



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO 52/2024

In the matter between:

NAHA EDWIN MAHAO

APPELLANT

AND

LEKHOOA MOEPI

1ST RESPONDENT

MINISTRY OF DEFENCE AND NATIONAL ASSEMBLY

2ND RESPONDENT

MINISTER OF DEFENCE AND NATIONAL SECURITY

3RD RESPONDENT

PRINCIPAL SECRETARY OF THE MINISTRY OF

DEFENCE AND NATIONAL SECURITY

4TH RESPONDENT

THE COMMANDER LESOTHO DEFENCE

FORCE

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

CORAM:

MOSITO, P

SAKOANE, CJ

MUSONDA, AJA

HEARD:

18 OCTOBER 2024

DELIVERED:

1 NOVEMBER 2024

SUMMARY

Prescription – Special Plea – Requirement of Evidence for Factual Disputes – The appellant, a Sergeant in the Lesotho Defence Force, sought damages for alleged assault and torture inflicted by fellow Defence Force members. The respondents raised a special plea of prescription, asserting that the claim was time-barred under Section 6 of the Government Proceedings and Contracts Act, as it was filed over two years after the incidents. The High Court upheld this plea, dismissing the action without hearing evidence on whether the prescription period had been interrupted due to ongoing settlement negotiations.

Appeal – Requirement of Factual Inquiry – On appeal, the Court of Appeal held that the High Court erred by dismissing the claim solely based on the special plea of prescription without permitting evidence. The Court emphasised that prescription involves mixed questions of law and fact, particularly when interruption claims are made. It ruled that the appellant should have been allowed to present evidence concerning the alleged interruption. The appeal was upheld, and the case was remitted to the High Court for a hearing on the special plea, allowing evidence to be led on disputed factual issues. Appeal upheld with costs.

JUDGMENT

MOSITO P

Background

[1] This appeal arises from the judgment of the High Court, delivered by Justice Mahase on 6 June 2024, following trial proceedings initiated by the appellant on 12 February 2020. In those proceedings, the appellant argued that the prescription in the case had been interrupted by mutual agreement during settlement negotiations facilitated by the Transformation Resource

Centre, with an implied understanding that all litigation relating to the incidents in question would be stayed during the negotiations.

[2] The appellant contended that the defendant had failed or neglected to compensate both the plaintiff and other victims of the period of terror within the armed forces. Furthermore, it was submitted that the negotiation period had amicably interrupted the two-year prescription prescribed by law and that the defendants would suffer no prejudice. Consequently, the appellant sought damages from the defendants, jointly or severally, for medical expenses amounting to M50,000.00, pain and suffering totalling M800,000.00, *contumelia* in the sum of M1,000,000.00, loss of dignity amounting to M500,000.00, and loss of amenities of life amounting to M200,000.00.

[3] The defendants, now the respondents, defended the action. The first defendant raised a special plea of prescription while also pleading on the merits. The special plea asserted that the plaintiff's claim had prescribed, as the cause of action, the alleged incidents of assault and torture that occurred on 17 June 2017. The respondent further contended that the plaintiff's claim became prescribed and lapsed on 16 June 2019, as the defendant, sued in his capacity as a member of the Lesotho Defence Force, is subject to the provisions of section 6 of the Government Proceedings and Contracts Act of 1965, which requires such a claim to be instituted within two (2) years of the date it first arose.

[4] The second to sixth respondents similarly raised the plea of prescription. They contended that the plaintiff asserted the cause of action arose on 17 June 2017. However, the plaintiff's summons was only served upon the defendants on 12 February 2020, beyond two years from the date the claim arose.

[5] The defendants, now respondents, proceeded to plead on the merits. However, the purposes of this judgment do not have to delve into the specifics of their substantive pleas. It is sufficient to note that, upon recognising the defence of prescription raised by the respondents, the appellant applied for condonation, seeking an extension of the prescription period.

[6] The respondent raised a point of law opposing the application for condonation, invoking rule 8(10)(c) of the High Court Rules 1980. The learned judge dismissed the application for the extension of the prescription period, holding that she lacked the legal authority to extend a prescription period set by an Act of Parliament. However, the judge did not stop there. She proceeded to dismiss the main claim because it had been prescribed, doing so without allowing any evidence to be presented in relation to the special pleas raised by the respondents.

[7] The appellant now brings this appeal before this Court, challenging the High Court's decision on three grounds. The appellant contends that the Honourable judge erred and misdirected herself in holding that the claim in the main action had been prescribed, further erred by ruling that no intervening

event had occurred to interrupt the prescription period, and ultimately erred in dismissing the main action. The present appeal, therefore, revolves around the propriety of the learned judge of upholding the special plea without allowing the parties to lead evidence regarding the said plea.

The facts

[8] This matter concerns the appellant, a Sergeant in the Lesotho Defence Force, who alleges that a delict was committed against him on or around 17 June 2017. The respondents raised a special plea of prescription. The learned judge in the court a quo upheld the special plea without hearing evidence thereon. These facts, set out in this concise conspectus, provide the essential context and pertinent details necessary for the High Court to consider the special plea upon remittal, should it be deemed appropriate to remit the matter for that purpose.

Issues for determination

[9] The issue for determination in this judgment is whether the High Court erred in upholding the special plea of prescription without allowing the parties to present evidence on the factual disputes regarding the alleged interruption or suspension of the prescription period.

The law

[10] As Browde JA (with whom Kotze JA and Tebbutt AJA concurred) pointed out, '[g]enerally speaking the need for evidence is present whenever prescription is pleaded, and it is for that reason that, unless special circumstances exist, prescription is not a matter for exception.' While it is true that, in many instances, the date on which a debt 'becomes due' may coincide with the date on which it 'arose', this is not the case in all circumstances. A crucial conceptual distinction exists between the mere existence of a debt and the point at which it becomes recoverable. The party who raises the prescription must allege and prove the date of the inception of the period of prescription.¹

[11] Section 6 of the Government Proceedings and Contracts Act 4/1965 reads as follows; 'Subject to the provisions of 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.'

[12] A party relying on this provision of the Act must lead evidence on several key aspects, particularly regarding the accrual of the cause of action and any events that might interrupt or extend the prescription period. The legal and evidentiary burden is substantial, requiring precise proof of dates, facts, and circumstances that align with the statutory provisions. The risk of

¹ Gericke v Sack 1978 (1) SA 821 (A),

the claim being barred by prescription is significant without such evidence. Hence, the focus in proceedings involving this section often lies in carefully navigating the interplay between the statutory timeframe and the case's specific facts, ensuring that all relevant exceptions and interruptions are properly supported by evidence.

[13] One is also reminded of the decision of this Court in *Likotsi Civic Association and 14 Others v Minister of Local Government and 4 Others*², in which a point was taken that the application was barred by the effluxion of time in terms of section 6 of the Government Proceedings and Contracts Act 4 of 1965. The point was upheld by the court *a quo* without evidence being led. Thring J.A, with whom Howie and Hurt JJA agreed, said that the case should not have been decided on the papers because disputes of fact had arisen which required *viva voce* evidence.

Consideration of the Appeal

[14] In considering this appeal, it is imperative first to address the primary ground upon which it rests—the contention that the court *a quo* erred in its approach by failing to hear evidence on the special plea of prescription. The essence of the appellant's case is that the trial court, having been seized with a special plea raising the issue of prescription, dismissed the main action without affording an opportunity for evidence to be led in relation to the matters at hand.

² *Likotsi Civic Association and Others v Minister of Local Government and Others* LAC (2013-2014)35

[15] The learned judge of the court a quo appears to have treated the special plea of prescription as a purely legal issue, capable of determination on the pleadings alone. However, this approach neglects the fundamental principle that prescription often involves mixed questions of law and fact. Indeed, prescription is not always a matter that can be resolved summarily or solely based on the pleadings. In many instances, it necessitates a thorough inquiry into the factual matrix surrounding the accrual of the cause of action, as well as any possible interruption or suspension of the prescription period.

[16] In the present case, the appellant has raised pertinent factual issues that ought to have been ventilated through the presentation of evidence. Specifically, the appellant contends that there was an implied agreement between the parties during settlement negotiations to suspend any legal proceedings and that such negotiations effectively interrupted the running of the prescription period.

[17] Moreover, it is well-established that the issue of when a debt "becomes due" under the law of prescription is not always synonymous with the date upon which the cause of action "arises." There may be a divergence between the moment when the factual basis of a claim comes into existence and the point at which it becomes recoverable in law. This distinction is vital in the context of prescription, and it often necessitates a factual inquiry into the specific circumstances surrounding the accrual of the claim and

the conduct of the parties. In this case, the appellant asserted that negotiations between the parties created an understanding that litigation would be in abeyance during the settlement discussions. Such an assertion, if proven, could significantly alter the computation of the prescription period.

[18] By dismissing the action on the special plea without hearing evidence on these critical issues, the court *a quo* effectively denied the appellant the opportunity to substantiate his claim that the prescription had been interrupted. This was a misdirection. The correct approach in such circumstances would have been to allow the parties to present evidence on the facts in dispute—specifically, the nature of the negotiations, the terms thereof, and whether they constituted an interruption or suspension of the running of prescription. Only after such evidence has been led and evaluated can the court properly determine whether the plea of prescription ought to succeed.

[19] The failure of the court *a quo* to follow this procedure constitutes a serious error in law. Prescription, while a legal mechanism intended to bring finality to disputes, should not be applied in a manner that deprives a party of the right to have their case fully and fairly heard. The appellant was entitled to have the factual issues surrounding the prescription plea determined on the merits, following a proper inquiry into the facts. The court *a quo*'s failure to conduct such an inquiry amounts to a miscarriage of justice.

[20] Accordingly, this Court is satisfied that the appeal must succeed. The court's judgment a quo is hereby set aside, and the matter is remitted for a hearing on the special plea, where the parties shall be allowed to lead evidence on the factual issues in dispute. Only after such evidence has been heard can a proper determination be made regarding the issue of prescription.

Disposal

[21] In conclusion, the appellant has successfully demonstrated that the court a quo erred by dismissing the main action without permitting the leading of evidence on the special plea. Justice demands that the parties be afforded the opportunity to present their case fully, and this Court finds that the appeal ought to be upheld on that basis.

Order

[22] In the result,

1. The appeal is upheld.
2. The judgment of the High Court is set aside.
3. The matter is remitted to the High Court for a hearing on the special plea of prescription, wherein the parties shall be afforded the opportunity to lead evidence on the factual disputes regarding the interruption or suspension of the prescription period.
4. The respondents shall pay the appellant's costs of appeal.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



S P SAKOANE
CHIEF JUSTICE

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANT:

ADV M J THIENYANE

FOR 2ND -6TH RESPONDENTS:

ADV M MOSHOESHOE with
ADV R MOSENENE