



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-GEN-2019/00024

ALBERTUS VAN WYK

APPLICANT

and

NAMIBIA CORRECTIONAL SERVICE COMMISSIONER

GENERAL: RAPHAEL HAMUNYELA

FIRST RESPONDENT

MINISTER OF SAFETY AND SECURITY:

CHARLES NAMOLOH

SECOND RESPONDENT

DEPUTY COMMISSIONER GENERAL: T ANGULA

THIRD RESPONDENT

OFFICER IN CHARGE: HARDAP CORRECTIONAL

FACILITY DEPUTY COMMISSIONER: L MUHUNDU

FOURTH RESPONDENT

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

Coram: GEIER J

Reserved: 20 May 2020

Delivered: 21 August 2020

Flynote: State – Actions by and against – Actions against – Liability of state for acts of members of Correctional Service – Statutory requirements for claims – s 133 (4) of Correctional Services Act 9 of 2012 requires ‘a proper and timeous written notice under the said section as a precondition for the institution of a civil action arising under the Correctional Services Act. The failure to plead that the statutory notice requirements had been met renders a claimants cause of action excipiable. The statutory precondition set by subsection 133(4) of the Correctional Service Act 2012 was not met in this instance - or – if it was – it was not ‘pleaded’, as it should have been. The applicant’s case on the papers could thus not succeed and the application was thus dismissed for these reasons.

Summary: The facts appear from the judgment.

ORDER

1. The application is dismissed.
2. There will be no order as to costs.

JUDGMENT

GEIER J:

[1] The applicant is an inmate at the Hardap Correctional Facility, currently serving a 19 year term of imprisonment.

[2] He was sentenced on 10 October 2014.

[3] On 1 April 2015 he was appointed to work at the workshop of the facility as a mechanic.

[4] His complaint is that since then periodic 'strip searches' have been done on his person.

[5] Dissatisfied with such treatment the applicant then obtained a copy of the Constitution, the Correctional Service Act of 2012 as well as the Regulations thereto, with reference to which he came to the conclusion that the respondents were violating his Article 5, 8(1)(2)(a)(b), 13, 10(2), 21(2) and 25(1) rights and that the respondents did not comply with sections 18(2)(a)(c), 3(6), 38, 43 and 46 of the said act.

[6] He thus complained about this and upon enquiring why this was done without suspicion he was informed by SSCCO Amutydkala that this was done on orders from Deputy Commissioner Muhundu. He was given the option not to go and stay in the 'section' or to raise the complaint with the workshop manager. He thus approached Assistant Commissioner Kawana to enquire from the Deputy Commissioner why this was done and he requested him to address the inmates in regard to his decision.

[7] The applicant then refused to go to the workshop, but was forcefully taken by CCC Hashipala. On each occasion he was apparently 'strip searched' and made to 'frog jump'.

[8] Upon a further enquiry in this regard the workshop manager informed him that the officer in charge had ordered the procedure to continue.

[9] All this apparently occurred during- or since 2015.

[10] On the occasion of his temporary transfer to the Windhoek Correctional facility during October 2018 he apparently laid a complaint in this regard with the Commissioner –General.¹

[11] On 24 November 2018 the Deputy Commissioner-General T Angula informed the applicant that the complained of order emanated from him and 'that it would continue'.

¹ The applicant refers to an annexure in this regard, which was not attached to the founding papers.

[12] On 28 January 2019 the applicant then approached the court on application seeking a number of orders interdicting the respondents from treating the applicant in a 'degrading, disrespectful and inhuman' manner and from inflicting 'physical, mental, emotional and spiritual torture' on the applicant.

[13] The applicant also requests the Court to issue a directive that the strip searches be conducted in the prescribed manner and not without suspicion as to any ingested article hidden in a body cavity.

[14] The respondents have opposed the application. They did so by virtue of the provisions of Rule 66(1)(c) of the Rules of Court and which allows them to raise questions of law only, without answering to the merits of the case adduced by the applicant.

[15] The questions of law so raised were formulated as follows:

- a) The plaintiff failed to serve statutory notice as contemplated by section 133(4) of the Correctional Services Act No. 9 of 2012 ("the Act");
- b) That the notice of motion does not disclose a cause of action;
- c) The claim has prescribed as contemplated by section 133(3) of the Act;
- d) There are disputes of fact that cannot be readily determined by way of a Notice of Motion.

[16] Accordingly and before the merits of this application are then to be considered it will have to be determined whether or not the questions of law so raised have any merit.

[17] It should possibly also be mentioned that, due to the Covid 19 pandemic, the parties were requested - in accordance with the 'Revised Road Map, dated 4 May 2020, for the High Court of Namibia, whilst the State of Emergency persists' - to consider waiving their right to oral argument and to have the matter determined on the papers only, which they did.

[18] When it so comes to the consideration of the written arguments advanced by the parties in support of their cases it needs to be observed firstly that the applicants heads focus solely on the merits, thus losing sight of the need to address the questions of law, which require *in limine* determination.

[19] As far as the arguments raised on behalf of the respondents on the questions of law are concerned it appears that it is, inter alia, in essence, contended that by virtue of the applicant's non-compliance with the notice requirements set in section 133(4) of the Correctional Service Act, that the matter is 'unprocedurally' before the court and that by virtue of the provisions of section 133(3) the applicant's claim has 'prescribed'.

[20] A finding in favour of the respondents based on the notice requirement point would however obviate the need to determine any of the other issues raised on behalf of the parties. I will thus proceed to determine this point first.

[21] This question of law is based on the statutory requirements set by Section 133 (4) of the Correctional Service Act 9 of 2012, which requires that:

'(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.'

[22] It appears from the preceding sub- section (3) that the type of action referred to in the quoted sub- section(4) is '*a civil action against the State or any person for anything done or omitted in pursuance of any provision of this Act*'.²

[23] It becomes clear at the same time that the complained of act or omission must relate to anything done or omitted in pursuance of any provision of the Correctional Service Act.³

² Sub section 133(3) reads in toto : '(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.'

³ Compare section 133(3).

[24] The background facts set out in the introductory parts of this judgment - which were not disputed by the respondents - prove that the complained of acts and omissions were done in the pursuance of the provisions of the Correctional Service Act 2012 by officers of the Correctional Service.

[25] It is also undisputed that no written notice, as contemplated in Section 133(4) of that Act was given by the Applicant to the relevant Respondents at least one month before the commencement of legal action in this case.

[26] In order to then determine the effect of this non-compliance with the sub-section it then appears from various decisions of the Courts relating to the same or similar provisions, in similar legislation, what the purpose for this legal pre-condition is and what the rationale therefore is.

[27] Prinsloo J, in the most recent judgment on this aspect, dealt with the failure to comply with sub-section 133(4) of the Correctional Service Act in *Elia v Minister of Safety and Security and Others* 2019 (1) NR 151 (HC) as follows :

'Statutory notice of one month prior to the institution of these proceedings in contravention of s 133(4) 12 of the Act

[32] In *Mahupelo v Minister of Safety and Security and Others*⁴ the court made the following remarks with respect to s 39 of the Police Act, which primarily carries the same intentions imposed by the legislature in s 133(4) of the Correctional Service Act:

[16] It is clear from the reading of s 39 of the Police Act that a proper and timeous notice of intention to bring proceedings is a pre-condition for the institution of a civil action under the Police Act. The question that would arise from the reading of this section would point to the purpose of this notice.

[17] The purpose of the notice in terms of s 39 of the Police Act was expounded in a number of judgments in the Namibian and as well as the South African jurisdictions. This is what the courts had to say in the case of *Simon v Administrator-General, South West Africa*:

⁴ 2017 (1) NR 275 (HC).

'The object of the notice required under s 32(1) is, as had been said often enough, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter. See *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) at 769H. The notice need not be as detailed as a pleading.'⁵

[18] It has further been stated:

'The purpose for which the notice is required to be given is of importance. That purpose is to ensure that the State, or the person to be sued, receives warning of the contemplated action and is given sufficient information so as to enable it or him to ascertain the facts and consider them.'

[33] In *Indilinga Systems Design & Logistics CC v Minister of Safety and Security and Another*⁶ 14 Geier J addressed the non-compliance with s 39(1) of the Police Act 15 as follows:

'[5] It immediately emerges that the plaintiff's particulars of claim do not comply with this fundamental principle of pleading. Not only has the section relied upon not been pleaded, but also the facts, which would show that the plaintiff has complied with the pre-conditions set by s 39(1) of the Police Act 1990, have not been set out.

[6] As the plaintiff's particulars of claim thus do not show that the pre-condition for the civil action against the defendants have been met, they fail to disclose a cause of action and are thus rendered excipiable thereby.'

[My emphasis.]

[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.

⁵ *Simon v Administrator-General, South West Africa* 1991 NR 151 (HC) (1992 (2) SA 347) at 153 A

⁶ [2014] NAHCMD 264 (I 209/2013; 20 May 2014).

[29] The statutory precondition set by subsection 133(4) of the Correctional Service Act 2012 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.

[30] 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.

[31] 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 section 133(4) of the Correctional Services Act No. 9 of 2012, 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.

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

[33] It follows also that the application – thus – cannot succeed. It thus falls to be dismissed.

Costs

[34] The respondent asks that in such event the application be dismissed with costs. The respondent is of course to be considered the successful party and would thus, on the application of the general governing principle, that costs should follow the result, be entitled to a costs order. The respondents have been successful on a technical point, whereas it seems, on the uncontradicted version of the applicant, a lay person, that he may very well have been subjected to unwarranted and improper and degrading treatment. I take into account also that the respondents have not presented their version or advanced any justification for their actions and that the Court was thus not able to consider both sides of the matter. As I nevertheless, in

such premises, have a measure of sympathy for the applicant I will exercise my discretion as to costs in his favour. I thus decline to make an award as to costs.

[35] In the result the application is dismissed.

H GEIER
Judge

APPEARANCES

APPLICANT:

In Person

RESPONDENTS:

J Ncube
Government Attorney,
Windhoek