IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1206/98

IN THE MATTER BETWEEN

GEORGE MAGAGULA	APPLICANT
VS	
THE MOTOR VEHICLE ACCIDENT FUND	RESPONDENT
CORAM:	S.B. MAPHALAIA - A J
FOR APPLICANT:	MR W. MKHATSHWA
FOR RESPONDENT:	MR MATSEBULA

JUDGEMENT

(17/08/98)

This is an application by way of motion seeking an order in the following terms:

a) That the claim in terms of Motor Vehicle Accident Act no. 13 of 1991 be condoned and the applicant granted leave to file his claim within 21 days from the date of granting the order prayed.

b) That the respondent be directed to pay the costs of this application only in the event of unsuccessful opposition hereto.

The applicant filed a founding affidavit in support of this application. He avers that during October, 1979 he was stationed at the Bhambham army barracks presently known as Mlindazwe army barracks in Siteki, in the District of Lubombo. During the same month of the same year he was travelling along with other soldiers stationed at the same barracks on assignment towards Maphungwane area in the Lubombo District at the back of an army truck registered S.246 and driven by one Christopher Dlamini. During the said trip, the said vehicle lost control and plummeted down a palisade off the road thereby causing all the passengers travelling at the back of the vehicle to be thrown off and sustain various injuries. He thereafter received medical treatment and shortly discharged. The diagnosis whereof being that he had suffered minor injury. On or about 1984 he began experiencing immense discomfort in his back very often occasionally

intense numbness of the legs and he stopped partaking in any training exercises, walking any long distances or doing any exerting activities. Although he very frequently sought medical assistance, his injury worsened as to sometimes render his legs totally dysfunctional. He was referred to hospitals in the Republic of South Africa but could not afford to pay for the nature of the treatment he sought.

During 1994 he consulted a doctor Stephen Cagle, a neurological surgeon who was on attachment at the time with the Raleigh Fitkin Memorial Hospital. After extensive radiographic examination, he was diagnosed as having had a small fracture along his spinal column, the redevelopment of the bone whereof had caused some bone tissue to grow inward and impeaching on nerves around his pelvic region. At the point of the fracture there still remained a gap that allowed air into his spinal column which he was advised was the cause for much of his discomfort. During the same year he underwent corrective surgery, he is still unable to carry out any exerting physical activity, walk any distances or lift anything heavy. He is unable to travel long distances in a vehicle without experiencing pain around the waist and

general abdomen. He further no longer has a healthy life or sexual activity. During cold weather he is not able to walk at all and have to rely entirely on assistance for the most menial of chores.

He submitted that he had not had any injury other than that stated in paragraph 5 and state it to be the cause of his present condition. He is advised and verily believes that his condition is now permanent and accordingly intend to lodge claim against the respondent. He is verily advised further and believe that from the time of his injury his claim would have long since prescribed. He submitted that he has no other recourse open to him but to approach the court for leave to comply with the requisite statutory two-year period. He submitted further that as set forth herein before, he could not reasonably have been expected to lodge his claim documents timeously as he had only recently been diagnosed and received confirmation of the injury being a direct consequence of the vehicle accident referred to in paragraph 5 of his affidavit. He submitted further that the claim has prescribed through no willful default or negligent error on his part, as he was not aware of the actual nature of the injury nor that such was a direct consequence of the said accident. He tendered the sum of E200-00 (two hundred emalangeni) as security for the respondent's costs relating to this application.

His founding affidavit is confirmed by that of one Khanya Dlamini who avers that he is also an army officer and was travelling with the applicant in the said motor vehicle when the accident described by the applicant took place.

This application is opposed by the respondent who filed an opposing affidavit. The respondent's affidavit is deposed by one Lomalanga V. Matsebula who avers that she has read applicant's affidavit and submits that the applicant's application is out of time in that the applicant's claim prescribed on or about 1981 which is the statutory prescription period of two years from the date on which the claim arose. She further submits that applicant is clearly out of time in terms of the provisions of section 15 (4) © of the Motor Vehicle Accident Act No. 13 of 1991 which provides as follows:

"© The court shall not grant an application referred to in sub-section (3) unless:

(b) The application is made within a period of ninety days after the date on which the claim become sue prescribed under sub-section "

In addition the respondent may not reasonably be expected to investigate fully the extent of the injuries which were sustained by the applicant from the accident which took place close to twenty years ago and whether the injuries in respect of which applicant states he was diagnosed during 1994 have any direct link to the accident in which he was involved in 1979.

She submits further that the liability of the respondent to compensate for damages suffered as a result of any bodily injury in terms of Act No. 13 of 1991 would lie if it arrives from the negligent driving of the motor vehicle in which the applicant was not alleged that the sole cause of the accident was as a result of the negligent driving of the driver of the motor vehicle S. 246. Further she avers that respondent cannot be reasonably expected to know whether the driver of the motor vehicle S. 246 was at fault when the accident occurred after such a long time and applicant has not annexed a police report about the accident to his affidavit.

The matter came before me for arguments on the 2nd July, 1998 in the contested roll.

Mr Mkhatshwa for the applicant conceded on the main that applicant's claim is out of time in terms of section 15 (4) of the Act. He conceded further that the said section does limit the exercise of the discretion of the court in so far as the relief sought can be granted. That courts have reserved discretion and not bound by the Act. He directed the court attention to South African decided cases on the subject. Reference was made to the South African case of Dure vs Provident Insurance 1979 (4) S.A. 420 where it was held that the court in the event it finds special circumstances may use its discretion in favor of an applicant who has lodged his claim out of time as prescribed by the Act. Further in the case of Feni vs

Protea Assurance (Co) (PTY) 1984 (2) S.A. 529 the same principle was applied. Mr Mkhatshwa argued that in the present case the applicant could not be reasonably be expected to have filed his claim in time as he did not know that he was going to have such a disease.

The respondent as represented by Mr Matsebula argued in opposition stating that the claim has not been brought in terms of section 15 (3) of the Act. The applicant did not even lodge his claim during the grace period as provided by section 15 (4) of the Act. He cited the case of Lange and another vs President Insurance Co. (LTD) 1976(3) S.A. 732 where special circumstances were defined. Mr Matsebula applied that the application be dismissed with costs at attorney and client scale as his client has been put out of pocket due to this unnecessary suit.

These are the issues before me. I must say that this is a very tragic case as shown by the facts presented before court. However, the law as we find it must take precedence. I agree in toto with Mr Matsebula that the claim has not been brought in terms of section 15 (3) of the Act, and to put salt to an injury the applicant did not lodge his claim during the grace period provided for by section 15 (4) of the Act. The provisions of this Act are peremptory and the court's discretion on the matter is totally curtailed. This much has been conceded by Mr Mkhatshwa for the applicant. However, Mr Mkhatshwa urged the court to follow South African decisions on the matter. I am unable to do so for the simple reason that those decisions were based on an Act, which has been amended to cater for situations like the present one. I am afraid to state that the applicant has no remedy when one follows the full strictures of the Act.
In the result, I dismiss the application with costs.

S.B. MAPHALALA

JUDGE