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DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

Nothing quite so strange as the truth

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The perennial *Pereira* principle prevails

Can a contingent right to claim indemnification under a liability policy prescribe prior to determining the liability of the insured, and the extent thereof?

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Once upon a time in Johannesburg, two boys were enrolled at Pridwin Preparatory school – a fancy all-boys private junior school. Their parents behaved badly, and the boys were expelled. Everyone ended up in the Constitutional Court where the horizontal application of the Bill of Rights to agreements between private parties was confirmed. Sounds like a fairy tale but it's not.

The parents signed contracts with the school; so far so good. But over eight months, the parents - mainly the father – commenced a "*persistent and alarming harassment of Pridwin's staff*" (*AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12 (17 June 2020)) and there were several incidents that came "*dangerously close to outright physical violence*". Most of the incidents related to sport and many took place publicly at school sporting fixtures. One of the more bizarre incidents saw the father engage the services of an accountant to audit the recording of his son's runs at a school cricket match.

Despite the father agreeing with the school's principal that he would refrain from coaching, offering advice to boys, stop publicly criticising umpires and abide by all refereeing and selection decisions, he didn't and the problems got worse. So, the principal decided to cancel the Parent Contract, effectively expelling the boys, under a clause permitting cancellation at any time and for any reason, provided that the school gave a full term's notice.

The parents went to court to challenge the validity of that clause in the parent contract. In the meantime, the boys had moved on to another fancy all-boys private school. The parents lost in the High Court and the Supreme Court of Appeal and brought their final appeal to the Constitutional Court where the principal issues were the right of a child to be heard and the right of a child to a basic education. On the first point, the majority of the Constitutional Court found that Pridwin did not sufficiently ponder the best interests of the boys when it decided to terminate the parent contract and exclude the boys from the school. Pridwin did not

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give the boys an opportunity to be heard, a right that must be explicitly observed, nor did it allow representations concerning their best interests.

On the right to a basic education, both the High Court and the Supreme Court of Appeal had found that Pridwin and similar independent educational institutions don't provide basic education and therefore the obligations that flow from section 29(1) of the Constitution don't apply. The Constitutional Court disagreed, finding that the term "*basic education*" refers to the content of the right to education. Neither the nature of the entity providing the education nor how that entity acquires its obligation to provide education is relevant in determining if what is offered is "*basic education*". They found accordingly that independent schools do provide basic education.

Following the same line of reasoning, the Court was also of the opinion that the right to basic education is independent of the parent contract and arises from the fact that the children receive a basic education. Pridwin did not have an obligation to provide basic education, but when providing such an education, the school acquired the constitutional duties resting on any other educational institution, whether public or private.

By acknowledging the positive constitutional obligations between private parties, specifically that the best interests of the child should take a central role in decisions made by private educational entities providing basic education, the Constitutional Court reinforced and expanded the horizontal application of the rights in the Bill of Rights. Pridwin and other independent schools, many of which include a right to terminate without cause in their parent contract, will have to draw a line through that section of the contract and take some time to consider the best interests of the child, including all of the other children in the school, before cancelling any parent contract. Not a bad outcome for independent schools and their flock, all things considered.

But we are left with a whole lot of questions. Why did the Supreme Court of Appeals prefer a strict contractual approach to the horizontal application of constitutional principles? Is there a growing division between that court and the Constitutional Court? Why is the Constitutional Court hearing disputes that are moot? How broadly will we see the horizontal application of the Constitution extend in the future? Fraught questions that will no doubt provide welcome entertainment to legal propeller heads during the lockdown.

The rest of us are grappling with the irony of these parents emerging as champions of the rights of children and wondering how all this hullabaloo can be in the best interests of their kids.

Tim Fletcher, Yana van Leeve and Ciara Quinn

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The perennial *Pereira* principle prevails

In terms of section 12(1) of the Prescription Act 68 of 1969 (Prescription Act), prescription commences to run the moment the debt is said to have fallen *due*.

Can a contingent right to claim indemnification under a liability policy prescribe prior to determining the liability of the insured, and the extent thereof?

In terms of section 12(1) of the Prescription Act 68 of 1969 (Prescription Act), prescription commences to run the moment the debt is said to have fallen due. Given the nature of liability provisions contained in standard indemnity insurance contracts, ascertaining when exactly prescription commences to run, can at times prove a tall order. Can my claim to indemnification prescribe, if my liability to a third party has yet to be determined? Does prescription run the moment the third party claims damages for the harm occasioned? What if my liability has been determined, but the extent thereof has not been established? These questions were the subject matter in the case of *Magic Eye Trading 77 CC v Santam Limited* (775/2018) [2019] ZASCA 188 (*Magic Eye Trading*).

The appeal arose out of a delictual damages claim brought by Imperial Cargo (Pty) Ltd (Imperial), against Magic Eye Trading 77 CC (insured), for the damage occasioned to its truck, as a result of the culpable conduct of a driver in the employ of the insured. As is commonplace in incidents of this nature, the insured resolved to join Santam Limited (insurer) as a third party, pursuant to an insurance contract issued in its favour which included, *inter alia*, an indemnity policy against loss incurred as a result of liability to third parties. The insurer filed a special plea, contending that the claim relied upon by the insured, had fallen outside of the three-year window period prescribed by section 11 of the Prescription Act.

The kernel of the insurer's contention was that, upon the occurrence of the defined event, or the insured's knowledge thereof, the right to claim indemnification under the liability policy had fallen due, and thus the running of prescription commenced immediately thereafter. In its special plea, the insurer set out three possible dates, upon which it alleged the claim had fallen due, namely:

(i) the date of the accident, which was the defined event contemplated in the insurance policy;

(ii) the date the insured gave written notice to the insurer; or

(iii) the date the insurer repudiated the claim as a result of the insured's non-compliance with certain policy conditions relating to the submission of documents.

The insurer averred that the claim had prescribed, regardless of which of the above three dates the claim was said to have fallen due.

In its replication, the insured averred that prescription only ran from the moment they paid the claim against them or became legally liable to do so, for a set amount. Additionally, the insured contended that the reference to 'claim' in the respective policy, referred to the indemnity claim made by the insured and not the third party claim. The latter claim, they averred, had to be for a set amount and could not have ripened until the insured's liability, as well as the extent thereof, had been determined.

The perennial *Pereira* principle prevails...*continued*

The SCA ruled in favor of the insured, confirming that the well-established principles emanating from Pereira remained good law.

This brought to the fore what can be best described as an ostensible impasse between, "*what at first blush, [appeared] to be two diametrically opposed decisions emanating*" from the SCA. These were the cases of *Truck and General Insurance* relied upon by the insurer, and *Pereira* which was relied upon by the insured. The apparent principle emerging from *Truck and General Insurance*, or so the insurer's argument went, was that a claim to be indemnified against liability, arose as soon as the insured suffered loss, notwithstanding the fact that the extent of the insured's liability had not yet been determined. Conversely, in *Pereira*, it was held that a claim to be indemnified against liability to a third party, arose only once the insured's liability, as well as the extent thereof, had been established by means of an agreement or through legal process. Moreover, any provision contained in the policy requiring the insured to institute action proceedings within a stipulated period, following a repudiated claim, could only apply to a claim made for a fixed amount.

The SCA ruled in favour of the insured, confirming that the well-established principles emanating from *Pereira* remained good law. Additionally, the facts of *Truck and General Insurance* were rendered distinguishable from the matter before the court, as a fixed amount had been sued for and the issues separated – only the liability of the insurer *vis-à-vis* the insured was dealt with in that instance. Thus, the insurer's reliance on *Truck and General Insurance* as having purportedly overruled *Pereira* was

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The perennial *Pereira* principle prevails...*continued*

A vested right comes into existence, when all of the investitive facts required for its creation, have occurred or are certain to occur.

ill-founded. The court concluded that a claim for indemnification made pursuant to a liability policy, could only arise once the insured's liability to the third party, and the extent thereof had been determined. Consequently, the debt becomes due, for the purposes of prescription, only when the insured is legally liable to pay a fixed amount.

Further reflections on the distinction between a claim and a contingent claim.

As is evident from the foregoing, the outcome of the case rested squarely on the distinction drawn between a claim and a contingent claim. Although not consistently referred to as such, upon closer inspection, the terminology used by the court i.e. 'claim' and 'contingent claim' are merely shorthand terms for rights that are vested, in respect of the former, and rights that are contingent, in the case of the latter. This distinction generally describes what is commonly referred to in jurisprudence as one's *title* to a right – the degree of which, depends upon the occurrence of a fact or set of facts required to bring the right into existence, otherwise known as investitive facts.

In this regard, a vested right comes into existence, when all of the investitive facts required for its creation, have occurred or are certain to occur. The title of such a right is described as complete and unconditional, as its completion no longer depends on the occurrence of an uncertain future event. By contrast, a contingent right comes into existence when one or more of the investitive facts have already occurred, but one or more of the remaining investitive facts required, have not occurred as yet, and may in fact, never occur. In this regard, the title of a contingent right is rendered incomplete and conditional, given that there is no certainty as to whether the investitive facts that are yet to occur, will in fact do so. (See Price 'Spei, contingent and vested rights: Towards the clear and consistent regulation of future uncertainty' (2005) *Responsa Meridiana*)

It is trite that the importance of this distinction extends far beyond the confines of insurance law, however, for present purposes our reflections pertain exclusively to the distinction as it relates to indemnity policies. Upon the conclusion of an indemnity insurance contract, rights and duties are created between the insurer and the insured respectively. On the one hand, the insurer has the duty to indemnify the insured against loss proximately occasioned by the perils insured against – the insured on the other hand, has the correlative right to indemnification, conditional upon the occurrence of the insured event.

At this point, it can be said that the nature of the insured's right to indemnification is incomplete, or conditional upon, *inter alia*, the occurrence of an uncertain future event, or to borrow from the parlance of jurisprudence, an investitive fact that is yet to occur, and may in fact, never occur. Consequently, the insured merely has a contingent right to indemnification.

The perennial *Pereira* principle prevails...*continued*

The insurer's duty to indemnify the insured only arises when the insured has a complete and unconditional correlative right to indemnification, in terms of the insurance policy.

Whether the insured's contingent right to indemnification will become 'complete' – giving rise to a vested right to indemnification – depends upon (i) the fulfillment of any suspensive conditions which the insurance contract may have been subject to; (ii) the occurrence of the insured event, during the currency of the insurance contract; (iii) the insured suffering some form of loss; and (iv) a causal nexus between the occurrence of the insured event and the loss suffered by the insured. The occurrence of these combination of 'facts' is inherently uncertain, therefore, the insured merely holds a contingent right to indemnification – at least until the full complement of facts occur or are certain to do so. (see LAWSA 'Insurance Part 1' Volume 12(1) 2nd Edition para 347-348)

The insurer's duty to indemnify the insured only arises when the insured has a complete and unconditional correlative right to indemnification, in terms of the insurance policy. In other words, only when the insured has a *vested right* to indemnification, will the insurer's corresponding debt to the insured fall due, for the purposes of prescription.

As intimated above, the insured can only be said to have a vested right, if she suffers some form of loss. The very nature of liability policies (as a subspecies of indemnity insurance) requires that the insured suffers loss in the form of liability to a third party. The insurer's correlative duty to indemnify the insured, cannot arise if the loss suffered by the insured has yet to be determined. Pending the determination of this amount – which remains uncertain – the insured cannot be said to have a vested right to indemnification.

Given that the extent of the loss remained uncertain, the court in *Magic Eye Trading* was correct in concluding that the insured's right to indemnification had yet to prescribe, as it was still a contingent right, and as such, prescription had not begun to run. Or to borrow from the parlance of jurisprudence, one of the investitive facts giving rise to a vested right to indemnification had not occurred, and as such, the insured only had a contingent right to claim indemnification, not a vested right, negating any possibility of a debt being *due* on the part of the insurer.

Roy Barendse and Khoro Makhesha

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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.

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