

IN THE HIGH COURT OF SWAZILAND

CASE NO. 36/06

HELD AT MBABANE

In the matter between:

SIPHO NGWENYA

1st APPLICANT

MUSA SIGUDLA

2nd APPLICANT

And

THE COMMISSIONER OF POLICE

1st RESPONDENT

COMMISSIONER OF CORRECTIONAL SERVICES

2nd RESPONDENT

CORAM

MAMBA AJ

FOR APPLICANT

MR. MABILA

FOR RESPONDENT

MR. KHUMALO

Judgement on a point in limine

17th March, 2006

- [1] The two applicants together with two other men were arrested and detained by members of the Royal Swaziland Police on the 11th day of July and 13th day of July 2003.
- [2] Following their arrest, they were charged with a contravention of the Pharmacy Act 38 of 1929, it being alleged that they had, in furtherance of a common purpose been found in possession of 151.6 kilograms of dagga on the 9th day of July 2003. Both applicants were at the time Police officers within the Royal Swaziland Police force.
- [3] They were admitted to bail by this court on the 23rd day of July 2003. Notwithstanding that each applicant paid the bail deposit fixed by the court, the respondents refused and or failed to release them inspite of the court order for them to do so, until four weeks later.
- [4] After or before being released from custody, the applicants were suspended from work on one half pay pending the determination of their criminal trial.
- [5] On the 20th day of July 2004 the applicants sought and obtained an order from this court, compelling the crown to either prosecute them or withdraw the charges against them. The crown opted for the latter and withdrew the charges against the applicants on the 24th day of September 2004, but despite the withdrawal of the charges, the applicants remained interdicted from work and on one half pay of their respective monthly salaries. It again took an order of this court to reinstate the applicants into their employment.

[6] The issue of the criminal charges against the applicants was then dealt with as a police internal disciplinary matter in terms of the POLICE AND PUBLIC ORDER ACT. The result of that enquiry or hearing was that both applicants were found guilty and dismissed from the Police organisation. This was communicated to them on the 4th day of January 2006. The applicants have appealed against their dismissals and these appeals are yet to be heard.

[7] As a sequel to the above facts, the applicants have filed this application seeking special leave to institute proceedings against the respondents outside the statutory time limits provided in section 2 of The Limitation of Legal Proceedings Against The Government Act 21 of 1972. This application is made in terms of section 4 (1) of the said act, which provides that

"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 prospects of succeeding in such proceedings;
- b) the government will in no way be prejudiced by reason of failure to receive the demand within the stipulated period;"

Section 2 of the said act states that

"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 90 days from the day on which the debt became due; ... (c) after the lapse of 24 months as from the day on which the debt became due."

The respondents have only filed an objection or point **in limine** in opposition to this application stating that (a) the cause of action on which the applicant's rely on to sue the respondents arose in July 2003 and (b) a period of 24 months has elapsed since July 2003 and therefore the applicants are debarred from suing as per the terms of clause 2 (1) (c) of the act. Put differently, the objection is that section 4 (1) of the act empowers this court to grant special leave to an applicant to sue where the claim or cause of action relied upon has not been hit by the 24 month period stated in section 2 (1) (c), but one who has failed to make the written demand on the Attorney General before the expiry of 90 days from the day on which the debt claimed or cause of action arose.

[10] It is common cause that the applicants have not made a written demand on the Attorney General in respect of their delictual claims herein since their arrest and detention. They now seek an order from this court granting them special leave to institute such delictual claim without the prerequisite of making a written demand on the Attorney General within the 90

days from date on which the cause of action arose.

[11] In support of the objection, Mr Khumalo for the respondents referred me to the following cases, namely; **MANDLA KHUMALO vs THE ATTORNEY GENERAL AND OTHERS, CASE NO. 2987/97, MCHALAGENI ZWANE AND OTHERS vs THE ATTORNEY GENERAL, CASE NO 1263/92 and WALTER SIPHO SIBISI vs THE WATER AND SEWERAGE BOARD AND THE ATTORNEY GENERAL CASE NO. 504/87**. All three cases were decided by this court and are unreported.

[12] In **WALTER SIPHO SIBISI'S** case (supra) **HANNAH CJ** (as he then was) at page 5 and 6 of the judgement stated that

"On a plain reading of section 4 (1) the person who may apply for special leave is "a person debarred under section 2 (1) (a)" and it must therefore be determined what category of person can be debarred by that section from instituting proceedings against the government. The answer, in my opinion, can only be a person claiming a debt arising from a delict who has failed to serve his demand within 90 days. A person claiming a non delictual debt who fails to serve his demand within 24 months becomes debarred from instituting proceedings not by virtue of section 2 (1) (a) but by virtue of section 2 (1) (c). ...In my judgement, the operation of section 4 (1) is confined solely to a case of a person demanding a debt arising from a delict who has failed to comply with the terms of the proviso to section 2 (1) (a) and has no application at all to a person, whatever his claim may be, who has failed to institute proceedings within the period of 24 months stipulated by section 2 (1) (c) . In my judgement, the court has no power to grant a relief sought by the applicant whatever the merits of his case may be ..."

[13] This judgement was followed in MCHALAGENI's case (supra) and a judgement in the same terms was delivered by SAPIRE CJ (as he then was) in MANDLA KHUMALO's case (supra). I am in respectful agreement with the above judgement.

[14] It has to be noted that a debt in the context of this legislation is equivalent to or it includes a claim for damages, insofar as such damages are delictual.

[15] I now examine the issue of the cause of action and when such cause of action arose or came into being.

[16] Generally speaking, a cause of action is each and every fact, event or element which is material or necessary for the plaintiff to prove in order to succeed in its claim.

[17] In **EVINS vs SHIELD INSURANCE CO. LIMITED, 1980 (2) SA 814 (A)** at **page 838** CORBETT JA (as he then was) stated that

"The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to

an enforceable claim and includes every fact which is material to be proved to entitle the plaintiff to succeed in its claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

[18] The above excerpt was quoted with approval in the case of **COMFORT SHABALALA vs THE SWAZILAND GOVERNMENT**, Appeal Case No. **2818/95** (unreported), where the court of appeal dealing with a claim for damages based on eviction by an order of court which had been appealed against and where it was contended that the plaintiff's cause of action arose on the date of the actual occurrence of the wrong and that prescription started running from then and not when the appeal was allowed setting aside the eviction, the court held that "the fallacy in that argument can be illustrated by reference to an action for damages based on alleged malicious prosecution. If Mr. Msibi's submission was valid then, by analogue, a plaintiff wishing to sue for damages for malicious prosecution could validly institute action as soon as the prosecution commenced. The authorities are clear, however, that this is not so. It is a necessary ingredient of such an action that the plaintiff be first acquitted by the court and until that occurs his cause of action is not complete.."

[19] What may be extracted from the above authorities is that where the cause of action is based or founded on a continuing wrong, the plaintiff's cause of action, whilst begun, is not complete until the illegal damage - causing occurrence is ended. In this situation the cause of action is one chain constituted or made of a set or series of facts or events. It is these events or occurrences that constitute the whole or the unit. Each of the links in the chain is distinct, separate from yet connected to each other and complete in terms of time, manner and occurrence.

[20] **P J VISSER and J M POTGIETER** in their book **LAW OF DAMAGES** (1993 edition) at page 130 have this to say;

"If a landowner causes nuisance to his neighbour the damage-causing event is not "complete" but there is a series of successive causes of action until the cause of the nuisance has been abated. The "once and for all" rule is thus inappropriate and the plaintiff may claim damages whenever there is a "complete" damage and may institute a fresh action for any further damage.

[21] Similarly, there are special principles in the case of a so-called continuing wrong. Already in **SYMMONDS vs RHODESIAN RAILWAYS, 1917 AD 589** the Appellate Division held that the "once and for all" rule could not apply where there is a continuing unlawful conduct (continuing refusal to take back wrongly delivered sheep). The same approach is evident from **SLOWOWITZ vs VEREENIGING TOWN COUNCIL**, where V had continuously obstructed a supply road to S's shops and the latter suffered damage because he could not let his shops. The court held that the cause of action in regard to S's action for damages had continued to arise for as long as Vs conduct had caused damage." (I have omitted the foot notes).

[22] In casu the applicants seek leave to file a claim for damages based or founded on unlawful arrest and detention and for legal costs incurred as a result thereof. These events began with the alleged or perceived unlawful arrest in July 2003. continued whilst the applicants were on bail and came to an end or were completed on 24th day of September 2004, when the charges against the applicants were withdrawn by the Director of Public Prosecutions. That is the date on which the applicants cause of action arose legally, in my judgement. Apart from the authorities cited above, I find support for this conclusion in the remarks of **SAPIRE CJ** (as he then was) in the case of **JOMO ZWELITHINI DLAMINI vs THE COMMISSIONER OF POLICE AND ANOTHER civil case 2096/96** (unreported) where the learned Judge stated that

"The debt became due immediately the arrest took place, **or at the latest immediately he was released on withdrawal of the charge.**" (the emphasis is mine).

[23] For the reasons stated above, my judgement is that a period of 24 months has not lapsed since the 24th day of September 2004; that being the date on which the charges against the applicants were withdrawn and the debt became due. The objection by the respondents is therefore dismissed with costs.

MAMBA AJ