

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/T/395/2021**

In the matter between:

**`MATHABISO PITSI**

**PLAINTIFF**

and

**THE COMMANDER, LESOTHO**

**1<sup>st</sup> RESPONDENT**

**DEFENCE FORCE**

**THE MINISTER OF DEFENCE**

**2<sup>nd</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**3<sup>rd</sup> RESPONDENT**

**CORAM : F.M. KHABO J.,**

**HEARD : 21 February, 2022**

**DELIVERED : 21 February, 2022**

Neutral Citation: `Mathabiso Pitsi v The Commander Lesotho Defence Force & 3 others [2022] LSHC 33 Civ (21 February 2022)

**ANNOTATIONS**

**Statutes**

1. Government Contracts and Proceedings Act No. 4 of 1965
2. High Court Rules No. 9 of 1980

## Cited cases

### Lesotho

1. Bokang Lelimo v Teaching Service Department and 4 Others C of A (CIV) No. 01 of 2012;
2. Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (CIV) No. 72 of 2014;
3. Makamane v Minister of Communication, Science and Technology and 5 Others C of A (CIV) No. 27 of 2011;
4. Putsoa v Attorney General C of A (CIV) No. 01 of 1987.

### South Africa

5. Melane v Santam Insurance Co., (Ltd) 1962 (4) SA 531 (CA)

## RULING

***Condonation application - For failure by applicant to file summons against a Government Ministry within two years - Court constrained by Section 6 of the Government Contracts and Proceedings Act 4 of 1965 - Condonation application dismissed for being brought out of time.***

[1] Applicant herein is also Plaintiff in the main action filed with this court under CIV/T/395/21. In her summons Plaintiff's claim against Defendants is:

- (a) Payment of One Million Maloti (M1 000 000.00) for pain and suffering resulting from a gunshot;
- (b) Payment of One Million Maloti (M1 000 000.00) for permanent disability;
- (c) Payment of Five Hundred Thousand Maloti (M500 000.00) for emotional shock and *contumelia*;

(d) Payment of One Hundred Thousand Maloti (M100 000.00) for medical expenses and costs associated with medical care; and

(e) Costs of suit as well as further and/or alternative relief.

[2] The basis of Plaintiff's claims is that on or around 24<sup>th</sup> January 1994, she was hit by a stray bullet during an unrest within the Lesotho Defence Force as a result of which she suffered as appears under the headings above. It is common cause that following the incident, Plaintiff's summons were filed on 4<sup>th</sup> June, 2021. The cause of action as reflected above arose on 24<sup>th</sup> January, 1994. In their plea, Defendants raised a special plea of prescription relying on section 2 read with Section 6 of the Governments Contracts and Proceedings Act No. 4 of 1965. Section 6 provides, *inter alia*, that:

***... no action or other proceedings shall be capable of being brought against [the State] by virtue of the provisions of Section two of this Act after the expiration of two years from the time when the cause of action or other proceedings first accrued.***

It was on that basis that Defendants pleaded that Plaintiff's claim as pleaded

in the summons be dismissed because it had prescribed.

[3] In reaction to the special plea, Plaintiff filed a replication wherein she pointed out that she "notes" Defendant's special plea of prescription. Plaintiff's replication was accompanied by the present application seeking an order for condonation of late filing of her summons. In motivating the condonation application Adv., Rakharebe for Plaintiff, argued that the delay on Applicant's/Plaintiff's part in filing this case was not intentional because the matter was still being dealt with within the Lesotho Defence Force.

[4] She prayed that condonation be granted in the interests of justice as anticipated by Rule 59 of the Rules of this court<sup>1</sup> which gives this court a discretion, to condone the late filing of any proceedings in which any provision of the Rules has not been followed. She submitted that it was 1<sup>st</sup> and 2<sup>nd</sup> Respondents' making that the action proceedings were filed out of time. She relied on a number of cases and took the court through the requisites of a condonation application as enunciated in *Lesotho Nissan (Pty) Ltd v Katiso Makara*<sup>2</sup> and *Melane v Santam Insurance Co., (Ltd)*.<sup>3</sup>

[5] In reply Adv., Thakalekoala underscored the words “**proceedings in which the provisions of these Rules are not followed**” in Rule 59. He argued that the condonation envisaged in Rule 59 relates to condonation over the infringement of the Rules of this court as contained therein not over other pieces of legislation such as the Government Contracts and Proceedings Act.<sup>4</sup> He contended that in terms of Section 6 of this Act any action against the State has to be brought within two years of the cause of action arising. He pointed out that in terms of the Act, negotiations do not interrupt prescription in an action brought against the State.

[6] He submitted that, therefore, there is no room for condonation in the matter.

That this court is not even permitted to grant such an order. He augmented his argument with a number of Court of Appeal decisions including *Putsoa*

*v Attorney General*<sup>5</sup> and *Mohau Makamane v Minister of Communication*

*and Others*<sup>6</sup> in which the apex court decided that this court has been usurped

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<sup>1</sup> High Court Rules No. 9 of 1980

<sup>2</sup> C of A (CIV) No. 72 of 2014

<sup>3</sup> 1962 (4) SA 531 (CA)

<sup>4</sup> Act 4 of 1965

<sup>5</sup> C of A (CIV) No. 01 of 1987

<sup>6</sup> C of A (CIV) No.27 of 2011

of its common law powers to extend times in proceedings against the State. This position was later confirmed by the same court in ***Bokang Lelimo v Teaching Service Department and 3 Others***.<sup>7</sup>

[7] Grateful for both Counsels' elegant submissions and consideration of authorities, the court comes to the conclusion that the condonation application stands to be dismissed. Section 6 of the Government Contracts and Proceedings is couched in peremptory terms. It follows, therefore, that any action against the State has to be brought within two years, which was not the case *in casu*. Rule 59 and judgments relied on by Applicant's Counsel relate to the infringement of High Court Rules. Present is not an infringement of Rules of court '*per se*' but an infringement of a mandatory statutory provision.

## **ORDER**

[8] The condonation application is dismissed with costs.

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**F.M. KHABO**

**JUDGE**

For Plaintiff : Adv., Rakharebe

For Respondents : Adv., Thakalekoala

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<sup>7</sup> C of A (CIV) No. 01 of 2012