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SWAZILAND HIGH COURT

SAISEE DA SILVA

1st Applicant

BULISANI TOFILE

2nd Applicant

vs

ATTORNEY GENERAL

1st Respondent

SWAZILAND GOVERNMENT

2nd Respondent

UMBUTFO SWAZILAND DEFENCE FORCE

3rd Respondent

Civ. Case No. 609/2001

Coram

SAPIRE, CJ

For Applicants
For Respondents

Adv. E. Thwala
Ms. S. Shongwe

JUDGMENT

(07/08/2002)

The applicants seek an order

- (a) condoning the applicants' failure to lodge a written demand .timeously in terms of the limitation of Legal Proceedings against the Government act 21 of 1972 ;
- (b) that special leave be granted to the applicant allowing applicant to lodge a claim and institute proceedings in terms of the Act and that Annexure "E" be accepted as the Demand in terms of the Act.
- (c) The applicant seeks costs from the respondent only in the event of opposition.

The application arises in the following circumstances that are set out in the founding affidavit attested to by the 1st applicant. The 1st applicant is an adult married female of Manzini who claims to be assisted in so far as is necessary by her husband. The 2nd applicant is a brother Bulisani Tofile also an adult male of Manzini. He was born on the 25th October 1985 and accordingly he is still a minor. The respondents are the Government of Swaziland. The 1st applicant recites in the founding affidavit that their parents were Tony Meyer Chechene and Bhela Maria Dlamini both of whom are now deceased. The 1st applicant recites that she was born on the 24th July, 1968. She states that the 2nd Respondent was born on the 15th February 1976. The meaning of this is not quite clear as the 2nd applicant is said in paragraph 3 to have been born on the 25th October 1985. The 1st applicant carries on to relate that in or about the month of October 1985 and at or near Ndzevane Refugee Camp in the Lubombo their parents were wrongfully and unlawfully killed by a member of the Umbutfo Swaziland Defence Force.. The name and further particulars of the person are unknown. She relates that on the fateful day their parents were travelling to Siteki from the Republic of South Africa through the Lavumisa Border Post where two members of the Umbutfo Swaziland Defence Force requested a lift to Siteki where they had other duties to perform.

On the way one of the soldiers alighted but the other continued and at or near Ndzevane Refugee Camp he killed both the applicants' parents and robbed them of

their car. The miscreant, whose name is unknown, later killed himself when the car overturned.

No indication is given by the applicant as to how she knows of these facts and what references there are to testify to these events is largely if not completely hearsay.

She also goes on to say that at the time of the killing the soldier was acting in the course of and within the scope of this employment with the Swaziland Government. There again nothing is stated from which this can be deduced and it is difficult to see how the applicant who was not present and a little girl at the time is able to testify to the occurrence.

She claims that as a direct result of the soldiers' wrongful and unlawful killing of their parents they suffered damages for loss of support in the sum of E4 000 000.00 and in words she says it is four hundred thousand Emalangeni. She also claims that there was emotional trauma arising from their remaining without parents, as they were still minors at the time. This is a most laconic way of stating a claim, so lacking in particularity that there is little material on which the court could assess the prospect of an award being made thereon.

On the 27th January 1995 she instructed the firm of Attorneys Shilubane Ntiwane & Partners to act on their behalf to sue the Government for loss of support. Nothing appears to have been done however to advance the applicant's case and the 1st applicant was later advised that the attorney in question had taken no action in that matter.

The 1st applicant then, again, somewhat ingenuously, states that in the circumstances it has become clear to her that notice in terms of limitation of legal proceedings against the Government Act has not been given timeously or at all. No condonation for the late filing thereof was ever prior to this application ever sought. She says that it has always been her intention and that of her brother to institute proceedings against the Government claiming damages.

She submits that it is apparent from the foregoing that the prospects of success in the proposed action are reasonable and that the Government will not suffer any prejudice by reason of the fact that the demand was made after the statutory period. The

application, as I have observed, has not disclosed what evidence there is of the essential matter which will have to be proved in the trial and there is nothing to show that the Government will not be prejudiced by the passing of time. It is not known who the witnesses are, and whether they are still available and how the matter is to be dealt with.

The respondent opposed the application and raised the point is that while it may have been possible to grant special leave in terms of Section 4 of the Act but only in regard to default under Section 2(1)(a).

The applicants would have had to show that they have reasonable prospect of succeeding in the proceedings. About which there is some doubt.

There is nothing in the papers to show that the Government would in no way be prejudiced by reason of a failure to make demand within a stipulated period.

The special circumstances in the case justifying the granting of special leave have probably not been demonstrated.

Applicants are debarred in terms of Section 2(1)(c) from instituting proceedings against the Government in respect of the debt, which became due on a day far more than 24 months ago. The Section reads

Limitation of time in connection with the institution of legal proceedings against the Government of Swaziland.

2. (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 came due.**

In terms of this Section, the relevant portion of which I have emboldened, it is no longer possible to institute action in respect of applicants claims. The provisions of Section 4 which reads

Granting of special leave.

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.

do not cover this situation at all. It is clear that the court may grant relief where the claimant is barred under section 2(1)(a) but not under 2(1)(c). This has been decided in *FORBES Peter v SWAZILAND GOVERNMENT* (as yet unreported) and there is no reason why the decision in that case cannot govern the present application.

The application is dismissed with costs.


SAPIRE, C.J.