

ACTIONS AGAINST THE POLICE: UNREASONABLE OBSTACLES TO OBTAINING REDRESS

Case Note on *Nyika & Ors v Minister of Home Affairs & Ors* HH-181-16 (“The Nyika Case”)

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INTRODUCTION

The police force plays an important role in our society. Under section 219 of the Constitution the Police Service’s functions include—

- detecting, investigating and preventing crime;
- preserving the internal security of Zimbabwe;
- protecting and securing the lives and property of the people;
- maintaining law and order; and
- upholding this Constitution and enforcing the law without fear or favour.

All these functions should be executed within the framework of relevant legislation governing the exercise of these functions and in accordance with the constitutional rights of citizens.

The police are given extensive legislative powers to carry out its legitimate functions. The problem is that their far-reaching powers are open to abuse or misuse and, not infrequently, police officers have abused or misused their powers resulting in serious violation of the rights of citizens.

As pointed out in the *Nyika* case, the police interact with the public on a daily basis and it is typically ordinary citizens who are the victims of violations of their rights arising out of abuse or misuse of police powers. Victims of police abuse will often be seeking redress for violations of some of their most fundamental human rights, such the right to life, liberty, bodily integrity, dignity and protection of their property. The claims may include actions for unlawful arrest and detention, malicious prosecution, unlawful assault, unlawful causing of injury or death, unlawful deprivation or destruction of their property and other human rights violations.¹ Given the serious nature of these

¹. The shortened prescription period also applies to other legal actions against the police (such as delictual actions for injury caused by negligent driving) and actions for breach of contract.

claims, it is vitally important that these matters are dealt with by the courts, the police are held accountable for such abuses and appropriate redress is given to victims.

The aggrieved parties have a legal right to bring delictual claims against the offending police officers and, where the police officers commit the delicts in the course of their employment as police officers, they can also claim against the Ministry in charge of the police on the basis of vicarious liability.² Suing the individual police officers responsible and making them pay damages acts as a deterrent against such misconduct on the part of police officers. These cases serve to alert the police to the legal consequences of abuse or misuse of their powers and show the public that such misconduct will not be tolerated by the courts.

Although the legal right to obtain redress exists on paper, many victims may not be aware of their right to sue the police and even if they are aware, they may lack the financial resources to engage lawyers to bring actions and may not be able to obtain state legal aid which is limited in its scope. The civic organisations offering legal assistance to victims of police abuse do not have the capacity to offer such assistance to victims all around the country. Victims may try to bring their cases to court without legal assistance but they face often insurmountable obstacles because of ignorance of the complex procedural and technical requirements for such claims.

What the *Nyika* case clearly establishes is that no unreasonable further obstacles should be placed in the paths of litigants seeking remedies for these wrongs. It deals with whether the special legislative provisions stipulating a shorter period of prescription for actions against the police create unfair barriers for persons seeking redress and whether these provisions violate fundamental constitutional rights of litigants.

EXTINCTIVE PRESCRIPTION

The *Nyika* case revolves around an aspect of extinctive prescription. Tsanga J points out that if a debtor successfully raises the defence of

² Recent cases in South Africa have expanded the scope of liability of the State for actions on the part of police officers. For instance, in the case of *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) a woman was brutally raped by three uniformed policemen who had given her a lift. With reference to constitutional provisions relating to the functions of the police the Constitutional Court found the State delictually liable for the crime committed by the police officers.

“extinctive prescription” in legal proceedings, the claim against him or her is made permanently unenforceable. Once the prescription period has expired the court has no discretion to admit the claim on the basis that the claim is legally well founded and even that there is irrefutable evidence proving the claim, or there were valid reasons why the claim was not brought within the prescribed period. To interrupt the running of prescription requires the service of the summons; the issuing of the summons does not suffice.

The main justifications for setting a prescription period is to create legal certainty and finality in litigation. It encourages claimants to bring their claims in a timely fashion and before the evidence turns stale. It protects debtors from facing claims which have been existed for such a long time that it is unfair to expect debtors to defend themselves against these claims. But extinctive prescription can be a trap for unwary claimants and legal practitioners representing claimants must ensure that the claims are brought before the prescription period expires. Legal practitioners are guilty of actionable negligence if they carelessly allow their clients’ claims to prescribe.³

The periods of prescription for delictual actions are laid down in the Prescription Act [*Chapter 8:11*]. In s 2 “debt” is defined so as to include a delictual claim and then in s 15 the prescription periods for debts are set out. Three years is the usual period for prescription for a delictual action.

SPECIAL PROVISIONS IN POLICE ACT

There are special provisions in the Police Act [*Chapter 11:10*] dealing with the period of prescription for claims arising out of delicts committed by police officers. Section 70 provides that in a civil action instituted against the State or a member of the police force “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 civil action and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:14*] before the commencement of such action.”

³ See, for instance, *Erasmus Ferreira & Ackermann & Ors v Francis* 2010 (2) SA 228 (SCA); *Manase v Minister of Safety and Security & Anor* 2003 (1) SA 567 (CK); *Moatshe v Commercial Union* 1991 (4) SA 372 (W) *Slomowitz v Kok* 1983 (1) SA 130 (A); *Manyeka v Marine & Trade Insurance Co Ltd* 1979 (1) SA 844 (SE)

Under s 6 of the State Liabilities Act [*Chapter 8:14*], 60 days' written notice must be given of an intention to claim money from the State. The notice must set out the grounds of the claim and, where appropriate and possible, give details of officials involved and have copies of documents relating to the claim attached to it. The 60 days is incorporated into the eight month period under which the claim is to be brought under the Police Act. The courts have the power to condone failure to give the required notice where there has been substantial compliance with the section or where there has been no undue prejudice to the State or to the officer being sued.

THE *NYIKA* CASE

In the *Nyika* case two army officers had been badly injured when police officers shot at them, apparently mistaking them for robbers and despite the fact that the army officers had complied with the instruction to get out of their vehicle and raise their hands. The army officers then sought to claim delictual damages from the Minister of Home Affairs⁴, the Police Commissioner-General and the police officers involved in the shooting.

Summons had been issued but the claim expired as the summons had not been served on the defendants within the mandatory eight month period. The court found that the failure to issue serve summons with the prescribed period was apparently "largely a result of tardiness on the part of their legal practitioner."

Counsel for the army officers then brought an application in the High Court seeking a declaration that the provisions in the Police Act requiring that the action be brought within eight months and that notice of 60 days be given before commencing action are unconstitutional. Respondents counsel argued that the shortened period of prescription was legally justified and was not unconstitutional.

4. The lawyers for the applicant had originally incorrectly cited the Ministry instead of the Minister. Counsel for the respondents raised the issue of the mis-citation at the outset of the application seeking a ruling on the constitutionality of the shortened period of prescription for actions against the police. The High Court took cognizance of the error in citation and altered the citation to read the Minister. This was done without applicant's counsel making a formal application for correction of this mis-citation.

ARGUMENTS OF APPLICANT'S COUNSEL

The applicants argued that not only the eight months' period was unreasonable but also the 60 day notice period incorporated therein was also unreasonably short.

The applicant's counsel argued that the justification relied upon for the shortened period of prescription is illogical and untenable and the preferential treatment of the police in terms of the time period for bringing a claim violated the constitutional right to equality before the law and equal protection and benefit of the law (section 56 of the Constitution). Computers and e-governance now allow for efficient handling of cases by large State institutions. There are many other large institutions, such as the Central Intelligence Organisation and big private corporations, which do not have a special prescription protection like that for the police.

Counsel for the applicant argued that the shortened period of prescription was also a violation of the right of access to justice. This right is encapsulated in section 69 of the Constitution which gives the right to have access to the courts and to have their civil rights determined before a court within a reasonable time. Counsel relied heavily on the South African case of *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC). In this case the court had to decide whether a provision obliging claimants to bring claims against the Ministry of Defence within six months incorporating a one month notification period was justifiable. The Constitutional Court decided that this provision infringed the right of access to court because it did not afford claimants an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. In reaching this conclusion the court took into account socio-economic conditions in the country, namely poverty, illiteracy, cultural and language differences and the inaccessibility of legal assistance. This meant that for the majority poverty, illiteracy and inequality adversely impacted on the ability to access the law. Legal illiteracy in particular abounds and many people who may have been injured may simply be unaware of their rights in light of limited availability of legal aid. The court held further that the infringement of the right could not be justified in terms of the limitation section of the Constitution because it would be possible to satisfy the State's legitimate objectives through means less stringent and detrimental to the interests of claimants. The test derived from this case, as applied in later cases, is whether the litigant has the opportunity to exercise the right to judicial redress and whether the limitation is reasonable in terms of time.

ARGUMENTS OF RESPONDENTS' COUNSEL

Counsel for respondents argued that the eight month prescription period for actions against the police was reasonable and justifiable and was not unconstitutional. Counsel cited *Minister of Home Affairs v Badenhorst* 1983 (2) ZLR 248 (S) at p 253A-B in which Gubbay JA referred with approval to the following observations in an early South African case:

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 provisions of s 30 seem to be only reasonable.⁵

The respondents' counsel maintained that, because of the large size of the police force and considerable volumes of cases handled by police officers, there were good reasons for ensuring that actions against the Ministry of Home Affairs and police officers were disposed of quickly before memories of the facts of individual cases were forgotten. This justified the shortened period of prescription for such cases.

DECISION OF THE COURT

Tsanga J found that the provision for the shorter period of prescription for actions against the police violated s 69(2) (on the right to a fair hearing before a court within a reasonable time) and s 56 (1) (on the right to equality before the law and equal protection and benefit of the law).

She agreed with the approach in the *Mohlomi* case. In Zimbabwe there was also a right of access to justice. She pointed out that knowledge of the law is necessary to access justice and in Zimbabwe lack of knowledge of the law is widespread and legal aid is limited. The State does little to disseminate legal information and the geographical reach of non-governmental organisations providing legal information is hampered by financial constraints. Put in this context the shortened time frame for bringing actions against the police "can only but deny ordinary people the right to access courts." She then concluded:

⁵. *Hatting v Hlabaki* 1927 CPD 220 at 223E

Therefore, if the critical test for reasonableness of a time limit such as the eight months in the Police Act, is whether it permits sufficient or adequate time to exercise the right of access to the court, then undoubtedly for the vast majority of our populace who face the challenges alluded to, the resounding answer is that it simply does not.

The learned judge pointed out that other legal systems have dispensed with restrictive protections for the police and other State institutions by way of shortened periods of prescription. For instance, following the ruling in the *Mohlomi* case in South Africa the period of prescription for actions against the police was changed to three years by legislation.

The judge therefore decided that there was no reason why the general prescription period for ordinary debts as contained in s 15(d) of the Prescription Act should not govern claims against the police. The 60 notice period, however, allowed the police enough time to respond to the claim and decide whether or not to settle the claim and the provision allows for condonation of the non-compliance with the time period and extension thereof for good cause shown.

Tsanga J found that it is “precisely in the everyday role of police as public servants that ordinary citizens generally encounter challenges with members of the police force which they expect the police to be held accountable for. Moreover, human rights standards have influenced the outlook on time limits as stipulated in the guiding recommendations to the implementation of the International Covenant on Civil and Political Rights to which Zimbabwe itself is a party.”

In more general terms, she pointed out that the arena of constitutional challenges to legislative provisions has tended to be dominated in the past by cases brought by political elites relating to high-level abuses, such as those arising from electoral provisions, public order and security laws and media laws. Those bringing such actions obviously have the capacity to pursue these matters. She says that it the court’s vigilant scrutiny of constitutionally deficient legislation should not be confined to such cases but must encompass cases such as the present one where abuses are suffered at the everyday level by ordinary citizens.

The judge referred this matter to the Constitutional Court in terms of s 175(1) of the Constitution for its confirmation or otherwise of this constitutional ruling. When the matter came before the Constitutional Court for confirmation, the court struck the matter off the roll on the

basis that the High Court had erred in correcting the erroneous citation of the Ministry instead of the Minister without a proper application being made for the amendment by the applicant's counsel. The applicant's counsel then made a successful chamber application before the High Court to correct the mis-citation. The matter has now been referred back to the Constitutional Court and is awaiting a hearing of the matter and a decision.

It is respectfully submitted that the Constitutional Court had also the opportunity to allow for filing of the application for the correction of erroneous citation. The constitutional jurisprudence should always lean towards disposing a matter on merits as opposed to technical aspects. This is precisely the purpose of the provisions of rule 5 of the Constitutional Court Rules which allow departure from the rules in the interests of justice. In this case, clearly the case in question had public benefit and interest. There was no prejudice that would be suffered if the Constitutional Court had allowed the matter to be postponed *sine die* to allow the amendment. The amendment at this point would not prejudice any of the litigants as the Minister had always been represented since the commencement of proceedings. Thirdly, even if there was a prejudice, the importance of the case far outweighed the importance of the case to the litigants and the public.⁶

GENERAL COMMENTS

The judgment in the *Nyika* case is significant for taking full account of the socio-economic conditions that inhibit ordinary persons from successfully obtaining redress for abuses suffered at the hands of the police.

The unjustifiably shortened period of prescription for actions against the police (whether for abuses or for any other reason) is just one of many barriers faced by ordinary litigants. It must be removed but a lot more needs to be done to ensure that persons who suffer abuse or loss at the hands of the police obtain redress.

A suitable starting point, with regard to abuses, is to ensure that police officers are fully trained on the proper exercise of their powers

⁶ For criticism of the tendency to disallowing cases from going forward because of minor technical irregularities see Musa Kika's article entitled 'The role and attitudes of the Zimbabwean Constitutional Court in operationalizing the 2013 constitution, 2013-2017' in the *Rule of Law Journal* at pages 10-14

in a manner which does not lead to abuses of the basic rights of persons with whom they interact. The police service must display zero tolerance to such misbehaviour and take firm disciplinary action against all abusers. It should make widely available a far stronger version of the Police Service Charter. The Government should use its country-wide information dissemination capacity to inform aggrieved parties remedies available to them and should prioritise such cases when granting state legal aid. Government must not leave it entirely to civic organisations, such as the Legal Resources Foundation and Zimbabwe Lawyers for Human Rights, to provide the necessary assistance. Finally a proper mechanism must be established for fair and expeditious processing of complaints against the police. This must be done in accordance with section 210 of the Constitution which provides:

An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct.⁷

If such a mechanism were established and properly capacitated, it would provide one way of ordinary persons could obtain redress. However, this mechanism must not be used simply to cover up police excesses rather than fairly investigating complaints and providing redress where complaints are well founded.

The police force must also display that it is non-partisan in the way in which it operates in accordance with the constitutional provisions mandating this.⁸

7. Section 207 of the Constitution includes the police service as one of the security services.

8. Section 119 (3) lays down that the Police Service must be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority as established by this Constitution. Section 208 provides that police officers as members of security services must not –

- (a) act in a partisan manner;
- (b) further the interests of any political party or cause;
- (c) prejudice the lawful interests of any political party or cause; or
- (d) violate the fundamental rights or freedoms of any person.