REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 70124/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE **08/06/2026**

SIGNATURE

In the matter between:

LISACRAFT (PTY) LTD	Plaintiff
and	
SUPERSTRIKE INVESTMENTS 37 (PTY) LTD	First Defendant
BODY CORPORATE OF UNIPARK	Second Defendant
HUURKOR ADMIN (PTY) LTD	Third Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 8 June 2026.

JUDGMENT

Pauer AJ

Introduction

[1] This action relates to the enforcement of an agreement of sale ("the agreement") concluded between the plaintiff and the first defendant on 19 January 2015 in terms of which the plaintiff purchased thirty-seven sectional units at the Unipark sectional title scheme ("the Units") from the first defendant. The purchase price of R 20 200 000 (twenty million two hundred thousand rand) is payable on the date of transfer of the Units from the first defendant to the plaintiff. In terms of the provisions of the agreement, the first defendant warranted that the Units had been built in accordance with fully approved building plans and complied with all provincial and local authority requirements affecting them or relating to them, and that the first defendant had not been called upon to make any alteration, repairs, or additions to the Units.

[2] The first defendant raised two special pleas *in limine*, namely that the matter is *res judicata* and that the claim has prescribed in terms of the Prescription Act[1] ("the Act").

[3] The parties agreed pursuant to rule 33(4) of the Uniform Rules of Court that the two special pleas be adjudicated prior to and separately from the remaining issues, and these were the issues before me for adjudication.

Previous litigation

[4] To give context to the primary relief the plaintiff is seeking in the particulars of claim, it is necessary to briefly set out the relevant litigation history.

[5] On 20 October 2015, the second defendant approached the urgent court and obtained an order against the first - and third defendants. In terms of the order issued by Mabuse J ("Mabuse J's order"), the first defendant had to perform certain demolition work and thereafter restore ten of the Units to be in accordance with the sectional title plans. Mabuse J's order further interdicted the first defendant from proceeding with the sale of any of the Units until such time as the ten sectional title

[1] Act 68 of 1969.

Units in issue complied with the National Building Regulations and Building Standards Act. Lastly, Mabuse J's order also interdicted the third defendant from issuing clearance figures unless and until such time as there had been proper approval and compliance with the provisions of the National Building Regulations and Building Standards Act.

[6] The first defendant failed to comply with Mabuse's J's order and has to date not performed the required demolition and restoration work of the ten Units to be in accordance with the sectional title plans. The third defendant could thus also not issue the clearance figures yet.

[7] About nine months after Mabuse J's order, on 25 July 2016, the plaintiff issued application proceedings out of this Court. It sought an order (a) that it in essence be authorised to give effect to Mabuse J's order (Part A) and (b) to compel the first defendant to do all things and sign all documents necessary to give effect to the agreement, including paying all amounts required by the relevant local authorities and the South African Revenue Service (SARS) to obtain clearance certificates (Part B, i.e. after Part A had been given effect to). This application was dismissed by Molahlehi J in his judgment of 16 February 2018. The grounds for the dismissal were: first, with reference to Part A, that the plaintiff who was not a party to the urgent application, did not apply for leave to intervene therein; and second, with reference to Part B, that there existed a dispute of facts ("Molahlehi J's judgment").

[8] The plaintiff then issued summons in the action before me on 26 September 2018, and it was served on the first defendant on 3 October 2018.

The plaintiff's claim

[9] It is against the aforementioned litigation background that the plaintiff now seeks the following primary relief in the particulars of claim:

> "1. The Plaintiff is given leave to intervene in case number 81764/2015 instituted by the Second Defendant against the First and Third Defendants out of this Court.
>
> 2. The Plaintiff be and is hereby authorised to:

2.1. give effect to the order handed down by The Honourable Mr Justice Mabuse on 20 October 2015 under case number 81764/2015 (the "**Court Order"**);

2.2. demolish all permanent structures erected in sectional title units 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 at the Sectional Title Scheme known as Unipark situated at Erf 1[...], City of Tshwane, Gauteng (**"Unipark"**) in order to ensure that such sectional title units are in accordance with the sectional title plans of Unipark;

2.3. restore sectional title units 1, 2, 3, 4, 5, 6,7, 8, 9 and 10 of Unipark, and specifically restore the electrical wiring and water pipes at Unipark, to be in accordance with the sectional title plans of Unipark;

2.4. sign all documents, and do all things necessary, to ensure that section title units 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 properly comply with the National Building Regulations and Building Standards Act.

3. The First Defendant shall forthwith give the Plaintiff access to sectional title units 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Unipark in order for the Plaintiff to give effect to the Court Order as set out above.

4. Any amounts expended by the Plaintiff in giving effect to the Court Order shall be deducted from the purchase price payable by it to the First defendant under and in terms of the sale agreement.

5. The Plaintiff shall obtain confirmation from the National Regulator confirming that sectional title units 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 properly comply with the National Building Regulations and Building Standards Act.

6. Following delivery by the Plaintiff to the First Defendant of confirmation from the national regulator that sectional title units 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Unipark properly comply with the National Building Regulations and Building Standards Act:

6.1. the First Defendant shall forthwith do all things, and sign all documents, necessary to give effect to the Sale Agreement;

6.2. the First Defendant shall pay all amounts required by the relevant local authorities and the South African Revenue Service in order to obtain clearance certificates in respect of the Units;

6.3. should the First Defendant fail or refuse to do such things, and sign such documents as may be necessary to effect the transfer of the Units to the Plaintiff as aforesaid, the Sheriff of this Court (or his lawful deputy) be and is hereby authorised to do such things and/or sign such documents for and on the First Defendant's behalf."

Further relevant background facts

[10] Although there is a discrepancy in the pleadings, it seemed to me during oral argument that it is common cause that the suspensive conditions in the agreement were duly fulfilled on 24 April 2015. Nothing in any event turns on the aforementioned discrepancy, and I accept the agreement became unconditional on 24 April 2015.

[11] On 15 September 2015, the plaintiff's attorney sent the second of two letters of demand to the first defendant, formally placing the first defendant on terms to remedy its breach of clause 9.1 of the agreement within ten calendar days of receipt of the letter ("the letter of demand"). The breach of clause 9.1 relates to the first defendant's non-payment of the charges required by the relevant Local Authority and SARS to obtain clearance figures contemplated in the agreement. It reads as follows:

> "9.1. All the costs of an incidental to the passing of transfer of the Property to the Purchaser, including transfer duty (if any), stamp duty, bond costs, bank charges, pro rata share of current rates and other charges, value added tax and all Conveyancing fees and disbursements shall be borne by the Purchaser, who shall pay such costs or estimated costs forthwith upon request being made therefor by the conveyancers. The conveyancers shall attend to the registration of transfer of the Property into the name of the Purchaser after the fulfilment of the suspensive conditions herein but provided:
>
> 9.1.1. the Purchaser has:
>
> 9.1.1.1. paid all transfer costs and other fees and disbursements (including estimated amounts payable by it as referred to herein; and
>
> 9.1.1.2. secured the Purchase Price as required herein; and
>
> 9.1.2. the Seller has:
>
> 9.1.2.1. procured that the third parties who have encumbrances over the Property have agreed to the cancellation of such

encumbrances upon transfer of the Property to the Purchaser;

9.1.2.2. paid all charges required by the relevant Local Authorities and SARS, to obtain clearance figures;

9.1.3. the Purchaser and Seller have duly attended to the signature and completion of all necessary information for the purposes of transfer, which the Purchaser and Seller shall be obligated to do within 14 (fourteen) calendar days after being called upon in writing to do so by the Conveyancers."

[12] It is common cause that the clearance figures were not paid.

[13] Clause 11 of the agreement deals with breach and provides as follows:

> "In the event of either party to this agreement committing any breach or default of its obligations under this agreement, and remaining in such breach or default for a period of 10 (ten) calendar days after the aggrieved party has called upon the party in breach by written notice to remedy such branch [breach], the aggrieved party shall be entitled either to sue the defaulting party for performance of its obligations under this agreement, or alternatively to cancel the agreement, without prejudice however to the aggrieved party's right to claim payment from the defaulting party of any damages sustained by it by reason of the defaulting party's default."

Res judicata

[14] The first defendant pleaded *res judicata* on the basis that the claim in this action was finally adjudicated upon by a Court of competent jurisdiction and set out in Molahlehi J's judgment.

[15] Counsel for the plaintiff referred me to *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*,[2] and argued amongst other, that it is settled law that in order to successfully raise a plea of *res judicata*, a defendant must show that the plaintiff is demanding the same thing on the same ground, on the same cause for the same relief, and that issue has been finally determined upon by a competent court. In counsel's view, although the plaintiff is demanding the same thing on the same ground from the first defendant, Molahlehi J

[2] 2001 (2) SA 232 (SCA) at paras 2-3.

did not deal with the merits of either Part A or Part B of the application and the issues have therefore not been finally determined.

[16] In *Horowitz v Brock*,[3] the Appellate Court dealt with the requirements of a defence of *res judicata* and stated as follows:

> "The requisites of a valid defence of *res judicata* in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties, and the same thing must have been demanded."

[17] The Appellate Court continued that the rule that the same thing must have been demanded in both actions has been held by Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality,*[4] to mean:

> "[T]hat where a court has come to a decision *on the merits of a question in issue*, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings." (Emphasis added.)

[18] In *Prinsloo NO v Goldex 15 (Pty) Ltd*,[5] Brand JA distilled the gist of the plea of *res judicata* as follows:

> "The expression *'res iudicata'* literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been *finally adjudicated upon* in proceedings between the parties and that it therefore cannot be raised again." (Emphasis added.)

[19] To my mind, neither of the two substantive questions in the application before Molahlehi J, being whether the plaintiff should be authorised to give effect to Mabuse J's order (Part A), and whether the first defendant should be compelled to do all things and sign all documents necessary to give effect to the agreement (Part B), was finally determined by Molahlehi J. It is patently clear from the judgment that Molahlehi J's reasoning was that, with regards to Part A, the application was flawed since the plaintiff didn't apply for leave to intervene, and with regards to Part B, there was a dispute of fact that was not resolvable on the papers. This view is fortified in the more recent matter of *Skog NO v Agullus*,[6] wherein the Supreme Court of Appeal

[3] 1988 (2) SA 160 (A) at 178H.
[4] 1963 (2) SA 555 (A) at 562C-D.
[5] 2014 (5) SA 297 (SCA) at para 10.
[6] 2024 (1) SA 72 (SCA) at paras 72-73.

was *inter alia* seized with a cross-appeal by occupiers (respondents) against the Land Claims Court's dismissal of their defence that the matter had been rendered *res judicata* by an earlier magistrates' court order dismissing an eviction application brought by the Trust (one of the appellants) against the same respondents. Molemela JA dealt as follows with the cross-appeal:

> "[72] It is well established that the successful invocation of res judicata requires the party raising that plea not only to show that there was an identity of the parties and of the issues in the former and in the present litigation, but must also show that the earlier judgment relied upon was a final judgment. It is evident from the magistrate's judgment that no final finding was made in respect of the allegations of misconduct against the occupiers, as the magistrate believed that there was a dispute of fact on that aspect.
>
> [73] Where the application is dismissed because of the existence of a factual dispute, it would result in untenable hardship for the applicant in a matter of this nature if, in circumstances where an issue was raised, but not finally determined, the earlier judgment would entitle the respondent to successfully invoke the plea of res judicata, despite that specific issue not having been adjudicated upon." (Footnotes omitted.)

On the above basis, the special plea of *res judicata* cannot succeed and must be dismissed.

Prescription

[20] The first defendant pleaded that prescription began to run on 15 March 2015, alternatively 28 April 2015 when the suspensive conditions in the agreement were fulfilled; further alternatively, and considering clause 11 of the agreement and the date of the letter of demand, the date upon which the plaintiff was entitled to enforce the agreement arose at the latest on 25 September 2015. Since the summons was served on 3 October 2018, the claim prescribed in terms of section 11 of the he Act.

[21] The first defendant also pleaded that the application before Molahlehi J as dismissed, did not interrupt prescription in terms of the provisions of section 15(2) of the Act. Although it is not pleaded that Mabuse J's order does not amount to a superior force in terms of the provisions of section 13(1) of the Act, this was argued by the first defendant's counsel in response to paragraphs 12.4 to 12.6 of the plaintiff's consequential replication, and I return to this aspect later.

[22] The plaintiff replied in its consequential replication that the plea of prescription is unsustainable for the following three primary reasons:

(a) Two of the plaintiff's claims do not constitute a "*debt"* that prescribes.

(b) The one claim that is a "*debt"* and can prescribe namely its claim under prayer 6.1 of the particulars of claim (to compel the first defendant to do all things and sign all documents necessary to give effect to the agreement), has not prescribed and in fact prescription has not begun to run on that claim yet. The debt is not due until the first defendant has paid all amounts necessary to obtain clearance certificates.

(c) The plaintiff was precluded by a superior force (Mabuse J's order) from enforcing its claim for transfer of the Units and therefore completion of prescription has, in any event, been delayed.

[23] According to the plaintiff, it is not its claim for transfer of the Units that arose at the latest on 25 September 2015, but only its claim to compel the first defendant to pay clearance figures and this claim is not a "debt" that can prescribe. Neither is its claim under prayers 1 to 5 of the particulars of claim to intervene in the urgent application (under case no: 81764/2015). From the wording of clause 9.1 of the agreement, a *necessary precondition* to transfer the Units to the plaintiff is that the purchaser pays the charges required by the relevant Local Authorities (i.e. clearance figures) and that a clearance certificate is thereafter obtained.

[24] Three issues arise from the above:

(a) What is the nature of the plaintiff's formulated claim – is it a debt capable of prescribing?

(b) If the plaintiff's claim is a debt capable of prescription, when did the debt become due?

(c) Is Mabuse J's order a superior force in terms of the provisions of section 13(1) of the Act that has (and continue to) delay the completion of prescription?

[25] The statutory provisions relevant to these three issues are sections 10(1), 11, 12(1), 13(1)(a) and (i) and 15(1) of the Act.

(a) Section 10 of the Act provides for the extinction of debts by prescription and the relevant part of section 10(1) reads:

> "[A] debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of prescription of such debt."

(b) Section 11 is headed "Periods of prescription of debts" and the relevant part provides:

> "The period of prescription of debts shall be the following:
> (a) . . .
> (b) . . .
> (c) . . .
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

(c) Section 12, in turn, is headed "When prescription begins to run" and the relevant part of section 12(1) provides:

> ". . .prescription shall commence to run as soon as the debt is due."

(d) Section 13 is headed "Completion of prescription delayed in certain circumstances" and the relevant part of section 13(1)(a) and (i) provides:

> "(1) If-
> (a) the creditor is a minor or . . . . is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1);
> (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or

on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

(e) Lastly, section 15 provides for judicial interruption of prescription and reads:

(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."

[26] I follow the following constitutional approach adopted the Constitutional Court in *Makate v Vodacom (Pty) Ltd (Makate)*,[7] when interpreting the relevant sections of the Act:

"It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not."

What is the nature of the plaintiff's formulated claim – is it a debt capable of prescribing?

[27] The first defendant's counsel argued as follows: in paragraph 12 of the particulars of claim, the plaintiff alleges that, notwithstanding the delivery of the letter of demand, the first defendant continues to refuse to effect transfer of the Units to the plaintiff. In paragraph 13, the plaintiff then seeks specific performance by the first defendant of its obligations under and in terms of the agreement, namely that the first defendant does all things and signs all documents necessary to give effect to the

[7] 2016 (4) SA 121 (CC) at para 90.

agreement. As such, the essence of the plaintiff's case is simply, in effect (despite what the aforementioned prayers are disguised to do otherwise), to seek transfer of the immovable property in terms of the agreement.

[28] In response to the plaintiff's pleaded contention that at best for the first defendant it is the plaintiff's claim to compel the first defendant to pay clearance figures that arose on 25 September 2015 (and not to claim specific performance for transfer) and that this is not a debt and therefore not capable of prescription, the first defendant's counsel relied upon the judgment in *Frieslaar NO and Others v Ackerman (Frieslaar)*,[8] and argued that ultimately the claim is for specific performance to achieve transfer of the Units in terms of the agreement. The plaintiff could have simultaneously asked for payment of clearance amounts and transfer within three years of fulfilment of the suspensive conditions, and they in fact did exactly that when the plaintiff brought the application that served before Molahlehi J. The same relief is sought again in this action, albeit after prescription of the claim.

[29] Lastly, with regards to the claim to intervene, the first defendant's counsel argued that the plaintiff does not need to intervene to enforce its contractual right, and in any event, if it is correct that what the plaintiff seeks is in effect a transfer of the immovable property and their claim has prescribed, then too has their right to intervene in the Court proceedings.

[30] The argument of plaintiff's counsel starts with the precursor that (a) the Constitutional Court in *Makate*[9] clarified the definition of a "debt" as an obligation to pay money, deliver goods or render services, (b) the Constitutional Court further held that there is nothing in law to suggest "that 'debt' includes every obligation to do something or refrain from doing something, apart from payment or delivery"[10] and (c) the debt in question must also be owed by the debtor to the creditor (and not to a third party).

[8] [2018] ZASCA 3.
[9] Above n 7 at para 92.
[10] Above n 7 at para 93.

[31] The plaintiff, so the argument proceeded, essentially seeks three forms of relief, namely (a) leave to intervene, (b) an order compelling the first defendant to pay all amounts required by the relevant local authorities and the SARS in order to obtain clearance certificates in respect of the Units, and (c) an order compelling the first defendant thereafter to do all things, and sign all documents, necessary to give effect to the agreement. Clearly, the first relief is not a "debt" whilst the third relief admittedly is.

[32] The reasons advanced in plaintiff's counsel's heads of argument as to why the second form of relief is not a "debt" to the plaintiff that can prescribe, is essentially that although the order seeks the first defendant to "pay money", the money is to be paid to the City of Tshwane and SARS and thus a "debt" owed to them and not to the plaintiff. Similarly, the order it seeks to compel the first defendant to "do something" (i.e. pay the City of Tshwane and SARS), is not an obligation to pay or deliver something to the plaintiff. Rather, it is an obligation to pay something to a third party, which will then enable the plaintiff to obtain clearance certificates, which, in turn, will allow the Units to be transferred.

[33] Although the plaintiff initially pleaded that the second form of relief it seeks is not capable of prescription in that "it does not constitute a claim for payment of money or a claim for the delivery of something", plaintiff's counsel has as aforementioned, in his heads of argument conceded, correctly in my view, that since the relief it seeks is indeed for the first defendant to *"pay money"* and *"to do something"*, it falls within the definition of a "debt". It now rather contends that it is simply not a "debt" to the plaintiff that can prescribe, but it is a debt owed to a third party.

[34] The Constitutional Court in *Makate*[11] referred with approval to *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd,*[12] in which the Appellate Division adopted the following dictionary meaning ascribed to the word "debt" in the Shorter Oxford English Dictionary 5ed (1993):

[11] Above n 7.
[12] 1981 (3) SA 340 (A) at 344E – G.

“1. Something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another.

2. A liability or obligation to pay or render something; the condition of being obligated.”

[35] Counsel for the first defendant submitted that *Frieslaar NO* is on material respects on all fours with the present matter.[13] That case related to four pieces of immovable property sold by the respondents to the Trust pursuant to agreements of sale couched in identical terms, concluded on 25 February 2010. Clause 7.1 of the respective agreements of sale, imposed the following obligation on the respondents as the sellers (which is comparable with clause 9.1 of the agreement *in casu*):

> “The Seller shall be liable for all transfer costs, transfer duty, stamp duty, . . . and transfer of the property into the name of the Purchaser by the conveyancers of the Seller, and the conveyancing shall only commence after such costs have been paid by the Seller.”

The respondents raised a special plea of prescription, asserting that the claim of the appellants had arisen on 25 February 2010 (when the agreements were concluded) and that the appellants' summons was served on them on 7 March 2013, more than three years after the date on which the claims arose.

[36] In the course of considering the meaning of the term *“debt”* in the Act, Petse JA held as follows:[14]

> [19] “The word 'debt' is not defined in the Prescription Act. But it is now trite that the word 'debt' in s 12(1) of the Prescription Act is a wide concept which does not equate to a 'cause of action'. Rather, it includes the broader concept of a 'right of action'. In *Drennan Maud & Partners v Town Board of the Township Pennington* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) Harms JA put it thus (212F-J):
>
> > '[I]n short, the word "debt" does not refer to the "cause of action", but more generally to the claim. In deciding whether a 'debt' has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word.'
>
> [20] In *Barnett & others v Minister of Land Affairs & others* [2007] ZASCA 95; 2007 (6) SA 313 (SCA), para 19, the term 'debt' was given a broad meaning to refer to an

[13] Above n 8.
[14] *Frieslaar NO* above n 8 at paras 19-21.

obligation to do something, such as payment or delivery of goods or to abstain from doing something.

[21] However, the Constitutional Court has expressed reservations in its recent decisions, notably, *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 87-93, in relation to the precise ambit of the word 'debt' implying that it should be interpreted narrowly. *Fortunately though, on the facts of this case*, it is not necessary to enter into that debate which must be left for another day when pertinently raised and this court has enjoyed the benefit of full argument on this score for, in the context of the facts of this case, *even in adopting a narrow meaning of the word 'debt', the obligations undertaken by the respondents in terms of clause 7.1 constitute a debt."* (Emphasis added.)

[37] In *Frieslaar NO*,[15] counsel for the appellants (plaintiffs) contended with reference to the aforementioned clause 7.1 (similar to plaintiff's argument *in casu* that the "debt" in terms of clause 9.1 of the agreement is an obligation to pay something to a third party), that the obligation on the seller did not constitute a debt and even if it were to be regarded as a debt, it was a debt owed not to the Trust but to the conveyancers who were to transfer the properties to the Trust. The argument was rejected by the Court, which *inter alia* stated the following:

"[36] Second, it cannot be an answer to say that the obligation to pay transfer costs is owed to the conveyancers simply because payment must, in terms of clause 7.1, be effected to them as the appellants sought to argue. The obvious answer is that all of the obligations undertaken by the respondents in terms of the agreements in question were owed to the Trust as the contracting party and only the Trust was entitled to enforce those obligations.

[37] It therefore follows that the Trust had every right, had it elected to do so, to demand that the respondents do what was required of them in terms of clause 7.1 immediately upon the conclusion of the agreements of sale."

[38] *In casu*, only the plaintiff is entitled to enforce clause 9.1 of the agreement and when the letter of demand is considered, the plaintiff was clearly aware that it had every right to demand, as it did, that the first defendant fulfil its obligations in terms of

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[15] Above n 8 at paras 36-37.

clause 9.1, and that the first defendant's non-compliance would amount to a breach of the agreement. The plaintiff's argument that payment of clearance figures is an obligation to pay something to *a third party* is thus rejected.

[39] I furthermore agree with the contention of the first defendant's counsel that the essence of the plaintiff's case is to seek transfer of the immovable property in terms of the agreement. Prayer 6.1 of the particulars of claim seeks to order the first defendant, after compliance with Mabuse J's order, to do all things and sign all documents necessary for the transfer of the Units in the plaintiff's name, and it constitutes a "debt". As was stated in *Ethekwini Municipality v Mounthaven (Pty) Ltd*:[16]

> "A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a 'debt' in the dictionary sense accepted in *Makate*. It really is as simple and straightforward as that."

[40] The first defendant has an obligation to the plaintiff to do all things and sign all documents necessary to transfer the Units, including the obligation to make payment of the clearance figures. The root premise behind prayer 6.2, i.e. to seek payment of the clearance figures, thus remains the transfer of the Units to the plaintiff. In using a narrow meaning, although a *"debt"* does not include every obligation in the agreement to do something or refrain from doing something, it is trite that payment and delivery are included. I thus apply *Frieslaar NO* and find that on either a broad or narrow view, both the second and third forms of relief the plaintiff seeks in prayers 6.1 and 6.2 are debts capable of prescription.

[41] Lastly, prayers 1 to 5, namely to intervene in the urgent application and to carry out Mabuse J's order, do not constitute obligations on the first defendant to pay money, deliver goods, or render services. As such, it does not constitute a "debt" and accnot prescribe.

When did the claims in prayers 6.1 and 6.2 fall due?

[16] 2019 (4) SA 394 (CC) at para 8.

[42] In this regard, the sum of the first defendant's prescription plea is that, considering the date of the letter of demand, the date upon which the plaintiff's claims arose was at the latest on 25 September 2015. During argument, counsel contended that this is the date when the plaintiff could have enforced its rights under the contract, including the first defendant's obligations under clause 9.1. Counsel relied on the plaintiff's replication and submitted, correctly in my view, that I must accept for purposes of the special plea that the pleadings are correct since no evidence is being led. He referred me to the replication wherein the plaintiff pleaded that "performance by both parties was due within a reasonable time after fulfilment of the suspensive conditions". As already stated, it is common cause that these conditions were fulfilled before the letter of demand was delivered (on 24 April 2015) and thus the contention of 25 September 2015, which is also in accordance with clause 11 of the agreement. He further again referred quite extensively to *Frieslaar NO*,[17] which I will return to again below.

[43] Plaintiff's counsel, for his part, contended as follows:

(a) Firstly, with reference to various authorities, a debt is "*due*" when every fact necessary to sustain a cause of action is present and in existence. That is when the creditor acquires a complete cause of action for its *recovery*. Thus, all necessary preconditions to claiming relief must have been fulfilled, and prescription cannot begin to run before the cause of action is fully accrued. In respect of the transfer of immovable property, the cause of action is fully accrued when the plaintiff is in a position to obtain the transfer of the immovable property from the defendant.

In casu, the plaintiff is not in a position to take transfer of the Units unless two events occur, i.e., the first defendant has made payment of the clearance figures and the City of Tshwane has issued clearance certificates, and secondly, Mabuse's J's order has been given effect to. Obtaining clearance certificates to obtain transfer of the Units is contingent upon compliance with Mabuse J's order.

[17] Above n 8.

Unless and until the plaintiff is entitled to transfer of the Units, every fact necessary to sustain a cause of action is not present and in existence. In support of this contention, plaintiff's counsel relied specifically on *Santam Ltd v Ethwar* ("*Ethwar*")[18] and *Brooklyn Edge (Pty) Ltd v City of Tshwane Metropolitan Municipality (Brooklyn Edge*).[19] Below, I will deal with these authorities, which, in my view, are both distinguishable from this matter.

(b) Secondly, even if the "debt" (i.e. transfer of the Units) could start to run prior to compliance with Mabuse J's order, it did not start to run on 25 September 2015. This is because clause 11 of the agreement gives the plaintiff an election upon the first defendant failing to remedy its breach on 25 September 2015 – the plaintiff can either "sue the defaulting party for performance of its obligations under this agreement, or alternatively to cancel this agreement…". It is settled law that since the first defendant repudiated the agreement, the plaintiff was entitled to a reasonable time to elect whether or not to claim specific performance or cancel and claim damages.[20] Unless and until the election is made, the plaintiff cannot be said to be in default, or guilty of dilatoriness and this contention is supported by the Supreme Court Appeal judgment in *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* ("*Miracle Mile Investment*s").[21] Only after this reasonable time could prescription said to have commenced to run. *In casu*, Mabuse J's order was granted on 20 October 2015, prior to a reasonable period elapsing from 25 September 2015. It was only on 21 October 2015, at the very earliest, that the Plaintiff could institute the claim and that prescription could notionally have started to run.

[18] 1999 (2) SA 244 (SCA).

[19] [2019] ZAGPPHC 233. This matter went on appeal - See City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and Another (928/2020) [2022] ZASCA 23; [2022] 2 All SA 334 (SCA) (1 March 2022) and n35 below.

[20] *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) (*HMBMP Properties*).

[21] 2017 (1) SA 185 (SCA) at para 26.

[45] I deal first with the plaintiff's second contention and the case law he referred me to in support thereof:

(a) I do not regard *HMBMP Properties* as authority for the contention that the innocent party has a reasonable time to make an election whether to reject or accept the repudiation. The case is also distinguishable from this matter because it deals specifically with anticipatory breach. It is within this context that Thirion J said at 912 F to H:

> "It is settled law that *an anticipatory repudiation* has no effect in law unless and until the innocent party elects to treat it as a breach and cancels the contract. If he does not elect to cancel the contract he cannot sue for damages in respect of obligations the due date, for the performance of which, has not yet arrived.
>
> In my view *in the case of an anticipatory breach* the innocent party's cause of action, in respect of damages resulting from the repudiation by the other party of an obligation which is to be performed by him at some future date, only accrues and the "debt" of the guilty party only becomes due when the innocent party makes his election to treat the contract as at an end. Consequently I am of the view that prescription commences to run from that date." (Own emphasis added.)

Election is a prerequisite to a plaintiff's right to claim damages in respect of anticipatory breach. Absent such election, the repudiating party can always retract his repudiation "and thus purge his own continuing refusal to be bound by the contract". Thus, in the event that the innocent party wants to claim damages in anticipation of a breach before the "debt is due", the party has to give notice thereof for the claim to accrue. That is different from the election in terms of clause 11 of the agreement *in casu* where the letter of demand evidenced that the breach already occurred and the first defendant was placed on terms to pay the clearance figures, failing which the plaintiff was immediately entitled to either sue for specific performance or cancel the agreement and sue for damages. In terms of this election I find that the due date of the debt is not postponed. As stated by Professor Loubser:[22]

> "The right of election to enforce a remedy for breach of contract should be exercised within a reasonable time; and the creditor who fails to act runs the risk of an inference of waiver of the rights; but prescription in any event applies as a backstop so that the debt correlative to this right becomes prescribed three years after the breach occurred or after the creditor obtained knowledge or could reasonably have had knowledge of the breach."

There is also the difficulty, as referred to in various authorities, that if time did not commence running until the plaintiff has made its election, the plaintiff would by its own action be able to put off the running of prescription indefinitely. That is contrary to what was stated in, amongst other cases, *Uitenhage Municipality v Molloy*,[23] and *Benson v Walters*.[24]

(b) *Miracle Mile Investments*[25] was decided within the specific context of accelerated clauses in a contract, and is similarly also distinct from this case. The issue in principle before the Supreme Court of Appeal was "when prescription commences to run *in an agreement containing an acceleration clause* that entitles the creditor bank to claim the whole outstanding amount payable, upon the occurrence of a breach by the principal debtor." (Own emphasis added.) Is the debt in terms of section 12(1) of the Act due when the principal debtor breaches the obligation to pay the monthly instalment, or is it due when the creditor elects to enforce the acceleration clause, in order to render the whole amount payable?

It was a condition of the acceleration clause in the agreement that before Standard Bank could claim payment of the full balance, it had to

[22] Loubser *Extinctive Prescription* 2nd ed (Juta & Co Ltd, Cape Town) at 154.
[23] 1998 (2) SA 735 (SCA) at 742A-G.
[24] 1981 (4) SA 42 (C) at 49G.
[25] *Miracle Mile Investments* above n 21 at para 2.

furnish the debtor with a first written notice to remedy a failure to pay any instalment within seven days, and in the event of a failure to make payment, a second written notice that it is terminating the facility and claiming immediate repayment of the full outstanding balance. Only the first notice was given and upon continued failure to make payment, the second notice was never issued. The full balance owing on the facility, excluding the outstanding arrear payments, was thus not yet due as Standard Bank never elected in terms of the agreement to terminate the facility and claim repayment of the full outstanding balance. It is within this context that Mbha JA held as follows:[26]

> "Compliance with the jurisdictional requirements for acceleration of the outstanding balance is not simply a procedural matter but is essential in establishing a cause of action. . . . .[T]here is no sense in looking for the moment in time when the debt is due, if the debt does not even exist. It is not a case of delaying an existing claim. The creditor cannot be said to be in default, or guilty of dilatoriness, until he has made his election. The election and communication thereof in the form of the requisite notices are essential preconditions to create a cause of action in the first place. The election is one which Standard Bank does not have to take at all. Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance in terms of clause 12.2 [of the agreement]."

[46] The provisions of clause 11 of the agreement *in casu* do not require notice to be given of the plaintiff's election to either sue for performance or cancel the agreement. It simply entitles the plaintiff to immediately proceed with either if the first defendant remains in breach for a period of 10 (ten) calendar days after demand.

[47] I now turn to the plaintiff's first contention, i.e. that the plaintiff is not in a position to take transfer of the Units unless (a) the first defendant has made payment of the clearance figures and clearance certificates are issued, and (b) Mabuse's J's order has been given effect to. Since this has not happened yet, the debt is not due yet, and prescription cannot commence running.

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[26] *Miracle Mile Investments* above n 21 at para 26.

[48] My starting point to decide when the debt became due is the interpretation of clauses 9.1 and 11 of the agreement and the interpretation of the Act referred to above. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[27] Wallis JA summarised the state of the law in regard to interpretation. The point of departure is the language of the relevant provisions, read in context and having regard to the purpose of the provisions and the background to the preparation and production of the document.

[49] In *Frieslaar NO,* the Supreme Court of Appeal examined the jurisprudence dealing with the interpretation of the phrase *"debt is due"* in section 12 of the Act, and referred to relevant authorities as follows:[28]

> "[22] Similarly, the phrase 'debt is due' is not defined in the Prescription Act. But it is now well settled that the term must be given its ordinary meaning, that is, that a debt owing and already payable or immediately claimable or immediately exigible at the election of the creditor . . . .Put differently, there must be a debt in respect of which the debtor is under an obligation to perform immediately.
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> [31] An obligation to do something undertaken in terms of a contract, when the contract is silent as to the time of performance, is a debt which becomes immediately claimable or exigible at the instance of the creditor. Thus prescription commences to run from the date on which the contract was concluded. In *Munnikhuis v Melamed* NO 1998 (3) SA 873 (W) the court said the following (at 887E-F):
>
> > '. . . A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which in appropriate circumstances, can be immediately . . .'"

Petse JA further refers to Professor Loubser who, *inter alia* points out that where a contract is silent as to the time of performance, the debt is generally due immediately upon conclusion of the contract.[29] He also refers to J Saner SC who in *Prescription in South African Law*, Issue 23 (2016) says the following (at 3.65):

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[27] 2012 (4) SA 593 (SCA) at para 18.
[28] Above n 8 at para 22 & 31.
[29] Above n 8 at para 34.

> "It is arguable that a contract allowing a creditor to determine, of his own accord, when performance is to be made is in effect silent as to the time of performance. Performance is therefore due immediately on conclusion of the contract, when prescription begins to run. Taking the argument further, the stipulation that performance is due on demand merely reinforces the implicit term of the contract that performance is due from the conclusion of the contract."

[50] According to clause 9.1 of the agreement, the conveyancers must attend to the registration of transfer of the Units into the name of the purchaser "after the fulfilment of the suspensive conditions, but provided" amongst others, the seller paid all charges required to obtain clearance figures. Plaintiff's contention implies that the payment of clearance figures and issuing of clearance certificates was a further suspensive condition that had to be fulfilled before transfer of the Units. Having regard to paragraph 9.1 as a whole and the language used in the context of the ordinary rules of grammar and syntax, I reject this approach. The obligations imposed on the parties in clause 9.1 are not couched as forming part of the suspensive conditions that should be fulfilled before transfer of the Units can take place, but rather as a further term or obligations. The plaintiff's contention can therefore not stand.

[51] Clause 9.1 nowhere stipulates the time at which payment of the clearance figures should be made. All it does is to impose, amongst others, an obligation on the first defendant as the seller to pay these costs. The only reference to a time period is in clause 3.2 of the agreement that stipulates that the first defendant/conveyancer "will not apply for clearance figures prior to the fulfilment of the suspensive conditions. ..." The plaintiff thus had every right, had it elected to do so, to demand that the first defendant complies with the terms of clause 9.1 immediately upon fulfilment of the suspensive conditions. This is precisely what the plaintiff did when it issued the two letters of demand.

[52] This brings me to Mabuse J's order and the contention that the claim for transfer of the Units is not yet due (the running of prescription has not yet commenced) because the order has not been complied with. Counsel for the plaintiff argued that the question is not whether the plaintiff was barred from the

order to institute proceedings, but rather whether the debt is due, i.e., all the elements are present to *successfully* prosecute the claim and obtain transfer of the immovable property from the first defendant.

[53] I find it difficult to follow the plaintiff's argument with regards to Mabuse J's order in the context of determining when the debt became due. It is irrelevant. It is only with reference to section 13(1) of the Act (which I return to below) that Mabuse J's order becomes relevant and, in that context, the only question is whether it is an impediment that delays the completion of prescription.

[54] In the event that I find that Mabuse J's order is indeed such an impediment and the completion of prescription is delayed, it is nevertheless possible for the debt to become due despite such impediment, as explained by Professor Loubser in his work *Extinctive Prescription*, wherein he states:[30]

> "A debt may be due even if some impediment or disability prevents that debt from being enforced by legal process at the time when it becomes due. For example, a due debt may not be enforceable because the creditor is a minor, or insane, or married to the debtor in community of property, or a juristic person with the debtor as a member of its governing body, or deceased without an executor having been appointed; or because the debtor is a minor, or insane, or outside the Republic, or deceased without an executor having been appointed. If these circumstances affect the creditor or the debtor, the 1969 Prescription Act provides that the eventual completion of the prescription period is delayed, but the Act does not provide that any of the circumstances mentioned delays the beginning of the running of the prescription period. The combined effect of ss 12 and 13 of the 1969 Prescription Act is therefore that a debt may become due and payable so that the prescription period begins to run even though a disability or impediment affecting one of the parties may prevent the debt from being immediately enforceable by legal process. In such a case the disability or impediment delays the completion of the prescription period in terms of s 13 of the Act."

[55] There are abundant authorities dealing with the term *"a debt is due"* and I only refer to a couple here.

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[30] Loubser above n 22 at 124.

(a) In *Truter & Another v Deysel,*[31] the Supreme Court of Appeal held as follows:

> "A debt is due . . . when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

55.1 It was further held in *Apalamah v Santam Insurance Co Ltd*[32] that:

> "Although it is true that in many cases the date upon which a debt "becomes due" might also be the date upon which it "arose", that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting sec. 12 (1) of the new Prescription Act was to crystallize that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due."

55.2 In *List v Jungers*,[33] the Court referred with approval to *Apalamah* and held that:

> "[T]he date on which a debt arises usually coincides with the date on which it becomes due, but that that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand."

[56] *In casu*, the plaintiff's claim for specific performance in terms of the agreement arose and became due on 24 April 2015 when the agreement became unconditional (with the letter of demand and clause 11 not creating the due date, but merely confirming an existing breach). On 24 April 2015 the entire set of facts

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[31] 2006 (4) SA 168 (SCA) at para 16.
[32] 1975 (2) SA 229 (D) at 232E-F.
[33] 1979 (3) SA 106 (A) at 121C-D.

which the plaintiff must prove to succeed with its claim for specific performance was in place or, in other words, "had happened which would entitle the plaintiff to institute action and to pursue the claim". Mabuse J's order was not in existence at this date. Even if it is accepted as pleaded that according to clause 11 the debt became due on 25 September 2015,[34] this date is still before Mabuse J's order.

[57] In regard to the plaintiff's reliance on *Brooklyn Edge*, the judgment is distinguishable: Firstly, in *Brooklyn Edge* the immediate transfer of the properties was in terms of that deed of sale conditional upon the City's compliance with a statutory obligation that was present when the deed of sale was entered into, namely, successfully effecting the closure and rezoning of the properties. Neither Mabuse J's order nor the payment of clearance figures in this matter are in terms of the agreement conditions precedent to transfer of the Units, and as stated, Mabuse J's order was furthermore only handed down after the debt became due. Secondly, in regard to the first defendant's defence in that case that the plaintiff's rights to seek the closure and the rezoning of the properties have prescribed, it was pointed out by the Supreme Court of Appeal, neither of these are debts that can prescribe.[35] *In casu*, the claims in prayers 6.1 and 6.2 are both debts that can prescribe.

[58] Counsel for the plaintiff also referred me to the Supreme Court of Appeal decision in *Ethwar*[36] to support his contentions that because the preconditions to enable transfer of the property, i.e. compliance with Mabuse J's order and then the issuing of clearance certificates, are contingent upon the extraneous aid of third parties, the debt cannot be due yet. In this regard:

(a) In *Ethwar*, the plaintiff had concluded a settlement agreement with the defendant pursuant to which the defendant offered to pay the plaintiff's costs "as taxed or agreed between the parties". More than three years after the acceptance of the offer, the plaintiff's attorneys served on the defendant's attorneys a bill of costs and a notice of

[34] See *Frieslaar* above n 8 at para 31 referring to *Munnikhuis v Melamed NO* 1998 (3) SA 873 (W).
[35] *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd* ZASCA 23 at para 30.
[36] Above n 18.

taxation, to which the defendant's attorneys objected on the basis that the plaintiff's claim for costs had prescribed. In dismissing the claim for prescription, Harms JA held at 253B that whether the costs became payable (i.e. the debt was due) without an agreement or taxation, depends on whether it was an agreed condition for payment or that payment was contingent thereon. Agreement or taxation was not just a simple procedural step, and the parties could not have intended that the plaintiff could recover her costs without a prior agreement or taxation. Both require extraneous aid of third parties over whom the plaintiff had no control. Any summons claiming payment of costs not agreed upon or not taxed would have been met by a successful exception.

(b) The contention by plaintiff's counsel *in casu* is that because the clearance certificates are likewise preconditions for transfer but cannot be obtained before Mabuse J's order is complied with, and both are contingent upon the extraneous aid of third parties, the plaintiff cannot sue for transfer yet.

(c) In my view, the flaw in the plaintiff's argument is that *in casu* it is the first defendant, not a third party, who, in terms of the agreement, should pay all amounts to obtain clearance certificates. A debtor's inability to perform (here, the building non-compliance) is the debtor's breach; it does not negate the creditor's accrued cause of action to demand transfer. The plaintiff pleaded in para 8 of the particulars of claim, "As such, and by no later than 18 March 2015 (corrected to 24 April 2015 in para 2 of its consequential replication to the first defendant's second special plea), the Sale Agreement became unconditional in accordance with its terms, and thus of full force and effect." It again pleaded in par 3.1 of its consequential replication that "The Plaintiff admits that the conditions precedent were indeed fulfilled by 24 April 2015". It seems contradictory to me that the plaintiff now argues that the transfer has never been due because it was conditional upon the payment of clearance figures. Simply put, the agreement cannot, in accordance with its terms, simultaneously be unconditional and conditional.

(d) Although Mabuse J's order interdicts the issuing of clearance certificates until the first defendant has performed certain demolition work and thereafter restores ten of the Units to be in accordance with the sectional title plans, I already found that the order was delivered after the debt became due on 25 September 2015, and it cannot retrospectively change the due date.

Is Mabuse J's order a superior force in terms of the provisions of section 13(1) of the Act that has (and continue to) delay the completion of prescription?

[59] Now that I have found that the plaintiff's obligation in clause 9.1 of the agreement to pay all the amounts required to obtain clearance certificates is indeed a debt that became due, together with transfer, on 25 September 2015, the only question remaining is whether completion of prescription is delayed by Mabuse J's order.

[60] First defendant's counsel submitted the following in summary: In paragraph 19 of the particulars of claim, the plaintiff pleads that its alleged right to enforce the sale agreement and *to take transfer* of the Units has been adversely affected by Mabuse J's order and the first defendant's alleged failure to comply and/or seek enforcement of the court order. The true test is, though, whether the *plaintiff* was stopped from doing anything, and they were not – the order only interdicted the first and third defendants from doing something. This is evidenced by the plaintiff having approached the Court twice, i.e., by launching the application that served before Mohahlehi J and instituting this action. They could and should have done so before prescription. It was also submitted that the order, in any event, only deals with ten of the Units and the plaintiff could have enforced performance with regards to the rest of the Units.

[61] Plaintiff's counsel, on the other hand, contended the following:

(a) Mabuse J's order is clearly a "superior force" contemplated by section 13(1) of the Act that precluded the plaintiff from enforcing his claim by summons. Although the plaintiff could have served summons, it could not enforce its claim for the transfer of the Units. In effect, it was powerless to enforce the agreement.

If it instituted action, the plaintiff would have been met with a special plea that performance was (at least temporarily) impossible because of the order. It is only when this impediment is removed and there is "proper compliance with the National Building Regulations and Building Standards Act", that the plaintiff is notionally able to "enforce its claim". It is precisely for this reason that the claim for enforcement of the agreement is conditional upon Mabuse J's order first being given effect to.

(b) The contention proceeds that if I find that Mabuse J's order did not interrupt the running of prescription, it would carry with it the absurd and inequitable consequence that on the one hand, if the plaintiff did not institute proceedings against the first defendant to enforce the agreement, its claim would prescribe, and on the other hand, if the plaintiff did institute such proceedings, its claim would be dismissed (i.e. on the basis of Mabuse J's order). In the latter scenario, section 15(2) of the Act would result in the interruption of prescription falling away. The plaintiff would be left in the absurd situation that nothing it could do could possibly interrupt prescription of the "debt" and this would undermine the very purpose of the Prescription Act.

(c) Plaintiff's counsel also does not agree with the contention by counsel for the first defendant that Mabuse J's order is against the first and third defendants and not the plaintiff. He contended that the order is against everyone it effects.

[62] In summary, section 13 of the Act provides that where an impediment contemplated by section 13(1) exists, the running of prescription shall not be

completed until one year after the impediment has been removed. In the context of section 13(1)(a) of the Act, the impediment in question is a “superior force including any law or any order of court” that precludes a person from interrupting the running of prescription.

[63] In *Knysna Hotel CC v Coetzee NO*,[37] the Supreme Court of Appeal interpreted “superior force” to mean that the creditor is, objectively speaking, prevented from enforcing the claim by causing a summons to be served on the debtor, for example, if a creditor company is in liquidation in respect of which no liquidator has yet been appointed.

[64] The purpose of section 13 of the Act was summarised as follows by the Supreme Court of Appeal in *Silhouette Investments Ltd v Virgin Hotels Group Ltd*:[38]

> “The various impediments listed in section 13(1) are circumstances which, as Professor MM Loubser puts it in his work Extinctive Prescription at 117, 'have in common some legal or practical problem which makes it difficult or undesirable for a creditor to institute proceedings for the enforcement of his claim against the debtor'. See also *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co* Ltd 1999 (3) SA 924 (SCA) at 930I - 931A, where it was said that:
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> > ‘(t)he word impediment . . . covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue'.”

[65] In the case of *Mattioda Construction (SA) (Pty) Ltd v Everite Ltd*,[39] Franklin J., gave the following interpretation of section 13(1)(a):

> "This means, in my view, that, between the time when a winding-up order has been granted and the appointment of a liquidator, the company is prevented by the operation of the Companies Act and of the order of the Court from interrupting prescription; ie that it is prevented by "superior force" within the meaning of section 13 (1)(a) of the Prescription Act from so doing."

[37] 1998 (2) SA 743 (SCA) at 754I.
[38] 2009 (4) SA 617 (SCA) at para 31.
[39] 1980 (3) SA 157 (W) at 161F-G.

[66] When I consider the aforementioned authorities, in the circumstances and facts *in casu*, I find that Mabuse J's order is not a superior force for the following reasons:

(a) I agree with the first defendant's counsel that Mabuse J's order interdicts only the first - and third defendant from doing something, i.e. the first defendant cannot proceed with the sale until it fulfils certain obligations and the third defendant cannot issue clearance certificates until there is compliance with the National Building Regulations and Building Standards Act. The order does not prevent the plaintiff from interrupting the prescription through issuing Court proceedings.

(b) Despite Mabuse J's order, the plaintiff brought the application before Molahlehi J and when that was unsuccessful, also instituted this action in which it seeks specific performance by the first defendant of its obligations under and in terms of the sale agreement. The plaintiff demonstrably could litigate — it brought the Molahlehi J application and this very action. That defeats the section 13(1)(a) plea.

(c) The plaintiff's current action was not met with the suggested special plea that performance is (at least temporarily) impossible. There is also no reason to accept that it would have been met by such a plea if it was brought timeously.

(d) I find it difficult to accept the plaintiff's "catch 22" speculation that if the plaintiff instituted proceedings against the first defendant to enforce the agreement by 24 September 2018, the claim would have been dismissed on the merits and that this would have triggered the operation of section 15(2) of the Act. There is no basis for me to find that if regard is had to the Mabuse J order, the claim would have been couched differently on 24 September 2018 from what it was couched currently on 26 September 2018. The contention can thus only imply that the plaintiff is of the view that the current action should be dismissed on the merits, which begs the question why then these proceedings in the first place? Section 13(1)(a) of the Act is concerned with whether the creditor was prevented from the act of interrupting prescription (serving process under section 15(1)) — not with the prospects of ultimate success on the merits. The prospect of losing is legally irrelevant to whether a "superior force" prevented service. The plaintiff conflates an impediment to interrupting prescription with an impediment to succeeding.

(e) The plaintiff's contention is incongruent with the litigation thus far. In the event that Mabuse J's order is a superior force as contemplated in section 13(1), the running of prescription shall not be completed until one year after the impediment has been removed. It would then not have mattered how long it took the plaintiff to first compel the first defendant to comply with the urgent application and remove the impediment (as it intended doing in the Molahlehi J application and now again in this action) before it thereafter brought an action with prayer 6.1 and 6.2 of the particulars of claim. Such a process would at least have been congruent with the plaintiff's contention. Having said that, I am not convinced that the plaintiff needed to intervene at all to enforce its contractual right, but this is not an issue I have to decide with regards to the special plea of prescription and I make no finding in this regard.

Conclusion, costs and order

[67] In this matter the due date is 24 April 2015 (or 25 September 2015). The prescription period under section 11(d) is three years using the civilian method of computation. Completion was at the latest on 25 September 2018 with summons being served after completion on 3 October 2018.

[68] The first defendant bears the onus to allege and prove the date of inception and that the prescription period has run. I conclude, that for all the foregoing reasons, the first defendant has discharged the onus upon it, and the special plea of prescription must succeed. Although the claim to intervene is not a debt that can

prescribe, it is contingent upon the plaintiff's claim for transfer of the Units which has now become prescribed.

[69] The special plea of res judicata on the other hand must fail.

[70] The principle that costs follow success finds application.

Order:

1. The first and second special pleas are separated in terms of the provisions of rule 33(4) of the Uniform Rules of Court from the rest of the issues.
2. The plea of *res judicata* is dismissed.
3. The plea of prescription is upheld with costs.
4. The transfer claim in prayers 6.1 and 6.2 having prescribed, prayers 1 to 5 disclose no cause of action and serve no purpose and are accordingly dismissed.
5. The plaintiff's claim is dismissed with costs, such costs to be on a party and party basis with counsel's fees on scale C.

F PAUER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:	10 November 2025
Judgment delivered:	8 June 2026

<u>APPEARANCES:</u>

For plaintiff:	**J M HOFFMAN**
Instructed by:	**Harris Incorporated, Pretoria**

For first defendant:	**J HERSHENSOHN SC**
Instructed by:	**Du Plessis & Eksteen Attorneys**

No appearance for the second and third defendants.