

Daily News

Don't delay in claiming from tenant

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What is prescription? The lease has ended and during the inspection, carried out jointly between the tenant and the landlord, certain damages were identified.

The tenant did not dispute this and undertook to pay for the repairs. The cost of repairs exceeded the tenant's security deposit, and the landlord issued a letter of demand for the balance after retaining the tenant's deposit. The landlord served a second letter of demand a few months later, with no response from the tenant. The landlord did not pursue the claim until three-and-a-half years later, by issuing summons.

The tenant defended the summons on the grounds that the claim had prescribed.

The landlord had a legal right to claim the cost of repairs, but needed to claim the debt from the tenant within a specified period.

In terms of the Prescription Act 68 of 1969, if a person fails to exercise that right within the time stipulated in the act, the right to claim is lost for ever.

The act provides for parties to finalise disputes, and sets out the time limit within which they must make their claims.

There are different time periods for different types of debts. If the landlord issued summons within three years of the claim and obtained a judgment, he has 30 years in which to claim the debt from the tenant.

A judgment obtained for a debt in South Africa will prescribe after 30 years, as would a debt for a mortgage bond, taxation, and certain amounts owed to the state.

The prescription period is "six years in respect of any debt arising from a negotiable instrument, such as a cheque, or a notarial contract", and "three years in respect of any other debt, except where stipulated otherwise by another Act of Parliament" (South Africa: Beware of the Dangers of Prescription, by Eric Levenstein and Ryan Tucker. <http://www.mondaq.com>)

The landlord's letter of demand did not interrupt prescription, but if he had issued summons within three years, that would have stopped the claim from prescribing.

Prescription is a way to "punish" the creditor for taking too long to claim her/his debt.

The claim is extinguished or rendered unenforceable. Where a summons is issued within the three-year period, but the creditor fails to take further steps, the debtor can compel the creditor to finalise the legal proceedings.

However, should the parties take no action through the courts after summons, prescription does not resume (*Cadac (Pty) Ltd v Weber-Stephen Products Co* 2011 (3) SA 570 (SCA)).

In *Arendsnes Sweefspoor CC v Botha* (471/12) (2013) ZASCA 86 (31 May 2013), it was held: "The service of a summons commencing action serves to interrupt the running of prescription (see *AC Cilliers, C Loots and HC Nel Herbstein and Van Winsen The Civil Practice of the High Court and The Supreme Court of Appeal of South Africa* 50d (2009) at 354-355; also at 503 citing *Re Hartley v Umkanganyeki* (1889) 10 NLR 49).

For prescription to be interrupted, the following three requirements must be present:

- * There must be a process.
- * The process must be served on the debtor.
- * By that process, the creditor must claim payment of the debt (see *J Saner Prescription in South African Law* (1996) at 3-112 (3). It is clear that the process must be served on the debtor, which service must necessarily be legally and properly effected consistent with the Uniform Rules of Court. It is the actual service of the summons, and not merely the issuing thereof, that serves to interrupt the running of prescription."

In this case, a close corporation took a decision of the Pretoria High Court on appeal, contending that *Dalia Marcelle Botha* served summons after three years, and her claim had therefore prescribed.

Botha had sustained injuries, allegedly falling about 30m to the ground from a cable car that flipped on to its side. The *Hartebeespoort* cable car system was operated by the close corporation.

The sheriff had attempted to serve summons at its registered address on December 2, 2006, but found that the close corporation had ceased trading on the premises, which was also its registered address. The summons was eventually given to a *Mr Pretorius*, who was employed at the restaurant on the premises.

The court held that prescription was interrupted when summons was served at the registered address of the CC, as this was proper service, even though *Pretorius* did not hand it over to the CC. The appeal was dismissed, allowing *Botha* to pursue her claim.

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