THE HIGH COURT OF SWAZILAND

MNGAYI FAKUDZE

Applicant

Vs

ATTORNEY GENERAL

Respondent

Civil Case No. 1075/2002

Coram: S.B. MAPHALALA - J

For the Applicant: Advocate L. Maziya (Instructed by Ntiwane & Associates)

For the Respondent: MR. D.V. DLAMINI (Attached to the Attorney General)

JUDGMENT

(7th April 2006)

[1] This matter was set-down for trial for the 13 March 2003, up to the 16 March 2003, where Counsel for the Defendant raised from the bar a point in *limine.* The point raised is that Plaintiff is barred from instituting the proceedings against the Defendant by virtue of the provisions of Section 2 (1) © of the Limitations of Legal Proceedings Against the Government Act No. 21 of 1972. The Defendant, however, conceded that the point in *limine* ought to have been raised by way of special plea in *initio litis.* The present point in *limine* is an exception to the general rule and that it can be raised at any stage of the proceedings and even after *litis contestatio.*

[2] In this regard the court was referred to many decided cases including the cases of *Stolz vs Pretoria North Council 1953 (3) S.A. 884 (T)* to the authority on the point that the special defence of prescription can be raised after *litis contestatio, Mandla Khumalo vs Attorney General - Civil Case No. 2987/97, Walter Sipho Sibisi vs The Water Sewerage Board vs The Attorney General, High Court - Civil Case No. 504/1987, Mchalageni Zwane and Nine others vs The Attorney General - High Court, Civil Case No. 1263/1992, Peter Thomas Forbes vs The Swaziland Government, High Court Civil Case No. 1035/1995.*

[3] The gravamen of the Defendant's case is that in *casu* the Plaintiff failed to serve a

written demand upon the Attorney General within ninety days after the debt allegedly became due as required by Section 2 (1) (a) of the Limitations of legal Proceedings against Government Act of 1972. The Plaintiff has further failed to institute the present action within twenty-four months from the date on which the debt, if any, became due. The Defendant further avers that the Plaintiffs cause of action arose on the 17lh February 1995, when he was arrested by members of the Royal Swaziland Police. Therefore, Plaintiff should then have filed a demand in terms of the Act against the Government within ninety days from that date and instituted legal proceedings within twenty-four months from that date. It is common cause that the Plaintiff only filed his letter of demand in 1997 and issued a summons and served it with the Defendant in April 2002, almost seven years after the cause of action arose. In terms of the Limitation of Legal Proceedings against the Government Act the claim by the Plaintiff is clearly prescribed and ought to be set aside as such.

[4] *Advocate L. Maziya* for the Plaintiff took the view that the arguments advanced for the Defendant do not apply to the facts of the present case and he relied heavily on the *dicta* in the South African case of *Els vs Minister of Law and Order and others 1993 (I) S.A.* at page *12,* where it was held, *inter alia,* that the cause of action commenced to run from the date on which the Plaintiff was informed that the Attorney General had decided not to prosecute him. As the action had been instituted within six months of this date the special pica had to be dismissed.

[5] In arguments before me *Mr. Maziya* contended that the cause of action in the present case is based on malicious prosecution and he conceded that any references to wrongful and unlawful arrest and detention should not be considered for the purposes of this case. That is the present case there were two separate demands made one was made in 1997. The other or second demand was made in the year 2001. When the first demand in 1997 the prosecution had already commenced before Magistrate Bwononga who then left Swaziland and the matter had to commence *de novo.* Immediately after the issuance of the first demand in 1997 the Plaintiff was then served with summons and called back to court for the criminal case which had not been completed. It is the Plaintiffs contention therefore that the prescription period should not start in 1997 as the Crown is alleging because immediately after the Plaintiff had issued that demand the Crown then took the matter back to court for the criminal prosecution. In this regard *Mr. Maziya* relied on what is stated by Foxcroft J in the case of *Els vs Minister of law and Order and other (supra)* that **"it is only when the prosecution has run its course and terminated in favour of the Plaintiff.** The prosecution in the present case was not proceeded with after the re issuance of summons in 1997 when Plaintiff approached this court for an order compelling the

Director of Public Prosecutions to prosecute the Plaintiff within 14 days or issue a *nolle prosequi* certificate. That application appeared before Sapire CJ (as he then was) where an order was issued by that court Plaintiff be prosecuted within 14 days failing which a *nolle prosequi* certificate be issued.

[6] According to *Mr. Maziya* the 14 day period set by the court expired without any prosecution taking place and no *nolle prosequi* certificate was ever issued as directed by the learned Chief Justice. Thereafter the Plaintiff approached the court for an order compelling the Director of Public Prosecutions to issue the said certificate. An order was granted by consent of the parties for the issuance of the certificate in 2001. About two weeks after the issuance of the *nolle prosequi* certificate the Plaintiff issued the second letter of demand in 2001. According to *Mr. Maziya* this is the demand that is actually envisaged by Section 2 of the Act because at that time the Crown had made it very clear that it was not prosecuting the Plaintiff.

[7] After considering all these arguments for and against the point of law in *limine* it is my considered opinion that the Plaintiff acted within the confines of Section 2 of the Act. I say so for a number of reasons. Firstly, it is clear on the facts that it was only in 2001 when the Crown issued a certificate *o f nolle prosequi* and that is the only time it can be said that the prescription period started running. In the instant case the prosecution was stopped by the Crown which issued a *nolle prosequi* certificate. Secondly, I find that the *ratio* in the South African case cited by the Plaintiff that of *Els (supra)* is apposite. Thirdly, and lastly Plaintiff averred at paragraph 21 of his Particulars of Claim that **"Plaintiff has made demand to the Defendant according to law and notwithstanding such demand Defendant fails and/or refuses to pay".** To this the Defendant answered in his plea at paragraph 17 thereof to the following effect: **"The Defendant admits that due statutory demand was made but avers that they refuse to pay the sum claimed or any amount whatsoever as they are not liable to pay same".** It would appear to me that the Defendant is blowing hot and cold in view of these averments, (see also Court of Appeal case of *Comfort Shabalala vs The Swaziland Government - Court of Appeal Case No. 2618/95).*

[8] In the result, for the afore-going reasons the point of law in *limine* is dismissed forthwith. The matter to proceed to trial. Costs to be costs in the course of trial.

S.B. MAPHALALA

JUDGE