

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING AND REASONS



MAIN DIVISION, WINDHOEK

Case no: I 1238/2016

In the matter between:

SKY DANCER CC

PLAINTIFF

and

WINDHOEK FLIGHT TRAINING CENTRE AND 4 OTHERS

DEFENDANTS

Neutral citation: *Sky Dancer CC v Windhoek Flight Training Centre* (I 1238/2016)
[2018] NAHCMD 138 (14 May 2018)

Coram: OOSTHUIZEN J

Heard: 13 March 2018

Delivered: 14 May 2018

Released: 22 May 2018

Flynote: Prescription.

Summary: Section 13(1) of the Prescription Act, Act 68 of 1969. "Superior force" in the circumstances of this case.

ORDER

The following order is issued:

1. Second defendant's special plea of prescription succeeds with costs.
 2. First defendant's plea of prescription fails, costs to be in the cause.
 3. A status hearing is convened for **11June 2018** at **14H00**.
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RULING AND REASONS

Oosthuizen J:

BACKGROUND

[1] The cause of action is the alleged negligence of the second defendant, who was employed by first defendant, when he caused damages to the plaintiff amounting to **N\$518 500**.

[2] Second defendant was allegedly in control of the plaintiff's aircraft when an accident occurred during take-off of the aircraft on 29 April 2013.

PRE-TRIAL COMPROMISE

[3] In the joint pre-trial report in respect of the special plea of prescription filed on 24 November 2017 the plaintiff, first and second defendants compromised and agreed that -

[3.1] The plaintiff's claim is a debt as contemplated in the Prescription Act.

[3.2] The cause of action arose on 29 April 2013.

[3.3] The plaintiff's claim (summons and particulars of claim) was filed with the Register of the High Court on 21 April 2016.

[3.4] The summons was issued by the High Court on 25 April 2016.

[3.5] The summons was delivered to the office of the Deputy Sheriff on 25 April 2016.

[3.6] The summons was served on first defendant on 13 May 2016 (the return says 12 May 2016)

[3.7] Ms Josefina Nekongo shall testify during the hearing of the special plea on behalf of the plaintiff.

[4] It was agreed between plaintiff, first and second defendants that the issues of fact to be resolved were -

[4.1] When did plaintiff contact the office of the Deputy Sheriff to request that the summons be served on first and second defendants forthwith?

[4.2] When did plaintiff follow up with the office of the Deputy Sheriff regarding the service?

[4.3] Was the plaintiff informed by the office of the Deputy Sheriff that the summons left their office to be served and when?

[4.4] Did plaintiff have control or influence over service of the summons?

[4.5] Was plaintiff unable to interrupt prescription?

[5] It was further agreed that the issues of law to be resolved were -

[5.1] Whether plaintiff's claim has prescribed having had regard to section 13 (1) (a) and (i) of the Prescription Act? If so, when?

[5.2] Whether plaintiff's conduct prior to handing summons over to the office of the Deputy Sheriff for service had adverse consequences (for plaintiff) to raise the defence of "superior force"?

[5.3] Whether the failure by the Deputy Sheriff to serve timeously amounted to "superior force"

EVIDENCE

[6] Ms Nekongo testified that she is an admitted Legal Practitioner who was employed by Nixon Marcus Public Law Office until June 2016 and tasked with the responsibility for filing plaintiff's summons with the High Court.

[7] Ms Nekongo's witness statement from paragraph 4 to 8 thereof is quoted verbatim hereunder:

"4. On Thursday 21 April 2016, I attended to filing the summons with the High Court of Namibia, Windhoek, Main Division ("the Court")

5. On Monday, 25 April 2016:

- a) The summons were issued by the Court;
- b) The summons was delivered to the Deputy Sheriff;
- c) I contacted the office of the Deputy Sheriff ("the Sheriff's office") to request that the summons be served on the defendant's urgently, I

specifically informed them that they had to be served before Friday, 29 April 2017.

6. On 26, 27 and 28 April 2016, I enquired with the Sheriff's office as to whether the summons had been served, more specifically:

a) On 26 April 2016, I spoke to a lady who informed that if the summons were brought after lunch on 25 April 2016, the staff responsible for serving the summons had already attended to serving the summons.

b) On the 27 April 2016, I called the Sheriff's office twice and there was no answer. Later on a certain Ms Cathy picked up the phone and she informed me that the summons had left the Sheriff's office to be served.

c) On 28 April 2016, I spoke to Ms Cathy, and annoyingly she said me that she had already informed me that the summons had left to be served, and that they were likely to have been served already. She stated that if they were not served they would be on her table.

7. I submit that these facts show that once the summons were delivered to the Deputy Sheriff's office on 25 April 2016, and once I requested that the summons be served urgently, service of the summons before 29 April 2016 was out of the plaintiff's control.

8. The failure by the Deputy Sheriff to serve the summons prior to 29 April 2016 constitutes a superior force as set out in section 13(1) of the Prescription Act of 1969".

APPLICABLE LAW AND DISCUSSION

[8] Sections 11(d), 12(1), 13 and 15(1) of the Prescription Act, Act 68 of 1969, section 32(1) of the High Court Act, Act 16 of 1990, Rule 8 of the Rules of the High Court and the various and different case law relied upon by the parties.

[9] In this ruling none of the above will be quoted as it will be superfluous and result in an overburdened judgment.

[10] Section 32 of the High Court Act and Rule 8 of the Rules of the High Court require service to be done by the Deputy Sheriff, whereas section 15(1) of the Prescription Act provide that service of the summons interrupt prescription.

[11] Summons was served on the first defendant of 12 May 2016. Summons was never served on the second defendant.

[12] Plaintiff had to plead and prove an impediment as required by section 13(1) of the Prescription Act.

[13] Plaintiff properly pleaded the impediment relied on in its Replication filed on 27 July 2016¹.

[14] In the circumstances of this case, set out in the parties' compromise and substantiated by the evidence of Ms Nekongo, the Court finds that Ms Nekongo for the plaintiff did what she reasonably could to make sure that service would be effected timeously.

[15] The court finds that to look at what did not happen before 21 April 2016, in the circumstances, would amount to irrelevant reasoning, in view of the agreed facts.

[16] Facts of the matter, agreed and proved, are that the summons was rendered to the Registrar for issuing on 21 April 2016, was issued on 25 April 2016, was delivered to the Deputy Sheriff on 25 April 2016 with a request for urgent service and was out of the hands and control of Ms Nekongo as she was assured it will be served timeously. The eventual remiss of the Deputy Sheriff to serve timeously was

¹ Pleadings bundle pp 44-47.

an impediment and "superior force" over which Ms Nekongo had no control and was not aware of.

[17] In result then -

[17.1] Plaintiff's claim against the second defendant has prescribed. Service was never effected on him.

[17.2] Plaintiff's claim against the first defendant has not prescribed. Plaintiff pleaded and proved an impediment, being "superior force" as provided by section 13 of the Prescription Act of 1969.

[17.3] Plaintiff's conduct prior to 21 April 2016 did not adversely affected its pleaded impediment, as there was adequate time left for service.

[17.4] The Deputy Sheriff's failure to serve prior to 29 April 2016 constituted a "superior force".

[18] The following order is issued:

[18.1] Second defendant's special plea of prescription succeeds with costs.

[18.2] First defendant's plea of prescription fails, costs to be costs in the cause.

[18.3] A status hearing is convened for **11June 2018** at **14H00**.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF AND 3RD PARTY: Marcus
of Nixon Marcus Public Law Office

1ST AND 2ND DEFENDANTS SWANEPOEL
of Phillip Swanepoel Legal
PRACTITIONERS

3RD AND 4TH DEFENDANT Ndlovu
of Government Attorneys