

Flynotes: Civil Practice — Actions against Namibian Police and Correctional Services — Requirements to be met in terms of s 39(1) of Police Act 19 of 1990 and s 133 of the Correctional Services Act 9 of 2012 — Section 39(1) of Police Act 19 of 1990 providing for period of 12 months within which action to be instituted - Section also providing in proviso for waiver by Minister if period of 12 months has lapsed.

Summary: This matter involves a claim instituted by the plaintiff against. The plaintiff instituted action against members of the Namibian police and Namibian correctional services alleging that members of the Namibian police assaulted and tortured the plaintiff and further that members of the Namibian correctional services placed the plaintiff in an isolation cell to cover up the injuries of assault and torture in attempt to rid of the evidence of the alleged assault and torture committed against the plaintiff by the members of the Namibian police.

The defendants were of the view that in light of the fact that the plaintiff's alleged cause of action and the instituting of civil action by way of summons was approximately 4 years and 10 months, it as a result of that time period, prescribed in terms of section 39 (1) of the Police Act 19 of 1990 and section 133 (3) of the Correctional Services Act 9 of 2012.

The plaintiff submitted that as a result of his imprisonment, he was left destitute with no assistance from the authorities and furthermore that he was kept in an isolation cell for a very long period where he was denied his basic human rights which included the right to consult a lawyer. Although conceding that his claim in terms of the Police Act and Correctional Services Act has prescribed, the plaintiff relied on the provision wherein the Minister can waiver the requirements of section 39 (1) and have his claim heard before this court, subject to the court's order to allow him to make an application to the Minister for waiver.

Held – There is no evidence before this court to suggest that the plaintiff was indeed impeded from prosecuting his claim as a result of the alleged conduct by the members of the Namibian police and Correctional Services.

Held further – That it would defeat the purpose granting the plaintiff to apply to the Minister for waiver and in the event of the waiver being granted, to have his claim dismissed on the ground of prescription if the plaintiff does not succeed to avoid prescription.

Held further– The position as laid down in *Madjiedt* and *Zhang Fuang*, is to be followed and defendant's special plea is upheld and no order is made as to costs.

ORDER

Defendant's special plea is upheld. No order is made as to costs.

RULING

Prinsloo J:

Introduction:

[1] This matter involves a claim instituted by the plaintiff against members of the Namibian police and Namibian correctional services. The plaintiff alleges that members of the Namibian police assaulted and tortured the plaintiff and further that members of the Namibian correctional services placed the plaintiff in an isolation cell to cover up the injuries of assault and torture in attempt to rid of the evidence of the alleged assault and torture committed against the plaintiff.

Background

[2] The plaintiff's summons and particulars of claim were served on the defendants on 15 May 2017 as per the return of service filed of record on 6 June 2017.

[3] The plaintiff in his particulars of claim alleges that the cause of action arose on 3 July 2012 as follows:

'5. At approximately 12h00 and 13h00 on the 3rd of July 2012 and at or between Otjinene and Gobabis, Plaintiff was wrongfully, unlawfully and intentionally assaulted and subjected to torture by members of the Namibian Police in the bushes, whose names are not known to Plaintiff

6. Plaintiff was or had been assaulted by approximately ten members of the Namibian police, whose names are unknown to Plaintiff, the said assault consisted of Plaintiff being kicked and hit with batons and rifle butts all over Plaintiff's body by the said members of the Namibian Police, this took place between the hours of 12h00 and 13h00 in the afternoon on the 3rd July 2012 at the place of Plaintiff's arrest...' (sic)

[4] Although not quite easy to read from the plaintiff's handwritten particulars of claim, the plaintiff further alleges that he was subject to further torture by the hands of the members of the Namibian police. In a nutshell, the plaintiff alleges that he was incarcerated where he was subject to inhumane treatment by members of the Namibian Police and Namibian Correctional Service who had no regard for his constitutional rights and in essence prevented him from exercising his rights to consult a lawyer to institute legal action within the prescribed period.

Submissions by the defendants

[5] The defendants submit that the approximate time period of plaintiff's alleged cause of action and the instituting of civil action by way of summons is approximately 4 years and 10 months.

[6] The defendant further submits that in terms of section 39 (1) of the Police Act 19 of 1990 and section 133 (3) of the Correctional Services Act 9 of 2012, the plaintiff's claim, when calculated from the date when the cause of action arose to the date on which he instituted the civil action, has become prescribed.

[7] The defendants further highlight the provisions of section 39 (1) which provides that 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 the cause thereof shall be given to the defendant not less than 1 month before it is instituted, provided that the Minister may at any time waive compliance with the provisions of this subsection. In this light, the defendant submits that the plaintiff's claim was instituted outside the 12 months' time period in terms of section 39 (1) of the Police Act and further that the Minister has not waived compliance thereto as provided in section 39.

[8] The defendants further provide that the plaintiff's claim also prescribed due to the fact that his claim was instituted outside the 6 month time period provided in terms of section 133 (3) of the Correctional Services Act wherein it states that:

'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.'

[9] The defendants in concluding, submit that even though the plaintiff was incarcerated during the time the alleged cause of action arose, he could have applied for legal aid as he did and he would have been assisted in bringing his claim within the

prescribed period of section 39 of the Police Act. Furthermore, the defendants submit that the plaintiff had the option of applying for a waiver to the Minister and as a result, the plaintiff's claim is fatally flawed and has become prescribed.

Submissions by plaintiff

[10] The plaintiff submits that as a result of his imprisonment, he was left destitute with no assistance from the authorities who was supposed to assist him. Furthermore the plaintiff submits that he was kept in an isolation cell for a very long period where he was denied his basic human rights which included the right to consult a lawyer.

[11] Further the plaintiff cites the case of *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC), which is the *locus classicus* when referring to section 39 (1) of the Police Act, and concedes that according to the cited judgment, his claim has prescribed as per section 39 (1) of the Police Act and section 133 of the Correctional Services Act.

[12] However, citing the same judgment, the plaintiff submits that he may at any time launch an application with the Minister to waive compliance with the provisions of section 39 (1) of the Police Act.

[13] In concluding, the plaintiff requests an opportunity to make an application to the Minister for such waiver before a decision is made regarding the prescription of his claim.

The law applicable

[14] In *Mahupelo v Minister of Safety and Security and Others* 2017 (1) NR 275 (HC) the court made the following remarks with respect to section 39 of the Police Act:

[16] It is clear from the reading of s 39 of the Police Act that a proper and timeous notice of intention to bring proceedings is a pre-condition for the institution of a civil action under the Police Act. The question that would arise from the reading of this section would point to the purpose of this notice.

[17] The purpose of the notice in terms of s 39 of the Police Act was expounded in a number of judgments in the Namibian and as well as the South African jurisdictions. This is what the courts had to say in the case of *Simon v Administrator-General, South West Africa*:

“The object of the notice required under s 32(1) is, as had been said often enough, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter. See *Minister van Polisie en 'n Ander v Gamble en 'n Ander 1979 (4) SA 759 (A)* at 769H. The notice need not be as detailed as a pleading.”

[18] It has further been stated:

“The purpose for which the notice is required to be given is of importance. That purpose is to ensure that the State, or the person to be sued, receives warning of the contemplated action and is given sufficient information so as to enable it or him to ascertain the facts and consider them.”

[15] In *Minister of Home Affairs v Majiedt and Others* Chomba AJA made the following remarks with reference to section 39 of the Police Act as follows:

[42] The s 39(1) proviso has also been criticised because the power of waiver has been vested in the Minister, who is at the same time the member of Cabinet responsible for the national police. It is granted that the Minister, not being a person who is not potentially disinterested, may not give a sympathetic ear to the waiver application. However, the supreme law of the land, the Namibian Constitution, obligates him/her to act fairly and reasonably and to comply with the tenets of common law and of any relevant statutory law when dealing with public affairs. In addition, the Constitution provides that a person who is aggrieved by the decision of a Minister in relation to a waiver application has a right to approach a court of law to ventilate his/her grievance (see art 18). True, by application of the s 39(1) proviso, access to court is delayed in as-much as the claimant has first to apply to the Minister and to subsequently win a waiver

before litigating on his claim. However, the entitlement to exercise the right of access to a court is never thwarted, it is never extinguished. Therefore I agree with Mr Coleman's argument that s 39(1) does not attempt to exclude the right of access to a court of law. In reality the position of a claimant taking advantage of the safeguards identified by the judge a quo is no better than that of the claimant resorting to the s 39(1) proviso. The former does not straight away litigate his claim, but has first of all to satisfy the court as to when he became aware of his right to sue or when he might reasonably be expected to have become aware. In that sense his right to litigate on the substantive issue is in reality equally delayed.'

[16] 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. The plaintiff however does not indicate how he was prevented from doing so. It is alleged that as he was in solitary confinement he had no contact with the outside world, yet attached to the particulars of claim are two letters from the Office of the Ombudsman dated 13 March 2013 and 20 October 2016 following correspondence from the plaintiff. There is also a letter attached dated 28 September 2015 directed to the Legal Assistance Centre. In addition thereto there is a copy of a charge sheet and an extract from court proceedings attached. The attached documents do not support the argument of superior force preventing plaintiff from complying with the relevant section of the Police Act. Plaintiff could have applied for the waiver in terms of section 39 at any time but failed to do so. Even if the plaintiff was detained in isolation he made court appearances and during his very first court appearance his right to legal aid was explained to him and he could have applied for legal aid then to assist him in prosecuting his claim as he has done now. Therefore to make a bold statement to say that he was prevented from complying with the relevant section of the Police Act and leave it at that is of no assistance to the plaintiff and his attempt to establish that he was prevented from complying with the relevant section of the Police Act must fail.

Conclusion

[16] At this point, it is seemingly common cause between the parties that in terms of section 39 (1) of the Police Act and section 133 of the Correctional Services Act, the

plaintiff's claim has prescribed. The plaintiff also conceded as such, however, is it the role of this court to allow the plaintiff the opportunity to make an application to the Minister to have the section waived so that the plaintiff can pursue its claim against the Namibian Police? As the plaintiff made submissions that it was difficult for him to seek legal representation due to incarceration and as a result, was impeded from pursuing his claim within the prescribed time period.

[17] In *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 579B the following is stated:

'It is accepted in the (1969 Prescription) Act that there are circumstances in which it would be unfair to require of the creditor that he institute proceedings within the time normally allowed. This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit.'

Hoff J in *Bank Windhoek Ltd v Kessler* 2001 NR 234 (HC) had regard to the dictum of Marais JA in *ABP 4X4 Motor Dealers (Pty) Ltd v IGI A Insurance Company Ltd* 1999 (3) SA 924 (A) at 930I-931A wherein he stated that:

'Next to be observed is that the use of the word "impediment" in ss (1)(i) is not to be taken to literally and interpreted as meaning an absolute bar to the institution of legal proceedings. ... some of the circumstances set forth in ss (1)(a) to (h) give rise to an absolute bar, others do not ... The word "impediment" therefore covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative.'

[18] It should be noted that if the plaintiff is to be granted the waiver and have his claim adjudicated, the defendants will come on the same defence of prescription as in the current matter before court. The plaintiff specifically requests that he be afforded the opportunity to apply for waiver to the Minister before a decision is made regarding the prescription of his claim.

[19] In all respects, it would defeat the purpose granting the plaintiff to apply to the Minister for waiver and in the event of the waiver being granted, to have his claim dismissed on the ground of prescription if the plaintiff does not succeed to avoid prescription.

[20] Furthermore, Ndaudapao J at para 9 in *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”.'

[21] Now it is very difficult to determine whether the plaintiff was indeed impeded to prosecute his claim as a result of the alleged conduct by the members of the Namibian police and Correctional Services, and if granted the opportunity by the Minister, would be able to submit the necessary evidence to persuade this court that he was indeed assaulted as claimed.

[22] However, there is no evidence before this court to hold otherwise than the position as laid down in *Madjiedt* and *Zhang Fuang*, therefore, the defendant's special plea is upheld. No order is made as to costs.

[23] My order is therefore as follows:

1. Defendant's special plea is upheld. No order is made as to costs.

J S Prinsloo
Judge

APPEARANCES:

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