

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title:	Case No:
CHARLES NAMISEB PLAINTIFF	HC-MD-CIV-ACT-OTH-2019/04178
and	Division of Court:
MINISTER OF SAFETY AND SECURITY 1 st DEFENDANT	HIGH COURT (MAIN DIVISION)
INSPECTOR- GENERAL OF THE NAMIBIAN POLICE FORCE 2 nd DEFENDANT	
THE (RETIRED) REGIONAL COMMANDER OF KHOMAS REGION, NAMIBIAN POLICE FORCE 3 rd DEFENDANT	
THE THEN STATION COMMANDER OF WINDHOEK POLICE STATION, KHOMAS REGION, NAMIBIAN POLICE FORCE 4 th DEFENDANT	
THE THEN REGIONAL CRIME INVESTIGATIONS COORDINATOR, NAMIBIAN POLICE FORCE, KHOMAS REGION, WINDHOEK 5 th DEFENDANT	
THE THEN UNIT COMMANDER OF CRIMINAL INVESTIGATION UNIT/DIRECTORATE, KHOMAS REGION, WINDHOEK, NAMIBIAN POLICE FORCE 6 th DEFENDANT	
THE THEN UNIT COMMANDER OF SERIOUS CRIME UNIT/DIRECTORATE, NAMIBIAN POLICE FORCE,	

KHOMAS REGION, WINDHOEK 7 th DEFENDANT THE INVESTIGATING OFFICER OF THE ESCAPE MATTER, NAMIBIAN POLICE FORCE, KHOMAS REGION, WINDHOEK 8 th DEFENDANT	
Heard before: Honourable Mrs Justice Rakow, J	Date of hearing: 22 October 2020
	Date of order: 26 October 2020
Neutral citation: <i>Namiseb v Minister of Safety and Security</i> (HC-MD-CIV-ACT-OTH-2019/04178) [2020] NAHCMD 489 (26 October 2020)	
Having read the record of proceedings as well as submissions made by counsels for the applicant and the respondent: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The pre-trial order is amended to include the name of the expert witness – Michael Tangeni Shilumbu. 2. The special pleas raised by the defendants in their plea will not be included in the pre-trial order and the court does not grant leave for them to be available to the defendants during the trial. 3. The wasted costs for the trial as well as the costs associated with the application are to be paid by the defendants. 4. The matter is postponed to 27 October 2020 at 15h30 to determine a date for the continuation of the trial. 	
Reasons for orders:	
<u>Introduction</u> - [1] The Plaintiff in this matter sued the respondents for damages he suffered after being arrested in South Africa and extradited to Namibia on charges of escaping from lawful custody. The allegation by the plaintiff is that he was lawfully released from custody by a member of the police and did not escape therefore the warrant authorized and the case opened by the Namibian police caused him to be detained illegally and exposed him to criminals and therefore caused him emotional injury. He was subsequently found not guilty	

on the charge of escaping from lawful custody. He instituted his claim against the Minister of Safety and Security, the Inspector-General of the Namibian Police Force, the (retired) Regional Commander of the Khomas Region, the then Station Commander of the Windhoek Police Station, the Unit Commander of Criminal Investigations Unit for Windhoek, the then Unit Commander of the Serious Crime Unit for the Khomas Region and the Investigating officer on the escaping matter, in Windhoek. These parties defended the matter and are all represented by the Government Attorney's office.

[2] The defendants filed a plea on 31 January 2020 and as part of the plea, raised three special pleas, being that no proper service of the process was effected on the defendants, the plaintiff failed to serve a statutory notice as contemplated in Section 39(1) of the Police Act, 1990 on the defendants and a special plea of non-joinder of the Prosecutor-General to the proceedings. The parties filed a joint case management report on 9 March 2020, which was made an order of court on 16 March 2020, and in this report no mention was made of the special pleas and the adjudication thereof. On the question of need for joining other parties and dates of such joinder, the report indicates not applicable; on the question of dates for filing interlocutory applications and possible dates for hearing such applications the answer is not foreseen at this stage; on the question of any objection on points of law is applicable, the report indicates not applicable; on the question of giving orders or directions for a separate hearing in respect of any relevant issue, the answer was not applicable and on the last question any other issues that are likely to facilitate the just and speedy disposal of the action of application the answer was that the parties will attempt to enter into settlement negotiations in an attempt to settle the matter amicably. This report was signed by both the legal practitioners and subsequently made an order of court. The special pleas and the disposal of them were never raised in this report.

[3] On 22 June 2020 the parties filed a joint proposed pre-trial report setting out the issues of dispute to be resolved at trial, issues of law to be resolved at the trial, facts not in dispute, witnesses they intend to call and those to be called by way of subpoena, evidence to be taken on commission if any, exhibits to be introduced as evidence at the trial, plans, photos, diagrams and models to be used, an indication of the anticipated length of trial, who will carry the duty to index and paginate the trial bundles, any measures to expediting the trial, the provision of trial particulars, addressing prospects of settlement and alternative dispute resolution and the possibility of transferring the case. Again no explicit mention is made for the special pleas pleaded by the defendants. The pre-trial order which was made on 6 July 2020 then incorporated these answers and it was made an order of court. The matter was subsequently set down for trial on the roll for 19 – 23 October 2020 and for roll-call the Friday before the trial is set to start, being 16 October 2020. Both legal practitioners attended the roll-call and indicated that the matter is ready to proceed

on 19 October 2020 with trial.

[4] On 19 October 2020, when the hearing commenced, the legal practitioner for the defendants, Mr. Kashindi addressed the court and indicated that the defendants still intend to raise their special pleas and that he intends to do it in argument. The court pointed out to Mr. Kashindi that he is bound to the pre-trial order and their memorandum and that these issues were never raised in the pre-trial memorandum. The legal practitioner for the plaintiff, Ms Siyomundji indicated to court that she was of the opinion that the special pleas were abandoned as they were not dealt with in the pre-trial memorandum and subsequent order. Upon questioning by the court why this was not raised at roll-call on 16 October 2020, Mr. Kashindi indicated that he only realised that special pleas were raised when he prepared for trial during the weekend 17 -18 October 2020.

[5] The legal practitioner for the defendants indicated that he wishes to bring a formal application to amend the pre-trial order and to include the issues raised with the special pleas. He was then allowed to bring such an application and filed an application seeking the following orders:

1. Granting the defendants leave to amend paragraph 2 of the Pre-Trial Report dated 18th of June 2020 to include the special pleas raised by the defendants in their Plea dated 31st January 2020 and to amend para 4 of the Pre-Trial Report to include the name of the Defendants' Expert Witness, Mr. Michael Tangeni Shilumbi in the pre-trial report.
2. Vacating the trial dates and setting a new date for the hearing of the special pleas.
3. Further and/or alternative relief.

[6] The application is supported by the affidavits of Allen Bwendo and Mathias Shanghala Kashindi. Allen Bwendo stated that he was advised by the defendants' legal practitioner of record that he has not been able to include the defendants' special pleas and name of the expert witness in the pre-trial report and he only became aware of that omission during the weekend of 17 – 18 October 2020 when he was preparing for the trial. He confirmed that the defendants did not waive or abandon their special pleas. He explains that the special plea of non-joinder relates to the Prosecutor-General who is not only a necessary party to the proceedings but also an interested party as it is common cause that the warrant of apprehension and the subsequent prosecution was done by the Prosecutor-General. Mathias Shanghala Kashindi filed a confirmatory affidavit.

[7] The application was opposed by the plaintiff and he filled an affidavit setting out his grounds for

opposition. He referred the court to the Case Management Report and subsequent order which also did not deal with any of the pleas the defendants now want to raise as special pleas and again in the pre-trial report and subsequent order, the pleas are also not mentioned. He indicated that he will suffer serious prejudice if the matter is set back a few steps as there are no more dates available for trial during this year and he is entitled to have his matter heard as soon as possible.

[8] Rule 26(10) of the High Court rules reads as follows:

'Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.'

From the reading of this rule it is clear that issues not raised as disputed between the parties will not be available to the parties during the trial unless it is with leave of the managing judge. This matter was allocated for trial to myself and I therefore became ceased with the matter as from the time that it was assigned to me by the judge doing the roll call of matters ready for trial. This therefore means that the issue of the special pleas are not available to the defendant who pleaded them without leave of the managing judge, who in this instance now became the trial judge. These issues were also not raised at the case management stage of the matter as an issue to be determined before trial. The defendant brought an application to amend the pre-trial order to include these issues and then, subsequently vacating the trial dates as the trial could not proceed.

[9] When considering whether to grant or not this application, the court took into account rule 1 of the court rules, dealing with the overriding objective of the Judicial Case Management System which reads as follows:

'(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -

- (a) ensuring that the parties are on an equal footing;
- (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;
- (c) dealing with a cause or matter in ways which are proportionate to
 - (i) the amount or value of the monetary claim involved;
 - (ii) the importance of the cause;
 - (iii) the complexity of the issues and the financial position of the parties;
- (d) ensuring that cases are dealt with expeditiously and fairly;
- (e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other

causes; and

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.

(4) The factors that a court may consider in dealing with the issues arising from the application of the overriding objective include -

(a) the extent to which the parties have complied with any pre-trial requirements or any other mandatory or voluntary pre-trial process;

(b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

(c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been prompt in undertaking interlocutory steps in relation to the proceeding;

(d) the degree to which any lack of promptness by a party in undertaking the step or proceeding has arisen in circumstances beyond the control of that party;

(e) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or any direction proposed to be given by the court;

(f) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;

(g) the extent to which the parties have had the benefit of legal advice and representation; and

(h) any other relevant matter.

[10] The *locus classicus* in our jurisdiction on matters of amendment of pleadings at a later stage in proceedings is *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*¹ where a full bench of the High Court dealt specifically with the question of amendment of pleadings at a very late stage in the proceedings. This court finds the sentiments expressed in the *I A Bell* matter also applicable when considering allowing amendments to pre-trial orders. In their judgment, they quoted with approval from the Australian judgement of *Aon Risk Services Australia Ltd v Australian National University*² where the court identified the following as relevant to the court's exercise of the judicial discretion to allow an amendment:

' (a) the extent of delay in seeking leave and its associated costs;

(b) the point the litigation has reached: applications brought during the time set for trial or that require vacating trial dates are less likely to be granted;

(c) the prejudice to the respondent if leave is granted – including the financial and emotional 'strain' of ongoing litigation, which even a costs indemnity may not heal;

(d) the prejudice to other litigants and the efficient use of court resources: that is, the court held that the 'just' resolution of disputes is not limited to justice between the parties, but requires account to be taken of other litigants;

(e) the applicant's explanation for the delay;

¹ (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

² (2009) 239 CLR 175.

- (f) the 'nature and importance' of the amendment to the applicant; and
- (g) the 'need to maintain public confidence in the judicial system'.

[11] In *Loubser v De Beers Marine Namibia (Pty) Ltd*³, Geier, J adopted the approach that to make a pre-trial order binding would render the courts inherent power meaningless to grant amendments and found that a pre-trial order should be able to be varied, most importantly, in order to expedite the determination of the real issues between the parties. He found that a managing judge may, on good cause, at any stage at any status hearing, case management hearing or at trial allow or order amendments to the pleadings so that the real issues between the parties and not mere technicalities are determined at the trial. The court emphasising however that it did not exercise these powers as a matter of course, but, because it was persuaded, that the applicant had advanced sufficiently strong grounds for the court to do so, and because the court was satisfied that justice in this instance could not properly be done unless the court would grant the applicant leave to continue.

[12] In *Scania Jinance Southern Africa (Pty) Ltd v Aggressive Transport CC*⁴ Smuts J (as he then was) said the following about the nature of the pre-trial agreement:

'It is after all an agreement to confine issues which is binding upon them and from which they cannot resile unless upon good cause shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an interlocutory application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.'

[13] The applicants, in this instance the defendants, should therefore have shown good cause for the proposed amendments. The explanation put forward for the inclusion of the name of the expert witness was that additional discovery was applied for and allowed after the pre-trial order was already made and therefore the name of the person who is to introduce the said evidence was not included in the pre-trial order. As part of the process of additional discovery, the order should have been amended. The court accepts this explanation and therefore allows the expert witness to be called and include the name of the expert witness in the pre-trial order.

³ (I 341/2008) [2013] NAHCMD 382 (26 September 2013).

⁴ (I 3499/2011) [2014] NAHCMD 57 (19 February 2014).

[14] On the issue of having the special pleas available to the defendants, I am of the opinion that no good cause was shown for allowing them to be raised during the trial. They were pleaded but not raised in the Case Management Report, where there are questions specifically dealing with joinder, the report indicates not applicable. Similarly on the questions of interlocutory applications – which was not foreseen and on the question of any objection on points of law, the report indicates not applicable. Also on the question of giving orders or directions for a separate hearing in respect of any relevant issue, the answer was not applicable. The issue of the special pleas was never raised in the Case Management Report or in the Pre-Trial Report and no satisfactory explanation was put forward by the legal practitioner for the defendants for this oversight. The only indication was that he only realised that there was special pleas during the weekend before the trial commenced when he was busy preparing for the trial. It therefore seems as if the legal practitioner never properly perused his file and studied his case when he participated in the Case Management Report as well as the Pre-Trial Report. He also did not do so at the time of the roll call hearing of 16 October 2020. The court did not deal with the application to vacate the dates as the trial did not proceed in any event due to the application that was brought and the days allocated to the trial ran out before this order was made.

[15] For those reasons, I make the following orders:

1. The pre-trial order is amended to include the name of the expert witness – Michael Tangeni Shilumbu
2. The special pleas raised by the defendants in their plea will not be included in the pre-trial order and the court does not grant leave for them to be available to the defendants during the trial.
3. The wasted costs for the trial as well as the costs associated with the application are to be paid by the defendants.
4. The matter is postponed to 27 October 2020 at 15h30 to determine a date for the continuation of the trial.

E Rakow

Acting Judge

	Note to the parties:
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	Not applicable.
Counsel:	
Plaintiff/ Respondent	Defendants/ Applicants
<p>Ms Siyomunji</p> <p>Of Siyomunji and Associates</p> <p>Windhoek</p>	<p>Mr Kashindi</p> <p>of the Government Attorneys</p> <p>Windhoek</p>