C of A (CIV) No.6 of 1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

KOANYA MAKHELE & OTHERS	**APPELLANTS**
AND	
THE HON. MINISTER OF DEFENCE & INTERNAL SECURITY	**1ST RESPONDENT**
ATTORNEY GENERAL	**2ND RESPONDENT**

Held at:
MASERU

Coram:
STEYN, P
BROWDE, JA
VAN DEN HEEVER, JA

JUDGMENT

STEYN, P

These three appeals came before us in consolidated form. They arise from actions of similar content instituted in the High Court by Appellants against the Government of Lesotho represented by the responsible Minister (the Minister of Defence and Internal Security) and the Attorney General. The averments are substantially the same in each case. The facts upon which

Appellants based their claims for damages can be summarised as follows:

> "The action arose from the events which took place on or about 16 November 1986 at or near Lekhalong La Baroa, when certain soldiers of the First Defendant, referred to as the "Royal Lesotho Defence Force"wrongfully, unlawfully and wilfully shot and killed both Plaintiff's parents, Montsi and Maliapeng Makhele.
>
> The identity of these soldiers was much later and after investigation and trial, revealed to be:
> Sergeant Lerotholi;
> Sergeant Ngoantloana Lerotholi;
> Private Lehloka; and
> Private Molapo.
>
> In committing the aforesaid acts, Plaintiff alleged that the four soldiers acted within the course and scope of their employment and in the execution of their duties as soldiers.
>
> Further, that they were duly authorized to commit the aforesaid acts by First Defendant, alternatively Second Defendant or were

First Defendant's agents.

In consequence of such acts, the minor children of the deceased in one of the matters suffered damages comprising loss of maintenance and support in a sum of M200,000.00 and funeral expenses in the sum of M15,000.00.

In the other two cases, Appellants claim delictual damages in their personal capacity.

The defence which is common in all three cases was raised by way of a pleading that is headed "Notice to raise points of law". It is in effect a plea in bar in which Respondents plead as follows:

The Defendants (Respondents) object to the Plaintiff's (Appellant's) claim on the ground that it is prescribed in that:

"(a) The legally prescribed period for suing the Government/State is two (2) years in terms of the Government Proceedings and Contracts Act Number 4 of 1965

(b) The summons and the Plaintiff's Declaration disclose that the cause of action arose in 1986.

(c) As such the above action was brought against the

> Government/State long after the expiration of the two (2) years from the time when the causes of action alleged first accrued, hence it is hopelessly prescribed."

A further objection was raised concerning a non-compliance with Section 4 of the *Government Proceedings and Contracts Act* 1965 (The Act) concerning the requirement that written notice should have been delivered before the issue of summons. This aspect of the matter is however not relevant for present purposes.

Appellant replicated to the plea in bar in the following terms:

> "While it is admitted that the cause of action arose in 1986 plaintiff only knew on the 15th March 1990 that defendants are responsible for deceased's death. Defendants could not under the circumstances sue anyone when the culprits were not known and the matter was still under investigation."

The matter came before Guni J in the High Court. She upheld Respondent's plea to the effect that Appellants' action had prescribed in terms of Section 6 of the *Government Proceedings and Contracts Act No.4* of 1965 (the Act). She also held that

> "Even if this court considered that the prescription should have not commenced to run from 16th November 1986 but start to run from 15/3/90 as the Plaintiff claimed it was only then that they had acquired the knowledge of the identity of the person to sue, the Summons issued on 17/3/93 were still hopelessly out of time."

Against this decision Appellants noted an appeal. Only one ground of appeal was pursued i.e. that the Act aforesaid "is unconstitutional because it denies the citizen access to the Courts and violates the provision of equality before the law and to the equal protection of the law".

When the matter was called, the Court raised a preliminary issue with Counsel for the Appellants. Had the issue of prescription not been adjudicated by the Court *a quo* and were appellants not confined in their appeal to challenging the correctness of that decision? Put differently - was it competent for Appellants to raise an issue on appeal for the first time, challenging the constitutionality of the prescriptive provisions? Counsel was asked more particularly whether the issue raised on appeal for the first time did not in any event require the leading of evidence on a matter never placed in issue on the pleadings.

Mr. *Phoofolo* attempted manfully to contend that the Court did have a discretion to allow him to argue the question of the constitutionality of the prescriptive provisions in the Act before us. The difficulties that faced him

in this respect proved however to be insuperable. I say this for the following reasons.

As can be seen from the pleadings, Appellants chose to found their case in an unqualified manner against an authority that is entitled to invoke the prescriptive protection afforded by the provisions of Section 6 of the Act. When reliance was placed upon these provisions by the Respondents and were pertinently pleaded by way of a special plea in bar, Appellants replicated by pleading facts which the Court, quite correctly, held would not avail them in seeking to escape the consequences of their delay in instituting their action.

These were the only issues before the Court. Even if no evidence were to be needed to underpin the legal challenge directed against the constitutionality of the prescriptive provisions (and there is clear authority for the proposition that in a case such as the present evidence would be necessary) the *lis* between the parties on the facts as defined by the pleadings was adjudicated upon by the High Court and decided by it. This decision has not been challenged on appeal. It would be irregular for this Court to permit the Appellants to plead a new cause of action based on further facts before it on appeal. In fact, what this Court has before it is not an appeal against the decision of the High Court, but an attempt to institute a fresh action based on averments never canvassed in the High Court, but averred for the first time on

appeal.

In the course of the debate that ensued arising from the Court's questions referred to above, reference was made to the fact that Appellants may face a plea of *res judicata*, should they seek to initiate an action in which they were to plead the constitutional issue now raised on appeal before us. However, this matter was not argued in any depth and it would be inappropriate for us to rule on it.

The appeal noted against the judgment before us is an attempt to raise a new cause of action not canvassed in the Court below. This is clearly irregular. Accordingly the appeal is struck from the roll with costs.

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J.H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

I agree .....
L. VAN DEN HEEVER
JUDGE OF APPEAL

Delivered at MASERU this 5th day of FEBRUARY, 1997.