



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1647/2012

In the matter between:

SINDI NDWANDWE

Plaintiff

and

THE PRINCIPAL SECRETARY

1st Defendant

MINISTRY OF HEALTH

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation: *Sindi Ndwandwe and The Principal Secretary Ministry of Health & Another (1647/2012) [2014] SZHC 126*

(19th June 2014)

Coram: Hlophe J

For Plaintiff: Mr. S. C. Dlamini

For 1st Defendants: Mr. M. Vilakati

Summary

Civil Law – Action proceedings – Claim for damages arising from an alleged negligent operation of Plaintiff by a Doctor employed by or under the 1st Defendant’s auspices – Plaintiff’s claim not preceded by a demand – Respondent files an application on notice of motion to have proceedings dismissed for failure to issue a written demand prior in accord with Section 2 (1) (a) of the Limitation of Proceedings Against the Government Act – Plaintiff filing a rule 30 notice (Notice of irregular proceedings) for the application to be set aside on the grounds that the application was irregular as there should have been filed a Notice of Intention to Defend followed by a Special Plea at least – Whether application irregular and what the effect of such irregularity if it is there – Application for dismissal of action proceedings irregular – Court’s discretion in such matters – Objection not to be upheld where no prejudice ensues to the other side – No prejudice suffered by Plaintiff in the present as meaning and effect of point made in application understood.

Failure to issue demand prior to institution of proceedings and its effect – Meaning and effect of Section 2 of the Limitation of Proceedings Against the Government Act vis-à-vis the failure to issue demand against Governemnt prior to institution of proceedings – Contention that demand required as a prerequisite only in matters based on delict and that in matters based on a

contract such a demand not required and that, even if demand is required, the summons amounts to such demand particularly as there is no prejudice suffered – Contention that Defendants objection putting emphasis on form over substance which is not what the court should concerns itself with – Court of the view that demand is a statutory requirement and as such cannot be deviated from – Accordingly point upheld and proceedings dismissed, with no order as to costs in view of the manner in which the point was taken.

JUDGMENT

- [1] The Plaintiff instituted action proceedings against the first Defendant claiming damages for an incident in which the Plaintiff was operated upon by Doctors situate at the Mbabane Government Hospital. The Plaintiff alleges that the operation which was conducted on her spinal code was carried out negligently resulting in her being paralysed or semi-paralysed on her left hand side of the body. Owing to the alleged negligence, the Plaintiff claimed damages amounting to a sum of E4, 341, 000.00 (Four Million, three hundred and forty one thousand Emalangeni)
- [2] It is common cause that when instituting the said action proceedings the Plaintiff had not issued prior, a letter of demand. The Defendant claiming to be acting in terms of Section 5 of the Limitation of Legal Proceedings

against the Government Act Of 1972, filed a Notice of Motion supported by an affidavit attested to by one Ngabisa Nkambule, Defendant's Attorney, and prayed mainly for an order of court dismissing the action proceedings on the grounds that they did not comply with Section 2 (1) (a) of the above stated Act.

[3] In response to the Defendant's application, the Plaintiff filed a Notice of Irregular Proceedings as envisaged by Rule 30 of the Rules of court. In it the Plaintiff contended that the Defendant's aforesaid application should be declared irregular proceedings or an irregular step and further that it be declared a misdirection. For these reasons it was prayed that the application concerned be dismissed with costs.

[4] Explaining what the irregularity complained of was, the Plaintiff contended that the point raised by the Defendant should have been raised by means of a special plea as envisaged in Rule 22 in terms of which a Defendant who had delivered a Notice of Intention to defend was required or obliged to file or deliver a plea or special plea, or exception within 21 days of the Notice of Intention to defend. The thrust of the Plaintiff's objection in this regard was that the application brought by the Defendant was not authorized in terms of the rules and was thus an irregular step.

[5] On the misdirection contended by the Plaintiff and attributed to the Defendant, it was alleged that the statute relied upon by the Defendant required that a demand be filed prior to instituting summons in delictual claims and not in matters like the present where the claim is based on a contract. It argued in this regard that the general rule of law was that service of a summons sufficed as a demand. This it was contended was a misdirection as Defendant seemed to have put more emphasis on form rather than on substance as required by law.

[6] It seems to me that there are in reality two matters for decision herein. Firstly, is it true that the filing of the application by the Defendant challenging the claim by the Plaintiff is an irregular step? Secondly is a demand in the claim brought by the Plaintiff necessary or put differently, is a failure to issue a demand prior to issuing a summons fatal to the Plaintiff's claim?

[7] These questions are, however not at the same level as the first one seems to be of a preliminary nature and should be decided before one could proceed to the second one. This being the case I must therefore decide firstly the effect and meaning of the Notice of Irregular proceedings or the rule 30 notice or objection.

[8] Commenting on the purpose of the setting aside of irregular proceedings in terms of Rule 30 of the High Court Rules Herbstein and Van Winsen's ***The Civil Practice of the Supreme Court of South Africa 4th Edition Juta and Company page 558***, puts the position as follows:-

“This rule affords a party an opportunity of compelling his opponent to abide by the rules of court on pain of having any step irregularly taken by him set aside. The object of the rule is to provide procedure whereby a hindrance to the future conduct of the litigation, whether created by non-observance of what the rules of court intended or otherwise, is removed”

[9] What stands out from this excerpt is clarification of the purpose of this procedure. Simply put it is a procedure aimed at removing a hindrance to the future conduct of litigation. This merits a comment on whether an irregular step without a hindrance to the future conduct of litigation does necessitate the setting aside of the step taken. The position of the law in this regard is that such a step albeit being irregular, does not warrant the setting aside of it where no prejudice ensues to the otherside. In this regard, and citing with approval the principle enunciated in ***KDL Motorcycles (PTY) LTD vs Pretorius Motors 1972 (1) SA 505 (o)*** and ***De Klerk vs De Klerk 1986 (4) SA 424 (W)***, ***Herbstein and Van Winsen***,

the Civil Practice of the Supreme Court of South Africa (Supra) at page 558, puts the position as follows:-

“A party who is prejudiced by an irregular step should not simply treat it as a nullity and proceed as though it has not been taken. He must apply to court under Rule 30 and allow the court to exercise the discretion conferred upon it to decide what is to be done in relation to the irregular step. Where the irregular step causes no prejudice, it is best ignored or corrected by some non-litigious means, since an application to set it aside is likely to be dismissed”

[10] Other than underscoring the point that a court has a discretion on whether or not to set aside an irregular step, the above excerpt also clarifies that a court is entitled to overlook an irregularity in procedure that does no prejudice to the other side. In *Trans-African Insurance Co. Ltd vs Maluleka 1956 (2) SA 273 (A) at 278 F-G, Schreiner JA* put the position as follows:-

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible in expensive decision of cases on their real merits”.

[11] Returning to the facts of the matter vis-à-vis the question of the existence or otherwise of an irregularity, it is not in dispute that contrary to the usual and or normal practice in terms of the rules which require that upon being served with a summons, the Defendant should file and serve a Notice of Intention to Defend, the Defendant filed an application on Notice of Motion for the dismissal of the proceedings.

[12] This procedure was abnormal and was in reality not in accord with the rules of court and the Plaintiff took issue with it by means of a notice in terms of Rule 30; that is a notice to set aside the irregular proceedings. Trying to justify the application concerned, the Defendant states that it was justified by Section 5 (2) of The Limitation of Proceedings Against the Government Act of 1972, which provides as follows:-

“In the event of a person who has instituted legal proceedings against the Government having failed to comply with Section 2 or any conditions imposed by the High Court under Section 4 (1), the court in which the legal proceedings have been instituted may on application made by the Government before or at the time of lodging its plea or any other documentary reply to the claim against it, dismiss such proceedings”.

[13] Practice of this court is regulated by the rules of court. They are the ones which provide for a summons including how and when it should be issued and served as well as how it should be defended where it has since been issued or even what the Defendant is required to do upon receipt of such a summons. It is now settled that the rules provide that a party served with a summons is required to enter or file a Notice of Intention to Defend within a certain specified period. In so far as the Defendant did not file a Notice of Intention to Defend to be followed by either an exception, plea or special plea; but instead filed a Notice of Motion supported by the acting attorney's affidavit, calling for the dismissal of the action proceedings, it did not act in terms of the rules of court which are the ones that regulate procedure or practice in this court. This is irregular.

That Section 5 (2) of the Limitation of Legal Proceedings Against Government Act of 1972, talks of an application to be made by the Defendant, does not mean that the procedure envisaged by the rules of court can be avoided. I have no doubt the application contemplated by the rule is not the one made by the Defendant. The application contemplated was in the form of a special plea asking for the dismissal of the proceedings for non-compliance with the relevant section, taken or made after there would have been compliance with the rules of court.

The section itself says as much as it does make reference to the procedural requirements of the rules of court such as a plea and any other documentary reply meaning that it was by no means suspending the usual or normal practice in this court as governed by the rules. This being the case I have no hesitation in finding that the procedure followed was irregular or that it amounted to an irregularity. The question is what the effect of this finding is therefore.

[14] As stated above, that a step is irregular does not per se bring about the end of the matter or necessarily that the setting aside of the step should follow. The position is now established that the court has a discretion to exercise and is entitled to overlook any irregularity in the proceedings which does not work any substantial prejudice. See in this regard ***Minister of Prisons and another v Jongilanga 1983 (3) SA 47 (E) at G7A-E.***

[15] In my view the import of the application was very clear namely that the action proceedings by the Plaintiff did not comply with Section 2 of the Act in so far as there was no prior demand served with the Attorney General. I have no doubt that the Plaintiff understood the objection fully when looking at what it said in its papers on this point.

[16] I am therefore convinced that the Plaintiff suffered no prejudice as a result of the irregular step taken by the Defendant in challenging the failure to comply with Section 2 (1) of the Limitation of Proceedings Against Government Act of 1992 by means of an application under a notice of motion. Where no prejudice was occasioned the other side the position of the law is clear being that the court hearing the matter is entitled to overlook such an irregularity. This being the case I cannot uphold the objection by the Plaintiff to set aside the irregular proceedings. Of course a comment cautioning practitioners to at all times adhere to the rules is merited at this stage, for them to avoid costs being awarded against a party or even they being not awarded costs in a case where they deserved otherwise to be so awarded.

[17] Having said this I am now required to turn to the question of the failure by the Plaintiff to file a demand and what its effect is on the proceedings as they stand.

[18] Section 2 (1) (a) of the Limitation of Legal Proceedings Against The Government Act of 1972 provides as follows:-

“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;”

[19] It is clear that in this jurisdiction the issuing and serving of demand prior to the institution of proceedings is a requirement of statute and is peremptory from the reading of the relevant Section as it uses the word “shall”. There is therefore no ambiguity on the statutory requirement in this regard and therefore no interpretation is called for. Advancing its case in terms of his Heads of Argument and submissions before court Plaintiff’s Counsel submitted in essence that there was no merit in the Defendant’s objection because firstly the requirement of a demand being served or delivered prior to the institution of proceedings was required only in the case of delictual claims which this one was not and secondly even if it was required, such a requirement was met when considering the common law position that summons are in themselves a demand with the difference being on the award or otherwise of costs in the event of the claim succeeding without being opposed or defended. Arguing further in this regard, the Plaintiff contended that the objection was concerning

itself more with form than with substance, an approach that the law does not favour

[20] Arguing in the contrary, Defendant's counsel contended that Section 2 (1) (a) of the Act aforesaid, does not confine the service of a letter of demand to delictual claims as contended by the Plaintiff's counsel. The meaning of the section was that a demand was a prerequisite to the institution of legal proceedings against the Government and it not mattering whether such was based on a contract or a delict. The difference between the two being in the proviso to the said subsection which requires that in the case of a claim based on a delict, the demand should be served within 90 days of the date from which the claim or debt became due. Based on this argument the defendant asked for Plaintiff's claim to be dismissed with costs.

[21] On the question of the propriety of the filing of the demand and its effect, I can only agree with the Defendant's counsel. The opening of the section expresses the position unambiguously, that no legal proceedings shall be instituted against the Government in respect of any debt without a demand having been issued and served on the Attorney General, who is the Legal Representative of the Government. To remove any further doubt there could be, the Section makes it clear how the service of the

demand should be. That is it should be by delivery on the Attorney General or be by registered mail.

[22] Clearly, if the service contemplated included that of a summons as contended by the Plaintiff, it becomes clear that such cannot be served by registered mail particularly in this court. In any event by providing that no legal proceedings shall be instituted against the Government without a demand, it is clear that the Legislature was not contemplating a summons or any other process instituting proceedings to serve as a demand as well. This is because the two, “legal proceedings” and a “demand” were distinguished from each other.

[23] On the contention that a demand is only required in the case of a delict I can only say that my understanding of this position is that in all legal proceedings against the Government, be they for a delictual debt or a contractual debt, a demand should be served in the manner stated in the section and that in the case of a delictual claim or debt, such demand should be filed within a certain specified period from the date on which the debt arose, which is 90 days. This is the only distinction between a debt from a delict and one based on a contract. This is as stated in the proviso to the said Section 2 (1) (a). Section 2 (1) (b) only emphasises that once the demand is issued, the claimant should not institute legal

proceedings against Government within 90 days of service of the demand unless the government denied liability before the lapse of such a period. This of course applies whether the claim is based on a delict or on a contract.

[24] The question that arises is what would be the effect of the dismissal of the claim or legal proceedings at this stage? In other words would it signal the end of the matter? This is not a question on which I was addressed and I do not propose to deal with in detail herein. It suffices for me to say that the Act addresses all such situations in terms of Section 3 as it provides for condonation being sought in an appropriate situation as envisaged in terms of the section. If the two years have not yet lapsed from the date on which the debt became due the section provides, condonation could be sought before court which cannot happen if two years or twenty four months has already lapsed. The case of ***Mandla Khumalo vs the Attorney General and Others Civil Trial No. 2987/1997*** and that of ***Musa Sigudla and Another vs The Commission of Police and Others Civil Trial Case No. 4043/08*** as well as that of ***Comfort Shabalala vs Swaziland Government Appeal Case No. 2618/95*** are instructive in this regard. For the sake of completeness in this regard the position was stated as follows in ***Mandla Khumalo vs The Attorney General and Two Others (Supra)*** particularly at page 3 thereof.

“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 the demand is served on the Attorney General. Nothing is said in Section 4 or any where 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”.

[25] Having said all I have above I have come to the conclusion that the point raised by the Defendants should be upheld. The effect of this is that the legal proceedings by the Plaintiff be and are hereby dismissed.

[26] Owing to the failure by the Defendant to adhere to the proper procedure in raising the point they did and as I stated in paragraph 16 above, I must order that each party bears its own costs.

N. J. HLOPHE
JUDGE – HIGH COURT