Short Notes on:

THE THREE-YEAR DEADLINE – WHEN SUSPICION BECOMES THE DATE, THE CLOCK STARTS TICKING.

Introduction

We have been aware of the period we refer to as prescription in law, where there is time barring on the ability to claim a debt. Quid essentially, when does the time start running? From a general point of departure, it is when the debt becomes due. But what about a suspicion?
What about a claim arising from an agreement that did not pan out the way you thought? Well, that is what happened in *WK Construction (Pty) Ltd v Moores Rowland and Others*[1]

The WK Construction Case

The appellant, WK Construction (Pty) Ltd, had employed a Mr Maartens as its financial director. Mr Maartens defrauded WK Construction between 2006 and 2013. As a result of the fraud, WK Construction lost R80 132 548. In addition, it recovered R26 million from Mr Maartens.

This claim relates to the audits for the financial year ending 28 February 2007 to 28 February 2013 conducted by the Respondents.

The Law

Section 11(d) of the Prescription Act 68 of 1969 (the "Act") provides that a debt prescribes in three years. However, section 12(1) of the Act provides that the time starts to run when the debt is due. In regards to the critical point of when the debt is due, section 12(3) of the Act provides:

"A debt <u>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</u>. Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

As is the case in the present matter, this provision has provided fertile soil for litigation over the years.

[1] (Case no 952/2020) [2022] ZASCA 44 (6 April 2022).

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It has been established through various cases in our courts that, for the prescription to run, the creditor need not be in a position to prove its case. In V*an Staden v Fourie*,[2] the Court held that the running of the prescription cannot be delayed "*until the creditor has established the full extent of his rights . . . .*"

This concept was elaborated on in *Minister of Finance and Others v Gore NO*,[3] where it was held that:

"This Court has in a series of decisions emphasized that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably". . . ."

But then in Links v Department of Health, Northern Province:[4]

"'this Court opined that it would be setting the bar too high to require knowledge of causative negligence. In answer to this issue, this Court held that in cases involving professional negligence, the facts from which the debt arises are those facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him or her to "seek further advice".

And so, WK Construction lost the appeal as the Court held that it should have at least suspected an issue to be present in regards to the audit in question.

Conclusion

Prescription is often the only consideration in debt collections or litigation matters where a contract or other document establishes when the debt is due. In cases of claims on negligence or misconduct resulting in damages, it remains an essential consideration. Therefore, we recommend that you seek advice early on the merits of a potential claim to avoid prescription because you should have known. Contact an expert at SchoemanLaw Inc for assistance and guidance today.

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[2] 1989 (3) SA 200 (A) 216B-F).
[3] ZASCA 98; 2007 (1) SA 111 (SCA).

[4] [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656.

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