MORDECAI PILATE MAHLANGU
versus
HENRY SOSTANE DOWA
and
CLEVER NTINI
and
AUGUSTINE CHIHURI
and
JOHANNES TOMANA
and
THE CO-MINISTERS OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 October 2014 & 12 November 2014

Interlocutory application

T. Mpofu with *R. Moyo,* for plaintiff
P. Machaya, for 1st, 2nd, 3rd & 5th defendants
F. Mutevedzi, for 4th defendant

MAFUSIRE J: On 29 October 2014 I postponed the pre-trial conference in the above matter. An issue had arisen. I had had no warning of it from either the pleadings filed of record or such of the correspondence between the parties as had found its way into the record. It was this. Mr *Mpofu,* for the plaintiff, applied to strike out, one by one, the pleas filed on behalf of the third defendant, the fourth defendant and then the first and second defendants jointly, in that order. Mr *Machaya*, the Deputy Attorney General in the Civil Division (hereafter referred to as "***the Civil Division***") represented the first, second, third and fifth defendants. At that stage there was no appearance for the fourth defendant.

I granted the applications in respect of the third and fourth defendants' pleas. The reasons are not very relevant. But for the sake of completeness, and very briefly, I struck off the third and fourth defendants' pleas on the ground that they were in default of appearance. With regards the third defendant, there was no explanation why he was in default. With regards the fourth defendant, neither he nor his legal practitioners was in attendance at all. That was at that stage. As such they were in breach of Practice Direction No. 95 of 1995.

Paragraph 10 of that practice direction says that every party to a trial action, together with his legal practitioner, if any, shall attend the pre-trial conference in person or through a representative who is familiar with the facts and who is duly authorised to make decisions on his behalf. The provision also entitles the legal practitioner to apply that his client be excused from attendance. The judge will only grant such an application in exceptional circumstances.

What forced the adjournment of the pre-trial conference was the application in respect of the striking out of the first and second defendants' plea. But before I go into the details of that, and again for the sake of completeness, I must mention that soon thereafter I had to quash my earlier directive. The parties had no sooner left my chambers than the plaintiff's group had come back with the fourth defendant's group. Unfortunately, at that time Mr *Machaya* was said to have gotten engaged elsewhere. So he and the first and second defendants did not come back.

It turned out that as I was conducting the pre-trial conference in his absence, the fourth defendant's representatives had been waiting in my clerk's chambers. There had been a mix-up on the notices of set down sent out to the parties by the registrar. The starting times had been different. On the notices to the plaintiff and the Civil Division the time was 09:00 hours. But on the notice to Mutamangira & Associates, the fourth defendant's legal practitioners, the time was 09:30 hours.

The plaintiff readily appreciated the error and readily accepted that my earlier directive striking out the fourth defendant's plea in default of appearance had to be set aside in terms of Order 49 r 449. The fourth defendant's plea was reinstated.

Unfortunately, that was not the end of the matter. The fourth defendant was not present in person. He was represented by the Deputy Attorney General in the Criminal Division. Mr *Mpofu* charged that at a previous pre-trial conference before a different judge but which pre-trial conference had to be aborted on account of that judge having had to recuse himself, the fourth defendant had also been in default. Mr *Mpofu* said he had warned that unless the fourth defendant appeared in person at the next pre-trial conference he would apply to have his plea struck out. He said he was now making that application, seeing that the fourth defendant was again in default.

I did not have to deal with the plaintiff's second application for the striking out of the fourth defendant's plea. Mr *Mutevedzi*, for the fourth defendant, refrained from responding to the application on the basis that the first, second and fifth defendants, and their counsel, were no longer in attendance. He said it was important that such issues be dealt with when the pre-

trial conference had properly been re-convened and properly re-constituted. He submitted that the absence of the other parties and their counsel was due to no fault of theirs, but to the mix-up referred to earlier.

Even though the issue of the striking out of the fourth defendant's plea strictly did not concern him, I eventually bought Mr *Mutevedzi's* argument. Given the problem caused by the mix-up I felt it prudent to adjourn the proceedings and properly reconvene them at some other time.

It was the application for the striking out of the first and second defendants' pleas that forced the adjournment. The application was vigorously opposed. The background to that application was this. All the parties to this suit are prominent personages. They all occupy high offices. The plaintiff is a very senior and very prominent legal practitioner. He is a senior partner in one of the largest law firms in the country. Among other numerous high positions held by him he is a former president of the Law Society of Zimbabwe.

The first and second defendants are senior police officers. At all relevant times they occupied the ranks of detective inspector and detective chief inspector respectively. The third defendant is the Commissioner-General of the Zimbabwe Republic Police. The fourth defendant was the then Attorney General of Zimbabwe. With the advent of the new Constitution of Zimbabwe in 2013 the fourth defendant became the Prosecutor-General. Prior to that there were two ministers of home affairs, an incident of the global political agreement involving the then two dominant political parties in the country. In this suit the two ministers, each from the two parties, were cited jointly as the fifth defendant.

The plaintiff sues for damages. He alleges wrongful arrest and detention by the first defendant allegedly at the instance of defendants 2, 3 and 4. The fifth defendants are nominal defendants, being representatives of Government. In his declaration the plaintiff stresses that he sues the first and second defendants in their personal capacities. Although a great deal of detail is not important or even relevant, nonetheless there is some that is necessary in order to fully appreciate the plaintiff's applications.

In 2009 a Mr Roy Leslie Bennett ("***Bennett***"), then a prominent member of one of the opposition political parties, had been indicted for treason. One Michael Peter Hitschman ("***Hitschman***"), had been subpoenaed to give evidence as a state witness. Hitschman consulted the plaintiff for legal advice. The plaintiff, in the course of his duties as an attorney, and, obviously, as an officer of the court, penned a letter to the fourth defendant in his capacity as the Attorney-General. Attached to the letter was Hitschman's affidavit which the

letter sought to summarise. In essence the letter pointed out that Hitschman's subpoena was invalid. It also said that he had no relevant evidence to give at Bennett's trial. The letter ended by seeking confirmation that Hitschman would not be called up as a witness.

The next thing was that the plaintiff was arrested by the first defendant. He was detained in police custody. He was only released the following day on bail. On April 2010 he issued summons against the five defendants. The Civil Division entered an appearance to defend on behalf of all of them. It subsequently renounced agency as against the fourth defendant. It seems this move was not prompted by anything said by the plaintiff. The basis of the claim against the defendants, in brief, and in my own words, was that the arrest and detention of the plaintiff was wrongful, unlawful and contrary to s 13 of the then Constitution of Zimbabwe.

Section 13 of the then Constitution of Zimbabwe protected the right to personal liberty. It prohibited the deprivation of personal liberty except as authorised by law in the cases specified. One of those cases specified was the depravation of personal liberty upon reasonable suspicion that the person (being arrested) had committed, or was about to commit a criminal offence. Sub-section (5) entitled any person who was unlawfully arrested or detained by any other person (the arresting person) to seek compensation from the arresting person, or from the person or the authority on whose behalf, or in the course of whose employment the arresting person was acting. There was a proviso. *Inter alia* public officers or persons assisting such public officers, **acting reasonably and in good faith and without culpable ignorance or negligence**, might be protected by law from liability.

As against the first defendant, the plaintiff averred that he did not hold, and did not form, a reasonable suspicion that the plaintiff had committed an offence that required his arrest. The plaintiff further averred that the first defendant had acted solely upon unlawful orders given him by the second defendant.

As against the second defendant, the plaintiff averred that he had acted on an unlawful order given him by the third defendant.

As against the third defendant, the plaintiff averred that he had acted on an unlawful order given him by the fourth defendant.

As against all the defendants the plaintiff averred that none of them had exercised the discretion required of them by law, or that they had exercised it improperly and that therefore they had breached the law.

The plea filed on behalf of defendants 1, 2, 3 and 5 raised no issue regarding the fact, *inter alia*, of the plaintiff's arrest and the circumstances surrounding it. However, it was stated that the first and second defendants had been acting in the course and scope of their employment and that therefore it was improper for the plaintiff to have sued them in their personal capacities. It was denied that the first defendant had acted on orders when he had arrested the plaintiff, but that after investigations the defendants had in their minds formed a reasonable suspicion that an offence had been committed. That offence was said to be the obstruction of justice in a case which involved the overthrow of Government. It was denied that the plaintiff had suffered any damages.

For the third defendant, reference was made to his obligation in terms of s 76 (4a) of the then Constitution to institute investigations upon written request by the fourth defendant. It was denied that there had been any instruction received by the third defendant from the fourth defendant to arrest and detain the plaintiff. It was then stated in the plea at that juncture that "***…. for the avoidance of doubt ….***" the Civil Division had renounced agency as against the fourth defendant.

Through his new attorneys the fourth defendant filed a plea. It opened up with an exception. It then substantively denied that the fourth defendant had issued any instruction for the arrest and detention of the plaintiff. It said the fourth defendant had acted in terms of s 76 (4)(a) of the then Constitution (undoubtedly, it was meant to read (4a)). It also stated that the fourth defendant was not responsible for the actions of defendants 1, 2 and 3 whom he said had acted on the basis of opinions formulated by them.

The plaintiff filed replications to the defendants' pleas. In none of them did he take up the point that defendants 1 and 2 were not entitled to representation by the Attorney-General. All the parties filed their draft pre-trial conference minutes. In none of them was the representation of defendants 1 and 2 by the Attorney-General made an issue. Further, at one point the plaintiff sought detailed particulars of the defences. Essentially these were refused. He then sought to administer detailed interrogatories in terms of Order 28. When these were again refused the plaintiff applied successfully to this court for an order to compel the defendants to answer the interrogatories. In all this the first and second defendants were represented by the Civil Division. But in none of all that was the point taken that their representation by the Civil Division was improper. Of course, that the point was not taken then does not necessarily mean that it may not be taken now. My point is, at no time prior to

the pre-trail conference held before me, was any kind of notice or intimation given that such an issue would be raised.

When the record was eventually referred to me I prepared for the pre-trial conference from the point of view of streamlining the issues. Given the nature of the claim and the nature of the defences I had resigned to the fact that an out-of-court settlement was improbable. It was only during the pre-trial conference that the plaintiff applied for the striking out of the pleas as aforesaid.

The applications in respect of defendants 3 and 4 could easily be dealt with. However, the one against defendants 1 and 2 required further consideration. By consent the proceedings were adjourned. Despite having made oral submissions already, both counsel readily accepted my request for them to supplement their oral arguments with written submissions. I am grateful to counsel for their insightful submissions.

In applying to strike out the first and second defendants' plea the plaintiff's case, as I understood it, and in my own words, was basically this. The first and second defendants were being sued in their personal capacities. Their representation by the Attorney General's Office was a breach of the law, particularly s 13 of the old Constitution. The Attorney-General is the chief law officer for Government. In terms of s 114 of the new Constitution his function is *inter alia* to represent Government in civil and constitutional matters. The first and second defendants are not Government. Their wrongful and unlawful actions in arresting and detaining the plaintiff brought them outside the protection of the law. Section 13 of the old Constitution squarely provided for a situation such as this. A person who arrests or detains another person unlawfully forfeits the protection of the law. He is liable to pay compensation in his personal capacity. It is not enough that the first and second defendants may have been public officers. It is not enough that they may have been acting within the course and scope of their employment. The proviso to paragraph (a) of subsection (5) of s 13 of the old Constitution required them to have acted reasonably and in good faith and without culpable ignorance or negligence. In the plaintiff's case they had not. Therefore there was no justification for the Attorney General expending public funds defending private suits.

It was also the plaintiff's case that the representation of the first and second defendants by the Attorney-General was in breach of the Legal Practitioners' Act [*Cap 27:07*]. Section 9(2) of that Act prohibits persons who are not registered legal practitioners and who do not have valid practising certificates from, *inter alia,* suing out any summons, or defending suits, or acting in any capacity in any action, suit or other proceedings in civil or

criminal courts on behalf of other persons. Officers in the Attorney General's Office do not "practice" by virtue of practising certificates even though they may be registered legal practitioners. They are restricted to appearing in court only on behalf of the State in terms of s 82(1) of the Act. They have no right to represent persons such as the first and second defendants who are being sued in their personal capacities. These defendants are not being sued as representatives of the State.

To stress the point that the first and second defendants are not the State or its representatives, the plaintiff referred to the State Liabilities Act [*Cap 8:14*]. In terms of that Act the State can be sued for civil wrongs committed by public officials in the course and scope of their duties. In terms of s 3 it is the minister to whom the headship of the ministry or department concerned has been assigned who should be the nominal defendant. If the headship of that ministry or department has been assigned to the Vice-President then it shall be the Vice-President who shall be the nominal defendant.

The plaintiff pointed out that in the current suit the true representatives of the State were the fifth defendants. They were being sued in their official capacities. Section 6 of the State Liabilities Act shows that even the sixty-day notice that the plaintiff is required to give before instituting proceedings, has to be given either to the State, the President or his Vice, the minister or his deputy in their official capacities, or "***any officer or employee of the State in his official capacity***" (emphasis by plaintiff's counsel). In the present suit the first and second defendants were none of the above.

In counter, Mr *Machaya* argued, again as I understood him, and in my own words, that the plaintiff's claim is in reality one against the State. He relied on s 2 of the State Liabilities Act. It reads:

> "**2 Claims against the State cognizable in any competent court**
> Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Sate or out of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be."

Mr *Machaya* interpreted that section to mean that civil suits arising out of actions by public officials acting in their official capacities and within the scope of their employment are claims against the State. There is harmony between the State Liabilities Act and the Police Act, [*Cap 11:10*]. In terms of s 70 of the Police Act eight months' written notice is required

to be given before any proceedings are instituted against the State or member in respect of any act of commission or omission by him under that Act, and notice in terms of the State Liabilities Act also needs be given. Actions by the first and second defendants in arresting and detaining the plaintiff were actions carried out in terms of the Police Act. That is why it was necessary for the plaintiff to have complied with both the Police Act and the State Liabilities Act. As such, since s 114 (2) of the current Constitution permits the Attorney General to represent Government, and since s 82 (1) of the Legal Practitioners Act permits State employees to represent the State in any court of law, the Attorney General is empowered to represent the first and second defendant in any claim arising out of the situation contemplated by the State Liabilities Act. The unilateral decision of a litigant to sue an officer or employee of the State in his personal capacity does not remove such suits from the purview of actions against the State if the causes of such actions are alleged wrongs done by State employees in the execution of their duties.

I acknowledge the force of the arguments by both parties. But I think, with all due respect, emphasis was rather misplaced. I was a judge merely conducting a pre-trial conference in terms of Order 26 of the Rules. During oral argument I asked what powers were reposed in me at a pre-trial conference. I drew attention to r 182(11). It reads:

> "(11) A judge may dismiss a party's claim or strike out his defence or make an order as may be appropriate if-
>
> (a) the party fails to comply with directions given by a judge in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4); and
>
> (b) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order."

A judge conducting a pre-trial conference in terms of Order 26 has powers, *inter alia*, to strike out a party's defence. There are three preconditions. The first is that a judge must have given directions in terms of any four of the preceding subrules specified therein, namely subrules (4), (6), (8) (I0). None of the provisions of those subrules applied to the first and second defendants' situation herein. Subrules (4) and (6) relate to the requirement of a party, together with such other persons, and any such documents, as may be directed, to appear for a pre-trial conference either on the date, time and venue as the other party may request, or on such date and time as the registrar may give following directions by the judge.

Subrule (8) relates to the directions given by a judge on the application of a party in the event of a failure by the parties to reach agreement on any matter in dispute at a pre-trial conference other than the one before a judge.

Subrule (10) relates to, *inter alia*, directions that a judge may give on matters in dispute on which the parties have failed to reach agreement.

The second pre-condition is that a party must have failed to comply with any of the judge's directions aforesaid.

Precondition three is that the other party has to make an application for the striking out of the defence, either orally at the pre-trial conference or through the chamber book.

It was not the plaintiff's case that defendants 1 and 2 had failed to comply with any directions previously given by a judge. Therefore, any striking out of their plea could not possibly be in terms of r 182(11).

Evidently realising this pitfall in his argument, Mr *Mpofu* sought to argue that the court has an inherent jurisdiction to regulate its own process. He submitted that a court can properly find that a plea is not properly before it and therefore can strike it out. It is part of the incidental duty of a judge conducting a pre-trial conference to ensure that the pleadings are properly closed and to refer to trial only such matters whose pleadings are in order.

I acknowledge that a court has an inherent power to regulate its own process. But for the court to do that it must be properly constituted. Furthermore, such power has to be exercised judiciously. In my view, it is an injudicious exercise of power to strike out a defence, on the ground such as advanced by the plaintiff herein, where, among other things, no prior warning had been given, let alone proper objection taken before. The pre-trial conference before me was being held some four years and six months after the defendants had entered an appearance to defend which, *inter alia*, notified that the Civil Division was representing them. Objection was being taken after the plaintiff had replicated to the defendants pleas and after all the parties had filed their draft pre-trial conference minutes in which none of them had listed as an issue the fact of the representation of defendants 1 and 2 by the Civil Division.

In my view, the plaintiff could have taken objection to the Civil Division representing the first and second defendants by way of an exception or otherwise at the time of its replications in accordance with Order 21 as read with Order 18 r 119. This is more so given that in the plea filed for defendants 1, 2, 3 and 5 the Civil Division expressly pointed out that it was renouncing agency as against the fourth defendant. As pointed out earlier, this move

was not prompted by anything said by the plaintiff. I presume the Civil Division dropped the fourth defendant on account of a possible conflict given the nature of the fourth defendant's defence in contrast to that of defendants 1, 2 and 3.

But in case I am wrong in saying that the plaintiff has not fulfilled the conditions prescribed by r 182(11) to entitle him to move for the striking out of the first and second defendants' plea, and in case I am also wrong in saying that such an objection should have been taken in accordance with Orders 21 and 18, I consider that in the circumstances of this case, it would not be proper for me to strike out the first and second defendants' plea at the pre-trial conference stage. In my view, the question whether or not these two defendants are properly being represented by the Civil Division will have to be determined at trial. But I consider that such an issue ought to have arisen from the pleadings. It ought to have been pleaded. Nonetheless, the point having been taken and having been fully ventilated before me, I direct that it be listed on the joint pre-trial conference minute for determination as a preliminary point at the trial.

But again in case I am wrong on all the foregoing, I still find against the plaintiff on the substantive argument that the representation of the first and second defendants by the Civil Division offends against the law. Firstly, and in my view, there will be something inherently offensive to the notion of justice that if a state functionary, in the execution of his duties, harms someone, through unbridled zeal, or ignorance, or negligence or even in circumstances amounting to abuse of office, should forfeit State assistance to defend himself especially where he is denying any wrong doing. That a plaintiff subjectively decides to sue such a State functionary in his personal capacity should not be decisive of the question whether or not he should be assisted by the State in putting his case before the court.

Secondly, in terms of s 13 of the old Constitution, the prohibition against the deprivation of personal liberty of one person by another is subject to the exception, *inter alia*, that such may be permissible where there is a reasonable suspicion of a crime having been committed or one about to be committed. *In casu*, whether or not the defendants formed in their minds the suspicion that the plaintiff had, or was about to commit a crime, when the first defendant arrested him, and whether or not such suspicion was reasonable, are issues to be determined at the trial. To deprive the defendants of State assistance in defending themselves, especially in circumstances in which it is common cause that they were acting in the course and scope of their duties as police officers, is to find them liable before the matter has been tried.

Subsection (5) of s 13 of the old Constitution read as follows:

"(5) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any person or authority on whose behalf or in the course of whose employment that other person was acting:

Provided that-

(a) any judicial officer acting in his judicial capacity reasonably and in good faith; or

(b) any other public officer, or person assisting such public officer, acting reasonably and in good faith and without culpable ignorance or negligence:

may be protected by law from liability for such compensation."

In my view, in terms of s 13 of the old Constitution it was wrong for anyone to deprive another of their right to personal liberty. However, it was excusable to deprive someone their right to personal liberty if they had committed, or were about to commit, a crime. An unlawful deprivation of the right to personal liberty rendered the perpetrator personally, or his principal vicariously, liable in a civil claim for damages. Among others, public offers could be made exempt from such claims for damages. However the law granting the exemption would make it a condition that the public officer was acting reasonably, in good faith and without culpable ignorance or negligence. The trial court would have to make such a finding in any given case.

In my view it was not s 13 of the old Constitution that make public officials forfeit the right to State representation in claims against them in their personal capacities. The section did not say that. Nor could it be interpreted to have implied that either. Neither the Legal Practitioners Act, the State Liabilities Act nor the Police Act says that. None of those Acts defines "**State**". I am persuaded by Mr *Machaya's* argument the import of which is that, given the provisions of s 2 of the State Liabilities Act, a claim against the State can only arise out of the wrongful actions of its functionaries. To qualify to be a claim against the State the functionary must have been acting within the course of his employment. A claim against both the functionary and the State in such circumstances is a claim against the State within the meaning of all those Acts.

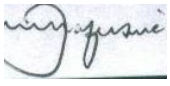
In my view, it will be an intolerable splitting of hairs for a plaintiff to say, in one breath, he is suing the State as duly represented by the minister or his deputy, the President or

his Vice, as the case might be, in which case the plaintiff will not mind the Attorney General representing the State, and then, in another breath, but in the same suit, say that he is suing the State functionary, whose alleged wrongful actions have given rise to the suit, but that in respect of that functionary, the claim is against him in his personal capacity and thus therefore not entitled to representation by the Attorney-General. After all, according to the online dictionaries, the term "**State**" can also be used to refer to the secular branches of government within a State, in contrast with institutions such as churches and other civilian institutions.

Section 6 of the State Liabilities Act requires that sixty days' notice in writing be given to each of the persons required to be served with process, of the plaintiff's intention to make, *inter alia*, a delictual claim against the State, the President or his Vice, the minister or his deputy in their official capacities, or "***any officer or employee of the State in his official capacity***". That a plaintiff might specify and stress, as did the plaintiff herein, that he is suing the "***…officer or employee…***" of the State in his personal capacity, and not in his official capacity, should not, by itself, and in my view, wrench from that officer or employee, his badge of office to disentitle him from State assistance in defending himself. Such a claim should still be a claim against the State and such proceedings should still be against such officer or employee in his official capacity, even though that should not make him immune from personal liability. It will be up to the trial court to make that kind of decision.

In all the circumstances therefore, the plaintiff's application for the striking out of the first and second defendants' plea on the basis that their representation by the Civil Division of the Attorney-General in circumstances in which they are being sued in their personal capacities is hereby dismissed with the costs being in the cause. However, that issue shall be listed for determination as a preliminary issue at the trial. The pre-trial conference shall resume on a date and time to be advised in the normal course of events.

12 November 2014



Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Civil Division of the Attorney-General's Office, 1st, 2nd, 3rd and 5th defendants' legal practitioners,
Mutamangira & Associates, 4th defendant's legal practitioners