

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
RULING ON SPECIAL PLEA



NAMIBIA, MAIN DIVISION,

Case No: HC-MD-CIV-ACT-OTH-2022/00521

In the matter between:

DAVID JOHN BRUNI N.O.

1st PLAINTIFF

IAN ROBERT MCLAREN N.O.

2nd PLAINTIFF

and

INSPECTOR GENERAL OF POLICE

1st DEFENDANT

MINISTER OF SAFETY & SECURITY

2nd DEFENDANT

MINISTER OF MINES & ENERGY

3rd DEFENDANT

DIAMOND COMMISSIONER

4th DEFENDANT

MATER OF THE HIGH COURT OF NAMIBIA

5th DEFENDANT

Neutral Citation: *Bruni N.O. v Inspector General of Police* (HC-MD-CIV-ACT-OTH-2022/00521) [2023] NAHCMD 347 (22 June 2023)

Coram: SIBEYA J

Heard: 7 June 2023

Delivered: 22 June 2023

Flynote: Civil practice – Special pleas – Notice in terms of Section 39 of the Police Act 19 of 1990 – Difference between in the course and scope of one’s duty and being in pursuance of the Act – Consequences of citing a party incorrectly which can be cured by amendments.

Summary: The plaintiffs instituted civil proceedings against the defendants for the return of diamonds which were placed in the custody of the first defendant for safe keeping and that in the event that the first defendant is no longer in possession of the said diamonds, the plaintiffs seek payment in money of the value of the diamonds.

The defendants defended the matter and raised special pleas. The defendants delivered a special plea of non-joinder of the Minister of Home Affairs, Immigration, safety and Security and another special plea of the plaintiffs’ failure to give notice to the first defendant in terms of s 39(1) of the Police Act 19 of 1990 (the Police Act). The special pleas are opposed.

Held: that this is not a matter where a necessary party was not joined but rather where a wrong title was accorded to a person sought to be cited. In the further view of the undertaking made by the plaintiffs to amend the particulars of claim to reflect the correct title and position of the said Minister, on whose behalf an appearance to defend was in any event entered, results in nothing turning on the special plea of non-joinder.

Held that: there is a distinction between acting in the course and scope of employment as compared to acting in pursuance with the Act. Acting in pursuance of the Act was introduced by the legislation (the Police Act) while acting in the course and scope of employment, may be wider than acting in pursuance of the Act, and is associated with the vicarious liability which finds its origin from common law.

Held further that: the defendants have not put up a case to prove that the action of the police officers or the Inspector-General to keep the diamonds were in pursuance of the Police Act or at the very least in accordance with the functions set out in the Police Act.

Special pleas dismissed with costs.

ORDER

1. The special plea of non-joinder and non-compliance with s 39(1) of the Police Act 19 of 1990 is dismissed.
 2. The defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs costs including costs of one instructing and one instructed legal practitioner, subject to rule 32(11).
 3. The matter is postponed to 6 July 2023 at 08h30 for status hearing.
 4. The parties must file a joint status report on or before 3 July 2023.
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RULING

SIBEYA J:

Introduction

[1] The plaintiffs instituted civil proceedings against the defendants for the return of diamonds which were placed in the custody of the first defendant for safe keeping and further that in the event that the first defendant is no longer in possession of the said diamonds, the plaintiffs seek payment in money of the value of the diamonds.

[2] The defendants defended the matter and raised special pleas. The defendants delivered a special plea of non-joinder of the Minister of Home Affairs, Immigration, safety and Security and another special plea of the plaintiffs' failure to give notice to the

first defendant in terms of s 39(1) of the Police Act 19 of 1990 (the Police Act). The defendants had earlier filed a further special plea that the plaintiffs' claim had prescribed in terms of s 39(1) of the Police Act, but, in their heads of argument, they abandoned the said special plea leaving the first two special pleas live for determination. The special pleas are opposed by the plaintiffs.

Parties and representation

[3] The first plaintiff is David John Bruni N. O, a major male and a proprietor of Bruni & McLaren with offices situated at first floor, Hidas Centre, Klein Windhoek in Windhoek.

[4] The second plaintiff is Ian Robert McLaren N. O, a major male and a proprietor of Bruni & McLaren with offices situated at first floor, Hidas Centre, Klein Windhoek in Windhoek.

[5] The first defendant is the Inspector General of the Namibian Police duly appointed as such in terms of Art 32(4)(c)(bb) of the Namibian Constitution. The first defendant is cited in his official capacity as the person responsible for the overall management, supervision, control and direction of the Namibian police.

[6] The second defendant is cited as the Minister of Safety and Security, and said to have been appointed in terms of Art 32(3)(i)(dd) of the Constitution of this Republic. He is cited as the Executive functionary that administers the Police Act.

[7] The third defendant is the Minister of Mines and Energy, duly appointed in terms of Art 32(3)(i)(dd) of the Constitution of this Republic. He is cited as the Executive functionary that administers the Diamond Act 13 of 1999 (the Diamond Act).

[8] The fourth defendant is the Diamond Commissioner, duly appointed in terms of s 14(1) of the Diamond Act.

[9] The first, second, third and fourth defendants' address of service is the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[10] The plaintiffs are represented by Mr Diedericks while the defendants are represented by Ms Makemba.

Non-joinder

[11] As alluded to hereinabove, the defendants raised a special plea of non-joinder of the Minister of Home Affairs, Immigration, Safety and Security, a Minister with substantial interest in the outcome of this matter and the orders that the court may make herein. It is common cause between the parties that the said Minister is the executive functionary that administers the Police Act and it is in such capacity that the second defendant is cited. It turned out during arguments that the qualms that the defendants have that resulted in their plea of non-joinder of the Minister of Home Affairs, Immigration, Safety and Security is that the party is not properly cited. Ms Makemba argued that the cited second defendant (the Minister of Safety and Security) does not exist as there is no such Minister, thus leaving the necessary Minister, (the Minister of Home Affairs, Immigration, Safety and Security) strictly speaking, not cited.

[12] Mr Diedericks argued that if the second defendant was not properly cited, then it can be cured by an amendment which should cause no prejudice to the defendants. He argued further that the person cited as the second defendant is cited in his capacity as the executive functionary that administers the Police Act and that is precisely within the statutory functions of the Minister of Home Affairs, Immigration, Safety and Security. During oral arguments, Ms Makemba conceded that an amendment to the particulars of claim which states the exact title of Minister will be sufficient to satisfy the special plea raised. In my considered view, this is not a matter where a necessary party was not joined but rather where a wrong title was accorded to a person sought to be cited. In the further view of the undertaking made by the plaintiffs to amend the particulars of claim, to reflect the correct title and the position of the said Minister, I find that nothing turns on this special plea of non-joinder.

[13] In any event, the Government Attorney filed a notice to defend the plaintiff's claim on behalf of the second defendant, the Minister of Home Affairs, Immigration, Safety and Security. I find it difficult to comprehend the fact that the Government filed a notice to defend on behalf of the second defendant, thus stating that they were instructed to defend the plaintiff's action by the second defendant and then by flip of a hand turn around and argue that the second defendant is non-existent. In view of the above-mentioned, I find that the special plea of non-joinder is in the premises weak and not deserving of being upheld. I, therefore, dismiss the special plea of non-joinder, as a result.

Non-compliance with statutory notice per s 39(1) of the Police Act

[14] The defendants contend that the plaintiffs did not comply with s 39(1) of the Police Act in that they failed to provide a statutory notice to the state before instituting these proceedings on 11 February 2022. The defendants contend that said statutory notice was never served on the state, neither did the second defendant waive compliance with the said provision.

[15] Ms Makemba referred to *Indilinga System Design & Logistics CC v Minister of Safety and Security and Another*,¹ where Geier J remarked as follows regarding an exception raised:

[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 section 39(1) of the Police Act 1990, have not been set out.'

[16] Ms Makemba argued that the plaintiffs' failure to give written notice in terms of s 39(1) is fatal to their action and renders the proceedings before court null and void. She argued that the special plea of non-compliance with the statutory notice should be upheld with the result that the plaintiffs' claim be dismissed with costs.

¹ *Indilinga System Design & Logistics CC v Minister of Safety and Security* (I 209/2013) [2014] NAHCMD 264 (20 May 2014) para 5.

[17] Mr Diedericks argued contrariwise. He submitted that the plaintiffs indeed did not provide the state with a written notice in terms of s 39(1) of the Police Act, but that, however, is not the end of the matter as the court should first determine whether the s 39(1) notice applies to the facts of this matter. He argued that s 39(1) does not apply to this matter hence the plaintiffs were not required to first have complied with the s 39(1) notice before instituting these proceedings.

[18] Mr Diedericks implored the court to consider the following questions:

18.1 Is the conduct forming part of the plaintiff's complaint one which can be said to be "anything done by the first defendant in pursuance of the Act. If answered in affirmative then the following question should be considered.

18.2 What is the consequence of plaintiff's failure to have served the s 39(1) notice prior to the institution of this action?

[19] Mr Diedericks argued that the second question does not arise in this matter as, on the facts of the matter, the first question calls for a negative answer.

[20] Mr Diedericks argued that had the particulars of claim alleged that the conduct complained of on the part of the police or the Inspector-General was performed in pursuance of the Police Act, then it would have been incumbent upon the plaintiffs to allege and prove compliance with s 39(1) of the Police Act. He laid great store on the decision of *Avex Air (Pty) Ltd v Borough of Vryheid*.²

[21] Mr Diedericks drove the point home that the conduct of the police does not automatically mean conduct in pursuance of the Police Act. He referred to *Khoza v Minister of Justice* 1965 (4) SA 286 (W); *Lopes v Co-Ministers of Justice and Law and Others* 1979 (2) SA 627 (R).

² *Avex Air (Pty) Ltd v Borough of Vryheid* (2) 1972 (4) SA 676 (N).

The law

[22] Section 39(1) of the Police Act which forms the center stage of this matter provides that:

‘Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within 12 months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than 1 month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection.’

[23] Unengu AJ had occasion to discuss the consequence of a party’s failure to comply with s 39(1) of the Police Act in *Kruger v Ministry of Safety and Security*,³ and remarked as follows:

‘[10] Section 39(1) of the Police Act and s 133(4) of the Correctional Service Act are identical and provide as a pre-condition for the institution of the civil action against the Police and the Correctional Services officials. A failure to give written notice to officials of the Correctional Services in compliance with s 133(4), is fatal to the action of the plaintiff and the action is null and void. The court will, under those circumstances, uphold the preliminary point raised against such a failure to give notice under the section and the action be struck from the roll.’

[24] I agree with the above remarks in the interpretation of the consequential effect of failure to comply with s 39(1) when the conduct of the police complained of was done in pursuance of the Police Act.

[25] Considering that it is apparent from the present matter that the plaintiffs did not provide the State or any person mentioned with a s 39(1) notice, it becomes vital to determine whether or not the plaintiffs’ claim is such that it relates to the action or inaction by the police or the Inspector-General in pursuance of the Police Act. If it is

³ *Kruger v Ministry of Safety and Security* (HC-MD-CIV-ACT-OTH-2018/00137) [2020] NAHCMD 334 (06 August 2020) at para 10.

found that the police or Inspector-General's conduct complained of was done in pursuance of the Police Act then the plaintiff's must bear the consequences of failure to comply with the provisions of s 39(1).

[26] The Concise Oxford English Dictionary, 11th edition, defines pursuance as "the carrying out or pursuing of something." Pursue, on the hand is defined as "Seek to attain (a goal)."

[27] In the South African decision of *Khoza v Minister of Justice*,⁴ the Witwatersrand Court, considered a matter where two constables were guarding five arrested persons in the back of a police van, when one of the constables had engaged in a 'lark' with the other, the plaintiff. For no reason and out of recklessness or negligence he drew his revolver and pointed it at the plaintiff, and it went off hitting the plaintiff. The plaintiff claimed damages from the state on the basis that the other constable was on duty guarding prisoners in the van, and injured him while acting in the course and scope of his employment. In the plea, the state denied that the constable acted within the course and scope of his employment during the shooting and further stated that the conduct of the constable did not constitute action in pursuance of the Police Act.

[28] In finding the state liable, the court stated that:

'Acting in obedience to orders is not acting in pursuance of the Police Act, 7 of 1958. It can only be that a thing is done 'in pursuance of', within the meaning of section 32 of that Act, if the Act itself or some other enactment lays down that thing as a function of the police constable. The lark was still an act done in the course of his employment.'

[29] Kroon J in *Mcangyangwa Nzima*⁵ was seized with the determination of the distinction, if any, between the conduct of a police officer done in the course of

⁴ *Khoza v Minister of Justice* 1965 (4) SA 286 (W).

⁵ *Mcangyangwa v Nzima* 1993 (1) SA 706 (E) at 712.

employment and that which is carried out in pursuance of the Act, and remarked as follows at pages 711-712:

'The debate at the Bar canvassed the validity of the distinction which the magistrate drew between an act done by a policeman in the course and within the scope of his employment and an act done by a policeman in pursuance of the Act, and of the magistrate's view, implicit in his reasons, that the two were not necessarily co-incident; that, in other words, the mere fact that a policeman is acting in the course and within the scope of his employment does not necessarily mean that he is acting in pursuance of the Act. This issue has engaged the attention of the Courts in a number of cases, but the decisions have not been harmonious. It is unnecessary to cite all the relevant decisions and I will content myself with a reference to the following: In *Thorne v Union Government* 1929 TPD 156, *E Rosenberg (Pty) Ltd v Union Government (Minister of Justice)* 1945 TPD 225, *Khoza v Minister of Justice* 1965 (4) SA 286 (W) and *Lopes v Co-Ministers of Justice and Law and Order and Others* 1979 (2) SA 627 (R) it was accepted that there are acts which may be done by a member of the police force *qua* member, ie in the course and within the scope of his employment as such, which are not to be categorised as acts done in pursuance of the Act (or its predecessor). In *Dease v Minister of Justice* 1962 (3) SA 215 (T) it was held that in everyday usage the phrase 'police duties' referred to the maintenance of law and order and the investigation and prevention of crime, but it was accepted that policemen are often called upon to do acts unconnected with those duties such as fighting bush or veld fires or rendering first aid to accident victims. In *Malou and Others v Minister of Police and Others* 1981 (2) SA 544 (E) approval was expressed of the dictum in *Masikane v Smit and Another* 1965 (4) SA 293 (W) at 298A, viz that it is difficult to conceive of any duty normally assumed by the police force to be part of a policeman's duty which would fall outside the expression 'anything done in pursuance of this Act' and that the two examples referred to in *Dease's* case of fighting fires and attending to injured persons would fall within the provisions of the Police Standing Orders, which constitute a law within the meaning of that word as envisaged in s 6(1). In *Magubane v Minister of Police* 1982 (3) SA 542 (N) the view was expressed that where a policeman acts within the course and scope of his employment and his actions are not committed for his personal ends, but in the course of his business as a policeman, it would follow that he is acting in pursuance of the Act.

...I respectfully align myself with the view that, depending on the nature of the act in question or the place where it is performed, a policeman may act in the course and within the scope of his employment without necessarily doing something in pursuance of the Act. In my judgment the

two concepts are not co-extensive and the former is of a wider import than the latter; while the latter includes the former, the converse is not necessarily so.'

[30] The above authority reaffirms the distinction there is between acting in the course and scope of employment as compared to acting in pursuance of the Act. Acting in pursuance of the Act was introduced by the legislation (the Police Act) while acting in the course and scope of employment, which is probably wider, is associated with the vicarious liability which finds its origin from common law. On this basis alone, the two concepts cannot be said to be the same or at the very least carry the same meaning.

[31] The Supreme Court of South Africa of *Masuku and Another v Mdlalose and Others*,⁶ considered the question whether a police officer who acts in the course and scope of his employment as a servant of the state acts in pursuance of the Police Act. Put differently whether the two concepts are co-extensive. Smalberger JA, who wrote for the majority, considered several decided and contradicting cases including *Thorne (supra)*; *E Rosenberg (supra)*; *Khoza (supra)*; *Dease (supra)*; *Masikane (supra)*; *Malou (supra)* and *Mcangyangwa (supra)* and remarked that:

'The concepts 'in the course and scope of his employment' (or any of its equivalents) and 'in pursuance of' the Act are notionally distinct from each other. They derive from different sources and deal with different incidents of liability. The former is primarily concerned with the common-law principles of vicarious liability; the latter is of statutory origin and its meaning and ambit stem from the provisions of the Act. Different policy considerations are at stake when dealing with the two concepts. The former favours a plaintiff by making a master liable for the wrongs of his servant, thereby extending and establishing liability where otherwise it would not exist. It is thus expansive in both its purpose and effect. The latter enures (endures) for the benefit of a defendant. A finding that a policeman acted in pursuance of the Act could result in the barring of a plaintiff's action for want of notice or the effluxion of the relatively short period of time within which action is to be instituted. It is therefore restrictive in its effect and can assist a defendant to escape liability. As such it needs to be strictly construed (*Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185). These inherent differences justify the conclusion that the two concepts legally do not entirely correspond. If the Legislature had in

⁶ *Masuku and Another v Mdlalose and Others* 1998 (1) SA 1 (SCA).

mind to apply the notice requirement and the limitation provision of s 32(1) to all actions against the State arising out of unlawful acts by a policeman acting *qua* policeman, it failed to state so in clear and unequivocal terms in s 32(1) as one might have expected bearing in mind that earlier cases like *Thorne* and *E Rosenberg (Pty) Ltd (supra)*, which preceded the current Act, had alerted it to a distinction between the two concepts. Instead it deliberately chose to retain the wording 'in pursuance of'. To the extent that the wording of s 32(1) lends itself to a restrictive interpretation, and impliedly recognises that there may be instances where the conduct of a policeman can give rise to State liability beyond the provisions of the Act, it should be interpreted accordingly.

...

In my view, one cannot determine the issue before us in *vacuo*. It is impossible to lay down precise rules governing the meaning of each of the concepts. Notionally they differ. Their application must inevitably depend upon the facts and circumstances of each particular case, which in the nature of things can vary radically and cover a myriad of situations.

Only once the relevant facts have been established will it be possible to determine, applying recognised principles, whether the acts complained of amount to conduct 'within the course and scope of employment' or 'in pursuance of' the Act, or both, or neither. While the concepts clearly overlap, one cannot predict with certainty that they will necessarily always be co-extensive.'

[32] The above authority makes it plain that there is no formula to determine whether the acts of a police officer are conducted within the course and scope of his employment or in pursuance of the Police Act. To resolve this issue, in my view, regard should be had to the reading of the Act, the purpose of the Act, the functions of the police created in the Act and the facts of each particular case.

[33] The long title of the Police Act is to "provide for the establishment, organization and administration of the Namibian Police Force; to regulate the powers and duties of the Force and to prescribe the procedures in order to secure the internal security of Namibia and to maintain law and order; to regulate the discipline, appointment, promotion and discharge of members of the Force; and to provide for incidental matters."

[34] Clause 13 of the Police Act provides that:

'The functions of the Force shall be –

- (a) the preservation of the internal security of Namibia;
- (b) the maintenance of law and order;
- (c) the investigation of any offence or alleged offence;
- (d) the preservation of crime; and
- (e) the protection of life and property.'

[35] Section 14(1) on the other hand provides that:

'A member shall exercise such powers and perform such duties as are by this Act or any other law conferred or imposed upon such member, and shall, in the execution of his or her office, obey all lawful orders which he or she may from time to time receive from his or her seniors in the Force.'

[36] As clause 39(1) is designed to protect the state to the prejudice of the claimants it requires to be restrictively interpreted (strict interpretation). I find that clause 14(1) above, recognises that a police officer may act in terms of any other legislation or common law other than the Police Act. Where reference is made to this Act (the Police Act) or any other Law (any other authority including any other Act or common law), a police officer may act in terms thereof and still acting within the course and scope of his employment but not in pursuance of the Police Act.

[37] The averments in the particulars of claim are that on 13 November 2008, a company, Brets Investments (Pty) Ltd, was wound up by order of court. The plaintiffs were appointed as liquidators of Brets Investments. A dispute was settled in court where the order confirmed that the diamonds which forms the subject of this matter were placed in possession of the Inspector-General's Protected Resources Unit for safe keeping pending resolution of the matter in the High Court case No. A 73/2010.

[38] The Inspector-General accepted the diamonds as such and was to keep the diamonds and had a duty to return the diamonds to the plaintiffs upon settlement of the

said case and further upon the plaintiffs obtaining the necessary statutory permit. The plaintiffs further claim that the case was settled on 19 July 2018 and the Diamond Commissioner approved authorisation for permits to be issued by the Minister of Mines and Energy to the plaintiffs, but the Inspector-General refuses or fails to hand over the diamonds to the plaintiffs. It is based on these allegations that the plaintiffs seek an order for the Inspector-General to hand over the diamonds to them. It is further on the basis of the said averments that the plaintiffs content that the actions of the police or the Inspector-General were not in pursuance of the Police Act.

[39] Section 66 of the Diamond Act authorises a police officer to seize any diamond ... or thing which appears to provide proof of a contravention of a provision of the Diamond Act. When this provision is invoked, in my view, it may not be in pursuance of the Police Act, especially when regard to the restrictive interpretation of 'in pursuance of the Act'.

[40] Considering the above findings, I opine that the defendants have not put up a case to prove that the action of the police officers or the Inspector-General to keep the diamonds were in pursuance of the Police Act or at the very least in accordance with the functions set out in the Police Act.

Conclusion

[41] In view of the foregoing findings and conclusions, I hold the opinion that the defendants failed to prove that the actions of the police officers or the Inspector-General to keep the diamonds were or are conducted in pursuance of the Police Act. It, therefore, follows that their special plea should fail and should, on such account, be dismissed accordingly.

Costs

[42] It is settled law that costs follow the result. The court was presented with no reason to depart from the said principle. Consequently, the plaintiff will be awarded costs. This being an interlocutory matter, I received no compelling reasons why the

costs to be awarded should not be capped as provided for in rule 32(11). As a result, costs to be awarded shall be subject to rule 32(11).

[43] Accordingly, the following order is made:

1. The special plea of non-joinder and non-compliance with s 39(1) of the Police Act 19 of 1990 is dismissed.
2. The defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs costs including costs of one instructing and one instructed legal practitioner, subject to rule 32(11).
3. The matter is postponed to 6 July 2023 at 08h30 for status hearing.
4. The parties must file a joint status report on or before 3 July 2023.

O S SIBEYA

JUDGE

APPEARANCES

PLAINTIFF:

J Diedericks

Instructed by Viljoen & Associates, Windhoek

DEFENDANTS:

A Makemba

Of the Office of the Government Attorney,
Windhoek