REPORTABLE

CASE NO: SA 75/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between

EBERHARD WOLFGANG LISSE **Appellant**

and

MINISTER OF HEALTH AND SOCIAL SERVICES **Respondent**

Coram: Maritz JA, Strydom AJA and O'Regan AJA

Heard: **21 June 2012**

Delivered: **12 December 2014**

APPEAL JUDGMENT

MARITZ JA, STRYDOM AJA and O'REGAN AJA:

[1] This case concerns the question of prescription. The appellant, Dr Lisse, seeks to recover damages for what he alleges was wrongful and negligent conduct by the respondent, the Minister of Health and Social Services, in refusing him permission to practice in State Hospitals. In previous litigation, the appellant successfully had the decision to refuse him permission set aside by first the High Court and then this Court. Just short of three years later, he issued summons to recover damages he suffered as a result of the refusal. Because more than three

years had elapsed since he was notified of the refusal, although three years had not elapsed since that decision was set aside, the Minister claims that any cause of action arising out of the decision to refuse permission has prescribed. Dr Lisse asserts, on the other hand, that because he launched proceedings within three years of this Court's judgment setting aside the decision, the claim has not prescribed.

Facts

[2] The appellant, Dr E W Lisse, is an obstetrician and gynaecologist who worked as a doctor in the state health service for nearly fifteen years. In December 2003, he resigned from that employment in order to commence private practice. In January 2004, he applied for permission to practice as a private practitioner in the Windhoek Central Hospital in terms of s 17 of the Hospitals and Health Facilities Act 36 of 1994. On 5 April 2004, the application was refused and on 12 April 2004 the appellant was informed of that decision.

Proceedings in the High Court

[3] On 20 April 2004, the appellant launched urgent proceedings in the High Court seeking to review the decision to refuse him permission to practice in the hospital. The prayer for urgent relief was dismissed[1] but the application for substantive relief proceeded in the ordinary course. On 8 December 2004 that application was granted by the High Court. The Minister appealed the High Court judgment but on 23 November 2005 the Supreme Court dismissed the appeal and the Minister was directed to issue a written authorisation in terms of s 17 of the

[1] See *Lisse v Minister of Health and Social Services* 2004 NR 107 (HC).

Hospitals and Health Facilities Act within 30 days of the Supreme Court order.[2] Dr Lisse began treating patients at state hospitals and health facilities with effect from 17 December 2005 and formally received a certificate authorising him to do so in January 2006.

[4] On 21 November 2008, these proceedings commenced when Dr Lisse issued summons against the Minister claiming delictual and constitutional damages for the period 5 April 2004 to 16 December 2005, the period during which he alleges he was wrongfully and negligently prevented from treating patients at the state hospitals.

[5] The Minister entered an appearance to defend and filed a plea denying liability. Shortly before trial, the Minister filed a notice of intention to amend its plea and introduced a special plea of prescription. The amendment was granted. The special plea[3] states that the cause of action is based on events that took place on 5 April 2004, that Dr Lisse had knowledge of those events, and that the cause of action had therefore prescribed as summons was only issued more than four years after the events of 5 April 2004.

[6] At the trial, the court ruled that the special plea should be considered separately before the merits were traversed. The trial court upheld the special plea, save for the period between 16 December 2005 and the date of issue of the summons. Dr Lisse now appeals against the whole of the High Court judgment.

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[2] See *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

[3] At the hearing before this court, it appeared that the notice of special plea had not been lodged, perhaps by oversight, after the application for the amendment was granted. Nothing turns on this omission in these appeal proceedings.

Appellant's submissions

[7] Counsel for the appellant noted that a debt is not deemed to be due within the meaning of s 12 of the Prescription Act 68 of 1969, until a claimant has knowledge of the facts from which the debt arose. Counsel argued that the appellant was unable to determine the quantum of his damages until some months after he had been permitted to practice. According to counsel the appellant was only able to determine his claim from October 2005 when he had been practicing for ten months in the State Hospital.

[8] Secondly, counsel, relying on the decision in *Njongi v MEC, Department of Welfare, Eastern Cape*,[4] argued that because the Minister did not, until his decision was set aside by the Supreme Court, concede that his decision was unlawful, any debt arising from the unlawful decision did not fall due until the Supreme Court decision setting it aside.

[9] Thirdly, counsel argued that the appellant's cause of action is based on a continuous wrong. A continuous wrong gives rise to 'a series of debts arising from moment to moment as long as the wrongful conduct endures'.[5] Accordingly, counsel argued, the debt did not arise once and for all on 4 April 2004, but continued until the unlawful decision was set aside on 24 November 2005. At the very least, according to appellant's counsel, the claim arising from the continuous wrong in the period 22 November 2005 – 16 December 2005 had not prescribed by the 21 November 2008 when proceedings were launched. The appellant also argued that the High Court had erred in its order by stipulating that the claim had

[4] 2008 (4) SA 237 (CC) at 257.

[5] *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) para 20.

not prescribed for the period 16 December 2005 to 21 November 2008. The claim terminated on 17 December 2005 when the appellant commenced practice in the State Hospital and so no claim arose after that date. The High Court order should have stated that the claim had not prescribed in the period between 22 November 2005 and 16 December 2005.

[10] Finally, counsel for the appellant argued that there had been a judicial interruption of prescription in terms of s 15 of the Prescription Act. In this regard, he relied on *Cape Town Municipality and Another v Allianz Insurance Co Ltd* where Howie J held that the key wording of s 15 'must be given a wide and general meaning'.[6] Howie J concluded that it is sufficient for the purposes of interrupting prescription if the process served is 'a step in the enforcement of the claim for a debt'.[7] Counsel argued that the review application was a first step in the process of recovering delictual damages for the consequences of the unlawful decision taken by the Minister and that therefore the review proceedings had interrupted prescription.

Respondent's submissions

[11] Counsel for the respondent argued that the appellant became aware of the cause of action in April 2004 and that accordingly the debt was due on that date. Counsel submitted that the appellant's argument that his cause of action did not arise until he had quantified his damages after practicing for ten months in state hospitals should be rejected. Counsel argued that the failure to have a clear grasp of the quantum of damages did not prevent a cause of action from arising.

[6] 1990 (1) SA 311 (C) at 330G–H.
[7] Id at 331D–E.

Respondent's counsel accepts that the delict was a 'continuing wrong' and that a fresh cause of action arose at least each day until 17 December 2005 when the appellant was permitted to use the hospital facilities.

[12] Counsel for the respondent argued that the appellant's reliance on *Njongi v MEC, Department of Welfare, Eastern Cape*[8] was misplaced, as the claim for an arrear pension is a claim in administrative law not in delict. The wrongful decision to discontinue the grant was an effective bar to the receipt of the grant and therefore had to be set aside before the grants could be claimed.

[13] Counsel for the respondent also submitted that the appellant could have instituted proceedings for the recovery of damages at the same time as the review proceedings, and that he did not have to wait till the review proceedings succeeded to sue for damages.

[14] Finally, counsel for the respondent submitted that the institution of review proceedings did not interrupt prescription as they did not constitute a claim for the debt and were not founded on the same cause of action.

Issues

[15] The main issue for decision on appeal is whether the appellant's claims against the Minister has prescribed as provided for in s 11(d), read with ss 12(1) and (3) of the Prescription Act 68 of 1969. This question has several sub-issues,

[8] Cited above n 4.

as will appear from the submissions on behalf of the parties. These issues include–

(a) was the debt due within the meaning of s 10 of the Prescription Act when the appellant was informed of the decision to refuse him permission to practice in the hospital, or did it become due only when the Minister's decision was finally set aside on 23 November 2005?

(b) did the debt only become due when the appellant became aware of the quantum of his damages in October 2006?

(c) was the delict that is alleged by the appellant based on a continuing wrong?

(d) did the institution of review proceedings interrupt the running of prescription?

As will appear from what follows, this court finds it necessary only to answer the last of these questions in this judgment.

Prescription Act

[16] Here we set out the key provisions of the Prescription Act. It should be noted that the Prescription Act has remained unchanged in all material 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.

[17] Section 10 of the Prescription Act 68 of 1969, provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of the prescription of such debt. Section 11 provides that:

> 'The periods of prescription of debts shall be the following –
> . . . .
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[18] Although the Prescription Act uses the word 'debt', which might be understood narrowly, the courts have held that the word should be given a wide meaning to include what is due or owed as a result of a legal obligation.[9]

[19] Section 12(1) provides that prescription will commence to run 'as soon as the debt is due'. And s 12(3) provides that:

> 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the fact from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

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[9]For a discussion of the ambit of the word 'debt' as used in the Act, see, for example, the South African Constitutional Court decision in *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) para 11; *Barnett and Others v Minister of Land Affairs and Others* cited above n 5 para 19; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 840 (A) at 344F–G.

[20] Section 15 of the Act governs the interruption of prescription. In relevant part, it provides that:

> '(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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> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of ss (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.
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> (3) . . .
>
> (4) If the running of prescription is interrupted as contemplated in ss (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of ss (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.
>
> (5) . . .
>
> (6) for the purposes of this section, "process" includes a petition, 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.'

Preliminary issue: determining prescription without considering the merits

[21] It is important to commence by noting that this appeal is decided on the premiss that the Minister's refusal to permit the appellant to practice for his own account in the Windhoek State Hospital did give rise to a delictual and/or a

constitutional action for damages. We stress, however, that this premiss may turn out not to be correct. Courts have often stressed that unlawful administrative action does not automatically give rise to delictual liability.[10] This court proceeds on the basis of the premiss that the appellant's particulars do disclose a cause of action, but without further consideration of that question, because the High Court chose to separate the question of prescription from a determination of the merits of the action.

Interruption of prescription

[22] Did the judicial review proceedings interrupt the running of prescription within the meaning of s 15(1)? Section 15(1) states that prescription will be interrupted by 'the service on the debtor of any process whereby the creditor claims payment of the debt'. In interpreting this provision, it is important to realise the Prescription Act displays a 'discernible looseness of language'.[11] For example, it uses the word 'debt' with several different meanings, and it is nowhere defined.[12] Also as mentioned above, although the word 'debt' could be construed narrowly to refer only to obligations to pay liquidated sums of money, the courts have given the word 'debt' a wide meaning to include what is due or owed as a result of a legal obligation and it is clear that it extends beyond 'an obligation to pay a sum of money'.

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[10] See, for example, *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33B-E; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 12; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para 37; *Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others* 2005 (2) SA 359 (CC) paras 79 – 81; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 37ff.

[11] per Howie J in *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 330E–G.

[12] Id.

[23] There is some guidance as to the meaning of s 15(1) to be found in the other provisions of s 15. First, s 15(6) states that '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.'[13] It is clear that a notice of motion in the review proceedings would fall within the meaning of 'process' in s 15(1), as read with s 15(6) of the Prescription Act, as long as it meets the other requirements of s 15(1).

[24] The crucial question that arises is whether the service of the notice of motion in the review proceedings in this case constituted 'a process whereby the creditor claims payment of the debt' within the meaning of s 15(1). South African courts have long accepted that in order for prescription to be interrupted as contemplated in s 15 of the Prescription Act there must be a right enforceable against the debtor in respect of which prescription is running, and a process served on the debtor instituting legal proceedings for the enforcement of that right 'or substantially the same right'.[14]

[25] The meaning of the phrase 'claims payment of the debt' in s 15(1) was considered in *Cape Town Municipality and Another v Allianz Insurance Co Ltd*.[15] In that case, the plaintiffs (the Municipality of Cape Town and a company called Land

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[13]See for a discussion *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N) at 286 – 287, where a notice in terms of rule 28 to substitute a new plaintiff for the old one was held to constitute a document whereby legal proceedings were commenced. See also the recent decision of the South African Supreme Court of Appeal in *Peter Taylor and Associates v Bell Estates (Pty) Ltd and Another* 2014 (2) SA 312 (A) in which a notice of joinder was held not to constitute a process whereby a creditor claims payment of a debt.

[14]See *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 470H–471 A; *De Bruyn v Joubert* 1982 (4) SA 691 at 695H–696B and Joubert *Law of South Africa 2nd ed.* Vol 21 para 131.

[15]1990 (1) SA 311 (C).

and Marine Salvage Contractors (Pty) Ltd) were jointly insured by the defendant, Allianz, for an amount of R6,1 million in respect of loss or damage relating to a sewage pipeline under construction at Green Point. Two winter storms caused damage to the pipeline in May and July 1985.

[26] The plaintiffs claimed that defendant was liable to indemnify them in terms of the insurance contract, but the defendant disputed that liability. Plaintiffs then instituted separate proceedings for orders declaring that the defendant was so liable, but they did not institute proceedings to recover damages. Before the trial relating to the claim for the declaratory orders could commence, the defendant lodged a special plea in July 1987, saying that as the plaintiffs had been aware of the identity of the defendant and the nature of the loss since 1984, the right to claim indemnity had prescribed.

[27] One of the questions to be decided was whether the institution of the proceedings for declaratory orders had interrupted the running of prescription. In addressing this question, Howie J reasoned that –

> The wide and general meaning of ‘debt’ is a pointer to the appropriate interpretive approach to s 15 in the context of the Act as a whole. Once it is clear that ‘debt’ has this loose connotation, it follows that the same applied to the word ‘payment’. Accordingly, one’s starting point is that the language to be interpreted has an inherent elasticity.[16]

[16] At 330 H–I.

[28] Howie J referred to *Santam Insurance Co Ltd v Vilakasi*,[17] a case that had interpreted the predecessor to s 15(1) in the 1943 Act. Section 6(1)*(b)* of the 1943 Act had provided that prescription would 'be interrupted by service on the debtor of any process whereby action is instituted' and 'action' was in turn defined as 'any legal proceedings of a civil nature . . . for the enforcement of a right'. In *Vilakasi,* the majority of the court had held that the process envisaged was one whereby action was instituted 'as a step in the enforcement of a claim or right'.[18] Howie J reasoned that it would be 'in keeping with the purposes of prescription and its operation in common law, and . . . applying the same elasticity of language' for s 15(1) to be interpreted along the lines suggested in *Vilakasi's* case. [19]

[29] The defendant argued in *Allianz* that an interpretation of s 15 which would mean that the proceedings for a declaratory order would interrupt prescription would fall foul of the 'once and for all rule', as it would mean that the plaintiffs could issue summons for damages if their declaratory order succeeded and so would be splitting the relief sought into two sets of proceedings. Howie J rejected this argument. He stated that if the declaratory action were to succeed, and a damages claim thereafter instituted, although the relief sought in the two sets of proceedings would be different, both claims would have been based on the same cause of action.[20] He noted that the precise form of the relief, and the quantum thereof, are not elements of the cause of action.[21]

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[17]1967 (1) SA 246 (A).
[18]At 253J-H.
[19]See *Allianz* case, cited above n 15, 331E–F.
[20]Id. At 333B.
[21]Id.

[30] Howie J acknowledged that the result would be a 'two-stage process', but although there are good reasons for avoiding piecemeal litigation, he reasoned that it was not a consideration that should influence the interpretation of the Prescription Act.[22] He accordingly concluded that –

> '1. It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.
>
> 2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also when the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in supplementary action instituted pursuant to and dependent upon that judgment.'[23]

[31] In the light of this reasoning, can it be said that in this case, the institution of judicial review interrupted the running of prescription in relation to the claims that form the basis of these proceedings? To address this question, it is necessary to consider three questions: firstly, whether the basis of the claim in the administrative review proceedings was the same or substantially the same as the basis of the claim in these proceedings; secondly, whether the administrative review proceedings were a 'step in the enforcement of a claim for the payment of a debt', and, thirdly, whether the judicial review proceedings disposed of some elements of the claim in the delictual action.

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[22] Id. At 333F–G.
[23] Id. At 334H–J.

[32] The first question is whether the basis of the claim in the judicial review proceedings was the same or substantially the same as the claim in these proceedings. The application for judicial review was based on Dr Lisse's right to administrative justice in terms of Art 18 of the Constitution. Article 18 provides that–

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[33] In dismissing the Minister's appeal in relation to the judicial review proceedings, this Court concluded, amongst other things, that the decision taken by the Minister was 'unfair, unreasonable and in conflict with Art 18 of the Namibian Constitution'.[24] The infringement of appellant's Art 18 rights were therefore the legal basis for the remedy granted.

[34] An analysis of the pleadings in these proceedings discloses that the damages claims are based both on the same facts as the administrative review proceedings, as well as, in the main, on the same alleged breach of appellant's Art 18 right. Insofar as the plaintiff seeks relief based directly on his constitutional rights (see paras 12 and 13 of the particulars of claim), appellant relies directly on Art 18 as well as on Art 21(j). Insofar as his cause of action is based on delict, appellant relies on the breach by the Minister of principles of administrative justice, including Art 18. The basis of the claim of the judicial review proceedings is

[24] See reported judgment 2006 (2) NR 739 para 30.

therefore either the same or substantially the same as that underpinning the delictual/constitutional damages claim at issue in these proceedings.

[35] The second question that arises is whether the judicial review proceedings constituted a 'step' in the enforcement of the claim for payment of the debt. It is clear that for the plaintiff his first priority in terms of relief was to seek the setting aside of the decision and obtain mandatory relief requiring the Minister to grant him authorisation in terms of s 17 of the State Hospitals and Health Facilities Act 36 of 1994. Until that relief was granted, the plaintiff was not able to practice at all in the state hospitals. He was required to proceed by way of judicial review to obtain that relief. For the plaintiff, the judicial review proceedings thus constituted a crucial step in the process of enforcing his constitutional rights.

[36] We turn now to the third question whether the administrative review proceedings disposed of some elements of the claim in the delictual/constitutional damages action. In the judicial review proceedings, the court held that the decision of the respondent to refuse appellant permission to practise in state hospitals was unlawful and it set the decision aside. The court also granted mandatory relief. The court's decision thus had the effect of disposing of a key issue in the damages proceedings, whether the conduct of the respondent was lawful. It is a central plank of the appellant's claim for damages that the decision of the Minister to refuse him permission to practice in state hospitals was unlawful. Establishing unlawfulness of course is not the same as determining that the decision was wrongful in the sense that is necessary to found aquilian liability but it is a necessary first step in the process of establishing wrongfulness. The appellant

could not succeed in obtaining the relief he seeks without establishing that the decision taken by the Minister in response to his formal application in terms of s 17 of the Hospitals and Health Facilities Act 36 of 1994, was unlawful. Establishing unlawfulness was thus a necessary first step to establishing aquilian liability.

[37] The administrative review proceedings had a second direct effect on issues that arise in the damages proceeding in relation to the mitigation of the damages suffered by the appellant as a result of the unlawful administrative decision of the respondent. The relief granted in the judicial review proceedings circumscribed the damages suffered by the appellant. In that sense too, the administrative review proceedings will have had a material effect on the relief sought in the current claim.

[38] As in *Allianz,* it might be argued that the fact that the plaintiff launched two sets of proceedings is in conflict with the ‘once and for all’ rule. However, that rule has particularly little purchase in the circumstances of this case, given the fact that damages claims are ordinarily pursued by way of summons, whereas judicial review is ordinarily pursued by way of notice of motion. There are long-established principles that underpin that practice. Thus, in most cases where a litigant seeks a remedy of judicial review as well as damages, it is likely that that litigant will have to pursue two separate sets of proceedings.

[39] In the light of this reasoning, we conclude that the launch of the administrative review proceedings by the appellant had the effect of interrupting the running of prescription as provided for in s 15 of the Prescription Act.

Prescription only recommenced to run, in terms of s 15(4) of that Act, once the respondent's appeal had been dismissed and the mandatory order was given effect. Accordingly, appellant's claim had not prescribed on the date that summons was issued in these proceedings.

[40] We emphasise once again that it is not open to us in these proceedings to decide whether appellant actually has a claim for compensation in the circumstances of this case. That is a matter still to be decided by the trial court. What is clear is that if an action for compensation does lie, whether in delict or directly based on the Constitution, the basis of the action for compensation is either the same or substantially the same as the basis of the application for judicial review, in that it arose from the same set of facts, and is founded, in the main, on the assertion of the same right. Moreover, the judicial review proceedings constituted a step in the enforcement of the appellant's right to claim the debt, as those proceedings determined a key issue that arises in the damages claim, whether the respondent's decision was unlawful.

[41] Accordingly, the service on the Minister of the notice of motion in the judicial review proceedings served to interrupt prescription in relation to the damages claim in this case. This conclusion makes it unnecessary to consider the other arguments raised by the appellant.

[42] The appeal must accordingly be upheld. The appropriate order is to substitute the order of the High Court, with an order dismissing the Defendant's

special plea of prescription and to remit the matter to the High Court for it to determine the case in the light of this judgment.

Costs

[43] The appellant has been successful upon appeal. There is no reason why costs should not follow that result and the respondent will accordingly be ordered to pay the appellant's costs on appeal, such costs to include the costs occasioned by the employment of one instructed and one instructing counsel. Given that the High Court order has been set aside and the special plea dismissed, it is appropriate that the appellant should be awarded the costs he incurred in opposing the special plea of prescription in the High Court.

Order

The following order is made:

1. The appeal succeeds.

2. The order of the High Court is set aside and replaced with the following order:

   'The Defendant's special plea of prescription is dismissed with costs.'

3. The case is remitted to the High Court to be determined in the light of this judgment.

4. The respondent is ordered to pay the costs of the appellant in this court, such costs to include the costs of one instructed and one instructing counsel.

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MARITZ JA

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STRYDOM AJA

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O'REGAN AJA

APPEARANCES

APPELLANT:	A W Corbett
	Instructed by Engling, Stritter & Partners
RESPONDENT:	G S Hinda assisted by G Narib
	Instructed by Government Attorney