

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
RULING ON SPECIAL PLEA



NAMIBIA MAIN DIVISION,
OF PRESCRIPTION

Case Title: ANTONIA KATJOMUISE PLAINTIFF TOBIAS NEGONGA DEFENDANT	Case No: HC-MD-CIV-ACT-OTH-2020/01594 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE SIBEYA	Date of hearing: 03 February 2023 Delivered on: 17 February 2023
Neutral citation: <i>Katjomuise vs Negonga</i> (HC-MD-CIV-ACT-OTH-2020/01594) [2023] NAHCMD 61 (17 February 2023)	
IT IS ORDERED THAT: a) The special plea of prescription is dismissed. b) The defendant is ordered to pay costs of the special plea which is subject to rule 32(11). c) The matter is postponed to 2 March 2023 at 08h30 for case management conference. d) The parties are directed to file a duly signed joint case management report in PDF and MS Word format on or before 27 February 2023.	
Following below are the reasons for the above order:	
<u>Introduction</u> [1] This is a special plea of prescription raised by the defendant against the plaintiff's claim. [2] The plaintiff is Antonia Katjomuise, an adult Namibian female who resides in Gobabis. The defendant is Tobias Negonga, an adult Namibian businessman who also resides in	

Gobabis.

[3] The plaintiff is represented by Ms Happie Ntelamo-Matswetu and the defendant is represented by Mr Sarel Maritz.

[4] The plaintiff instituted action against the defendant in which she claims an amount of N\$29 032.32 with interest at the rate of 20% per annum from date of judgment to the date of full and final payment. The plaintiff further seeks an order that the defendant return movable properties to her which the defendant is alleged to have confiscated or removed when he took occupation of Erf 690 Njambe Street, Herero Block, Epako, Gobabis.

[5] The plaintiff, in her amended particulars of claim, alleges that the defendant during the year 2006, took unlawful occupation of her immovable property, Erf 690 Njambe Street, Herero Block, Epako, Gobabis. She alleges further that the defendant proceeded to consume water and electricity for the said property without making payment.

[6] The plaintiff further contends that, on or about 2018, the municipality of Gobabis instituted civil action against her for outstanding bills on the municipality account of the property. She settled the matter when she became aware of the said debt. The plaintiff attached a statement of account of N\$29 032.32 provided to her by Kemp-Maske Legal Practitioners.

[7] The defendant raised a special plea of prescription on the basis that the plaintiff's cause of action arose on or about 2006, while the summons in this action were only served on him on 17 May 2021. The defendant, therefore, avers that the claim has prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.

[8] The court is faced with the issues as to when the cause of action arose and when it became due.

Arguments

[9] Mr Maritz argued that the plaintiff had knowledge of this debt long before the

defendant became the owner of the said property. He argued further that the defendant only took occupation of the abovementioned immovable property during the year 2008 after purchasing it at a public auction.

[10] He argued that the plaintiff was served with summons from the Magistrate Court for the district of Gobabis issued by the Municipality of Gobabis, on 9 May 2007, which made her aware of the claim for water and electricity that had since accumulated to N\$29 032.32 including legal costs. The return of service of such summons is available. Mr Maritz further argued that the plaintiff has signed an acknowledgement of debt of the said claim on 5 May 2013, thus making her fully aware of the terms for the said claim and being to terms regarding payment of the debt. Therefore, the claim being instituted by the plaintiff against the defendant has prescribed.

[11] Mr Maritz further contends that the defendant denies to having confiscated the movable properties of the plaintiff during the year 2006 as alleged. He further states that the special plea of prescription relates more to the claim amount of N\$29 032.32 and not so much to the claim of *rei vindicatio*. This concession was premised on the question from the court that, whether or not a claim based on *rei vindicatio* prescribes after a period of three years.

[12] Ms Ntelamo-Matswetu countered the arguments raised by Mr Maritz pound for pound, so to speak. She argued that the claim amount is more of a factual dispute between the parties which requires evidence to be led. She argued that it was necessary that the parties lead evidence to prove as to who occupied the house in 2006 and 2007 and this meant that prescription cannot apply.

[13] Ms Ntelamo-Matswetu, in respect of the amount claimed, argued further that the plaintiff's cause of action arose in November 2018 as that is when she paid the above-mentioned account. Ms Ntelamo-Matswetu argued that this is when the debt for water and electricity consumption that was paid on behalf of the defendant became due and payable to her by the defendant. She argued further that summons were issued on 17 May 2021, about six months before the expiration of the three year period prescribed in the Prescription Act. She also argued that the plaintiff has no knowledge of having been put to terms and signing of an acknowledgement of debt on 5 May 2013 as alleged. Plaintiff only became aware of such debt after receiving a phone call from Kemp-Maske Legal

Practitioners in 2018.

[14] In respect of claim 2, Ms Ntelamo-Matswetu argued that the plaintiff seeks to have the properties that were confiscated by the defendant to be returned to her based on a claim of *rei vindicatio* which cannot prescribe. She argued further that in cases of prescription, ownership need not be proven, as proof of ownership is an issue to be determined at trial.

Applicable law

[15] Section 11(d) of the Prescription Act¹ provides that a debt prescribes after a period of three years. There are exceptions to the general rule, which are not relevant to the present matter.

[16] It is well-established law that a party who raises prescription must allege and prove the date of the inception of the prescription. Generally, prescription runs as soon as the 'debt' is due. The debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and the facts that give rise to such debt. However, a creditor who could have acquired knowledge of the debt by exercise of reasonable care is deemed to have such knowledge.²

[17] In *MEC for Health, Western Cape v M C*³, this Court stated:

'[6] Prescription begins to run when the debt in question is due, that is, when it is owing and payable...

[7] ... only the requirement of knowledge of? the facts from which the debt arises? needs (*sic*) to be considered. These are the minimum essential facts that the plaintiff must prove in order to succeed with the claim.'

[18] In *Kaxuxuena v Hot Shoot Trading CC*,⁴ Munsu AJ at para [27] quoted with approval the following passage from *HMBMP Properties (Pty) Ltd v King*⁵ where it was held that:

¹ Prescription Act 68 of 1969.

² *Kapuka v Haufiku* (HC-MD-CIV-ACT-CON-2017/04086) [2018] NAHCMD 178 (14 June 2018).

³ *MEC for Health, Western Cape v M C* [2020] ZASCA 165 (SCA) para 6 - 7.

⁴ *Kaxuxuena v Hot Shoot Trading CC* (HC-NLD-CIV-ACT-CON-2021/00116) [2022] NAHCNLD 29 (28 March 2022).

⁵ *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 C-E.

'...in its ordinary meaning a debt is "due" when it is immediately claimable by the creditor...A debt can only be said to be claimable immediately if the creditor has the right to immediately institute an action for its recovery. In order to be able to institute action for the recovery of a debt the creditor must have a complete cause of action in respect of it.'⁶

[19] Munsu AJ proceeded to state that:

'It follows that the plaintiff must have a complete cause of action at the stage of issuance of summons⁷ or at the time of service of summons.⁸ In *Abrahamse & Sons v SA Railways and Harbours*⁹ Watermeyer J stated:

"The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

[20] I associate myself with the principles set out in the above authorities. In this matter, the plaintiff only had a complete cause of action against the defendant on the date she paid the amount of N\$29 032.32. As a matter of consequence, the plaintiff could only institute action for recovery of the amount paid after she settled the debt with the Gobabis Municipality in 2018.

[21] In *Moshao v Lesotho General National Insurance Co*,¹⁰ it was held :

'[19] It was imperative the pleader of the "Special plea" to lead evidence that establishes a *prime* (sic) *facie* case then the plaintiff is then called upon to rebut that evidence, that is the tenor of this court's judgment in *Lesotho National General Insurance Company v Ever Unison Garments (Lesotho) (Pty) Ltd (supra)*.'

[22] At the moment, I cannot conclusively say that the plaintiff was aware of the debt due in 2007. This is premised on the fact that I am not privy to the acknowledgement of debt allegedly signed by the plaintiff. The defendant did not annex the acknowledgement of debt

⁶ See also *Uitenhage Municipality v Molly* 1998 (2) SA 735 (SCA).

⁷ *Mahomed v Nagdee* 1952 (1) SA 410 (A).

⁸ *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A).

⁹ *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626.

¹⁰ *Moshao v Lesotho General National Insurance Co* (C of A (CIV) 10 of 2016).

to his plea nor produce it in evidence. He merely listed it in the discovery affidavit. I have however, had privy to the statement of account annexed to the amended particulars of claim as Annexure B. Based on the said Annexure B and at this stage, I am of the view that the plaintiff only became aware of the debt due on 1 November 2018.

[23] In view of the foregoing, I find that the debt could not have prescribed by 17 May 2021 when summons were served on the defendant in this matter. The summons were thus served about six months prior to prescription.

[24] With respect to claim two, a vindicatory claim does not constitute a 'debt' as envisaged by s 11 of the Prescription Act.¹¹ I further hold the view that the concession made by Mr Maritz during arguments not to pursue the challenge against a claim based on *rei vindicatio* was correctly made. Nothing further deserved mention on this issue.

[25] Having considered the above, I find that it is inevitable that the special plea falls to be dismissed, in respect of both claims.

Costs

[26] There is a well-established principle that costs follow the event. This principle entails that the successful party is awarded his or her costs. The parties did not make out a case which warrants a departure from the said principle, neither could I gather such a case from the record. *In casu*, the plaintiff, who is represented by a legal practitioner on the instructions of the Directorate of Legal Aid, in her written heads of argument seeks the dismissal of the special plea with costs.

[27] Section 17 (1) and (2) of the Legal Aid Act¹² provides that:

'(1) Where a court awards costs to a legally aided person in any proceedings, such costs shall be the costs which would have been payable of the services performed under legal aid had been performed by a legal practitioner on the instruction of a client without the benefit of legal aid, and such costs shall be taxed accordingly.

(2) Notwithstanding that costs referred to in subsection (1) have been awarded to the legally aided

¹¹ *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022).

¹² Legal Aid Act 29 of 1990 as amended.

person, such costs shall be payable to the Director.¹³

[28] In view of the above cited provision of the Legal Aid Act together with the well-beaten principle that costs follow the result, I find that this is a matter befitting of costs to be awarded to the plaintiff for successfully warding off the special plea. This is an interlocutory matter and it is only just, in the premises that such costs should be capped as provided for in rule 32(11).

Order

[29] As a result, I make the following order:

- a) The special plea of prescription is dismissed.
- b) The defendant is ordered to pay costs of the special plea which is subject to rule 32(11).
- c) The matter is postponed to 2 March 2023 at 08h30 for case management conference.
- d) The parties are directed to file a duly signed joint case management report in PDF and MS Word format on or before 27 February 2023.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendants
H Ntelamo-Matswetu Of Happie Ntelamo-Matswetu, Windhoek	S F Maritz Of Dr. Weder, Kauta & Hoveka Inc., Windhoek

¹³ *Ultimate Safaris (Pty) Ltd v Gariseb* 2022 (2) NR 487 (SC).