

IN THE HIGH COURT OF LESOTHO

In the matter between:

HAAE EDWARD PHOFOLO

v

ATTORNEY-GENERAL

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 18th day of December, 1995.

On the 23rd August, 1991, Plaintiff issued Summons
against the Attorney-General in which he claims:-

- (a) An Order declaring plaintiff's dismissal as
Deputy Governor of the Central Bank unlawful.
- (b) Costs of the suit.
- (c) Further or alternative relief.

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Defendant filed a Notice of Appearance to defend on the 16th October, 1991, defendant filed a Special Plea in which he objected to Plaintiff's claim in the following terms:-

1.

According to paragraph 7 of the Declaration the alleged proceedings first accrued on the 25th September, 1987 when the King dismissed the plaintiff from his position as Deputy Governor of the Central Bank. This action was instituted by the plaintiff on the 23rd August, 1991 and served on the defendant on the 14th October, 1991. In terms of Section 6 of the *Government Proceedings and Contract Act (Act 4/1965)* no action or other proceedings shall be capable of being brought against the Government after the expiration of the period of two years from the time when the cause of action first accrued.

2.

WHEREFORE the action is hopelessly prescribed and must be dismissed with costs.*

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According to Plaintiff's Declaration that was served along with the Summons:-

4.

"Pursuant to the *Lesotho Monetary Authority Act* 1978 (as amended), plaintiff was on 30th March 1984 appointed as Deputy Governor of the Central Bank of Lesotho, then Lesotho Monetary Authority. The said appointment was for three (3) years with effect from the 16th November.

5.

On the 30th October 1984, plaintiff was re-appointed for a further period of three years with effect from 16th September 1984.

6.

In terms of Section 10(1) of the *Lesotho Monetary Authority Act* 1978 plaintiff was by virtue of his position as Deputy Governor a director of the Bank.

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7.

On the 25th September 1987, the King while purporting to act in terms of Section 14(4) of the *Lesotho Monetary Authority Act 1978*, wrongfully and unlawfully dismissed plaintiff from his position as Deputy Governor of the Bank."

Plaintiff's cause of action is that of Contract. In terms of paragraph 5 of his Declaration, his contract expired on the 16th September, 1987. He could therefore not have been Deputy Governor of the Central Bank unless he had been re-appointed on a new contract. On the 27th November, 1995, I adjourned this case after hearing Mr. *Tampi* in order to give plaintiff an opportunity to address me on whether with pleadings as they stand, plaintiff's Summons disclose a cause of action.

I asked to be addressed on the absence of cause of action based on contractual allegations on Plaintiff's Declaration *mero motu* because Mr. *Tampi* had not excepted to Plaintiff's action on this ground. He had only contended himself on the fact that the matter had prescribed. The Court, however cannot allow an excipiable action to continue. In adjourning the matter, I gave plaintiff's

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Counsel an opportunity to file Heads of Argument canvassing issues generally.

On the 8th December, 1995, when the case resumed, Mr. *Pheko* was unable to overcome the problems caused by the fact that on the face of the Plaintiff Declaration, plaintiff's contract had expired. That being the case, plaintiff's Declaration lacked averments which are necessary to sustain an action. If indeed an amendment could have helped, plaintiff would not doubt have applied for one during the period of ten days that I had postponed the matter. It is trite law that at any stage before judgment, pleadings can still be amended. See also Rule 33 of the *High Court Rules 1980*. I had pointed out to Mr. *Tampi* for the respondent, during argument, that the plaintiff's action was excipiable and his point was that his Special Plea will abate this action just as much as an exception would. It does appear that the special Plea the Crown has taken would dispose this action if upheld.

An exception is appropriate as a method of settling a point of law. This is because as Innes CJ said in *Stephens v De Wet* 1920 AD 279 at 282, an exception goes to the root of an entire claim or defence. In *Du Preez v. Boetsap Stores (Pty) Ltd.* 1978(2) S.A. 177 Van den Heever

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J found that exception is the appropriate way of deciding or testing legal issues before trial unless there are special reasons making such a course inappropriate. The main purpose of an exception that the Summons and Declaration do not disclose a cause of action is to dispose of the case without the need of leading evidence. See *Barclays Bank Ltd. v. Thompson* 1989(1) SA 547 at 553 GH. It seems to me as (in this case) I would be confined to the four corners of the record, the Crown could have brought their Special Plea in abatement by way of exception.

Mr. *Pheko* for the plaintiff argued that a Special Plea or an exception and the rules that govern it do not apply to proceedings in which a declaratory order is being sought. Section 2(1)(c) of the *High Court Act* provides

"The High Court...shall have, in its discretion, and at the instance of any interested person, power to inquire into and determine any existing future or contingent right or obligation notwithstanding that such a person cannot claim any relief consequential upon the determination."

I do not understand this rule to oblige Courts not to tell litigants that they do not have the title to sue if the rights they are claiming have prescribed. In any event

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Mr. *Pheko* stated plaintiff wanted this declaratory order in order to claim his terminal benefits in terms of his contract. If that is the intention, then I am obliged to point out that the *Government Proceedings and Contract Act No.4* of 1965 is intended to deny plaintiff that very remedy, if he is claiming under a contract.

In using my discretion, I cannot ignore that the declaration that applicant has been unlawfully dismissed is intended to be a step that precedes an endeavour to have full restitution including reinstatement if possible. The Court has discretion in the making of Declaratory Orders. What I have to avoid is to create unnecessary ambiguities. For example in *Mosala Khotle v. Attorney General C of A (CIV) No. 13 of 1992*, Browde JA said:

"Once there was no dismissal there is no question of reinstatement and prayer (b) was therefore unnecessary."

The implication might be that the granting of a declaratory order makes reinstatement automatic. It would be unwise to make such an order in this particular case.

What I am trying to say is that a declaratory order should not be used as a means of obtaining a remedy that

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is no more available through the back-door. As Nicholas AJA said in *National Union of Metal Workers of S.A. v Henred Fruehof Trailers* 1995(4) SA 456 at 462 IJ:

"Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such a wrong be redressed... The fullest redress obtainable is provided by the restoration of the *status quo ante*."

According to the Common Law, reinstatement or damages are options which the Court has to consider in restoring the *status quo ante*. See *P.A.C.T. v Printing & Allied Workers' Union* 1994(2) SA 204 at 219 E. Making a declaratory order would be opening a door to the remedy that has become time barred. Even if I had the power to make such an order (in the circumstances of this case) I feel I should not do so.

It seems to me here, that we are dealing with extinctive prescription. If the right to bring an action has been extinguished then that right is not an "existing, future or contingent right or obligation". I am therefore obliged to hold that Section 2(1)(c) of the *High Court Act* 1978 does not apply to plaintiff's case. I do not see how I could exercise any discretion under that section.

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Mr. Pheko referred me to case of *Mikhane Maqetoane v. Minister of Interior & Others* C of A (CIV) No.3 of 1984 (unreported) where Wentzel JA said:

"Nonetheless and even if the remedy is not a review, but a declaration of rights, the delay is a factor to be considered, as the remedy of a declaratory order is a discretionary one."

The fact that a declaratory order is discretionary is not in issue, what I have difficulty with is the fact that the order that is being sought does not involve "any existing, future or contingent right or obligation". *Prima facie* and *ex facie* the plaintiff's Declaration, the right claimed has been extinguished by law.

In the light of the foregoing the appropriate order to make is the following:

Plaintiff's claim is dismissed with costs as the course of action has been extinguished by prescription.



 W.C.N. MAQUTU
 JUDGE

For Plaintiff : Mr. L. Pheko
 For Respondent : Mr. K.R.K. Tampi