

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b>	<b>Case No:</b>
Amalia Festus	HC-MD-CIV-ACT-DEL-2021/00077
Plaintiff	<b>Division of Court:</b>
and	Main Division
Minister of Health and Social Services	<b>Heard on:</b>
Defendant	22 July 2022
<b>Heard before:</b>	<b>Delivered on:</b>
Honourable Lady Justice Rakow	12 August 2022

**Neutral citation:** *Festus v Minister of Health and Social Services* (HC-MD-CIV-ACT-DEL-2021/00077) [2022] NAHCMD 406 (12 August 2022)

**Order:**

1. The special plea is dismissed. The defendant is entitled to the costs of disbursements.
2. The matter is postponed to 30 August 2022 at 15: 30 for a Case Management hearing.
3. The parties to file a joint case management report on or before 25 August 2022.

**Reasons for order:**

RAKOW, J:

Introduction

[1] The plaintiff in this matter, Ms Festus, who was about 7 months pregnant at that time, was admitted in the Katatura State Hospital on 12 December 2017 after complaining about back and lower abdominal pains. During a vaginal examination it was discovered that the plaintiff was in

labour and had to deliver her baby by way of an emergency caesarean section. After the emergency delivery, she remained in the hospital for about four days and was then discharged.

[2] She returned to the Windhoek Central Hospital on 17 December 2017, a day after her discharge and complained about excruciating abdominal pain, neck pain and vomiting. She was examined by a doctor and received treatment for an infection for about five days. She was then informed that her body is not responding to the antibiotics and that an operation should be done to diagnose her condition. After the operation when she came to, she was informed that her womb had rotten and had to be removed. This was done without informing the Plaintiff of the said procedure and without obtaining her consent. She is therefore alleging that she suffered unbearable pain and discomfort and will not have any further children. She alleges that the Defendant and/or his medical staff failed to execute their duties professionally and reasonably as can be expected from trained and qualified medical professionals. She is claiming N\$3 850 000 in total for the injuries she suffered due to an infringement of her rights guaranteed under the Namibian Constitution.

#### The special plea

[3] In his plea, the Defendant raised a special plea of prescription. It was pleaded that the periods of prescription of debts shall be the following under s 11 of the Prescription Act, 68 of 1969. This section reads 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.

[4] It was further pleaded that the plaintiff alleges in her particulars of claim that the cause of action arose on or about December 2017, when the defendant intentionally or negligently caused permanent damage to the plaintiff's womb, by subjecting her to a sterilization procedure without her informed consent and leaving her sterilized. The Combined Summons that commenced this action was issued by the Registrar of the High Court on Ejustice on 15 January 2021 and served on the defendant on same day which is more than three (3) years after the date on which the claim arose.

[5] The defendant specifically referred to the COVID – 19 Regulation dealing with the ‘Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations’ under Proclamation 16 of 2020 and pleaded that only suspended the Prescription Act period as from 14:00 on 28 March 2020 and ending at 23:59 on 17 April 2020 which calculates the suspension to be for only twenty-one (21) days which than dictates that the plaintiff’s cause of action should than have prescribe on or before 11<sup>th</sup> of January 2021.

#### The arguments by the parties

[6] On behalf of the defendant it was argued that the Proclamations issued by the President relating to the period of lock-down under the Covid-19 regulations, interrupts the running of prescription as set out in the Prescription Act. It is, however, argued that an interpretation of these regulations will result in finding that the running of the prescription period was interrupted only with 21 days, and if so calculated, the cause of action had already prescribed when the summons was issued and served.

[7] On behalf of the plaintiff, it was argued that these proclamations in actual fact provided for an interruption of prescription of 37 days, in which case the cause of action had not yet prescribed when the summons was issued and served on 15 January 2021. If this calculation is used, the cause of action would only have prescribed on 27 January 2021.

#### The applicable law and proclamations.

[8] The crux of this matter is therefore whether or not the period of suspension of prescription was only from 28 March 2020 to 17 April 2020 as per the defendant’s contention or whether it was from 28 March 2020 to 4 May 2020 as per the plaintiff’s assortment.

[9] Initially, the President declared a State of Emergency to run as from 17 March 2020.<sup>1</sup> He then proceeded and made regulations after declaring the State of Emergency. This proclamation is proclamation 9 of 2020, State of Emergency – COVID -19 Regulations, and was published in Government Gazette 7159 of 28 March 2020. Under regulation 3(3) of these regulations the period of lockdown is said to start at 14:00 on Saturday 28 March 2020 and ends at 23:59 on 17 April 2020, inclusive of the first and the last day. This regulation further under regulation 13(1)(b) gave the Chief Justice power to issue directions to stay prescription in terms of the Prescription Act, 1969 (Act no 68 of 1969).

---

<sup>1</sup> Declaration of State of Emergency: National Disaster (COVID-19) (Proclamation No. 7 of 18 March 2020 published in Government Gazette No. 7148 of 18 March 2020).

[10] On 17 April 2020 in Government Gazette no 7180, Proclamation no 13 of 2020: Amendment of State of Emergency Covid -19 Regulations, was published. These regulations substituted some of the regulations published in Proclamation 9 of 17 March 2020. One of these, regulation 4 substituted regulation 3 in the original regulations under the heading 'Period of lockdown' and it read:

'The country wide lockdown starts from 23:59 on 17 April 2020 and ends at 23:59 on 4 May 2020.' It also substituted the previous regulation 13 in Proclamation 9 and gave him powers to give directions to all courts in Namibia but no longer the power to stay prescription that was present in Proclamation 9. This is mentioned but not much turns on it.

[11] In Proclamation no 16 of 2020 – State of Emergency – Covid 19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations, which was published in Government Gazette 7194 on 28 April 2020, under the definitions in regulation 1, a definition for the period of lockdown is found. It reads:

'period of lockdown" means the period of lockdown referred to in Regulation 3 of the Regulation and includes the period of lockdown, commencing at 14:00 on 28 March and ending at 23:59 on 17 April 2020, that was imposed prior to the amendments to the Regulations;'

[12] These regulations continues and under regulation 7 it deals with the suspension of operation of certain provisions of the Prescription Act, 1969. It reads as follows:

' (1) Despite anything to the contrary in the Prescription Act, 1969 (Act No. 68 of 1969), the running of prescription under any provision of that Act is deemed to be interrupted during the duration of the period of lockdown.

(2) The computation of any time period or time limit or days required for the completion of any process or the doing of anything as contemplated in sub regulation (1), where interrupted by the period of lockdown, resumes after the expiry of the period of lockdown, and commences after the expiry of that period.'

[13] In the matter of *Torbitt and Others v International University of Management*,<sup>2</sup> the Supreme Court referred to the golden rule of interpretation and said the following regarding interpretation:

'The approach by the Labour Court in the interpretation of s 86(18) was to have recourse to the golden rule of construction, namely, that words of a statute must be given their ordinary, literal or

<sup>2</sup> *Torbitt v Tie Internatianal University of Management* (SA 16-2014) [2017] NASC (28 March 2017).

grammatical meaning if the words are clear and unambiguous. This may be departed from if it is apparent that such literal construction falls within one of the exceptional cases in which it will be permissible for a court of law to depart from such literal construction, for example, where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to legislative intent.’

[14] Small AJ in *S v Mateus*<sup>3</sup> interpreted the lockdown period as follows:

‘The first Stage 1 State of Emergency – Covid-19 Regulations were issued on 23 March 2020 in Proclamation 9 of 2020 and amended on 18 April 2020 by Proclamation 13 of 2020. The lockdown period covered by these regulations was initially stated in Proclamation 9 of 2020 to be from 14:00 on 28 March 2020 until 23:59 on 17 April 2020, then amended by Proclamation 13 of 2020 to continue from 23:59 on 17 April 2020 to 23:59 on 4 May 2020.’

### Conclusion

[15] In order to determine the period of days in which prescription was stayed under the Covid-19 regulations, as set out above, the court needs to interpret specifically the intention of the legislature with regard to the lockdown period. If one uses the definition in Proclamation 16 of 2020 for “period of lockdown” and impose that definition into the reading of regulation 7(1) and 7(2) it will read something like the following:

(1) Despite anything to the contrary in the Prescription Act, 1969 (Act No. 68 of 1969), the running of prescription under any provision of that Act is deemed to be interrupted during the duration of the period of lockdown referred to in Regulation 3 of the Regulation and includes the period of lockdown, commencing at 14:00 on 28 March and ending at 23:59 on 17 April 2020, that was imposed prior to the amendments to the Regulations.

[16] From reading the above, it is clear that the legislature intended whichever period of lockdown, to also include the period of lockdown commencing at 14:00 on 28 March 2020 and ending at 23:59 on 17 April 2020, which was the position prior to the amendments to the regulations. The amendment to the regulations therefor refers to the amendment in Proclamation 13 of 2020 where the “period of lockdown” which was announced in the initial regulations under Proclamation 9 of 2020 was replaced with the words lockdown starts from 23:59 on 17 April 2020 and ends at 23:59 on 4 May 2020. The period of lockdown therefore is the period from 14:00 on 28 March 2020 until 23:59 on 4 May 2020.

<sup>3</sup> *S v Mateus* (CR 16/2022) [2022] NAHCNLD 39 (19 April 2022).

[17] It is then also for this period that the operation of the Prescription Act, 1969 was suspended and as such totals to 38 days, if both the starting and ending days are included. The prescription period in respect of the current matter was therefore after the expiry of 3 years and 38 days from 12 December 2017, being the date that the Plaintiff was first treated by the staff members in the employ of the Defendant. This in essence will take the date of prescription of the claim to a few days after the claim was filed.

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

1. The special plea is dismissed. The defendant is entitled to the costs of disbursements.
2. The matter is postponed to 30 August 2022 at 15:30 for a Case Management hearing.
3. The parties to file a joint case management report on or before 25 August 2022.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
N TJOMBE Instructed by Legal Assistance Centre, Windhoek	L Tibinyane Of Government - Office of the Government Attorney, Windhoek