

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1784/2016

In the matter between:

NEAVERA FRANSISCA OLIVIER

PLAINTIFF

And

VINCENZIO MAXIMILLIAN OLIVIER

DEFENDANT

Neutral citation: *Olivier v Olivier* (I 1784/2016) [2018] NAHCMD 223 (20 July 2018)

Coram: USIKU, J

Heard on: 16 July 2018

Delivered: 20 July 2018

Flynote: Prescription – Special plea – Prescription – Plaintiff claiming proceeds from sale of immovable property – Immovable property was ordered to be transferred to the Plaintiff in terms of a Final Order of Divorce – Plaintiff and Defendant agreeing that

immovable property be sold and proceeds be paid to Plaintiff after settlement of the mortgage bond amounts on the property – Defendant alleging that Plaintiff's debt has prescribed – Court holding that the debt originates from a court order and has therefore not prescribed.

Summary: The Plaintiff instituted an action against the Defendant for payment of N\$ 256.711.01. That amount constitutes the balance amount, after payment of mortgage bond, from the proceeds of a sale from an immovable property, to which the Plaintiff was entitled in terms of a Final Order of Divorce. The Defendant alleged that the Plaintiff's claim has prescribed. The court held that the claim originates from a court order and has not prescribed.

ORDER

Judgment is hereby granted in favour of the Plaintiff against the Defendant, in the following terms:

- 1) payment in the amount of N\$ 256,711.01,
- 2) interest at the rate of 20% per annum on the aforesaid amount calculated from 25 October 2001 to date of final payment,
- 3) Costs of suit,
- 4) the matter is removed from the roll and regarded finalized.

RULING

USIKU, J:

Introduction

[1] On the 16 October 1998 this court granted a final order of divorce, dissolving the bonds of marriage then existing between the Defendant and the Plaintiff. In terms of that order, a settlement agreement entered into by the parties was made an order of court. The relevant provisions of the settlement agreement are that:

- (a) the immovable property situated at Erf 3116, Pasteur Street, Windhoek, becomes the sole and exclusive property of the Plaintiff, and that,
- (b) the Defendant undertakes, at the date of the Final Divorce, to sign all documents necessary to transfer the aforesaid immovable property into the name of the Plaintiff.

[2] On the 15 October 2001 and with the consent of the Plaintiff, the Defendant sold the aforesaid immovable property to a third party for the amount of N\$ 830 000.

[3] On or about the 25 October 2001 the Defendant settled the outstanding bond on the immovable property of N\$ 553 288.99, from the proceeds of the aforesaid sale, leaving the balance due and payable to the Plaintiff in the amount of N\$ 276 711.01.

[4] According to the evidence of the Plaintiff, the Defendant later made payment of N\$ 20 000.00 to the Plaintiff, reducing the N\$ 276 711.01 debt to the Plaintiff to a balance amount of N\$ 256 711.01.

[5] On or about the 06 June 2016, the Plaintiff initiated the present action against the Defendant praying an order for:

- a) payment in the amount of N\$ 256 711.01.
- b) interest at the rate of 20% per annum on the aforesaid amount calculated from 25 October 2001 to date of final payment, and,
- c) costs of suit.

[6] The Defendant raised a special plea of prescription against the Plaintiff's claim, indicating that according to the Plaintiff's particulars of claim the debt became due and payable on or about 25 October 2001 or November 2001. The Defendant therefore states that more than six years have gone by since payment was due by the Defendant to the Plaintiff, and thus the Plaintiff's claim had prescribed at the date when summons were served on the Defendant in these proceedings.

[7] On the 16 July 2018, just before trial proceedings commenced in respect of this matter, the court pointed out that in terms of a court order dated the 20 November 2017, the parties were ordered to file their respective witness statements on or before the 29 January 2018, however the Defendant filed his witness statement only on or about 02 March 2018. The court then invited the Defendant to address the court and show cause why the Defendant should be permitted to give oral evidence when such time comes.

[8] After hearing oral submissions from both parties, this court held that the Defendant has not shown good cause why he has not served his witness statement within the time specified in the relevant court order, and that the Defendant would not be allowed, in terms of Rule 93(5) to give oral evidence. The Defendant was aware of his non-compliance with the relevant court order as of 02 February 2018, as such non-compliance was raised in paragraph (d) of the parties' proposed pre-trial order filed on

05 February 2018. Despite such awareness, the Defendant took no positive steps to make the necessary application for condonation.

[9] The Plaintiff gave evidence and called one witness. The Plaintiff thereafter closed her case.

[10] The Defendant applied for absolution from the instance, in essence raising the special plea of prescription as outlined earlier.

[11] The court is therefore presently called upon to determine the issues arising from the special plea. The court invited the parties to address the court whether, after ruling on the special plea, it would be necessary to afford the parties an opportunity to raise further arguments. The Plaintiff indicated that she would have no further arguments to make. The Defendant's response was non-committal.

[12] I am of the opinion that after disposing of the issue of the special plea, in view of my ruling that the Defendant shall not be allowed to give oral evidence, there would be no need for further arguments. I would therefore give my order on the whole matter after disposing of the special plea.

The Special plea

[13] The Defendant argues that the Plaintiff's claim has prescribed, as more than 6 years had passed since the Plaintiff's debt arose.

[14] The Plaintiff contends that the Plaintiff's claim originates from the Final Order of Divorce dated the 16 October 1998, and the claim has therefore not prescribed.

Analysis

[15] Most of the material facts in this matter are not in dispute, as more fully appears from paragraph (c) of the Pre-Trial Report made order of court on 13 February 2018.

[16] It appears that the crucial issue in dispute is whether or not the Plaintiff's claim has prescribed in terms of the provisions of the Prescription Act, 68 of 1969.

[17] I am of the opinion that the obligation of the Defendant to transfer the immovable property (or the value thereof) into the name of the Plaintiff originates from the Final Order of divorce (a court order) dated the 16 October 1998; which made the settlement agreement entered into by the parties an order of court.

[18] The fact that the value of the immovable property was converted into cash, did not change the nature of source of the obligation (which is the court order) to transfer or deliver the property or value thereof to the Plaintiff.

[19] In view of the reasons foregoing, the Plaintiff's claim has not prescribed and the special plea put forth by the Defendant is therefore rejected.

Payment of interest

[20] The Plaintiff claims interest on the amount of N\$ 256 711.01 at the rate of 20% per annum calculated from 25 October 2001 to date of final payment.

[21] The Plaintiff contends that the Defendant has sold the immovable property in question, with the consent of the Plaintiff, on 15 October 2001, and after the Plaintiff had paid off the outstanding bond amounts, on 25 October 2001, that left the balance amount due and payable to the Plaintiff. In other words the Defendant was in mora, as from 25 October 2001 for the purposes of interest payment on the outstanding amount.

[22] I am satisfied that the Plaintiff has made out her case in respect of payment of interest, from 25 October 2001, and I shall grant her an order in that respect.

Conclusions

[23] In the result, the application for absolution from the instance, in the form of special plea, raised by the Defendant is dismissed. The Plaintiff succeeds in her claim, and I make the following order:

Judgment is hereby granted in favour of the Plaintiff against the Defendant in the following terms:

- a) payment in the amount of N\$ 256,711.01,
- b) interest at the rate of 20% per annum on the aforesaid amount calculated from 25 October 2001 to date of final payment,
- c) costs of suit.
- d) the matter is removed from the roll and regarded finalized.

B Usiku
Judge

APPEARANCES

PLAINTIFF : EM Angula
of AngulaCo Inc, Windhoek

DEFENDANT: A Vaatz
of Adreas Vaats & Partners Inc, Windhoek