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“WITHOUT PREJUDICE”		

Frequently Asked Questions

“Without Prejudice”

1. What is a prescription claim?

1.1 A prescription claim is a claim served on a creditor or his/her attorney to claim a legal privilege of cancelling a debt which is older than 3 years old **and which meets certain legal requirements;**

“In Uitenhage Municipality v Molloy 1998 1 All SA 140 A the court held that one of the main purposes of the Prescription Act is to protect the debtor from old claims against which he could not effectively defend himself. If creditors were allowed by their deliberate or negligent act to delay the pursuit of a claim without incurring the consequences of the prescription, that purpose would be subverted”;

1.2 The prescription Act is designed to promote certainty in the affairs of a debtor and creditor and is actually aimed at fairness towards the debtor;

1.3 A further reason for prescription is to protect debtors against unscrupulous creditors who intentional delay the collection of that debt so that the debt can collect interest and administrative costs which in practice will make that debt far higher than the original debt;

1.4 A debt is prescribed when the debtor is no longer liable for it, or no longer owes it

2. What are the legal requirements of a bona fide prescription claim

2.1 The debt must be due and claimable. Unless a prescription claim is invoked that debt is still due and collectable by a creditor himself or his agents such as debt collectors and attorneys;

2.2 Upon a date of the debt becomes due and payable: this is the month after you made your last payment, 3 years are legally allocated to the creditor to collect that debt by one or another means. The law leaves it to the creditor to decide whether he wishes to procure the services of either a debt collector or attorney. The law also makes provision for the creditor himself to collect that debt from you by their own internal means i.e. special collections department or internal legal department;

2.3 Should a period of 3 years or more have passed by from the date that the debt became due, the holder of that debt is eligible to:1: invoke the Prescription Act 68 of 1969, different sections applying to different individual situations and 2: serve a prescription claim on the creditor or his attorney wherein prescription is not only claimed but it is requested that the creditor update his systems; provided that.,

2.3.1 The debtor has made no payment to the creditor over a 3 year period;

2.3.2 The debtor has not acknowledged debt to the creditor in written or other means within this 3 year period

2.3.3 The creditor must have not sued out summons against you in this 3 year period,

2.3.4 The debtor must not willfully prevent the creditor from knowing that the debt Exists. (This will normally not be a problem at all since the creditor has the debt Listed on their computer systems and have an account number);

2.3.5 The debtor must not willfully conceal his identity or contact details from the Creditor.(This will normally not be a problem at all since the creditor has all the Debtor's contact details on their computer systems)

2.4 Should the legal exceptions mentioned in 2.3.1 up to and including 2.3.5 not apply to your individual case, then you are eligible for extinctive prescription;

2.5 Should the exceptions mentioned in 2.3.1 up to and including 2.3.5 apply to your individual case, especially acknowledgement of debt and/or actual payments then prescription will start to run afresh!

3. What are the reasons that the law allows your debt to be prescribed?

“3.1 The reasons given for prescription of debts are the following:

3.1.1 After a specified period of time the fault of a creditor (claimant) in taking care of his or her claim should be visited by certain penalties, namely, the extinction or rendering unenforceable of the claim;

3.1.2 Prescription relieves the debtor of having to defend a claim long after the event; and

3.1.3 A state of affairs which has existed for a considerable period of time ought to be legally formalised in the interests of certainty in legal affairs.

4. In general the courts seem to have favoured the idea that the primary purpose of prescription is to punish the slovenly creditor, although fault on the creditor's part is not, and never has been, a requirement for prescription.

4.1 Creditors (claimants) and debtors (defendants) have competing interests

4.2 It is unfair that a debtor should be subject to an indefinite threat of being sued.

4.3 It is in the interests of creditors to have as long as possible to institute a claim.”

5. What does “stay’ prescription mean?

- 1. Stay is just a legal word for delay;**
- 2. Besides events that cause prescription to run afresh such as acknowledgement of debt and actual payments to that account, there are certain events that will not cause prescription to run afresh but rather delay prescription. Let me explain.**
- 3. One factor which will cause prescription to stay is when you are outside the Republic of South Africa i.e. overseas;**
- 4. To illustrate. Mr X takes a personal loan of R20 000 from xyz bank in January 2008. He pays diligently for 6 months up to and including June 2008. He then stops paying for whatever reason. In principle the creditor xyz has 3 years from the date that the debt became due to collect that debt before it prescribes and we’ve addressed that prescription never takes place automatically, you need to claim for prescription i.e. submit a prescription claim. In this example the debt would be due and payable on 30 July 2008, so on the 30 July 2011 the debt becomes eligible for a bona fide prescription claim.;**
- 5. Mr X is aware of this and intends to submit a prescription claim. BUT Mr X has travelled extensively during this period, in 2009 he went to the USA for 3 months, in 2010 he went to Canada for 2 months and in 2011 he went to work in Britain for 4 months and as such his credit bureau reports have been updated and now show that he was employed by leech company. In practice prescription is now “stayed for 9 months, the total of the months that he was outside the country. So we need to add 9 months to the original prescription period before it prescribes. The debt will effectively be eligible for a prescription claim on 30 April 2012;**

6. A meticulous creditor will pick this up on the credit bureau, it is standard practice for a creditor to first check the credit bureaus to see if the debt is still listed before they will even entertain a prescription claim;
7. No xyz has an astute attorney Mr Snake. Mr Snake picks up that Mr X was overseas and now requests a copy of Mr X's passport to essentially prevent the prescription claim from ever taking place and the creditor losing such money;
8. In my opinion(only my humble opinion!) I would argue that it is unreasonable based on the reasonable man concept of law to request a personal document from Mr X on the following basis: 1: The creditor is not the judiciary who by way of a court order can demand a passport; 2: the creditor is not the executive(police force) who by way of a search warrant can seize a passport; 3: the creditor is not an international country who in terms of international law can indeed seize a passport holder's passport should such a person commit a crime on their territories which includes oceans, rivers and water ways; and 4: The creditor is not a South African customs/airport official who can indeed seize a passport for example drug smuggling etc.

6.1 AN EXAMPLE OF PRESCRIPTION(where it applies)

Mr A takes a personal loan from xyz bank in January 2008. Mr A is a diligent and credible man and pays his debt up to and including June 2008. Tragically Mr A loses his Job. The fact that Mr A has lost his job does not preclude a creditor from obtaining judgement against him or collecting the debt from him. The debt becomes due and payable on 30 July 2008. The law grants the creditor xyz 3 years from the date on which the debt becomes due to legally claim the debt either by summons, debt collector, attorney or the creditor's own internal legal/special collections department failing which the debtor becomes eligible for prescription. It's noteworthy that prescription never takes place automatically, the debtor must claim for prescription failing which the creditor can still obtain a judgement or collect that debt. In this example Mr A does not acknowledge debt within a 3 year period nor does he make any payments in that 3 year period so Mr A becomes eligible for prescription on 30 July 2011. Mr A must then claim prescription from xyz bank

6.2 AN EXAMPLE OF PRESCRIPTION(where there is an exception(payment), and prescription runs a fresh)

Mr A takes a personal loan from xyz bank in January 2008. Mr A is a diligent and credible man and pays his debt up to and including June 2008. Tragically Mr A loses his Job. The fact that Mr A has lost his job does not preclude a creditor from obtaining judgement against him or collecting the debt from him. The debt becomes due and payable on 30 July 2008. The law grants the creditor xyz 3 years from the date on which the debt becomes due to legally claim the debt either by summons, debt collector, attorney or the creditor's own internal legal/special collections department failing which the debtor becomes eligible for prescription. It's noteworthy that prescription never takes place automatically, the debtor must claim for prescription failing which the creditor can still obtain a judgement or collect that debt.

Debt collector C, contacts Mr A telephonically on 10 April 2011, 3 months before Mr A becomes eligible for prescription. Debt collector C tells Mr A that they understand his predicament and are very sympathetic to the fact that he lost his job. They inform Mr A that he can even pay R10(ten rand) per month and they will accept this. Mr A deposits R10(ten rand) into the account of debt collector C on 11 April 2011. Prescription now starts to run a fresh from this date 11 April 2011. The debt will now only prescribe on 11 April 2014! The creditor now has 3 more years to collect that debt by suing out summons, a debt collector or their own internal special collections department.

6.3 AN EXAMPLE OF PRESCRIPTION(where there is an exception(acknowledgement of debt), and prescription runs a fresh)

Mr A takes a personal loan from xyz bank in January 2008. Mr A is a diligent and credible man and pays his debt up to and including June 2008. Tragically Mr A loses his Job. The fact that Mr A has lost his job does not preclude a creditor from obtaining judgement against him or collecting the debt from him. The debt becomes due and payable on 30 July 2008. The law grants the creditor xyz 3 years from the date on which the debt becomes due to legally claim the debt either by summons, debt collector, attorney or the creditor's own internal legal/special collections department failing which the debtor becomes eligible for prescription. It's noteworthy that prescription never takes place automatically, the debtor must claim for prescription failing which the creditor can still obtain a judgement or collect that debt.

Debt collector C, contacts Mr A telephonically on 10 April 2011, 3 months before Mr A becomes eligible for prescription. Mr A tells debt collector c that he is unemployed and cannot pay. Debt collector C then tells Mr A that this is no problem, that they understand Mr A's predicament, and are sympathetic to Mr A's predicament. The request that Mr A complete an affidavit to the effect that he is unemployed and this is the reason he cannot pay the debt. Mr A does so and faxes this affidavit to debt collector C on 11 April 2011. Prescription now starts to run a fresh from this date 11 April 2011. The debt will now only prescribe on 11 April 2014! The creditor now has 3 more years to collect that debt by sueing out summons, a debt collector or their own internal special collections department.

7. WHAT ARE THE PRESCRIPTION TIME PERIODS

- 7.1 All debts prescribe in 3 years EXCEPT:
- 7.2 Mortgage bond debt(prescribes in 30 years);
- 7.3 Judgement debt(prescribes in 30 years)
- 7.4 Tax/SARS debts(prescribes in 30 years)
- 7.5 Debt owing to the State such as a loan from the state or lease of land by the state to the debtor(prescribes in 15 years)
- 7.6 Bill of exchange, promissory note, negotiable instrument(prescribes in 6 years)

All other debts prescribe in 3 years

To explain this in another way: in our law all debts except a mortgage debt, judgment debt, taxation debt, any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances, debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, prescribes after three years from the date on which that debt becomes due and payable.

To explain this in yet another practical way, your home-loan (bond), traffic fines and judgments take 30 years to prescribe. Sale or lease of land debts and loans or advances owed to the state(government) prescribe in 15 years. Debts arising from negotiable instruments, bills of exchange or promissory notes prescribe in 6 years

All other debts prescribe in 3 years

8. The following is an extract from the South African Law Reform Commission, discussion paper 126(2011).

“3.1 The reasons given in common law for prescription of debts are the following:

(a) After a specified period of time the fault of a creditor (claimant) in taking care of his or her claim should be visited by certain penalties, namely, the extinction or rendering unenforceable of the claim;

(b) Prescription relieves the debtor of having to defend a claim long after the event;

(c) A state of affairs which has existed for a considerable period of time ought to be legally formalised in the interests of certainty in legal affairs.²⁸

(d) In general the courts seem to favour the idea that the primary purpose of prescription is to punish the slovenly creditor, although fault on the creditor’s part is not, and never has been, a requirement for prescription.

(e) Creditors (claimants) and debtors (defendants) have competing interests. It is unfair that a debtor should be subject to an indefinite threat of being sued. It is in the interest of creditors to have as possible to institute a claim.

Prescription legislation is therefore intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce rights. The imposition of prescription periods has thus been justified on the basis of fairness, certainty and public policy.

Fairness

3.3 It is argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

3.4 The consideration of the principle of fairness is important, for example to enable transactional defects flowing from failure to fulfil formalities to be rectified timeously rather than where state witnesses and relevant documentary evidence are no longer available. This precludes prolonged uncertainty of ownership and encourages social and economic development by removing fear of future litigation.

3.5 Memories can dim with time. Witnesses can die or disappear. Records can be disposed of. Changes (in land values for example, or professional standards) can make it very difficult for expert witnesses to take their minds back to what the situation was some years previously. It can be difficult or impossible for civil engineers (for example) to assess the position if land or chattels are no longer available either in the state they were in at the relevant time or at all.³⁰

3.6 Although plaintiffs may also be affected by deterioration of evidence over the passage of time, it can be argued that a potential defendant is in more vulnerable position than a plaintiff. This is because the plaintiff decides when to commence proceedings, and can use the time before the claim is brought to collect evidence, while the defendant may not even be aware that he or she is at risk of being sued and is therefore unlikely to take any steps to preserve the necessary evidentiary material.

2. Certainty

3.7 Prescription rules prevent procrastination and its adverse consequences. They thus serve a justifiable purpose to which no exception in principle can cogently be taken.

3.8 The main practical purpose of extinctive prescription is the promotion of certainty in the affairs of individuals, and particularly in the relationship between the debtor and creditor.

Public Policy

3.9 It is generally accepted that the public has an interest in resolving disputes as quickly as possible. Prescription periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely.

3.10 It is also recognised that limitation periods help improve the administration of justice. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will deteriorate. It will be considerably more difficult for a court to achieve a just resolution of the dispute if the reliability of the evidence has been affected by the passage of time.”

Saturday, 3 March 2012

All information accurate as at today's date

I sincerely wish you everything of the best with your prescription claim!!!!!!!!!!

Vanash Naick

“without prejudice”