REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: (P)A 74/2002

In the matter between:

BRIGITTE SEBATANE	**FIRST APPLICANT**
PRISCILLA MATJILA	**SECOND APPLICANT**
and	
BONIFACE MUTUMBA	**FIRST RESPONDENT**
THE COUNCIL OF THE MUNICIPALITY OF GOBABIS	**SECOND RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**THIRD RESPONDENT**
THE MINISTER OF LOCAL GOVERNMENT AND HOUSING	**FOURTH RESPONDENT**

Neutral citation: *Brigette v Mutumba (A 4562009) [2012] NAHCMD* 11
(04 October 2012)

Coram: SHIVUTE J

Heard on: 18 March 2003

Delivered on: 04 October 2012

Flynote: Prescription – Constitutionality of – Section s 2(1)(*a*) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970 (Act 94 of 1970) – Act not unconstitutional.

Summary: Application to declare section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970 (Act 94 of 1970) – Act setting down a period within which legal proceedings may be instituted against *an administration, local authority or officer* – Statutory requirement includes a notice to first be given within 90 days from the day the debt arose – Same Act gives the creditor an opportunity to seek condonation in cases where such statutory requirement has not been met.

Arguments – It is the applicants' case that impugned section is unconstitutional and of no force and effect on the basis that it violates their rights to approach any court of competent jurisdiction in determining their civil rights as entrenched in Article 12(1)(*a*) of the Namibian Constitution – That the period of 90 days is of a very limited nature and unreasonable – It is the third and fourth respondents' case that it is not necessary for the applicants to seek a declaratory order on the constitutionality of the impugned section since there were other non-constitutional remedies available to the applicants as they could bring an application for condonation in terms of s 4 of the Act.

Constitutional test – validity of section to be tested against the Namibian constitution- applicants rights to have access to a competent court of law forms part of chapter 3 of the Namibian constitution - applicant will have the burden to allege and prove that a specific fundamental right or freedom has been infringed – The Act is confirmed to be a Limitation Act – however such limitation are legitimate and reasonable, are in the public interest and serve a legitimate purpose.– right to have access to courts not absolute - The limitations contained in the impugned section are not aimed at infringing a person's right to approach a court but merely set out formalities and requirements within which rights and obligations should be ascertained.

Exhaustion of internal remedies – The applicants have ignored that fact that the Act provides internal remedies for non-compliance – Section 4 the Act also provides for other avenues for the exercise of one's right to have access to courts.

ORDER

1. The application is dismissed.
2. No order as to costs is made.

JUDGMENT

SHIVUTE J: [1] The Court heard oral submissions for the relief in the following terms:

> '1. That the provisions of section 2(1)(*a*) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970 (Act 94 of 1970) be declared unconstitutional and of no force and effect.
>
> 2. Ordering the first and second respondent to pay the costs of the Applicants' application jointly and severally the one paying the other to be absolved, and in the event of the third and fourth respondents opposing this application, ordering the first, second, third and fourth respondents to pay the costs of this application, the one paying the other to be absolved.'

[2] The applicants instituted action against the first and second respondents in the Magistrates Court of Gobabis on 26 July 2001 under case no 170/ 2001. The cause of action is the alleged defamatory statements allegedly made by the first respondent to members of the council of the second respondent and to a newspaper through a journalist. The plaintiffs averred that their reputation had been damaged because of the publication of the alleged statements and that they had suffered damages in the sum of N$ 25 000 each. First and second respondents raised a special plea, stating that the plaintiffs did not comply with the provisions of s 2(1)(*a*) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970 (Act 94 of 1970) (hereinafter referred to as 'the Act'). In this application, the applicants have challenged the constitutionality of s 2(1)(*a*) of the Act (hereafter to be referred to as 'the impugned

section') on the ground that it violates their rights to have access to courts as guaranteed under Article 12(1)(*a*) of the Namibian Constitution.

[3] First and second respondents withdrew their opposition to the application. Third and fourth respondents who were cited by virtue of the interest that they may have in the matter opposed the relief sought by the applicants and in addition raised the following questions of law in terms of rule 6(5)(d)(iii) of the rules of Court at the hearing:

(a) Whether a decision on the constitutionality of s 2(1)(*a*) of the Limitation of legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970 (the Act) is absolutely necessary given the fact that applicants can apply to the Magistrate's Court for condonation for non-compliance with s 2(1)(*a*) of the Act.

(b) Whether s 2(1)(*a*), when considered as part and parcel of a composite scheme of the Act infringes applicant's right to have access to a court of law.

Issues for determination

[4] The issues for determination in this application are whether or not the restrictions imposed by the impugned section infringe the applicants' rights to have access to court and if so, whether such limitation is justified under the Namibian constitution.

Relevant provisions of the Act

[5] Section 2(1) of the Act reads as follows:

> '2. *Limitations of time in connection with, and other requirements for, the institution of legal proceedings against an administration, local authority or officer.*
>
> (1) Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer (hereinafter referred to as the debtor) -
>
> (a) unless the creditor has within ninety days as from the day on which the debt became due, served a written notice of such proceedings, in which are set out the facts from which the debt arose and such particulars of

such debt as are within the knowledge of the creditor, on the debtor by delivering it to him or by sending it to him by registered post;

(b) before the expiration of a period of ninety days as from the day on which the notice contemplated in paragraph (a) was served on the debtor, unless the debtor has in writing denied liability for the debt before the expiration of such period;

(c) after the lapse of a period of twenty-four months as from the day on which the debt became due.'

Section 4 of the Act provides:

'4 **Leave to serve notice after the lapse of the prescribed period**

If a creditor has failed to comply with the provisions of paragraph (a) of subsection (1) of section 2 in relation to legal proceedings which he desires to institute and the debtor has not, within fourteen days after having been requested by the creditor to do so, in writing waived his right to invoke those provisions, the court having jurisdiction in respect of such legal proceedings may, notwithstanding those provisions but subject to the provisions of paragraphs (b) and (c) of that subsection, grant to the creditor on his application and on such conditions as the court may deem fit, leave to serve the notice contemplated in the said paragraph (a) on the debtor after the lapse of the period prescribed in that paragraph, if the court is satisfied –

(a) that the debtor is not prejudiced by the failure; or

(b) that by reason of special circumstances the creditor could not reasonably have been expected to serve the notice within that period.'

Case for the applicants

[6] The founding affidavit in the application is deposed to by the first applicant while the second applicant deposed to a confirmatory affidavit. It is the applicants' case that impugned section is unconstitutional and of no force and effect on the basis that it violates their rights to approach any court of competent jurisdiction in determining their civil rights as entrenched in Article 12(1)(*a*) of the Namibian Constitution. The applicants

further state that the impugned section limits their right to have access to courts in contravention of Article 24(3) which states, amongst other things, that nothing contained in that Article shall permit the denial of access by any person to a court of law even during the period when Namibia is in a state of national defence or when a declaration of state of emergency is in force. The applicants contend that the impugned section is drastic in that the period of 90 days is of a very limited nature and unreasonable and is a real impediment to the applicants' rights to have access to a court of law.

[7] The applicants further assert that the object of the Act was not to regulate judicial proceedings, but to protect the interests of persons and institutions in the position of the first and second respondents. The applicants acknowledge the fact that condonation could be sought for the non-compliance with the notice as required by s 2, but it is their contention that none of the applicants had knowledge of the existence of the section and that such averment should be regarded as a special circumstance. Applicants argue furthermore that the respondents did not plead any prejudice suffered as a result of the applicants' non-compliance with the impugned section. Despite the condonation provision, it is applicants' case that the restrictions the impugned section imposes on the exercise of the applicants' rights are not reasonable and for that reason the provisions of the section are not necessary in a democratic society or in the interest of sovereignty and integrity of Namibia.

The case for third and fourth respondents

[8] It is the third and fourth respondents' case that it is not necessary for the applicants to seek a declaratory order on the constitutionality of the impugned section since there were other non-constitutional remedies available to the applicants. In this regard, the respondents concerned argue that the applicants were not precluded from instituting legal proceedings in future as they could bring an application for condonation in terms of s 4 of the Act. Third and fourth respondents further argue that the applicants would have complied with the requirements of s 4 if they were to satisfy the court in which the summons were issued that no prejudice had been caused to the debtor as a result of the non-compliance with the section and further that due to their lack of knowledge of the provision, as alleged, it was not reasonably expected of them to serve

such notice. It is therefore third and fourth respondents' contention that the internal remedies provided for by s 4 of the Act had not been resorted to. Third and fourth respondents further point out that it is not necessary in this case to declare the said section unconstitutional, relying for this contention on the principles laid out in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (NmSc) at 184A-B where it was held that constitutional issues should be decided only if it is absolutely necessary to do so. Counsel for the respondents argued that the choice not to follow the non-constitutional remedy available to the applicants would not justify deciding the constitutionality of the impugned section.

[9] The applicants have made the following factual averments that have not been disputed, namely that the High Court has jurisdiction to hear matters on the constitutionality of legislation; the application is properly before Court;[1] the applicants have the right to approach the Magistrate's court in respect of their cause of action; Article 12 of the Constitution gives the applicants the right to seek assistance in a court of law in Namibia; the applicants had directed a letter to first and second respondents' legal practitioners requesting them to waive compliance with the impugned section and to withdraw their special plea and that the constitutional challenge was brought after the refusal by the first and second respondents to withdraw their special plea.

Analysis of the Law

[10] Counsel for the applicants submits that s 2(1)(*a*) is unconstitutional and that an order similar to the order made by the South African Constitutional Court in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC) should be made. The Constitutional Court in that case confirmed the order of the Witwatersrand High Court declaring the provisions of the impugned section unconstitutional by employing a two-stage enquiry: firstly whether or not the impugned section limited the right of access to a court and secondly, whether such limitation was

[1] Article 80(2) of the Namibian Constitution states that the High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.

justified under the South African Constitution. Samyalo AJ at 494A-B examined the Act as a whole and pointed out that in order to determine whether one's right to have access to a court had been limited depended primarily on the meaning and effect of the section read in the context of the whole Act.

[11] Paraphrased, the impugned section states that 'the creditor' (being the applicant) may not institute legal proceedings against 'the debtor' (being the first and/or second respondent) unless a notice has been served on the creditor by delivering it or by sending it by registered post. Such notice shall notify the creditor of the nature of the debt and the facts from which the debt arises. In terms of s 2(2)(c) of the Act, a debt becomes due on the first day on which the creditor has knowledge of the identity of the debtor and the facts from which the debt arose. The debtor may only then institute proceedings within 90 days from the day on which the debt became due, i.e. the day that the creditor became aware of the debt via notice. Sec 4 thereafter comes into play to afford the creditor the avenue to apply for condonation for any non-compliance with a part of s 2. A competent court in respect of the legal proceedings will grant such condonation if it is satisfied that the debtor is not prejudiced by the failure or that by reason of special circumstances the creditor could not reasonably have been expected to serve the notice within that period.

<u>The test for constitutionality</u>

[12] The Namibian Constituting is the supreme law of the land against which all laws are measured for validity. The Namibian constitution further contains a Bill of Rights which sets out the rights and freedoms that are inalienable and cannot be derogated from save where so permitted by the Constitution itself. Article 25 of the Constitution states that:

'(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid…'

[13] The limitation of any rights and freedoms as contained in Chapter 3 of the Constitution should comply with Article 22 which states:

> 'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

It is evident from the above provisions of the Constitution, firstly that the rights and freedoms, set out in Chapter 3, cannot be abolished or abridged and can only be amended in so far as such amendment does not diminish or detract anything from the rights and freedoms so set out in that Chapter. Secondly, the limitation of the rights is only permissible where this is authorised by the Constitution itself and then only to the extent set out in Article 22. Thirdly, any law or action that purports to abolish or abridge any of the rights or freedoms in contravention of the Constitution shall to that extent be invalid.

<u>The burden of proof when a person alleges an infringement of a fundamental right or freedom.</u>

[14] As opposed to the general qualification clause contained in the South African constitution, the Namibian constitution makes a distinction between the fundamental rights contained in Articles 6 - 20 and the fundamental freedoms enumerated in Article 21(1). The Supreme Court pointed out in *Immigration Selection Board v Frank* 2001 NR 107 at 32D that in both cases, whether one is dealing with a fundamental right or freedom, the applicant will have the burden to allege and prove that a specific

fundamental right or freedom has been infringed. This will necessitate that the applicant must also satisfy the court in regard to the meaning, content and ambit of the particular right or freedom. The Supreme Court went on to state at 132E-F that with regard to fundamental rights, specifically, the burden of proof remains throughout on the applicant to prove that a fundamental right had been infringed at least as regards those rights where no expressed qualification or exception is provided for in the wording of the fundamental rights such as in Articles 6 - 12, 14 and 18. Where an expressed qualification or exception is provided for such as in Articles 13, 17(1), 20(3) and 20(4), the burden of proof may shift as in the case of the fundamental freedoms.

[15] Article 12(1)(*a*) of the Constitution reads:

> 'Fair Trial
> (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[16] The meaning, content and ambit of the right to have access to a court would involve an interpretation of the constitution which should be broad, liberal and purposive so as to avoid the 'austerity of tabulated legalism' and so as to enable the Namibian constitution to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.[2] In the area of constitutional interpretation, courts have adopted the exercise of giving value judgments based on the commonly shared values of the Namibian people and to declare any Act of Parliament which does not respect such values unconstitutional.

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[2] *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC) at 340B-D; 1994 (1) SA 407 (NmS) at 418F-G.

[17] Counsel for the applicants argued that the Court will be required to make a value judgment in determining the constitutionality of the impugned section read with s 4. It is furthermore submitted that the exceptions under Article 21(2) should also apply in this matter as they form part of the Constitution when read as a whole. As regards the right to have access to courts, counsel contended that such right is not expressly mentioned in Article 12(1)(*a*) of the Constitution on which the applicants rely but submits that from a liberal and broad interpretation, the right to have your civil rights and obligations determined by a competent court includes the right to have access to courts.

[18] The right to have access to a court of law is one of the entrenched rights under the Bill of Rights as could be seen from the following Articles:

> 'Article 18 - Administrative Justice
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions *shall have the right to seek redress before a competent Court or Tribunal.*
>
> Article 25 – Enforcement of Fundamental Rights and Freedoms
>
> (1) …
>
> (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened *shall be entitled to approach a competent Court to enforce or protect such a right or freedom*…' (Emphasis added)

<u>Did the applicants make out a case that their rights have been infringed?</u>

[19] As previously mentioned, in discharging the burden of proof as required, applicants must satisfy the court as to the meaning, content and ambit of the particular right or freedom allegedly infringed. Counsel for the applicants argues that Article 12(1)(*a*) should be interpreted in the same way Article 10 has been interpreted by our courts and should be subjected to Article 22 which sets criteria for limitations upon fundamental rights and freedoms. Counsel summed up his oral submissions by stating at p 16 of the record of proceedings as follows:

‘However, if the Act or the section is not really a limitation statute but a mere section which protects a specific person like in this case a local authority and the period of the notice is totally unreasonable given the value judgment to be exercised, then even if there is the provision in section 4 of the Act under consideration, that will be unconstitutional…’

[20] If I understand counsel correctly, the contention is that the section should be declared unconstitutional primarily because it singles out particular kinds of proceedings against specific kinds of respondents and attaches extraneous pre-conditions to the institution of those proceedings as found in the *Moise v Greater Germiston Transitional Local Council* case. In reaction to this submission, counsel for the third and fourth respondents argues that the impugned section serves a legitimate government purpose of ensuring that an institution falling in the category of persons or bodies mentioned in the impugned section is not unnecessarily dragged to court. On whether or not the impugned section infringes the applicants’ rights to have access to courts, counsel for the respondents submits that Article 12(1)(*a*) was not absolute in that the right to have access to a court or to have a public hearing may be limited, for example, by excluding the media or press for various reasons or as is necessary in a democratic society. In reply, counsel for the applicants argued, correctly, that the limitation mentioned in that sub-article related to the press or the public and not the right to have access to courts.

[21] It is further submitted on behalf of the third and fourth respondents that the applicants have ignored the internal remedies that are provided by the Act to avoid the limitations imposed by the impugned section. It was argued that s 4 does not have requirements apart from the guidelines set by the Legislature which a court with the requisite jurisdiction should follow. Accordingly, s 4 does not have limitations as to when condonation may be brought. It is further contended on behalf of the applicants in reaction to the argument of exhausting internal remedies that by the time the third and fourth respondents had raised the issue of s 4, it was already two years after the cause of action had arisen and that that had made it impossible for the applicants to seek condonation.

[22] Legislation that prevents judicial resolution of a dispute or which constitutes an impediment to a person's right to have a dispute resolved by a court of law is commonly challenged in terms of the access to courts clause or the equality clause (Article 10). The equality clause may be invoked when such limitation only applies to a specified group of people e.g. only those in the employment of government. Article 10 is, however, not engaged in these proceedings.

[23] A limitation of 90 days within which to institute legal proceedings is in itself a limitation and there is no doubt that the Act in question is a statute of limitation. The only issue left to determine is whether this limitation is justifiable in terms of the constitution and to further determine whether the limitation has an objective purpose, connected to a legitimate purpose. I respectfully agree with the observation of Somyalo AJ at 496D-E in the *Moise* case where he noted, amongst other things, that the requirement of a written notice as a precondition to the institution of legal proceedings was an obstacle and that the 90 day period was a real impediment to the prospective claimant's access to a court. At 495A, Somyalo AJ observed that the object of 'statutory provisions that single out particular kinds of proceedings against specific kinds of defendants and attach special extraneous preconditions to their institution' is not to regulate judicial proceedings but to protect the interests of the defendants in proceedings involving the organs of state and that the active protection of the right of this category of prospective litigants to approach a court for adjudication of their claims without the limitation contained in the impugned section outweighed the governmental interests concerned. In my respectful view the position in this jurisdiction should be different.

[24] This Court in *Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118 (NmHC) laid down the principle that for it to be justified, a limitation, 'should permit reasonable classifications which are rationally connected to a legitimate object'. Applying this test to the question before it, the court found that it was reasonable for a law to provide a shorter prescription period for claims against the state as an employer than for other civil claims. The judgment made reference to several factors such as the state being by far the largest employer in Namibia with the largest number of separate divisions as well as the widest geographic spread; the government

having an unusually high turnover of staff; and the need for the state to be in a position to timeously investigate disputes. It was further stated at 1140D-F that Article 12(1)(*a*) may be invoked where the period of prescription was unreasonable to such an extent as to bar the right of a party in a practical sense and thereby offends the right of access to the courts.

[25] In determining the purpose of any limitation clause, such as the present, courts have followed the same reasoning as stated in the case of *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) at 624D-E where Marais JA said:

> 'The purpose of legislation like this is plain and has been set forth in so many cases that their citation yet again seems unnecessary. In this instance it is to protect a local authority against precipitate citation of it in a lawsuit by a litigant seeking to obtain payment of a debt allegedly due by the local authority. It is aimed at providing a local authority with an opportunity of investigating the matter sooner rather than later when investigations might prove more difficult, of considering its position, and, if so advised, of paying or compromising the debt before becoming embroiled in costly litigation.'

[26] Furthermore, the third and fourth respondents relied on a dictum in *Stambolie v Commissioner of Police* 1990 (2) SA 369 which was cited with approval in *Mwellie* where it was stated that:

> 'It has been said that statutes of limitation are conservators without which society cannot wholly govern. They are founded on grounds of public policy and give effect to two maxims:
>
> (a) First, *interest reipublicae ut sit finis litium*- the interest of the state requires that there should be a limit to litigation
>
> (b) Second: *vigilantibus non dormientibus jura subveniunt*- the laws aid the vigilant and not those who slumber.'

[27] It is therefore the position that restrictions such as those in the impugned section have over the years been held to be connected to a legitimate purpose, i.e. to provide defendants in claims against governmental bodies time to investigate a claim as early as possible and to decide whether to defend or compromise the claim. It is my considered opinion that limitations such as those contained in the impugned sections are legitimate and reasonable. The right to have access to courts is, of course, not absolute as conceded by both counsel. The limitations contained in the impugned section are not aimed at infringing a person's right to approach a court but merely set out formalities and requirements within which rights and obligations should be ascertained. This is necessary for the orderly operation of institutions falling in the categories specified in the impugned section. Bearing in mind the ethos and values expressed in our Constitution, I am satisfied that the legislative constraints placed on the applicants' rights to bring legal proceedings are reasonable, are in the public interest and serve a legitimate purpose. Applicants have therefore failed to discharge the burden of proving that the limitations in s 2(1)(*a*) infringe their rights to have access to courts. In the light of this conclusion, it has become unnecessary to deal with the argument based on Article 22 of the Constitution.

[28] In any event and as previously observed, counsel for the third and fourth respondents argued that the applicants did not exhaust all the internal remedies provided for under s 4. Their right to have access to a court should be limited in such a way that the Act does not provide any other avenue to exercise such right. In the criminal matter of *S v Tcoeib* 1996 (1) SACR 390 (NmSC), the Supreme Court remarked that a sentence of life imprisonment was not unconstitutional and against Article 8, because the Prison Act allows release on parole under appropriate circumstances. By parity of reasoning, in the present proceedings, the Act also provides for other avenues for the exercise of one's right to have access to courts. The applicants had the opportunity to seek condonation under s 4 which they elected to ignore.

[29] It is common cause that a letter was served on the first and second respondents on 15 July 2002 to request them to abandon the special plea and to afford the applicants an opportunity to seek condonation. As states above, it was submitted on

behalf of the applicants that by the time the third and fourth respondents had raised the issue of s 4, it was already two years after the cause of action had arisen and that that made it impossible for the applicants to seek condonation. However, no factual averments were made by the applicants in support of this submission and to show that it would not have been reasonably expected of them to file the notice within the stipulated time. It was not indicated at what stage they became aware of the provisions nor was it alleged that all steps to invoke s 4 were fruitless. As submitted on behalf of the third and fourth respondents, s 4 does not have a limitation as to when the condonation application may be brought. The applicants could have applied for condonation in the Magistrate's Court even after the first and second respondents had refused to withdraw their special plea. Instead of taking that route, they chose to pursue the constitutional challenge. It is, of course, a choice they were entitled to make.

[30] It is therefore my considered opinion that the applicants sought the declaratory relief prematurely in that all internal procedures were not exhausted. By following the procedures as contained in s 4, they have avoided the limitations imposed by the impugned section and the action would have been decided in the light of the outcome of such procedure. The application ought therefore to be dismissed.

[31] As regards costs, the applicants have asked for a costs order against any of the respondents who opposes the application. The third and fourth respondents, on the other hand, did not seek an order as to costs. In the circumstances, no order as to costs will be made.

Order

3. The application is dismissed.
4. No order as to costs is made.

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P SHIVUTE

JUDGE

APPEARANCE:

APPLICANTS:	R Heathcote SC
	Instructed by Dr Weder, Kruger & Hartman, Windhoek
THIRD AND	
FOURTH RESPONDENTS:	N Markus
	Of Government Attorney, Windhoek