MICHAEL NYIKA
and
CRISPEN TOBAIWA[1]
versus
MINISTER OF HOME AFFAIRS[2]
and
COMMISSIONER GENERAL, POLICE N.O
and
INSPECTOR DAMBURAI
and
CONSTABLE LISBORNE CHIBANDA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 17 November 2015 & 9 March 2016

OPPOSED APPLICATION

T Biti, for the applicants
D Mambo, for respondents

TSANGA J: This opposed application is brought as a constitutional challenge to the eight month time limit for suing the police as stipulated in s 70 of the Police Act *[Chapter 11:10]*. The time limit is said to be unconstitutional in that it violates s 69(2) of the Constitution of Zimbabwe[3] which relates to the right to a fair, speedy and public hearing within a reasonable time. It is also said to be a violation of s56 (1) of the Constitution which guarantees equality before the law and the right to equal protection and benefit of the law. The application is opposed by the Civil Division on behalf of the respondents on the basis that the time frame provided has valid justifications, more so when examined from the prism of the nature of their work.

[1] The parties instituted separate actions for damages. However, for purposes of this constitutional determination their matters have been consolidated as one.
[2] The Respondents pointed out that applicants sued the Ministry of Defence when they should have sued the Minister of Defence. This error in citation can be corrected upon application and hence I have chosen to spell out the correct party herein.
[3] Amendment (No.20) Act 2013

DISTRIBUTED BY VERITAS
e-mail: veritas@mango.zw; website: www.veritaszim.net
Veritas makes every effort to ensure the provision of reliable information,
but cannot take legal responsibility for information supplied.

THE FACTUAL BACKGROUND

The factual background that has exorcised these alleged constitutional shortcomings in the relevant statute stems from a trigger-eager incident involving gun-toting police officers in relation to two army officers. It unfolded on a fateful night on the 19th of July 2014. The applicants, Michael Nyika and Chrispen Tobaiwa, are both members of the National Army stationed at One Zimbabwe Armoured Car Regimen HQ Squadron, Inkomo Barracks. They boarded a vehicle around 11pm at Westgate shopping centre in Harare on their way to Karoi. They were clad in army uniform. They arrived in Banket an hour later. There they boarded another vehicle, an NP 300 pick-up truck, together with other passengers which was proceeding to Karoi. The driver, however, indicated that he needed to pass through a farm known as *Madzibaba* farm. Unfortunately, in the darkness of the night, he lost his way ending up at Ashire mine. A person said to be most likely a security guard at the mine is said to have advised the driver that he had gotten lost. The driver had made a U-turn.

About three kilometres from the mine, the vehicle had been stopped by police officers whose three vehicles are said to have blocked the road. The seven police officers, stationed at Banket Police Station, were led by the third respondent, one Inspector Damburai. They ordered all passengers out of the vehicle and to raise their hands. They complied. Despite their compliance, it is said that Inspector Damburai and Constable Lisborne Chibanda (who is the fourth respondent), together with their other colleagues who were all armed with FN rifles, proceeded to fire arms at the applicants. They were mistaken for robbers though ultimately never charged. Michael Munyika lost his right hand middle finger and was also shot in the chest on the far bottom right. The bullet remains lodged in his body. He also sustained injury to his ribs behind the right arm. He was in hospital from the time of the incident to 29 November 2014. Whilst hospitalised, he gave the police the required notice to sue as required by the law.

He issued summons against the police on the 9th of June 2015 claiming itemised special and general damages in the sum of **US$382 725.00** being delictual damages arising out of the negligent and wrongful use of fire arms by the third and fourth respondents in particular. He also claimed interest a prescribed rate of 5% and costs of suit. His summons were served on the 23rd of June which was some 11 months after the incident.

In the case of Chrispen Tobaiwa, who says he had also lifted his hands in surrender and complied with orders, the officers proceeded to shoot him in his right leg. As a result, he

lost the leg from the knee down. He now walks with the aid of crutches. He was hospitalised until sometime in October 2014. Notice to sue as required had been communicated to the first and second respondents on the 9th of September 2014. It is indicated by both applicants that there had been negotiations between the National Army's relevant authorities and the Police until December 2014 when the applicants say they realised that the respondents were just buying time.

Thus, Chrispen Tobaiwa issued summons on the 9th of June also claiming itemised special ad general damages amounting to **US$572 725.00** through the same firm of lawyers as first applicant, namely *Pundu and Company*. There was thus some 11 months from the cause of action to the actual service of summons. As there is a distinction between issuing of summons and the actual service of summons, the running of prescription is only interrupted when service of summons has been effected.[4] Therefore summons in both cases were too late to interrupt prescription as both claims had expired after eight months in terms of the Police Act [*Chapter 11:10]*. Both applicants rightly emphasise that the lengthy period in hospital had a fundamental impact on their ability to fully pursue their claims. However, the time limit had been no bar to their taking action all along until service of the summons. What is apparent from the facts is that there was largely an awareness of the law at least on the lawyer's part and that despite this, the delay in the actual issuance and subsequent service of the summons appears to have been lawyer driven. The parties were legally represented by the same firm of practitioners at the time that they instituted the proceedings. The requirement to give notice to the state had been complied with. It is the totality of this context that leads me to believe that the ultimate failure to serve summons timeously was largely a result of tardiness on the part of their legal practitioner.

Materially, however, the application is brought on the basis of the applicable law in question being in violation of the highest law of the land. By zeroing in on the constitutional argument, the gist of the applicants' standpoint is that what should preoccupy this court in this matter is not a subjective assessment of the failure to meet the deadline but rather an objective assessment of whether the relevant provision of the Act, looked at objectively, deprives persons in general of their right to access court within a reasonable time. In other words, as a result of the barring of the applicants arising from s70 of the Police Act, the matter encapsulates a constitutional argument that is said to speak beyond the facts of this individual case. In so far as the underlying facts are paramount, it is with regard to their

[4] See *Masenga* v *Minister of Home Affairs* 1998 (2) ZLR 183

assisting this court to make its assessment of the effects of the shortened prescription period from a constitutional violation standpoint.

Whilst applicants zero in on the constitutional violation argument, for the respondents it is precisely within the four corners of the applicable law that they rely on prescription and upon which they justify the provisions as constitutional.

APPLICABLE PROVISIONS OF THE LAW

General limitation periods in our case are captured in the Prescription Act [*Chapter 8:11*] while the time period set out in the Police Act [*Chapter 11:10*] is an example of a special limitation period whose justifications will be briefly analysed below given their centrality to respondent's arguments. Section 70 of the Police Act reads as follows:

> "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 as arisen….."

Section 6 (1) of the State Liabilities Act [*Chapter 8:14*] requires 60 days' notice to be provided to the state before any legal proceedings can be instituted on a claim sounding in money or delivery of goods. It is worded as follows:

> "6 (1) Subject to this Act, no legal proceedings in respect of any claim for –
> (a) money, whether arising out of contract, delict or otherwise; or
> (b) the delivery or release of any goods:
> and whether or not joined with or made as an alternative to any other claim, shall be instituted against-
> i) the State; or
> ii) the President, a Vice President or any Minister or Deputy Minister in his official capacity ; or
> iii) any officer or employee of the State in his official capacity;
> **unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at last sixty days before the institution of the proceedings.**" (My emphasis.)

The sixty days is incorporated into the eight month period under which the claim is to be brought under the Police Act. Mr *Biti*'s argument was therefore that it is not only the eight months period which is unreasonable but also the two months' notice period incorporated therein that is also unreasonably short. What is apparent from the above provisions is that there is nothing therein that gives the court discretion to depart from the prescription period as outlined on the grounds of injustice or explicable delay on the part of the applicant. The time limit is strictly construed and results in extinctive prescription regardless of whether the

claim is justified or not justified and regardless of whether the delay was voidable or unavoidable.

JUSTIFICATIONS

The rationale for giving notification of intention to sue state institutions is explained as being grounded in the need to give such institutions an opportunity to investigate and consider claims against them. It also accords an opportunity to decide before getting embroiled in litigation at public expense whether they ought to accept, reject, or endeavour to settle the claim. [5]

Limitation periods in general are justified on three primary grounds. The first is in the repose or finality to claims argument. It is essentially that there should be a fixed time when a potential defendant knows that he or she will not be held accountable for ancient obligations. The second justification is an evidentiary one, namely, that claims should not be based on stale evidence. The third rests on the need for diligence on the part of those who seek to claim in the sense that litigants should not "sleep on their rights". Statutes of limitation therefore act as an incentive for plaintiffs to act in a timely fashion.

In the case of *Stambolie* v *Commissioner of Police* [6] which respondents heavily rely on Gubbay JA as he then was, drew on the case C*hase Securities Corporation* v *Donaldson*[7] in which the following observations were made by Justice Jackson regarding statutes of limitations:

> "….Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defence after memories have faded, witnesses have died and disappeared and evidence has been lost."

In relation to the special time limit accorded the police, the respondents also draw legitimacy for their position from the case of *Minister of Home Affairs* v *Badenhorst*[8] in which Gubbay JA as he then was, approvingly endorsed the following observations made by Benjamin J in *Hatting* v *Hlabaki*[9] that:

---

[5] See *Stevenson NO* v *Transvaal Provincial Administration 1934 TPD 80 at p84*, Osler v Johannesburg City Council 1948 (1) SA 1027 (W) a 1031; *Minister of Agriculture & Land Affairs* v *CJ Ranche (Pty) Ltd* 2010 (4)SA 109 (SCA)
[6] 1989 (3) ZLR 287 SC at p 298C
[7] (1944) 325 US 304
[8] 1983 (2) ZLR 248 (SC) at p253 A-B
[9] 1927 CPD 220 at 223E

> "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 s30 seem to be only reasonable".

On the basis of these arguments, the respondents point out that the eight months' time period is not so inadequate in a practical sense as to nullify the fundamental right of access to the courts.

The reality is that whilst justifications which underlie statutes of limitation remain valid in and of themselves, special protections accorded certain state institutions, have not remained unshakeable constants. Country-level experiential data with time limits and recommendations of law development commissions have at one level been a core driver of reform in this area, bringing to the fore the need for adjustments. In England for example, a shorter limitation period of six months for actions against public authorities used to be applicable between 1893-1954, by virtue of s1 of the then Public Authorities Protection Act. It was repealed in 1954 by the Law Reform (Limitation of Actions) Act 1954. An earlier reform committee in 1943 had found that most of the justifications for the shorter limitation period against public authorities no longer held sway.[10] It was observed for instance that the justification emanating from the size of public authorities and the resultant difficulty of record keeping was not unique to public authorities as large corporstions were in the same situation as public authorities in this regard. It had also been concluded that most cases would still be brought timeously even if the special limitation period were removed.[11] Significantly, restrictions were seen as a curtailment on the rights of individuals and caused injustice to plaintiffs with genuine claims. Limitation periods since the repeal have been exactly the same as those applying to any other defendant. To date it is the Limitation Act of 1980 which applies to proceedings against the crown in the same way as it applies to proceedings between any other subjects.[12]

The Act outlines limitation periods for various causes of action. These cover negligence claims, tort product liability, personal injury or death, contract, contract under seal and claims for the recovery of land, proceeds of sale of land or money secured by a mortgage

---

[10] This historical overview of the English experience is gleaned from the comparative discussion of prescription periods in the following document: ***South Africa Law Reform Commission Discussion Paper 126 on Prescription Periods****, (July 2011) ISBN 978 -0- 621-40078-6.*

[11] Supra

[12] Supra

charge among a variety of issues.[13] Claims against the police which constitute torts and include actions such as wrongful arrest/false imprisonment; death in custody; malicious prosecution; negligence by the police; unlawful stop and search must all be brought within 6 years of the event. However, a claim for assault must be brought within 3 years of the event. A claim alleging breach of the Human Rights Act[14] must be brought within 1 year of the event in terms of that particular Act which deals with human rights.[15]

GROUNDING OF THE CONSTITUTIONAL ARGUMENT

At another level, the ever strengthening practice of mirroring for conformity, all laws against human rights and constitutional standards, has equally impacted on the need to revise limitation statutes in pursuance of meaningfully achieving the goal of access to justice.

As captured by Didcott J in *Mohlomi* v *Minister of Defence*[16]*,* in acknowledging the underlying justifications for statutes of limitation in general:

> "It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s22[17] bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it is not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there and it does not *per se* dispose of the point, as I view that at any rate. **What counts is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one.**" (My emphasis).

This case was heavily relied on by applicants in this matter. The emergent principle from this case as applied in later cases dealing with various instances involving statutes of limitation has thus been the availability of the opportunity to exercise the right to judicial redress and whether that is reasonable time wise.[18] What constitutes an adequate and fair

---

[13] See https//www.pinsentmasons.com
[14] Human Rights Act 1998
[15] These time frames have been accessed and extracted from https //www.donoghue–solicitors.co.uk
[16] 1997 (1) SA 124 (CC)
[17] This was with reference to s22 of the then interim Constitution of South Africa of 1993
[18] Mr *Biti* referred this court to cases that drew on the principle in the *Mohlomi* decision supra in South Africa such as *Moise* v *Greater TLC: Minister of Justice Intervening* 2001 (4) SA 491; *Engelbrecht* v *Road Accident*

opportunity is a more fundamental contextual question which draws on social, economic and political context where the statute of limitation seeks to find fruition.

What was at stake in that particular case was the constitutionality of the then s113 (1) of the SA Defence Act 44 of 1957 which required a civil action to be instituted against the police within a period of six months, incorporating a one month notification period. It was held to be a violation of the constitutional right to have justiciable disputes settled by a court of law or where appropriate another independent or impartial forum. The court took due notice of the South African contextual realities for the majority of poverty, illiteracy and inequality in so far as these impact on ability to access the law. Legal illiteracy in particular abounds, and, as observed, many people who may have been injured may simply be unaware of their rights in light of limited availability of legal aid. It was therefore emphasised that within such context, the limited time frame within each ordinary citizens were expected to purse their remedies against state bodies such as the defence forces in this instance was jarring.

By placing statutes of limitations under constitutional scrutiny, the tampering has been at two levels: firstly in the adjustment in the time period for giving notice for the intention to sue and permitting condonation, and, secondly in the adjustment of the curtailed time period for suing state institutions by subjecting hitherto 'sacred' cows to prescription periods that are in line with those in the relevant provisions of the Prescription Act in line with everyone else.

It is within the above knowledge context of constitutional arguments elsewhere that the applicants point to core constitutional violations arising from the unreasonably short time periods for giving notification and for suing. They draw strength from s56 of the Constitution which focuses on the right to equal protection and s 69 (2) on the right to a fair and speedy hearing within a reasonable time.

Section 56 (1) reads as follows:

> "All persons are equal before the law and have the right to equal protection and benefit of the law."

Section 69 (2) is couched as follows:

Fund 2007 (6) SA 966*; Brummer* v *Minister of Social Development* 2009 (6) SA 323 (CC) and *Barkhuizen* v *Napier* 2007 (5) SA 323 (CC) among others.

> "In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing ***within a reasonable time*** before an independent and impartial court, tribunal or other forum established by law."

Two sets of constitutional arguments therefore arise from the above. The one relates to the unconstitutionality of the protective time limit accorded to the police as violating the principle of equal protection before the law. The other relates to the time limit in so far as it infringes the right to access courts. I will address the equality argument first as in my viewing that is really the starting point.

Equal protection before the law

By giving the police preferential treatment in terms of the time period within which claims must be instituted against them, the underlying argument is that implicit therein is the absence of equal protection and benefit of the law. In other words, by giving special protection to the police, this piece of legislation is an exemplar of positive discrimination in favour of the police on one hand, which certainly results on the other hand, in negative discrimination against ordinary citizens with claims against them.

By way of illustration, Mr *Biti* argued that the police are given protection for reasons which at the end of the day bear little grounding in logic. He emphasised that in the modern age of computers and e-governance, the argument regarding the need to accord special protection on account of the size and bulkiness of the state no longer holds water. He pointed that there are equally other large corporations and institutions, among them the CIO as an institution and corporates like Econet that employ a large work force and yet do not enjoy any special privileges when it comes to being sued. He also observed as equally problematic, the justification for the curtailed time limit, on account of the volume of their work and their heightened likelihood of forgetting. He opined that this lacked logic on the basis that every other person forgets too and that if a general period of three years is good enough for everyone in terms of the Prescription Act, it should be good enough for the police.

I would agree with these observations for the following reasons. An examination of changes in prescriptive periods involving actions against the police from other legal systems do indeed bear testimony to the fact that over the years dynamic changes which accord with equal protection before the law have infiltrated this sphere of restrictive protections. The trend has shifted in favour subjecting state institutions like the police to time periods which

generally accord with everyone else. In the *Mohlomi* case[19], the court pointed out that reasons such as those advanced by the respondents in this case, which touch on the logistical and bureaucratic hurdles in suing the state, had, in the context of South Africa, been discounted by its Law Commission some ten years earlier. The Commission had even at that time recommended that ordinary prescription periods apply to litigation against departments of state. It had also recommended that save for the requirement for rigor in notification, special periods should be scrapped. The situation in South Africa today is that a 3 year prescription period applies to actions against the Police. Following the Constitutional Court declaration that certain limitation or expiry periods were inconsistent with the constitution and hence unconstitutional, the culmination in South Africa was the enactment of the Institution of Legal Proceedings against Certain Organs of the State Act, [20] which impacted on among other statutes involving state institutions s113 of the Defence Act , 1957; s57 of the South African Police Service Act 68 of 1995; and s26 of the Intelligence Services Act to mention a few. The time period for suing the police is now 3 years in line with the Prescription Act.

In face of the constitutional argument it is however, not all time bar limits that have been held to be inconsistent with constitutional standards. In *Road Accident Fund & Anor* v *Mdeyide*[21] it was held that the Road Accident Fund Act (RAF) had been specifically enacted because the Prescription Act was not regarded as appropriate. The Act differed with the Prescription Act as to when prescription begins to run. Whilst acknowledging that the Act limits the right to access to the courts, what was taken into account in finding the limitation reasonable and justifiable was the potential harm to the viability of the function of the Fund, should a "knowledge requirement" as under the Prescription Act be imported into the relevant provision in RAF.[22]

Access to the courts

The gist of the argument with regard to access to justice is that extinctive prescription that arises from the failure to institute proceedings against the police within the stipulated time frame, means that those with genuine claims are denied of redress in relation to their right to access courts. This is particularly so given the absence of the power to condone late

[19] Note 14 *supra*
[20] Act 40 of 2002
[21] 2011 (2) SA 26 (CC)
[22] See also *Barkhuizen* v *Napier in note 16 supra.*

applications in the said provision.[23] Applicants find favour in the arguments presented in the *Mohlomi* case that in a social context where poverty and legal illiteracy abounds, and where legal aid is limited, the curtailed time frame can only but deny ordinary people the right to access courts.

Again I would agree fully with Mr *Biti*'s argument that the contextual challenges presented in that case such as lack of awareness of the law, and, inability to readily access legal aid, pertain to our situation just as vigorously, if not more so. I had occasion to observe in the case of *Deria Mupapa* v *George Mandeya*[24] that the state's role in promoting access to justice through widespread information dissemination so as to create, at the very least, knowledge of the law for accessing the courts remains minimal. Non-governmental organisations who often play this role more directly are equally hampered by financial constraints in terms of their geographical reach. Where they do have reach, people may also only get to know of their rights well out of time. 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.

Notably, as Mr *Biti* was indeed keen to emphasise, the *Stambolie*[25] case which the respondents rely on was also scrutinised in the *Mohlomi* case since it had been drawn on in argument as one of the cases justifying time limits. The first observation made by Didcott J was that the *Stambolie* case had not been confronted with a similar provision like s 22 relating to the right to have all justiciable disputes settled by a court of law, which was what was under scrutiny in the case before him. Secondly, it further observed that the *Stambolie* case had not been about actual the time limit provided in the Police Act for bringing a case against the police but rather about the constitutional entrenchment of the right to compensation for unlawful arrest or detention. To the extent that the actual time limits had been referred to, it was noted that these had been obiter.

Mr *Biti* also argued that the 60 day notice period for notifying the police is problematic in so far as it is sufficient to allow for access to justice within a reasonable time

---

[23] Other cases that have come before our courts where the stipulated time period has proved to be an Achilles heel in the pursuance of claims against the police include *Chihota* v *Home Affairs Minister & Ors HH 93-15 Charles Ngoni* v *Minister Of Home Affairs & The Commissioner of Police & Anor HH-658-15*.

[24] HH 443-14. See in particular the discussion on pp. 8-9 of that judgement.

[25] See note 5 supra

as envisaged by s 69 (2). As pointed out, in the framing of s 70 the Police Act, there is no power to condone noncompliance with time frames. Such power is important in the sense that it provides applicants with an opportunity to explain their noncompliance and if good cause is shown condonation is granted.

In Botswana for example, although the time frame for suing the police is six months in terms of s61 of the Police Act [*Chapter 21:01*], the provision permits an extension on good cause shown. It reads as follows:

> "For the protection of persons acting in pursuance of this Act, any civil action against any such person in respect of anything done or omitted to be done in pursuance thereof shall be commenced in the six months next after the cause of action arises, and notice of any civil action and of the substance thereof shall be given to the defendant at least two months before the commencement of the said action:
>
> ***Provided that the court may, for good cause, proof of which shall be upon the applicant, extend the said period of six months."***[26] (My emphasis)

In South Africa, following the enactment of the *Institution of Legal Proceedings against Certain Organs of the State Act*[27] the notice period for suing an organ of the state institutions must now be given within a period of six months Even then, condonation can be sought for failure to adhere to the stipulated time for notification. Thus in *Madinda* v *Min of Safety & Security of the Republic of South Africa*[28] the court held that the determination of good cause entailed a consideration of those factors which have a bearing on the fairness of granting condonation and affecting the proper administration of justice. These factors to be taken into account were said to include i) prospects of success in the proposed action ii) reasons for the delay; iii) the sufficiency of the explanation offered; iv) the *bona fides* of the applicant; v) any contribution by other persons and other parties to the delay and applicant's responsibility therefor.[29]

CONCLUSION

Looking at the totality of the arguments attacking the constitutionality of the s70, I come to the conclusion that it is inconsistent with s69 (2) and s56 (1) of the Constitution of

---

[26]See the case of *Tidimane v Attorney General 1990 BLR 540 (HC)* for the application of the provision in that case. I tried to ascertain if there have been changes to this legislation and it appears to be still as outlined.
[27] Act 40 of 2002. Section 3 (1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the said organ of state notice in writing of his or her or its intention to institute the legal proceedings. **Section 3 (2) (a)** stipulates that a notice must, within six months from the date on which the debt became due.
[28] 2008 (4) SA 312 (SCA)
[29] See also *MEC for Education, Kwazulu Natal v Shange* 2012 (5) SA 313 (SCA)

Zimbabwe. There is no reason why the general 3 year prescription period for ordinary debts as contained in s 15 (d) of our prescription should not govern claims against the police.

I am bolstered in this view by other equally important considerations as to why the shortened time limit is constitutionally problematic. The provision being of colonial legacy, the time period stipulated, whatever other expediencies, was also no doubt influenced among them at the time by the need to keep claims against the police in check in light of the repressive policies. Like many others, this law was taken over at independence amidst a reality where just as many laws have been reformed or challenged constitutionally whilst just as many have remained intact. The specific provision therefore embodies "legislative lag."

More significantly, with the ushering in of the new Constitution in 2013, an unprecedented number of civil and political liberties have been introduced by the new constitution to keep the state accountable. The tenets of the new constitution commit the State to fostering a new era of people centred constitutionalism. Core to constitutionalism is regulating all forms of public power. It is at the everyday level that most ordinary citizens often experience abuse of power as opposed to the abuse coming from those at the highest levels. It is therefore vital that as courts we do not confine our sense of vigilant scrutiny of constitutionally deficient legislation to only those issues, often brought by political elites that have tended to dominate the courts such as those centred on participation in and the outcome of elections, or media discourses.

Writing about the revival of *Constitutionalism in Africa*, one scholar Kwesi Prempheh puts it aptly when he observes as follows:

> "To the average African, then the constitutionalism that would seem to matter the most is not always the high constitutionalism of political elites (or what we might call wholesale constitutionalism) but a low constitutionalism (or retail constitutionalism) that would address the rampant impunity and abuse of power by public officials at the most basic level of their public administration."[30]

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. Actions may arise from alleged assaults, malicious prosecutions, false imprisonment, negligence, death in custody and general human rights violations. A provision which favours the police in terms of the limited time frame within which unacceptable transgressions must be challenged does not accord with equal protection before the law nor the right to access courts within a reasonable time. Moreover, human rights

[30] H K Prempheh *Africa's "Constitutional revival: False start or new dawn?* 5 Int'l J. Const. L 469 2007

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 terms of General Comment 31[31], where public officials have committed violations of the Covenant, among the impediments to their legal responsibility that should be removed by the State are "unreasonably short periods of statutory limitation in cases where such limitations are applicable in suing violators".

It is therefore equally in the light of these considerations that I have reached my conclusion. In my view, this finding should cause no great consternation among the police. As with any change, it is the opportunity that it provides for necessary re-adjustments not just in outlook but particularly to ongoing strategic interventions such as training that seeks to ensure that operational practices on the ground accord with the ethos of our new constitutional dispensation. After all, it is in making these adjustment that the police will avoid the high costs associated with being sued.

Section 175 (1) provides that where a court makes an order concerning the constitutional invalidity of any law, such order has no force and effect unless it is confirmed by the constitutional court.

Furthermore, in terms of s 175 (2) a court which makes a finding of constitutional invalidity of a law may grant a temporary interdict or other temporary relief to a party or may adjourn proceedings pending a decision of the constitutional court to which such a matter must be referred for confirmation of such invalidity. In the event of the Constitutional court confirms such invalidity, it will be for that court to make a pronouncement on what interim arrangements ought to apply pending the legislature's intervention regarding s70.

DISPOSITION

In the result, it is accordingly ordered that:

1. Section 70 of the Police Act [*Chapter 11:10*], is hereby declared to be inconsistent with s 69 (2) and s 56 (1) of the Constitution of Zimbabwe.

2. This matter is referred to the Constitutional Court in terms of s 175 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 for its confirmation or otherwise.

---

[31] Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States parties to the Covenant, U.N Doc. CCPR/C?21/ Rev.1/Add.13 (2004). See paragraph 18 in particular of this General Comment.

3. Pending the Constitutional Court's decision as in (2) above, the applicants' actions are hereby stayed.

Tendai Biti Law, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners