

IN THE HIGH COURT OF SWAZILAND

CIVL CASE NO.504/87

In the matter of

WALTER SIPHO SIBISI

Applicant

vs

THE WATER AND SEWERAGE BOARD

1st Respondent

THE ATTORNEY-GENERAL

2nd Respondent

CORAM:

HANNAH. C.J.

FOR THE APPLICANT:

P. M. ZWANE

FOR THE RESPONDENTS:

L. WIMALARATNE

JUDGMENT

(31/7/87)

Hannah, C.J.

I have before me a notice of motion in which the applicant seeks condonation of his failure to serve notice of demand on the second respondent within the period prescribed by The Limitation of Legal Proceedings against the Government Act, 1972 (the Act) and leave to serve such notice and to institute proceedings against the second respondent.

The applicant was employed as a civil servant and as such was assigned to the Water and Sewerage Board as a clerk. The Board has no legal personality of its own being merely a department of Government and accordingly it should not have been joined as a party to this application. If the applicant has a claim it lies against the Government alone as represented by the second respondent.

The applicant alleges that during his employment certain differences arose between himself and officials of the Water and Sewerage Board and that these ultimately led to his employment being terminated on 30th September 1982. He alleges that he has a

2

claim against the Government not only for wrongful dismissal but also for arrears of salary. However, he did not serve a written demand particularising his claim as is required by section 2 of the Act hence the present application.

Section 2(1) of the Act provides:

"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 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."

The parties accept that "debt", as used in the Act, should be given its widest possible meaning and includes damages and that the subsection makes a clear distinction between a debt arising from a delict and a debt arising from another cause of action

3

such as contract. It is also accepted that the subsection makes it clear that in the case of a delictual debt, subject to certain other provisions in the Act concerning knowledge of when the debt became due, a claimant must serve a written demand within ninety days from the day when the debt became due failing which he will be debarred by Section 2(1)(a) from instituting proceedings in respect of such debt. However, no time limit is expressly imposed by the subsection in the case of other debts and again the parties accept that in such cases the matter must be governed by subsection (1)(c) and that the demand must be served within twenty four months from the day on which the debt became due. In the present case the applicant's proposed claim lies in contract and a demand should therefore have been served at the very latest by the 29th September 1984. This, however, was not done.

I now come to the point of contention between the parties. This turns on the proper interpretation to be placed on section 4 of the Act which empowers this Court to grant special leave to a claimant to institute proceedings against the Government in certain circumstances. The section reads:

"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

4

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. (2) The High Court may, on application by the Government, and if it is satisfied that Government has a reasonable prospect of succeeding in such proceedings, on good cause shown, grant special leave to extend the period of ninety days referred to in section 2(1)(b):

Provided that the Court in granting such application, may impose such conditions as it deems fit (including the payment of any costs), and at the same time shall extend the period of twenty-four months referred to in section 2(1)(c) to such extent as it may deem fit."

Mr. Zwane, for the applicant, submits that the applicant is "a person debarred under section 2(1)(a) from instituting proceedings against the Government" and accordingly contends that he may bring the present application for special leave and, if the Court should be satisfied that his case falls within the requirements of section 4(1)(a),(b) and (c), he submits that the Court may extend the twenty-four month limitation period

referred to in section 2(1)(c). That the Court has such a power must follow, he submits, from the fact that the applicant has a right to apply and must therefore have a remedy and, should there be any doubt, such doubt is resolved by the terms of the proviso to section 4(1) which provides that the Court may stipulate the date by which the proceedings are to be instituted "notwithstanding section 2(1)(c)".

5

Mr. Wimalaratne, on the other hand, contends that the relief granted by section 4(1) applies only in the case of a debt arising from a delict where the claimant has failed to serve written demand within ninety days. He submits that the final cut-off date for all claimants, irrespective of the nature of their claims, is the twenty-four month period prescribed in section 2(1)(c) and once a claimant has allowed that period to elapse without instituting proceedings then, whether he has served a written demand or not, he is debarred from suing. Section 4(1), he submits, is designed solely to ameliorate the harsh requirements of the proviso to section 2(1)(a) by virtue of which a person claiming a debt arising from delict has only ninety days in which to serve his demand.

On a plain reading of section 4(1) the person who may apply for special leave 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

6

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(1)(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.

N.R. HANNAH

CHIEF JUSTICE