IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between: Case No. 1973/2002

GCINA VILAKATI Plaintiff

And

COMMISSIONER OF POLICE 1st Defendant

ATTORNEY GENERAL 2nd Defendant

Neutral citation : ***Gcina Vilakati & Commissioner of Police and Another (1973/2002) [2019] SZHC 109 (21st June, 2019)***

Coram : **M. Dlamini J**

Heard : **16th May, 2019**

Delivered : **21st June, 2019**

Rule 30 - ***Replication - the Rule is clear that a party who fails to deliver a replication, as Rule 25 refers inter alia to replication is automatically barred from filing the same - it is unnecessary for the defendant to serve him with a Notice of Bar which is a reminder to file - upon lapse of fourteen days, the plaintiff is disallowed to file a replication - the***

replication ought to be set aside and not form part of the pleadings.

- ***action proceedings should be ordered to proceed without the admission of the replication following that plaintiff was ipso facto barred by reason of filling the replication on 9th May, 2019 instead of 25th or 31st January, 2019.***

Prescription - ***The first is when did he became aware - the second is in the circumstances of the case serving, when the plaintiff ought to have become aware of the existence of the debt - the second question raises the standard of a reasonable man who is deemed to exercise caution in his affairs.***

Letter of demand
- ***Is it a court process?***
- ***This wording, "any process of a court" whose service results in the institution of a court processes is well within the common law parameters that for a document to be described as a court process, it must be served with the Registrar or Clerk of Court as the case may be - a letter of demand is a document between the parties and not intended for a court of law - this means therefore, the plaintiff must issue summons or an application as the case may be for him to be held to have instituted legal proceedings.***

Summary: A Rule 30 application together with a plea of prescription is serving before me following plaintiff's combined summons. Plaintiff objects to the special plea mainly on the ground that a letter of demand was served within the prescribed period.

The Parties

[1] The plaintiff is described as *"an adult Swazi male of Ezulwini area in the Hhohho District born on 14th October, 1979."*[1]

[1] **Book of pleadings at page 2 paragraph 1**

[2] The first defendant is in charge of the Kingdom's police force. His seat of authority is at Mbabane, Usuthu-Link Road. The second defendant is the legal representative of all government establishments including the first defendant. He discharges his functions from the 4th floor, Justice building, Mbabane, Usuthu –Mhlambanyatsi Link Road.

Parties' Pleadings

[3] It is common cause that plaintiff registered his combined summons with the Registrar of this court on 25th June 2002. He alleged in his combined summons:

"*4. On or about 17th December, 1999 at or near Bellinah Bus stop at Ezulwini area, in the Hhohho Region, certain members of the Swaziland Royal Police, in uniform belonging to the traffic department, from Lobamba Police Station unlawfully assaulted Plaintiff.*

4.1. The said Police Officers unlawfully assaulted Plaintiff by firing a live round of ammunition at Plaintiff and thereby hitting him in the process."

[4] The claim was tabulated as follows:

"8. As a result of the aforegoing, the Plaintiff suffered damages in the amount of E400 000.00 being made up as follows:

a) Hospital expenses	*E300.00*
b) Estimated future medical expenses	*E10 000.00*

c)	*Loss of earning from date of assault to date*	*E45 000.00*
d)	*Estimated future loss of earnings*	*E64 500.00*
e)	*General damages (pain and suffering) loss of Amenities of life and permanent Disability*	*E280 200.00*
	Total	***E400,000.00"***

[5] On 20th August, 2002, first defendant served plaintiff with its plea, pleading to the merits of plaintiff's case. A notice to defend had been served on 19th July, 2002. On 26th August, 2002 the plaintiff served a Notice to Discover to the defendant. A discovery affidavit was served upon defendant on 17th September, 2002. The first defendant had served its discovery affidavit on 16th September, 2002. It is not clear what happened thereafter as the file reflects that on the 14th February, 2006, the offices of **Ben J. Simelane and Associates** served a Notice of Appointment to the second defendant in respect of the same parties and case number. This throws some confusion because from the onset, the original combined summons and all subsequent court processes were filed from the same office of **Ben J. Simelane and Associates**.

[6] What clouds this case further is that nothing happened on the file until sixteen years later on 5th November, 2018 when plaintiff filed an Amended Particulars of Claim. First defendant reacted by raising the special plea of prescription serving before me. In its special plea first defendant raised:

"Plea to Amended Particulars of Claim Special Plea"

"1. Plaintiff's claim has prescribed as the Summons was issued on the 25th June, 2002 for a cause of action which arose on 17th December, 1999, in complete disregard of the twenty-four months prescribed under section 2(1)(c) of the limitation of Legal Proceedings against the Government Act 21/1972. These proceedings should therefore be dismissed with costs to defendants."

[7] Defendant continued also to plead on the merits of the Amended Particulars of Claim. Plaintiff reacted by filling a replication where he pointed out:

"1. *On 17th December, 1999, Plaintiff was shot by the police as a result of which he suffered a fracture of his jaws and lost of his left side of the body including his arm, wrist elbow and knee. He suffered a central nervous system injury and was hospitalised.*

2. Plaintiff was charged with attempted robbery and his criminal trial was set for hearing at Lobamba Circuit on 16th October, 2000 and was released on bail of E500.00 under case no. L290/2000.

3. On 24th October, 2000 the criminal trial was postponed to 4th March, 2001 at Lobamba Circuit Court.

4. *Plaintiff is being treated for the injury received to date and on 5th August, 2014* ***Dr. Dlamini*** *at Mbabane Government Hospital declared plaintiff to be 100% paralyzed, a copy of the medical report is attached and marked Annexure "GV1".*

5. *Plaintiff could not issue nor sue Defendant for the injury until he had fully comprehended the nature and extent of the injury which only came to be in 2003.*

6. *Plaintiff was not prosecuted for the attempted robbery on 4th March 2001 and the matter is still outstanding. The cause of action is only complete when the debt becomes claimable and the damages arise.*

7. *The damages could not arise prior to June 2003 because defendant was not only prosecuting plaintiff but plaintiff was still undergoing treatment for the injury received."*

[8] He concluded in replication:

> *"It is therefore humbly submitted that although plaintiff was injured in 1999, he is still undergoing treatment and by the time 2 years lapsed plaintiff had not fully comprehended the full extent of the injury suffered and the damages claimed.*

WHEREFORE may it please the Honourable Court to dismiss the point in limine with costs."

[9] The replication was served on the defendants on 19th February, 2019. Defendant raised a Rule 30 application upon service of the replication. He highlighted:

> *"1. The Replication has been served four months after service of the Plea, way outside the 14 days prescribed under **Rule 25(1);***
>
> *2. At the times of service and filing of the Replication, plaintiff was automatically and permanently barred from delivery of same in terms of the ipso facto bar of Rule 25(1) as read together with **Rule 26,** and;*
>
> *3. The said replication was served and filled after close of pleadings and Notice of Trial dated 28 January 2019 in terms of **Rule 55A(1)."***

[10] On 14th May, 2019 legal representatives for both parties appeared before me. Defendants' Counsel made representation on both Rule 30 and the special plea of prescription. The matter was postponed to 16th May, 2019 for plaintiff's Counsel to make his submissions. Counsel for defendant failed to show up in court on 16th May, 2019. The Registrar of this court called both his office and his mobile after the court had to

adjourn at his instance. He was reported not to be present in the office. His mobile was off-line.

[11] On this information, the court resumed at 1017 hours. Learned Counsel on behalf of the plaintiff made his representation. The matter was postponed for a ruling. I must hasten to say however that learned Counsel for defendant later filed written submissions in reply. He took a wise decision to ameliorate his absence.

Issues:

[12] Two questions require attention by this court. The first question is whether the plaintiff was entitled to file this replication. The second, is whether the claim by the plaintiff has prescribed.

Adjudication

Replication

[13] Rule 25(1) reads:

> *"Within fourteen days of the service upon him of a plea, and subject to sub-rule (2), the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22."*

[14] Was the replication filed within fourteen days after service of a plea? I turn to the plea serving before court. The amended plea was served upon the plaintiff as evident by the signature of plaintiff Counsel's Clerk

on 11th January, 2019 at 1555 hours.[2] Plaintiff served the replication upon the defendant on 9th May, 2019 as evident by second defendant's office stamp. The time was 10:29 am.

[15] From the above it is clear that plaintiff served defendant the replication way out of time. Fourteen days lapsed on 31st January, 2019, if one considers fourteen court days. However, the rule does not refer to "court days" but to days in the ordinary sense. This means fourteen days lapsed on 25th January, 2019. This effectively means plaintiff was way out of time when he filed his replication on 9th May, 2019. This was not an issue during the hearing.

[16] In address of the lapse of time in filling the replication, plaintiff's Counsel urged the court to dismiss the point raised by the defendant on the basis that defendant has not pleaded or submitted to this court on the prejudice it has suffered as a result of the delayed replication. Should the court decline to accept a replication pleading on the mere ground that it ran out of time? The answer lies in the Rules themselves.

[17] Rule 26 stipulates:

> ***"Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred.*** *If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice serve upon him require him to deliver such pleading within three days after the*

[2] **See page 7 of book**

day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: (my emphasis)

Provided that for the purposes of this rule the days between 16 December and 7 January both inclusive shall not be counted in the time allowed for the delivery of any pleading..”

[18] The Rule is clear that a party who fails to deliver a replication, as Rule 25 refers *inter alia* to replication is automatically barred from filing the same. It is unnecessary for the defendant to serve him with a Notice of Bar which is a reminder to file. Upon lapse of fourteen days, the plaintiff is disallowed to file a replication. The replication ought to be set aside and not form part of the pleadings. In other words, pleadings are considered closed after the lapse of fourteen days from the date of filing of a plea by the defendant for purposes of a replication or a plea to a claim in reconvention.

Effect of Automatic Bar

[19] It must be borne in mind that a replication is not a necessary pleading in trial proceedings.[3] It is filed by the plaintiff where a plea raises new allegations. A special plea for instance raises new allegations and a replication may be filed. It may also be filed where the plea amounts to

[3] **Milne v Shield Insurance 1969(3) SA 352(A)**

a confession or avoidance. **Butler v Swain**[4] is authority that a plea of prescription call for a replication. The plaintiff may replicate by raising for instance interruption of prescription.

[20] Following that the Rule imposes automatic bar on plaintiff and in line with the principle of natural justice on the right to be heard, setting aside of a replication does not bring about an end to the plaintiff's cause of trial. The outcome of *ipso facto* bar is that the trial must proceed as if there was no replication. **Caney J** referring to this position of the law eloquently expressed:

> "*In my judgement however, the fact that a plaintiff is barred under Rule 37 does not debar him from "proceeding with the action"; he is only barred from filing a replication. There is a fundamental difference between the situation which exists when a plaintiff has failed to file a replication and that which exists when either a plaintiff has failed to file a declaration or a defendant has failed to enter appearance or to file a plea or except to the declaration, the circumstances under which the plaintiff may obtain a default judgement against him under the provisions of para. (b) of Rule 49. The fundamental difference is that in those instances there is no issue before the court; in the one, the plaintiff has not proceeded with his action, in the other the defendant has not raised an issue. Where, however, the plaintiff has failed to file a replication, the issues between the parties are contained and to be found in the pleadings as they stand; the*

[4] **1960 (1) SA 527 (N)**

failure to file a replication is not to be taken as an admission by the plaintiff of the averments in the plea, and so, although there be no denial of them, they must be taken to be not admitted. ***Vermaak v. Birkenstock, 1912 N.P.D. 8****, in which a full Bench held that Rule 33, which provides, inter alia, that every allegation of fact in the declaration, if not denied specifically or stated to be not admitted in the plea, shall be taken to be admitted, does not apply to a replication."*[5]

[21] From the above, it is clear that the action proceedings should be ordered to proceed without the admission of the replication following that plaintiff was *ipso facto* barred by reason of filling the replication on 9th May, 2019 instead of 25th or 31st January, 2019. The matter serving before me however does not end upon the question of whether or not to admit the replication. The court must consider the special plea raised.

Prescription

[22] Following that plaintiff's replication is set aside, the court must refer to the amended particulars of claim and the other pleadings serving in the file to make a determination. Writing on the purpose for prescription **Mohamed CJ[6] expressed:**

*"**One of the main purpose of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse***

[5] **1963 (31 SA 61 at 62 D-H**
[6] **Uitenhagen Municipality v Molloy (1997) ZASCA 112; 1998 2 SA 735 (SCA) at 742 I – 743 A**

of time. *If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted."*

[23] **Van der Westhuizen J** emphatically stated on the reason for prescription provisions:

"This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for ***indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute.*** *The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify or their recollection of events may have faded.* ***The quality of adjudication is central to the rule of law.*** *For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence."*

[24] **Wessels J**[7] eloquently expounded:

*"The principle which activated the legislature in passing the statute of 1540 (***Plakaat Ordinance on prescription***) that it is very difficult when the thing itself is removed and goes out of being, to prove years after wards exactly what amount was*

[7] Spiller v Mostert 1904 TS 635 at 636

*delivered and what it was that was delivered. The corpus is gone, and the action should be brought whilst the memory is still green and thereafter the statute provided that after the lapse of two years the claimant could no longer enforce his claim."(*My own and emphasis*)*

Case at hand

[25] Defendant referred the court to section 2(1)(c) of the Limitation of Legal Proceedings Against Government Act No: 21 of 1972 (the Act)which reads:

> *"(1) Subject to section 3 no legal proceedings against the Government in respect of any debt –*
>
> *(c) after the lapse of a period of twenty-four months as from the day on which the debt became due."*

[26] Sub-section 2 (c) states:

> "(*c) a debt nor[sic] 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 exercise of reasonable care, whichever is the earlier day."*

[27] Now the question is when did plaintiff become or he ought to have become aware of the debt? **T.L. Dlamini J in Somnotfo Khumalo v Swaziland Government and Another (1744 /2012) [2019] SZHC 16 (19 February 2019)** found this provision to be creating a two pronged questions. The first is when did he became aware. The second is in the circumstances of the case serving, when the plaintiff ought to have become aware of the existence of the debt. The second question raises the standard of a reasonable man who is deemed to exercise caution in his affairs.

[28] In the present case, the plaintiff alleged in both his original summons and Amended Particulars of Claim that:

> *"On or about 17th December 1999 and at or near kaBhelinah bus stop at Ezulwini area, in the Hhohho District, certain members of the Swaziland Royal Police in uniform belonging to the traffic department from Lobamba police station unlawfully assaulted plaintiff."*

[29] Now the question is when did the plaintiff become aware of the unlawful conduct upon him? The answer is from the plaintiff's own mouth. From the above, the unlawful act occurred on 17th December, 1999. This is the date when plaintiff became aware of the unlawful conduct by first defendant. The second position is that a reasonable man in the circumstances of the plaintiff ought to have become aware of the unlawful conduct on 17th December, 1999. It is common cause that twenty four months in terms of defendant's Prescription Act lapsed on

18th December and not 17th December, 2001. The reason for it to lapse on 18th and not 17th December, 2001 is that Section 2(2) (c) provides that the first date should be discounted where the claim is delictual.

When did plaintiff file his claim?

[30] According to the defendant, plaintiff filed his claim upon service of the original summons. This date is reflected as 26th June 2002. In terms of defendant, the claim was late by six months. Plaintiff on the other hand disputes that his claim had lapsed. He submits that a letter of demand was served within the twenty four months. The question facing this court is whether a letter of demand results in "*instituting legal proceedings*" as per the wording of Section 2(1) of the Act. I must reinstate the provision for purposes of clarity:[8]

> *"2(1) Subject to section **3 no legal proceedings against** the Government in respect of any debt –*
>
> *2(1) (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;*
>
> *2(1) (b) before the expiry of ninety days from the day on which such demand was served on the Attorney-*

[8] Section 2(1)(a) and (b) page 21

General unless the Government has in writing denied liability for such debt before the expiry of such period."

[31] From the wording of the provisions, it is clear that the Legislature called upon a claimant to engage in a prior step before instituting legal proceedings. This step is serving a letter of demand against the defendant. This means therefore that a service of a letter of demand upon the Government does not amount to instituting legal proceedings. If there is any doubt to this interpretation, sub-section (2) categorically clarifies this point. It reads: [9]

"(2) *For the purposes of subsection* (1) –

2(2) (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 an 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."

[32] This wording, *"any process of a court"* whose service results in the institution of a court processes is well within the common law parameters that for a document to be described as a court process, it must be served with the Registrar or Clerk of Court as the case may be.

[9] Insert (a) C page 21

A letter of demand is a document between the parties and not intended for a court of law. This means therefore, the plaintiff must issue summons or an application as the case may be for him to be held to have instituted legal proceedings.

[33] I have already pointed out that the plaintiff alleged that the unlawful conduct of inflicting injuries (gun wounds) upon him was on 17th December, 1999. This is the date upon which the cause of action occurred. He had knowledge of the defendant's allege unlawful conduct on this day. The submission that the quantum could not be ascertained cannot vitiate that liability for the unlawful conduct arose on 17th December, 1999. Worse still even the letter of demand relied upon was served outside the ninety days provided by the Legislature.

[34] Section 5 (2) reads:

> *"5(2)* ***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"*

[35] This section directs the court on the outcome of a special plea raised by the defendants. The circumstances of this case as highlighted in the preceding paragraphs warrant compliance with Section 5(2) of the Act.

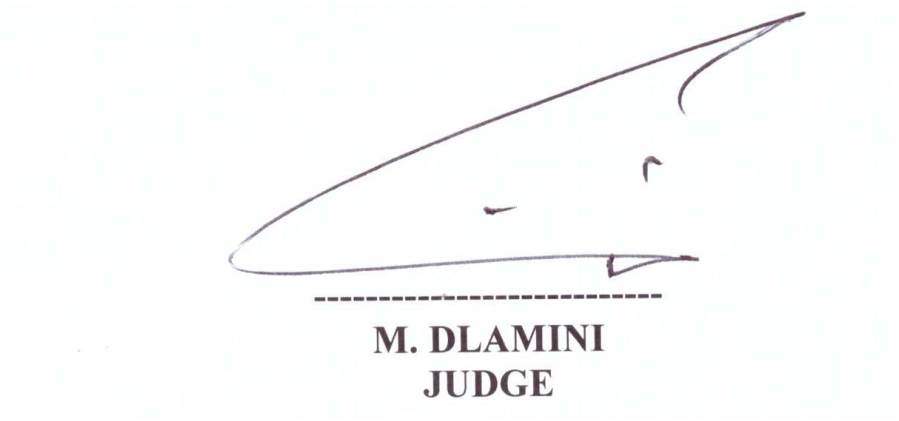
Costs

[36] It is not clear why defendant failed to raise the special plea earlier. Defendant waited until proceedings were closed and a trial date set down to argue its special plea. An astute lawyer would have first raised the special plea on the original Particulars of Claim. Secondly, he would have set down the matter for arguments on the special plea instead of allowing the proceedings to close and matter enrolled for trial. It goes without saying that unnecessary expenses were incurred at the hands of the defendant by causing the parties to discover and hold a pre-trial conference. However, I am mindful that plaintiff availed the opportunity to the defendants to raise the special plea by filing what was termed an Amended Particulars of Claim. This document was filed sixteen years after the original Particulars of Claim. It appears defendant took the opportunity to "plead" following the Special plea. The conduct by both parties is not warranted. This must be sanctioned by a costs order in favour of the successful party. In the result, the conduct by defendant must be visited by declining a costs order which would otherwise be in its favour.

[37] In the result, I enter the following orders:

37.1 Plaintiff's cause of action is dismissed

37.2 No order as to costs.



For the Plaintiff : B. J. Simelane of Ben J. Simelane & Associates

For the Defendant : N. G. Dlamini of the Attorney General