IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 110/2020

In the matter between:

FUTHI KUNENE **APPLICANT**

AND

THE COMMISSIONER OF THE ROYAL SWAZILAND POLICE **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

Neutral Citation: *Futhi Kunene vs. The Commissioner Of The Royal Swaziland Police and Another (110/2020) [2020] SZHC (210) 16th October 2020*

Coram: **MLANGENI J.**

Heard: **9th October 2020**

Delivered: **16th October 2020**

Summary: *Administrative law – application for review – need to bring such application within a reasonable time – failure to do so is fatal to the application.*

Civil procedure –application for review ordinarily to be moved in terms of Rule 53 of the High Court rules – failure to do so may be fatal to the application.

Limitation of actions against the Government - the word ***"debt"*** *as used in section 3 (a) of the Limitation of Legal Proceedings Against Government Act 1972 given a wide interpretation to include delictual and contractual claims, and therefore subject to the limitation of 24 months.*

The applicant, a former Police officer, was dismissed from service in 2013 after she was convicted of a criminal offence. In 2020, some seven years later, she filed this application for review and made no attempt to explain this inordinate delay.

Respondent raised points in limine, being that:-

i) Application does not comply with Rule 53 of the High Court ;

ii) The application was time barred in terms of the limitation of Legal Proceedings Against Government Act 1972;

iii) The applicant had delayed unreasonably in bringing the application for review.

Held: *1. In application for review it is imperative to comply with the procedure laid down in High Court rule 53.*

2. *Our courts have adopted a wide interpretation of* ***"debt"*** *to include delictual and contractual claims, this based on the rationale behind the statute of limitation.*

3. *Applicant's delay in bringing the application was unreasonable in as much as no satisfactory explanation was advanced.*

Application dismissed. No order for costs.

JUDGMENT

[1] The applicant was employed by the Government as a police officer. She was dismissed from Police service in May 2013. The exact date of her dismissal would have been on annexure **"FK2"** which is mentioned on her founding affidavit but not attached thereto. Her dismissal was pursuant to criminal charges which were brought against her, resulting in conviction.

[2] By letter dated 19th March 2013 the police service called upon the applicant to show cause why she should not be dismissed on the basis of her criminal conviction. There is no common ground between the parties on the details of what transpired at this hearing, but in the manner that I see this matter it is inconsequential what transpired there.

[3] Now, seven years later, the applicant has moved an application before this court to review and set aside her dismissal from the police service. She also prays for reinstatement and payment of arrear wages. The application is opposed. The respondent has raised points of law and pleaded over. At the hearing of the matter it was agreed that the

points of law, if upheld, would determine the matter, and that the court should hear the parties on the points first. I proceed to deal with the points of law.

NONE – COMPLIANCE WITH RULE 53

[4] In this jurisdiction applications for review are governed by Rule 53 of the High Court Rules. It is in that rule that requirements as to notices, content and time limits are stipulated. This is the only rule of procedure that deals with reviews in the High Court. In the present constitutional era, there are constitutional provisions that deal with the power of the High Court to review. I mention, for instance, clauses 151(3) (b), and 152 of the Constitution. It appears to me that any review remedy, whether sanctioned by the Common Law or by the Constitution, can only be pursued through High Court rule 53. The only exception that I can think of is in cases where the court is approached on grounds of urgency, but even then there must as far as possible be compliance with rule 53, for there is no other rule of procedure that deals with same.

[5] The application before me does not comply with the requirements of rule 53 and it is a far cry from it. This rule provides, in part, as follows:-

> 53 (i) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered…..to the Magistrate, presiding

officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.

a) Calling upon such persons to show cause why such decisions or proceedings should not be reviewed and corrected or set aside, and
b) .....

[6] The applicant has made no attempt to comply with the rule and it is scary but not far-fetched to think that the applicant's adviser was oblivious of this rule. I say this because in its papers the applicant has not even attempted to justify non-compliance with the rule. This, in my view, is adequate ground for dismissing the application. Any other conclusion would have the effect of rendering rules of court nothing more than a dispensable formality.

APPLICATION IS TIME BARRED

[7] The respondent relies upon the Limitation of Legal Proceedings Against Government Act 1972 (the Act) to submit that the applicant's application is time barred and can no longer be pursued. Reference is made to section 2 (1) of the Act which provides as follows:-

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

[8] In seeking to defeat this point the applicant argues that its claim is not for debt, hence it is outside the purview of the limitation. If the

applicant's argument is correct her claim, being *ex contractu*, can be brought literally at any time after the incidence of the cause of action. It is common cause that the cause of action arose in May 2013 when she was dismissed. To the contrary, the respondent argues that the rationale for the limitation is that Government must be made aware in good time of a pending claim against it, and that this must be done within 24 months. This, therefore, calls for the interpretation of the word **"debt".** The Act does not have an interpretation section.

[9] In the case of WALTER SIPHO SIBISI v THE WATER AND SEWRAGE BOARD AND ANOTHER, Civil Case No. 504/87, Hannah C.J. (as he then was) observed that the purpose of the limitation Act is to protect the interests of Government. It is obviously not in the interests of governance that potential claims against the state should be held back indefinitely and brought up as and when the claimant wishes to do so. It is therefore objectively unlikely that the intention was to leave the time open-ended in respect of matters that are neither debt nor delictual. In the same judgment the court came to the conclusion that the word **"debt"** is inclusive of damages arising from delictual **"or other causes of action such as contract"**, and that a demand against the Government should have been made within a period of 24 months. Verbatim, Hannah C.J. expressed the position as follows:-

> **"A person claiming a non-delictual debt who fails to serve his demand within twenty-four months becomes debarred from instituting proceedings…..by virtue of Section 2 (1) (c)",**

and that after the lapse of twenty-four months the court has no power to grant the relief sought.

[10] The net result of the aforegoing is that after the lapse of two years from the date the cause of action arose the door is shut to anyone who may have a claim against the Government, of whatever nature. As a matter of fact, if the position was to be otherwise that would have the effect of closing one door and leaving another one wide open. Clearly the court, in interpreting the word **"debt",** made reference to the mischief that the legislation sought to address.

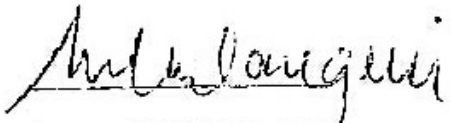
On this point the applicant also fails.

UNREASONABLE DELAY IN INSTITUTING PROCEEDINGS

[11] The respondent submits that the applicant has delayed for an unreasonably long time before instituting the review application. The period is about seven (7) years, which is extra-ordinarily long. It is trite that review proceedings must be instituted within a reasonable time of the occurrence of the cause of action. See: DEBBIE SELLSTROOM v MINISTER OF HOUSING AND URBAN DEVELOPMENT AND 4 OTHERS, (25/14) [2018] SZSC 02. Worse still, the applicant has offered no explanation for this long delay other than stating in her reply that she had no money to instruct an attorney, until a **"Good Samaritan"** came through. It certainly took a very long time for the Good Samaritan to come through. This explanation, whatever its worth is, ought to have been in the founding affidavit. It has been stated time and again that the applicant stands or falls by its founding affidavit (see: FARMERS (PTY) LTD v MOSES B. MOTSA, Civil Case No. 53/04, per Masuku J; ROYAL SWAZILAND SUGAR CORPORATION t/a SIMUNYE v SWAZILAND AGRICULTURAL PLANTATION WORKERS UNION AND 8 OTHERS, Civil Case No. 2959/97, unreported, per Dunn J.

[12] In my view even if the explanation was advanced in the founding affidavit, without anything exceptional in addition it would not suffice to justify this inordinate delay. If anything this delay is consistent with an acceptance by the applicant of her fate, as seen in her claiming her pension contributions, without demur, and not applying that to vindicate her perceived rights.

[13] The application is dismissed. I make no order for costs.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the applicant: **Mr. L. Dlamini**

For the respondent: **Mr. V. Manana**