



IN THE SUPREME COURT OF NAURU  
AT YAREN DISTRICT  
CIVIL JURISDICTION

CIVIL SUIT NO. 21 OF 2019

BETWEEN

GYM MOBIT OF AIWO DISTRICT

Plaintiff

AND

NAURU POLICE FORCE, YAREN DISTRICT

First Defendant

AND

SECRETARY FOR JUSTICE (AS LEGAL  
REPRESENTATIVE FOR FIRST DEFENDANT)

Second Defendant

Before: Khan, ACJ  
Date of Hearing: 24 November 2020  
Date of Ruling: 12 January 2021

Case to be referred to as: Mobit v Nauru Police Force and Secretary for Justice

**CATCHWORDS:** Where the plaintiff's motor cycle was ceased by the first defendant and was subsequently lost – Where the plaintiff is seeking declarations that the first defendant committed an act of tort and is also seeking a declaration that he is entitled to be paid the replacement cost of the lost motor cycle – Where the defendant filed a summons for the claim to be dismissed under O.28, r.2 and 4 of the Civil Procedure Rules 1972 and section 3 of the Republic Proceedings Act 1972 – Whereas the defendant claims that the plaintiff's claim is framed to circumvent section 3(2) of the Republic Proceedings Act 1972 – Whether the plaintiff is entitled to seek declarations against the defendant.

APPEARANCES:

Counsel for the Plaintiff: Mr V Clodumar  
Counsels for the First and Second Defendant: Miss B Narayan & Miss J Torgan

RULING

INTRODUCTION

1. The plaintiff filed a claim against the first defendant (Nauru Police Force) wherein he alleged that his Yamaha Krypton 110cc motorcycle was seized by the Nauru Police Force in 2018, as it was unregistered. The plaintiff went back later in 2018 to have his motorcycle released after having it registered and paying the necessary registration fees.
2. The officer in charge could not find the motorcycle and thereafter the plaintiff made several attempts to see the Commissioner of Police. He eventually met the Commissioner of Police with the assistance of Honourable Aaron Cook MP.
3. In that meeting with the Commissioner of Police it was admitted that the motorcycle was lost and the plaintiff asked to be paid the replacement cost of the motorcycle. In the plaintiff's claim he states that he bought the motorcycle for \$2,500 and the cost of a new motorcycle would be \$2,800. The Commissioner of Police told the plaintiff that the Nauru Police Force did not have the funds to pay him for the cost of the replacement motorcycle, and as a result the plaintiff filed this action seeking the following relief:
  - a) A declaration that the Nauru Police Force committed a tort against the plaintiff by losing his motorcycle while in its possession;
  - b) A declaration that the plaintiff is entitled to be paid the replacement cost of a new Yamaha Krypton motorcycle;
  - c) Cost of the suit; and
  - d) Any other orders that the Court deems suitable.

SUMMONS TO STRIKE OUT ACTION

4. On 30 September 2020 the defendants filed a summons under O.28, r.2 and 4 of the Civil Procedure Rules 1972 (CPR 1972) and section 3 of the Republic Proceeding Act 1972 (RPA 1972) seeking orders for dismissal of the action on the grounds that the consent of the Cabinet was not obtained as required under section 3(2) of RPA 1972.
5. O.28, r.2 and 4 states as follows:

Time for Trial of Questions or Issues (O.28, r.2)

“[2]. The Court may order any question or issue arising in a suit, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the questions shall be stated.

Dismissal of Suit After Decision of Preliminary Issue (O.28, r.4)

[4]. If it appears to the Court that the decision of any question or issue arising in a suit and tried separately from the suit substantially disposes of the suit or renders the trial of the suit unnecessary, it may dismiss the suit or make such other order or give such judgement therein as may be just.”

6. Section 3 of RPA 1972 reads as follows:

“[3]. **Claim against the Republic**

1) In this section:

‘Republic’ means the Republic or any government department or instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his official capacity; and

‘Proceedings’ includes a counter-claim in proceedings against the Republic.

2) No civil proceedings may be taken against the Republic to enforce a claim against the Republic unless:

- a) before the commencement of the proceedings Cabinet has given leave for them to be taken; or
- b) the claim is of a kind mentioned in subsection (3).

3) A person may take civil proceedings, without leave of the Cabinet, to enforce any of the following claims:

- a) A claim for the enforcement of a contract validly entered into by, or on behalf of, the Republic;
- b) A claim for judicial review of administrative action;
- c) A claim to enforce the payment of debt charges which are a charge on the Treasury Fund; and
- d) A claim in respect of which it is provided in an Act that the provision of this section do not apply.

- 4) The Cabinet must prescribe by regulations the manner in which application may be made to the Cabinet for leave to take proceedings against the Republic.
- 5) Where leave to take proceedings against the Republic is granted by the Cabinet, the proceedings, if taken, must be taken in accordance with the provisions of this Act.”

DEFINITION OF ‘THE REPUBLIC’

7. I adopt [9], [10], [11] and [12] of the written submissions filed by the counsels for the first and second defendants dated 24 November 2020 where it is stated as follows:

[9] The definition of ‘the Republic’ for the purposes of section 3 of the Republic Proceedings Act 1972 as stated under section 1 of the Republic Proceedings Act means ‘the Republic or Government Department, or Instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his official capacity’.

[10] The term ‘instrumentality of the Republic’ is broadly defined under section 2(2)(a) of the Republic Proceedings Act as ‘a body established by statute, which statute expressly provides that the body is subject in so respect to Cabinet or Ministerial direction ...’.

[11] The first defendant, the Nauru Police Force, is established under section 3 of the Nauru Police Force Act 1972, which states:

- 1) There shall be in Nauru a police force to be called Nauru Police Force.
- 2) The force shall consist of the Director of Police, Superintendent of Police, Inspectors and officers of such other ranks as the Minister may from time to time by notice in Gazette direct.

[12] Given that section 3(2) of the Nauru Police Force Act 1972 makes reference to Ministerial direction, the first defendant, the Nauru Police Force, falls within the definition of ‘the Republic’ in section 3(2) of the Republic Proceedings Act 1972. In essence therefore, any civil proceedings to be taken against the Nauru Police Force to enforce a claim against the Nauru Police Force requires Cabinet leave.

8. Mr Clodumar concedes that the consent of the Cabinet was not obtained and he submits that there is no need for Cabinet’s consent as the plaintiff is only seeking declaratory orders. He submits that the plaintiff is seeking declarations from the Court that:

- a) The first defendant had possession of the plaintiff’s motorcycle after it was impounded;
- b) That the plaintiff is seeking a declaration for him to be given a replacement motorcycle;

- c) Cost of the proceedings.
9. He further submits that once these declarations are made, he will then advise the Cabinet that these are the findings of the Court and seek its approval to claim damages against the Republic.
10. In support of his submissions Mr Clodumar relies on the case of *Eidagauwe Clodumar and Ors v Secretary for Justice*<sup>1</sup> where it is stated at [6], [7] and [8] as follows:
- [6] In the course of discussion Mr Bliim fairly conceded that subsection 3(2), in its reference to ‘enforce a claim against the Republic’, was not infringed in this case. He accepted that the relief sought in this proceeding is only by way of a declaration of the rights of the plaintiffs under Article 8 of the Constitution. Accordingly, these proceedings do not seek to enforce a claim against the Republic, but merely to obtain a declaration of rights.
- [7] In the event that the plaintiffs were successful, they would not be able to enforce the declaration and would need to obtain a Court order for some further remedy by way of an injunction or other relief against the Republic before they would be able to enforce the legal ruling made in the declaration.
- [8] Mr Bliim conceded that subsection 3(2) did not, therefore, prohibit the claim, for the reasons just explained, and accordingly I dismiss the application by Notice of Motion brought on behalf of the defendant.
11. Miss Narayan and Miss Togran counsels for the defendants disagree with Mr Clodumar’s submission and submit that the plaintiff’s claim is in fact in tort and the way the claim is framed it is clearly an attempt to circumvent the mandatory requirements of section 3(2) of RPA 1972. In support of their submissions, they rely on the case of *Trawnik and Another v Ministry of Defence*<sup>2</sup> (Trawnik) where at page 797 Sir Robert Megarry V-C in which the Crown had complete immunity in liability in tort under the Crown Proceedings Act 1947 for all acts committed by its servants or agents.
12. In this matter the Republic is liable in tort in respect of all torts committed by its servants or agents – see section 4 of RPA 1972.

### CONSIDERATION

13. In *Eidagauwe Clodumar and Ors v Secretary for Justice*, the plaintiff had filed a proceeding to seek declaration of rights under Article 8 of the Constitution and had not infringed section 3(2) of RPA 1972 as he was not seeking to “enforce a claim against the republic.”
14. In his statement of claim the plaintiff is seeking reliefs at paragraph 6 which are as follows:  
(a) a declaration that Nauru Police Force has committed a tort against the plaintiff by losing his motor cycle while in its possession.

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<sup>1</sup> [2013] NRSC 16 Eames, C.J. dated 20 November 2013

<sup>2</sup> [1984] 2 All ER 791

(b) a declaration that the plaintiff is entitled to be paid the replacement cost of a new Yamaha Krypton motorcycle.

15. The defendant admits that the motorcycle was impounded but in its defense it is stated that it was released within an hour. This is a matter of contention which can only be determined after hearing evidence from both sides, however, for the purpose of this application I shall accept the plaintiff's version that the motorcycle was lost. Counsel for the defendant contend that by seeking these declaration that the Nauru Police Force lost the motor cycle after it was impounded and the plaintiff is seeking a further declaration that he is entitled to be paid the replacement cost of a new motor cycle will complete the entire act of tort against the Nauru Police Force; and if these declaration were to be made then it would amount to an "enforcement of a claim against the republic" as provided for in section 3(2); that because the consent of the republic was not obtained before the proceedings was filed those declaration cannot be made.
16. In *Trawnik* case similar arguments were made by the Counsels for the plaintiff and defendant at page 796 and 797 where it stated:

"Before I say any more about this, I shall turn to a related point taken by counsel for the plaintiffs. Put broadly, he contended that the plaintiffs were not suing in tort at all. **All that they sought were certain declarations as to their rights. A declaration that the Crown is liable to the plaintiffs in tort would be one thing, and a declaration that the plaintiffs have a right not to be subjected to a nuisance by noise by the ministry is another; and the latter form of declaration can be made even if the right is wholly unenforceable.**( emphasis added mine) He stressed the width of the remedy by way of declaratory relief, and the absence of any need to show that there is any cause of action (points which were not controverted), and said that the essence of a declaratory judgment was that it stated the rights or legal positions of the parties as they stood, without changing them: see Wade Administrative law (5<sup>th</sup> edn, 1982) p 522. I do not think that the declarations at present claimed by the plaintiffs fit very well into that mould, with the use of the words 'should not' in two of them; but that does not seem to be a matter of any great significance, for in granting declarations it is common enough to revise the language so as to trim off any excess, and to make the declarations fit the substance of the decision.

**Counsel for the ministry contended that this argument was wrong. The declarations sought, he said, plainly sounded in tort. In substance and effect, they were declarations as to Crown wrongs, not declarations of the plaintiffs' rights, and they therefore fell within the former inability to sue the Crown in tort and the present ability to sue the Crown in tort in cases within s 2 of the Act.**(emphasis added mine) Neither the width of the remedy by way of declaratory relief nor the absence of any need to show that there was a cause of action affected the fact that the declarations were claims in tort, albeit quia timet.

Counsel for the ministry supported his contention by citing an authority on which he strongly relied, namely, *Kynaston v A-G* (1933) 49 TLR 30. This was a decision of the Court of Appeal which affirmed the decision of Farwell J (49TLR 114). The claim there was a claim for declaratory relief made by a retired officer in the Medical Corps who had been recalled to service on the outbreak of war in 1914. Some of his

complaints were contractual in nature, but one of the declarations that he sought was that the Army Council had exceeded their legal powers in depriving him of his seniority as a major and in retaining him with the military forces after his name had been removed from the active list. The case was argued on points of law raised by the defence which had been ordered to be argued as preliminary issues. All I need say about the contractual issues is that it was held that employment in the armed forces was not a matter of contract; but the plaintiff's claim for a declaration as to his overlong retention on service was treated as a claim in tort. On this Lord Hanworth MR said (at 301):

‘The last declaration asked for raised the point that the plaintiff had been retained on service for longer than he ought to have been retained. In other words, the plaintiff claimed that he had suffered a wrong at the hands of someone who detained him beyond his period of service. The action was brought for a declaration against the Attorney-General, as in *Dyson v Attorney-General* ([1911] 1 KB 410). It was well to recall that the precedent then laid down was in respect of the construction of an Act of Parliament involving the rights of the King's subjects. It was not a question with regard to the service of any person to H.M. the King in any of the forces. Such a declaration as was asked for in *Dyson's* case bore no analogy to that asked for in the present proceedings, and it did not seem possible by means of the declaration sought in this case to obtain a decision on the merits or demerits of the Army Council. But another objection to this mode of proceeding was that it was a leading principle that the King could do no wrong, and the Courts could not deviate from it. **If a wrong had been done to the plaintiff that was a tort executed against him by some person or persons for whom there was no responsibility in the heads of department. The action being for a tort must be against the person who had committed it, whether he did so in the service of the Crown or not.** (emphasis added mine) The Attorney-General was not the person who had done the act, nor was he responsible for it. On that ground also the action was misconceived, and the appeal must be dismissed.’

17. Counsel for the defendant had earlier submitted that the plaintiff's act of framing the claim to seek the declaration was an attempt to circumvent section 3(2) of RPA 1972 at page 797 of *Trawnik* it is stated as follows:

‘The report then states that Lawrence and Romer LJJ ‘also gave judgment dismissing the appeal’, without any other indication being given as to the nature of their judgments. I was told that there appears to be no better report of the case; and counsel for the plaintiffs not surprisingly pointed to the brevity with which the leading judgment had been reported, saying that it was a special case which should be confined to its own facts. He also reserved the right to contend in a higher court that it was wrongly decided.

**The decision plainly binds me. The decision also seems to me, if I may say so, plainly right. If a prospective defendant is immune from liability in tort, I do not think that it is open to a plaintiff who will suffer from his acts to avoid that immunity by the simple device of framing the proceedings as a claim for declarations instead of a direct claim in tort. The immunity is in tort, and no alteration in the mode of proceeding will alter that.** (emphasis added mine) It seems to me to be improbable in the extreme that, apart from 1947 Act, the position

could be that the Crown is immune from all proceedings in tort save that a declaration can be made that certain conduct by the Crown is tortious and wrong and should not take place or be continued. I do not think that it would make any difference even if the declarations sought were to be reworded so as to speak of the rights of the plaintiffs rather than the wrong of the defendants. You do not prevent a claim for a declaration from being a claim in tort by saying that what you seeking is not a declaration that the acts of the defendant are unlawful or tortious, but a declaration that you have right not to be injured by the defendant's unlawful acts or torts."

18. I shall also discuss O.50, rr.1 and 2

O.50, r.1(2) of the CPR 1972 which governs proceedings against the Republic states:

'Order against the Republic' means an order, including an order for costs, made in any civil proceedings by or against the Republic or in connection with any arbitration to which the Republic is a party, in favour of any person against the Republic or against a Government Department or against the President or an officer of the Republic as such; (emphasis added mine)

'Order' includes a judgement, decree, rule, award or declaration.

O.50, r.2 of the CPR1972 provides:

'No Writ of Summons to commence civil proceedings against the Republic by virtue of section 3 of the Republic Proceedings Act 1972 cannot be taken without leave of the Cabinet shall be issued unless prior to its issue the plaintiff has presented at the Registry of the Court in which the proceedings are to be commenced a Certificate under the hand of the Secretary of the Cabinet that the Cabinet has given leave for those proceedings to be commenced and such Certificate has been filed.'

19. In the plaintiff's statement of claim at paragraph 6 he is seeking a declaration that the Nauru Police Force committed a tort against the plaintiff; a further declaration that the plaintiff is entitled to be paid the replacement cost of a new motorcycle and costs of the suit. The defendants' contention is that all these amount to an enforcement of a claim against the Republic as provided for in section 3(2) of RPA 1972.
20. A tort is a civil wrong which causes injury to a person which entitles him to seek compensation for that wrong. In this case the plaintiff is seeking a declaration that the Nauru Police Force impounded his motor cycle and subsequently lost it and thereby committed an act of tort against him; and a further declaration that he is entitled to be paid the replacement cost of a new motorcycle – so the entire act of tort is complete. Although the plaintiff seeks these orders in the form of declarations, and if these orders were to be granted it would infringe section 3(2) of RPA 1972 as this proceeding was filed "to enforce a claim against the republic" without leave of the Cabinet.



## CONCLUSION

21. In the circumstances the plaintiff's claim is dismissed. I make no orders as to cost as this is the first time that the interpretation of section 3(2) of RPA 1972 has been advanced before this court in this manner.

DATED this 12 day of January 2021

Mohammed Shafiullah Khan  
Acting Chief Justice