



CONSTITUTIONAL COURT OF SOUTH AFRICA

Dion Rademeyer v Thomas Ignatius Ferreira

CCT 184/2022

Date of hearing: 9 May 2024

Date of judgment: 25 October 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 25 October 2024, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA). The SCA upheld the decision of the High Court, Eastern Cape Division, Gqeberha (High Court), which dismissed a special plea of prescription concerning a claim for damages resulting from the cancellation of a written sale agreement (sale agreement).

The matter produced two judgments. The first judgment was penned by Mathopo J (Bilchitz AJ concurring), and the second, majority, judgment was penned by Majiedt J (Zondo CJ, Madlanga ADCJ, Gamble AJ, Mhlantla J and Theron J concurring).

The application was brought by Mr Dion Rademeyer (Mr Rademeyer), a businessman who resides in Gqeberha, and opposed by Mr Thomas Ferreira (Mr Ferreira), the respondent and retired businessman also residing in Gqeberha.

The central issue revolved around the interpretation of the Prescription Act 68 of 1969 and whether the legal steps taken by Mr Ferreira interrupted the prescription period of his damages claim.

The dispute originated from a property transaction involving Mr Ferreira's property, which he was subdividing for the development of an upmarket residential estate in Gqeberha, called Heatherbank Manor. Mr Rademeyer entered into a sale agreement with Mr Ferreira on 27 August 2008 to purchase one of the subdivided properties. However, Mr Rademeyer failed to fulfil several obligations under the agreement, leading to legal action initiated by Mr Ferreira in the High Court.

In the legal dispute between the parties, Mr Ferreira initially sought a declaratory order for specific performance, compelling Mr Rademeyer to fulfil his obligations under the sale agreement. On 7 August 2012, Pickering J ordered Mr Rademeyer to sign all transfer documents required to effect registration of transfer of the property (Pickering J order). The court ordered Mr Rademeyer to comply with his obligations in terms of the sale agreement within five days of the order, failing which Mr Ferreira would be entitled to cancel the sale agreement and claim damages. Mr Rademeyer failed to comply with the Pickering J order. In July 2015, Mr Ferreira elected to cancel the sale agreement and served a notice of such cancellation on Mr Rademeyer. During 2016, under the same case number of the Pickering J order, Mr Ferreira launched action proceedings claiming damages as a result of Mr Rademeyer's failure to comply with that order. In response, Mr Rademeyer filed a Rule 30 notice alleging irregular proceedings and contended that the Pickering J order was a final order which had disposed of all the relief set out in the first application. Further, that the subsequent action proceedings filed by Mr Ferreira were distinct from the initial application and ought to have been brought under a new case number as opposed to a continuation of the former proceedings. Pursuant to the Rule 30 application, Mr Ferreira withdrew his action, and instituted action proceedings under a new case number in which he sought damages pursuant to the cancellation of the sale agreement as a result of Mr Rademeyer's non-compliance with the Pickering J order.

Mr Rademeyer, in his defence, raised a special plea of prescription. He relied on section 11(d) of the Prescription Act, arguing that the claim for damages should have been initiated within three years of his failure to comply with the court order, being 23 August 2012. He contended that Mr Ferreira only instituted action on 18 April 2016, more than three years later. Further, in the plea over, Mr Rademeyer contended that the cancellation of the sale agreement happened on 23 August 2012 by virtue of the court order and not on 1 July 2015, when Mr Ferreira elected to formally cancel. However, Mr Ferreira argued that the service of the first application papers in 2012 interrupted prescription or, alternatively, that the court order constituted a judgment debt with a longer prescription period, namely 30 years. By agreement, the parties agreed for the matter to be determined in the High Court by way of a stated case regarding the special plea of prescription. That Court, however, rejected Mr Rademeyer's prescription defence.

On appeal to the SCA, Mr Ferreira abandoned the argument regarding a judgment debt. The SCA found the issues to be; (a) whether the 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 Prescription Act and, (b) whether the issuance of summons under a different case number amounted to the prosecution of "the process in question" as contemplated by section 15(4) of the Prescription Act.

The SCA held that the basis for the action for damages is the same as the application for specific performance because they emanate from the exact same facts. Further, the right to claim damages was part of the Pickering J order. According to the SCA, Mr Ferreira had merely sought to quantify the damages suffered as a consequence of Mr Rademeyer's conduct when he failed to meet the obligations of the sale agreement. Further, the service of the application constituted a crucial "step" in enforcing a claim for payment of a debt.

As a result, held the SCA, by virtue of the proceedings before Pickering J and the resultant Pickering J order, prescription was interrupted in terms of section 15(1) of the Prescription Act in relation to the damages claim. Therefore, the appeal was dismissed with costs, affirming the rejection of Mr Rademeyer's special plea of prescription and Mr Ferreira's right to pursue damages.

Before this Court, Mr Rademeyer asserted that there are reasonable prospects that the Court will reach a different conclusion. Mr Rademeyer emphasised that the High Court and SCA incorrectly approached the matter on the basis that essentially the same "cause of action" was being pursued in a subsequent action as had been the case in the original application. He submitted that the new action proceedings were not merely the same process under a different case number, but constituted entirely separate and new legal proceedings. He argued that the effect of the ruling is that Mr Ferreira would have had an indefinite period of time to institute the new action proceedings, which would effectively never prescribe, provided it was based upon the same cause of action and was thus fundamentally at odds with established principles relating to the law of prescription.

According to Mr Rademeyer, the SCA's reliance on *Cape Town Municipality v Allianz Insurance Co Ltd (Allianz)* was misplaced because in that case, the further relief sought was based on the same "cause of action" that was instituted in the same proceedings. In this matter, the debt only arose subsequent to the judgment and order of Pickering J, specifically upon the failure of Mr Rademeyer to perform in terms of the Pickering J order, thus constituting a fresh breach of contract and basis underpinning the order for cancellation of the contract. Mr Rademeyer interpreted section 15(2) of the Prescription Act to provide for the interruption of prescription and that such interruption 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. According to Mr Rademeyer, the issue before this Court was whether the service of the application proceedings interrupted the running of prescription as contemplated in section 15 of the Prescription Act. Mr Rademeyer submitted that Mr Ferreira's claim had prescribed by virtue of the provisions of section 10(1) read with section 11(d) of the Prescription Act in that a period of three years had passed between the date when the debt was due and payable, subsequent to cancellation and when Mr Ferreira instituted the action proceedings seeking to recover the debt.

Mr Ferreira, on the other hand, maintained that there was an essential link between the two proceedings and the same "debt" that served before the court in motion proceedings was the same in the action for quantification of damages. He disputed Mr Rademeyer's assertion that his cause of action was separate and distinct from the cause of action in the previous application and should have been brought under a new case number, and not as a continuation of the previous proceedings. He maintained that in the action, he sought to quantify and claim his damages, which were pleaded as a consequence of the cancellation." Mr Ferreira contended that, although the action was issued under a new case number, it was linked to the original application of 2012 and arose from Mr Rademeyer's non-compliance with the Pickering J order.

Mr Ferreira contended that Mr Rademeyer misinterpreted “debt” as contemplated in the Prescription Act and that the judicial interruption of the debt in terms of section 15(1) of the Prescription Act occurred when the first application was instituted in 2012. He contended that the entire debt included the claim for rectification, specific performance of the agreement of sale and the alternative claim for cancellation and damages flowing from Mr Rademeyer’s non-compliance with the court order. Mr Ferreria submitted that he could not have succeeded in his damages claim without first establishing Mr Rademeyer’s liability for such damages by a declaratory order. Therefore, the action proceedings instituting in 2016 sought to quantify his claim for damages consequent upon the cancellation of the deed of sale and arising from Mr Rademeyer’s non-compliance with the Pickering J order. The service of the initial application in 2012 constituted a “step” in enforcement of the debt.

First judgment

The first judgment, penned by Mathopo J (Bilchitz AJ concurring), found that this matter raises important issues relating to the extent of the right of access to courts in the context of extinctive prescription. Prescription laws ought to be interpreted and applied in a manner that is consistent with constitutional principles, more specifically, the right of access to courts as enshrined in section 34 of the Constitution. Extinctive prescription limits the right of a party to pursue legal recourse under section 34 of the Constitution. Therefore, given the effect of extinctive prescription on the right of access to courts, this matter engaged this Court’s constitutional jurisdiction.

The first judgment found that the crux of the matter was whether the initial proceedings were a step in the enforcement of debt payment and whether prescription was considered to be interrupted at that point. Section 15(1) of the Prescription Act provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of a debt. There was, in the present matter, such a process in the form of Mr Ferreira’s initial application for specific performance, resulting in the Pickering J order, which required Mr Rademeyer to perform in terms of the sale agreement. The subsequent litigation which Mr Ferreira had pursued was a step in pursuit of the self-same debt. Thus, for purposes of prescription, the question whether legal proceedings were commenced which related to the same set of facts and flowed from the same legal source was to be answered in the affirmative as the initial application satisfied this requirement.

The first judgment held that Mr Ferreira’s claim for damages flowed from precisely the same breach of contract dealt with in the original application for specific performance. It thus followed that the damages were sustained as a result of a breach of the contract and not as a result of non-compliance with the Pickering J order. While a breach (that is a failure to comply with the contractual obligations after being called upon to do so) triggers damages, a court order legitimises a claim for damages. Prescription was, therefore, interrupted by the service of the original application because it was a step taken to enforce the debt owed by Mr Rademeyer in terms of the sale agreement.

As a result of prescription limiting the right of access to courts, circumstances in which individuals are deprived of access to courts should be interpreted in a restrictive manner. That, in turn, requires that the notion of “debt” be interpreted to extend to all causes of action that flow from the same legal complaint. This means recognising that any legal process that was instituted from the same legal complaint and same facts interrupted prescription.

The first judgment agreed with the SCA decision, that the cause of action for damages was the same as that of the application for specific performance, because they were both based on the same set of facts. The right to claim damages was incorporated in the initial Pickering J order in favour of Mr Ferreira, and the service of this application was an element of executing a claim for the payment of the same debt.

In conclusion, the first judgment held that the fact that Mr Ferreira sued for damages did not represent a different cause of action, but arose from the same obligation which Mr Rademeyer undertook in terms of the written agreement of sale. Mr Rademeyer’s obligations were of the same scope and nature. That he was sued for damages later in no way detracted from the basic cause of action, namely, that he was sued based on the written agreement of sale.

The effect of this was that the right sought to be enforced in the previous application was substantially the same as the one which is the subject matter of the present proceedings, in that the parties were the same, the amount claimed was the same, and the liability, therefore, arose out of the same cause of action and written agreement of sale. Thus, Mr Ferreira’s previous action in the High Court interrupted prescription and therefore the debt had not prescribed.

For these reasons, the first judgment held that the application for leave to appeal should be granted, but leave to appeal should be refused with costs, including the costs of two counsel.

Second judgment

The second, majority judgment by Majiedt J (Zondo CJ, Madlanga ADCJ, Gamble AJ, Mhlantla J and Theron J concurring) agreed that this matter engages the Court’s jurisdiction. The judgment held that there are many cases that have come before this Court where it was called upon to decide whether a litigant’s claim had prescribed and this Court held that it had jurisdiction in such matters. Since the Court in the present instance was called upon to decide whether Mr Ferreira’s claim for damages had prescribed by the time he instituted the proceedings in the High Court that have led to these proceedings, this Court had jurisdiction. There were reasonable prospects of success in the matter, the legal issues raised were important and the impact of the judgment in this case would go beyond the parties before the Court, so the matter was of great importance. It was thus in the interests of justice to grant leave to appeal.

It, however, disagreed on the merits of the case, concluding that the appeal should be upheld with costs. The second judgment held that Mr Ferreira's claim for damages had indeed prescribed. At the time of the proceedings before Pickering J, there was no enforceable claim for damages, as Mr Ferreira was seeking specific performance of the sale agreement. The second judgment emphasised well-established principles relating to remedies for breach of contract. The innocent party had an election to keep the contract alive and sue for specific performance or to cancel the contract and sue for damages. These two remedies are mutually exclusive and an innocent party cannot both approbate and reprobate. On this basis, in electing to sue for specific performance and, thus, to keep the contract alive, Mr Ferreira had not as yet suffered any damages, no claim for damages was thus in existence, and prescription could not have been interrupted by those proceedings. The claim for damages only arose when the sale agreement was cancelled due to Mr Rademeyer's failure to comply with the order for specific performance (the Pickering J order). By that point, more than three years had passed since the date the debt became due and payable, meaning the claim for damages had prescribed.

The second judgment also clarified that the ambiguity in Pickering J's order, which combined specific performance and a conditional claim for cancellation and damages, did not assist Mr Ferreira in interrupting prescription. The second judgment distinguished the present case from prior case law, including *Evins v Shield Insurance Co Ltd, Allianz, and Cadac (Pty) Ltd v Weber-Stephen Products Company*, emphasising that in that instance, Mr Ferreira's right to claim damages arose only after the cancellation of the sale agreement following non-compliance with the Pickering J order for specific performance. As such, the judicial interruption of prescription was limited to the claim for specific performance, not for damages.

The second judgment further rejected the argument that the "double-barrelled approach" could be used to preserve the damages claim, and that this approach was not applicable, as at the time of Pickering J's order, there was no existing claim for damages. Thus, the institution of proceedings under that order could not interrupt the running of prescription for the subsequent damages claim.

As a result, the second judgment upheld Mr Rademeyer's special plea of prescription and concluded that Mr Ferreira's claim for damages had indeed prescribed. Leave to appeal was therefore granted and the appeal was upheld with costs.

The following order was made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(a) The appeal is upheld.
 - (b) The order of the High Court dismissing the defendant's special plea is set aside and replaced with an order upholding the special plea.”

4. The respondent is ordered to pay the costs of the applicant in this Court, the Supreme Court of Appeal and the High Court, including the costs of two counsel, where so employed.