

NORBERT MANGENA
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL
ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 3 December 2015 and 10 February 2016

Opposed Matter – Special Plea

T T G Musarurwa, for the plaintiff
H Magadure, for the respondents

MUNANGATI-MANONGWA J: The plaintiff sued the first and second defendants for damages which he categorised as arising from a delict committed against him, and, from a violation of his constitutional rights. The incident whence from the claim arises occurred on 23 March 2014. The plaintiff was in a vehicle an Audi Station Wagon in Kadoma when the moving vehicle was shot at by persons standing on the roadside who, unbeknown to plaintiff, were police officers employed by the first and second defendants. It is not clear in which part of Kadoma the plaintiff was and where the vehicle was heading to. What is clear is that the plaintiff sustained very serious bullet wounds and had to be hospitalised. Whilst in hospital, the police pursued him and he was placed under arrest, chained to the hospital bed and kept under armed guard. It was only after 12 days, on 4 April 2014 that he was informed of the reason of the arrest, being allegations that he had assaulted a police sergeant one Eric Salamu with bottles and stole his service pistol that had four rounds of ammunition. In a warned and cautioned statement the plaintiff vehemently denied the charges. The plaintiff was never prosecuted on these charges.

On 5 March 2015 after giving due notice of his intention to sue the police, the plaintiff issued summons against the defendants for payment of damages for unlawful arrest,

pain and suffering, past and future medical expenses, loss of amenities and transport expenses.

In his declaration the plaintiff alleges that he had requested the first defendant to investigate the shooting with a view of bringing his assailants to book but the first defendant declined to do so. As he never got to know of his assailants apart from the fact that they were police officers acting within the scope of their duties and during the course of their employment, the plaintiff sued the first and second defendants on vicarious liability.

In pleading to the plaintiff's claim both defendants raised a special plea to the effect that in terms of s 70 of the Police Act [*Chapter 9:10*] the plaintiff's claim had prescribed by the time that the plaintiff issued out summons. The first and second defendants alleged that 11 months had lapsed from the time the cause of action arose, which they claim was 23 March 2014 the date of the shooting. Section 70 of the Police Act provides 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 8 months after the cause of action has arisen and notice in writing of any such civil proceedings and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:14*].”

The first and second defendants stated that the notice of intention to sue was received by them on 25 September 2014 and same was within the prescribed time limits. The summons was however received on 9 March 2015 having been issued out on 5 March 2015. According to the defendants, the cause of action had arisen at the time of shooting which is 23 March 2014 and therefore, 11 months had elapsed. Consequently, the plaintiff's claim was out of time and had prescribed.

The plaintiff opposed the special plea on two grounds. The plaintiff indicated that his claim was within time and not prescribed as civil proceedings commenced on 25 September 2014 when the notice to institute legal proceedings was served on the defendants. The plaintiff stated that civil proceedings do not commence with the filing of summons but with the serving of the peremptory notice in terms of the State Liabilities Act. This argument was rightly not pursued in argument at the hearing as it was certainly misplaced as a notice of intention to sue does not constitute process (see s 7 (1) of the Prescription Act; and s(s) 6 (1) and 6 (4) State Liabilities Act [*Chapter 8:14*]). Linked to this, in the alternative, plaintiff maintained that, the cause of action arose on 19 September 2014 when the plaintiff became aware through a letter from the police that the plaintiff was shot by a police officer as he was a suspect in a robbery case. The plaintiff alleges that prior to this official confirmation, which

only came after requesting the police for an investigation, he was not armed with full facts that could enable him to prosecute his case.

The plaintiff raised another alternative ground, that his claim was based on s 85 of the Constitution which among others grants a right to any person acting on their own interests the right to approach a court alleging that a right has been infringed. In terms of that provision the court may grant appropriate relief including a declaration of rights and an award for compensation. The plaintiff alleged that his rights under s (s) 49 (1), 50, 51, 53 and 54 of the Constitution were violated when he was shot and unlawfully arrested by the police. He said that being so, the Police Act does not cover constitutional claims as the application of s 70 of the Police Act is limited to acts or omissions under the Police Act. He said that in that regard his claim had not prescribed. Put simply, the plaintiff argued that the eight months prescription period provided for in the Police Act does not apply as his claim was grounded upon a constitutional provision. Alternatively, the plaintiff submitted that if the court finds that the Police Act applies then s 70 is ultra vires the Constitution. Without dwelling much on this issue, the plaintiff submitted that the limitation of time provided in s 70 of Police Act promotes violation of human rights and promotes anarchy as it was designed to protect the police rather than citizens.

This issue was not covered in the defendants' heads of argument as the defendants had filed their heads of argument earlier and had not filed supplementary heads of argument. However, Mr *Magadure* addressed same in his oral submissions. He maintained that the *Stambolie v Commissioner of Police* 1989 (3) ZLR 283 case had settled this point and stated that the prescribed time to lodge a claim as stated in the Police Act still applies even when the claim arose from an alleged violation of a constitutional right.

I indeed agree with Mr *Magadure*. This very argument was extensively dealt with in the *Stambolie* case cited (*supra*) and the correct legal position was duly pronounced. At issue was s 76 of the then Police Act which more or less reads like the current s 70 save for the period within which civil action had to be instituted which was six months. To put this into perspective the issue was put as this by Gubbay JA in the *Stambolie* case at p 291:

“The constitutional argument advanced on the appellant's behalf may be summarised in this way: s 76 of the Police Act is void to the extent that it is inconsistent with s 13(5) of the Constitution, which gives an individual an absolute entitlement to compensation for unlawful arrest or detention effected by any other person. Thus, to limit the period within which notice of an action against the State or a member thereof (i.e. a police officer) is to be given, and such action is to be commenced, fetters the individual's constitutional right. Put differently, any limitation in time in this type of action is a fetter.”

The s 13(1) of the Declaration of Rights in the then Constitution of Zimbabwe protected the right to personal liberty with s(s) 5 giving any “person unlawfully arrested or detained by any other person the right to compensation therefrom.....”.

Very comparative to s 85(1) (a) of Zimbabwe’s current constitution which gives a right to any person the entitlement “to approach a court, alleging that a fundamental right or freedom enshrined in this chapter has been, infringed, and the court may grant appropriate relief including a declaration of rights and an award of compensation”.

In holding that s 76 did not fall foul of s 13(5) of the Constitution, the Supreme Court after considering a number of authorities concluded that statutes of limitation do not affect the substantive right guaranteed under a Constitution but merely limit the time within which one has to institute proceedings when enforcing their rights for a remedy. The Supreme Court cited as correct with approval H.M Seervai’s *Constitutional Law of India* volume 1 para 8.4. where it was pointed out that:

“enforcement of fundamental rights by the courts is part of the administration of justice. Rules of evidence, rules of procedure, statutes of limitation and the doctrine of res judicata all apply to the enforcement of such fundamental rights just as they do to the enforcement of other rights”.

It is therefore settled in our law that in pursuing a remedy or compensation for violation of a fundamental right, the claim has to be within the four corners of the rules of procedure, and evidence and if there are limits so prescribed by statutes, same have to be adhered to. In that regard the plaintiff’s argument that the time limit imposed by s 70 of the Police Act does not apply is misplaced. Equally the argument that the provisions of s 70 of the Police Act are a fetter to the enjoyment of the conferred constitutional rights (which argument was only mentioned in passing and was in my opinion half-hearted given the brief expression in the papers and in argument) is not supported by the *Stambolie* case and the cited relevant authorities. In that regard, the claims by the plaintiff against the defendants should comply with the time limit stated in s 70 of the Police Act irrespective of whether they are based in delict or arising from a violation of constitutional rights.

Apart from the law being clear on statutes of limitation, I struggled to understand plaintiff’s argument in seeking to exclude the Police Act given the following facts: The plaintiff has alleged violation of his constitutional rights under s (s) 49 (1), 50, 51, 53 and 54 of the constitution “when he was shot and unlawfully arrested by the Police.” Clearly, the acts complained of were committed by the police, these proceedings were instituted against

the State or member thereof. This is the very essence of s 70 to direct whoever has a claim arising out of anything done or omitted to be done under the Act to act in a particular manner. Certainly if the violations had been by any other person not a member of the police force the Police Act would not apply, the Prescription Act being the applicable Act. In the result, given the settled law and indeed the facts of this case, s 70 of the Police Act applies in this matter.

Having made a finding that the time limits stated in s 70 of the Police Act are applicable, the pertinent question that has to be determined is whether or not the plaintiff's claims have prescribed in terms of s 70 of the Police Act.

In determining the question one has to look at when the cause of action arose to determine whether the plaintiff brought his claim within the prescribed 8 months period prescribed by s 70 of the Police Act. Consequently, one has to understand what a cause of action is before even considering when same arose. In *Hodgson v Granger & Another* 1991 (2) ZLR 10 (HC) "cause of action" was defined as the entire set of facts which give rise to an enforceable claim and include every fact which it is material to plead and prove so as to successfully sustain an action. See also *Dube v Banana* 1998 ZLR 92 (H) at 95 where Smith J defined same as follows;

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

The next question would be when does a cause of action arise? In *Mukahlera v Clerk of Parliament and Others* 2005 (2) ZLR 365 (H) it was held that:

"a debt is not deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises."

However, a creditor is deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

It is common cause that the shooting that gave rise to injuries on the plaintiff and the various claims of damages occurred on 23 March 2014. It is also common cause that it turned out that the shooting was by members of police whose identity is unknown to the plaintiff and the defendants have not revealed. The second defendant formally acknowledged in a letter of 19 September 2014 that the plaintiff had been shot by the police as he was a suspect in the robbery case, no investigations were to be done and the plaintiff was to be prosecuted.

Given the facts of the matter I am certain that the cause of action only arose on 19 September 2014 when the plaintiff became aware of the debtor's identity and the full facts of the matter which were material in order for him to succeed in his claim for damages

arising out of the shooting. Full information came out after the police had done an internal investigation when a complaint was raised by the plaintiff's legal practitioner.

As for the unlawful arrest, the plaintiff was placed under arrest whilst in hospital, chained to the hospital bed, informed of the charges 12 days after being arrested and a warned and cautioned statement was later taken. The plaintiff was not prosecuted although on 19 September 2014 he was advised that he would be prosecuted. No such prosecution was carried out till the date of this hearing.

In the Stambolie case cited supra the Supreme Court indicated the distinction between unlawful arrest and malicious arrest. It made it clear that:

“all arrests are prima facie illegal, and the onus is upon the person who effected it (the arrest) to prove that the arrest was legally justified. (see p 301). Where unlawful arrest is alleged, the cause of action arises as soon as the arrest is made. A distinction was made between unlawful arrest and imprisonment and malicious arrest and detention.” (my emphasis).

The court pointed out that the two are separate and distinct species of wrong doing: In the latter the arrest has to be actuated by malice. In that regard, the onus shifts on to the plaintiff to prove the element of malice. Where malicious arrest and detention are alleged, the Stambolie case makes it clear that the cause of action arises when the proceedings are terminated in favour of plaintiff by either withdrawal, acquittal or refusal/decline to prosecute. In essence, “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 prosecution has been determined by his discharge” *Thompson v Minister of Police* 1971 (1) SA 371 E at 375 C.

The current claim therefore seems to me as a midstream scenario. The plaintiff was arrested whilst in hospital on 23 March 2014 and only became aware of the reasons 12 days later followed by the recording of a warned and cautioned statement later. Although he was bedridden, he remained constrained as he was under police guard which to me is a form of detention as he had no freedom of movement. There is no evidence that he was placed on remand, but on 19 September 2014 in a response to his legal practitioners' letter the defendants made it clear they were to prosecute him.

In my view, the plaintiff could not have instituted proceedings of unlawful arrest and detention citing 23 March 2014 because as at that date he was still to be informed of the charges. Suffice to say this was a violation of his right to be informed of the reasons of his arrest immediately. It took 12 days for the Police to inform him of the charges and till

19 September 2014 the first defendant was threatening to prosecute him. Having been arrested, a warned and caution statement already recorded, the plaintiff was uncertain of his future. Plaintiff remained an accused person with a threat of prosecution hanging over his head. A process was set in motion which became continuous and could be said to have been reasonably stopped by the plaintiff when he realised that no prosecution was to be done when he instituted proceedings on 5 March 2015. The threats of prosecution having been made on 19 September 2014 and nothing turning on it, the plaintiff could not be expected to wait till eternity. To restrict the cause of action as arising on 23 March 2014 would not be proper given the developments outlined above. As damages are not being claimed for malicious prosecution, I am convinced this is one of the rare cases where one can still claim for unlawful arrest beyond the date of arrest given the circumstances of the matter and the conduct and attitude of the Police. Due to the above, I find that the claim for unlawful arrest had not prescribed by the time the plaintiff sued for damages as the plaintiff was still within the 8 months period given the date when the cause of action arose.

In the premise, having found that the cause of action in both instances arose on 19 September 2014 and as such, the plaintiff's claim was within the time limits prescribed by s70 of Police Act, the special plea by the first and second defendants is dismissed with costs.

Mambosasa, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners