



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Reportable

Civil Case No: 2009/12

In the matter between:

JOHN MGIJIMI SIMELANE	(CASE NO. 2009/12)	1 <sup>ST</sup> PLAINTIFF
BONGANI MFANA DLAMIN	(CASE NO. 2012/12)	2 <sup>ND</sup> PLAINTIFF
DUMSILE DUDUZILE DLAMINI	(CASE NO. 2013/12)	3 <sup>RD</sup> PLAINTIFF
SIMANGA DLAMINI	(CASE NO. 2014/12)	4 <sup>TH</sup> PLAINTIFF
MAPHEFU MAGAGULA	(CASE NO. 2015/12)	5 <sup>TH</sup> PLAINTIFF
ARCHIE KHULU GWEBU	(CASE NO. 2018/12)	6 <sup>TH</sup> PLAINTIFF
DUMAPHI MAMBA	(CASE NO. 2019/12)	7 <sup>TH</sup> PLAINTIFF
SIBUSISO MAGAGULA	(CASE NO. 2020/12)	8 <sup>TH</sup> PLAINTIFF
SARAH MAGAGULA	(CASE NO. 2023/12)	9 <sup>TH</sup> PLAINTIFF
ISAAC MAKHOSINI MAGAGULA	(CASE NO. 2024/12)	10 <sup>TH</sup> PLAINTIFF
JULIET HAMBAPHI DLAMINI	(CASE NO. 2025/12)	11 <sup>TH</sup> PLAINTIFF

v

PRINCIPAL SECRETARY , MINISTRY OF PUBLIC WORKS AND TRANSPORT SWAZILAND GOVERNMENT THE ATTORNEY GENERAL	1 <sup>ST</sup> DEFENDANT 2 <sup>ND</sup> DEFENDANT 3 <sup>RD</sup> DEFENDANT
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**Neutral citation** : John Mgijimi Simelane v Principal Secretary, Ministry of Public Works and Transport, Swaziland Government and the Attorney General (2009/12) [2012] SZHC 219 (4OCTOBER 2013)

**Coram** : MABUZA J

**Heard** : 28/6/2013

**Delivered** : 4/10/2013

**Summary** : **The Plaintiff's property was adversely affected due to the construction of the Mliba-Madlangempisi-Tshaneni-Msahweni public road - The 2<sup>nd</sup> Defendant made written offer for the payment of moneys as compensation thereof; such offer was accepted in writing by the Plaintiff - To date the 2<sup>nd</sup> Defendant has not made good its offer - In an action to compel specific performance the 3<sup>rd</sup> Defendant has raised a special plea in terms of section 2 (1) (c) of The Limitation of Legal Proceedings against the Government - Act 1972 namely that the claim is out of time - Defence dismissed as incompetent in respect of claim for specific performance – Special plea dismissed with costs.**

## JUDGMENT

MABUZA J

[1] The Plaintiff's cause of action emanates from the construction of the Mliba-Madlangemphisi-Tshaneni-Msaweni public road wherein their properties were affected.

[2] On the 8<sup>th</sup> May 2008 in a letter to the Plaintiffs the Swaziland Government made an offer to the Plaintiffs for the payment of moneys as compensation in respect of the affected properties.

[3] The offer which is addressed to John Mgijimi Simelane reads as follows:

“The Ministry of Public Works and Transport would like to make you the attached offer as compensation for your property that is affected by the Mliba-Madlangempisi-Tshaneni-Msahweni Roads. Please indicate your acceptance or objection to this offer in the attached form, and return this form to the Ministry as soon as possible. The Ministry will contact you again to give you directions regarding settlement of your payment or objection.”

[4] The letter was signed by the Principal Secretary in the Ministry of Public Works and Construction, Mr. M.E. Madlopha and copied to the Attorney General.

[5] Attached to the letter was the agreement form and a separate document which contained a pre-amble to the form which reads as follows:

- “1. I acknowledge that in accordance with the Roads and Outspans Act of 1931 and its applicable amendments, if any, the Government of Swaziland has a right to expropriate the land in my possession and developments thereof, and a duty to compensate me.
  
2. I acknowledge that damage that occurs outside the road reserve caused by works related to construction will be settled between myself and the contractor that is constructing the road, and that fences that have been brought down will be re-erected by the contractor.
  
3. In my capacity as the owner or representative of the owner, and without duress, I accept the offer by the Ministry of Public Works and Transport as full and final settlement of financial compensation by the Government of Swaziland for the expropriation of improvements on the land in my possession for works related to the construction of the Mliba-Madlangempisi-Tshaneni-Msahweni Roads, and that the land and any items compensated for become the property of the Government of Swaziland.

4. My witnesses and myself are aware that false presentation for the purpose of claiming compensation is a criminal offence irrespective of whether the attempt is successful or not.”

[6] The agreement form is between M.E. Madlopha and the respective Plaintiffs. The form further states the amount in monetary terms of the compensation.

[7] The forms were completed by the Plaintiffs and the offer of settlement was signed and returned to the Ministry; thereby creating a binding contract between the parties.

[8] The letter clearly states that the offerees should indicate their acceptance or objection to the offer in the attached form and to return this form to the Ministry as soon as possible. Thereafter, the Ministry would contact the offerees again to give them directions regarding settlement of their payment or objections.

[9] The Government has to date not contacted the Plaintiffs whom I am told are all waiting to be paid. Out of frustration and tired of waiting the Plaintiffs issued summons against the Government in an effort to obtain payment as offered.

[10] In a complete turn-around the Government decided to defend the matter and instead of paying out in terms of its obligation has raised a special plea in terms of section 2 (1) (c) of The Limitations of Legal Proceedings Against Government Act 1972 (the Act) which reads as follows:

“2. (1) Subject to section 3 no legal proceedings shall be instituted against the Government of Swaziland in respect of any debt ...  
(c)after the lapse of a period of twenty-four months as from the date on which the debt became due.”

[11] Mr. Vilakati contends that because the Plaintiff’s claims are for damages for breach of contract they are “debts” within the meaning of section 2 of the Act. That being the case the Plaintiffs should have issued summons after the lapse of twenty four months from the day on which the debt became due. In this case he submits the debts became due during May 2008 and the summons ought to have been sued out at the latest by 31<sup>st</sup> May 2010. Instead they were sued out on the 3<sup>rd</sup> December 2012 making them time barred in terms of section 2 (1) (c) of the Act.

[12] The contracts were concluded during May 2008; but the Government being the dominant party acted in bad faith by adding an unlawful condition to the contract namely that the Ministry would contact the

parties to give them directions regarding settlement of their payments without setting a reasonable time frame from within which to pay the Plaintiffs. It is this condition which accepted in good faith by the Plaintiffs effectively stopped them from acting against the Government.

[13] I agree with Mr. Mamba that the action herein is for specific performance and that being the case has not been hit by the provision of the Act nor has the claim prescribed. See A.J. Kerr, the Principles of the Law of Contract 3<sup>rd</sup> edition at 397:

“In general, an aggrieved party has a right to a decree of specific performance”.

See also **Farmers Co-operative Society v Berry** 1912 AD 343 at 350; per Innes J.A:

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation has a right to demand from the other party, as far as possible, a performance of his undertaking in terms of the contract.”

[14] In the event the special plea is dismissed with costs.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. S.P. Mamba  
For the Defendant : Mr. M. Vilakati