

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEA

Case No.: HC-MD-CIV-ACT-DEL-2023/00633

In the matter between:

KIIMBA SHIGWEDHA

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

FIRST

DEFENDANT

J.S MUPATI

SECOND DEFENDANT

Neutral citation: *Shigwedha v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2023/00633) [2023] NAHCMD 697 (2 November 2023)

Coram: SIBEYA J

Heard: 16 and 24 October 2023

Delivered: 2 November 2023

Flynote: Civil practice – Special plea of prescription – Notice in terms of Section 39 of the Police Act 19 of 1990 (‘the Act’)– Difference between acting in the course and scope of one’s duty and doing anything in pursuance of the Act.

Summary: This is a special plea of prescription raised by the defendants that the plaintiff’s claim prescribed for non-compliance with s 39(1) of the Act. The plaintiff, in the particulars of claim, seeks payment of damages allegedly caused to his motor vehicle after a collision with a motor vehicle, GRN 986, driven by the second defendant while acting within the course and scope of his employment with the first defendant, plus interest and costs of suit.

The defendants contend that the plaintiff’s claim prescribed for non-compliance with s 39(1) of the Act, and further that the plaintiff did not plead that he sought a waiver from the Minister to exempt him from compliance with the provisions of s 39(1). They buttress their contention with the averment that the plaintiff’s claim falls within the ambit of civil claims against the state or a person in respect of anything done in pursuance of the Act, therefore, such claim should be instituted within a period of 12 months after the cause of action arose.

The plaintiff, on the other hand, contends that the special plea is bad as it does not raise the failure by the plaintiff to provide a notice to the defendants of not less than one month before instituting the proceedings. It was submitted on his behalf that failure to refer to the one month notice in the special plea is fatal to the said special plea and, therefore, the special plea must fail.

Held: there is a clear distinction between acting on within the course and scope of one’s employment and doing anything in pursuance of the Police act.

Held further: that no factual basis was established to suggest that the second defendant acted in pursuance of the Act in order for the provisions of s 39(1) of the Act to be

invoked. The failure to establish such factual basis means that the attempt by the defendants to invoke the provisions of s 39(1) of the Act is misplaced.

ORDER

1. The first and second defendants' special plea of the plaintiff's failure to comply with the provisions of section 39(1) of the Police Act 19 of 1990, is dismissed.
 2. There is no order as to costs.
 3. The matter is postponed to 16 November 2023 at 08h30 for a status hearing.
 4. The parties must file a joint status report on or about 13 November 2023.
-

JUDGMENT

SIBEYA J:

Introduction

[1] This matter revolves around the meaning of words "anything done in pursuance of this Act" provided for in s 39(1) of the Police Act 19 of 1990 ('the Act').

[2] This is a special plea of prescription raised by the defendants that the plaintiff's claim prescribed for non-compliance with s 39(1) of the Act. The plaintiff, in the particulars of claim, seeks payment of damages allegedly caused to his motor vehicle after a collision with a motor vehicle, GRN 986, driven by the second defendant while acting within the course and scope of his employment with the first defendant, plus interest and costs of suit. It is against this claim that the defendants raised a special plea of non-compliance with s 39(1) of the Act. The special plea is opposed by the plaintiff.

Parties and their representation

[3] The plaintiff is Mr Kiimba Shigwedha, a major male resident of Windhoek.

[4] The first defendant is the Government of the Republic of Namibia, a juristic person cited herein as represented by the Minister of Safety and Security ('the Minister'), whose address of service is care of the Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek. The first defendant shall be referred to as the 'Government'.

[5] The second defendant is Mr J S Mupati, a major male police officer employed by the Namibian Police and who resides in Windhoek.

[6] The plaintiff is represented by Mr Elago while the defendants are represented by Ms Van der Smit. I express my gratitude to Ms Van der Smit for being prompt in attending to court orders and detailed written and oral arguments presented. It will be apparent as the judgment stretches out why such gratitude is only extended to Ms Van der Smit and not to Mr Elago.

Background

[7] In the special plea raised against the plaintiff's above-mentioned claim, the defendants contend that the plaintiff's claim prescribed for non-compliance with s 39(1) of the Act, and further that the plaintiff did not plead that he sought a waiver from the Minister to exempt him from compliance with the provisions of s 39(1). They buttress their contention with the averment that the plaintiff's claim falls within the ambit of civil claims against the state or a person in respect of anything done in pursuance of the Act, therefore, such claim should be instituted within a period of 12 months after the cause of action arose.

[8] The defendants contend that, as per the particulars of claim, the cause of action arose on 31 August 2020 and summons were only issued on 23 February 2023, thus after a period of over two years had lapsed since the cause of action arose. It is on this premise that the defendants argue that the plaintiff's claim prescribed for non-compliance with s 39(1) of the Act.

[9] For reasons unbeknown to the court, the plaintiff did not file his replication to the said special plea. This is despite him being afforded an opportunity to do so as per the court order of 15 June 2023, which called for the defendants' plea to the particulars of claim to be filed by 4 July 2023 and the plaintiff's replication thereto by 18 July 2023.

[10] On 14 September 2023, Mr Tjombe, from Tjombe-Elago Inc, appeared in court for the plaintiff, while Ms Van der Smit appeared for the defendants. The court ordered the defendants and the plaintiff to file their heads of argument regarding the special plea on 9 and 11 October 2023, respectively. The matter was postponed to 16 October 2023 for hearing. The defendants filed their heads of argument as ordered, while the plaintiff failed to file his. Mr Elago appeared at the hearing of the special plea, and although disconcerting, the court permitted him to argue against the special plea without having filed heads of argument.

[11] After the hearing of 16 October 2023, and upon realising that there is a judgment of this court of *Bruni N.O. v Inspector-General of Police* (HC-MD-CIV-ACT-OTH-2022/00521) [2023] NAHCMD 347 (22 June 2023) ('Bruni'), which dealt with the subject of the dispute between the parties, the court, in the presence of Mr Elago and Ms Van der Smit ordered the parties to prepare and further address the court on 24 October 2023. On 24 October, Ms Van der Smit appeared in court while Mr Elago was a no show.

[12] The court, nevertheless, is seized with the determination of the propriety of the special plea. I, dutifully, turn to address this live issue.

Arguments

[13] Ms Van der Smit argued that the plaintiff's failure to institute his claim within 12 months from the date that the cause of action arose contravenes s 39(1) of the Act and is dispositive of his claim against the defendants. She relied on the decision of this court of *Benyamen v Government of the Republic of Namibia*,¹ where the court upheld a special plea of prescription in terms of s 39(1) of the Act and emphasised that the provisions of s 39(1) are peremptory and non-compliance therewith is fatal to the plaintiff's claim.

[14] In addressing *Bruni*, Ms Van der Smit stated that *Bruni* was concerned with the interpretation of the words 'anything done in pursuance of this Act' as provided for in s 39(1) of the Act. She argued that, on the facts of this matter, the plaintiff avers in his particulars of claim that when the second defendant drove the motor vehicle in question, he acted in furtherance of the interest of the Government represented by the Minister. On this basis, she submitted, the plaintiff's case falls squarely within the ambit of the provisions of s 39(1) of the Act. She argued that the plaintiff, on his own accord, alleges that the second defendant acted in furtherance of the interest, with the consent of and to the benefit of the Government, represented by the Minister, therefore drawing s 39(1) into the equation. Resultantly, she called for the special plea to be upheld with costs.

[15] Ms Van der Smit further submitted only on 24 October 2023, that certain factual evidence is relevant and needs to be led by the defendants to establish that the second defendant acted in pursuance of the Act. She requested the court to refer the determination of the special plea to trial for oral evidence to be heard.

[16] Mr Elago, on his part, argued that the special plea is bad as it does not raise the failure by the plaintiff to provide a notice to the defendants of not less than one month before instituting the proceedings. He submitted that failure to refer to the one month

¹ *Benyamen v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/04342) [2022] NAHCMD 361 (22 July 2022) para 27.

notice in the special plea is fatal to the said special plea and, therefore, the special plea must fail.

[17] Mr Elago further argued that the failure by the plaintiff to institute the proceedings within a period of 12 months, as required by s 39(1), cannot shield the second defendant from liability for his personal conduct. At most, he submitted, the special plea can only relieve the Government from the suit.

[18] Ms Van der Smit was not to be outmuscled on the failure to refer to the one month notice in the special plea. She submitted that it cannot be said that s 39(1) can only be raised if there is no one month notice provided to the defendants, to the contrary, the special plea can succeed solely on failure to institute proceedings within a period 12 months.

The law

[19] Section 39(1) of the Act reads:

‘(1) 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.

(2) If any notice contemplated in subsection (1) is given to the Inspector-General, it shall constitute notification to the defendant concerned.

(3) Any process by which any proceedings contemplated in subsection (1) are instituted and in which the Minister is the defendant or the respondent, may be served on the Inspector-General.’

(Own emphasis)

[20] The Supreme Court in *Minister of Home Affairs v Madjiet and Others*,² reconsidered the constitutionality of s 39(1) for alleged violation of Articles 10(1) and 12(1)(a) of the Constitution, and found that the limitation was connected to legitimate governmental purpose of regulating claims against the state so as to promote speed, prompt investigation of surrounding circumstances and settlement where justified. The Supreme Court further stated that, in para 38, that:

‘... It was, in my view, for that reason of avoiding rigidity and inflexibility that the legislature (in s 39(1) decided to include the waiver proviso. In this regard, I want to stress the component of that proviso which states that the Minister’s power of waiver can be exercised *at any time*. I construe this component to mean, for instance, in the case of those sections which provide that limitation period starts to run from the date when the claimant became aware or might be reasonably expected to become aware of the facts constituting the cause of action, that the claimant’s right to sue would be prescribed and extinguished if he/she does not sue within the ensuing limitation period. On the other hand, time is of no essence in the case of moving the Minister for waiver.’

[21] The Supreme Court has settled the law that the provisions of s 39(1) are not inflexible and rigid, nor are they unconstitutional. It follows that compliance with s 39(1) remains mandatory where the civil proceedings are instituted against the state or any person in respect of anything done in pursuance of the Act. The provisions are peremptory and non-compliance therewith is fatal to the plaintiff’s claim.

[22] This court, in *Bruni*,³ had occasion to determine the meaning of what constitutes ‘anything done in pursuance of this Act’ provided for in s 39(1) of the Act as opposed to merely acting within the course and scope of employment, and remarked as follows at para 30 and 32:

² *Minister of Home Affairs v Madjiet and Others* 2007 (2) NR 475 (SC).

³ *Bruni N.O. v Inspector-General of Police (supra)* para 32. See also: *Mutaleni v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-ACT-DEL-2022/03820) [2023] NAHCMD 439 (26 July 2023) paras 6-7, where *Bruni* was cited with approval.

[30] ... 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.

[32] ... 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.'

Analysis

[23] At the outset I opt to commence by considering the argument raised by Mr Elago that the special plea is bad for not addressing the one month notice and that, on that basis alone, the special plea ought to fail. This contention, in my view, can be disposed of without breaking a sweat.

[24] Section 39(1) provides for two processes. Firstly, that the proceedings must be instituted within a period of 12 months after the cause of action arose. Secondly, a notice in writing of such proceedings and of the cause of action must be provided to the defendants not less than one month before the proceedings are instituted. Section 39(1) compels compliance with the said two processes. This means that for the proceedings to comply with s 39(1), they must be instituted within the said period of 12 months, and before which, a notice of not less than one month must be provided to the defendants.

[25] In several decisions of this court, proceedings against the state have failed for not complying with either the 12 months period or the one month notice distinctive of one from the other. In *Hamwoongo v Government of the Republic of Namibia*,⁴ this court upheld a special plea solely raised and decided on the basis of not being instituted within a period of 12 months from the date that the cause action arose. In *Kariseb v Ministry of Safety and Security*,⁵ the Supreme Court confirmed the High Court's finding

⁴ *Hamwoongo v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2021/00670) [2022] NAHCMD 24 (30 January 202).

⁵ *Kariseb v Ministry of Safety and Security* (SA 68/2018) [2020] NASC para 47.

of the dismissal of a civil claim instituted after the 12 months' period provided for in s 39(1) had lapsed.

[26] The failure to institute civil proceedings against the state within a period of 12 months after the cause of action arose violates the provisions of s 39(1), irrespective of whether a one month notice is given to the state or not. The claimant's failure to institute proceedings within 12 months means that he or she is time barred and unless the Minister waives compliance with s 39(1), the claim is prescribed and the claimant is barred from instituting such proceedings.

[27] I, therefore, find that there is no merit in the argument raised that the special plea of non-compliance with the 12 months' period cannot be raised without simultaneously raising non-compliance with the one month notice period. Any of the two processes, as stated, are distinguishable from each other and may be uniquely pursued in different proceedings. In my considered view, there will be nothing untoward with pursuing any of the two processes singularly, in appropriate proceedings.

[28] It still remains to be determined whether the defendants' special plea has merit or not. To answer this question in line with *Bruni*, it should be determined whether the conduct of the second defendant complained of was done in pursuance of the Act or not.

[29] As gleaned from *Bruni*, there is a distinction between anything done within the course and scope of employment and anything done in pursuance of the Act. Section 39(1) applies to anything done in pursuance of the Act. Drawing a distinction between the two concepts involves the consideration of the purpose of the Act, the functions of the police provided for in the Act and the facts of each particular case.

[30] In *casu*, the plaintiff pleaded as follows in para 6 of his particulars of claim:

'On or about 31 August 2020 at approximately 08h20 at Independence Avenue, Windhoek a collision occurred between the Plaintiff's motor vehicle, there and then driven being driven by Shigwedha Kiimba, and a motor vehicle bearing registration number, GRN 986 there and then driven by the Second Defendant, while acting within the course and scope of his employment with the First Defendant, alternatively whilst acting in the furtherance of the interest, with the consent and to the benefit of the First Defendant.' (Own emphasis)

[31] In order to determine whether the conduct of the second defendant was carried out in pursuance of the Act, it is critical to consider the facts of the matter. In the present case, no evidence was led. Ms Van der Smit relied on para 6 of the particulars of claim in her argument that the plaintiff acknowledged that the second defendant acted in pursuance of the Act. If she is correct, then it means we have a concession from the plaintiff that the actions of the second defendant falls within the provisions of s 39(1). The question remains whether or not she is correct.

[32] As stated above, it is accepted from *Bruni* that there is a difference between acting within the course and scope of employment and acting in pursuance of the Act. What then is meant by "in pursuance of this Act" provided for in s 39(1) of the Act.

[33] In the matter of *Alexander v Minister of Justice and Others*,⁶ Parker J (citing from *S v Jacobs* case No 198/2007) remarked that:

'[it] is trite that in interpreting statute, recourse should first be had to the golden rule of construction. In *Paxton v Namibia Rand Desert Trails (Pty) Ltd* 1996 NR 109 (LC) at 111A – C, and *Sheehama v Inspector-General of Namibia Police* 2006 (1) NR 106 (HC) at 114G – I, this court relied on the restatement of the golden rule by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804B – C in the following passage:

"The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless

⁶*Alexander v Minister of Justice and Others* 2009 (2) NR 712 (HC) para 38.

it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. See *Venter v Rex* 1907 TS 910 at 913 – 14, *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 813 – 14, *Senker v The Master and Another* 1936 AD 136 at 142; *Ebrahim v Minister of The Interior* 1977 (1) SA 665 (A) at 678A – G.”

“In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, which Hannah, J cited with approval in *Engels v Allied Chemical Manufacturers (Pty) Ltd and another* 1992 NR 372 at 380F – G, Evershed, MR said:

“Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.”

[34] The Oxford English Dictionary, 11th edition, defines as ‘the carrying out or pursuing of something’. Pursue is defined as ‘seek to attain (a goal), follow or continue with’. Can it be said that the plaintiff, in the particulars of claim, averred or conceded that the second defendant acted in pursuance of the Act or not.

[35] A closer scrutiny of para 6 of the particulars of claims reveals that the plaintiff avers that the second defendant acted ‘within the course and scope of his employment with the first defendant, alternatively whilst acting in the furtherance of the interest, with the consent and to the benefit of the first defendant’. The furtherance of the interest, consent and the benefit of the first defendant mentioned in para 6 of the particulars of claim is sought to be stretched by Ms Van der Smit to include pursuance of the Act.

[36] I find that by no stretch of imagination does para 6 of the particulars of claim refer to the pursuance of the Act. What paragraph 6 refers to is the furtherance of the interest, consent and benefit of the Government represented by the Minister. Whatever such interest of the Government may be is unknown to the court, nor can it be ascertained or concluded from the reading of the particulars of claim. The interest of the Government may not necessarily be in pursuance of the Act. I find that what comes for

sure from the particulars of claim is that the plaintiff does not aver that the second defendant acted in pursuance of the Act. I, therefore, find that the argument by Ms Van der Smit that the averments in para 6 of the particulars of claim falls within the ambit of s 39(1) of the Act is overly ambitious and, therefore, without merit. I find that para 6 is placed beyond circumference of the provisions of s 39(1) of the Act.

[37] Having found that there were no averments or concession made by the plaintiff that the second defendant acted in pursuance of the Act, it follows that there are no established facts before court where it can be deduced that the second defendant acted in pursuance of the Act. Ordinarily this should signal the end of the special plea and command that its dismissal be voiced out.

[38] Ms Van der Smit, however had another arsenal in her string. She submitted that at the end of her arguments that the determination of the special be referred to trial. I point out that the special plea was filed on 4 July 2023, where no mention was made to refer the matter to trial for oral evidence to be led. She filed heads of arguments on 9 October 2023 and presented oral arguments on 16 October 2023 with no voice of any suggestion of referral of the special plea to trial being heard. It was only after the court brought *Bruni* to the attention of the parties, and only at the tail end of the arguments of 24 October 2023, that Ms Van der Smit suggested the referral of the special plea to trial.

[39] It follows from the above that the defendants were content with bringing their special plea based on the papers filed of record without referring the matter to trial. This is an option that the defendants made as the parties that are *dominus litis* in the special plea. The defendants took the option to institute and proceed with the special plea on the papers and they must live with their option. I find that referring the special plea to trial, as belatedly suggested by the defendants, after an option to proceed on the papers and after hearing arguments on the special plea will result in the defendants having a second bite at the cherry, so to speak, and I hold the view that this will be unjust to the plaintiff or at the very least not be in accordance with justice.

Conclusion

[40] In view of the conclusions made hereinabove, I find that no factual basis was established to suggest that the second defendant acted in pursuance of the Act in order for the provisions of s 39(1) of the Act to be invoked. The failure to establish such factual basis means that the attempt by the defendants to invoke the provisions of s 39(1) of the Act is misplaced. The inevitable consequence is that the special plea ought to fail.

[41] Similarly, the belated request by the defendants to refer the special plea to trial ought to fail for reasons set out hereinabove.

Costs

[42] Ordinarily, costs follow the event. In this matter, however, considering that the plaintiff defaulted from compliance with court orders and further that the plaintiff rendered no assistance to the court in the determination of the special plea, I hold the view that he should not benefit from his inactivity. In the exercise of my discretion, I find for the reasons stated above that the plaintiff does not deserve an award of costs. Consequently, no costs will be awarded.

Order

[43] In view of the foregoing, it is ordered that:

1. The first and second defendants' special plea of the plaintiff's failure to comply with the provisions of section 39(1) of the Police Act 19 of 1990, is dismissed.
2. There is no order as to costs.
3. The matter is postponed to 16 November 2023 at 08h30 for a status hearing.

4. The parties must file a joint status report on or about 13 November 2023.

O S Sibeya
Judge

APPEARANCES

PLAINTIFF:

P Elago

Of Tjombe-Elago Inc, Windhoek

DEFENDANTS:

C Van der Smit

Of Office of the Government Attorneys, Windhoek