

**Mahoune v Attorney-General  
(2007) SLR 94**

Lucy POOL for the plaintiff  
David ESPARON for the defendant

**Ruling delivered on 24 September 2007 by:**

**GASWAGA J:** A plea in limine litis has been raised by Mr Esparon to the effect that the plaintiff's claim is prescribed by Section 3 of the Public Officers (Protection) Act (hereinafter referred to as the Act) which stipulates a shorter period of six months in respect of actions against public officers.

Ms Pool, who represents the plaintiff, submitted that that Act does not protect doctors who are employed by the defendant and yet are not under its control and supervision. That a doctor exercises the skill and care of a competent doctor in the diagnosis and treatment of patients and that although he is an employee of the Government, there exists no master/servant relationship between them. She cited article 27 of the Constitution providing for the right to equal protection of the law, article 29 regarding the right to health care and article 30.

With due respect article 30 is not applicable to the matter at hand as it caters for the rights of working mothers. Ms Pool further contends that the state used an archaic statute enacted during the colonial days to deprive the plaintiff of her right to claim compensation from the tortfeasor, the medical practitioners employed by the Ministry of Health.

In conclusion she submits that the Public Officer's (Protection) Act is inconsistent with the provisions of the Constitution, which is the supreme law of the land.

It is however Mr Esparon's contention, and rightly so, that the duty to declare a law unconstitutional is entirely in the province of the Constitutional Court and not the Supreme Court. He then submitted that since the Constitutional Court had not pronounced itself on this matter, though my research revealed otherwise, the Act in question still remains good law.

Briefly the facts are that the plaintiff, who was a minor at the time, suffered an injury to her left knee on 6 October 1995 and because of an alleged failure on the part of the defendant's employees to properly diagnose and treat her she was taken to Germany where her condition was remedied by an operation. She filed an action (CS 261/1997) through her father as guardian on 30 July 1997 which was dismissed on the ground that it was outside the six months period of prescription (vide section 3 of the Act), admittedly the cause of action having arisen on 2 November 1995. Now the plaintiff, in her own name and capacity, has filed this suit holding the defendant vicariously liable for the acts or omissions on the part of the employees of Victoria Hospital when the said

employees refused, failed or ignored to carry out appropriate diagnostic tests and treatment on the plaintiff for which she claims a total sum of R875,000 as damages with interest and costs. The claim is similar in nature to the one in the earlier case.

Section 3 of the Act reads as follows -

No action to enforce any claim in respect of...

(a) Any act done or omitted to be done by a Public Officer in the execution of his Office.

(b).....

(c)... ..

Shall be entertained by a Court unless the action is commenced not later than six months after the claim arose.

The said section 3 was judicially interpreted by the Constitutional Court in the case of *Gervais Amiee v Philip Simeon* (unreported) CC 4/1997. This was a referral to the Constitutional Court under article 46 (7) arising from a matter before the Supreme Court in which the plaintiff, a minor, sued the defendants in respect of the personal injuries allegedly caused to her by the first defendant in the course of his employment with the Government on 20 October 1990. The plaint was filed on 4 May 1995. The defendants raised the issue of prescription as a plea in limine litis to which the plaintiff's counsel responded by seeking a challenge of the constitutionality of section 3 of the Act.

So the question for determination before the Constitutional Court was whether section 3 of the Act contravenes article 27(1) of the Constitution.

Article 27(1) provides thus -

Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except is necessary in a democratic society.

The Court found

that basically, equal protection of the law guaranteed in Article 27 (1) implies that any person will have free access to the Courts for a remedy. Section 3 of the Act does not take away that right, it only limits it.

Further,

it was a matter for the legislature in Seychelles to decide as a matter of policy whether the period of limitation in section 3 of the said Act should be extended or

be repealed altogether.

In conclusion, it was determined that section 3 of the Act is not inconsistent with article 27(1) of the Constitution and that therefore it continues to be valid law . In the present case it is clear that the action was filed out of time and cannot therefore be entertained pursuant to section 3 of the Act. But the plaintiff is not without a remedy. Article 2278 of the Civil Code is instructive. It states -

Prescription as established by this Title shall run against minors as well as adults under guardianship; but such persons shall have a remedy against their guardians .

it is therefore open to the plaintiff, who was a minor at the time when the cause of action arose, to seek a remedy, if she so wishes, from the guardian who ought to have lodged the claim within the prescribed period.

In a nutshell, the plea in limine litis raised by the defendant's counsel is hereby upheld but for the reasons outlined. The plaint is dismissed.

**Record: Civil Side No 47 of 2005**