

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1650/2017

In the matter between:

WINILE DLAMINI (Nee Mncube)

Applicant

And

THE PRINCIPAL SECRETARY MINISTRY OF HEALTH

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Neutral Citation: *Winile Dlamini (Nee Mncube) v The Principal Secretary, Ministry of Health and Another (1650/2017) [2023] SZHC 371 (13 December 2023)*

CORAM: N.M. MASEKO J
FOR APPLICANT ATTORNEY T. HLANZE
FOR RESPONDENTS: ATTORNEY S. HLAWE
HEARD: 02/02/2021
DELIVERED: 13/12/2023

Preamble: Civil Procedure – Civil suit against Government filed out of time – Respondents raised a point *in limine* in terms of Section 2 (1) (c) of the Limitation of Legal Proceeding Against the Government of 1972 – Application for special leave in terms of Section 4 (1) of the Act cannot be granted because of the preemptory Section 2 (1) (c) of the Act which prescribe the maximum period of twenty-four months and not beyond.

RULING ON POINTS IN LIMINE

- [1] On the 17th October 2017, the Applicant launched motion proceedings for an order in the following terms:-
1. That special leave be granted to the Applicant to sue the Respondents in terms of the provisions of Section 4 (1) of The Limitation of Legal Proceedings Against the Government Act 21 of 1972 (hereinafter referred to as the Act)
 2. That the above Honourable Court grants an order condoning the late filing of the Applicant's letter of demand.
 3. Costs of suit in the event that this application is opposed by the Respondents.
- [2] The Founding Affidavit of the Applicant is used in support of this application.
- [3] It is common cause that the Respondents filed a Notice of Intention to Oppose on the 14th November 2017, and on the same date further filed a Notice to Raise a Point *in Limine* as follows:-
- (1) The Applicant applied for special leave to sue in terms of the provisions of Section 4 (1) of the Limitation of Legal Proceedings Against the Government Act 21/1972 (the Act).
 - (2) In terms of Section 2 (1) (c) of the Act, no legal proceedings shall be instituted against the Government in respect of any debt after the lapse of a period of twenty-four months from the day on which the cause of action arose.

- (3) The Applicant alleges that her late husband was administered a wrong blood type on 13 September 2014 and succumbed to death on 11 June 2015. The Applicant's cause of action arose on that date.
- (4) The Applicant ought to have instituted proceedings by 10 June 2017.
- (5) The Applicant instituted proceedings on 27 October 2017.
- (6) In the premises, the Applicant's action to sue the Respondent has by virtue of Section 2 (1) (c) of the Act prescribed.

[4] The Respondent has not filed any Answering Affidavit but raised this point *in limine* and this is a ruling in respect of that.

THE APPLICANT'S CASE

- [5] The Applicant states that her husband was admitted into the Mbabane Government Hospital on the 9th September 2014, a nurse under the employ of the Mbabane Government Hospital, wrongfully and unlawfully administered a wrong blood type on the deceased.
- [6] The Applicant states that the deceased was a group "A" blood type but the nurse administered a group "O" blood, and from there he developed difficulty in breathing and would sometimes lose consciousness. The Applicant states that as a result of the error, they together with the deceased lodged a grievance with the Mbabane Government Hospital. The matter also received wide publication in the print media. Having

lodged the complaint they held a series of meeting with the Director of Medical Services between September and October 2014.

- [7] The Applicant alleges that the 1st Respondent made an underking to investigate the matter and report back to the deceased on the issue of quantum of damages, and they suggested an amount of (Emalangeni One Million Five Hundred Thousand) E1.5 as contained in **Annexure "C"**. However, after submitting that letter, the Applicant and her husband who was sickly at that time were sent from pillar to post by the Respondent's staff. Applicant states that the condition of the deceased deteriorated and on 11th June 2015 he succumbed to death.
- [8] It was only in August 2016 that a Social Worker attached to a non-governmental organisation assisted the family to obtain legal assistance from her attorneys on a *pro bono* basis. She states that the deceased was a Security Guard earning about E834.00 per month at the time of his demise and that he was the sole provider to his family. She stated further that it was going to be costly for her to bring a claim against the Respondents since she was not employed and have no source of income. She states that it is the negligence of the Respondents as described above which caused the death of her husband and that the Respondents are liable to pay damages. She states that she is now a widow with no means to support her children.

THE RESPONDENT'S CASE

- [9] As stated above herein, the Respondents raise a point *in limine* that the Applicant's intended action to sue the Respondents has, by virtue of Section 2 (1) (c) of the Act prescribed.

- [10] Mr Hlawe submitted that the Respondent object to the application being brought in terms of Section 4 (1) of the Act, because the position of the law is settled that when a litigant institute legal proceedings against the Swaziland Government, after the lapse of twenty-four (24) months a Court has no power to entertain such a case.
- [11] Mr Hlawe argued further that the Applicant failed to serve a written demand particularising her claim within the prescribed time as per the terms of Section 2 of the Act. Counsel Hlawe submitted that the Applicant's proposed claim lies in delict and demand should therefore have been served at the very latest in or by 10th September 2015.
- [12] Mr Hlawe submitted that the Applicant is debarred from instituting proceedings by virtue of Section 2 (1) (c) of the Act which bars institution of legal proceedings against Government after the lapse of a twenty-four months period as from the day on which the debt became due. Counsel submitted that *in casu*, the application has been served on the Attorney General four (4) months after the period of twenty-four months has elapsed.

APPLICANT'S CASE

- [13] Counsel for the Applicant Mr T. Hlanze argued that the proviso under Section 4 (1) grants this Court the power to exercise its discretion and grant the condonation even if the period of twenty-four months has lapsed. Mr Hlanze argued that Section 4 (1) (a) (b) (c) was designed in such a way as to cater for applications which fall outside the twenty-four months bracket. Counsel argued that the Section 4 (1) (a) introduces the element of reasonable prospects of success in such proceedings and he

referred to the newspaper articles, and also that there would be no prejudice on Government for not receiving the demand within the stipulated period i.e. in terms of Section 4 (1) (b).

- [14] Counsel Hlanze submitted further that Section 4 (1) (c) provides for the existence of special circumstances which can influence the Court to grant such special leave being sought by the Applicant. Mr Hlanze argued that the Applicant is an unemployed widow and has no source of income to raise and sustain the minor children, and that she could not raise funds to instruct attorneys timeously to action the matter on her behalf after the demise of her husband.

ANALYSIS OF THE POINT IN LIMINE

- [15] Section 2 (1) (c) of the Act provides as follows:-

"2 (1) subject to Section 3 no legal proceedings shall be instituted 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."

- [16] Section 2 (1) (c) imposes a peremptory ceiling of twenty-four months within which legal proceedings against the Government may be institute from the day on which the debt became due.

- [17] Section 4 (1) only provides for the granting of special leave to institute legal proceedings within twenty-four months where the person is debarred under Section 2 (1) (a).

[18] In the case of *Mandla Khumalo v Attorney General and Two Others* Civ. Trial No. 2987/97 S.W. Sapire ACJ stated as follows, at pg. 3 of his judgment:-

“In terms of Section 4 of the Act the High Court may on application by a person debarred under Section 2 (1) (a) from instituting proceedings against the Government grant special leave to him to institute such proceedings subject to being satisfied as to certain matters. It is 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 such demand is served on the Attorney General. Nothing is said in Section 4 or anywhere 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 ...”

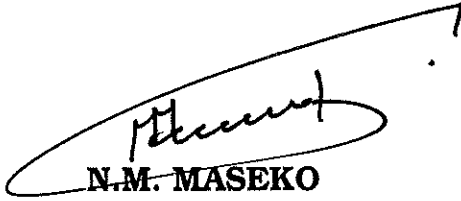
[19] I am cognisant of the painful situation of the Applicant, including those meetings with the Respondents which ended up bearing no fruits. However, my hands are tied by provisions of Section 2 (1) (c) of the Act which sets the maximum period at twenty-four months.

[20] Mr Hlanze has presented formidable submissions in an attempt to persuade this Court to grant the special leave and condonation in these circumstances, however, the law is that the period prescribed by Section 2 (1) (c) had already expired.

[21] Consequently,

1. The point *in limine* raised by the Respondents is upheld.

2. The Application in terms of Section 4 (1) is therefore dismissed.
3. Each party is to pay its own costs.

A handwritten signature in black ink, appearing to read 'N.M. Maseko', is written over a large, hand-drawn oval. The signature is fluid and cursive.

N.M. MASEKO

JUDGE