

BRIAN CHOBA
and
JUSTICE CHIUTSI
versus
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE
and
COMMISSIONER GENERAL OF POLICE N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 27 July 2022 & 10 January 2024

**Opposed Application- Constitutionality of s 70 of the
Police Act [Chapter 11:10]**

Mr T Bhatasara, for the applicants
Mr D Jaricha and *Mr C Chitekuteku*, for the respondents

MUSITHU J:

The first and second applicants share certain things in common. They seek the same relief against the first and second respondents. They were both shot at and injured by members of the Zimbabwe Republic Police on 22 February 2018. They both instituted claims for general and special damages before this court under HC 11467/18 and HC 11469/18 respectively. In their defence, the respondents herein raised the defence of prescription as part of their plea to the plaintiffs' claims. It is that defence of prescription that has prompted the applicants to approach this court for the following relief:

“IT IS ORDERED THAT:

1. Section 70 of the Police Act [Chapter 11:10] be and is hereby declared inconsistent with s 56(1) and s 69(2) and (3) of the Constitution.
2. The matter be and is hereby referred to the Constitutional Court in terms of section 175(1) of the Constitution for its confirmation or otherwise.
3. Applicants' matters being HC 11467/18 and HC 11469/18 are held in abeyance until confirmation or otherwise of this order.
4. The Respondents shall pay costs of suit jointly and severally.”

The application was made in terms of r 59 as read with ss 85 and 175(6) of the Constitution of Zimbabwe. The application was opposed by the second respondent. Any reference to the respondent herein shall therefore mean the second respondent.

THE APPLICANTS' CASE

The first applicant claims that on 22 February 2018 between 1800 hours and 1900 hours, he was shot in the thighs by uniformed police officers as he was boarding a commuter omnibus at the corner of Julius Nyerere and Kenneth Kaunda in Harare. The identities of the police officers are unknown to him. He was admitted at Parirenyatwa Hospital on the same day and was discharged on 27 February 2018.

On 25 June 2018, the first applicant gave the respondents notice of his intention to sue in terms of s 6 of the State Liabilities Act¹, as read with s 70 of the Police Act. Summons were issued and filed under HC 11467/18 on 12 December 2018. The respondents filed appearance and a plea in terms of which they raised a preliminary point that the claim had prescribed in terms of s 70 of the Police Act.

The second applicant filed a supporting affidavit to the first applicant's founding affidavit. He claims that on 22 February 2018, around 1900 hours and while on his way to board a commuter omnibus alongside his wife and child, he was shot on the forehead, at the back of his head and on the neck by uniformed police officers. Their identities are unknown to him. He reported the matter at Harare Central Police Station under IR 021762. He was referred to Parirenyatwa Hospital where he received medical treatment.

Just as was the case with the first applicant, the second applicant gave the respondents notice of his intention to sue on 25 June 2018. His matter proceeded in the same manner as that of the first applicant since the two were being represented by the same legal practitioners.

THE CONSTITUTIONAL ISSUE

Section 70 of the Police Act provides that civil proceedings must be instituted within 8 months from the date that the cause of action arose. The applicants seek an order declaring s 70 of the Police Act to be unconstitutional for the following reasons. The time frame within which a litigant must institute proceedings is unreasonably short because the 60-day notice required under the State Liabilities Act is also part of the 8 months period. Section 15 of the Prescription Act provides a general prescription period of three years for debts. There was therefore no justification for according a shorter prescription period in respect of claims against the police.

¹ [Chapter 8:14]

The applicants also contend that s 2 of the Constitution regards the Constitution to be the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid. Section 56 (1) of the Constitution guarantees the right to equality before the law and equal protection and benefit of the law. The applicants argue that s 70 of the Police Act therefore infringed the rights constitutionally guaranteed by s 56(1) because: s 70 is couched in mandatory terms which takes away the courts' discretion to depart from the prescription period in deserving cases; the provision gives the Police special or preferential treatment, consequently discriminating against ordinary citizens with claims against the police; the general prescription period of three years under the Prescription Act also applied to bigger corporates or entities similar in size or even larger than the police force. There was no justifiable reason why the police should be treated differently.

The applicants also contend that s 70 of the Police Act infringed upon their right to a fair, speedy and public hearing within a reasonable time. It also infringed upon their right of access to the courts in terms of s 69(2) and (3) of the Constitution. The 8 months period denied litigants adequate time to exercise their rights of access to the courts. The section also abrogated the values of the Constitution especially the rule of law and the protection of fundamental human rights and freedoms.

For the foregoing reasons, the applicants averred that if the plea of prescription filed by the respondents were to be upheld, it would deny them their right of access to the courts.

THE RESPONDENT'S CASE

The respondent's opposing affidavit raised two preliminary points at the outset. The first concerned the non-joinder of key parties that were critical to the law-making process. The second respondent averred that the applicants ought to have cited the Minister of Justice, Legal and Parliamentary Affairs, being one of the authorities involved in the law-making process. That minister had a substantial interest in the matter. The second point was that the matter was *lis pendens* and that the applicants were on a forum shopping expedition.

According to the respondent, the first applicant was plaintiff in HC 11467/18. In that matter, the respondents filed a plea of prescription in terms of s 70 of the Police Act, which the applicants did not respond to. The same position also obtained for the second applicant. As the plaintiff in HC 11469/18, he had not responded to the special plea on prescription that had been filed in response to his claim. The respondent averred that the applicants ought to have requested that the matter concerning the constitutional validity of s 70 be referred to the

Constitutional Court without filing a fresh court application. That ought to have been done in terms of s 175(4) of the Constitution, as read with r 108(2) of the High Court rules, 2021.

The respondent further averred that the applicants appeared to be forum shopping by having two separate proceedings bearing the same facts hoping for a favourable outcome in one or both.

Concerning the merits of the matter, the respondent submitted that s 70 was a time limitation clause that protected the police from prejudice that arose in the formulation of defences to claims instituted after the lapse of lengthy periods from the date of the cause of action. The 8-month period within which proceedings had to be instituted was not unreasonably short. It was sufficient for one to obtain relevant material required for the successful prosecution of a claim against the police. The giving of notice did not prejudice the litigant in preparing and lodging claims. It did not require 8 months for one to realise that a wrong that warranted institution of proceedings had been committed.

The respondent also dismissed the attempt to equate claims made in terms of the Police Act and those made under the Prescription Act. The set of claims were different and incomparable. The nature of the claim determined the prescription period for institution of proceedings. This explained the various prescription periods under the Prescription Act. The prescriptive period provided under the Police Act was reasonable and justifiable.

It was also averred that the Zimbabwe Republic Police was a large organisation whose officers were sparsely distributed across the country. The tasks handled by individual officers were varied and numerous. That made it difficult for one to recall events that would have occurred after a long period of time. Further, members of the police also frequently left the organisation through discharge, retirement or by death. The organisation also relied on a paper-based system to store information. Most records were destroyed after a year due to shortage of storage space. It was for all these reasons that the period of 8 months was justified.

The respondent denied that s 70 infringed upon the applicants' rights to approach the courts or the period within which proceedings maybe instituted.

THE REPLY

The applicants denied that it was necessary to join authorities involved in the law-making process. The Minister of Justice did not have a substantial interest in the Police Act. It was unnecessary to cite him as a party in the proceedings. It was only the first respondent

that had a direct and substantial process in the matter. In any case, the non-joinder of a party did not vitiate the proceedings.

The applicants further denied that the matter was *lis pendens*, arguing that the validity or otherwise of s 70 of the Police Act was not an issue before the court under the two summons cases. The issue of the constitutional validity of s 70 was not pending before any court. The applicants persisted with their contention that s 70 of the Police Act was unduly restrictive and therefore unconstitutional.

THE SUBMISSIONS

At the commencement of the oral submissions, Mr *Jaricha* for the respondent abandoned the preliminary points on non-joinder and *lis pendens*. He submitted though that the application was not properly before the court. The application was predicated on pending action proceedings instituted by the applicants under HC 11467/18 and HC 11469/18. In response, the respondents raised a preliminary point that the applicants' claims had prescribed. The applicants did not file a replication to the plea. Mr *Jaricha* submitted that the applicants should have followed the procedure set out in s 175(4) of the Constitution as read with r 108 of the High Court rules.

Mr *Jaricha* further submitted that the applicants had no leeway to raise the constitutional question through the application procedure as they had done. The constitutional question should have been raised in the proceedings to which the question related. Counsel also referred to r 24 of the Constitutional Court Rules in arguing the point that the applicants should have simply sought a referral of the matter to the Constitutional Court instead of mounting a fresh application based on the same pleadings that were already before the court. Counsel also referred to the case of *Nyika & Another v Minister of Home Affairs & 3 Others*², in which the Constitutional Court held that the High Court had no jurisdiction to determine a constitutional issue arising from a non-constitutional matter. Counsel urged the court to strike the matter off the roll.

In response, Mr *Bhatasara* for the applicants submitted that following the filing of the special plea, it was the respondents who were supposed to progress the matter further. The respondents did nothing although they could have set the matter down for argument. The applicants were merely seeking a declaration of the constitutional invalidity of s 70 of the Police Act. The court had the powers to issue such a *declaratur*.

² CCZ 5/20

Mr *Bhatasara* further submitted that no constitutional issue arose in the summons matters. Pleadings had progressed to a stage where a special plea had been filed. Counsel further submitted that the present matter was distinguishable from the *Nyika* case in that in the *Nyika* case, the constitutional issue had been raised in heads of argument filed by the applicant. The Constitutional Court determined that the High Court should have referred the constitutional issue to the Constitutional Court in terms of s 175(4) of the Constitution. Counsel submitted that the respondent was wrong to argue that a constitutional issue had been raised herein. The applicants were merely challenging s 70 of the Police Act. These were separate proceedings and the applicants had only referred to the summons case to demonstrate their *locus standi*.

Mr *Bhatasara* further submitted that r 108(4) of the High Court rules was not applicable herein because the court was not seized with a matter in which a constitutional issue had been raised. The applicants were not seeking a referral of the constitutional issue, but its determination.

In his brief reply, Mr *Jaricha* submitted that the respondents did not file a special plea to the applicants' claim. Rather, they filed a plea on the merits in respect of which rules pertaining to special pleas did not apply. For that reason, the applicants ought to have filed a replication to the plea. The applicants' application was not independent of the summons case. Proceedings in the summons case were still pending before this court.

THE ANALYSIS

The powers of the courts in constitutional matters are set out in s 175 of the Constitution. Section 175(4) states as follows:

“If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.”

In my view, the above provision envisages a scenario where a constitutional issue arises in non-constitutional litigation. Where that happens, the court may, *mero motu* or at the invitation of a party to the proceedings, refer that constitutional issue to the Constitutional Court for determination unless the court deems the request to be frivolous or vexatious.

The procedure for referring constitutional matters to the Constitutional Court is set out in r 108 of the High Court rules as read with r 24 of the Constitutional Court rules. Rule 108 and r 24 are phrased pretty much the same. Rule 108 provides in subrule (1) that where the

court or a judge wishes to refer a matter to the Constitutional Court on his own initiative in terms of s 175(4) of the Constitution, then the court or the judge shall request the parties to make submissions on the constitutional issue or question to be referred for determination. The court or the judge must also state the constitutional issue or question that needs to be resolved by the apex court. Subrule (2) of r 108 deals with those instances where the court or a judge is requested by a party to refer the constitutional issue to the Constitutional court.

Section 171(1)(c) of the Constitution bestows on the High Court the jurisdiction to decide constitutional matters except those that the Constitutional Court may decide. The High Court may therefore make an order on the constitutional invalidity of a law, but such an order has no force unless it is confirmed by the Constitutional Court as required by s 175(1) of the Constitution. From a reading of the law, it is clear that the High Court can only deal with a constitutional matter and render a determination thereon in terms of s 171(1)(c) of the Constitution as read with s 175 (1) thereon. Where a constitutional issue arises in the context of proceedings that are already pending before the High Court, then the court must refer such issue for determination by the Constitutional Court as provided in s 175(4) of the Constitution as read together with r 108 of the High Court rules and r 24 of the Constitutional Court rules.

The question that arises herein is whether the application before me is independent of the applicants' summons cases in HC 11467/18 and HC 11469/18. If the matter is independent and therefore can stand alone, then it follows that this court can deal with it in terms of s 171(1)(c) of the Constitution. If the present application is inseparable from the two summons cases, then it must be dealt with in terms of s 175(4) of the Constitution. Mr *Bhatasara* for the applicants argued that the two matters were separate. He argued that no constitutional issue was raised in the summons matter so the present application could stand on its own. Mr *Jaricha* on the other hand argued that the matters were inseparable, and this was also confirmed in paragraph 3 of the applicants' draft order in which they sought to have the summons cases held in abeyance until the disposal of the present application.

The scenario that presents itself herein is not materially different from what the Constitutional Court had to deal with in the *Nyika* case³. In the High Court matter the defendants had filed a plea in bar, arguing that the plaintiffs' claims had prescribed in terms of s 70 of the Police Act. The parties proceeded to file heads of argument in support of their respective positions on the plea in bar. The defendants sought the dismissal of the plaintiffs'

³ *Nyika & Another v Minister of Home Affairs & 3 Others* paragraph 20 at p 10 of the judgment

claims with costs. On their part, the plaintiffs filed supplementary heads of argument in which they argued that s 70 of the Police Act was unconstitutional as an issue. The High Court proceeded to set the matter down as an opposed application in which the sole issue for determination was the constitutionality of s 70 of the Police Act. The High Court determined that s 70 of the Police Act was unconstitutional. When the matter was referred to the Constitutional Court for confirmation of the order in terms of s 175(1) of the Constitution, the Constitutional Court had this to say:

“[20] The matter before the court *a quo* was an ordinary claim for delictual damages. The respondents pleaded prescription pursuant to s 70 of the Police Act and, in response, the applicants alleged that s 70 of the Police Act was unconstitutional, which allegation was upheld by the court *a quo*. I have no doubt in my mind, as already indicated, that the court *a quo* was wrong in dealing with the question of the constitutionality of s 70 of the Police Act when the issues before it were whether the claim had prescribed and whether the Ministry of Home Affairs had been properly cited. The constitutionality of s 70 of the Police Act was not part of the issues raised in the plea in bar filed by the respondents which fell for determination before the court.”

Further down in the same judgment, the court made the following pertinent observations:

“[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.”⁴ (Underlining for emphasis).

In its concluding remarks, the court reiterated the correct position of the law as follows:

“[26] In light of the above authorities and others, it is clear that the court *a quo* had no jurisdiction to deal with the question of the constitutionality of s 70 of the Police Act. The court was seized with the plea in bar filed by the respondents and the two issues raised in that plea were the only issues that the court was required to determine. The question of the constitutionality of s 70 having been raised, the court *a quo* should have referred the matter for determination by this Court. It did not itself have the jurisdiction to determine that constitutional issue.”

As I have already stated the circumstances of the *Nyika & Another v Minister of Home Affairs & 3 Others* case are not dissimilar to the present matter. The respondents in

⁴ At p 12 of the judgment

their plea raised the issue of the claims having prescribed in terms of s 70 of the Police Act. As a reaction to that plea of prescription, the applicants proceeded to mount the present application in which they seek a *declaratur* of constitutional invalidity of s 70. In addition, they also want the summons proceedings stayed pending the determination of the constitutional issue of the validity of s 70 of the Police Act. Whether or not s 70 of the Police Act is constitutional has a huge bearing on the applicants' claims in the main matter. That matter cannot be resolved before the constitutionality of s 70 of the Police Act is interrogated and determined by the Constitutional Court.

For the foregoing reasons, I determine that the current application and the applicants' claims under HC 11467/18 and HC 11469/18 are not independent. The two summons matters cannot be disposed of before the constitutional question has been determined. It is for that reason that the applicants seek a stay of the summons cases pending the resolution of the constitutional issue. The procedure adopted by the applicants does not exist. It is not provided for in the law. The issue of the constitutionality of s70 of the Police Act arose in the context of non-constitutional litigation, and for that reason the applicants ought to have sought a referral of the matter to the Constitutional Court in terms of s 175(4) as read with r 108 of the High Court rules and r 24 of the Constitutional Court rules. I therefore determine that the application is not properly before the court.

COSTS

The approach of the courts in litigation that raises constitutional issues is to guard against penalising unsuccessful litigants with an order of costs unless the circumstances of the case clearly call for such a punitive measure. No such exceptional circumstances exist to warrant such an adverse order of costs herein.

DISPOSITION

Resultantly it is ordered that:

1. The application is hereby struck of the roll.
2. Each party shall bear its own costs.

Bhatasara Attorneys, legal practitioners for the applicants
Civil Division of the Attorney General's Office, legal practitioners for the respondents