

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> Annanias Ekongo Nailenge // Correctional Service Officer (Kawana P Muyoba) And 9 Others.	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2020/04734
	<b>Division of Court:</b> High Court, Main Division
<b>Heard before:</b> Honourable Justice Herman Oosthuizen	<b>Date of hearing:</b> 7 June 2021
	<b>Delivered on:</b> 1 July 2021
<b>Neutral citation:</b> <i>Nailenge v Correctional Service Officer</i> (HC-MD-CIV-ACT-OTH-2020/04734) [2021] NAHCMD 313 (1 July 2021).	
<b>Result on merits:</b> Special plea succeeds.	
<b>The order:</b>  Having heard <b>Mr Annanias Nailenge</b> , plaintiff in person and <b>Ms J Gawises</b> , counsel for the defendant:  <b>IT IS ORDERED THAT:</b>  1. The special plea of prescription is upheld.  2. There is no order as to costs.  3. The matter is finalized and removed from the roll.	

## Reasons for orders:

OOSTHUIZEN J:

### **Introduction and Background**

[1] The plaintiff instituted an action against the defendants on the facts that on or about 5 July 2017 he was assaulted by the first, third, fourth, fifth, sixth and seventh defendants. The plaintiff then only instituted a claim against the defendants on 13 November 2020. Defendants specially pleads prescription.

### **Determination and Applicable law**

[2] The issue for determination is whether or not the Plaintiff's claim prescribed in terms of the Prescription Act, Act 68 of 1969 (herein referred to "Prescription Act"), and the Correctional Service Act, Act 9 of 2012 (herein referred to "Correctional Services Act").

[3] The defendants raised section 10(1) of the Prescription Act which states that

'subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'.

[4] Section 11(d) of the Prescription Act states that "save where an Act of Parliament provides otherwise, three years in respect of any other debt".

[5] The claim by plaintiff fall in this category.

[6] Section 133(3) of the Correctional Service Act provides that:

'(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.

(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.’ (underlining is the relevant portions)

[7] The plaintiff had to notify the defendant at least (1) one month before instituting the claim, which was not done.

[8] The plaintiff at first seem to concede that he did not notify the defendants of his claim, but then later submitted that he did submit a letter in writing to one correctional officer. However, there is no proof of that.

[9] In the judgment of *Kruger v Ministry of Safety and Security*<sup>1</sup>the importance of Section 133(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

---

<sup>1</sup> *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.

institute an action against the officials of the Correctional Services within the period stipulated in sub-section (3), that person is, by 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*<sup>2</sup> 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*.<sup>3</sup>”

[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.’

[10] Therefore, the importance of the notice cannot be overlooked.

[11] Nor did the plaintiff institute action within 1 year of the assault.

[12] The obstacles in [10] and [11] become more insurmountable in view thereof that plaintiff's claim has prescribed in terms of the Prescription Act.

## **Conclusion**

[13] I therefore make the following order:

13.1 The special plea of prescription is upheld.

---

<sup>2</sup> [2] 1991 NR 151 at 153 B.

<sup>3</sup> SA 302 (T).

13.2 There is no order as to costs.

13.3 The matter is finalized and removed from the roll.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
<b>Counsel:</b>	
<b>Plaintiff(s)</b>	<b>Defendant (s)</b>
Mr Annanias Nailenge (in person) Windhoek Correctional Facility	Ms J. Gawises Instructed by Government Attorney