



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2112/2010

In the matter between:

PIA M. TEEK

PLAINTIFF

and

THE MINISTER OF FISHERIES AND MARINE RESOURCES

1ST DEFENDANT

THE OMBUDSMAN

2ND DEFENDANT

BENJAMIN KHEIBEB

3RD DEFENDANT

GOTTFRIED RHEIS

4TH DEFENDANT

ESTATE ERNA KHEIBES

5TH DEFENDANT

ESTATE ERIKA UIRAS

6TH DEFENDANT

ESTATE JUSTINE HARASES

7TH DEFENDANT

GODFREY GAOSEB

8TH DEFENDANT

AXALI DOESEB

9TH DEFENDANT

HENDRIK NAMASEB

10TH DEFENDANT

OLD MAN FISHING CC

11TH DEFENDANT

AUGEI-KHAS SEA PRODUCTS CC

12TH DEFENDANT

REGISTRAR OF CLOSE CORPORATIONS N.O.

13TH DEFENDANT

Neutral citation: *Teek v The Minister of fisheries and Marine Resources (I 2112/2010) [2017] NAHCMD 89 (17 March 2017)*

Coram: MILLER AJ

Heard: 21 January 2015

Delivered: 17 March 2017

Flynote: Plea of Prescription – When dealing with a plea of prescription, the court is not tasked to look at the merits of the case, but to look at whether the cause of action arose before the 3 years period stipulated in Section 11 of the Prescription Act has not prescribed – Meetings and discussions held by parties in resolving dispute does not interrupt prescription – Section 15 of Prescription Act – Plea of Prescription upheld.

ORDER

1. The Special Plea is upheld.
 2. The Plaintiff is ordered to pay the costs of the first and second defendants.
 3. The matter is finalized and removed from the case management roll.
-

JUDGMENT

Miller AJ:

[1] The plaintiff instituted action in this Court, and the combined summons were served on the first and second defendant on the 8th of July 2010. The plaintiff subsequently filed a notice of intention to amend its particulars of claim to which the particulars of claim were so amended.

[2] The plaintiff seeks damages against the first and second defendants in which the plaintiff claims an amount of N\$3 000 000.00 for financial damages and loss of income from the quota rights against the first to third defendant jointly and severally, the one paying the other to be absolved alternatively against the second defendant in his private capacity.

[3] The basis of the plaintiff's claim as it appears from the plaintiff's particulars of claim is as follows, (which I will deal with briefly and as far as necessary):

*'4. On 15 August 2002, **1st Defendant** intentionally and unlawfully, alternatively, wrongfully, intentionally and maliciously recognized only "the original shareholding structure as submitted by Old Mann Fishing to the Minister in its application" in violation of the Amended Founding Statement. [See Annexures "A" . . . which recognition detrimentally affected the business relationship amongst the shareholding members.*

*5. On 11 December 2002, **1st Defendant** reversed the above mentioned decision of the 15th August 2002 by stating that "having studied all these documents, I agree with the share redistribution reached by members of the corporation by resolution taken on 27 July 2002."*

. . .

*6. On 3 November 2004, **1st Defendant** unlawfully and intentionally, alternatively, intentionally, wrongfully and maliciously allowed a transfer of the OMF cc Hake Fishing exploitation/quota rights or the interest Old Man Fishing cc held in the Omaru Consortium to a whole new entity, **12th Defendant**, Augei-khas Sea Products cc, No:2004/1895 . . . of which*

Plaintiff is neither a shareholding member nor has any interest, without ensuring that the correct procedures are followed for a change of name which is stipulated by the Close Corporation and Marine Resources Acts, (re share alienation) and satisfying himself that the shareholding membership interest of the two Corporations is the same – has not been altered, by comparing and scrutinizing the two Corporations' Amended Founding Statements, before and after the alleged name change from OMF cc to Augei-Khas, causing Plaintiff major financial losses [Economic advancement] and unnecessary Emotional anguish, trauma and distress. This was not done, contrary to the Laws, Regulations and Policies of the Ministry of Fisheries and Marine Resources . . .

7. On 3 November 2006, after learning of the unlawful transfer Plaintiff lodged a complaint with 1st Defendant questioning and objecting to the fraudulent transfer of rights or the interest Old Man Fishing cc held in the Omaru Consortium to a whole new entity, 12th Defendant, without ensuring that the correct procedures are followed for change of name which is stipulated by the Close Corporation Act, and satisfying himself that the shareholding membership/interest of the two Corporations' Amended Founding Statements, before and after the name change from OMF cc to Augei-Khas, causing Plaintiff major financial losses and unnecessary mental anguish, trauma and distress and requesting an audience with 1st Defendant, but to no avail. This is clear proof of 1st Defendant's mala fide and arrogance / impunity . . .

8. On 21 May 2007, pursuant to 1st Defendant's undue lengthy delay, Plaintiff requested 2nd Defendant's intervention to get and provide her with 1st Defendant's response to her complaint regarding the irregular transfer of the rights or interest Old Man Fishing cc held in the Omaru Consortium to a whole new entity, 12th Defendant, without ensuring that the correct procedures are followed for a change of name which is stipulated by the Close Corporation Act, satisfying himself that the Shareholding membership/interest of the two Corporations is the same – has not been altered, by comparing and scrutinizing the two Corporations' Amended founding Statement before and after the name change, causing Plaintiff major financial losses and unnecessary mental anguish, trauma . . . Due to 2nd Defendant's unlawful and lengthy delay in responding to their request, Plaintiffs on 28 July 2008, claimed payment of damages and losses from 1st Defendant through 2nd Defendant's offices . .

9. On 22 May 2009, 2nd Defendant eventually responded to Plaintiff's complaint and made the determination that the transfer of rights/interest was irregular and recommended that 1st Defendant rectify the situation and revert to 2nd Defendant within 28 days. . .

10. On 14 August 2009, a meeting was held between Plaintiff, former 1st Plaintiff, 1st, 3rd, 4th and 9th Defendants at which meeting 1st Defendant unfairly, unreasonably and oppressively requested the OMF cc members resolve the shareholding dispute by 28 August 2009. Subsequently, a shareholders meeting was held on 24 August 2009, and a resolution passed in favour of abandoning the shareholding redistribution of 27 July 2002 . . . in favour of the original shareholding as reflected in the Amended Founding Statement, Annexure "A", which was opposed by OMF cc member and Executive Chairperson of Augei-Khas, 3rd Defendant, and which resolution was served on 1st Defendant. . .

11. On 7 September 2009, 9th Defendant had a consultation with 1st Defendant with the sole purpose of requesting the latter to intervene and request the OMF cc Partners Omaru/Tunacor to withhold the dividend payouts pending a satisfactory resolution of the issue of the irregular transfer of the rights. . .

12. On 10 February 2010, Plaintiff (et al) requested 2nd Defendant to decisively deal with her complaint by making recommendation to 1st Defendant to compensate Plaintiff in the sums claimed as per Annexure "E" to original Combined Summons. However notwithstanding 1st Defendant's dilatory tactics, unlawful and undue lengthy delay and non-compliance with 2nd Defendant's determination, recommendation and request, 2nd Defendant on 16 February 2010, wrongfully, maliciously, unfairly, unreasonably and oppressively summarily stopped and terminated the investigation of the Complaint and closed the file to Plaintiff's financial detriment and prejudice. This is clear proof of 2nd Defendant's mala fide and arrogance/impunity . . .

13. On 2 July 2011 at an OMF ccc Shareholders' meeting convened pursuant to written statements made by 3rd and 4th Defendants on 10 June 2011 and 29 May 2011 respectively, that are disingenuously reconciliatory in nature, but in which 3rd Defendant unequivocally admitted and confessed his unlawful conduct and apologized for the hurt he caused Plaintiff and the rest of OMF cc aggrieved shareholders by the unlawful alienation of OMF cc interest held in Omaru Consortium Partnership. . .

14. *In the premises, the proceedings/procedures adopted, followed and applied by 1st and 2nd Defendants, alternatively, by 1st Defendant alternatively, 2nd Defendant relating to the consideration, handing and investigation of the Plaintiff's Complaint regarding the unlawful alienation of OMF cc Rights or interest, Old man Fishing cc held in the consortium to a whole new entity, 12th Defendant, Augei-Khas cc, without ensuring that the correct procedures were followed for an alleged name change which is stipulated by the Close Corporation and Marine Resources Acts, satisfying himself that the Shareholding Membership/interest of the two Corporations is the same . . .*

15. *As a consequence of 1st and 2nd Defendants', alternatively 1st Defendant's, alternatively 2nd Defendant's aforesaid conduct and actions in the handling of the Complaint investigation, were unlawfully and intentionally, alternatively, wrongfully maliciously and oppressively in violation of Plaintiff's Constitutional and Statutory/Legal, per se and Common Law Rights to fair hearing and/or investigation of the Complaint, in that Plaintiff was; on the strength of 1st and 2nd Defendants', alternatively, 1st Defendant's, alternatively 2nd Defendant's] noncompliance with and breach of their legal duty and Obligation to protect, defend, guard and promote Plaintiff's Legal Rights, denied:*

(a) due process of law/natural justice;

(b) effective and adequate redress/ remedies, and,

(c) pursuit of economic emancipation/advancement/ interest and happiness resulting in Plaintiff's insult and humiliation, with the settled intention to injure . . .

WHEREFORE Plaintiff claims against 1st and 2nd Defendants, alternatively, 1st or 2nd Defendant or those Defendants opposing, if any, jointly and severally, the one paying the other to be absolved:

1. *Payment of the sum of N\$3 000 000.00 to Plaintiff.*
2. *Interest on the said sums to be calculated at the prescribed rate of 20% per annum a tempore morae from the date of judgment to date of payment, alternatively,*
3. *An order directing 1st and 2nd Defendants, alternatively 1st Defendant, alternatively 2nd Defendant, to take the necessary steps to secure an allocation of the right of exploitation for dermesal hake or comparable fishing rights/quota, exclusively to*

plaintiff for the period of ten (10) years or any other period determined by 1st Defendant's Ministry or competent body, whichever period is longer.

4. *costs of suit . . .*'

[4] The first and second defendants both raised a plea of prescription to the plaintiff's claim and pray that the plaintiff's claim be dismissed with costs, and in support submitted the following in its plea:

4.1. *Plaintiff's claim is based on an alleged transfer of OMF CC hake fishing exploitation/quota rights to Augei-Khas Sea products CC by first defendant on 4 November 2004.*

4.2. *Plaintiff's summons was served on the first defendant on 8 July 2010 which is more than three years after the date on which the claim arose.*

4.3. *In the premises, plaintiff's claim is prescribed in terms of section 11 of Act 68 of 1969.*

[5] When dealing with a plea of prescription, the court is not tasked to look at the merits of the case, but to look at whether the cause of action arose before the 3 years period stipulated in Section 11 of the Prescription Act has not prescribed.

[6] The cause of action arose in 2004 and the summons were only issued in 2010. The further allegations regarding the meetings and discussions between the relevant parties in trying to resolve the dispute do not serve to interrupt the period of prescription which is 3 years. Section 15 of the Prescription Act states –

'15 Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[7] The first claim against the 1st defendant and the 2nd defendant is a claim in the amount of 3 000 000.00 which is based on the original cause of action which arose in 2004, being the loss of income, to mention but one, suffered by the plaintiff as a result

of the decision made by the first defendant in 2004. Once the claim which is based on the decision made by the first defendant in 2004 has become prescribed, there is no room for any argument that the first and second defendants should re-visit that decision and to substitute it with an order directing the first and second defendants either jointly or severally to secure an allocation of the right of exploitation for dermesal hake or comparable fishing rights/quota, exclusively to plaintiff for the period of ten (10) years or any other period.

[8] For these reasons, I make the following orders:

1. The Special Plea is upheld.
2. The Plaintiff is ordered to pay the costs of the first and second defendants on the basis of one instructing and one instructed counsel.
3. The matter is finalized and removed from the case management roll.

PJ MILLER

APPEARANCE:

FOR THE PLAINTIFF:

Pia M. Teek
Plaintiff in Person

FOR THE FIRST DEFENDANT:

OF:

Mrs. C. Machaka
Government Attorneys, Windhoek

FOR THE SECOND DEFENDANT:

INSTRUCTED BY:

N. Bassingthwaighe
Office of the Ombudsman, Windhoek