

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2017/02151

In the matter between:

AVELINUS ELIA

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

1ST DEFENDANT

**COMMISSIONER GENERAL OF THE
NAMIBIAN CORRECTIONAL SERVICE**

2ND DEFENDANT

**SENIOR SUPERINTENDENT OF THE
NAMIBIAN CORRECTIONAL SERVICE**

3RD DEFENDANT

Neutral citation: *Elia v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017/02151) [2019] NAHCMD 21 (04 February 2019)

CORAM: **PRINSLOO J**

Heard: 05 December 2018

Delivered: 04 February 2019

Reasons: 12 February 2019

Flynote: Civil Practice – Actions – Correctional Services – Requirements to be met in terms of s 133 (4) of the Correctional Service Act 9 of 2012 – Claimant to give

one month notice before instituting legal proceedings against the State – Exception raised by defendants in terms of s 133 (4) of Correctional Service Act 9 of 2012 for non-compliance.

Summary: Plaintiff instituted a claim against the defendants for assault allegedly perpetrated by the members of the second defendant. The defendants however raised an exception to the claim filed by the plaintiff in that plaintiff failed to provide the statutory notice of 1 month as provided in s 133 (4) of the Act prior to the institution of these proceedings.

Plaintiff then challenged the constitutionality of s 133 (4) of the Correctional Service Act in light that it infringed upon his constitutional right in terms of Article 12 to have his claim adjudicated by a court of law. Plaintiff was of the view that dismissing his claim based on s 133 (4) would result in a violation of his entrenched constitutional right to have his matter heard in a court of law.

The defendant, on the other hand, was plainly adamant that the plaintiff's claim must be dismissed solely on the basis that he did not comply with s 133 (4), which is couched in peremptory terms.

Held that the general view of this court seems to be that statutes imposing limitations is not to prevent parties from executing their claims per say entirely, but to do so in a timeous manner.

Held further that looking at the provisions of s 133 (4), the primary intention is to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter and consider its options primarily. As was held in *Minister of Home Affairs v Madjiedt and Others*, the requirement of statutory notice is administrative in that it ensures that relevant government ministries and/or agencies prepare adequately for contemplated proceedings or ultimately avoid such costly proceedings.

Held further that it is clear that a constitutional challenge cannot be launched for the first time in heads of arguments. To conduct the matter in this manner puts the defendants at a disadvantage, which would be prejudicial to them. Parties who

challenge the constitutionality of a provision in a statute must raise the constitutionality of the provision at the time they institute legal proceedings.

Held further that a proper and timeous notice of the intention to bring these proceedings is a pre-condition for the institution of a civil action under the Act. The purpose of such a notice is to ensure that the State receives warning of the contemplated action and is given sufficient information so as to enable it to ascertain the facts and consider them. It was therefore held that defendants' exceptions are therefore upheld with costs.

ORDER

1. The exceptions are upheld with costs.
2. The plaintiff is afforded 10 days to amend its particulars of claim, if it so advised, failing which the defendant is granted leave to apply for the dismissal of the plaintiff's action within 10 days of the expiry of the aforesaid 10 day period afforded to the plaintiff.
3. The matter is postponed to **14 March 2019** at **15:00** for a status hearing.

JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff instituted a claim against the defendants for assault allegedly perpetrated by the members of the second defendant. The plaintiff is currently serving his sentence in the Namibian Correctional Facility, specifically the Windhoek Central Prison.

[2] Parties will be referred to as they are in the main action.

[3] The defendants raised an exception to the claim filed by the plaintiff on the following basis:

'a) In terms of Section 133(3)¹ of the Correctional Services Act 9 of 2012 (the Act) the cause of action has been brought outside the 6 month period.

b) The plaintiff did not provide statutory notice of 1 month prior to the institution of these proceedings in contravention of Section 133(4)² of the Act.

c) The particulars of claim contains legal definitions of assault and is drafted from heads of argument and does not state how the quantum is derived.'

[4] In the result, proceedings came to a halt pending the determination of the exceptions raised.

[5] The parties were required to file heads of argument in anticipation of the argument herein.

[6] Prior to the hearing of the matter but after the filing of heads of argument the plaintiff filed an application for condonation in the following terms:

'1. Condoning non-compliance with section 133(4) of the Correctional Services Act 9 of 2012 on statutory notice;

2. Granting such further and alternative relief as the above Honorable court may deem fit.'

[7] In addition to the application for condonation the plaintiff launched a constitutional challenge in respect of s. 133 in his heads of argument.

Arguments advanced by the parties

Excipient's submissions

¹ (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.

² (4) 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.

[8] During oral argument Mr Ncube addressed the belated filing of the condonation application and the constitutional challenge that was raised for the first time in plaintiff's heads of argument.

[9] Mr Ncube took issue with the late filing of the condonation application as the defendants are at a disadvantage not being able to respond to the said application. He argued that the filing of the condonation application amounts to a concession on the part of the respondent that he did not give notice as provided for in the Act.

[10] Mr Ncube further urged the court not to give any consideration to the condonation application as it is bad in law and not rule compliant.

[11] On the constitutional issue raised in the plaintiff's heads of argument for the first time the court was referred to the matter of *Lesley Ubiteb v Minister of Education*³ where the court ruled that if a party wish to raise a constitutional issue, as in the matter *in casu*, same should be done on a substantial application and not in heads of argument.

[12] On the merits of the exception raised by the defendants, Mr Ncube argued that the plaintiff should have served the notice on the defendants as envisaged in s 133 (4) of the Correctional Service Act which provide that:

'(4) 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.'

[13] He further emphasized that the use of the word "must" in the above section is peremptory and further that the court has held that the court or any parties to litigation should follow and apply the mandatory provisions. Counsel further submits that the plaintiff did not serve the notice as required by the Act and as a result, meant that this matter is procedurally before court in contravention of the Act.

[14] On the issue surrounding the fairness of s 133 (4) of the Correctional Service Act, Mr Ncube submits that the inherent inequality of the section is justified and

³ *Lesley Ubiteb v Minister of Education* unreported judgment by Unengu J, delivered on 12 August 2011.

reasonably so by the need to regulate claims against the State in a way that promotes the speedy, prompt investigation of surrounding circumstances so that where necessary, the State could ensure that it was not engaged in avoidable and costly litigation. Counsel further submits that s 133 (4) ensures that parties do not approach the court *carte blanche* in the hope that their failure to comply with this provision will be condoned.

[15] On this score, Mr Ncube cites *Legal Aid Board v Singh*⁴ wherein a failure to comply with a similar section rendered the claim irrevocable and the matter was dismissed, despite the fact that the defendants were aware of the matter by virtue of the summons served on them.

[16] Regarding the interpretation to be applied in the current circumstances, Mr Ncube cites *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape*⁵ wherein Schultz JA quoted Stratford JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129 stating that:

'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.'

Plaintiff's submissions

[17] At the commencement of the argument by Ms Mbaeva on behalf of the plaintiff in essence conceded that the plaintiff did not comply with the statutory provisions of s 133 of the Act and that no notice was filed in terms of s 133(4) but submitted that on the notion where an organ of State relies on a plaintiff's failure to serve a notice as required by the Act, that the plaintiff may apply to court having jurisdiction for condonation of the failure. Ms Mbaeva is of the view that a court may grant such condonation if it is satisfied that the cause of action has not been

⁴ *Legal Aid Board v Singh* 2009 (1) SA 184 (N) para 10.

⁵ *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).

extinguished by prescription, and that good cause exists for the failure by the plaintiff and the organ of State was not prejudiced by the failure.

[18] Ms Mbaeva further conceded that s 133(4) is peremptory but raised the question that what if an explanation exists for the court to condone such non-compliance.

[19] On the aspect of the exception raised by the defendants against the plaintiff's particulars of claim that it does not disclose a cause of action, Ms Mbaeva concedes that although how the quantum was arrived at could be considered as vague in the present circumstances, this vagueness does not amount to an embarrassment nor does the embarrassment amount to prejudice. Ms Mbaeva further submits that if indeed the particulars were excipiable, then the defendants should have given the plaintiff the opportunity to remove the cause of complaint as opposed to raising an exception on the grounds that it does not disclose a cause of action.

[20] On the issue of the notice in terms of s 133 (4) of the Correctional Service Act, Ms Mbaeva submits that the Act is meant not only to bring consistency to procedural requirements for litigating against organs of State but also to render them compliant with the Constitution. She was further of the opinion that the Act seeks to achieve a procedure that is not arbitrary and one that operates efficiently and fairly both for a plaintiff and organ of State by giving the court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. In this regard the court was referred to *Mohlomi v Minister of Defence*⁶.

[21] Ms Mbaeva further advanced an argument on the constitutionality of s 133 (4) of the Correctional Service Act, but also conceded that this argument was advanced for the first time in the plaintiff's heads of argument and did not reply to the argument of Mr Ncube regarding the prejudice.

[22] Ms Mbaeva argues that the provision is in actual fact unconstitutional and invalid which does not follow the tradition of constitutionalism and or allow for judicial activism and judicial discretion on the check and balance mechanism of the balancing abuse of power.

⁶ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

[23] Counsel further submits that the argument that it is peremptory by the legislative use of the word “must” and therefore resulting in the plaintiff’s claim be dismissed without due regard to his circumstances and persuasive arguments, results in the austerity of tabulated legalism.

[24] Counsel further addressed the argument raised by the defendants that the courts upheld a similar argument in respect of the statutory notice requirement in *Lesley Ubiteb v Minister of Education*. It was argued that defendants’ argument does not hold water in that s 33 of the Public Service Act, whose interpretation the court was ceased with, is not valid in law from the moment it came to be in conflict with the Constitution as is the argument in *Minister of Home Affairs v Madjiedt and Others*⁷ and *Indilinga Systems Design & Logistics CC v The Minister of Safety and Security*⁸. On this score, counsel submits that s 133 (4) of the Correctional Service Act is unconstitutional and invalid as law reform of these statutory non-compliance is called upon in the spirit of transformational constitutionalism as a mode of societal re-engineering contrary to the positivist approach.

[25] In respect of the quantum of damages, Ms Mbaeva submits that on numerous occasions, the plaintiff has applied to have access to his medical records to seek a second opinion, supervise his recovery and in order for him to, with sufficient particularity, lay the quantum of damages in respect of this action. She submits that the defendants arbitrarily denied his applications without just cause and informed him that he can only obtain those medical records once he gets a court order to that effect.

[26] On this score, counsel refers to the exception raised by the defendant that the absence of quantum which, so she argued, demonstrates the double jeopardy that the plaintiff suffers, because counsel submits that the third defendants received the plaintiff’s applications for access to his medical records in their custody and they allegedly capriciously and effectively hamper the plaintiff in his endeavour to have his matter heard by the court.

⁷ *Minister of Home Affairs v Madjiedt and Others* 2007 (2) NR 475 (SC).

⁸ *Indilinga Systems Design & Logistics CC v The Minister of Safety and Security* (I 209/2013) [2014] NAHCMD 264 (20 May 2014).

[27] In concluding, counsel further submits that the circumstances of this matter are exceptional in that the plaintiff is serving in the custody of the defendants and is seeking redress in respect of the abuse of power by the defendants whilst in their custody and he deserves the consideration and protection of this court, not from the law but from the defendants.

Applicable law

Constitutional Challenge

[28] In *Minister of Land and Resettlement v Dirk Johannes Weidts & Another*⁹ Masuku discussed the appropriate time to bring a constitutional challenge with reference to *Prince v President, Cape Law Society, And Others*¹⁰ at para 46 as follows:

[46] Regarding issues that are relevant in the present proceedings, Ngcobo J,¹¹ writing for the majority of the court had this to say about the proper place and time to bring constitutional challenges:

“Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provision sought to be challenged at the time they institute legal proceedings. In addition, a party must place before Court the information relevant to the determination of the constitutionality of the impugned provisions. . . It is not sufficient for a party to raise the constitutionality of a statute in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature or the case that it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.”

It is accordingly clear that the court made some remarks that are pertinent to this case and are instructive and therefore applicable.’

[29] I am of the considered view that these remarks also applies to the matter before me. It is crystal clear that a constitutional challenge cannot be launched for

⁹ *Weidts & Another* (1852/2007) [2016] NAHCMD 7 (22 January 2016).

¹⁰ *Prince v President, Cape Law Society, And Others* 2001 (2) SA 388 (CC).

¹¹ *Ibid* para 22.

the first time in heads of arguments. To conduct the matter in this manner it puts the defendants at a disadvantage, which would clearly be prejudicial in a matter as the one at hand.

Condonation application

[30] If one have regard to the wording of s 133 of the Act it would not appear that there is any provision made for condonation.

[31] The relevant provision of the Act is not qualified with clauses that would have given the court powers to consider an application to extent the time. Unlike the Police Act which provides that 'Provided that the Minister may at any time waive compliance with the provisions of this subsection' the Correctional Services Act does not contain a similar provision. This court can therefore not entertain an application for condonation as no provision is made for such an application in the Act.

Statutory notice of 1 month prior to the institution of these proceedings in contravention of Section 133 (4)¹² of the Act

[32] In *Mahupelo v Minister of Safety and Security and Others*¹³ the court made the following remarks with respect to s 39 of the Police Act, which primarily carries the same intentions imposed by the Legislature in s 133 (4) of the Correctional Service 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.

¹² (4) 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.

¹³ 2017 (1) NR 275 (HC).

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.”

[33] In *Indilinga Systems Design & Logistics CC v The Minister of Safety and Security*¹⁴ Geier J addressed the non-compliance with s 39(1) of the Police Act¹⁵ as follows:

‘It immediately emerges that the plaintiff’s particulars of claim do not comply with this fundamental principle of pleading. Not only has the section relied upon not been pleaded, but also the facts, which would show that the plaintiff has complied with the pre-conditions set by section 39(1) of the Police Act 1990, have not been set out.

[6] As the plaintiff’s particulars of claim thus do not show that the pre-condition for the civil action against the defendants have been met¹⁶, they fail to disclose a cause of action and are thus rendered excipiable thereby.’ (My underling)

Particulars of claim is vague and embarrassing

[34] There is common cause between the parties that the particulars of claim is vague and embarrassing in respect of the calculation of damages.

[35] In the result, I order as follows:

1. The exceptions are upheld with costs.
2. The plaintiff is afforded 10 days to amend its particulars of claim, if it so advised, failing which the defendant is granted leave to apply for the dismissal

¹⁴ (I 209/2013) [2014] NAHCMD 264 (20 May 2014)

¹⁵ Act 19 of 1990

¹⁶ *Simon vs The Administrator General South West Africa* 1991 NR 151 (HC)

of the plaintiff's action within 10 days of the expiry of the aforesaid 10 day period afforded to the plaintiff.

3. The matter is postponed to **14 March 2019** at **15:00** for a status hearing.

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF:

L. Mbaeva

Instructed by Legal Aid Directorate, Windhoek

DEFENDANTS:

J Ncube
Government Attorneys