SOLOMON MADZORE
versus
MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER GENERAL OF POLICE
and
THE PROSECUTOR GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 22 March & 12 April 2017

Special Plea

DT Hofisi, for the plaintiff
K Chimiti, for the defendants

CHAREWA J: The plaintiff issued summons for damages for unlawful arrest and detention on 16 August 2016. He stated the facts grounding his cause of action in his summons as follows:

> "This claim arises from his unlawful arrest on 4 October 2011 and the four hundred and five (405) days he spent in solitary confinement at Chikurubi Maximum Prison. In his discharge at the close of the State case, the High Court confirmed that his arrest and incarceration was in spite of the confirmation of his alibi by the police and that there was no evidence linking him to the alleged offence."

In para 7-11 of his declaration, he amplified these facts in support of his cause of action as follows:

> "7. On 4 October 2011, several armed police officers attended at his then Waterfalls home and arrested him in connection with the murder of Inspector Mutedza.
> 8. Therefore he was questioned at Harare Central Police Station about his activities and whereabouts on the 29th of May 2011. He explained that on that day in questioned (*sic*) he had taken his wife to see Dr Regis Munyoro, a general medical practitioner, as she suffered a miscarriage on the day. He explained that he spent the day and night with her.

9. Police officers confirmed this alibi and placed it on record in open court that they confirmed his alibi.

10. In spite of such confirmation, they still proceeded to detain and arraign him before the courts where he was remanded in custody until his release on 12 December 2012 (my emphasis) following his discharge at the close of the State case.

11. He spent a total of four hundred and five (405) days in solitary confinement at Chikurubi (*sic*) Maximum Prison until he was discharged at the close of the State Case."

Prior to the issuance of the summons, the plaintiff had also issued a notice of intention to sue in terms of the State Liabilities Act, [*Chapter 8:14*], wherein he also alleged the same basis for his claim.

On receipt of the summons, the defendants noted a special plea that, the summons having been issued more than three years since the date the cause of action arose, the matter had prescribed. Further, the defendants specially pleaded that the claim being based on the conduct of police officers acting within their scope of employment in terms of the Police Act, [*Chapter 11:10*], ran afoul of s 70 thereof, having been made more than eight months from the date the cause of action arose.

Upon receipt of the special plea, the plaintiff noted an amendment to his declaration, purportedly in terms of Order 20. The notice was couched as follows:

"**NOTICE OF AMENDMENT TO PLAINTIFF'S DECLARATION IN TERMS OF ORDER 20 OF THE HIGH COURT RULES, 1971.**

TAKE NOTICE THAT the Plaintiff hereby amends its declaration as follows:-….."

This was followed by the purported amendment. There was no indication that the plaintiff intended to make an application to seek this amendment, and if so, at what stage of the proceedings.

Further, no amendment of the summons was "made" or sought.

On 14 October 2016, the plaintiff wrote to defendants seeking their consent to the amendment to the declaration, which was, unsurprisingly, not forthcoming.

Thus, it must be noted firstly, that no notice of intention to amend in terms of Order 20 was ever issued. What the plaintiff did was to present the defendants with a *fait accompli*: that the "*Plaintiff hereby amends its declaration…*" Thereafter, plaintiff then sought the defendants' acquiescence to the amendment that had been "done".

Nor, failing the consent of the defendants, was any intention to apply to a judge to make such an amendment done in terms of r132. The procedure used by the plaintiff was certainly not in terms of the rules.

Secondly, attached to the plaintiff's notice of amendment was the judgment of the Supreme Court, SC8/12, admitting the plaintiff to bail, as support to the error sought to be corrected by the amendment. As it turns out, that judgment does not aid the plaintiff's case. It was handed down on 13 February 2012, not 12 December 2012 as alleged.

Therefore, whether the date of plaintiff's release from detention was 12 December 2012, or 13 February 2012, as at the date summons were issued on 16 August 2016, the matter had prescribed.

The plaintiff sought to correct this difficulty in para 4 of his heads of argument, by alluding to the judgment of BHUNU J dated 19 September 2013 a procedurally wrong path to take.

Consequently, as at the date the special plea was set down to be heard before me, the summons and declaration were still unamended and defendants had no notice that the amendment would be sought at such hearing. Hence, at the hearing of the special plea, upon it being pointed out by the Court that since the summons was still unamended, there appeared to be an unassailable basis for the upholding of the special plea, the plaintiff made an oral application for leave to amend his summons and declaration in terms of R132. The defendants opposed the application.

Upon the Court advising the plaintiff that it appeared improper to seek an oral amendment of a summons at the hearing of a special plea impugning such summons, without appropriate notice to the defendants, and in circumstances were such application was opposed, the matter was stood down to the end of the roll to enable the parties to agree on the proper procedure to take in the circumstances. On resumption, the plaintiff insisted on proceeding with his oral application for leave to amend his summons and declaration. This was because, Mr Hofisi, for the plaintiff, conceded that if the summons were not amended, he had no submissions to make against the plea of prescription which would have to be upheld.

The application for leave was persisted with despite that there was still no evidence before the court supporting such intended amendment. Mr Hofisi's position was that since amendments are generally dealt with liberally[1] and the rules allow them to be made at any

[1] UDC Ltd v Shamva 2000 (ZLR) 210

stage of the pleadings[2] he should be allowed to amend his summons to defeat the special plea and any prejudice to the defendants should be remedied with an appropriate order for costs.[3] He had no answer to the query of the court regarding his having to adduce evidence from the bar to support his application. In the end, he adduced no such evidence.

While I agree that amendments are generally dealt with liberally, and may be made at any stage unless there is irreparable damage which cannot be remedied with an order for costs, I must state that I found the conduct of Mr Hofisi for the plaintiff to be entirely inappropriate and unethical. It is trite that once summons has been properly impugned the best procedural recourse to a plaintiff is to withdraw the matter and start afresh. To insist on amending the summons, in my view amounts to lack of integrity and professionalism unbefitting an officer of the court. This is particularly so when the problem has been created by Mr Hofisi's own ineptness in drafting the summons and declaration and his failure to follow the proper procedure for seeking an amendment thereto.

While it is agreed that amendments are generally dealt with liberally by the courts, to allow amendments to overcome defences raised by a party is certainly not in the best interests of the administration of justice. Mr Hofisi was in fact asking the court to allow him to defeat the special plea by amending the summons. He was in effect saying to the court, "now that a special plea has been validly raised, permit me to make an amendment as a defence against the special plea". He quoted no authority for such a proposition and I have not come across any jurisprudence were a court has allowed an amendment to be raised as a defence to a properly raised point of law. As already pointed out, the proper course for a party in such circumstances is to make a withdrawal and issue fresh summons.

In my view, s132 was not designed to allow a party to correct his cause of action or defence as he went along once defences had been raised to defeat the cause of action or to impugn a defence. Such procedure would make the administration of justice well-nigh impossible and would lead to never ending litigation. If such a precedence were to be allowed, what would stop a party who had issued summons with no cause of action to then seek an amendment to create a cause of action after a defendant had raised the defence of lack thereof. Or where a defendant had not raised any defence at all in his plea and the plaintiff sought judgment, what would then stop a defendant from seeking to amend his plea to raise an appropriate defence.

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[2] Rule 132 "…
[3] Lourenco v Raja 1984 (2) ZLR 151 (SC)

In my opinion, Mr Hofisi's conduct is tantamount to closing the stable door after the horse had bolted and saves no purpose. An efficient and conscientious legal practitioner would, as soon as the special plea of prescription was raised, have immediately withdrawn the summons and issued new summons timeously.

In any event, it is my considered view that once the oral application to amend the summons and declaration is opposed, it must be properly made in writing as a court application to accord the defendant the opportunity to appropriately respond thereto.

It is unfortunate if the plaintiff is unable to receive compensation for unlawful arrest and detention because of the sheer ineptitude and crass incompetence of his legal practitioner.

In the circumstances, leave to amend the summons is denied. The special plea of prescription is upheld.

Once I have refused leave to amend the summons and have upheld the special plea of prescription, the second ground of the special plea, that the plaintiff is, in any case, barred for failing to abide by the provisions of s 70 of the Police Act becomes academic. However, for the sake of completeness of a determination of the special plea in its entirety, I will summarily address the effect of failing to comply with s70 of the Police Act.

In the first place, I do not agree that s70 is inapplicable to acts done in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as alleged. The Criminal Procedure and Evidence Act does not provide for the employment of police officers as such, nor does it vest in them power to act as police officers. A police officer is employed as a policeman/woman in terms of the Police Act and derives his authority to act as such from that act. Section 25 of the Criminal Procedure and Evidence Act merely authorises peace officers, who may include police officers, to detain and arrest suspects. Nor do I agree that the Police Act only authorises police officers to arrest and detain other police officers. S19 of the Police Act provides for the powers and duties of the police to enable them to exercise the powers conferred by the Criminal Procedure and Evidence Act.

In any event, the provisions of s 70 have been dealt with before in our jurisprudence and it is settled that civil proceedings against the police, exercising their duty as such, falls squarely within the provisions of s 70.[4]

The question whether or not, by providing limitations to the time within which one must institute civil proceedings against the police acting within the scope of their

[4] See *Norbert Mangena v Minister of Home Affairs & Anor* HH115/16, *Michael Nyika & Anor v Minister of Home Affairs & 3 Ors* HH181/16, *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 283

employment, s70 is therefore ultra vires the constitution, is certainly not yet settled. Conflicting judgments have been rendered in this court.[5]

The matter has already been referred to the Constitutional Court for confirmation of the finding of unconstitutionality in the *Michael Nyika* (*supra*) case. There is therefore no need for a further referral to the Constitutional Court for a determination of this issue.

However, pending such confirmation, I am more persuaded by the reasoning of MUNANGATI-MANONGWA J in the *Norbert Mangena* (*supra*) matter. In my view, once it is found that placing limitations as to when one may exercise their constitutional rights is a reasonable and acceptable principle in any democratic society, each State is at liberty, in the exercise of its margin of appreciation in the conduct of governance, to determine the time limits appropriate to its own circumstances. Nor is it an automatic infringement of the right to equal treatment before the law or non-discrimination, that certain classes of persons are treated differently, in relation to rights which are not absolute but are subject to competing claims.

Further, that other states may have lengthened the periods of limitations to act is not relevant in my view, and does not give rise to unconstitutionality. It merely points to the "best practise" model.

Besides, I do not discern any compelling reason to depart from the Supreme Court decision in *Stambolie* v *Commissioner of Police,* which, on similar facts and similar legislative and constitutional provisions, ruled that the time limit then set at 6 months was not unconstitutional, which decision I am bound by in accordance with the principle of *stare decisis*.

In the premises, the special plea is upheld with costs.

Donsa-Nkomo Mutangi, plaintiff's legal practitioners
Honey and Blankenberg, defendant's legal practitioners

[5] See for instance Charles Ngoni v Minister of Home Affairs & 2 Ors HH658/15, *Norbert Mangena v Minister of Home Affairs & Anor(supra) and Michael Nyika & Anor v Minister of Home Affairs & 3 Ors*.