



REPORTABLE

CASE NO.: SA 100/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SAKARIA NATANGWA MWAALA

Appellant

and

EINO KAULINGE NGHIKOMENWA

First Respondent

MINISTER OF SAFETY AND SECURITY

Second Respondent

Coram: MAINGA JA, FRANK AJA and LIEBENBERG AJA

Heard: 24 October 2022

Delivered: 14 November 2022

Summary: The appellant (plaintiff *a quo*) instituted action for damages from the first and second respondents (Nghikomenwa and the Minister) jointly and severally, the one paying the other to be absolved. On or about 17 May 2018, in Church street, Gobabis, the appellant's vehicle was involved in a collision with a vehicle belonging to Correctional Service, driven by the first respondent. Appellant alleged that the first

respondent drove the vehicle, whilst acting in the course and scope of his employment with the second respondent. The appellant further alleged that the sole cause of the collision was the negligent driving of the first respondent. Prior to the issuance of the combined summons on 29 March 2019 the appellant had caused a letter of demand on 22 October 2018 to the Commissioner of Prisons demanding damages in the amount of N\$51 487,17 suffered by him.

The respondents among other things raised a special plea stating that in terms of s 133(3) of the Correctional Service Act 9 of 2012 (the Act), when calculated, from the date of collision, the appellant's claim had become 'prescribed'. Respondents' further admitted that the vehicle was driven by the first respondent whilst acting within the course and scope of his employment with the second respondent and/or in pursuance of the Act (regulation 40 of the Regulations made in terms of the Correctional Service Act 9 of 2012) at the time of the collision.

In replication the appellant pleaded that, s 133(3) was not applicable in the circumstances of his case.

In the case management and pre-trial reports the parties had agreed, and an order was made by the managing judge, that the special plea would not be heard separately and that evidence should be led on whether the second respondent, at the time of the accident, was acting in pursuance of the Act, specifically regulation 40 and whether the appellant's claim had expired by virtue of s 133(3).

The High Court contrary to the agreement by the parties, heard the special plea separately and upheld the special plea. The appellant appeals against the whole judgment and order.

Held that, regulation 40 which provides for approval and control of official journeys of officers begs the questions, as it were in this case, who approved first respondent's journey, was the journey necessary and in the interest of the Correctional Service,

which questions can only be ventilated by leading evidence. It was then incumbent upon the respondents to prove that first respondent's journey was approved, by whom and if the journey was in the interest of Correctional Service in the sense that the journey was in pursuance of the Act.

Held that, the parties were bound by the issues they had agreed upon as contained in the pre-trial order. The court below did not show good cause or special circumstances arising why it departed from the parties' agreement.

Held that, the proceedings, judgment and order of the court below set aside and the matter remitted to the High Court for trial to commence *de novo* before another judge.

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APPEAL JUDGMENT

MAINGA JA (FRANK AJA and LIEBENBERG AJA concurring):

Introduction

[1] Appellant (as plaintiff *a quo*) instituted action for damages from the first respondent (Nghikomenwa) and the second respondent ('the Minister') (the defendants *a quo*) jointly and severally the one paying the other to be absolved. Appellant alleges that at all relevant times he was the owner of a red 2014 Toyota Hilux motor vehicle with registration number N163-887W, in the alternative the *bona fide* possessor of the said vehicle, in respect of which the risk of loss and profit had passed to him.

[2] In paras 5 to 8 of his particulars of claim the appellant alleged:

- '5. On or about 17 May 2018 at approximately 20h00 in Church Street, Gobabis, a collision occurred between the Plaintiff's aforesaid motor vehicle and a white Volkswagen sedan motor vehicle with registration number PS 332, then and there being driven by the First Defendant, whilst acting in the course and scope of his employment with the Second Defendant, alternatively within the ambit of risk created by such employment, further alternatively whilst acting in the furtherance of the interest and with the consent of the Second Defendant.
6. The sole cause of the collision was the negligent driving of the First Defendant in that he, *inter alia*:
 - 6.1. failed to keep a proper lookout, especially for the Plaintiff's vehicle travelling in the same lane and direction ahead of his vehicle;
 - 6.2. failed to take cognizance of the Plaintiff's vehicle brake lights and decreasing speed;
 - 6.3. failed to maintain a reasonable and safe driving distance from the Plaintiff's vehicle;
 - 6.4. failed to apply his brakes timeously or at all;
 - 6.5. collided with the rear-end of the Plaintiff's vehicle;
 - 6.6. failed to avoid a collision when by the exercise of reasonable care he could have and should have been able to do so.
7. As a result of the negligence of the First Defendant as aforesaid, the Plaintiff's motor vehicle was damaged and did the Plaintiff suffer damages in the total amount of **N\$51, 487.17**, being the fair and reasonable costs (N\$34, 997.17) to repair the Plaintiff's vehicle to its pre-collision condition, . . . together with the fair and reasonable rental (N\$14,880.00) of a replacement vehicle for the Plaintiff for a period of thirteen days, . . . and the fair and reasonable

assessor's fee incurred to assess the damage to the Plaintiff's vehicle in the amount of N\$1,610.00,

8. Despite proper statutory demand, . . . the Defendants refuse and/or neglect to pay the aforesaid amount of **N\$51, 487.17** or any part thereof, to the Plaintiff.'

[3] Prior to the issue of the combined summons on 29 March 2019 the appellant had authored a letter of demand on 22 October 2018 to the Commissioner of Prisons in terms of s 126(2) of the Prisons Act 17 of 1998 which Act was repealed by the Correctional Service Act 9 of 2012 ('the Act').

[4] The respondents raised a special plea, pleaded to the appellant's allegations on the merits and counterclaimed. The special plea reads:

- '1.1. Plaintiff's summons and particulars of claim were served on the second and first defendant on the 4th and 15th of April 2019 respectively.
- 1.2. Plaintiff's alleged cause of action arose on 17 May 2018 as per paragraph 5 of his particulars of claim.
- 1.3. The approximate time period between the aforementioned dates is about 11 months.
- 1.4. In terms of section 133(3) of the Correctional Service Act 9 of 2012, plaintiff's claim, when calculated from the date when his alleged cause of action arose, has become prescribed.
- 1.5. Section 133(3) of the Correctional Service Act 9 of 2012 clearly states that 'No civil action against the State or any person for anything done or omitted in

pursuance of any provision of this Act may be entered into after the expiration of six months immediately succeeding the act or omission in question or in the case of an offender, after the expiration of six months immediately succeeding the date of his or her release from correctional facility, but in no case may any such action be entered into after the expiration of one year from the date of the act or omission in question'.

- 1.6. As a result of the above the plaintiff's claim has therefore prescribed due to the fact that his claim was instituted outside of the six month period provided for under Section 133(3) of the Correctional Services Act No. 9 of 2012.
- 1.7. The Second Defendant's vehicle bearing registration number PS 332 was driven by the First Defendant, whilst acting within the course and scope of his employment and/or within the risk created by his employment with the First Defendant in pursuance of Act (regulation 40 of the Namibian Correctional Service Regulations made in terms of the Correctional Service Act No. 9 of 2012), at the time it was involved in an accident.

AS A RESULT THEREOF THE DEFENDANTS PRAY THAT BASED ON THE SPECIAL PLEA THAT THE PLAINTIFF'S CLAIM BE DISMISSED WITH COSTS.'

[5] The appellant filed a replication. He admitted paras 1.1, 1.2 and 1.3 above of the special plea. He also admitted the provisions of s 133 of the Act, but pleaded that s 133 was not applicable in the circumstances of the appellant's case other than admitting the provisions of s 133, he denied all allegations contained in paras 1.4, 1.5 and 1.6 of the special plea. He further denied that his claim had prescribed. He admitted that the first respondent was acting within the course and scope of his employment with the second respondent at the time of the accident which is the subject matter of appellant's claim but specifically denied that the first respondent was

acting in pursuance of any of the provisions of that Act at the time of the accident and reiterated the non-applicability of s 133 to the circumstances of appellant's claim and prayed for the special plea to be dismissed with costs.

[6] On 29 August 2019 the parties filed a status report wherein the parties agreed that the special plea must be determined separately, prior to the merits and quantum being determined. In the same report it is recorded that the appellant held the view that the evidence would have to be led in that regard and the appellant proposed that the managing judge allocate a date for the hearing of evidence in respect of the special plea and that one court day was sufficient and that the parties must file witness statements in respect of the special plea 15 court days prior to the date allocated for the hearing of evidence in the special plea. The respondents held an opposite view that a special plea of prescription is a point of law and parties should only file their heads of argument and the matter must be set down for hearing. In view of the divergent views on the point, the parties sought direction from the court on whether or not it was necessary to lead evidence on a point of law.

[7] On 18 September 2019 the case was postponed to 2 October 2019 for status hearing – the reason for the postponement being that the court were to consider the papers filed by the parties and give directions as to the hearing of the special plea.

[8] On 2 October 2019 the parties filed a status report agreeing that the special plea must be determined separately and a proposal that the managing judge allocate

a date of hearing. The parties also sought directions on whether or not it is necessary that evidence be led on a point of law. On that date the matter was postponed to 23 October 2019 for case management conference hearing. The parties were to file the case management conference report on or before 18 October 2019.

[9] On 18 October 2019 the parties filed the case management report. Paragraphs (J) and (K) of that report headed, 'The Determination Of Any Objection On Points Of Law, If Applicable, And Giving Orders Or Directions For A Separate Hearing In Respect Of Any Relevant Issues' respectively, reveals that the court had taken the decision not to hear the special plea by the respondents separately.

[10] On 21 October 2019, during the case management conference in chambers and in the absence of the parties the court considered the case management report and made an order adopting same, ordered parties to file witness statements, expert reports and summaries on or before 20 November 2019, discovery affidavits on or before 26 November 2019, a joint pre-trial report on or before 29 November 2019 and the matter was postponed to 4 December 2019.

[11] The pre-trial report was filed on 25 November 2019 and was made an order of court on 4 December 2019. The matter was postponed to 11 March 2020 for allocation of trial date hearing. It is not apparent from the record as to what transpired on 11 March 2020 but on 26 May 2020 a court order was made, ordering the parties

to appear at the roll call of 4 September 2020 at 8H30 and on that date the matter was postponed to 7 – 11 September 2020 at 10H00 for trial on the action floating roll.

[12] On 11 September 2020 Unengu AJ without hearing evidence as agreed by the parties ordered by the managing judge, heard arguments in respect of the special plea separately and upheld the special plea with costs. He held the view that by giving notice in terms of s 133(4) the plaintiff had brought himself in the realm of s 133(3) and contrary to the appellant's argument, the learned judge found that s 133(3) was applicable under the circumstances and consequently the appellant's claim was time-barred or had prescribed in the Judge's words.

[13] Appellant appeals against the whole judgment and orders of the court below.

The grounds of appeal

[14] The . . . court *a quo* erred in law and on the facts, alternatively, misdirected itself:

- (i) by hearing argument on the special plea raised by the Respondents contrary to the Pre-Trial Order made on 4th day of December 2019 and without any evidence having been led on the merits in the Court *a quo*.
- (ii) by holding that because the Appellant complied with section 134(3) of the Correctional Service Act remedies notice on the repealed Prison Act that therefore the Correctional Service Act was invoked by the Appellant.

- (iii) by holding that the Appellant had the onus in respect of the special plea raised by the Respondents in the Court *a quo*.
- (iv) by holding that there was no defense to the special plea raised against the claim of the plaintiff by the Respondents in the Court *a quo*.
- (v) by holding that section 133(3) of the Correctional Service Act is applicable to the claim of the Appellant without any evidence having been led to that effect by the Respondents in support of the special plea as raised by them in the Court *a quo*.
- (vi) He submits that there was a failure of justice and that the appellant's rights as contained in Article 12(1) were trampled on. He is seeking the proceedings of the court *a quo* to be set aside and the matter to be remitted to the High Court for trial before another judge with costs of appeal including the costs of one instructing and one instructed counsel.'

[15] In his oral argument counsel for the appellant makes reference to the case management report of 18 October 2019 particularly paras (J) and (K) where the parties jointly recorded that 'in the view of the court's decision that it will not hear the special plea raised by the defendants separately, this aspect is not foreseen by the parties at this stage'.

[16] Counsel further referred to the joint proposed pre-trial report where the parties agreed that the issues of fact and law to be resolved at the trial would be *inter alia*, whether the first respondent was, at the time of the accident, acting in pursuance of the provisions of the Act, specifically reg 40 of the Regulations and, further, whether the appellant's claim against the second respondent had become 'prescribed' by

virtue of the provisions of s 133(3) of the Act and that the respondents agreed that the first respondent acted within the course and scope of employment with the second respondent and that it is notionally distinct from '*acting in pursuance of the provisions of the Act*'.

[17] Therefore, so counsel argued, on the pleadings, read with the pre-trial order, there were two issues of fact and law to be determined at the trial (in respect of the special plea); namely:

17.1 Whether the first respondent was, at the time of the accident, acting in pursuance of the provisions of the Act, specifically reg 40 of the Regulations promulgated in terms of the aforesaid Act; and

17.2 Whether the appellant's claim against the second respondent had become prescribed by virtue of the provisions of s 133(3) of the Act?

[18] Counsel submits that evidence must be led in order to establish in what capacity or purpose the first respondent was operating the Government motor vehicle and whether he was duly authorised to operate the vehicle as per reg 40 of the Regulations. Counsel reiterates the prayers as per the notice of motion.

[19] Counsel for the respondents supports the judgment of the court *a quo*, contending that by giving notice in terms of s 134(4) the appellant brought himself in the purview of s 133(3) and therefore admitted that s 133(3) was applicable.

[20] The issue before us for determination is whether in the light of the agreement between the parties to lead evidence on the issues of whether the first respondent was acting in pursuance of the Act and whether the appellant's claim was time-barred and further, whether the decision of the managing judge not to hear the special plea separately, meant that he could determine the special plea without hearing evidence.

[21] The question should be answered in the negative. In view of the pleadings, the case management and the pre-trial order a dispute of fact arose, namely did the first respondent drive the vehicle involved in pursuance of the Correctional Service Act 9 of 2012. Whereas the notice given of the intended action could cause some confusion it did not detract from the fact that an issue developed between the parties as to whether the vehicle was driven in pursuance of the Act.

[22] Regulation 40 provides:

'Approval and control of official journeys of officers-

40. Every official journey of an officer must be approved by the Commissioner-General, the officer in charge or head of office or work place who must ensure that the journey is necessary and in the interest of the Correctional Service.'

[23] The provision begs the questions, namely, was the first respondent's journey authorised, by whom, was the journey necessary and in the interest of the Correctional Service?

[24] In my opinion, the questions above are best ventilated by leading evidence. In this regard I share the sentiments of the Supreme Court of South Africa (SCA) where Smallburger JA writing for the majority said:

'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.

In the result the particulars of claim were, at worst for the plaintiffs, equivocal. For the defendants to have succeeded in their special pleas, which was in the nature of a special defence (see *Minister of Police and Another v Gasa* 1980 (3) (N) at 388G-H; *Gericke v Sack* 1978 (1) SA 821 (A) at 826B *et seq*), it was incumbent upon them to prove that the first defendant's conduct on which the plaintiffs' action was founded, was in pursuance of the Act (compare *Matlou v Makhubedu* 1978 (1) SA 946 (A) at 955E *et seq*). This they failed to do. The appeal accordingly cannot succeed.¹

[25] In this particular case the parties agreed to lead evidence, but counsel for the respondents argued that the respondents always opposed the leading of evidence

¹ *Masuku and another v Mdlalose and others* 1998 (1) SA 1 (SCA) 10J-11A-C.

because the appellant by giving notice in terms of s 134(4) brought himself in the realm of the Act – admitting that s 133(3) was applicable. What counsel omits to consider is, despite respondents' protestations, on 18 October 2019 the parties filed the case management report and paragraphs (J) and (K) records that the court had taken the decision not to hear the special plea separately. On 21 October 2019 the court considered and adopted the said report and among other things, the court ordered the parties to file witness statements on or before 20 November 2019. Eventually dates were set for trial. Furthermore, as indicated above, a factual issue arose which could not be determined without hearing evidence.

[26] There is nothing before us why the trial judge departed from the agreement by the parties nor is there an order varying the prior agreement and order, when he heard the special plea without evidence. Counsel for the respondents confirmed that the witness statements were available, so were the witnesses.

[27] On the agreements between the parties I do no better than to refer with approval the sentiments of Damaseb AJA (as he then was), in *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331, when he said:

'[20] For his part, the defendant relies on the agreement reached between the parties' legal practitioners to limit the issues to be decided by the trial court and recorded at the commencement of the hearing by Mainga J and argues that the plaintiff was not entitled *a quo* (and is not entitled on appeal), to raise the issue of the ineffectiveness of the repudiation as that was not an issue before the trial court in view of the agreement limiting the issues.

[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) ([1998] 1 All SA 239) at 614B-D:

“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding.”
[Footnotes omitted.]

In *F & I advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F-H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D):

“. . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement.”²

[28] The parties were bound by the issues they had agreed upon as contained in the pre-trial order. There is no good cause shown or special circumstances arising why the court *a quo* heard the special plea contrary to the parties' agreement and

² *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) paras 20-21.

court order. On the contrary, in view of the factual dispute as to whether the vehicle was driven in pursuance of the Act, the special plea could not be dealt with without recourse to evidence. It was not simply a matter for legal argument. Counsel for the respondents' contention that the court *a quo* had a discretion to do so, has no substance in the circumstances of this case.

[29] For the reasons above, I make the following order:

1. The appeal succeeds with costs, including costs occasioned by the employment of one instructing and one instructed counsel.
2. The proceedings dated 9 September 2020 and the judgment and order of the court below dated 22 October 2020 are set aside.
3. The matter is remitted to the High Court for the trial to commence *de novo* before another judge.

MAINGA JA

LIEBENBERG AJA

FRANK AJA:

[30] I have read the judgment of my brother Mainga JA (the main judgment) and concur with the order proposed by him.

[31] In view of how the matter was pleaded and informed the plea-trial order a factual dispute was clearly contemplated by the parties in respect of whether or not the first respondent when driving the vehicle acted in pursuance of the Correctional Service Act 9 of 2012 (the Act).

[32] The stance on behalf of the respondents in the court *a quo* and in this court was, as the appellant gave notice of his intended action, he admitted that s 133(3) of the Act was applicable and hence admitted implicitly that the first respondent drove the vehicle in pursuance of the Act. For the reasons mentioned in the judgment of my brother Mainga JA this submission, in view of the pleadings and pre-trial order, cannot be sustained. In short, the notice given in this case, could not be construed as an admission that the Act complained of was in pursuance of the Act.

[33] In *Masuku* referred to in the main judgment Smallburger JA defined the issue arising in that appeal as follows:

‘The fundamental issue arising in this appeal is whether a policeman who acts “in the course and scope of his employment” as servant of the State is invariably acting “in pursuance of” the Police Act 7 of 1958 . . . Differently put, are the two concepts necessarily coextensive.’

[34] Smallburger JA who wrote for the majority found that the concepts were notionally distinct and hence that situations could arise where a member of the police force would be acting within the scope of his or her employment but not in pursuance of the Police Act 7 Of 1958 (the Police Act).

[35] It must be borne in mind that members of the police force get their powers from both the common law and the Police Act or some other legislation.

'In English Law the duties and rights of the police were a creation of the common law and of legislation enacted from time to time. In general the Police as a civil force is a very old institution in society that can already be found in the Egyptian, Greek and Roman law. The form of the organization and the powers exercised by the Police is not something that remain static through the centuries The basic duties of the Police in England is the same as on the continent and the basic duties applies also in my view in the Union of South Africa. It is the duty of the Police, from the nature of their position, to maintain the internal security of the State, to safeguard the public peace and to prevent crime In my opinion it was not the intention of the legislature with the set section 7 to remove the basic duties of the Police and to replace it with statutory duties.'³

[36] It thus follows that, where a member of the police force exercises police powers, it is done either in terms of the common law or some statutory instrument (i.e. the Police Act). In either event such member will also act in the course and scope of his or her employment. Where a member of the police force acts in terms of the common law, then such member obviously does not act in pursuance of the Police Act and *vice versa*.

³ *Wolpe & another v Officer Commanding South African Police, Johannesburg* 1955 (2) SA 87 (W) at 92F-93E (my translation from the Afrikaans text).

[37] A similar situation can arise where the powers and functions of an official is contained in different statutes. An example of this is evident from the facts in *Dixon v Government of the Republic of Namibia (Ministry of Education) & another*⁴ where a damages claim was instituted against the State and a teacher flowing from the alleged negligent driving of the teacher when she was en route to a teacher's workshop. In a special plea filed in the claim it was averred that the claim has expired (was time-barred) pursuant to the provisions of s 33 of the Public Service Act 13 of 1995 which covered situations relating to 'anything done in terms of this Act'. The court found that, at the time the teacher drove the vehicle, she 'exercised the powers conferred by the Education Act and not the powers given by the Public Service Act and hence the special plea was dismissed'.⁵ I should mention in passing that in this case it was also accepted that the teacher acted within the course and scope of her employment when she drove the car.

[38] When it comes to members of the correctional service, they have no common law power, nor is there any Act apart from the Correctional Service Act that confers them with powers as far as I am aware of. This means their powers will exclusively be found in this Act. It thus follows that when they act within the course and scope of their employment they also act in pursuance with the Correctional Service Act. It thus seems to me that when it comes to the Correctional Service Act, a distinction cannot

⁴ 2011 (1) NR 111 (HC).

⁵ *Dixon* para [36].

be drawn between 'acting within the scope and course' of employment and acting 'in pursuance' of the said Act.

[39] Because of the manner in which the matter was pleaded and the resulting pre-trial order coupled with the fact that neither the judge *a quo* nor counsel for the respondents dealt with the matter based on the approach indicated above, I express my view above simply as a *prima vacie* view.

[40] Without the benefit of full argument in relation to the analysis undertaken above, I am not prepared to express such analysis as a final view and thus agree with the main judgment that, on the record and the arguments placed before this court the order made in the main judgment is the correct one in the circumstances of this case.

FRANK AJA

APPEARANCES:

Appellant:

C J van Zyl

Instructed by Francois Erasmus &
Partners

Respondents:

J Ncube (with him H R Ketjijere)
Of Government Attorneys