



REPORTABLE

CASE NO: SA 4/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF SAFETY AND SECURITY

First Appellant

COMMISSIONER-GENERAL OF THE NAMIBIAN

CORRECTIONAL SERVICE

Second Appellant

SENIOR SUPERINTENDENT OF THE NAMIBIAN

CORRECTIONAL SERVICE: SILAS MATHEWS

Third Appellant

and

ELIA AVELINU

Respondent

Coram: SHIVUTE CJ, SMUTS JA and LIEBENBERG AJA

Heard: 7 March 2022

Delivered: 30 March 2022

Summary: This appeal emanates from an action instituted by the respondent against the appellants in the High Court claiming damages in the amount of

N\$500 000 for assault allegedly perpetrated by members of the Namibian Correctional Service. An exception was successfully taken to the particulars of claim on the ground that they did not disclose a cause of action as they failed to allege and show proof that a written statutory notice, in terms of s 133(4) of the Correctional Service Act 9 of 2012 (the Act), had been given to the appellants before the institution of the action. The court thereafter granted leave to the respondent to amend his particulars of claim within ten days of its order. The appellants were also granted leave to apply for the dismissal of the respondent's action in the event that he failed to amend his particulars of claim within the period set out in the order.

The appellants, with the leave of the High Court, have now appealed against the decision of the court granting leave to the respondent to amend his particulars of claim. Although the appeal was initially opposed, the respondent has since withdrawn his opposition to it. The principal argument advanced by the appellants is that s 133(4) of the Act imposes an absolute prohibition on the institution of legal proceedings without the requisite notice having first been given to the defendant. Non-compliance with this provision attracts invalidity of the instituted legal proceedings. The appellants thus argued that consequent to the upholding of their exception, the court *a quo* should have dismissed the respondent's action instead of granting him leave to amend his particulars of claim.

Held that, it had always been the practice that in a successful exception on the ground that a pleading did not disclose a cause of action, a court should not dismiss the action. Instead, it should set aside the impugned pleading and give the plaintiff leave to amend.

Held further that, the absence of an indication at the time of the hearing of the exception that the plaintiff wished to amend their particulars of claim did not entitle the successful excipient to an order dismissing the plaintiff's action.

Held further that, the High Court was correct in granting the respondent leave to amend his particulars of claim. As to the appropriate order that court should have

made, in light of the invariable practice followed in this jurisdiction, it should have set aside the respondent's particulars of claim before granting him leave to amend them.

The appeal is dismissed and the order of the High Court is altered to read that the particulars of claim are set aside and the plaintiff is given leave, if so advised or minded, to file amended particulars of claim within one month of this judgment.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and LIEBENBERG AJA concurring):

Introduction

[1] The narrow issue in this appeal is whether the High Court misdirected itself in granting the respondent leave to amend his particulars of claim despite upholding the appellants' exception on the ground that the respondent's particulars of claim did not disclose a cause of action. The appeal is with leave of the High Court and is unopposed following the withdrawal of the respondent's notice of opposition to it.

Proceedings in the High Court

[2] As plaintiff, the respondent instituted an action against the appellants (defendants *a quo*) in which he claimed damages in the amount of N\$500 000 for assault allegedly perpetrated by members of the Namibian Correctional Service.

[3] The appellants defended the action and took several exceptions to the respondent's initial pleadings, the one relevant to the present appeal was that the respondent did not comply with s 133(4) of the Correctional Service Act 9 of 2012

(the Act) that requires notice in writing of every action to be given to a defendant at least one month before its institution.

[4] On the date of the hearing of argument on exception, the respondent filed an application in which he sought an order condoning his failure to comply with s 133(4). Additional to the condonation application, the respondent for the first time, raised in his heads of argument a constitutional point that the dismissal of his action would violate his fair trial rights guaranteed under Article 12 of the Namibian Constitution. The appellants opposed both the condonation application and the constitutional challenge.

[5] Arguments on the exception were heard and the appellants' exception was upheld with costs. In upholding the exception, the court held that the respondent's particulars of claim did not disclose a cause of action as they failed to allege and provide proof that a written statutory notice had been given to the appellants before the institution of the action.

[6] The court proceeded to make an order giving the respondent leave to amend his particulars of claim within ten days of its order. The appellants were also granted leave to apply for the dismissal of the respondent's action in the event that the respondent failed to file his amended particulars of claim within the period set out in the order. The matter was then postponed to a further date for a status hearing.

[7] The appellants thereafter successfully brought an application for leave to appeal against that portion of the judgment and order granting the respondent an opportunity to file his amended particulars of claim.

Approach of the High Court

[8] As regards the effect of the non-compliance with s 133(4), after analysing the law on the point, the court held that that provision imposed an absolute prohibition on the institution of legal proceedings without the requisite notice having been given. It was further held that in terms of the section, courts had no power to condone the institution of legal proceedings in circumstances where the provision was not complied with. The court drew a distinction between s 133(4) of the Act and s 39(1) of the Police Act 19 of 1990. The latter provision, unlike the former, provides for a discretion, at any time, for the waiver of compliance with the provision. The court thus held that the respondent was required to give a written statutory notice to the appellants before instituting his action. As he failed to do so, the appellants' exception was upheld with costs.

[9] As stated above, despite the court below upholding the appellants' exception, it made a further order affording the respondent an opportunity to amend his particulars of claim. It is this decision that has triggered the appeal to this court.

Argument on appeal

[10] The decision of the court below is principally attacked on the ground that s 133(4) imposes an absolute prohibition on the institution of legal proceedings without the requisite notice having first been given to the defendant. It is contended that no power is conferred on courts to condone the non-compliance with the provision. According to the appellants, non-compliance with s 133(4) has the effect of nullifying the issuing of summons.

[11] The legal practitioner for the appellants submitted further that the absence of an explicit statement in the statute vesting a power in courts to condone the non-compliance with that provision points to a presumption in favour of not granting condonation. It was thus contended that on a careful reading of s 133(4), courts do not have the power to condone a party's failure to comply with the provision.

[12] The legal practitioner for the appellants referred us to *Legal Aid Board & others v Singh*,¹ where a Full Bench of the South African High Court held that courts did not have powers to condone the institution of legal proceedings in circumstances where the provisions of that country's s 3(1) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 had not been complied with. We were also referred to a decision of our High Court in *Indilinga Systems Design & Logistics CC v Minister of Safety and Security & another*,² in which an exception was upheld on the ground that the particulars of claim did not

¹ *Legal Aid Board & others v Singh* 2009 (1) SA 184 (N) para 10.

² *Indilinga Systems Design & Logistics CC v Minister of Safety and Security & another* (I 209/2013) [2014] NAHCMD 264 (20 May 2014).

show that the requirements of a pre-litigation notice in terms of s 39(1) of the Police Act 19 of 1990³ had been met.

[13] It was thus argued that consequent to the upholding of the appellants' exception, the court below ought to have dismissed the respondent's action instead of granting him leave to amend his particulars of claim.

Consideration of the appeal

[14] The decision by the court below that s 133(4) is peremptory in nature and that as such no legal proceedings may be instituted against the defendants unless the plaintiff had given written notice of the impending proceedings is not on appeal before us. As noted above, the question we are seized with is a narrow one and it is whether the court below was wrong to have given the respondent leave to amend his particulars of claim after it upheld one of the exceptions on the basis that the particulars of claim did not disclose a cause of action for want of a requisite statutory notice to the appellants.

[15] Despite the neglect by the legal practitioner for the appellants to refer us to readily available relevant and pertinent authorities on the point, this question is not novel to our jurisdiction. It would appear that it has always been the practice that in a successful exception on the ground that the pleading does not disclose a cause of action, a court should not dismiss the action. Instead, it should set aside the impugned pleading and grant the plaintiff leave to amend. This issue was

³ Before the amendment to s 39(1) of the Police Act took effect, the provision was identical to s 133(4) of the Correctional Service Act in that it provided as a pre-condition for the institution of the civil action against police officials, the giving of notice to the Minister. A failure to give written notice was fatal to the institution of the action. As such, the action was null and void.

authoritatively decided by our courts and we need only refer to the following relatively recent cases.

[16] In *Hallie Investment 142 CC t/a Wimpy Maerua & another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish*,⁴ writing for the court, Damaseb DCJ observed that there had been a long line of cases predating Namibia's Independence where a pleading was successfully excepted to on the basis that it did not disclose a cause of action. He noted that the practice of the South African courts (of which the South West Africa Division was part), was to grant the unsuccessful party in the exception leave to file an amended pleading.

[17] The Deputy Chief Justice concluded that in the case before the court, the High Court had misdirected itself in not following the 'invariable practice' of allowing the defendants the opportunity to amend the counterclaim, if so advised. The learned Deputy Chief Justice relied for this conclusion, amongst others, on *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors*,⁵ where Strydom JP in that case, in turn relying on decisions of the South African Appellate Division,⁶ held that in exceptions on the basis that the pleadings did not disclose a cause of action, a court should set aside the pleadings and not dismiss the action.

[18] This approach was also followed by this court in the recent past in *Joseph & others v Joseph*.⁷ There can, therefore, be no doubt as also observed in *Hallie*

⁴ *Hallie Investment 142 CC t/a Wimpy Maerua & another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish* 2016 (1) NR 291 (SC) para 53 (*Hallie Investment*).

⁵ *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 (HC) (*Total Namibia*).

⁶ In *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) (*Group Five*); *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) and *Rowe v Rowe* 1997 (4) SA 160 (SCA).

⁷ *Joseph & others v Joseph* 2020 (3) NR 689 (SC) para 71.

Investment, that the approach has become an invariable practice of the Namibian courts as well. As such, it would have been wrong for the High Court not to have followed the practice in this case.

[19] The rationale for the practice was set out in ringing terms by Corbett CJ in *Group Five* at 602J–603A as follows:

'An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start *de novo*. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action.'

[20] The legal practitioner for the appellants readily conceded that had the respondent in the present appeal not been given an opportunity to amend his particulars of claim, by the time he would have commenced the action *de novo*, in all probabilities his claim would have prescribed. This is precisely one of the mischiefs the practice seeks to cure, doubtless in the interests of justice and fairness. The cases referred to above support the approach that a party should be allowed to amend where its pleading is successfully excepted to on the basis that it did not disclose a cause of action. This is so, irrespective of whether or not the plaintiff applied for such leave at the hearing of the argument on exception.⁸

[21] In *Group Five*, for example, the court held that instead of dismissing the action, the particulars of claim – as is the position in this matter – should be set

⁸ *Group Five* at 602D–E.

aside thereby allowing the plaintiff to amend its particulars of claim or, in any event, for the plaintiff to be given an opportunity to apply for leave to amend after the delivery of the judgment.⁹

[22] The court reasoned that this is so, because the appropriate and obligatory time for making an application for leave to amend is when judgment setting aside the pleading had been delivered.¹⁰ The court further held that the absence of an indication at the time of the hearing of the exception that the plaintiff wished to amend their particulars of claim did not entitle the successful excipient to an order dismissing the plaintiff's action.¹¹

[23] As noted above, this salutary practice was endorsed by this court, amongst others, in *Hallie Investment* and *Joseph & others v Joseph*, no doubt for the reasons amply set out with characteristic clarity of thought and erudition by Corbett CJ in *Group Five*. It follows that the High Court was correct in granting the respondent leave to amend his particulars of claim. As to the appropriate order that court should have made, in light of the holding in both *Group Five* and *Total Namibia*, it should have set aside the respondent's particulars of claim before granting him leave to amend them. It follows that the order made by the High Court must be corrected to comply with the practice.

Costs

⁹ *Ibid.*

¹⁰ At 602G.

¹¹ At 602H.

[24] Although it is apparent from the record that the respondent initiated the action in person, we were informed during oral arguments, that at some point legal aid was granted to him in relation to the proceedings both in the High Court and in this court. It was submitted on behalf of the appellants that in light of the provisions of s 18 of the Legal Aid Act 29 of 1990, which provides that 'no order as to costs shall be made against the State in or connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in such proceedings', no order as to costs should be made. I agree.

Order

[25] In the result, the following order is made:

(a) The appeal is dismissed.

(b) The order of the High Court is altered to read:

'The plaintiff's particulars of claim are set aside and the plaintiff is given leave, if so advised and/or minded, to file a notice to amend the particulars of claim within one month, failing which the defendants are granted leave to apply for the dismissal of the plaintiff's action within ten (10) days of the expiry of the period of one month afforded to the plaintiff.'

(c) The period of one month referred to in paragraph 25(b) above begins to run from the date of the delivery of this judgment.

- (d) No order as to costs is made.
- (e) The matter is remitted for further case management, if required, for the further conduct of the proceedings.

SHIVUTE CJ

SMUTS JA

LIEBENBERG AJA

APPEARANCES

APPELLANTS: J Ncube
Of the Government Attorney

RESPONDENT: No appearance