



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON SPECIAL PLEA OF PRESCRIPTION**

HC-MD-CIV-ACT-CON-2016/03949

In the matter between:

**MAGRIETHA JONANNA LOUW**

**PLAINTIFF**

and

**ANNA HENDRINA STRAUSS**

**DEFENDANT**

**Neutral Citation:** *Louw v Strauss*( HC-MD-CIV-ACT-CON-2016/03949)[2017]  
*NAHCMD 217 (9 August 2017)*

**CORAM:** MASUKU J

**Heard:** 5 July 2017

**Delivered:** 9 August 2017

**Flynote:**     **CIVIL PROCEDURE** – Special plea of prescription – **STATUTE** – The Prescription Act 68 of 1969 – acquisitive prescription – meaning of the word ‘debt’ as employed in the Prescription Act.

**Summary:** The plaintiff sued the defendant for an order compelling her to sign documents of transfer of landed property that the plaintiff’s husband had purchased from the defendant in around 1996. In addition to pleading over on the merits, the defendant raised a special plea of prescription, alleging that the ‘debt’ sued for, arose more than 20 years ago and that the plaintiff’s claim had prescribed three years from the purchase of the property. It was argued that the plaintiff ought to be non-suited therefor.

*Held* – the plaintiff did not have any right to acquisitive prescription in this matter as she had no title to the property in question.

*Held* – that the plaintiff’s claim was not a ‘debt’ within the proper meaning to be ascribed to the word. It was further held that the word debt must be given a narrow meaning, related to payment of something that is owed or due such as money, goods or services.

*Held further* – that the meaning of debt as extended in case law, ostensibly following the decision of the South African case of *Desai v Rajendra Desai*, to include an obligation to do something or to refrain from doing something was an incorrect reading of the judgment in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*.

*Held further* – that the application of a wide meaning to the word ‘debt’ in cases of prescription has the potential to exclude the rights of persons to access courts, hence the need to apply a restricted meaning.

The special plea was accordingly dismissed with costs.

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## ORDER

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1. The defendant special plea of prescription is dismissed.
  2. The defendant is to pay the costs occasioned thereby.
  3. The matter is postponed to 6 September 2017 at 15:15 for a case management conference hearing.
  4. The parties are ordered to file a joint case management report at least three (3) days before the date stipulated in paragraph 3 above.
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## RULING

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**MASUKU J.,**

### Introduction

[1] At issue in this ruling is a plea of prescription raised by the defendant. The court is accordingly called upon to decide whether or not the said plea, which is potentially dispositive of the matter has merit.

### Background

[2] The special plea is moved by the defendant against the backdrop of the following factual matrix and averrals: The plaintiff issued out a summons against the defendant for an order directing the defendant to take the necessary steps within 10 days of the making of the order, to transfer ownership of Erf 750, Block B, Rehoboth, Windhoek, Republic of Namibia, in favour of the plaintiff. The plaintiff further seeks an order directing the defendant to pay the costs of such transfer. Furthermore, she prays for an order authorizing the Deputy Sheriff to take such steps as are necessary to give effect to such transfer of ownership should the defendant fail to take the necessary steps. Lastly, the plaintiff prays for an order for costs.

[3] The averrals behind the relief sought may briefly be stated to be the following, as gleaned from the particulars of claim: On 22 January 1996, the late Jacobus Louw entered into an agreement of sale with the defendant regarding the property described in para [2] above. The purchase price of the property was N\$6 000, which the plaintiff is alleged to have paid in two instalments of N\$ 3 000, with the final instalment being made on 1 February 1996. A copy of the deed of sale is attached to the particulars of claim.

[4] It is further averred that the said Mr. Jacobus Louw passed on to the celestial jurisdiction on 5 June 2000 and is survived by his wife, the plaintiff. It is furthermore averred that in accordance with the agreement concluded by the defendant and the deceased, the defendant is under an obligation to transfer the said property to the plaintiff as prayed. It is further averred that the defendant acknowledged liability to the plaintiff in an affidavit but has refused to avail herself to the Office of the Registrar of Deeds in Rehoboth to effect transfer of the property to the plaintiff. It is further alleged that the defendant time and again breathes threats of eviction against the plaintiff which disturb the latter's occupation and enjoyment of the said tenement.

#### The special plea

[5] In her special plea, the defendant avers that the actions upon which the plaintiff's claim is allegedly based, took place on 22 January 1996 and 1 February 1990, respectively. In that regard, it is further contended, the plaintiff instituted its action against the defendant only in November 2016, which is a period of more than 20 years from the date when the claim in question arose. It is accordingly contended that the provisions of s. 11 of the Prescription Act,<sup>1</sup> (the 'Act'), apply to the transaction in question.

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<sup>1</sup> Act No. 68 of 1969.

[6] I should pertinently add that the defendant also proceeded to plead on the merits of the plaintiff's claim. I am not, however, required, for present purposes, to chronicle or even comment on the balance of the plea as the issue presently before court is limited to the special plea.

#### The Prescription Act and argument thereon

[7] According to the defendant, the relevant provision of the Act applicable to the present matter is s. 11 (*d*), which provides as follows:

'The periods of prescription of debts shall be the following:

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- \*
- \*

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[8] Mr. Muluji, in argument, contended that in this instant case, the period for prescription to start running, must be reckoned from the date when the plaintiff knew of the debt. In his submission, this was from February 1996, the latest date from the documents filed as read with the pleadings. He argued accordingly, that in the circumstances, the date from which the debt became due amounts to almost 20 years, therefor suggesting inexorably that the period of three years stipulated in s. 12 (*d*) above came and passed a long time ago so as to allow prescription of the plaintiff's claim to kick in. In this regard, he contended, and strenuously too, that the defendant's special plea was, in the circumstances, totally unanswerable.

[9] Mr. Carolus, for his part, argued that the premise on which the defendant's special plea is founded is erroneous. His contention, in this regard, was that the Prescription Act finds no application to the plaintiff's claim. This, so he contended, was

because his client had a vested real right in the property in question. In his argument, this was a case where acquisitive, as opposed to extinctive prescription applied.

[10] In response thereto, Mr. Muluti argued that there is no basis whatsoever to claim that the plaintiff had any real right to the property in question and this, he submitted, was principally because there is no dispute that the property in question is registered in the defendant's name. It was his case that only registration of the property in the plaintiff's name could result in the plaintiff having a real right in the property in question. Absent registration and the question of acquisitive prescription simply does not apply, he further submitted. When the plaintiff realised that her case is limping, so to speak, Mr. Muluti further argued, she applied for an order for the property to be registered in her name, suggesting that she was acutely aware of the deficiencies of her case in so far as the reliance on acquisitive prescription is concerned.

### Live Issues

[11] I am of the view that two live issues then present themselves for determination, namely, whether the issue of acquisitive prescription contended for by the plaintiff has any merit. Second, whether the cause of plaintiff's cause of action qualifies to be regarded as a 'debt' within the meaning of the Act as contended by Mr. Muluti. I accordingly proceed to deal with these two issues *ad seriatim* below.

### *Acquisitive Prescription*

[12] In his able argument, Mr. Carolus argued that his client's claim is one of a vindicatory nature. He contended in the heads of argument that 'The unmissable (sic) issue that the Honourable Court needs to address is that of ownership. That is the basis of the Plaintiff's claim.'<sup>2</sup> In this regard, the plaintiff referred the court to *Absa Bank Limited v Keet*,<sup>3</sup> where the court reasoned as follows:

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<sup>2</sup> Para 8) of the plaintiff's heads of argument.

<sup>3</sup> (817/2013) [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] All SA 1 (SCA) 28 May 2015.

'Counsel for the appellant submitted that a vindicatory claim is clearly based on ownership of a thing and that it cannot be described as a claim for satisfaction of a debt. He argued that this Court should follow the reasoning in *Stategemann*, which he submitted, was correct. The *amicus curiae* submitted that if the legislature in its wisdom, had wanted to stipulate the period of prescription in respect of a vindicatory claim, for which neither the 1943 Prescription Act nor the present Prescription Act provided, it could have done so. But it chose not to do so, because, he submitted, it intended the prescription period in respect of a vindicatory claim to be decided on a case by case basis. But when asked by the Court whether that proposition reflected a correct approach to construing a statute such as the Prescription Act, he was constrained to concede that the construction he contended for was incorrect. His alternative argument was that for the sake of consistency this Court should in construing the Prescription Act interpret the concept 'debt; in the same manner as it was interpreted in cases such as *Barnett; Desai N.O.* and *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd.*'

[13] It is perhaps important to place the context and facts of the judgment in issue before evaluating the correctness of the argument advanced by Mr. Carolus. In *Keet*, the appellant bank sought an order in the High Court seeking confirmation of its cancellation of an instalment sale agreement upon the respondent defaulting in payment of instalments. The latter raised a plea of prescription which was upheld by the High Court. On appeal, the question for determination was whether a claim under the *rei vindicatio* became prescribed after a period of three years. The Supreme Court of Appeal came to the conclusion that the High Court had erred in upholding the special plea on that basis.

[14] What is unmistakable in the *Keet* matter is that in terms of the instalment sale agreement, the Bank retained ownership of the vehicle and its claim thereto could not, in the circumstances, be said to have prescribed after three years as the High Court had held. That case is markedly different from the present case where the plaintiff is not the owner of the property in question, hence she seeks an order compelling the defendant to sign documents that would entitle her to transfer of ownership of the property in question. It is trite law that a deed of transfer evidences ownership of immovable

property and it is that title that can entitle the owner to seek to reclaim the property from whosoever is in possession of that property.

[15] In this case, it is clear as noon day, that reliance on *Keet* is mistaken as the plaintiff, although in occupation of the property, is not the registered owner thereof, which can be the only basis upon which a *rei vindicatio* can properly be moved. In the premises, I am of the view that the plaintiff's bold claim that its claim is based on the *rei vindicatio* is unmistakably based on sinking sand and is clearly insupportable regard had to the entire factual matrix of this case. The reliance on acquisitive prescription is accordingly also misplaced.

[16] In the premises, I come to what I consider the ineluctable conclusion that the reliance on acquisitive prescription by the plaintiff is totally misplaced and I find that the argument raised does not pass muster. It is my considered view that the plaintiff ought to fail on this score and I so hold.

*Does the plaintiff's claim fall within the meaning of 'debt' for the Act to apply?*

[17] In this regard, as earlier stated, Mr. Muluti's main contention is that the plaintiff's claim, namely for an order directing the defendant to sign the necessary documents to enable transfer of the property into the plaintiff's name falls within the meaning of debt as defined in case law. It is on the above basis that he contends that the provisions of s. 11 apply to the instant case. Is his contention correct?

[18] The starting point is to note that the Legislature unfortunately did not take the time to define what the word 'debt' as employed in the Act means. In that regard, and in order to give meaning to same, it is imperative that we have regard to the meaning of the term as ascribed in various judgments by the courts in this country and beyond. If Mr. Muluti is correct in his argument, this will put the matter to bed, namely, that the claim in this case has prescribed, for it is evident, according to the pleadings, being the plaintiff's own version, that it was launched about 20 years after the 'debt' became due.



[19] In contradistinction, I intend to start with a comparable jurisdiction, Zimbabwe, where the relevant legislation stipulates what a debt is. In *Efrelou [Pvt] Ltd v Mrs Muringani and Emily Ntombizodwa Luwaca v The Registrar of Deeds and Another*,<sup>4</sup> the court quoted the provisions of s. 2 of the Prescription Act,<sup>5</sup> where a debt is defined as including anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

[20] In his forceful argument, Mr. Muluti referred the court to a number of decisions that deal with the concept of prescription; the reasons for its existence and its applicability. In this regard, great store was laid in argument at when prescription starts running and the relevant period when it may be properly pleaded, depending on the cause of action. I am of the considered view that those principles are not really in contention in this case. The real question for determination is whether the relief sought by the plaintiff in this matter, namely an order to compel the defendant to sign the documents for transfer of the property in question fall within the meaning of the word debt. If it does, then the defendant is on *terra firma*. If not, then the defendant's special plea is bad in law and must consequently be dismissed.

[21] Mr. Muluti referred the court to *Lisse v Minister of Health and Social Services*,<sup>6</sup> where the Supreme Court reasoned as follows at para [16] to [19], in part:

'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.'

The question that naturally arises is whether that expansive interpretation should, all relevant issues taken into account, extend to the cause of action in this matter.

[22] In *Keet*, the court, at para 12 stated the following:

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<sup>4</sup> HC 1816/10 and HC 3285/10.

<sup>5</sup> [Cap 8:11].

<sup>6</sup> (SA 75/2011) [2014] NASC 24.

'It was pointed out by Holmes AJA in *Electricity Supply Commission* at 344 F-H with reference to the *Shorter Oxford Dictionary* and also to *Leviton & Son v De Klerk's Trustee* that a debt is "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another and '(w'hatever is due – *debitum* – from any obligation'. That definition was thereafter adopted and extended by this Court in *Desai* **NO** at 146I-J where a 'debt' was said to have 'a wide and general meaning, and includes an obligation to do something or refrain from doing something'.

[23] During my research, I found a few recent judgments from the South African Constitutional Court which have a bearing on this question and which none of the parties referred to, but which the practitioners would have been expected, with due diligence to have found and drawn the court's attention to. I deal with these judgments below.

[24] *Desai*, to which Mr. Muluti referred and relied upon in his heads of argument, has recently come for trenchant criticism by the Constitutional Court of South Africa as having unduly extended the meaning of debt in a manner that is impermissible and more importantly, in one that is not supported by the decision in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*,<sup>7</sup> (*Escom*) on which it purported to rely for the extended meaning.

[25] In *Makate v Vodacom (Pty) Ltd*,<sup>8</sup> the Constitutional Court reasoned as follows on this matter at p 34 para 85-86:

[85] The absence of any explanation for so broad a construction of the word "debt" is significant because it is inconsistent with earlier decisions of the same Court that gave the word a more circumscribed meaning. In *Escom* the Appellate Division said that the word "debt" in the Prescription Act should be given the meaning ascribed to it in the *Shorter Oxford Dictionary*, namely:

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<sup>7</sup> 1981 (3) SA 340 (A).

<sup>8</sup> [2016] ZACC 13.

“1. Something owed or due: something (as money or goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.’

*Escom* was cited and followed in subsequent cases. It was also cited as authority for the proposition in *Desai* **NO**.

[86] It is unclear whether the Court in *Desai* intended to extend the meaning of the word “debt” beyond the meaning given to it in *Escom*. If it did, it does not appear that this followed either from any submissions made to the Court by the parties or any issue arising in the case. Nor, if that was the intention, did the Court give consideration to the constitutional imperatives in regard to the interpretation of statutes in section 39 of the Constitution.’

[26] At para 93, the Constitutional Court concluded the treatise in the following manner on the wide meaning it found had been impermissibly given to the word “debt” by *Desai*:

‘To the extent that *Desai* went beyond what was said in *Escom* it was decided in error. There is nothing in *Escom* that remotely suggests that “debt” includes every obligation to do something or refrain from doing something apart from payment or delivery. It follows that the trial Court attached an incorrect meaning to the word “debt”. A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.’ (Emphasis added).

[27] I have taken the trouble to read both judgments, namely *Escom* and *Desai*. In *Escom*, Holmes AJA dealt with the meaning of the word ‘debt’ at p. 344 para F-G and does not include the extended meaning ascribed to the *Escom* judgment in *Desai*. In point of fact, the learned Judge of Appeal referred to *Leviton and Son v De Klerk’s Trustee*.<sup>9</sup>

[28] In *Desai*, FH Grosskopf JA stated at p.146 I, regarding the meaning to be ascribed to the term ‘debt’ is:

‘that which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another’. See *Shorter Oxford Dictionary*; and also

<sup>9</sup> 1914 CPD 685 at 691.

*Leviton and Son v De Klerk's Trustee* 1914 CPD 685 at 691 *in fin.* "Whatever is due – *debitum* – from any obligation.'

I am therefore in full agreement with the conclusion of the Constitutional Court in *Makate* that what was ascribed by the court in *Desai*, is not correctly captured. I say this for the reason that the extended meaning of debt is not found in *Escom* as alleged in *Desai*.

[29] I pause to mention that when one has regard to the judgment in *Desai*, it would appear that the extended meaning ascribed to the word 'debt' by the court in that case to some extent adopts or is consistent with the statutory meaning given by the Legislature in Zimbabwe as recorded above. In the latter jurisdiction, it is clear that that the word includes anything that may be sued for or claimed, arising by reason of an obligation arising from statute, contract, delict or otherwise. I should, however mention that even in Zimbabwe, there is no mention in the definition of refraining from doing something in relation to an obligation, which is unfortunately part of the extension given in *Desai*. In South Africa and this jurisdiction, it is not so. As stated earlier, I respectfully associate myself with the conclusion of the Constitutional Court in *Makate* that the definition of debt, placing reliance on *Desai* is incorrect. I say so for other reasons that will be adverted to shortly below.

[30] The Constitutional Court in *Makate* went a step further and impressed on the courts in South Africa the imperative to construe legislation in a manner that takes into account the Bill of Rights as enshrined in s. 39 of the South African Constitution, which the court *a quo* was adjudged not to have done in coming to the decision it did. At para [91], the Constitutional Court expressed itself as follows on the correct interpretation of the word in question:

'On this approach an interpretation of debt which must be preferred, is the one that is least intrusive on the right to access to courts.'

I propose to deal with the latter aspect in due course in the succeeding paragraphs of this judgment.

[31] The Constitutional Court also had occasion to deal with the same question in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others*.<sup>10</sup> In that case, the court re-affirmed its decision in *Makate* in the following terms:

'After the SCA's judgment, this Court handed down its decision in *Makate*. In sum, *Makate* held that the broad interpretation of "debt" in *Desai* was inconsistent with earlier decisions that gave the term a narrow definition.

I am satisfied that in interpreting the meaning of "debt", *Makate* functionally overturned the broad test adopted in *Desai* to the extent it went beyond the narrow test in *Escom*. The SCA's reliance on the broader test in *Desai* in finding that the applicants' section 252 claim is capable of the narrow test as enunciated in *Escom* would bring the applicants' section 252 claim outside of the purview of "debt", and therefore would be incapable of prescribing under the Prescription Act.<sup>11</sup>

[32] Having been persuaded by the compelling reasoning of the Constitutional Court in both *Makate* and *Offbeat Holiday Club*, the question that remains for determination is whether the characterisation of the plaintiff's claim in this matter as a debt is proper and whether it is not unduly broadened so as to affect other constitutional imperatives in particular. To put the matter bluntly, the sole question for determination is whether the plaintiff's claim to compel the defendant to sign the documents of title to the property can be correctly characterized within the narrow confines as stated in *Escom*, i.e. as an obligation to pay money, deliver goods, or render services? In this regard, I must pertinently mention that the proper approach at this stage, no evidence having been led, is to consider the claim based on the averrals of the plaintiff, which must, for the purpose of this enquiry, be dealt with as being true.

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<sup>10</sup> [2017] ZACC 15.

<sup>11</sup> *Ibid* at paras [47] and [48].

[33] I have considered the plaintiff's particulars of claim and have come to the inexorable conclusion that when one has regard to the plaintiff's claim, it would be stretching matters too far to characterise the plaintiff's claim as one for payment of money, delivery of goods or the rendering of services. It simply does not fall within any of the above categories in my respectful view. That the claim arises from a contract, and would probably be classified as an action for specific performance, does not necessarily allot the claim to one of rendering of services or the payment of money or delivery of goods as discussed above.

[34] There are other reasons for this conclusion as well and this leads me to the other aspect as earlier intimated in para [29] above. This is the pernicious result that the upholding of the special plea could have on the plaintiff's right to access the court as dealt with by the Constitutional Court in *Makate*. I am the first to accept that in Namibia, we do not have an equivalent section to s.39 of the Constitution of the Republic of South Africa, which mandates, if not peremptorily requires the courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. In this regard, the Constitutional Court reasoned as follows in *Fraser v ABSA Bank Limited*:<sup>12</sup>

'Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.'

[35] In my search, I have failed to find an Article in our Constitution that is *in pari materia* with the above quoted section of the South African Constitution. That notwithstanding, I am of the considered view that we cannot stand tall and claim that because we have no equivalent provision in our Constitution, we, as the courts of this Republic are at large to interpret legislation in a manner that conflicts with the Constitution, particularly one that would offend the Fundamental Rights and Freedoms enshrined in Chapter 3 of our Constitution. To hold otherwise would, in my view, amount to an abdication by our Judges of their constitutional mandate and responsibility, which

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<sup>12</sup> [2006] ZACC 24; 2007 (3) SA (CC); 2007 (3) BCLR 219 (CC) at para 43.

would be sufficient basis to cast a vote of no confidence and call upon us as Judges, to vacate the offices we occupy without further ceremony.

[36] I am accordingly of the firm view that notwithstanding the absence of such a provision, we are impelled to follow the same approach that the South African courts do in the interpretation of legislation. In this particular regard, I am of the view that the guidance that some of the South African courts give on such matters are applicable to our jurisdiction.

[37] In this regard, I am of the considered view that the approach of the Constitutional Court in South Africa to the issue of the proper interpretation of the word 'debt', namely that it should be accorded a restrictive meaning, fully resonates with the position in this country. I say so for the reason that an elastic interpretation of the word would have debilitating consequences to some people's right to access the court to receive the justice, which they crave.

[38] The consequences of extending the meaning of debt in this particular case, which Mr. Muluti advocated, would have unjust consequences in the instant case as I will attempt to exemplify below. In this case, it would mean that the defendant (according to the particulars of claim, which should, as earlier stated, be regarded as true for present purposes) would be entitled to retain the purchase price for the property that they allege was paid to the defendant by the plaintiff's husband and she would at the same time, be entitled to retain ownership of the property, meaning that they have had their cake and have also eaten it.

[39] This would, in my considered view, be the high watermark of injustice that the court would have to sternly turn its face against, as courts of law must also be courts of justice, with their quest and core mandate being to ensure that the law and justice are reconciled and made to live under one roof, if not in the same room.

### Conclusion

[40] In the event, I am of the considered view that the special plea ought to fail for the reason that the word 'debt' as used in the Act has been impermissibly extended in the instant case to include a claim that does not, properly construed, admit of the common usage of the word 'debt' as correctly defined in case law adverted to above. It may be some other species of action and not a 'debt' as contemplated by the Lawgiver, as indicated in the ruling.

[41] I am also of the considered opinion that in any event, if the extended meaning of the word 'debt' was to be adopted, as contended by the defendant, this would, in the context of this case cause a severe injustice, considering in particular, the effect a plea of prescription has on a party's right to access the courts.

#### Order

[42] In the circumstances, I issue the following order:

1. The defendant's special plea of prescription is dismissed.
2. The defendant is to pay the costs occasioned thereby.
3. The matter is postponed to 6 September 2017 at 15:15 for a case management conference hearing.
4. The parties are ordered to file a joint case management report at least three (3) days before the date stipulated in paragraph 3 above.

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T.S. Masuku  
Judge



## APPEARANCES

PLAINTIFF:

T. Carolus

Instructed by:

Kadhila Amoomo Legal Practitioners

DEFENDANT:

P. Muluti

Instructed by:

Muluti &amp; Partners