REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

EX-TEMPORE REASONS

PRACTICE DIRECTIVE 61

Case Title:	**Case No:**
Avelinu Elia	HC-MD-CIV-ACT-OTH-2017/02151
v	**Division of Court:**
Minister of Safety and Security	HIGH COURT(MAIN DIVISION)
Heard before:	**Date of hearing:**
Honourable Lady Justice Prinsloo	17 August 2022
	Date of order:
	17 August 2022

Neutral citation: *Elia v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017/02151) [2022] NAHCMD 477 (13 September 2022)

Results on merits:
As set out below.

Reasons for orders:

PRINSLOO J:

Introduction

[1] On 17 August 2022, I made the following order:

'1. The special plea raised in respect of the statutory notice in terms of s 133(4) of Correctional Services Act, 9 of 2012 is upheld.

2. No order as to costs.'

[2] Herewith my reasons:

Background

[3] The plaintiff instituted action against the defendants arising from an incident that occurred on 23 November 2016, whilst he was detained in the Windhoek Correctional Facility. The plaintiff claims damages for assault and torture which he was allegedly subjected to at the hands of the Correctional Officers.

[4] After the plaintiff instituted action in June 2018, the defendants filed an exception to the particulars of claim on the basis that:

a) the plaintiff failed to comply with s 133(3) of the Correctional Services Act 9 of 2012 (the Act),
b) that the plaintiff failed to provide statutory notice of 1 month prior to the institution of the action proceedings, and
c) that the plaintiff failed to plead in his particulars of claim of how the quantum was arrived at.

[5] On 4 February 2019, this court upheld the exceptions raised on behalf of the defendants and granted the plaintiff leave to amend his particulars of claim.[1]

[6] Aggrieved by the outcome of the interlocutory proceedings, the defendants sought leave to appeal the court's ruling dated 4 February 2019, which was granted.

[7] On 30 March 2022, the appeal was dismissed and the matter was referred back to this court to allow the plaintiff the opportunity to amend his particulars of claim, which the plaintiff did.[2]

Special pleas raised on behalf of the defendants

[1] *Elia v Minister of Safety and Security* (HC-MD-CIV-OTH-2017/02151) [2019] NAHCMD 21 (04 February 2019).
[2] *Minister of Safety and Security v Avelinu* (SA4-2020) [2022] NASC (30 March 2022).

[8] The defendants filed their consequential plea and raised two special pleas in the following terms:

'**A) STATUTORY NOTICE**

a) In terms of Section 133(3) of the Correctional Services Act 9 of 2012 (the Act) the cause of action has been 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) of the Act.'

Arguments advanced on behalf of the parties

On behalf of the defendants

[9] During oral argument, Mr Ncube, on behalf of the defendants, indicated that the first special plea will not be further pursued. However, the defendants persisted with the second special plea with regards to the plaintiff's failure to comply with s 133(4) of the Act.

[10] Mr Ncube argues that the terms of s 133(4) is peremptory and the courts held in a number of cases, including the 'first' *Elia* case when the court decided on the exception, that the plaintiff should follow and apply the mandatory provisions.

[11] Mr Ncube submits that the legislature did not intend to allow parties to institute legal proceedings without complying with s 133(4) and the court is not in the position to condone a failure to comply with the peremptory statutory provisions. Mr Ncube submits that the legislature would have otherwise expressly provided for the court to condone a failure to comply with the provisions of the section.

[12] Mr Ncube further submitted that it is common cause that the plaintiff did not comply with the provisions of s 133(4) and is not pleaded in his particulars of claim.

On behalf of the plaintiff

[13] Mr Nanhapo argued on behalf of the plaintiff that s 133(4) of the Act does not say that one cannot institute the action against the defendants if no notice was given one (1) month before the institution of the action. Mr Nanhapo submitted that the notice as referred to in s 133(4) is comparable with s 39 of the Police Act 19 of 1990 and serves to notify the defendants of the intended action and if necessary, to allow the investigation of the surrounding circumstance so that costly litigation can be avoided.

[14] As a result, so argued Mr Nanhapo, s 133(4) does not serve the purpose of barring the plaintiff from instituting an action and submitted that the non-compliance with s 133(4) does not render the claim irrecoverable as submitted by the defendants.

Applicable legal principles

[15] Section 133 (3) and (4) of the Correctional Service Act provides that:

'(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.
(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.' (my underlining)

[16] It is common cause that the plaintiff did not give the required one month notice prior to the institution of his claim.

[17] When the matter was returned to this court for further adjudication of the matter the plaintiff was granted the opportunity to amend his particulars of claim, which he did, but the averment regarding the notice in terms of s 133(4) of the Act was conspicuously absent from the amended particulars of claim.

[18] During oral argument Mr Nanhapo conceded that in the event of non-compliance with the

provisions of s 133(4) of the Act is peremptory and that a party may not approach the court but seems to suggest that if the party is already before court that the door should not be shut on him.

[19] In the judgment of *Kruger v Ministry of Safety and Security*[3] the importance of s 133(4) was dealt with Unengu AJ and held that a failure to give written notice in terms of s 133(4) is fatal to the action of the plaintiff and is null and void.

[20] In *Van Wyk v Namibia Correctional Service Commissioner General: Hamunyela*[4] my Brother Geier J discussed the precondition set by s 133(4) as follows:

'[28] Finally – and relevant for purposes of the current decision – it so appears that the Courts have held that a proper and timeous statutory notice – such as the one set by subsection 133(4) of the Correctional Service Act 2012 - is a compulsory precondition that has to be met - and which aspect also has to be pleaded - to enable a claimant in *a civil action against the State or any person for anything done or omitted in pursuance of any provision of the Correctional Service Act*- to successfully launch any such claim'.

[21] The statutory precondition set by subsection 133(4) has not been met in this instance, or if it was, it was not pleaded as it should have been. The applicant's case on the papers does therefore not disclose a cause of action and can thus not succeed.

[22] At the same time it appears that the statutory purpose for which the notice was required was also, in all probability, not satisfied as the respondents did not receive the prescribed warning of the contemplated action or given sufficient information and the prescribed period of time to enable them to ascertain the facts and consider them as intended by the legislature.

[23] It follows that the question of law raised to the effect that the plaintiff failed to serve the requisite statutory written notice, as contemplated by s 133(4), has to be answered in the affirmative and that the point made in this regard, to the effect that the applicant's case is thus 'unprocedurally' before the Court, must be upheld.

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[3] *Krugerv Ministry of Safety and Security (*HC-MD-CIV-ACT-OTH-2018/00137) [2020] NAHCMD 334 (06 August 2020) at para 10.

[4] *Van Wyk v Namibia Correctional Service Commissioner General: Hamunyela* (HC-MD-CIV-MOT-GEN-2019/00024) [2020] NAHCMD 368 (21 August 2020).

[24] The importance of the notice in terms of s 133(4) was yet again confirmed in *Nailenge v Correctional Service Officer.*[5]

[25] As stated above – this finding obviates the need for the determination of all the other issues raised in this case.

Conclusion

[26] Having referred to the relevant case law in this regard it is thus crystal clear that the plaintiff has no defence against the special plea raised by the defendant regarding the failure to comply with s 133(4) and omission is fatal to the plaintiff's case. It follows also that the special plea must this succeed.

[27] My order is therefore as set out above.

Judge's signature	**Note to the parties:**
Prinsloo Judge	Not applicable.
Counsel:	
Applicant	**Respondent**
MR J NCUBE GOVERNMENT ATTORNEYS WINDHOEK	MR T NANHAPO of BROCKERHOFF LEGAL PRACTITIONERS WINDHOEK

[5] *Nailenge v Correctional Service Officer* (HC-MD-CIV-ACT-OTH-2020/04734) [2021] NAHCMD 313 (1 July 2021) para 10.