

CHARLES NGONI
versus
MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER OF POLICE
and
OFFICER CHIMEDZA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 16 & 29 July 2015

Opposed Application: Plea in bar

M Matsvairé, for the plaintiff
TS Musangwa, for the defendants

TSANGA J: The plaintiff, Charles Ngoni issued summons claiming US\$15 000-00 being damages for shock, pain, suffering and medical expenses incurred as a result of unlawful detention and assault by the third defendant, Officer Chimedza, a police officer acting in the course and scope of his employment. The first and second defendants, being the Minister of Home Affairs and the Police Commissioner respectively were sued on the basis of vicarious liability.

The defendants filed a plea in bar on the basis that the plaintiff's claim had prescribed in terms of the relevant provisions of the Police Act [*Chapter 11:10*] which prescribes the time frame for bringing an action against the police. According to s 70 of the Police Act civil proceedings must be commenced within eight months of the cause of action.

The brief facts giving rise to the action were that on 24 May 2014 Charles Ngoni had gone to Dombotombo Police Station as he had been informed that three of his youth members from MDC had been taken in on account of public drinking. He states in his declaration that on arrival officer Chimedza began assaulting him on the left arm and face with a baton stick because he was wearing an MDC t-shirt. He says he was forced to sit on the floor and kicked

with booted feet and was unlawfully detained for 30 minutes before being released. This was the basis upon which he issued summons. The summons were issued on the 17 February 2015 and served on the defendants on the 24 February 2015. A period of 9 months had thus elapsed since the cause of action.

Section 2 of the State Liabilities Act provides as follows:

“Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be recognisable by any such court whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any officer or employee of the state acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.”

Section 70 of the Police Act states as follows:

“Any civil proceedings instituted against the State **or a member in respect of anything in relation to the Police Act must be commenced within eight months** after the cause of action arose”. (My emphasis)

As a result of s 70 of the Police Act in particular, the plaintiff Charles Ngoni withdrew his action against the Minister of Home Affairs and the Commissioner of police as first and second defendants but now insists on proceeding against the third defendant, Officer Chimedza in his personal capacity.

He argues that the Officer’s actions were not justifiable and were unlawful. He draws on s 50 (9) of the Constitution which reads as follows:

“Any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention, but the law may protect the following persons from liability under this section-

- a) A judicial officer acting in judicial capacity reasonable and in good faith
- b) Any other public officer acting reasonably and in good faith and without culpable ignorance or negligence”

In insisting on proceeding against the officer in his personal capacity his core argument is that he was not acting in terms of the Police Act and that there is nothing in the Act that requires him to assault an individual. He argues that the provisions of the State Liabilities Act and the Police Act should not be applied in isolation of the Constitution to remove liability from Police officers who act outside the ambit of their professional duties. He argues that the officer was acting over zealously and abusing his powers and functions as a police officer. Moreover, he points out that he was released without formal charge. He alleges that the police officer forfeited the protection of the law in that he did not act

reasonably or in good faith and without culpable ignorance or negligence. As such it is his contention that the officer does not enjoy the protection granted by the Police Act in terms of the necessity for the action to be brought within a specified time period. He maintains that he is liable in his personal capacity.

Officer Chimedza opposes the action against him in his personal capacity. The basis for his objection is that civil suits arising out of action by public officials acting in their official capacities and within the scope of their employment are claims against the State. He argues that he was acting within the scope of his employment and his action was carried out in terms of the Police Act [*Chapter 11:10.*]. It is also his argument that s 2 of the State Liabilities Act [*Chapter 8:14*] applies. His position is primarily that the proceedings against him in his personal capacity are equally out of time as there is a nexus between acts done by members of the police force and the State even if these acts are contrary to the performance of their duties. He further points out that the plaintiff even cited him as Officer Chimedza and that his actions cannot be said to have been on a frolic of his own. He places reliance on the case of *Minister of Police v Rabie* (1986 (1) SA 117 (A)) for the averment that where a person has been appointed as a police officer, the state creates a risk of unlawful harm to others i.e. the risk that the police man might misuse his power for his own purposes.

The nature of the then equivalent of the current s 50 (9) of the new constitution, being then s 13(5) of the old constitution, was discussed in some detail in the case of *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC) together with the then s 76 of the Police Act which dealt with time limits. As explained by Gubbay CJ as he then was:

“The entitlement to compensation for unlawful arrest for detention is no more than an embodiment of an existing common law right. Subsection (5) does not afford a right which is not already available to the aggrieved party; but that right is derogated from under the proviso to the extent that it specifies protection from liability for judicial and public officers and any person assisting such public officers, as being matters which it is permissible to regulate by law.”

The case also discussed the principle that rights guaranteed by the Constitution are not necessarily immune from being time barred even though the right itself remains otherwise unaffected. Constitutional rights can be subject to time barring in terms of the time frame during which proceedings are to be brought. Thus the time limit placed by the Police Act is not of necessarily in violation of the constitutional right to seek compensation for unlawful arrest and detention effected by another person. Plaintiff's reliance on s 50 of the Constitution suggests that by proceeding against the defendant in his personal capacity he is able to

circumvent the time limits placed on suing the police by s 70 of the Police Act and that it is the broader principles of the Prescription Act that would apply.

The issue however, is if the underlying reasons for limiting the time frame within which a remedy is to be sought may still be pertinent where an officer is sued in personal capacity given the link to his work in general. Leon¹ discusses the reasons behind the shortened prescription period as it relates to the police in relation to s 32 of the South African Police Act whose wording is similar to ours save that ours now talks of eight months. As regards the need to give police notice, he sees this affording the State the opportunity of investigating the incident and considering whether it should meet the claim instead of incurring costs.

The second reason he canvasses regarding the shortened prescription period is that it allows the State which can incur vicarious liability on behalf of its employees to identify the individual responsible for the delict.

The third reason, which in my view is the one most pertinent to the issue before me, is that what he calls the 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 authority or wide discretionary powers.

Given that the plaintiff Charles Ngoni admits that he is out of time in pursuing his action against the defendant vicariously, the issue of the police needing to decide whether or not to settle the claim or the police needing to identify the individual fall away. However, in my view his efforts to pursue the same action against the defendant in his personal capacity would nonetheless still embroil his employers into the matter outside the time limits, in terms of dealing with issues of abuse of authority given the factual circumstances giving rise to the cause of action. Granted not all situations where one is a police officer automatically result in vicarious responsibility or the risk of unlawful harm to others. Much depends on the facts. See for example *Minister Van Wet En Orde v Wilson en 'n Ander* 1992 (3) SA 920 A where it was stated that 'by appointing a person as a police man creates the risk of unlawful harm to others in that the police man might misuse his power for his own purposes the link between such harm and the aforementioned creation of risk can be so slender that the state is not vicariously liable. *Dithipe v Ikageng Town Council* 1992(4) SA 748 (T) is an example of a case where the state was not found to be responsible on the facts.

¹ 99 South African law journal 1982 at p509-515 at p514

The important point here is that when plaintiff instituted his legal proceedings he had no doubt in his mind that his action was against the police officer in question in his official capacity. Not only had he regarded his employers as vicariously liable for his actions. What has changed his mind about his original standpoint is that he is out of time with his claim. It is solely on this basis that he now purports to proceed against the officer in question in his personal capacity on the understanding that the time limit would accordingly be in terms of the Prescription Act and would be three years. Brought timeously, it would have been the role of the trial court to make a finding whether an officer was acting reasonably and in good faith without culpable ignorance and negligence. (See the remarks made by Mafusire J in *Mordecai Pilate Mhlanga v Henry Sostane Dowa and Ors* HH 611-14 regarding the duty of the trial court to make such a finding.

One has to consider here that the act complained of is one which occurred at the police station during a time when the police officer was at work. Furthermore this is not a case where the defendant was incapacitated by any pending action for example from instituting his action immediately. It is not clear why he delayed in bringing his claim in the first place. There were no charges pressed against him so it's not like he had to await the outcome of any matter against him. The plaintiff in the initial instance clearly intended to proceed against the state. But as stated the fact that one has a constitutional right does not make that right immune from any statutory limitation.

As was stated in the *Stambolie* case at p 299:

“It has been said that statutes are conservators without which society cannot wholly govern. They are founded on grounds of public policy and give effect to two maxims: First *interest reipublicae ut sit finis litium* – the interest of the State requires that there should be a limit to litigation. Second, *vigilantibus non diormientibus jura subveniunt* – that laws aid the vigilant and not those who slumber. They exist to prevent oppression; to protect individuals from having to defend themselves against claims when the basic facts have become obscured with the passage of time.”

Also pointed out in the same case is that all arrests are prima facie illegal and the onus is upon the person who effected it to prove that the arrest was legally justified. Significantly the cause of action arose as soon as the arrest occurred. But time limits apply in suing the police. Against a backdrop of factual realities which would undoubtedly involve the State in a matter which is effectively time barred I come to the conclusion that s 70 is not only an

absolute bar to proceeding just against the first and second defendants but also against the third defendant.

Accordingly, the third defendant's plea in bar on the grounds of prescription is upheld with costs.

Zimbabwe Human Rights NGO Forum, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners