GUGU MOTSA	APPLICANT
And THE ATTORNEY GENERAL	RESPONDENT
Coram	S.B. MAPHALALA – J
For the Applicant	MR. MDLADLA
For the Respondent	MR. SIMELANE

JUDGEMENT (07/06/99)

Maphalala J:

This is an application brought on motion for an order granting applicant leave to issue a letter of demand against the respondent in respect of a defendant's action for the payment of a sum of E250, 000-00 alternatively granting applicant leave to institute proceedings against the respondent for payment of the sum of E250, 000-00 in respect of a defendant's action and directing when proceedings shall be instituted, costs in the event the application is opposed and further and/or alternative relief.

The application is founded by the affidavit of the applicant who alleges that she was a 68-year-old widow that she was married by civil rights to one Gilbert Dlebenkhomo Motsa during 1954, The said Gilbert Motsa (hereinafter referred to as the deceased) died on the 14th July 1995. He had a broken femur of the leg. During February 1997 at Malunge Township, Mbabane her son Stephen Motsa and in the presence of other members of her family informed her that he had certain discussion with a certain nurse who apparently treated the deceased and would not have died when he did. It

was then agreed that her son would follow the matter up to establish whether in fact the deceased had been negligently treated and whether the Government could be sued for his death. She avers that her failure to comply with the provisions of the Limitations of Legal Proceedings against Government Act 21/1972 was not caused by her wantom disregard of the law but by the following factors: It was only during February, 1997 that she got to know that she might have a cause of action against the Government, her son Stephen Motsa indicated to her that a claim against Government had to be lodged within two (2) years and that she has been a house wife and was not conversant with the Provisions of Act 21 of 1972.
Further that she has been advised and verily believe that she has reasonable success in the proceedings by her son Stephen Motsa.

Her application is supported by that of her son Stephen Motsa, who deposed that during October 1997 he attended a workshop - cum - conference in Harare, Zimbabwe with other civil servants from Swaziland including a certain Mrs. Sibongile Sibandze an attorney with the respondent. On the 25th October 1995 in the lounge of the Sheraton Hotel where they were booked he found and joined his colleagues who were in the company of Mrs. Sibandze. Amongst the matters discussed there was the issue of a patient suing after having been negligently treated. He got interested as he had all along thought that his father had been negligently treated.

It was indicated by Mrs. Sibandze that in such cases an aggrieved party could sue. He was informed by the said Mrs. Sibandze that a person could institute proceedings against Government within two years from the death of that person. No mention was made of letters of demand and when they were to be filed. In March, 1996 he again approached their legal advisor at work a certain Mrs. Teresa Mlangeni and enquired from her whether in fact a claim against Government had to be brought within

a two year period. She confirmed.

It was in 1996 that he approached a certain Dlamini nurse and who during 1995 was apparently one of the nurses who treated the deceased at the Mbabane Government Hospital. This nurse indicated to him that the deceased had been negligently treated and would not have died. He went on to state his reasons at paragraph 9 of his

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affidavit why he submits that applicant has a good cause of action against the respondent.

These are material facts the applicant is relying on in her application.

The crown opposes the application and has filed an answering affidavit deposed by Dr. John Mbambo who is the Director of Medical Services at the Ministry of Health. The defence as gleaned from his papers is that ignorance of the law is not an excuse. He avers that the applicant has failed to establish that extra-ordinary circumstances prevailed at the time to prevent her from serving the Attorney General with a demand. He avers further that people who may be required to give evidence in this matter would have a great difficulty recollecting the facts after such a long time lapse. Other people who attended the deceased who would be important witnesses for the respondent have now left the public service and he is not aware of their present where about. This includes doctors who attended to the deceased.

This is the factual defence of the respondent to the applicant's application.

The applicant filed a replying affidavit to counteract some of the averments made by the respondent in its answering affidavit.

The matter came before court on the contested roll of the 23rd April 1999. Mr. Mdladla for the applicant argued that this is an application for condonation of the late filing of the proceedings against the respondent and granting leave to institute her claim for damages. He urged the court to use its discretion. The only reason that the respondent is opposing the applicant is because some of the doctors are no longer in the service of the Swaziland Government. The respondent has not even alleged that the pertinent documents in this case can no longer be located. He submitted that the applicant has prospects of success in this matter.

On the other hand Mr. Nxumalo contends that this application is brought in terms of Section 4 (1) of Act No. 21 of 1972. In order for applicant to succeed she has to fulfil three legal requirements viz, a) special circumstances, b) prospects of success and c) that Government would not be prejudiced. In respect of the first requirement Mr.

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Simelane contends that applicant was ignorant of the law. That in law ignorance of the law is no excuse. The advice that she got from the people she mentioned has no effect because those people were acting in their personal capacities. On the second requirement he argued that paragraph 8 and 9 of the supporting affidavit of Stephen Motsa constitute hearsay evidence and thus ought not be admitted. Applicant does not even annex a supporting affidavit of the mentioned nurse who they allege detected the negligence. On the third point that of prejudice he contended that some doctors are no longer in the country after the expiry of their contracts with Government. All in all the applicant has not satisfied the requirements of Section 4 (1) of the Act. To buttress this point he directed the court's attention to the cases of Mbongwa Zeblon Ziyane vs Umbutfo Swaziland Defence Force Civil Case No. 3004/96 (unreported) and that of Jomo Zwelithini Dlamini vs Commissioner of Police Civil Case No. 2096/95 (unreported). In the former case the learned Acting Chief Justice Sapire (as he then was) had this to say on a similar matter before him:

"This court may on application by a person be barred under Section 2 (1) (A) from instituting proceedings against the Government grant special leave to him to institute the proceedings if it is satisfied on three matters.

a) that the applicant has a reasonable prospect of succeeding;
b) that the Government who in no way be prejudiced on reasons of failure to receive the demand in the stipulated period;
c) having regard to any special circumstances he would not reasonably have expected to have serve the demand within such prescribed period.

These therefore, are the issues confronting this court in this case. It appears to me that the applicant main allegation for the non-filing of a letter of demand was due to ignorance of the time limits prescribed by the Act. The law dictates that ignorance of the law does not constitute a special circumstance. To this effect I refer to the cases of Guardian National Insurance Co. Ltd vs Meyers 1988 (1) S.A. 255 (A), Webster and another vs Santam Insurance Co. Ltd 1977 (2) S.A. 874 (A) at 883 and the recent decision by Sapire CJ in the case of Barrymore Sibusiso Nkosi vs

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Commissioner of Police and another Civil Case No. 2963/98 (unreported) where the learned Chief Justice made this same observation,

I further agree with the submissions made by Mr. Simelane in respect of the other requirements. Furthermore, there is no supporting affidavit from the nurse who is alleged to had detected the negligence. The evidence of the son as it relates to that nurse is hearsay evidence and thus inadmissible.

My view is that the applicant has not shown any special circumstances as envisaged by the Act.

I rale, therefore, that the application ought to fail with costs.

S. B. MAPHALALA

JUDGE