

# DISPUTE RESOLUTION ALERT

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CLIFFE DEKKER HOFMEYR

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### Seeing the picture before the puzzle is complete: When does prescription begin?

Prescription is the indifferent friend of debtors and the foe of creditors. Most debts prescribe three years after the creditor becomes aware (or could reasonably have become aware) that they are due. The Prescription Act does not forgive a tardy creditor; if they can see a picture that creates a reasonable suspicion, even if they do not have all the puzzle pieces yet, they must act. The Supreme Court of Appeal's recent judgment of *WK Construction (Pty) Ltd v Moores Rowland* [2022] ZASCA 44 (6 April 2022) illustrates this point.



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The financial manager of WK Construction uncovered extensive fraud by a director of the company who had siphoned millions of rands from the company over several years with little or no paper trail. Although WK Construction was able to recover a lot of the stolen money from the director (Mr Maartens), the recovery was not complete and on 23 August 2016, WK Construction launched an action against its auditors, Mazars, for damages. Mazars argued that three years before WK Construction brought its claim, it ought reasonably to have known that it had a potential claim. That supported the conclusion, so the auditors said, that the claim had prescribed.

In response, WK Construction argued that it only knew Mazars owed it a debt when Maartens couldn't pay any more, and that was less than three years before the summons was issued. The court disagreed, finding that the ability of the first culprit to pay is irrelevant to the prescription of the debt of the second culprit.

WK Construction also argued that the High Court was wrong to conclude that WK Construction knew of Mazars' alleged negligence when the auditors provided "clean" auditing reports despite the company already being aware that it had been defrauded. WK Construction claimed that, on 22 August 2013 (being three years prior to the service of summons), it lacked the evidence necessary to prove Mazars' negligence. This argument was also rejected as prescription begins when a debtor "can prove its case", not when the

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## Seeing the picture before the puzzle is complete: When does prescription begin?

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debtor has all the evidence needed to “comfortably” prove its case. This means that a debt becomes due once the claimant has enough puzzle pieces to reasonably see what the picture is, not when the claimant has every piece and every piece is in place. The directors of WK Construction knew of the fraud by 22 August 2013, and on this date they also knew that Mazars had not detected the fraud. They had all the

necessary facts to reasonably suspect that Mazars was negligent, even if they did not have all the evidence. On that basis the appeal court upheld the decision of the High Court that WK Construction’s claim had prescribed.

It is worth repeating that a creditor cannot afford to wait for the completed puzzle. If the picture the creditor sees, albeit an incomplete picture, creates a reasonable suspicion that a debt is due, the creditor will fail to act at its peril.

**TIM FLETCHER, LISA DE WAAL AND KEAGAN HYSLOP**

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