



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 184/2022

In the matter between:

DION RADEMEYER

Applicant

and

THOMAS IGNATIUS FERREIRA

Respondent

Neutral citation: *Rademeyer v Ferreira* [2024] ZACC 24

Coram: Zondo CJ, Madlanga ADCJ, Bilchitz AJ, Gamble AJ, Majiedt J, Mathopo J, Mhlantla J and Theron J.

Judgments: Mathopo J (minority): [1] to [56]
Majiedt J (majority): [57] to [94]

Heard on: 9 May 2024

Decided on: 25 October 2024

Summary: Prescription Act 68 of 1969 — sale agreement — same cause of action — breach of contract — specific performance — right to claim damages

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Local Division, Gqeberha):

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.

JUDGMENT

MATHOPO J (Bilchitz AJ concurring):

Introduction

[1] This application for leave to appeal raises the question whether the respondent’s claim became prescribed under the Prescription Act.¹ The issues surface in the application for leave to appeal against the judgment and order of the Supreme Court of Appeal. That court 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).

¹ 68 of 1969.

[2] The application is brought by Dion Rademeyer (Mr Rademeyer), a businessman who resides in Gqeberha. It is opposed by the respondent, Thomas Ferreira (Mr Ferreira), a retired businessman also residing in Gqeberha.

Background

[3] Mr Ferreira was the registered owner of Erf 723 Theescombe, Port Elizabeth.² Prior to 2008, Mr Ferreira was developing this property (“mother erf”) by subdividing it into separate erven with the purpose of developing an upmarket residential estate to be known as “Heatherbank Manor”.

[4] Upon the successful subdivision, the mother erf was subdivided into five separate properties. On 27 August 2008, the parties concluded a sale agreement for one of the subdivided properties. Mr Ferreira sold the property described as Erf 4097, Theescombe, in the Nelson Mandela Metropolitan Municipality, Port Elizabeth, Province of the Eastern Cape, in extent 1119 square metres (the property) to Mr Rademeyer.

[5] The essential terms of the sale agreement, amongst others, were as follows:

- (a) The purchase price of the property was R950 000;
- (b) Mr Rademeyer would make payment of the deposit of R190 000 within seven days from the date of signing the agreement;
- (c) The balance of the purchase price was to be paid by Mr Rademeyer on date of registration of transfer;
- (d) Mr Rademeyer would be liable for all transfer costs and duties and was to sign all required documents to give effect to the registration of the transfer of the property; and
- (e) In the event that Mr Rademeyer failed to fulfil his obligations under the sale agreement, and failed to rectify any failure after being given five

² The erf was registered thus in the Deeds Office, under Gqeberha’s previous name.

days' written notice to do so, Mr Ferreira would be entitled to sue for specific performance.

[6] On 2 September 2008, Mr Rademeyer made payment of R190 000 as a deposit to Mr Ferreira's attorneys which was invested in an interest-bearing account. The interest which accrued from this amount was paid to Mr Ferreira, in terms of the sale agreement. However, Mr Rademeyer did not fulfil all the essential obligations of the sale agreement. In particular, he did not sign all the transfer documents required to effect transfer; furnish guarantees for payment of the balance of the purchase price, or pay the transfer costs and duties.

[7] During 2011, and upon major development of the property, Mr Ferreira was in a position to proceed with the registration of transfer of the property, as per the sale agreement. He communicated with Mr Rademeyer, requesting that he fulfil his obligations in terms of the sale agreement. This was met with no success and, as a result, Mr Ferreira launched an application in the High Court requesting, among others, an order for specific performance, and in the event of Mr Rademeyer failing to comply with his obligations within five days of the service of the specific performance order, cancellation of the sale agreement and damages. In response thereto, Mr Rademeyer filed a counter-application seeking an order that Mr Ferreira be ordered to pay him the sum of R190 000, together with interest thereon calculated at the prevailing legal rate, from 3 September 2008 to date of payment.

Litigation history

High Court

[8] Mr Ferreira sought a declaratory order compelling Mr Rademeyer to comply with his obligations in terms of 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). In the event that Mr Rademeyer failed to comply with the obligations of the sale agreement after five days of the service of the

order upon him, Mr Ferreira would be entitled to cancel the sale agreement and claim damages. Relevant to these proceedings, the following was contained in the order:

“That in the event of the Respondent failing to comply with his obligations within five days of service of this order upon the Respondent, cancellation of the said agreement of sale and damages.”

Subsequent to and in terms of the Pickering J order, Mr Rademeyer was requested to execute the transfer documents and pay the balance of the purchase price, which he elected not to.

[9] In July 2015, Mr Ferreira cancelled the sale agreement and served a notice of cancellation on Mr Rademeyer. During 2016, under the same case number as the Pickering J order, Mr Ferreira launched a further application claiming damages, as a result of Mr Rademeyer’s failure to comply with the Pickering J order. In response, Mr Rademeyer filed a notice in terms of rule 30(1) of the Uniform Rules of Court³ and submitted that the Pickering J order was a final order which had disposed of all the relief set out in the first application. Further, he contended that this application was distinct from the initial application and ought to have been brought under a new case number as opposed to a continuation of the proceedings.

[10] As a result, Mr Ferreira withdrew this application and instituted action proceedings in the High Court under a new case number in which he sought damages in the sum of R854 182.20, pursuant to the cancellation of the agreement, and as a result of Mr Rademeyer not complying with the Pickering J order for specific performance.

[11] Mr Rademeyer, in his defence, raised a special plea and submitted on the basis of the Pickering J order having been served on him on 15 August 2012, and it being common cause that he failed to comply, that Mr Ferreira’s claim for damages, if any,

³ Rule 30(1) relates to irregular proceedings and provides that a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

should then have begun to run on 23 August 2012. He relied on section 11(d) of the Prescription Act and pleaded that Mr Ferreira should have instituted action proceedings within three years from 23 August 2012, whereas Mr Ferreira only instituted this action on 18 April 2016. Further, in the plea, 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, which is when Mr Ferreira opted to formally cancel the agreement.

[12] Mr Rademeyer further pleaded that the claim for accrued interest in the amount of R422 466.30 was incompetent and denied liability for that interest or any, at all. He argued that Mr Ferreira had a duty to mitigate his damages by selling the property to another interested buyer.

[13] Mr Ferreira then filed a replication to the special plea and raised two defences (in the alternative) namely; that the service of the application papers in the Pickering J order interrupted prescription with regards to the claim for damages, and, alternatively, that the right to claim damages stemmed from an order of court which constituted a judgment debt in terms of section 11(a)(ii) of the Prescription Act, the prescription period thus being 30 years.

[14] By agreement, and in terms of the Uniform Rules of Court,⁴ the parties agreed for the matter to be determined by way of a stated case before Govindjee AJ. Mr Rademeyer contended that, when interpreting the phrase “debt” in terms of section 11(d) of the Prescription Act, the court order did not constitute a judgment debt in terms of section 11(a)(ii). On the contrary, Mr Ferreira argued that the Pickering J order interrupted prescription and constituted a debt in terms of section 11(1) of the Prescription Act. However, if the court did not find for him on that score, then the

⁴ According to rule 33(4):

“if, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

Pickering J order constituted a judgment debt in terms of section 11(a)(ii) of the Prescription Act and, thus, the claim for damages had not prescribed.

[15] After hearing argument, the High Court dismissed the special plea of prescription and held that “the action instituted is to proceed in respect of the computation of the Plaintiff’s damages”.⁵ Dissatisfied with the judgment, Mr Rademeyer approached the Supreme Court of Appeal for leave to appeal.

Supreme Court of Appeal

[16] Before the Supreme Court of Appeal, Mr Ferreira abandoned the argument that the Pickering J order constituted a judgment debt, with the result that there were only two issues for determination by that court, namely, (a) 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 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. Section 15 of the Prescription Act is headed “Judicial interruption of prescription” and reads 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) If the running of the prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run

⁵ *Ferreira v Rademeyer*, unreported judgment of the High Court of South Africa, Eastern Cape Division, Gqeberha, Case No 1256/15 (23 February 2021) (High Court Judgment) at para 20.

afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

- (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) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.
- (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.”

[17] The Supreme Court of Appeal, relying on its earlier judgment in *Cadac*⁶ which endorsed *Allianz*,⁷ made a number of findings:

- (a) it held that the basis for the action for damages is the same as the application for specific performance, because they stem from the same facts.⁸ Accordingly, the right to claim damages was said to be part of that order;
- (b) Mr Ferreira 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;
- (c) it held further, that the service of the application constituted a crucial “step” in enforcing a claim for payment of a debt;
- (d) it endorsed the ratio in *Allianz* to the effect that “to return to the expression ‘under the process in question’, clearly a final executable judgment will

⁶ *Cadac (Pty) Ltd v Weber-Stephen Products Company* [2010] ZASCA 105; 2011 (3) SA 570 (SCA) (*Cadac*).

⁷ *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) (*Allianz*).

⁸ *Rademeyer v Ferreira* [2022] ZASCA 92; 2022 JDR 1993 (SCA) (Supreme Court of Appeal judgment).

be obtained ‘under’ a process where process and judgment constitute the beginning and the end of one and the same action.”;⁹ and,

(e) concluded 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 section 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 J was never abandoned.”¹⁰

Consequently, the Supreme Court of Appeal dismissed the appeal with costs.

Before this Court

Applicant’s submissions

[18] Mr Rademeyer submits that leave should be granted to appeal against the whole of the judgment of the Supreme Court of Appeal, as there are reasonable prospects that this Court will come to a different conclusion to that of the Supreme Court of Appeal, and the application raises an arguable point of law of general public importance. Mr Rademeyer contends that the appeal concerns the interpretation of the relevant provisions of the Prescription Act, which have been held to play a vital role in bringing certainty to the process of adjudication. Further, it implicates the right of access to courts and thus raises a constitutional issue.

[19] Mr Rademeyer emphasises that the High Court and the Supreme Court of Appeal 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 submits that the new action was not merely the same process under a different case number, but it constituted entirely separate and new legal proceedings. He argues that the effect of the ruling is that Mr Ferreira would have had

⁹ *Allianz* above n 7 at 333G.

¹⁰ Supreme Court of Appeal judgment above n 8 at para 23.

an indefinite period of time to institute the new action, which would effectively never become prescribed, provided it was based upon the same cause of action. This is fundamentally at odds with established principles relating to the law of prescription.

[20] Mr Rademeyer contends that *Allianz* and *Cadac* are distinguishable and do not support Mr Ferreira's case. The contention advanced is that the distinguishing feature in this case is that the debt only arose subsequent to the judgment and order of Pickering J, whereas, in *Allianz* and *Cadac*, the relief sought was based on the same cause of action that was instituted in the same proceedings. The contention continued that, upon failure of Mr Rademeyer to perform in terms of the order, a fresh breach of contract ensued as the basis for the cancellation.

[21] Mr Rademeyer interprets 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. Mr Rademeyer says Mr Ferreira did not pursue the relief claimed in the prior application to final conclusion because he abandoned and withdrew that application. Therefore, the current proceedings were new and not instituted within the three-year period and were thus hit by prescription. In conclusion, Mr Rademeyer submits that Mr Ferreira's claim has 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 passed between the date when the debt was due and payable, subsequent to cancellation (five days after service of the order on Mr Rademeyer) and when Mr Ferreira instituted the action proceedings seeking to recover the debt.

[22] Mr Rademeyer contends that the debt in this matter comprises the contractual damages pursuant to cancellation of the contract and that it only arose at the earliest upon cancellation of the contract, as per the definition of "debt" in *Makate*,¹¹

¹¹ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) (*Makate*).

*Desai N.O.*¹² and *Off-Beat Holiday Club*.¹³ He contends that where specific performance has been ordered and not complied with, the innocent party may, either in the same proceedings or in subsequent proceedings, obtain relief that cancellation and damages be ordered.

[23] Mr Rademeyer took issue with the “double-barrelled approach”, a procedural practice followed pertinently in *Shembe*,¹⁴ and—

“[P]ermits a plaintiff-seller to elect to pursue the first of these rights, i.e., to demand implementation of the agreement and obtain judgment therefor, but further permits him in the same action to ask the Court, should the defendant fail to comply with the Court’s judgment for implementation of the agreement, to set aside the agreement and grant consequential relief.”¹⁵

[24] Mr Rademeyer argues that this approach, which has been followed in many other cases, is out of touch with reality and must be jettisoned. In the alternative, he contends that this procedural practice ought to be limited to an order for cancellation only and not extended to instances where a claim for damages is sought.

Respondent’s submissions

[25] Mr Ferreira denies that there are reasonable prospects that this Court will come to a different conclusion. He asserts that the Supreme Court of Appeal was correct in applying *Allianz* and that the interpretation put forward by Mr Rademeyer is incorrect. He submits that the decisions in *Cadac* and *Peter Taylor & Associates*¹⁶ support the findings of the Supreme Court of Appeal, as there is an essential link between the two

¹² *Desai N.O. v Desai NNO* [1995] ZASCA 113; 1996 (1) SA 141 (A) (*Desai N.O.*).

¹³ *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited* [2017] ZACC 15; 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC) (*Off-Beat Holiday Club*).

¹⁴ *Custom Credit Corporation (Pty) Ltd v Shembe* [1972] ZASCA 28; 1972 (3) SA 462 (A) (*Shembe*).

¹⁵ *Id* at 470.

¹⁶ *Peter Taylor & Associates v Bell Estates (Pty) Ltd* [2013] ZASCA 94; 2014 (2) SA 312 (SCA).

proceedings. He contends that the “debt” that served before the court in the motion proceedings is the same in the action for quantification of damages.

[26] Mr Ferreira contends that service of the notice of motion on Mr Rademeyer in the initial application interrupted prescription in respect of Mr Rademeyer’s cause of action, including the damages claim. The claim for damages related to the same cause of action which was interrupted by prescription in 2012.

[27] Mr Ferreira therefore disputes 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 maintains that in the current action he sought to quantify and claim his damages, which was pleaded in the following terms – “as a consequence of the cancellation” and 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 order of Pickering J.

[28] Mr Ferreira contends that Mr Rademeyer misinterprets the “debt” as contemplated in the Prescription Act, which was pertinently addressed in *Allianz*, and that the judicial interruption of the debt in terms of section 15(1) of the Prescription Act occurred when the original application was instituted in 2012. He contends that the entire debt included the claim for rectification, specific performance, and the alternative claim for cancellation and damages flowing from Mr Rademeyer’s non-compliance with the court order.

[29] Mr Ferreira does not dispute that the action proceedings were instituted more than three years after the order of Pickering J, but emphasises that it was unnecessary to institute proceedings for damages within three years of non-compliance. As judicial interruption had already taken place in 2012, it was therefore unnecessary to interrupt prescription again.

[30] Mr Ferreira submits 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 instituted 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 order of Pickering J. In essence, service of the initial application in 2012 constituted a "step" in the enforcement of the debt.

Issues

[31] The following issues arise in this application:

- (a) whether the basis of the claim in the application proceedings in 2012 was the same as the basis of the claim in the current proceedings;
- (b) whether the application proceedings were a step in the enforcement of a claim for the payment of a debt; and
- (c) whether the application proceedings disposed of some element of the claim which arise in the current matter.

Jurisdiction and leave to appeal

[32] In order for this Court to entertain this matter, the applicant must show that the matter is a constitutional matter or that it raises an arguable point of law of general public importance which ought to be considered by this Court.¹⁷ The latter subsection provides for three requirements which all need to be met before the Court will have general jurisdiction to hear a particular matter.

[33] This matter raises important issues relating to the extent of the right of access to courts in the context of extinctive prescription. This means that 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, and as developed through case law culminating in the decision in

¹⁷ Section 167(3)(b)(i) and (ii) of the Constitution.

Mdeyide.¹⁸ Cases in which prescription laws, when applied strictly, will infringe on the fundamental rights of a person to redress through courts are those that will engage the jurisdiction of this Court. These will be instances that involve an application of the periods of prescription in a disproportionate way between vulnerable people or groups in society, drawing in broader constitutional rights related to more than mere procedure.

[34] Extinctive prescription limits the right of a party to pursue legal recourse under section 34 of the Constitution.¹⁹ Therefore, to some extent, matters of this nature generally engage this Court's jurisdiction. It cannot be ignored, though, that the questions that arise in this matter are not necessarily novel and have already been established. However, given the effect of extinctive prescription on the right of access to courts, I am of the view that this matter engages this Court's constitutional jurisdiction.

[35] Even if the matter raises a constitutional issue or an arguable point of law, this Court has previously pronounced that leave may be refused if it is not in the interests of justice for this Court to hear the appeal.²⁰ Further this Court has found that prospects of success are an important factor in deciding whether to grant leave to appeal.²¹ In considering leave to appeal, the prospects of success are of crucial importance. In doing so, the different interpretations of the relevant sections in Chapter III of the Prescription Act, as submitted by the parties, must be interrogated.

[36] Though it cannot be disputed that the point of law does not transcend the narrow interests of the parties, the interests of justice and the constitutional implications bearing

¹⁸ *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (*Mdeyide*).

¹⁹ *Le Roux v Coetzee & Seuns* [2023] ZACC 46; 2024 (4) SA 1 (CC); 2024 (4) BCLR 522 (CC) (*Le Roux*) at para 25; *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) (*Mtokonya*) at para 9; *National Union of Metalworkers of SA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9; 2017 (7) BCLR 851 (CC) at para 8; and *Mdeyide* above n 18 at para 138.

²⁰ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

²¹ *Fraser v Naude* [1998] ZACC 13; 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) at para 7.

upon extinctive prescription, and its relation to the right of access to courts, weigh in favour of leave to appeal being granted by this Court.

Analysis

[37] The crux of the matter is whether the initial proceedings are a step in the enforcement of debt payment and whether prescription is 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. This provision serves to avoid the extinction of a creditor's claim by the effluxion of time, on condition that the creditor takes timely legal action in enforcing his or her right. There is, 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 has pursued is a step in pursuit of the self-same debt. For purposes of prescription, the question is whether legal proceedings were commenced which relate to the same set of facts and flow from the same legal source. The initial application satisfies this requirement.

[38] When the debt became due in this case requires this Court's attention, as it featured in Mr Rademeyer's argument – this question requires a consideration of when the damages were sustained. Mr Rademeyer, relying on *Makate*,²² *Desai N.O.*²³ and *Off-Beat Holiday Club*,²⁴ argued that the damages were only sustained at the earliest upon cancellation of the sale agreement and that the debt thus became due then. The meaning of "debt" was considered in *Allianz*,²⁵ and approved in judgments such as *Cadac*,²⁶ *Makate*, *Desai N.O.*, and *Off-Beat Holiday Club*. These cases establish that a debt extends to any liability arising under a contract, which includes both the primary

²² *Makate* above n 11.

²³ *Desai N.O.* above n 12.

²⁴ *Off-Beat Holiday Club* above n 13.

²⁵ *Allianz* above n 7.

²⁶ *Cadac* above n 6.

performance and the subsequent damages claim. Mr Ferreira's claim for damages flows from precisely the same breach of contract dealt with in the original application for specific performance. It follows 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.

[39] As recognised above, prescription limits the right of access to courts. Consequently, 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 interrupts prescription.

[40] I accept as correct the submission that the declaratory order by Pickering J which established liability, and the potential further action for the quantification of damages constitute one cause of action under a two-stage process. Hence, the interruption of prescription was effected. It is difficult to visualise it any other way. A valid agreement must be established in the first place before one can proceed and succeed in subsequent proceedings for damages.

[41] Mr Rademeyer's interpretation of section 15(2) of the Prescription Act, which he argues mandates that the interruption of prescription lapses if the creditor does not successfully prosecute the claim to final judgment, is misplaced. To demonstrate the fallacy in Mr Rademeyer's argument, one has to look at the debt and the process in terms of the act under which the debt was pursued, since the underlying debt was not altered. What accrued to Mr Ferreira by virtue of the Pickering J order was a claim in respect of which the running of prescription had been interrupted by the service of the

application. In my view, subsequent motion proceedings for claims for damages were not in any way affected.

The applicability of Allianz and Cadac

[42] It remains to consider whether the Supreme Court of Appeal was correct in following *Allianz* and *Cadac*. Counsel for Mr Rademeyer advanced a number of arguments in support of his main submission. They all flounder because they raise issues which are not supported by the authorities. The submission as a whole indicates that counsel not only sought to distinguish the above cases as misplaced but stridently argued that the double-barrelled procedure outlined in *Shembe*,²⁷ which Mr Ferreira followed, should be abandoned and be jettisoned.

[43] In *Allianz*, the facts were these. Allianz Insurance had concluded a contract with the Cape Town Municipality and a company that was constructing an undersea pipeline for the municipality. In terms of the contract, Allianz Insurance agreed to indemnify the municipality and the company for any loss or damages suffered as a result of damage to the pipeline. The pipeline was damaged on two different occasions as a result of stormy seas. The municipality and the company instituted actions against Allianz Insurance, seeking orders declaring Allianz Insurance liable to pay them in respect of loss or damages suffered as a result of the damage to the pipeline. The actions were instituted in the year after the damage occurred (damage to pipeline occurred in May and July 1984, and actions were instituted in March and August 1985). Three years elapsed before the matter could be heard. Allianz Insurance amended its plea and introduced a special plea, and by then three years had elapsed since the date of damage to the pipeline. The effect of the special plea was that the debt to indemnify the claimants for loss or damage had since prescribed as the three-year prescription period had expired.

²⁷ *Shembe* above n 14.

[44] Relying on the first part of the dictum of Howie J, that the declarator action in *Allianz* was only concerned with establishing liability and not exacting payment for the damages, Mr Rademeyer contends that this invariably means that a further action must be instituted to cover elements of the claim that were not previously considered in the declaratory order. He urged upon us that *Allianz* is distinguishable and does not support Mr Ferreira’s case. It is important to state that this submission is not correct. A further reading of *Allianz* indicates that Howie J qualified the statement by stating that any further litigation for the determination of damages would be founded on the same cause of action on which the declaration was based.²⁸ In essence, the court in *Allianz* held that a final executable judgment obtained under a process constitutes the beginning and the end of the same action.²⁹ Further—

- “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 where 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 a supplementary action instituted pursuant to and dependent upon that judgment.”³⁰

The principle supports Mr Ferreira’s contention that subsequent actions for damages consequent upon an order for specific performance are not separate proceedings, but a continuation of the initial legal action.

[45] The case of *Allianz* helps elucidate the understanding of judicial interruption of prescription. In *Allianz*, what was brought to the fore was that a process leading up to

²⁸ *Allianz* above n 7 at 331G-J.

²⁹ *Id* at 334A-E.

³⁰ *Id* at 334H-I.

a final judgment is a single continuum.³¹ This view supports Mr Ferreira's case where the initial application for specific performance and the later claim for damages are all part of the same continuous legal process aimed at enforcing the same debt.

[46] Mr Rademeyer's argument that *Cadac* is not relevant also flounders in many respects. For context, the court in *Cadac* dealt with an urgent application to set aside a warrant and for damages. The warrant was set aside and the damages enquiry was postponed *sine die* (indefinitely). In *Cadac*, the court reasoned that connected legal proceedings arising from identical contractual obligations and facts ought not to be considered different for purposes of prescription. This judgment reinforces the notion that Mr Ferreira's action for damages is essentially inextricably linked with the initial application for specific performance as both emanate from actions to redress the breach of the same sale agreement.

[47] The Supreme Court of Appeal confirmed that a plaintiff may have the issue of liability decided before pursuing the quantification of damages. It held that the motion proceedings for the setting aside of the warrant were accordingly regarded as a step in the enforcement of a claim for a debt. In the present matter, the Supreme Court of Appeal also confirmed the ratio in *Cadac* that subsequent motion proceedings instituted were a step in the enforcement of a claim for a debt. Tellingly, Mr Ferreira did not seek an order postponing the determination of quantum *sine die* in the declaratory action before Pickering J.

[48] The Supreme Court of Appeal thus correctly held that the cause of action for damages is the same as that of the application for specific performance. Because both were based on the same set of facts, the right to claim damages was incorporated in the initial 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.

³¹ *Allianz* above n 7 at 333G-H.

[49] Any attempt by Mr Rademeyer to distinguish this matter from *Cadac* and *Allianz* should be rejected as the distinction is purely artificial. Unlike in *Cadac*, what transpired in this case is that the court confirmed that the plaintiff may have the issue of liability decided before pursuing a claim for the quantification of damages. Subsequent motion proceedings instituted were a step in the enforcement of a claim for that debt.

[50] The contention that the claim for damages was incomplete when the declaratory application was filed and, further, that the declaratory action and the order of Pickering J did not interrupt prescription, was based on two misconceptions. Firstly, it was argued that a judgment determining the existence of liability cannot perpetually preserve the plaintiff's claim to determine the quantum of damages in respect of that liability. Secondly, that the failure to comply with the Pickering J order resulted in a new breach, and Mr Ferreira ought to have instituted fresh proceedings arising from the said breach.

[51] This argument is misplaced. The double-barrelled procedure is still part of our law. Mr Ferreira did not seek an order postponing the determination of quantum *sine die* in the declaratory application before Pickering J. Indeed, courts routinely separate and adjudicate issues of liability and postpone the question of quantum which arose in the same litigation. This is most often found in claims for personal injury arising from motor vehicle accidents and professional negligence. The fact that the quantum determination will be dealt with much later does not affect the claim. What actually transpired in this case is not novel, but is an enforcement of the double-barrelled procedure enumerated in many cases. This procedure affords a defaulting party the opportunity to remedy the breach and perform according to his or her contractual obligations. If, however, after this opportunity the defaulting party still refuses to perform, as in this case, the aggrieved party is entitled to cancel the agreement and claim damages. A link between the two claims exists and cannot be wished away.

[52] The fact that Mr Ferreira sued for damages does not represent a different cause of action, but arises from the same obligation which Mr Rademeyer undertook in terms

of the written agreement of sale. Mr Rademeyer's obligations are of the same scope and nature. That he was sued for damages later in no way detracts from the basic cause of action, namely, that he was sued based on the written agreement of sale. The effect of this is 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. I think it is necessary to underscore that Mr Ferreira's cause of action was not only foreshadowed, but clearly comprehended and specifically pleaded in the previous litigation and, therefore, could not have prescribed. Mr Rademeyer could not have been under any misapprehension that it was a completely new cause of action based on an entirely new set of facts. The service of the application interrupted the running of prescription.

[53] In the present case, Mr Rademeyer is still being sued on the self-same agreement. This position is analogous to the factual scenario in *Allianz*. The fact that Mr Ferreira sued for specific performance in no way means that he abandoned or failed to exercise his right to sue for damages. He was entitled to sue for specific performance and, alternatively, damages in the event of non-compliance with an order for specific performance. Once the first application was instituted, it had the effect of interrupting prescription.

[54] There is yet another reason why Mr Rademeyer's case is unsustainable. He relied on *Tembani*³² in support of his contentions. This case is distinguishable and does not support his argument. *Tembani* dealt with two separate causes of actions, where finalisation of the Law Society matter was not a necessary "delictual ingredient" of the claim for damages. In this matter, Mr Ferreira sought a declaration for specific performance and, in the absence of such performance, damages. Mr Ferreira's cause of action was founded on the principles of the double-barrelled procedure. The alternative

³² *President of the Republic of South Africa v Tembani* [2024] ZACC 5; 2024 JDR 1862 (CC); 2024 (9) BCLR 1152 (CC).

claim for damages which was premised on the further assumption of non-compliance with the court order was interrupted by service of the first application. There is an inextricable link between the Pickering J order and the later action instituted in the matter for damages. The Pickering J order has not been set aside, nor abandoned.

[55] I have had the opportunity to consider the second judgment of my Brother, Majiedt J. Even if I disagree with him, I have to recognise the force and quality in its reasoning. However, after careful reflection, I find that nothing in that judgment compels me to revisit or alter my conclusion on the outcome of this appeal.

[56] I agree with the High Court and Supreme Court of Appeal that Mr Ferreira's previous action before Pickering J interrupted prescription and that the debt has not prescribed. If I had commanded the majority, I would have granted the application for leave to appeal, and refused leave to appeal with costs, including the costs of two counsel.

MAJIEDT J (Zondo CJ, Gamble AJ, Madlanga J, Mhlantla J, Theron J concurring):

[57] I have read the judgment of my Colleague Mathopo J, (first judgment) and, while I agree that this matter engages our jurisdiction and that it is in the interests of justice that we hear the appeal, I reach a different outcome on the merits. In respect of jurisdiction, the central issue is that of prescription. 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.³³ In this case, this Court is 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, and therefore this Court has jurisdiction.

³³ See, among others, *Mtokonya* above n 19 at para 9 and *Le Roux* above n 19 at para 25.

[58] This Court grants leave to appeal when it is in the interests of justice to do so. The factors that the Court takes into account in determining whether it is in the interests of justice to grant leave include whether there are reasonable prospects of success for the appeal, the importance of the issues involved in the appeal, whether the issues go beyond the interests of the parties before the Court and will also affect a large section of society. This list is not exhaustive. In my view there are reasonable prospects of success in this matter. The legal issues raised are important and the impact of the judgment in this case will go beyond the parties before the Court and the matter is of great importance. It is thus in the interests of justice to grant leave to appeal.

[59] I regrettably part ways with my Colleague on the merits of the appeal. I would uphold the appeal with costs, inclusive of costs of two counsel. First, a simplified, sweeping synopsis of, I daresay, the well-established law. Prescription of a debt starts running as soon as the debt becomes due, or when knowledge of the debt becoming due can reasonably be expected of the creditor. Prescription is judicially interrupted when process initiating a lawsuit for *recovery of that particular debt* is issued and served on the debtor. In our law, breach of contract is remediable through *two mutually exclusive options* — a claim for specific performance that seeks, notwithstanding the breach, to keep the contract alive; *or* cancellation of the contract and a claim for damages.³⁴

[60] When an election is made to sue for specific performance, axiomatically that lawsuit cannot possibly be a basis for the judicial interruption of the running of prescription in respect of cancellation and a damages claim in respect of the same debt arising from breach of the contract. Judicial interruption of the running of prescription of the latter can self-evidently only occur when the election is made to cancel and sue for damages. And, plainly, where summons has been issued and served to determine liability in respect of damages for breach of contract within the three-year prescription period, it matters not that you sue after the three-year period to determine the quantum of the damages in respect of that same claim. This is because the later claim for the

³⁴ Christie and Bradfield *Christie's Law of Contract in South Africa* 8 ed (LexisNexis, South Africa 2019) at 642.

assessment of damages is a continuation of the first proceedings to determine liability. Proceeding then from the general to the specific – what are the facts in this case and how do these legal principles apply to them?

[61] I gratefully adopt my Colleague’s comprehensive factual narrative and will repeat facts only for purposes of clarification, context or emphasis. In particular, it is necessary to have regard to the specific dates of key events. This case concerns the judicial interruption of prescription. The crucial aspect for consideration, and the primary difference between my Colleague and I, is the precise status and ultimate legal effect of the order made by Pickering J (Pickering J order) by agreement between the parties, and the events that followed. As I shall endeavour to demonstrate, these events place this matter on a different footing to both *Allianz*³⁵ and *Cadac*.³⁶ Those cases are distinguishable and, in relying on them for their reasoning, both the first judgment and the Supreme Court of Appeal err. The distinction is not merely “artificial” as the first judgment would have it.³⁷

[62] The following salient facts bear repetition. The first breach of the sale agreement occurred on 13 September 2011. Thus, prescription began running at that time in respect of the damages which Mr Ferreira may have suffered as a consequence of this initial breach. It is common cause, however, that the damages then incurred (and the question of prescription in respect thereof) is not the subject-matter in issue here. When Mr Rademeyer failed to fulfil all the essential obligations of the sale agreement,³⁸ and failed to respond to a demand to do so, Mr Ferreira launched an application in the High Court requesting, amongst others, an order for specific performance. Mr Ferreira also sought a further order that, in the event of Mr Rademeyer failing to comply with his obligations within five days of the service of the specific performance order,

³⁵ First judgment [42] – [53] with reference to *Allianz* above n 7.

³⁶ *Cadac* above n 6.

³⁷ First judgment at [49].

³⁸ By not signing all the transfer documents required to effect transfer; furnish guarantees for payment of the balance of the purchase price or pay transfer costs and duties.

cancellation of the sale agreement and damages. Mr Ferreira therefore elected, in the first instance, to keep the sale agreement alive and to insist that Mr Rademeyer upholds his part of the bargain. The obvious corollary is that an election was irrevocably exercised by Mr Ferreira not to cancel. Damages were therefore in Mr Ferreira's contemplation as a future event, contingent upon non-compliance with the Pickering J order for specific performance and, then, cancellation of the sale agreement.

[63] The Pickering J order was issued on 7 August 2012. Service of that order on Mr Rademeyer occurred on 15 August 2012. Mr Rademeyer remained non-compliant and Mr Ferreira consequently formally cancelled the sale agreement and served a notice of cancellation on Mr Rademeyer. Cancellation in accordance with the Pickering J order occurred, and damages were thus suffered, by Mr Ferreira on 23 August 2012, that is, five days after service of the Pickering J order. Therefore, an action for those damages had to be instituted within three years from that date, that is, by no later than 23 August 2015.

[64] On 17 February 2016, under the same case number of the Pickering J order, case number (239/12), Mr Ferreira launched a further application claiming damages, as a result of Mr Rademeyer's non-compliance with the Pickering J order. In response, Mr Rademeyer filed a rule 30 notice as adumbrated in the first judgment. As a result, Mr Ferreira withdrew this application on 16 March 2016 and, on 18 April 2016, instituted action proceedings in the High Court under case number (1256/16). In that matter, he sought damages pursuant to the cancellation of the agreement as a result of Mr Rademeyer not complying with the Pickering J order for specific performance. The date of service of this action does not appear in the papers, but the special plea filed by Mr Rademeyer is dated 28 June 2016.

[65] As the first judgment explains, Mr Rademeyer's special plea of prescription was met by a replication with a defence, amongst others,³⁹ that the service of the application papers that ultimately led to the Pickering J order had interrupted the running of prescription in the damages claim. In essence, the first judgment holds that this defence is good in law, while I hold the contrary view that the special plea ought to have been upheld, as Mr Ferreira's damages claim had prescribed. The central issue is whether the proceedings before Pickering J constitute the same cause of action as the damages claim.

[66] Of cardinal importance is the fact that when the matter came before Pickering J, Mr Ferreira had plainly not suffered any damages as yet and he therefore had no extant damages claim at that time. It follows that Mr Ferreira could not obtain an order at that time relating to the liability for damages which had not yet been sustained. Self-evidently, there was thus no claim in respect of which prescription could have commenced running. Any claim for damages then would have been premature, since Mr Ferreira was seeking specific performance of the agreement, and, self-evidently, could not approbate and reprobate with a simultaneous damages claim at that time. Enforcement and cancellation of a contract are two mutually exclusive options available to an innocent party who must make an election as to the relief it seeks – that much is trite in our law.⁴⁰ The debt for damages (not specific performance) arose only subsequent to the order made by Pickering J, when Mr Rademeyer failed to perform as ordered. That failure was a fresh breach of the contract which constituted the basis for cancelling the contract, and prescription began running five days after the Pickering J order was served on Mr Rademeyer (which, as stated, occurred on 15 August 2012).

[67] At the time when Mr Ferreira was seeking specific performance of the sale agreement before Pickering J, the sale had not yet been cancelled. The order by

³⁹ Mr Ferreira later abandoned the second defence that the order of Pickering J constitutes a judgment debt in terms of section 11(a)(ii) of the Prescription Act which provides that the prescriptive period for a judgment debt is 30 years, and nothing more need be said about it.

⁴⁰ Christie and Bradfield above n 34 at 675; Van Huyssteen et al *Contract: General Principles* 6 ed (Juta, Cape Town 2020) at 385 and 397.

Pickering J was for specific performance within five days of service of the order, “failing which cancellation and damages”. Damages, if any, were thus suffered by Mr Ferreira only when, five days after service of the order, Mr Rademeyer’s non-compliance persisted. On the objective facts, cancellation only occurred on 23 August 2012, five days after the service of the Pickering J order on Mr Rademeyer. Moreover, and importantly, Mr Ferreira has accepted that cancellation of the contract occurred in terms of the order of Pickering J upon the failure of Mr Rademeyer to comply with the order of specific performance within the period provided in the order, and did not pursue the pleaded cancellation of July 2015.⁴¹ Only at that point did Mr Ferreira’s right to damages come into existence.

[68] It is necessary to restate some well-established legal principles. First, it bears emphasis that a debt is the correlative of a right of action, when one is extinguished, so, too, is the other.⁴² It is important to draw a clear distinction between the contractual remedies of specific performance and cancellation and concomitant damages. In the case of the former, the claim is based on the contract itself and breach of the contract is not a prerequisite for the claim.⁴³ It is the primary remedy for breach of contract and simply seeks to ensure that the other contracting party performs as she undertook to do.⁴⁴

[69] Prescription in respect of a damages claim for breach of contract commences to run at the earliest from the time of breach of contract.⁴⁵ A claim for specific performance can prescribe separately from a claim for damages. This is so, since upon

⁴¹ Vol. 1, Para. 7.3 of the Particulars of Claim at p 35, lines 9 to 11.

⁴² *Makate* above n 11 at para 195, citing *Evins v Shield Insurance Co Ltd* [1980] ZASCA 3;1980 (2) SA 814 (A) (*Evins*) at 842E-F; see also *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A).

⁴³ Van Huyssteen et al above n 40 at 429.

⁴⁴ *Id.*

⁴⁵ *Id.* at 479. I do not agree with the contrary view that breach of contract does not give rise to a new obligation. See in this regard Lubbe and Murray *Farlam and Hathaway: Contract – Cases, Materials and Commentary* 3 ed (Juta, Cape Town 1988) at 414. On that approach, prescription in respect of a claim for damages due to breach of contract starts running as soon as the original right to performance becomes due; see also De Wet and Van Wyk *Die Suid-Afrikaanse Kontrakreg en Handelsreg* 5 ed (Butterworths, Durban 1992) at 294.

breach with resultant damages, a new separate personal right arises so that the innocent party is restored to the status *quo ante*, that is, the position she would have been in had the breach not occurred. On the other hand, a right to claim specific performance originates upon conclusion of the contract, and prescription of the debt would commence running as soon as it is due — that is not the case in respect of a damages claim where prescription would only start running when the breach occurs. If a debtor is non-compliant with a court order to make specific performance, it constitutes a further breach of the contract and a judgment creditor may seek an order from the court cancelling the agreement and for an award of damages.⁴⁶ The so-called “double-barrelled” approach permits a plaintiff to claim specific performance and, in the alternative, an order cancelling the agreement in the event that the debtor fails to comply with the order for performance within the period stipulated by the court order. That is what happened here.

[70] It bears repetition that, if we accept as we must, by the time of the Pickering J order, Mr Ferreira had not yet suffered any damages, he could not at that time obtain an order relating to the liability for damages.⁴⁷ There may arguably be a good reason why this is so – the duty resting upon an innocent party to mitigate its damages only arises once the damages are suffered. Conceivably, there may then even be a full mitigation of damages and an order for liability and payment of damages would be premature, and may well lead to the “guilty” party being deprived of the right to raise mitigation of damages as a defence. Thus, in the present instance, Mr Ferreira may have been able to sell the property for a higher purchase price, in which event there would be no damages, or for a substantial purchase consideration, resulting in a reduced sum of damages. Of course, a guilty party may even seek to prove that no loss has been suffered, but that can only happen at the time that damages are alleged to have been suffered. It is furthermore theoretically possible that a party may be deprived of the

⁴⁶ *Shembe* above n 14 at 469EE.

⁴⁷ Compare *Coetzee v SA Railways and Harbours* 1933 CPD 565 at 576: “I know of no case which goes as far as to say that a person who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future”.

potential protection of the three-year period of prescription, because in effect then the claim would never prescribe and summons could be issued many years and even decades later.

[71] On behalf of Mr Rademeyer, it was vigorously contended before us that the double-barrelled approach should be discarded. The thrust of that contention embraces the arguable aspects raised in the previous paragraph, that a judgment on the question of liability for prospective damages, or for the calculation of prospective damages, would deprive the party against whom the order was made of the opportunity to contest liability on the basis that no loss had been suffered, alternatively, to raise the issue of the mitigation of damages. The argument was further that it would also deprive a party of the potential protection of the prescriptive period of three years as its effect would be that the claim could never prescribe and summons could be issued decades later. While the argument is, on the face of it, rather attractive, I do not adopt any position in that regard, as the matter can in my view be disposed of within the purview of the double-barrelled approach.

[72] The case law, discussed next, supports the viewpoint that at the time of the Pickering J order, Mr Ferreira had not yet suffered damages and could not then obtain an order in respect of liability for damages. *Evins*⁴⁸ concerned a defence of prescription in a damages claim in the context of the “once and for all” rule. Mrs Evins, the appellant, had sustained serious bodily injuries in a collision between the vehicle in which she was being conveyed as a passenger, driven at the time by her husband who died in the collision, and another vehicle. Mrs Evins had initially claimed compensation in a single combined summons (first summons), first for her own injuries and, second, for loss of support arising from the death of her husband. It was common cause that, while Mrs Evins had complied with the antecedent legislative prescripts in respect of

⁴⁸ *Evins* above n 42 at 835A.

her own claim, there was no compliance therewith as far as her loss of support claim was concerned.⁴⁹

[73] Some five years after the collision, Mrs Evins caused a second summons to be issued in which she claimed only loss of support due to her husband's death in the collision. In the particulars of claim she alluded to the delivery of the first claim form, the service of the first summons and the delivery of the second claim form. Shortly thereafter, she amended her first summons by the deletion of all references to the claim for loss of support.

[74] The respondent,⁵⁰ Shield Insurance, raised prescription in a special plea to the second summons, in respect of the claim for loss of support. The two actions were later consolidated by order of court. The question was what the effect of the service of the first summons had on the loss of support claim. The argument for Mrs Evins was that a single negligent act by the insured driver had caused both her bodily injuries and the death of her husband. She was therefore entitled to sue in one single action for both sets of damages, her own and those incurred as her husband's dependant, for loss of support. In the premises, she argued, the service of the first summons had interrupted the prescription of the entire (two-pronged) claim since there can be no piecemeal prescription of a debt and interruption of prescription of only part of a debt. That argument was rejected in the trial court on two bases, first, that the loss of support claim was a right distinct from the right to claim damages for bodily injuries where both are caused by the same negligent act and, second, that in any event, the loss of support claim was not interrupted by service of the first summons, since that claim had not been prosecuted to final judgment as required by the Act.

[75] On appeal, Corbett JA noted that the central concept of a cause of action and the enquiry whether different claims constitute parts of a single cause of action or separate

⁴⁹ This entailed the claimant in terms of section 25(1) of the Prescription Act submitting a claim form (the so-called MVA 13 form), prior to issuing summons.

⁵⁰ Defendant at the trial.

causes of action were of particular significance in regard to the application of the so-called “once and for all” rule and the related questions of *res judicata* (the matter has been decided) and prescription. The rule applied mostly in common law actions for damages in delict, but also in claims for damages for breach of contract,⁵¹ and its purpose is to deter a multiplicity of actions in a single cause of action and to ensure that there is an end to litigation.⁵²

[76] In answering the central question in the case, Corbett JA conducted an extensive analysis of what the essential criterion of a cause of action is,⁵³ and concluded that, although there is some overlap, the *facta probanda* (the facts required to be proven) a bodily injury claim differs substantially from those in a loss of support claim. The two causes of action may also conceivably arise at different times, although they may flow from the same event (for example, where the breadwinner dies later, after the accident) and may otherwise lead to serious anomalies, were they to be regarded merely as facets of one single indivisible cause of action. Thus, Corbett JA ultimately concluded that a claim for damages for bodily injuries was distinct from a loss of support claim, even though they may both arise from a common occurrence. In respect of the case itself, the Court held that the first summons encompassed two causes of action. The claim for loss of support was, however, not properly and effectively prosecuted due to non-compliance with the prescripts in section 25 of the Act. The first summons had not interrupted prescription of that claim and it had thus become prescribed.

[77] The following dictum of Corbett JA in *Evins* is instructive:

“Where a creditor has two rights, or causes, of action then there are two corresponding debts. When it comes to the judicial interruption of prescription in terms of section 15, then, if the process seeks to enforce two debts (or causes of action), it will only interrupt prescription in respect of both if it is effective as a means of commencing legal

⁵¹ Corbett JA in *Evins* above n 42 at 835A-D citing, among others, *Shembe* above n 14 at 472.

⁵² *Id.*

⁵³ With reference to, among others, *Mckenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16.

proceedings in respect of both. If it is effective only in respect of one, then this will not enure for the benefit of the creditor in respect of the other”.⁵⁴

[78] That dictum authoritatively sets out the position regarding judicial interruption of prescription – for prescription to be judicially interrupted in respect of a damages claim, there must be an extant claim for damages, that is, a right enforceable against the debtor in respect of which extinctive prescription is running, when the initial proceedings are instituted. Before dealing with *Allianz* and *Cadac*, which are central to the mistaken reasoning of the first judgment and that of the Supreme Court of Appeal, it is useful to have regard to an earlier case, *Neon and Cold Cathode Illuminations*,⁵⁵ cited by Howie J in *Allianz*. That case concerned the question whether the appellant company’s right of action against the respondent, a surety and co-principal debtor, had become prescribed under the previous Prescription Act.⁵⁶ The respondent had originally incorrectly been sued as lessee. The claim was dismissed for that reason and a new summons, the subject of the prescription issue, was then issued. Trollip JA explicated the assessment whether actions for declaratory orders would involve the same cause of action as that on which the further litigation would be founded as follows—

“[I]n order to effectively interrupt prescription . . . there must . . . be (a) a right enforceable against the debtor in respect of which extinctive prescription is running, and, (b) a process served on that debtor instituting legal proceedings for the enforcement of . . . ‘the same or substantially the same right as would otherwise be rendered unenforceable by lapse of time.’”⁵⁷

[79] Against that backdrop, I discuss *Allianz*. My colleague has dealt comprehensively with the facts of that case.⁵⁸ It is necessary to add that the plaintiffs

⁵⁴ *Evins* above n 42 at 842C-F.

⁵⁵ *Allianz* above n 7 at 333B-C citing *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 464 (A) (*Neon and Cold Cathode Illuminations*).

⁵⁶ 18 of 1943.

⁵⁷ *Neon and Cold Cathode Illuminations* above n 55 at 470H to 471A.

⁵⁸ At [43] and following.

there first sought declaratory orders in 1985 (the first plaintiff in August 1985 and the second plaintiff in March 1985) that the defendant (Allianz) was liable in terms of the insurance policy for all loss or damage to the works as a result of a storm, and was legally liable to make payment in terms of the policy for that loss or damage. But the debt had become due, and prescription had already begun running, before then, on 7 October 1984. The Court's judgment and dicta of Howie J, referred to by Mathopo J, must be understood within this context. In dismissing Allianz's special plea of prescription, the Court did so on the basis that service of the action for declaratory relief in 1985 had interrupted the running of prescription of the damages claim.

[80] With reference to *Allianz*,⁵⁹ my Colleague finds that the case is *in pari materia* (on the same subject/matter) with this one and "supports Mr Ferreira's contention that subsequent actions for damages consequent upon an order for specific performance are not separate proceedings, but continuations of the initial legal action". Therefore, finds Mathopo J, "[t]he Supreme Court of Appeal thus correctly held that the cause of the action for damages is the same as that of the application for specific performance".⁶⁰ I disagree.

[81] As I see it, the primary distinction between this case and *Allianz* (and also *Cadac*, which I will discuss presently) is that there, when the plaintiff in *Allianz* sued for loss incurred due to storm damage, the plaintiff's right to damages had already accrued. The damages suit was a first step to recover the damages. What remained was only the quantification of the damages. The portion of the claim in respect of which the prescription defence was raised was instituted at the same time as the proceedings that interrupted the running of prescription. But here, as stated, when Mr Ferreira instituted proceedings against Mr Rademeyer which culminated in Pickering J's order of 7 August 2012, Mr Ferreira did not, as yet, have an existing claim for damages. At that stage, Mr Ferreira was merely seeking an order for specific performance of the sale

⁵⁹ At [44] with reference to *Allianz* above n 7 at 334H-I.

⁶⁰ At [48].

agreement. The sale had not yet been cancelled and there was in law and in fact no basis for a claim for damages at that juncture.

[82] I must in passing add that the parties' agreement to proceed before Pickering J on the basis of a stated case appears to have been poorly considered. The matter is complicated by the ambiguous and opaque order of Pickering J, who ordered specific performance within five days of service of the order, failing which, cancellation and damages. That was pursuant to a draft order placed before the High Court, which Pickering J then accepted and made an order of court. At the hearing in this Court, counsel had great difficulty explaining what exactly the order meant and what its effect was on the commencement of the running of prescription.

[83] The special plea that Howie J had to adjudicate in *Allianz*, bore some similarity to the factual scenario here, save in respect of the important point of distinction to which I have already alluded. The Court explained:

“The special plea highlights the distinction between a claim for a declarator and a claim for payment of money. The crux of it is that defendant's liability, if any, was to pay money, which debt was, in terms of section 11(d) of the Prescription Act 68 of 1969 extinguished by the passing of more than three years after 7 October 1984. By that date, says defendant, the debt had become due and plaintiffs knew the facts from which the debt arose.”⁶¹

[84] The Court thus had to decide whether the subsequent proceedings for the quantification of damages would be a continuation of the initial proceedings. As stated, the Court's dismissal of Allianz's special plea of prescription, was based on the fact that service of the declaratory action in 1985 had interrupted the running of prescription of the damages claim. Howie J emphasised:

“Plaintiffs are quite patently not seeking to obtain payment of part of the indemnity now and part later. They are seeking to enforce their rights to the indemnity. If further

⁶¹ *Allianz* above n 7 at 317C-D.

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 plaintiffs' claim not canvassed in the current action. Conversely, those elements of the claim covered in the present matter will be *res judicata* hereafter. But the two actions together will still deal only with one cause of action. Although the relief sought in the present case differs from the relief which will, on the above supposition, be sought in the second action, the precise form of the relief and, if it is monetary relief, the *quantum* thereof, are not elements of the cause of action.”⁶²

[85] The Court in *Allianz* emphasised that the cause of action in the initial proceedings and the subsequent proceedings were the same and cited the passage from *Neon and Cold Cathode Illuminations*.⁶³ The important part of that dictum of Trollip JA is that there must be *a right enforceable against the debtor in respect of which extinctive prescription is running* before prescription can be effectively interrupted. That is absent in the present instance, for the reasons I have advanced.

[86] *Cadac* concerned the wrongful seizure of Cadac's kettle grills at the instance of Weber-Stephens, based on alleged trademark infringement and counterfeiting. In the High Court, Cadac sought, amongst others, an order setting aside the warrant under which the grills had been seized and an order for an inquiry into damages. The High Court found that the warrant of seizure had been obtained irregularly and set it aside. That Court postponed the prayer for damages *sine die*. Cadac only pursued the damages claim three years and two days after the judgment and order of the High Court relating to the setting aside of the warrant. Weber-Stephens raised prescription as a defence.

[87] On appeal, one of the issues was the nature of Cadac's claim in the High Court. This was because Weber-Stephens contended that at the time when the main application

⁶² Id at 332H-333A.

⁶³ *Allianz* above n 7 at 333B-D with reference to *Neon and Cold Cathode Illuminations* above n 55.

was launched, the right to damages had not yet accrued, and that the proceedings for the recovery of damages (albeit in the form of an inquiry into damages) were accordingly premature. This argument was based on the supposition that the warrant was not void, but voidable, and that a cause of action for wrongful attachment of goods could only arise once the warrant had been set aside – until then it remained valid.

[88] The Supreme Court of Appeal held that “the cause of action for an interdict and one for damages is the same. Only the nature of the relief differs.”⁶⁴ The Court concluded that the action for damages had accrued when the kettles were seized and that, once the warrant was set aside, it was set aside with retrospective effect. The application for an inquiry into damages had thus not been premature:

“[T]he claim relating to damages in the application to set aside the warrant was not premature. *The notice of motion was a process whereby proceedings were instituted as a step in the enforcement of a claim for payment of a debt. This means that the running of prescription was interrupted in terms of section 15(1) of the Prescription Act 68 of 1969*”.⁶⁵ (Emphasis added).

[89] This case is different – as I have said, at the stage when the matter came before Pickering J, there was no extant claim for damages in respect of which prescription had already started running. It bears repetition that any claim for damages at that time would have been premature, since Mr Ferreira was seeking specific performance of the agreement and self-evidently could not approbate and reprobate with a simultaneous claim for damages at that time. Hypothetically speaking, had Mr Ferreira complied with the order of specific performance of Pickering J, there would have been no cancellation and consequently no right to claim damages based on such cancellation. Therefore, Mr Ferreira’s claim had prescribed, since more than three years had passed between the date when the debt was due and payable subsequent to cancellation (which

⁶⁴ *Cadac* above n 6 at para 18.

⁶⁵ *Id* at para 19.

had occurred five days after service of the order on Mr Rademeyer) and the date when Mr Ferreira had issued summons for the recovery of the debt.

[90] The double-barrelled approach does not assist Mr Ferreira. The point of departure in this regard is that the double-barrelled approach is limited to an order for cancellation and not recognised as appropriate for an order for damages (whether it is in respect of liability for prospective damages or a specific sum of prospective damages). That limitation accords with trite principles of contract law enunciated earlier. On that approach, in the present case, what was left after the Pickering J order was not merely the quantification of the damages claim. To establish the existence of a claim for damages, Mr Ferreira would still have had to prove a further breach of contract, that is:

- (a) service of the order on Mr Rademeyer;
- (b) that Mr Rademeyer did not thereafter timeously comply with his obligations under the sale agreement; and
- (c) that as a result, the sale agreement was cancelled.

[91] I reiterate that Mr Ferreira's right of action only arose subsequent to the issue of the Pickering J order. At the time that the breach described by the terms of the order occurred, Mr Ferreira acquired a right of action to claim damages arising from such cancellation. The fact that our Courts have recognised the procedural mechanism of a double-barrelled approach does not have the effect that Mr Ferreira could, through legal process in the case before Pickering J which concerned specific performance and not damages, interrupt prescription insofar as his claim for damages was concerned.

[92] In sum then, the debt in this matter constitutes the contractual damages arising from the cancellation of the contract. As defined by this Court in *Makate*,⁶⁶ the obligation to pay the debt, and the corresponding right to claim or receive payment, only arose at the earliest upon cancellation of the contract, which, as stated, was on

⁶⁶ *Makate* above n 11 at paras 85, 86 and 93.

23 August 2012. The fresh breach and consequent damages could only in fact and law arise after the Pickering J order. On first principles, Mr Ferreira's conditional election to cancel, in the event of non-compliance with the order of Pickering J, only became available and effective when Mr Rademeyer failed to comply. That means that the institution of proceedings before Pickering J, under case number (239/2012), could never serve to interrupt prescription of that debt as the debt did not exist then or even later, at the time of the Pickering J order. The judicial interruption that did in fact occur, was of the debt relating to specific performance and not in respect of damages. That is the crucial point of distinction between the first judgment and this one. In the premises, the prescription point raised in Mr Rademeyer's special plea was good and Mr Ferreira's claim for damages has prescribed.

[93] For these reasons, I would grant leave and uphold the appeal with costs, including the costs of two counsel.

[94] I make the following order:

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.

For the Applicant:

JJ Nepgen SC
Instructed by Manilal Brewis Attorneys

For the Respondent:

A Beyleveld SC and TJD Rossi
Instructed by Friedman Scheckter
Attorneys