

## PRESCRIPTION NOT A DEFENCE AGAINST THE DILIGANT CLAIMANT'S EFFORTS

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

*Some 14 years after entering into a sale agreement and paying the deposit, the purchaser remained obstinate in his refusal to proceed with registration of transfer. The seller had at all times attempted to hold the purchaser to the agreement: Initially a claim for specific performance was launched, and later (albeit under a different case number), an action for damages. The seller was ultimately successful, the purchaser's reliance on prescription failing on the facts. The Court noted that although the seller had proceeded against the purchaser in separate proceedings, he had at all times been acting on the same cause of action, the breach of the sale agreement. Hence prescription was sufficiently interrupted. The peculiar facts of the matter make for a good read!*

The Judgment can be viewed [here](#).

### FACTS

In 2008 Rademeyer entered into an agreement of sale with Ferreira for the purchase of the latter's property. The sale price was R950,000. Rademeyer paid a deposit but thereafter refused to sign the required documents to effect registration of transfer into his name, or to furnish guarantees for payment of the balance of the purchase price.

In 2012 Ferreira launched proceedings in the High Court, essentially for an order: (i) compelling Rademeyer to sign the necessary transfer documents to effect registration of transfer; and (ii) failing which, an order that the agreement would be cancelled, and that Ferreira would be entitled to claim damages.

On 7 August 2012, Pickering J granted the relief sought by Ferreira (the 'Pickering order').

Rademeyer failed to comply with the Pickering order. Early in 2016, and under the same case number and in the same application, Ferreira applied for amended relief for payment of damages as a result of Rademeyer's failure to comply with the order of Pickering (the 'interlocutory application'). Thereafter, Rademeyer filed a rule 30(1) notice contending that the order of Pickering was a final order, as it disposed of all the relief set out in the first application and that it was therefore not open to variation.

As a result of this objection, in March 2016, Ferreira withdrew the interlocutory application and issued fresh summons under a new case number. He sought payment of R854,182.20 as damages arising from Rademeyer's failure to comply with the original order of Pickering and cancellation of the agreement.

Rademeyer in turn filed a special plea contending that Ferreira's claim had become prescribed as he had failed to institute the action by 23 August 2015, i.e. within 3 years from the date of the order of Pickering.

The special plea of prescription was argued before the Port Elizabeth High Court which found in favour of Ferreira. Rademeyer appealed to the Supreme Court of Appeal.

The law:

Section 10 of the Prescription Act 68 of 1969 ('the Act') provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of such debt.

Section 11(d) of the Act provides as follows:

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'(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.**'

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.'**

Rademeyer argued that Ferreira did not pursue the relevant relief in the initial application to its logical conclusion, as Ferreira had abandoned and withdrawn that application. He contended that the subsequent proceedings were new and were not instituted within the three-year prescriptive period, and the claim had thus become prescribed.

Ferreira contended that service of the notice of motion on Rademeyer in the initial application in 2012 interrupted prescription in respect of Ferreira's cause of action, including the cause of action in respect of the damages claim. He further submitted that the subsequent application – the claim in respect of damages - related to the same cause of action, in respect of prescription was (already) interrupted when the 2012 notice of motion was served on Rademeyer.

## HELD

- 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 section 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 section 15 (4) of the Act.
- As background, it must be noted that section 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.
- The phrase 'any process' contained in section 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.

- There were two different case numbers which sought to enforce the debt in the current instance. One was the initial application in 2012, basically for enforcement of the contract with an alternative claim for damages. The other was the issue of summons in 2016, in which Ferreira sought to quantify his damages consequent to the alternative part of the Pickering order, since the latter order 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'.
- There is guidance in the previous judgment in *Cape Town Municipality and Another v Allianz Insurance Co Ltd*. Here the Court 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.
- While acknowledging the undesirability of piecemeal litigation, the Court stated that the words 'debt' and 'payment' in section 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. Thus, 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. That Court concluded that it was "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. 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."
- Thus the question here was 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 (i.e. the subsequent claim for damages).
- 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.
- The current claim for damages is based on the alternative relief in the event of non-compliance with the order of Pickering. The basis of the action for damages is the same as the basis for a claim for specific performance - it arose from the same facts. In fact, the right to claim damages formed part of the Pickering order.
- Ferreira sought to quantify his damages consequent to the cancellation of the deed of sale when Rademeyer failed to comply with the main part of the Pickering order. He could not have succeeded in the damages claim without first establishing Rademeyer's liability for the damages he suffered. That liability for damages was established by way of the Pickering order when Rademeyer failed to comply within the requisite period.
- 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 the declaratory order granted by Pickering 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 the Pickering J judgment accordingly constituted a crucial step in the process of recovering the debt.

- 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. The judgment of Pickering was never abandoned. This conclusion makes it unnecessary to consider the other arguments raised by the appellant.

## CONCLUSION

Rademeyer's appeal therefore had to fail.