

CIV/T/142/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

KHATHATSO THETSANE	1st Plaintiff
SEMAFO SETLOBOKO	2nd Plaintiff
NABALANE TSMOLI	3rd Plaintiff
TAU MOSOKOANE	4th Plaintiff
THABO MONALEDI	5th Plaintiff
TSEKO RAMAOTO	6th Plaintiff
MOTLALEPULA LEKAU	7th Plaintiff
CHABELI CHABELI	8th Plaintiff
REENTSENG BERENG	9th Plaintiff
PESI SEHLABO	10th Plaintiff
MONICA LIPHOTO	11th Plaintiff
MATELA MOKHETHI	12th Plaintiff
SIMON MOSOKE	13th Plaintiff
TSEOLLO RAPEANE	14th Plaintiff
THLATHLOBO MOKHETHI	15th Plaintiff
MOKHOTHU MAKARA	16th Plaintiff
LEBOHANG SEKOPE	17th Plaintiff
JONATHAN MOLAPO	18th Plaintiff
'MUSO MONALEDI	19th Plaintiff
TAMANYANE LIBUKE	20th Plaintiff

AND

ATTORNEY GENERAL

DEFENDANT

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice
J.L. Kheola on the 6th day of January, 1995.

This is an action in which the plaintiffs are claiming payment of their salaries and damages for unlawful arrest, unlawful detention, assault, defamation, malicious criminal proceedings and unlawful confiscation of their personal property. It is not necessary at this stage to set out in detail the claim of the plaintiffs except to mention that the plaintiffs were

soldiers in the Royal Lesotho Defence Force.

In January, 1986 they were arrested and charged with various offences before a Court-Martial. They were tried and convicted. They were sentenced to various terms of imprisonment. It is common cause that the plaintiffs or most of them were released from prison in July, 1992. It is again common cause that the present actions were instituted in March, 1993, that is to say, about eight (8) months after the plaintiffs were released from prison.

The defendant has raised a special plea to the plaintiffs' action. It is alleged that in terms of section 6 of The Government Proceedings and Contracts Act 1965 the legally prescribed period for suing the Government is two years. Section 6 of the aforesaid Act reads as follows:

"Subject to the provisions of section six, seven, eight, nine, ten, eleven, twelve and thirteen of the Prescription Act (1) no action or other proceedings shall be capable of being brought against Her Majesty in Her Government of Basutoland 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."

Section 6 of the Prescription Act No.6 of 1861 to which

section 6 of The Government Proceedings and Contracts Act 1965 refers reads as follows:

"If at the time when any such cause of action as in section three, four and five of this Act mentioned first accrued, as the person to whom the same accrued was a minor, or under coverture, or of unsound mind, or absent from Basutoland, then such person or the person claiming through him may, notwithstanding that the period of prescription hereinbefore limited in regard to such cause of action has expired, bring a suit or action upon such cause of action at any time within eight years or three years (as the case may be) next after the time at which the person to whom such cause of action first accrued ceases to be under any such disability as aforesaid or has died, whichever of these two events has first happened".

Mr. Ntlhoki, attorney for the plaintiffs, submitted that during the period the plaintiffs were in prison they were people who were under coverture. Consequently they were only in a position to bring action against the Government once the disability was over. In terms of section 6 of the Prescription Act 1861, prescription is reckoned from the time such disability ceases. He submitted that the claim of the plaintiffs was not prescribed because the period of prescription must start to run from the time such disability ceases. He submitted that

coverture includes custody, imprisonment, curatorship and warship. It is regarded as a lawful disability.

I do not agree with above submission because it is based on the wrong definition a "person under coverture". In Bell's South African Legal Dictionary, 3rd edition by A. Milne, person under coverture is defined as:

A married woman is only a person under coverture for purposes of section 6 of the Prescription Act (chapter 27) where, at the time when her right of action arose, she was under a disability to enforce such right by virtue of being under coverture."

It is very clear from the above definition of a "person under coverture" that a person who is serving a term of imprisonment during which his cause of action first accrued, cannot claim that he was under coverture because only a woman who is under her husband's marital powers at the relevant time can claim such a disability. What the plaintiffs can do in the present case is to explain that because of their imprisonment they were unable to institute these proceedings at the time their cause of action first accrued. If their explanation is found to be true or reasonable the Court might come to their assistance and say that imprisonment was a disability during which the prescription period in any law ought to be suspended.

Mr. Ntlhoki submitted that while in prison, the plaintiffs

were prohibited from availing themselves of the services of legal counsel. In this regard he referred the Court to paragraph 14 of an affidavit filed by the first plaintiff as first applicant in CIV/APN/270/92 of this Court. It reads as follows:

"At the end of our trial we were kept in a tight security part of the Central Prison, and separated from other prisoners for almost one year. Our visitors were restricted into not discussing with us our trial and what possible steps, if any, they could take to assist us to have the Court Martial proceedings reviewed by this Honourable Court. Most importantly we were firmly informed by our captors and the court martial that we could neither appeal nor have their decision reviewed by a civilian court. None of our rights subsequent to our trial and conviction were drawn to our attention. It was not until this year that legal advice and assistance was sought and obtained for us. Hence the delay in bringing these proceedings before this Honourable Court." (My underlining)

My understanding of what the first plaintiff is saying in that affidavit is that the disability to seek legal advice was for only one year i.e. 1986 to 1987. This fact is stated in no uncertain terms. The first three lines of paragraph 14 of his affidavit read as follows:

"At the end of our trial we were kept in a tight part of the Central Prison, and separated from other prisoners for almost one year." (My underlining)

At the end of the same paragraph the first plaintiff alleges that, "none of our rights subsequent to our trial and conviction were drawn to our attention. It was not until this year that legal advice and assistance were sought and obtained for us. Hence the delay in bringing these proceedings before this Honourable Court." (My underlining)

The impression one gets from the above statement, especially the underlined words, is that the plaintiffs rested on their laurels and made no attempt to seek legal advice from at least 1988 until 1992. Or the people who were supposed to seek legal advice and assistance on behalf of the plaintiffs failed to do so until March, 1992. There is nothing in the papers before me to show that such people were stopped by the defendant or his agents from instituting the present proceedings. It seems to me that the plaintiffs or their agents were just negligent and took no steps before the prescription period set out in section 6 of the Government Proceedings and Contracts Act 1965 started to run against them.

It is not correct that the defendant in any way stopped the plaintiffs while they were in gaol from exercising their rights to seek legal advice and to institute legal proceedings against anybody. In fact the present proceedings were instituted while

the plaintiffs were still serving their sentences.

Another submission by **Mr. Mtlhoki** is that the Government Proceedings and Contracts Act 1965 is inapplicable particularly section 2 and 6. The Act, particularly section 2 and 6 have been repealed by subsequent legislation. He submitted that the repeal was not expressly stated in the repealing legislation but it had such effect for all intents and purposes. The repealing legislations are Lesotho (No.2) Order No.3 of 1986; Indemnity Order No.3 of 1988; Indemnity Order No.9 of 1987 and Lesotho Order No.2 of 1990. He submitted that in effect the Indemnity Orders repealed and re-enacted the provisions of Lesotho (No.2) Order No.3 of 1986; that the last Indemnity Order i.e. Order No.3 of 1988 lapsed through effluxion of time by the end of April, 1988.

I do not agree with the submission that the Indemnity Order No.3 of 1988 lapsed through effluxion of time at the end of April, 1988. The purpose of the Order was to prohibit any legal proceedings against the Government and its servants for certain specified acts committed by the Government and its servants during a specified period. In section 2 of the Order specified period means the period beginning on the 24th February, 1988 and ending on the 30th April, 1988. Such a piece of legislation cannot lapse through effluxion of time because the prohibition of legal proceedings against Government and its servants for certain specified acts committed during a specified period, will remain in force for as long as the Order has not been repealed.

The Lesotho Order No.2 of 1990 and the National Constituent Assembly Order No.4 of 1990 did not repeal the Indemnity Order No.3 of 1988.

The Indemnity Order No.9 of 1987 has also never been repealed by any subsequent legislation. It was not affected by the Lesotho Order No.2 of 1990 nor by the National Constituent Assembly Order No.4 of 1990. The specified period in the Indemnity Order No.9 of 1987 is the period beginning on the 15th January, 1986 and ending on the 15th January, 1988. It is clear that the intention of the Legislature in enacting the Indemnity Order No.9 of 1987 was to cover the specified period in the Lesotho (No.2) Order No.3 of 1986. The repeal of the latter by subsequent legislation has not affected the indemnity created by section 13 because that section was re-enacted by section 3 of the Indemnity Order No.9 of 1987.

The submission that the Indemnity Orders of 1987 and 1988 were repealed is not correct. It would not make sense to indemnify people for certain specified acts covering a specified period and then subsequently repeal the Indemnity Orders and thus expose the Government and its servants to civil as well as criminal legal proceedings for such acts.

It is not correct that the Government Proceedings and Contracts Act of 1965 was repealed by the Indemnity Orders of 1986, 1987, 1988 and other subsequent legislation. The Act deals with prescription i.e. the period within which an action must be

instituted from the time the right of action against the Government first accrued. The Indemnity Orders deal with an entirely different subject i.e. prohibition of legal proceedings against the Government and its servants for certain specified acts committed during a specified period. Such legal proceedings are permanently prohibited as long as the Indemnity Orders of 1987 and 1988 are still on the statute book. I am of the opinion that they have never been repealed.

In their replication to the defendant's special plea the plaintiffs allege that the summons and the declaration disclose that whilst some actions giving rise to certain heads of claims arose in 1986, others arose subsequently and were of a continuing nature over the years concerned. Unfortunately the plaintiffs do not state which actions arose subsequently to those that arose in 1986. Paragraph 31 of the declaration sets out the plaintiffs' claims in detail. Prayer (a) relates to salaries and non payment of salaries arose in 1986.

Prayer (b) concerns payment of risk allowance; that non payment first accrued in 1986.

Prayer (c) (i), (ii), (iii), (iv), (v) and (vi) also first accrued in 1986. Even the defamation was only done in 1986.

It seems to me that the allegation of the plaintiffs that some actions arose subsequently to 1986 is not correct or fails to give the details of the dates on which such claims first

accrued.

In the result the defendant's special plea succeeds and the plaintiffs' action is dismissed with costs.

G/L. KHEOLA
CHIEF JUSTICE

6th January, 1995.

For Plaintiffs - Mr. Ntlhoki
For Attorney General - Mr Letsie