



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

***EX TEMPORE* JUDGMENT**

In the matter between:

Case no: I 25/2016

**MARTIN KEHRMANN**

**PLAINTIFF**

and

**STEPHAN GRADTKE**

**DEFENDANT**

**Neutral citation:** *Kehrmann v Gradtke* (I 25/2016) [2018] NAHCMD 141 (01 February 2018)

**Coram:** GEIER J

**Heard:** 30 January 2018

**Delivered:** 01 February 2018

**Released:** 23 May 2018

**Flynote:** Prescription - Extinctive prescription - Interruption of - By service of summons - Act 68 of 1969 s 15 (1) - Lapsing of such interruption in terms of s 15 (2) - Failure by plaintiff to 'successfully prosecute his claim under the process in question to final judgment' -

**Summary:** Section 15(1) of the Prescription Act 68 of 1969 provides that prescription will be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt - if a creditor fails in his claim, ie if he does not successfully prosecute his claim under the process in question to final judgment or the judgment is abandoned or set aside, the provisions of s 15 (2) come into play in that the interruption of prescription which has occurred in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted.

In casu the Plaintiff had instituted two actions for the enforcement of the same debt against the defendant. The first action instituted in 2004 under High Court case (T) I 1632/2004 ended in absolution from the instance being granted on 18 May 2015. The order for absolution was also never taken on appeal and thus became final;

The second case, which was instituted in May 2016 in the High Court, was instituted on essentially the same cause of action - and on substantially similar facts - and for the same relief as the first action. This was also the case which the parties agreed to have determined by way of a stated case;

The plaintiff was thus attempting to claim payment of the original- and substantially the same debt - through the institution of the said two actions.

Held that the relevant process in question, i.e. the first legal proceedings instituted under case (T)I 1632/2004, had a final outcome i.e. that reflected in the court order on 18 May 2015, which was one for absolution from the instance.

Held further that this result determined the question whether or not the plaintiff was able to prosecute his claim successfully to final judgment, as required by Section 15(2).

Held that this outcome was clearly not successful, so much was signified by the granting of absolution from the instance.

Held that it had to follow in such circumstances – that the interruption of prescription

- achieved through the service of the first summons under case (T) I 1632/2004 on 23 July 2004 - lapsed once the order for absolution from the instance - (signifying an unsuccessful prosecution of the plaintiff's claim) - was granted on 18 May.

Held further that this conclusion was re-enforced by the ancillary factors that the order granting absolution had since become final, as it was never taken on appeal and through the circumstances where the first case was, in any event, never re-enrolled, (if that was at all possible), after the payment of costs.

In such circumstances the deeming provisions contained in Section 15(2) of the Prescription Act 1969 came into play, with the result that the interruption of prescription, which had occurred on 23 July 2004 was deemed not to have occurred, thus resulting in the situation that the plaintiff's claim, against the defendant had already become prescribed during or about October 2005.

In the result the special plea of prescription was upheld with costs.

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### **ORDER**

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1. The defendant's special plea of prescription is upheld with costs, such costs to include the costs of one instructed- and one instructing counsel.
2. The case is accordingly regarded as finalised.

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### **JUDGMENT**

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GEIERJ:

[1] The parties have brought their dispute to the court for its determination by way of a stated case.

The agreed facts

[2] The amended statement of agreed facts, on which this determination is to be made, was summed up by the parties as follows:

'3.1 The parties entered into a building contract during 2001. The plaintiff was the contractor and the defendant the employer.

3.2 A dispute regarding payment arose between the parties during 2002.

3.3 Plaintiff instituted the First Action against defendant with respect to the dispute during July 2004 for the following relief:

1. Payment of the amount of N\$101, 331.04;
2. Interest on the aforesaid amount of N\$101, 331.04 calculated at the rate of 20% per annum from date of issue of certificate no. 10 until date of payment;
3. Payment of the amount of N\$132, 082.88;
4. Interest on the aforesaid amount of N\$132, 082.88 calculated at the rate of 20% per annum from date of issue of certificate no. 11 until date of payment;
5. Payment of the amount of N\$6, 165.04;
6. Interest on the amount of N\$ N\$6, 165.04 calculated at the rate of 20% per annum a tempore morae;
7. Payment of the amount of N\$52, 881.25 calculated at the rate of 20% per annum a tempore morae until date of payment.
8. Payment of the amount of N\$52, 881.25 calculated at the rate of 20% per annum a tempore morae until date of payment.
9. Costs of suit.
10. Further and/or alternative relief.

3.4 A copy of the combined summons and annexures in the First Action is attached hereto as annexure **"SG1"**.

3.5 On or about **24 April 2006**, the plaintiff delivered a "Notice of Amendment". A copy of this "Notice of Amendment" is attached hereto marked as annexure **"SG3"**.

3.6 On or about **10 May 2006**, the defendant delivered a "Notice of Objection". a copy of which is attached hereto marked as annexure **"SG4"**.

3.7 The defendant on or about **28 June 2007**, delivered his Plea. A copy of which is attached hereto marked as annexure **"SG5"**.

3.8 On or about **March 2014**, the plaintiff again delivered a "Notice of Amendment" which was similar in nature to annexure "SG3". A copy of this second "Notice of Amendment" is attached hereto marked as annexure **"SG6"**.

3.9 On or about **12 March 2014** the defendant again delivered a "Notice of Objection" to annexure "SG6". A copy of which is attached hereto marked as annexure **"SG7"**.

3.10 On or about **14 April 2014**, and by virtue of the "Notice of Objection "SG7", the plaintiff launched an "Application to Amend". A copy of this "Application to Amend" is attached hereto marked as annexure **"SG8"**.

3.11 On 3 December 2014, this Honourable Court referred the "Application for Amendment", to be decided "at the trial together with the merits if still persisted with". A copy of the court order dated 3 December 2014 is attached hereto marked as annexure **"SG9"**.

3.12 On the **8 of April 2015**, this Honourable Court ordered the trial dates to be 18 to 22 May 2015 and furthermore, that the plaintiff be barred from filing witness statements and the filing of discovery affidavits. A copy of the court order dated 8 April 2015 is attached hereto marked as annexure **"SG10"**.

3.13 On the trial date i.e. 18 of May 2015, this Honourable Court, without having dealt with the "Application to Amend", ordered the plaintiff to proceed to trial.

3.14 The plaintiff was unable to proceed to trial on 18 May 2015 because no Witness Statement on behalf of plaintiff had been delivered and no discovery affidavit (on behalf of the plaintiff) had been filed as per the court order dated 8 April 2015. On the preceding

Friday, 15 May 2015, the plaintiff applied for a postponement of the trial which the court refused after hearing submissions from both parties on 18 May 2015. The court then ordered that the trial should proceed. Mr Mouton then withdrew as practitioner of record, but when the court enquired as to the rule regarding withdrawal of legal practitioners, Mr Mouton retracted his withdrawal. The plaintiff was not present at court. This Honourable Court proceeded to grant absolution from the instance. A copy of the transcribed proceedings of 18 May 2015 is annexed hereto marked "SG15". A copy of the court order dated 18 May 2015 is attached hereto marked as annexure "SG11".

3.15 During May 2016, plaintiff instituted the Current Action against defendant on only slightly different but substantially similar facts, i.e. in line with the proposed amendment as per annexures "SG3" and "SG6". The "new" summons and particulars of claim, is based on the same and/or substantially similar causes of action and for the same or substantially similar relief as the First Action. The relief sought under the Current Action being:

1. Payment of the amount of N\$101, 331.04;
2. Interest on the aforesaid amount of N\$101, 331.04 calculated at the rate of 20% per annum from date of issue of certificate no. 11 until date of payment;
3. Payment of the amount of N\$132, 082.88;
4. Interest on the aforesaid amount of N\$132, 082.88 calculated at the rate of 20% per annum from date of issue of certificate no. 11 until date of payment;
5. Payment of the amount of N\$6, 165.04;
6. Interest on the amount of N\$ N\$6, 165.04 calculated at the rate of 20% per annum a tempore morae;
7. Payment of the amount of N\$52, 881.25.
8. Interest on the amount of N\$52, 881.25 calculated at the rate of 20% per annum a tempore morae until date of payment.
9. Costs of suit.
10. Further and/or alternative relief.

3.16 During October 2016, plaintiff paid defendant the taxed costs to which he was entitled by virtue of annexure “SG11”.

3.17 A copy of the combined summons and annexures in the Current Action is attached hereto marked as annexure “**SG12**”. A copy of the return of service is annexed hereto marked “**SG13**”.

3.18 The running of prescription was interrupted by service on the defendant of the summons in the First Action on 23 July 2004.’

### The issues

[3] Against this background they then formulated five main issues for the determination by the court. These were the following:

‘2.1.1 Whether the delivery of the summons and particulars of claim on or about 23 July 2004 under case number I 632/2004 (“the First Action”), interrupted the running of prescription until 18 May 2015 when absolution from the instance was granted.

2.1.2 Whether absolution was granted as a result of plaintiff having closed his case at the trial proceedings of 18 May 2015.

2.1.3 Whether plaintiff’s claim as set out in the summons and particulars of claim so delivered during May 2016 under case number I 25/2016 (“the Current Action”), had become prescribed by virtue of the provisions of sections 15(1) and 15(2) as read with section 11 of the Prescription Act 68 of 1969 (“the Act”).

2.2.1 Whether section 15(2) of the Act finds any application especially since absolution from the instance was not granted at the end of plaintiff’s case but rather under the process as envisaged in section 15(2) of the Act.

2.2.2 Whether absolution was granted as a result of plaintiff having been unable to proceed with his case.’

## The contentions

[4] As was required by rule 63 they also recorded their respective contentions, in regard to the aforementioned issues, in respect of which they also formulated the questions of law which flowed from these issues, namely:

‘4.1 Does section 15(2) of the Act find any application and, if so, did the plaintiff successfully prosecute his First Action under the process in question to final judgment, considering that the defendant was absolved from the instance on 18 May 2015?’

4.2 If the running of prescription has lapsed and/or is not deemed to have been interrupted in terms of section 15(1) as read with section 15(2) of the Act, have the plaintiff’s claims prescribed?’

[5] It does not take much to fathom that the outcome of this case will hinge on the provisions of section 15 of the Prescription Act, Act 68 of 1969, and it is this section that will then also form the backdrop against which this decision will be made. It will thus be apposite to quote the relevant parts of the section in full:

‘15 Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.’

[6] The provisions of section 15(1) in my view conveniently dispose of the first issue formulated for determination namely whether or not the “delivery” of the summons and of particulars of claim on or about 23 July 2004 in the first case interrupted prescription until 18 July 2015.



[7] I believe that the use of the term “delivery”, as employed by the parties legal practitioners, is somewhat unfortunate,<sup>1</sup> as what is of relevance, to the interruption of the running of the applicable periods of prescription, is the “service of any process” on the debtor, as defined in section 15(6), which obviously includes the “service” of a combined summons on the debtor – as occurred in this case.<sup>2</sup>

[8] It would however seem - although this aspect was formulated as an issue for the determination of the court - that this aspect was nevertheless common cause, as in paragraph 3.18 of the parties’ statement of agreed facts, it is recorded that *“The running of prescription was interrupted by service on the defendant of the summons in the first action on 23 July 2004.”*

[9] This statement, which is in clearly in accord with section 15(1) of the Act, then correctly records when the initial interruption of the applicable first prescriptive period to this matter occurred.

[10] It also appears not to be in dispute that this period of interruption, at the very least, ran until 18 May 2015, when absolution from the instance was granted.

[11] This must be so as the first action – instituted by the plaintiff then - under case no T (I) 1632/2004 - dragged on until 18 May 2015 - when its fate was determined by the court’s order granted on that date.

[12] In other words the ‘process’<sup>3</sup>, which judicially interrupted the running of prescription of the cause of action, which arose in 2002, was at the very least so interrupted until the 18<sup>th</sup> of May 2015, as this was the period of time that it took to obtain a decision, by the court, in case T (I) 1632/2004, in which scenario the plaintiff is to be regarded as the ‘creditor’ - who claimed payment from the defendant - the ‘debtor’ - for payment of the ‘debt’ - claimed in respect of the building contract concluded between the parties during 2001.

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<sup>1</sup> After all it is a concept defined in Rule 1 of the Rules of High Court and which concept also includes the aspect of filing, which aspect is irrelevant for purposes of the interruption of prescription.

<sup>2</sup> See : Section 15(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. See also: *Van der Merwe v Protea Ins Co Ltd* 1982 (1) SA 770 (E) at 773 A-B.

<sup>3</sup> As judicially defined in *Van der Merwe v Protea Ins Co Ltd* op cit and *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 333G.

The circumstances under which absolution from the instance was granted

[13] It is clear from the orders granted on 8 April 2015 and 18 May 2015 that the plaintiff in the first case was first barred from filing his witness statements and from making discovery on 8 April 2015 and that he was thus deprived of the benefit of duly presenting his case effectively and fully at the trial set for 18 May 2015, which scenario then resulted in a situation where absolution from the instance was granted at the subsequent hearing of 18 May. The record of that date reflects that Mr Mouton, counsel for the plaintiff, after initially wanting to withdraw, after an application for postponement had been refused, had also placed on record that he had no instructions to proceed and that the plaintiff was also not able to proceed. It so appears that it was indeed so that absolution was not granted after the plaintiff had presented its case, i.e. after the hearing of evidence adduced on behalf of the plaintiff. In this instance - where the plaintiff was thus not able to proceed to present his case, because of the bar imposed by court order on his client - defendant's counsel asked for- and was granted absolution, which was akin to granting absolution, in favour of a defendant, at a trial, where a plaintiff has failed to appear – a scenario contemplated in Rule 98(2).

[14] In any event it is to be noted that the order for absolution granted by Ueitele J on 18 May 2015 was never taken on appeal, which ruling so, so become final.

[15] It is also to be noted that the court also ordered on 18 May 2015: *'that the plaintiff may not re-enroll the matter without leave of court, except where it has paid the defendant's costs set out in paragraph 2 of the order'*. These costs were only paid during October 2016, after the second action had already been instituted. The plaintiff however never re-enrolled the first action.

[16] In these premises I fail to understand the plaintiff's qualification – 'that absolution was not granted at the end of the plaintiff's case - but rather under the process as envisaged in Section 15(2) of the Act'?

[17] If this qualification was meant to signify that absolution was granted in the legal process, that is in the action, initiated by plaintiff against defendant, under case

T (I) 1632/2004, then it would appear, on the basis of the statement of agreed facts, paragraphs 3.12 to 3.14, that this was indeed the case.

[18] This aspect is of significance, I will revert to this below.

#### The scheme created by section 15(1) and 15(2) of the Prescription Act

[19] It now becomes apposite to call to mind the provisions of Section 15(2). The salient components set by the section, as relevant to this case, in which there is no acknowledgment of liability by the debtor, which aspect can thus be ignored for present purposes, are the following:

(a) the judicial interruption of any prescriptive period shall lapse - that is the interruption brought about by the service of summons, i.e. by the service of any 'process' in which a 'creditor claims payment of a debt' - if the creditor does not successfully prosecute his claim under that process in question to final judgment, which is a final and executable judgment, or if he does so prosecute his claim, that is successfully, but then abandons the judgment or the judgment is set aside;

(b) in such circumstances - it shall be deemed - that the service of summons, which, until the listed outcomes, has interrupted the running of the applicable prescriptive period - shall lapse;

(c) that all this must have occurred under the 'process' in question, i.e. that is the action, as in this case, or as in the other types of proceedings, as defined in Section 15(6) of the Act.

[20] It is against the backdrop of this analysis that it must then be determined whether the section finds any application in this case.

#### The arguments

[21] Here Mr Mouton's contention on behalf of the plaintiff was that prescription began to run afresh from the date of absolution, ie. from 18 May 2015. On the plaintiff's calculation, a remaining period of some 15 months remained available -

given that a 3 year period of prescription was applicable. If one would calculate a further period of 15 months from the date of absolution it would appear that the second action under case I 25/2016 - which was served during May 2016 - was then instituted well within the remaining period.

[22] It was contended further that when absolution was granted, the plaintiff was still in the process of successfully prosecuting his claim to final judgment. In other words, it was submitted that, when absolution was granted, it could not be said that the plaintiff had not yet successfully prosecuted his claim to final judgment.

[23] This submission was bolstered by the further argument that the event, at which absolution was granted, did not result in a situation of *res judicata* as the plaintiff may and could still initiate fresh proceedings, which was done.

[24] It was pointed out further that the court, in its order of 18 May 2015, had also ordered that the plaintiff may not re-enroll this matter without leave of the court, except when it has paid the defendant's costs as set out in paragraph 2 of this order. These costs were paid and accordingly the process in question was still ongoing. Accordingly, it was submitted that the plaintiff was still in the process of prosecuting his claim to the stage of final judgment, which process had not yet been concluded and that accordingly Section 15(2) finds no application.

[25] Mr Mouton submitted further that the order for absolution could still be appealed against, with leave. He reiterated that no evidence had been led and that no case could be made out as to the finality of the plaintiff's case, as no final judgment had been granted in the process instituted by way of the first action. As no final judgment had been obtained Section 15(2) found no application. Also because plaintiff, as creditor, had not as yet failed in his claim. In such circumstances the plaintiff had two options as to how to proceed, either in the court before which the first action was still pending or to start new proceedings afresh. The election was made to pursue the plaintiff's claim through the second action launched in 2016 and thus the plaintiff was still in the process of prosecuting his claim.

[26] The defendant's case on the other hand was simply stated in 3 paragraphs:

'5.6 . . . that plaintiff did not successfully prosecute his claim under the First Action because the court absolved defendant from the instance in May 2015.

5.7 Defendant contends that when the defendant was absolved from the instance, the interruption of prescription lapsed since plaintiff did not successfully prosecute his claim to final judgment as envisaged by section 15(2) of the Act. The effect of this was that prescription was never interrupted. The fact that plaintiff was "in the process of successfully prosecuting his claim to final judgment" when absolution was granted, is of no relevance and cannot assist the plaintiff.

5.8 Defendant contends that by virtue of section 15(2) of the Act read with section 11(d) of the Act and the fact that the court granted absolution from the instance in May 2015, plaintiff's claim under the Current Action prescribed during 2005 already.'

[27] These contentions were underscored in written heads of argument as follows:

'6. The purpose and effect of section 15(2) has been held to be the following:

"...the whole purpose of s 15(2) was that, if a creditor fails in his claim, in other words if he does not successfully prosecute his claim under the process in question to final judgment, then the provisions come into force concerning the interruption of prescription lapsing and the running of prescription not being deemed to have been interrupted. The practical effect of this is that should a plaintiff, eg, have absolution granted against him at the end of his case, then he cannot be said to have successfully prosecuted his claim to final judgment or, if an exception is taken to his claim and he cannot amend but has to issue fresh summons or a fresh declaration, then the process by which he commenced the proceedings is deemed not to have interrupted prescription and the running of prescription is deemed not to have been interrupted thereby. In other words...he is not allowed to have two bites at the cherry. It is not unreasonable to assume that what the legislator had in mind was the following: It is necessary that there should be finality in litigation. The plaintiff is given reasonable time within which to institute his action, thereafter he is in the hands of the administration of the Courts."

7. In the matter of *Van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E), Smallberger J stated that:

"...the whole purpose of s 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such

process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted.”

[28] On this basis it was further submitted that:

- ‘1. The issues for determination by this court are limited<sup>4</sup>.
2. The primary issue is whether plaintiff’s claim against defendant has become prescribed by virtue of section 15(2) of the Prescription Act 68 of 1969 (“Act”) as read with sections 15(1) and 11 of the Act. Defendant’s case is that plaintiff’s claim prescribed during 2005 already.
3. The context in which this court must determine the primary issue is embodied in the amended statement of agreed facts<sup>5</sup>, which facts, for the sake of brevity, will not be repeated in these heads of argument.

#### **A. THE AUTHORITIES**

4. It should be noted that the Prescription Act has remain unchanged in all relevant respects in both Namibia and South Africa since the date of Namibian Independence. The jurisprudence of the South African courts on the Act is therefore helpful in interpreting its provisions.<sup>6</sup>

#### Section 15 of the Act

5. The relevant provisions of section 15 of the Act read as follows:

“15 Judicial interruption of prescription

- (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

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<sup>4</sup> Stated Case Record (“D” under the index) p. 2 par 2.

<sup>5</sup> *Ibid* p. 2 to 6.

<sup>6</sup> *Lisse v Minister of Health and Social Services* (SA 75/2011) [2014] NASC at para 16.

- (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.

...

- (6) For purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi*, a pleading in convention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

6. The purpose and effect of section 15(2) has been held to be the following:

"...the whole purpose of s 15(2) was that, if a creditor fails in his claim, in other words if he does not successfully prosecute his claim under the process in question to final judgment, then the provisions come into force concerning the interruption of prescription lapsing and the running of prescription not being deemed to have been interrupted. The practical effect of this is that should a plaintiff, eg, have absolution granted against him at the end of his case, then he cannot be said to have successfully prosecuted his claim to final judgment or, if an exception is taken to his claim and he cannot amend but has to issue fresh summons or a fresh declaration, then the process by which he commenced the proceedings is deemed not to have interrupted prescription and the running of prescription is deemed not to have been interrupted thereby. In other words...he is not allowed to have two bites at the cherry. It is not unreasonable to assume that what the legislator had in mind was the following: It is necessary that there should be finality in litigation. The plaintiff is given reasonable time within which to institute his action, thereafter he is in the hands of the administration of the Courts."<sup>7</sup>

7. In the matter of Van der Merwe v Protea Insurance Co Ltd 1982 (1) SA 770 (E), Smallberger J stated that:

"...the whole purpose of s 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgement in his favour, or it

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<sup>7</sup> *Titus v Union & SWA Insurance Co Ltd 1980 (2) SA 701 (TKS) 704.*

is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted.”<sup>8</sup>

8. Regarding the interpretation of the expression ‘process in question’ as contained in sections 15(1) and 15(2), Smallberger J also stated that:

“Section 15(1) provides for the interruption of prescription by the service on the debtor ‘of any process whereby the creditor claims payment of the debt’. In terms of section 15(6) ‘process’ is the document whereby legal proceedings are commenced, in the present instance, the summons in the magistrate’s court. The provisions of section 15(1) are, however, subject to those of ss(2). The ‘process in question’ is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor, and not any other. The reference to ‘final judgment’, in the context, contemplates judgment in the court in which process is instituted or, if the creditor is unsuccessful in such court, any higher tribunal in which the creditor is ultimately successful on appeal in relation to the ‘process in question.’ ”<sup>9</sup>

9. The expression was also briefly considered in Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 311 (C) by Howie J who, with reference to section 15(2) of the Act, stated that:

“To return to the expression ‘under the process in question’, clearly a final executable judgment will be obtained ‘under’ a process where process and judgement constitute the beginning and end of one and the same action.”<sup>10</sup>

#### Policy considerations underlying extinctive prescription

10. The main object of extinctive prescription is to create legal certainty and finality in the relationship between creditor and debtor after the lapse of a period of time, and the emphasis is on protection of the debtor against a stale claim that has existed for such a long time that it becomes unfair to require the debtor to defend himself against it. The primary consideration is therefore one of fairness to the debtor.<sup>11</sup>

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<sup>8</sup> At page 773 para C.

<sup>9</sup> *Van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E), 772 at para H and p 773 at para A. See also *Cadac (Pty) Ltd v Weber Stephen Products Company and Others* (530/09) [2010] ZASCA 105 at para 25.

<sup>10</sup> *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) 333 at para G.

<sup>11</sup> M M Loubser, *Extinctive Prescription* 1996 p.22.



11. The emphasis is on the protection of the debtor because the debtor with the passage of time ought to become secure in his reasonable expectation that the slate has been wiped clean of obligations towards his creditor.<sup>12</sup>

12. Other policy considerations underlying extinctive prescription are that delayed enforcement of a debt causes evidence to disappear and witnesses to forget; that certainty in dealings between persons requires a fixed time after which old disputes will be forgotten; and that judicial economy and the smooth functioning of the legal system is best served when the parties are obliged to bring their disputes to the courts promptly, so that they can be swiftly resolved while evidence is available and fresh in the memory of the witnesses.<sup>13</sup>

13. Extinctive prescription ensures that there comes a time between a creditor and debtor when the books are closed.<sup>14</sup>

## **B. THE ARGUMENTS**

14. The amended stated case on prescription records the contentions of the parties with reference to their respective cases.<sup>15</sup> Plaintiff argues that prescription started to run afresh on or about 18 May 2015 when defendant was absolved from the instance, and defendant argues that the interruption of prescription of plaintiff's claim lapsed on 18 May 2015 (when plaintiff closed his case and absolution was granted<sup>16</sup>) with the effect, firstly, that prescription was never interrupted and, secondly, that plaintiff's claim prescribed on or about October 2005.

15. To prevent his claim from prescribing, we submit that plaintiff (as creditor) carried the onus to do two things: 1) interrupt prescription by timeously serving summons/process on defendant for payment of the debt<sup>17</sup>, and 2) successfully prosecute his claim to final judgment under the process instituted against defendant<sup>18</sup>. Although plaintiff timeously served summons on defendant during July 2004<sup>19</sup>, thereby interrupting prescription<sup>20</sup>, he failed to successfully prosecute his claim under that process, with the result that prescription was never interrupted. We submit therefore that plaintiff's claim prescribed on or about

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<sup>12</sup> *Ibid* p. 23.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* p.24.

<sup>15</sup> Stated Case Record p. 6 to 8.

<sup>16</sup> *Ibid* p.211 to 214.

<sup>17</sup> The requirements of section 15(1) of the Act.

<sup>18</sup> Section 15(2) of the Act.

<sup>19</sup> 'First Action' as defined in the Stated Case Record p. 2 at subparagraph 2.1.1.

<sup>20</sup> Plaintiff's cause of action arose during October 2002.

October 2005, some three years after his cause of action arose.

16. Plaintiff argues that prescription started to run afresh from date of absolution (18 May 2015)<sup>21</sup>. Plaintiff also argues that he had a further 15 months from 18 May 2015 within which to commence proceedings against defendant afresh.<sup>22</sup> These two arguments contradict each other: on the one hand plaintiff claims that he had another full 3 years from 18 May 2015 within which to institute a fresh action against defendant, and on the other hand plaintiff claims that he had 15 months from 18 May 2015 to institute a fresh action against defendant. Notwithstanding the apparent contradiction, both arguments are bad in law.

17. On the first argument, plaintiff in effect claims a perpetual and reoccurring prescriptive period of three years. There is no basis in law or on the facts to support such a claim.

18. Plaintiff's second argument is essentially this:

18.1 Plaintiff's cause of action arose during October 2002;

18.2 Plaintiff had 36 months (from October 2002) within which to enforce his right against defendant for payment of the alleged debt;

18.3 Plaintiff interrupted prescription during July 2004, when he caused summons to be served on defendant for payment of the alleged debt (the First Action). As at July 2004, a period of 21 months of plaintiff's 36 month prescriptive period had already lapsed;

18.4 Plaintiff 'banked' the remaining period of 15 months for use at a later stage;

18.5 When absolution was granted on 18 May 2015, 11 years after the First Action was instituted, plaintiff still had 'a balance' of 15 months on the initial prescriptive period of 36 months within which to cause a fresh action for the same/similar claim to be served on defendant;

18.6 Plaintiff caused a fresh action to be served on defendant during May 2016 (the Current Action<sup>23</sup>), leaving 'a balance' of three months on the initial prescriptive period, for use, yet again, at a later stage.

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<sup>21</sup> Pleadings Record p. 47 at subparagraph 1.4 and Stated Case Record p. 7 at subparagraph 5.1.

<sup>22</sup> Pleadings Record p. 47 at subparagraph 1.5 and Stated Case Record p. 7 at. subparagraph 5.2.

<sup>23</sup> As defined in the Stated Case Record p. 2 at subparagraph 2.1.3.

19. The practical effect of plaintiff's argument in this regard is that should plaintiff fail to successfully prosecute his claim to final judgment under the Current Action, plaintiff still has another 3 months on the initial prescriptive period within which to institute another action against defendant, irrespective of the additional months or years which the parties may spend in court to prosecute and defend respectively, the Current Action. On this reasoning, plaintiff's failures to successfully prosecute his claim against defendant to final judgment is no bar to the running of prescription, and he can, as a result, have as many bites of the cherry as he sees fit.

20. Plaintiff's argument, in all material respects, is untenable and contradicted by the authorities on prescription. To hold that plaintiff's contention is right in the present case would lead to a result so inconsistent with the purpose behind prescription as a legal institution, so contrary to relevant case law and so out of keeping with the aim of and scope of the Prescription Act, that the Legislature could not have intended it.<sup>24</sup>

21. The policy considerations on extinctive prescription should be interpreted not only with reference to the prescriptive period in which creditors are required to enforce their rights, but also with reference to protection and fairness towards the debtor/defendant, and with reference to the effectiveness and efficiency of the courts as envisaged in the overriding objective of the rules of this court.

### **C. CONCLUSION**

22. Plaintiff failed to successfully prosecute the First Action after 11 years in court. As a result, his claim prescribed in October 2005. In fairness to defendant, and based on principles of extinctive prescription, defendant should not have to defend a claim that is 15 years old.

23. We submit that the special plea of prescription should be upheld and that costs be awarded to defendant, including the costs of one instructed and one instructing counsel.'

[29] During oral argument Mr Dicks, who appeared on behalf of the defendant, submitted that the important dates to the special plea of prescription raised were that the underlying contract was concluded during 2001 and that a dispute in this regard had arisen during 2002, that summons which was issued as a result was served on

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<sup>24</sup> *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) 334 at para F.

23 July 2004, that was before the claim could have prescribed during 2005. In May 2016, the second action was instituted. With reference to *Titus v Union & SWA Ins Co Ltd*<sup>25</sup>, it was submitted that it could not be said that the plaintiff had prosecuted the first action to final judgment, given that the relevant process was that as instituted during 2004. A final judgment - that was an executable judgment - was never obtained by the plaintiff in the first action. With reference to the relevant passages of the transcript from which it appeared that absolution was granted and how it came about, he submitted that the recorded events underscored his submission that the plaintiff's claim was never successfully prosecuted. The effect of all that was that the interruption of the prescriptive period, which had occurred through the service of summons on 23 July 2004, thus lapsed and that accordingly the deeming provision contained in Section 15(2) had kicked in, which meant that the prescriptive period of 3 years, which had commenced in 2002, would no longer have been interrupted resulting in a situation that the plaintiff's claim had thus become prescribed in 2005. The second action - which was instituted some 11 years later - during May 2016 - thus had become prescribed. The issues, which had been formulated by the parties in the amended stated case, for the determination of the court, were thus to be answered as follows: 2.1 in the affirmative, 2.2 in the affirmative, 2.3 in the affirmative.

### Resolution

[30] Given the contradictory arguments and stances adopted by the parties it would seem that they have to be determined, in the first instance, against the following factual matrix:

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<sup>25</sup>1980 (2) SA 701 (TkS) where Munnik CJ stated at 704 D to F: ' ... it seems to me that the whole purpose of s 15 (2) was that, if a creditor fails in his claim, in other words if he does not successfully prosecute his claim under the process in question to final judgment, then the provisions come into force concerning the interruption of prescription lapsing and the running of prescription not being deemed to have been interrupted. The practical effect of this is that, should a plaintiff, eg, have absolution granted against him at the end of his case, then he cannot be said to have successfully prosecuted his claim to final judgment or, if an exception is taken to his claim and he cannot amend but has to issue a fresh summons or a fresh declaration, then the process by which he commenced the proceedings is deemed not to have interrupted prescription and the running of prescription is deemed not to have been interrupted thereby. In other words, to put it colloquially, he is not allowed to have two bites at the cherry. I am fortified in this view by the words which follow after the words 'final judgment' in s 15 (2), viz 'or if he does so prosecute his claim (which words 'so prosecute' must obviously mean prosecute his claim successfully) but abandons the judgment or the judgment is set aside', which clearly means on appeal for some good reason or in some action on the basis of fraud for example. It is not unreasonable to assume that what the legislator had in mind was the following: It is necessary that there should be finality in litigation. ... '.

1. Plaintiff clearly instituted two actions for the enforcement of the same debt against the defendant;
2. Those are the actions instituted under High Court cases (T) I 1632/2004 and I 25/2016;
3. The action instituted in 2004 under High Court case (T) I 1632/2004 ended in absolution from the instance being granted on 18 May 2015. It was this case that could have been re-enrolled, as per Ueitele J's order, upon payment of the costs, which was never done. The order for absolution, which was granted on 18 May 2015, was also never taken on appeal and thus became final;
4. The second case instituted in 2016, in High Court case I 25/2016, was instituted on essentially the same cause of action - and on substantially similar facts - and for the same relief as the first action. This is also the case in which the parties have agreed to have their dispute determined by way of this stated case;
5. It so emerges that the plaintiff has tried and is still attempting to claim payment of the original- and substantially the same debt - through the institution of two actions, i.e by way of cases (T) I 1632/2004 and I 25/2016;
6. It appears from the dictum of Smalberger J, (as he then was), in *Van der Merwe vs Protea Insurance*<sup>26</sup> that "process" is deemed as that document whereby legal proceedings are commenced.
7. In the current instance there are two such documents: the one, initiating legal proceedings under case (T) I 1632/2004 and the other instituting legal proceedings under case I 25/2016.

[31] Section 15(2) is however subject to the provisions of Section 15(1), in the sense that the process in question, through which prescription was originally interrupted in terms of Section 15(1), in this case by the institution of legal proceedings under case (T) I 1632/2004 - was the action which had to be successfully prosecuted to final judgment and not the second action instituted under case I 25/2016.

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<sup>26</sup> Op cit at 770E and 772 H to 773 A.

[32] The result achieved in the process, set in motion under case (T) I 1632/2004, was one of absolution from the instance. No further steps were taken in this regard, save that the costs, flowing from the result, were paid in October 2016. Importantly, the order granted on 18 May 2015 for absolution was never taken on appeal and that action was never re-enrolled. The only conclusion that can be derived from this scenario is that the relevant process in question, i.e. the legal proceedings instituted under case (T)I 1632/2004, had a final outcome i.e. that reflected in the court order on 18 May 2015.

[33] It is this result that will, in my view, determine the question whether or not the plaintiff was able to prosecute his claim successfully to final judgment, as required by Section 15(2), i.e. that is the process through which the running of prescription was interrupted in the first place.

[34] This outcome of case (T) I 1632/2004 was clearly not successful or finally executable, so much is signified by the granting of absolution from the instance.

[35] I pause to mention that I consider it insignificant how absolution came about and I find therefore that this aspect is irrelevant for determining the issues of this case. The argument that was raised on behalf of Plaintiff in this regard is thus not upheld.

[36] It must follow therefore – that - in such circumstances - the interruption of prescription - achieved through the service of the first summons under case (T) I 1632/2004 on 23 July 2004 - lapsed once the order for absolution from the instance - (signifying an unsuccessful prosecution of the plaintiff's claim) - was granted on 18 May. This conclusion, is, in my view, re-enforced by the ancillary factors that the order granting absolution has since become final, as it was never taken on appeal and through the circumstances where that case was, in any event, never re-enrolled, (if that was at all possible), after the payment of costs.

[37] In such circumstances the deeming provisions contained in Section 15(2) of the Prescription Act 1969 came into play, as was contended for on behalf of the defendant, with the result that the interruption of prescription, which had occurred on 23 July 2004 was deemed not to have occurred, thus resulting in the situation that

the plaintiff's claim, against the defendant, became prescribed during or about October 2005.

[38] In the result the issues for determination, as formulated in paragraph 2 of the amended stated case, must be answered as follows:

2.1.1 The service of summons and particulars of claim on or about 23 July 2004 under case T (I) 1632/2004 (the First Action) interrupted the running of prescription until 18 May 2015 when absolution from the instance was granted;

2.1.2 Absolution was granted as a result of the plaintiff having closed his case as a result of having been precluded from adducing any evidence through the order barring him to file witness statements and to make discovery;

2.1.3 The plaintiff's second claim, as instituted though the service of summons and particulars of claim during May 2016, under case I 25/2016, the current action, has thus indeed become prescribed by virtue of the provisions of Sections 15(1) and 15(2) as read with Section 11 of the Prescription Act 68 of 1969.

2.2.1 It appears from this judgment and the answer provided in 2.1.3 above that section 15(2) finds application.

2.2.2 Absolution was granted in the circumstances as found in this judgment and the answer provided in 2.1.2 above.

### Costs

[39] The parties differed on the question as to who should bear the wasted costs occasioned by the postponement of the hearing, which occurred last year, on 22 June 2017, and which was occasioned by the attempt to hand up the transcript of the proceedings before Ueitele J reflecting more particularly how his order for absolution from the instance had come about during May 2015. The attempt by Mr Dicks to do so was objected to, at the time, by Mr Mouton, who insisted that defendant's legal practitioners follow the correct procedure for the admission of the transcript.

[40] Mr Dick's now endeavored to justify this attempt by submitting that the transcript was offered as it would have placed the court in a better position to determine how absolution had really come about especially because of the manner in which the plaintiff had formulated the issue, reflected in paragraph 2.2.1 of the stated case, to the effect that absolution was not granted at the end of the plaintiff's case.

[41] Mr Dicks agreed with the court that if the court would consider it fit to award the costs occasioned by the postponement to the defendant and if the court would also uphold the stated case in favour of the defendant, where the costs should really follow the result, that, in that event, no special cost order would have to be made in respect of the wasted costs, occasioned by the postponement of the matter on 22 June 2017. If the stated case would however be determined in favour of the plaintiff, Mr Dicks indicated that he would still insist on the wasted costs of 22 June being awarded to his client.

[42] Mr Mouton on the other hand insisted that the wasted costs should be awarded to his client, as it was the defendant that was prosecuting the stated case and that it was the defendant that had wanted to utilize the transcript for the stated purpose. This endeavor had resulted in the postponement and accordingly the defendant should be mulcted in the wasted costs occasioned as a result. Defendant after all had not followed the prescribed procedure for the admission of the record.

[43] In spite of the valid arguments raised on behalf of both the parties I believe however, that the wasted costs of the postponement, which were occasioned on 22 June 2017, should be costs in the cause. I say so because both parties had agreed to present their case for the determination of the court, by way of a stated case. It was for that purpose, that the parties had become obliged to set out the agreed facts accompanied by the necessary documents to enable the managing judge to decide the questions raised, as was required by Rule 63(2)(a).

[44] Given the nature of the transcript and its high relevancy to such stated case - both parties were thus always duty-bound and should thus have incorporated and annexed whatever aspect or part of the document they considered relevant - and as could have been extracted from the transcript - into the statement of agreed facts



- prior to its final formulation. In my view, both parties failed in this duty, particularly, as this was obviously relevant and could have been easily done. It is because of this failure that I believe that I should exercise my discretion, in regard to costs, in the manner indicated above.

[45] In the result, the defendant's special plea of prescription is upheld with costs, such costs to include the costs of one instructed- and one instructing counsel.

[46] The case is accordingly regarded as finalised.

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H GEIER  
Judge

APPEARANCES

PLAINTIFF:

C J Mouton  
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Windhoek

DEFENDANT:

G Dicks  
instructed by Ellis Shilengudwa Inc., Windhoek