Argent Industrial Investment (Pty) Ltd

Vs

Ekurhuleni

Metropolitan Municipality

SCHINDLERS

attorneys - conveyancers - notaries

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What does prescription mean?

- It means that the law considers the charges that have prescribed as being too old to enforce the creditor’s right to collect.
- In most cases a creditor can still demand payment of prescribed charges and include them on the invoice, but the debtor can raise the defence of prescription when asked for payment.
- In relation only to debts that are subject to a credit agreement regulated by the National Credit Act 34 of 2005 (read with the National Credit Amendments Act 19 of 2014) it is unlawful for a creditor to invoice a consumer for prescribed charges, or to collect them from the debtor.

Prescription in relation to a municipality

- In terms of the Prescription Act read with various cases on the issue, it is trite (accepted) law in South Africa that refuse, rates and sewerage charges prescribe after a period of 30 years, whereas water and electricity charges prescribe after a period of 3 years.
- This means that provided there has been no interruption of the prescription, the municipality will not be able to claim the amounts due to it, after either a 30 year period or a 3 year period (depending what the charges are in relation to) if certain criteria are met:
  - The debt hasn’t been paid
  - The debt hasn’t been acknowledged
  - The municipality hasn’t issued summons for the debt

Possible problems arising with regard to a prescription claim against a municipality

1.

- In terms of the Prescription Act the prescription period starts running when the debt falls due.
- A debt commonly falls due when invoiced; however, prescription can also start running when the knowledge of the claim should reasonably have come to the creditor’s attention.
- This means that if the creditor – i.e. the municipality – didn’t raise an invoice for the amount in question for several months or years, prescription might have started running not when the municipality did eventually invoice the consumer, but rather when it would have been reasonable for the municipality to have invoiced that consumer.

- This is especially important in the context of cases where a municipality fails for several months (or years) to invoice a consumer for the whole or a portion of that consumer's electricity or water consumption.
- This could happen for many reasons, the most common of which would be that the municipality has failed to take actual readings of the meters for an extended period.

2.

- Prescription is "interrupted" and the prescription period must begin running afresh in respect of charges that a consumer has admitted indebtedness in respect of.
- What is very important is that the admission of indebtedness must be made to the creditor and not to a third party, and the acknowledgment of liability must be unambiguous and unequivocal, meaning that it must be very clear that the debtor in question intended to acknowledge liability for the amount in question.

- This becomes problematic when consumers are advised by a municipality to sign an acknowledgement of debt in respect of charges that they dispute, in order to procure a payment plan in respect of such charges or in order to arrange for the reconnection of the services which were terminated as a result of the non-payment of the disputed charges.

3.

- Once an amount has been paid, it cannot prescribe, because the debt is extinguished by payment and ceases to exist. Often people do not know this, and they pay amounts that are prescribed. Once payment has been made of a prescribed amount, you cannot then claim a reversal of the prescribed amount, or a refund of the amount erroneously paid.

4.

- Once a municipality has summonsed a consumer in respect of any amount, this amount does not prescribe (unless the municipality is found by a court at a later stage to have abandoned the legal proceedings).

5.

- The biggest concern is whether the payment of current charges interrupts the running of prescription in respect of previous amounts that are still reflected on the invoice, but which have prescribed.
- This question is what we are here to discuss tonight.

The Municipal Systems Act- section 102

- (1) A municipality may-
  - (a) consolidate any separate accounts of persons liable for payments to the municipality;
  - (b) credit a payment by such a person against any account of that person; and
  - (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
- (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.

The Argent Matter

Facts of the case:

- The municipality had been billing Argent for its water consumption based on estimated readings for a period of 6 years.
- In March 2015 Argent received a water account from the municipality for approximately R 1.2 million based on consumption of water for a period of six years.
- Argent raised a dispute with the Municipality almost immediately after they received the invoice.
- The municipality acknowledged the dispute, but reiterated that in order to avoid disconnections Argent had to continue making payments of its current charges.
- Argent complied with the municipality's request and made payment of its current service charges. Those payments were made under protest and specifically marked as for the current monthly charges and specifically excluding the disputed amounts.

Arguments raised by the municipality

- The municipality argued that these amounts paid by Argent interrupted the defence of prescription.
- Further the municipality argued that it was entitled to allocate the payments made by the Applicant for current service charges to settlement of the oldest outstanding debt (in terms of section 102).
- It also argued that as Argent had made payments of the estimated readings, over the period of 6 years prior, that it had interrupted prescription from running.
- Its final argument was that as the amounts had only been billed to Argent in March 2015, that the debt only became due at that stage and accordingly that prescription could only start running on the date the invoice was issued and not prior thereto.

Arguments made by Argent

- The water charges in the **March 2015** invoice started becoming due six years earlier. At the time that the invoice was issued three years' worth of charges had already become prescribed.
- Argent raised a query with the municipality when it received the invoice and it placed the charges in dispute. As time marched forward more and more of those charges prescribed in terms of the Prescription Act.
- When it paid the Respondents for current charges it made a point of earmarking its payments with reference numbers that referred to the month that they were to be allocated to.
- In terms of S102(2) of the Municipal Systems Act, once the Applicant declared a dispute the Respondent was not entitled to allocate the money that was paid to the amount that was in dispute.

- The municipality could have reasonably become aware of the outstanding amounts due to it at an earlier stage, by reading the meters of Argent.
- Accordingly, the municipality did not act reasonably in these circumstances and prescription started running when they started billing Argent based on estimated readings and not when the debt was eventually raised by it in the March 2015 invoice.

The Judgment

- The municipality relies on section 12(3) of the Prescription Act for the contention that the debt only became due when the meter was read and the invoice issued, contending that it is only when the meter was read and the invoice issued that the respondent, the creditor, became aware of the facts giving rise to the debt.
- I disagree that the prescription could not start running until respondent had taken these steps. This would be inconsistent with the very reason why the law recognises the concept of prescription. It would also entitle the respondent to ignore its constitutional duties, which include debt collection, indefinitely. It is worth noting that the respondent's duty to take reasonable steps to collect what is due to it are for the benefit of both the respondent and the applicant.

- In any event, the respondent had knowledge of the relevant facts. At all times, the respondent was aware that it was supplying water to the applicant. It was aware of the applicant's identity. It was clear from the fact that the applicant was paying an estimate each month, if from nothing else, that the respondent had not read the meter on the applicant's property. These are the facts giving rise to the debt. The only "fact" of which the respondent did not have knowledge was the exact consumption of the applicant, and this was knowledge within the respondent's reach, had it simply fulfilled its functions.
- Even if, as the respondent contends, it did not have the necessary knowledge of the facts giving rise to the debt, it is in my view clear in this particular case that the respondent could have acquired by exercising reasonable care, that is, by reading the meter or meters on the property and issuing an invoice ·for consumption within a period less that that which did in fact elapse.

- It is not the applicant's duty to read meters, determine what its consumption is, and be ready to pay for that consumption whenever the respondent gets around to asking for payment, whenever in the future that may be. The respondent has a duty to read the meters and invoice for consumption, at its convenience, but at reasonble intervals.
- The applicant submitted that reasonable interval at which a meter should be read is every 6 months. There is no reason, in the circumstances of the relief sought in this case, for me to make a determination in that regard. All that is necessary for me to find in the applicant's favour, is a conclusion that a delay beyond three years is unreasonable. Since there are no facts pleaded which support a conclusion that the delay beyond three years was reasonable, I am able to conclude with no doubt that the respondent's failure to read the meter or meters and invoice the applicant for consumption for any period longer than three years was unreasonable, and amounts to the respondent not having exercised reasonable care to ascertain the applicant's indebtedness.

- In these circumstances, to the extent that the respondent did not have the required knowledge of the applicant's indebtedness for the period more than three years before the date of the invoice, it is deemed to have had that knowledge.
- As far as the respondent's contention that the applicant's regular payments for estimated consumption amount to an acknowledgment of debt goes, there is no merit in that contention. The respondent cannot rely on the applicant's fulfilment of its obligations to make up for its own failures.
- Had the respondent read the meter and informed the applicant of the indebtedness, the applicant's regular payments from that date without raising a dispute would have constituted acknowledgments of debt. However, a debtor cannot be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt, and does not do so.

For the reasons above, I make the following order:

- The respondent is to reverse all charges for water consumption added to Municipal account number 2604227860 ("the applicant's account") on the invoice dated 24 March 2015, as a result of the reading of the meter on 13 March 2015;
- reverse all interest and legal fees charged to the applicant's account in respect of the charges for water consumption added to the applicant's account on 24 March 2015;
- calculate the applicant's average monthly consumption over the period 21 September 2009 and 13 March 2015, using the meter reading reflected on the invoice of the applicant's account dated 24 March 2015, and charge the applicant an amount based on that average for the period 13 March 2012 to 13 March 2015, and
- send the applicant a full statement of account reflecting the reversals, calculations and charges dealt with in this order, and an invoice reflecting the amoun that is due and payable, within 14 days of this order.

- The respondent is not entitled to claim any payment from the applicant in respect of the applicant's account for any period before 13 March 2012.
- The respondent may not terminate, restrict, or threaten to terminate or restrict services on the basis of the applicant not having paid the amounts added to the applicant's account in the invoice of 24 March 2015.
- The respondent is to pay the costs of this application.

What does the judgment mean for us as consumers?

- A consumer who receives a bill for municipal charges for electricity or water for any period older than three years cannot be held liable for the amounts older than three years, because they have prescribed. This is taken from the judgment read as a whole.
- Prescription of charges more than three years old has not been interrupted (stopped) by payments made by a consumer of estimated charges during the period that the municipality was billing on estimates. A debtor cannot be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt (paras 18 and 19).

- Prescription starts running not when the invoice is presented to the consumer, but rather when the municipality should have become aware of all of the facts that gave rise to its claim – one of those facts being the actual charge (as opposed to the estimated charge). The municipality could have taken actual readings at any time. It simply failed to. It thus could have become aware of the actual charge at any time. This means that prescription starts running when a municipality should have taken actual readings and billed the consumer on actual readings. Note that this judgment did not, unfortunately, say when a municipality should be taking actual readings – the judge specifically did not decide this issue and this has been left open for consideration in future (para 11).
- However, the court did say that it is not the consumer's duty to read meters and determine what its consumption is. The municipality is under a duty to take reasonable steps to collect what is due to it – this duty exists for the benefit of both the consumer and the municipality. The municipality has a duty to read the meters and invoice for consumption at its convenience but at reasonable intervals (paras 12 and 15).

- Where there are no records of regular actual readings to assist in determining how much of a bill for several years has prescribed, it is appropriate to apply the industry standard – which is to average the consumption for the entire period out over all of the months in that period, and then use the average arrived at to calculate the consumer’s liability for the whole period by multiplying that average by 36 months (para 20).