MDA PRESENTS

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# CALCULATING EXTINCTIVE PRESCRIPTION: THE HIDDEN TIME BAR IN CONSTRUCTION CONTRACTS

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**Most parties to a construction contract are aware of the time limits contained in the general conditions of their contract document for, among other things, the delivery of a contractual claim, reference of a dispute to adjudication and notifying disagreement with an adjudicator's decision. Usually, a failure to comply with these time limits will bar the non-complying party from pursuing the claim/dispute[1]. This is generally referred to as being 'time barred'.**

Time bars are calculated in accordance with the provisions of the contract. For example, Clause 5.1.1.2 of the GCC 2015 stipulates that the day on which a timespan commences is excluded from the calculation of the timespan concerned.

Many parties to a construction contract are not aware of what could be considered an additional legislative time bar. In terms of the Prescription Act[2] a debt (including liability arising from and being due or owing under a contract[3]) is generally extinguished after the lapse of three years.

This period begins to run as soon as the debt is due (meaning that it is immediately claimable by the creditor or immediately payable or performable by the debtor[4]).

1 Barkhuizen v Napier 2007 (5) SA 323 (CC)

2 Prescription Act 68 of 1969

3 HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N)

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It was decided by the High Court in the matter of *Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry*[5] that where a construction contract requires a claim process (such as that envisaged in Clause 10 of the GCC 2015) to be followed, the debt does not become due until this process has been finalized and the impediment to referring the dispute to court proceedings or arbitration is removed. This decision was later confirmed by the Supreme Court of Appeal[6].

The prescription period can be interrupted by several actions, most commonly by service of process commencing legal proceedings in a court (provided the court out of which the process is issued has jurisdiction to determine the claim) or subjecting the debt to arbitration, provided that these actions are taken before the prescription period expires. Interestingly, a judgment debt (obtained from a court) will itself prescribe in 30 years, but an arbitrator's decision will interrupt prescription for a period of only 1 year from the date of the decision (unless the 3-year prescription period would have ended after that year – in that case, the prescription period remains 3 years).

Submitting a claim to an employer's agent in terms of the contractual claims process does not interrupt prescription[7]. Neither does referring the dispute to adjudication.

Once the prescription period has expired the debt is extinguished and there is no further right to make a claim, be it by way of adjudication, arbitration or court proceedings.

It is, therefore, important to understand how to calculate the prescription period.

There are two commonly used methods for calculating time periods. The first is the civil method which includes the first day and excludes the last day. The second is that provided for in the Interpretation Act[8], which excludes the first day and includes the last day. The Prescription Act does not stipulate which method should be used to calculate the prescription period.

This is significant to those who have (for one reason or another) not taken action to interrupt the running of prescription until the end of the period. If, for example, a debt became due on 11 November 2018 and the civil method was used to calculate the three-year prescription period, the period would start on 11 November 2018 and end on 10 November 2021. On the other hand, if the method provided for in the Interpretation Act was used, the period would start on 12 November 2018 and end on 11 November 2021. Using the wrong method of calculation could mean a failure to take action before the prescription period lapses, resulting in the debt being extinguished.

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5 Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry 2010 JDR 0512 (GNP)

6 Group Five Construction (Pty) Ltd v Minister of Water Affairs and Forestry 2011 JDR 0161 (SCA)

7 As per footnotes 5 and 6 above

8 Interpretation Act 33 of 1957

It would be safer to use the civil method, but the question is: in a pinch, are you required to? The High Court in the 2016 Afrisun matter said that you are[9].

In terms of the common law, departure from the civil rule is only allowed if it is clear from the language used and the context in which it appears that the drafters of the Prescription Act intended a different method to be used[10]. The Interpretation Act applies to all laws (which includes the Prescription Act) unless there is something in the language or context of the Prescription Act repugnant to the provisions of the Interpretation Act or unless the contrary intention appears in the Prescription Act.

In light of this, and looking at the language used in the Prescription Act, the court in Afrisun pointed out that:

1. The words "*as from the date on which the claim arose*" are the typical words of commencement that bring the ordinary civil method of computation into operation[11].

2. The Interpretation Act only applies to periods calculated in days[12]. The period in the Prescription Act is calculated in years.

The court concluded that the language of the Prescription Act clearly indicated that the civil method of calculation must be used.

In conclusion, beware the hidden time bar (prescription)! The prescription period is significantly longer than any time bar contemplated in the standard form contracts, but this is no reason to become complacent. As the case law attests, the computation of extinctive prescription can be complicated, and it is best to always err on the side of caution.

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9 Afrisun KZN Proprietary Ltd T/A Sibaya Casino and Entertainment Kingdom and Another V Prithiraj Sewpersad in the High Court of South Africa Kwazulu-Natal Division, Pietermaritzburg Case No: Ar299/16

10 See Joubert v Enslin 1910 AD at 37; Kleynhans case at 549; South African Mutual Fire & General Insurance Co. Ltd v Fouche en 'n ander 1970 (1) SA 302 (A) at 315H-316 C.

11 See Kleynhans v Yorkshire Insurance Co. Ltd 1957 (3) SA 544 (A) at 549 G-H

12 See Joubert v Enslin 1910 AD 6, 37-38; Nair v Naicker 1942 NPD 3 at 5; Muller v New Zealand Insurance Co. Ltd 1965 (2) SA 565(D) at 571E