OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: CASE NO: 1256/15

THOMAS IGNATIUS FERREIRA Plaintiff

and

DEON RADEMEYER Defendant

JUDGMENT

GOVINDJEE, AJ:

[1] The parties approached this Court by way of a Stated Case on an issue of prescription.

[2] The Plaintiff obtained an order on 7 August 2012, subsequent to motion proceedings before Pickering J (as he then was) under case number 239/2012 ("the Order"). The material part of the Order is as follows:

'*2. That the respondent is to comply with his obligation in terms of the Agreement of Sale of the immovable property known as Erf 4097 Theescombe, in the Nelson*

Mandela Metropolitan Municipality, division of Port Elizabeth, Province of the Eastern Cape, in extent 1119 square metres, as concluded between the Applicant and the Respondent on 27 August 2008, and more specifically that the Respondent is to sign all transfer documents required to effect registration of transfer of the aforementioned property into the name of the Respondent within 3 days of service on him or his attorneys of record of this Order (if any), and, simultaneously therewith, to provide any and all documents as required by the conveyancing attorneys for purposes thereof…
4. That in the event of the Respondent failing to comply with his obligations within five (5) days of the service of this order upon the Respondent, cancellation of the said Agreement of Sale and damages.'

[3] The Defendant failed to comply with his obligations arising from this Order and the Plaintiff instituted the present proceedings during April 2016, alleging cancellation of the Agreement of Sale in July 2015, and claiming damages. The Defendant filed a special plea to the claim, arguing that the claim has prescribed.

[4] In particular, the Defendant contends that the Plaintiff had elected to claim cancellation and that such cancellation occurred, as a matter of law, five days after service of the Order upon the Defendant. As paragraph 4 of the Order constitutes a 'debt' for purposes of section 11(d) of the Prescription Act, 1969[1] (the Act) but not a 'judgment debt' as envisaged in section 11(a)(ii), so the argument goes, the claim prescribed three years subsequent to 23 August 2012.

[5] The Defendant's contention that the Plaintiff elected to cancel the contract and claim damages in the event of non-performance must be accepted, given the manner in which the application was formulated and the relief sought therein, which resulted in the wording of the Order. Regarding prescription, Plaintiff submits that the service of the original application papers on the Defendant interrupted prescription of the Plaintiff's cause of action, which included the cause of action in respect of the damages claim. The present claim relates to the same cause of action and, it is argued, has therefore not prescribed. Alternatively, the Plaintiff pleads that the Order

[1] Act 68 of 1969.

constitutes a judgment debt in terms of the Act, so that a 30-year period of prescription is applicable.

[6] The starting point must be to determine the manifest purpose of the Order, read within the legal context of the words used.[2] In this case it is clear that the purpose of the Order was to direct specific performance in order to remedy the Defendant's breach of contract, and to provide further relief in the form of cancellation and damages in the event that the Defendant failed to comply with paragraph 2 of the Order within five days of the Order being served. What the Order clearly failed to specify was the quantum of damages payable in the event of cancellation.

[7] Reference must also be made to the relevant provisions of the Act, particularly s 15.[3] The prescription period applicable in the present matter, insofar as the original dispute was concerned, was three years. In terms of s 15(1) of the Act, read with s 15(6), the running of prescription was interrupted by the service on the debtor of a process by way of notice of motion, commencing legal proceedings for

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[2] See *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49 par 13, cited with approval in *National Union of Metalworkers of South Africa obo M Fohlisa and 41 Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd* [2017] ZACC 9 para 11. The principle has been established that, where relevant, when a court has to ascertain the meaning of a court order, it should give the court order a meaning that is in conformity with the Constitution of the Republic of South Africa, 1996 (the Constitution), rather than one that is inconsistent with the Constitution where it is reasonably possible to do so and where such an interpretation is not unduly strained.

[3] '15. Judicial interruption of prescription.- (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, 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.'

specific performance and, in the event of failure to perform, cancellation of the agreement of sale and damages.[4]

[8] The 'process in question', for purposes of s 15(2) must, at face value, relate to the process triggered by the Notice of Motion in case 239/2012, which culminated in the judgment of Pickering J. As Smallberger J held in *Van der Merwe v Protea Insurance Co Ltd*:[5]

'The "process in question" is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor, and not any other. The reference to "final judgment", in the context, contemplates judgment in the court in which process is instituted…When a creditor is successful in the court in which the process in question commences legal proceedings prescription stands interrupted until the judgment is abandoned or set aside on appeal.'

[9] In this case the 'process in question' involved a claim for specific performance and, failing compliance, cancellation and (unspecified) damages. Importantly, it has been held that the Act does not deal with the period within which *the process must be completed* and this period has to be determined by the rules of court.[6] The practical effect was descripted by Munnik CJ in *Titus v Union & SWA Insurance Co Ltd* as follows:[7]

'…should a plaintiff, eg, have absolution granted against him at the end of his case, then he cannot be said to have successfully prosecuted his claim to final judgment or, if an exception is taken to his claim and he cannot amend but has to issue fresh summons or a fresh declaration, then the process by which he commenced the proceedings is deemed not to have interrupted prescription and the running of prescription is deemed not to have been interrupted thereby…'

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[4] See *Melamed and another v BP Southern Africa (Pty) Ltd* 2000 (2) SA (W) at 614 621.
[5] 1982 (1) SA 770 (E) 793A-C, cited with approval in *Melamed* 621.
[6] *Melamed* at 621. Also see *Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (Tk) at 703A-B and 704A-H.
[7] *1980 (2) SA 701* at 704D-E.

[10] While there is no question in this matter of a withdrawal or an abandonment of the claim, the key question is whether the plaintiff 'prosecuted' the claim documented in the motion proceedings to 'final judgment'. That claim dealt in the first place with specific performance but quantification of the damages pursuant to cancellation was absent.[8] In this respect the decision of Harms DP (as he then was) in *Cadac (Pty) Ltd v Weber-Stephen Products Company and others*[9] would appear to be instructive. In that matter, the applicant applied on an urgent basis to set aside a warrant issued in terms of the Counterfeit Goods Act, 1997,[10] together with a declaration that the goods seized were not counterfeit and for an inquiry into damages. The application was upheld (by Schwartzman J), but the prayer relating to an inquiry into damages was postponed *sine die* and the applicant failed to take further steps in relation to that matter until three years and two days after the original judgment. Its subsequent step was, understandably, met with a defence of prescription, based on the provisions of s 15(2) of the Act.

[11] On appeal, the SCA held as follows:[11]

'One finds regularly that parties agree or courts order that issues concerning liability are to be decided first and *quantum* thereafter. But the present rigid system requires of a plaintiff to particularise its damages when instituting action, sometimes a costly exercise which may prove to have been unnecessary. I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases albeit because of specific legislation but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice – a power derived from common law and now entrenched in the Constitution (section 173) – I can see no justification for refusing to extend the practice to other areas. The plaintiff may run a risk if it decides to follow this route because of the court's discretion in relation to

[8] See *Van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770(E) at 773H and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 827G-828-B.
[9] [2011] 1 All SA 343 (SCA).
[10] Act 37 of 1997.
[11] Paras 12-14, references omitted.

interest orders. It might find that interest is only to run from the date when the debtor was able to assess the *quantum* of the claim. Another risk is that a court may conclude that the issues of liability and *quantum* are so interlinked that it is unable to decide the one without the other. Once the principle is accepted for trial actions there is no reason why it cannot apply to application proceeding…'

[12] Relying on *Cape Town Municipality and another v Allianz Insurance Co Ltd*,[12] the SCA held further that the notice of motion in *Cadac* 'was a process whereby proceedings were instituted as a step in the enforcement of a claim for payment of a debt', so that prescription was interrupted in terms of s 15(1) of the Act. Significantly, the Court dealt specifically with the argument that prescription had not been interrupted and that the claim had therefore prescribed because of the wording of s 15(2), on the basis that the applicant had not timeously prosecuted its claim to a *final judgment*. As was the case in argument before me (in relation to the Pickering J Order), counsel in that case argued that the claim had prescribed three years after the judgment of Schwartzman J. That argument was unequivocally rejected, with reference to *Titus*, on the basis that s 15(2) contains no time limit within which a claim must be prosecuted with success.[13] The Court held that extinctive prescription limits the time within which proceedings must be *instituted*, but once instituted its continuance is governed by the rules of court. It is only if a creditor's claim *fails* that s 15(2) would come into force. Examples cited include the granting of absolution, an exception requiring a fresh summons or withdrawal of an action in one court in order to institute it in another, so that the first summons was not successfully prosecuted.[14] The Court concluded that although the manner in which the applicant had conducted the case was lackadaisical, the respondent debtor could have had some say in the running of prescription by enforcing the rules of court, and could have enrolled the case for dismissal of the postponed relief.[15]

[12] 1990 (1) SA 311 (C) at 334G-J.
[13] *Cadac* para 21.
[14] *Cadac* para 22, 23.
[15] *Cadac* para 24.

[13] A similar sentiment was expressed in *A Adams (Pty) Ltd v Vermaak NO and others*, in the context of a debtor company in liquidation. Again relying on *Allianz Insurance*,[16] the Court concluded that:[17]

'The plaintiff could have interrupted the running of prescription by instituting and prosecuting to a successful conclusion an action in ordinary form, even though he would still have to prove his claim, now based upon that judgment, in the winding up of the company. It is to be noted in this regard that s 15(2) makes the obtaining of judgment (or of course its non-abandonment or its not being set aside on appeal), not the execution upon it, the determining factor in deciding whether the interruption shall lapse or not. Section 15(4) does no more than fix the date upon which the period of prescription in respect of the judgment shall begin to run…'

[14] Counsel for both parties placed reliance on *Allianz* to support their interpretation. The case is indeed important given that the SCA has supported its reasoning in both *Cadac* and *Peter Taylor & Associates v Bell Estates (Pty) Ltd*.[18] In particular, the following passage was brought into issue, and demonstrates the similarity between that case and the case at hand:[19]

'Ignoring for present purposes second plaintiff's belated monetary claim, if defendant refused to pay, further litigation would have to ensue in order to compel payment. Moreover, the issues defined on the present pleadings do not include the issue of the *quantum* of the loss. Even if there were no other issues to be decided by such further litigation than *quantum*, the further proceedings could not simply be a shortly-worded application seeking payment of the sum already determined in the present proceedings. The further litigation would have to take the form of an action and attendant trial. Such further proceedings would have to be launched under a different process. If, thereby, judgment were obtained for payment, what would then be executable would be that judgment, not the judgment obtained in the present

[16] 1993 (1) SA 107 (N).
[17] At 110J-111B.
[18] 2014 (2) SA 312 (SCA).
[19] At 328G-H.

proceedings. It follows that judgment for plaintiffs in the present action would not be final and executable.'

[15] What that quotation, read in isolation, fails to convey is the sentiment expressed in the very next line of that judgment,[20] together with the detailed s 15 analysis that follows. This explains the ultimate rejection of the defendant's submissions and support for the conclusion that prescription was interrupted (in terms of s 15, by the service of plaintiffs' summonses) and remained interrupted, so that the special pleas were dismissed with costs.[21] In *Allianz* the crux of the defendant's contention was that for prescription to be judicially interrupted in terms of s 15, the process had to have been one whereby payment of the debt was claimed. Since defendant's debt could only be discharged by paying money, the claim, in order to effect interruption of prescription, had to be one sounding in money. Since plaintiffs had not claimed money but merely sued for declarators, the summonses were not for 'payment of the debt' within the meaning of s 15(1) and prescription had not been interrupted. In addition, defendant's counsel in *Allianz* argued that the declarators could never 'become executable' as required by s 15(4).[22] Despite the clear similarities with the defendant's position in this matter, it was nonetheless argued that that case was distinguishable on the basis that an amendment to proceedings had been sought in *Allianz*, so that the initial declaratory relief was supplemented with a claim for actual financial loss. In fact, it was only the second plaintiff who abandoned its claim for declaratory relief and replaced this with a claim for the full sum insured in *Allianz*.[23] The first plaintiff amended *the terms of its desired declarator* but without specifying any actual financial loss, and the Court confirmed that nothing important turned on that amendment.[24]

[16] It was also argued that there may be some significance to quantifying the damages under the same case number, without the need to issue fresh proceedings, and that even a permissible two-step process would require damages to be

[20] "However, that is not an end of the matter."
[21] At 335C-D.
[22] At 327I-328A.
[23] At 316I.
[24] At 317A-C. It will also be noted that the paragraph at 328G, quoted above, commences with 'Ignoring for present purposes *second plaintiff's* belated monetary claim…'

quantified and claimed within three years from the declaratory relief granted. My reading of *Allianz* (as supported by *Cadac*) suggest that these submissions must be rejected. The principles emanating from the judgment of that court are instructive in explaining this conclusion and, in order to fully convey the rationale of this judgment, will be dealt with at some length:

- It is in keeping with the purposes of prescription and its operation in common law to apply 'elasticity of language' when interpreting s 15(1) so that a legal proceeding may be instituted 'as a step in the enforcement of a claim or right whereby the creditor formally involves his debtor in court proceedings for the enforcement of his claim'.[25]
- A favourable judgment for a plaintiff claiming declaratory relief regarding liability will only be final in the sense of being appealable, so that the liability issue is *res judicata*. This judgment is, however, *not executable*, and the only final executable judgment which could be given in respect of defendant's liability would be one ordering the payment of money (i.e. a judgment that quantifies the damages payable).
- It is tempting to interpret the s 15(2) words 'his claim under the process in question' to mean the original claim, but in a fashion that permits any subsequent final executable judgment from other proceedings to flow from that original claim. This interpretation is problematic and unacceptable, and the preferred interpretation is provided below.[26]
- It could be suggested that the 'once and for all' rule prohibits further proceedings to obtain recovery of the money, and should bar 'double-litigation' occasioned by an initial judgment on liability only. These submissions must be rejected.[27]
- Further proceedings to exact payment are permissible on the basis that the initial proceeding is only concerned with the issue of liability. While that dimension

[25] At 331D-E.
[26] At 332 B-C.
[27] At 332 I. The Court held that: 'If further proceedings are instituted by plaintiffs in due course to exact payment from defendant pursuant to judgment in the present case, such further action will be necessary by reason of the fact that the present action is only concerned with the issue of liability, and the further action will cover elements of plaintiff's claim not canvassed in the current action.'

would be *res judicata* once judgment is delivered in the initial matter, the two legal proceedings together will still only deal with one cause of action.[28]

- Although the relief to be sought in the second legal proceeding will differ from the first, the precise form of the relief and, if it is monetary relief, the quantum thereof, are not elements of the cause of action.[29] As a result, the cause of action on which the first legal proceedings are based is the same cause of action as that on which the future litigation will be founded.[30]
- It may then be said that prescription has been effectively interrupted when there is a right enforceable against a party (in respect of which extinctive prescription is running) and a process is served on that party instituting legal proceedings (for the enforcement of the same or substantially the same right as would otherwise be rendered unenforceable by lapse of time).[31]
- Permitting this two-stage process is a departure from the usual position, but this is irrelevant to the issue of prescription and the undesirability of suing piecemeal should not be allowed to influence interpretation of the Act.[32]
- It is uncontroversial that the expression 'under the process in question' in s 15(2) covers the situation where a final executable judgment is obtained 'under' a process in terms of which process and judgment constitute the beginning and the end of *one and the same* legal proceeding.[33] As a matter of direct cause and effect it might then be suggested that an order for payment is not obtained 'under' the process in question when further legal proceedings are required in order to secure an order for payment. But it is undoubtably the case that the order *establishing liability* would be obtained 'under the process in question'. And, crucially, there is unquestionably an essential link between that initial process and the final executable judgment, 'notwithstanding that some further process will be required to initiate the supplementary proceedings'.[34]

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[28] At 332I-J.
[29] At 333A.
[30] At 333C and 334E.
[31] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 464 (A) at 470H-471C, as quoted in *Allianz* at 333C-D.
[32] At 333E-F. In support of this, the Court in *Allianz* noted that evidence may establish that quantum was hardly in dispute, and in any event any unnecessary expenditure on the part of the defendant could be met with an appropriate cost order: at 333G.
[33] At 333H.
[34] At 333I-334A.

- This interpretation, construing the contemplated final executable judgment as being obtained by (or via) prosecution of the claim 'under the present process', does not defeat any objectives of the Act.[35]
- S 15 must be interpreted so that it is sufficient for purposes of interrupting prescription to serve an initial process as a step in the enforcement of a claim for payment of a debt.[36]
- A party prosecutes a claim under that initial process to final, executable judgment not only when the process and the judgment constitute the beginning and end of the same legal process. This is also the case where the initial process triggers a judgment which finally disposes of some elements of the claim, and the remaining elements are disposed of by way of a supplementary legal process instituted pursuant to and dependent upon the original judgment.[37]
- The facts in *Cadac* make it clear that the extinction of a claim by prescription does not arise merely because there is more than a three-year gap between the two legal processes in question.

[17] Applying these principles and authorities to the case at hand results in the conclusion that judicial interruption of prescription occurred when the Notice of Motion in case 239/2012 was served on the defendant, including a claim for cancellation and damages in the event of the respondent failing to comply with his obligations in terms of the Agreement of Sale.[38] That interruption of prescription has not lapsed in terms of s 15(2), despite two processes being required to bring the matter to conclusion. These processes pertain to a single cause of action. The first process, under case 239/2012, resulted in the judgment of Pickering J and finally disposed of the issue of liability. There is an inextricable link between that judgment and the action instituted in this matter for damages, which will ultimately yield an executable judgment in future (assuming that the parties are unable to settle the issue of quantum before then). Such a judgment must be considered as being

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[35] At 334A.
[36] At 334H.
[37] At 334I-J.
[38] On s 15 generally, see *Peter Taylor & Associates v Bell Estates (Pty) Ltd and another* [2013] ZASCA 94; *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd and others* [2019] ZAGPPHC 618 at para 12. For an example of an instance where prescription was upheld because of a failure to include a prayer for declaratory relief in its notice of motion, see the *obiter* remarks by Revelas J in *Avante Fishing Enterprises v Rafel Ondernemings CC* [2008] ZAECHC 62 par 35.

obtained by (or via) the original prosecution of the claim by notice of motion in case 239/2012 in such a way that the judicial interruption of prescription has not lapsed in terms of s 15(2). The judgment of Pickering J has not been set aside and there is no suggestion before me of abandonment. The argument that the second step should have been taken within three years of the Order being served on the Defendant is ultimately defeated by the wording of s 15(4) and the *Allianz* interpretation, which has subsequently found SCA support as indicated above. Prescription, having been successfully interrupted in terms of s 15(1), only commences to run afresh on the *day on which the judgment of the court becomes executable*. That day is sometime in the future.

[18] The conclusion of the court in *Allianz* is worth repeating:[39]

'…I think that defendant's contention that plaintiffs are out of Court because they have not claimed in the present proceedings an order sounding in money is unacceptable. To hold that that contention is right in the present case would lead to a result so inconsistent with the purpose behind prescription as a legal institution, so contrary to relevant case law and so out of keeping with the aim and scope of the Prescription Act, that the Legislature could not, in my view, have intended it.'

[19] These sentiments must be endorsed and speak of an interpretation of the Act that affords a party time to take judicial steps to recover damages when initial attempts at securing specific performance have failed. Prescription should not continue running while the law takes its course.[40] This interpretation appears to me, ultimately, to give effect to the manifest purpose of the Order, read in context, as well as the constitutional right to have any dispute resolved by the application of law before court.[41]

[20] On the approach I take to the matter the plaintiff's alternative submissions are unwarranted and it is unnecessary to determine or express a view whether the Order amounts to a judgment debt for purposes of s 11 of the Act. In conclusion, the

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[39] At 334F-G.

[40] *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (AD) at 578.

[41] S 34 of the Constitution. See *Kruger v National Director of Public Prosecutions* [2019] ZACC 13 para 14.

prescription defence is without merit and must be rejected. The special plea is accordingly dismissed with costs, and the action instituted is to proceed in respect of the computation of the Plaintiff's damages.

[21] I make the following order:

The special plea is dismissed with costs.

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A. GOVINDJEE
ACTING JUDGE OF THE HIGH COURT

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