REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Case Title:	**Case No:**
Kangandjera Haufiku Gregory v Minister of Safety and Security	HC-MD-CIV-ACT-OTH-2021/01397
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Schimming-Chase	**Date of hearing:** 19 April 2022
	Delivered on: 9 May 2022
Neutral citation: *Gregory v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2021/01397) [2022] NAHCMD 228 (9 May 2022)	

The order:

Having heard **Mr Gaeb**, amicus curiae, and **Mr Kauari**, on behalf of the defendants and having read other documents filed of record:

IT IS ORDERED THAT:

1. The special plea of prescription is upheld.
2. The matter is finalised and removed from the roll.
3. No order is made as to costs.

Below are the reasons for the above order.

Schimming-Chase J:

Introduction

[1] This plaintiff is a serving inmate at the Hardap Correctional Facility in Mariental. He instituted civil action against the Minister of Safety and Security and other Governmental defendants for theft by certain prison officials of property (certain craft items) allegedly belonging to the plaintiff. The defendants raised a special plea of prescription to the plaintiff's claim on the basis that the plaintiff's action was instituted outside the time limits prescribed by s 133(3) of the Correctional Service Act, 9 of 2012 ('the Act'). It is that special plea which now serves before me.

[2] For ease of reference, I will refer to the parties as they appear in the main action. The court is indebted to Mr Gaeb for acting amicus curiae in this matter, and to Mr Kauari, who appeared for the defendants for their helpful heads of argument.

Brief background

[3] As alleged in the particulars of claim, on 3 January 2019, the seventh defendant summoned the plaintiff to his office and 'ordered' the plaintiff to take his craft items to the storeroom in cell seven. The plaintiff complied. He was then detained from 3 January 2019 to 14 January 2019 in a single cell. On 14 January 2019, the plaintiff was informed that he would be transferred to the Hardap Correctional Facility. When he enquired about his craft items, he was verbally informed that the eighth defendant had the keys to the storeroom in cell seven and that he was off duty at that time. The plaintiff further pleaded that he was one of the inmates in cell seven authorised to participate in craft making. In support of this allegation he attached to his particulars of claim an unidentified document containing a list of names of inmates with 'types of crafts' listed next to their names. By letter dated 10 April 2019, the fourth and fifth defendants advised the plaintiff that his claim that he had left his craft items in the

storeroom in cell seven and that he had not received same to date, was false.

[4] The plaintiff then instituted action ("the first action") against the defendants on 5 August 2019. As he had not given the defendants the requisite written notice as envisaged by s 133(4)[1] of the Act, he withdrew that action on 10 February 2021, and on this date, notified the defendants of his intention to institute a civil action against the State as required by the Act. Summons in respect of the present matter was then issued on 9 April 2021.

[5] It is the plaintiff's case that the total value of the craft items in question is N$51,500. Further that, by arbitrarily depriving him of his craft items, the defendants caused him loss of income – as he would have generated N$51,500 from same. The plaintiff claimed a further N$51,500 damages and N$500,000 for loss of 'ordinary amenities of life, discomfort and suffering as a result of the violation by the defendants of his Article 8 right to dignity'.

Defendant's special plea

[6] The defendants raised a special plea of prescription. The defendants' stance is that from their reading of the plaintiff's particulars of claim, his cause of action arose on 14 January 2019 and that summons in the present matter was issued on 10 April 2021. Thus the plaintiff's claim is out of time if one considers s 133 (3) of the Act. The defendants pleaded over and alleged that on or about 3 January 2019, information was received that the plaintiff was engaged in gang activity. Unit seven, where the plaintiff was kept, was then searched and all unauthorised items were confiscated. Defendants pleaded further that the plaintiff was not granted permission to partake in craft activities and if he was, as he alleged, then according to the defendants, he had not provided proof thereof.

[1] The subsection provides that notice in writing of every such action, stating the cause thereof and the details of the claim, must be given to the defendant at least one month before the commencement of the action.

[7] In his replication, the plaintiff pleaded that on his interpretation of s 133(3) of the Act, his claim had not prescribed, because he instituted his action within the prescribed time frames. Also, the craft items in question were not unauthorised items as 'offenders housed in unit seven, prior to the plaintiff's transfer to the Hardap Correctional Facility', were given verbal permission to partake in craft making.

[8] The plaintiff took a further point that the defendants' special plea is excipiable for being vague and embarrassing, in that it does not disclose material facts or part of the section that renders the plaintiff's claim to have prescribed. In the alternative, the plaintiff took the stance that his cause of action was essentially based in theft, which action was not one covered by the Act, as the actions of the defendant could not have been undertaken in pursuance of the Act. Further, and in any event, the plaintiff's first action which was withdrawn on 10 February 2021, interrupted prescription.

Issue for determination

[9] The first issue for determination is whether the defendants' special plea is excipiable. The second issue for determination is whether the conduct of the prison officials was conduct undertaken in pursuance of the Act, thereby ousting its provisions for purposes of determining the issue of prescription. The third issue is whether the first action of the plaintiff interrupted prescription.

[10] As regards the first issue, I am of the considered view that the special plea is not excipiable for being vague and embarrassing. The principle is now trite that the object of pleadings are to provide a succinct statement of the grounds upon which a claim is made or resisted. Where such a statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing when it cannot be gathered from it what ground is relied on by the pleader. Whether an exception on the ground of being vague and embarrassing is established depends on whether there was compliance with rule 45(5) of the High Court Rules, subject to the overriding objective of judicial case

management. The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly a determination of whether the pleading lacks particularity to the extent that it is vague and secondly, determining whether the vagueness caused prejudice.[2]

[11] The special plea is not meaningless nor is it capable of two meanings. It is also not vague and embarrassing as it is clear to my mind from reading same, that the ground relied upon is one of prescription in terms of the Act. Further, the plaintiff was able to reply to the special plea with no difficulty and therefore I am satisfied that he was not prejudiced by any vagueness or embarrassment, if any, of the special plea. The plaintiff was wrong to allege that the relevant legislative provision was not cited, because s 133(3) was cited in the special plea. Furthermore and in any event, the plaintiff did not give the defendant an opportunity to remove the cause of complaint. It is for these reasons that I reject the exception raised. I now proceed to consider the special plea of prescription.

When did the cause of action arise?

[12] The s 133(3) provides that:

'(3) No civil action against the State or any person for anything done or omitted in pursuance of any provision of this Act may be entered into after the expiration of six months immediately succeeding the act or omission in question, or in the case of an offender, after the expiration of six months immediately succeeding the date of his or her release from correctional facility, but in no case may any such action be entered into after the expiration of one year from the date of the act or omission in question.'

[13] In *Kahimise v Commissioner General of Correctional Services*[3], Masuku, J held

[2] *Van Straten v Namibian Financial Institutions Supervisory Authority* 2016 (3) NR 747 (SC) para [19] and [20].

[3] *Kahimise v Commissioner-General of Correctional Services* (HC-MD-CIV-MOT-REV-2020/00054) [2021] NAHCMD 24 (4 February 2021).

that the computation of the time within which the proceedings could be brought should be calculated from the last action which instigated the proceedings.

[14] It is the plaintiff's version that the cause of action arose on 10 April 2019 when it was conclusively communicated to him by the defendants by letter annexed to the particulars of claim and marked "E" that his allegations pertaining to the 'missing' craft items were false. Further, on 5 August 2019 the plaintiff instituted the first action against the defendants, which he withdrew on 10 February 2021 so as to give notice to the defendants in terms of s 133(4) of the Act. According to the plaintiff, this first action interrupted prescription. As such, the argument goes, the prescription period in respect of this action only became operative from 10 February 2021 when the initial matter was withdrawn. Therefore, when the plaintiff instituted the present action on 9 April 2021, the six month period envisaged in s 133(3) had not yet lapsed.

[15] On their part the defendants take the view that the plaintiff's cause of action arose on 14 January 2019 when the plaintiff was allegedly denied access to his craft items.

[16] Insofar as the argument of interruption of prescription goes, it was submitted by the defendants that as the cause of action had arisen on 14 January 2019 (on their version), the first action instituted on 5 August 2019, was out of time in terms of s 133(3). Alternatively, in the event that this court finds that the cause of action arose on 10 April 2019, defendants argued that the first action could not have interrupted prescription, firstly because the summons was marred with discrepancies and did not comply with s 133(4) in that no notice of the intended action was given to the defendants prior to the institution of that action, and secondly, because the first action was not successfully prosecuted to finality.

[17] I am of the considered view that the cause of action arose on 10 April 2019. I say so because the letter from the fifth defendant dated 10 April 2019 was the last action which instigated the present proceedings. All other times when the plaintiff made

enquiries regarding his craft items, there was no conclusive denial by the defendants of the truthfulness of his allegations as regards the whereabouts of his craft items. What instigated the first action of the plaintiff and ultimately this one was the allegation that the plaintiff's claim was false and that he was given the opportunity to remove his belongings from the locker before being transferred to the Hardap Correctional Facility.

[18] As regards the question of interruption of prescription, it is an established principle that the service of process on a debtor must commence proceedings against the debtor in a legally effective manner. Thus, where service of the process is premature in terms of a statutory provision such as the Act, legal proceedings are not effectively commenced and prescription is therefore not interrupted in such an instance.[4]

[19] In light of the foregoing, it is apparent that the plaintiff's first action, although instituted and served before the lapse of six months (calculated from 10 April 2019) was withdrawn by the plaintiff because the plaintiff did not comply with s 133(4) of the Act, which provides that one month's written notice must be given before the institution of any action against State. The plaintiff had not given such notice before he instituted the first action and this was the reason for the withdrawal the first action. The first action was thus premature in terms of s 133(4) of the Act because same was not legally effective for want of compliance with the statutory notice period. The court order marked "GK2" removed the matter from the roll for the reason that it was withdrawn by the plaintiff. In any event, even if that matter had been prosecuted to finality, it would not have been successful, for the same reason. Thus prescription was not judicially interrupted by institution of the first action as same was not competent for want of compliance with the statutory time periods.

Was the conduct complained of one that was in pursuance of the Act?

[4] MM Loubser *Extinctive Prescription* Juta & Co 1996 at 127 and the authorities collected at fn 29. See also *Nangolo v Imene* (HC-MD-CIV-ACT-CON-2016/03515) [2018] NAHCMD 109 (20 April 2018).

[20] Section 133(3) of the Act provides that:

'(3) No civil action against the State or any person for anything done or omitted in pursuance of any provision of this Act may be entered into after the expiration of six months immediately succeeding the act or omission in question, or in the case of an offender, after the expiration of six months immediately succeeding the date of his or her release from correctional facility, but in no case may any such action be entered into after the expiration of one year from the date of the act or omission in question.' (emphasis supplied)

[21] In argument, it was submitted on behalf of the plaintiff that for s 133 (3) of the Act to apply, the conduct complaint of must have been an act or an omission 'in pursuance' of the Act. I understand the argument of the plaintiff to be that the actions of the defendants amounted to theft and thus were not undertaken in pursuance of the Act. The defendants in their plea on the merits vehemently deny that the plaintiff had any authorisation to participate in any craft making and absent such authorisation or proof thereof, 'any illegal items found on plaintiff within unit seven were confiscated'. Further that, when the plaintiff was taken to be detained in the single cell – he placed his belongings in a locker, locked same and was given the key. On the day he came out of the single cell, he opened the lock and took his belongings.

[22] My issue with this argument, though at first glance prima facie persuasive[5], is that the plaintiff instituted his first action, as well as this action - in terms of the Act. If the argument was to hold, the first action, and in particular this action, should not have been instituted in compliance with the Act's provisions. In fact this is the reason why the first action was withdrawn and the present one instituted. In his particulars of claim, the plaintiff also formally brought the provisions of s 133 of the Act into play when he pleaded that the defendants were given notice in terms of s 133(4).

[23] In the result, this argument does not hold water. The plaintiff bound himself to the provisions of the Act. The first action was premature for lack of statutory compliance, and this action was instituted outside the time frame prescribed by s 133.

[5] *HN & Another v Government of Namibia* 2009 (2) NR 752 (HC) at para 15.

The plaintiff's claim has accordingly prescribed.

[24] In the result the following order is made:

1. The special plea of prescription is upheld.
2. The matter is finalised and removed from the roll.
3. No order is made as to costs.

Judge's signature:	**Note to the parties:**
Schimming-Chase Judge	Not applicable.
Counsel:	
Applicant	**Respondent**
KN Gaeb (amicus curiae) Sisa Namandje & Co Inc Windhoek	N Kauari Government Attorneys Windhoek