

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title:	Case No:
Petrus Fridel Frederik	Main Case Number: HC-MD-CIV-ACT-OTH-2021/00391
Applicant	INT-HC-OTH-2023/00196
and	Division of Court:
	Main Division
	Heard on:
The Minister of Home Affairs, Immigration, Safety and Security	13 September 2023
1 st Respondent	
The Commissioner-General of the Namibian Correctional Services	
2 nd Respondent	
Officer in Charge of Evaristus Shikongo Correctional Facility, Deputy Commissioner	
Ikosa Leonald Mahundu	3 rd Respondent
The Officer second in Charge of Evaristus Shikongo Correctional Facility,	
Assistant Commissioner Hangula	4 th Respondent
Unit 2 Manager Superintendent Kamwi	5 th Respondent
Unit 3 Manager Superintendent Immene	6 th Respondent
Case Management Officer Senior	
Chief Aikanga	7 th Respondent
Correctional Officer Chief Kapofi	8 th Respondent
Correctional Officer Sergeant Shivolo	9 th Respondent
Correctional Officer Senior	
Sergeant Kavari	10 th Respondent
Correctional Officer Sergeant Shikulu	11 th Respondent

Correctional Officer Chief Ipunye	12 th Respondent
Heard before: Honourable Lady Justice Rakow	Delivered on: 10 October 2023
Neutral citation: <i>Frederik v The Minister of Home Affairs, Immigration, Safety and Security</i> (HC-MD-CIV-ACT-OTH-2021/00391) [2023] NAHCMD 636 (10 October 2023)	
Order:	
The action is dismissed with costs.	
Reasons for order:	
<p>RAKOW J:</p> <p><u>Introduction</u></p> <p>[1] The plaintiff is Petrus Fridel Frederik, a major male Namibian citizen, currently serving a 35 year sentence and incarcerated at the Evarustus Shikongo Correctional Facility. The first defendant is the Minister of Home Affairs, Immigration, Safety and Security. The second defendant is the Commissioner-General of the Namibian Correctional service, the third defendant to the twelfth defendants are all officials of the Correctional Service, serving in various capacities at the Everustus Shikongo Correctional Facility.</p> <p>[2] The claim of the plaintiff is for damages for the unlawful and wrongful assault and handcuffing of the plaintiff. The defendants filed two special pleas, being that the plaintiff was to give the defendants statutory notice as per s 133(4) of the Correctional Service Act 9 of 2012 and further that the claim prescribed in terms of s 133(3) of the said Act because the action was brought outside the mandatory one year period.</p> <p><u>Background</u></p> <p>[3] The plaintiff alleges that during or about 16 December 2019 he was unlawfully and intentionally assaulted by the defendants, who were members of the Namibian Correctional</p>	

Service, acting in the course and scope of their employment with the first defendant. The plaintiff caused summons to be issued and served on the defendants on 08 February 2021, which is plus/minus 14 months after the plaintiff's cause of action arose.

[4] The plaintiff, in his replication, admitted that he did not provide a notice in terms of s 133(4) of the Act and that his action was instituted more than one year after his cause of action arose. The plaintiff, however, denies that s 133(3) and (4) of the Act is applicable to his cause of action because the defendants did not act in pursuance of the Act, but in the course and scope of their employment with the first defendant.

Arguments

[5] Counsel for the plaintiff it was argued that It is trite that failure to comply with s 133(3) and (4) of the Correctional Service Act, and the similarly worded s 39(1) of the Police Act 19 of 1990 is fatal to a plaintiff's action and that the action is null and void. However, before applying s 133(3) and (4) of the Correctional Service Act, one must consider whether an act or omission of the correctional officers is an act or omission in pursuance of the Act.

[7] It was further argued that pursuance is defined as 'the carrying out or pursuing of something'. Pursue is defined as 'seek to attain (a goal)' and that ties in with what the correctional officer was to do regarding the functions performed under the Act. The argument therefore goes that, the defendants did not necessarily act under the scope of the Act and as such, their evidence should be tested during cross-examination.

[8] For the defendants, it was argued that the plaintiff must file the notice in terms of s 133(4) of the Act, which makes such a filing peremptory and mandatory. They further argued that the special plea should succeed on both grounds.

Legal principles

[9] Section 133(3) of the Correctional Service Act, 2012 states –

'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.’

[10] Section 133(4) of the Correctional Service Act, 2012 states –

‘ 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.’

[11] *Bruni N.O v Inspector General of Police*¹ referred to a South African judgment in the matter of *Mcangyangwa Nzima*² wherein the learned judge, deciding between the conduct of a police officer done in the course of employment and that which is carried out in pursuance of the Act stated –

‘I respectfully align myself with the view that, depending on the nature of the act in question or the place where it is performed, a policeman may act in the course and within the scope of his employment without necessarily doing something in pursuance of the Act. In my judgment the two concepts are not co-extensive and the former is of a wider import than the latter; while the latter includes the former, the converse is not necessarily so.’

[12] In the judgment of *Kruger v Ministry of Safety and Security*³ the importance of s133(4) was dealt with. It stated that:

‘[5] On 28 July 2020 when the matter was called for trial, Mr Bangamwabo appeared on behalf of the plaintiff instructed by the Legal Aid directorate while Ms Tjahikika from the Government Attorney’s Office represented all the defendants. Ms Tjahikika informed the court that the defendants were not persisting with the special plea of prescription of the plaintiff’s claim in terms of s 133(3) but would pursue plaintiff’s failure to comply with the peremptory provisions of s 133(4) which provides that notice in writing of every such action, stating the cause thereof and the details of the claim, must be given to the defendants at least one month before the commencement of the action.

[6] Section 133(3) prescribes the time limit within which to institute actions against the Correctional Services officials in terms of the Act. Thus a failure by any person who wants to institute an action against the officials of the Correctional Services within the period stipulated in sub-section (3), that person is, by

¹ *Bruni N.O v Inspector General of Police* [2023] NAHCMD 347 (22 June 2023).

² *Mcangyangwa v Nzima* 1993 (1) SA 706 (E) at 712.

³ *Krugerv Ministry of Safety and Security* (HC-MD-CIV-ACT-OTH-2018/00137) [2020] NAHCMD 334 (06 August 2020). In the matter of *Elia v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017/02151) [2019] NAHCMD 21 (04 February 2019) the same issue of the importance of Section 133(4) was dealt with and considered.

law, barred from instituting such an action. There is nothing that person can do to be allowed to sue after the time limit. He or she is time -barred. Even if the written notice of one month in terms of s 133(4) to the other parties has been given, that will not lift the bar. In this matter, counsel for the defendants did not insist with the special plea in respect of prescription for reasons only known to her. In my view, the plaintiff was required in the first instance to meet the requirement set out in s 133(3) before one could think of the written notice under s 133(4).

[7] In *Simon v Administrator-General, South West Africa*⁴ Du Toit, AJ when dealing with s 32 of the Police Act 7 of 1957 a provision similar to s 133(4) of the Correctional Service Act, held as follows:

“A proper and timeous notice under s 32(1) is of course a precondition for the institution of a civil action arising under the Police Act. See *Dease v Minister van Justisie 1962*.⁵”

[8] Du Toit, AJ held further that the object of the notice required under s 32(1) is, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter. And that such notice need not be as detailed as a pleading.’

Conclusion

[13] The statutory precondition set by subsections 133(3) and 133(4) have not been met in this instance, or if it was, it was not pleaded as it should have been. The special plea must therefore be upheld and the action of the plaintiff dismissed with costs.

[14] In the result, I make the following order:

The action is dismissed with costs.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Applicant(s):	Respondent(s):
P Like	DV Esau

⁴ *Simon v Administrator-General, South West Africa* [2] 1991 NR 151 at 153 B.

⁵ *Dease v Minister van Justisie 1962 SA 302 (T)*.

Of Office of the Government Attorney, Windhoek	Of Ministry of Justice: Legal Aid, Windhoek
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