28 SEPTEMBER 2016

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

COMMERCIAL:

TOO LATE TO JOIN THE PARTY?

What happens when one institutes proceedings against a defendant and only later realises that another defendant should have been joined?

ADMINISTRATIVE AND PUBLIC LAW:

E-TOLLS: GAUTENGERS TO PAY BUT CAPETONIANS NOT?

Given the latest judgment in the Supreme Court of Appeal in the matter of *SANRAL vs The City of Cape Town*, Capetonians do not have to pay e-toll tariffs. This finding justifiably resulted in Gautengers asking why they have to pay e-toll tariffs since the 2013 judgment of the same court in the well-known *OUTA* case, when the Capetonians get off scot-free.

CDH
CLIFFE DEKKER HOFMEYR

COMMERCIAL:
TOO LATE TO JOIN THE PARTY?

The Rules of Court specifically provide for a procedure for joining a new defendant to an existing action.

Peter Taylor and Associates contended that the claim against it had prescribed, as service of the joinder application was insufficient to interrupt prescription against it.

What happens when one institutes proceedings against a defendant and only later realises that another defendant should have been joined?

The Rules of Court specifically provide for a procedure for joining a new defendant to an existing action. The procedure is relatively simple: the plaintiff brings an application to join the new defendant to the main action. Once this joinder application is successful, the plaintiff amends its particulars of claim to include the new defendant/s and the new defendant can thereafter enter a plea. The main action then proceeds as normal.

The joinder application procedure is more convenient than instituting fresh proceedings against the new defendant, as it allows the plaintiff to deal with their claim against both defendants at once and reduces costs. But does the service of an interlocutory joinder application interrupt prescription against a new defendant?

A claim generally prescribes three years after a debt becomes due. The Prescription Act, No 68 of 1969 (Act) provides that prescription is interrupted when the debtor is served with any "process" whereby the creditor claims payment of the debt. Therefore, where a summons is served on a defendant, there is no question that prescription is interrupted.

The Act, however, is not clear as to whether this "process" includes a joinder application. The lower courts have handed down conflicting decisions on this topic.

Then came *Peter Taylor and Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA).

In the *Peter Taylor* case, Bell Estates sued the underwriter of an insurance policy, as it had repudiated a claim made by Bell Estates under the policy. Bell Estates later became aware that the underwriter's repudiation arose due to the fact that its insurance broker, Peter Taylor and Associates, had been negligent. As a result, Bell Estates attempted to join Peter Taylor and Associates to the main proceedings by way of a joinder application.

The joinder application was served on Peter Taylor and Associates within the three year prescription period, but the application was not finalised until after the expiry of the three year period. Peter Taylor and Associates contended that the claim against it had prescribed, as service of the joinder application was insufficient to interrupt prescription against it.

The Supreme Court of Appeal (SCA) concluded that the test to determine whether a specific "process" (in this case the joinder application) is sufficient to interrupt prescription, is two-fold:

- firstly, the court must look at whether the joinder application and the main claim (for payment of the debt) are sufficiently close to one another; and

CDH
CLIFFE DEKKER HOFMEYR

COMMERCIAL:
TOO LATE TO JOIN THE PARTY?

CONTINUED

It is extremely important that all potential defendants be cited in an action well within the prescribed time period, and that any parties who have not been cited are joined as soon as possible.

- secondly, in order to determine whether the two are sufficiently close, it must be determined whether the issues raised in the joinder process, finally dispose of any elements in the main claim.In light of this test, according to the SCA, a joinder application would not finally dispose of any elements relating to the liability of Peter Taylor and Associates and therefore does not constitute a "process" for the purpose of interrupting prescription.

One could argue that this approach is inconsistent with the general purpose of prescription: to penalise unreasonable inaction on the part of the creditor. In an instance where a notice of joinder is served on the new defendant before the claim has prescribed, it is incorrect to claim that there has been inaction on the part of the plaintiff in prosecuting its claim against the new defendant.

In light of this judgment, it is extremely important that all potential defendants be cited in an action well within the prescribed time period, and that any parties who have not been cited are joined as soon as possible.

Alternatively, when prescription is looming, a plaintiff would be wise to issue a separate summons against the new defendant after which they can take steps to consolidate the two actions.

Fiorella Noriega Del Valle and Jonathan Ripley-Evans

CLICK HERE to find out more about our Dispute Resolution practice.

CDH
CLIFFE DEKKER HOFMEYR

ADMINISTRATIVE AND PUBLIC LAW:
E-TOLLS: GAUTENGERS TO PAY BUT CAPETONIANS NOT?

The Supreme Court of Appeal found that it was in the interests of justice to condone the late application by the City of Cape Town but previously found - in the OUTA case - that it was not in the interests of justice to condone OUTA's late filing.

Given the latest judgment in the Supreme Court of Appeal in the matter of *SANRAL vs The City of Cape Town*, Capetonians do not have to pay e-toll tariffs. This finding justifiably resulted in Gautengers asking why they have to pay e-toll tariffs since the 2013 judgment of the same court in the well-known *OUTA* case, when the Capetonians get off scot-free.

Two judgments in the same court but with two different results. Why? In both cases, OUTA and the City of Cape Town had to apply for condonation for the late filing of their applications. The City of Cape Town was successful in its condonation application whereas OUTA did not succeed despite the finding, in both cases, that the delay in bringing the court cases was unreasonable.

The Supreme Court of Appeal considered the interest of justice requirement in both the *City of Cape Town* and *OUTA* matters when it exercised its discretion as to whether it should grant condonation for the late filing of the applications. It found that it was in the interests of justice to condone the late application by the City of Cape Town but previously found - in the OUTA case - that it was not in the interests of justice to condone OUTA's late filing. Why?

The circumstances of the *Cape Town* case were different to those in the *OUTA* case. The road works have not commenced in Cape Town and the amount (already spent) of approximately R136 million is relatively small in comparison to the huge costs of the entire SANRAL project in Gauteng worth R22 billion. In the *OUTA* case the upgrades of the highways had already been completed and were due to be paid for by the time OUTA launched the application to review and interdict the implementation of the e-toll system. Without e-tolling, SANRAL's R22 billion debt, along with interest which was "running at an alarming rate", would remain unpaid. The Supreme Court of Appeal found that the five-year delay in bringing the review application was unreasonable and that it was contrary to public interest to attempt to "undo history". The Supreme Court of Appeal's Judge Brand said "the clock cannot be turned back to when the toll roads were declared, and I think it would be contrary to the interests of justice to attempt to do so".

If SANRAL starts the process afresh by implementing e-tolling in Cape Town and getting it right the second time, Gautengers may find some (cold) comfort in the fact that Capetonians may eventually also have to "cough up".

If SANRAL starts the process afresh by implementing e-tolling in Cape Town and getting it right the second time, Gautengers may find some (cold) comfort in the fact that Capetonians may eventually also have to "cough up".

Pieter Conradie

CLICK HERE to find out more about our Administrative and Public Law team.

CDH
CLIFFE DEKKER HOFMEYR

International Arbitration
NEWS BULLETIN

The Mumbai Centre for International Arbitration (MCIA), India's first major centre for commercial arbitration, will be launched in Mumbai on 8 October 2016.

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016
Cliffe Dekker Hofmeyr
BAND 2
Dispute Resolution

The LEGAL 500
2015-2016
Ranked Cliffe Dekker Hofmeyr
TIER 2
FOR DISPUTE
RESOLUTION

2013
HIGHEST
RANKING
of Client Satisfaction
amongst African Firms
Legal Week

NO.1
6
YEARS IN A ROW
for client service excellence
#6YearsInARow
pmr.africa

CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016

CDH
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

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

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 THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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