

IN THE HIGH COURT OF LESOTHO

In the matter between:

MALEE EMSLEY PUTSOA

Plaintiff

and

THE ATTORNEY GENERAL

Defendant

JUDGMENT

Delivered by the Hon. Acting Mr. Justice M.L. Lehohla
on the 27th day of November, 1986

Summons was issued by plaintiff in this matter and filed of record in the Registrar's office on 27th May 1986. Service on defendant was effected on 12th June 1986.

In the summons plaintiff claims against the defendant the sum of M20,000 made up as follows:-

- (a) M 5,000 for unlawful detention
- (b) M 5,000 for unlawful arrest
- (c) M10,000 for malicious prosecution

Furthermore plaintiff claims interest at the rate of 22% per annum from the date of issue of summons to date of payment, costs of suit plus further and/or alternative relief.

The Attorney General gave notice of his intention to oppose this matter on 19th June 1986, and on 4th July 1986 acting in terms of Rule 32(1) raised a special plea based on prescription.

The rule reads:

" The parties to any civil action may, after institution

/of ...

of proceedings agree upon a written statement of facts in terms of a special case for adjudication of the Court."

Subsection (2) of the Rule supra was complied with by both parties in that as a result thereof plaintiff filed on 29th July 1986 a document styled "Special case in terms of Rule 32" a subheading of which reads as follows:- "The parties in these proceedings agree upon the following facts." The subheading is followed by a tabulation of facts agreed upon, namely:-

1. The plaintiff was arrested on Saturday 18th September, 1982 and the plaintiff was subsequently acquitted on the 15th December, 1982.
2. The cause of action arose on or about the 15th December, 1982.
3. In effecting the arrest and prosecution, the police were acting during the course of their duties and acting within the scope of their authority as servants of the Lesotho Government.
4. A letter of demand for the sum of M10,000 was delivered to the Solicitor-General on or about the 21st May, 1984.
5. Summons was duly served on the Attorney-General on or about the 12th June 1986.

The question of law in dispute between the parties is set out as follows:-

" There is a dispute between the parties as to whether the plaintiff's claim has prescribed in terms of Government Proceedings and Contracts Act No.4 of 1965."

/While ...

While at this point in reference to and contrast with tabulation 2 of points agreed upon I may point out that in argument Mr. Mpopo for the applicant/defendant submitted that the cause of action arose in 1982 i.e. on 18th September, 1982 and pointed out that despite this fact no demand was made by plaintiff until 21st May 1984. He buttressed his argument on the words appearing in paragraph 4 of the declaration namely that "On or about the 18th September, 1982 plaintiff was arrested and kept in detention by the police until 6th October, 1982."

In reply Mr. Mphutlane for respondent/plaintiff conceded that while this may be so, it is important to bear in mind that the first stages of this malicious prosecution in the form of arrest and detention may have been within the law in so far as the Criminal Procedure and Evidence Act 1981 legitimises detention for interrogation for no more than forty eight hours. In fact the malicious prosecution was proved in that plaintiff was acquitted on 15th December 1982. Thus cause of action arose, he argued, on 15th December 1982 when the malice complained of in these proceedings became conclusively manifest. Therefore the two years within which prescriptive period runs as envisaged by the Government Proceedings and Contracts Act 1965 Section 6 thereof should end on 15th December 1984.

Section 6 reads:-

" Subject to the provisions of Sections 6,7,8,9,10,11, 12 and 13 of the Prescription Act no action or other proceedings shall be capable of being brought against the (State) by virtue of the provisions of section two of this Act after the expiration of the period of two years from the time when the cause of action or other proceedings first accrued."

/It was ...

It was argued on behalf of Respondent/Plaintiff that it would appear that section 6 supra is subject to provisions of prescription Act 6 of 1861 none of which envisages delictual liability. Sections 6 to 13 of this Act it was argued confine their application to liquid or money debts or contractual obligations only and say nothing about delictual claims, the argument went on.

Learned Counsel for Respondent/Plaintiff accordingly, relying on The Roman-Dutch and Sesotho Law of Delict by Palmer, pointed out that the learned author regarding prescription has this to say at page 96 "Extinctive prescription on delictual actions in Lesotho is governed not by statute but by very old common law rules." Consequently it was urged that in order for this matter to be resolved resort has to be had to Common Law. In a footnote the learned author emphasises that Lesotho's Prescription Proclamation deals mainly with contractual obligations and not at all with delictual obligations.

It was argued that since under Common Law there are various incidents of extending any prescribed period it would appear that the letter of demand by plaintiff to defendant would have the effect of interrupting the prescription period and that this period should be reckoned to run from the time of such demand which factor would bring plaintiff's claim within the provisions of the prescription Act supra. Counsel for Respondent/Plaintiff submitted on the authority of Zietman vs Zietman 1944 NPD at 389 that prescription begins to run from the time the injured party becomes aware of the wrong and submitted further that nothing express or implicit would preclude the Common Law on interruptions from operating in the instant case. He urged me

/to treat ...

to treat this instant case in terms similar to provisions of Motor Vehicle Insurance Order No.18 of 1972 Section 13 (2)(a) of which says: "The right to claim compensation under Subsection (1) shall become prescribed upon the expiration of a period of two years as from the date upon which that claim arose:

Provided that prescription shall be suspended during the period of sixty days referred to in sub-section (2) of section fourteen" which merely says a claim cannot be enforceable before the expiration of sixty days from the date on which the claim was sent to the registered company.

Referring to page 261 of the Law of Delict by McKerron learned Counsel submitted that plaintiff had made a case which meets the criterion that in order to succeed in an action for malicious prosecution he must show that

- (a) the defendant instituted the proceedings;
- (b) acted without reasonable or probable cause;
- (c) was actuated by malice; and finally
- (d) that the proceedings terminated in plaintiff's favour.

Rounding off his submissions Mr. Mphutlane urged the Court to take the view that the period of prescription as interrupted should have run for 2 years from the date of demand i.e. 21st May, 1984 so that because in terms of the Act plaintiff was precluded from issuing summons until the expiry of a month the logical consequence would be that the period of prescription would end on 21st June, 1986.

In making submissions that preceded Mr. Mphutlane's reply Mr. Mpopo had pointed out that Section 4 of Government Proceedings and contracts Act provides that a month's notice

/has ...

has to be given and allowed to lapse before summons can be issued against Government.

He maintained that cause of action arose on 18th September, 1982. The demand was only made on 21st May 1984. The last day within which summons and not letter of demand should have been served on the Attorney-General is 18th September 1984 but sommons was only served on 12th June 1986. He submitted therefore that the action was well out of time.

He argued further that a letter of demand has not the effect of interrupting the prescription period as far as the provisions of the 1965 Act supra go, and also that the Court has no discretion to extend the period of prescription even on a good cause shown. For had this been the case the legislature would have had no hesitation to include a provision similar to that found in Section 34 of the Police Order 36/71, now amended to read Section 60, reading:

" For protection of persons acting in pursuance of this Order every civil action against such person shall be commenced within six months next after the cause of action arises and notice shall be given to defendant at least two months before the commencement of the said action:

Provided that the Court may for good cause shown extend the said period of six months." (My underlings)

Arguing in similar vein he referred to Sec. 13(2) of the Motor Insurance Order supra and submitted that if what obtains in that Order applies in the instant case the Legislature in its wisdom would have included a similar Section or provision in the statute under consideration. But in both cases it has not.

/Reference ...

Reference to the Government Proceedings and Contracts Act 1965 Section (2) would suffice to answer the question whether as submitted by plaintiff's counsel, Lesotho statute only relates to contractual and not delictual liabilities.

It reads "Any claim against the Government, which would if that claim had arisen against a subject, be the ground of an action or other proceedings in any competent Court, shall be cognisable by any such Court, whether the claim arises out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant:

Provided that nothing in this Section contained shall be construed as affecting the provisions of any law which limits the liability of the Crown in respect of any act or omission of its servants, or which prescribes specified periods within which a claim shall be made in respect of any such liability" I have underlined the words relevant to the instant matter.

On the basis of the foregoing it appears that the learned author Palmer was labouring under a misconception when he said the question of extinctive prescription is not governed by statute but by common law. Any argument based on this view cannot hold for it disregards the existence of the 1965 Act supra.

I am also of the view that the Court has no discretion to extend the prescription period to affect provisions of Sec. 6 of the said Act or to read into that Section the spirit embodied expressly in what was referred to as sections analogous to this one in question.

/Consequently ...

Consequently I would uphold the special case made by defendant. Costs are accordingly awarded to Applicant/Defendant.



M. L. LEHOHLA

ACTING JUDGE

27th November, 1986

For the Plaintiff : Mr. Mphutlane
For the Defendant : Mr. Mpopo