

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Tomas Amunyela Hango: Plaintiff and Police Officer F N Shipena : 1 st Defendant Police Officer Tauxab Theophilus: 2 nd Defendant	Case No: HC-MD-CIV-ACT-OTH-2021/02656 Division of Court: Main Division Heard on: 9 March 2022
Heard before: Honourable Mr. Justice Usiku J	Delivered on: 9 March 2022
Neutral citation: <i>Hango v Shipena</i> (HC-MD-CIV-ACT-OTH-2021/02656) [2022] NAHCMD 99 (9 March 2022)	
Order: <ol style="list-style-type: none">1. The defendants' special plea is upheld.2. I make no order as to costs.3. The matter is struck from the roll and regarded finalised.	
Reasons for order:	
USIKU J: <u>Introduction</u> [1] This is a special plea of prescription raised by the defendants.	

[2] In the main action, the plaintiff instituted action against the defendants for damages for wrongful arrest and detention. According to the particulars of claim and the annexures thereto, the defendants, who are members of the Police Force, arrested the plaintiff on 13 August 2018. The plaintiff appeared before a magistrates' court on 15 August 2018. He was subsequently released on bail. The case was eventually withdrawn against him on 1 July 2019.

[3] On 12 July 2021, the plaintiff instituted the present action for damages against the defendants for wrongful arrest and detention.

[4] The defendants entered appearance to defend, and delivered a special plea, stating that the plaintiff's claim has prescribed in terms of s 39(1) of the Police Act No. 19 of 1990 ("the Act").

[5] The plaintiff did not deliver any replication to the defendants' plea. As such there is no basis pleaded upon which the claim could be said not to have prescribed.

The special plea

[6] The defendants assert that the plaintiff's cause of action arose on 13 August 2018 and the plaintiff instituted his action only on 12 July 2021, some 36 months after the cause of action arose.

[7] The defendants further state that, in terms of the provisions of s 39(1) of the Act, a person instituting civil proceedings against any person in respect of anything done in pursuance of the Act, is obliged to do so within 12 months after the cause of action arose. In addition, such person is required to give to the defendant written notice of such proceedings and the cause thereof, not less than one month before instituting the proceedings.

[8] The defendants contend that the plaintiff failed to institute his claim within 12 months after the date upon which the cause of action arose and therefore, the plaintiff's claim has prescribed. The defendants pray for an order upholding the special plea of prescription and dismissing the plaintiff's claim with costs.

[9] The plaintiff argues that the court ought not to have allowed the defendants to continue with their defence, because they entered appearance to defend after 10 days, after service of

the summons. On this aspect the plaintiff is referred to the provisions of rule 14(2) which provides that, in actions against any official in the service of the state, in his official capacity, the time allowed for delivery of the notice of intention to defend is not less than 20 days after service of the summons. Furthermore, rule 14(6) provides that a notice of intention to defend may be delivered at any time, but before default judgment has been granted. The plaintiff also raised certain arguments which are not relevant to the special plea in question.

Analysis

[10] Section 39(1) of the Act requires a person instituting civil proceedings against any person in respect of anything done in pursuance of the Act to:

- (a) institute the proceedings within 12 months after the cause of action arose; and
- (b) notify, in writing, the defendant of such proceedings and the cause thereof, not less than one month before the proceedings are instituted.

[11] There is a *proviso* to s 39(1) that the Minister responsible for police matters, may at any time waive compliance with the provisions of the subsection.

[12] It is apparent that s 39(1) prescribes the time limit within which an action may be instituted against a defendant police officer, in respect of acts performed during the course of his employment. A failure by a plaintiff to institute the action within the prescribed period would result in the plaintiff being barred from proceeding with the action, unless the plaintiff first seeks and obtains a waiver from the Minister, in terms of the *proviso* to s 39(1)

[13] It is common cause that the plaintiff did not institute his action within a period of 12 months after the cause of action arose. In the present matter, I find that the cause of action arose on 13 August 2018 when the plaintiff was arrested and detained. At best, the cause of action may arguably be said to have arisen when the plaintiff was released on bail on or about 15 August 2018. The plaintiff brought his action on 12 July 2021. In either case, the plaintiff's claim has prescribed in terms of the provisions of s 39(1) of the Act. The Minister has not waived compliance with the provisions of the subsection and therefore the plaintiff is barred from proceeding with the present action.

[14] It therefore follows that the special plea stands to be upheld.

[15] In regard to the issue of costs, I am of the view that in the circumstances of this matter, it is fair and just that no costs order should be made. I am, therefore, not going to make any costs order.

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

1. The defendants' special plea is upheld.
2. I make no order as to costs.
3. The matter is struck from the roll and regarded finalized.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Tomas Amunyela Hango (In person) Windhoek	F Kadhila Of Office of the Government Attorney Windhoek