

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/01509

In the matter between:

SHOOYA SHOOYA

PLAINTIFF

and

PETRUS SHAMBO

DEFENDANT

Neutral citation: *Shooya v Shambo* (HC-MD-CIV-ACT-CON-2022/01509) [2023]
NAHCMD 38 (8 February 2023)

Coram: PARKER AJ

Heard: 25 January 2023

Delivered: 8 February 2023

Flynote: Extinctive prescription – Running of prescription interrupted by the period of lockdown in terms of Proclamation 16 of 2020 of 28 April 2020 – After the interruption, the computation of time for the running of prescription resumes and commences after the expiry of the period of lockdown.

Summary: The plaintiff sued on a breach of contract whereby plaintiff alleged that the defendant failed to deliver the merx, a motor vehicle, on 22 May 2019 in terms of the parties' agreement. The defendant raised a special plea of prescription that the plaintiff's claim had prescribed in terms of the Prescription Act 68 of 1969, as

summons was delivered to the defendant on 19 June 2022. This is more than three years after the claim arose on 24 May 2019 when the plaintiff orally cancelled the agreement upon the defendant's repudiation of the agreement. The plaintiff elected to accept the repudiation and communicated his acceptance of the repudiation to the defendant on that date. The court found that prescription commenced to run on 24 May 2019. But for the Regulations made under Proclamation 16 of 2020, suspending the running of prescription under any provision of Act 68 of 1969, the plaintiff's claim would have expired on 23 May 2022. The court found that in terms of regulation 7(2) of the Regulations, the computation of the three-year period required to claim damages for debt in terms of Act 68 of 1969, s 11(d), resumed and commenced on 5 May 2020, after the expiry of the lockdown period on 4 May 2020. Having undertaken the computation of time in terms of regulation 7(2) of the Regulations, the court determined that the plaintiff's claim prescribed on 30 June 2022. Since the defendant received the originating process on 19 June 2022, the plaintiff's claim has not prescribed. Consequently, the special plea of prescription was dismissed with costs.

Held, during the implementation of the Emergency Regulations, certain provisions of Act 68 of 1969 ceased to have legal force, including the provisions on the running of prescription in terms of that Act.

ORDER

1. The defendant's special plea of prescription is dismissed with costs as prescribed by rule 32(11) of the rules of court.
2. Counsel are to attend a status hearing at 08h30 on 15 February 2023 for the court to determine the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] The plaintiff sues on a breach of contract involving the sale of a motor vehicle. The plaintiff alleges the defendant's failure to deliver the motor vehicle on 22 May 2019 in terms of the agreement. On his own version, in his pleading in the particulars of claim, the plaintiff says that because of the defendant's failure to deliver the motor vehicle, the 'plaintiff verbally cancelled the agreement on or about 24 May 2019 and demanded a refund from (the) defendant'. The plaintiff's version is reiterated in a letter, dated 12 July 2021, and written upon instructions by the plaintiff's legal representatives, to the defendant. I shall return to these crucial facts in due course.

[2] The defendant, represented by Mr Silungwe, raised a special plea of prescription that the plaintiff's claim has prescribed in terms of the Prescription Act 68 of 1969 ('the Act') as 'summons in this action was delivered on the defendant on 19 June 2022, that is, more than 3 (three) years after the claim arose'. The crisp response of the plaintiff to the special plea of prescription is couched in these terms: The 'plaintiff's cause of action arose at the time when he communicated his intention to cancel the agreement to the defendant on the 12th of July 2021 and not on the 22nd of May 2019, when defendant breached the agreement'. Alternatively, the debt only became due on 12 July 2021. Consequently, the 'plaintiff's claim will only become prescribed on 11 July 2024', as Mr Kasita, the plaintiff's counsel, argued.

[3] The burden of the court is to determine the special plea of prescription. The first aspect to consider is naturally to determine when the debt became due, within the meaning of s 12 of the Act. One important requirement has been settled in this passage; and the parties do not dispute it:

'It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract. Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract, and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication

of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise. Accordingly, prescription commences to run from that date.¹

[4] Upon the authority of *Dave Pretorius v Kenneth Bedwell*,² I find on the pleadings that the agreement came to an end on 24 May 2019 upon the plaintiff's communication to the defendant of the plaintiff's acceptance of the defendant's repudiation of the agreement. The plaintiff's legal practitioners' letter (dated 12 July 2021) was a reiteration of the plaintiff's settled and categorical acceptance of the repudiation and cancellation of the agreement and communication of same to the defendant. Thus, the plaintiff crossed the Rubicon on 24 May 2019. It follows, as a matter of law that the contract came to an end on 24 May 2019; and so, it was on that date that the plaintiff's claim arose. And therefore, prescription commenced to run on 24 May 2019.³

[5] The Suspension of Operation of Certain Laws and Ancillary Matters Regulations (Proclamation 16 of 2020) ('the Regulations')⁴ suspended certain provisions of Act 68 of 1969. The effect was that the suspension interrupted the running of prescription during the period of lockdown which was 14h00 on 28 March 2020 to 23h59 on 4 May 2020.⁵ Thus, but for the Regulations, the plaintiff's claim would plainly have prescribed on 23 May 2022.

[6] Without beating about the bush, I should stress that the Regulations must be enforced by the court and applied in the instant proceedings in line with the rule of law. Regulation 7 of the Regulations provides:

'7. Suspension of operation of certain provisions of Prescription Act, 1969

(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.

¹ *Dave Pretorius v Kenneth Bedwell* [2022] ZASCA 4 (11 January 2022); applied by the court in *Kaxuxuena v Hot Shoot Trading CC* NAHCNLD 29 (28 March 2022).

² *Dave Pretorius v Kenneth Bedwell*, footnote 1.

³ *Ibid.*

⁴ Government Gazette No. 7194 of 28 April 2020.

⁵ *Festus v Minister of Health and Social Services* [2022] NAHCMD 406 (12 August 2020).

(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 subregulation (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.'

[Underlining in original instrument]

[7] I now proceed to interpret regulation 7 of the Regulations and apply the interpretation to the facts of the case. The running of prescription from 24 May 2019 was interrupted by the said regulation 7, as I have held. Thus, from 24 May 2019 (when the plaintiff's claim arose, as aforesaid) to 28 March 2020 (when regulation 7 started to operate), prescription had run for 308 days out of 3 years (ie 1095 days) being the time limit in terms of s 11(d) of the Act.

[8] The running of prescription resumed and commenced on 5 May 2020 after the expiry of the lockdown period on 4 May 2020, within the meaning of regulation 7 to complete its three years' running period in terms of s 11(d) of the Act. Thus, as on 4 May 2020, the running of prescription had 778 days to complete its run of three years. Thus, the computation of the three-year period resumed and commenced, within the meaning of regulation 7(2) of the Regulations, on 5 May 2020 and came to an end after 778 days. That takes us to 30 June 2022.

[9] Mr Kasita argued that because the period of lockdown was 38 days, the plaintiff's claim prescribed on 28 June 2022, that is, after a period of three years and 38 days from 24 May 2019. As I have demonstrated previously, the product of Mr Kasita's calculations is two days shorter than the product of my computation undertaken in terms of reg 7(2) of the Regulations. It would seem counsel overlooked the conjunctive clauses 'resumes after the expiry of the period of lockdown and commences after the expiry of that period' in regulation 7(2) of the Regulations.

[10] From what I have said previously, it follows notably that the plaintiff's claim prescribed on 30 June 2022. In the defendant's pleading, it is acknowledged that the originating process was delivered to the defendant on 19 June 2022. The conclusion is, therefore, inescapable that in the instant matter, the plaintiff's claim has not prescribed.

[11] But that is not the end of the matter. Mr Silungwe had another string to his bow, as it were. Mr Silungwe put forth an argument based on what he said was the difference between the repealed Prescription Act 18 of 1943 and the current Act 68 of 1969. Counsel talked about how 'delayed completion' and 'superior force' in the Act 68 of 1969 operated. And upon his understanding of these concepts, counsel argued that the defendant's special plea of prescription should be upheld.

[12] There are several important obstacles in counsel's way. Significantly, in a self-serving mode, Mr Silungwe made no discernible attempt to offer any interpretation of the aforementioned Regulations and their application to the facts of the instant case, as if the Regulations did not exist. But they existed; and the court has a bounden duty to enforce them, as I have done, in the interest of due administration of justice.

[13] During the implementation of the Regulations, certain provisions of the Act 68 of 1969 ceased to have legal force.⁶ And the provisions include those interpreted by Mr Silungwe in his argument on the concepts of 'delayed completion' and 'superior force' and the difference between Act 18 of 1943 and Act 68 of 1969.

[14] Regulation 7 is as precise as it is categorical in its formulation. The opening words of sub-regulation (1) of regulation 7 are thorough in their effect. They say clearly: 'Despite anything to the contrary in the Prescription Act, 1969 (Act No. 68 of 1969)'. Doubtless, the concepts put forth by Mr Silungwe in his interpretation of the relevant provisions of the Act have no force and are irrelevant in these proceedings in the face of regulation 7 of the Regulations inasmuch as they are put forth to interpret the provisions dealing with the running of prescription, because *'[D]espite 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 under lockdown'*. (Italicised for emphasis) What has force and relevance is, therefore, only this: '...the running of prescription under any provision of that Act (ie Act 68 of 1969) is deemed to be interrupted during the

⁶ See H M Seervai *Constitutional Law of India* 4ed Vol 2 (1999) at 2030 where the preeminent and world renowned Indian constitutional lawyer and distinguished author was interpreting the emergency provisions in article 123 of the Indian Constitution which are similar to the provisions in article 26(5) of the Namibian Constitution.

duration of the period of lockdown'. It follows that the textual authority and case law from South Africa referred to the court by Mr Silungwe⁷ are of no assistance on the point under consideration. I hold firmly that the preponderance of my determination that the plaintiff's claim has not prescribed is unaffected by Mr Silungwe's submission on 'delayed completion' and 'superior force'. The maxim *ex nihilo nihil fit* applies.

[15] What remains is the matter of costs. I do not see any good reason why the capped costs prescribed by the rules of court in rule 32(11) should not be followed.

[16] Based on these reasons, I conclude that the special plea of prescription is rejected. In the result, I order as follows:

1. The defendant's special plea of prescription is dismissed with costs as prescribed by rule 32(11) of the rules of court.
2. Counsel are to attend a status hearing at 08h30 on 15 February 2023 for the court to determine the further conduct of the matter.

C PARKER
Acting Judge

⁷ Saner J Prescription in South African Law – Service Issue 31 (2021) at 198-3-200; *ABP 4X4 Motor Dealer (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA).

APPEARANCES:

PLAINTIFF:

T KASITA

Instructed by Nambahu & Associates,
Windhoek

DEFENDANT:

R SILUNGWE

Of Silungwe Legal Practitioners, Windhoek