REPUBLIC OF NAMIBIA Not Reportable

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 2119/2012

In the matter between:

NEDBANK NAMIBIA LTD **PLAINTIFF**

And

PRO-HOUSING CLOSE CORPORATION **1ST DEFENDANT**

PAUL REYNHARD OCKHUIZEN **2ND DEFENDANT**

HELEN RUTH OCKHUIZEN **3RD DEFENDANT**

Neutral citation: *NEDBANK v Pro-Housing CC* (I 2119/2012) [2016] NAHCMD 33 (24 February 2016)

Coram: DAMASEB, JP

Heard: **04 November - 07 November 2013, 25 November 2014.**

Delivered: **24 February 2016**

Flynotes: Prescription – Extensive prescription of a debt arising from an overdraft facility – Time limit set out in the Prescription Act 68 of 1969 still applicable – Prescription to run for three years from the date that the debt become due – Interruption by part payment –Special plea of prescription dismissed since part

payments were made before the expiration of a period of three years – Plaintiff proved established on a balance of probabilities.

ORDER

---

1. The defendants' special plea of prescription is dismissed.

2. The defendants are ordered to pay to the plaintiff, jointly and severally, the one paying the other to be absolved the amount of **N$ 176 819.62;**

3. Interest on the aforesaid amount is awarded to the plaintiff at the rate of 20% per annum, calculated and capitalised monthly as from the 27 August 2010 to date of full payment.

4. Costs are awarded to the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

Damaseb JP:

[1] Judgment in this matter was reserved on 25 March 2014. I have cause to be delivered to the parties my apology for the late delivery of the judgment. I record my regret for the delay and once again extend an apology to the parties for the delay in delivering judgment.

[2] The plaintiff, a bank, claims against the defendants, jointly and severally, an amount of N$ 176 819.62 which it alleges to be the unpaid balance on an overdraft (OD) facility held on a cheque account with the plaintiff by the first defendant, a close corporation. The second and third defendants are sued as sureties and co-principal debtors for the debts of the first defendant.

[3] It is common cause that the plaintiff on 13 April 2007, entered into a partly written, partly oral agreement with the first defendant in terms of which the plaintiff advanced monies to first defendant on an OD facility to a limit of N$ 1 130 000. The

first defendant was represented by the second defendant and third defendant when the OD facility was arranged. The agreed terms were that the OD facility would expire within one year of being granted, unless reviewed by the plaintiff upon receipt of first defendant's annual financial statements. The due date for submission of the financial statements, it is admitted, was 31 March 2008. The balance on the OD facility would thereupon become due and payable to the plaintiff. The first defendant pledged certain listed properties as security in respect of the OD facility, which were to be sold to liquidate the OD.

[4] The arrangement made by the parties was that the plaintiff's conveyancer, PF Koep & Partners would be the transferring attorneys who would receive the proceeds of sale in trust and pay same over to the plaintiff who would in turn allocate it to the first defendant's account in reduction of the OD facility.

The pleadings

[5] The plaintiff alleges that on first defendant's request, the OD limit was extended during August/September 2007 with an amount of N$ 700 000 on the same terms and conditions as the extant OD and which was to expire on 31 December 2007. It is further alleged that the OD facility terminated as a result of first defendant's failure to furnish financial statements before 31 March 2008. The balance then outstanding allegedly became due and payable on that date, alternatively on 11 August 2008 when the plaintiff demanded payment of same. The plaintiff alleges that the amount owing then was N$ 2 020 657 and that, after some part payments were made, a balance of N$ 176 819.62 remained outstanding. This is the amount the plaintiff claims with interest and costs.

[6] According to the plaintiff, the following part payments were made during the period of 4 September 2008 – 27 August 2010:

a) 4 September 2008 –N$ 60 000.
b) 13 March 2009 –N$ 534 891.83
c) 12 May 2009 – N$ 749 000.
d) 3 December 2009 – N$ 10 000.
e) 11 June 2010 – N$ 14 050.
f) 27 August 2010 –N$ 921 861.37

[7] The defendants' version is that the reason the OD facility was terminated was because the construction and property development business took a 'turn for the worse' resulting in the sales of the properties not being sufficient to offset the debt on the OD facility. As regards the part payments, it is denied that they were anything other than the payments which accrued to the plaintiff via its attorneys PF Koep & Partners in reduction of the OD debt as pre-arranged by the parties. The only exception being the last payment of N$ 921 861.37 that was made directly to the plaintiff on 27 August 2010. The amount alleged by the plaintiff to be owing on 11 August 2010 is denied. According to the defendants the last payment on behalf of the first defendant on 12 August 2008 (and not 27 August 2008), left the balance due and payable at N$ 70 000.

Defendants' special plea

[8] It is common cause between the parties that the plaintiff's claim constitutes a debt in terms of the Prescription Act.[1] In the special plea, the defendants allege that the plaintiff's claim had become prescribed in that the summons was served on first defendant on 26 September 2012, being more than three years after the debt became due, ie 31 March 2008, alternatively on 11 August 2008. The plaintiff denied this allegation and pleads that prescription was interrupted by the part payments made by the first defendant with the last recorded payment being made on 27 August 2010. It was therefore agreed in the parties' proposed pretrial order that, amongst others, the issue of prescription be adjudicated. I will therefore deal with that issue first.

Prescription plea

[9] It is not in dispute that the summons was served on first defendant on 26 September 2012. The prescription plea is predicated on the plaintiff's allegation in the combined summons that the course of action arose on 31 March 2008, alternatively on 11 August 2008. According to the defendants the summons was therefore served more than three years after the claim arose.

[10] In its replication, the plaintiff denies that the claim had prescribed and in 'amplification' alleged that 'the running of prescription was interrupted by acknowledgment of liability by the first defendant through part payment of the debt as pleaded (and admitted by defendants) in paragraph 11 of the amended particulars

[1]Act No. 68 of 1969, section 11.

of claim.' In the amended particulars of claim the plaintiff alleged that the first defendant made the following part payments after the date on which the claim became due and payable:

(a) 13 March 2009 – N$ 534,891.83;
(b) 12 May 2009 – N$ 749,000;
(c) 3 December 2009- N$ 10 000;
(d) 11 June 2010 – N$ 14, 050;
(e) 27 August 2010 – N$ 921.861.37.

The operation of extinctive prescription

[11] Prescription is an absolute defense that must be specifically pleaded and can be raised at any stage of the proceedings to repel an action which is commenced after expiry of a period within which it should have been initiated.[2] The running of extensive prescription is interrupted when the creditor commences court proceedings for the enforcement of a claim before expiration of the prescription period, or if the debtor acknowledges liability before expiration of the prescription period.[3]

[12] The onus is on a defendant to show that a claim has prescribed; but if the plaintiff alleges that prescription was interrupted or waived, the onus rests on him or her to prove the interruption or waiver.[4] Where there was an amendment of the summons in order to add a claim constituting a different cause of action, the period of prescription in respect of the new claim would not be interrupted by the service of the original summons but only by the service of the notice of amendment.[5]

[13] Once the period of three years has lapsed, the debt is deemed to have been extinguished and the creditor may not enforce any claim against the debtor. In the same vein, the debtor may not rely on extinctive prescription where the creditor timeously commences court proceedings or where the debtor had acknowledged liability before prescription takes effect.[6]

[14] In order to escape prescription the plaintiff's claim must have been instituted within three years from 11 August 2008; that is 11 August 2011. It is common cause

---

[2] Claasen C, J. 1979. *Dictionary of Legal words and phrases* (Vol 3 N-REQ).Durban: Butterworth's, p 186.
[3] Loubser M M. 1996.*Extencive Prescription.* Cape Town: Juta & Co, p 123.
[4] Daniels, H.2002. *Beck's Theory and Principles of Pleadings in Civil Actions* (sixth edt). Durban: LexisNexis, p 161.
[5] Stroud v Steel Engineering Co Ltd and Another 1996 (4) SA 1139 (W).
[6] Loubser, p 123.

that the claim was served on the defendant in September 2012. On the face of it therefore, the plaintiff's claim prescribed unless it can be shown that there was an acknowledgement of liability through part payment after prescription kicked in.

[15] According to Ms. Angula for the defendants the payments relied on by the plaintiff were the result of the pre-arranged protocol whereby the properties would be sold and the proceeds used to reduce the debt and not a voluntary payment amounting to an acknowledgement. In the alternative, Ms. Angula argued that the debt became due when the *dies* in the letter of demand expired, alternatively when the matter was transferred to the legal department of the plaintiff, at best on 1 October 2008. The debt therefore prescribed on 12 September 2011. Defendants' special plea, properly construed, amounts to this: payments made by the defendants in reduction of the outstanding debt beyond the date on which prescription would have operated unless interrupted, was a self-executing act by which the plaintiff cashed in on securities it held. In other words, it was not a voluntary act of payment by the defendants as, given that the properties served as security for the payments, the defendants could not have withheld payments realised on their sale.

[16] As regards the question whether the payments made on behalf of the defendant interrupted prescription, counsel for the defendants argued that in light of the fact that there were no part payments made that could have interrupted prescription, the debt would have prescribed by August 2011. Counsel argued in the alternative that the last payment acknowledged was on December 2009 and prescription would have kicked in then until December 2012. The amended particulars of claim were only served on 13 May 2013, which means that even if prescription was interrupted, the debt would still have prescribed.

[17] Ms. Bassingthwaighte, for the plaintiff, countered that on defendants' own admission, the last payment was done on 3 December 2009 and that prescription would not arise until 2 December 2012 since summons was served during September 2012.

[18] I will assume, without deciding, that the defendants are correct in saying that all the payments from the proceeds of sale were a self-executing act not capable of amounting to acknowledgement of liability. I also assume that they are correct in saying that the debt became due and payable at the very least on 11 August 2008. The original summons was served on first defendant on 26 July 2012 and on 26

September 2012 on second and third defendant. The amended particulars of claim were delivered on 7 March 2013.

[19] It is not disputed by the second defendant that he paid the amount of N$ 10 000 on behalf of first defendant on 3 December 2009 towards the loan after he made an undertaking to plaintiff's Ms Ben-Elungu to pay N$ 10 000 per month. In the plea to the amended particulars of claim the defendants admitted the plaintiff's allegation in paragraph 11.5 that the first defendant 'as part-payment' in respect of the amount outstanding, paid the amount of N$ 10 000 on 3 December 2009 and the amount of N$ 14 050 on 11 June 2010.

[20] Given the admissions, which are without any qualification, that the two payments were made as part payment towards the overdraft facility, the summons was served in September 2012 before the prescription period ran out in December 2012. The N$ 10 000 was paid by the second defendant on behalf of the first defendant after the former was advised by the plaintiff's Ms. Ben-Elungu what the outstanding balance on the OD facility was. How that cannot amount to an acknowledgement of liability defies logic and stands to be rejected. The prescription plea fails.

Balance of issues

[21] The parties' proposed pre-trial order dated 12 June 2013 identifies the remaining issues for determination by the court as follows:

a) Whether the parties during or about August/September 2007 agreed to a temporary extension of the overdraft limit in the amount of N$ 700 000 to expire on 31 December 2007;
b) Whether the first defendant failed to submit its audited financial statements before 31 March 2008;
c) Whether the full amount became due and payable on 31 March 2008, alternatively on 11 August 2008;
d) Whether the balance on the bank overdraft facility as at 11 August 2008 was the sum of N$ 2 020 657.00
e) Whether the first defendant made six payments towards the settlement of the debt as set out in para 11 of the amended particulars of claim;
f) When the amount of N$ 921 861.37 was paid over;
g) What was the balance outstanding after the aforementioned amount was paid?

[22] The remaining dispute really boils down to whether or not the plaintiff proved on preponderance of probabilities that the first defendant owes it the amount claimed. It bears the onus to show that after all part-payments, the first defendants' OD facility had not been cleared in respect of principal, interest and bank charges.

The evidence

[23] The plaintiff led the evidence of Ms. Elizabeth Tuukwatha Ben-Elungu (Ms. Ben-Elungu), its Manager: Legal Collections who dealt with the defendants when the matter was referred to the plaintiff's legal department for recovery of the debt; Ms. Delene Botha (Ms. Botha) who was the personal banker responsible for the defendants affairs at the plaintiff when they were experiencing financial difficulties with the credit facilities. This witness also dealt with the defendants before the matter was referred to the legal department. The other witness was Ms. Nikola Hayward (Ms. Hayward) who was the Manager: Credit Banking Manager for the plaintiff who was involved in the granting of credit facilities to the defendants.

[24] The second defendant, Mr. Paul Reynhardt Ockhuizen (Mr. Ockhuizen), testified on behalf of all the defendants, as one of the members in the first defendant. Mr. Ockhuizen was the person responsible for securing the credit facilities from the plaintiff.

[25] Having found that the prescription plea is bad, I will in my narrative of the rest of the evidence exclude evidence which was geared on either side to address that dispute, save in so far as an item of evidence has a bearing on the probabilities in the case.

Plaintiff's case

Ms. Ben-Elungu

[26] This witness testified that she dealt with the first defendant's account during October 2008 when it was referred to her department for collection. She testified that the first defendant had put up immovable properties as security for the debt on account 11000103715 which had an outstanding amount of N$ 2 027 903.29. In terms of the arrangements as regards collection, the first defendant was allowed to sell the properties privately so as to pay off the debt owing to the plaintiff. The first defendant made six payments towards the debt and the last payment of N$ 921

861.37 was made on the 27 August 2010. This accordingly reduced the debt to N$ 176 819.62.

[27] Ms. Ben-Elungu further testified that on 05 April 2011, the second defendant enquired about the outstanding balance on the account which, at that point in time, amounted to N$ 205 119.18 (principal debt plus interest) in respect of which the second defendant offered N$ 50 000, to be paid in instalments of N$ 10 000, in full and final settlement of the debt. She testified that the plaintiff did not accept this offer and made a counter offer for the second defendant to at least pay the capital debt of N$ 176 890.62 and 50% of the accumulated interest. According to her, no response was thereafter received from the second defendant until legal proceedings were instituted during 2012.

[28] It is clear from this witness' evidence that the second defendant did not deny liability up until April 2011 and that he acted in the capacity as a representative of the first defendant.

[29] It transpired during cross-examination that the initial agreement between the plaintiff and the first defendant was that the properties were to be sold to reduce the debt and that the outstanding debt was to be paid in instalments of N$ 10 000. Only one payment in that regard was paid by the first defendant on 3 December 2008. Subsequent thereto, the balance on the first defendant's account was written off in terms of the Bank of Namibia regulation which required an account, where there is no more security or where all properties have been realised, to be written off after a certain time frame. This witness was recalled to introduce some documents which included copies of deposit slips and cheques that were allegedly deposited on behalf of the first defendant.

Ms. Botha

[30] Ms. Botha testified that she dealt with the defendants for the first time in December 2007 during the time that the defendants were struggling to maintain their OD facilities with the plaintiff. Botha confirmed the temporary extension of the N$ 700 000 facility approved on 3 August 2007 until December 2007 and that the defendants approached her for a further extension until April 2008 for an additional increase of N$ 400 000. According to Ms. Botha, the additional funds were needed to

finish the building of houses in Kleine Kuppe and that the temporary facility would be reduced from the proceeds realised through the sale of these houses.

[31] Ms. Botha also testified that the defendants further advanced, as the reason for seeking the additional credit, that more proceeds would yield from the sale of other houses in Dorado Park during March- April 2008 which would be used to settle the OD facility. The temporary extension of N$ 700 000 was then extended until February 2008. The bank records did, however, not reflect the extension but Ms. Botha indicated that what shows is the charges for unauthorized excess limit which indicates that there is a charge levied (unauthorized excess charges) on the account for every debit entry per day which indicates that the facility had lapsed at that point.

[32] Ms. Botha testified that as of March 2008, the credit facility was cancelled because the defendants failed to provide financial statements which was the pre-requisite for the plaintiff to review the credit facilities. The plaintiff demanded payment during August 2008 after the defendants acknowledged the debt as being N$ 4.1 million. Ms. Botha however testified that as at 1 January 2008, the defendants owed N$ 4 169 140 to the plaintiff. Several attempts were made to sell the properties and extensions were granted to the defendants to settle the outstanding debt but that did not materialise. The matter was then referred to the Legal department for recovery.

Ms. Hauward

[33] This witness testified that she knew the second and third defendants since 2001 as the plaintiff's clients and since she was involved in most of the meetings where applications for facilities by the defendants were considered. She confirmed that an additional temporary extension in the amount of N$ 700 000 was approved on 3 August 2008 and again extended until 15 February 2009. Ms. Hauward testified that the credit facilities could not be reviewed and were cancelled because the defendants did not submit the financial statements. As a result, a letter of demand was served on the defendants during August 2008, which she co-signed, and the matter was thereafter referred to the legal department.

<u>Defendants' case</u>

Mr. Ockhuizen

[34] Mr. Ockhuizen testified that he, together with the third defendant, are members of the first defendant. The first defendant held two accounts with the plaintiff: one being an account for the development of houses in Kleine Khuppe, and an OD facility. He conceded that the plaintiff's claim concerns the OD facility the plaintiff had approved in the limit of N$ 1 130 000 and which was further reviewed on 13 April 2007- bringing the balance on that date at N$ 1 190 000. According to him, the special conditions of the agreement were that the houses constituted security for the repayment of the debt and as a result mortgage bonds were registered over the properties. Upon completion of the houses, the properties would be sold and the proceeds applied towards the OD. Mr. Ockhuizen testified that, to the best of his knowledge, the development account had been paid off when the last property was sold. As regards the submission of the financial statements, he testified that he never received the statements on the outstanding balance and was never informed of the requirement to submit the statements and that accordingly such statements were in any event not due by the time the plaintiff cancelled the facility.

[35] Mr. Ockhuizen testified that on 3 September 2008, the outstanding debt amounted to N$ 2 050 360.73 and that the following payments were allegedly made to the plaintiff by the defendants during the period of September 2008 - December 2009:

a) N$ 60 000 on 4 September 2008;
b) N$ 534 891.83 on 13 march 2009 (proceeds from the sale of house held as collateral for overdraft of first defendant);
c) N$ 749 000 on 12 may 2009 (proceeds from sale of house held as collateral for overdraft for first defendant);
d) N$ 10 000 on 3 December 2009;
e) N$ 14 050 on 11 June 2010 (by an unknown third party);
f) N$ 921 861.37 on 27 August 2010 (proceeds from the sale of a house held as collateral for overdraft for first defendant).

[36] Mr. Ockhuizen testified that the last payment made directly by the first defendant was on the 3 December 2009. Under cross examination, he could not verify the source of payments in the amount of N$ 120 000 made on 14 May 2008; N$ 100 000 paid on 11 July 2008 as well as other payments drawn on a standard

bank cheque account. As regards the proceeds from the sale of the properties held as collateral, Mr. Ockhuizen testified that the sale was done by the legal practitioners, PF Koep & Partners and the proceeds were paid directly into the account of PF Koep & Partners who after deducting their fees, paid to the plaintiff who in turn applied the proceeds towards the reduction of the outstanding debt by first deducting interest and bank charges. Only then, was the second defendant notified of the remaining balance.

[37] This witness admitted that the facility became due and payable on 31 March 2008 when the facility was cancelled, alternatively 11 August 2008 when the letter of demand was served. In view of the above payments, Mr. Ockhuizen testified that the outstanding amount is N$ 130 000 and not N$ 176 819.62 as claimed by the plaintiff. He admitted that on behalf of the first defendant he and third defendant offered N$ 50 000 in full and final settlement of the debt but that this tender was rejected by the plaintiff.

[38] I must state at once that there is incongruity in Mr. Ockhuizen's stance about the plaintiff's claim: on the one hand he says the account was according to him fully paid, yet he states that it is less than what the plaintiff claims. On the assumption it is less than what he claims, he does not even make any tender for the lesser amount he claims it to be.

[39] The evidence led on plaintiff's behalf shows on balance of probabilities that the second defendant knew that the plaintiff held the first defendant liable for an outstanding debt on the OD facility. The second defendant also knew that the debt on the OD facility attracted interest and that the amount outstanding fluctuated for that reason. It is clear both from plaintiff's witnesses and the evidence of Mr. Ockhuizen that the parties intermittently engaged each other concerning what the plaintiff's managers considered was the outstanding debt to the bank. In fact, it is apparent from the evidence of Mr. Ockhuizen that he accepted that the first defendant was in some amount indebted to the plaintiff. He knew from his conversations with Ms. Ben-Elungu and Ms. Botha what the plaintiff's officials considered the extent of that indebtedness was. He never disputed it in any serious way. All he did was to make an offer to pay N$ 50 000 in full and final settlement. That offer was rejected and a new counter offer made in the very amount that the

plaintiff claims, with 50 % interest. He never disputed that amount, which he should have if he genuinely believed the first defendant was no longer indebted.

[40] The plaintiff's managers tendered in evidence account statements showing opening balances at various stages during the currency of the OD facility, payments received, interest allocated and bank charges debited. Those transactions curiously include a credit of N$ 14 000. Curiously because the second defendant denies it came from the first defendant in order to defeat the plaintiff's claim of acknowledgement of liability. The probabilities favour the conclusion that a payment was credited towards a continuing liability which first defendant had on the OD facility.

[41] Some suggestion was made on behalf of the defendants that the inability to generate sufficient income from the first defendant's property development business was the reason it was unable to meet its commitments to the plaintiff. That is no legal defence to the plaintiff's claim. In my view, nothing turns on the concession made by the plaintiff's officials that at some point the debt was 'written off' in compliance with Bank of Namibia requirements. Quite clearly, that is no bar to recovering an outstanding debt.

[42] I am satisfied that the plaintiff has established on a balance of probabilities that the first defendant is indebted to it in the amount of N$ 176 819.62; that the said amount is due and payable and that the first defendant had failed to pay it. Second and third defendants are liable to the plaintiff on account of the sureties executed in plaintiff's favour in respect of first defendant's indebtedness.

Costs

[43] The plaintiff has proven its case against the defendants and is therefore entitled to its costs.

Order

1. The defendants' special plea of prescription is dismissed.

2. The defendants are ordered to pay to the plaintiff, jointly and severally, the one paying the other to be absolved the amount of **N$ 176 819.62;**

3. Interest on the aforesaid amount is awarded to the plaintiff at the rate of 20% per annum, calculated and capitalised monthly as from the 27 August 2010 to date of full payment.

4. Costs, are awarded to the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

_____

PT Damaseb

Judge-President

5.

6.

Appearance:

Plaintiff	N Bassighweighthe
Instructed by:	Dr Weder, Kauta & Hoveka Inc, Windhoek
Defendants	E Angula
Of	AngulaColeman, Windhoek