

CYNTHIA FUNGAI MANJORO
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL OF POLICE
and
PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 28 May 2015 & 17 June 2015

Opposed application

N.P Timba, for the plaintiff
C Garise-Nheta, for 1st & 2nd defendants

MUREMBA J: On 12 June 2014 the plaintiff issued summons against the defendants for payment of damages for unlawful arrest, assault, past and future medical expenses, pain and suffering, humiliation, loss of income and malicious prosecution.

In her declaration the plaintiff stated that on 30 May 2011 she was wrongfully arrested by the functionaries of the first and second defendants for the murder of a police officer which happened at Glen View 3 Shopping Centre, Harare. What caused her to be arrested was her motor vehicle, a Mazda Demio registration number ACA 5099 which had been spotted at the murder scene.

The plaintiff stated that despite giving an *alibi* that she was attending church at the time the murder was committed and stating that it was her boyfriend, one Darlington Madzanga who was in possession of her car at the material time the police went ahead and arrested her.

The plaintiff stated that following her arrest she was unlawfully detained in police custody. She alleged that while in police custody the police severely assaulted her resulting in her sustaining severe injuries causing her to seek medical treatment. She said that when she was taken to court the third respondent's representatives declined to consent to bail in spite of compelling circumstances. She said that she was only granted bail after 7 months in prison detention. She said that the third respondent went ahead and prosecuted her. However, she was acquitted of the charges at the close of the state case on 19 September 2013. She stated

that her arrest, detention and prosecution were unlawful and malicious. She said that while in detention she lost income in the form of salaries and benefits.

In pleading to the plaintiff's claim the first and second defendants filed a special plea to the effect that in terms of s 70 of the Police Act [*Chapter 11:10*] the claim had prescribed when she issued out summons. The provision reads,

“...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 8 months after the cause of action has arisen.”(My emphasis)

The first and second respondents stated that they received the plaintiff's notice of intention to sue on 7 January 2014, but it was dated 30 November 2014. The first and second respondents aver that the plaintiff instituted proceedings after 29 months of having been arrested. They argued that the plaintiff's cause of action arose between 30 May 2011 when she was arrested and 3 June 2011 when she was taken to court for initial remand. Consequently her claim is out of time.

In opposing the special plea the plaintiff stated that her cause of action arose not on 30 May 2011 which was the day of her arrest, but on 19 September 2013 which was the day of her acquittal. The plaintiff averred that her cause of action commenced on the day that she was arrested and continued right up to the day that she was acquitted. She stated that her acquittal points to the wrongfulness of the arrest and the malicious nature of the proceedings instituted against her. She argued that her cause of action was a continuous process from the day of arrest right through detention, and finally prosecution. She averred that she became aware of the full particulars of her claim against the defendants when she was acquitted of the charges against her.

In the heads of argument the plaintiff's counsel raised another defence to the special plea. The defence was to the effect that s 70 of the Police Act is not applicable in this case because the plaintiff's claim is founded in delict not under the Police Act.

It is true that the plaintiff's claim is founded in delict, but the cause of action is derived from the actions of the police who are governed by the Police Act. In her declaration the plaintiff even stated that the first defendant is being sued as the public official with the overall supervision of the Zimbabwe Republic Police in terms of the Constitution of Zimbabwe. The Police Act is the legislative instrument governing the establishment of the organisation and control of the Police Force. So police officers in carrying out their duties they are controlled by this Act. It therefore follows that if they do any act or omit to do any

act during the course of their duties, civil proceedings can be instituted against the organisation. Section 70 is the provision that governs the prescription period of the bringing of civil suits against the organisation. Since the prescription period is provided for under this Act I hold the view that the Prescription Act [*Chapter 8:11*] is not applicable. Section 15 of the Prescription Act even states that,

“The period of prescription of a debt shall be-
a
b
c
d except where any enactment provides otherwise, three years, in the case of any other debt.”

What this means is that if there is a different enactment which provides for a prescription period in respect to a particular organisation as is in the present case, the prescription period provided for in that enactment is the one that is applicable, not the prescription period provided for under the Prescription Act.

In the case of *Masenga v Minister of Home Affairs* 1998 (2) ZLR 183 (H) the plaintiff issued summons claiming damages arising out of a shooting incident involving the Zimbabwe Republic Police Riot Squad. The plaintiff was wounded in his arm. It was held that civil proceedings against the State or a police officer, should, in terms of s 70 of the Police Act, be commenced within 8 months after the cause of action has arisen. See also the case of *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC).

In view of the foregoing I will dismiss the plaintiff’s averment that the prescription period in this case is in terms of the Prescription Act.

I will now deal with the other defence that the plaintiff raised. This defence is to the effect that the cause of action arose on 19 September 2013 which is the date of her acquittal, not 30 May 2011 which was the date of her arrest. I am persuaded by the plaintiff’s argument. As correctly argued by the plaintiff, the question that the court ought to answer is, when did the cause of action for unlawful arrest and malicious prosecution arise?

To answer this question I will start by determining what is meant by “a cause of action”. In *Dube v Banana* 1998 (2) ZLR 92 (H) at 95 SMITH J said,

“The cause of action means the combination of facts that are material for the plaintiff in order to succeed in his claim.”

In *Mukahlera v Clerk of Parliament and Ors* HH 107/07 the phrase was defined as, “the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim.”

So in the present case an entire set of facts which will enable the plaintiff to prove her claim constitutes facts about her arrest, her detention both in police and prison custody, her prosecution and her acquittal. The proceedings from arrest to acquittal are continuous.

In the case of *Thompson v Minister of Police* 1971(1) SA 371 (E) at 375 A-C it was said:

“In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudiced by the civil action: (*Lemve v Zwartbooi*) 13 SC 403 at 407. The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney- General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (*Bacon v Nettleton* 1996 TH 138 at 142-3)” (My emphasis)

In *Stambolie v Commissioner of Police supra*, GUBBAY JA (as he then was) citing with approval the case of *Thompson v Minister of Police supra* said that,

“Whereas in the case of false arrest and imprisonment, the cause of action arises on the day the arrest is effected, in the case of malicious arrest and detention the cause of action arises only when the criminal proceedings have been terminated in favour of the plaintiff.” [Headnote at p 289]

The above cited authorities make it abundantly clear that the cause of action for unlawful arrest and malicious detention arise when criminal proceedings have been finalised and they should have been finalised in the plaintiff’s favour. *In casu* the criminal proceedings were finalised on 19 September 2013 which is the day the plaintiff was acquitted. 19 September 2013 is therefore the date the plaintiff’s cause of action arose. As such the plaintiff instituted legal proceedings against the defendants within 8 months as is required by s 70 of the Police Act.

In the result, the special plea by the first and second defendants is dismissed with costs.