REPORTABLE

CASE NO: SA 9/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE MINISTER OF HOME AFFAIRS AND IMMIGRATION **APPELLANT**

and

RICHARD MAJIEDT **FIRST RESPONDENT**

SEVERUS NAMBAZI **SECOND RESPONDENT**

YOLANDE MARIHETTE SOWDEN **THIRD RESPONDENT**

CORAM: Maritz, JA, Chomba, AJA *et* Gibson, AJA

HEARD ON: 13/04/2006 and 02/10/2006

DELIVERED ON: 27/11/2007

APPEAL JUDGMENT

CHOMBA, A J A: [1] The proceedings in this appeal were commenced in the High Court by way of a Notice of Motion lodged by the three respondents herein who were

then the applicants. The respondents to the Notice of Motion were then two, namely the current appellant and *Namdeb Diamond Company (Pty) Ltd.* The relief which the applicants prayed for was as set out below.

> "A. First applicant against the First Respondent
>
> 1. That the First Respondent be ordered to consider and make a decision with regard to the First Applicant's application dated 14 March 2003 that the First Respondent waive the requirements of section 39 (1) of the Police Act, No. 19 of 1990 in respect of the First Applicant's claim within 14 days of this order.
>
> B. First, Second and Third Applicants against the First Respondent
>
> 2. That section 39(1) of the Police Act, No 19 of 1990 be declared unconstitutional in terms of the Namibian Constitution.
>
> 3. Costs of this application
>
> 4. Further and/or alternative relief".

[2] In this appeal judgment I shall refer to the parties hereto by the designations they bore in the court *a quo*. Accordingly, the three respondents to this appeal will be referred to as the first, second and third applicants respectively, while the present appellant will be referred to merely as the respondent although in the court below he was known as the first respondent. This is because only he of the two respondents filed an appeal against the judgment of the Judge-President who presided over the proceedings at the hearing in the court *a quo.* For this reason no further reference will be made in this judgment to the second respondent in the court below. In passing

I must mention that at the time of the hearing of the appeal we were informed that the respondent's official designation had since changed from that of Minister of Home Affairs and Immigration to that of Minister of Safety and Security

[3] It is appropriate to state at the outset that the learned Judge-President, after considering all the evidence before him - which was wholly by affidavit - and heads of argument together with oral submissions thereon made by the parties' counsel, handed down a well reasoned and very carefully researched judgment. That judgment was in favour of the applicants and, in the event he made the following orders against the respondent:

> "(a) Section 39(1) of the Police Act is declared to be inconsistent with Articles 10(1) and 12(1)(a) of the Constitution of the Republic of Namibia and to be invalid for that reason.
>
> (b) The Government of the Republic of Namibia is allowed the opportunity to correct the defect found to exist in that section within a period of three months from the date of this judgment.
>
> (c) Should the defect in the said section not have been corrected by the time the period of three months elapses, the declaration of invalidity will apply and govern all actions to be instituted after that in terms of the Police Act.
>
> (d) First respondent is ordered to pay 50% of the applicant's taxed costs. Such costs to include one instructing and one instructed counsel."

[4] Having regard to the relief which the applicants claimed, it will be noted that the foregoing orders are silent about the claim of the first applicant against the respondent. That was the claim that the respondent should make a decision in regard

to the application for waiver of the requirements of section 39 (1) of the Police Act, No. 19 of 1990. Counsel who appeared before us in this appeal never addressed us either on that claim and therefore I assume that the issue which it raised in the court *a quo* is no longer moot. In the event I do not propose to deal with it either. Accordingly, no further mention of it will be made in this judgment.

[5] The record of appeal as well as the notice of appeal show that this appeal is against the whole of the judgment and orders given by the presiding judge in the court *a quo.* However, the issues which this appeal raises are broadly two. The first is whether or not section 39(1) of the Police Act, No. 19 of 1990 (hereinafter "section 39(1)") violates Articles 10(1) and 12(1)(a) of the Constitution of Namibia so as to necessitate striking it down as being unconstitutional. Arising from the foregoing issue, the second issue is whether or not the non-joinder of the Attorney-General as a party to the proceedings in the court below vitiated those proceedings. As I shall show presently, the second issue is anchored on the provisions of Article 87 of the Constitution. The second issue is less complex than the first and so I propose to dispose of it first.

[6] It is common cause in this appeal that the prayer of the applicants requiring the declaration of section 39(1) as being unconstitutional did indeed raise a constitutional issue. This, according to the respondent, necessitated joining the Attorney-General on account of the provisions of Article 87(c) of the Constitution, but the Attorney-

General was not so joined. Article 87 provides as follows, quoting only the provisions which touch on this issue:

> "87. Powers and Functions of the Attorney-General
>
> The powers and functions of the Attorney-General shall be –
>
> (a) ...
>
> (b) …
>
> (c) to take all action necessary for the protection and upholding of the Constitution
>
> (d) …"

[7] The Judge-President observed in his judgment that the omission to join the Attorney-General as a party was hinted at in the affidavit of the Permanent Secretary in the respondent's ministry, but he noted that the omission was made an issue neither in the heads of argument nor in the oral submissions made during the trial. For this reason, he said that he would assume that the issue was abandoned. In the circumstance it was never considered any further.

[8] Notwithstanding the foregoing assumption the matter was made an issue in this court as the heads of argument filed on behalf of the respondent clearly show. Therefore, when this appeal came before us on April 13, 2006, we allowed Mr. Coleman, the respondent's counsel, and Mr. Botes, appearing for the applicants, to address us on the matter. In consequence of the submissions they made, we ordered that the appeal be rescheduled to a date to be arranged with the Registrar.

We also directed the Registrar to notify the Attorney-General of the date of resumption of the hearing of the appeal; to provide the Attorney-General with a copy of the appeal record in addition to a transcript of the proceedings of April 13; and then to invite the Attorney-General to make submissions on the following question of law:

> "(i) Given the functions, duties and obligations of the Attorney-General under the Namibian Constitution, the interest of other organs of State in the making and application of laws and the effect of an order of the court made under Article 25(1)(a) and (b) of the Constitution, was it not necessary for the applicants *a quo* to cite the Attorney-General as a party to the proceedings, alternatively, to notify the Attorney-General thereof and afford her an opportunity to be heard? If so, was it permissible for the court *a quo* to decide that application without joinder of or notification to the Attorney-General?
>
> (ii) If the answer to (i) is in the negative, whether the appeal may be heard without the Attorney-General being afforded an opportunity to make submissions in the appeal".

[9] In answer to the aforementioned order of the court, the Attorney-General, Honourable Pendukeni Iivula Ithana filed an affidavit in which she made the following notable depositions:

> "4. The legal practitioners employed by the Government Attorney are members of the Directorate of Civil Litigation which falls under my office as Attorney-General. The Government Attorney, who heads the Directorate, reports to me directly. Therefore, the Government Attorney also represents my office in any litigation it conducts.
>
> 5. In practical terms, I am of the opinion that my office should be a specific party, in addition to the other parties involved, to any constitutional litigation, even if it is a Government agency. It would avoid that a particular matter does not come to my

attention. It is particularly important that I am a party in constitutional matters where the parties are not Government agencies.

6. In my opinion, Articles 86 and 87 of the Constitution should be construed to require notice to the Attorney-General in every matter involving a constitutional issue.

7. As far as the present case is concerned I abide by the Court's ruling.

8. I am satisfied with the submission made on behalf of the appellant through the Government Attorney on the merits of this appeal and I have nothing to add at all."

[10] On resumption of the hearing of the appeal on 2 October 2006, Mr. Coleman, having regard to the Attorney-General's affidavit aforesaid, conceded that the proceedings in the court *a quo* were not vitiated by the non-joinder of the Attorney-General. He based that concession on the fact that the Attorney-General's office was fully represented in the court *a quo*. That notwithstanding, he observed that ideally this country should follow the Canadian procedure which specifically requires the joining of the Attorney-General in constitutional cases. Mr. Botes tagged the call for the Attorney-General to have been joined during the proceedings of the court below as academic, evidently because in those proceedings there was the presence of lawyers from the office of the Government Attorney.

[11] In the light of the consensus on both sides arising from the Attorney-General's affidavit, the question of the possibility of the proceedings of the court of first instance having been vitiated has, so to speak, resolved itself amicably. I consequently hold that the failure to join the Attorney-General in the action when it was commenced in

the court below did not, in the light of the explanation given by the Attorney-General in answer to the question we posed as a follow-up to the submissions we heard on 13th April, 2006, vitiate the proceedings of the court *a quo.* However, in an action in which it is intended to call upon a trial court to make an order pursuant to Article 25(1)(a) and (b) of the Constitution, it is prudent to cite the Attorney-General as a party despite that a Government department is represented in such action. I shall therefore, proceed straight away to consider the substantive and very important constitutional issue of whether section 39(1) violates the rights guaranteed by Articles 10(1) and 12 (1)(a) of the Constitution.

[12] As already shown, the principal issue raised by the declaratory orders of the court *a quo* is whether section 39 (1) is in breach of the Articles of the Constitution as stated in the preceding paragraph. For the sake of clarity, let me quote the two Articles:

> "10. Equality and Freedom from Discrimination
>
> (1) All persons shall be equal before the law.
>
> 12. Fair Trial
>
> (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law; provided that such court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society."

And the controversial section 39(1) provides as follows:

> "39(1) Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within twelve months after the cause of action arose, and notice in writing of such proceedings and the cause of action thereof shall be given to the defendant not less than one month before it is instituted; provided that the Minister may <u>at any time</u> waive compliance with the provisions of this subsection." (Underlining is mine).

[13] Before adverting to the contentions of the parties to the appeal, it is apposite to reproduce the kernel of the impugned judgment in so far as section 39 (1) is said to offend the constitutional provisions set out above. This is what the learned Judge-President had to say, beginning to read from the 13th line on page 015 of the first volume of the record of appeal.

> "To properly appreciate limitation provisions such as the ones I have so far referred to contained in the Police Act, the Public Service Act and the Defence Amendment Act, it is essential to trace their origin: The combined effect of ss 10(1) and 11(d) of the Prescription Act 68 of 1969 (Prescription Act) is that the prescription period relating to delictual debts is 3 years, "save where an act of Parliament provides otherwise". The limitation clauses in the Police Act, Public Service Act and the Defence Amendment Act are thus intended to avoid the 3-year prescription period decreed in the Prescription Act. Chapter III of the Prescription Act provides for how claims become prescribed: In terms of s 12 (1) of that Act the prescription period begins to run 'as soon as the debt is due'. In terms of s 12(3) a debt is not due though until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises or until he or she could have learnt of those circumstances by exercising reasonable care; and the Prescription Act in s 13 (1)(a) extends the prescription period in respect of minors in that the period only begins to run once the minor has reached the age of majority.
>
> Section 16 (1) of the Prescription Act is a default provision which reads:
>
> > *'(T)he provisions of this chapter shall, save insofar as they are not inconsistent with the provisions of any Act of*

> *Parliament which prescribes a specified period within which … an action is to be instituted in respect of a debt…., apply to any debt arising after the commencement of this Act.'*

Put simply, Chapter III of the Prescription Act would have applied in respect of the applicants if s 39(1) of the Police Act did not exist. The same goes for the limitation provision in the Public Service Act and the Defence Amendment Act. I will hereafter for brevity refer to such provisions as 'special limitation provisions'.

A reading of the provisions of the Prescription Act to which I have referred makes it clear at once that, by comparison, s 39(1) of the Police Act makes serious inroads into rights which a prospective plaintiff under the Police Act would otherwise have enjoyed but for the restrictions imposed by that section. A striking disability suffered by a prospective plaintiff against the state on account of s 39(1) of the Police Act, is that he or she cannot rely on any of the grounds under the Prescription Act which delay the commencement of the running of prescription or which delay the completion of prescription. (Compare *Pizani v Minister of Defence 1987 (4) SA 592 (A) at 602 D-G).*

As I have shown, in terms of Chap III of the Prescription Act, one of the grounds which delays the commencement of the running of prescription is the creditor's lack of knowledge of the identity of the debtor and the facts from which the debt arises. Section 39(1) of the Police Act ensures that avenue is not available to a prospective plaintiff proceeding under it."

[14] After considering a number of authorities, the Judge-President went on to state the following; reading from page 026 of volume 1 of the record at line 16 to page 027 line 7:

> "For the reasons set out in the judgments to which I have referred extensively and bearing in mind the rationale therefore advanced by the first respondent in Taapopi's affidavit and the legal argument, I have come to the conclusion that, all things being equal, the 12-month limitation period and the requirement of prior notice before commencement of proceedings contained in s 39(1) of the Police Act, are not *per se* unconstitutional. They 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, if justified. The applicants have failed to establish that the limitation period of 12 months and the requirement for notice in s 39(1) of the Police Act, are *per se* unconstitutional. All they did was to allege own ignorance or negligence of legal practitioners for not bringing their claims within the 12 months period. They have failed to establish how it would have been different if the limitation period was not 12 months but longer. The bald allegation of ignorance, without more, does not also take the matter any further. Negligence on the part of legal practitioners is not unfamiliar even in claims covered by Chapter III of the Prescription Act and it cannot credibly be put forward as a basis of inferring unreasonableness in s 39(1)."

[15] In his heads of argument, Mr. Coleman expresses agreement with the Judge-President's conclusion thus far. However, he takes issue with his adverse reasoning which starts with the next paragraph after the preceding quotation. That paragraph reads:

> "That is not the end of the matter though for, in my view, the applicants will still be entitled to succeed if they are able to demonstrate that taking s 39(1) as a 'composite', it produces an unreasonable rigidity and inflexibility which has the effect of either denying applicants their right of access to court; or because of its failure to provide for safeguards employed in other comparable statutory schemes, it treats them unequally. It is to that inquiry that I now turn."

[16] It will suffice to refer to only one judicial precedent which the learned trial Judge cited and which embodied the safeguards he said were absent from section 39(1), and which therefore, according to him, made that section rigid and inflexible. This is case of *Peens v Minister of Safety and Security and Others, 2000 (4) SA 727*

(T). The salient facts in *Peens'* case may be outlined as follows. Peens was arrested and charged with committing some criminal offences. She was therefore detained in custody from August 15th to 20th December 1995. On the latter date the charges were withdrawn at Pretoria Magistrates Court. On the 6th February 1996, the charges were resuscitated but during August 1997 they were once again withdrawn. Peens then instituted a civil action on September 18th 1998 alleging that the defendants had maliciously and unlawfully caused criminal charges to be instituted against her. In proceedings preceding the trial of her plaint and by consensus among all the parties, the following matters were agreed. I quote from the judgment at page 729 letter G to page 730 letter A :

> "1. It is common cause that:
>
> 1.1 Plaintiff's cause of action, at the latest, was completed during August 1997.
>
> 1.2 Plaintiff instituted her action against the first defendant on 18 September 1998.
>
> 1.3 Plaintiff failed to give the defendant one month's written notice of her intention to institute action against the defendant.
>
> 1.4 The period of 12 months from the date on which the plaintiff's cause of action arose had expired by the time the plaintiff instituted action against the defendant.
>
> 2. The first defendant is of the opinion that the plaintiff's action has prescribed because of her failure to comply with section 57 of the Police ServiceAct 68 of 1995.
>
> 3. As a result of the plaintiff's replication, the court is requested to determine if the provisions of section 57(1) and (2) of Act 68 of 1995 are unconstitutional in the light of ss 9 and 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (the

> Constitution), as the plaintiff's right of equal treatment by the State as well as her right of access to the courts have been negatively affected."

[17] The court which tried the preceding issue mentioned in (3) was presided over by Seriti, AJ. Section 57(1) of the Police Act 68 of 1995 provides as hereunder:

> "57(1) No legal proceedings shall be instituted against the service or anybody or person in respect of any alleged act performed under or in terms of this act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of twelve calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.
>
> (2) No legal proceedings contemplated in subsection (1) shall be instituted before the expiry of at least one calendar month after written notification of the intention to institute such proceedings has been served on the defendant, wherein particulars of the alleged act or omission are contained.
>
> (4) …..
>
> (5) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those subsections where the interests of justice so required."

[18] In his quest to establish that section 57, *ibid*., was unconstitutional as posed in point (3) of the common causes above, counsel for Peens, the plaintiff made submissions relying to a great extent on the decision of the Constitutional Court of South Africa in the case of *Mohlomi v The Minister of Defence, 1997(1) SA 124 (CC).* In that case the Constitutional Court had ruled that section 113 (1) of the Defence Act,

No 44 of 1957, violated the plaintiff's right as set out in section 22 of the Interim Constitution of South Africa, Act No. 2000 of 1993. The Constitutional Court in the event struck down section 113(1) of the Defence Act on the ground that it was not constitutional.

[19] Seriti, AJ rejected the foregoing submission because, after juxtaposing and comparing the two sections, he found that one was different from the other. Section 113(1) of the Defence Act No. 44 of 1957 which, like section 57 aforesaid, was prescriptive, provided as follows:

> "113(1) No civil action shall be capable of being instituted against the state or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before commencement thereof."

[20] Seriti, AJ highlighted three aspects which he found to constitute fundamental differences between the two sections. These were:

1. While the prescription period under section 113(1) was six months, the corresponding period under section 57 was twelve months.

2. Section 113(1) stipulated that the civil action had to be instituted within six months starting from the date when the cause of action arose, whereas section 57 stipulated that the prescription period did not start to

run until after the date when the claimant became aware of the facts consisting the cause of action.

3. While section 57 contained a provision which empowered a court of law to condone failure to comply with the requirements precedent to the institution of the civil action, section 113(1) did not.

[21] He then concluded that section 57 was not rigid and inflexible and therefore, differed from section 113(1) which the Constitutional Court had struck down on account of being unconstitutional because of its rigidity and inflexibility. Therefore, Seriti, AJ determined that the provisions of section 57 of the Police Act No. 68 of 1995 were not unconstitutional. In other words the learned Judge held that the provisions of section 57 did not negatively affect the plaintiff's right to equal treatment before the law, nor the right of access to courts of law.

[22] *In casu,* the safeguards which the Judge-President referred to as being absent from section 39(1) thereby, according to him, making the section rigid and inflexible, were the same (except the provision relating to condonation) as those which Seriti, AJ found to be absent from section 113(1) of the South African Defence Act No. 44 of 1957. The Judge-President in particular highlighted as missing the safeguard that the prescription period should start to run when the claimant becomes aware of the facts constituting the cause of action or from the date when he/she might be reasonably expected to have become aware of such facts. To that end, he agreed with the

applicants' counsel, Mr. Botes, who had submitted that section 39(1) was too rigid because it did not make provision for cases where the claimant could not institute an action immediately or otherwise for *bona fide* reasons which he specified.

[23] In further justifying his conclusion that when treated as a composite section 39(1) did not contain the safeguards which other comparable prescriptive statutes contained and consequently, holding that section 39(1) breached the constitutional rights of equal treatment before the law and of access to the courts of law, the Judge-President derived inspiration from the Judgment of Didcott, J, in *Mohlomi's* case. In doing so he quoted the following passage from the *Mohlomi* judgment:

> "That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most people who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so solely is often difficult for financial or geographical reasons. The severity of s113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of s 22 are thus, I believe, infringed."

[24] The Judge *a quo* equated the situation referred to in the preceding quotation from *Mohlomi* to that prevailing in Namibia. In that vein he went on to state at page 029, reading from the last paragraph thereon as follows:

> "I take the view that to allow section 39(1) of the Police Act to survive in its present form carries the risk that poverty and ignorance – which is the lot of the vast majority of this country because of past discriminatory policies – will only serve to perpetuate that condition for long. Instead of making it possible for as many people as possible to exercise the right to access to court which has been "denied to them for so long", the law will achieve the opposite result. A proper balance should be struck between realising the legitimate governmental purpose I have identified in this judgment – sought to be achieved by special limitation clauses – and the imperative of guaranteeing the right of access to court. Not only does s 39(1) fail in that respect; it weighs too heavily against the interests of the individual to be able to have justiciable disputes adjudicated upon by a competent court."

[25] In due course, he came to the conclusion that section 39(1) infringed Articles 10(1) and 12(1)(a) of the Namibian Constitution. As we have already seen the former Article guarantees the right of equality before the law while the latter that of, first, access to the courts of law and secondly, for a person undergoing trial, the right to a fair hearing. In arriving at his conclusion, he considered the proviso to section 39(1) which empowers the Minister in charge of the National Police to waive the requirements of section 39(1). In his view, even the proviso did not provide solace to a poverty stricken claimant. The Judge hypothesised that such a claimant might not afford the resources to enable him to pay the legal fees entailed in going through the process of applying for a waiver; if such waiver application does not succeed, to institute proceedings for review so that the Minister's decision is set aside, and subsequently, if the review application succeeds, to then commence a civil action against the State. It was the Judge-President's view that the prospect of having to go through such an expensive process could be so daunting that it might inhibit the

claimant from litigating. He/she would thus be denied the right of equality before the law and especially the right of access to a court of law. He described such predicament as a chilling effect on potential litigants. The Judge consequently held that the Minister's power of waiver did not "really ameliorate the inflexibility" of section 39(1). He added that if the power of waiver was an adjunct to those safeguards which he identified as existing in other prescriptive statutes, it might then have been a useful provision.

[26] In opposing the appeal, Mr. Botes submitted powerful heads of argument and contentions. I shall now consider these.

[27] In the first place, he laid down a two-stage criterion which, according to him, may serve to determine whether a prescriptive provision can be said to be reasonable and justifiable, viz:-

(a) Whether the limitation provision infringes the rights constitutionally protected by Articles 10(1) and 12(1)(a) and, if so

(b) Whether the infringement is reasonable and justifiable.

[28] He then carried out a comparative exercise similar to that done by Seriti, AJ in *Peens'* case, by juxtaposing section 39(1) and section 57 of the Police Act No. 68 of

1995 of South Africa. Having done so he highlighted two material and important differences which he found to exist between the two sections, to wit:-

(1) That under section 57, the limitation period begins to run from the day when the claimant either becomes aware or would be reasonably expected to become aware of the facts constituting the cause of action, whereas under section 39(1) the period runs from the day the cause of action arose.

(2) That section 39(1) provides for a Ministerial waiver whereas section 57 contains the power of condonation which is vested in a court of law.

[29] Mr. Botes thereafter referred to the *Mohlomi* case in which, as we have seen, the Constitutional Court of South Africa struck down section 113(1) of the Defence Act No. 44 of 1957 on the ground that it was unconstitutional. Reverting to section 39(1) he contended that that section was wanting because –

> "(a) it, *inter alia*, limits the constitutional rights of access to a court and/or the right to equality before the law; and
>
> (b) it, as a composite, produces an unreasonable rigidity and inflexibility and/or fails to provide for the kind of safeguards employed by comparable prescriptive statutes."

He, in the event, went on to condemn section 39(1) as being

> "too rigid because it does not make provision for cases where the claimant cannot institute a claim immediately on medical grounds, or other grounds; does not know the extend (*sic*) of damages or does not realise that he has claim for damages or is minor."

[30] As regards the waiver proviso in section 39(1), Mr. Botes posed the question whether it saves section 39(1) from being declared unconstitutional. For the sake of economy of space in this judgment it is unnecessary to recapitulate the whole process which the learned counsel treaded in arriving at his answer to the question. It suffices to state that at the end of the day he came to the conclusion and consequently submitted that section 39(1) imported inequality and unreasonableness, which attributes were compounded by the waiver proviso. In his view this was so because the waiver was exercisable by a Minister, "a political appointee who is responsible for the national police", and not by the courts of law. He contended that the fact that the Minister had to comply with the provisions of Article 18 of the Namibian Constitution, which requires him to act fairly and reasonably and to comply with the tenets of common law and of any relevant statutory law, did not take the matter further "as the obstacle at the <u>beginning</u> of the exercise of the right remains" (the underlining is his). Mr. Botes concluded his written arguments by quoting the following dictum from the case of *Moise v Great Germiston TLC, Minister of Justice Intervening, 2001 (4) SA 491 (CC)* at page 499 G, to wit:

> "23…. Untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity,

> equality and freedom. In the absence of such right the justiciability of the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory. In *Beinash and Another v Ernest & Young and Others* Mokgoro J, on behalf of an unanimous court, said:
>
> > 'The right of access to courts protected under section 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of section 36(1) there can surely be no dispute that the right of access to court is by statute a right that requires active protection.'"

[31] In his oral submission at the hearing of this appeal, Mr. Botes underscored his written heads of argument. He also stressed that the section 39(1) proviso merely compounded the situation by vesting the power of waiver in a Minister who is a political appointee of the government. He likened the scenario created by the proviso to that of being granted a right to seek a remedy for one's grievance in a partial forum. He added that section 39(1) was oppressive because of the inequality it promoted.

[32] In evaluating the impugned judgment of the court *a quo* in the light of the warring contentions of counsel representing the parties to the appeal, my starting point will be to pose and then answer the following question: Recognising that section 113(1) of the South African Defence Act No. 44 of 1957, is undoubtedly too rigid and inflexible on the basis of the reasons determined by the South African Constitutional Court, can it be justifiably said that section 39(1) presently under consideration is in *pari materia* with the said section 113(1) and therefore that it, too, should be struck down as being unconstitutional? In other words, does section 39(1) violate the

constitutional rights of equality before the law and of access to the courts which are guaranteed by the Namibian Constitution? In the further alternative, is section 39(1) too rigid and inflexible? The whole of this appeal as I perceive it, hinges on the resolution to this question. At the risk of being accused of repetitiveness I shall reproduce the two sections consecutively for comparative purposes.

[33] Section 113(1) of the Defence Act No. 44 of 1957 of South Africa:

> "No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant not less than one month at least before the commencement thereof."

Section 39(1) of the Police Act No 19 of 1990 of Namibia reads:

> "Any civil proceedings against the State or any person in respect of anything done in pursuance to this Act shall be instituted within twelve 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 one month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection. (Underlining is mine)

[34] There are two other subsections of section 39 which are not crucial for the purpose of this judgment. It suffices to mention that their combined effect is that the notice mentioned in subsection (1) and service of process in any consequential civil

proceedings may be effected on the Inspector-General of Police instead of the Minister.

[35] Upon examination of the two sections it will be readily noted that they both contain shortened prescriptive periods *vis-a-vis* the three year general prescription period provided for in the Prescription Act No. 68 of 1969. The other common factor between them is that they both require pre-conditional written notice of one month before institution of contemplated civil proceedings. However, section 39(1) only, and not section 113(1), contains the waiver proviso.

[36] The first point I make, and which necessitated my having to juxtapose the two sections is to show that granted that they have two common factors as shown in the preceding paragraph, the two are <u>not</u> totally on all fours with each other. In my view, and as I shall be elaborating later in this judgment, the point of difference between them is very significant. It will be apparent as I make further comment on this point of difference, that the condemnation of one - in this case section 113(1) in the Mohlomi case, *supra*, - does not and should not be understood to taint the other to the same extent.

[37] Had section 39(1) not contained the proviso, it would, in substance, have been the exact replica of section 113(1) in terms of rigidity and inflexibility. It was, in my view, for the reason of avoiding rigidity and inflexibility that the Legislature 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 the limitation period starts to run from the date when the claimant becomes 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 a waiver. In other words, the claimant who fails to sue during the period when the limitation starts to run on account of, say, lack of financial resources, can still sue much later when he comes into enabling financial resources. The same would be the case for a person who was a minor at the time the cause of action arose. If when he/she attains majority he/she is incapacitated from suing because of some genuine handicap; he/she can still motivate the Minister for a waiver at any time after the handicap has ceased to exist, which might be well beyond the limitation period which would have started to run upon attainment of majority. Looked at from this point of view, I would venture to state that the waiver proviso does possess an ameliorative attribute.

[38] The foregoing examples, which in my view represent real probabilities, are instructive. As shown hereinbefore, in closing his written heads of argument Mr. Botes quoted the dictum in the Moise case in which the right of access to courts of law is qualified by the term "untrammelled." Quite to the contrary, prescriptive statutes have stultified the concept of the right of access to courts being untrammelled. An untrammelled right cannot be prescribed, whereas one can

justifiably say that the right of applying for waiver is untrammelled because it can be exercised at any time. Similarly, the preceding examples serve so show that a person relying on the postponed limitation period provision may be in a worse off position sometimes than one who is relying on the waiver provision.

[39] The hypothetical situation portrayed by the learned Judge-President of a person being daunted by the prospect of having to go through the waiver process before ever hoping to exercise the right of access to court is plausible. However, and with due respect, I can liken the judge's hypothesis to philosophising or to an exercise in sociology. In my view the hypothesis does not represent a true legal problem, but even if it does represent a legal problem, it is a double edged sword which cuts both ways. The socio-economic situation he described could still handicap quite a number of people even if the law in section 39(1) was amended as contemplated by the court *a quo's* order pursuant to Article 25(1)(a) of the Namibian Constitution. Many of our people are so poverty stricken that even when they are aware of their cause of action, they are handicapped by financial incapacity and so cannot pursue their guaranteed constitutional rights.

[40] The learned Judge-President states at page 029 of the judgment that "to allow section 39(1) of the Police Act to survive in its present form carries the real risk that poverty and ignorance – which is the lot of the vast majority of this country because of past discriminatory policies – will only serve to perpetuate that condition for long." I have in the preceding paragraph commented on the influence of poverty on the right

to sue. In similar vein I would state that ignorance can equally be a double edged sword. It strikes not only at the poor and vulnerable but also at the affluent. Indeed the learned judge *a quo* himself passed an uncomplimentary remark on some legal practitioners when he said "Negligence on the part of legal practitioners is not unfamiliar even in claims covered by chapter III of the Prescription Act and it cannot credibly be put forward as a basis of inferring unreasonableness in section 39(1)." He could equally have used the epithet "ignorance" in place of "negligence" because this case quite clearly shows that if some of the legal practitioners who served the applicants were not ignorant, they could have timeously instituted proceedings instead of, for instance, insisting on procuring a police docket before they could sue. Moreover, the applicants themselves are a case in point. They were well aware of the dates when their respective causes of action arose. Yet as one can see from perusal of records of appeal, the tardy handling of their cases by their legal practitioners cost them dearly by not suing within the permitted limitation periods.

[41] The section 39(1) proviso has also been criticised because the power of waiver has been vested in the Minister, who is at the same time the member of Cabinet responsible for the national police. It is granted that the Minister, not being a person who is not potentially disinterested, may not give a sympathetic ear to the waiver application. However, the supreme law of the land, the Namibian Constitution, obligates him/her to act fairly and reasonably and to comply with the tenets of common law and of any relevant statutory law when dealing with public affairs. In addition the Constitution provides that a person who is aggrieved by the decision of a

Minister in relation to a waiver application has a right to approach a court of law to ventilate his/her grievance (see Article 18). True, by application of section 39(1) proviso, access to court is delayed in as much as the claimant has first to apply to the Minister and to subsequently win a waiver before litigating on his claim. However the entitlement to exercise the right of access to a court is never thwarted, it is never extinguished. Therefore I agree with Mr. Coleman's argument that section 39(1) does not attempt to exclude the right of access to a court of law. In reality the position of a claimant taking advantage of the safeguards identified by the judge *a quo* is no better than that of the claimant resorting to the section 39(1) proviso. The former does not straight away litigate his claim, but has first of all to satisfy the court as to when he became aware of his right to sue or when he might reasonably be expected to have become aware. In that sense his right to litigate on the substantive issue is in reality equally delayed.

[42] As regards the constitutional right of equality before the law, the court *a quo* did, after a careful consideration of the purpose of enacting for a shorter prescription period under section 39(1), accept that it constituted a legitimate differentiation which did not go beyond constitutional propriety. To that end the court stated in the last paragraph on page 026 as follows:

> "For the reasons set out in this judgment I have come to the conclusion that, all things being equal, the twelve month limitation period and the requirement of prior notice before commencement of proceedings contained in section 39(1) of the Police Act, are not *per se* unconstitutional. They 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, if justified."

[43] Despite the foregoing holding, the Judge-President engaged in a *volte-face* when he looked at section 39(1) as a composite. After coming to the conclusion that it lacked the safeguards which characterised other prescriptive statutes which provided for permissible conditions, he made statements such as –

> "There is inherent in section 39(1) inequality between a prospective plaintiff under the Police Act and other claimants covered by the Prescription Act…" (Page 30, lines 22-24, vol 1 appeal record)

and -

> "The failure to emulate the statutory scheme of the Public Service Act which is decidedly more favourable to litigants than is the case in the Police Act, has not been explained <u>at all</u> by the first respondent and adds force to the conclusion that the section 39(1) differentiation is not reasonably connected to a legitimate government objective." (Page 31, lines 3-8, vol.1)

[44] It would appear to me that the learned Judge-President was contradicting himself notwithstanding that his change of stance was arrived at as a result of later looking at section 39(1) as a composite. I disagree with him when he declares that the section 39(1) differentiation was not reasonably connected to a legitimate governmental objective. As for the inherent inequality which he states as existing in section 39(1), that, as he himself earlier stated, was justified, and reasonably so, by the need "to regulate claims against the State in a way that promotes speed, prompt

investigation of surrounding circumstances" so that, where necessary, the State could ensure that it is not engaged in avoidable and costly civil litigation. That legitimate government purpose cannot surely evaporate just because section 39(1) has later assumed a composite stature. I disagree with the judge *a quo* for the further reason which I have demonstrated regarding the competitiveness of the waiver provision with the safeguards which the judge identified in comparable prescriptive statutes.

[45] In concluding this judgment, let me make another observation on why I disagree with the judge of the court below when he held that section 39(1) breached Articles 10(1) and 12(1)(a) of the Namibian Constitution. He gave an example of a claimant contemplating going through the process of applying for a waiver and possibly thereafter to have to apply to a court for a review of the Minister's negative decision on the waiver application before he could hope to litigate his claim against the police. Because of the expense involved, he described the prospect of doing all this as daunting and as having a chilling effect on potential claimants. In my considered opinion, a discerning claimant does not need to be daunted and therefore the prospect of having to go through the waiver route need not, as of necessity, have a chilling effect.

[46] At the on-set of independence the Namibian people, through their founding fathers, took a number of steps aimed at creating a society no longer to be deprived as was the case during the apartheid era. One such step found expression in the

provision in Article 95 of the Constitution. That Article provides, quoting only the relevant part of it, as follows:

> "95. Promotion of the welfare of the people
>
> The State shall actively promote and maintain the welfare of the people, adopting, *inter alia*, policies aimed at the following:
>
> (a) …..
> (b) …..
> (c) …..
> (d) …..
> (e) …..
> (f) …..
> (g) …..
> (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State."

[47] True to that constitutional undertaking, the State enacted the Legal Aid Act, No. 29 of 1990, the purpose of which was, in terms of the long title:

> "To provide for granting of legal aid in civil and criminal matters to persons whose means are inadequate to enable them to engage legal practitioners to assist and represent them; and to provide for matters incidental thereto."

[48] In the wake of the enactment of the legal aid law, no one should necessarily feel left out, on account of poverty, from the right of access to the courts of law. So, the poverty-stricken potential claimant referred to in the Judge-President's hypothetical example is catered for.

CONCLUSION

[49] It is my view that in order to violate the constitutional rights and freedoms encapsulated in Articles 10(1) and 12(1)(a), namely the right of equality before the law and of access to the courts, respectively, a statutory provision has to purport to ensure that every reasonable avenue to the enjoyment of those rights is closed. I have, in this judgment, hopefully with success, attempted to demonstrate that section 39(1) was not intended to, nor does it in fact, have such effect. It is my understanding that the Legislature, in annexing the proviso to section 39(1), intended to mitigate the rigidity and inflexibility which that section would have had without the proviso. Hence the inclusion in the proviso of the words “at any time". Therefore, when motivated to exercise the power of waiver, the Minister cannot simply say to the applicant “even though a genuine handicap prevented you from timeously litigating when your cause of action arose, or from the time when you became aware or might have reasonably been expected to have become aware of the facts constituting your cause of action, or indeed even though you were a minor at the material time, the limitation period within which you should have instituted your action against the police has prescribed and therefore I cannot allow your application”. In the light of the provisions of Article 18 of the Constitution relying on the expiration of the prescription period, simpliciter**,** cannot in such a case, be regarded, in law, to be fair and reasonable as a justification for rejecting an application for waiver.

[50] The judge *a quo* was concerned that the delay and cost entailed in going through the waiver route could inhibit a potential claimant from litigating a claim against the police. I have, on the other hand, demonstrated in this judgment that even a claimant relying on any one of the touted safeguards can experience similar delay in as much as he/she has first to satisfy the court that he/she became aware or might reasonably be expected to have become aware of his/her right to sue at a much later stage vis-à-vis the date when the cause of action arose. In any case the law is replete with provisions which, for various reasons, defer the exercise of the right to sue. An obvious example is the case of a minor. Although he/she may generally boast of having the constitutional right of equality before the law, the law itself provides that a minor cannot sue until he/she attains the age of majority, otherwise he/she may sue only through a guardian *ad litem.* As for the cost entailed in litigating, this need not any longer be an insuperable hindrance since indigent persons may obtain legal aid to enable them to gain access to the courts of law.

[51] In the final analysis I have come to the conclusion that the judge *a quo* erred when he held that section 39(1) breached the applicants' right guaranteed to them by Articles 10(1) and 12(1)(a) of the Namibian Constitution. Consequently, I find that the declaration of section 39(1) as invalid for being unconstitutional was incompetent.

[52] Notwithstanding the result of this appeal, it is not the intention of this Court to send wrong signals to the citizenry that they are inhibited from exercising their right of access to the courts of law, and in particular going to courts of law to challenge the

constitutionality of legislation they perceive as impinging on good governance. This is especially so when they intend to institute action which, like the present one, are not vexatious nor an abuse of the process of courts. This consideration justifies a departure from the usual rule of practice that a loser must bear the costs of the winning party. In the event, I hereby make the following orders:

1. The appeal is allowed.

2. The order striking down section 39(1) of the Police Act, No. 19 of 1990 is quashed.

3. All orders consequential to the quashed order are set aside.

4. All parties are to bear their own costs.

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CHOMBA, A.J.A.

I agree

_____
MARITZ, J.A.

I agree

_____

GIBSON, A.J.A.

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