

PRESCRIPTION: THE PRESENT INTERPRETATION OF EXTINGTIVE PRESCRIPTION AND THE ACQUISITION OF REAL RIGHTS

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1 Introduction

The Prescription Act provides that a debt can prescribe or rather ‘expire’ and further that one can acquire ownership through prescription.¹ Prescription in simple terms refers to old debt which occurs when it is no longer an obligation for a debtor to pay off their debt. One of the original methods of acquiring real rights is by the passage of time, and other various types of obligations may be rendered unenforceable by the effluxion of time.

2 The running of prescription

MM Loubser stated in his book that, ‘the main objective of extinctive prescription is to create legal certainty and finality in the relationship between the parties after the lapse of a period of time’.² The emphasis is on the protection of the defendant against a stale claim that has existed for such a long time.³ ‘It becomes unfair to require the defendant to defend himself against it, solely because the

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1 68 of 1969.

2 M Loubser *Extinctive Prescription* (1996) 33.

3 As above.

claimant is responsible for enforcing his right timeously and must therefore suffer the consequences of failure in this regard.⁴

Prescription in South African law is governed by the Prescription Act and it consists of four chapters. It is also important to note that not all debt prescribes in a period of three years, as some of the types of debt are likely to take an extended period of time to prescribe. These are discussed below.

The Constitutional Court in the matter between *Makate v Vodacom (Pty) Ltd* gave debt a narrow meaning providing that, a debt means only an obligation to pay money, deliver goods, or render services.⁵ The Constitutional Court also confirmed that only a personal right and not a real right can give rise to a debt which can be extinguished through prescription.⁶ Real rights are primarily concerned with the relationship between a person and a thing meanwhile personal rights are concerned with a relationship between two persons.⁷

Furthermore, it should also be noted that in simple terms, a debt can be anything that is owed or that is due such as money, goods or services that a debtor is under an obligation to pay or to render to a creditor.⁸ In *Absa Bank Limited v Keet*, the Court established that a debt is that which is owed or due, or anything which one person is under obligation to pay or render to another and whatever is due from any obligation.⁹

A debt becomes due when it is capable of being claimed, i.e. when it is time for the debtor to perform. In most instances the parties agree on a date the debtor is required to render his/her performance. However, if the parties had not agreed on a certain date or specific time upon entering into the contract, a debt will become due as soon as it arises. In the Supreme Court of Appeal (SCA) case between *Standard bank of SA Ltd v Miracle Mile Investments 67 (Pty) Ltd and another*, the Court had to decide on the question concerning when a debt becomes due in terms of the Prescription Act, specifically, in relation to instalment agreements which contain an acceleration clause.¹⁰ The SCA had to ascertain whether a debt becomes due at the time when the debtor breaches the agreement, or only once the creditor elects to enforce its rights under the acceleration clause in the facility agreement (rendering the entire amount outstanding due

4 Loubser (n 2) 32.

5 [2016] ZACC 13.

6 As above.

7 *Absa Bank Limited v Keet* [2015] 4 All SA 1 (SCA) at p 2.

8 *Cf Erasmus v Grunow en 'n Ander* 1978 (4) SA 233, at 254E.

9 [2015] JOL 33298 (SCA) p 3.

10 *The Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd & another* case 187/215 at para 2.

at that time).¹¹ The timing of prescription depends on the wording of the particular acceleration clause. The SCA held that if a creditor elects not to enforce his rights to accelerate the full outstanding amount, the creditor is entitled to wait until all the individual instalments become due before instituting action.¹² The court however warned that in such circumstances, a creditor runs the risk of prescription having ‘taken effect in respect of earlier instalments’.¹³

In terms of section 12(1) of the Prescription Act, the debt begins to run on the day that the debt becomes due and enforceable or the date by which the creditor could reasonably have become aware of the breach.¹⁴ For example, if X built a house for Y in 2018 at a price of R1 Million Rand and on the 31st of January 2020 the roof of the house starts leaking as a result of destructive construction (positive malperformance) by X, prescription in terms of the law starts running on the 31st of January 2020 as this is the date the owner of the house would have become aware of the defect, which constitutes a breach.

It is also important to note that the owner Y must be aware of the defect on the roof before the date of prescription. Furthermore, section 12(3) of the Prescription Act 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 facts from which the debt arises, unless the creditor could have acquired such knowledge by exercising reasonable care.¹⁵ In the Law of Contract in South Africa Text book, Hutchison states that;

A person who is not aware that a delict has been committed against him/her or that a claim based on unjustified enrichment has been raised in his/her favour, is hereby protected against the commencement of prescription, provided that his/her lack of knowledge is not due to the unreasonable conduct of the creditor.¹⁶

Moreover, a debt can be considered as prescribed if it has met certain pre-requisites which include *inter alia*, failure to acknowledge the existing debt, no payment having been made for that particular debt for a certain period of time and/or the failure to summon one in respect of the debt within a certain period of time as per the pre-requisite of such debt.

Additionally, not all debt prescribes within a period of three years as aforementioned. The following types of debts are likely to take an extended period of time to prescribe;

11 As above.

12 *The Miracle Mile Investments 67* case (n 10) at para 15.

13 *The Miracle Mile Investments 67* case (n 10) at paras 15-16.

14 68 of 1969.

15 As above.

16 D Hutchison and others *The Law of Contract in South Africa* (2017) 493.

- (a) Debt secured by a mortgage bond prescribes after 30 years;¹⁷
- (b) Judgment debt also prescribes after 30 years;¹⁸
- (c) Taxation imposed by law;¹⁹
- (d) Debt arising from mining activities in relation to the State also prescribes after 30 years;²⁰
- (e) Debt owed to the State arising from a loan, sale, or lease of land prescribes after 15 years;²¹
- (f) All the other debts prescribe after 3 years.²²

The general rule applies to all kind of aforementioned debts, that in terms of the said Act, prescription starts running as soon as a debt is due.²³

Lastly, in the recent SCA case of *Fluxmans Incorporated v Levenson*, the Respondent Levenson had concluded a contingency fee agreement with the Appellant, a firm of Attorneys called Fluxmans Incorporated.²⁴ The Appellant deducted the contingency fee when Levenson's claim was successfully settled. Five years after payment, the Respondent became aware of the fact that the agreement was void as it was not in writing and had not been signed by the parties as required by the Contingency Fees Act 66 of 1997.²⁵ The Appellant defended the claim on the basis that it had prescribed.²⁶ On appeal, the Judge President of the SCA held that the agreement was void as it did not comply with Section 12(3) of Prescription Act, which provides that a debt must not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debts arises.²⁷

3 Instances when prescription is delayed

Section 13 of the Prescription Act deals with the delay of prescription.²⁸ According to this provision, the period of prescription would be considered to have delayed if one of the following restrictions applies:

- (a) The creditor is a minor or insane or is a under curatorship or is prevented by superior force, including any law or any order of Court from interrupting the running of prescription;

17 Sec 11(a)(i) of the Prescription Act 68 of 1969 as amended.

18 Sec 11 (a) (ii) of the Prescription Act 68 of 1969 as amended.

19 Sec 11(a)(iii) of the Prescription Act 68 of 1969 as amended.

20 Sec 11(a)(iv) of the Prescription Act 68 of 1969 as amended.

21 Sec 11(b) of the Prescription Act 68 of 1969 as amended.

22 Sec 11(d) of the Prescription Act 68 of 1969 as amended.

23 Sec 12 of the Prescription Act 68 of 1969 as amended.

24 [2017] 1 All SA 313 (SCA).

25 *Fluxmans Incorporated v Levenson* [2017] 1 All SA 313 (SCA) at para 2-3.

26 As above.

27 *Fluxmans Incorporated* case (n 25) at para 6.

28 68 of 1969.

- (b) The debtor is outside the Republic ;
- (c) The creditor and debtor are married to each other;
- (d) The creditor is a juristic person and the debtor is a member of the governing body of a juristic person;
- (e) The debt is the object of a claim filed against the state of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an application under the Agricultural Credit Act;
- (f) The creditor or the debtor is deceased and an executor of the state in question has not yet been appointed.

In light of the above, it is also important to note that prescription does not commence to run against²⁹ a person while he remains *non compos mentis* as a result of injuries.³⁰ Should the impediment cease to exist, the creditor may institute action until one year after the impediment has ceased to exist.³¹ Furthermore, should the impediment cease to exist more than a year before the end of the normal prescription period, the impediment does not affect the running of prescription.³² This is because the creditor had one year to institute action after cessation of the impediment.³³

In *Malcom v Premier, Western Cape Government NO*, a matter that dealt with the delay of prescription in terms of section 13(1) of the Prescription Act in respect of a minor, the Constitutional Court presided over a claim of damages sought by the Appellant from the Respondent.³⁴ The Appellant was admitted to a State hospital for cancer treatment but whilst he was in hospital undergoing treatment, there was an outbreak of Hepatitis B at the hospital and in October 1994 he was diagnosed with that disease. Alleging that he had contracted it due to negligence on the part of the hospital and its staff, the Appellant sought damages from the Respondent.

His claim was met with a special plea of prescription.³⁵ The plea of prescription was resisted on the basis that when the claim arose, the Appellant had until one year after he turned 21 to institute the action and that was not affected by the statutory amendment to the age of majority. Reliance was placed on the broad principle that statutory changes are presumed not to prejudice acquired rights and in terms of the Prescription Act, as he commenced the proceedings

29 Sec 13 of the Prescription Act 68 of 1969.

30 Sec 13(1)(a) of the Prescription Act 68 of 1969. See also the *Fluxmans Incorporated* case.

31 Hutchison (n 16) 488.

32 As above.

33 As above.

34 [2014] 2 All SA 251 (SCA).

35 *Malcom v Premier, Western Cape Government NO* [2014] 2 All SA 251 (SCA) at para 1.

within one year of 21, it was contended that his claim had not prescribed.³⁶

The issue in the aforementioned matter arose from a change in the law relating to the age of majority that occurred after the Appellant had been infected with Hepatitis B. At that time the age of majority was 21 years in terms of the Age of Majority Act.³⁷ However, the age of majority was repealed by section 17 of the Children's Act, which came into operation on the 1st of July 2007.³⁸ In terms of the law, Prescription does not run against a minor. Moreover, it is of paramount importance to note that the word 'major' sometimes is used to refer to a specific age or to a person who enjoys full legal capacity.

Prescription can also be delayed on the basis that the debt is the object of a claim filed against a company in liquidation. In the Western Cape Division matter between *Van Deventer and Another v Nedbank Ltd*, the Respondent had originally sued the Appellants on the basis of the latter having signed as surety for a close corporation which had fallen into debt with the Respondent.³⁹ The Appellant argued that the claim had prescribed because the summons had been issued more than three years after the relevant debt had arisen.⁴⁰ The Court held that the purpose of Section 13(1)(g) of the Prescription Act was clear in circumstances where insolvency legislation contained a specifically tailored non-litigious procedure for establishing claims against insolvent parties.⁴¹ The Court further held that it was undesirable as a matter of policy that creditors should have to engage in a parallel process of litigation so as to prevent their claims from prescribing, and, likewise, for those administering the insolvency, to be put through the expense of investigating and defending litigation claims which could be established without controversy through specified procedures.⁴²

4 Interruption of prescription

In terms of the law, once the debt has prescribed you are not legally obligated to pay the amount owed. The interruption of prescription happens by an express acknowledgment in writing of liability on the part of the debtor or in respect of the service on the debtor of any process whereby the creditor claims payment of the debt. This process is also known as the judicial interruption process. In simple

36 The *Malcom* case (n 35) at para 1-2.

37 57 of 1972.

38 38 of 2005.

39 2016 (3) SA 622 (WCC) at 4.

40 *Van Deventer and Another v Nedbank Ltd* 2016 (3) SA 622 (WCC) at 8.

41 The *Van Deventer* case (n 40) at 8.

42 The *Van Deventer* case at (n 40) 10-11.

terms, the onus rests on the debt collector or an attorney to recover monies owed to them within a specified period and not delay recovery, such that it accumulates massive amounts of interest and costs.

As aforementioned, prescription is interrupted by an admission of indebtedness or by institution of judicial process whereby, the creditor institutes legal action to recover the debt. For example, if X owes Y an amount of R20 000, which was due to be paid Y on the 1st of January 2015 and X failed to pay such amount to Y, and Y did not take any action to enforce the debt, in terms of the Prescription Act the debt will prescribe after 3 years as on the 31st of December 2018. However, if X admits that he owes Y an amount of R20 000 on the 31st December 2018, prescription is interrupted and starts afresh. The debt will therefore only prescribe on the 31st of December 2021.

It is therefore imperative to also highlight that one of the mechanisms of interruption of prescription is by an acknowledgment of debt. The period of prescription begins to run *de novo*, unless the acknowledgment of debt is accompanied by an extension in writing on the day upon which the debt becomes due.

In the law of contract, the authors state clearly that ‘a partial acknowledgement of liability interrupts prescription with respect to the debt as whole and that in order to interrupt prescription, the acknowledgment must be made by the debtor or by her authorized agent, and only to the creditor or agent.’⁴³

On the other hand, judicial interruption is effected by services of the summons on the debtor whereby a creditor claims payment of the debt. Judicial interruption of prescription is conditional upon the success of the attempt to enforce the debt. In order to prevent situations of abuse, the Prescription Act states that interruption by means of process served on the debtor shall lapse if creditor does not obtain final judgment in terms of the process or if a judgment obtained is set aside or abandoned. Furthermore, an effective interruption of prescription in terms of Section 15(1) of the Prescription Act, causes a new period of prescription to commence on the day on which the judgment becomes executable.

However, in the 2016 judgment of *KLD Residential CC v Empire Earth Investment 17 (Pty) Ltd*, the Court held that, when ‘without’ prejudice, offer of settlement does not interrupt prescription. In this matter the Plaintiff (KLD Residential CC) sued the Defendant (Empire Earth Investment) for commission earned after selling certain erven in a development project and transferring ownership to buyers.⁴⁴ The commission was earned between October 2008 and November 2009

43 Hutchison (n 16) 490.

44 2016 (5) 485 (WCC) at 3.

when the transfer took place. The Plaintiff issued summons claiming commission in 2013, which is a period that was more than three years after the last commission was earned. Evidently, the claim had prescribed in terms of the Prescription Act. However, the Plaintiff alleged that the running of prescription had been interrupted when, in July of 2011, the Defendant's Attorneys, wrote a letter to the Plaintiff Attorneys acknowledging that, after taking into account certain deductions, the Plaintiff was entitled to a certain amount in respect of which a cheque was attached.⁴⁵ Justice Rogers held that the acknowledgment of debt, and the offer of settlement made to the Plaintiff in a 'without prejudice' offer, did not interrupt prescription.⁴⁶

This shows that in many exceptional circumstances where one thought prescription would run, it in fact does not. In the following recently decided case in the Gauteng Division, Pretoria, in the matter between *De Klerk v Ferreira and Others*, the parties were equal members of close corporation Plaantsaam and shareholders in a company called Benjo.⁴⁷ When they fell out, De Klerk sought orders to compel Ferreira to transfer his membership interest in Plaantsaam and shares in Banjo to him, against payment of fair and reasonable value.⁴⁸

In his replication De Klerk pleaded that the debt arose out of a partnership relationship and that the partnership was only dissolved during 2015.⁴⁹ It was stated by the Court that there was a delay in the prescription as provided by the provisions of Section 13(1)(d) of the Prescription Act, which provides that if the creditor and debtors are partners and the debt which arose out of the partnership.⁵⁰ The Court held that the period of prescription would be completed before or within a year of the dissolution of the partnership.⁵¹ Furthermore, it held that the period of prescription would not and cannot be completed before a year has elapsed after the dissolution of the partnership.⁵² In the consideration, Justice Murphy held that prescription was interrupted and that the debt had not prescribed when the summons was issued.⁵³ He proceeded to dismiss the special plea of prescription.⁵⁴

In respect to the above submissions it is therefore of paramount importance to note that Courts have no authority to raise prescription

45 The *KLD Residential* case (n 44) at 5-8.

46 The *KLD Residential* case at (n 44) at 3.

47 *De Klerk v Ferreira and others* 2017 (3) SA 502 (GP) at 1.

48 The *De Klerk* case (n 47) at 2.

49 2017 (3) SA 502 (GP) at paras 19-23.

50 As above.

51 As above.

52 The *De Klerk* case (n 47) at 27, para 122.

53 The *De Klerk* case (n 47) at para 52.

54 The *De Klerk* case (n 47) at 28, para 126.

particularly where parties have not raised it in their pleadings. This is governed by Section 17 of the Prescription Act, which clearly states that:-

- (a) A Court shall not of its own motion take notice of prescription,
- (b) A party to litigation, who invokes prescription, shall do so in the relevant document filed on record in the proceedings; provided that a Court may allow prescription to be raised at any stage of the proceedings.⁵⁵

This was also confirmed in the Constitutional Court matter between *Njaji v MEC, Department of Welfare, Eastern*, where a disability grant of which the Applicant (Njonji) had been a recipient for just under ten years was stopped without a reason.⁵⁶ The Applicant had requested to re-apply for the grant and her application succeeded, but her claim for pay back led to the present protracted proceedings. The Respondent raised a contention that the Applicant's claim had prescribed.⁵⁷ The Court held that the Prescription objection was not properly raised by the Respondent except in a belated and invalid manner.⁵⁸ The Court is prohibited, in terms of the Prescription Act, from considering the point *mero motu*.⁵⁹ The stated that in light of the *mero motu*, it cannot on its own take notice of prescription.⁶⁰ The Court further stated that presuming that prescription did apply, prescription would begin to run only once the decision was set aside by a Court or disavowed by the decision maker.⁶¹

In terms of the law, Prescription can also be applied in respect of acquisition of movable and immovable property. A person shall, by prescription, become the owner of a thing which he has possessed openly and as if he were the owner thereof, for an uninterrupted period of thirty years.⁶² Such period which, together with any periods for which such thing was so possessed in title, constitutes an uninterrupted period of thirty years.⁶³

In the Supreme Court of Appeal matter dealing with the ownership of a thing, in the matter between *Absa Bank Limited v Keet*, the Court found the merit in the argument that a claim for a vindicatory claim (claim based on ownership of a thing) cannot be described as a debt.⁶⁴ Meaning therefore, that such a claim does not prescribe after 3 years as the debt, instead it prescribes after a period of thirty years uninterrupted.

55 68 of 1969.

56 [2008] JOL 21573 (CC).

57 The *Njaji* case (n 56) at 2.

58 The *Njaji* case (n 56) at 1.

59 Sec 17 of the Prescription Act 68 of 1967.

60 The *Njaji* case (n 56) at 10.

61 The *Njaji* case (n 56) at 1.

62 Sec 6 of the Prescription Act 68 of 1969.

63 As above.

64 [2015] JOL 33298 (SCA).

5 Conclusion

It therefore is important to note that prescription cannot be applied to achieve unjust results. Prescription cannot be applied in the acquisition of a thing (property) by means of fraud, and one cannot commit a debt with the intent of relying on prescription. That would defeat the purpose of the law. When interpreting prescription one should always uphold the need to strike a balance between the need to have a cutoff point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time, if he/she failed to act diligently and to ensure fairness in those matters in which a rigid application of prescription legislation would lead to unfair or rather unjust results.