



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 1670/2018

In the matter between:

**MICHAEL NTONDO NXUMALO & 366 OTHERS** Applicants

And

**SWAZILAND GOVERNMENT** Respondent

Neutral Citation : Michael Ntondo Nxumalo & 366 Others v  
Swaziland Government (1670/2018) [2020] SZHC 66  
(28 April 2020)

Coram : MABUZA – PJ

Heard : 21 October 2019

Delivered : 28 April 2020

### **SUMMARY**

*Civil Procedure: Delictual claim against the Government – prescription of liability as per the limitation of Legal Proceedings against the Government Act, 1972 – Applicant’s claim first prescribed during October 2009; was resuscitated during*

*October 2014 making the new date of prescription October 2016. Applicants only filed application during October 2018, 4 years after the second prescription date.*

*Held: Application has prescribed. Accordingly the points of law are upheld and the application is dismissed with costs.*

## **JUDGMENT**

### **MABUZA –PJ**

[1] I wish to tender my apologies for the delay herein this is due to the fact that I have not had a Secretary for some time.

[2] Before me is an application by the Applicant and 366 others for an order in the following terms:

1. That the Applicants' failure to file its letter of demand with the Respondent timeously in terms of Section 2 (1) of the limitation of legal proceedings against the Government Act 1972, is hereby condoned;
2. That the Applicants are allowed to institute proceedings against the Respondent.
3. The Applicants are allowed to serve the letter of demand on the Respondent out of time;

4. The Respondent is ordered to pay costs of this application only in the event of unsuccessful opposition;
5. Granting the Applicants further and/or alternative relief;

[3] The application is opposed by the Respondent which has raised points of law.

### **THE PARTIES**

[3] The Applicant is Michael Ntongo Nxumalo and 366 others, is an adult Swazi Male of Madlangemphisi, district of Hhohho, who is the chairman of the sub-committee of the people affected by the construction of the MR5 and MR6 roads whose list appears hereunder marked “MN1”. The 366 others are the affected residents of the area whose confirmatory affidavits are attached hereto.

[4] The Respondent is the Swaziland Government a body duly established in terms of Section 64 of the Constitution of Eswatini of 2005 and with its principal place of operation in Mbabane, herein represented by the Legal Representative of the Government of Eswatini.

### **THE APPLICANTS CASE**

[5] The Applicants are residents of Madlangemphisi who allege that their homes were affected during the construction of the MR5 and MR6 public roads by the Respondent under the Ministry of Public Works and Transport.

[6] The Applicants state that during the construction of the aforesaid roads, their properties were affected by the blasting and other earth works that were undertaken during the construction. Some were affected by the detour roads which were used during the construction of the roads.

[7] Subsequent to this, the Respondent through the Ministry of Public Works and Transport sent a delegation to do a physical inspection of the affected houses and properties. During the inspection, some properties were not inspected because of a variety of reasons which include amongst others, that the property owners were not present at their homesteads at the time the inspectors were conducting the exercise.

[8] Seeing that there was little that was happening towards the Applicant's being compensated, the Applicants then approached the Respondent, in particular, the Honourable Minister Lindiwe Dlamini, who was the Minister of Public Works and Transport at that time, for a meeting with the residents at

Nyakatfo in October 2014 pertaining to this matter. During this meeting, the then Minister undertook and/or promised to sort out the issue, specifically with respect to the properties not inspected. The minutes of that meeting are attached to the Applicant's Founding Affidavit.

[9] Evident to the facts that the engagement between the Ministry and the Applicants was yielding no results, on or about the 1<sup>st</sup> of August 2017, the Applicants then engaged the services of their current attorneys to pursue the matter on their behalf by claiming damages suffered by the Applicants as a result of the road construction work embarked on by the Respondent through the Ministry of Public Works and Transport, which construction damaged their properties.

[11] Through their attorneys the Applicants were made aware that their claim was time barred, it had prescribed in terms of the Limitation of Legal Proceedings against the Government Act No 21/1972 (the Act). They were also made aware that in order to sue the Respondent they would have to apply for condonation in order to pursue their claim. Hence the present application.

## **THE RESPONDENT's CASE**

[12] The Respondent in response stated that the construction of the roads in question commenced during 2004 and were completed during September 2007. They were officially opened on the 29<sup>th</sup> February 2008.

[13] The Respondent raised the following points of law:

### 1. Prescription

In terms of Section 2 (1) (a) of the Limitations of Legal Proceedings against the Government Act 21/1972 (the Act), no legal proceedings shall be instituted against the government in respect of any debt unless a written demand, claiming payment of the alleged debt has been served on the Attorney General within ninety (90) days from the day on which debt became due.

Moreover, the demand has prescribed as the mandatory statutory period of two (2) years has long passed. This makes the present application un-condonable. In other words, under no circumstances can the Applicants be condoned in the present application. See Section 2 (1) (c) of the Act 21/1972.

2. The Applicants have not demonstrated that the Respondents will not suffer any prejudice.

The Respondents stand to be highly prejudiced should the Application be granted. The cause of action arose sometime in 2007 and the Applicants elected not to initiate any proceedings. The cause of action arose more than 10 years and with such a lapse of time, there have been numerous changes within the offices of the Respondent. The Government of Eswatini may have lost key witnesses through death and any other cause and this Application has huge budgetary implications for the Government.

3. Applicants have failed to demonstrate that they have prospect of success.

The Respondent states that the Applicants have failed to demonstrate that they have prospects of success at the trial should the above Honourable Court grant them leave to sue. This is one of the requirements of the Act. Merely mentioning that the Applicants have prospects of success without detailing them is not enough. The prospects of success must be shown or demonstrated in the Application for leave to sue.

4. The Applicants have failed to give a reasonable explanation for the delay.

The Respondent states that the Applicants have failed to give a reasonable explanation for not filing their letter of demand. This is another requirement in terms of the Act. The Applicants only state that they were ignorant of the law. In terms of the law ignorance of the law is not an excuse.

A long period has now passed without any action taken by the Applicants. It does not suffice for the Applicants to just merely lay blame squarely on the doorstep of the Minister of Natural Resources. The Minister has nothing to do with the failure to take reasonable steps to claim and act in accordance with the Act. The Applicant cannot therefore try to pass the buck to someone else. This explanation of blaming the Minister is not one which is or should be treated as being reasonable.

[14] The following additional points of law were raised by the Respondent:

- (a) That the application lacks the necessary averments for the grant of an order for condonation in that:
  - (i) They do not disclose when the cause of action first arose.
  - (ii) They do not disclose when the Applicants were expected to issue their letter of demand.



(iii) They do not disclose the period of delay for non-compliance with the law. This is to enable the Court to assess the reasonability of the delay occasioned.

(b) The Applicant's papers are contradictory in that on the one hand the Applicants allege that they are out of time and on the other hand they allege that the cause of action has not yet been completed.

(c) The Applicants' papers do not disclose how much money is being claimed by the Applicants. This is a major flaw and defect in the Applicants' papers as it goes to the roots of this application. This also goes to the issue of prospects of success.

[15] Using the dates provided by the Respondent, the construction of the roads began during 2004 and were completed during September 2007. The two year prescription dates would be approximately September 2009. The matter died a natural death.

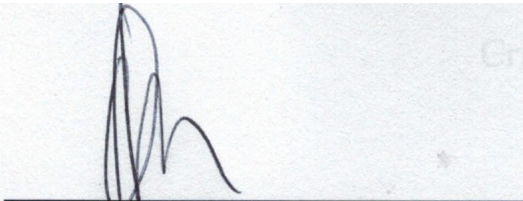
[16] During October 2014, the Minister of Public Works and Transport revisited the matter. She held a meeting with the affected persons at Nyakatfo on the 20<sup>th</sup> October 2014. (See Annexure "MN2") she clarified that for those whose

properties were not inspected she would go back to her office and consult with her staff on how they will sort out that issue.

[17] The effect of the Minister's assurance to the Applicants in my view raised the dead issue from its death and it became live from the 20<sup>th</sup> October 2014 to approximately October 2016. Even though the Minister raised the people's hopes up she failed to follow up on this expectation by the Applicants. The Applicants also failed to make periodic follow ups. They literally sat on their laurels and have themselves to blame.

[18] The present application was filed during October 2018 two years after October 2016. The claim has prescribed and cannot be revived. And as a matter of law this Court has no powers to grant the relief sought no matter how sympathetic it is.

[19] In the event, the points of law are hereby upheld and the application dismissed with costs.



**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Applicants: Mr. H. Magagula

For the Respondent: Mr. Dlamini with Ms Mbhamali