



When does a contingent right to claim indemnification under an insurance policy prescribe?

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Much confusion existed in South African insurance law regarding whether an insured's contingent right to claim indemnification under an insurance policy is capable of becoming prescribed in terms of section 12(1) of the Prescription Act 68 of 1969 before the liability of the insured, and its amount, is determined.

The Supreme Court of Appeal in *Magic Eye Trading 77 CC v Santam Limited (775/2018) [2019] ZASCA "Magic Eye"* addressed this confusion and provided the necessary clarification on this topic.

Distinction between "a claim", "right to claim" and "contingent claim"

There is an important distinction between a claim and a contingent claim.

In *Reinecke v Incorporated General Insurance 1974 (2) SA 84 (A)*, Reinecke subsequent to the repudiation of liability by the insurer, Reinecke sought a declaratory order prior to liability of the insured to the claimants having been determined.

The applicant requested that the insurer should be held liable to indemnify him for losses by a third party, which he may become liable to pay in respect of a motor accident.

The insurer raised a special plea that the application was premature, as Reinecke's liability had not yet been determined and subsequently indemnification was not applicable as yet.

The court found that at the time proceedings were instituted, Reinecke's interest did not represent the ultimate right to claim, but only a contingent right to claim, under the policy for a future occurrence of the specific event, including compensation to third parties for a determined amount.

The nature of the claim was thus contingent. It was accordingly determined that the court had jurisdiction to grant a declaratory order to determine existing, future or contingent rights or obligations. The party seeking such an order cannot claim relief as a consequence of the declaration until the amount is determined.

A distinction was drawn between 'a claim', a 'right to claim' and a 'contingent right to a claim'.

In the judgement delivered on 10 December 2019 in *Magic Eye* the Supreme Court of Appeal (SCA), provided clarity on a longstanding uncertainty in South African insurance law.

The possibility of whether an insured's contingent right to claim indemnification under an insurance policy can become prescribed in terms of section 12(1) of the Prescription Act 68 of 1969 before the liability of the insured, and its amount, is determined.

Imperial Cargo (Pty) Ltd instituted an action for damages in the High Court against Magic Eye Trading 77 CC and Mr. Chetty (who was an employee and driver at the time of the accident).

At the relevant time of the accident, Magic Eye Trading held an insurance policy with Santam Limited (Santam) which included liability cover for damage caused to third parties in an accident involving the Magic Eye Trading insured vehicles.

Magic Eye Trading joined Santam in the High Court action as a Third Party, contending that Santam was bound to indemnify them against any amount for which they were found to be liable, as per their Santam insurance policy.

Santam raised a special plea of prescription, claiming that the matter had prescribed, as indemnification applied on either the date of the accident, the date on which Magic Eye Trading informed Santam of the accident or the date on which Santam repudiated the claim.

The High Court upheld the special plea, relying on *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC* (540/04) [2006] ZASCA 85; 2007 (2) SA 26 (SCA) (31 May 2006) in which it was decided that liability of the insurer to the insured arises as soon as the insured suffers the loss.

In that matter it was decided that the "cause of action" arose when the event occurred, which affected liability, even if the amount of the claim for damages had not yet been quantified.

The High Court found that when Santam rejected the claim for indemnification, on 12 January 2012, this gave rise to a right to approach the court for a declaratory order. Due to the late submission by the appellants in September 2016 (more than three years later) their claim had already prescribed.

Magic Eye Trading appealed to the SCA, arguing that their right to approach the court for a declaratory order could not prescribe prior to their liability to the third party being determined and quantified.

Only after liability was determined and quantified would Magic Eye Trading have a claim against Santam for indemnification against the loss suffered by the third party.

Until determination and quantification of the liability to the third party, the possible claim is not 'a debt' as defined in the Prescription Act and therefore prescription cannot have commenced to run yet.

The Appellants relied on *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A). The Court in the *Pereira* case was confronted with a dispute between an insurer and insured as to whether the insured had disintitiled itself to claim against the insurer, by failing to institute summons within the contractually prescribed period, following the insurer's rejection of the claim for indemnity.

The insured in the *Pereira* case argued that the claim against the insurer could not have contractually prescribed, as the claim for indemnity did not as yet exist and would only exist once the insured was found to be legally liable.

The SCA upheld the appeal and concluded that where the amount of a claim was not yet determined by a Court or agreement, the claim would as yet exist. Furthermore, the contractual requirement per the insured policy to institute summons within a prescribed period after repudiation can only then be applied to a fixed amount.

A practical example of the consequences of the Magic Eye judgement is as follows:

FLY (Pty) Ltd is insured with ABC Insurer. Employee of FLY, Lucky Rodgers, transports goods on behalf of the company and he becomes involved in a collision with a company vehicle which is insured by ABC.

The other party is a private person, Linda Lang, who suffers bodily injuries and damages to her vehicle. Linda takes almost 3 years to institute an action for damages against FLY and Lucky. FLY informs ABC of the claim but the claim is repudiated for reasons FLY does not agree with.

The prescription of FLY's claim for indemnification from ABC Insurer will only commence to run from the moment or event when liability and quantum of damages is determined. Prescription of FLY's claim for indemnification from ABC will not commence until a Court determines liability and the damages amount.

The Court's finding in Magic Eye case has provided certainty that prescription of an insured's claim for indemnification from an insurer, will only commence to run once the insured's liability and the amount of damages has been determined.



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