REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING ON SPECIAL PLEA OF PRESCRIPTION

Case no**:** HC-NLD-CIV-ACT-CON-2021/00116

In the matter between:

SAMUEL KAXUXUENA **PLAINTIFF**

and

HOT SHOOT TRADING CC **DEFENDANT**

Neutral citation: *Kaxuxuena v Hot Shoot Trading CC* (HC-NLD-CIV-ACT-CON-2021/00116) [2022] NAHCNLD 29 (28 March 2022)

Coram: MUNSU, AJ
Heard on: **24 February 2022**
Delivered: **28 March 2022**

Flynote: Practice - Special plea of prescription – damages arising from breach of contract - whether the damages constitutes a debt as provided for in the Prescription Act - Defendant bears onus to prove that the debt has prescribed – when prescription begins to run in claims for damages.

Summary: In this matter the court is seized with a special plea of prescription raised by the defendant. The Parties entered into an agreement wherein the defendant undertook to effect certain repairs to the Plaintiff's vehicle engine in a workmanlike and efficient manner and within a reasonable time. The defendant breached the agreement and the plaintiff forthwith cancelled the agreement. In the result, the plaintiff claims for damages arising from the breach. The defendant maintains that the claim constitutes a debt as defined in the Prescription Act 68 of 1969 (the Prescription Act) and such debt has prescribed. In essence the court was tasked with deciding whether the plaintiffs claim fell within the parameters of a debt as described by the Prescription Act, if so, whether it had prescribed. The court in its considerations found as follows:

Held: that the debt is the claim for damages that arose from the alleged breach of the agreement.

Held that: the agreement between the parties did not fix a specific time for performance, and in such an instance the law makes provision for an inference that such performance must be carried out within a reasonable time and this reasonable time is decided with reference to the nature of the agreement between the parties and the interrelationship of the obligations undertaken.

Held further that: the conduct of the parties suggests that the agreement remained alive until 10 July 2020 when the plaintiff inspected the vehicle, cancelled the agreement and took possession of the vehicle.

Held: that a debt becomes due when the plaintiff has a complete cause of action at the stage of the issuance of summons or at the time of service of summons.

Held that: prescription begins to run, not when the reneging party repudiates the contract, but rather when the innocent party communicates its acceptance of such repudiation to the repudiating party and elects to cancel the agreement.

Held further that: the onus rests on the defendant to prove that the claim has prescribed.

Held: that the special plea failed to set out relevant facts dealing with the repudiation of the contract and whether such repudiation had been accepted and forthwith communicated.

Held that: the plaintiff's cause of action arose at the date of cancellation of the agreement, and from that date the debt became due and prescription began to run.

In the result the court found that the debt had not prescribed and dismissed the special plea of prescription with costs.

ORDER

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1. The special plea of prescription raised by the defendant is dismissed.
2. The defendant is ordered to pay costs of the special plea which shall not be subject to rule 32(11).
3. The matter is postponed to 25 April 2022 for a case management conference.
4. The parties are directed to file a joint case management report on or before 20 April 2022.

RULING

MUNSU, AJ:

Introduction

[1] At issue in this ruling is a special plea of prescription raised by the defendant against the relief sought by the plaintiff. The object of the said plea is to quash the plaintiff's action altogether.

Parties and representation

[2] The plaintiff is Samuel Kaxuxuena an adult male employed as a priest and residing at Oshandi Anglican Church, Ondobe, Ohangwena Region.

[3] The defendant is Hot Shoot Trading CC, a close corporation duly registered and incorporated as such with its place of business situated 500m from Eenhana on the Eenhana – Oniipa main road.

[4] Where reference is made to both the plaintiff and the defendant, they shall be referred to as 'the parties'.

[5] The plaintiff is represented by Mr. Jan Greyling (Junior) while the defendant is represented by Mr. Hifindaka.

Background

[6] The plaintiff instituted action against the defendant for damages in the amount of N$ 69 476 arising from an alleged breach of the agreement entered into by and between the parties. According to the particulars of claim, on or about 04 April 2018, and at the defendant's place of business, the parties entered into an oral agreement in terms of which the defendant undertook to effect certain repairs to the plaintiff's vehicle engine, a Toyota Fortuner bearing registration number N 69824 W.

[7] The alleged express and/or implied, alternatively tacit terms of the agreement were that:

a) The defendant would disassemble the engine of the plaintiff's vehicle, source the necessary parts and repair same in a workmanlike and efficient manner;
b) The defendant would complete the repair works within a reasonable period;
c) The defendant would exercise a reasonable duty of care towards the plaintiff's vehicle, its components and parts whilst the vehicle is in the defendant's care;
d) The defendant would present the plaintiff with the costs of the parts and labour once all of the repair works are completed and plaintiff would effect payment.

[8] The plaintiff alleges that he complied with his obligations in terms of the agreement in that he made the vehicle available to the defendant to effect the repairs.

[9] The plaintiff further alleges that the defendant breached the agreement by:

a) Failing to source the necessary parts and/or failed to effect the repairs within a reasonable time despite the plaintiff's indulgence;
b) Failed and/or neglected to exercise the necessary skill and attributes to attend to the repairs in a workmanlike and efficient manner in that when the defendant gave possession of the vehicle to the plaintiff, very little or no oil was circulating through the engine compared to a similar standard operating engine;
c) Failed and/or neglected to exercise a duty of care towards the plaintiff's vehicle in that when defendant gave possession of the vehicle to the plaintiff, some parts were broken and/or missing;

[10] As a result of the alleged breach by the defendant, the plaintiff cancelled the agreement on or about 10 July 2020, inspected the vehicle, and took possession thereof. The plaintiff alleges that he suffered damages in the amount of N$ 69 476.20 being the reasonable cost of suitable replacement parts and labour to affix the parts to the plaintiff's vehicle, which the defendant failed and/or neglected to pay to the plaintiff despite demand.

<u>The special plea</u>

[11] In response to the plaintiff's claim, the defendant raised a special plea of prescription as follows:

1. The cause of action ("the claim") sued upon arose on 04 April 2018.
2. The plaintiff's claim constitutes a debt as defined by the Prescription Act, 68 of 1969 ('the Prescription Act')
3. The summons in this action were instituted against the defendant on 26 April 2021, that is, more than 3 years after the claim arose.[1]
4. In the premises and by virtue of section 11 of the Prescription Act, the plaintiff's claim has become prescribed.

[12] I should add that the defendant also proceeded to plead over on the merits of the plaintiff's claim. However, the issue for determination at this stage is limited to the special plea.

[13] The court is called upon to decide, firstly, whether the plaintiff's claim is a debt as envisaged by the Prescription Act. The second issue for determination is captured differently by the parties. According to the defendant, the issue is: when did the plaintiff's claim become due – at the breach of the agreement or at the cancellation of the agreement? According to the plaintiff, the issue is: when did the plaintiff's claim become due? - On the date of conclusion of the agreement or on the date of termination of the agreement? Essentially, the court has to decide whether or not the plaintiff's claim constitutes a debt, and if so, determine when it became due, and whether or not it prescribed.

Prescription

[14] In *Louw v Strauss*[2] Masuku J stated the following:

[1] The correct date on which the summons were issued is 27 April 2021.
[2] *Louw v Strauss* (HC-MD-CIV-ACT-CON-2016/03949) [2017] NAHCMD 217 (09 August 2017).

'[18] The starting point is to note that the Legislature unfortunately did not take the time to define what the word 'debt' as employed in the Act means. In that regard, and in order to give meaning to same, it is imperative that we have regard to the meaning of the term as ascribed in various judgments by the courts in this country and beyond…'

[15] Although not defined in the Act, the term 'debt' refers to:

> '1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> 2. A liability or obligation to pay or render something; the condition of being so obligated'[3]

[16] The plaintiff admits that his claim against the defendant constitutes a debt as envisaged by the Act. This admission is consistent with the law as set out above.

[17] The general rule is that a debt prescribes after three years.[4] The exceptions to this rule as provided by section 11(a)–(c) of the Prescription Act do not find application in this matter. It is common cause from the pleadings that the plaintiff's claim falls in the category of claims that would prescribe after three years as provided by section 11(d) of the Prescription Act.

Arguments

[18] The parties agree that it was a term of the agreement that the defendant would complete the repair works within a reasonable period. According to the defendant, the reasonable period must be established by examining the facts pleaded by the plaintiff in his particulars of claim.

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[3] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC); *Council of Itireleng Village and Another v Madi and Others* (SA 21 of 2016) [2017] NASC 39 (25 October 2017). *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A); *Empire Fishing Company (Pty) Ltd v Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022); *Louw v Strauss* Ibid;

[4] Section 11 (d) – Save where an Act of Parliament provides otherwise, three years in respect of any other debt.

[19] The defendant further contends that a reasonable period in terms of the agreement must be construed to have been a period of not longer than two weeks from the date of the conclusion of the agreement. Having been concluded on 04 April 2018, the defendant maintained that it entered into default of its performance on 19 April 2018 (two weeks after) on which date the debt became due, owing and payable. It was the defendant's further contention that prescription begins to run on default by the debtor and not when the creditor elects to claim.[5]

[20] On the other hand, the plaintiff contends that his cause of action only arose on 10 July 2020, when he became aware of the defendant's breach of the agreement and consequently cancelled the agreement.

Analysis

[21] It is common cause that the parties entered into the agreement on 04 April 2018. The plaintiff issued summons against the defendant on 27 April 2021. The duration between the date of the agreement and the date of summons is 3 years and 3 months. However, section 12(1) of the Act expressly requires that a debt be 'due' before prescription begins to run.[6] In the present case, the 'debt' is the claim for damages arising from the alleged breach of the agreement.

[22] The agreement between the parties did not fix a specific time for performance. In such an instance, the law infers and imposes a reasonable time for such performance.[7] I am reminded that, what could be considered a reasonable time for performance could be decided with reference to the nature of the agreement between the parties and the interrelationship of the obligations undertaken.[8]

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[5] Reliance is made to the decision in *Western Bank v Van Vuuren* 1980 (2) SA 348 (T); *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty)* (187/2015) ZASCA 91 (1 June 2016).
[6] *Stockdale v Stockdale* 2004 (1) SA 68 (C).
[7] See *Viviers v Ireland & Another* (I 3757/2020) [2014] NAHCMD 148 (18 May 2016).
[8] See *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W).

[23] In terms of the agreement, the defendant warranted its knowledge and expertise to attend to the repairs in a workmanlike and efficient manner; would disassemble the plaintiff's vehicle engine, source the necessary parts and repair same. Whereas the defendant emphasized that two weeks was reasonable to complete the repair works, no such allegation was made in the pleadings. On the contrary, the following stands out:

'6.1. The engine was damaged beyond economic repair and therefore the defendant could not repair it at all, or alternatively defendant could not repair the engine within a reasonable time as is alleged by the plaintiff.'

[24] Moreover, while the defendant maintained that the agreement was breached on 19 April 2018, it only handed back the vehicle to the plaintiff after two years on or about 10 July 2020. There is no averment in the pleadings explaining this state of affairs. Considering the date of the alleged breach (19 April 2018), the defendant went on to plead that:

'6.2. During or about May 2020, the defendant telephonically informed the plaintiff to purchase a new engine, which engine the plaintiff continuously failed and/or neglected to purchase.

[25] Although the defendant stressed that the agreement was breached two weeks after conclusion, the conduct of the parties inexorably suggests that the agreement remained alive until on or about 10 July 2020 when the plaintiff inspected the vehicle, cancelled the agreement and took possession of the vehicle. The 'reasonable period' of two weeks alleged by the defendant was not founded or based on anything, for instance, prior dealings, business routine or custom within the trade. This is more so, especially when the alleged period does not appear to constitute a fair amount of time necessary and convenient to do what the agreement required the defendant to do.

[26] The vexed question is: when did the debt become due? It would seem that this question is not complicated when it relates to agreements that specify time for performance.

[27] In *HMBMP Properties (Pty) Ltd v King*[9] the court held as follows:

'…in its ordinary meaning a debt is "due" when it is immediately claimable by the creditor… A debt can only be said to be claimable immediately if the creditor has the right to immediately institute an action for its recovery. In order to be able to institute action for the recovery of a debt the creditor must have a complete cause of action in respect of it.'[10]

[28] It follows that the plaintiff must have a complete cause of action at the stage of issuance of summons[11] or at the time of service of summons.[12] In *Abrahamse & Sons v SA Railways and Harbours*[13] Watermeyer J stated:

'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

[29] The plaintiff's contention is that prescription commenced to run from the date of his election to cancel the contract. On the contrary, the defendant's contention is that prescription commenced to run from the date of repudiation.[14] If it should be held that prescription commenced to run on the alleged date of repudiation (two weeks after conclusion of the agreement), then the plaintiff's claim would have prescribed. Similarly, if it should be held that prescription commenced to run from the date of cancellation, then plaintiff's claim would not have prescribed.

[30] It seems to me that the distinction between the concept of a debt 'arising' (i.e. when it came into existence) and that of one becoming 'due' (i.e. when it became recoverable) is important in this matter. The authorities relied upon by the defendant in asserting that

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[9] *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 C-E.
[10] See also *Uitenhage Municipality v Molly* 1998 (2) SA 735 (SCA).
[11] *Mahomed v Nagdee* 1952 (1) SA 410 (A).
[12] *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A).
[13] *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626.
[14] Subject to my views expressed in paragraph 23-25 above regarding the alleged date of repudiation.

prescription begins to run on default by the debtor and not when the creditor elects to claim, all concerned contracts with acceleration clauses that entitled the creditor to claim the whole outstanding amount payable upon the occurrence of breach by the debtor.[15]

[31] In *Stockdale v Stockdale*[16] the Court held as follows:

'It is clear that in determining when a debt arises and when it becomes due (*opeisbaar*) different concepts are concerned. A distinction needs to be made between 'the coming into existence of the debt on the one hand and recoverability thereof on the other'…'

[32] In *Curlverwell and another v Brown*[17] the Supreme Court of Appeal of South Africa (SCA) had the following to say:

'…Where, however, no time for performance is specified in the agreement, different considerations apply. Where a party to an agreement (in which no time for performance has been specified) repudiates the agreement, such repudiation does not *per se* bring the agreement to an end. At the date of repudiation, the agreement is still alive, and the injured party has the right to elect whether to accept the repudiation and so terminate the agreement, or whether to insist upon receiving performance in terms of the agreement. The injured party is afforded a reasonable period within which to make the election. During that period, the repudiator's obligation to perform and the injured party's right to receive performance remains wholly unaffected. It is only when the injured party accepts the repudiation that the agreement is cancelled, and it is only then that a claim for damages arises.

[33] In the High Court decision involving the same parties[18] Friedman J observed, thus:

'…It is only when the seller has exercised his election to accept the repudiation that the contract is cancelled. Only when the date of cancellation has been crystallised can any question of damages arise. It would be entirely artificial in a case such as this to assess the plaintiff's damages by reference to an anterior date, viz the date of repudiation, on which date the contract was still alive and no claim for damages had yet arisen. It seems, moreover, that those cases in which it has

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[15] These are: *Western Bank v Van Vuuren* (supra); *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty)* (supra).
[16] *Stockdale v Stockdale* 2004 (1) SA 68(C).
[17] *Curlverwell and another v Brown* 1990 (1) SA 7 (A).
[18] *Culverwell and another v Brown* 1988 (2) SA 468.

been held that the decisive date is the date of repudiation have proceeded on the unwarranted basis that the innocent party is obliged to accept the repudiation immediately, which is clearly not so.'

[34] On appeal, the SCA agreed with the view expressed by Friedman J captured above. The only qualification to the view was that it could not be gainsaid that, as a matter of principle, a claim for damages does not arise until the repudiation is accepted.

[35] In *Stewart Wrightson (Pty) Ltd v Thorpe,*[19] Jansen JA found that the exercise of the right to terminate a contract must, as a juristic act, require an expression of intent. To his mind, that expression of intent would, as a juristic act, become relevant only when it is communicated to the other party, whose position is affected by the decision and who has a right to be informed of it.

[36] The above position appears to have been reiterated in *Cook v Morrison & Another*[20] wherein the court held that a claim for damages resulting from a repudiation and subsequent cancellation of an agreement only arises when the innocent party elects to accept the repudiation of the agreement and conveys such election to the other party.

[37] In *HMBMP Properties (Pty) Ltd v King*[21] the court had the following to say:

'…If however the innocent party elects to treat the repudiation as a breach and cancels the contract, he treats the contract as at an end from the date of his election…'[22]

[38] The SCA settled the issue in a recent decision of *Dave Pretorius v Kenneth Bedwell*[23] wherein the court stated the following in paragraph 10:

'It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and

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[19] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 954.
[20] *Cook v Morrison & Another* case no A 5058/2016, High Court of South Africa, South Gauteng Local Division, delivered on 18 August 2017.
[21] Supra.
[22] The court remarked further that the date of election will sometimes coincide with the date of repudiation. More often than not, however, the election will be made on some later date.
[23] *Dave Pretorius v Kenneth Bedwell* (659/2020) [2022] ZASCA 4 (11 January 2022).

unequivocal intention to no longer be bound by the contract. 1. Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise. Accordingly, prescription commences to run from that date. '

[39] It follows therefore that prescription begins to run, not when the reneging party repudiates the contract, but rather when the innocent party communicates its acceptance of such repudiation to the repudiating party and elects to cancel the agreement. Upon such communication of acceptance of the repudiation, the innocent party's claim for damages arises and prescription then begins to run.

[40] The onus was on the defendant to prove that the claim had prescribed. The defendant elected not to lead evidence in support of the special plea. The special plea did not set out the relevant facts, that is, that the agreement was repudiated on 19 April 2018 and the repudiation was accepted and such acceptance was communicated on the same date or at a later date. The Court of Appeal of Lesotho in *Mahamo v Lesotho National General Insurance Company*[24] explains it as follows:

'…The way the learned judge tried the special plea was incorrect. In short, a party must allege the legal basis for the relief claimed (or opposed) and allege and prove the primary facts for such application of the law. As Smalberger JA correctly pointed out in *Lesotho National General Insurance Co Ltd v Ever Union* (sic) *Garments (Lesotho) Ltd*[25] '[t]he *onus* of establishing a special plea rests on the defendants, not only in the evidential sense of requiring the defendant to first adduce evidence, which if it establishes a prima facie case, calls for rebuttal by the plaintiff, but also the primary and substantial duty of proving the plea.' *In Moshao v Lesotho General National Insurance Co.*[26] it was held:

> "[19] It was imperative the pleader of the "Special plea" to lead evidence that establishes a *prime* (sic) *facie* case then the plaintiff is then called upon to rebut that evidence, that is the

[24] *Mahamo v Lesotho National General Insurance Company* (C of A (CIV) 51/2017) [2021] LSCA 27 (14 May 2021).
[25] *Lesotho National General Insurance Co Ltd v Ever Unison Garments (Lesotho) Ltd* 2009-2010 LAC p 541.
[26] *Moshao v Lesotho General National Insurance Co* (C of A (CIV) 10 of 2016)

tenor of this court's judgment in Lesotho National General Insurance Company v Ever Unison Garments (Lesotho) (Pty) Ltd *(supra)*."'

[41] Having regard to the considerations above, I am inclined to the view that the plaintiff's cause of action arose at cancellation of the agreement, and it is from that date that the debt became due and prescription began to run. Accordingly, I find that the plaintiff's claim has not prescribed.

Costs

[42] The general rule is that costs follow the event. There is no reason why this rule should not be applied in this matter. In line with the decision in *Uvanga v Steenkamp & Others,*[27] rule 32 (11) does not apply.

[43] In the result, it is ordered that:

1. The special plea of prescription raised by the defendant is dismissed.
2. The defendant is ordered to pay costs of the special plea which shall not be subject to rule 32(11).
3. The matter is postponed to 25 April 2022 for a case management conference.
4. The parties are directed to file a joint case management report on or before 20 April 2022.

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DC MUNSU

ACTING JUDGE

[27] *Uvanga v Steenkamp & Others* (I 1968/2014) [2016] NAHCMD 378 (2 December 2016).

APPEARANCES

FOR THE PLAINTIFF:	J. Greyling (Junior) Of Greyling & Associates, Oshakati.
FOR THE DEFENDANT:	V. Hifindaka Of Henry Shimutwikeni & Co Inc.