16 OCTOBER 2019

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

"Till dissolution do us part?"

There is no escaping the fact that the Matrimonial Property Act, No 88 of 1984 (MPA) provides for the date of determination of the accrual in a divorce action to be set at the date of dissolution of the marriage; whether it be at death or divorce. The question is whether the strict interpretation of this provision provides for a practical consideration of the divorce of two individuals, and the protection of their respective rights, or whether there should be an amendment to the MPA to change the date of determination of the accrual (and therefore the calculation of each respective parties' estates).

I love it when you talk foreign! Foreign debtors may not be as far away as you think

Under South African law, the prescription of debts is regulated by the Prescription Act, No 68 of 1969 (Act). A debt is said to prescribe after a certain period of time has lapsed from the date on which it became due. The result of a debt prescribing is that the creditor can no longer initiate legal proceedings to recover the debt in question.

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE

For more insight into our expertise and services

"Till dissolution do us part?"

It is likely, as a result of the parties having been separated for quite some time, that the quantum of their respective estates would have altered substantially during this period – between the date of issue of summons and the date of the decree of divorce.

There is no escaping the fact that the Matrimonial Property Act, No 88 of 1984 (MPA) provides for the date of determination of the accrual in a divorce action to be set at the date of dissolution of the marriage; whether it be at death or divorce. The question is whether the strict interpretation of this provision provides for a practical consideration of the divorce of two individuals, and the protection of their respective rights, or whether there should be an amendment to the MPA to change the date of determination of the accrual (and therefore the calculation of each respective parties' estates).

Due to the emotional nature of divorce proceedings, as well the current backlog of our court rolls, a defended divorce action may take years to reach finality. It is likely, as a result of the parties having been separated for quite some time, that the quantum of their respective estates would have altered substantially during this period – between the date of issue of summons and the date of the decree of divorce.

In the unlikely event of one spouse winning the lotto during this period, is it fair that this fortune be included in the determination of the parties' respective estates on calculation of the accrual? Conversely, does it not pose a greater risk, whilst parties are in the midst of lengthy divorce proceedings, for one party to succeed in maliciously dissipating his/her assets in order to benefit in the accrual calculation? This, on a practical level, is required to be revisited by the legislature as it could pose serious prejudice to one spouse in either of the above situations.

Brassy AJ was alive to this consideration, and the possible prejudice thereof, in *MB v NB 2010* (3) SA 220 (GSJ), in that he contemplated when that moment, with reference to each party's respective estates, is to be crystallised. Brassy AJ found that the operative date is at the date of *litis contestatio* (the date of close of pleadings in an action), and the value of each party's estate should be secured at this date – for as long as the divorce proceedings endure.

It is clear that Brassy AJ did not exclude s3(1) of the MPA from his deliberation since the judgment states that s3(1) of the MPA *"establishes the moment at which the contingent right becomes perfected .... at the moment when the divorce court makes the applicable order"*. Brassy AJ did not view the date of dissolution of a marriage as the moment the parties' respective estates should be quantified but instead considered s3(1) as the provision which creates the contingent right – which is perfected at the date of the divorce order.

This authority is confirmed in *MB v DB 2013* (6) SA 86 (KZD). Sutherland J, however highly criticised this approach in *JA v DA 2014* (6) SA 233 (GJ), finding that

"Till dissolution do us part?"

...continued

The question is whether the legislature should effect amendments to the MPA in order to confirm that *litis contestatio* is not just a "*banal*" event but instead the moment at which the quantum of the respective parties' estates is crystallised.

"*litis contestatio* is an archaic label for a banal event: the moment when no more pleadings may be filed. It is the moment when the formulation of the contending propositions have all been put on record". Sutherland J further found that the date of dissolution, as per s3(1) of the MPA, is not open for interpretation as it specifically provides for the relevant date of the calculation of the accrual (being the date of the divorce decree).

Although these judgments have been raised in matters before the Supreme Court of Appeal, the Court has yet to make a final determination in respect of the contradictory case law.

The question is whether the legislature should effect amendments to the MPA in order to confirm that *litis contestatio* is not just a "*banal*" event but instead the moment at which the quantum of the respective parties' estates is crystallised. Surely this should be the position, not only for practical considerations but since it is far more commercially acceptable?

Taking into consideration that the parties have elected to separate and no longer share a day-to-day relationship, it seems appropriate that the date of close of pleadings in a divorce action should be the date of calculation of the accrual, and that the subsequent enforcement of that accrual calculation (the date on which the right is perfected), should remain at date of divorce, as per the MPA.

In the interim, before the above question is finally determined, legal practitioners who are particularly alive to the practical and commercial advantages of the date of determination of the accrual being set at *litis contestatio* should consider, in consultation with their clients, including this provision in antenuptial contracts, or even to take it a step further to include the operative date, for accrual purposes, as the date of separation of the respective parties should they ever divorce. The effect would crystallise the quantum of the parties' respective estates at the date of the termination of the relationship.

The question remains for all parties engaged in current divorce proceedings: "*Till dissolution do us (financially) part?*"

Claudette Dutilleux

CDH
CLIFFE DEKKER HOFMEYR

I love it when you talk foreign! Foreign debtors may not be as far away as you think

This provision provides for an automatic delay of the period of prescription if the debtor is outside the Republic and will only be completed a year from the date of the debtor's return.

Under South African law, the prescription of debts is regulated by the Prescription Act, No 68 of 1969 (Act). A debt is said to prescribe after a certain period of time has lapsed from the date on which it became due. The result of a debt prescribing is that the creditor can no longer initiate legal proceedings to recover the debt in question.

Of importance is s13(1)(b) and s13(1)(i) of the Act that sets out the circumstances in which prescription will be delayed when a debtor is outside the Republic. It provides that:

> *"If -*
>
> ...
>
> (b) *the debtor is outside the Republic; and*
>
> (i) *the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (b), has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in para (i)."*

This provision provides for an automatic delay of the period of prescription if the debtor is outside the Republic and will only be completed a year from the date of the debtor's return.

In the matter *Silouette Investments Ltd v Virgin Hotels Group Ltd* [2009] 4 All SA 617 (SCA), the Supreme Court of Appeal (SCA) had to interpret the meaning of the phrase "outside the Republic" as contemplated in the Act. It was argued on behalf of the appellant creditor that the prescription of the appellant creditor's claim had been interrupted, in terms of s13(1)(b) of the Act, because at all material times the respondent debtor had been outside the Republic. This submission was because the respondent debtor was a foreign company, incorporated and registered in the United Kingdom, with its chosen *domicilium* address in London and not in South Africa.

The court dismissed this argument and held that the legislature envisaged the absence of a debtor as an impediment for a creditor to institute legal proceedings and further held that:

> *"Where, as in the present case, the debtor has not only consented to the jurisdiction of the South African Courts (by way of a jurisdiction clause in the contract) but also agreed to accept service of process, care of its South African attorneys, there is no circumstance which gives rise to a problem which creates a difficult or undesirable situation for a creditor seeking to institute legal proceedings against the debtor in this country...I think that to interpret the phrase "outside the Republic" as covering a case where, although the debtor itself is physically outside the Republic, it has consented to the jurisdiction of*

I love it when you talk foreign! Foreign debtors may not be as far away as you think...*continued*

The Court ultimately found that it would go beyond the purpose of s13(1)(b) if it were held that the respondent debtor was outside the Republic for the purposes of interrupting prescription as the impediment had been removed.

the South African courts in respect of a claim and has a representative here whom it has authorised to receive service on its behalf of any process in which the claim in question is sought to be enforced would give a meaning to the provision under consideration which Parliament could never have intended".

The Court ultimately found that it would go beyond the purpose of s13(1)(b) if it were held that the respondent debtor was outside the Republic for the purposes of interrupting prescription as the impediment had been removed.

Creditors need to err on the side of caution when seeking to institute legal proceedings against foreign debtors. The debtor may not be regarded as being outside the Republic for prescription purposes and thus the phrase "the sooner the better" is applicable to any legal proceedings to be instituted against the debtor.

Burton Meyer, Denise Durand and Thabo Mkhize

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

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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

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

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

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

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

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

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

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

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@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

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

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

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

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

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

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

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR