

Practice Directive 61

“Annexure 11”



IN THE HIGH COURT OF NAMIBIA

Case Title: WERNER JANUARIE v MINISTER OF SAFETY AND SECURITY AND OTHERS	Case No: HC-MD-CIV-ACT-OTH- 2021/00001
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Schimming-Chase	Date of hearing: 8 October 2021
	Date of order: 27 October 2021
Neutral citation: <i>Januarie v Minister of Safety and Security</i> (HC-MD-CIV-ACT-OTH-2021/00001) [2021] NAHCMD 497 (27 October 2021)	
Having heard Mr W Januarie, the plaintiff in person, and Ms M Meyer, on behalf of the first to fifth defendants and having read the papers filed of record for HC-MD-CIV-ACT-OTH-2021/00001	
IT IS HEREBY ORDERED THAT:	
<ol style="list-style-type: none">1. The special pleas are upheld.2. The plaintiff is directed to engage in and finalise the process of amending his particulars of claim within 30 days of the date of this order.3. Should the plaintiff fail to comply with paragraph 2 of this order, the first to fifth defendants are granted leave to bring an application (on papers duly amplified if necessary) for the dismissal of the plaintiff's claims.4. The matter is postponed to 8 December 2021 at 15:30 for a Status hearing.5. The parties are directed to file a joint status report on or before 3 December	

2021.

Reasons for order:

SCHIMMING-CHASE J

[1] Serving before this court for determination are three issues raised by the first to fifth defendants (“the defendants”) by way of special plea.

[2] On 4 April 2021 the plaintiff in the main action, instituted action proceedings seeking constitutional damages against the defendants. The plaintiff’s claim for damages is based on unlawful assault, unlawful arrest, unlawful detention, and malicious prosecution.

[3] The plaintiff’s causes of action emanate from events which he alleges took place in the Dolam residential area of Katutura, Windhoek on 21 August 2020. On the date in question, the plaintiff alleges that he was threatened, harassed and assaulted by members of the Namibian Police and National Defence Force. He further pleads that he was arrested and detained at Wanaheda Police station for a weekend, but was subsequently released and is currently out on bail.

[4] As a result of the events which took place on 21 August 2020, the plaintiff pleads that several of his constitutional rights were violated and as such he seeks constitutional damages to the tune of N\$77 million ¹ for, inter alia, violations against his human dignity, human rights and freedoms, reputational damage and public humiliation. In addition, the plaintiff seeks costs against the defendants in the amount of N\$150 million for what he terms a ‘frivolous and vexatious defense.’

[5] In response to the action, the defendants effectively raised three special pleas. I will deal with each of these separately.

Claim for malicious prosecution

[6] The first special plea relates to the plaintiff’s claim for malicious prosecution for which he seeks N\$5 million in damages.

¹ Erroneously calculated as N\$75 million in the plaintiff’s particulars of claim dated 4 January 2021.

[7] The defendants contend that the plaintiff has not pleaded the averments necessary to sustain this cause of action.

[8] It is to be noted that the plaintiff neither pleaded that the alleged malicious proceedings brought against him have been terminated, nor that such termination resulted in his favour. In fact, based on what is pleaded in the particulars of claim it appears that the criminal proceedings are ongoing.

[9] The Supreme Court in *Minister of Safety of Security and Others v Richwell Kulisesa Mahupelo*² confirmed the findings of Damaseb JP in *Akuake v Jansen van Rensburg*³, wherein he stated that to sustain a claim based on malicious prosecution the plaintiff must allege and prove the following:

- a) that the defendant actually instigated or instituted the criminal proceedings;
- b) without reasonable and probable cause; and that
- c) it was actuated by an indirect or improper motive (malice) and;
- d) that the proceedings were terminated in his favour; and that
- e) he suffered loss and damage.

[10] In raising this issue the respondents rely on the allegations made by the plaintiff in his particulars of claim, being:

‘[1]...thereafter they (officers) arbitrarily arrested and detained Applicant an entire weekend at Wanaheda police station...upon which false charges were laid against the Applicant, for which he has to appear in court’

and

‘[3] Additionally upon his release on bail...’ (emphasis mine)

² *Minister of Safety of Security and Others v Richwell Kulisesa Mahupelo* (SA-2017/7) [2019] NASC 2 (28 February 2019) at [38]

³ *Akuake v Jansen van Rensburg* 2009 (1) NR 403 HC

[11] Before I make a finding on this point, and because the same issue runs through each of the special pleas raised by the defendants, it is apposite to at this stage briefly deal with some of the legal principles governing special pleas and exceptions. The learned authors, Herbstein & Van Winsen explain the difference between a special plea and an exception as follows:

‘The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any new matter. Special pleas, on the other hand, do not appear ex facie the pleading. If they did, then the exception procedure would have to be followed. Special pleas therefore, have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. As a general rule, the exception procedure is appropriate when the defect appears ex facie the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect.’⁴

[12] This approach was confirmed by the Supreme Court in *Joseph v Joseph*⁵, where Frank AJA held the following:

‘[24] ... The special plea contains five subparagraphs which, in essence contain legal argument and even a reference to case law, to justify with references to sections in the Act why the special plea should be upheld. No new facts or additional facts are raised in the special plea. Special pleas are to be raised where, apart from the merits, there is ‘some special defence not apparent ex facie’ the particulars of claim.⁶ Hence, if it is apparent from the averments in the particulars of claim that the plaintiff lacks *locus standi* this must be raised by way of an exception.⁷ The fact that there was no evidence or allegations necessary in addition to what is referred to for the purposes of the special plea is also evident from the fact that the point was argued on the pleadings without the need for any evidence. This was thus a case where the *locus* point should have been raised as an exception and not in a special plea.’⁸

⁴ Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* (5th ed) at 599 – 600

⁵ *Joseph v Joseph and Joseph v Joseph* (SA 44-2019 and SA 18-2020) [2020] NASC (30 July 2020)

⁶ *Brown v Vlok* 1925 AD 56 at 58

⁷ *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759-760

[13] In *casu*, it would therefore have been apt for the respondents to raise the issue by means of an exception, as they relied solely on the allegations made by the plaintiff in his particulars of claim and have not introduced any new facts to support their contention. Nevertheless, the defendants' inapposite approach to attacking the plaintiff's pleadings on this ground does not preclude the court from considering the issue raised and making a finding.⁹

[14] Based on the decision in *Minister of Safety of Security and Others v Richwell Kulisesa Mahupelo*, it is clear from what is pleaded by the plaintiff that the case against him, on which he bases his claim for malicious prosecution is ongoing. And thus, his claim is entirely premature and I find that the special plea must be upheld.

Claim for constitutional damages

[15] The second of the defendants' special pleas relates to the plaintiff's claim for constitutional relief. The defendants contend that the plaintiff's claim for constitutional damages is bad in law, as he has other common law remedies available to vindicate his rights.

[16] Articles 25 (3) and 25 (4) of the Namibian Constitution empower persons aggrieved by a breach of a fundamental right or freedom guaranteed under the Constitution to approach a court of competent jurisdiction, and grant such court the power to award monetary compensation in respect of any damage suffered as a result of the violation of the fundamental right or freedom. The rider is that in awarding such damages, the court must consider such an award to be appropriate in the circumstances of the particular case.¹⁰

[17] The plaintiff's claim for constitutional damages is based on his 'assault, malicious arrest and malicious prosecution, emotional pain and suffering,

⁸ Emphasis supplied.

⁹ See para [63] in *Joseph v Joseph* supra where Frank AJA made the following remark: 'I have already alluded to the fact that both the legal issues should have been raised by way of exception. The fact that it was not, however did not preclude the court *a quo* from dealing with them separately from the other issues for the reasons indicated above.'

¹⁰ *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* (SA 38 - 2016) [2018] NASC (13 July 2018) para 18.

psychological injury and suffering, reputational damage, wrongful arrest and detention and public humiliation...’ In terms of our common law, however, the cause of action for a claim based on unlawful assault, unlawful arrest and unlawful detention and malicious prosecution is the *actio iniuriarum*.

[18] Ueitele J confirmed this to be the case with specific reference to a claim for malicious prosecution in *Mukendwa v Minister of Safety and Security*¹¹ where the he stated the following:

‘[48] In *Prinsloo v Newman*,¹² Mullier JA stated that in actions of malicious prosecution the plaintiff’s remedy is provided under the *actio iniuriarum*, from which it follows that what has to be alleged and established is *animus injuriandi*.’

[19] The Supreme Court in *Road Fund Administration v Scorpion Mining Company (Pty) Ltd*¹³ confirmed the position in our law to be that relief should first be sought by way of the common law before resorting to the Constitution:

‘[45] The Constitution must be the last and not the first resort in the resolution of disputes that come before the courts. In the present case, the exact opposite happened. The High Court preferred to have recourse to the Constitution instead of first considering if the claim and the competing allegations could be resolved applying the common law. Given that the court was faced with two mutually destructive versions in an action proceeding, the dispute was capable of and was one which had to be resolved by the application of tried and tested techniques known to the common law. We have warned in the past that the court must first try to resolve a dispute by the application of ordinary legal principles before resorting to the Constitution.¹⁴

[20] As with the first special plea, this point too should have been raised as an exception as it relates to a pure issue of law and the defendants did not introduce any new facts in raising the issue. Nonetheless, the special plea in this respect is also upheld, based on the *ratio* expressed in *Mukendwa v Minister of Safety and Security* and *Road Fund Administration v Scorpion Mining Company (Pty) Ltd*.

¹¹ *Mukendwa v Minister of Safety and Security* (I 1490/2013) [2020] NAHCMD 342 (31 July 2020).

¹² *Prinsloo v Newman* 1975 2 All SA 889 (A); 1975 1 SA 481 (AD) 492.

¹³ *Road Fund Administration v Scorpion Mining Company* supra.

¹⁴ Emphasis supplied.

Claim for legal costs sounding in money

[21] Finally, the defendants' third special plea relates to the plaintiff's claim for legal costs in the sum of N\$150 million. The defendants argue that a party cannot seek costs sounding in money.

[22] The purpose of an award of costs to a successful litigant is to indemnify the litigant for the actual expense to which he or she has been put through having been unjustly compelled to initiate or defend litigation.¹⁵

[23] Costs are determined at the conclusion of proceedings. This is because it is impossible for a party at the very institution of proceedings to reckon what his or her costs will be by the time – and in the event – that such party obtains a costs order in his or her favour. In order to determine the costs due to a party, such costs – unless ordered otherwise – are subject to taxation.

[24] I am therefore also in agreement with the defendants' objection on this point. The plaintiff cannot claim costs sounding in money in the particulars of claim in the manner that he did. If the plaintiff were successful with his claim and a costs order were granted in his favour, such costs would be subject to taxation by a taxing master in terms of Rule 125 of the Rules of this Court.¹⁶

[25] Once again, the defendants' failed to follow the appropriate legal procedure in raising this point, as no fresh facts were introduced beyond that contained in the pleadings. Be that as it may, the special plea in this respect is also upheld.

[26] In the result, I make the following order:

1. The special pleas are upheld.

¹⁵ LAWSA Vol 3, Part 2 at para 289.

¹⁶ Rule 125(3) reads as follows:

'With a view to awarding the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs are borne by the party against whom such order has been awarded the taxing officer must on every taxation allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party.'

2. The plaintiff is directed to engage in and finalise the process of amending his particulars of claim within 30 days of the date of this order.
3. Should the plaintiff fail to comply with paragraph 2 of this order, the first to fifth defendants are granted leave to bring an application (on papers duly amplified if necessary) for the dismissal of the plaintiff's claims.
4. The matter is postponed to 8 December 2021 at 15:30 for a Status hearing.
5. The parties are directed to file a joint status report on or before 3 December 2021.

Judge's signature	Note to the parties:
Schimming-Chase Judge	Not applicable.
Counsel:	
Plaintiff	Respondent
In person	Ms M Meyer Office of the Government Attorney