

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**EX TEMPORE JUDGMENT**

Case No.: HC-MD-CIV-ACT-DEL-2022/03820

In the matter between:

**WILSON HAPITA MUTALENI**

**PLAINTIFF**

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION,  
SAFETY AND SECURITY**

**FIRST**

**DEFENDANT**

**V K NEHONGA**

**SECOND DEFENDANT**

**Neutral citation:** *Mutaleni v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL-2022/03820) [2023] NAHCMD 439 (26 July 2023)

**Coram:** Schimming-Chase J

**Heard:** 25 July 2023

**Order:** 25 July 2023

**Written Reasons:** 26 July 2023

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**ORDER**

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1. The determination of the defendants' special pleas stands over for determination at trial.
  2. Costs in the interlocutory shall be costs in the cause.
  3. The matter is postponed to 11 September 2023 at 15h00 for a Case Management Conference.
  4. The parties must file a joint case management report on or before 6 September 2023 at 15h00.
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**JUDGMENT**

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SCHIMMING-CHASE J:

[1] The claim of the plaintiff is premised on a motor vehicle accident that is alleged to have occurred on 21 September 2020, between the vehicle of the plaintiff and the vehicle of the first defendant – driven by the second defendant, during the course and scope of his employment, alternatively, the ambit of risk created by such employment, so pleads the plaintiff.

[2] It is common cause that the plaintiff issued summons out of this court, and served summons on the defendants on 16 September 2022.

[3] On 12 January 2023, the defendants delivered their pleas and therein raised special pleas in terms of s 39(1) of the Police Act 19 of 1990, and s 11 of the Prescription Act 68 of 1969, pleading that the plaintiff caused summons to be issued and served on them more than 12 months after the alleged cause of action arose, as such, the plaintiff's claim has prescribed.

[4] The plaintiff, in replication, denies prescription of the claim, and pleads, the prescriptive provisions do not apply to his cause of action because the second defendant did not act in pursuance of the Police Act, but in the course and scope of his employment with the first defendant, alternatively, within the ambit of risk created by such employment.

[5] In *Masuku and Another v Mdlalose and Others*,<sup>1</sup> the South African Supreme Court of Appeal, considered the question before court today, writing for the majority of the court Smalberger JA found:

‘The concepts ‘in the course and scope of his employment’ (or any of its equivalents) and ‘in pursuance of’ the Act are notionally distinct from each other. They derive from different sources and deal with different incidents of liability. The former is primarily concerned with the common-law principles of vicarious liability; the latter is of statutory origin and its meaning and ambit stem from the provisions of the Act. Different policy considerations are at stake when dealing with the two concepts. The former favours a plaintiff by making a master liable for the wrongs of his servant, thereby extending and establishing liability where otherwise it would not exist. It is thus expansive in both its purpose and effect. The latter enures (endures) for the benefit of a defendant.’

...

‘In my view, one cannot determine the issue before us in vacuo. It is impossible to lay down precise rules governing the meaning of each of the concepts. Notionally they differ. Their application must inevitably depend upon the facts and circumstances of each particular case, which in the nature of things can vary radically and cover a myriad of situations. Only once the relevant facts have been established will it be possible to determine, applying recognised principles, whether the acts complained of amount to conduct “within the course and scope of employment” or “in pursuance of” the Act, or both, or neither. While the concepts clearly overlap, one cannot predict with certainty that they will necessarily always be co-extensive.’

[6] Most recently, in *Bruni N.O. v Inspector General of Police*,<sup>2</sup> Sibeya J had

<sup>1</sup> *Masuku and Another v Mdlalose and Others* 1998 (1) SA 1 (SCA).

<sup>2</sup> *Bruni N.O. v Inspector General of Police* (HC-MD-CIV-ACT-OTH-2022/00521) [2023] NAHCMD

occasion to consider the distinction between 'in pursuance of the Act' and 'in the course and scope of employment':

[30] The above authority reaffirms the distinction there is between acting in the course and scope of employment as compared to acting in pursuance of the Act. Acting in pursuance of the Act was introduced by the legislation (the Police Act) while acting in the course and scope of employment, which is probably wider, is associated with the vicarious liability which finds its origin from common law. On this basis alone, the two concepts cannot be said to be the same or at the very least carry the same meaning.

...

[32] The above authority makes it plain that there is no formula to determine whether the acts of a police officer are conducted within the course and scope of his employment or in pursuance of the Police Act. To resolve this issue, in my view, regard should be had to the reading of the Act, the purpose of the Act, the functions of the police created in the Act and the facts of each particular case.

...

[36] As clause 39(1) is designed to protect the state to the prejudice of the claimants it requires to be restrictively interpreted (strict interpretation). I find that clause 14(1) above, recognises that a police officer may act in terms of any other legislation or common law other than the Police Act. Where reference is made to this Act (the Police Act) or any other Law (any other authority including any other Act or common law), a police officer may act in terms thereof and still acting within the course and scope of his employment but not in pursuance of the Police Act.'

[7] Sibeya J accepted the finding of the Supreme Court of Appeal in *Masuku* regarding the distinction between the words in pursuance of the Act and within the course and scope of employment. It is to be determined on the facts of each case. I, respectfully, agree with the above principle.

[8] The case of the plaintiff is pleaded as an MVA. However, having regard

to the defendants' pleas, the denials by the defendants make no averment to place this court in a position to assess and apply the above test to the present matter. Counsel for the defendants in paras 3.7 and paras 3.8 of her heads of argument attempt to place factual averments before court, which averments are not even pleaded. It would be wholly inappropriate for this court to make any factual finding before trial. It is thus clear that it is apt in the circumstances of this matter that the special pleas of the defendants be determined after the hearing of evidence, fitting only for the trial court.

[9] In the circumstances, I make the following order:

1. The determination of the defendants' special pleas stands over for determination at trial.
2. Costs in the interlocutory shall be costs in the cause.
3. The matter is postponed to 11 September 2023 at 15h00 for a Case Management Conference.
4. The parties must file a joint case management report on or before 6 September 2023 at 15h00.

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E M SCHIMMING-CHASE  
Judge

APPEARANCES

PLAINTIFF:

D Esau  
Of Directorate of Legal Aid,  
Windhoek

DEFENDANTS:

Q Fenyeho  
Of Office of the Government Attorney,  
Windhoek