

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directions 61

<b>Case Title:</b> APB PROPERTY SERVICES v MUNICIPAL COUNCIL OF WINDHOEK	<b>Case No:</b> HC-MD-CIV-DEL-2017/01335
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 5 August 2022
	<b>Date of order:</b> 22 August 2022
<b>Neutral citation:</b> <i>APB Property Services v Municipal Council of Windhoek</i> (HC-MD-CIV-DEL-2017/01335) [2022] NAHCMD 426 (22 August 2022)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b>  Having heard <b>DIRK CONRADIE</b> , on behalf of the Plaintiff(s) and <b>MEKUMBU TJITEERE</b> , on behalf of the Defendant(s) and having read the pleadings for <b>HC-MD-CIV-ACT-DEL-2017/01335</b> and other documents filed of record:	

1. The special plea raised by the defendants is dismissed. The defendants are ordered to pay the costs of the application.
  
2. The matter is postponed to 8 September 2022 at 15h00 for further Pre-trial Conference.

**Reasons for orders:**

Prinsloo J

Introduction

[1] The matter before me has a long and troubled history. The action was instituted during the early part of 2017 and served on the defendants on 24 April 2017. The action was withdrawn in September 2018 but reinstated in 2020.

[2] The matter before this court is to determine the special plea of prescription raised by the defendants against the claim of the plaintiffs.

The parties

[3] I will refer to the parties as they are in the main action.

[4] The first defendant is APB Property Services, a close corporation registered in terms of close corporation law of Namibia.

[5] The second plaintiff is Albert Brockerhoff, an adult male and the only member of the first plaintiff close corporation.

[6] The first defendant is the Municipal Council of Windhoek, a juristic person established and declared as such in terms of s 3 of the Local Authorities Act 23 of 1992 (the Local Authorities Act).

[7] The second defendant is the Management Committee of the first defendant, as established in terms of s 21 of the Local Authorities Act.

[8] The third defendant is the Chairperson of the Management Committee of the first defendant as established in terms of s 25 of the Local Authorities Act.

[9] The fourth defendant is the Tender Board of the first defendant as established in terms of s 94A of the Local Authorities Act.

### Background

[10] The plaintiffs were awarded a tender by the first and fourth defendants in terms of which the plaintiffs were tasked to carry out an interim valuation of rateable properties within the newly extended boundaries at a contract price of N\$848 700.

[11] The conditions of the tender awarded to the plaintiff was as follows<sup>1</sup>:

- a) That the tender be paid according to the number of properties valued.
- b) That 25% of the tender amount be paid only after the valuation court is finalized.
- c) That the tenderer complete the provisional valuation roll before the end of August 2012.

[12] The plaintiffs plead that they complied with their obligations in terms of the tender agreement, however, during the execution of the tender agreement it became clear that some of the properties to be valued were subdivided into new and smaller properties which resulted in the increase of the properties to be valued by 305 properties. The plaintiffs pleads that the valuation of the additional properties resulting in an increase of costs, with an additional N\$1 830 000, which the defendants, despite demand, refuses to pay.

[13] As a result. the plaintiffs are claiming from the defendants, jointly and severally, the following relief:

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<sup>1</sup> Annexure 1 to the plaintiffs' particulars of claim.

- a) Payment in the amount of N\$1 830 000.
- b) Interest at a rate of 20% a tempore morae from date of judgment to date of payment.
- c) Cost of suit.
- d) Further and/or alternative relief.

[14] The defendants raised a special plea of prescription against the claim of the plaintiffs wherein the defendant pleaded that the plaintiffs' claim is based on a contract concluded on 1 June 2012 alternatively 10 September 2013, when the plaintiffs demanded payment from the defendants. The defendants further plead that summons was served on them on 24 April 2017, which is three years after the claim arose and therefore the plaintiffs' claim has prescribed.

[15] In pleading over the merits, the defendants admitted that the plaintiff demanded on 10 September 2013 payment for the fees due for valuation done by the plaintiffs.

[16] In replication filed on 29 August 2017 to the defendants' special plea, the plaintiffs deny that the claim prescribed as the parties were engaged in amicable settlement negotiations in respect of the dispute up until April 2017 when the summons was issued. The plaintiffs plead that they were obligated to exhaust the internal mechanisms before issuing summons. In the alternative the plaintiffs plead that the special plea of prescription cannot be invoked because as soon as the plaintiffs became aware of the complete cause of action for the recovery of their debt, they instituted the current legal proceedings.

[17] In their rejoinder the defendants pleaded that engaging in settlement negotiations or exhausting internal remedies is not a defence to prescription.

[18] At this point it is necessary to point out that the plaintiffs on 17 May 2018, filed a further replication to the defendants' special plea of prescription. It is not clear from the e-file what prompted the filing of a further replication, as it was without leave by court and there was no application to amend the replication dated 29 August 2017. To exacerbate the situation the plaintiffs also filed a ten page 'supplementary affidavit' in answer to the plaintiffs' special plea, wherein the plaintiffs attempted to explain why prescription could not be invoked from 10 September 2013 as pleaded by the defendants.

Arguments advanced on behalf of the parties

[19] In summarizing the arguments of the respective parties and where I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

*On behalf of the defendants*

[20] Mr Tjiteere argued that the plaintiffs did not deny that the payment was demanded from the defendants on 10 September 2013 and that the summons was subsequently issued on 24 April 2017.

[21] Mr Tjiteere submitted that in order to effectively determine whether or not the debt has prescribed, the court should consider when the plaintiffs became fully aware of the cause of action and when the alleged debt became due.

[22] Mr Tjiteere further submitted that, should the court have regard to the affidavit filed by the second plaintiff wherein he attempted to explain why prescription did not commence on 10 September 2013, as pleaded by the defendants, the second plaintiff alleges that on 23 January 2014 he received a letter wherein his invoice was rejected. Mr Tjiteere contended that the date of 23 January 2014 is critical because even if the court calculates from that date it is clear that the claim prescribed in January 2017 already.

[23] In conclusion, Mr Tjiteere addressed the averments made in replication wherein the plaintiffs attempt to convince the court that prescription did not commence yet as there was ongoing discussions between the parties. Mr Tjiteere reiterated what the defendants pleaded in rejoinder in submitting that prescription can only be interrupted by payment, issuing of summons or acknowledgment of debt.

[24] Mr Tjiteere submitted that even on the plaintiffs' own version, it is clear from the pleadings that the plaintiffs were aware by 10 September 2013 of the facts underpinning their claim and

neglected to institute their claim against the defendants as required by law and therefore the special plea of prescription must succeed.

*On behalf of the plaintiffs*

[25] Mr Conradie argued that the defendants bear the onus to prove that plaintiffs made demand for payment on 10 September 2013, and that the claim fell due for payment on that date.

[26] The plaintiffs plead a written agreement with reference to Annexes "1", "2" and "3", concluded on or about 1 and 12 June 2012. They aver that by reason of conducting valuation services in respect of additional properties, they are entitled to payment on the original contract price per property. No date for payment is averred. Plaintiffs make the averment that despite numerous demands, the defendants refuse and/or fail to pay.

[27] Mr Conradie submitted that there is a fundamental difference between the "coming into existence" of a debt on the one hand and the "recoverability thereof" on the other. Prescription commences to run upon the debt becoming recoverable, and not when it comes into existence. It was submitted that the defendants conflate the two concepts in their special plea.

[28] It is submitted on behalf of the plaintiffs the common cause facts as they appear from the pleadings do not assist the defendants in discharging their onus in respect of when prescription started to run or to assist in a determination of the special plea of prescription.

[29] It is further submitted that the plaintiffs allege no date as to when payment for the additionally valued properties became due. The defendants construe the due date as, principally, date of contract (1 June 2012), and in the alternative, when demand was allegedly made (10 September 2013). The date of contract cannot be regarded as the date contemplated in s 12(1) of the Prescription Act 68 of 1969.

[30] Mr Conradie contended that the defendants must prove that the debt for valuation of additional properties fell due on 1 June 2012, i.e. on date of contract. In addition thereto clause 2

of Annexure '2" to the Amended Particulars of Claim itself provides that 25% of the total tender amount shall only be paid after Valuation Court is finalized.

[31] Mr Conradie submitted that there is no evidence before court that demand was made on 10 September 2013. There is also no evidence that the parties intended demand to constitute a condition precedent for payment of additional valuation services to be due. The defendants prosecute the special plea at their peril, and on absent requisite evidence and as a result Mr Conradie prayed that the special plea be dismissed with costs.

#### The legal principles applicable

[32] The Prescription Act 68 of 1969 (the Act), does not define the term 'debt' however in *Council of Itireleng Village and Another v Madi and Others*<sup>2</sup> our Apex Court accepted the meaning of 'debt' as defined by Wallis AJ in the South African Constitutional Court in *Makate v Vodacom Ltd*<sup>3</sup> in the following way:

[187] Section 10 of the Prescription Act provides for a "debt" to be extinguished by prescription. In terms of section 12(1) prescription begins to run when the debt is due. The meaning that has been given to the word "debt" since the Prescription Act came into force has been in accordance with the definition in the New Shorter Oxford Dictionary, namely:

1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
2. A liability or obligation to pay or render something; the condition of being so obligated.'

[33] It is common cause between the parties that the monetary claim of the plaintiffs constitute a debt for purposes of s 11(d) of the Act.

[34] Therefore, under s 12 of the Act prescription of a debt (which includes a delictual debt) begins running when the debt becomes due and a debt becomes due when the creditor acquires knowledge of the facts from which the debt arises, in other words, the debt becomes due when the creditor acquires a complete cause of action for the recovery of the debt or when the entire

<sup>2</sup> *Council of Itireleng Village and Another v Madi and Others* (SA 21 of 2016) [2017] NASC 39 (25 October 2017) at para 65.

<sup>3</sup> *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

set of facts upon which he relies to prove his claim is in place<sup>4</sup>.

[35] On behalf of the plaintiffs it was argued that there is a distinction between 'coming into existence of a debt and the recoverability thereof'. This distinction was raised because in their special plea the defendants pleaded:

'1.1 The Plaintiffs' claim is based on contract concluded on 01 June 2012, alternatively 10 September 2013. On either of those dates, Plaintiff's claim fell due.

1.2 Plaintiffs' claim, alternatively, fell due on 10 September 2013 when they demanded payment from Defendants.'

[36] The distinction is important as prescription in terms of the Act begins to run not necessarily when the debt arises, but only when it becomes due. In other words, a debt must be immediately enforceable before it can be claimed<sup>5</sup>. I agree that the date that the agreement was entered into cannot be the date as contemplated in s 12(1)<sup>6</sup> of the Act.

[37] In the current matter the material question is, as in all other prescription cases, when did the debt become due? It is important to remember that the amount claimed by the plaintiffs relates to the additional properties valued that did not fall within the strict terms of the tender awarded to the plaintiffs. It is, however, the case of the plaintiffs that during the execution of their duties in terms of the tender agreement, it became clear that many of the properties set out in the tender agreement was subdivided and as a result these properties had to be valued as well. The plaintiffs plead the defendants were aware, alternatively had to be aware of the valuation of the additional properties and have in fact agreed to such a valuation, either expressly or tacitly<sup>7</sup>.

[38] The due date for the completion of the valuation of the properties was end of August 2013. The defendants pleaded that the demand for payment was made on 10 September 2013. I find this to be common cause as the plaintiffs did not deny this in replication and in the affidavit filed by the second plaintiff, he in as many words admitted that he submitted the invoice to the

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<sup>4</sup> *Lisse v The Minister of Health and Social Services* I 3891/2008 delivered on 23 August 2011.

<sup>5</sup> Prescription in South African Law Lexis Nexis Service issue 18 at 3-44

<sup>6</sup> Section 12. (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

<sup>7</sup> Plaintiffs' amended particulars of claim para 11.



Manager of Valuations of the City of Windhoek on the said date.

[39] In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*<sup>8</sup> H Van Heerden JA stated the following in respect of the Prescription Act:

'Section 12(1) of the Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due'. This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See *The Master v I L Back & Co Ltd and Others* 1983 (1) SA 986 (A) at 1004, read with *Benson and Others v Walters and Others* 1984 (1) SA 73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim (cf *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) at 401).'

[40] In *Truter & another v Deysel*<sup>9</sup> Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. 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.

[41] In the present context it appears to be after the Valuation Court is finalised. Assumingly this means that the valuation roll must be approved by the Valuation Court before the remaining 25% of the debt can be payable.

[42] It is only after the debt becomes due, that the debtor has an obligation to make payment or perform, and the creditor acquires the right to demand performance or payment at any time<sup>10</sup>. In my view, given the circumstance of this matter the plaintiffs' cause of action did not fully accrue on 10 September 2013, when payment was demanded by the plaintiffs. This date often coincides with the date on which the debt arose, but this is not necessarily always so. Where there is no additional requirement, the debt becomes due and payable automatically on

<sup>8</sup> *Deloitte Haskins & Sells Consultants (Pty) Ltd V Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532 H-I.

<sup>9</sup> *Truter & another v Deysel* 2006(4) SA 168 (SCA) para 16.

<sup>10</sup> *Amardien and Others v Registrar of Deeds and others* 2019 (3) SA 341 (CC) para 35.

conclusion of an agreement subject to the terms of that agreement or the possible need for the debt to be demanded in order to become due.

[43] The valuation of the additional properties arises as a consequence of the agreement dated 1 June 2012. There is no date pleaded for the payment of the additionally valued properties but one must assume if payment is due it would be on the same basis as set out in the tender agreement. In this regard it is not clear when the Valuation Court sat and when the valuation roll was approved, if at all. On the papers the date when the creditor acquired a complete cause of action for the recovery of the debt is not clear. I am thus of the view that the defendants did not discharge the onus resting on it as the parties invoking prescription.

#### Costs

[44] The costs should follow the result and whereas the current matter is a special plea, rule 32(11) does not apply.

[45] My order is as set out above.

<b>Judge's signature</b>	<b>Note to the parties:</b>
Prinsloo Judge	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
MR TJITEERE DR WEDER, KAUTA HOVEKA inc WINDHOEK	MR CONRADIE CONRADIE & DAMASEB LEGAL PRACTITIONERS WINDHOEK