IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE CIVIL APPEAL NO.32/97

In the matter between:

SANDILE D. DLAMINI APPELLANT

and

ATTORNEY GENERAL 1ST RESPONDENT

THE ROAD TRANSPORTATION BOARD 2ND RESPONDENT

CORAM : KOTZé J P

: LEON J A

: STEYN J A

FOR THE APPELLANT :

FOR THE RESPONDENTS :

JUDGMENT

Leon J A:

The appellant was the unsuccessful respondent in the Court a quo in which an action brought by him against the first respondent and the Government represented by the second respondent was dismissed with costs by Sapire A C J. The action was so dismissed by reason of the Court a quo holding that the appellant's claim was time-barred and accordingly upheld the second respondent's plea in abatement that the appellant's claim was prescribed in terms of the Limitation of Legal Proceedings against the Government Act, 1972. It is against that judgement that this appeal is brought.

On the 14th June 1993 the appellant brought an action against the second respondent in which he claimed damages in the sum of El6,000 by reason of the withholding of a permit in December 1992. Despite being served the second respondent failed to enter an appearance to defend and default judgement was granted against it on the 1st September 1994.

However on the 28th September 1994 application was brought by the second respondent (the Attorney General) for rescission of that default judgement. In paragraph 5 of his affidavit he states the following:

"In my capacity as the Attorney General, I am charged, amongst other things, with the task of being the principal legal advisor and sole legal representative of the Government of the Kingdom of Swaziland, its ministries, departments, tribunals and statutory boards, including the applicant." He ascertained that,

"No letter of demand or court process was ever served on his chambers, neither was I cited in my capacity as the Government's nominal legal representative in the suit; hence the order in question was granted in our absence and without our notice or knowledge."

He submitted that the failure to serve was in contravention of section 2(1) of the Limitation of Legal Proceedings against the Government Act, 1972.

In his answering affidavit the appellant stated that a copy of the letter of demand dated 14th January 1993 was served on the first respondent. There was no replying affidavit by the first respondent.

The application for rescission of judgement was decided by Hull CJ on 7th June 1995 about two and half years after the appellant's claim arose.

After setting out the facts Hull CJ said this.

"The Attorney General has applied to set aside the default judgement on the grounds that he was not cited as a defendant and that he was not served with the combined summons. A further ground alleged is that the respondent failed to serve on him a letter of demand in compliance with the requirements of section 2(1) (a) of the Limitation of Legal Proceedings against the Government Act 1972, but on the whole of the evidence on the present application for rescission, it is apparent that such a demand was made on January 1993. It was addressed incorrectly to the Chairman of the Board. Nevertheless a copy was sent to the Attorney General. In substance therefore the demand was made. A copy of the default judgment was served on the Attorney General at some time between 1st and 5th September 1994 "

The learned Judge went on to hold that it was not essential for the Attorney General to be made a nominal defendant in the action. However,

"it is evident that the respondent has sued and intended to sue the government.....No doubt he will look to the Government for payment of any damages to which he is

entitled"

The learned Judge held further that the appellant was bound to serve the combined summons at the offices of the Attorney General in terms of Rule 4(10) of the High Court Rules. He also held that the Court had an inherent jurisdiction to set aside a default judgment and that the appellant's failure to serve the combined summons on the Attorney General was "a serious procedural irregularity and a fundamental one" as it prevented the Attorney General from raising any defences which he might wish to make.

The learned Judge then concluded his judgement as follows:

"The judgement by default given on 1st September 1994 is therefore rescinded. The respondent, if he wishes to proceed upon his action, is to serve the combined summons at the office of the Attorney General. Thereafter the action is to take its course. The costs of this application for rescission are to be the present applicant's costs in any event."

The relevant provisions of the Limitation of Legal Proceedings against the Government Act 1972 provide as follows: (I interpolate to say that it is not disputed that no application for special leave

under Section 4 was ever sought or obtained by the appellant.)

"1. This Act may be cited as the Limitation of Legal Proceedings against the Government Act, 1972.

Limitation of time in connection with the institution of legal proceedings against the Government of Swaziland.

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;

© 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 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;

(b) a debt shall, if the Government prevents the claimant thereof from coming to know of its existence, not be regarded as due before the day on which such claimant becomes aware of its existence;

Granting of special leave.

3. (1) 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 if it is satisfied that -

(a) he has a reasonable prospect of suceedings in such proceedings;

(b) the Government will in no way be prejudiced by reason of the failure to receive the demand within the stipulated period; and

© having regard to any special circumstances he could not reasonably have expected to have served the demand within such period:

Provided that the Court in granting such leave may impose such conditions as it deems fit (including the payment of any costs) and notwithstanding section 2(1)(c) stipulate the date by which such proceedings shall be instituted."

The appellant served the combined summons on the Attorney General on 2nd June 1997. In his judgement Hull CJ did not stipulate a time when the combined summons had to be served on the Attorney General.

It is correctly pointed out on behalf of the appellant that his cause of action arose in December 1992 when the debt became due and that therefore in terms of section 2(1) of the said Act would be time barred after December 1994. It is further urged, correctly in my view, that at the time default judgement was rescinded by Hull CJ on 7th June 1995 the time for instituting a fresh action had already expired and that such fresh action would be time-barred. This is common

cause.

But Hull CJ held that the Government had been sued and that the appellant had intended to sue the Government. "It is clear," he said, "that the plaintiff had sued the Government."

Reference is also made to the fact that a copy of the default judgement was served on the Attorney General between 1st and 5th September 1994 and that in terms of section 2(2) (a) of the said Act legal proceedings shall be deemed to be instituted by service on the Attorney General of any process of a court in which the claimant of the debt claims payment thereof.

It is contended that "process of the Court" would include the default judgement which the appellant served on the Attorney General between 1st and 5th September 1994 claiming payment of the amount awarded in terms of such judgement.

Reliance is placed on cases such as BATES V BATES 1927(1) PH P.64 and the cases referred to by Marais J in CERONIO VS SNYMAN 1961(4) S.A. 294(W) at p.296 a - g. The effect of those judgements is that a civil summons includes a notice of motion; so does a restitution order BOTES V BOTES 1944 WLD 76 at 78.

I am disposed to think that, by analogy, a default judgement and the service thereof is a "process of the Court" and it is also implied by Section 3 l(3)(b) of the High Court Rules that a default judgement must be served upon the defendant.

It seems to me to be clear that in his judgement Hull CJ was stating in effect that the appellant would not have to commence an action de novo against the Government for if he had that action would clearly the time-barred. Hull CJ must have been aware of that because he referred in terms to section 2 of that Act in his judgement and he had the right in terms of section 31(3)(b) of the High court Rules to set aside a default judgement on such terms as to him seemed fit.

I am accordingly disposed to think that Hull CJ was correct in making the order which he did and it is also clear that he held in effect that the appellant's claim was not time-barred because he had

sued and intended to sue the Government.

However whether Hull CJ was right or wrong this Court and this Court only could set it aside on

appeal. And there was no appeal against the judgement of Hull CJ.

It is now convenient to turn to the judgment of Sapire A C J. The learned Judge set out the facts and then quoted the following statement by Hull CJ:-

"The respondent, if he wishes to proceed upon the action, is to serve the combined summons at the office of the Attorney General. Thereafter the action is to take its course."

Sapire A C J went on to hold that that statement was not called for and was plainly wrong as it overlooked the provisions of section 2(1) of the said Act which showed that the action had become prescribed in December 1994 and that the appellant's claim was time-barred when the matter came before Hull CJ.

Sapire A C J had no jurisdiction to overrule a decision of the High Court for that, as I have said earlier, falls with the exclusive domain of this Court as has been held in decisions both of the High Court and of this Court.

If the respondent was dissatisfied with the undue delay taken by the appellant to serve upon the Attorney General it could have made an application to obtain some relief from the High Court but did not do so. Hull CJ did not prescribe a time within which service should be effected. The alternative argument on behalf of the respondent that the action became prescribed after two years from the date of Hull CJ's judgement cannot prevail for Hull CJ ordered the continuation of the same action not the institution of an action de novo.

In my judgement the appeal must be allowed, with costs and the judgement of the Court a quo altered to one dismissing the plea in abatement with costs.

R.N. LEON J A

I agree:

G. P. C. KOTZé J P

I agree:

J.H. STEYN J A

Delivered on.....day of April 1998.