



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1598/2013

In the matter between:

1.1.1.1.

JUNIAS FILLIPUS

PLAINTIF

And

GOVERNMENT OF THE REPUBLIC

OF NAMIBIA

DEFENDANT

Neutral citation: *Fillipus vs Government of the Republic of Namibia (I 1598-2013)*
[2016] NAHCMD 238 (18 August 2016)

Coram: Miller AJ

Heard: 25 to 27 July 2016

Delivered: 18 August 2016

Summary: The plaintiff was arrested without warrant on the 27th of July 2010 in Windhoek. He was further detained at the Windhoek Correctional Facility for 191 days until the charges were withdrawn against him on the 13th of May 2011. The Plaintiff instituted his first action against the defendant after one year and some months after his date of arrest, and later withdrew it. He instituted another action against the same defendant in that he was unlawfully arrested, detained, consequently that he has suffered damages in that regard. The defendant raised a special plea of prescription in terms of Section 39 of the Police Act of 1990.

The question that this Court had to decide was whether the plaintiff's claims are prescribed in terms of section 39 of the Police Act.

ORDER

1. The special plea to claims 1 & 2 is upheld.
2. The special plea to claim 3 is dismissed.
3. The plaintiff is ordered to pay 70 percent of the defendant's costs which will include the costs of one instructing and one instructed counsel.
4. The matter is postponed to **08 September 2016** at 15h30 for a status hearing

JUDGMENT

MILLER, AJ

[1] The parties in this matter are Junias Fillipus, hereinafter referred to as the plaintiff who is an adult male person residing at Ohamenya village in Ohangwena region. Namibia.

[2] The defendant is the Government of the Republic of Namibia. Established in terms of Article 1 of the Namibian Constitution, c/o 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek Namibia.

Brief Background

[3] On the 27th of July 2010, the plaintiff was arrested without a warrant by a certain Sergeant Amatundu employed by the defendant specifically in the Ministry of Safety and Security for the rape and murder of Magdalena Stoffel.

[4] The plaintiff was detained at the Windhoek Correctional Facility for a period of 191 days until the charges were withdrawn against him on the 13th of May 2011.

[5] The plaintiff first instituted action proceedings under case number I 231/2012, which he withdrew on the 10th of July 2013. Subsequently, the plaintiff around May 2013, instituted a new action against the defendant for damages under case number I 1598/2013 in which he claimed the following:

5.1. The first claim is for unlawful arrest and the quantum claimed is N\$ 200 000 for damages suffered.

5.2. The second claim is for wrongful detention which violated his constitutional rights as enshrined in Article 7, 8(1) and 11(1) of the Namibian Constitution and the plaintiff claims N\$ 2 000 000.00.

5.3. The third claim is for malicious prosecution in respect of which the plaintiff claims N\$ 500 000.00 for damages suffered.

[6] The defendant raised a special plea of prescription and none compliance by the plaintiff with the provisions of section 39 of the Police Act¹ in respect of all claims. The defendant submits that the plaintiff's cause of action arose more 12 calendar months prior to the date upon which summons was instituted and, as a result the claim has prescribed

[7] The issue thus to be decided is whether the plaintiff's claims have prescribed.

Applicable Law

[8] Section 39(1) of the Police Act 19 of 1990 reads as follows:

' any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within 12 months after the cause of action arose and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than 1 month before it is instituted.'

[9] The above mentioned section sets out two requirements:

1. Firstly that a civil action against the state or any person in respect of anything done in pursuance of the said Act shall be instituted 12 months after the cause of action arose, and;
2. A notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than a month before such action is instituted.

¹ Act 19 of 1990

[10] Ndauendapo J at para 9 in the case of Zhang Fuang vs The Government of the Republic of Namibia held that -

'In Namibia the Supreme Court had occasion to consider section 39(1) of the Police Act. In the case of Minister of Home Affairs v Madjiedt and Others 2007(2) NR 475 the court, in refusing to declare section 39(1) unconstitutional, held that:S39(1) "differentiation (between claimants under the Police Act and other claimants covered by the Prescription Act 68 of 1969) was reasonably connected to a legitimate governmental objective. The inherent inequality said to be existing in S39(1), was justified and reasonably so, by the need „to regulate claims against the State in a way that promotes, speed, prompt investigation of surrounding circumstances so that, where necessary, the State could ensure that it was not engaged in avoidable and costly civil litigation“.'

Application of the law to the facts

[11] It is common cause between the parties that there was no compliance with the relevant provisions of the Police Act. The case sought to be made by the plaintiff is that he was prevented from doing so. His evidence is to the effect that he was driven to his home in the north of the country once the charges had been withdrawn. He concedes however that he had the telephone number of his legal representative and was within reach of telephonic communication with him. He admits also that he would have been ask to travel to Windhoek.

[12] It follows in my view that the attempt to establish that the plaintiff was prevented from complying with the relevant section of the Police Act must fail.

[13] It follows further that the special plea in relation to the first and second claims must be upheld.

[14] The third claim which is based on an alleged malicious prosecution is in a different category. A prosecution malicious or otherwise is at the instance of the

Prosecutor-General and not the Namibian Police. Consequently there is no need for compliance with the Police Act.

[15] As far as costs are concerned, the defendant was successful in respect of two of the claims. The plaintiff was successful in respect of the third claim. That being the case I consider it appropriate to order the plaintiff to pay a portion of the costs.

[16] In the result I make the following order

1. The special plea to claims 1 & 2 is upheld.
2. The special plea to claim 3 is dismissed.
3. The plaintiff is ordered to pay 70 percent of the defendant's costs which will include the costs of one instructing and one instructed counsel.
4. The matter is postponed to **08 September 2016** at 15h30 for a status hearing.

MILLER

ACTING JUDGE

APPEARANCES

PLAINTIFF

T Ipumbu

Titus Ipumbu legal practitioners, Windhoek

DEFENDANT

G Hinda

Instructed by Government Attorneys, Windhoek