IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 31/2017

In the matter between:

SIPHIWE SIBONGILE MAMBA Appellant

And

THE GOVERNMENT OF THE KINGDOM OF SWAZILAND 1st Respondent

THE ATTORNEY GENERAL 2nd Respondent

SIKELELA DLAMINI 3rd Respondent

Neutral Citation: *Siphiwe Sibongile Mamba v The Government of the Kingdom of Swaziland & 2 Others* (*31/2017*) [2017] SZSC 43 (20 October 2017)

Coram: S.P. DLAMINI JA, R.J. CLOETE JA and **S**.B. MAPHALALA JA

Heard : 11 October 2017

Delivered : 20 October 2017

Summary: *Civil procedure – Delictual claim against The Government, prescription of liability as per the limitations of Legal Proceedings against Government Act, 1972 and when and how to invoke the envisaged prescription as well as the exceptions provided for therein – Held that both sides committed fundamental and basic errors - Held further that the Court a quo misdirected itself in the manner it interpreted and applied the statutes as well as the case-law in dismissing the Appellant's claim - Held further that the appeal is upheld and Held further that the matter* ***mero motu*** *and in the interest of Justice is referred to the High Court for trial on the merits and Held further that in view of how the matter has been handled by both parties no order as to costs is made.*

JUDGMENT

S.P. DLAMINI JA

[1] This is an appeal against the judgment as Her Ladyship Justice Q.M. Mabuza PJ delivered on 04 April 2016.

[2] The background of the matter is sufficiently set out in the judgment of the *Court a quo* as set out in the following paragraphs.

[3] The Appellant was a passenger in a vehicle driven by the 3rd Respondent who had given her a lift. The 3rd Respondent was employed by the Swaziland Defence Force at the time. The vehicle was involved in an accident and it overturned. As a result of the accident, Appellant suffered serious injuries and life-long disabilities resulting in her being confined to a wheelchair, requiring daily medication and assistance.

[4] Appellant successfully filed a claim against the Motor Vehicle Accident Fund (MVA) established in terms of the Motor Vehicle Accident Act 13 of 1991 but due to the fact that the Appellant suffered her injuries when she was a passenger, her claim was limited to E12,000.00 (Emalangeni Twelve Thousand).

[5] The amount if E12,000.00 (Emalangeni Twelve Thousand) was a far cry as compensation for her injuries and disabilities occasioned by the accident. Appellant, as envisaged by the Act, sought to institute proceedings against the Respondents by way of action proceedings.

[6] In her particulars of claim attached to the combined summons issued on 18 September 2014 at paragraph 10 she states the following;

"10. As a result of the injuries sustained in the accident the plaintiff suffered damages in the amount of ***E1,765,000.00 [Emalangeni one million seven hundred and sixty-five thousand]*** *which is calculated as follows:*

(a) Estimated future medical expenses

(i)	*Caregiver for 41 years at E12,000.00 per year*	*492,000.00*
(ii)	*Pain killers for life*	*15.000.00*
(iii)	*Wheelchair for life 8 x E5,000.00*	*40,000.00*
(iv)	*Specially designed house*	*250,000.00*
		797,000.00

(b) Estimated loss of earning capacity as hairdresser at E1,500.00 per month up to 60 years of age ***468,000.00***

(c) General damages for pain and suffering, disfigurement, loss of amenities of life and permanent disability ***500,000.00***

TOTAL ***1 765 000.00"***

[7] The Defendants entered an appearance to defend the action as per the intention to defend dated 06th October 2014 but curiously only served on Appellant's attorney on 17 October 2014.

[8] For nearly a month nothing happened until Appellant filed a Notice of Bar dated 18 November 2014 which was served on the 1st Respondent on the same day giving notice that unless the Defendants file their Plea in 72 hours they shall be barred to plead and naturally a default judgment would be the next step.

[9] The Notice of Bar seemed to have galvanised Defendants into action because the Plea was then filed on 18 November 2014. The Defendants Plea did not contain any special plea or points of law challenging the Plaintiff's claim apart from denying any liability. (It is recorded that the said Plea was drawn in an extremely unprofessional fashion).

[10] Plaintiff then filed her Replication buttressing negligence on the part of the 3rd Respondent.

[11] The Pleadings were then closed after discovery Affidavits were filed. On 20 January 2015 a pre-trial conference was held which in reality did no more than to confirm the position of the parties as per the Pleadings.

[12] The matter was slated to be heard on 04 September 2016. However, on the date of the hearing the matter was postponed to 29 September 2016 since, according to the *Court a quo*, *"Mr B.T. Tsabedze indicated to the court that the Defendants intended to raise points of law in particular that the Plaintiff's claim had prescribed in terms of section (2) of the limitations of Legal Proceedings against the Government Act, 1972"*. The *Court a quo* further recorded that the said Mr Tsabedze ***"was not involved with the earlier proceedings."*** (my bolding)

[13] On the 29 September 2016 the *Court a quo* states "… *wherein the Defendants filed their* ***Notice to raise points of law***". (my bolding and underlining). However, the Notice to raise points of law by the Defendants referred to Siboniso Clement Dlamini as Plaintiff and was amended in handwriting with the name Siphiwe Sibongile Mamba, was actually served on the Appellant's attorneys on 14th September 2016. Other than this development, it appears that nothing happened on the 29 September 2016.

[14] The said Notice to raise Points of law by the Defendants stated;

> ***"BE PLEASED TO TAKE NOTICE that*** *Defendants intend to raise the following points of law:*
>
> *1.* ***THAT*** *a period of 24 months has elapsed since plaintiff's cause of action arose and the debt became due and payable. In terms of section 2(1) of the Limitation of Legal Proceedings against the Government Act, 1972 plaintiff's action has prescribed.*
>
> *(a) The Motor Vehicle Accident Fund settled plaintiff's claim in terms of section 11(1) (b) of the Motor Vehicle Accidents Act, 1991 during March 2011. The period of prescription ran from March 2011to March 2013, i.e. 24 months.*
>
> *(b) Plaintiff served on the Attorney General a demand on the 12th June 2014, fifteen (15) months after the period of prescription had elapsed.*
>
> *2. That plaintiff, having been debarred in terms of section 2(1)(a) of the Limitation of Legal Proceedings against the Government Act, 1972, has failed to apply for special leave to institute these proceedings against Government in terms of section 4(1)(c)."*

[15] The judgment reflects that the matter was then heard on 11 October 2016 and the judgment was delivered on 04 April 2017, some six months after the trial. There is no information at all as to what happened on the 29 September 2016. The fact that there is no transcribed record of the hearing of the matter by *Court a quo* before this Court, makes it even more impossible to make any inference.

[16] The *Court a quo* characterised the issues for determination at paragraph [12] of the judgment as follows:

"[12] There are two issue for the Court to decide:

(a) Whether it is permissible in our law for a party to canvass an issue at a trial which he has not raised in the pleadings.

(c) Whether it is permissible for the Government to raise the special plea of prescription in the form of points of law by invoking the provisions of section 2 (1) of the Limitation of legal proceedings against the Government Act, 1972 after the close of pleadings."

[17] The *Court a quo*, after setting out the arguments by both sides, came to the conclusion that;

"[25] … it is clear that a party is in my view perfectly entitled to raise a defense of prescription even though such defense has not been pleaded. The Plaintiff is debarred from instituting proceedings not by virtue of section 2 (1) (a) but by virtue of section 2 (1) (c).

[26] The Defendants submit further that even the demand which Plaintiff was to serve on the Attorney General was not served within the 90 days after the cause of action arose but was served on the Attorney

General 15 months after the period of 24 months had elapsed. They submit therefore that the Court cannot ignore the point of law of prescription raised by the Defendants.

[27] I agree with the arguments advanced on behalf of the Defendants and hold that the liability of the Swaziland Government extinguished after the lapse of 24 months.

[28] In the event, the special plea is hereby upheld and the action by the Plaintiff is dismissed with costs."(my underlining)

[18] The Appellant was dissatisfied with the judgment of the *Court a quo* and launched the present appeal.

[19] Appellant in her a Notice of Appeal stated the grounds of appeal as follows;

"1. The Court a quo erred both in fact and in law by granting an order that negates section 5 of the Limitation of Legal Proceedings Against the Government Act, 1972.

2. The Court a quo erred both in fact and in law by not upholding the contention that the failure on the part of Government to invoke the provisions of section 2 of the aforesaid Act, either before or at the time of filing the plea, results in the demise of the right to rely thereon and that such right can only be resurrected by a substantive application to Court.

3. Alternatively, the Court a quo erred by applying section 2 of the foresaid Act as it is inconsistent with the Constitutionally enshrined rights of access to courts and equality before the law."

[20] Contrary to the contention by Mr. B. Tsabedze for the 1st Respondent, the issues raised herein are not novel. In the matter of **Walter Sipho Sibisi vs The Water and Sewerage Board and The Attorney-General, High Court Civil Case No. 504/87 His Lordship Hannah C.J.** delivered a comprehensive judgment on this matter. Aspects of the judgment of His Lordship Justice Hannah, C.J. have been relied upon in the *Court a quo.* However, with respect, without the full scope of the dictum being considered where relevant. As a result of this error, conclusions which are not supported by the substance of the judgment have been made while ostensibly relying on it.

[21] Therefore, it is important to reproduce the decision of the judgment of His Lordship Justice Hannah, C.J. for the reasons that follow below;

On a plain reading of section 4(1) the person who <u>may apply for special leave</u> is "a person debarred under section 2(1)(a)" and it must therefore be

determined what category of person can be debarred by that subsection from instituting proceedings against the Government. The answer, in my opinion, can only be a person claiming a debt arising from a delict who has failed to serve his demand within ninety days. A person claiming a non-delictual debt who fails to serve his demand within twenty-four months becomes debarred from instituting proceedings not by virtue of section 2(1)(a) but by virtue of section 2(1)(c). That this must be the correct construction to be placed upon section 4(1) is, in my view, put beyond any doubt by the reference in section 4(1)(b) to "the failure (by the Government) to receive the demand within the stipulated period". The only stipulated period is that of ninety days. As for the reference in the proviso to section 4(1) to "notwithstanding section 2(1)(c)" that expression must be contrasted with the language used in the proviso to section 4(2) which deals with an application by the Government to extend the period of ninety days referred to in section 2(1)(b) and provides, in clear terms, that the Court "shall extend the period of twenty four months referred to in section 2(1)(c)." In the one case the Court is being empowered to limit the time within which proceedings may be instituted to a lesser period than one of twenty four months whereas in the other it is quite clearly being empowered to extend

that period. The intention in both cases is to protect the interests of the Government which, of course, is the whole purpose of the Act.

In my judgment, the operation of section 4(1) is confined solely to the case of a person demanding a debt arising from a delict who has failed to comply with the terms of the proviso to section 2(l)(a) and has no application at all to a person, whatever his claim may be, who has failed to institute proceedings within the period of twenty four months stipulated by section 2(1)(c). In my judgment, the Court has no power to grant the relief sought by the applicant whatever the merits of his case may be and, accordingly, the application is dismissed with costs." (my underlining)

[22]. Serving before His Lordship Justice Hannah, C.J was not a matter premised on a delictual claim but one based on a labour dispute. The contention of the applicant was that his employment with the 1st Respondent was untimely terminated. He sought to institute a claim against the Government for wrongful dismissal and salary arrears. By way of a Notice of Motion he sought condonation for his failure to serve notice of demand on the 2nd Respondent and leave to serve the notice and to institute proceedings against the 2nd Respondent. After the consideration of the applicable law in particular the distinction between delictual claims and other types of claims

in the context of the Act, His Lordship Justice Hannah, C.J dismissed the application on the basis of the distinction he made.

[23] In this matter the Appellant was out of time in filing her demand in violation of the limitation prohibited in Section 2(1) of The Limitation of Legal Proceedings against The Government Act (" the Act")which provides that

"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;

(c) after the lapse of a period of twenty-four months as from the day on which the debt became due."

[24] However, that is not the end of the matter as per the decision of His Lordship Justice Hannah, C.J. **in the Walter Sipho Sibisi case (supra)** and the provision of section 5 of the Act which provides that;

"5. (1)A court shall not of its own motion take notice of a failure to comply with section 2 or with any conditions imposed by the High Court under section 4(1).

(2)In the event of a person who has instituted legal proceedings against the Government having failed to comply with section 2 or any conditions imposed by the High Court under section 4(1), the court in which the legal proceedings have been instituted may on application made by the Government before or at the time of lodging its plea or any other documentary reply to the claim against it, dismiss such proceedings:

Provided that such court may allow the Government to make such application at any other stage in such proceedings if it is satisfied that —

(a) the Government could not have reasonably been expected to have invoked such section before or at the time of the filing of its plea or other documentary reply; and

(b) no prejudice will be suffered by the person who has instituted such proceedings which could not be cured by a suitable order of costs against the Government."

[25] The inescapable conclusion in terms of the judgment of His Lordship Justice Hannah, C.J. and the above quoted Sections is as follows;

(a) that the failure to comply with Section 2 of the Act (in delictual claims) is not necessarily fatal;

(b) that the Court may not *mero mutu* raise the point of the statutory limitation;

(c) that the Government may raise a point of prescription on application before or with its plea or a similar step prior to the close of pleadings; and

(d) that the Government may be allowed after the Plea or a similar step to apply for leave to rely on prescription but it must prove that it could not reasonably have been expected to do so at an earlier stage and that no prejudice will be occasioned to any person as a result.

[26] In a similar but flip-side fashion, Section 4 of the Act provides for a special remedy to a person debarred under Section 2(1)(a) and provides that;

"4.(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 succeeding 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

(c) 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."

[27] It is common cause that both the Appellant and Respondent did not make use of the procedures contained in the Act or the law discussed above in order to obtain redress before the *Court a quo*. Infact, the manner in which both sides handled the matter leaves a lot to be desired hence the decision of this Court on the issue of costs as it appears below.

[28] Contrary to the Act, Respondent sought to introduce the issue of prescription belatedly on the day of trial on the 04 September 2016 and later by serving Notice to raise points of law referred to above on the 14 September 2016. Even the said Notice to raise the points of law cited **SIBONISO CLEMENT DLAMINI** as Plaintiff and this was crossed out by a drawing line through it and the name of the Appellant is written by hand below it.

[29] This not only took place after the Pleadings had been closed and a pre-trial conference held but on the day of the trial and the *Court a quo* postponed the trial in order to allow the 1st Respondent to formalise the points of law regarding prescription it had raised from the bar.

[30] The *Court a quo* in upholding the point about prescription in favour of the 1st Respondent concluded that the notice concerned was a special plea. With respect, the Notice to raise points of law cannot be said to be a special Plea by any stretch of the imagination.

[31]. At the hearing of the matter, before this Court, Counsel for the Respondents conceded that no special Plea was filed in this matter nor that the Rules of the High Court (Rule 28) were followed relating to the purported amendment of pleadings.

[32]. It is clear that the *Court a quo* erred in holding that the ill-fated notice of intention to raise points of law constituted a special plea and on that ground alone the judgment of the *Court a quo* must be set aside.

[33]. In the absence of any lawful step to introduce the issue of the prescription against the Appellant's claim, the Court a quo sought to have proceeded with the trial of the matter.

[34]. The other issue which the *Court a quo* deemed necessary to decide on, which is not apparent in the final judgment, was whether it is permissible in our law to canvas a completely new and unpleaded defence. With respect it is clear from the judgment in **Jerry Nhlapho and 24 Others v Lucky Howe N.O. Appeal Case No. 37/07** and the cases referred to therein that a litigant is entitled to know from the pleadings what she or he is facing and that it is wrong to direct the attention of the other party to one thing in the pleadings and then attempt to canvas another thing at the trial. See **Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A).**

[35]. The Court a quo also sought to buttress its judgment by reference to the decision in **Sipho Ngwenya and another vs Commissioner of Police and another, High Court Case No. 36/06.** With the greatest of respect that judgment has no similarity to the current matter and as such has no bearing on the outcome of this matter. In that matter an application seeking special leave to institute proceedings outside the statutory time limits provided for in Section 2 of the Act had been instituted by the Applicants. The Respondents filed an objection to the point in limine stating that its cause of action arose in

July 2003 and that 24 months had lapsed as per Section 2(1)(c). The distinction between the two matters are;

[35.1]. that in the **Sipho Ngwenya** and **Musa Sigudla** case, the "issue was the cause of action and when it arose". The court found that the action was within the 24 months stipulated in the Act and dismissed the point in limine raised by the Respondents; and

[35.2]. that in the present matter the issue is whether the 1st Respondent was entitled to raise and rely on the point in limine raised after the close of Pleadings and the manner in which the issue was raised.

[36]. Counsel for the Appellant also raised an issue to the effect that Section 2 of the Act infringes on the constitutional rights of the Appellant to be heard before the Courts of Swaziland. However since the issue was not raised or argued before the *Court a quo* and since this court is not a court of first instance, we do not deem it appropriate to deal with the issue concerned.

[37]. The actions and omissions of both sets of Legal Advisors leave much to be desired and as such the displeasure of this Court is evidenced by the fact that there will be no order as to costs.

[38] At the hearing of the matter and after having heard both Counsel, this Court made an *ex tempore* and judgement sets out the reasons for the said *ex tempore* order.

[39] In the result the following order is made;

1. That the appeal of the Appellant is upheld;

2. That the judgment of the *Court a quo* is set aside and replaced with the following order:

"That the purported points of law raised unlawfully by the Defendant are dismissed, the trial on the merits of the matter to be proceeded with and no order as to costs is made;" and

3. That no order as to costs is made regarding the Appeal before this

Court.

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S. P. DLAMINI JA

I agree _____

R.J. CLOETE JA

I agree _____

S. B. MAPHALALA JA

For Appellant: Mr S. C. Dlamini

For Respondents: Mr B. Tsabedze