THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 558/12

REPORTABLE

In the matter between:

PETER TAYLOR & ASSOCIATES **APPELLANT**

and

BELL ESTATES (PTY) LTD **FIRST RESPONDENT**

RENASA INSURANCE COMPANY (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Peter Taylor & Associates v Bell Estates & another* (558/12) [2013] ZASCA 94 (04 July 2013)

Coram: Mpati P, Tshiqi and Pillay JJA and Plasket and Saldulker AJJA

Heard: **6 May 2013**

Delivered: **04 July 2013**

Summary: Prescription – whether service of a Rule 10(3) notice constitutes process as envisaged by s 15(1) and (6) of the Prescription Act 68 of 1969.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Madondo J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs'.

JUDGMENT

TSHIQI JA (MPATI P, PILLAY JA AND PLASKET AND SALDULKER AJJA CONCURRING):

[1] The narrow issue in this appeal is whether service of a notice of joinder, in terms of rule 10(3) of the uniform rules of court, on the appellant (Taylor) interrupted prescription as envisaged by s 15(1) of the Prescription Act 68 of 1969 (the Act).The court below (KwaZulu-Natal High Court, per Madondo J) found that it did and that the claim of the first respondent (Bell Estates) against the appellant had not prescribed. This appeal is with the leave of that court.

[2] Bell Estates, duly represented by Taylor, an insurance broker, insured its motor vehicle with the second respondent, Renasa Insurance Company (Pty) Ltd (Renasa), against, inter alia, theft, loss and damage for the amount of R240 000. The vehicle was stolen on 6 July 2006 and was never recovered. Bell Estates lodged a claim but Renasa repudiated. On 8 May 2007 Bell Estates issued a summons against Renasa as the insurers of the vehicle, claiming compensation for the loss of its vehicle. In its plea, dated 19 June 2007, Renasa disputed liability. It pleaded, inter alia, that it was a term of the contract that, where the value of the insured vehicle exceeded R150 000, the vehicle must be fitted with one of certain types of tracking devices specified in the insurance agreement. As the vehicle was not fitted with any of those devices, Renasa averred that it was entitled to repudiate liability and that Bell Estates could not recover the compensation claimed.

[3] On 30 September 2009[1] Bell Estates served a rule 10(3) joinder application on Taylor, seeking an order that:

'(a) Peter Taylor and Associates be joined as second defendant in the action;

(b) Bell Estates serve the pleadings on Peter Taylor and Associates within 10 days; and

(c) Bell Estates be given leave to amend its particulars of claim to make provision for the inclusion of Peter Taylor and Associates.'

It was alleged in the founding affidavit, in support of the joinder application, that if the vehicle had to be fitted with a tracking device for it to be covered, then Taylor, as the insurance broker who represented Bell Estates, was privy to this requirement and thus owed the latter a duty to convey the information, but failed to do so.

[4] On 5 October 2009 Taylor served, on Bell Estates' attorneys, a notice of intention to oppose the application. The answering affidavit was deposed to on 31 May 2010. The point was raised therein that the claim had prescribed as more than three years had elapsed since Bell Estates acquired knowledge of Renasa's repudiation of its claim (on 11 November 2006). Reference was also made to a letter from Bell Estates' attorneys to Taylor, dated 24 January 2007, in which it was stated that the latter had 'failed in its duty as our client's broker' and that it would 'therefore be liable for damages which our client has suffered'. It was accordingly alleged, in the answering affidavit, that prescription against Taylor had commenced to run as from 24 January 2007, (the date on which Bell Estates' attorneys came to the conclusion that Taylor had failed in its duty as insurance broker and was thus liable for the damages suffered by Bell Estates) and the action would thus be a fruitless exercise as the claim against him had prescribed.[2]

[5] Section 15(1) and (6) of the Act provide:

'<u>Judicial interruption of prescription</u>

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

…

(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'.

Section 15(5) deals with the situation where a person applies to be joined as a defendant in an action. It says:

---

[1] At that stage it was already two years and four months after the summons was served on Renasa.

[2] It is not in dispute that when the rule 10(3) notice was served, the three-year prescription period had not yet expired. However, on 31 May 2010, when Taylor raised the plea of prescription in his affidavit three years had already expired.

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

In its judgment the court below defined the issue in the case to be whether a notice of joinder in terms of rule 10(3) 'constitutes a process' for purposes of s15(1) of the Act and, consequently, whether the service of the notice of joinder interrupted the running of prescription.

[6] The contention on behalf of Taylor was that the rule 10(3) notice was not a 'process whereby the creditor claims payment of the debt' and that therefore its service did not interrupt prescription. Bell Estates contended, on the other hand, that the notice was such a process and that its service had the effect of interrupting prescription. Rule 10(3) provides:

'Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiffs depends upon the determination of substantially the same question of law or fact, which, if such defendants were sued separately, would arise in each separate action'.

As has been mentioned above, the notice of joinder served on Taylor sought an order (a) joining Taylor as a defendant; (b) allowing service of the pleadings on it within 10 days; and (c) granting Bell Estates leave to amend its particulars of claim.

[7] In the court below Madondo J correctly stated that s 15(1) of the Act entails three requirements for prescription to be interrupted. They are: (a) a process; (b) served on the debtor; and (c) by means of which the creditor claims payment of the debt. In considering whether these requirements have been met in the present matter, the learned judge was faced with two high court decisions in which conflicting views are expressed on whether prescription had been interrupted by service of a rule 10(3) notice on the party sought to be joined. In *Naidoo & another v Lane & anothe*r 1997 (2) SA 913 (D) the court (Meskin J) held that a joinder application was not a process by which a creditor claims payment of a debt as contemplated by s 15(1) of the Act and that its service had therefore not interrupted the running of prescription. In *Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd & another* 2002 (4) SA 166 (C) the court (Comrie J) rejected that view and held that the joinder application was a process whereby a creditor claimed payment of a debt and that its service had interrupted prescription. Both courts sought to place reliance on *Cape Town Municipality & another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C).[3] The court a quo dealt with both decisions and preferred the view expressed in *Waverly Blankets.*

[8] It would be helpful to deal with the facts and the nature of the issue raised in *Allianz* in order to understand the dichotomy. That case concerned two consolidated actions, the essential relief claimed by each plaintiff being an order declaring that *Allianz* was liable to indemnify the plaintiffs in terms of an insurance policy in respect

[3]Counsel for the respondent also referred to the recent decision of *Wessels v Coetzee* [2013] ZAGPPH 82, where Victor J aligned herself with the reasoning in *Waverley Blankets*.

of all loss or damage suffered as a result of two storms. The issue for determination was whether service of a process whereby the creditor claimed a declaratory order that the debtor was liable to indemnify it, rather than a claim for payment of a debt, interrupted the running of prescription. Howie J stated (at 334H-I):

'1 It is sufficient for 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 a debt.

2 A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment'.

[9] It appears that the plaintiffs in that case intended, should it be necessary, to institute further action for payment of sums of money. In this regard Howie J said:

'If further proceedings are instituted by plaintiffs in due course to exact payment from defendant pursuant to judgement in the present case, such further action will be necessary by reason of the fact that the present action is only concerned with the issue of liability, and the further action will cover elements of plaintiffs' claim not canvassed in the current action. Conversely, those elements of the claim covered in the present matter will be *res judicata* hereafter. But the two actions together will still deal only with one cause of action…. Therefore the cause of action on which the present action is based is the same cause of action as that on which the supposed further litigation will be founded'.[4](My emphasis)

The learned judge held further that the connection between the action in which the declarators were sought and a second claim for payment of the debt was sufficiently close to interrupt prescription. He reasoned, citing *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578H, that the issue of summons for the declarators amounted to taking judicial steps to recover the debt, thereby removing all uncertainty as to its existence.

[10] In *Waverly Blankets* Comrie J recognised that the joinder order in that case did not resolve any issue of liability, but stated (at 175C-E):

'It appears to me, however, that there is still a sufficiently close link between the joinder application and a final judgment sounding in money in the plaintiff's favour, if such should be granted on the merits. Thus the joinder application led to the joinder order, which in turn led to further pleadings and eventually to trial. But for prescription, it is open to the plaintiff to prove its case on the merits and to secure a final judgment'.

In that case the second defendant had been joined in the action between the plaintiff and the first defendant by consent. The second defendant thereafter raised prescription as a defence. Comrie J's reasoning seems to be that the joinder application was sufficiently closely related to the claim for damages against the defendant to be joined (who was there joined) and that it therefore qualified as a process whereby the creditor claimed payment of the debt.

[4] *Cape Town Municipality v Allianz* at 332B-333.

[11] It seems to me that Comrie J's approach may have been influenced by a misreading of Howie J's judgment in *Allianz*. The basis for the finding in *Allianz,* that the connection between the action in which the declarators were sought and the second claim for payment of the debt was sufficiently close to interrupt prescription, was that the judgment in the action for the declarators would finally dispose of some elements of the claim, the remaining elements to be disposed of in a supplementary action. That was not the case in *Waverly Blankets*. The joinder order did not dispose of any element of the claim to which the second defendant was joined.

[12] The crux of Howie J's reasoning appears in the following passage in his judgment in *Allianz* (at 333I-334B):

'What, then, would the situation be if plaintiffs succeeded "under the process" served in the present action and then had to initiate further proceedings in order to secure an order for payment? Could it then be said that the order for payment had been obtained "under" the process in question, i.e under the present summons? As a matter of direct cause and effect the answer must be in the negative. On the other hand, the finding establishing liability would undoubtedly have been obtained under the present process, i.e "under the process in question", and it would unquestionably be an essential link between that process and the final executable judgment, notwithstanding that some further process will be required to initiate the supplementary proceedings. Not only that, but it would not defeat any objective which the present prescriptive Act sought to attain if one were to construe the contemplated final executable judgment as obtained by prosecuting the claim "under the present process"'.

[13] Howie J gave three further reasons why his view was consistent with the purpose underpinning the Prescription Act. The first was that there was no basis for an inference that the plaintiffs' actions for the declarators were intended to be no more than a means of obtaining an 'advisory opinion'. Rather, he said, the actions were 'instituted as steps in the enforcement of [the plaintiffs'] rights to an indemnity, that is to say, with the eventual object to get defendant to implement the indemnity', and not 'as "foot in the door" manoeuvres to keep prescription at bay'. Secondly, the plaintiffs' cause of action 'is the self-same cause of action as that which would found any subsequent related litigation aimed specifically at obtaining an order for payment of money'. Thirdly, the steps taken by the plaintiffs in respect of the indemnity were taken expeditiously - within 18 months of the storm damage.[5]

[14] In *Naidoo,* Meskin J accepted Howie J's conclusion in *Allianz* that for the purposes of interrupting prescription it is sufficient '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'.[6] The two plaintiffs in *Naidoo* had sought to join the Minister of Safety and Security as second defendant in an action they had instituted against the first defendant. Having accepted Howie J's conclusion, Meskin J stated that neither plaintiff (in *Naidoo*) purported to enforce, by means of the joinder application *per se,* 'the right co-relative to the obligation to pay damages allegedly owed to such plaintiff by the proposed second defendant'.[7] He said further:

---

[5] *Cape Town Municipality v Allianz* at 334C-F.
[6] *Naidoo & another v Lane & another* 1997 (2) SA 913 (D) at 919G-H.
[7] At 919G-H.

'No judgment directing the second defendant to pay the damages claimed by each plaintiff could be obtained "under" the application. Such a judgment could be obtained only "under" the amended summons and the amended particulars of claim as amplified by any further pleadings, the delivery of which the exigencies of the litigation might entail. If such a judgment were to be obtained, the application itself in no way would have grounded such judgment: it would exist simply as a preliminary process by means of which the plaintiffs had placed themselves in a position by means of the subsequent service of the process constituted by the amended summons and the amended particulars of claim to claim payment of the damages suffered by them'.[8]

[15] I agree with the sentiments expressed by Meskin J. And when the joinder application in the present matter is analysed in the context of the *Allianz* case, it appears to me that it would be stretching the interpretation of the Act a little too far to say that the application constitutes a 'process whereby the creditor claims payment of the debt' and that its service therefore interrupted prescription. First, it cannot be said that judgment in the joinder application (assuming it to be in favour of the applicant) 'finally disposes of some elements of the claim'. Indeed, it would finally dispose of no elements of the claim, but would merely make it possible, from a procedural perspective, for the plaintiff to institute a claim against the defendant who had been joined. Second, the causes of action in the joinder application and the claim for damages have nothing in common. It certainly cannot be said that the two processes involve the self-same, or substantially the same,[9] cause of action.

[16] It is true that there is reference to the cause of action in the founding affidavit in support of the joinder application, but in terms of the order sought, Bell Estates would be able to claim payment of a debt from Taylor only once the court had granted the application in its favour. In the event of the court refusing the application, it would not be possible for Bell Estates to proceed against Taylor for payment of a debt on the basis of that notice. It follows from what has been said above that *Waverly Blankets* was, with respect, wrongly decided.

[17] In the result, I make the following order:

1 The appeal is upheld with costs.
2 The order of the court below is set aside and replaced with the following:
'The application is dismissed with costs'.

Z L L TSHIQI

[8] At 921B-D.
[9] See *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 470H-471D.

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A.J Boulle
	Instructed by
	Norton Rose South Africa, Durban
	Webbers, Bloemfontein
For Respondent:	A.C Camp
	Instructed by
	Truter, James, De RidderInc, Empangeni
	Naudés, Bloemfontein