

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: ISMAEL GARISEB v KARL REIMANN	Case No: HC-MD-CIV-ACT-OTH-2020/03904
Heard before: Honourable Lady Justice Rakow J	Division of Court: Main Division
	Date of hearing: 29 October 2021
	Delivered on: 16 November 2021

Neutral citation: *Gariseb v Reimann* (HC-MD-CIV-ACT-OTH-2020/03904) [2021] NAHCMD 533 (16 November 2021)

IT IS ORDERED THAT:

1. Plaintiff's cause of action against first, seventh to ninth defendants, has prescribed in terms of sections 10 to 12 of the Prescription Act of 1969.
2. Plaintiff's cause of action against second to the sixth defendants has prescribed and in terms of Section 39 of the Police Act, Act 19 of 1990.
3. The tenth defendant was never served but the effect of sections 10 to 12 of the Prescription Act, Act 68 of 1969, would have been the same, i.e. the claim is extinct by virtue of prescription.
4. Defendants are awarded costs of suit.
5. The matter is removed from the roll and regarded as finalized.

Reasons

RAKOW J,

Background

[1] Mr Ismael Gariseb (plaintiff) on 23 September 2020 instituted summons claiming

damages against Mr. Karl Reimann (a farmer in the Gobabis, Omaheke District), the Inspector-General Of The Namibian Police, the Minister for Safety And Security, the Omaheke Regional Police Commander, Mr. Hermanus Goagoseb (Investigating Officer), Mr. Herman Van Wyk (Chief Inspector at the Anti Stock Theft Unit at Gobabis Police Station), Ms. Desire Kamboua (magistrate who convicted the plaintiff), The Minister Of Justice, The Permanent Secretary (Ministry Of Justice), The Messenger Of Court (Gobabis District).

[2] The plaintiff's claim arose as a result of an arrest on a Stock Theft case, in which him and four others were arrested and subsequently convicted of theft of goats from the first defendant's farm. The arrest took place on 10 May 2014. The plaintiff's motor vehicle, a metallic grey Toyota pick-up Hilux with registration number N 44839 W VVTI LWB 2X4 delivery bakkie, was as a consequence impounded on even date and kept at the Gobabis Police Station, on suspicion that it was used to commit the crime. The motor vehicle was kept in police custody until 10 August 2014.

[3] The plaintiff contends that the correct legal procedure was not followed when his motor vehicle was impounded, as there was no court order or any written authority from the prosecution to detain the motor vehicle. This contention is on the basis that when he was released on bail, he approached the prosecutor on the matter, who confirmed to him that the state had not given any order or instruction for the motor vehicle to be impounded. When he approached the investigating officer (the fifth defendant) regarding the release of his motor vehicle, he was informed that the vehicle will only be released on permission from Mr. Herman Van Wyk (the sixth defendant). It is alleged that the sixth defendant then refused to grant this permission. It is further alleged that the sixth defendant then informed the plaintiff to secure the services of a legal practitioner, who should assist him with making an application to court for the release of the vehicle.

[4] The first defendant subsequently instituted civil proceedings against the plaintiff and his co-accused. On 21 August 2014, the sixth defendant released the vehicle to the plaintiff, after which the messenger of the Gobabis magistrate court informed him that they had instructions to impound the vehicle, and then proceeded to tow the vehicle away.

[5] The seventh defendant presided over the civil case instituted by the first defendant

against the plaintiff and his co-accused. She ruled in favour of the first defendant and ordered that the plaintiff and his co-accused should compensate the first defendant for the theft.

[6] The plaintiff contends that before his arrest, he used to generate an income from a transport business in which he used the impounded vehicle, as a result of the vehicle being impounded, he was unable to generate an income and compensate the first defendant in full as ordered by the seventh defendant. He however, made some payments. As a result of his default, the first defendant obtained another order from the seventh defendant enabling him to auction off the plaintiff's motor vehicle and recover the remaining amount.

[7] It is the plaintiff's contention that the proceedings in the lower court which include amongst others, the order in favour of the first defendant for compensation and the order allowing the auction of his motor vehicle, were not in accordance with the law and procedure and went against the requirements of a fair trial.

[8] He further contends that upon finding out that the vehicle was set to be sold on auction, he had to engage the services of a legal practitioner in the amount of N\$ 3 500.00, to assist him in staying execution and contacting the bank to repossess their vehicle as he was no longer in a position to comply with the instalment sale agreement. He claims this was due to the actions of the defendants, who deprived him from making an income with his vehicle from 10 May 2014 to 30 August 2014. The plaintiff also avers that he had tenders to transport stock for a shop in the Buitepost village to and from Gobabis, he used to transport charcoal and charcoal workers, he used to transport firewood to various customers, transporting livestock to auctions for the farmers in the Omaheke district, transporting his children to school, etc. He therefore suffered loss of income as he was deprived of making an income with his vehicle the defendants.

[9] The plaintiff therefore claims damages against the defendants in the amount N\$ 3 718 660 Namibian Dollars plus 20% interest on that amount. The amount claimed includes amongst others, loss of income due to the alleged unlawful, arbitrary, intentional detention and impounding of personal property, emotional and psychological shock, pain, suffering, defamation and deprivation of his constitutional rights to a fair trial, etc. He seeks for the court to declare both the civil and the criminal judgement including the

sentence unconstitutional and set aside. He seeks an apology from the defendants, which is to be published in the three main newspapers. He further seeks costs against the defendants.

The Special Plea of Prescription

[10] Mr. Tjiteere on behalf of the first defendant raised a special plea of prescription. He submitted that the summons were only served on the first defendant during July 2021. The date of service is approximately 6 years and 6 months after the cause of action arose. Therefore, the plaintiff's claim has prescribed in terms of s 10 read with s 11 (d) of the Prescription Act 68 of 1969.

[11] Ms. Van der Smit appeared for the second to ninth defendants. She a special plea of prescription in terms of section 39(1) of the Police Act 19 of 1990 in respect of the second to sixth defendants and section 11(d) of the Prescription Act 68 of 1969 in respect of the seventh to ninth defendants. She further an additional point of law relating to improper process followed by the plaintiff to bring his claim for his criminal sentence and civil judgment against declared unconstitutional and set aside. Similar to Mr. Tjiteere, she held the position that the plaintiff's claim, against the second to ninth defendant, had prescribed.

[12] The plaintiff in his heads of argument submitted that his claim could not have prescribed as it did not arise in 2014, but rather in 2019 after he had received advice from a fellow inmate that he that he could institute action against the defendants. In this regard the plaintiff relied on section 12 (2) which provides that if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. This is founded upon the plaintiff's averments that the defendants herein wilfully prevented or failed to disclose evidential proof to him as a lay litigant that he had an actionable case against them as a result of their wrongdoing.

The applicable law

[13] Section 10 of the Prescription Act, provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of the prescription of that

particular debt. Section 11(d) provides then that the period of prescription of debts in respect of any other debt, shall be 3 years.

[14] Section 12(1), alludes to the fact that prescription commences to run as soon as the debt is due and then section 12(3) provides that, a debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. It is common cause between the parties that the plaintiff was aware of the debtors in this matter as early as 2014, as he knew the investigating officer on his matter, he knew of the alleged unlawful impounding of his vehicle, he knew of the refusal to release his vehicle, he knew of the civil judgement against him and as a result was aware that it was the first defendant who instituted it against him and his co-accused, he knew the magistrate who presided over his civil case and gave the order to have his vehicle auction, etc.

[15] The debt against the first, seventh to ninth defendants has prescribed in terms of section 11 (d) of the Prescription Act and therefore stands to be dismissed.

[16] Section 39(1) of the Police Act 19 of 1990 limits the time during which litigation may be launched against the State and requires at least thirty days' notice before litigation is commenced. It provides as follows:

'39. (1) Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within 12 months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than 1 month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection.'

[17] From the reading of the plaintiff's papers the plaintiff's claim against the second to sixth defendant, arose during May – August 2014, it does not appear as though he served the notice as required by the abovementioned section of the Police Act, nor is it indicated that he sought a waiver from the Minister to grant him an exemption to bring his claim outside of the period contemplated in section 39(1). He then only instituted his action approximately 6 years later on 23 September 2020. It is clear that there was non-compliance with section 39(1). It therefore follows that, the plaintiff's claim in respect of the second to the sixth defendants has prescribed and stands to be dismissed.

[18] There appears to be no service effected upon the 10th defendant, as a result, the claim against him/her is accordingly dismissed.

[19] The consequence of the special plea of prescription being upheld is that the claim against the first to ninth defendants is to be dismissed and I will therefore not deal with the second point of law raised by the government defendants, nor with the rest of the merits in this matter.

[20] It is further trite that the cost should follow the cause and in this instance I cannot see any reason why it should not be the case. The defendants are therefore awarded cost of suit.

[21] In the result:

1. Plaintiff's cause of action against first, seventh to ninth defendants, has prescribed in terms of sections 10 to 12 of the Prescription Act of 1969.
2. Plaintiff's cause of action against second to the sixth defendants has prescribed and in terms of Section 39 of the Police Act, Act 19 of 1990.
3. The tenth defendant was never served but the effect of sections 10 to 12 of the Prescription Act, Act 68 of 1969, would have been the same, i.e. the claim is extinct by virtue of prescription.
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Judge's signature:	Note to the parties:
Counsel:	
Plaintiff(s)	Defendant (s)
Mr. I Gariseb (in person)	Mr. M Tjiteere Of Dr Weder, Kauta & Hoveka Inc. (for the first defendant) And Ms. C Van der Smit Of

	The Office of the Government Attorney (for second to ninth defendants)
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