

NETSAI MAROVA
versus
CHIEF SUPERINTENDANT PHILLIP
and
DETECTIVE CHIEF INSPECTOR CHAFA
and
OFFICER IN CHARGE LAW AND ORDER HARARE CENTRAL POLICE STATION
and
COMMISSIONER MAKOTOSE
and
OFFICER COMMANDING CRIMINAL INVESTIGATIONS HEADQUARTERS
and
COMMISSIONER GENERAL OF POLICE
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 27 October 2021, 17 September 2024 and 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 *D Halimani*, for the plaintiff
Mr *C Chitekuteku*, for the defendants

MUSITHU J: This is a referral judgment of a matter to the Constitutional Court in terms of s 175(4) of the Constitution as read together with r 108 of the High Court rules, 2021 and r 24 of the Constitutional Court rules, 2016. The judgment was made pursuant to the filing of a joint stated case in which the parties agreed on the constitutional issue for determination by the Constitutional Court.

BACKGROUND

On 4 March 2021, the plaintiff instituted a summons claim against the defendants jointly and severally, one paying the others to be absolved, in the sum of ZWL\$5, 000, 000.00 being general damages arising from what the plaintiff called the unwarranted and malicious affront to her dignity through the circulation of sensitive and confidential photographs of her body that had been captured for the purpose of evidence gathering. In her claim, the plaintiff also sought interest on the amount claimed at the prescribed rate from the date of issue of summons to date of full payment. She also sought costs of suit.

The genesis of the plaintiff's claim is that on 13 May 2020, she was abducted by some unknown persons who subjected her to inhuman and degrading treatment including sexual assault and the insertion of foreign objects in her body. As a result of the assault and the torture, the plaintiff was hospitalized at Parktown Hospital in Waterfalls. She reported the matter to the police who undertook to carry out investigations to ascertain the truthfulness of the allegations.

On 15 May 2020, the first defendant in the company of a Dr. Nyamukure, arrived in the hospital ward where the plaintiff was receiving medical assistance. The first defendant identified herself as a member of the Zimbabwe Republic Police Forensic Department. She proceeded to take photographs of the plaintiff's body, as part of her evidence gathering. She also captured pictures of the plaintiff's colleagues, Cecelia Chimbiri and Joanah Mamombe who were also hospitalized at the same institution. In the process of taking those photographs, the first defendant would at various times request the plaintiff to remove her clothing and expose the various sections of her body so that they could also be captured. The exercise was only carried out by the first defendant and no other person was given express permission by the plaintiff to do so.

The plaintiff's understanding was that the photographs were strictly for investigation purposes. On 18 May 2020, the plaintiff became aware that her photographs that had been captured in strict confidence and for the sole purpose of evidence gathering were circulating on several social media platforms which included twitter handles of various individuals. The plaintiff contends that the circulation of her sensitive pictures on various social media platforms was a result of the first defendant's actions as she was the only individual who was granted access to take such photographs.

As a direct consequence of the sensitive photographs being unlawfully circulated on various social media platforms, the plaintiff's dignity was impaired. As a well-known political figure, the plaintiff averred that the unlawful circulation of photographs of her naked body was an insult which caused her great pain. The circulation of the photographs was made without reasonable grounds and therefore negligent, malicious and unlawful.

At all material times, the first defendant who unlawfully released the sensitive photographs of the plaintiff's body into circulation, was acting within the course and scope of her employment with and/or under the control or instructions of the sixth and seventh defendants. Accordingly, the sixth and seventh defendants were vicariously liable for their employee's actions. The damages claimed were broken down under the following heads:

- a) *Contumelia* ZWL\$2, 000, 000.00
- b) *Injuria* ZWL\$3, 000, 000.00
- c) Interest on the above sum at the prescribed rate of interest from the date of the issue of summons to date of full payment
- d) Costs of suit.

After entering appearance to defend, the defendants proceeded to file a special plea in bar. The defendants' defence was that the plaintiff's claim had prescribed. The cause of action arose on 18 May 2020, and the summons were served on the defendants on 1 April 2021. The plaintiff had served the defendants outside the stipulated eight months period provided for under s 70 of the Police Act [*Chapter 11:10*] (the Police Act). The defendants sought the dismissal of the plaintiff's claim with costs.

In her response to the special plea, the plaintiff denied that her claim had prescribed contending that s 70 of the Police Act was unconstitutional and therefore of no force or effect. Further, and in the alternative, the plaintiff denied that her claim had prescribed owing to a supervening impossibility based on the COVID-19 pandemic which prevented her from filing her summons within the period prescribed by s 70 of the Police Act. While the cause of action arose on 18 May 2020, the plaintiff attempted to file her summons on the 11th January 2021, but was unable to do so as the Registrar declined to accept the summons citing the provisions of Practice Directive 1 of 2021.

The Practice Directive was issued by the Chief Justice in response to the proclamation of the 30 day COVID-19 Level IV Lockdown by the Minister of Health. The effect of the Practice Directive was to suspend the filing of new cases, processes, documents and pleadings for 30 days beginning 5 January 2021. The period for the filing of the summons expired on 18 January 2021 during the lockdown. The plaintiff's summons was issued on 4 March 2021, and service was effected on the defendants on 1 April 2021.

The plaintiff further averred that in the event that it was held that s 70 of the Police Act required the plaintiff to file and serve her summons strictly within the period stipulated in the said section, the plaintiff would apply for condonation on the basis that she was prevented from complying with s 70 of the Police Act due to a supervening impossibility brought about by the COVID-19 Regulations and the Practice Directives.

The matter was placed before me as an opposed matter for arguments on the special plea. At the first hearing in October 2021, the parties agreed to proceed by way of a Stated Case and refer the question of the constitutionality of s 70 of the Police Act to the Constitutional Court

for determination. The first stated case was filed on 27 October 2021. An amended version was filed on 3 November 2021. While waiting to prepare the referral judgment, on 3 March 2022, the Registrar received a letter from the plaintiff's legal practitioners requesting me to delay the referral of the matter to the Constitutional Court. The reason for the request was that the plaintiff's legal practitioners intended to file a Chamber Application for the consolidation of the plaintiff's matter with the following related matters: *Mamombe v Chief Superintendent Phillip and 6 Others* HC 287/21 and *Chimbiri v Chief Superintendent Phillip and 6 Others* HC 286/21. The circumstances of the cases were essentially similar since the cause of action arose from the same facts. The pleadings were also similar, and the defendants had raised the same special plea in respect of all of them.

Nothing was heard from the plaintiff's legal practitioners by way of an update until I directed the Registrar to set down the matter for case management. At the case management meeting, it turned out that the plaintiffs in the other two matters were not so keen on pursuing the referral of their matters to the Constitutional Court. The court was therefore requested to proceed with the referral of the present matter to the Constitutional Court.

THE CONSTITUTIONAL ISSUE

The plaintiff contends that the short prescription period accorded to the Police under s 70 of the Police Act is an unconstitutional limitation of the right to human dignity and to protection of the law. There was no constitutional basis for according the Police this short prescription period when many other arms of the Executive were all susceptible to the three-year prescription period. The defendants on the other hand submitted that there was nothing unconstitutional about s 70 of the Police Act. The referral is therefore concerned with the constitutionality of s 70 of the Police Act in view of the parties conflicting positions.

Having considered the parties joint submissions as captured in their stated case, the court is satisfied that the request to refer the matter to the Constitutional Court is not frivolous or vexatious as the constitutional question that arises for determination is critical to the resolution of the plea in bar pending before this court. Further, the constitutional question is a legal issue that does not require the adducing of further evidence to determine its propriety.

Resultantly it is ordered that:

1. Pursuant to s175(4) of the Constitution of Zimbabwe, the question of the constitutionality of s 70 of the Police Act [*Chapter 11:10*], 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.

Wintertons, plaintiff's legal practitioners

Civil Division Attorney General's Office, defendants' legal practitioners