

Prescription of Claims The Importance of Getting It Right First Time

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Recovery proceedings are an important part of claims management and can make a substantial difference to the loss ratio on a book of business underwritten by an insurer. The process of recovery from third parties causing loss to an insured can have a significant impact on an insurer's performance but the process may often be difficult, time consuming and costly making it imperative that insurers take effective measures to recover losses as soon as possible after a claim has been settled.

One of the major pitfalls in the recovery of damages lies in overcoming the raising of a defence of Prescription which may be fatal to a case no matter how strong it may be on the merits. Prescription is the process whereby a debt is extinguished by the passage of time unless the running of prescription is interrupted in terms of s 15(1) of the Prescription Act ("the Act") which provides that prescription is interrupted "by the service on the debtor of any process whereby the creditor claims payment of the debt". Generally speaking, and save for special circumstances, in terms of Sections 10(1) and 11(d) of the Act, the prescriptive period for the recovery of debts is three years; whilst in terms of s 12(1) prescription of any debt begins to run when the debt becomes due. A debt becomes due when the creditor has knowledge of the identity of the creditor and the circumstances from which the debt arose which will be viewed objectively.

The necessity of getting it right first time when a Summons is issued, is amply demonstrated by a recent decision of The Supreme Court of Appeal in the case of *Solenta v Aviation @ Work [2013] ZASCA 103*. In this case the Appeal Court was called upon to decide whether prescription was interrupted by the service of a summons in the name of a company which was not a creditor of the defendant but which was subsequently substituted with the true creditor by means of an amendment affected after the prescriptive period had elapsed. The North Gauteng High Court had previously upheld a special plea of prescription raised by the defendant to a claim made against it in terms of a lease agreement. The appellant contended that the court had erred in this finding stating that although the plaintiff company had been incorrectly described in the summons the process instituted conveyed to the reader the intention of the appellant, as creditor, to claim payment from the debtor.

The trial court in upholding the special plea of prescription followed the decision of *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd 2004 (3) SA 160 (SCA)* holding that the summons that was served upon the defendant in this case, objectively considered, failed to communicate to the defendant the intention of the plaintiff to claim payment of the debt. It concluded that the summons did not meet the requirements of Sec 15(1) of the Act and it did not interrupt prescription.

On appeal the SCA approved of the objective approach adopted in the *Blaauwberg* case which emphasised the importance of certainty in legal relationships through 'an objective outward manifestation of the creditor's intentions as the criterion'. This standard it was held in the *Blaauwberg* case, was not one 'which allows for reservations of mind or reliance on intentions which are not reasonably ascertainable from the process itself'. The subjective knowledge of either party not derived from the process cannot affect the interpretation of the Act or the interruptive effect of the process.

The SCA also referred with approval to the decision of *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd 1995 (4) SA 510 (C)* where the court stated that the fact that the plaintiff may subjectively intend to claim a particular debt and that the defendant may by virtue of extrinsic knowledge appreciate that the plaintiff had wrongly identified the debt in the summons cannot convert the summons into one which interrupts prescription in respect of any debt other than the one identified in the process. It is the process which interrupts prescription, not the plaintiff's subjective intention to sue. In applying the objective test, the Court concluded that the claim made in the summons was, on plain reading, not that of the true creditor and service of that process on the defendant did not interrupt the running of prescription.

This decision emphasises the importance of the utmost care being exercised when resorting to litigation to enforce rights, to ensure that the cause of action is correct in every respect before a summons is issued and to institute legal proceedings as soon as possible after an event has occurred so as to afford sufficient opportunity to fix up any deficiency which may emerge after action has been commenced, or even to commence new proceedings if necessary. Delay in the institution of legal proceedings may prove to be very costly!