APPEAL CASE NO.2618/95

In the matter between:

COMFORT SHABALALA APPELLANT

AND

SWAZILAND GOVERNMENT RESPONDENT

CORAM : BROWDE JA

: STEYN JA

: ZIETSMAN JA

JUDGMENT

Browde JA:

In 1994 Alson Kosi Shabalala ("the deceased") was in occupation of the farm Ntsalitje in the Shiselweni region when he was served with a summons in the Magistrate's Court, Nhlangano, issued by the respondent, claiming the deceased's eviction from the farm. He apparently did not react to the summons and, as a consequence, judgment was given by the Magistrate ordering his eviction. Pursuant to that judgment a writ of execution dated 20th October 1994 was served on the deceased on 27th July 1995 and he was evicted from the farm on that date.

The summons in the Magistrate's court was based on the allegation that the farm was the property of the respondent Government but after his eviction the deceased, so he alleged, discovered that it was owned by the Ingwenyama in trust for the Swazi Nation.

In November 1995 the deceased instituted proceedings in the High Court to review the judgment of the Magistrate the application being served on the respondent on 7th November 1995. These review proceedings challenged the legality of the eviction order. The matter came before the High Court for the first time in March 1996 and it was postponed from time to time until July 1996 when argument was heard in the High Court. Thereafter there was a further delay caused by a search for the record of the case in the Magistrate's Court and finally after heads of argument were filed, judgment was reserved on 16th May 1997. Judgment, which was finally delivered by the Chief Justice, bears the date 4th July 1997. We were informed by Mr. Dunseith, who appeared before us on behalf of the appellant, that he was the deceased's legal representative and that he had been handed the judgment by the Registrar for the first time on the 21st January 1999. This was not disputed by Mr. Msibi, who appeared for the respondent, nor did he dispute that despite the date appearing on the judgment it came to the knowledge of the appellant for the first time, through no fault of his or his attorney, on that date.

The judgment of the learned Chief Justice concluded as follows:

"The judgment for the eviction of the applicant from Farm 61 in Ntsalitje, Shiselweni granted by the Subordinate Court for the District of Shiselweni in Case No.49/1994 is hereby set aside and the first respondent ("i.e Swaziland Government") is to pay the costs of this application."

The basis for the judgment was that there was no indication in the summons for eviction in the Magistrate's court that the matter fell within the jurisdiction of the latter court.

Having successfully had the judgment of the Magistrate set aside the appellant, the deceased having died on 25th August 1999, sued the respondent for damages arising from what he claimed was the unlawful eviction. The summons was served on 7th December 2000. The respondent filed a special plea in bar to the effect that the action had prescribed in terms of Act 21/1972 to which I refer below.

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It was common cause that the appellant had delivered the statutory notice required on 18th March 1999, but the respondent contended that both the demand and the summons were time-barred in terms of the Act. This plea was upheld by the Chief Justice in the High Court and the action was dismissed with costs. It is against that Order that this appeal has been brought before us.

In the course of his judgment the learned Chief Justice referred to the Act which is the Limitation of Legal Proceedings Against the Government, Act No.21 of 1972 and stated that the effect of Section 2 of the Act is to bar proceedings against the Government, if certain steps are not taken within the prescribed periods. A plaintiff wishing to prosecute a claim against the Government is required as a first step to make written demand claiming payment of the debt. Where the claim is delictual the demand has to be served "within 90 days from the day upon which the debt became due." Summons initiating the action may not be served-

(a) before the expiry of 90 days from the date of service of the demand on the Attorney General, unless the Government has within that period repudiated the claim.

(b) After the lapse of a period of 24 months as from the date upon which the debt became due.

The learned Chief Justice held that the date upon which the debt became due was the date of the eviction in 1995, and that being so the action was prescribed."

Mr. Dunseith contended in the High Court and again before us, that before prescription could begin to run against a creditor he must have been able to bring his action and that in order to institute a valid action for a debt, the creditor must have a complete cause of action in respect of it. The writ in terms of which the appellant was evicted, so the argument went, was prima fade valid and lawful until the judgment in terms of which the writ was issued was set aside on review. This, according to Mr. Dunseith's submission, only occurred on 21st January 1999 when, as was pointed out, the judgment in the High Court setting aside that in the Magistrate's court, came to the knowledge of the appellant.

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As I have already mentioned, the statutory demand had to be served within 90 days from the date upon which the debt became due and the summons served within 24 months from that date. The question thus arising for our determination is the meaning to be attached to Section 2(2)(c) of the Act which reads "a debt not arising from contract shall not be regarded as due before the first day on which the claimant has knowledge that the debt is due by the Government."

In the case of HMBMP PROPERTIES (PTY) LTD VS KING, 1981 (1) SA 906 the court considered the meaning of the section of the South African Prescription Act which lays down that

prescription commences to run "as soon as the debt is due". After considering various decided cases on the subject, the court approved of the decisions which are authority for the proposition that in its ordinary meaning a debt is "due" when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. The learned judge went on to say that a debt can only be said to be claimable immediately if the creditor has the right to forthwith institute an action for its recovery and that, in order to be able to institute action for the recovery of a debt, the creditor must have a complete cause of action in respect of it. In considering what is meant by "a cause of action", the court then referred to the judgment of Corbett JA (as he then was) in EVINS VS SHIELD INSURANCE COMPANY LIMITED 1980 (2) SA 814 (A) 838 in which the learned judge referred with approval to an earlier case which laid down the following:

"The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle the plaintiff to succeed in its claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

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Relying on these authorities Mr. Dunseith submitted that a complete cause of action only arose on the date when the appellant had knowledge that the Chief Justice had set aside the Order for eviction granted by the Magistrate in 1994. Before that occurred, had the appellant issued summons based on unlawful eviction, he would have been met with the plea that eviction had been ordered by the Magistrate and that consequently the writ of eviction was a valid one. In my judgment that is a submission which is unanswerable. In attempting to answer it Mr. Msibi, who appeared for the respondent, submitted that the debt became due on the date of the occurrence of the delict and the correct step which appellant ought to have taken was to file the demand as soon as the eviction took place; he should not have waited for the outcome of the review which was to test the legality thereof. Waiting for the result of the review proceedings, he submitted, was "risky" because the prescription period was actually running irrespective of the steps being taken to address the problem.

The fallacy in that argument can be illustrated by reference to an action for damages based on alleged malicious prosecution. If Mr. Msibi's submission was valid then, by analogy, a plaintiff wishing to sue for damages for malicious prosecution could validly institute action as soon as the prosecution commenced. The authorities are clear, however, that this is not so. It is a necessary ingredient of such an action that the plaintiff be first acquitted by the court and until that occurs his cause of action is not complete. See ELS THE MINISTER OF LAW AND ODER 1993(1) SA at p12. Also MCKERRON THE LAW OF DELICT 7th ED. 264.

I am of the view that similarly in casu before the appellant's cause of action was complete the writ of eviction had to be set aside. This could only be done by a superior court declaring the judgment of the Magistrate to be wrong and setting it aside. Until that happened the writ on which the eviction was executed was a valid one and no action could be properly brought which required an allegation, as did the action of the appellant, that the eviction was unlawful. The day

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on which it came to the knowledge of the appellant that the judgment of the Chief Justice had set aside that of the Magistrate was the day on which the debt became due. Consequently the notice and the summons in respect of the damages claimed by the appellant were within the time limits of the Act. The special plea should, therefore, have been dismissed.

The appeal is therefore upheld with costs and the decision of the learned judge a quo in relation to the special plea is altered to read, "The special plea is dismissed with costs".

J. BROWDE JA

I AGREE

J. H. STEYN JA

I AGREE N.W.

ZIETSMAN JA

Delivered in open Court on the ...7th. day of June 2002

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place is ordered as follows. The application is dismissed with costs including the costs of two counsel.

J.H STEYN JA

I AGREE

J. BROWDE JA

I AGREE

N.W. ZIETSMAN JA

Delivered in open court on ..7th... day of June 2002