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THE LAW OF PRESCRIPTION IN RELATION TO MUNICIPAL CHARGES AND UTILITIES

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THE LAW OF PRESCRIPTION IN RELATION TO MUNICIPAL CHARGES AND UTILITIES

Schindlers is often instructed to handle disputes with the City of Johannesburg ('the City') in relation to charges billed for water and electricity several years after the consumption actually occurred. The aim of this info guide is to educate the public as to what its rights are with regard to such charges.

In terms of the Prescription Act 68 of 1969, certain charges 'prescribe' or become 'unclaimable' after a certain period of time, if no legal 'process' (namely summons or a court application) is served to claim such amounts. This only applies if the debtor has not acknowledged its indebtedness for such amounts.

- Rates charges
  These only prescribe after 30 years.
- Electricity, water and gas charges
  These prescribe after 3 years.
- Sewer and refuse charges

The leading case on this issue indicates that these charges constitute 'rates and taxes' and thus only prescribe after 30 years. However, this judgment has been criticized and may be overturned, to bring the prescription period for these services into line with that for water, electricity and gas.

When does prescription start running?
It starts running when the debt becomes 'due and payable'. This happens when the creditor became aware of all of the facts giving rise to its claim for payment. Alternatively, this can happen when the creditor should have become aware of these facts. Billing in arrears for service charges The City is obliged to take actual readings at least every six months. Although it is not settled law, it is submitted that this means that the City should bill the consumer for consumption within six months of actual use. Legally speaking, this means that the debt for the consumption, becomes 'due and payable' at the latest 6 months after the consumption actually took place. You would then count three years from the date when the charges became due, to determine when they prescribe. If the City sends you a bill for charges that were incurred more than three and a half years after the consumption was actually incurred, then the charges have prescribed, and the City cannot lawfully claim those charges from you in court.

When prescription does not run
As mentioned above, there are times when prescription will not run, or will stop running, or the running will be 'interrupted'. For example, if the debtor admits that it owes the debt, then prescription begins running from the beginning again, which means that the creditor has another three years to claim payment from the debtor from the date that the debt is admitted. There are other times that it will not run, not listed here. Consult your attorney for more information.

BEWARE: Payment of account can be construed as admission of debt If payment is made of any part of the debt, this is taken as an admission of indebtedness, and so it is crucial, if you dispute any charges on your account, to ensure that before payment is made, the City is notified in writing of which portion of the account you dispute, and that payments you make must not be allocated to the disputed portion. If this is not done payments may be allocated to the oldest debt first, which may settle the whole or part of the amounts in dispute. This will extinguish your dispute and claim against the City in relation to these disputed amounts.

Billing period indicated
Most accounts indicate the billing period. Check this carefully to see whether you are being billed back beyond the legal time frame. If you suspect that you are being charged for amounts that have prescribed, contact your attorney for assistance.

The Argent Case

Introduction
Judgment in the matter of Argent Industrial Investments (Pty) Ltd v Ekurhuleni Metropolitan Municipality (17808/2016) [2017] ZAGPJHC 14; 2017 (3) SA 146 (GJ)was handed down on 13 February 2017 in the Gauteng Local Division of the High Court by Judge S Yacoob. This matter was handled by Christopher Tucker (Partner) and Maike Gohl (Senior Associate) at Schindlers and argued by Adv. Mark Oppenheimer of the Bridge Group.

Facts
In this case the Ekurhuleni municipality failed for approximately 5 and a half years to take actual readings of the water meter. It billed in the interim based on estimated readings. Argent argued that it was not liable for charges for water that were older than three years at the date that the big bill finally arrived in 2015 on the basis that these charges had already prescribed by the time that the bill was presented to it.

The municipality argued, in response, that:

Firstly, because the consumer made payments each month during the period in question for the estimated charges, that this constituted an acknowledgement of its debt for the large bill presented years later based on actual readings (it lost on this point); and

Secondly, that the water charges older than three years included in the big bill in 2015 had not prescribed because prescription can only start running when the municipality actually bills the client, and not before that.

Court's findings
We quote/paraphrase from the judgment:

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 cannot be 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).

Conclusion
This is a victory for property owners against errant municipalities, as the judgment sets a precedent on the abovementioned important principles of law.

Please note: This Info Guide is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case by case basis and you should consult an attorney before taking any action contemplated herein.

All information provided courtesy - Schindlers Attorneys - https://www.schindlers.co.za/
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