REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON PRESCRIPTION

CASE NO. I 3744/2014

In the matter between:

PETRUS SHAMBO **PLAINTIFF**

And

MARIA AMUKUGO **DEFENDANT**

Neutral citation: Shambo v Amukugo (I 3744-2014) [2015] NAHCMD 244 (9 October 2015)

CORAM: MASUKU, AJ

Heard: 1 September 2015

Delivered: 9 October 2015

Flynote: PRESCRIPTION – Provisions of the Prescription Act 1969 i.e. ss 14 and 15 – interruption of prescription by acknowledgment of liability; judicial interruption of period of prescription and the application of the continuous wrong argument in relation to an alleged fraud and its effect on the running of prescription considered.

Summary: The plaintiff sued the defendant for N$ 75 000 allegedly given to the defendant following an alleged misrepresentation made by the latter to the former that the latter was properly authorized by the Ondangwa Town Council to sell land to members of the public. This misrepresentation induced the plaintiff to pay over the sum claimed to the defendant, which the latter despite demand failed to pay back. Held that a summons issued in the Magistrate's Court did not interrupt prescription because the amount claimed and the cause of action as well as the dates of the relevant transactions did not have any bearing on the present action. Held that prescription was interrupted by acknowledgement of liability but the period when prescription started running afresh showed that the claim was prescribed. Held further that the fraud alleged in the instant case constituted a single choate transaction and that the argument relating to continuous wrong did not apply to the case at hand. The special plea of prescription upheld with costs.

ORDER

The defendant's special plea of prescription is upheld with costs.

RULING ON SPECIAL PLEA OF PRESCRIPTION

MASUKU, AJ:

[1] The question confronting this court, and in need of an answer is whether a plea of prescription raised by the defendant should serve to non-suit the plaintiff in the present action proceedings.

[2] The facts giving rise to the question may be briefly summarized as follows: The plaintiff sues the defendant for payment of an amount of N$ 75 000.00 an amount he

alleges is due to him from the defendant. The indebtedness alleged to arise from an alleged representation made by the defendant to the plaintiff that she was authorized to alienate property on behalf of the Ondangwa Town Council, for whom she worked in the capacity of Town Planner. Part of her duties, it was understood, was to deal with members of the public and to render advice to them on which plots were up for sale to members of the public.

[3] The plaintiff avers that acting on a representation made to him by the defendant in her aforesaid capacity, he parted with the amount claimed which he allegedly handed over to the defendant for the purchasing of a plot in the said Council. It is further averred that when the defendant made this representation she well knew that same was false and further knew that the plaintiff would rely on her said representation to his prejudice. It is further averred that having ascertained that the said representation, the plaintiff has been unsuccessful in his attempts to have the defendant refund the money, hence the issuance of the summons.

[4] In response to these averrals, the defendant filed a special plea, alleging in the main that the summons was issued more than three years after the event allegedly giving rise to the claim is alleged to have arisen. The defendant also pleaded over on the merits but it is no necessary at this juncture to deal with the averrals in the defendant's plea, as the live issue, for the moment, is whether the plea of prescription is good and should in this case avail the defendant.

[5] In the special plea, the defendant alleges that on the plaintiff's version, the event giving rise to the claim took place "during 2009" and that the summons was served on the defendant on 12 November 2014, a period, which it is averred, is more than three years and falls foul of the provisions of the Prescription Act[1] (the 'Act).

[6] The plaintiff, in his heads of argument claims that the running of period of prescription was interrupted by two events, namely, an acknowledgment of debt signed

[1] Act No. 68 of 1969.

by the defendant in favour of the plaintiff and also a summons issued by the plaintiff against the defendant, which was tenable at the Windhoek Magistrate's Court. I intend to first consider whether indeed these two events, in the present circumstances did serve, as alleged, to interrupt the period of prescription as alleged.

Judicial interruption of prescription

[7] I intend to commence with the effect of the summons issued in the Magistrate's Court as aforesaid. But before I do so, it is important to have regard to the relevant provisions of the Act, being s 15 (1), which has the following rendering:

'(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

[8] In *Eberhard Wolfgang Lisse v Minister of Health and Social Welfare*[2] the Supreme Court, in dealing with the subject of interruption had this to say at para [24]:

'South African courts have long accepted that in order for prescription to be interrupted as contemplated in s 15 of the Prescription Act there must be a right enforceable against the debtor instituting legal proceedings for the enforcement of that right 'or substantially the same right.'

In this case, the Supreme Court had to grapple with the decision whether the launch of review proceedings, which preceded a claim for damages and were successful, served to interrupt prescription and the court came with a resounding answer in the affirmative.

[9] The summons issued by the plaintiff in the Magistrate's Court was, no doubt between the two protagonists. The claim was by the present plaintiff against the

[2] Case No. SA 75/2011.

defendant, claiming payment of an amount of N$ 15 000. The claim was instituted, it would appear, on simple summons and there were, as a result, no averments stated as to the basis of the claim and the circumstances in which the amount claimed came to be owing to the plaintiff.

[10] Crucially, and the above notwithstanding, the simple summons reflects in respect of the said claim that, 'The Plaintiff's claim against the Defendant is for payment of the sum/balance of N$ 15 000, in respect of monies lent and advanced to the Defendant by the Plaintiff, at the special instance and request of the Defendant on 2 August 2010.' The question is whether the proceedings at the Magistrate's Court were launched to enforce the same or substantially the same right?

[11] My answer is in the negative and I say so primarily on the following grounds. First, the amount claimed is different. Whereas the amount claimed was N$ 15 000 before the Magistrate's Court, the one serving before this Court is for N$ 75 000, which amount is about four times more than that claimed in the lower court. It must be mentioned that it cannot be said that the amount has increased over time, all things being equal.

[12] Second, the causes of action are as far as East is from the West. In the lower court, the amount claimed was in respect of monies lent and advanced, yet the claim before this court is based on fraudulent misrepresentation. The causes of action, thus seen cannot, on the most benevolent of interpretations, be said to be consanguineal or related at all so as to say a possibility exists that the right sought to be vindicated was the same or substantially similar. One claim may well be said to be from Mars, while the other from Jupiter.

[13] Last, but by no means least, the dates when the said causes of action arose, ineluctably show and spell doom to any consideration that one may have entertained that these were enforcement proceedings of the same or similar right. In the claim before the lower court, as will be evident from what I quoted above, the claim is alleged

to have arisen on 2 August 2010. The averrals in the instant claim allege that the transaction giving rise to the claim took place 'around 2009'. It therefore becomes clear that the proceedings before the Magistrate's Court took place later, although they appear to have been prosecuted earlier than the present claim.

[14] On any construction, I can only come to what I consider an inexorable conclusion that the claims pursued before the Magistrate's Court and this court are different and for that reason I am of the view that the issuance of the summons before the Magistrate's Court did not in the peculiar circumstances of this case serve to interrupt prescription. The fact, harped upon by the plaintiff's counsel in argument, that the judgment in the Magistrate's Court was only issued on 4 July 2014 does not, in my respectful view assist the plaintiff at all. It is irrelevant, regard being had to the conclusion I came to regarding the judicial interruption of the period of prescription alleged.

Interruption of prescription as a result of acknowledgment of liability

[15] I now turn to consider Ms. Nguasena's argument that the acknowledgment of liability signed by the defendant also served to interrupt prescription in this case. Does this argument have any merit? The acknowledgment of liability referred to is a document signed by the defendant and dated 2 August 2010. It is a document in manuscript in which the defendant stated, 'I will pay the N$15 000 after six month (*sic*) to Mr. Shambo'. It then bears the defendant's name and signature.

[16] The one curious feature of this letter is that the defendant undertakes to pay an amount of N$ 15 000. The acknowledgment is in response to and written on the top of a letter written in manuscript by the plaintiff to the defendant claiming an unstated balance owing. The letter alleges that the plaintiff agreed to withdraw a case of theft and fraud against the defendant on the understanding that the defendant would reimburse the plaintiff his money in full. It is not clear how much the said outstanding balance is as the plaintiff's letter does not state the amount.

[17] Section 14 of the Act reads as follows:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due'.

[18] It is important to note that in terms of this section, whose terms it must be mentioned are couched in peremptory language, prescription is interrupted by acknowledgement of liability either expressly or tacitly, which imports acknowledgement of liability indirectly. In this regard, it must be further mentioned, the prescription commences running from the date of interruption or if the parties postpose the due date of the debt, from such date chosen.

[19] The learned author Saner,[3] states the following regarding acknowledgment serving as an interruptus in the running of prescription:

'To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefore'.

I am of the considered view that the letter I have quoted above does meet the requirements of being an acknowledgment as the defendant specifically admitted owing the debt to the defendant and further made a promise to pay. The only issue that might serve to create a doubt is the amount that the defendant admitted to pay i.e. N$ 15 000, which appears to be the same figure claimed in the Magistrate's Court.

[3] Prescription in South African Law, Lexis Nexis, July, 2008 at p 3-19.

[20] On the balance, I hold that the acknowledgment in this case was in respect of the claim in question and this is so in my view from the contents of the plaintiff's letter where he states, "The case of theft and fraud (*sic*) was withdrawn on your request in order to receive my money in full. I was patient and fulfilled your request to withdraw the case on the 3rd August 2010. I waited for 459 days for my money, but I never received a cent as promised.' This, in my view shows indubitably that the amount claimed by the plaintiff which the defendant acknowledges owing was in relation to a case of theft and fraud and the present claim, generally speaking, falls into that category.

[21] That the amount the defendant agreed to pay does not tally with the extent of the claim should not, in my view serve to non-suit the plaintiff for the reason that the plaintiff did not, in his letter claim N$ 15 000 but it is the defendant who undertook to pay that amount. I should also add that from the opening paragraph of this letter by the defendant, it would appear that the defendant had earlier admitted liability in the presence of two witnesses in writing, namely the defendant's uncle and another person. This may yet be another instance of acknowledgment of debt but on which no claim is laid and I cannot, in the circumstances, have regard to same for purposes of any interruption occasioned thereby, which according to the plaintiff's letter ran into some 459 days.

[22] I am of the view that the acknowledgment in this case did serve to interrupt prescription. It would appear to me that the debt became due six months from the date of acknowledgment, which is 2 February 2011. I say so because the defendant wrote the letter of acknowledgment on 2 August 2010 and stated that she would pay the amount in question six months from that date. Six months in this scenario postpones the due date of payment to 2 February 2011. This is in line with the provisions of s 14 (2) quoted above.

[23] In view of this computation, read together with the provisions of s 14 (2) that prescription again began to run afresh from 2 February 2011. The period of three years from 2 February 2011, takes us to 2 February 2014. It is evident that the summons in

this case was issued on 3 November 2014, which is a period in excess of three years, resulting in the conclusion, which I have reached that the claim had prescribed by the time the summons was issued.

[24] It will be seen that there were two forms of interruptions that were claimed by the plaintiff to have interrupted the running of prescription, namely a judicial interruption, being the service of process in the Magistrate's Court, which I held did not hold. The last is interruption by acknowledgment of liability, which I have found holds but will not avail the plaintiff for reasons canvassed in the immediately preceding paragraph.

Continuous wrong argument

[25] I now turn to the last argument raised by the plaintiff in applying for the dismissal of the special plea. The argument is that a fraud, that the defendant is alleged to have perpetrated on the plaintiff does not constitute a single debt within the meaning of the Act. For that reason, it was contended, there is no precise date from which the debt must be reckoned to run as the fraud or its effects continue to haunt the plaintiff as long as the amount claimed remains unpaid. Is this argument sustainable?

[26] In support of this contention, reliance was placed on the case of *David Sinclair Barnett and Others v The Minister of Land Affairs and Others*[4]. In that case, the court held that certain types of conduct which are of a continuing nature do not qualify to be regarded as a debt within the meaning of the Act. The court expressed itself in this regard as follows at page 9 para [20] of the cyclostyled judgment:

'Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act – with or without continuing injurious effects, such as a blow to the head – on the one hand, and a continuous wrong in the course of being committed, on the

[4] Case No. 304/06.

other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures."

[27] In dealing with what constitutes a continuous wrong, the court, at para [21] said:

'In Slomowitz (at 331) this court accepted the description of a continuous wrong as one which 'is still in the course of being committed and is not wholly past'.

It would appear to me that whether the doctrine applies, will have to depend on the peculiar circumstances of the case at hand. The case does not say that every type of fraud is a continuous wrong. What this court has to determine is whether the issue giving rise to the debt is continuing; still in the course of being perpetrated to constitute a new wrong, and in a sense, thus inchoate. In the *Barnett* case, it is quite understandable on the facts why the court held that the wrongful acts continued and that the special plea of prescription would not hold. In that case, the appellants were, even at the time of the judgment, still occupying the disputed property illegally and as such, the illegality continued with each passing day and the effects of prescription could not kick in, in the natural way.

[28] I have, in the course of my research, come across the judgment of this court in *Ongopolo Mining Ltd v Uris Safari Lodge And Others*[5]. The court considered the 'continuous wrong argument' and came to a view, in relation to a fraud in the registration of immovable property that was the basis of the claim in that case, which was summed up in the following language at para [52]:

'The conclusion I come to is that the alleged fraud giving rise to the present claim is capable of being construed as a single act which occurred on 28 October 2002 when the Farm was transferred to the first defendant.'

I agree entirely with the finding of the learned Judge President in that case and hold that his reasoning resonates and actually applies to the instant case.

[5] 2014 (1) NR 290 (HC) per Damaseb JP.

[29] By parity of reasoning, I therefore come to the view that in the instant case, there is nothing to suggest that the fraud was inchoate and continues to be perpetrated. It would seem that it was consummated in 2009 and resulted in the plaintiff taking legal action, which included reporting a criminal case, which he appears to have later withdrew. Unlike in the *Barnett* case, I find nothing, as the learned Judge President also did not find in the *Ongopolo* case that the fraud was a continuous wrong which endures and still in the course of being committed. I should also mention that there was no indication either that if the harm is not being committed now, it however continued for some time after the year alleged and then stopped at some date which would serve to affect the operation of prescription.

[30] I accordingly come to the conclusion that the continuous wrong argument does not apply in the instant case and is not in any shape or form supported by the facts. I conclude that the continuous wrong argument does not avail the plaintiff in the circumstances of this case and I accordingly refuse to uphold same.

[31] In the premises, I come to the conclusion that the special plea of prescription is good and it serves, in the circumstances to non-suit the plaintiff. The defendant's special plea of prescription is therefor upheld with costs.

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TS Masuku,

Acting Judge

APPEARANCES

PLAINTIFF:	E. Nguasena
	Instructed by AngulaCo. Inc.
DEFENDANT:	E.H.T Angula
	Instructed by LorentzAngula Inc.