

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-OTH-2017/00119

In the matter between:

MBELLE PANEL BEATERS & TRANSPORT CC

PLAINTIFF

and

FERNANDA WILLEMSE

DEFENDANT

Neutral citation: *Mbelle Panel Beaters & Transport CC v Willemse* (HC-NLD-CIVACT-OTH-2017/00119) [2018] NAHCNLD 21 (12 March 2018)

Coram: CHEDA J

Heard: 20 - 21 February 2018

Delivered: 12 March 2018

Flynote: In order for a party to succeed under the Prescription Act 68 of 1969, it should show that there was (a) an obligation which is against him; (b) performance must be due; and (c) must be or is deemed to have been aware of the nature of the contract.

Mora is in three categories, thus: (a) *Mora ex lege*, that is arising out of the operation of law; (b) *Mora ex re*, arising from the contract itself; and (c) *Mora ex persona*, performance expected within a reasonable time. A letter of demand is not a legal

process and therefore does not interrupt the running of the prescription period - Where the debtor is in *mora ex re* there is no need for the plaintiff to write a letter of demand. Special plea upheld.

Summary: Plaintiff and defendant entered into an agreement wherein defendant was supposed to pay the amount of N\$127 064-54 by the 31st December 2013. Defendant failed to do so. Plaintiff did not demand payment then or institute legal proceedings when the debt became due and payable. Plaintiff served defendant with summons commencing action on the 2nd of May 2017, a period of over 3 years from the date the debt become due. Plaintiff had written a letter of demand on the 8th of April 2016. Defendant applied for a special plea on the basis that the debt had been prescribed. It was held that a letter of demand is not a legal process. Summons is a legal process and was issued after the prescription period had lapsed. The special plea was upheld with costs.

ORDER

The special plea is upheld with costs.

JUDGMENT

CHEDA J:

Prescription

[1] This is an application for a special plea on the basis of effects of the prescription period.

[2] Plaintiff is a panel beating company carrying on business in accordance with the laws of Namibia and operating in Oshakati, while defendant is employed by Toyota Pupkewitz, Oshakati.

[3] It is plaintiff's assertion that it entered into a contract with defendant on the 12th of November 2013 wherein plaintiff undertook to effect certain repairs on a motor vehicle being a Toyota Hilux VVTI double cap which was brought to their premises by defendant and plaintiff was made to believe that it belonged to defendant.

[4] Certain repairs were effected on it and it was part of the agreement that defendant was to pay the sum of N\$127 064.54 on or before the 31st of December 2013. Defendant denied these allegations. According to her plea and witness statement filed, she stated that plaintiff knew that the motor vehicle belonged to one Mr Neto.

[5] Plaintiff averred that he did not receive payment both from either Mr Neto or defendant and as a result of this failure, plaintiff issued summons out of this court against defendant which summons was defended. The matter proceeded to trial stage. However, defendant has now filed an application for a special plea on the grounds that the debt has been prescribed.

[6] This is the issue before this court for determination. In order to make a proper and full determination of this matter it is essential that a historical and factual background be given. It is common cause that plaintiff effected repairs on the above motor vehicle and was expecting the sum of N\$127 064.54 for its services. No payment has been made either by defendant or Mr Neto

[7] It is, however, not clear at this stage as to who owes plaintiff. This question would have been relevant at a later stage, but, in light of this application, it is not necessary to delve into that now. I will, therefore, deal with the special application plea. However, plaintiff is of the strong view that, it is defendant who should pay and not Mr Neto. It is for that reason that, plaintiff issued out summons against defendant which was served on the 2nd of May 2017.

[8] Prior to the summons, plaintiff had written a letter to defendant on the 8th of April 2016 demanding payment for services rendered as per the invoice which had been submitted to them. Defendant did not respond to the said letter.

[9] The court is now called upon to determine whether or not the debt owed by defendant is prescribed or not. It has been submitted by Ms Nambinga for defendant that the debt has been prescribed as it was due for payment on the 31st December 2013, and that the letter of demand of the 8th April 2016 did not interrupt the prescription period. Consequently, the summons has no legal effect.

[10] She referred the court to the provisions of the Prescription Act 68 of 1969, in particular sections 11(d) and 12(1) which provides thus:

'11 Periods of prescription of debts

The period 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.'

[11] Further section 12(1) provides thus:

'12 When prescription begins to run

(1) subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.'

[12] That the claim made is a debt admits of no doubt as service was rendered, but, payment was not made. Ms Nambinga also referred the court to the matter of *Namibia Liquid Fuels (Pty) Ltd v Engen Namibia (Pty) Ltd* (I 836/2011) [2014] NAHCMD 113 (31 March 2014) where the principle of prescription was dealt with.

[13] It was further her argument that the debt became due and payable on the 31 of December 2013 and defendant was placed in *mora* as of that date. This was the thrust of her argument.

[14] On the other hand, Ms Tjihero for defendant argued that the prescription period was interrupted by defendant's letter of demand of the 8th of April 2016, therefore, the debt was at the time still live, so to speak.

[15] There are four issues which call for interrogation and crystallization in this matter, namely;

- (a) mora;
- (b) letter of demand;
- (c) legal process; and
- (d) prescription

Mora

[16] The concept of mora is employed as a consequence of a party's failure to carry out an obligation within a stipulated time or reasonable time, depending of course on the nature of the contract. In the commercial world we live in time is the common and effective element of almost our daily transactions. A party who is obliged to pay a debt by a certain date, but, fails to do so is in mora. In as much as the creditor is entitled to enforce his right when the debtor in mora he/she must prove that three essential elements are in existence, namely that;

- (a) there is an obligation which favours him/her;
- (b) performance is due; and
- (c) the debtor is or is deemed to have been aware of the nature of the contract.

[17] There are categories in which mora lies and is exercised namely;

- (a) *Mora ex lege*, that is arising out of the operation of the law.
- (b) *Mora ex re*, arising from the contract itself; and
- (c) *Mora ex persona*, performance expected within a reasonable time.

[18] In *casu*, the court is faced with *mora ex re* as the contract had a stipulated time for performance and I will therefore not examine the other two categories.

Letter of demand

[19] It has been argued by defendant that the letter of demand interrupted the prescriptive period. However, Ms Tjihero for plaintiff has argued that the letter of demand is part of the legal process and, therefore, it interrupted the prescriptive period.

[20] In my view a letter of demand is generally the initial step a creditor takes before commencing legal action against a debtor. It is, therefore, not a legal process as it is a warning of legal action that will be taken in the event of one's failure to discharge his/her obligation to the creditor. For that reason a mere letter of demand is insufficient to qualify as a legal process. It is the issuance of and service of summons or some such other issued court process which qualifies as a legal process. This principle was dealt with in *Cadac (Pty) Ltd v Weber-Stephen Products Co* 2011 (3) SA 570 (SCA) and had been unquestionably applied in many other matters in this jurisdiction.

Legal process

[21] As pointed out above a legal process is clearly distinguished from a letter of demand. It falls in the category of its own. It is trite that a legal process is a series of actions, as a writ, warrant, mandate, subpoenas, citations, complaints or any other process issued from a court of justice. It is a document which by its very nature needs to be served by a member of court or Deputy Sheriff.

Prescription

[22] This is a process which entitles a claimant to act within a given period thereby enforcing its legal rights. At the same time it protects a debtor from being perpetually indebted to the creditor. It is an effective way of creating or destroying rights which rights must be exercised within a set period or reasonable period. Section 15(1) of the Act under discussion states thus: '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. In addition to this, section 14(2) states: '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.'

[23] The determining factor is whether the debt claimed by plaintiff was, at the time of the issuance of summons under the Prescription Act was within the prescriptive period. In terms of the Act under discussion, a debt is prescribed after three years from the time it became due and payable. In *casu* defendant was supposed to pay the debt by the 31st December 2013, but, failed to do so. The question then is, when did he become in *mora*?

[24] The contract between the parties was that defendant should pay by the 31st December 2013. The fact that she failed to do so, was a breach of the contract and she was therefore in *mora*. The prescription began to run from the date the debt become due and payable. This has been the stance of our courts, see *Wellman v Hollard Insurance Co of Namibia Ltd* 2013 (2) NR 568 (HC) at p 582 para 75. In addition to this, there should be an obligation to perform immediately, see *Van Reenen v Santam Ltd* 2013 (5) SA 595 (SCA) at para 12. Defendant had a duty to perform, his failure to perform fulfilled one of the requirements of a *mora*.

[25] At this point plaintiff was within its right to demand payment and/or institute legal proceedings immediately when defendant became in *mora*. The debt was due and payable on the 31st of December 2013 and defendant was obliged to settle this debt then.

[26] Plaintiff has argued that its letter of demand interrupted the prescription period. From my reading of the law, it cannot be and unfortunately I found no case authorities to support plaintiff's position.

[27] The correct legal position is that laid down by the authorities (*supra*) which view I subscribe to, is that where the obligation is created by contract, *mora ex re*, no

demand (*interpellation*) is necessary to place the debtor in *mora*, because, the fixed time makes the demand that would otherwise have to be made by the creditor (*dies interpellat pro homine*), see R H Christie, *The Law of Contract in South Africa* (1981) p 483. This principle has been part of our law for a long time. In fact in, *Laws v Rutherford* 1924 AD 261 at 262 Innes, JA remarked:

'It is the same principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand; *dies interpellat pro homine*, and the debtor is in *mora* if he fails to pay on the appointed day.'

[28] This is the law and has been applied persistently and consistently in our courts, see *Cohen v Haywood* 1948 (3) SA 365 (A) and *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T). Its application is very strict as it has to be applied irrespective of how hard the result may be as long as the time lines are clear and have not been met.

[29] In that regard the court has no authority or power to extend the time fixed by the contract to meet a hard case, see *Chomse v Lotz* 1953 (3) SA 738 (C). The only time where a demand for payment can be made in order to place the debtor in *mora* is when no time has been stipulated and that situation is governed by *mora ex persona*, see *Louw v Trust Administrateurs Bpk* 1971 (1) SA 896 (W) see p 903 E-G where *Colman J* stated:

'(c) If no time for performance was stipulated, but it is clear that immediate performance was contemplated, and that immediacy was essential by reason of the subject matter of the contract or the relevant circumstances....

(d) If no time for performance was expressly stipulated in the contract, but by necessary implication it can be shown that performance by some specific time was intended, and was essential.'

[30] It is defendant's argument that the running of prescription was interrupted by a letter of demand. If, I understand this argument correctly, it means that prescription would have been interrupted by the operation of law, that is judicial interruption. This infact is provided for under the Act of which section 15(1) reads:

'15 Judicial interruption of prescription

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

[31] As pointed out above, the letter of demand is not a legal process and therefore it did not interrupt the prescriptive period. There was no reason for plaintiff to write a letter of demand when its rights were already established and guaranteed by the Prescription Act. Whatever, attempts plaintiff in trying to interrupt the running of the prescription period, was of no legal force or effect as it had already failed to exercise its right as soon as defendant became in *mora* on the 31st of December 2013.

[32] The act under consideration renders a right to enforce a right to sue after the time lapse unenforceable. The necessity for this is based purely on the principle of the need for finality in litigation. A party that fails to act within the time limits set either, contractually (*mora ex re*) or within a reasonable time, (*mora ex persona*) or by operation of law (*mora ex lege*) cannot attract the court to its aid as the prescription period would have kicked in. In *casu* plaintiff failed to exercise its right, it has no one to blame, but, itself.

[33] In light of the above, I find that defendant's application for a special plea for prescription is well founded and I can do no better than agree with defendant's legal practitioner's submissions and therefore reject those of plaintiff as they lack legal support. The following is the order of court:

1. The special plea is upheld with costs.

M Cheda
Judge

APPEARANCES:

PLAINTIFF:

S Nambinga
Of AngulaCo Inc., Ongwediva

DEFENDANT:

C Tjihero
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva