

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/0094/2023

In the matter between:

MOEKETSI MOHLAHATSA

1st APPLICANT

THUSO MOTANYANE

2nd APPLICANT

and

**THE COMMANDER, LESOTHO DEFENCE
FORCE**

1st RESPONDENT

ATTORNEY GENERAL

2nd RESPONDENT

Neutral citation : Moeketsi Mohlahatsa and Another v The Commander, Lesotho Defence Force and Another [2023] LSHC ... Civ (10 February 2025)

CORAM : **KHABO J.,**
HEARD : **06 SEPTEMBER 2023**
DELIVERED : **10 FEBRUARY 2025**

SUMMARY

Practice and procedure - Special plea of prescription - Respondents raising two points of law including the special plea that Applicants' claim had prescribed under Section 6 of the Government Proceedings and Contracts Act, 1965 - The issue is whether this special plea is applicable to Applicant's case, it being a review application - Court finding that Section 6 does not cover review proceedings, that it only applies to delictual and contractual liabilities against Government - Court upholding prescription on the common law ground of unreasonable delay.

ANNOTATIONS

Statutes and subsidiary legislation

Government Proceedings and Contracts Act, 1965
High Court Rules, 1980

Cases cited

Lesotho

Motebang Motumi v Maseru City Council and Others
LC/APN/28/2021

Other jurisdictions

JUDGMENT

KHABO J.,

Background to the dispute

[1] These are review proceedings in which Applicants seek to have the decision of the 1st Respondent, the Commander of the Lesotho Defence Force to exclude in the calculation of their gratuity and pension an additional forty - five percent (45%) allowance they received as pilots and technicians in the airwing division of the Lesotho Defence Force over and above their monthly basic salary.

[2] The 1st Applicant was a Pilot when the 2nd Applicant was a Technician. They have since retired, and wish to have their monthly pension adjusted to include the forty - five percent (45%) benefit. Applicants aver that this benefit accrued

pursuant to a savingram from the office of the Government Secretary dated 25th March, 1993. It is common cause that Applicants were deployed in the airwing division of the Lesotho Defence Force and received such an allowance.

Applicants' case

[3] They have approached this court to seek the following prayers that (quoted *verbatim*):

(a) The decision of the Respondents to calculate the Applicant's gratuity and pension without including the additional 45% due to pilots and technicians be declared discriminatory and or infringing on the Applicants' right to equality and consequently be declared unlawful;

(b) The decision by the Respondents to calculate Applicants' gratuity and pension without including the additional 45% due to pilots and technicians be reviewed, corrected and set aside for its unreasonableness;

- (c) *It be declared that Applicants are entitled to gratuity and pension, the calculation of which must be inclusive of the additional 45% due to them as retired members of the airwing division of the Lesotho Defence Force;*
- (d) *The respondents be ordered to pay applicants the additional 45 % of gratuity due to them as retired members of the airwing division of the Lesotho Defence Force;*
- (e) *Respondents be ordered to adjust Applicants' monthly pension by an additional 45% due to them as a Pilot and a Technician and pay the Applicants the accumulated arrears due to be calculated from the day they received their first pension payments;*
- (f) *Further and or alternative relief;*
- (g) *Costs of suit in the event of opposition hereof.*

Respondents' case

[4] In reaction to the claim, Respondent's Counsel filed an intention to oppose but decided not to file an answering affidavit and chose to raise two points of law on non - joinder of the Ministry of Finance and Development Planning, and prescription. The latter being to the effect that the claim had prescribed in terms of **Section 6 of the Government Proceedings and Contracts Act, 1965**¹ (the Act) in that it had been instituted beyond the two years prescribed therein. **Rule 8 (10) of the High Court Rules, 1980**² which provides that:

Any person opposing the grant of any order sought in the applicant's notice of motion shall:

- (a) *within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice, he must state an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents;*

¹ Act No. 4 of 1965

² Legal Notice No. 9 of 1980

(b) *within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and*

(c) *if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.*

[5] The points of law were raised pursuant to **Subsection (c)**. In motivating the special plea of prescription, Respondents' Counsel argued that the cause of action arose some thirteen (13) years ago. It is Respondents' case that the cause of action arose when Applicants' terminal benefits were paid, namely, in 2010 in respect of the 1st Applicant and in 2009 in respect of the 2nd Applicant. I turn to deal with the point of law on prescription first.

[6] It is Respondents' case that they were only served with this application on 14th April 2023, more than two years after the cause of action had arisen, and, that the claim had, therefore, prescribed in terms of the Act.

Raising the special plea in abatement of prescription in review proceedings

[7] Section 6 of the Act provides that:

Subject to the provisions of sections six, seven, eight, nine, ten, eleven, twelve and thirteen of the Prescription Act no action or other proceedings shall be capable of being brought against the Government of Lesotho³ by virtue of the provisions of section two 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.

[8] The Act outlines procedures related to legal proceedings against the Government of Lesotho. Applicants' Counsel argued, in

³ Change was in terms of

converse, that judicial review proceedings are not subject to prescription under the said Section because they do not arise from a contract lawfully entered with the State nor out of any wrong committed by a servant of the State acting in the course of employment as envisaged by Section 2 thereof. The latter Section provides that:

Any claim against the Government of Lesotho which would, if that claim had arisen against a subject, be the ground of action or other proceedings in the competent court, shall be cognisable by any such court, whether the claim arises out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant:

Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the Crown or of the Government of any department thereof in respect of any act or omission of its servants, or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action ...

The issue then arises whether review proceedings qualify as a claim in terms of **Section 2** of the Act.

Whether Applicants' claim is subject to prescription under the Government Proceedings and Contracts Act

[8] The enquiry on which claims are covered under the **Government Proceedings and Contracts Act** was answered in a number of decisions of this court and the apex court. These include **Former Employees of Lesotho Agricultural Development Bank v Government of the Kingdom of Lesotho and 2 Others**⁴ where the court held that the said Act was directed at imposing vicarious liability on the Crown for tortuous acts committed by its servants acting in the scope of their work, as well as for contracts lawfully entered into by its servants acting in their scope of employment. In essence, the Act only relates to contractual and delictual liabilities against the Government.

⁴ CIV/APN/375/2019 at p. 24 para 21

[9] The court pointed out that the phrase ‘*action or other proceedings*’ in Section 2 refers only to the two scenarios above and not to judicial review. Respondents’ Counsel had argued in the above case that the phrase ‘*other proceedings*’ included review proceedings. The court concluded that the preliminary point of law taken by the Respondents that the matter had prescribed was ill - conceived and cannot stand.

Arguing in the alternative

[10] Respondents’ Counsel argued, in the alternative, that Applicants brought the application after an inordinate delay, a relief available under the common law. The learned Judge, Banyane J., in dismissing the special plea of prescription in ***Motbang Motumi v Maseru City Council and Others***⁵ pointed out that:

It is concludable from the preceding discussion that these being judicial review proceedings, Section 6 of the Government

⁵ LC/APN/28/2021

Proceedings and Contracts Act is not applicable. It follows, therefore, that the general principle that review proceedings must be instituted within a reasonable time is the relevant principle to be applied in the matter before me ...

[11] It follows, therefore, that the special on prescription in review proceedings may only be raised under the common law and not under the Act. The court finds a delay of thirteen (13) and fourteen (14) years unreasonable, and, therefore, grants Respondents' prayer in the alternative.

Effect of not answering the merits

ORDER

[12] In the result, the following order is made:

- (a) The special plea on prescription is upheld; and
- (b) The application is dismissed with costs.

**F.M. KHABO
JUDGE**

For the Applicants : Adv., M.G. Makara

For the Respondents : Adv., L. Motikoe