TICHIVANHU JOSEPH
and
JANGARA ELLIOT
and
TABVANEI LIBERTY
and
MASUNDA TATENDA
and
CHARUMBIRA CUTHBERT
versus
OFFICER-IN-CHARGE-MORRIS DEPOT
(INSPECTOR MHOTIWA)
and
THE SENIOR ASSISTANT COMMISSIONER
(J.C CHENGETA)
and
SENIOR ASSISTANT COMMISSINER
HARARE PROVINCE (SENIOR Ascom NDEBELE)
and
COMMISSIONER GENERAL OF POLICE
ZIMBABWE REPUBLIC POLICE
and
MINISTRY OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 16 October 2018 and 31 October 2018

Prescription, Section to of the Police Act

T. Biti, for the plaintiff
K Chimuti, for the defendants

MUZENDA J: On 15 December 2016 the five plaintiffs who were then self-actors issued summons suing the five defendants claiming the following:

‘(a) payment of the sum of US$40 000-00 to each plaintiff by the defendants jointly and severally one paying the other to be absolved being damages arising out of unlawful detention;

(b) interest at the prescribed rate of 5% per annum from the date of summons to date of payment in full.

(c) costs of suit

On 6 March 2018 Messrs Tendai Biti Law Legal Practitioners notified the defendants that they will apply to amend summons and declaration on behalf of the plaintiffs. Accordingly the plaintiffs amended their claim as follows:

'(a) general damages for pain, shock and suffering including deprivation, of freedom, psychological trauma *contumelia*, dignity and reputation:
US$40 000-00.

(b) aggravated damages pursuant to the defendant's blatantly unlawful and unmitigated actions: US$50 000-00,

(c) punitive constitutional damages arising out of the defendant's failure to respect the plaintiff's constitutional rights: US$50 000-00,

(d) interest at the above amounts at the prescribed rate of 5% per annum with effect from the date of judgment to the date of payment in full.

(e) costs of suit.

The amendment of the summons and declaration was by consent, of the defendants on the date of the pre-trial conference.

The issuing of summons on 15 December 2016 was followed simultaneously on the same date by a Notice of Intention to sue which reads as follows:

"NOTICE OF INTENTION TO SUE"

BE PLEASED TO TAKE NOTICE that the plaintiffs hereby intend to sue as herein above.

FURTHER TAKE NOTICE that the plaintiffs are suing for:

(a) unlawful detention

(b) deprivation of freedom

(c) psychological trauma

(d) general damages for, *contumelia*

(e) impairment of dignity and reputation"

The cause of action is arising from the plaintiff's unlawful detention by the first, second and third defendants. During their employ with the Zimbabwe Republic Police the plaintiffs were convicted of various acts of misconduct and detained at detention barracks in terms of the Police Act. Upon their release, they were denied their freedom and they were immediately taken to other detention barracks where they were detained unlawful for periods varying between 14 and 30 days.

WHEREFORE the plaintiffs will be issuing summons accordingly.

DATED AT HARARE this 15th DAY OF DECEMBER 2016."

BACKGROUND

The plaintiff's particulars of claim issued on 15 December 2016, para(s) 7-9 are crafted as follows:

> "7. 1st, 2nd, and 4th plaintiffs were members of the Zimbabwe Republic Police while 3rd and 5th plaintiffs are still employed by the Zimbabwe Republic Police. During their tenue of service they were convicted of various acts of misconduct and detained at detention barracks in terms of the Police Act. Upon their release, they were denied their freedom and they were immediately taken to other detention centres where they were detained unlawfully as follows:
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> | | | |
> |---|---|---|
> | Tangara Elliot | Ndabazindima Barracks | 14days |
> | Tirivanhu Joseph | Morris Depot | 29days |
> | Tichabvanei Liberty | Ndabazindima Barracks | 20days |
> | Masenda Tatenda | Morris Depot | 29days |
> | Charambira Cuthbert | Morris Depot | 20days |
>
> The plaintiffs aver that the 1st, 2nd and 3rd defendants did not have a right to detain them beyond their sentences as per the Police Act.
>
> The 1st, 2nd and 3rd defendants took the law into their own hands and severely infringing of the legal rights of the plaintiffs who believe are entitled to delictual damages. They were detained without a court order and without any lawful cause."

The amended declaration on pp 48-49 of the consolidated record added the following information in para(s) 5-9:

> "5. The plaintiffs aver that Senior Assistant Commissioner, Ndebele, the Officer Commanding Harare Province Senior Assistant Commissioner JC Chengeta and Inspector Mhotiwa the officer in charge for Morris depot did not have a right to detain them beyond their sentences as per the Police Act.
>
> 6. The defendant's actions were aggravated and in breach of the plaintiff's rights at common law not to be detained without cause and not to be subjected to unnecessary pain, shock and suffering.
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> 7. Further the defendants' actions were in flagrant breach of the plaintiff's constitutional right in particular the right not to be detained without trial set out in s 49 of the Constitution, the right to human dignity defined in section 51 and the right not to be subjected to torture, cruel or human degrading treatment defined in section 53.
>
> 8. As a result the plaintiffs have thus suffered damages at common law in respect of pain, shock and suffering and aggravated damages arising out of the blatantly unlawfully and unconstitutional actions of the defendants.
>
> 9. In addition the plaintiffs pray that this Honourable Court makes an order of punitive constitutional damages against the defendants for their failure to uphold the rule of law and the rights and for breaching the plaintiffs' rights defined above."

Upon this set of facts the defendant raised the defence of prescription contending that the plaintiffs' claim has prescribed in terms of s 70 of the Police Act, [*Chapter 11:10*]. The plaintiffs ought to have made their claim within 8 months after the cause of action.

The joint pre-trial conference held by the parties referred two matters to trial; that is to say:

(a) the quantum of damages to be paid by the defendants to the plaintiffs, and,

(b) the question whether or not the defence of prescription can successfully be upheld in the instant matter.

The parties agreed further that this court has to decide on the defence of prescription first and of it is upheld that will resolve the matter but if it is dismissed the court will proceed to consider the aspect of quantum of damages to be paid by the defendants to the plaintiffs.

THE STATUTES CITED

"Section 69: Right to a fair hearing
1. ……..
2. ……..
3. Every person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute."

Section 86: Limitation of rights and freedoms

86 (2): The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom taking into account all relevant factors including:

"a. ……
b. the purpose of the limitation, in particular whether it is necessary in the interest of defence public safety, public order, public morality, public health, regional or form planning or the general public interest.
c-f"

Section 70 of the Police Act [*Chapter11:10*] reads as follows:

"Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any such civil proceedings shall be given in terms of the State Liabilities Act (*Chapter 8:14*)" (my emphasis)

The State liabilities Act provides that a litigant should give the state or its agent at least 60 days notice before the commencement of any proceedings against the state.

Having outlined the relevant statutes pertinent to this matter it is now necessary to look at the arguments of the parties *vis-a-vis* the aspect of prescription.

Defendant's Submissions

Mr *Chimiti* for the defendants submitted on the aspect of prescription that it is true defendants raised prescription on the date of pre-trial conference because the plaintiff had

blatantly refused to provide further particulars detailing their cause of action and the date when the delict was committed. During the pre-trial conference after the plaintiffs revealed the specific dates when the alleged delict was committed the defendants raised prescription as a point of law. In any case this aspect should not delay this court since the plaintiff admitted that the issue, can be argued on a point of law, and be raised at stage of proceedings.

On whether s 70 of the Police Act constitutes an unreasonable and unjustified limitation on plaintiff's right to access the courts, contrary to S 69 (3) of the constitution of Zimbabwe, the defendants disagreed with the plaintiffs. They argued that a progressive purposive interpretation of s 69 (3) of the Constitution will reveal that s 70 of the Police Act is not unconstitutional, it is instead a reasonable limitation of the right to access of the courts as the rights guaranteed under Chapter 4 of the Constitution may be limited subject to a law of general application and the Police Act is such a law of general application. The defendants further submitted that the limitation provided by s 70 of the Police Act which restricts to eight months the time within which members of the public may institute claims against the Police is a reasonable and justified limitation: The defendants extensively relied on the matter of *Stambolie* v *Commissioner of Police 1989* (3) ZLR 287 SC. They finally contended that the need to act within time in order to safeguard one's rights can therefore not be over emphasised. To the defendants s 70 of the Police Act is not *ultra vires* to the provisions of the constitution and should thus not be declared to be constitutionally invalid. The law will help the vigilant but not the sluggard. They urged this court to uphold the special plea raised by the defendants and also by making a finding that s 70 of the Police Act is not a violation of s 69 (3) of the Constitution.

Plaintiff's Submissions

Mr *T, Biti* submitted that the defendants belatedly raised the defence of prescription. They never raised that special plea in bar in terms of order 21 of the High Court Rules. The special plea only surfaced in the defendants' amended plea. He argued that the Judge who dealt with the parties at the pre-trial conference ought to have dismissed that special plea. However he, recoiled on the contention, by properly, in this court's view, admitting that a point of law can be raised at any time during the proceedings. It is now trite that prescription can qualify as a point of law and can competently be raised at any stage and has a potential to finalise the matter.

The plaintiffs' did not address the merits or otherwise on the aspect of prescription but instantly embarked on attacking s 70 of the Police Act's constitutionality. They submitted that

s 70 is a breach of the right to access the court as guaranteed by s 69 of the Constitution cited hereinabove. Mr *Biti* cited the matter of *Michael Nyika and Chrispen Tobaiwa* v *The Commissioner of Police N.O & Ors* HH 181/16. He further submitted that the access to courts allows and affords weaker members of the society and the voiceless to have a voice through the judiciary. Hence access to court should be regarded as a cardinal right. He further cited a host of South African decided cases emphasizing the fundamental principles and values of letting litigants access the courts without limitations. He added the right of fair hearing before an individual is deprived of a right interest or legitimate expectation. To the plaintiffs s 86 of the constitution requires a judiciary officer to determine whether or not there has been a limitation and an illegitimate limitation, Secondly, it has to determine whether the limitation is justifiable and can be protected under section 86, In fact the limitation must be fair, reasonably necessary in a democratic society.

The period of prescription, plaintiff submitted is in reality six months that is when one factors in the 60 days, notice in terms of s 6 of the State Liabilities Act, hence it is less than eight months provided for by the Police Act, hence the onerous requirement of the notice and then the obligation to sue within a restricted period imposes a serious restriction on the enjoyment of the right and it is therefore a breach . A number of litigants are as a result being prejudiced by the same. Section 70, plaintiffs further submitted undoubtedly hamper the ordinary rights of an aggrieved person to seek the assistance of the courts. As a result they urged the courts to make a finding that s 70 of the Police Act, is in breach of s 69 (2) of the constitution of Zimbabwe.

Plaintiffs also submitted that the court should determine whether the provisions complained of has the effect of curtailing or limiting rights and the threshold that is whether the limitation is justifiable in a democratic society and s 70 of the Police Act fails to meet the test. Plaintiff prays that the court declares s 70 of the Police Act not justifiable in a reasonable democratic society.

The Plaintiffs' summons

The original summons dated 15 December 2016 shows that the plaintiff's cause of action arose out of "unlawful detention". However the summons were subsequently amended and the amended summons on p 50 of the record shows the following constituting Plaintiff's claim.

"The Plaintiff's claim as against the defendants is for

(a) Judgment in the sum of US$40 000 per general damages for pain shock and suffering inclusive of deprivation of freedom, psychological trauma, *contumelia*, dignity and reputation.
(b) Aggravated damages in the sum of US$50 000
(c) Punitive constitutional damages in the sum of US$50 000
(d) Interest …….
(e) Costs of suit …….”

As is apparent from the above excerpts, there is virtually no cause of action in the amended summons, no dates for that cause of action no specificity of the places where the delicts were committed. Even for one to critically analyse the aspect of prescription, it will be complicated, on which date will the prescriptive period of eight months start to be computed. Plaintiffs' pleadings are in a deplorable condition that the court wonders how they were allegedly amended and left in such a condition. As crisply held by GUBBAY JA (as he then was) In *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (SC) on p 301 E-F.

> “Plainly, the stated cause of action is alleged to be false arrest and imprisonment and not malicious arrest and detention. The two concepts give rise to different causes of action. They are separate and distinct species of wrongdoing, under the former, the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose actions and it is vicariously liable. The arrest itself gives the right of action and it is unnecessary to establish either absence of reasonable or probable cause or malice. All arrests are prima facie illegal and the onus is upon the person who effected it to prove that the arrest was legally justified.”

The plaintiffs in their pleadings do not plead malice or wrongfulness. The issue of dates is completely not addressed by the plaintiffs. The judgment of BERE J (at he then was) is dated 4 December 2014, one would assume that that is the date the plaintiffs were liberated from detention. However both the letter of notice and the summons are dated 15 December 2016, a period of 2 years had passed. There is no explanation by the plaintiffs in their pleadings as to what transpired in between December 2014 and the date the summons were issued. However the period in between is definitely in excess of eight months and plaintiff's counsel was alive to that, that is why he deliberately avoided to address the court on that and rushed to deal with the constitutionality of s 70 of the Police Act. One would also observe that it was not proper for the plaintiffs to issue the notice of intention to sue as well as the summons on the same date. In the matter of *Masenga* v *Minister of Home Affairs* 1998 (2) ZLR 183 (H) MUNGWIRA J, on p 185 B-C had this to say:

> “The purpose of giving notice is to inform the defendant of the cause of action and the intention to institute action. Thus forewarned, the defendant is placed in a position whereby he is able to investigate the merits of the proposed action and to collect any relevant evidence. That enables him to make a decision on whether or not to meet the claim. This may prevent the incurrence of unnecessary legal costs.”

A further observation on the plaintiff's pleadings as well as the notice of intention to sue is that the amended summons do not contain the same issues contained in the notice. As observed by GUBBAY JA (as he then was) in the *Stambolie* case *supra* on p 300 F.

> "The notice is good, provided it is sufficiently informative of the cause of the civil action complained of and does not leave the recipient confecturing as to what form, once commenced such action will take." The cause of action does not have to be described in legal terminology but it must be clearly identifiable from the notice itself."

Dealing with the same points as raised by Mr T *Biti* in this matter, GUBBAY JA (as he then was) in the *Stambolie* case (cited *supra*) at p 298 F-G gave a serminal direction:

> "Although one may envisage situations in which the person would be absolutely unable to give notice and commence action within the times permitted (for instance, he may be in capacitated in an accident), the adequacy of the periods must be tested against the normal and not the extraordinary situation. For statutes of limitations do not distinguish between just and unjust delay. This means that in the very rare case a person with a good claim, through no dilatoriness or fault on his part but due to circumstances beyond his control, will be barred from asserting a constitutional right. But in the pragmatic words of Justice HOLMES in *Blun* v *Nelson* 222 US 1 (1911) at 7
>
> > 'Now and then an extraordinary cause may turn up, but constitutional law like other moral contrivances has to take some chances and in the great majority of instances, no doubt, justice is done'
>
> It has been said that statutes of limitations are conservators without which society cannot govern. They are founded on grounds of public policy and give effect of two maxims: First, *interest rei publicae ut sit finis litium* – the *interestsof the State requires that there be a limit to liotigation.* Second, *vigilantibus non dormientibus jura subverient* – the law aid the vigilant and not those who slumber. They exist to prevent oppression to protect individuals from having to defend themselves against claims when basic facts have become obscured with the passage of time. All this is true of s 76 of the Police Act."

The learned Judge of Appeal went on to cite the cases of *Minister of Home Affairs* v *Badenhorst* 1983 (2) ZLR 248 (SC) at 253 and court endorsed the observation of BENJAMIN J in *Hatingh* v *Hlabaki* 1927 CPD 220 at 223E, that:

> "A police constable may have to deal with a great number of cases, the details of which would probably be evanescent and if a plaintiff was not under an obligation to bring an action within a period recollection of the proceedings would probably vanish from the mind, or become obscure, therefore, these provisions of s 30 seem to be only reasonable."

Section 30 is equivalent to the old s 76 of the Police Act, and s 70 of the current Police Act [*Chapter 11:10*]. As can be discerned from the cited case of Hatingh (*supra*) such like provisions have been in existence for many decades and the underlying reason for such is to afford the State timeous opportunity to conduct its own investigations and enable it, before the issue of summons by a defendant and the unnecessary incurring of costs, and decide whether to settle or defend the claim. The prescribed period equally allows the State to identify more

readily and accurately the individual agent or employee responsible for the alleged delict which if proved, would render the State vicariously liable. In the Stambolie case *supra*, the then learned Judge of Appeal, GUBBAY JA citing LJ Barlie in his article.

> Prescription and the Police (1982) 99 SAL J 509 stated on p 300 A of the judgment.
>
> "… there is also a public interest served by the notice and shortened prescription period in that the State is enabled thereby to take prompt action against an employee who might be abusing his position of trust or wide discretionary powers."
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> On p 300B of Stambolie case (supra) the then learned Judge of Appeal concluded:
>
> "These particular objects persuade me that it would be extremely unreasonable and contrary to public policy generally to oblige the State or a member to answer an action for unlawful arrest or detention there were no limit of time in which it had to be brought.
>
> It follows in my view, that section 76 of the Police Act insofar as such an action is concerned, does not fall afail of section 13 (5) of the Constitution of Zimbabwe."

The logic, the reasons and justification and the basis given by the Supreme Court in the Stambolie case (*supra*) falls squarely to the issues presented before me. The question for decision is whether the plaintiff's claim is prescribed in terms of s 70 of the Police Act?

Over and above the poor manner in which the plaintiffs prepared their pleadings they have apparently failed to defend the point of prescription. Their claims were brought to court well outside the eight months period. As can be noted from the citation of the defendants, most of them if not all of them, have now left the police service and the State is crippled to locate them and account for the deeds complained of by the plaintiffs if the civil claim by the plaintiffs was timeously brought to court during the service of the defendants justice would have been met for both sides. Accordingly s 70 of the Police Act in this court's view is reasonable in a democratic society and is in tandem with public policy. If the plaintiffs were vigilant they should have brought their action within the stipulated period of eight months. I do not agree with Mr T. *Biti*'s submissions that the plaintiffs should be classified amidst the poor and unsophisticated group of Zimbabweans. Although they were self-actors at the beginning of their civil suit, they were not naive to know that one has to first issue a notice of an intention to sue before summons. Surely one cannot be heard to say that that person/litigant is naive and should be pardoned for not complying with s 70. The defendants have managed to prove the defence of prescription and the preliminary point is upheld and the plaintiffs' claims for damages are dismissed with costs.

Tendai Biti Law, plaintiffs' legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners