

Case 1

HC 5310/15

MICHAEL NYIKA
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL OF POLICE N.O.
and
INSPECTOR DAMBURAI
and
LISBORNE CHIBANDA

Case 2

HC 5311/15

CRISPEN TOBAIWA
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL OF POLICE N.O.
and
INSPECTOR DAMBURAI
and
LISBORNE CHIBANDA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 21 July 2023, 9 April 2024 & 7 January 2025

Constitutionality of s 70 of the Police Act [Chapter 11:10]- Referral of matter to the Constitutional Court in terms of s 175(4) of the Constitution

Mr T Biti, for the plaintiffs
Mr M Chimombe and *Mr F Chimonoko*, for the defendants

MUSITHU J: This referral judgment is rendered pursuant to the provisions of s 175(4) of the Constitution as read with r 24 of the Constitutional Court rules, 2016 and r 108 of the of the High Court rules, 2021. The composite judgment is concerned with both Case 1 and Case 2, which arose from the same cause of action and circumstances. The constitutional

issue that arises for determination in both cases is the constitutionality of s 70 of the Police Act [*Chapter 11:10*] (the Police Act), which states that:

“70 Limitations of actions

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 eight 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 8:15*].

The circumstances under which the constitutional question arose in the two cases are set out hereunder.

THE BACKGROUND

On 9 June 2015, the plaintiffs instituted summons proceedings claiming damages for bodily injuries that they sustained following a shooting incident involving the third and fourth defendants who are police officers. At the time of the shooting incident, the plaintiffs were serving members of the Zimbabwe National Army. The shooting incident occurred on 19 July 2014, when the plaintiffs boarded a vehicle at Westgate Shopping Centre around 11:00pm on their way to Karoi. They were wearing army uniforms at the time the incident happened. When the plaintiffs arrived in Banket Town, they boarded an NP 300 pick up truck which was on its way to Karoi. They were other passengers on board.

The driver of the truck informed them that he intended to pass through some farm called Madzibaba Farm. Along the way, the driver lost his way because of the darkness and ended up at some mine called Ashire Mine. The driver was advised by a Security Guard at the mine that he had lost his way. The driver made a u-turn, and about 3 kilometres from the mine the vehicle was stopped by seven police officers armed with F.N. rifles. There were three other vehicles that were parked blocking the road. The police officers ordered everyone to disembark from the truck with their hands up and they complied. Even though the plaintiffs had complied with the order by the officers, the officers proceeded to fire at the plaintiffs whom they mistook for armed robbers.

As a result of the shooting, the first plaintiff lost his right hand middle finger. He was also shot on the far bottom right of his chest and he fell down unconscious. A bullet remained lodged in his body. He also sustained injuries to his ribs behind the right arm. He was hospitalised from the day of the incident until 29 November 2014. The first plaintiff issued summons out of this court claiming special and general damages in the sum of US\$382, 725.00, being delictual damages arising from the negligence and wrongful use of fire arms by the third

and fourth defendants in particular. Summons were served on 23 June 2015, some 11 months after the incident.

The second plaintiff was shot in the right leg. He lost the leg from the knee down and now walks with the aid of crutches. He was hospitalised until sometime in October 2014. The second defendant issued summons claiming special and general damages in the sum of US\$572, 725.00. There was also a delay of 11 months from the time of the cause of action to the actual service of summons.

In response to the claims, the defendants filed a plea in bar on 9 July 2015. They averred that the plaintiffs' claims had prescribed after proceedings were only commenced some 11 months after the cause of action had arisen, in violation of s 70 of the Police Act. The parties proceeded to file heads of argument in support of their respective cases in connection with the plea in bar. In their original heads of argument, the plaintiffs averred that they had been hospitalised until November 2014 and October 2014 respectively. For that reason, prescription had only commenced to run from those dates and not from the date of the shooting incident.

The plaintiffs proceeded to file supplementary heads of argument in which they challenged the constitutionality of s 70 of the Police Act. They argued that s 70 of the Police Act violated their right of access to the courts in terms of s 69(2) of the Constitution. They also argued that the same law violated their right to equal protection of the law in terms of s 56(1) of the Constitution. In their supplementary heads of argument, the defendants denied that s 70 of the Police Act was unconstitutional, contending that it was a reasonable limitation of the right of access to the courts.

The plea in bar was set down for hearing before TSANGA J as an opposed application. The issue for determination was the constitutional challenge to the eight months' time limit for suing the police under s 70 of the Police Act. In a judgment handed down on 9 March 2016 as HH 181/16, the court per TSANGA J made the following order:

1. That s 70 of the Police Act was unconstitutional.
2. That the matter be referred to the Constitutional Court in terms of s 175(1) of the Constitution for its confirmation or otherwise.
3. That the High Court proceedings be stayed pending the decision of the Constitutional Court.

THE DECISION OF THE CONSTITUTIONAL COURT

In a judgment handed down on 14 July 2020 as CCZ 5/20, the Constitutional Court noted that the matter before TSANGA J was an ordinary claim for delictual damages. The defendants had pleaded prescription pursuant to s 70 of the Police Act. In response, the plaintiffs had averred that s 70 of the Police Act was unconstitutional, which submission was upheld by TSANGA J. The Constitutional Court determined that the High Court had no jurisdiction to deal with the question of the constitutionality of s 70 of the Police Act. The High Court was seized with the plea in bar filed by the defendants and the two issues raised in that plea were the only issues that the court was required to determine.

In paragraph 25 of the judgment, the Constitutional Court made the following instructive remarks:

“[25] More pertinently, in *Chihava & Anor v Mapfumo N.O* 2015 (2) ZLR 31(5), this Court emphasised the same legal position. The court noted in that case that whilst a subordinate court, such as the High Court, may, in terms of s 171(1), have jurisdiction to decide constitutional matters (except those that are the exclusive domain of the Constitutional Court), it (the court) cannot assume jurisdiction under s 171(1) of the Constitution if the constitutional question arises in the course of ordinary non-constitutional litigation. The correct route to be followed in such a situation would be a referral in terms of s 175(4) of the Constitution which does not give the High Court the power to determine, at first instance, the substantive constitutional question arising in non-constitutional litigation.”¹ (Underlining for emphasis).

The Constitutional Court reiterated the position it made in several other decisions that in cases where a constitutional matter arises in non-constitutional proceedings before a lower court, that court may, *mero motu*, or, on request refer such question to the Constitutional Court unless the lower court considers the request to be frivolous or vexatious.

The court determined that the decision by the High Court to deal with the question of the constitutionality of s 70 of the Police Act was therefore void. The order granted by the court was equally void. There was nothing before the Constitutional Court to confirm. The application was consequently struck off the roll with costs.

¹ At p 12 of the judgment

PROCEEDINGS BEFORE THE HIGH COURT POST THE CONSTITUTIONAL COURT JUDGMENT

Following the striking off of the matter by the Constitutional Court, the matter was referred to me for set down and hearing as an opposed matter. The matter to be argued was the same plea in bar, as the one before TSANGA J, which raised the same question of the constitutionality of s 70 of the Police Act. Regrettably, at the time that the parties appeared before me, it seems none of the parties, and myself included, had gone through the Constitutional Court judgment involving the same parties and considered its implications. I reserved judgment following submissions by the parties on the merits of the plea in bar including the question of the constitutionality of s 70 of the Police Act.

It was only when I was preparing the judgment, and had an opportunity to go through the Constitutional Court judgments which dealt with the same issue, that I realised that both the Court and the parties' counsels had made the same mistake that had been made earlier before my sister TSANGA J. The High Court had no jurisdiction to deal with the question of the constitutionality of s 70 of the Police Act in a non-constitutional matter. As had already been observed by the Constitutional Court in its judgment in the same matter, the matter before the High Court was an ordinary claim for delictual damages. The defendants pleaded prescription in terms of s 70 of the Police Act. The sole issue that therefore arose for determination was whether the plaintiffs' claims had prescribed. The question of the constitutionality of s 70 of the Police Act, though central to the resolution of the special plea, arose as an offshoot in the proceedings before the court.

Having realised the grave error that had been made, I invited the parties' counsels to make further submissions on the constitutional issue that I reckoned had to be referred to the Constitutional Court in terms of r 108(1)(a) of the High Court rules, 2021, as read with s 175(4) of the Constitution. Regrettably, owing to their busy schedules, counsel did not avail themselves for varying reasons on the several dates that were proposed to them by the Registrar. At the time the invitation for counsel to appear before me was made, I had also requested that they familiarise themselves with the judgment of the Constitutional Court involving the same parties that I have already referred to. I also requested them to familiarise themselves with the Constitutional Court judgment in *Dengezi v Nyamururu & 4 Ors* CCZ 13/23. That judgment

also dealt with the question of the constitutionality of s 70 of the Police Act and the way a referral must be made.

When the counsels eventually appeared before me, they conceded that they had made the same error that was made when they appeared before TSANGA J. This court had no jurisdiction to interrogate the constitutionality of s 70 of the Police Act in a non-constitutional matter that was pending before it. Counsels agreed that I refer the constitutional question *mero motu* to the Constitutional Court in terms of s 175 (4) of the Constitution. They decided to abide by the submissions already made in their heads of argument concerning the constitutionality of the said section, seeing as the issue to be determined was a legal question. They also agreed that the determination of the plea in bar in which the question of the constitutionality of s 70 of the Police Act arose be stayed pending the determination of the constitutional issue.

Having considered the submissions already on record, it was my considered view that a determination of the constitutional issue by the Constitutional Court was critical to the resolution of the plea in bar pending before this court. Further, the question of the constitutionality of s 70 of the Police Act is an issue that has also arisen in several matters in which proceedings have been instituted against the Police. It is therefore a matter that requires the Constitutional Court to provide guidance on the legality of that provision which has been the subject of legal discourse over the years.

THE CONSTITUTIONAL ISSUE

The constitutional question that arises for determination as agreed by the parties is whether the eight months period for suing the police as required by s 70 of the Police Act is unconstitutional in that it violates section 56(1) of the Constitution which guarantees equality before the law and the right to equal protection and benefit of the law, and section 69(2) of the Constitution which guarantees the right to a fair, speedy and public hearing within a reasonable time.

Resultantly it is ordered that:

1. Pursuant to s 175(4) of the Constitution of Zimbabwe, the question whether s 70 of the Police Act [*Chapter 11:10*], is inconsistent with sections 56(1) and 69(2) of the Constitution of Zimbabwe is hereby referred to the Constitutional Court for determination.
2. Pending the decision of the Constitutional Court on the constitutional question referred to in paragraph (1) above, the determination of the defendants' plea in bar is hereby stayed.
3. There shall be no order as to costs.

Tendai Biti Law, legal practitioners for the plaintiffs

Civil Division of the Attorney General's Office, legal practitioners for the defendants