

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

<b>Case Title:</b> Salmi Peingombili Joseph v Government of the Republic of Namibia & Another.	<b>Case No.:</b> HC-NLD-CIV-ACT-DEL-2021/00216
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice Munsu, AJ	<b>Delivered on:</b> 16 January 2023
<b>Neutral citation:</b> <i>Joseph v Government of the Republic of Namibia</i> (HC-NLD-CIV-ACT-DEL-2021/00216) [2023] NAHCNLD 01 (16 January 2023).	
<b>Results on the merits:</b> Merits not considered.	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The Defendants' special plea of prescription is upheld and the Plaintiff's claim is dismissed.</li><li>2. There is no order as to costs.</li><li>3. The matter is removed from the roll and is regarded as finalised.</li></ol>	
<b>Reasons for the order:</b>	

MUNSU AJ:

### Introduction

[1] The plaintiff instituted action against the defendants, jointly and severally for payment of a sum of N\$ 550 000 for damages she allegedly suffered as a result of actions by members of the Namibian police.

[2] The plaintiff is Salmi Peingombili Joseph, a female person and student, residing at Ohandiba Village, Eenhana, Namibia.

[3] The first defendant is the Government of the Republic of Namibia, a legal persona duly constituted as the Government of the Republic of Namibia in terms of the Namibian Constitution, with address of service at office of Government Attorney, 2<sup>nd</sup> Floor, Sanlam Centre, Independence Avenue, Windhoek.

[4] The second defendant is the Minister of Safety and Security, duly appointed as such in terms of the applicable provisions of the Namibian Constitution with address of service at office of Government Attorney, 2<sup>nd</sup> Floor, Independence Avenue, Sanlam Centre, Windhoek, Namibia.

### Background

[5] The action was instituted in the court's Main Division. The defendants entered appearance to defend and the matter went through the stages of judicial case management up to the stage of filing witness statements. The matter was then transferred to the court's Northern Local Division where it proceeded to trial.

### The plaintiff's claim

[6] The plaintiff alleges in her particulars of claim that on or about 30 September 2016, she was assaulted by members of the Namibian Police whose full and further particulars are

unknown to her. By then, the plaintiff was 14 years old.

[7] The plaintiff alleges that members of the Namibian police, unlawfully took her into custody and detained her and three other minor children for allegedly having committed crimes. This was done in the absence of the plaintiff's legal guardian.

[8] The plaintiff further alleges that she was interrogated in ways that are unconventional, which amount to torture, cruel, inhumane and degrading treatment. She alleges that the police used 'police standard issue weapons' to assault her and the other children with the aim of instilling fear in her and the other children so as to confess to having committed the criminal acts.

[9] Furthermore, the plaintiff alleges that the members of the police unlawfully and illegally pointed a firearm at her and threatened to shoot her if she did not confess to the alleged criminal acts.

[10] The plaintiff alleges that the members of the Namibian police had a legal duty to protect her but failed, in one or more of the following ways:

- 10.1. They failed to protect her against threats and attacks on her bodily integrity;
- 10.2. They failed to protect her against insults;
- 10.3. They failed to refrain from subjecting her to any physical and emotional harm;
- 10.4. They failed to protect her from unlawful assault.

[11] As a result of the breach of the above duties, the plaintiff alleges that she suffered an infringement on her constitutional rights, namely, her right to liberty in terms of Article 7 of the Namibian Constitution, in that she was unlawfully taken into custody and detained at a police station without being charged or informed of the reasons for her detention; and her right to human dignity in terms of Article 8 of the Namibian Constitution in that: she was physically assaulted with hands and police weapons; she was forced to put herself in a plank position while being beaten on her buttocks with a button stick for over an hour; she was forced to walk to the area where the national flag was being hoisted while she held her hands stretched out in front of her with a button stick balancing on her hands; and she was forced to cluck like

a hen.

[12] For the alleged infringement on her constitutional rights, the plaintiff claims an amount of N\$ 200 000 as compensation in terms of Article 25(3) and 25(4) of the Namibian Constitution. Her further claims are: N\$ 250 000 for pain and suffering and N\$ 100 000 for loss of amenities.

#### Defendants' special plea of prescription

[13] In response to the plaintiff's claim, the defendants raised a special plea of prescription as follows:

- '1. According to the plaintiff, her cause of action arose on or about 30 September 2016.
2. The plaintiff's summons and particulars of claim were served on the defendants on 31 December 2019.
3. The period from the plaintiff's cause of action to the date of service of the plaintiff's summons and particulars of claim on the defendants is in excess of 12 months and a total period of 3 years, 2 months and 13 days.
4. The plaintiff's civil action was therefore not instituted within 12 months after the cause of action arose and as required by section 39(1) of the Police Act 19 of 1990.
5. In light of what is stated above, the plaintiff's civil action has prescribed in terms of the above-referred provision of the Police Act. This civil action is statute barred.
6. On account of what is stated above, the plaintiff's civil action has also prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.
7. **WHEREFORE** the defendants will pray for the dismissal of the plaintiff's civil claim against them on this preliminary and special plea alone.'

[14] It follows from the foregoing that the Police Act 19 of 1990 (the Police Act) and the

Prescription Act 68 of 1969 (the Prescription Act) serve as the foundation for the defendant's special plea of prescription.

#### Replication by the plaintiff

[15] The plaintiff denies that her claim has prescribed in terms of section 39(1) of the Police Act as well as section 11(d) of the Prescription Act. The plaintiff states that in terms of section 13(1)(a) of the Prescription Act, prescription is interrupted in respect of minor children. The plaintiff states that she was a minor at the time when the cause of action arose and that she only attained majority on 24 December 2018.

[16] The plaintiff further states that section 12(1)(i) of the Prescription Act provides that the relevant period of prescription would only be completed within one year after the impediment in question would cease to exist. According to the plaintiff, the matter would only have prescribed on 24 December 2019.

[20] The plaintiff claims that she served a notice of action on 14 November 2019 and issued summons on the defendants on 13 December 2019 thereby negating prescription.

#### Prescription in terms of the Police Act

##### *Submissions by the parties*

[21] Mr Khupe for the defendants' submitted that the plaintiff's action is statute barred and that it has prescribed in terms of section 39(1) of the Police Act. Counsel further pointed out that the plaintiff did not timeously give notice of the civil action as required by the Police Act. Mr. Khupe further argued that if the plaintiff was a minor at the relevant time and could therefore not sue, she ought to have obtained the second defendant's waiver contemplated in section 39(1) of the Police Act but failed to do so. \_

[22] Ms Boois for the plaintiff did not address the court on the special plea raised. During oral submissions, Ms Boois chose to stand by her written heads of argument. However, her written heads of argument only deal with the merits of the plaintiff's claim and not the special

plea raised by the defendants.

### Discussion

[23] It is appropriate to determine the defendants' special plea right away, seeing that it has the effect of quashing the plaintiff's claim if upheld.

[24] I propose to first deal with prescription under the Police Act as it has a shorter period compared to the Prescription Act. Section 39(1) of the Police Act provides that:

'(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.'

[25] Mr Khupe pointed out that the plaintiff did not give notice of the action timeously as is required by the Police Act. Also, the claim was not instituted within 12 months after the cause of action arose. Neither did the plaintiff obtain waiver from the Minister.

[26] In *Mahupelo v Minister of Safety and Security and Others*<sup>1</sup> this court held that it is clear from a reading of s 39 of the Police Act that a proper and timeous notice of intention to bring proceedings is a pre-condition for the institution of a civil action under the Police Act. The court went on to state that the object of the notice required under s 39(1) is, to inform the State sufficiently of the proposed claim so as to enable it to investigate the matter.<sup>2</sup>

[27] In *Minister of Home Affairs v Majiedt and Others*<sup>3</sup> the Supreme Court held that the 12-month limitation period and the requirement of 30 days prior notice before commencement of proceedings contained in s 39(1) of the Police Act are connected to a legitimate governmental purpose of regulating claims against the state in a way that promotes speed, prompt investigation of surrounding circumstances, and settlement.

<sup>1</sup> *Mahupelo v Minister of Safety and Security and Others* 2017 (1) NR 275 (HC).

<sup>2</sup> See *Benyamen v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/04342) [2022] NAHCMD 361 (22 July 2022).

<sup>3</sup> *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC) at 482F – G.

[28] In *Benyamen v Government of the Republic of Namibia*<sup>4</sup> this court concluded that the provision of section 39(1) are peremptory and non-compliance therewith is fatal to the plaintiff's claim.

[29] In the present matter, the plaintiff did not place before court any information why she did not seek the waiver from the Minister for her failure to comply with the provisions of section 39(1). I am satisfied that the defendants proved the plaintiff's non-compliance with section 39(1) of the Police Act, and as a result, the special plea is upheld.

#### Costs

[30] The plaintiff was a minor at the time when the cause of action arose. She is a student. She was assisted by the Legal Assistance Centre to institute the action. In the exercise of my discretion, I find that it will meet the interests of justice if there is no order as to costs.

#### Order

[31] In the result, it is ordered as follows:

1. The Defendants' special plea of prescription is upheld and the plaintiff's claim is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

<b>Judge</b>	<b>Comments:</b>
MUNSU, AJ	NONE
<b>Plaintiff:</b> BB Boois Of BB Boois Attorneys	<b>Defendants:</b> M Khupe Of the Office of Government Attorney

<sup>4</sup> *Benyamen v Government of the Republic of Namibia* supra footnote 2 at para 27.

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