



## PRESCRIPTION AND ITS EFFECT ON THE APPORTIONMENT OF DAMAGES ACT

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**Section 12(1) of the Prescription Act 68 of 1969** (the Prescription Act) states that "prescription shall commence to run as soon as the debt is due".

### When Does a Debt Become Due?

- It has been held that "debt is due" should be given its ordinary meaning, thus (a debt will be due) when a debt is immediately claimable by a creditor and is immediately payable by a debtor.
- Debt also refers to an obligation to do something or not to do something.

### Prescription periods

- Although the general rule is that a debt prescribes after a period of three years from the date of it falling due for payment, we must note that certain prescription periods exist for different types of debts.
- Moreover, in terms of section 14 of the Prescription Act, prescription is typically interrupted by service of legal processes on a debtor (such as the issuing of summons) or by a tacit or express acknowledgement of debt by the debtor.
- Prescription runs from when a debt becomes due as opposed to when such debt arises.

In the unreported case of *Avante Fishing Enterprises v Rafel Ondermemings CC (4108/05)[2008] ZAECHC 62*, it was held that although one could not precisely quantify future damages at the time of

a breach, this did not change the fact that the date of the breach is the time that prescription begins to run and not when the losses occurred or are able to be precisely quantified.

Therefore, it is important to however note, only when a "creditor" acquires a complete cause of action for the recovery of the debt...when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place", the debt becomes due.

### **Knowledge Requirement Under Section 12(3)**

- Section 12(3) of the Prescription Act states that "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

### **Impact of the Apportionment of Damages Act 34 of 1956**

Sometimes, in life we find ourselves in situations involving a claim of a delictual nature. That is to say, a wrongful act or omission by one person giving rise to a claim for compensation to another. The most prevalent of these types of claims are motor vehicle collisions.

In cases involving motor vehicle collisions, where the Defendant argues that the Plaintiff also contributed to the negligence, the **Apportionment of Damages Act 34 of 1956** comes into play. In such situations, Defendants often counterclaim, but delays in instituting legal actions including a counterclaim can raise prescription issues.

When institution of action is left to the very last minute, this delay will have effect on Defendant filing a counterclaim and may result in the Defendant instituting his counterclaim beyond the prescriptive period (typically three years under the **Prescription Act 69 of 1969**). This would ordinarily mean the counterclaim has prescribed. However, **Section 1(2) of the Apportionment of Damages Act** addresses cases where both claims arise from the same incident. This provision prevents a Plaintiff from recovering damages if they assert that the Defendant's counterclaim has prescribed in the same cause of action.

The aforementioned was considered and decided in the matter of ***Vaal Maseru Busdiens (Edms) Bpk v Wascon Siviell CC 2003 (3) SA 226 (O)***, this case being a prime example of this principle. In this case, the Defendant's counterclaim, filed beyond the three-year period, was subject to a special plea of prescription. Although the counterclaim was time-barred, the Plaintiff's reliance on the prescription to avoid the counterclaim triggered Section 1(2), leading the court to dismiss the Plaintiff's claim entirely.

The Court concluded that the Plaintiff qualified as a claimant who avoided liability by relying on prescription; that the Plaintiff pleaded and proved prescription of the Defendant's claim and that the Plaintiff had thus forfeited the right to recover the damages from the Defendant. Accordingly, the Plaintiff's claim was dismissed with costs.

## Conclusion

South African law on prescription balances fairness and legal certainty. The timing of when a debt becomes due, the knowledge requirements for prescription, and the interplay with suretyship and delictual claims ensure that both creditors and debtors are treated equitably under the prescriptive framework. Therefore, the outcome of reliance on prescription for a counterclaim under the same cause of action can backfire. The Plaintiff, while avoiding the Defendant's counterclaim on the basis of prescription, may ultimately lose their own claim as a result, as seen in the **Vaal Maseru** case.

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