

SOUTH AFRICA / JUDGMENT

Rademeyer v Ferreira (343/2021) [2022] ZASCA 92 (17 June 2022)

[2022] ZASCA 92

COURT

Supreme Court of Appeal

BEFORE

Matojane, Makgoka, Plasket, Gorven, Smith

CASE / FILE NUMBER

343/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 343/2021

In the matter between:

DION RADEMEYER

APPELLANT

and

THOMAS IGNATIUS FERREIRA

RESPONDENT

Neutral citation: Rademeyer v Ferreira (343/2021) [2022] ZASCA 92 (17 June 2022)

Coram: MAKGOKA, PLASKET and GORVEN JJA and MATOJANE and SMITH AJJA

Heard: 10 May 2022

Delivered: 17 June 2022

Summary: Civil procedure – prescription – contract – agreement of sale – whether the respondent's claim instituted by action proceedings in April 2016 had prescribed – whether a claim for cancellation of a contract and consequential damages action instituted under a different case number constituted a 'step' in the enforcement of a claim for payment of a debt.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Govindjee AJ, sitting as a court of first instance):

The appeal is dismissed with costs.

Matojane AJA (Makgoka, Plasket and Gorven JJA and Smith AJA concurring):

[1] This is an appeal against the judgment of the Eastern Cape Division of the High Court, Port Elizabeth (the high court), in which the appellant's special plea of prescription was dismissed with costs. The appeal is before us with the leave of the high court.

[2] On 27 August 2008, the parties concluded a written agreement of sale. The appellant, Mr Rademeyer, purchased an immovable property from the respondent, Mr Ferreira, for R950 000. The appellant paid R190 000 as a deposit. However, he refused to sign the required documents to effect the transfer registration into his name and furnish guarantees for payment of the purchase price

balance.

[3] As the applicant in the high court, the respondent brought an application for rectification of the deed of sale and an order compelling the appellant to sign the necessary transfer documents to effect registration of transfer of the property into his name. Furthermore, the respondent sought an order that, in the event of the appellant failing to comply with his obligations within five days of the service of the order upon him, the agreement would be cancelled, and the respondents would be entitled to claim damages.

[4] On 7 August 2012, Pickering J granted the relief sought by the respondent as per the notice of motion. This part of the relief sought read as follows:

‘4. That in the event of the Respondent failing to comply with his obligations within five (5) days of service of this order upon the Respondent, cancellation of the said agreement of sale and damages.’

[5] The appellant failed to comply with the above order. In 2016, and under the same case number and in the same application, the respondent applied for amended relief for payment of damages as a result of the appellant's failure to comply with the order of Pickering J. Thereafter, the appellant filed a rule 30(1) notice contending that the order of Pickering J was a final order, as it disposed of all the relief set out in the first application.

[6] As a result of the objection, and in March 2016, the respondent withdrew the interlocutory application and issued fresh summons under a new case number, in which the respondent sought payment of the sum of R854 182.20 as damages arising from the appellant's failure to comply with the original order of Pickering J and cancellation of the agreement.

[7] The appellant filed a special plea to this claim contending that the claim had become prescribed, as the respondent failed to institute the action by 23 August 2015, which was three years from the date on which the order of Pickering J was granted plus five days.

- [8] The special plea of prescription was argued before the high court and adjudicated based on an agreed statement of facts in the form of a special case in accordance with the provisions of rule 33(1) of the Uniform Rules of Court. The high court found for the respondent on three grounds. Firstly, it held that the service of the notice of motion on the appellant, which included a claim for cancellation and damages, interrupted prescription; secondly, that the interruption of prescription had not lapsed, as the two processes dealt with the same cause of action; and lastly that the second step, that is the cancellation of the agreement and the claim for damages, did not have to take place within three years of the order granted by Pickering J.
- [9] In this Court, the respondent abandoned his earlier assertion that the order of Pickering J constitutes a judgment debt in terms of s 11(a)(ii) of the Prescription Act 68 of 1969 (the Act), which provides that the prescriptive period for a judgment debt is 30 years. While the order of Pickering J constitutes a 'debt' for the purposes of s 11(d) of the Act, it does not constitute 'a judgment debt' as envisaged in s 11(a)(ii) of the Act, as it is not final in effect.
- [10] Section 10 of the Act provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of such debt.
- [11] Section 11(d) of the Act provides as follows:
- '(11) The periods of prescription of debts shall be the following:
- ...
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'
- [12] Section 15 of the Act is headed 'Judicial interruption of prescription' and provides in relevant part as follows:
- '(1) 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.
- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection
- (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully
- prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (3) ...
- (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor

successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) . . .

(6) For the purposes of this section, “process” includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[13] Counsel for the appellant submitted that the respondent did not pursue the relevant relief in the prior application to its logical conclusion, as the respondent abandoned and withdrew that application. He contended that the present proceedings were new and were not instituted within the three-year prescriptive period, and had thus become prescribed. On the other hand, counsel for the respondent submitted that service of the notice of motion on the appellant in the initial application in 2012 interrupted prescription in respect of the respondent's cause of action, including the cause of action in respect of the damages claim. He further submitted that the claim in respect of damages related to the same cause of action, which was interrupted by prescription when the 2012 notice of motion was served on the appellant.

[14] The crucial question that arises for decision is two-fold. Firstly, whether service of the notice of motion in 2012 constituted 'a process whereby the creditor claims payment of the debt' within the meaning of s 15(1) of the Act. Secondly, whether the issuing of summons claiming damages under a different case number amounted to the prosecution of 'the process in question' as contemplated by s 15

(4) of the Act. It bears mentioning that s 15(1) does not refer to a cause of action, but to claiming of a 'debt'. Therefore, in order for prescription to be interrupted, there must be a right enforceable against the debtor in respect of which prescription is running, and the process served on the debtor instituting legal proceedings must be to enforce that right.[1]

[15] The phrase 'any process' contained in s 15(1) is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor.[2] The expression 'claims payment of the debt' in s 15(1) was considered in *Cape Town Municipality and Another v Allianz Insurance Co Ltd*[3] by Howie J, who, with reference to s 15(2) of the Act, stated that:

"To return to the expression "under the process in question", clearly a final executable judgment will be obtained "under"

a process where process and judgment constitute the beginning and the end of one and the same action.'[4]

- [16] There were two different case numbers which sought to enforce the debt in the current instance. One was the application seeking a declaratory order in 2012 and enforcement of the contract as a result with an alternative claim for damages. The other was the issue of summons in 2016, in which the respondent sought to quantify his damages consequent to the alternative part of the said order, since it had not been complied with. It bears mentioning that, ordinarily, damages claims are pursued by way of summons. In contrast, a declaratory order is ordinarily pursued by way of notice of motion. This raises the question of whether these two steps were steps in the enforcement of the same debt, or conflict with the 'once and for all rule'.
- [17] There is guidance in *Allianz Insurance*,^[5] where Howie J was called upon to decide whether the service of a process, whereby the plaintiffs claimed a declaratory order that the defendant was liable to indemnify them, interrupted the running of prescription. The defendant argued that the proceedings for a declaratory order would fall foul of the once and for all rule, as it would mean that if the defendant failed to make payment of the plaintiff's claim after the grant of such a declaratory order, the plaintiff would have to institute a fresh action for payment of the money, in which action the quantum of the damages claim might well be in issue.
- [18] While acknowledging the undesirability of piecemeal litigation, Howie J stated that the words 'debt' and 'payment' in s 15(1) were used in a wide and general sense, and that claiming payment of a debt is no different in principle from enforcing the right to payment of the debt.^[6] He reasoned that if the declaratory order was to succeed and damages claims after that were instituted, although the relief sought in the two sets of proceedings would be different, both claims would be based on the same cause of action. He concluded that:
- '1. It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.
2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also when the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in supplementary action instituted pursuant to and dependent upon that judgment.'^[7]
- [19] The approach by Howie J was approved by this Court in *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others*^[8] and *Peter Taylor & Associates v Bell Estates (Pty) Ltd*.^[9]
- [20] As indicated above, this Court has to consider whether the institution of the application procedure in 2012 interrupted the running of prescription in relation to the claim that forms the basis of the present proceedings. To answer this question, it must be determined, firstly, whether the basis of the claim in the application procedure in 2012 was the same as the basis of the claim in the present proceedings; secondly, whether the application proceedings were a 'step in the enforcement of a claim for the payment of a debt'; and lastly,

whether the application proceedings disposed of some element of the claim in the current action.

- [21] The current claim for damages is based on the alternative relief in the event of non-compliance with the order of Pickering J. The basis of the action for damages is the same as the basis for a claim for specific performance, in that it arose from the same facts. In fact, the right to claim damages formed part of that order. The respondent sought to quantify his damages consequent to the cancellation of the deed of sale when the appellant failed to comply with the main part of the order. He could not have succeeded

in the damages claim without first establishing the appellant's liability for the damages he suffered. That liability for damages was established by way of that order when the appellant failed to comply within the requisite period.

- [22] Next comes the question of whether the service of the initial application in 2012 constituted a 'step' in enforcing a claim for payment of a debt. It is clear that declaratory order granted by Pickering J determined a key issue that arises in the damages claim, namely whether the appellant was liable for damages suffered by the respondent. The respondent could not succeed in his damages claim without first establishing that the appellant was liable for his damages. The claim for specific performance, alternatively damages, before Pickering J accordingly constituted a crucial step in the process of recovering the debt.

- [23] Applying the above interpretation, it follows that the service of the notice of motion in the application for a declaratory order, alternatively damages, in 2012 had the effect of interrupting the running of prescription as provided for s 15(1) of the Act in relation to the damages claim in this case. Prescription stands interrupted unless the judgment is abandoned or set aside on appeal.[10] The judgment of Pickering J was never abandoned. This conclusion makes it unnecessary to consider the other arguments raised by the appellant.

- [24] The appeal must therefore fail. Costs will follow that result, but given the simplicity of the matter, the costs of two counsel are not justified.

- [25] In the result, the following order is made:

The appeal is dismissed with costs.

K E MATOJANE

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant: R G Buchanan SC

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For respondent: A Beyleveld SC (with T Rossi)

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[1] Du Bruyn v Joubert 1982

(4) SA 691 (W) at 695H-696B; Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) at 470-471H.

[2] Van der Merwe v Protea Insurance Co Ltd 1982

(1) SA 770 (E) at 773C (Protea Insurance).

[3] Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990

(1) SA 311 (C) (Allianz Insurance).

[4] Ibid at 333G.

[5] Ibid.

[6] Allianz Insurance fn 5 above.

[7] Ibid at 334H-J.

[8] Cadac (Pty) Ltd v Weber-Stephen Products Company and Others [2010] ZASCA 105; [2011] 1 All SA 343 (SCA); 2011 (3) SA 570 (SCA) para 19.

[9] Peter Taylor & Associates v Bell Estates (Pty) Ltd and Another [2013] ZASCA 94; 2014 (2) SA 312 (SCA) paras 12-16.

[10] Protea Insurance fn 2 above.

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Prepared on 14 October 2026 · Esheria