

WHEN DOES A PERSON'S RIGHT TO CLAIM AGAINST YOU END?

Understanding legal prescription

Your civil legal liability to a person does not last forever. Justice requires that a person pursue any claim that they may have against you within a reasonable period of time and if they fail to do so that their right to claim against you be forfeited.

The period that you have within which to legally enforce a claim is known as the 'prescription period.' After the running of the prescription period the claim is said to have 'prescribed'.

The Prescription Act 68 of 1969 governs the issue of when a claim will be deemed to have prescribed. After the prescription period has elapsed you can therefore raise the defence that the claim has prescribed and that the claimant therefore has no legal entitlement to enforce the claim against you.

However, you need to be aware that should you pay the claimant the alleged 'debt' that you owe them, even though the 'debt' has in fact prescribed- you will not be able to recover your payment. Prescription of a 'debt' needs to be alleged up front as a defence to a claim.

The general rule in terms of prescription of a claim is that that claim will 'prescribe' (lapse) 3 years from the date that:

1. the 'harm' occurred or from the date that the 'debt' became due; and
2. the person making the claim became aware of the identity of the person who caused them to suffer the loss (they obviously have to have exercised reasonable diligence in ascertaining this).

Prescription of a claim will only begin to run once the claimant is aware that they have suffered a loss.

To give an example: An architect designs a building which (due to a design defect) falls down 10 years after it was built. Prescription of the claim does not begin to run from the date that the architect completed the project. It begins to run from the date that the loss is suffered, i.e. 10 years later when the building falls down and the loss is made evident.

Alternatively, if it was evident 5 years after the building was built that there are cracks in the wall and that the design was defective and needed to be rectified to prevent the building from falling down, then prescription of the claim would begin to run then- because prescription is deemed to start running from the time that the claimant becomes aware that they have suffered a loss, or ought reasonably to have become aware that they have suffered a loss.

If a person purposefully takes steps to avoid the loss coming to the attention of the claimant- then this would delay the running of prescription of that claim.



The general rule in terms of the Prescription Act is that most 'debts' (as they are referred to but this includes losses, etc.) are deemed to have prescribed within 3 years from the date that the 'debt' became due or from the date that the claimant became aware of the loss or from the date that he ought reasonably to have become aware that he had suffered a loss.

There are exceptions to the general rule. For example, prescription of a minor's claim does not occur until one year after the day on which they reach the age of majority or three years after the date that they became aware of their loss (whichever provides the minor with the longest period). Therefore, if you treat a 6-year-old, your liability toward that patient extends until they reach the age of 19.

If you treat a 17-year old- they would still have the usual 3-year period within which to claim against you.

This is why the insurance premiums for obstetricians and gynaecologists are so high. Not only are the claim amounts generally high, but they also have a very long-tail exposure of 19 years from each birth they are involved in (or treatment of the mother prior to birth).

Other exceptions to the 3-year period are any debt secured by a mortgage bond, any judgement debt, any debt arising from any tax imposed, levied by or under law, which would all have a 30-year prescription period!

Prescription of a claim may also be delayed by certain events. For example, if prescription of a claim has run for 2 and a half years and then the debtor leaves South Africa for 6 months. When the debtor returns to South Africa, the claimant will have a year from the date that they have returned to institute action to recover the debt (the rules allow a period of one year from the time that the 'impediment' has ceased within which to take legal action. This can therefore in some instances have the effect of extending the usual 3-year period allowed).

Prescription is also interrupted if the debtor acknowledges that they owe the debt. It does not matter whether the acknowledgement is expressly or tacitly made. Even if you only acknowledge part of the debt, prescription will be interrupted on the date that you do so and begin to run afresh from that date.

Prescription is also interrupted by the service on the debtor of any process, instituting legal proceedings for the payment of the debt, e.g. a summons.

Please be aware that the general principles of prescription have been provided in this article and that there are exceptions that have not been mentioned, e.g. different rules apply under the Road Accident Fund Act. This article is not intended to be acted upon as legal advice and you should always obtain legal advice which will be applicable to your own particular situation.

We hope that you found this article useful and would be interested in hearing your views on this topic. You can write to me at kristy@cfpbrokers.co.za .