REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: Ishmael Haimbili Benyamen v Government of the Republic of Namibia and 3 Others	**Case No:** HC-MD-CIV-ACT-DEL-2019/04342
	Division of Court: High Court (Main Division)
Heard before: Honourable Justice Ueitele	**Date of hearing:** 06 May 2022
	Date of order: 22 July 2022
Neutral citation: *Benyamen v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/04342) [2022] NAHCMD 361 (22 July 2022)	
Results on the merits: Merits not considered.	
Having heard, **Corinna van Wyk** on behalf of the plaintiff, **Freddy Kadhila** on behalf of the first and second defendants, and **Panderee Kamarenga** on behalf of the third and fourth defendants, and having read the pleadings and all other documents filed of record, in respect of case number **HC-MD-CIV-ACT-DEL-2019/04342**:	

IT IS HEREBY ORDERED THAT:

1. The first and second defendants' special plea of prescription is upheld, and the matter is regarded as finalised as against the first and second defendants.

2. The plaintiff must pay to the first and second defendants their costs of suit.

3. The matter is postponed to **02 August 2022 at 08h30** for status hearing as regards the third and fourth defendants.

4. The parties must file a joint status report by not later than **28 July 2022 at 15h00**, recording the proposed further conduct of this matter, with respect to the claim against the third and fourth defendants.

UEITELE J:

Introduction

[1] The plaintiff is Ismael Haimbili Benyamen an adult male Namibian citizen employed as a paramedic by the Council for the Municipality of Windhoek.

[2] The first defendant is the Government of the Republic of Namibia, a legal *persona* constituted as the Government of the Republic of Namibia in terms of the Namibian Constitution. The second respondent is the Minister of Safety and Security. He is the executive in charge of the administration of the provisions of the Police Act, 1990[1]. He is sued in his capacity as such.

[3] The third defendant is Erwin Katiti an adult male person who is employed by the Municipal Council for the Municipality of Windhoek in the City Police Department. The fourth defendant is the Municipal Council for the Municipality of Windhoek, a juristic person and the employer of the third defendant and it is being sued on the principal of

[1] The Police Act, 1990 (Act 19 of 1990).

vicarious liability in its capacity as the employer of the third defendant.

Factual background

[4] On 26 September 2019 the plaintiff caused summons to be issued out of this Court against the first three defendants. The summons were served on the first three defendants on 30 September 2019. In its summons the plaintiff claimed, against the first, second, and third defendants jointly and severally the one paying the others to be absolved, payment in the amount of N$2 834 000 plus interest on the amount of N$2 834 000 at the rate of 20% per annum a *temporae morae*; alternatively from the date of judgment and cost of suit. I must add here that during the process of case management of this matter the Municipal Council for the City of Windhoek was joined as the fourth defendant to these proceedings. It follows that the claim for payment is also against the fourth defendant.

[5] The plaintiff's claim against the defendants is based on the allegations that on 28 September 2018 and at the Windhoek Central Police Station the plaintiff was subjected (by peace officers, a certain Katiti and Jeripo who are employed by the City Police and Namibian Police respectively) to torture, cruel, inhumane and degrading treatment. The details of the alleged torture, cruel, inhumane and degrading treatment are set out in the plaintiff's particulars of claim.

[6] The defendants entered notice of intention to defend the plaintiff's claim and pleaded to the plaintiff's particulars of claim. The first and second defendants amended their plea on two occasions. In the second amendment of their plea, the first and second defendants raised a point *in limine*. The point *in limine* raised by the first and second defendants is that the plaintiff failed to comply with the provisions of s 39 of the Police Act, 1990 and that the plaintiff's claim against the first and second defendants has prescribed.

[7] I indicated earlier in this judgment that I case managed this matter, and at the pre-trial conference which was held on 21 April 2022, the parties indicated to me that since the first and second defendants raised a special plea of prescription they want that issue to be decided before the merits of the case is heard.

[8] In the draft pre-trial report which was submitted for my consideration, the parties had agreed that the following facts were not in dispute;

(a) The plaintiff's cause of action arose on 28 September 2018.

(b) On 05 September 2019, the plaintiff through his legal practitioners, gave notice, in terms of s 39 (1) of the Police Act to the minister responsible for Safety and Security, of his intention to institute legal proceedings against the Government of the Republic of Namibia.

(c) On 30 September 2019 the plaintiff's summons were served on the first and second defendants.

[9] It is against the above set out background that I now have to consider whether the plaintiff's claim against the first and second defendants is time barred.

Section 39(1) notice of the Police Act, 1990

[10] Section 39(1) of the Police Act[2] requires any civil proceedings against the state or any person, in respect of anything done in pursuance of the Act to be instituted within 12 months after the cause of action arose. The section further stipulates that a notice in writing of any such proceedings and of the cause thereof must be given to the defendant not less than one month before the proceedings are instituted. The section contains a proviso which provides that the minister may at any time waive compliance with the provisions of the section.

[11] In the matter of *Mahupelo v Minister of Safety and Security and Others*[3] this court opined that it is clear from a 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

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2 Section 39(1) 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 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.'

3 *Mahupelo v Minister of Safety and Security and Others* 2017 (1) NR 275 (HC).

civil action under the Police Act. The court went on to state that the object of the notice required under s 39(1) is, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter. The court quoting from the case of *Minister van Polisie en 'n Ander v Gamble en 'n Ander*[4] held that:

'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.'

Discussion

[12] In this matter the facts are not in dispute. The plaintiff's alleged cause of action arose on 28 September 2018. On 05 September 2019 the plaintiff gave notice to the Minister of Safety and Security of his intention to institute proceedings against the police and the plaintiff served his summons on the Government on 30 September 2019. There is thus no doubt that the notice which the plaintiff gave to the defendants was not in accordance with s 39(1) as it was given less than one month (it was for 25 days) before the proceedings were instituted and the summons were also issued after a period of twelve months had passed. The twelve months would lapse on 28 September 2019.

[13] The question which this Court thus needs to answer is whether the plaintiff's claim against the government is in those circumstances time barred. Mr Kadhila who appeared on behalf of the first and second defendants argued that the plaintiff's claim is time barred. He argued that s 39(1) of the Police Act, 1990 imposed an absolute prohibition on the institution of legal proceedings against the police without the requisite notice having been given.

[14] Mr Kadhila further argued that the reason for demanding timeous notification of any intention to sue the Police is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense,

[4] *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) at 769H.

whether it ought to accept, reject, or endeavour to settle them. Mr Kadhila thus asked the court to uphold the point *in limine* that the plaintiff did not give a notice of not less than one month and that the summons were served after a period of twelve months had lapsed.

[15] Ms van Wyk who, appeared for the plaintiff on the other hand argued that, there was substantial compliance with s 39(1) and thus the plaintiff's claim is not time barred. She argued that the purpose of s 39(1) is to ensure that the state receives warning and is given enough time to ascertain the facts. Relying on the matter *Elia v Minister of Safety and Security*[5], Ms Van Wyk argued that all that the law requires is that a claimant must prove sufficient compliance in terms of s 39(1). She furthermore relied on the case of *Minister of Safety and Security v Molutsi and Another*[6] where it was held that the object of requiring statutory notice was to ensure that the defendant, or alternatively the State, received timely warning of a plaintiff's intention to commence legal proceedings. Molutsi looked at whether or not the objects of the provision requiring statutory notice had been achieved, the argument went.

[16] Although Ms Van Wyk conceded that a proper and timeous notice is a precondition for the institution of a civil action arising under the Police Act, she argued that the case of *Simon v Administrator-General*[7] emphasized that each notice must be considered on its own merits. She argued that

'Therefore, it is clear that although the object of section 39 is to give the state warning ahead of instituting civil proceedings, Simon shows that what "proper and timeous" notice is for the court to consider on a case-by-case basis and each notice should be considered on its own merits.'

[17] Ms Van Wyk argued that this court has inherent jurisdiction not only under the Constitution, but in terms of the common law, to interpret statute, which includes s 39 of the Police Act. She implored the court not to adopt a highly technical and demanding approach when considering whether or not a claimant has fulfilled the requirements of s 39(1) in relation to the giving of notice. Ms Van Wyk furthermore implored the Court to

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

6 *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (SCA) para 46.

7 *Simon v Administrator-General, South West Africa* 1991 NR 151 (HC) at 151.

emulate the approach of the Supreme Court in the *Torbitt and Others v International University of Management*[8] where the Supreme Court quoting Hart AJP in *Suidwes Afrikaanse Munisipale Personeel Vereniging*, held that

'… but the principle in my opinion had now been firmly established that, in all cases of time limitation, whether statutory (emphasis own) or in terms of the Rules of Court, the Supreme Court has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the court'.

[18] The Supreme Court held in *Minister of Home Affairs v Majiedt and Others*[9] that the 12-month limitation period and the requirement of 30 days prior notice before commencement of proceedings contained in s 39(1) of the Police Act 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.

[19] I am therefore of the considered view that there is no merit in Ms Van Wyk's submission advanced on behalf of the plaintiff that if the requirement of 30 days' notice required under s 39(1) is interpreted that it must be obeyed exactly is rigid and inflexible. I say there is no merits in that submission for the simple reason that s 39(1) contains a proviso which states that the minister's power of waiver can be exercised at any time. This is indicative of the fact that the proviso accommodates the modern approach which manifests a tendency which is inclined towards flexibility.

[20] Ms Van Wyk relying on *Torbitt* invited me to exercise the court's constitutional and common law powers to, in all cases of time limitations, whether statutory or in terms of the Rules of Court, grant condonation where the principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the court.

[21] I decline the invitation for three reasons. The first is that there is a principle of the rule of law as articulated by the Supreme Court in the matter of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*[10]

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8 *Torbitt and Others v International University of Management* 2017 (2) NR 323 (SC).
9 *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC) at 482F – G.

that the exercise of power must be authorised by law. The Supreme Court put it as follows:

'The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its 'Supreme Law', it demands that the exercise of any public power should be authorised by law — either by the Constitution itself or by any other law recognized by or made under the Constitution. "The exercise of public power is only legitimate where lawful." If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling — and where necessary, in constraining — the exercise of public powers and functions in our constitutional democracy'.

[22] Section 39 (1) in no uncertain terms confers the power to condone non-compliance with the requirements of that section on the minister. It follows that if the court were to exercise that power it will be usurping the power lawfully conferred on the minister.

[23] The second reason why I decline Ms Van Wyk's invitation is the fact that in the Torbitt matter the Supreme Court was justified to deviate from the cardinal rule of interpretation and to interpret the word '*must*' not as peremptory but as permissive, requiring substantial compliance with the time period prescribed in s 86(18) of the Act, in order to be legally effective. The Court adopted that approach, not only to achieve the object of effective and efficient resolution of disputes, but to at the same time avoid gross injustice to a party.

[24] The Court went on and stated that in order to determine whether or not there was substantial compliance - (with the time limit clause) - a court may consider the following factors: the reason for the delay, the period of the delay, the prejudice to the respective litigants if the award was to be allowed to stand or was to be dismissed, and the availability of evidence if the matter were to be reheard. The list is not exhaustive.

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[10] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) para [23].

Each case must be considered on its own circumstances and merits.

[25] In the present matter the plaintiff has not placed before the Court any information why he did not seek condonation from the minister for his failure to comply with the provisions of s 39(1), he also did not inform this court what caused the delay in the compliance with the s 39(1), he also has not advanced any argument relating to the in injustice or otherwise of s 39(1). There has, in my considered view, not been substantial compliance with the provisions of s 39(1) nor has the plaintiff given a satisfactory explanation for non-compliance with the time limit set out in s 39(1).

[26] The third reasons is that this court sitting as a full bench, as recent as 2021 in the matter of *Amadhila v Government of the Republic of Namibia*[11], considered what primary facts a claimant in the position of the plaintiff has to advance to escape any legislative time bar limitations. The plaintiff in *Amadhila* contended the legal proceedings time bar in s 133 of the Correctional Services Act 9 of 2012, violated his rights to equality and a fair hearing. For context, s 133(3) of the Correctional Services Act requires a claimant 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, provided 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. The court in that matter found:

'[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 . . . *(sic)*

[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

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

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

[27] As I indicated earlier in this judgment, the plaintiff instituted his claim upon giving the Police only 25 days' notice instead of the prescribed 30 days' notice. It is also evident that when the summons were served on the government defendants, more than the prescriptive 12 months had elapsed. For the reasons set out in this judgment, I am satisfied that the provisions of s 39(1) are, peremptory and non-compliance therewith is fatal to the plaintiff's claim and that the defendants proved the plaintiff's non-compliance with the statutory provision, and as a result, the special plea is upheld.

[28] As regards the costs, no reason has been advanced why the general principle namely that cost must follow the event should not apply. In the circumstances, I make the following order:

1. The first and second defendants' special plea of prescription is upheld, and the matter is regarded as finalised as against the first and second defendants.

2. The plaintiff must pay to the first and second defendants its costs of suit.

3. The matter is as regards the third and fourth defendants postponed to **02**

August 2022 at 08h30 for status hearing.

4. The parties must file a joint status report by not later than **28 July 2022 at 15h00**, recording the proposed further conduct of this matter, with respect to the claim against the third and fourth defendants.

Judge's signature	**Note to the parties:**
Ueitele J	Not applicable.
Counsel:	
Plaintiff Corinna van Wyk Of the Legal Assistance Centre Windhoek	**First and Second Defendants** Freddy Kadhila Office of the Government Attorney Windhoek **Third and Fourth Defendants** Panderee Kamarenga Of Muluti & Partners Windhoek