REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 51923/15

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

29/8/2019 Keightley
DATE SIGNATURE

In the matter between:

NATIVA MANUFACTURING (PTY) LTD Applicant

and

KEYMAX INVESTMENTS 125 (PTY) LTD First Respondent

ANVOCON BUILDING PROJECTS CC Second Respondent

MARCE MARKETING CC Third Respondent

Summary

Extinctive prescription – joinder – whether service of application for joinder interrupts running of prescription period for purposes of s15(1) of the Prescription Act – judgment of SCA in Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another 2014 (2) SA 312 (SCA) *analysed and discussed – judgment of GPD in Huyser v Quicksure (Pty) Ltd* 2017 (4) SA 546 (GP) *considered – in Huyser Prinsloo J found that Peter Taylor distinguishable and court not bound to follow SCA decision - Held: judgment in Huyser clearly wrong – Peter Taylor is binding authority and applicable to case at hand – service of application for joinder does not interrupt running of prescription – joinder refused as claim prescribed.*

JUDGMENT

KEIGHTLEY, J:

INTRODUCTION

1. This matter involves the intertwined issues of joinder and prescription. While the application is one of joinder, the main issue in dispute is that of prescription. Furthermore, in view of the authorities relied on by the respective parties, the matter also involves the question of precedent. More particularly, I must decide whether I am bound to follow the decision of my learned brother, Prinsloo J, in this Division in the matter of *Huyser v Quicksure (Pty) Ltd*,[1] or whether I am entitled to depart from it on the basis that in my view it was clearly, or convincingly, wrongly decided.[2] This question in turn requires me to analyse the binding judgment of the Supreme Court of Appeal (SCA) on the issue of joinder and prescription in *Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another*.[3]

2. The applicant (Nativa) seeks to join the third respondent (Marce), as third defendant in an action for damages it has instituted against the first and second respondents (Keymax and Anvocon, respectively). The relief it seeks is an order, in relevant part:

   1. joining Marce as a third defendant in the action under case number 51923/2015;

   2. granting Nativa leave to amend its Summons and Particulars of Claim filed of record in order to reflect such joinder;

   3. directing that all pleadings filed on record be served upon Marce within ten days of the order.

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1 2017 (4) SA 546 (GP)
2 See the discussion of the test to be applied in permitting a High Court to depart from the decision of a previous decision of the same Division in Du Bois *et al* Wille's Principles of South African Law (9ed) at pg87, n125.
3 2014 (2) SA 312 (SCA)

3. In short, Marce resists being joined as a party in the main action on the sole basis that Nativa's claim against it has prescribed, and thus that the joinder would serve no purpose. As I flesh out in more detail below, the key question for determination is whether service of the application for joinder had the effect of interrupting the running of the prescription period for purposes of s15(1) of the Prescription Act.[4] Relying on the decision of the Supreme Court of Appeal in *Peter Taylor*, Marce contends that the joinder application did not interrupt the running of prescription. On the other hand, Nativa contends that the present case is on all-fours with the *Huyser* case, and that I am bound to follow the judgment of Prinsloo J, which found that that case was distinguishable from *Peter Taylor*.

BACKGROUND FACTS

4. It is not necessary to set out the facts in any detail. The main action arises out of damages allegedly suffered by Nativa as a result of a fire that broke out on commercial premises owned by Keymax on 19 July 2012.

5. Nativa was a tenant of unit 5 of the property, which it used as a warehouse for purposes of packaging pharmaceutical material. Marce is alleged to have been a tenant of unit 10, which it had recently vacated. The fire broke out in unit 10, and spread to unit 5. It was started by a workman carrying out repair work in unit 10 following Marce's departure. Nativa initially instituted a claim against Keymax on the basis that it had contracted with Anvocon to carry out the repair work; and against Anvocon on the basis that it had employed or contracted with the workman concerned to do the repairs.

[4] Act 68 of 1969

6. Nativa did not originally proceed against Marce as a defendant. It says that this was because preceding the institution of the action Marce had told Nativa that it (Marce) had vacated unit 10 and had had nothing to do with the work carried out on the premises at the time of the fire. Marce told Nativa that Keymax and Anvocon were responsible for the repair work, and hence for the fire. Nativa says that it was only when Keymax filed its plea on 11 March 2016, averring that it was Marce's employee who had started the fire while removing fixtures and fittings from unit 10, that Nativa acquired knowledge that Marce was potentially liable for its damages.

7. Sections 12(2) and (3) of the Prescription Act provide as follows:

> "(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts 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."

8. Nativa's case is that in terms of these sections, the period of prescription only commenced running from 11 March 2016, when it acquired the requisite knowledge to institute a claim against Marce. On this calculation, the prescription period ended at midnight on 10 March 2019. It is common cause that Nativa instituted the present joinder application in December 2018, which falls within the period of prescription. It contends that this had the effect of interrupting the period of prescription, and hence that its claim against Marce has not prescribed. On this basis, it says that it makes no difference that joinder was not actually effected, and that no consequent procedural steps were taken against Marce prior to the end of the prescription period.

9. Were it not for the issue of prescription, it seems to me that the joinder application would have to succeed. Indeed, Marce does not take issue with

that proposition. Its opposition to joinder is based on what it says is the binding authority of the SCA in *Peter Taylor* which, Marce submits, lays down that a joinder application on its own does not interrupt the running of prescription for purposes of the Act.

JURISPRUDENCE

10. Section 15(1) deals with the judicial interruption of prescription. It provides that:

> "The running of prescription shall …be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt … ." (my emphasis)

Subsection (6) is also relevant, in that it states that:

> "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." (my emphasis)

11. Until the SCA decision in *Peter Taylor* there was disagreement among different divisions of the High Court on the question of whether the filing and service of a joinder application constituted service of a process whereby a creditor claimed payment of a debt for purposes of these two sections. In *Naidoo & Another v Lane & Another*,[5] Meskin J held that a joinder application did not constitute such process and that it did not interrupt the running of prescription. On the contrary, in *Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd*,[6] Comrie J rejected this approach and found that a joinder application fell within what was contemplated in section 15, and that its service did interrupt prescription. To add to the complexity, albeit that they came to contradictory conclusions, both courts sought to base their findings on the

[5] 1997 (2) SA 913 (D)
[6] 2002 (4) SA 166 ©

judgment of Howie J in *Cape Town Municipality & Another v Allianz Insurance Co Ltd.*[7]

12. In *Peter Taylor* the SCA was faced with the two competing High Court judgments: the court *a quo* in that matter had followed the *Waverley Blankets* approach, and had found that the service of a joinder application was a process that interrupted the running of prescription within the meaning of s15(1) and s15(6). The appellant in the matter argued that *Waverley Blankets* had been wrongly decided, and that the court should favour the *Naidoo* approach. The SCA commenced by analysing the judgment of Howie J in *Allianz*, being the source of the two conflicting decisions. The salient features of this analysis, and of the SCA's findings may be summarised as follows:

12.1. The court confirmed that s15(1) entails three requirements for prescription to be interrupted: (a) a process; (b) served on the debtor; and (c) by means of which the creditor claims payment of the debt.[8]

12.2. The court referred to Howie J's finding in *Allianz* to the effect that:

> "1. It is sufficient for purposes of interrupting prescription if the process to be served is one whereby <u>the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of a debt</u>. (my emphasis)
>
> 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 <u>where the process initiates an action, judgment in which finally disposes of some elements of the claim</u>, and where the <u>remaining elements</u> are disposed of in a <u>supplementary action instituted pursuant to and dependent upon that judgment</u>."[9] (my emphasis)

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[7] 1990 (1) SA 311 (C)
[8] At 316A-B
[9] At 316F-H

12.3. It is clear from the judgment of the court in *Peter Taylor* that these findings were to be understood in the context of the particular facts of the *Allianz* case.[10] Critically, in that case the court was not dealing with the question of whether a joinder application interrupted prescription. Instead, it was dealing with the question of whether the service of process in an action for an order declaring that the defendant was liable to indemnify the plaintiffs in terms of an insurance policy was a process that interrupted prescription under s15. This was notwithstanding that the declaratory action did not include relief directing the payment of any debt that might arise from a finding of liability in favour of the plaintiff. It was in this context that Howie J accepted that the service of such prior action would be sufficient to interrupt prescription. This was because the action for a declarator would finally dispose of the issue of liability in respect of the defendant, even though the plaintiff would have to institute a further action for payment of any consequent debt ultimately flowing from the original judgment.

12.4. It was also in this context that one had to understand Howie J's finding that the application before him (i.e. the action for a declaratory order) and any subsequent action for damages arising therefrom, had the same cause of action. It was this shared cause of action that constituted a sufficiently close connection between the action for a declarator, and any subsequent action for payment of the debt, to interrupt the running of prescription.[11]

[10] At 316E-F
[11] At 316I - 317D

12.5. The SCA referred to the approach adopted by Comrie J in *Waverley Blankets* in applying Howie J's findings. Comrie J had found that :

> "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 let to further pleadings and eventually to trial."[12]

12.6. In the SCA's view, Comrie J's approach was influenced by a misreading of the judgment in *Allianz* in that:

> "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 <u>the judgment in the action for the declarators would finally dispose of some elements of the claim</u>, the remaining element to be disposed of in a supplementary action. <u>This was not the case in *Waverley Blankets*. The joinder order did not dispose of any element of the claim to which the second defendant was joined</u>."[13] (my emphasis)

12.7. The SCA contrasted Comrie J's approach with that adopted by Meskin J in *Naidoo* to the effect that:

> "No judgment directing the second defendant to pay the damages claimed by each plaintiff could be obtained "under" the (joinder) 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. <u>If such a judgment were to be obtained, the (joinder) 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</u>."[14]

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[12] Cited at 317E

[13] At 317G-I

[14] Cited at 318H-319A

12.8. The SCA expressly endorsed the approach of Meskin J in *Naidoo*, and concluded that *Waverley Blankets* was wrongly decided.[15]

12.9. It concluded that:

> "... 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, cause of action. 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, (the applicant) would be able to claim payment of a debt from (the respondent) 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 (applicant) to proceed against (respondent) for payment of a debt on the basis of that notice."[16] (my emphasis)

13. On my reading of the SCA's decision in *Peter Taylor* and its analysis of *Allianz*, in order to constitute a "process whereby the creditor claims payment of the debt" for purposes of judicial interruption of prescription under s15(1), more is required than a mere procedural connection between the process in question (for example, as in this case, a joinder application) and the claim for payment of the debt. What is required is a substantive connection between the process served, and the claim for payment of the debt. There must be an overlapping cause of action between the two: the mere fact that it is procedurally necessary

[15] At 319F
[16] At 319B-E

to issue out the process in question in order to ultimately claim payment of the debt is not sufficient.

14. This explains why the context of *Allianz* was, in the SCA's view, so important, and why it found that the court in *Waverley Blankets* had got it wrong. What was critical in *Allianz* is that the process in question (i.e. the service of the summons in the declaratory action) sought substantive relief in the form of a declaration of liability against the defendant. The effect of the order under that process would dispose of a substantive element of the ultimate claim for payment of the debt. An application for, and granting of joinder does not share this characteristic: it only has a procedural, and not a substantive connection to the claim for the payment of the debt. It is for this reason that the SCA held that the joinder application did not constitute "a process whereby the creditor claims payment of the debt".

15. The judgment in *Allianz* includes an extensive analysis of extinctive prescription in our law. Although this analysis is not traversed in the *Peter Taylor* judgment, it is nonetheless important in my view to understanding the principles underlying both judgments.

16. In the course of his analysis, Howie J noted that the purpose of extinctive prescription is to bring an end to the uncertainty that is created through inaction over a period of time on the part of a creditor who fails to institute legal action.[17] It reflects the law's disapproval of a creditor's negligence in pursuing a claim, and penalises his or her inaction.[18] He noted further that at common law, the running of prescription was interrupted by either the debtor's acknowledgment of the debt, or by judicial interpellation, which involved not

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[17] *Allianz* at 329B-D, citing Professor J C de Wet 'The Law of Prescription' in Opuscula Miscellanea (1972)
[18] *Allianz* at 329E

merely the issuing of summons, but the serving of summons so as to institute the action. The purpose of serving the summons as opposed to issuing it was "to effect an *in ius vocatio* so that the debtor would not be condemned without the opportunity of being heard."[19] The common law position was that the judgment emanating from the summons served would end the dispute by, *inter alia*, pronouncing on the issue of liability.[20]

17. In Howie J's view, the changes effected from the 1943 Prescription Act to the present Act indicated an intention to move from a "weak" to a "strong" prescription regime.[21] One example of this noted in the judgment is that whereas under the 1943 Act, service of any process whereby action was instituted was sufficient to interrupt prescription, under the present Act it must be process whereby payment of the debt is claimed. Another example is that under the 1943 Act, as interpreted by the courts at the time, service of summons would have the effect of interrupting prescription even if it was later withdrawn. Under s15(2) of the present Act, the interruption of prescription effected by service of process will lapse "if the creditor does not successfully prosecute his claim under the process in question to final judgment".[22] These changes strengthened the prescription regime by, *inter alia*, lending support to the underlying purpose of extinctive prescription which is to reduce the uncertainty that arises when a creditor delays in enforcing action against a debtor.

18. In my view, the SCA's interpretation of *Allianz*, and its endorsement of Meskin J's approach in *Naidoo* is consistent with the underlying purpose of prescription and with its common law roots. In the context of prescription,

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[19] *Allianz* at 329H-I
[20] *Allianz* at 329J-330A
[21] *Allianz* 330A; 331A-B
[22] *Allianz* at 331G-H

what provides certainty as between creditor and debtor is when the creditor serves the debtor with a formal process calling on the debtor to answer the creditor's claim in court. In our procedural system this is done by service of summons or notice of motion in which the creditor is required formally to state the basis of the claim and the nature of the payment he or she is calling on the debtor to make. It is at that point that the debtor is placed on terms before the court either to comply with the demand, or to formally signal an intention to defend the action and state his or her case in pleadings. As Howie J put it in *Allianz* it is the service of the summons that amounts to the taking of judicial steps to recover the debt, thereby removing all uncertainty as to its existence.[23]

19. The service of process for procedural relief that may be necessary before the creditor can issue the summons does not have the same effect of certainty. An application for joinder, if granted, permits the creditor to join the debtor in the action, but it is no more than a preliminary step and creates no certainty in and of itself that the creditor will indeed make a judicial demand for payment. Only the subsequent service of the summons demanding payment or performance by the debtor does that. Were it otherwise, a creditor could extend the period of uncertainty and delay by failing to serve the summons and particulars of claim timeously, thus placing the intended debtor in an invidious position.

20. It is this scope for delay and uncertainty that our law of extinctive prescription aims to curtail. This is why the service of the process required for purposes of interruption of prescription under s15(1) must be process demanding

[23] At 317D. In the text of the judgment, Howie J used the term "issue" not "service" of the summons. I assume this was a slip of language, as it is accepted in our law that it is not the issue of the process, but the service that institutes the proceedings.

payment of a debt from the debtor. An application for procedural relief such as joinder or substituted service does not make such a demand, and thus does not create the certainty our law of extinctive prescription requires.

THE JUDGMENT IN HUYSER

21. It is against the background of my analysis of this case law that I turn to the judgment of my learned brother Prinsloo J in *Huyser*.

22. The court in *Huyser* accepted that *Peter Taylor* was binding on it but concluded that the two cases were distinguishable. On this basis it departed from the decision reached in *Peter Taylor*, and held that the joinder application served while the period of prescription was still running had the effect of interrupting prescription for purposes of s15(1).

23. In *Huyser*, and in *Peter Taylor*, as in the case before me, the applicants had sought joinder of the respondents in a pending action. The applications for joinder had been made and served within the requisite three years of the applicant having acquired knowledge of the respondents' possible liability. However, joinder had not been effected within that three year period, and thus there was no service of summons in the action on the respondents before the prescription period had run its course. In other words, but the time the joinder applications came before the respective courts, the prescription period applicable in each case had ended. This prompted the respondents in both cases to oppose joinder on the basis that the claim against them had prescribed and no purpose would be served by ordering their joinder.

24. Counsel for Nativa, Ms Goodhart, submitted correctly that as the facts before me are on all-fours with those before Prinsloo J in *Huyser*, I am bound to follow that decision, unless I am convinced that it was wrongly decided. It is

necessary, therefore, for me to consider whether I agree with the grounds of distinctions drawn by my learned brother, Prinsloo J, in his judgment between *Huyser* and *Peter Taylor* which permitted him, in his view, to reach a different conclusion to that of the SCA.

25. Prinsloo J[24] referred to the two "legs" underpinning the SCA's decision, viz., first, whether it could be said that the judgment in the joinder application "finally disposes of some elements of the claim"; and second, whether the causes of action in the joinder application and the intended action against the respondent were common.

26. As regards the first "leg", Prinsloo J found that the relief sought in the matter before him was similar to the relief sought in *Waverley Blankets*. Further, that this relief was different to that sought in *Naidoo*, and that the relief sought in *Peter Taylor* was similar to that sought in *Naidoo*. On this basis, he sought to draw a distinction between the case before him and that before the court in *Peter Taylor*.

27. I have already pointed out that in *Huyser* and *Peter Taylor*, as in this matter, the process under consideration was an application for joinder. The same holds true for *Naidoo* and *Waverley Blankets*. However, a critical basis on which Prinsloo J distinguished the case before him from *Peter Taylor* was the idea that not all joinder applications are the same. In his view, there was what he called a "straightforward joinder," like the one in *Huyser* and in *Waverley Blankets*. On the other hand, in other cases, such as in *Naidoo*, the applicant had sought relief that was more in the nature of being a "preliminary type of

[24] At 355I

joinder", rather than being a "straightforward joinder" application in which the respondent had been "joined as a defendant right away".[25]

28. As to the basis of this distinction, Prinsloo J compared the relief that had been sought in the relevant Notices of Motion in various cases. He appeared to find a material distinction between those joinder applications where the Notice of Motion had sought relief in the form of a prayer that "leave be granted to join" the respondent, and those in which it had sought an order "joining" the respondent. Prinsloo J pointed out that in *Naidoo*, the Notice of Motion had included relief in terms of the former formulation, and in the matter before him, the relief was sought in the form of the latter formulation.[26]

29. He agreed with the court in *Waverley Blankets* that these different formulations of relief indicated two different types of applications for joinder. This was because in the formulation sought in *Naidoo*, the court was requested not only to grant leave to join the respondent in the action, but also to give further directions regarding the amendment of pleadings and service of process on the respondent. He noted that on the other hand, in the "straightforward" type of joinder before the court in *Waverley Blankets* and *Huyser*, the court was requested to join the respondent and was not requested to make further directions.[27] Prinsloo J also concluded that in his view the relief sought in *Peter Taylor* was more akin to that in *Naidoo* than in *Waverley Blankets.*[28] This distinction provided him with a basis for approaching the case before him along the lines of *Waverley Blankets*, thus permitting him to depart from what would otherwise be the binding authority of the SCA in *Peter Taylor*.

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25 At 559A
26 At 550A; 557B-G
27 *Waverley Blankets* at 174G-F; *Huyser* at 559B-G
28 At 566H

30. With great respect to my learned brother Prinsloo J there are many reasons why I cannot accept the correctness of this distinction. In the first case, Prinsloo J unfortunately overlooked the fact that in the Notice of Motion before him, the court was requested to direct that further steps should be taken in that all pleadings were required to be served on the respondent. Further, in *Peter Taylor* the relief that was sought was in the form of an order joining the respondent, not seeking leave to join. In my view, there was thus no distinction between the nature of the relief sought in *Huyser* and that sought in *Peter Taylor.*

31. In addition, Prinsloo J also stated that the court in *Naidoo* had appeared to endorse this distinction at page 918F-I of its judgment.[29] With respect, this appears to me to be an inaccurate reading of the judgment. All that Meskin J in this particular part of his judgment did was to summarise the submissions on the point made by counsel before him: he did not indicate any approval or disagreement with those submissions at that stage.

32. Apart from these basic difficulties, there is also, in my respectful view, simply no substance in the underlying basis for the distinction that Comrie J sought to draw in *Waverley Blankets* and that Prinsloo J endorsed. All applications for joinder in essence require the "leave" of the court. It is a fundamental rule of our law of civil procedure that a party cannot simply join an additional defendant to an action by service of summons on him or her at any stage after the institution of the action. It requires an application to court, and it requires the court to agree to, and order the joinder. The very purpose of the application is to seek the court's leave to join, and it makes no difference, in my view, how the applicant elects to formulate the relief in the notice of motion.

[29] At 358D-E

There is no magic to the words "leave to join", in, or the absence of those words from, the notice of motion.

33. Furthermore, and again in my respectful view, whether or not the court is requested to make further directions as to the amendment of particulars of claim and service of pleadings on the respondent consequent on joinder is neither here nor there. As a matter of procedure, the summons will have to be served on the applicant as an additional defendant: without this step, the respondent is not called to court to answer the merits of the claim. And, in order to ensure that the particulars of claim are not excipiable, the applicant will have to amend them to include the necessary averments to support the claim against the respondent as an additional defendant. This will, of necessity, require leave of the court, whether such leave to amend is granted together with the application for joinder or thereafter.

34. It is common practice, presumably because of the convenience to the court and all parties, that the court is asked to grant leave to amend the particulars and to direct that the pleadings are served on the respondent at the same time as it orders the joinder of the respondent as an additional defendant. However the relief is formulated in the joinder application, and whether or not further directions are sought from the court in the joinder application, it makes no difference to the substance of the application: it is merely an application to join the respondent to the action, and further process must be served by the applicant in any event to bring the respondent to court to answer the substance of the claim for the payment of the debt.[30]

[30] See in this regard the discussion in *Naidoo* at 919G-920E

35. Prinsloo J noted that, "this distinction was not debated before the learned Judge of Appeal (in *Peter Taylor*) so that it appears to be appropriate to rely thereon for present purposes."[31] He also referred to, and was persuaded by, the following statement by Comrie J in *Waverely Blankets*:

> "But my disagreement is more fundamental than that. The notice of motion was undoubtedly process, see s 15(6). It can also be regarded as a document whereby legal proceedings [were] commenced against the second defendant. It seems to me, with respect to Meskin J, that the application for joinder was the first step whereby the plaintiff (as creditor) claimed payment of the debts from the second defendant, or as Howie J put it in *Allianz*:
>
> '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.'"[32]

36. Prinsloo J continued by expressing the view that on his reading of the *Peter Taylor* judgment, it did not appear that the court had "considered this particular point". He proceeded that in the case before him it was unquestionably the situation that the notice of motion in the joinder application was process commencing legal proceedings as a step towards the enforcement of the claim, as required by Howie J in *Allianz*.[33] Respectfully, I cannot agree with the correctness of my learned brother Prinsloo J's findings in this regard. As I have explained in my analysis of the *Peter Taylor* and *Allianz* judgments, the entire thrust of the judgment by the SCA was directed at pointing out why, on a proper analysis of *Allianz*, a joinder application is not process whereby the creditor claims payment of the debt as required under s15(1). The SCA considered the question very thoroughly and it expressly rejected the approach adopted in *Waverley Blankets* upon which Prinsloo J relied.

[31] At 567B-E
[32] At 567C-E of *Huyser*
[33] At 567F-G

37. Finally, I deal with Prinsloo J's approach to the second "leg" of the SCA judgment, viz. whether the application for joinder and the main action share a common cause of action. In this respect, Prinsloo J found that unlike the situation pertaining in *Peter Taylor*, the claims against the two defendants (i.e. the existing defendant, and the respondent, who was sought to be joined as a defendant) were exactly the same and shared the same cause of action.[34] He found this to be an important distinction between the *Peter Taylor* case and the one before him.

38. In my respectful view, this is not a proper basis on which to draw a distinction between the two cases. On a proper reading of the *Peter Taylor* judgment, its analysis of the *Allianz* judgment, and its endorsement of the approach followed on *Naidoo*, it is clear to me that what is required is that the cause of action under the process that is served must be the same as the cause of action in the main action. As I have already indicated, it is this that draws the necessary close connection between the two processes for purposes of the interruption of prescription.

39. The question is not whether, if the respondent is joined, the same cause of action will apply to all defendants then before court (although it may be an additional factor the court will consider in exercising its discretion as to whether or not joinder is in the interests of the parties). As pointed out in *Naidoo*,[35] the application for joinder only informs the respondent as to what an intended cause of action in the action will be: the cause of action in the joinder application is based on the requirements for joinder; whereas the cause of action for the payment of debt is that set out in the particulars of claim, as

[34] At 565C-F
[35] At 920A-E

amended, and subsequently served on the respondent, once they are joined as a defendant. This was the comparative exercise required in the second "leg" of the SCA judgment, not the comparison between the causes of action as between the co-defendants, as my learned brother Prinsloo J appears to have understood it.

40. For this reason, in my respectful view, it makes no difference that in *Peter Taylor* the applicant as plaintiff in the action would have proceeded on a different cause of action in respect of the original defendant than that in respect of the respondent as a joined defendant. This is not a material distinction between *Peter Taylor* and *Huyser* (and the present case, for that matter) for purposes of determining the question of whether the service of the joinder application interrupted prescription.

41. In summary, I do not agree with the correctness of the distinctions that were drawn by Prinsloo J in *Huyser* between that case and *Peter Taylor*. In my view, the same fundamental issue arose in both cases, viz. whether the service of the joinder application interrupted the running of prescription under s15(1) of the Act, and the facts were in all material respects aligned. It follows, in my respectful view, that the findings and conclusion reached by my learned brother Prinsloo J in the *Huyser* matter, that he was not bound by *Peter Taylor* in the case before him, are clearly wrong. It follows that I may depart from the decision in *Huyser*.

CONCLUSION AND ORDER

42. On the authority laid down by the SCA in *Peter Taylor*, I find that the service of the application for joinder on Marce did not constitute "service of process

whereby (a) creditor claims payment of (a) debt" as required by s15(1). Consequently, service of the joinder application did not interrupt prescription.

43. In order to effect an interruption of prescription, Nativa should have applied for joinder in time to ensure that it could have served the amended summons and particulars of claim on Marce before the date on which the prescription period ended. It had three years in which to do so. This is normally more than enough time for a party who wishes to join an additional defendant to an action to apply for and obtain a joinder order, and to take the necessary step of serving the summons on the joined defendant in order to prevent the claim from prescribing. Although Nativa indicated in a letter dated 6 May 2017 that it intended to take steps to join Marce in the action, it was only over 18 months later, in December 2018 that it filed and served the joinder application. By the time the matter came before me for hearing it was already too late: the prescription period had run its course, and the claim against Marce had prescribed.

44. In the circumstances, there is merit in Marce's defence that Nativa's claim against it has prescribed, and that the joinder of Marce as the third defendant in the action would serve no purpose. It follows that the joinder application must be dismissed.

45. I make the following order:

The application is dismissed with costs, including the costs of senior counsel.

RM, KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : **12 AUGUST 2019**

DATE OF JUDGMENT : **29 AUGUST 2019**

APPEARANCES

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