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DISPUTE RESOLUTION ALERT

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Mr Links dislocated his thumb and it was amputated in a hospital. It later emerged that he lost his thumb due to the fact that the plaster of Paris, which was fitted by independent medical professionals at the hospital, was too tight on his arm. In *Links v MEC for Health Northern Cape* [2016] ZACC 10, the Constitutional Court analysed s12(3) of the Prescription Act, No 68 of 1969 (Act), finding that prescription did not begin to run on the approximate date when Mr Links' thumb was amputated, but rather, the date on which he had knowledge of all the facts that caused his thumb to be amputated.

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CDH
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AN ANALYSIS OF S12(3) OF THE PRESCRIPTION ACT BY THE CONSTITUTIONAL COURT

A debt will only be due when the creditor has knowledge of the debtor and the facts from which the debt arose, and not a moment sooner.

Mr Links dislocated his thumb and it was amputated in a hospital. It later emerged that he lost his thumb due to the fact that the plaster of Paris, which was fitted by independent medical professionals at the hospital, was too tight on his arm. In *Links v MEC for Health Northern Cape* [2016] ZACC 10, the Constitutional Court analysed s12(3) of the Prescription Act, No 68 of 1969 (Act), finding that prescription did not begin to run on the approximate date when Mr Links' thumb was amputated, but rather, the date on which he had knowledge of all the facts that caused his thumb to be amputated.

A creditor may not institute legal action against the debtor to recover the debt once the period of prescription has run its prescribed course, as the debt would have become extinguished by prescription.

Mr Links only acquired these facts when he consulted doctors and gained access to hospital records. The *Links* judgment thus emphasises that a debt will only be due when the creditor has knowledge of the debtor and the facts from which the debt arose, and not a moment sooner.

The Constitutional Court held that the court of first instance appeared to have overlooked the question whether Mr Links had the full facts necessary for him to institute his claim on or before 5 August 2006. Before the end of August, Mr Links could not have had access to independent medical professionals nor could he have had knowledge of all the material facts that he needed before he could institute legal proceedings. Mr Links did not have reasonable grounds to suspect that his negligent treatment at the hands of the respondent's personnel had caused the amputation of his thumb and the loss of function of his left hand. Prescription could therefore not have begun running before 5 August 2006. The Constitutional Court accordingly held that Mr Links' claim had not prescribed, and in doing so, upheld the appeal and set aside the order made by the court of first instance.

The magnitude of the law of prescription is that there exists no condonation where the institution of the action in the court is out of time. Accordingly, a creditor may not institute legal action against the debtor to recover the debt once the period of prescription has run its prescribed course, as the debt would have become extinguished by prescription.

It is therefore crucial that creditors remain vigilant of the date that prescription commences to run and, in particular, the dates upon which a court may deem a debt to fall due.

According to s12(3) of the Act, "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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

In arriving at its judgment, the Constitutional Court considered the judgment of the Supreme Court of Appeal in *Truter and Another v Deysel* [2006] ZASCA 16, where the SCA held that "'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim".

CDH
CLIFFE DEKKER HOFMEYR

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Knowledge of the cause of his condition was a necessary material fact that a litigant wishing to sue in a case such as this would need to know.

The court also quoted from *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23 where 'cause of action' was defined for the purposes of prescription to mean "every fact which it would be necessary for the plaintiffs to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".

In *Minister of Finance and Others v Gore* NO [2006] ZA SCA 98, the court emphasised that "time begins to run against the creditor when it has the minimum facts that are necessary to institute action" – knowledge is required to trigger the running of prescriptive time.

In the *Links* matter, the Constitutional Court found that until Mr Links had knowledge of facts that would have lead him to realise that there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in s12(3) of the Act. Knowledge of the cause of his condition was a necessary material fact that a litigant wishing to sue in a case such as this would need to know.

As such, once the full facts necessary to institute a claim are present, a creditor must immediately proceed to institute legal action to mitigate against the risk of the claim prescribing.

Pieter Conradie and Boipelo Diale

CDH
CLIFFE DEKKER HOFMEYR

DELAYS ARE JUST THE BEGINNING OF GRAND ADVENTURES – *CATHY CARLTON WILLIS*

In the context of an insurance contract, the accrual of a right to cancel notwithstanding, the insured remains liable for the premium and the insurer liable to insure the risk until the contract is actually cancelled.

The Supreme Court of Appeal confirmed that a party's failure to exercise a right to cancel an agreement within a reasonable time does not necessarily result in the loss of this right.

Contracts of insurance and reasonable delay in exercising a right to cancel.

Contracts generally have a momentum and until they terminate they continue to operate with rights and obligations and money flows. There are circumstances in which a party to a contract may be entitled to cancel but while that party considers its position, time rolls on. In the context of an insurance contract, the accrual of a right to cancel notwithstanding, the insured remains liable for the premium and the insurer liable to insure the risk until the contract is actually cancelled. Regardless of how the right to cancel arose, the right must be exercised within a reasonable time but that begs the question of what that reasonable time might be and what factors a court will take into account in coming to a decision. An insured and/or insurer must at some point exercise an election, failing which it is likely to be inferred that the insurance contract persists.

The case of *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) concerned an agreement for the sale of land for a prospective residential and hotel development from Paradyskloof to the Municipality. Certain suspensive conditions were not met and the Municipality elected to cancel the agreement which decision Paradyskloof challenged. The point of interest in this case is that the court considered the reasonableness of the 13 month period that had passed before the Municipality communicated any intention to resile from the contract.

In its judgment, the court implicitly acknowledged that what is reasonable will depend on the circumstances of each case. In this instance, the parties had been engaging one another in the 13 month period and the Municipality had also sought further legal advice in respect of its rights and position in terms of the agreement. The agreement also included a clause to the effect that no indulgence would be given by either party in respect of the performance of any obligation in the agreement, and that a delay in the enforcement of a right would not constitute a waiver of that right.

The Supreme Court of Appeal confirmed that a party's failure to exercise a right to cancel an agreement within a reasonable time does not necessarily result in the loss of this right. However, the Court noted that the circumstances of the particular matter "may…justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so…". The point being that an unreasonably long delay in exercising a right to cancel may be taken to mean that a decision, one way or another has in fact been taken. On the facts, the Court concluded that there had not been an unreasonable delay in the Municipality's exercise of its right to cancel the agreement and it was accordingly still entitled to exercise the right.

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In the context of insurance agreements, especially where there is not a clause against presumption of a waiver, a court considering a delay will take into account that premiums continue to be paid by an insured, or collected by an insurer or that a renouncement of the insurance agreement is not communicated promptly by an insurer.

This judgment highlights that a delay in exercising a right to cancel an agreement creates unnecessary risk and opens the door for a court to consider the reasonableness of a delay. In that event the court will take into account all of the objective circumstances surrounding the delay including the position of the other contracting party and whether the other contracting party had been misled into believing that the election had already been exercised.

In the context of insurance agreements, especially where there is not a clause against presumption of a waiver, a court considering a delay will take into account that premiums continue to be paid by an insured, or collected by an insurer or that a renouncement of the insurance agreement is not communicated promptly by an insurer. This case shows that delay in exercising a right to cancel is not necessarily fatal but it does expose the parties to unnecessary uncertainty and risk. Cathy Carlton Willis said that "Delays are just the beginning of grand adventures" and that may be so but contracting parties would be well advised to act without delay and avoid the grand (and painful) adventure of contested litigation.

Tim Fletcher and Philene Spargo

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CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR