IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO. 2689/03**

In the matter between:

SOPHIE ZWANE **APPLICANT**

VERSUS

THE ATTORNEY GENERAL **I[ST] RESPONDENT**

THE COMMISSIONER OF POLICE **2[nd] RESPONDENT**

CORAM **SHABANGU AJ MS.**

FOR APPLICANT FOR **VILAKATI MS.**

RESPONDENT **KATAMZI**

JUDGEMENT 20[th]

October, 2004

The applicant, one Sophie Zwane in these proceedings seeks an order in the following terms;

> *"1. That applicant be granted special leave in terms of section 4 (1) of the Limitation of Legal Proceedings Against the Government Act, 1972, to institute proceedings against the Government by way of demand, being debarred under Section 2 (1) (a) of the same, on the basis that the debt arises from a delict.*
>
> *2. Costs of this application in the event this application is opposed."*

The application is opposed and the basis of the opposition is set out in a "notice to raise points of law in limine" wherein it is contended that;

"The Applicant's claim has prescribed in terms of Section 2 (1) (c) of the Limitation of Legal Proceedings against the Government Act No. 21 of 1972 and that no relief is available to the Applicant under Section 4(1). "

The Parties have argued the matter on the basis that the government is a party to the present proceedings. The relief sought is clearly sought against the government. Similarly, the "notice of intention to raise points of law in limine" mentioned implicity assumes that government is a party to these proceedings. Inspite of these however there is nothing in the body of the affidavit filed in support of the notice of application which makes the government a party to the present proceedings. The Attorney-General is cited in paragraph 1.2 of the applicants' affidavit and is described in the following language;

"The first respondent is the Attorney-General, Minister (sic) of Justice Usuthu Link road, Mbabane who is cited in his capacity as such and as legal representative of the 2nd Respondent."

There is no description of who the second respondent is in the body of the affidavit. The only reference to a second respondent on the papers as a whole is found in the heading wherein the Commissioner of Police is named as the second respondent. The second respondent is not the government but it is the Commissioner of Police. The Commissioner of Police is not the government. In light of this to cite the Attorney-General in his capacity "as such and as legal representative of the Commissioner is not the same as citing the Attorney-General in his capacity as legal representative of government. In fact it seems to me that a better and clear description of the government as a party to legal proceedings would be to say that "the respondent is the government of Swaziland represented in these proceedings by the Attorney-General who is cited herein in a nominal capacity as such, with a principal place of business at 4th Floor Ministry of Justice Building, Usuthu Link Road, Mbabane," or such similar description. The basis of citing the Attorney-General in proceedings against the government is found in section three of the Government Liabilities Act, 1967. That section reads;

"3. In any action or other proceedings which are instituted by virtue of Section 2, the plaintiff, the applicant or the petitioner, as the case may be, may make the Attorney-General the nominal defendant or respondent and in any action or other legal proceedings by the Government or by the Minister, the Attorney-General may be cited as the nominal plaintiff or applicant, as the case may. "

The word "may" in the expression "may make the attorney General the nominal defendant or respondent" does not confer upon the plaintiff or applicant who wishes to institute proceedings against the government a choice between citing the Attorney-General or some other person such as a head of department or a Minister responsible. The words authorise the person who has been wronged by the government or by a servant of the government who is alleged to have been acting within the scope of his employment as a government servant to sue. In other words the Government Liabilities Act 1967 was enacted to enable any person who had a claim against government arising from contract or from any other wrong allegedly committed by any servant of the government acting in his capacity and within the scope of his authority as such servant, to bring proceedings against the government. Similar legislation exists in South Africa in the form of the State Liability Act 20 of 1957. It has been observed elsewhere that the source of this kind of legislation was the success of the special plea in BINDA V. COLONIAL GOVERNMENT, (1887) 5 SC 284 wherein it was held that because of the prerogative or immunity of the crown, the crown could not be held liable for the delicts of its servants, because according to the English law which was accepted as governing the matter the government (as the crown) was not subject to the jurisdiction of its own courts. In other words the crown could not be dragged before its own courts. The English law relating to the prerogative was accepted as being applicable inspite of the fact that the British Government had no intention of imposing the law of England upon the Cape or its acquired territories in Southern Africa and had in fact specifically made provision for the Roman-Dutch law to be the applicable law in Southern Africa. The understanding was that even though a necessary inference is that the law which the British sovereign authority had chosen would apply in the acquired territories of Southern Africa, was the Roman-Dutch law, it did not follow that the British Sovereign authority had also abandoned those attributes of the prerogative most closely linked to the exercise of sovereign authority, such as whether the crown was subject to the jurisdiction of its own courts. See BAXTER, ADMINISTRATIVE LAW @ 397. A distinction was therefore drawn between the 'political rights of the crown' and the so-called "minor rights of the crown" which are not essentially bound up with its sovereignty. In the case of the latter, the crown must be taken to have abandoned its prerogatives; the former must be assumed

to operate as the necessary result of the fact that it was the British Crown which governed. From the case of UNION GOVERNMENT (MINISTER OF LANDS) V. ESTATE WHITTAKER 1916 AD 194 @ 211, BAXTER *supra* quotes the following statement from the judgement of Solomon J.A, which illustrates the understanding of the legal position of the time. SOLOMON J.A. observed;

> *"It is almost inconceivable that in any English possession the [Constitutional relations between the Crown and its officials] should be decided by any other than English law, but there is nothing at all repugnant to the idea that in the case of the rights (rights of property, of the Crown), the local law should prevail."*

Similarly INNES CJ in the same case, that is UNION GOVERNMENT (MINISTER OF LANDS) V. ESTATE WHITTAKER expressed the position as follows;

> *"It is clear that the prerogative is as extensive in Natal as in England, except in so far as it has in either country been duly modified or abandoned ...it is clear, nor do I understand the point to be disputed, that the British government had no intention of imposing the law of England upon the newly acquired territory. The country was taken possession of on that understanding... Now, when the Sovereign agrees that the system of law prevailing in a conquered settlement shall continue in force thereafter, it would seem a necessary inference, in the absence of any stipulation to the contrary, that the rights of the state, with regard to the acquisition, alienation and disposition of property, are intended to be regulated by the legal principles which the Sovereign expressly sanctions. Such questions as whether the Crown is amenable to the jurisdiction of the courts, and its constitutional position in regard to matters of government stand on a different footing, and no inference affecting them could properly be drawn from the establishment of a system of law different from that of England. But the crown continually engages in transactions relating to the ownership of property; it may frequently appear in the Courts. Even if not subject to their authority, either by consenting to the jurisdiction if defendant, or by invoking their assistance as plaintiff.*

The legal position as understood at the time legislation such as the Government Liabilities Act 1967 was promulgated for the first time in Southern Africa was therefore as outlined above, namely that the crown (ie the government) was not subject to the authority of its own courts and therefore could not be sued in those courts. Despite strong criticism of this legal position it might be interesting to note PROFESSOR BAXTER's views who in his analysis appears to hold the firm view that the decision in BINDA V. COLONIAL GOVERNMENT *supra* and in other cases which followed it

was correct. See BAXTER, ADMINISTRATIVE LAW pages 398 and 622. At page 622 of the abovenamed text LAWRENCE BAXTER summarises the historical background which gave rise to the promulgation of the various Crown, Government or State Liabilities legislation in so far as the legal liability of the state is concerned with the following observations.

> *"The most important public authority is the state. Obviously it can only act through the medium of officials acting individually or collectively; indirect methods are therefore necessary in order to hold the state liable for the acts of its 'agents' as is also the case with other public institutions. Until 1888 this was impossible because, although one might have been able to sue the crown as an act of grace, the crown could not be held liable for the delicts of its servants as the ancient feudal maxim that 'the King can do no wrong' had come to mean that fault could not be attributed to the crown...In BINDA V. COLONIAL GOVERNMENT the court reluctantly but correctly held that the government at the Cape could not be held vicariously liable for the acts of its servants. As a result of the criticisms levelled by the judges in that case, the situation was reformed by the enactment of remedial legislation in the Cape Colony and, shortly thereafter, in other colonies. In this respect South African law was progressive by comparison with the English law, although practice had already developed in England whereby the Crown would have been liable had it been a private employer. On the formation of the Union, the colonial legislation was replaced by the Crown Liabilities Act which was itself replaced in 1957 by the State Liabilities Act."*

For a discussion of the merits of the criticism that have been levelled against the decision in BINDA V. COLONIAL GOVERNMENT *supra* see footnote number 158 in BAXTER'S ADMINISTRATIVE LAW page 623. See also notes 75-6 at page 398 of BAXTER'S ADMINISTRATIVE LAW. The Government Liabilities Act of 1967 in this country must therefore be understood as remedial legislation aimed at giving persons who believe they had a claim against the government to approach the courts which are then given authority over the person of the government as a party to such proceedings. The Swaziland Act is worded in *almost* identical language with its South African counterpart. Beside making it possible for the government to be sued or to sue in the courts it also provides that where the government is being sued it is the Attorney-General who should be cited as the nominal defendant or respondent as the case may be. On this latter aspect its South African counterpart makes reference to and names the Head of Department or the Government Minister responsible as the person to be cited as a

nominal defendant or respondent in the place of government. In the South African counterpart of section **3** of our Government Liabilities Act it would be competent to join and cite the Commissioner of Police as a respondent in proceedings such as the present. However our Act, unlike the South African Act does not provide for the citation of a head of department but provides for the citation of the Attorney-General instead. The Attorney-General has to be cited in a nominal capacity on behalf of the government. To cite the Attorney-General in his capacity "as such and as legal representative" of the Commissioner of Police is not the same thing as citing him as a "legal representative of the government" and does not make the government a party to the present proceedings. It follows from this that it would be inappropriate to grant relief against the government in these proceedings when it is not even a party to the proceedings. The Government Liabilities Act of 1967 which as already observed is intended to be remedial legislation making the government subject to the jurisdiction of the courts even in matters where its officials act under the prerogative powers. By the prerogative power of the government is meant the residue of all the non statutory powers, privileges, liberties and attributes which are recognised at common law to be possessed by the head of state and exercised by him personally or exercised through his officials in the executive branch of government. This relates to the prerogative as one such source of authority for exercise of power by the administrative or executive arm of government. The second source of authority for executive action is legislation. See BAXTER, ADMINISTRATIVE LAW, **393** for the conceptions of the prerogative authority. Except in the case of an exercise of power under the prerogative, a public authority has no powers other than those which have been conferred upon it by legislation. In practice nearly all the authority for administrative action emanates from legislation, because many of the powers which used to fall within the prerogative are now wholly or partially codified by statute. CORA HOEXTER **in (1985) 48** 'INHERENT EXECUTIVE POWER : PREROGATIVE OR PUISSANCE PUBLIQUE' THRHR **(1985) 48** AT **152** raises the discussion whether the prerogative authority of the state and its servants still exists. The Government Liabilities Act, 1967 does not apply to the exercise of power by public authorities which emanate from legislation or statute as their source. Where therefore the exercise of statutory power by a public authority is being challenged it is not necessary

and it is not competent to cite the Attonery-General as a party to the proceedings aimed at questioning the regularity or validity of the administrative action purportedly confered by statute. Where for instance an administrative official or statutory body exercises powers conferred upon it by statute such administrative official can be cited in his name or in his official capacity without citing the Attorney-General at all. This is because as has been observed in a number of cases a public authority who is conferred with authority by statute is said to be exercising a power conferred upon him personally by Parliament. This distinction is well illustrated by the cases of wrongful arrest effected by the police. A police officer is authorised by the Criminal Procedure and Evidence Act to effect an arrest without a warrant under certain defined circumstances. It has been held that such a police officer in effecting an arrest on the basis of the Criminal Procedure and Evidence Act 67 of 1938 is exercising a personal discretion conferred upon him personally by Parliament. In other words such a police officer is not acting as a servant or employee of the government, with the logical consequence that no question of vicarious liability on the part of government can arise. In other words because the police officer is exercising a personal discretion conferred upon him personally by parliament he does not act as a government employee. The only basis it has been said for joining government is because the victim is detained in a government owned police station and the detention is before the first remand authorised by government. On the other hand if a junior police officer is instructed by a senior police officer, such as the station commander to go out and arrest a particular person he is under such circumstances acting as an employee or servant of the government and the government represented by the Attorney-General in accordance with the provisions of the Government Liabilities Act, 1967may be joined in the proceedings on the basis of an alleged vicarious liability. In short therefore it is important to determine the circumstances when the government, that is the Attorney-General may be cited in legal proceedings and when it would be competent to cite any public authority or administrative official such as the Commissioner of Police in the present proceedings. In the present proceedings it is not competent to cite or join the Commissioner of Police in the present proceedings. Support for this proposition is to be found in the judgement of ROONEY J., in the yet unreported case of FRANK B. MAGAGULA VS COMMISSIONER OF POLICE & OTHERS case No. 455/90 where even though the

plaintiff succeeded in his claim for wrongful arrest the learned judge dismissed his claim

in so far as it related to the Commissioner of Police remarking;

> *"It follows that the plaintiff in this case has established that he was unlawfully arrested and detained by the third, fourth, fifth and sixth defendants and he is entitled to damages from the second defendant as the others were acting as the servants of the Swaziland Government. The first defendant who is the Commissioner of Police is not responsible for the delicts of his officers. He should not have been joined in these proceedings and I dismiss the claim in so far as it relates to him. "*

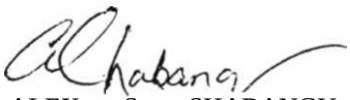
See also BRITISH SOUTH AFRICA COMPANY VS CRICKMORE 1921 AD 107. See also MCKERRON, R.G. THE LAW OF DELICT 7th edition page 78. MHLONGO V. MINISTER OF POLICE 1978(2) SA 551 (A).

Furthermore, the Government Liabilities Act, 1967 in providing that the attorney-General may be cited in proceedings where any person is instituting an action or claim or application against government does not necessarily entitle the Attorney-General to a right of audience on behalf of government in the courts. It may well be that this is provided for in another statute. Similarly where the proceedings of a statutory body such as Road Transportation Board are being challenged on review reliance cannot be placed on the Government Liabilities Act for the appearance of the Attorney- General or his citation in such proceedings.

However I should point out *obiter* that it is not clear to me why the present application is necessary in the first place. The applicant does not say when the vehicle in respect of which she wishes to claim damages was destroyed by fire. She further does not allege any fault on the part of those she intends to bring the claim against. She does say however in paragraph 4.2 of the founding affidavit that the destruction of the vehicle by fire has not been communicated to her. She further goes on to say that a list of vehicles which were destroyed by fire was published on 20th November, 2002 in the Swazi Observer newspaper and that her vehicle is not listed therein. On the authority of the court of Appeal decision in COMFORT SHABALALA V. SWAZILAND GOVERNMENT CIVIL APPEAL NO. 2618/95 delivered on the 7th day of June, 2002 read together with the provisions of section 2 (2) (b) and (c) of the Limitation of Legal

Proceedings Against Government Act the debt did not become due until the date upon which the applicant became aware of the fact that her vehicle was amongst those destroyed by fire. She does not give the date on which she became aware that the vehicle was destroyed by fire. Other than that she says she has been informed by some Police Officers who are her relatives that her car has been destroyed by fire she has not been advised by the Police or by the government that her vehicle was destroyed by fire.

In many other respects the applicants' papers, are badly drafted to say the least. For example, other than what is referred to in this judgement, she describes herself in paragraph one of the founding affidavit as "a Swazi female adult and widower of Mbabane". Similarly the respondents' notice of intention to raise points of law in limine is badly formulated and is misconceived. It would not have succeeded. There is nothing in the point as formulated which gives an indication of the reason for the contention that the applicants' claim has prescribed. As formulated the point of law in limine is nothing but a bald legal proposition. There is no indication as to when the debt is considered to have become due by either the applicant or the respondents. In the circumstances it seems to me that the appropriate result which should follow from the above is that *"no order is made"*. Each party is to bear its own costs.



ALEX S. SHABANGU
ACTING JUDGE