CIV/APN/150/98

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ZAALA AUGUSTINUS NTSOERENG **APPLICANT**

and

THE COMMANDER - LESOTHO DEFENCE FORCE **1ST RESPONDENT**
ATTORNEY GENERAL **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 14th December, 2000

On the 9th April, 1998 this application was filed and notice given to the respondents that an order shall be prayed for couched in the following terms:-

"1. Condoning applicant's delay in the institution of proceedings against the Government;

2. Declaring as unlawful applicant's dismissal from the Lesotho Defence Force;

3. Directing first Respondent to pay applicant's salary including pension from the date of his dismissal until the date of his retirement or death which ever comes first;

4. Granting applicant further and/or alternative relief."

In his founding affidavit the applicant states that he was a member of the Lesotho Defence Force holding the rank of lieutenant. He states that on the 20th February 1990 he was arrested by a second lieutenant named Mochesane and a group of other soldiers. Having been disarmed he was locked up in a cell at Maximum Security Prison in Maseru. He says on the 22nd February 1990 some soldiers amongst whom he recognised Lieutenant Hlophe entered his cell and began suffocating him with a tube like object - asking him who killed Mr Sixishe and Mr Makhele. Para 7 and Para 8 of his founding affidavit reads:

7.

"During the aforesaid interrogation Lieutenant Makhanya told me in no uncertain terms that they were going to kill me for having killed Mr Sixishe and Mr Makhele. The Lieutenants carried a lot of clout in the army. I took his threats very seriously.

8.

Upon my release on the 20th March 1990 and whilst still on the prison grounds I was given a letter of dismissal from the army dated the 19th March, 1990 a copy of which is annexed hereunto and marked "**ZAN1**"

He explains that he delayed to file his claim for unlawful dismissal because he believed that Lieutenant Makhanya and his friends in the army would carry out their vouched threats to kill him. He says he brings his application now because Lieutenant Makhanya is no longer in the army and because Mochesane and Hlophe are no longer in strong position. He says his purported dismissal was unlawful and unfair; nor was he given a hearing before his purported dismissal.

The letter of dismissal reads:-

"The Government Secretary,
Offices of the Military Council,
P.O. Box 527,
Maseru

MC/P/16621 — 19th March, 1990

Lt. A. Nt'soereng
R.L.D.F

u.f.s. Commander

Dear Sir,

I am directed to inform you that it has been decided to terminate your services with the Royal Lesotho Defence Force in terms of the provisions of Section 13 (2) of the Lesotho Paramilitary Force Act 1980 with effect from 20th March, 1990.

Your terminal and other benefits will be determined in accordance with the terms and conditions of your appointment.

N.S. Bereng
ACTING GOVERNMENT SECRETARY

CC. P.S. PUBLIC SERVICE
AUDIT
ACGEN"

The notice of motion and its supporting affidavit and annexures were served upon the respondents on the 14th April 1998. The respondents then elected to raise points of law in terms of Rules 8 (10) (c). It reads:-

> "Any person opposing the grant of any order sought in the applicant's notice of motion shall-
>
> (a) .....
> (b) .....
> (c) if he intends to raise any question of law without any answering affidavit deliver notice of his intention to do so, within the time aforesaid, setting forth such question."

The point of law is stated as follows:-

1.

"The cause of action arose on or about February 1990. The present proceedings were instituted on or about April 1998, well after eight (8) years from the date the cause of action arose.

2.

Wherefore it is submitted that the matter is time barred in terms of section 6 of the Government Proceedings and Contracts No.4 of 1965. There is also no provision for condonation or extension of time within which to institute proceedings in terms of the said Act.

3.

There is nothing in the papers connecting respondents with the acts allegedly committed against the applicant, and as such the applicant has no case against the respondent."

To this the applicant replied as follows:-

1.

"AD PARA 1 and 2

Section 6 of the Government Proceedings and Contracts Act No.4 of 1965 is unconstitutional for impermissibly infringing the right of access to court guaranteed by the Constitution.

2.

AD PARA 3

Applicant from the papers has a case against respondents."

Section 6 of the Government Proceedings and Contracts Act 4/1965 reads as follows;

> "Subject to the provisions sections **six, eight, nine, ten, eleven, twelve and thirteen** of the Prescription Act, no action or other proceedings shall be capable of being brought against His Majesty in His Government of Lesotho by virtue of the provisions of section 2 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 is not in dispute that the purported dismissal of the applicant occurred on the 20th March 1990 and that, in my view, was the date on which the cause of action, if any, accrued. The applicant's claim is not based on the fact of arrest and detention at the Maximum Security Prison, but upon the purported dismissal ("termination of services") from the Lesotho Defence Force. Assuming, in favour of the applicant, that the purported dismissal was wrongful in that it violated the provisions of Section 13 (2) of the Lesotho Paramilitary Force Act 1980, then his cause of action accrued on the 20th March 1990. It is not in dispute that the applicant spent about eight years and nineteen days before enforcing his claim.

Section 6 is imperative in stating that no action or other proceedings (this should include application proceedings) shall be instituted against Government of Lesotho

after the expiration of the period of two years from the time when the cause of action first accrued. Computation of two years gives the 20th March 1992 as the date on which the claim got extinguished and hence no longer capable of enforcement. Section 6 creates what may be termed "extinctive prescription," and, in my view, if a right becomes extinguished **ex lege**, the court has no power nor discretion to resuscitate it and make it enforceable. **Mr Mapetla**, for the respondents submits that the court has no power to extend the period of two years and therefore no power nor discretion condone the late filing of the claim. I am of the view that his submission is valid because the enforceability of a claim against Government is governed by an Act of the Legislature and unlike Rules of Court, the court has no power to extend the period unless the law so provides. For example, section 60 of the Police Act No.26 of 1971 reads as follows:-

> "Provided that the court may for good cause shown, proof of which shall be upon the applicant, extend the said period of six months."

A discretion, if there is any, for the court to exercise must always have a legal foundation. Exercise of a discretion must not create a right where none exists or where one has been extinguished **ex lege**; the courts have no inherent power to create a substantive rights unless such power is conferred on them. The provisions of section 6 of the Government Proceedings and Contracts Act are indeed quite drastic and may be thought to be a serious infringement of the right of individual to access the courts of law. (**Avex Air (Pty) Ltd vs Borough of Vryheid** - 1973 (1) SA 617 at 621 F-G); **Administrator (TvL) vs Traub & Others** - 1989 (4) SA 731.

The words of **Didcott J.** in **Mohlomi vs Minister of Justice** 1997 (1) SA 124 at 129 are however very apposite:

> "Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

It does not follow therefore that all limitation clauses on prescription must always be subjected to the microscopic test of constitutionality. Of course where an injured individual is denied access to the courts altogether or the time limit is unreasonably short, it is germane to test the constitutionality of that section. For example, the Internal Security Act No.24 of 1984 contains certain provisions, and which I dare say are obnoxious, and which limit or nullify the liability of Government and its officials for acts done in good faith.

In this case, the applicant does not contend that he was unaware about his legal rights nor does he say that he was ignorant of the prescriptive provisions of section 6; he

pleads fear. He does not refute the fact that he is **in mora** and indeed that the delay is inordinately long. I do not think it would be proper to believe that the applicant's fear was justified or reasonable; more so I don't understand what has allayed his fears after eight years. If he had consulted his lawyers within two years as he has done ultimately, the lawyer could have fearlessly instituted action proceedings forthwith. I hold however that even if such fears were justified or reasonable, I do not possess any power or discretion to condone the late filing of this application. This is rather unfortunate because if timeously challenged, the dismissal of applicant could have probably been set aside as being null and void. I make no decision on the lawfulness of this dismissal though.

I am however not convinced that section 6 of the Government Proceedings and Contracts Act renders the right of access to court and to have justiciable disputes settled by the court nugatory. Nor am I persuaded that section 19 of the Constitution is violated in that section 6 creates a system of unequal justice between the Government and the individual (**Bangindawo** - 1998 (3) SA 262). In my view there are other valid statutes which have prescriptive provisions e.g. Section 10 of the Motor Vehicle Insurance Order 1989. It is only when a prescriptive clause or provision renders the substantive claim nugatory or nigh impossible to enforce that its constitutionality must be tested. For all I know, governments in a democratic setting can come and go - as so do its officialdom; it is therefore not an unreasonable requirement that actions against the government of the day be made within a limited period and indeed the Constitution states that civil proceedings must be adjudicated

upon within a reasonable time (Section 12 (8) thereof). There is indeed a universal principle that a justiciable claim must be adjudicated upon timeously (see **infra**).

It was not argued by **Mr Nteso** for applicant that the period of two years as prescribed is so inadequate as in a practical sense, to nullify the fundamental right to access to the court (**Stambolie vs Commissioner of Police** - 1990 (2) SA 369). **Gubbay J.A.** there held that most statutes of limitation do not impinge on the substantive right guaranteed under the constitution but merely limit in time remedy of bringing proceedings to enforce that right. Quoting several USA Supreme Court decisions he opined that limitation of time was not infrequent and its legality was unquestionable and was not **per se** unconstitutional unless unreasonable. The statutes of limitation, he went further, are founded on grounds of public policy and give effect to two maxims- **interest reipubicae ut sit finis litium** (the interest of the state requires that there should be a limit to litigation);-**vigilantibus non dormientibus jura subveniunt** - (the laws aid the vigilant and not those who slumber).

More importantly **Gubbay J.A.** had this to say:-

> "The prescribed period also allows the state to identify more readily and accurately the individual responsible for the alleged delict, which, if proved would render it vicariously liable."

See also "Prescription and the Police." - **LJ Boulle** (1982) 99 SALJ 509.

The application is therefore dismissed **in toto** with costs.

S.N. PEETE

JUDGE

For Applicant : Mr Nteso

For Respondents : Mr Mapetla