



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 4043/08

In the matter between:-

MUSA SIGUDLA

1st Plaintiff

SIPHO NGWENYA

2nd Plaintiff

and

THE COMMISSIONER OF POLICE

1st Defendant

THE PRIME MINISTER OF SWAZILAND

2nd Defendant

**THE COMMISSIONER OF CORRECTIONAL
SERVICES**

3rd Defendant

Neutral citation: *Musa Sigudla v The Commissioner of Police and others (4043/08)*
[2012] SZHC 70 (13th April 2012)

Coram: HLOPHE J.

Dates Heard: 14/03/12

Delivered: 12th April 2012

For the Plaintiff: Mr. M. Mabila

For the Defendants: Mr. S. Khumalo

Summary

Civil – Plaintiffs instituting action proceedings against Defendants *inter alia* for unlawful arrest as well as for unlawful detention in disregard of

an order of court releasing them - Special plea raised contending that claim has prescribed in terms of the Limitation of Legal Proceedings Against The Government Act of 1972 – Meaning and effect of the provisions of the Act discussed. – Whereas the period for filing a demand or notice of the proceedings can be extended if application for such an order is made within 24 months of the debt becoming due, no proceeding can be instituted after 24 months in terms of section 2 (1) (c) of the Act. – Special plea upheld, claims B and C dismissed.

JUDGMENT

- [1] The Plaintiff instituted action proceeding against the Defendants for orders of this court inter alia reviewing the decision of the first Respondent dismissing the Plaintiff's from their employment as members of the Swaziland Royal Police, another one for unlawful arrest as well as that of unlawful detention.
- [2] The basis for the action proceedings was a claim by the Plaintiffs that their dismissal was irregular (claim A) as well as that they were respectively unlawfully arrested on the 11th and 13th July 2003 (claim B) and that they were unlawfully detained when officers of the third respondent refused to release them from custody notwithstanding their having obtained bail (claim C). It is contended that the charges preferred against the Plaintiffs were withdrawn on or about the 20th September 2004. For both claims B and C the Plaintiffs claimed sums of E 300, 000.00 and E 900, 000.00 respectively.

[3] Having filed and served a Notice of Intention to Defend, the Defendants raised a special plea in which they contended the following:-

“1. The Plaintiffs’ claim has prescribed in terms of the Limitation of Legal Proceedings Against The Government Act of 1972, particularly section 2 (1) (c) thereof.

2. Section 2(1) (c) of the above Act provides; “subject to section 3 no legal proceedings shall be instituted against government in respect of any debt after the lapse of twenty four months as from the day on which the debt became due”.

3. The Plaintiff’s (sic) claims fall outside the 24 months statutory period.

4. Defendants pray that all the Plaintiff’s claims be dismissed with costs.”

[4] The matter serving before court is therefore the determination of the special plea. It was contended at the hearing of the matter that given that the cause of action arose on the 20th September 2004 when the charges against the Plaintiffs were withdrawn, this matter, which it is common ground was instituted in August of 2008, was instituted after the claim had prescribed in terms of the Limitation of Legal Proceedings Against The Government Act of 1972, as it was instituted after 24 months of the day the debt became due.

[5] Denying that the cause of action had lapsed or prescribed as alleged, Mr. Mabila for the Plaintiffs clarified that even if prescription did apply in the matter it did not apply to claim 1, which by and large is about the review of the decision of the 1st Respondent dismissing the Plaintiffs

from their employ as members of the Royal Swaziland Police. The review he claimed fell on different considerations and should be unaffected by the provisions of the Limitation of Proceedings Against The Government Act and therefore do not form part of the objection raised. As concerns the claims of unlawful arrest and that of unlawful detention, it was contended that those had not lapsed or prescribed because sometime in March 2006, this court per Justice Mamba issued an order in terms of which the Plaintiffs were granted leave to issue a notice or demand or even summons against the Defendant.

- [6] It was contended further by Mr. Mabila that in so far as the Applicant or Plaintiffs were given leave to sue by the court in March of 2006, per the judgment of Mamba J, then it did not matter when after that date they instituted their action. Faced with a counter submission from Mr. Khumalo to the effect that Judge Mamba had not granted leave to the Plaintiffs to sue the Government, Mr. Mabila submitted that if it is true that the learned Judge had not granted the Plaintiffs leave to sue, then he could not pursue the argument he was advancing that the claim had not prescribed. He also submitted that the converse was also true, which was that if the learned Judge had granted them leave to sue in March 2006, then the claim remained valid whenever the action was instituted afterwards. This latter view was challenged by the Respondent's Counsel Mr. Khumalo who contended that even if the leave had been granted in March 2006, if no action proceedings were instituted within 24 months from the date of the order concerned, the claim would once again prescribe and that this latter prescription would not allow for the subsequent institution of action proceedings against the Respondents. In

fact he argued that not even this court could grant any leave to institute proceedings after this date.

[7] The legal position as concerns the meaning and effect of the provisions of the Limitation of Legal Proceedings Against The Government Act of 1972, particularly as to when a matter prescribes including when no proceedings can be instituted against the Government has been a subject of numerous judgments of this court and the Court of Appeal (now the Supreme Court). I was referred in this regard to such judgments as that of *Walter Siphso Sibisi vs The Water and Sewerage Board and The Attorney General Civil case no. 504/87*; *Comfort Shabalala v Swaziland Government Civil Appeal case no. 2618/95*; *Mandla Khumalo vs Attorney General and two others civil case no. 2987/97* as well as *Evins v Shield Insurance Company Ltd 1980 (2) SA 814*.

[8] These cases clarify when a cause of action is taken to be complete so that the period can start running for purposes of computing the time within which a claim for a debt (which includes a delict) can be made against the Government. In a nutshell a cause of action becomes established where all that a plaintiff must set out in his declaration to succeed in a matter has been established. It has been said that a cause of action does not arise or accrue until the occurrence of the last of those facts that must be proved to entitle the applicant to succeed. See in this regard *Comfort Shabalala and Swaziland Government civil case no. 2618/95 at page 4* thereof, where an extract from *Evins v Shield Insurance Company Ltd 1980 (2) SA 814 (A) at page 38* is quoted stating the foregoing position.

[9] These cases further agree on the meaning of sections 4 (1) read together with section 2 (1) (a) and 2 (1) (c) of the Limitation of Legal Proceedings Against The Government Act of 1972. It is stated to mean that whereas a condonation for failure to issue a demand against the Government can be made with the result that the period gets extended before the expiry of 24 months, no claim and no extension can be made or granted against the Government after the expiry of 24 months of the debt becoming due. The case of ***Mandla Khumalo vs Attorney General and two others (Supra) particularly at pages 2 and 3*** is apposite in this regard.

[10] At page 2 of the said judgment and the learned Chief Justice stated the position as follows:-

“There are two different requirements under the Act with which an intending plaintiff must comply. Firstly Notice of the intended action must be timeously given by way of a demand on the Attorney General. And thereafter the plaintiff is to issue and serves his summons instituting the action within two years of the date on which the debt arose.”

[11] Elucidating further on the meaning of the section particularly that no extension of time or condonation can be granted after two years or 24 months of the date on which the debt arose, the learned Chief Justice put the position as follows at page 3 of the judgment:-

“It has to be noted that a granting of special leave is only applicable to a person debarred under section 2 (1) (a) of the Act. Section 2 (1) (a) of the Act is the section which provides that a written demand has to be made and that in terms of section 2 (1) (b) summons may not be issued before the

expiry of 90 days from the date on which such demand is served on the Attorney General. Nothing is said in section 4 or anywhere else, which would give the court the power to condone the failure to institute an action within 24 months as from the day on which the debt became due.”

[12] It is with the foregoing position in mind that one must determine whether or not the Plaintiff’s claim has prescribed as alleged in this matter.

[13] It seems to me that so much for the proper adjudication of this matter is dependent on what the March 2006 judgment of this court per Judge Mamba says in reality as concerns the extension of time. It is otherwise not in dispute that the current proceedings comprising the Plaintiffs claim was only instituted in August of 2008, well after 24 months of the grant of the judgment itself.

[14] At paragraph 23 of his judgment, Mamba J stated the following:-

“For the reasons stated above, my judgment 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”.

[15] It appears that the application resulting on the above judgment was for an order extending the period within which a demand could be made and was before the lapse of the 24th months period. The court correctly dismissed the special plea raised, in my view when considering that the 24 months period had not yet lapsed. My understanding on reading the judgment is that no order was however made on whether or not the leave

sought was being granted Plaintiff to issue the demand within 24 months nor was the period for which the time was being extended spelt out. The latter, it appears was unnecessary because 24 months had not yet lapsed, with some 6 months remaining. This in my view means that even if the effect of Judge Mamba's judgment of the 17th March 2006 was to grant an extension of the time within which the demand had to be made the summons still had to be issued before the lapse of the 24 months period on the 24th of September 2006. Whether or not it was opened to this court to extend the period for filing the notice or demand beyond the 24 months from the date on which the debt arose and subsequently the summons, is an issue that does not arise in the circumstances of this matter given that the court itself did not say so. Clearly, and assuming that the judgment was extending the period within which a demand could be filed within the 90 days envisaged in section 2 (1) (b) of the Act, plaintiff was required to institute the proceedings for the claims made within 24 months of the date the debt became due.

[16] In his judgment in ***Mandla Khumalo vs Attorney General and Others case no. 2987/97 at page 2*** of the unreported judgment Sapire CJ (as he then was) made the following observation *vis – a – vis* the filing of a notice or demand before an action can be instituted.

“The applicant appears to be oblivious of the requirements of the Act in question, and has failed to distinguish between the institution of an action, and the giving of notice by way of demand which is obligatory before an action can be instituted against the Government”.

[17] My observation is that owing to the fact that the court per Judge Mamba merely dismissed the special plea without pronouncing on whether or not the order initially sought was being granted, it was incumbent upon the current plaintiffs to set the matter down for an order on the merits of the application they had made in order to dispel any ambiguities. Whatever the position I do not agree that if the effect of the said judgment was to grant the applicants leave to institute a demand, it also entitled them to institute the proceeding after 24 months of the judgment itself. This I disagree with because it turns to defeats the whole logic behind the Limitation of Legal proceedings Against The Government Act.

[18] Consequently I have come to the conclusion that the special plea raised succeeds and I accordingly make the following order.

18.1 Claims B and C of the action proceedings instituted by the Plaintiffs against the Defendants be and are hereby dismissed.

18.2 Claim A of the action proceedings instituted by the Plaintiffs is to be proceeded with on the basis of defended action proceedings as it is not governed by the Limitation of Proceedings Against The Government Act of 1972.

18.3 With regards Claim A, the Defendants be and are hereby directed to file their plea within 21 days from the date of delivery of this judgment.

18.4 Owing to the conclusion I have reached with regards all the claims made, each party is to bear its costs as regards the special plea.

Delivered in open Court on this the day of April 2012.

N. J. HLOPHE
JUDGE