

IN THE HIGH COURT OF SWAZILAND

CASE NO.119/2000

In the matter between:

EMMANUEL UDOIDUNG

APPLICANT

AND

ATTORNEY-GENERAL

RESPONDENT

CORAM:

MASUKU J.

For Applicant:

MR P.R. DUNSEITH

For Respondent:

MRS T. NKONYANE

JUDGEMENT

This is an application for the grant of special leave to the Applicant to sue the Respondent in terms of the provisions of Section 4 (1) of the Limitation of Legal Proceedings Against the Government Act 21 of 1972, (hereinafter referred to as "the Act").

Section 4 (1) of the Act reads as follows: -

"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

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receive the demand within the stipulated period; and

(c) Having regard to any special circumstances he could not reasonably have served the demand within such period.

The Applicant states in his Founding Affidavit that he is the lawful owner of a vehicle bearing registration number B V G 560 MP, which was seized by the Royal Swaziland Police for investigation from an unmentioned garage where it was to undergo repairs. The Police took the said vehicle to Lobamba Police Station. The said vehicle was whilst in the care and custody of the Police destroyed by fire, allegedly caused by the negligence of the Police who did not take proper precautions to clear proper firebreaks and safeguard the vehicles in their custody.

The Applicant further states that when he learned about the damage to his vehicle, he went to the Police Headquarters to lodge a claim and was advised by a Police Officer that no claim would be accepted without a South African Police clearance. The Applicant contends further that he spent a number of weeks trying to obtain the said clearance in South Africa and his efforts were humstrung by the absence of the vehicle. On reverting to the Police Headquarters, the Applicant did not obtain a satisfactory answer regarding the claim until he obtained services of an attorney towards the end of December, 1999.

The Applicant's attorney sent a letter of demand, which was correctly regarded, to have been transmitted

after the statutory period set out in Section 2 (1) (a) of the Act, hence the Applicant seeks the Court's special leave in order to file the demand.

In addressing the requirements of Section 4 (1) above, the Applicant states that the vehicle was destroyed by the negligence of the Police as aforesaid whilst the said vehicle was in their custody and care. The Applicant states in this regard that the Police have no defence to the claim. Regarding (b), the Applicant contends that the delay on his part was minor and further alleges that the Police have full access to facts and events giving rise to the claim. Regarding the requirement in (c), the Applicant's contention is that he was misled by the Police by giving him wrong advice regarding the lodging of a claim and as a result, he lost valuable time following the advice obtained from the Police.

It was his further contention that he was personally unaware of the time constraints for making demand and

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pointed out further that the Police never formally advised him of the fact of the damage to his vehicle by the fire. According to the Applicant, he is employed in South Africa and comes to Swaziland on weekends only and he argued that this fact militated against him obtaining the facts relating to the destruction of the vehicle and also in consulting with his attorney.

The Respondent raised points of law in terms of the provisions of Rule 6 (12) © of the High Court Rules. The Respondent's contentions are three fold -

(i) that the Applicant's cause of action lies with Qobonga Garage, Sidwashini, which the Applicant contracted with and gave custody of the motor vehicle in question.

(ii) that the Applicant has not averred the special circumstances as required by Section 2(1) (c) to entitle him to the grant of the relief. The Respondent further alleges that the Applicant has hardly complied with the requirements of Section 4 of the Act aforesaid.

(iii) that the Applicant's supplementary Affidavit by which the Applicant attempted to comply with the requirements of the Act does not supplement the Founding Affidavit but introduces new facts.

The Respondent further annexed affidavits by certain Police Officers whose import is to state that the Applicant's vehicle was towed by Leites Motors at the behest of the owner of Qobonga Garage to the Police Station after it had been involved in a collision which rendered it beyond economical repair.

I will now proceed to analyse the Applicant's Affidavits to ascertain whether the requirements of Section 4 have been met. The object of this Act is clearly to protect the Government against prejudice which might be occasioned to it by reason of a delay in acquainting it with an intended claim for damages.

(a) reasonable prospects of success.

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In the heads of argument, the Respondent argued that the Applicant has no reasonable prospects of success because under the action legis aquilae, a claim for damages ex delicto does not lie against a bona fide possessor as his good faith protects him. In this regard, the Court was referred to Silberberg and Schoeman "The Law of Property", Butterworth, 2nd Edition 1983, 299 and the case of MORABANE v BATEMAN 1918 AD 460 at 465-6.

This is good law which is however cited out of context. The authors and the case refer to a situation where a person acquires possession of property oblivious to the fact that it is stolen and therefore becomes a bona fide possessor of the same. The person is adjudged to be insulated against claims ex delicto by his good faith. This is inapplicable in this case.

The Respondent further alleged that there is no debt due to the Applicant by the Respondent as envisaged by the Act. The Respondent contends therefore that the Applicant does not fall within the category of persons debarred under Section 2 (1) (a). This contention flies in the face of a decision of this Court by Hannah C.J. (as he then was) in WALTER SIPHO SIBISI v WATER AND SEWERAGE BOARD AND ATTORNEY GENERAL CASE NO... 504/87 (unreported). In that judgement, Hannah C.J. held and it was agreed by the parties that the word "debt" occurring in the Act must be given the widest possible meaning and includes a claim for damages. I respectfully endorse that view as correct because the strict interpretation of the word "debt" in the Act would lead to grave injustices and would subvert Parliament's intention.

In my view, from the facts alleged the Applicant has reasonable prospects of success, against the Government. Seeking leave against the Government does not in any way mean that no proceedings can be instituted by the Applicant against the other parties mentioned by the Respondent. Should these not be cited in any future proceedings, the Respondent would be at large to haul those before Court by employing the provisions of Rule 13.

What the Applicant alleges is that its vehicle was taken by and kept by the Police and whilst still in their custody and care, the said vehicle was destroyed by fire which the Police took no reasonable steps to prevent. What is required of an Applicant in such cases is not to show that he has an answerable claim as in one for Summary Judgement but to show that his claim prima facie carries a reasonable prospect of success. This is designed to

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ensure that spurious and vexatious and hopeless claims are not lodged after the respective periods set out in Section 2 (1). To hold otherwise would require the Court to conduct a trial before the actual trial which is thus obviated by the Court being satisfied on the Applicant's papers that prospects of success are reasonable. At the actual trial, the Defendant may be successful. I am satisfied that this requirement has been satisfied.

(b) Prejudice to the Government.

The Applicant's case is that the Respondent will not be prejudiced by the grant of special leave in that the Application was out of time by a few weeks. The Applicant contends further that the Applicant has access to all the information it may need to defend its claim. I agree. All witnesses, records and documents should, regard being had to the time when the incident arose and the time when the demand was made be accessible to the Defendant. It has not been suggested that these are either destroyed or unavailable. Mrs Gamedze was at pains to point out any prejudice without success. It is my considered view therefore that the Applicant must succeed on this requirement as well.

(c) Special circumstances.

The special circumstances averred by the Applicant include the following - wrong advice from the Police regarding the lodging of the claim, which resulted in a loss of valuable time; that the Applicant works in South Africa and was not immediately aware of the damage to his vehicle and that when he eventually became aware, and obtained advice from his attorney, the ninety day period had already lapsed.

These facts in my view constitute special circumstances, particularly the fact that the Respondent is resident in South Africa and only returns to Swaziland on weekends and holidays. The Police also did not help because they should have referred any enquiries to their Legal Advisor who would have given sound advice to the Applicant. Another factor that weighs in the Applicant's favour in this regard is that the delay was not in anyway unconscionable. It was less than thirty days.

What constitutes a cause for concern to me is that the Applicant has been very vague regarding the time periods when the various incidents occurred. In an application for condonation such as this, it is

imperative to account for the delay with precision to enable

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the Court to ascertain whether or not you are guilty of dragging your feet. Notwithstanding these deficiencies, I am of the view that the Applicant has met this requirement as well.

I come to this conclusion mindful of the remarks of Van Winsen J. in *STOKES v FISH* 1966 (4) S.A. 421 at 425, where the learned Judge stated as follows regarding similar provisions relating to suing a municipality:-

"The attitude of the Courts to sections such as these is that they constitute a 'very serious infringement on the rights of individuals' and must be liberally interpreted in favour of the applicant. "

The point regarding the Supplementary Affidavits raising new matter was not pursued and appears to be without merit. There is no mention of the particular allegations which constitute new matter in the Supplementary Affidavits. I find it unnecessary to say more on this issue.

Regarding the question of costs, the normal rules in regard to indulgences requested by litigants are that the applicant in such cases is held liable, not only for his own costs but for the costs of the respondent if such opposition by the respondent is reasonable and contributed to the solution of the dispute. See *MEINTJES N.O. v ADMINISTRATOR BOARD OF CENTRAL TRANSVAL* 1980 (1) S.A. 283.

I am of the view that the Respondent's opposition in this case was not unreasonable and the Applicant is to pay the costs of this application and it is so ordered.

The Applicant be and is hereby ordered to file a letter of demand within ten (10) days of the date of this judgement.

T.S. MASUKU

JUDGE