

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO. 24/2022

In the matter between:

**THEBE
APPELLANT**

MAJORO

AND

OFFICER COMMANDING

**QUTHING POLICE
RESPONDENT**

1ST

**COMMISSIONER OF POLICE
RESPONDENT**

2ND

**ATTORNEY GENERAL
RESPONDENT**

3RD

CORAM: K E MOSITO P
P MUSONDA AJA
M H CHINHENGO AJA

HEARD: 11 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

Police - Actions against - Limitation of - Police Act 1998, s 77 - Notice in terms of s 77 - When required - Applicant instituting application for condonation against policeman, Officer Commanding Quthing Police, Commissioner of Police and Attorney General enabling him to institute an action for order for assault by policemen - Whether a letter of demand is necessary before condonation application can be brought - Respondents raising special defence of non-compliance with requirements of s 77 of Act in that timeous notice of condonation application - Whether notice thus prerequisite to condonation application - An opportunity to seek extension was denied the appellant by the court preemptively and wrongfully thereby forestalling his condonation application, which he is permitted to make, and the Court has to consider within the context of section 77 - In result, notice thus prerequisite to condonation application - Special plea ought to have been dismissed.

Appeal - appeal succeeds and the order of court a quo set aside with costs - The matter remitted to the High Court to hear and determine whether the application seeking an extension of the time within which the appellant may file his claim - The Judge before whom the matter is placed shall expedite the hearing of the application.

JUDGMENT

MUSONDA AJA

Introduction

[1] This appeal is against a High Court judgement delivered by **Makara J**. The appeal revolves around s 77 of the Police Act 1998 that provides:

“Any civil action against the Crown or persons acting in pursuance of this Order or regulations made thereunder in respect if anything done or omitted to be done in pursuance thereof, shall be

commenced within six months next after the cause of action arises and notice in writing of any civil action and of the substance thereof shall be given to the defendant at least two months before the commencement of the said action:

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

[2] Section 77 and is a limitation or prescription provision which requires a person intending to sue the Police or any member thereof to commence his action within six months and before doing so to give two months' notice of the intended action. The appellant failed to do both. He tried to take advantage of the proviso to s 77 so as to commence his action. The High Court rejected application hence this appeal.

Factual Matrix

[3] On 15th November 2015 the applicant driving a Nissan Motor vehicle Qash-Qau, Registration Numbers CA59856 along Main South 1 road in Mount Moorosi in the district of Quthing. He was driving He was in the company of his brother Sello Majoro, and his uncle Makhants'ang Thonkha. They were about the business of burying their grandmother and on the way to buy groceries for the funeral.

[4] They came to a police road block. They were stopped by Sub-Inspector Phatela. The appellant complied. Sub-inspector Phatela asked for the appellant's driving license, which he produced. Not all was well with the motor vehicle that the

appellant was driving. It had a defective left front headlight. The police officer wanted to arrest him for that traffic offence. Appellant pleaded that he be allowed to pay a spot fine, so that he and those accompanying him could proceed to prepare for the funeral. Sub-Inspector Phatela directed Sgt. Joele, who was standing at a distance to give the appellant a spot fine.

[5] As he went about prescribing a spot fine, Sgt. Joele told the appellant that he wondered who the people of Phamong, the appellant's home village, thought they are: they are full of self-importance, they were too forward, and yet they did not know anything about spot fines. The appellant averred that during the course of an exchange that then ensued, Sgt. Joele punched him on the chest, and they struggled with each other. Other police officers soon joined in assaulting him. He fell unconscious as a result of the assault. He was handcuffed and taken to Mt. Moorosi Police Post. Before he was detained the officer-in-charge was told that appellant had assaulted police officers. The officer-in-charge by the name of Bob, slapped him.

[6] The following morning Sgt. Joele demanded M1000 from the appellant so that he may take him to court otherwise he was going to be jailed. The appellant's family members who had come to the police station demanded that he be taken to court. The appellant was released from custody. When he reported to the police station on the following day, appellant was asked to call in his family members so that the matter could be settled out of court. When the family members came

to the police station, Sgt. Joele was not there. The appellant was taken to Quthing Police Station after spending another night in detention. At Quthing Police Station he was finger printed before Quthing Magistrate court and charged with failure to fasten a seat belt, obstruction or resisting traffic police officers and assaulting a police officer. The court released appellant on bail.

[7] Upon his release, he went to see a doctor at Bethele Health Centre. His left eye was painful and unable to open. He had pain in his chest and ribs. He was referred to an eye specialist. When he was finally tried, the Magistrates Court acquitted him on 11th October 2017.

[8] Appellant engaged Adv. Thiye to prosecute institute a civil claim against the respondent and surrendered the medical records to him. Adv. Thiye kept on assuring him that he was pursuing the case and would inform of the hearing date. Later Adv. Thiye stopped picking the applicant's calls. Appellant made efforts to contact Adv. Thiye through his friend, Mr. Kuloile. Such efforts bore no fruit.

[9] Later, around November 2020, his sister approached the Secretary of Law Society, Ms Pheko for assistance. She was advised to go to the High Court. At the High Court appellant's sister was advised that no case had been opened at the High Court. On or around March 2021 Adv. Pheko advised appellant's

sister that since they had failed to locate Adv. Thiye, they should engage another advocate.

[10] His sister was, however, low on finances until June 2021, when they managed to secure the services of their counsel of record. After engaging current Counsel, that is when they learnt that appellant ought to have instituted his intended civil action within 6 months of the events giving rise to the present appeal.

[11] The appellant was advised by medical experts that his eye has to be removed. The applicant is on daily medication to suppress the pain.

[12] The appellant averred that his failure to sue the police within the prescribed period was not willful. His sister Malinle Ramphalla and the Secretary of the Law Society Adv. Pheko deposed to supporting affidavits in support of the averment that appellant had good cause for not instituting the intended civil action within six months of the date that the cause of action arose. In a nutshell that was the appellant's case in the court *a quo*.

Respondent's case

[13] The answering affidavit was deposed to by Sgt. Joele. The respondents raised a point in *limine* regarding jurisdiction. They disputed the appellant's allegations of fact and alleged that the appellant was drunk and abusive towards the police, in particular, Sgt Joele. They disputed appellant's accusation that

the police wanted a bribe and were not concerned with giving him a spot fine. In the milieu that followed the appellant had slapped Sgt. Joele and a fight ensued.

[14] The respondents denied that the appellant was knocked unconscious by the police. The other police officers used minimum force to subdue him at a time when he had overpowered Sgt. Joele. He was arrested and detained. The deponent also denied that the officer-in-charge assaulted the appellant.

[15] The deponent disputed that the appellant's left eye could not open as he was fine when he was released from police custody released at the instance of his relatives. The eye surgery was done sometime after 28th December 2020 and there was no explanation as to who caused it.

[16] The merits of the appellant's claim was not a matter of any moment for the court a quo, nor is it before this Court. The critical question is the delay in instituting civil proceedings which the appellant attributes to his legal representative. I do not think the reasons advanced for the delay are reasonable. This is one of those cases in which a litigant cannot divorce himself from the ineptitude or failure to act, of his legal representative.

[17] It is the respondents' contention averment that the appellant deliberately and willfully failed to institute his civil claim. Appellant averred that he was advised that civil

proceedings could only be instituted at the end of criminal proceedings. Sub-Inspector Phatela aligned himself to the contents of Sgt. Joele's affidavit.

[18] The Learned Judge in the Court *a quo* dismissed the appellant's application on the ground that, in the main he had not furnished the respondents with a letter of demand. That omission was fatal to the respondent's case.

[19] The applicant's case on appeal.

Aggrieved with the judgement of the court *a quo* applicant noted an appeal to this Court. There are two grounds of appeal.

- a) The first ground is that, the learned Judge misdirected himself by dismissing the appellant's condonation application on the ground that the applicant failed to furnish the respondents with the letter of demand before instituting the application. I do not agree with the learned judge. There is no law or principle of law that requires an applicant for condonation of failure to institute a claim in terms of s 77 of the Police Act to serve the respondents with a letter of demand prior to filing the condonation application. An application for condonation in terms of the proviso to s 77 only requires good cause to be shown for not instituting the civil claim within the period of six months therein prescribed. In my view, only when condonation has been granted is when an applicant is required to give two months' notice of his intention to sue. The section requires the plaintiff to serve the defendant with a notice of his claim two months before filing the civil summons whether within the six month or after and extension of time has been granted by the court.

[20] Adv. Lefikanyana for the appellant canvassed the law dealing with condonation. The authorities in this jurisdiction are legion and the principles therein are applicable to showing good cause in terms of the proviso to s 77 - **Lesotho Nissan (Pty) Ltd v Katiso Makara**¹, **National University of Lesotho and Another v Thabane**², **United Plant Hire (Pty) Ltd v Hill and Others**³. What this jurisprudence shows is that:

“Formalism in the application of the Rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent’s legitimate rights. This is what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains discretion to condone a breach of its rules in order to achieve a just result. The attainment of justice is the Court’s aim.”

[21] It was the appellant’s case that the point in limine was raised prematurely. The appellant could only serve notice or the letter of demand upon the respondents after the granting by the court of leave to file summons.

[22] In the present appeal the six months period provided by the Police Act had lapsed. The notice or letter of demand can only be served after the non-compliance with section 77 has been condoned. It was a misdirection by the Court *a quo* to

¹ (2016) LSCA 20 (29 April 2016)

² (2007-2008) LAC

³ (1976)(1) SA 717 (A) at 720 E-F

uphold the respondents' preliminary point and dismiss the appellant's application.

The Respondent's case

[23] Adv. Molise anchored his response on two issues, (i) whether a Court can condone non-compliance with an Act of Parliament, and (ii) whether a Court can grant leave to file civil summons in disregard of the provisions of the Act. It was argued that Courts have no power either under the High Court 1978 (Act No. 5 of 1978) or under common law to condone non-compliance with an Act of Parliament: it however has power to condone non-compliance with its own rules. In other words a court cannot resuscitate a right which *ex-lege* has prescribed and been extinguished. Peete J's judgement in *Pius Teboho Ntja Masopa v Lesotho National Insurance Co. Ltd*⁴, was cited as authority for the above contention. It was canvassed that, the case of Also cited is ***Makele v Lesotho National General Insurance Company Ltd***⁵, for the proposition the function of the Court is to interpret the law.

[24] It was Adv. Molise's view that appellant ought to have filed civil summons first and then apply for condonation. Herbestein and Van Wisen point out that "the supporting affidavit must set-out a cause of action. If they do not, the respondent is entitled to ask the Court to dismiss the application on the ground that it discloses no ground on which the relief could be sought."

⁴ CIV/APN/136/97

⁵ (2004) LSHC 104

Consideration of the appeal.

[25] I have already stated that the solitary issue in this appeal is the interpretation of section 77 of the Police Act. The substance of the condonation application was not considered by the Judge *a quo* because he upheld the point *in limine* and came to the conclusion that he had no jurisdiction.

[26] Section 77 provides for the expiry period and not prescriptive period. Mosito P's judgement in *Mafereka v Commissioner of Police*⁶, draws that distinction. At the expiry of six months, the court is clothed with jurisdiction to extend the period for good cause shown, proof of which lies upon the applicant. The applicant can only show good cause if he is allowed to justify his non-compliance with the section. An applicant cannot serve notice or a letter of demand after the expiry of six months without the court allowing him to do so. In any event after the expiry of six months, the Police will say, 'you have come too late in the day as the period within which you were supposed to file your civil summons has expired'.

[27] An opportunity to seek extension was denied the appellant by the court preemptively and wrongfully thereby forestalling his condonation application, which he is permitted to make, and the Court has to consider within the context of section 77.

⁶ (2020) LSCA 39 (30th October 2019)

[28] It is clear from the foregoing that this appeal should succeed with costs.

Order.

[29] The order of this Court is that -

1. The appeal succeeds and the order of court *a quo* is set aside with costs.
2. The matter be sent back to the High Court to hear and determine whether the application seeking an extension of the time within which the appellant may file his claim.
3. The Judge before whom the matter is placed shall expedite the hearing of the application.



P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree.



K.E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree.

M. Chinhengo

M. CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV. L. LEFIKANYANA
FOR RESPONDENTS: ADV. T. MOLISE