

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**RULING**

Case no: HC-NLD-CIV-ACT-DEL-2021/00057

In the matter between:

**TUYENIKELAO-NDINELAO MASHINDANGE**

**1<sup>ST</sup> PLAINTIFF**

**and**

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> DEFENDANT**

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE**

**2<sup>ND</sup> DEFENDANT**

**JOSEPH SHIKESHO**

**3<sup>RD</sup> DEFENDANT**

**Neutral citation:** *Mwashindange v Minister of Safety and Security* (HC-NLD-CIV-ACT-DEL-2021/00057) [2022] NAHCNLD 67 (27 June 2022)

**Coram:** MUNSU, AJ

**Heard on:** 18 May 2022

**Delivered:** 27 June 2022

**Flynote:** Practice – Special Plea – Prescription – Section 39(1) of the Police Act, 19 of 1990 – Claim for unlawful arrest and detention – Malicious Prosecution – Stage at which

Prescription begins to run – Complete cause of action- Requirements for malicious prosecution distinguished.

**Summary:** The plaintiff instituted action against the defendants for damages arising from alleged unlawful arrest and detention as well as malicious prosecution. The defendants raised a special plea of prescription in terms of section 39(1) of the Police Act, 19 of 1990. The defendants argued that the plaintiff's claim has prescribed as it was only instituted more than 1 year after the date upon which it arose, which is not in compliance with the provisions of the Act. The plaintiff conceded and proceeded to abandon the claim for unlawful arrest and detention but persisted with the one for malicious prosecution.

The plaintiff alleges that the defendants instituted criminal proceedings against her on 02 September 2019. There is no dispute that on 01 October 2020, the aforesaid criminal proceedings were terminated on account of the Prosecutor-General decision declining to prosecute the matter.

*Held:* In order to be able to institute action, the plaintiff must have a complete cause of action.

*Held further:* In a claim for malicious prosecution, it is the termination of proceedings in favour of the plaintiff which triggers the cause of action. This means that the period of 1 year begins to run from 01 October 2020 when the Prosecutor General declined to prosecute the plaintiff and the criminal proceedings were terminated in her favour.

*Held further that:* The combined summons was served on the defendants on 02 March 2021, which is within a period of 12 months from the date the cause of action arose (01 October 2020).

Accordingly, the court found that the claim for malicious prosecution has not prescribed.

---

**ORDER**

---

**CLAIM 1:**

1. The defendants' special plea of prescription is upheld.

**CLAIM 2:**

2. The defendants' special plea of prescription is dismissed.
3. Each party is to bear its own costs in respect of the special plea raised.
4. The matter is postponed to 18 July 2022 at 10h00 for a case management conference.
5. The parties are directed to file a joint case management report on or before 13 July 2022.

---

**RULING**

---

MUNSU, AJ:

Introduction

[1] Serving before court is a special plea of prescription raised by the defendants to the plaintiff's particulars of claim. The plaintiff instituted action against the defendants for damages in the amount of N\$ 4 450 000, arising from alleged unlawful arrest and detention (claim 1) as well as malicious prosecution (claim 2).

Parties and representation

[2] The plaintiff is Ms. Tuyenikelao Ndinela Sunday Mwashindange, an adult female employed by the Ministry of Home Affairs, Immigration, Safety and security, holding the rank of Warrant Officer in the Namibian Police. She is a resident of Ondangwa.

[3] The first defendant is the Minister of Home Affairs, Immigration, Safety and Security, duly appointed as such in terms of Article 32(3)(i)(dd) of the Constitution of the Republic of

Namibia. His address of service is c/o Government Attorneys, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek, Namibia.

[4] The second defendant is the Inspector-General of the Namibian Police Force, appointed in terms of Article 32(4)(c) (bb) of the Namibian Constitution. His address of service is c/o of Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek, Namibia.

[5] The third defendant is Mr. Joseph Shikesho a major male and a member of the Namibian Police. His address of service is c/o of Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek, Namibia.

[6] The plaintiff is represented by Mr. Matheus while the defendants are represented by Mr. Ngula.

### Background

[7] The plaintiff alleges in her particulars of claim that on 02 September 2019 at Ondangwa, she was arrested by the third defendant without a warrant of arrest and in full view of members of the police force.

[8] It is alleged that, as a result of the aforesaid arrest, the plaintiff was detained at Etayi Police Station for a period of one (1) day until she was granted bail and released from custody on 03 September 2019.

[9] It is further alleged that the plaintiff was detained under conditions detrimental to her health or well-being.

[10] The plaintiff alleges that the aforesaid unlawful arrest and subsequent detention violated her constitutional rights to liberty and good name, privacy, dignity, bodily and psychological integrity.

[11] In respect to claim 2, the plaintiff alleges that on 02 September 2019 at Ondangwa, the third defendant wrongfully and maliciously set the law in motion by instigating an arrest and a charge of corruption against her. By so doing, it is alleged that the third defendant acted without reasonable and probable cause that the plaintiff committed an offence justifying her arrest and subsequent charges against her.

[12] It is alleged that at all material times relevant to the claims, the third defendant acted with malicious intent to instigate criminal proceedings against the plaintiff.

[13] It is further alleged that on 01 October 2020, the criminal proceedings against the plaintiff were terminated on account of the decision by the Prosecutor-General declining to prosecute the matter.

[14] As a consequence of the institution of the criminal proceedings, the plaintiff was arrested and consequently suspended from the Namibian Police without pay for a period of 11 months (18 November 2019 – 20 October 2020).

[15] In respect to the first claim, the plaintiff claims that she suffered damages in the amount of N\$ 700 000 which comprises of N\$ 350 000 injury to her personal liberty, N\$ 350 000 injury to her personality. In respect to the second claim, the plaintiff claims that she suffered damages in the amount of N\$ 3 750 000, which comprises of N\$ 1 500 000 for shock; N\$ 750 000 for deprivation of freedom and bodily liberty and N\$ 1 500 000 *contumelia* and discomfort. The combined total of the damages claimed is N\$ 4 450 000.

#### Special plea

[16] In response to the plaintiff's particulars of claim, the defendants raised a special plea of prescription in terms of section 39(1) of the Police Act, 19 of 1990 (the Act). The aforesaid section provides that:

(1) 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 of 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.'

[17] The defendants assert that the plaintiff's cause of action arose on 02 September 2019, however, the combined summons were only served on the defendants on 02 March 2021, which is some 18 months later. The defendants contend that the plaintiff's claim has prescribed as it was only instituted more than 1 year after the date upon which it arose.

[18] The defendants argued that there is no proof that the plaintiff's notice in terms of section 39 was received by the defendants. For this reason, the defendants argued that the plaintiff did not comply with the statutory requirement of giving notice to the defendants prior to instituting the proceedings. Furthermore, it was argued that, although the plaintiff had an option to apply for waiver to the Minister, she did not do so.

#### Plaintiff's arguments

[19] The plaintiff contends that she complied with section 39 of the Act. This much can be deduced from the letter by the Inspector-General in which he acknowledges receipt of such notice. The aforesaid letter is dated 04 January 2021 and is addressed to the plaintiff's legal representative. Accordingly, I am satisfied that the plaintiff complied with the provision of section 39 above.

[20] The plaintiff contends that two claims were instituted against the defendants. The first claim is for unlawful arrest and detention while the second claim is one for malicious institution of criminal proceedings. The plaintiff argues that the defendant clumsily lumped the claims together indiscriminately.

[21] Nonetheless, considering the special plea raised, the plaintiff no longer pursues the first claim relating to unlawful arrest and detention. However, she argued that the second claim of malicious institution of criminal proceedings has not prescribed and is persisted with.

[22] In line with section 39 of the Act, the plaintiff argued that the claim for malicious institution of criminal proceedings must be instituted within 12 months after the cause of action arose. She submitted that, in a claim for damages for malicious institution of criminal proceedings, the delict is completed by the termination of proceedings in favour of the plaintiff. Further that, until a termination of proceedings in favour of the plaintiff (either, an acquittal, withdrawal or decline to prosecute), the cause of action has not arisen.

### Analysis

[23] The plaintiff referred me to decisions that I find useful in deciding the issue at hand. In *Akuake v Jansen van Rensburg*<sup>1</sup> Damaseb JP laid down the elements of the claim for malicious prosecution as follows:

‘To sustain a claim based on malicious criminal proceedings the plaintiff must allege and prove:

- (i) that the defendant actually instigated or instituted the criminal proceedings;
- (ii) without reasonable and probable cause; and that
- (iii) it was actuated by an indirect or improper motive (malice) and;
- (iv) that the proceedings were terminated in his favour; and that
- (v) he suffered loss and damage:’ (my underlining).<sup>2</sup>

[24] In *Holden v Assmang Limited*<sup>3</sup> the Supreme Court of South Africa held as follows:

‘[9] The importance of the fourth requirement, which is the only one with which we are concerned in this appeal, lies in the fact that the claim can only arise if the proceedings were terminated in the plaintiff’s favour. That is so because a claim for malicious proceedings cannot anticipate the outcome of proceedings yet to be finalised. To hold otherwise would permit recognition of a claim when the proceedings may yet be decided against the plaintiff.

<sup>1</sup> *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC).

<sup>2</sup> See also *Minister of Safety and Security and Others v Mahupelo Richwell Kulisesa* (SA 7 of 2017) [2019] NASC 2 (28 February 2019).

<sup>3</sup> *Holden v Assmang Limited* (Case no 1277/19) [2020] ZASCA 14 (5 November 2020).

[10] A claim for malicious prosecution can ordinarily only arise after the successful conclusion of the criminal case in a plaintiff's favour. In a criminal matter, such a favourable conclusion in the plaintiffs' favour would occur on acquittal or the withdrawal of the charges. The institution of a civil claim based on a malicious prosecution before such prosecution has been finalised in the plaintiff's favour, may amount to prejudging the result of the pending proceedings. There is no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals. The HPCSA is such a tribunal. The cause of action applies to both civil and criminal proceedings and not only the latter.

[17] A debt is due, owing and payable within the meaning of [s 12\(1\)](#) of the [Prescription Act](#) [when](#) the creditor acquires a complete cause of action for the recovery of the debt. What this means is that the entire set of facts which the creditor must prove in order to succeed with his/her claim against the debtor must be in place. In other words, when everything has happened which would have entitled the creditor to institute action and to pursue his/her claim.

[18] I conclude that from the foregoing it is clear that the appellant's cause of action only arose and prescription only started to run when the HPCSA notified the appellant that the respondent's complaint against her had been dismissed. That was on 13 November 2009. It was only then that the appellant would have been able to establish the fourth and final requirement for an action for malicious prosecution. It follows that as at the date of summons, the claim or debt had not prescribed.' (my underlining).

[25] In the instant matter, it is alleged that the defendants instituted criminal proceedings against the plaintiff on 02 September 2019. There is no dispute that on 01 October 2020, the aforesaid criminal proceedings were terminated on account of the Prosecutor-General decision declining to prosecute. In order to be able to institute action, the plaintiff must have a complete cause of action.

[26] In *Abrahamse & Sons v SA Railways and Harbours*<sup>4</sup> Watermeyer J stated:

'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence

---

<sup>4</sup> *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626.



of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

[27] It is the termination of proceedings in favour of the plaintiff which triggers the cause of action. This means that the period of 1 year begins to run from 01 October 2020 when the Prosecutor General declined to prosecute the plaintiff and the criminal proceedings were terminated in favour of the plaintiff.

[28] The combined summons was served on the defendants on 02 March 2021, which is within a period of 12 months from the date the cause of action arose (01 October 2020). Accordingly, I find that claim two has not prescribed.

### Costs

[29] The defendants managed to show that claim one has prescribed. They were unsuccessful in respect to claim two. Similarly, the plaintiff managed to show that claim two has not prescribed. She was however, unsuccessful in respect to claim one. Thus, both parties were partially successful. In the exercise of my discretion, I find that it will meet the interests of justice for each party to pay its own costs regarding the preparation and hearing of the special plea raised.

[30] In the result, it is ordered as follows:

#### CLAIM 1:

1. The defendants' special plea of prescription is upheld.

#### 1. CLAIM 2:

2. The defendants' special plea of prescription is dismissed.
3. Each party is to bear its own costs in respect of the special plea raised.
4. The matter is postponed to 18 July 2022 at 10h00 for a case management conference.

5. The parties are directed to file a joint case management report on or before 13 July 2022.

---

D C MUNSU  
ACTING JUDGE

APPEARANCES

FOR THE PLAINTIFF:

Mr. J. L. Matheus  
Slogan Matheus & Associates, Ongwediva

FOR THE DEFENDANTS:

Mr. N. Ngula  
Nicky Ngula Attorneys, Ondangwa  
Instructed by Government Attorney