

REPORTABLE Z.L.R. ONLY (55)

Judgment No.S.C. 117/83

Civil Appeal No . 260/83

MINISTER OP HOME AFFAIRS v HENRY HERTZOG  
BADENHORST

SUPREME COURT OF ZIMBABWE,  
GEORGES, CJ, BECK, JA & GUBBAY, JA HARARE,  
OCTOBER 18 & NOVEMBER 10, 1983.

M.J. Gillespie, for the appellant

J.B. Colegrave, for the respondent in forma pauperis

GUBBAY JA: This is an appeal from a decision of the High Court (MCNALLY J) upholding the contention of the respondent (the plaintiff) that s 76 of the Police Act (Cap 98) did not prescribe his cause of action against the appellant (the defendant).

The cause of action arose in this way: The plaintiff was under arrest and in the custody of the Police in Bulawayo. On 13 November 1981 he was being driven in a Police motor vehicle from the Donnington Police Station to the Bulawayo Central Police. Station when the vehicle came into collision with a truck.

The accident was entirely due to the negligence of the Police driver and resulted in the plaintiff sustaining an injury to the spine. These facts were common cause at the trial. It was also not disputed that in conveying the plaintiff to the Bulawayo Central Police Station, where he was required for questioning in connection with a crime under investigation, the Police driver was acting for the purposes of the detection of crime and the apprehension of offenders - duties imposed upon the Police Force by s 93(1) of the Constitution - and that he was obeying a lawful direction in respect of/

of the execution of his office given him by a superior officer.

The plaintiff, however, delayed in instituting an action for damages against the State until a period well in excess of six months of the date of the accident had elapsed. He was thereupon met with the special defence that by virtue of s 76 of the Police Act the action was barred not only for a failure to commence it within six months but also on the ground that notice in writing had not been given as required.

Section 76 reads

"Any civil action instituted against the State or a member in respect of anything done or omitted to be done under this Act shall be commenced within six months after the cause of action has arisen, and notice in writing of any civil action and the cause thereof shall be given to the defendant one month at least before the commencement of such action,"

The phrase "anything done or omitted to be done under this Act" necessitates a referral to s 8, That section was repealed by Statutory Instrument 793 of 1979 together with ss 7 and 9, but one week later Statutory Instrument 813 of 1979 reinstated s 8 and repealed s 10 instead.

Section 8(1) reads:-

"Every Regular Force member shall exercise such powers and perform such duties as are by law conferred or imposed on a Regular Force member, and shall, subject to the provisions of such law, obey all lawful directions in respect of the execution of his office which he may from time to time receive,"

Mr Gillespie argued, both in the Court a quo and in this Court, that the effect of s 8(1) is to incorporate into the Police Act the provisions of all other/

other enactments which give powers to the Police and define their duties - in particular s 93(1) of the Constitution and Parts V and VI of the Criminal Procedure and Evidence Act (Cap 59). It imposes upon every member of the Force the obligation to perform the duties as are by law imposed. Any such duty, when performed, meets the requirement of s 8(1) and constitutes something done "under this Act". Consequently, as the Police officer in transporting the plaintiff to the Bulawayo Central Police Station was performing an action bound up with and incidental to the duty imposed upon him by s 93(1) of the Constitution, that of investigating crime, and was in addition obeying a lawful direction in respect of the execution of his office, the action instituted against his employer, the State, is in respect of something done under the Police Act,

The learned judge rejected this argument. He held that s 8(1) is concerned not with the definition of the member's powers or duties but merely with his obligation to exercise such powers and perform such duties, and that what the powers and duties are is immaterial. He reasoned therefrom that the protection afforded by s 76 only applies to something done or omitted to be done under the Police Act alone - for instance where the State is sued because a Police officer is alleged to have acted wrongfully under s 8(2). But where the State is sued for something done or omitted to be done by a Police officer under the Criminal Code or the Constitution the protection is not available to it. In other words, the phrase "under this Act" means under the Police Act and cannot be extended to include what was done under the Constitution, the Criminal Code or any other statute. The further view was expressed that the plaintiff was injured/

injured not because the member of the Police Force was obeying a lawful order but because he had driven negligently and a negligent act is not something done under the Act.

The Police Act did not give the member any authority to be negligent.

In support of his argument Mr Gillespie cited a passage from the judgment of GREENBERG J (as he then was) in Thorne v Union Government 1929 TPD 156. In that case the court was concerned with whether an action for damages resulting from the negligent driving by a policeman of a mule drawn trolley was prescribed by s 30 of the Police Act, No 14 of 1912. The section, where relevant, read:-

"For the protection of persons acting in the execution of this Act every civil action against any person in respect of anything done in pursuance of this Act or the regulations, shall be commenced within ... ."

The learned judge looked to s 7(1) of the Act to ascertain what were the powers and duties of the members of the Police Force and said this at 158:—

"Section 7 of the Act deals with the powers and duties of members of the police force, and anything falling within these powers and duties would be done in pursuance of the Act or the regulations.

The powers and duties referred to in s 7 are those contained in the Act and in any other law. Thus Act 31 of 1917? (the Criminal Procedure and Evidence Act) ss 25 to 27, 41 to 45, 49. to 52, 54, 332, 381 (3), and Act 32 of 1917, (the Magistrates Court Act) s 14, and Order 2, rule 3, confer powers or impose duties on members of the police force."

Clearly s 7(1) equates materially in its language to s 8(1) of Chapter 98, Nor do I consider that the words "in pursuance of this Act" in s 30 connote a meaning different from/

from "under this Act" in its counterpart, s 76. In the context of their sections both phrases are synonymous and mean "in conformity with" or "in terms of".

It is my view therefore that the dictum in Thorne's case, supra, coming as it does from so eminent a judge, is a most persuasive pointer in favour of the defendant's contention. Moreover its correctness has never been doubted, It was approved by MALAN J in E. Rosenberg (Pty.) Ltd. v Union Government (Minister of Justice) 1945 TPD 225 at 228, and twenty years later was re-stated by CLAYLEN J in Khoza v Minister of Justice 1965 (4) SA 286 (W) at 292B, in these words:-

"... it can only be that a thing is done in pursuance of that Act if the Act itself or some other enactment lays down that thing as a function of the police constable." (the emphasis is mine).

The cases of Thorne and Rosenberg, supra, are distinguishable from the present in that on the facts it

was thereheld that the respective activities of the policemen, in driving the mule-drawn trolley and in going on patrol, at the time when they committed the acts complained of were not being conducted pursuant to the Police Act or any other law. It therefore followed that the acts of negligence done in, the process or driving the trolley and patrolling could not be "anything done in pursuance of this Act". The position changes, however, once there is a course of conduct admittedly under the Act and while following that course an unlawful act is committed.

The facts in Hattingh v Hlabaki 1926 CPD 220 are apposite and the judgment instructive. The plaintiff Claimed/

claimed damages in the magistrate's court for malicious arrest and assault against three Police constables who had arrested him upon a charge under the Stock Theft Act, The defendants objected that the plaintiff had given no notice of the intended action nor had the action been commenced within four months as required by s 30 of the Police Act. The magistrate dismissed the objection.

An appeal against that order was allowed. BENJAMIN J (with whom LOUWRENS J concurred) said at 222-223:-

"Now, I have already read s 30 of the Act, which affords this protection to police constables when doing anything in pursuance of the Act. In order to ascertain what may be done in pursuance of this Act, one has to turn back to s 7(1), which says ...

Now, it is clear from the pleadings and from the evidence, that the three defendants were acting as police constables, and that they were acting in pursuance of lawful instructions given by a superior officer. They were instructed to go out and make investigations in connection with stock thefts, and, in pursuance of this duty, they arrested the plaintiff. They were in plain clothes at the time they arrested the plaintiff, and they were without a warrant.

They were justified in arresting him without a warrant while in plain clothes by reason of the provision of the Stock Theft Act (s 6(1), Act No 26 of 1923).

It is true that in arresting the plaintiff in this way, they were acting by virtue of the powers conferred upon them by this particular section of the Stock Theft Act, but, nevertheless, they were also acting under and by virtue of the provisions of s 7(1) of the Act of 1912. They were carrying out lawful instructions given to them by a superior officer, and therefore, if in committing the alleged assault upon the plaintiff, they were acting in pursuance of the arrest, then I think clearly they fell under s 30 of the Act of 1912, and were entitled to enjoy all the benefits conferred by that section, and that any proceedings

intended should have been brought within the period prescribed and after due notice has been given."

But the force of these authorities apart, the interpretation adopted by the learned judge in the court below leads to the startling/

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startling consequence that the only actions falling within the protection of s 76 are essentially those dealt with under ss 8(2) and (3) of the Act; litigation in respect of which is not readily conceivable. I can discern no apparent reason for so restricted a limitation of actions.

It could hardly have been the intention of the lawmaker to afford the State or a member of the Police Force protection only in respect of the comparatively trivial powers and duties specified in ss 8(2) and (3). To the contrary, it seems to me that the intention in enacting s 76 was to impose an effective limitation of actions brought against the State in respect of anything done in the exercise of powers or duties proper to the Police Force. It would be unreasonable in the extreme to expect a member of the Police Force to answer a cause of action alleged to arise, for instance, from the execution of his power of arrest or search if there were no limit of time in which such actions were to be brought. I respectfully endorse the observations of BENJAMIN J in Hattingh v Hlabaki, supra, 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."

Mr Colegrave , who appeared for the plaintiff, was constrained to concede that prior to the repeal of **37** of the Act the plaintiff's cause of action would have been prescribed under s 76. He sought to argue, however, that by its repeal the carpet had been pulled from underneath s 76. With this submission I cannot agree. The repeal was effected because the Constitution of Zimbabwe/

Zimbabwe Rhodesia (Act No 12 of 1979) contained a similar provision in s 98(1) (now s 93(1) of the present Constitution). It was therefore unnecessary to have the general duties of the Police Force repeated in two enactments. But it is more than probable that the Legislature considered that notwithstanding the excision of s 7 from the Act, the ambit of s 8(1) remained sufficiently wide to afford the State or a member the protection hitherto enjoyed. Certainly it is not unfair to suppose that the extent of the protection held to obtain under the former South African Police Act of 1912, which had no equivalent provision to s 7, was known and appreciated. It is inconceivable therefore that the intention was to emasculate an existing and necessary protection.

Mr Colegrave, quite correctly in my opinion, did not rely on the alternative approach of the learned judge that because the Police officer had driven negligently he could not have been performing a duty under the Act.

The theory that a servant acting in the course of his employment has no authority to act negligently or improperly was exploded very many years ago. The mere fact that the act complained of was wrongful does not in itself denote that it was not pursuant to the performance of a legal duty. The plaintiff cannot say in one breath that the State is liable because the Police officer drove the motor vehicle in the course of his employment and in the next the opposite, that the Police officer could not have been acting under the Act because the Act gives him no authority to perform his duties negligently or improperly. See Woodiwiss v Union Government 1937 NPD 101 at 104. It is only the negligent or improper performance of a duty which will give rise to a cause of action to which s 76 applies, for if that provision were confined regular or lawful actions there would be no need for it. It is obvious that where anybody does a lawful act  
under/

under the Act .he needs no protection and no action lies against him whether brought within six months or not.

See Dineka and Anor v Van Der Merwe and Ors 1962 (3) SA 220 (T) at 223A-B.

Finally the Australian case of Board of Fire Commissioners (N.S.W.) v Ardouin (1963—1964) 109 CLR 105, referred to by Mr Colegrave, does not seem to me to be in point, The section of the Act there considered did not fall to be interpreted in the light of any provision similar to s 8(1) of the Police Act,

In the result I am satisfied that the view of the learned judge a quo, that the delict of the Police officer did not enjoy the protection and benefit of s 76 of the Police Act, was ill-founded.

There remains the question of costs. Although there is no principle which precludes a court from awarding costs against an unsuccessful plaintiff who has sued in forma pauperis, the grant of such an order is not usual. This is especially so where, as is the case here, the particular proceeding was not vexatious and the conduct of the pauper in no way improper. A further relevant factor is that the plaintiff suffered injury as a result of the admitted negligence of the Police and only failed to recover compensation because of a procedural bar. Taking account of these matters, I do not consider it appropriate to saddle the plaintiff with the defendant's costs.

The appeal will be allowed and the judgment altered to read:  
"The plaintiff's claim is dismissed.

GEORGES CJ: I agree.

BECK JA: I agree.

Civil Division of the Attorney-General Office, legal practitioners for the appellant.

Coghlan, Welsh & Guest, legal practitioners for the respondent.