

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEA OF PRESCRIPTION

CASE NO. I 2242/2015

In the matter between:

**CENTRAL TECHNICAL SUPPLIES (GEIGER)
ENGINEERING SERVICES (PTY) LTD**

PLAINTIFF

and

**KHOMAS ALUMINIUM AND GLASS CC
HAUDANO BRICKS AND BUILDERS CC**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral Citation: *Central Technical Supplies (Geiger) Engineering Services (Pty) Ltd v Khomas Aluminium and Glass CC & Another* (I 2242/2015) [2018] NAHCMD 76 (29 March 2018)

CORAM: MASUKU J

Heard: 16 - 17 October 2017 and 27 February 2018

Delivered: 29 March 2018

Flynote: Law of Contract – relating to construction and related work – Prescription – The Prescription Act 1988 – when is prescription to start running in relation to a debt.

Summary: The plaintiff sued the defendants jointly and severally in respect of a contract, which was awarded to the 1st defendant and in which the plaintiff was appointed as a sub-contractor. Two certificates of payment, were made by the Ministry of Health, to the 1st defendant in respect of the work done by the plaintiff. The 1st defendant did not immediately pay the money received to the plaintiff in 2011, when the money was paid to the 1st defendant by the Ministry of Health. In 2015, the plaintiff instituted action against the defendants claiming payment of the money in respect of the work it had done. The defendants raised the special plea of prescription, arguing that the amounts became due in 2011 and that because the plaintiff lodged its claim in 2015, the claim had prescribed in terms of the provisions of Prescription Act.

Held – that the time which must be considered, in line with the practice in the construction industry, is not when the payment certificates were issued by the Government to the 1st defendant but rather, when the plaintiff got to know that payment had been made and the plaintiff could issue invoices against the 1st defendant.

Held further – that the plaintiff did not know that the 1st defendant had been paid until it got information of the said payment from the Engineer to that effect in March 2015. The plaintiff thereafter issued its invoices, culminating in the issuance of summons in 2015.

Held – that the summons was issued within a period of three years from the time that the plaintiff became aware of the payment of the claim to the 1st defendant.

The claim was therefor held not to have prescribed and the defendants' special plea was dismissed with costs.

ORDER

1. The defendants' special plea of prescription is dismissed.
2. The defendants are ordered to pay the costs consequent upon the instruction of one instructing and one instructed counsel.
3. The matter is postponed to 5 April 2018 at 08h30 for allocation of dates for the continuation of trial.

RULING

MASUKU J:

Introduction

[1] Serving before court for determination is one critical question, namely, whether or not the defendants' special plea of prescription must be upheld.

[2] I must point out that the process of returning an answer to this all-important question, requires recourse to the evidence that was led on behalf of the plaintiff in this matter. This is so because the answer is not only dependent upon a consideration of questions of law, but supremely, on factual issues and procedures that govern operations in the building industry.

The parties

[3] The plaintiff is a company duly incorporated in terms of the company laws of this Republic and having its principal place of business situate at No. 13 Walter Street, Southern Industrial Area, Windhoek.

[4] The 1st defendant is Khomas Aluminium and Glass CC, a close corporation established in accordance with the Close Corporations Act.¹ It has its principal place of business situate at No. 11 Platinum Street, Prosperita, Windhoek.

[5] The 2nd defendant is Haudano Bricks and Builders CC, another close corporation, duly established in terms of the Close Corporations Act of this Republic, with its principal place of business situate at Efr. 1331, Main Road, Oshakati West, Republic of Namibia.

The claim

[6] The plaintiff instituted a claim against the defendants, jointly and severally, the one paying and the other being absolved, for payment of an amount of N\$ 152, 913.35, interest thereon at the rate of 20% *a tempore morae* and costs of suit.

[7] In terms of the plaintiff's particulars of claim, the claim arises out of an oral sub-contract agreement entered into in Windhoek on 5 March 2010 and in terms of which the plaintiff was to install an incinerator and accessories at the Okahango Health Care Centre. It was allegedly agreed that the 1st defendant would provide a 10% guarantee for the value of the contract as approved by the project engineer.

[8] The plaintiff claims that it performed all its obligations in terms of the said agreement and as a result, the payment certificates were issued on 27 June 2011 and 7 February 2012, respectively to the 1st defendant, which has failed and/or refused to make payment to the plaintiff in the amount claimed as stated in paragraph 6 above.

¹ Act No. 26 1988.

The defence

[9] In their defence, the defendants allege that when one has regard to the plaintiff's claim, the amounts claimed were due, on the plaintiff's papers from 27 June 2011 and 7 February 2012, respectively. It is alleged that when one has proper regard to the provisions of s. 11 of the Prescription Act,² the plaintiff's claim has prescribed and that the plaintiff should be non-suited therefor.

The evidence

[10] The plaintiff called two witnesses in support of its claim. The first was the Mr. Frank Biederlack, the Managing Director of the plaintiff and Mr. Joshua Maganga Chiwambu, an electric engineer who was appointed by the Ministry of Works to be the Engineer for the project. I will proceed to narrate the material aspects of these witnesses' evidence, particularly as same relates to the issue for determination, namely, whether or not the plaintiffs claim prescribed as alleged by the defendants.

Mr. Frank Biederlack

[11] I will refer to Mr. Biederlack as the plaintiff's witness number 1 (PW1). It was his evidence that in 2009, the 2nd defendant was appointed by the Ministry of Health and Social Services as the main contractor for the purposes of building and upgrading the Okalongo Health Centre, in the Omusati Region. The 1st defendant, in turn, he further testified, appointed the 2nd defendant as a sub-contractor, to manage the project on the former's behalf.

[12] It was his further evidence that on 5 March 2010, in Windhoek, the 1st defendant, duly represented by a Mr. Chuan-Kuo and the plaintiff, represented by him, entered into an oral sub-contract agreement, whose terms included *inter alia* –

² Act 68 of 1968.

- (a) the plaintiff would install an incinerator and accessories at the aforesaid Health Care Centre, as appointed by the project engineer and approved by the aforesaid Ministry;
- (b) the plaintiff would supply and deliver the goods required; effect the installations and also take care of the training of the personnel of the Health Centre in respect of the goods so installed;
- (c) the 1st defendant would provide the plaintiff with a 10% guarantee for the contract value as approved by the project engineer in respect of the supply, installation, testing and commissioning of the incinerator. The 1st defendant duly provided such guarantee on 12 July 2010 and it was in the amount of N\$ 44, 477;
- (d) the plaintiff shall provide to the 1st defendant a 10% performance guarantee for the due performance by the plaintiff of all the plaintiff's obligations in relation to the project. This guarantee was indeed provided by the plaintiff on 18 August 2010, also in the amount of N\$ 44, 477;
- (e) the 1st defendant would compensate the plaintiff for the goods and services aforesaid as per certificates of payment to be issued by the quantity surveyor, appointed by the Ministry aforesaid; and
- (f) the plaintiff shall only invoice the 1st defendant once the 1st, alternatively, the 2nd defendant had received payment from the aforesaid Ministry in respect of the payment certificates.

[13] PW1 further testified that the plaintiff duly complied with its obligations as set out above. PW1 further testified that another oral agreement was entered into on 8 July 2011 in terms of which he represented the plaintiff was instructed by Mr Chiwambu of Jacobs Engineering, the latter duly instructed by the 1st defendant, to provide and install laundry machines at the aforesaid Health Centre. The terms stipulated in the immediately preceding paragraph also applied in this agreement, he further testified.

[14] It was PW1's evidence that the plaintiff also complied with its obligations in terms of the latter contract and in this regard, the quantity surveyor issued a payment certificate number 18 in the amount of N\$ 91, 648.39 and this was in respect of the incinerator. He further testified that a further payment certificate was issued as number 19 by the quantity surveyor on 12 February 2012 and it was in the amount of N\$ 61, 229.45. PW1 further testified that the 1st defendant had neglected, failed or refused to pay the amounts of both certificates.

[15] PW1 further testified that the plaintiff, having complied with its obligations, on 19 March 2014, issued two invoices to the 1st defendant in the amount claimed in this action, which is a total of the two certificates referred to above. It was PW1's evidence that the plaintiff only became aware that the 1st defendant had been paid by the Ministry only in March 2014 and despite demand, the 1st defendant and/or the 2nd defendant failed and/or refused to honour the payment of the amount claimed.

[16] In cross-examination, it was put to PW1 that the claims which are the subject matter of the action have prescribed because the amounts claimed were certified on 27 June 2011 and 7 February 2012, respectively and that for that reason, the three year period for prescription had run its course, thus rendering the claims to be prescribed. His answer was to the effect that there were many delays in the matter and that the information that the first defendant had been paid was relayed to the plaintiff by Mr. Bob Mould very late and that as soon as the plaintiff learnt of the payment, it issued the invoices, culminating in the present claim.

[17] In the battle of wits that ensued between Mr. Diedericks for the defendants and PW1, the following is recorded immediately after the answer recorded in the paragraph immediately above was furnished:³

'Q: That cannot be correct. Did you not submit your claim for payment to form part of this certificate that is issued?

³ Page 34 line 29 to p. 36 line 1.

A: When the certificate is issued it does not mean that the payment was made by the Government to the main contractor. We only make payments or we only invoice once we have conformity (*sic*) (should be confirmation) or once we had feedback from the main contractor that they have received payment. Now during that period there were a lot of communication, say please make payments, we see the payment certificates are there and it was denied that payment was not received and only after we went through and got confirmation from Mr. Bob Mould that payment was done, then we started putting the invoices in place.

Q: You submit a payment for work done. That payment claim is assessed and it forms part of the certificates that is issued?

A: The payment claim itself is we refer to the engineer which we report to. He goes onto site and verifies what our claim is. So we claim and put our claim in to the engineer in this case it is Jacob's Engineering and once it is approved, they hand the claims over to the quantity surveyor, which checks and makes sure that everything is correct and from there it is passed over to the principal agent, who is the architect and then it is passed over to Government for payment. Now, when the Government makes payment, we have no insight of that and that was one of the reasons we have continuously or we have followed up and we never received confirmation that payment actually was made and that it is the reason why the invoices were only produced so far later in the project itself, only after we received hundred percent written information from the principal agent, Mr. Bob Mould, yes they have received payment and that is that. There is also a letter which will confirm that.'

[18] PW1 was cross-examined on a number of issues as well that I need not traverse, in view of the narrow compass of the issue that arises in this matter, namely, that of prescription. I now proceed to deal with the evidence of Mr. Chiwambu, to whom I will, for ease of reference, call PW2.

Mr. Joshua Mganga Chiwambu (PW2).

[19] He testified that he was an adult male of Malawian extraction and a duly qualified electrical engineer. It was his evidence that he had, from 2009 to 2014 been in the employ of an outfit called Jacob's Engineering Consulting but had since 2014, established his own company called Joshua Consulting Engineers.

[20] It was his evidence that in 2009, Jacobs Engineering Consulting was appointed by the Ministry of Works and Transport as the engineer in which the 2nd defendant was appointed by the Ministry of Health and Social Services as the main contractor for the additions and upgrade of Okalongo Health Care Centre in the Omusati Region of this Republic. It was his evidence that he served in this project as the representative of Jacobs Engineering Consulting on this project.

[21] PW1 further testified that he was in charge of the non-nominated mechanical sub-contractor appointments. He outlined the procedure followed in these appointments as follows:

- (a) a list of the sub-contractors is sent to the builder (main contractor) and the Ministry of Works and Transport for approval before the tendering process;
- (b) the bids/tenders are received by him and issued per the list referred to in (a) above;
- (c) the tender offers are received by him and sent to the aforesaid Ministry of Works for the appointment of the successful sub-contractor;
- (d) the Ministry issues an appointment letter to him informing him to inform the architect appointed on the project to instruct a builder to enter into an agreement with a specialist sub-contractor as per the letter from the Ministry of Works;
- (e) the sub-contractor then assumes and commences the work once the agreement is entered into with the builder, i.e. the main contractor;
- (f) the subcontractor procures the materials and does the installation on site, after which he (PW2) evaluates the work done to date and if done in a satisfactory manner, PW2 then issues payment certificates;

- (g) his engineer's payment certificate is included in the valuation done by the quantity surveyor. The architect, thereafter, issues a payment valuation after the receipt of the quantity surveyor's valuation and the architect's evaluation is sent to the user i.e. the Ministry of Health, through the Ministry of Works for payment; and
- (h) the builder gets paid by the user Ministry and then within 10 working days, the builder is obliged to settle the dues to the sub-contractor.

[22] PW2 continued with his evidence and informed the court that on 1 April 2010, the 2nd defendant, during a site meeting, announced that it had appointed the 1st defendant as the sub-contractor, to manage the said project on its behalf. Again on 19 February 2010, during a site meeting, the tender for the incinerator, was formally awarded to the plaintiff. It was his evidence that the plaintiff duly complied with its obligations in relation to that tender and it was paid an amount of N\$ 293,447.47 therefor.

[23] He testified further that during a site meeting on 24 May 2010, the tender for the installation of laundry machines at the Okalongo Health Centre, was formally awarded to the plaintiff. In this regard, he, on 8 July 2010, instructed the plaintiff to proceed with the works as per the tender. PW2 testified that the plaintiff carried out its obligations and an amount of N\$ 91, 683.39 was issued by the quantity surveyor for certificate no. 18, in respect of the incinerator. It was his further evidence that he was aware of this payment by the Ministry of Health to the 1st defendant but was unable, despite several enquiries, to obtain proof of this payment.

[24] It was PW4's further evidence that on 2 February 2012, payment certificate no. 19 in the amount of N\$ 61, 229.45 was issued by him to the quantity surveyor. The said amount, he further testified, was paid to the 1st defendant by the Ministry of Health and this amount was supposed to have been paid to the plaintiff within 10 days from receipt of same from the said Ministry by the 1st defendant.

[25] During his evidence, the following exchange took place in examination-in-chief, between PW2 and Ms. Garbers for the plaintiff:⁴

'Q: Thank you. Okay, before you carry on I want you to come back to this one. You said that the amount, the 1st defendant was supposed to pay to the plaintiff within 10 days from receiving the payment from the Ministry of Health and Social Services because of these contracts?

A: Yes.

Q: Now, if they have not entered into a contract, what would have been the position then regarding this payment?

A: The position still remains the same, they have received the money. It is not theirs they have to just pass it on, they received profit on attendance on the money which is paid but the amount is supposed to be paid to the sub-contractor Central Technical Supplies. They are written on a separate schedule which the quantity surveyor I will show you later is supposed to stipulate how much they are supposed to be paid.'

[26] At page 204 lines 8-12, and at the tail end of PW2's cross-examination, Mr. Diedericks asked the following questions and PW2 returned the answers recorded below:

'Q: What we can accept is that these two amounts appearing here at number 1 and 2, those are the two amounts claimed in this court?

A: Yes.

Q: And those certificates you issued in the name of the Plaintiff, respectively 24 May 2011 and 6 September 2011.

A: Yes.'

⁴ Page 114 line 22

Analysis and findings

[27] Having listened to the evidence of the plaintiff's witnesses, I should state that I will not, at this stage, make any credibility findings as the issue for determination at this stage is very narrow and it is whether the plaintiff's claim has prescribed as alleged by the defendants or not. In my assessment, the plaintiff's witnesses were very clear in their evidence that in terms of the procedures followed, they could only issue an invoice to the defendants once they became aware that money had been paid to the defendants by the relevant Government Ministry.

[28] To this extent, their evidence that they only became aware of the fact that the 1st defendant had been paid after receipt of a letter from Mr, Bob Mould, cannot be dislodged. PW2, for his part, was also clear that he attempted to find the proof of payment to the 1st defendant without success. In the premises, I find for a fact that the plaintiff only became aware of the payments made by the Ministry of Health to the 1st defendant after receipt of the letter from Mr. Mould and not necessarily at the time when the payment was made by the Ministry of Health to the 1st defendant.

[29] I say so for the reason that there is a connection between the date of the letter from Mr. Mould and the issuance of the summons, which, in my view, constitutes an objective fact that lends credence to the plaintiff's version. The letter from Mr. Mould is dated 12 March 2014 and reads as follows in part:

**'RE: OKALONGO HEALTH CARE CENTRE – TENDER NO:f1/10/1-26/2006:
PROJECT NO: 134-32; NPC CODE:0452**

According to correspondence received from Central Technical Supplies, the amounts of N\$91684.30 and N\$61229.45 for Incinerator and Laundry equipment respectively, are still outstanding by you to the sub-contractor.

These amounts are to be paid immediately. If not, we will advise Central Technical Supplies to take legal action.

...

Please attend to this matter as a matter of urgency.'

[30] It is clear that the plaintiff issues these proceedings after becoming aware that the said amounts had been paid and there is nothing to gainsay the plaintiff's evidence in that regard. Taking PW1's word, and there is no reason to doubt it, that the first time they became aware of the payment was on receipt of the letter from Mr. Mould, referred to above, it will be clear that they became aware of the payment in March 2014 and they issued the summons in July 2015, a fact that is common cause.

[31] The legal issue to determine in this connection, is whether the court should incline to Mr. Diedericks' argument that the debt became due as soon as payment was made to the 1st defendant, i.e. when the payments were certified in June 2011 and February 2012, respectively. If Mr. Diedericks is correct in his computation, then I am compelled to agree with him that the respective claims prescribed and the plaintiff is accordingly, non-suited. If, on the other hand, I agree with Ms. Garbers in her able argument, then I will necessarily have to find that Mr. Diedericks is on the wrong lane and will inevitably have to dismiss the special plea. What does the law say on this subject?

[32] The relevant law, which has already been referred to earlier in the ruling, is the Prescription Act, (the 'Act'). Happily, both parties have agreed that there is no contestation about the applicable law. The only question is the application of the law to the present facts, and to be more precise, the question will be whether the time for prescription should be reckoned from the time when the payment certificates were certified or it should be from the date when the plaintiff, for the first time, became aware of the payments made to the 1st defendant. I turn to that issue below.

[33] Section 12 (1) of the Act reads as follows:

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

(2) 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 debt.

(3) 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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’

[34] It was Mr. Diederick’s argument that in the instant case, the plaintiff acquired a complete cause of action at least prior to the submission of its certification to the Engineer, who issued both payment certificates. This, he argued, was on 24 May 2011 and 6 September 2011, respectively. He accordingly moved the court to hold that the plaintiff’s claim had prescribed by the time the summons instituting action was issued.

[35] In contrary argument, Ms. Garbers referred the court to a few cases dealing with the question of when a debt becomes due. She laid the basic principles, namely, that the party raising prescription bears the onus to prove same.⁵ Secondly, she submitted that prescription does not begin to run necessarily when the debt arises, but rather, when the debt is due and that the debt becomes due when the creditor acquires a right to institute action in relation to that debt.⁶

[36] In *Stockdale v Stockdale*,⁷ Traverso AJP, commented on the issue of when a debt can be said to have arisen as follows:

⁵ *Nedbank v Pro-Housing CC* (I 2119/2012) [2016] NAHCMD 33 (24 February 2016) at para 12.

⁶ *Ilse v Government Institutions Pension Fund* (I 1929/2012) [2012] NAHCMD 122 (4 April 2014).

⁷ 2004 (1) SA 68 at para 13; [2003] All SA 358 (C).

‘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” (*List v Jungers*, 1979 (3) SA 106 (A) at 121 C-D). The stage when a debt became recoverable, and therefore due in the sense in which the Act speaks of it, has been described as follows in *Deloitte Haskins & Sells Consultants v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H:

“There has to be a debt immediately claimable by the creditor or stated in another way, that there has to be debt in respect of which the debtor is under an obligation to perform immediately.”

[37] Mr. Diedericks, for his part, referred the court, and helpfully, I may add, to the case of *Truter and Another v Deyssel*,⁸ where the court reasoned as follows:

‘A debt is due in the sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.’

[38] I consider the above judgments to state the law in relation to this subject correctly and authoritatively too. My only task, at the moment, and in the circumstances, is to consider which of the two protagonists is correct, there being no contest about the correctness of the stainless principles enunciated by the foregoing judgments. It will be the application of these judgments to the facts that will be critical and decisive.

[39] According to the evidence before court, I incline to the view that the critical time at which the debt became due, was not when the payment certificates were certified by the Engineer. At this stage, the evidence is clear that the plaintiff did not know that the Ministry of Health had made the payment

⁸ 2006 (4) SA 168 at para 16 (cited with approval in *Namibia Fuels (Pty) Ltd*).

to the 1st defendant. It is unmistakeable from the evidence that it was the duty of the 1st defendant, upon having received payment, to, within 30 days, pay the money over to the plaintiff.

[40] It is also not in contention that the plaintiff was unaware that the payments had been made by the aforesaid Ministry to the 1st defendant and PW2 also testified that his efforts to establish whether payment had been made, drew a blank. In this regard, it is clear that the plaintiff could not, in terms of the practice in the industry, lay a claim if they did not know that the Ministry had paid the 1st defendant. Once they received that information, only then could they issue the invoice.

[41] I accordingly come to what I consider an inexorable conclusion that the plaintiff only knew that everything had happened which would have entitled it to sue, as recorded in *Truter*, when Mr. Mould copied the plaintiff in, in the letter adverted to earlier. In the words of *Deloitte (op cit)*, the recoverability of the debt, and not necessarily its coming into existence, came upon knowledge that the 1st defendant had been paid and this was on 12 March 2014.

[42] That date having been established as the operative one in the circumstances, I am of the considered view that with the plaintiff instituting the action in July 2015, it becomes clear that at that time, the claim had not prescribed. In the circumstances, the claim was instituted within the three-year period mandatorily provided for in the Act. This therefor leads me to the ineluctable conclusion that Ms. Garbers is eminently correct in her submissions. Correspondingly, I cannot, in the circumstances, agree with Mr. Diedericks in his submissions, however forceful and compelling they may have seemed at first blush.

[43] In this regard, I should mention that the parties, perhaps unwisely, but perhaps *ex abundanti cautela*, if I may say so, decided to deal with the issue of the relationship between the 1st and 2nd defendant and further addressed the issue of the terms of the agreement between the parties. Whereas these may be interesting and brain-teasing issues to consider, we must not lose sight of

the fact that the prime issue at the present moment, is not an application for absolution from the instance. The four corners of the present dispute were clearly demarcated and are crisp, namely, whether or not the claim has prescribed.

[44] I mention the foregoing for the reason that I have not dedicated any time to the other issues that counsel digressed and found it fit to address. Daniels in his work entitled 'Morris Technique in Litigation',⁹ tells the story of a lawyer who put up a notice in a newspaper for the vacancy of an office clerk. During the interview of the respondents, he told the story of a farmer who had a barn full of produce, which was infiltrated, so to speak by a squirrel. In an effort to kill the squirrel using a firearm, the barn unfortunately went up in flames.

[45] As he narrated the story, there were numerous interjections from the applicants asking questions as to what happened to the barn; how the fire was put out; whether the people in the barn survived or not. The lawyer did not answer any of the questions but the one posed by a timorous young man, in a quacking voice at the end of the story, 'I want to know what became of that squirrel! That's what I want to know.'

[46] That young man is the one who was offered the job as the lawyer said to the young man: 'You will do, you are my man; you have not been switched off by a confusion and a barn's burning, and hired girls and water-pails; you have kept your eyes on the squirrel.'

[47] Like that young man, I found it imperative to keep my eyes on the proverbial squirrel in this matter, namely, on the question whether the plaintiff's claim had prescribed or not. The other issues are not of any material relevance to the special plea as mentioned above.

⁹ 4th edition, Juta & Co, 1993 at p.13.

Disposal

[48] In the premises, having considered the evidence tendered thus far, and which I must mention, was not seriously challenged in so far as it related to the issue under consideration presently, I come to the view that the 1st defendant's special plea should fail and I so order.

Order

[49] Having regard to the foregoing, I issue the following order:

1. The 1st defendant's special plea of prescription is dismissed.
2. The defendants are ordered to pay the costs consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 5 April 2018 at 08h30 for the allocation of dates for continuation of the trial.

TS Masuku
Judge

APPEARANCE:

APPLICANT/DEFENDANT:

H Garbers-Kirsten

instructed by Engling Stritter &
Partners, Windhoek

RESPONDENT/PLAINTIFF:

J Diedericks

of Diedericks Inc., Windhoek