



IN THE HIGH COURT OF THE KINGDOM OF ESWATINI
JUDGMENT

HELD AT MBABANE

Civil Case No. 94/2014

MANENE GIMSON GAMEDZE
PLAINTIFF

and

THE PRINCIPAL SECRETARY
MINISTRY OF PUBLIC WORKS & TRANSPORT

1ST DEFENDANT

ATTORNEY GENERAL

2ND DEFENDANT

Neutral citation: *Manene Gimson Gamedze v The Principal Secretary Ministry of Public Works and Transport & Another (94/2014) [2018] SZHC 139 (06 July 2018)*

CORAM

MASEKO J

FOR PLAINTIFF:

MR MARTIN DLAMINI

FOR DEFENDANT:

MR SIKHUMBUZO HLOPHE

DATE OF HEARING: 14TH DECEMBER 2017

DATE OF RULING: 06TH JULY 2018

Preamble: *Civil law – summons issued against the Government of Eswatini for delictual damages – late filing of Special Plea of Prescription of Claim in terms of Section 2 of The Limitation of Legal Proceedings Against the Government Act No. 21/1972 – whether Application by Government to file the Special Plea of Prescription after the close of pleadings can be granted – issue of prejudice occasioned on the Plaintiff – whether such prejudice can be cured by a suitable order for costs.*

Held: that Government has complied with discharging the onus as per Section 5 (2) (a) of the Act and therefore leave is hereby granted to raise and file the Special Plea of Prescription in terms of Section 2 of the Act.

Held further: that Government pays costs to the Plaintiff on the ordinary scale in compliance with Section 5 (2) (b) of the Act to cure the prejudice occasioned therein.

THE SUMMONS

- [1] On the 27th January 2014, the Plaintiff launched civil action proceedings against the 1st Defendant for delictual damages in the amount of E815 000 00.

- [2] The summons consists of Claim 1 for damages amounting to E800 000 00 and Claim 2 for damages amounting to E15 000 00 respectively.

- [3] The Particulars of Claim attached to the Combined Summons are as follows:
 - 1. Plaintiff is Manene Gimson Gamedze and adult Swazi male of Siphofaneni, Lubombo District of Swaziland.**

2. ***The First Defendant is the Principal Secretary, Ministry of Works and Transport of the Government of Swaziland.***
3. ***The Second Defendant is the Attorney General cited herein in his nominal capacity as representative of the Government of Swaziland.***
4. ***During April 2011, the Defendants through their employees who were acting in the course and scope of their employment issued a memorandum falsely stating that Plaintiff's wife had died. A copy of the memorandum is annexed hereto marked "A". The Plaintiff was unaware of this memorandum until late January 2012.***
5. ***The information referred to in the preceding paragraph reached the Plaintiff's in-laws which created animosity resulting in a complete breakdown of their relationship as the said in-laws accused Plaintiff of dishonesty and of wishing for his wife's premature death.***
6. ***The statement of the Defendants is wrongful and defamatory of the Plaintiff in that when it was discovered by the employer that Plaintiff's wife has not died he was portrayed a dishonest person.***
7. ***The aforesaid statement also damages the Plaintiff's reputation at his place of employment because the alleged death was used to procure assistance for one of the senior officers of the Ministry of works and Transport whose maid had died. The said maid did not qualify for government's assistance with her funeral expenses.***
8. ***The statement was made with the intention to defend Plaintiff and to injure his reputation.***
9. ***As a result of the defamation, Plaintiff has been damaged in his reputation and has suffered damages in the sum of E8000 000 00.***

CLAIM 2:

- 10. When the Plaintiff's wife eventually died on the 22nd July 2011 the Plaintiff could not get assistance from the Government as an official of the Ministry of Works and Transport had already fraudulently lodged a claim using the name of Plaintiff's wife. A copy of the Death Certificate of Plaintiff's wife is annexed hereto marked "B".**
- 11. The value of assistance which Plaintiff would have received from the Government is the sum of E15 000 00.**
- 12. The Defendants are therefore liable to pay the Plaintiff the amount of E815 000 00 which the Defendants refuse to pay despite demand.**

WHEREFORE, Plaintiff claims -

- a) Payment of the sum of E815 000 00.**
- b) Interest on the aforesaid sum at the rate of 9% per annum from date of judgment to date of payment.**
- c) Costs**
- d) Further and/or alternative relief.**

[4] The summons was served on the 2nd Defendant's principal place of business on the 28th January 2014 – being the Ministry of Justice, Usutu Link Road Mbabane.

[5] On the 27th February 2014 the Plaintiff filed a Notice of Application for Default Judgment in terms of Rule 31 (3) (a) of the Rules of Court.

[6] This Rule provides as follows:-

‘(3) (a) Whenever a defendant is in default of delivery of Notice of Intention to Defend or of a plea, the Plaintiff may set the action down as provided in sub-rule (5) for default judgment and the Court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or documentary, and in the case of any other claim, after hearing such evidence as the Court may direct, whether oral or documentary, grant judgment against the defendant or make such order as to it seems fit.’

- [7] Attached to the Notice of Application for Default Judgment was an affidavit deposed to by the Plaintiff in proof of the aforesaid damages of E815 000 00.
- [8] The Notice of Application for Default Judgment was served on 2nd Defendant on the 27th February 2014. On the same day the 2nd Defendant filed the Notice of Intention to Defend the Action.
- [9] Thereafter on the 7th April 2014 the Defendants filed a Plea, which was followed by Plaintiff’s Discovery Affidavit on the 28th July 2014 and the Defendant’s Discovery Affidavit on the 28th August 2014.
- [10] The Pre-Trial Conference was held on the 23rd September 2014 and the Minutes of the Pre-Trial Conference were duly signed by the parties on that date. The Book of Pleadings was filed by the Plaintiff’s then Attorney of record on the 28th November 2014 together with a request for a date of hearing.

[11] On the 13th September 2017 the matter appeared before Court and was allocated the 8th-9th November 2017 for trial.

[12] On the 26th September 2017 the 2nd Defendant filed a Notice of Leave to File Special Plea. The matter was set down for 27th September 2017 and attached to the 'Notice of Leave to File' was the Special Plea itself, which reads as follows:

'Having read and considered Plaintiff's Combined Summons, particularly paragraph 4 of the Particulars of Claim, Defendants raise a Special Plea of Prescription, to wit:

- (1) The cause of action arose in April 2011, and;***
- (2) These proceedings were instituted in January 2014, outside of the 24 months prescribed under Section 2 (1) (c) of the Limitation of Proceedings against the Government Act 21/1972.***

WHEREFORE THESE PROCEEDINGS OUGHT TO BE DISMISSED WITH COSTS.'

[13] On the 8th November 2017, the Plaintiff filed a Replication on the Special Plea in the following manner:

- '1. The Plaintiff denies that the matter had prescribed in anyway, in that, the Plaintiff had demanded for compensation from the Defendants, as early as August 12, 2011, and immediately thereafter, the claim, see Annexure MNG 1.***
- 2. That the Plaintiff also fell seriously ill and was excused by Defendant from employment to a point where Plaintiff had to go on a wheelchair to date, and was only able to process the court process in November 2014.***

3. ***In terms of the law, any prescription would have also been interrupted by the acknowledgement by Defendant of the facts of the claim, in particular the fraud conduct against Plaintiff.***
4. ***Defendant had by conduct waived its right against prescription, by engaging on pleadings and admitting to the act of wrong-doing against Plaintiff until the trial.***
5. ***The Defendant tacitly waived its right on prescription, even if there was any by admitting to the wrong doing and indirectly admitting to liability to Plaintiff.***
6. ***The Defendant has not proved a date of inception of prescription of the matter'.***

THE LAW

[14] Legal proceedings against the Government of Eswatini are regulated by The Limitation of Legal Proceedings Against The Government Act No. 21 of 1972 (hereinafter referred to as the Act) which was enacted to prescribe limitation of time in connection with the institution of legal proceedings against the Government. It provides as follows:

'Section 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 ninety days from the day on which the debt became due;

- (b) Before the expiry of ninety days from the day on which such demand was served on the Attorney General unless the Government has in writing denied liability for such debt before the expiry of such period.**
- (c) After the lapse of a period of twenty-four months as from the day on which the debt became due.**

2. For the purpose of subsection (1) -

- (a) legal proceedings shall be deemed to be instituted by service on the Attorney General of any process of a court (including a Notice of Application to court, a claim in reconvention, a third party notice referred to in any rules of court and any other document by which legal proceedings are commenced) in which the claimant of the debt claims payment thereof;**
- (b) a debt shall, if the Government prevents the claimant therefore from coming to know of its existence, not be regarded as due before the day on which such claimant becomes aware of its existence;**
- (c) a debt nor arising from contract shall not be regarded as due before the first day on which the claimant thereof has knowledge that the debt is due by the Government or the first day on which he could have acquired such knowledge by the exercise of reasonable care, whichever is the earlier day;**
- (d) a period prescribed in such sub-section shall, in the case of a debt of which the sue date is postponed by agreement between the Government and the claimant, be calculated afresh as from the day on which the debt again becomes due.**

NON-APPLICABILITY

3. (1) Section 2 shall not apply in respect of -

- (a) a debt for which the Government has unequivocally in writing acknowledged liability to the person instituting legal proceedings in respect of such debt.**

- (b) a counter claim in any legal proceedings instituted by Government;**
- (c) a claim under the Motor Vehicle Insurance Act No. 10 of 1946;**
- (d) a claim in respect of which any of the provisions of the Workmen's Compensation Act No. 4 of 1963 apply.**

[15] Section 5 (2) of the Act provides as follows:

'(2) In the event of a person who had 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.

Provided that such court may allow the Government to make such application at any other stage in such proceedings if it is satisfied that -

- (a) the Government could not have reasonably been expected to have invoked such section before or at the time of the filing of its plea or other documentary reply; and**
- (b) no prejudice will be suffered by the person who has instituted such proceedings which could not be cured by a suitable order of costs against the Government.**

[16] It is common cause that the Defendants filed their plea and did not raise the special plea of Prescription of Plaintiff's claim in terms of the Act.

[17] I must state that notwithstanding the fact that the Plaintiff filed a Replication to the Special Plea, it became necessary that the Defendants file a full blown application for leave to file the Special Plea at this stage of the proceedings where the pleadings have been closed and trial dates allocated. I granted leave to the Defendants to file this application in compliance with Section 5 (2) (a) (b) of the Act and the Supreme Court Judgment of *Siphiwe Sibongile Mamba v The Government of the Kingdom of Swaziland & Others* Case No. 31/2017. The Defendants are under a duty to discharge the onus as envisaged in Section 5 (2) (a) of the Act.

[18] On the 8th November 2017, being the date of trial of the matter, there was no appearance for the Defendants and the matter was eventually postponed to the 9th November 2017. Mr. M. Dlamini for the Plaintiff applied for wasted costs of the day and I reserved the matter pending the discussion of the issue between the two Counsel.

[19] On the 9th November 2017 Mr. S. Hlophe appeared on behalf of the Defendants and the matter was postponed to the 24th November 2017 at the instance of the Defendants, who wanted to deal with the Notice to file the Special Plea which was opposed vigorously by the Plaintiff. The Defendants were then ordered to file their Heads and Bundle of Authorities by the 13th November 2017, however,

they did not file any process. On the 24th November 2017 the matter was again postponed to the 27th November 2017 and again at the instance of the Defendants.

[20] On the 27th November 2017 the matter was again postponed to the 30th November 2017 and again at the instance of the Defendants.

[21] On the 30th November 2017 the Defendants were granted leave to file the full blown application for leave to file the Special Plea by the 5th December 2017. The Court went on to prescribe time limits within which the parties were to file their papers and Bundle of Authorities. The application was duly filed on the 5th December 2017 and was set down for the 14th December 2017. The Defendants were to file their Replying Affidavit, if any, on or before the 11th December 2017, however, no such Replying Affidavit was filed. The Plaintiff did file their Answering Affidavit on the 7th December 2017 as ordered by the Court. The Plaintiff filed their Bundle of Authorities on the 28th November 2017 and the Defendants had filed their Heads and Bundle of Authorities on the 14th November 2017.

THE APPLICATION FOR LEAVE TO FILE THE SPECIAL PLEA

[22] I must state that it is this Application for Leave to File the Special Plea by the Defendants that this Court must pronounce a ruling on.

[23] The issue for determination at this stage by this Court is the following:

- (i) Whether a Special Plea based on prescription in terms of the Act may be raised at this stage of the proceedings when the pleadings have been closed and the matter has been allocated trial dates.

[24] The Founding Affidavit of the Defendants was deposed to by Senior Crown Counsel Mr. Sikhumbuzo Hlophe who had just been allocated to deal with the matter by the Attorney General.

[25] In order to prove that the Defendants could not plead the Defence on Prescription during the pleading stages, Mr. Hlophe stated that he was allocated the file on the 25th September 2017, when the pleadings had long been closed. He stated further that upon perusal of the pleadings he realised that the Crown Counsel who dealt with the matter earlier ought to have raised the Defence of Prescription as the Plaintiff's claim was already time barred.

Mr. Hlophe stated further that upon further investigation of the matter it came to his attention that this is an appropriate matter where the defence of Prescription ought to have been raised by Defendants during the pleading stage.

Mr. Hlophe stated further that the Special Plea of Prescription can be raised at any stage during the proceedings as long as good cause is shown why it could not be raised earlier.

[26] The Plaintiff filed his Answering Affidavit wherein he raised three points *limine*, the first point being:

‘That the Heading of the Application is bad in law, as it does not articulate the parties according to their interest in the matter, in particular, suggesting that an application has been made on my behalf yet am supposed to be Respondent. Am advised that this is bad in law and renders the application fatal’

[27] As regards the first point in *limine*, I am in agreement with Mr. Dlamini for the Plaintiff that the heading of the Application is defective and bad in law. The Defendants were supposed to properly draft this heading to befit the interlocutory status of the matter. However, I am of the view that the failure to properly draft the heading or citation of the matter is not *per se* fatal, these being interlocutory proceedings and also because it is an oversight or error on the part of Counsel. There is no prejudice occasioned on the Plaintiff by this error. I must caution though that Counsel must and should at all material times be very cautious when drafting process to avoid such mistakes which are capable of being magnified to the disadvantage of their clients by the other side.

[28] The second being point in *limine* which the Plaintiff raised is that the Founding Affidavit ought to have been deposed to by a relevant official of the Ministry of Works as opposed to Senior Crown Counsel Mr. S. Hlophe. I see nothing wrong in Mr. Hlophe deposing to the Affidavit, these being interlocutory proceedings dealing only with a point of law.

[29] The third point in *limine* is that the Founding Affidavit does not expound the circumstances and or demonstrate same which cannot be curable by an order for costs. Again I find little substance in this argument, because Mr. Hlophe has in my view demonstrated that he was allocated the matter only on the 25th September 2017 and upon perusal thereof the pleadings he discovered that a Special Plea of Prescription in terms of Section 2 of the Act ought to have been raised. Further he tendered the costs as per paragraph 12 of the Founding Affidavit wherein he states that:

‘May I further state that no prejudice will be suffered by the Plaintiff which cannot be cured by a suitable order of costs’.

[30] I am therefore of the considered view that the points in *limine* be and are hereby dismissed.

[31] As regards the merits of this interlocutory application, I must point out that the issues are very brief in that Mr. Hlophe has in my view demonstrated that he was allocated the file very late in the proceedings and certainly cannot be faulted for the non-pleading of

the Special Plea of Prescription during the pleading stage. In his submissions Mr. Hlophe referred this Court to *HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE HIGH COURT OF SOUTH AFRICA, 5TH EDITION* at page 600 where the learned authors stated the following:

“Special pleas of a peremptory or permanent nature to quash the action altogether, for example prescription, res judicature, compromise, payment, or release, can be raised even after litis contestatio, as can a plea to the court’s jurisdiction is status matters’.

[32] Mr. Dlamini further referred this Court to the Supreme Court judgment in re: ***Siphiwe Sibongile Mamba*** (*supra*) where SP Dlamini JA sitting with RJ Cloete JA, and SP Maphalala JA, both concurring, stated at pages 15-16 paragraph 25 as follows:

‘The inescapable conclusion in terms of the judgment of His Lordship Hannah CJ, and the above quoted Sections is as follows:

- (a) that the failure to comply with Section 2 of the Act (in delictual claims) is not necessary fatal;***
- (b) that the Court may not meromutu raise the point of the statutory limitation.***
- (c) that the Government may raise a point of prescription on application before or with its plea or a similar step prior to the close of pleadings;***
- (d) that the Government may be allowed after the plea or a similar step to apply for leave to rely on prescription but it must prove that it could not reasonably have***

been expected to do so at an earlier stage and that not prejudice will be occasioned to any person as a result'.

[33] Mr. Dlamini for the Plaintiff also raised a constitutional point in opposition to the Defendant's Application. I am of the view that he is at liberty to raise these during the arguments on the merits of the Special Plea of Prescription and not at this stage. The same applies to the other legal arguments he raised. I am grateful to Mr. Dlamini for the authorities cited and filed herein as they are very informative and resourceful.

[34] I am therefore of the considered view that it would be in the interest of justice not to shut the door in the face of the Defendants and disallow the application because Section 5 (2) (a) (b) permits the late filing of the Special Plea by Government and also permits that the prejudice of the delay of the matter occasioned on the Plaintiff can be cured by a suitable order for costs. I therefore grant the Defendants leave to file the Special Plea and that it be incorporated into the pleadings.

COSTS

[35] I have no doubt in my mind that there has been too many short comings on the part of the Defendants since the matter was allocated to this Court. On the other hand the Plaintiff and his


Counsel were at all material times in Court and ready to deal with the matter. For example when the trial was to commence on the 8th November 2017, there was no appearance for the Defendants, however the Plaintiff and his Counsel were in Court. Mr. M. Dlamini applied for wasted costs of that day and I reserved same pending the availability of the Defendant's Counsel. On the 9th November 2017 the matter was postponed to the 24th November 2017 by consent of the parties and the issue of the wasted costs of the 8th November 2017 was in my view unsatisfactorily addressed by Mr. Hlophe for the Defendants. I am of the view that the Plaintiff is entitled to the wasted costs of the 8th November 2017.

[36] As regards the costs as from the 9th November 2017 to the 14th December 2017, Mr. Hlophe conceded that the prejudice occasioned on the Plaintiff by raising the Special Plea of Prescription in terms of the Act at this late stage of the proceedings and the actual prosecution of the Special Plea by the Defendants should be cured by a suitable order of cost is in favour of the Plaintiff. This in my view is a correct approach by the Defendants and in compliance with Section 5 (2) (b) of the Act.

[37] In the premises I hereby order as follows:

1. The Defendants are granted leave to file the Special Plea of Prescription in terms of Section 5 (2) (a) of the Act.
2. The Special Plea of Prescription is hereby declared to form part of the pleadings in this matter.
3. The Plaintiff is awarded **wasted costs** of the 8th November 2017.
4. The Defendants are also ordered to pay costs on the ordinary scale as from the 9th November 2017 to the 14th December 2017.
5. The parties are to agree on a date for trial in this session.

It is so ordered.



NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT