

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title: MARTHA PHILLIPINA !GAEB // /GAI-OB FISHING (PTY) LTD & 11 OTHERS	Case No: HC-MD-CIV-ACT-CON-2022/02364
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 13 NOVEMBER 2023
	Delivered on: 4 DECEMBER 2023
Neutral citation <i>!Gaeb // /Gai-ob Fishing (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2022/02364) [2023] NAHCMD 781 (4 December 2023)	
Order:	
<ol style="list-style-type: none">1. The special plea of prescription is upheld.2. The plaintiff's action is dismissed.3. The plaintiff shall pay the defendant's costs, and the costs must not be capped in terms of rule 32(11) of the rules of court.4. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ:	

[1] Once more we are seized with a matter about the ubiquitous fish. This time it is about shares in a company that were granted the right to the exploitation of fish. The plaintiff has made two claims in an action instituted on 6 June 2022, namely, a claim of specific performance (claim 1) and a claim of payment of dividend (claim 2). It should be noted at the threshold that claim 1 is the primary claim. Claim 2 is a consequential claim, that is, a claim consequential upon the success of claim 1, as Mr Kasper, counsel for the fifth defendant, submitted. And what is more, considering the nature of claim 1 and claim 2 and the pleadings, the evidence adduced in respect of the special plea of prescription dealt with the merits of the case, too. The reason is that the special plea of prescription was intertwined evidentially and substantially with claim 1 and claim 2 on merits.

[2] The first, seventh, eighth and ninth defendants (represented by Ms Siyomunji), the second defendant (represented by Mr Pretorius), and the fifth defendant (represented by Mr Kasper, as aforesaid), raised a special plea of prescription. I shall refer to the said defendants simply as the defendants. The other defendants have not taken part in the instant proceedings.

[3] The plaintiff (represented by Mr Ikanga) has moved to reject the special plea of prescription. In the course of events and upon an application by the defendants, the court referred the issue of prescription to oral evidence. The plaintiff testified and called no other witness to support her case. On their part, the defendants called two witnesses in support of their case, namely, Mr Frans Daniel Gariseb and Ms Juliana Ida Garises.

[4] The following testimony of the plaintiff is relevant in the determination of the plea of prescription: In 2010, she and other family members agreed orally to establish a close corporation for the sole purpose of applying to the Minister of Fisheries and Marine Resources ('the Minister') (the eleventh defendant) for fishing exploitation rights. To that end, the parties to that agreement submitted a proposal to the Minister 'during the period from 1st September to to 30th September 2010'.

[5] During or about 2010, the plaintiff, the late Christy Naobeb and the third to the ninth defendant agreed orally that a legal entity would be registered under the name /Gai-Ob Fishing and that that entity would apply to the Minister for a hake exploitation right. The application was made.

[6] On or about 6 December 2011 a close corporation was registered under the name /Gai-Ob Fishing CC ('the CC'). The plaintiff's name was not listed in the founding statement of the CC as a member thereof. On or about 19 July 2010 the CC was converted into a private limited company ('the company'), that is, the first defendant. Significantly, only the members of the CC became the shareholders of the company. The plaintiff did not become a shareholder of the company. The entries in Part C of Form CM2 to the Memorandum of Association filed with the Business & Intellectual Property Authority (BIPA) on 19 July 2018 evidences that fact. There is no evidence that the share structure was amended. The plaintiff's own version confirmed that she held no shares in the company. As a matter of law and logic, if the plaintiff was a shareholder in the company, then it is inexplicable that she would have 'addressed a letter to the 11th defendant (the Minister) on 26 June 2019, addressing the issue of my shareholding and my unfair exclusion from 1st defendant'.

[7] The evidence is overwhelming that the plaintiff has never been a member of the CC and she became aware of it on 6 December 2011. She has also never been a shareholder in the company.

[8] I have compared the share certificate issued to Shonane Nicolene Marieta Goreses and to Juliana Ida Garises, for instance, in respect of the company, with that issued to the plaintiff. Having done that, I accept the defendants' evidence that the plaintiff's share certificate is probably not genuine and authentic. The following important features are absent from the plaintiff's share certificate:

- (a) an embossed flowery presentation;
- (b) 'Distinctive Numbers'; and
- (c) Revenue stamp.

[9] Be that as it may, on 6 December 2011, the plaintiff became aware that she had not been made a member of the CC. This superlatively crucial fact is common cause between the parties. But it was only 'during or about June 2019' that the plaintiff addressed a letter to the Minister to complain about her exclusion, as aforesaid. On the facts, I find that it is from 6 December 2011 that prescription under s 11(d) of the Prescription Act 68 of 1969 ('the Act') started to run, ending on 5 December 2014. It is common cause between the parties that

specific performance is a debt, within the meaning of the Act.¹

[10] The defendants admitted that dividends were paid to the plaintiff but that the payment was not duly authorized. Upon that admission, Mr Ikanga hanged the plaintiff's case. Mr Ikanga submitted that even if 'the date of inception' of prescription was 6 December 2011, prescription was interrupted when dividends of the company were paid to the plaintiff. Nothing, as far as the present proceeding is concerned, turns on the payment of dividends. As on 5 December 2014, the plaintiff's claim of specific performance had already prescribed in terms of s 11(d) of the Act, as aforesaid. The irrefragable conclusion in law and logic is that in 2019 the debt had already become extinct, and as Mr Kasper put it felicitously, the payment of the dividends could not resuscitate the debt which had become extinct as long ago as on 5 December 2014.

[11] It is neither insignificant nor aleatory that s 10, which must be read contextually with s 11 (d) of the Act, is titled 'Extinction of debts by prescription'.

[12] Based on these reasons, I uphold the special plea of prescription. As I intimated in para 1 above, since I have decided that the claim for specific performance has prescribed in terms of the Act, the plaintiff's consequential claim 2 should, as a matter cause, fail, and it fails. Besides, claim 2 should fail because I have found that the plaintiff has never been a shareholder in the company.

[13] Based on these reasons, I conclude that the plaintiff has failed to prove her case in respect of both claim 1 and claim 2. She is, therefore, not entitled to judgment.

[14] It remains the issue of costs. Mr Kasper submitted that in the nature of the case, since the instant proceedings concern the issue of a special plea of prescription, shareholding of shares in the first defendant and the payment of dividends, and the decision of the court on prescription would be dispositive of the action on the merits, costs should not be capped in terms of rule 32(11) of the rules of court. I accept counsel's submission because it has force and is valid. As I said in para 1 above, the special plea of prescription is intertwined evidentially and substantially with claim 1 and claim 2 on the merits.

[15] In the result, I order as follows:

¹ *Kaxuxuena v Hot Shoot Trading CC* [2022] NAHCNLD 29 (28 March 2022).

1. The special plea of prescription is upheld.
2. The plaintiff's action is dismissed.
3. The plaintiff shall pay the defendant's costs, and the costs must not be capped in terms of rule 32(11) of the rules of court.
4. The matter is finalised and removed from the roll.

Judge's signature:

Note to the parties:

Not applicable.

Counsel:

Plaintiff

Defendants

M Ikanga
Of
M. Ikanga & Associates Inc., Windhoek

M Siyomunji (for 1st, 7th, 8th and 9th Defendants)
Of
Siyomunji Law Chambers, Windhoek

F Pretorius (for 2nd Defendant)
Of
Francois Erasmus & Partners, Windhoek
and
G L Kasper (for 5th Defendant)
Of
Murorua Kurtz Kasper Incorporated, Windhoek