

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING ON SPECIAL PLEA OF PRESCRIPTION AND NON-JOINDER

Case no.: HC-NLD-CIV-ACT-DEL-2017/00080

In the matter between:

ELIZABETH MAUTA

PLAINTIFF

and

EENHANA TOWN COUNCIL

DEFENDANT

Neutral citation: *Mauta v Eenhana Town Council* (HC-NLD-CIV-ACT-DEL-2017-00080)
[2020] NAHCNLD 141 (1 October 2020)

Coram: MASUKU, J

Heard: 31 August 2020

Delivered: 1 October 2020

Flynote: Special Plea – Prescription - *rei vindicatio* only proved when there is a clear real right - prescription upheld - Non-joinder - A party that may have a direct and

substantial interest must be joined - court held the Estate late Ndafelai ought to have been joined – special pleas of prescription and non-joinder upheld.

Summary: The Defendant raised special pleas of prescription and non-joinder. Plaintiff alleged that she is the real owner of the expropriated erf. Defendant alleged that the late Ndafelai was the rightful registered owner and consent was obtained from him.

Court held that this claim for damages does not fall into the classification as stipulated in the *Louw* case and thus the claim prescribed as 8 years had passed since the plaintiff obtained the knowledge of the cause of action. The court upheld the prescription. Furthermore the court upheld that the Estate of the Late Ndafelai Elia ought to have been joined as it has a direct and substantial interest in the outcome of the case.

ORDER

1. The special pleas of prescription and non-joinder are hereby upheld.
 2. The plaintiff must pay the costs of the special plea.
 3. The matter is removed from the roll and is regarded as finalised.
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RULING

MASUKU J,

Introduction

[1] The court in this judgment is tasked to determine two questions of law, raised by way of a special plea, namely issues of prescription and non-joinder of a necessary party to the proceedings.

[2] The plaintiff in this matter is Ms Elizabeth Mauta. She is unemployed and is currently residing at House No. 1317, 14th Road Tsumeb and the defendant is the Eenhana Town Council, duly established in terms of the Local Authorities Act 23 of 1992.

Background

[3] According to the plaintiff's particulars of claim, the cause of action arose during 2009 at Eenhana. The plaintiff was allegedly in lawful occupation of a plot situated at Erf 155, Eenhana. While in occupation of the said erf, she erected a building structure on the said erf. The defendant, in the same year, allegedly unlawfully demolished the building structure erected thereon by the plaintiff. The plaintiff approached the court seeking compensation in the amount of N\$ 300 000 from the defendant as a result of the demolition of the property. The plaintiff further sought compensation for the loss of the erf, and alternatively, her relocation by the defendant to another plot.

[4] In the plea it filed, the defendant alleges that the plaintiff was not the lawful owner of Erf 155 and that the said Erf was lawfully registered in the name of the Late Ndafelai Elia, (the deceased). The deceased was allegedly contacted by the defendant for purposes of expropriation of the said Erf 155, Eehana, in terms of the law. The deceased was compensated during 2009 for the expropriation of the erf. The defendant after the aforementioned expropriation and compensation to the deceased, demolished the structures on Erf 155 accordingly. This it is alleged by the defendant, is wholly within the ambit of its powers and with the full knowledge of the previous lawful owner of the property.

[5] The defendant further averred in its plea that the plaintiffs' claim has prescribed in terms of section 11 (d) of the Prescription Act, Act 39 of 1969, ('the Act'). In this regard, the defendant avers that the cause of action arose during 2009 and that at all material times, the plaintiff knew the identity of the defendant and she ought to have instituted proceedings much earlier than in 2017.

[6] In the light of the issues raised by the defendant in its special plea, it is necessary to deal with both special pleas in turn. I do so below, commencing with the plea of prescription.

Prescription

[7] As indicated above, the defendant raised a special plea of prescription, claiming that the plaintiff's cause of action arose during 2009, which is almost eight years from the time when the action was instituted. The plaintiff issued summons on 22 March 2017. There is no return of service on the record to indicate when the summons was served. The defendant submits that the plaintiff's claim has prescribed in terms of section 11 (d) of the Act.

[8] Section 11 (d) of the Act, provides 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.’

[9] Prinsloo J states the following, with which I wholeheartedly agree, in *Negonga v Nampost Limited*¹ with regards to the above-mentioned section as follows:

‘[12] In terms of the *Prescription Act* 68 of 1969 ("**the Act**"), "debts" prescribe after a period of 3 years. In order to avoid losing the legal right to enforce a claim (payment of a "debt"), a creditor must interrupt prescription by instituting proceedings against a debtor before the end of the 3 year period.’

¹ (HC-MD-CIV-ACT-OTH-2017/01174) [2018] NAHCMD 212 (13 July 2018), para 13 and 14 at page 9.

[10] This court must, in order to effectively determine whether or not this debt has prescribed, consider when the plaintiff became fully aware of the cause of action and when the alleged debt became due.

[11] In her own particulars of claim, the plaintiff states that she became aware of the cause of action in 2009 when the defendant demolished the structure on erf 155 to allegedly recover municipal rates and taxes on an overdue water bill. In the plaintiff's heads of argument it is submitted that during the period 2005 to 2016 the parties were involved in negotiations regarding the possible compensation of the plaintiff for the alleged un-procedural and unlawful demolition of the plaintiff's structure on the property.

[12] Through her own admission Ms. Mauta concedes that she became aware of the demolition since 2005 and sat idly on her hands, this knowledge notwithstanding. Her contention that she only realized in 2016 that the Town council will not pay her does not detract from the fact that she knew that she had a claim against the said Town Council. That notwithstanding, she ought to have paid and she failed to institute proceedings in good time.

[13] Ms. Amupolo for the plaintiff cited the case of *Louw v Strauss*². In this case, this court held that only a registered owner of immovable property institute a claim based *rei vindicatio*. In the same judgment, reference was made to the case of *Efrelou [Pvt] Ltd v Mrs Muringani and Emily Ntombizodwa Luwaca v The Registrar of Deeds and Another*,³ where the court quoted the provisions of s. 2 of the Prescription Act,⁴ in which a debt is defined as including anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

[14] Ms. Amupolo contends that her client was the registered owner of the expropriated erf. There is nothing before the court to actually prove the correctness of that allegation. In law, he or she who alleges, must prove. Proof of ownership of

² (HC-MD-CIV-ACT-CON-2016/03949)[2017] NAHCMD 217 (9 August 2017).

³ HC 1816/10 and HC 3285/10.

⁴ [Cap 8:11].

immovable property in law requires the production of a title deed and this was not done by the plaintiff. Due to that fact alone, the plaintiff cannot properly rely on the *rei vindicatio* in circumstances where the real right to the property is not explicitly proven by the best evidence, to vest in Ms. Mauta.

[15] Mr. Shakumu, on the other hand contends that the plaintiff was aware since 2009 of the defendant's identity and only instituted her claim in 2017 some 8 years later. That, by simple arithmetic, is well beyond the period of 3 years prescribed by the Act.

[16] I am convinced that the plaintiff has been aware of the cause of action since 2009 but failed to take the necessary steps as required institute the claim. In the premises, the plea of prescription is well taken and must succeed.

Non-joinder

[17] The defendant contends further that the plaintiff ought to have joined the estate of the Late Ndafelai Elia as the deceased was the rightful owner of the expropriated property. Furthermore, the said estate was the party that was compensated by the Town Council after the expropriation of the property.

[18] The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour*.⁵ It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which the court might make would not be capable of being sustained or carried into effect without prejudicing a party's rights and interests, that party is a necessary party and should be joined except where it, with full knowledge consents to its exclusion from the litigation.

[19] Ms. Amupolo submits that there is no need to join the deceased's estate as the deceased was not the rightful owner of the immovable property and thus has no interest in the case. However, without diving headlong into the merits of the case, if the

⁵ 1949 (3) SA 637 (A).

deceased was the one that actually gave the approval for the expropriation and actually received the compensation, as alleged, the outcome of this case would have a direct impact on his estate which is not joined to the proceedings. As stated in the *Amalgamated engineering Union* case where the party stands to be prejudiced, then that party needs to be joined. This, it appears to me, is the position of the deceased's estate. The order given is likely to impact upon it, thus necessitating its joinder in the proceedings.

Conclusion

[20] Having regard to both special pleas raised by the defendant, it appears to me that the defendant stands on firm legal ground. Both special pleas have merits and must, in the circumstances, be upheld. In view of the upholding of the plea of prescription, it seems to me that this ruling marks the end of the road for the plaintiff. The upholding of the plea of non-joinder, though merited in the circumstances, is rendered superfluous in the light of the prescription.

Costs

[21] Having achieved success, the defendant is entitled to costs. There exist no other compelling factors that would render the court to deviate from the principle that costs follow the event.

Order

[22] In the result I make the following order:

1. The special pleas of prescription and non-joinder are hereby upheld.
2. The plaintiff must pay the costs.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku,
Judge

APPEARANCES:

PLAINTIFF:

M. Amupolo

Of Amupolo & Co. Inc.

Oshakati

DEFENDANT:

S. Shakumu

Of Kishi Shakumu & Co. Inc.

Oshakati