

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Emilie Hausiku and Sebastiaan Shivoko Likuwa	 Plaintiff Defendant	Case No: HC-MD-CIV-ACT-DEL- 2020/03475
		Division of Court: Main Division
		Heard on: 6 October 2021
Heard before: Honourable Lady Justice Rakow, J		Delivered on: 26 October 2021
Neutral citation: <i>Hausiku v Likuwa</i> (HC-MD-CIV-ACT-DEL-2020/03457) [2021] NAHCMD 494 (26 October 2021)		
Order:		
<ol style="list-style-type: none">1. The special plea is upheld and the claim is dismissed with cost2. The matter is finalized and removed from the roll.		
Reasons for order:		
RAKOW, J:		
<u>Background</u>		
<p>[1] The present matter relates to a claim for damages as a result of disabilities suffered emanating from a motor vehicle accident. On or about 28 February 2015 at Independence road at or near Kehema location in the district of Rundu a motor vehicle collision occurred between a white sedan motor vehicle bearing registration number N111-827W being driven by the defendant and a beige N8258RU Toyota corolla sedan, a taxi, and in which vehicle the plaintiff</p>		

was a passenger.

[2] Summons was issued against the defendant on 20 August 2020 and was served on 22 September 2017. In the Particulars of Claim, it is alleged that the plaintiff suffered serious injuries and was hospitalized for a considerable period as a result of the defendant's negligent driving. As a result of the vehicle accident, she sustained serious injuries on both legs, and these injuries resulted in her being paralyzed and wheelchair-bound. In support of this, a doctor's affidavit made in terms of section 212(4) of the Criminal Procedure Act, 51 of 1977 was attached. This report is dated 19 May 2015 and indicates that the plaintiff is unable to walk due to a spinal injury. It is further alleged that due to the accident the plaintiff suffered a narrowing or tightening of the openings between the bones in her spine which in turn causes pain, numbness, and weakness in certain parts of the nervous system. In support of this, an MRI report dated 19 March 2015 was attached as part of the Particulars of Claim.

[3] The plaintiff further instituted a claim against the Motor Vehicle Accident Fund, which covered physiotherapy for ten sessions and paid out a lump sum payment of N\$50 436,00 in July 2017. They have however failed to pay the full extent of all the plaintiff's medical expenses incurred, i.e. hearing aids, wheelchair replacement every five years, eyeglasses, medicine prescriptions, caregiving services, and special transportation required. The Fund also failed to compensate the plaintiff in respect of pain and suffering and loss relating to the enjoyment of amenity of life, as well as loss of further income. The damages were subsequently quantified in an actuarial report dated 17 August 2020. The plaintiff holds the defendant liable for an amount of N\$6 956 314.00

[4] The Defendant in response raised a special plea of prescription in terms of the Prescription Act 68 of 1969, Section 11 (d) in terms whereof the section provides that debts prescribe after three years, and that is the matter for determination before the court.

Arguments

[5] The plaintiff's argument to the plea of prescription is that the matter did not prescribe as the Prescription Act 68 of 1969 provides in Chapter 3 for the extensive extinction of debts by prescription. The general provisions of the Act refer to matters such as the delay of the completion or the interruption of prescription are of application to other statutes which contain prescriptive periods unless the words of that other statute indicate the contrary. According to the

defendant, the prescription period began to run from the date of the accident – and that is not and cannot be legally and factually correct.

[6] They further argue that as a general rule prescription commences to run as soon as the debt is due but Section 12 (3) of the Prescription Act clearly states that a debt that does not arise from a contract shall not be deemed to be due until the creditor knows the identity of the debtor and of the facts from which the debt arises. And as the plaintiff at the time of the accident did not know the full facts from which the debt arises, such as when her claim became perfected alternatively when the extent of the damages suffered was quantified by the expert report, prescription cannot run from the date of the accident.

[7] They further argued that the fact that the plaintiff claimed from the Motor Vehicle Accident Fund interrupted the prescription as Section 31 of the Motor Vehicle Accident Fund Act, effectively directs that prescription may only start running after a claim to the Motor Vehicle Accident Fund has been finalised. The claim was only finalised on 11 October 2017 when the Fund rejected the plaintiff's injury grant application.

[8] On behalf of the plaintiff, it was also argued that there was a delay in the completion of the prescription in respect of when the claim became perfected. This aspect of the plaintiff's claim is twofold, one being that although a medical affidavit dated 15 April 2015 confirms paralysis and the Medical Imaging report the plaintiff received indicates a suggestion of foraminal narrowing as opposed to a conclusion. The plaintiff acquired the knowledge of paralysis as conclusive, through the exercise of reasonable care when her physical conditions deteriorated over the recent years, and as such, she concluded that paralysis is her new life. The second fold is that the plaintiff's claim was delayed until such a time when the plaintiff's claim was quantified and only on or about 17 August 2020 the plaintiff receives an expert report concerning the extent of the damages suffered by the plaintiff.

[9] On behalf of the defendant, it was argued that the plaintiff relies on the accident of 28 February 2015 and/or the alleged failure of the Motor Vehicle Accident Fund in July 2017 in seeking to hold the defendant liable for damages. The claim, therefore, constituting a debt, which the plaintiff seeks to enforce, arises from the 2015 accident and/or the MVA's alleged 2017 failure in fully compensating the plaintiff. The question arising for determination in this interlocutory matter is this – Did the plaintiff have knowledge of the identity of the defendant and of the facts from which the debt arose before 22 September 2017 and therefore meet the

requirement as set out in Section 12(3) of the Prescription Act. If the answer to the question formulated aforesaid is answered in the affirmative, then on section 11(d) of the Prescription Act 86 of 1969 the plaintiff's claim has become prescribed, and the special plea stands to be upheld.

[10] It was further argued that the accident arose on 28 February 2015, and on 07 September 2016, the defendant admitted guilt in a criminal court in charges purportedly relating to the accident. Thus at least on 07 September 2016 the plaintiff knew the identity of the debtor for section 12(3) of the Prescription Act 68 of 1969. Similarly, the plaintiff was provided with medical certifications in respect of the paralysis and impact of the accident in reports dated 19 March 2015 and 19 May 2015, and thus, at least on these respective dates, the plaintiff knew of the facts from which the debt arose for section 12(3) of the Prescription Act 68 of 1969.

[11] In July 2017 the MVA allegedly failed to fully compensate the plaintiff, as per the Particulars of Claim, and on those facts to the claim would have prescribed for the reason of section 11(d) of the Prescription Act 68 of 1969. The plaintiff pleads that damages were computed and quantified by actuaries as contained in a report dated 17 August 2020, which report was not attached to the Particulars of Claim but this date is, in any event, irrelevant for section 11(d) of the Prescription Act 68 of 1969. The claim for "loss of enjoyment of amenities of life" for N\$ 3,000,000 is not a benefit for the purposes of section 25 of the Motor Vehicle Accident Fund Act, 10 of 2007. This applies to the "pain and suffering" claim of N\$ 500,000.00 also.

Did prescription only start to run after the actuary report was obtained?

[12] Section 12 (3) of the Prescription Act states that:

'A debt which does not arise from the 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.'

[13] *Mahomed CJ in Uitenhage Municipality v Molloy*¹, which suggest 'that a debt becomes "due" when the creditor acquires the right to institute action or when the creditor has "a complete cause of action" in respect of such debt'

¹ *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 741A.

[14] In *Truter and Another v Deyssel*², Van Heerden JA interprets Section 12(3) of the Prescription Act as follows:

'For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim'

[15] Van Heerden JA in *Truter and another* then continues and describes what is understood under 'complete cause of action'. He quotes from *M M Loubser's Extinctive Prescription*³:

'In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

' A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.'

[16] And further, he continued, quoting Maasdorp JA in *McKenzie v Farmers' Co-operative Meat Industries Ltd*⁴ 1922 AD 16 at 23.

'Cause of action' for the purposes of prescription thus means '. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[17] It can therefore never be said that the cause of action was only complete after the plaintiff obtained an actuary report. That was merely the quantification of the claim, everything that is needed to prove the claim was already known when the plaintiff was furnished with the second medical report (regarding the extent of her injuries) and at least when the defendant was criminally charged.

² *Truter and Another v Deyssel* - 2006 (4) SA 168 (SCA).

³ M M Loubser *Extinctive Prescription* (1996) para 4.6.2 at pp 80 – 1 with specific reference to *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814.

⁴ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

Was the running of prescription interrupted by the operation of the Motor Vehicle Accident Fund Act.?

[18] In general, Section 31 of the Motor Vehicle Accident Fund Act has as a result that prescription only starts to run after a claim against the Motor Vehicle Accident Fund has been finalized. The Section reads as follows:

'(1) An award of a benefit in terms of this Act is without prejudice to a claim that may lie against any other party, provided that a claim must first be made against the Fund and a court adjudicating a claim against another party in a cause of action arising out of the same facts must take into account the award or offer made by the Fund in terms hereof.

(2) If because of any limitation imposed under this Act on the liability of the Fund, the value of benefits awarded under this Act for the damage or loss sustained is less than the actual amount due for the loss or damage sustained, the claimant may claim for the difference from the owner of the motor vehicle or from the person whose negligence or other unlawful act caused the loss or damage.

(3) The value of an injury grant awarded under this Act is deducted from an award of general damages in any action arising out of the same accident as that giving rise to the grant and brought by the person to whom such injury grant was made.

[19] Section 25 of the Motor Vehicle Accident Fund Act sets out the benefits payable under the scheme as follows:

'25. (1) The benefits to be provided by the Fund are confined to the following categories -

(a) reimbursement of income lost as a result of being unable to secure employment or generate income on account of injuries sustained in a motor vehicle accident which benefit is the aggregate of a capital sum, together with interest accruing on any unpaid portion and where the benefit is to reimburse future income loss it is payable by installments -

(i)

(ii)

(iii)

(b) reimbursement of financial support lost by a dependent as a result of the death of a person caused by a motor vehicle accident which benefit is an aggregate of a capital sum, together with interest accruing on any unpaid portion, and if -

(i)

(ii)

(iii)

(c) a cash grant as compensation for injury, including loss of earning capacity, as a result of physical injury suffered in a motor vehicle accident, which is determined in accordance with the prescribed

procedure;

- (d) reimbursement of the costs of medical treatment for physical injury suffered in a motor vehicle accident, calculated in accordance with the prescribed tariff;
- (e) an undertaking to pay for medical treatment or injury management in accordance with a treatment plan as prescribed subject to periodic assessment in terms of subsection (6);
- (f) an undertaking to pay for rehabilitation of a person injured in a motor vehicle accident in accordance with a rehabilitation plan as prescribed subject to periodic assessment in terms of subsection (6);
- (g) an undertaking to pay for life enhancement assistance in accordance with a life enhancement plan as prescribed where the injured person has suffered permanent physical or mental incapacity subject to periodic assessment in terms of subsection (6);
- (h) a cash grant for funeral benefit in respect of the burial of a person killed in a motor vehicle accident as specified by section 24(4)(e);
- (i) reimbursement of any costs reasonably incurred in the provision of a service to a person entitled to an award of a benefit other than costs that may be reimbursed in terms of the other subsections hereof; and
- (j) such other benefits as the Minister, on the recommendation of the Board, may prescribe.'

[20] The amount claimed by the plaintiff from the defendant is made up as follows:

'-Past medical expenses in the amount of N\$125 554.00

- Future medical expenses in the amount of N\$1 233 464
- Loss of past income in the amount of N\$526 036
- Loss of future income in the amount of N\$1 571 260
- Pain and suffering in the amount of N\$500 000
- Loss of the enjoyment of amenities of life in the amount of N\$3 000 000'

[21] It is therefore clear that prescription of not all the amounts were stopped by the operation of the Motor Vehicle Accident Fund Act as not all the claims fall within the description of benefits in the said act for example the claim for the loss of the enjoyment of amenities.

[22] This is however not the end of the matter. The Particulars of Claim refers to July 2017 as the date on which the payment was received from the MVA, and as a consequence when the monies claimed by the plaintiff but not paid by the MVA becomes due and payable, provided that these claims fall within the description of benefits that can be claimed. In its arguments, the plaintiff indicated that she was informed of the outcome of her claims in October 2017. There is however no support for this specific date in the pleadings and for that reason, the court must hold that the date she became aware that her claims were paid only in part or not at all, was July 2017.

[23] Prescription, therefore, started to run, regarding these claims, in July 2017. The summons was issued on 20 August 2020 and served on the defendant on 22 September 2020. The prescription period ran out already in July 2020, at least for the claims which are claimable under the Motor Vehicle Accident Fund Act, and have therefore prescribed. The claims which were not stayed by the Motor Vehicle Accident Fund Act became prescribed even before July 2020.

[24] In the result, I make the following order:

1. The special plea is upheld and the claim is dismissed with cost.
2. The matter is finalized and removed from the roll.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Ms. J. Janke of Sisa Namandje & Co. Inc. Windhoek	Adv. J. Diedericks Instructed by Kloppers Legal Practitioners) Windhoek