REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-DEL-2019/00602

TEOFILUS AMADHILA **PLAINTIFF**

versus

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1ST DEFENDANT**
MINISTER OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY **2ND DEFENDANT**
ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA **3RD DEFENDANT**

Neutral citation: *Amadhila v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/00602) [2021] NAHCMD 428 (24 September 2021)

Coram: UEITELE J, RAKOW J, SIBEYA J
Heard: **31 March 2021**
Delivered: **24 September 2021**
Reasons: **18 October 2021**

Flynote: Special Plea - Prescription - Correctional Service Act, 2012 (Act no. 9 of 2012) - Section 133(3) - Section 133(4) – Constitutional Challenge - The Namibian Constitution - Essential freedoms and constitutional human rights protected by the Namibian constitution - Article 10(1) – Article 12(1) (a) - Limitations on the institution of proceedings against the State - Section 39(1) of the Police Act – Section 33 of the Public Service Act.

Summary: The plaintiff instituted action against the defendant after he was physically assaulted by other inmates and sustained serious injuries while in the custody of the defendants. The incident occurred after he had informed an officer in the employ of the second defendant, that he had received information that his fellow inmates were plotting to assault him and he requested to be moved to a different cell. The officer, Mr. Hanguwo, undertook to bring the matter to the attention of his superior, it however appears that he never did and the plaintiff was not moved to another cell.

The plaintiff alleges that the pain, suffering, and trauma he suffered, was caused by the unlawful and wrongful conduct or omission, of the members of the Correctional Service, who were acting within the course and scope of their employment. The plaintiff seeks damages in the amount of N$150 000.00.

After the assault incident, the plaintiff gave notice in terms of s 133(4) of the Correctional Service Act, 9 of 2012. This notice was given within one month after the incident on 7 February 2018, however the plaintiff only instituted the action after the expiry of 12 months from the date when his cause of action arose and therefore seeks for the court to declare s 133(3) of the Correctional Service Act, 9 of 2012 unconstitutional.

The defendants defended the matter and filed a special plea of prescription. Their position is that the alleged incident occurred on 8 January 2018 and the plaintiff was released on bail from the correctional facility on 18 February 2018. On 15 February 2019, the plaintiff issued summons against the defendants. The defendants pleaded that in terms of s 133(3) of the Correctional Service Act, Act 9 of 2012, the plaintiff's claim has become prescribed.

Held that s 133(3) of the Correctional Service Act is similar to s 33 of the Public Service Act, as well as s 39(1) of the Police Act save for the waiver to condone non-compliance with the time limits provided for in the Police Act. All three sections are connected to a legitimate governmental purpose to limit the time for the institution of proceedings against the State.

Held further that to decide whether or not s 133(3) is unconstitutional, the court needs to decide if the section is in breach of the rights protected in Chapter 3 of the Namibian Constitution.

Held that a party seeking to declare a statutory provision unconstitutional bears the onus prove the unconstitutionality.

Held further that when a party challenges a statutory provision, it is prudent to place sufficient material before the court, upon which he/she contends that the limitation in a certain section is unreasonable and it unconstitutionally places a limitation on his or her rights, to enable the court to judicially consider all the facts.

Held that, in order to determine whether or not s 133 (3) of the Act is rigid and inflexible should be determined on a case by case basis and must be assessed regarding the question of whether or not the claimant who is hit by that section was afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to him or her.

Held further that in this matter, the period of 12 months from the date that the cause of action arose, within which action can be instituted, appears to be fair and reasonable and it was the plaintiff's duty to prove the contrary.

Held that a court is not bound by what parties have agreed upon, as the court still has a duty to thoroughly consider the merits of each case and exercise its discretion when issues of the rule of law, which could have a far-reaching effect, are raised.

Held further that where a person is unsuccessful in a constitutional challenge, he/she should not be mulcted in costs but parties must be ordered to pay their costs, unless if the constitutional challenge by the individual was frivolous or vexatious, or was based on objectionable grounds, an adverse cost order may be justified.

ORDER

1. The plaintiff's application to declare s 133(3) of the Correctional Services Act, 9 of 2012 as unconstitutional and inconsistent with Articles 10(1) and 12(1)(a) of the Namibian Constitution is refused.
2. The plaintiff's application to strike down s 133(3) as invalid retrospectively is refused
3. There is no order as to costs.
4. Parties must file a joint status report on or before 30 September 2021.
5. The case is postponed to 05 October 2021 at 08:30 for status hearing.

JUDGEMENT

Background

[1] The plaintiff is Teofilus Amadhila, an unemployed adult male (I will, for ease of reference, refer to the plaintiff as Mr. Amadhila). He instituted action against the Government of the Republic of Namibia, as the first defendant, the Minister of Home Affairs, Immigration, Safety and Security, as the second defendant, and the Attorney General of the Republic of Namibia as the third defendant (I will, for ease of reference, refer to the three defendants as the defendants).

[2] The background facts relating to this matter are as follows: During January 2018, Mr. Amadhila was a trial-awaiting inmate at the Windhoek Correctional Facility. Mr. Amadhila alleges that on 7 January 2018, he became aware of a plot by other inmates to assault him during the night of 7 January 2018. He further alleges that as soon as he became aware of the plot to assault him, he laid a formal complaint with the prison warden on duty on the day, a certain Mr. Hanguwo.

[3] Mr. Amadhila furthermore alleges that he specifically informed Mr. Hanguwo and also explained to him that he feared for his life in that specific cell and requested

to be immediately transferred to another cell. Mr. Hanguwo undertook to discuss the request for his transfer to another cell with his superior, a certain Superintendent Hitorwa.

[4] Mr. Amadhila furthermore alleges that he was never moved to another cell as he requested and also that the officers did not take any steps to protect him against the planned assault.

[5] Mr. Amadhila alleges that on the evening of 8 January 2018, he was physically assaulted by other inmates. He says that he was assaulted all over his body and face, and he sustained serious bodily injuries as a result. Mr. Amadhila contends that the pain, suffering, and trauma suffered, was caused by the unlawful and wrongful conduct or omission, of the officers of the Correctional Service, who were acting within the course and scope of their employment.

[6] On 18 February 2018 Mr. Amadhila was released from custody, on bail. From the pleadings, it appears that prior to his release (to be specific on 7 February 2018), Mr. Amadhila notified the Minister responsible for safety and security of his intention to institute an action. The notice of action concerned damages that he alleges suffered as a result of the omission by the officers of the Department of Correctional Services.

[7] On 15 February 2019, which is slightly more than a year after he was released, Mr. Amadhila caused summons to be issued out of the High Court against the defendants. He claimed an amount of N$ 500 000 as damages in respect of the pain and suffering that he allegedly endured.

[8] On 19 March 2019, the defendants gave notice that they will defend the plaintiff's claim and filed their plea to Mr. Amadhila’s particulars of claim. In their plea, the defendants stated that Mr. Amadhila’s cause of action arose on 8 January 2018 but the summons was only served on the defendants on 18 February 2019, which calculates to 13 months after the cause of action arose. They thus raised a special

plea of prescription, in terms of s 133(3) of the Correctional Services Act, 2012[1] (hereinafter referred to as the Act).

[9] In response to the amended special plea raised by the defendants, Mr. Amadhila amended his particulars of claim. In his amended particulars of claim, Mr. Amadhila amended the amount claimed from N$ 500 000 to N$ 150 000, pleaded that he, in terms of s 133(4) of the Act, gave notice of his intention to institute action against the Minister of Safety and Security within one month of the assault, that is on 7 February 2018. He however admits that he only instituted his action after the expiry of 12 months from the date when his cause of action arose. Mr. Amadhila further pleaded that s 133(3) of the Act which requires him to institute action not later than 12 months from the date that his cause of action arose or within six months from the date of his release from prison, is unconstitutional as it offends Article (10)(1) and 12(1) of the Constitution. He accordingly prayed for s 133(3) of the Act to be declared unconstitutional as a result.

[10] The defendants amended their plea and raised the special plea of prescription in terms of s 133(3) of the Act. The defendants pleaded that Mr. Amadhila instituted his claim outside the prescribed 12 months period from the date that the cause of action arose or six months from the date of release from prison. In response to the amended plea, Mr. Amadhila replicated as follows:

(a) he denied that his claim has, in terms of s 133(3) of the Act, prescribed. He based his denial on the contention that the absence of safeguards which other comparable prescriptive statutes contain, particularly a provision whereby the prescription period contemplated in s 133(3) of the Act can be waived by the Minister or by a competent Court of law causes inequality and thus offends Article 10(1) and 12(1) of the Namibian Constitution;

(b) he contends that, juxtaposing the Act as a prescriptive statute permeates a constitutional violation when read against Article 10(1) and 12(1)(a) of the Namibian Constitution. He stated further that the right to equality before the law and access to

[1] (Act No. 9 of 2012).

the courts is greatly impeded by the lack of the waiver *proviso* and therefore negates prescription;

(c) he contends that in its current state, the Act purports to ensure that every reasonable avenue to the enjoyment of the plaintiff's rights is closed, and

(d) he contends that the current application of the s 133(3) of the Act is rigid, inflexible, and poses a real impediment to the attainment of justice in that he is not allowed all possible avenues to explore to initiate his claim, while similar regulatory statutes allow for a waiver proviso.

[11] Based on the contentions outlined in the preceding paragraph and the replication to the defendants' special plea, Mr. Amadhila, seeks an order dismissing the defendants' special plea of prescription and 'Declaring *that section 133(3) of the Correctional Services Act, 9 of 2012 is unconstitutional as it is inconsistent with Articles 10(1) and 12 (1)(a) of the Namibia Constitution* and *Striking down section 133(3) as invalid retrospectively*.'

[12] During the cause of case management, the managing judge ruled and directed that the challenge to the constitutionality of s 133(3) of the Act be heard before the merits of Mr. Amadhila's claim are heard. It is that challenge that this court is seized with.

[13] The matter was originally scheduled to be heard on 8 October 2020 but the court requested the parties to address it on two issues. The first issue was to compare s 133(3) of the Act with s 39 (1) of the Police Act, 1990 and specifically to consider whether the use of the word "*may*" in s 133(3) of the Act as opposed to "shall" in s 39(1) of the Police Act can be understood to imply flexibility or the power of a court to condone non-compliance with s 133(3) of the Act. The second issue was for the parties to address the court on the test to assess the constitutionality of legislation.

The issue for determination

[14] The question that the Court is required to determine at this stage is whether s 133(3) of the Act infringes the rights of the plaintiff as contained in Article 10(1) and 12(1) of the Constitution. If so, whether such violations are justifiable or not. If the said violation of the plaintiff's rights is justifiable, then s 133(3) would not be unconstitutional but, if the said infringement of the plaintiff's rights is not justifiable, then s 133(3) of the Act will be unconstitutional.

The test applied to determine whether or not a legislative provision violates or infringes the Constitution.

[15] It is now established that the *onus* is on the party who alleges the unconstitutionality of a statutory provision to prove the unconstitutionality. In the matter of *Mwellie v Minister of Works, Transport and Communication and another*[2] Strydom JP (as he then was) quoted from the Indian case of *Govind Dattatry Kelkar and Others v Chief Controller of Imports and Exports and Others*[3] where it was remarked that:

'In short, whether there is a reasonable classification or not depends upon the facts and circumstances obtaining at the recruitment is made. Further, when a State makes a classification between two sources of recruitment unless the classification is unjust on the face of it, the *onus* lies upon the party attacking the classification to show by placing the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution.'

[16] The learned judge (Strydom JP) outlined the matters that the plaintiff has to place before the court to prove the unconstitutionality of the impugned provision in the following terms.

'If therefore … the *onus* is on the plaintiff to prove the unconstitutionality of section 30 (1) on the basis that it infringes the plaintiff's right of equality before the law, it will, on the findings

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2 *Mwellie v Minister of Works, Transport and Communication and another* 1995 (9) BCLR 1118 (NmHC) at p 1135F-G. Also, see Alexander *v Minister of Justice and Others* 2010 (1) NR 328 (SC).

3 *Govind Dattatry Kelkar and Others v Chief Controller of Imports and Exports and Others* (1997) 2 SCR 29.

made by me, have to show that the classification provided for in the section is not reasonable, or is not rationally connected to a legitimate object or to show the time prescription laid down in the section is not reasonable. Until one or all of these factors are proving it cannot be said that there was an infringement of the plaintiff's right of equality before the law.' (Underlined for emphasis).

[17] In the matter of *Disciplinary Committee for Legal Practitioners and Others, v Makando*[4] Parker J (with Siboleka J concurring) held that:

'[9] In considering the first respondent's constitutional challenge based on Article 12(1) and Article 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC). And before it can be held that an infringement has, indeed, taken place, the applicant must define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (S v Van den Berg 1995 NR 23). Under item (2), the inquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, Article 12(1) and Article 18 of the Namibian Constitution – has in truth been violated concerning the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC) (Unreported))'.

The plaintiff's basis of alleging that s 133(3) of the Correctional Services Act, 2012 is unconstitutional.

[18] Mr. Amadhila did not lead any evidence but relied on the pleadings to contend that s 133(3) of the Act is unconstitutional. Pleadings do not constitute evidence. Mr. Amadhila in his amended particulars of claim makes the following allegations:

'20. Section 133(3) is unconstitutional as it offends Articles 10(1) and 12(1) of the Namibian Constitution.

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4 *Disciplinary Committee for Legal Practitioners and Others, v Makando Case No. A 216/2008) (delivered on 08 October 2011).*

21. Section 133(3) produces “unreasonable rigidity and inflexibility which has the effect of either denying [the plaintiff his] right of access to court; [and] because of its failures to provide for safeguards employed in other comparable statutory schemes, treats [the plaintiff] unequally.”

22. *Like* the comparable section 113(1) of South Africa’s Defence Act, 44 of 1957, which has been struck down in South Africa as unconstitutional, and *unlike* section 39(1) of Namibia’s Police Act and section 57(1) of South Africa’s Police Act, 68 of 1995, which have both been held as constitutionally sound, Namibia’s Correctional Services Act, 9 of 2012 does *not* contain a waiver or condonation proviso.

23. There are no other features that would distinguish section 133(3) from section 39(1) of Namibia’s Police Act. In the absence of any mitigating proviso, section 133(3) produces unreasonable rigidity and inflexibility, and inequity between litigants under the Correctional Services Act versus other claimants covered by the Prescription Act, which does not amount to legitimate differentiation, in violation of Articles 10(1) and 12(1)(a) of the Namibian Constitution.

24. As a result, section 133(3) ought to be declared unconstitutional and struck down with retrospective effect.’

[19] At the hearing of this matter, Mr. Maasdorp, who appeared on behalf of the plaintiff and Mr. Ncube, on behalf of the defendants, informed the court that they have agreed that the absence of a provision that empowers a waiver of the prescription period or condonation to comply with s 133(3) of the Act renders the section inflexible and rigid. We indicated to counsel that this court is not bound by what they have agreed upon. The court has a duty to consider the allegations and contentions on their own merits because they raise issues of the rule of law that could have a far-reaching effect. The question that begs the answer is whether Mr. Amadhila has discharged the *onus* to prove the alleged unconstitutionality of s 133(3) of the Act or not.

<u>Does s 133(3) of the Act offend Articles 10(1) and 12(1) of the Namibian Constitution?</u>

[20] Other than saying so, Mr. Amadhila does not set out in detail the basis or grounds upon which he alleges that s133 (3) of the Act offends Articles 10(1) and 12(1) of the Namibian Constitution. We resonate with the words of Kumleben, then AJA, in *Radebe and Others v Eastern Transvaal Development Board*[5]: that the allegation (i.e. that s 133(3) of the Act, offends Articles 10(1) and 12(1) of the Namibian Constitution) in the amended particulars of claim is a conclusion of law, it is at best for Mr. Amadhila an inference, a "secondary fact", with the primary facts on which it depends omitted.

[21] In the matter of *Willcox and Others v Commissioner for Inland Revenue*[6] Schreiner JA explained the concept of '*primary*' and '*secondary*' facts as follows:

> 'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[22] In the instant case, Mr. Amadhila had to state the facts on which he based his conclusion that s 133(3) of the Act, offends Articles 10(1) and 12(1) of the Namibian Constitution. On the contrary, what he did was to plead the legal result.

[23] The conclusion pleaded by Mr. Amadhila further flies in the face of at least two authorities. In the matter of *Mwellie v Minister of Works, Transport and Communication and Another*[7] Strydom JP opined that in general, statutes of limitation do not affect a substantive right guaranteed under a Constitution, but merely limit in time the remedy of bringing proceedings to enforce that right. They only require that the constitutional right be asserted within a particular time, and thus concluded that as a general rule, statutes of limitation are constitutional.

[24] In the matter of *Madjiet and Others v Minister of Home Affairs and Another*[8] Damaseb JP said the following:

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[5] *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-G.
[6] *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602.
[7] *Supra (footnote2).*
[8] *Madjiet and Others v Minister of Home Affairs and Another* Case No (P) A 190/2003 (delivered on 16 May 2005).

'…bearing in mind the rationale, therefore, advanced in Mr. Taapopi's affidavit and the legal argument, I have come to the conclusion that all things, being equal, the 12 – months limitation period and the requirement of prior notice before commencement of proceedings contained in s 39 of the Police Act, are not *per se* unconstitutional. They are connected to a legitimate governmental purpose of regulating claims against the State in a way that promotes speed, prompt, investigation of surrounding circumstances, and settlement if justified.'

[25] In the matter of *Mohlomi v Minister of Defence*[9] Didcott J who authored the Court's judgment reasoned that:

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end, is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

[26] The learned Judge continued and argued that it does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its particular range and terms are compatible with the right which s 22 [the equivalent of our Article 12(1)] bestows on everyone to have his or her justiciable disputes settled by a court of law.

[27] We indicated earlier on in this judgement that no primary facts were placed before us for us to scrutinize the range of s 133(3) of the Correctional Services Act. The failure to place primary facts before us is fatal and for that reason and the reasons that I have set out in the preceding paragraphs, we are of the view that Mr. Amadhila has failed to prove that s 133(3) of the Correctional Services Act offends Articles 10(1) and 12(1) of the Namibian Constitution.

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[9] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

Does s 133(3) of the Correctional Services Act produce 'unreasonable rigidity and inflexibility?

[28] Mr. Amadhila contends that s 133(3) of the Act produces 'unreasonable rigidity and inflexibility' which has the effect of denying him his right of access to the court. That contention is based on the assertion that the failure in s 133(3) to provide safeguards (such as the power to condone non-compliance with the time limits) employed in other comparable statutory schemes, amounts to unequal treatment.

[29] Except for s 39(1) of the Police Act, we have not been referred to the 'comparable' statutory schemes alluded to by Mr. Amadhila. Another statutory scheme that limits the institution of proceedings against the State is s 33 of the Public Service Act.[10] Section 33 of the Public Service provides as follows:

> 33 (1) No legal proceedings of whatever nature shall be brought in respect of anything done or omitted in terms of this Act unless such proceedings are brought within 12 calendar months from the date on which the claimant had knowledge or might reasonably have been expected to have knowledge of that which is alleged to have been done or omitted, whichever is the earlier date.
>
> (2) No such legal proceedings shall be commenced before the expiry of 30 days after written notice of intention to bring such proceedings, containing full particulars as to that which is alleged to have been done or omitted, has been served on the defendant.'

Section 39(1) of the Police Act, 1990 provides as follows:

> '39(1) Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within twelve months after the cause of action arose, and notice in writing of any such proceedings and the cause of action thereof shall be given to the defendant not less than one month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection.'

Whereas, s 133(3) of the Correctional Services Act, 2012 provides as follows:

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[10] Public Service Act, 1995 (Act 13 of 1995).

'133 (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 a 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.'

[30] Section 39(1) of the Police Act, s 33 of the Public Service Act, and s 133(3) of the Act limit the time during which litigation may be launched against the State and require at least thirty days notice before litigation is commenced. In respect of the statutory limitations contained in the three different pieces of legislation, it is only the Police Act which contains a provision that empowers the Minister to, in appropriate circumstances, condone the non-compliance with the time limits set out in the statutes.

[31] Although s 33 of the Public Service Act and s 133(3) of the Act, do not contain a clause that empowers the responsible Minister to condone non-compliance with the time limits set by those sections, the Court found that s 33 of the Public Service Act[11] and s 39(1) of the Police Act, 1990[12] are connected to a legitimate governmental purpose. In the *Mwellie* matter, Justice Strydom argued that:

'It was also submitted that section 30 (1) [the predecessor of s 33 of the Public Service, 1995] deprives the plaintiff of his constitutional right to a fair and public hearing (article 12(1)(a) of the Constitution). It, however, seems to me …that once it is accepted that statutes containing limitation clauses are constitutional such a general statement of the law is untenable.'

[32] In the Supreme Court in the matter of *Minister of Home Affairs v Majiedt and Others,*[13] *Chomba AJA* who authored the Court's judgment reasoned that:

'[43] As regards the constitutional right of equality before the law, the court *a quo* did, after careful consideration of the purpose of enacting for a shorter prescription period

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11 In the matter of *Mwellie v Minister of Works, Transport and Communication and another (supra footnote 2)*

12 In the matter of *Madjiet and Others v Minister of Home Affairs and Another (supra footnote 7).*

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

under s 39(1), accept that it constituted a legitimate differentiation which did not go beyond constitutional propriety. To that end the court stated in the last paragraph on p 26 as follows:

> "For the reasons set out in the judgments to which I have referred extensively and bearing in mind the *rationale* therefore advanced by the first respondent in Taapopi's affidavit and the legal argument I have concluded that all things being equal, the 12-month limitation period and the requirement of prior notice before commencement of proceedings contained in s 39(1) of the Police Act are not per se unconstitutional. They are connected to a legitimate governmental purpose of regulating claims against the State in a way that promotes speed, prompt investigation of surrounding circumstances, and settlement if justified.

[44] Despite the foregoing holding, the Judge President engaged in a volte-face when he looked at s 39(1) as a composite. After concluding that it lacked the safeguards which characterized other prescriptive statutes which provided for permissible conditions, he made statements such as:

> "There is inherent in s 39(1) inequality between a prospective plaintiff under the Police Act and other claimants covered by the Prescription Act … The failure to emulate the statutory scheme of the Public Service Act, which is decidedly more favourable to litigants than is the case in the Police Act, has not been explained at all by the first respondent and adds force to the conclusion that the s 39(1) differentiation is not reasonably connected to a legitimate government objective. "

[45] It would appear to me that the learned Judge President was contradicting himself notwithstanding that his change of stance was arrived at as a result of later looking at s 39(1) as a composite. I disagree with him when he declares that the s 39(1) differentiation was not reasonably connected to a legitimate governmental objective. As for the inherent inequality which he states as existing in s 39(1), that, as he earlier stated, 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. That legitimate Government purpose cannot surely evaporate just because s 39(1) has later assumed a composite stature.'

[33] Mr. Amadhila did not dispute or contradict the generally established justifications recognised by the Courts why limitations are placed on the time during

which litigation may be launched against the State. It was incumbent on Mr. Amadhila to place sufficient material before the court, the basis on which he could claim that the limitation in s 133(3) violated his rights to equality and fair hearing. Mr. Amadhila was duty-bound to demonstrate the alleged unreasonableness of s 133(3) of the Act claimed and lay bare the unconstitutionality of its limitation.

[34] The *obiter dictum* by the Supreme Court in the *Majiedt*[14] case where the constitutionality of s 39(1) of the Police Act was challenged and the Supreme Court referred to provisions that are "rigid and inflexible" does not alter the test for constitutionality as outlined in *Mwellie's* case. The test essentially is that the claimant in a constitutional challenge must prove the unconstitutionality of a provision based on material facts or evidence.

[35] The question of whether or not s 133 (3) of the Act is rigid and inflexible must be assessed concerning the question of whether or not the claimant who is hit by that section is afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to him or her. If the time is short and inadequate, it is unreasonable, rigid, and inflexible. If on the other hand, the time afforded to a claimant is adequate, the question of flexibility and rigidity is irrelevant. The period of 12 months from the date that the cause of action arose, within which action can be instituted, appears to be fair and reasonable unless and until it is proven to the contrary by the claimant.

[36] In this matter, as alluded to earlier, Mr. Amadhila failed to establish why the period of 12 months is alleged to be unfair, unreasonable and rigid, or inflexible. Similarly, no evidence is before us why the period of six months after being released from prison, within which action may be instituted, is claimed to be unreasonable and unconstitutional. Mr. Amadhila was required to provide a reasonable explanation for the failure to comply with the prescription limitation in s 133(3). His failure to provide reasons for not acting within the limited period in terms of s 133(3) deprived the court of the opportunity to assess his non-compliance thereof and further denied the court the opportunity to judicially consider all the facts that could obstruct or hinder him to comply with s 133(3). The court was therefore left with no facts which could explain

[14] Supra footnote 12.

the reasons for non-compliance with s 133(3) and could therefore not assess the effect of the limitation in the said provision baselessly.

[37] The court was not provided with materials or facts to suggest that the limitation in s 133(3) is unreasonable. On the contrary, Mr. Amadhila left the court second-guessing as to what could have obstructed him from complying with the time limitation. Applicants, Mr. Amadhila alike, have a duty to lay bare reasons for their failure to comply with the statutory limitations. Frankly, this court finds the approach of Mr. Amadhila disingenuous as he complains about the limitation in s 133(3) yet he provides no explanation whatsoever why he failed to comply with such limitations. He may have run through obstacles that could make his non-compliance of no fault on his part or may have sat idly doing nothing, the court is left in darkness. How then is the court to determine the reasonableness or lack thereof of the limitation without supporting facts? This approach is akin to shooting in the dark.

Conclusion

[38] In the view of the findings and conclusions made hereinabove, the court concludes that Mr. Amadhila failed to establish that s 133(3) of the Act produces unreasonable rigidity and inflexibility which has the effect of either violating his right to equality before the law or denying his right of access to the court.

Costs

[39] It is trite that costs follow the result. In determining costs, the court retains a discretion that must be exercised judicially. In what has come to be known as the *Biowatch* principle from the celebrated *Biowatch case*,[15] the Constitutional Court of South Africa discussed costs in constitutional litigation and found that cost orders can obstruct the advancement of constitutional justice.[16] The Constitutional Court further found that private parties who are unsuccessful in constitutional litigation

[15] *Biowatch Trust v Registrar Genetic Resource and Others* 2009 (6) SA 232 (CC) (*Biowatch)*. See also *Kambazembi Guest Farm CC v Minister of Lands and Resettlement* 2018 (3) NR 800 (SC).
[16] Id at para 14 at 241J – 242B.

against the State should not generally be mulcted with costs as that may hinder further constitutional litigation.[17]

[40] Adverse constitutional litigation cost orders further threaten the development of our constitutional jurisprudence. Private persons may further be hesitant to challenge the constitutionality of certain statutory provisions in fear of adverse costs which may not be in the interest of justice. Where a private person is therefore unsuccessful in a constitutional challenge, as in *casu*, he should not be mulcted in costs but parties must be ordered to pay their own costs. We caution that there are, however, exceptions to this general principle on costs. Where the constitutional challenge by the individual is frivolous or vexatious or is based on objectionable grounds, an adverse cost order will be justified.

Order

[41] In the result, it is ordered that:

1. The plaintiff's application to declare s 133(3) of the Correctional Services Act, 9 of 2012 as unconstitutional and inconsistent with Articles 10(1) and 12(1) (a) of the Namibian Constitution is refused.
2. The plaintiff's application to strike down s 133(3) as invalid retrospectively is refused.
3. There is no order as to costs.
4. Parties must file a joint status report on or before 30 September 2021.
5. The case is postponed to 05 October 2021 at 08:30 for status hearing.

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S Ueitele

Judge

[17] Id at paras 21- 22.

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E Rakow

Judge

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O Sibeya

Judge

APPEARANCES:

PLAINTIFF:	Adv R Maasdorp Instructed by the Legal Assistance Centre Windhoek
1ST TO 3RD DEFENDANTS:	Ncube J of the Office of the Government Attorney Windhoek