

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2016/03515

In the matter between:

PETRUS CANISIUS NANGOLO

PLAINTIFF

and

MATHEUS IMENE

DEFENDANT

Neutral citation: *Nangolo v Imene* (HC-MD-CIV-ACT-CON-2016/03515) [2018]
NAHCMD 109 (20 April 2018)

Coram: Usiku J

Heard: 06 March 2018

Delivered: 20 April 2018

Flynote: Prescription – Interruption of prescription – Summons issued in 2015 –

Matter not prosecuted to finality – Action removed from the roll on 25 October 2015 and not re-enrolled since – Plaintiff subsequently serving fresh summons on the Defendant on 02 March 2017 – Whether the year 2015 summons interrupted the running of prescription – Court holding that the Plaintiff’s claim has prescribed.

Summary: Plaintiff instituted an action against the Defendant on 25 October 2016, but did not prosecute such action to finality. The Plaintiff served fresh summons on the Defendant on 02 March 2017. The Defendant raised a special plea of prescription, in that the cause of action arose on 17 October 2013, however, the Plaintiff only served the Defendant with the summons on 02 March 2017. The Defendant alleged that the initial summons interrupted the running of prescription. The initial action was removed from the roll on 22 October 2015 and was not prosecuted to finality.

Held, that the Plaintiff’s claim has prescribed.

ORDER

The defendant’s special plea of prescription is upheld with costs.

REASONS IN TERMS OF PRACTICE DIRECTION 61

USIKU J:

[1] The defendant raised a special plea of prescription, claiming that insofar as the plaintiff alleges in his particulars of claim, that his cause of action arose on 17 October 2015 and insofar as the plaintiff’s combined summons were only served on the defendant on 02 March 2017, the plaintiff’s claim has prescribed.

[2] In his replication to the special plea, the plaintiff averred that he had initially issued summons, which were served on 15 July 2015. This action was subsequently removed from the roll on 25 October 2015. As a result, the summons served on 15 July of 2015 had interrupted the running of prescription.

[3] It is apparent from the arguments of the parties and the pleadings filed of record, that the plaintiff's claim is alleged to stem from an agreement between the parties in terms of which the plaintiff installed a jackpot machine on the premises, he believed to be owned by the defendant. The jackpot machine was stolen from the premises on or about 17 October 2013 at about 21:00. According to the plaintiff, the defendant only reported the theft to the police at about 01:00, the following day. The plaintiff claims that the late reporting, of the theft, hampered the chances of apprehending the thieves and as a result, the plaintiff suffered damages.

[4] It is common cause that as a general rule, a debt prescribes after a period of three years. There are exceptions to the general rule, which are not relevant to the present matter. The plaintiff in this matter contends that the running of prescription was interrupted when the plaintiff served the initial summons on the defendant on 15 July 2015. Although the year 2015 process was subsequently removed from the roll, the plaintiff argues, the matter/process was not dismissed.

[5] From the evidence on the papers, it appears that the plaintiff alleges that his cause of action arose on 18 October 2013, when he became aware that the theft was only reported to the police 01:00 that day, which late reporting, according to the plaintiff, hampered chances of apprehending the thieves.

[6] In terms of section 4(2) of the Prescription Act, No. 68 of 1969, the interruption of the prescription period, by service of a judicial process, lapses if the plaintiff does not successfully prosecute his claim to final judgment.

[7] The plaintiff (creditor) bears the onus of alleging and proving the interruption of the

prescription period by service on the defendant of the process whereby the plaintiff claims payment of the debt.¹

[8] It is common cause that the initial action in respect of which the summons were served on the defendant on 15 July 2015, was removed from the roll on 22 October 2015 and no further steps were taken in the prosecution of that action. It is not the plaintiff's contention that he has successfully prosecuted his claim under the summons of 2015, to final judgment.

[9] The process served on 15 July 2015, therefore, did not serve to interrupt the prescription period and the plaintiff's claim is to be taken to have prescribed on or about 19 October 2016.

[10] It follows that the plaintiff did not prosecute his action under the 15 June 2015 court process, to finality and the running of prescription was never interrupted.

[11] In the premises, the special plea of prescription is upheld with costs.

B Usiku
Judge

¹ Section 15(2) of the Prescription Act, No. 68 of 1969.

APPEARANCES:

PLAINTIFF:

J Diedericks
of Diedericks Inc, Windhoek

DEFENDANT :

L Shikale
of Shikale & Associates, Windhoek