

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
RULING ON SPECIAL PLEA OF PRESCRIPTION

Case no: HC-MD-CIV-ACT-OTH-2017/01174

In the matter between:

**TOBIAS NEGONGA**

**PLAINTIFF**

and

**NAMPOST LIMITED**

**DEFENDANT**

**Neutral citation:** *Negonga v Nampost Limited* (HC-MD-CIV-ACT-OTH-2017/01174)  
[2018] NAHCMD 212 (13 July 2018)

**Coram:** PRINLSOO, J

**Heard on:** 19 June 2018

**Delivered:** 10 July 2018

**Reasons:** 13 July 2018

**Flynote:** Prescription - Extinctive prescription — Running of — Prescription beginning to run not necessarily when debt arose, but when it became due.

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Debt due when creditor has 'knowledge of . . . facts from which . . . debt arises —'Meaning of 'debt'.

Banking — Relationship between bank and client — Rights of bank in respect of money in customer's account — Due to the unique and multifaceted contractual relationship between the banking institution, prescription would not begin to run at the time of making a deposit — Inactivity in an Post Office Savings Bank account for three years would not cause it to prescribe but rather causes it to become dormant — Date of the deposit therefore not the determining factor in when the debt became due — The determining factor in deciding if the claim has prescribed or not is in respect of when demand was made for the payment thereof.

**Summary:** The plaintiff instituted action against the defendant which action arises from monies that the plaintiff deposited in his account with the defendant over a period of time. Once the plaintiff reconciled his statements received from the defendant, he noticed that there was a deficit on his account as the amounts deposited did not reflect on his statement. The defendant raised a special plea to the effect that the plaintiff's claim has prescribed.

The defendant submitted that prescription would start running on date of deposit based on the fact that the plaintiff had access to the account at all times and the fact that repayment in respect of the said claim would become due and payable on the date of deposit. The first deposit was made on 18 January 2013 and action was instituted on 02 May 2017.

The defendant further submitted that the plaintiff cannot and should not rely on when he became aware of the alleged debt but rather on when he should have become aware of the debt. The defendant argues that the plaintiff at all times had access to his statements and if he had exercised reasonable care as expected of the reasonable man, he would have become aware of the alleged debt before prescription of the debt,

i.e. prescription cannot be postponed by the inaction of the creditor if he could have acquired knowledge of the debt by exercising reasonable care.

The plaintiff however advanced that the prescription of the debt could only have started to run when the plaintiff became aware that the monies were not in his account and further that the plaintiff indeed exercised reasonable care in as far as it is required by the Prescription Act.

The plaintiff further raised the question as to what would be reasonable care. Plaintiff denies that he had continuous access to his account as he is residing in Gobabis and the account was held at the defendant's Leonardville branch.

A further question of when the debt becomes due was also raised by the plaintiff. When a client deposits money into his or her account, can it be said that the debt is said to exist at the moment when the deposit is made or does there need to be a demand made for there to be a debt. She further argues that upon depositing monies into the customer account, there is no stipulation as when the plaintiff would have to withdraw the said monies and the defendant can therefore not argue that prescription in respect of claim as such begins to run from date of deposit.

Held – that prescription would not begin to run at the time of making a deposit. This would create an untenable position as a client would not be able to claim refund of his/her monies after the lapsing of three years as the claim would have prescribed.

Held further – the date of the deposit is therefore not the determining factor in when the debt became due. The determining factor in deciding if the claim has prescribed or not is in respect of when demand was made for the payment thereof.

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**ORDER**

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- a) The special plea of prescription raised by the Defendant, is dismissed.
- b) The Defendant is ordered to pay the Plaintiff's costs in respect of the special plea.
- c) The matter is postponed to 02 August 2018 at 15:00 for a Status Hearing.
- d) The parties are directed to file a joint status report on or before 30 July 2018.

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**RULING**

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PRINSLOO, J:

Introduction

[1] The plaintiff, Mr Negonga, instituted action against the defendant, Nampost Ltd., which action arises from monies that the plaintiff deposited in his account with the defendant over a period of time. Once the plaintiff reconciled his statements received from the defendant, he noticed that there was a deficit on his account as the amounts deposited did not reflect on his statement. The defendant raised a special plea to the effect that the plaintiff's claim has prescribed.

The issues raised

[2] This matter before me raises the questions concerning the commencement of the running of prescription in regard to the claim of the plaintiff and this court is requested to adjudicate the special plea as a preliminary issue.

[3] The issue arises for determination against the following backdrop:

The plaintiff instituted action against Nampost Ltd and the basis of the plaintiff's claim is contained in paragraphs 4 – 8 inclusive of his particulars of claim, which reads:

'4. During the period of January 2013 to January 2014 the Plaintiff's employee, alternatively the Plaintiff, at different intervals, deposited money in the Plaintiff's savings account which is held with the Defendant at its Leonardville branch. The deposits were made as follows:

4.1	18 January 2013	N\$ 16,236.20
4.2	01 March 2013	N\$ 13,129.70
4.3	10 May 2013	N\$ 21,393.40
4.4	04 October 2013	N\$ 20,032.00
4.5	27 December 2013	N\$ 11,919.30
4.6	13 January 2014	N\$ 16,446.70
	TOTAL	N\$ 99,156.70

5. During February 2015 the Plaintiff, whilst attending to a reconciliation of his deposit receipt with his statement provided by the Defendant, notice that the payments mentioned in Paragraph 3 (*sic*) above were not reflected on the said statements.

6. Upon realizing that the payment detailed in paragraph 3 (*sic*) above were missing from his statement, and that the debt became due, owing and payable, the Plaintiff did on 7 March 2016 cause a letter of demand to be forwarded to the Defendant demanding that payment of the capital amount and interest be made to him.

7. To date hereof the Defendant failed to make payment as demanded, neither has it updated the Plaintiff's statement to reflect the deposits. It is clear that the total of N\$ 99 156.70 was therefore stolen/misappropriated by employees of Defendant at Leonardville for which Defendant is liable.

8. In the premises, the Defendant is indebted to the Plaintiff in the amount of N\$ 99 156.70 in respect of deposits detailed herein above which amounts have become due, owing and payable, and which amounts the Defendant, despite due and proper demand, fail and/or refuses to pay the Plaintiff.'

### The special plea

[4] In reply to the claim of the Plaintiff the defendant raised a special plea as follows:

'The Defendant raises a Special Plea of Prescription to the Amended portion of Plaintiff's Amended Particulars of Claim dated 19 March as follows:

1. Plaintiff's claim is amongst others premised on a transaction originating from 18 January 2013, and in terms whereof repayment would have been due to him from the said date upon demand.
2. Notwithstanding, continuous access to his account since 18<sup>th</sup> January 2013 the Plaintiff's summons was served on 2 May 2017, which is more than three years after the date on which the claim arose.
3. The Plaintiff has had continuous and unrestricted access to his account at all relevant times since date of deposit on 18<sup>th</sup> of January 2013.
4. In the premises, Plaintiff's claim is prescribed in terms of section 11, read with section 12(3), of the Prescription Act of 1969 (Act 68 of 1969)

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.'

### *Argument on behalf of the Defendant*

[5] Mr. Kandara advanced the argument on behalf of the defendant that prescription would start running on date of deposit based on the fact that the plaintiff had access to the account at all times and the fact that repayment in respect of the said claim would become due and payable on the date of deposit. The first deposit was made on 18 January 2013 and action was instituted on 02 May 2017.

[6] The defendant further submitted that the plaintiff cannot and should not rely on when he became aware of the alleged debt but rather on when he should have become aware of the debt. The defendant argues that the plaintiff at all times had access to his statements and if he had exercised reasonable care as expected of the reasonable man, he would have become aware of the alleged debt before prescription of the debt, i.e. prescription cannot be postponed by the inaction of the creditor if he could have acquired knowledge of the debt by exercising reasonable care.

*Argument on behalf of the Plaintiff*

[7] In her argument on behalf of the plaintiff, Ms. Mudzanapabwe advanced that the prescription of the debt in this matter *in casu* could only have started to run when the plaintiff became aware that the monies were not in his account and further that the plaintiff indeed exercised reasonable care in as far as it is required by the Act.<sup>1</sup>

[8] On behalf of the plaintiff, the question was raised as to what would be reasonable care. Plaintiff denies that he had continuous access to his account as he is residing in Gobabis and the account was held at the defendant's Leonardville branch.

[9] Ms. Mudzanapabwe also raised the question of when the debt becomes due. She argued that the question that begs an answer is: 'when a customer deposits money into his or her account, can it be said that the debt is said to exist at the moment when the deposit is made or does there need to be a demand made for there to be a debt?' She further argues that upon depositing monies into the customer's account, there is no stipulation as to when the plaintiff would have to withdraw the said monies and the defendant can therefore not argue that prescription in respect of claim as such begins to run from date of deposit.

[10] In conclusion, Ms. Mudzanapabwe submitted that the debt cannot become due from the date of depositing as it would result in the absurd conclusion that a person

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<sup>1</sup> *Prescription Act 68 of 1969.*

must demand his money which he placed in a banking institution within three years of doing so, failing which he is no longer entitled to it.

Legal principles and application to the facts

[11] According to the defendant, the relevant provision of the Act applicable to the present matter is s. 11 (d), which provides as follows:

‘ The periods of prescription of debts shall be the following:

- (a) ....;
- (b) ....;
- (c) ....;
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.’

Defendant further maintains that the aforementioned section should be read with section 12(3) of the said Act, which provides as follows:

‘12 When prescription begins to run

(1) ....

(2) ....

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’ (my underlining)’



[12] In terms of the *Prescription Act* 68 of 1969 ("**the Act**"), "debts" prescribe after a period of 3 years. In order to avoid losing the legal right to enforce a claim (payment of a "debt"), a creditor must interrupt prescription by instituting proceedings against a debtor before the end of the 3 year period.

[13] In terms of s 12 of the Act, the 3 year prescription period is calculated, and begins to run, from the date on which the "debt" becomes "due". A "debt" in terms of the Act is only deemed to be due when a creditor has "knowledge" of both the identity of the debtor as well as of all the facts from which the "debt" arises.

*When did the debt become due?*

[14] In order to decide the special plea advanced by the defendant, it is important to understand the nature of the relationship between the plaintiff and the defendant.

[15] The defendant in this matter is Nampost Limited, an authorized deposit-taking institution established in terms of the *Posts and Telecommunications Companies Establishment Act*, Act 17 of 1992. Separate regulations<sup>2</sup> were introduced in 1996 to govern the operations of the Post Office Savings Bank. In terms of the *Banking Institutions Act* of 1998, the Post Office Savings Bank was exempted from the law regulating banks and other deposit-taking institutions. However, in accordance with the said Act, this exemption was lifted in 2011 through a Government Gazette<sup>3</sup> issued by the Minister of Finance, and the Post Office Savings Bank has since been under the regulatory and supervisory ambit of the Bank of Namibia.

[16] Generally speaking, the relationship between the Post Office Saving Bank and its customer is that of a debtor and a creditor. This is the similarity between a bank and the banking institution *in casu*. The Post Office Savings Bank regulations require that a

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<sup>2</sup> Regulations made in terms of *Post and Telecommunications Act* 19 of 1992 section 52: Post Office Savings Bank Regulations : General Notice 113 of 1996 (GG1322). Came into force on date of publication: 6 June 1996.(as amended).

<sup>3</sup> Removed by GN 34 of 1 April 2011.

banking institution conducts its business with the objective of “encouraging and promoting savings by inhabitants of Namibia; and, providing efficient banking services to meet the requirements of the rural and urban population of Namibia.”<sup>4</sup> The difference between a bank and the Post Office Savings Bank is that the relevant regulations enable to accept deposits, and to offer other banking and financial services as the Board sees fit, but does not empower the banking institution to provide credit services.<sup>5</sup>

[17] In spite of this difference between a bank and an institution like the defendant, the contractual relationship between banking institution and customer is essentially the same.<sup>6</sup> The contractual relationship between a bank and its customer has, depending on the particular circumstances, been variously described as a *sui generis* relationship, one of deposit, debtor and creditor and as agency. The relationship is most commonly described as a debtor-creditor relationship.<sup>7</sup> The client whose account is in credit is a creditor who makes a loan to the bank and the role is reversed when the account is in debit, then the bank becomes the creditor and the customer the debtor.<sup>8</sup> The bank in its role as debtor but does not pay money on its own, as it is to repay the money upon payment being demanded.

[18] It would therefor appear that the general legal relationship of banking institution like the defendant and its customer is a contractual relationship, which started from the date of opening an account. Therefore when a customer deposits money in to his

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<sup>4</sup> Post Office Savings Bank Regulations 1996, s 2.1.

<sup>5</sup> *Ibid* Section 2.2.

<sup>6</sup> Where reference is made to a bank for purposes of this judgment it should also be understood to mean a financial institution like the defendant.

<sup>7</sup> *Absa Bank Ltd v Intensive Air (Pty) Ltd* 2011 (2) 275 (SCA) at [20]: Bertelsman AJA stated:

‘The relationship between banker and client is one of debtor and creditor:

‘(I)t has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank’s obligation to honour cheques validly drawn by the customer. . . .’ [Per Holmes JA in *S v Kearney* 1964 (2) SA 495 (A) at 502H – 503A.]’

<sup>8</sup> Itzikowitz and Du Toit “Banking and currency” 2(1) LAWSA (2003) para 343: “The bank . . . receives money and collects bills for the account of its customer, borrows the proceeds and undertakes to repay them to the customer on demand. When a customer deposits money it becomes that of the bank subject to the bank’s obligation to honour cheques validly drawn by its customer. Any money deposited with a bank is not held in trust for the customer but constitutes a loan, without interest, to the bank. When a customer’s account is overdrawn the relationship is reversed. The customer becomes the debtor and any deposit made by the customer reduces his or her indebtedness to the bank.”

account, the banking institution becomes a debtor of the customer. No new contract is created every time there is a new deposit as the account is continuing in nature.

[19] When the customer deposits money with a bank, the money itself becomes co-mixed with the bank's money and becomes the property of the said institution.<sup>9</sup> As a concurrent creditor, the customer with money in the bank/financial institution has a personal claim against the bank, which claim arises out of the debtor-creditor relationship and retains a "special property interest"<sup>10</sup> in the money deposited, even though he is no longer the owner of the money.<sup>11</sup> The creditor has the right to determine when performance shall be made.

[20] When a creditor has the right to determine when performance shall be made, as in the case of debt payable on demand, opinions are divided as to whether prescription begins to run from the moment that the creditor has the right to demand that performance be made, or from the moment when the actual demand is made by the creditor. This is exactly the issue on which the parties before me cannot agree on. On behalf of the defendant it was argued as set out above that prescription begins to run from the moment that the creditor has the right to demand performance, i.e. on date of deposit. On behalf of the plaintiff the contrary was argued.

[21] The two different approaches were discussed by MM Loubser in his authoritative book, *Extinctive Prescription*<sup>12</sup>, as follows:

'Arguably the debtor's duty to perform in such a case is conditional and contingent upon demand or notice by the creditor, and prescription period should therefore begin to run when the condition is fulfilled by demand or notice.<sup>13</sup> It is also arguable in support of this view that the

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<sup>9</sup> *Absa Bank Ltd v Intensive Air (Pty) Ltd* supra at foot note 6: at [20]-[22].

<sup>10</sup> Banking Law and Practice, Service Issue 7 at 15-21: *S v Kotze* 1965 (1) SA 118 (A) 125 A -127 E; *Commissioner of Customs and Excise V Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N) 208I, 213I. See also *Cargo Motor Corporation Ltd v Tofalos Transport Ltd and Another* 1972 (1) SA 186 (W) 193E.

<sup>11</sup> Banking Law and Practice, Service Issue 7 at 15-21: *Rennie NO v The Master, Glaum NO v The Master* 1980 (2) 601 (C) 608H -609A; *First National Bank of Southern Africa Ltd v Perry NO and Another* 2001 (3) SA 960 (A) para. 16.

<sup>12</sup> Published by Juta & Co 1996: First Edition at page 54.

<sup>13</sup> Von Savigny 282, 295,298

notion of a due debt implies breach of duty on the part of the debtor, on account of which the performance becomes enforceable by the legal process. When a debt is payable on demand and no demand has in fact been made, there has yet been no breach of duty and therefore the prescription period has not begun to run.<sup>14</sup>

It is arguable on the other hand, that a contract allowing a creditor to determine of his own accord when performance shall be made is in effect silent as to the time of performance, and performance is therefore due immediately upon conclusion of the contract, when the prescription period begins to run. According to this argument the stipulation that performance is due on demand merely reinforces the implicit terms of the contract that performance is due as from conclusion of the contract.'

[22] Due to the unique and multifaceted contractual relationship between the bank and the customer and because of the continuing nature of the account of the customer, I am of the opinion that that prescription would not begin to run at the time of making a deposit. This would create an untenable position as a customer would not be able to claim refund of his/her monies after the lapsing of three years as the claim would have prescribed.

[23] In fortification of my opinion, it is noted that the relevant legislation<sup>15</sup> made provision for the instance where an account becomes dormant, in the following terms:

**'19. Dormant Savings Accounts**

If a balance in a savings account has remained unchanged for more than three years, except for the accrual of interest, the Company may in its discretion transfer the balance to its revenue, but if the depositor concerned or any person legally competent to claim the balance on such depositor's behalf applies for the repayment thereof, or if an amount for deposit in the savings account concerned is paid after such transfer, an amount equal to the balance and the interest which would have accrued thereon if it had not been so transferred shall be transferred from the revenue of the Company to the credit of the depositor concerned.'

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<sup>14</sup> As to this theory that the running of the prescription period is triggered by a breach of duty- See Von Savigny 281-2; Spiro 51 93.

<sup>15</sup> Post Office Savings Bank Regulations.

It is thus quite clear that inactivity in an account for three years would not cause it to prescribe but rather causes it to become dormant but it does not detract from the rights of the client to competently claim repayment thereof.

[24] The date of the deposit is therefore not the determining factor in when the debt in these instances became due. The determining factor in deciding if the claim of the plaintiff has prescribed or not is in respect of when demand was made for the payment thereof.

[25] Even if the court accepts for argument sake that at the time when the plaintiff became aware of the discrepancy in his account during February 2015 and he made enquiries about it which could possibly constituting demand, it would still not cause the claim to prescribe, as summons was served in May 2017. Formal demand in the form of a letter of demand was served on the defendant on 06 March 2016 and in this instance the claim(s) could also not have prescribed yet.

#### *Reasonable care*

[26] The last issue to consider is the issue of reasonable care and what it would constitute given the circumstances.

[27] Section 12(3) of the Prescription Act provides that a debt shall not be deemed due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[28] Mr. Kandara argued that the plaintiff had access to his statements from the defendant at all material times and should have exercised care and if he had done so he would have become aware of the alleged debt, i.e. the discrepancies in his account.

[29] In considering the issue of reasonable care it appears that the reasonable care for purposes of s 12(3) is not measured by the objective standard of the hypothetical reasonable or prudent person but rather by the more subjective standard of a reasonable person with the creditor's characteristics.<sup>16</sup>

[30] It was submitted that the plaintiff only had intermittent access to his account as the account is located at the defendant's Leonardville branch, whereas the plaintiff is in Gobabis. However, does the plaintiff's failure to scrutinize his account statement on a monthly basis or having access to the Leonardville branch make the plaintiff negligent or less reasonable? The answer on both scores must be unequivocally 'no'.

[31] Section 12(3) is aimed at preventing prescription from running against a creditor, who by reason of lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action. The underlying object of s 12(3) is accordingly to ensure that is it negligence rather than innocent inaction that is penalized.<sup>17</sup>

*The question that therefor begs an answer is whether there was a duty on the plaintiff towards the defendant to check his account statements?*

[32] The answer to this question is clear from reading the matter of *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd*<sup>18</sup> where the court discussed the duty of a customer of a bank by stating the following:

'The customer's duty is a restricted one. Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duty to the bank to supervise his employees, to run his business carefully, or to detect frauds. (Spencer-Bower and

<sup>16</sup> MM Lourens Extintive Prescription supra at page 105-106.

<sup>17</sup> MM Lourens Extintive Prescription supra at page 105-106

<sup>18</sup> 1979 (3) SA 267 ((W) at 283A-B. Also see See *Holzman v Standard Bank Ltd* 1985 (1) SA 360 (W) at 363H-I; *Barclays Bank DCO v Straw* 1965 (2) SA 93 (O) at 95D-F; *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 at 223-4; *Trull v Standard Bank of South Africa Ltd* (1892) 4 SAR 203 at 205; *Union Government v National Bank of South Africa* 1921 AD 121 at 128-9. Cf *Universal Stores Ltd v OK Bazaars* (1929) Ltd 1973 (4) SA 747 (A) at 762D-G.

Turner Estoppel by Representation 2nd ed paras 64 and 207 - 209; Cowen (op cit at 374); *Standard Bank v Kaplan* 1922 CPD 214 at 222, 223 and 224 - 225).

The same authorities make it clear that the customer has no duties to the bank to check his bank statements.'

[33] In my opinion defendant's argument on the issue of reasonable care can therefore not be sustained.

[34] My order is therefore as follows:

- a) The special plea of prescription raised by the Defendant, is dismissed.
- b) The Defendant is ordered to pay the Plaintiff's costs in respect of the special plea.
- c) The matter is postponed to 02 August 2018 at 15:00 for a Status Hearing.
- d) The parties are directed to file a joint status report on or before 30 July 2018.

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J S

Prinsloo

Judge

APPEARANCES:

PLAINTIFF: K Mudzanapabwe  
of Etzold – Duvenhage, Windhoek

DEFENDANT: J Kandara  
of Shikongo Law Chambers, Windhoek