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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INSURANCE:

DIVORCE, DEATH AND INSURANCE... AND AN UNHAPPY ENDING!

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On 10 May 2011, almost five years after her death, Mr M proceeded by way of an application in the Western Cape High Court to claim payment of some R8,876,778 based on the life policies. Company Y, a major life insurance provider, did not want to pay Mr M that money because, aside from arguing that his claim had prescribed, there was a suspicion that Mr M had been complicit in his former wife's death. Judge Saldanha found that the claim had prescribed and dismissed it. Mr M was granted leave to appeal to the SCA.

As if there wasn't enough egregious-ness in Mr M's situation already, the SCA first turned to what it referred to as a chronology which "tells a tale of egregious flouting of the rules of this court". Indeed, the SCA then painstakingly reflected each period of delay from 20 March 2014 when Judge Saldanha granted leave to appeal, to December 2015 when the record of appeal was filed in the SCA. Company Y obviously opposed the application for reinstatement and condonation. In answer to Mr M's application for condonation, the court said that "condonation is not to be granted merely because it is sought". It identified the factors to be considered to include the degree of non-compliance, the explanation therefor, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of the SCA and the avoidance of unnecessary delay in the administration of justice. The court then added a further requirement that "there should at least be reasonable prospects of success on appeal. If it appears that an injustice may have been done to a party by a court a quo, then that may be weighed against the degree of his or her non-compliance". It was only in order to determine this final requirement (the prospects of success of appeal) that the SCA was willing to engage with Mr M's other arguments.

Prescription: the SCA rejected Mr M's argument that until a claim has been repudiated by an insurer, the debt does not become due. It held that Mr M was fully aware of the existence of the policies when his wife died and that the debt therefore prescribed three years after her death.

The change to the long-term insurance rules: the court quickly dismissed Mr M's argument that the general principles have changed since the promulgation of a new

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CONTINUED

The case is a strongly worded reminder to litigants and legal practitioners that condonation is not something there merely for the asking and that the rules of court are to be respected and obeyed.

rule 16 under section 62 of the Long-Term Insurance Act, No 52 of 1998 by finding that the rules promulgated in 2004 were applicable in 2005 and 2006 when the policies were taken out. It had no effect on the running of prescription.

Estoppel and waiver: the court found that although Company Y may have added to the false impression created by Mr M's lawyers that Company Y would not rely on prescription, the correspondence and conduct relied upon by Mr M to substantiate his assertion that he had been misled by Company Y's conduct all occurred after the debt had already prescribed. Mr M could also not rely on waiver because no inference could be drawn on the facts that Company Y had an unequivocal intention to abandon its right to rely on prescription.

Reciprocity: an insurance contract, the SCA held, is not reciprocal. Therefore Mr M's argument that Company Y's obligation to pay the death benefits was reciprocal to his obligation to pay the premiums and therefore that section 13(2) of the Prescription Act, No 68 of 1969 would have delayed the running of prescription had to fail. Section 13(2) provides that a debt which arises from contract and which would, but for the provisions of the subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.

Having batted each of Mr M's submissions in turn, the SCA held that there was no reasonable prospect of success on appeal and the application for reinstatement and condonation was dismissed. If Mr M was naughty in not bringing the application until five years after his wife's death, it is certainly true that his attorneys were equally naughty in their delay in bringing the appeal. The case is a strongly worded reminder to litigants and legal practitioners that condonation is not something there merely for the asking and that the rules of court are to be respected and obeyed.

Megan Badenhorst and Tim Fletcher

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