What 'prescription' means in terms of medical malpractice claims

11 AUG 2023 SAVE | EMAIL | PRINT | PDF

BY: JEAN-PAUL RUDD

'Prescription' refers to the extinguishment of a legal claim or the loss of a right to take legal action due to the passage of time. The purpose behind prescription is to promote legal certainty, avoid stale claims, and provide a fair and just resolution to disputes.

Image source: feverpitched – 123RF.com

Prescription periods are set out in various laws and regulations and may differ depending on the type of legal claim or the nature of the right in question. By way of example, the prescription period for a Road Accident Fund claim differs from that of a medical negligence claim.

The Prescription Act 68 of 1969 (the Act) regulates the prescription of medical malpractice claims in South Africa. In terms of the Act, a creditor has three years to institute summons against a debtor to recover a debt, failing which the debt will prescribe and is no longer regarded as lawfully due to the creditor. However, the three-year period does not necessarily run from the date of the incident; the Act requires a creditor to have knowledge of the identity of the debtor and of the facts from which the debt arises.

There are conflicting judgments on when a creditor possesses sufficient knowledge for the proverbial prescription clock to start ticking. Some judgments require a creditor to simply possess the minimum facts necessary to institute action whereas others require a creditor to be in possession of professional or expert advice.

How load shedding could impact medical negligence cases

Prescription applied to minors

The position is somewhat different when it comes to minors (persons under the age of 18)*. The Act provides that, where the three-year period of prescription is completed before a minor attains the age of majority, the minor will have a year from the date they attain the age of majority to institute action against the debtor.

By way of example, if the incident occurred when the minor was 11 years old and they became aware of sufficient facts to institute an action a year later, the minor would need to institute action within one year of attaining the age of majority.

Conversely, where the three-year period of prescription begins to commence whilst the claimant is still a minor but is completed after the lapse of one year after attaining the age of majority, the claimant enjoys no further extension and the claim will prescribe on the date the three-year period of prescription is completed.

By way of example, if the incident occurred when the minor was 16 years old and he/she became aware of sufficient facts to institute an action a year later, the minor would need to institute action before he/she reaches the age of 20.

In conclusion, the nuanced interplay of time, awareness, and legal status underscores the complexity of prescription in the context of medical malpractice claims. Navigating these intricacies is essential for both creditors seeking justice and debtors seeking protection against stale claims.

*The age of majority is deemed to be 21 for claimants born before 1 July 2007 - see *Malcolm v Premier, Western Cape [2014]* (14 March 2014)

ABOUT JEAN-PAUL RUDD

Jean-Paul Rudd is a partner in Adams and Adams' personal injury and insurance departments. He specialises in civil litigation with special emphasis on personal injury related matters, which includes Road Accident Fund, medical negligence, slip and fall and wrongful arrest claims, professional indemnity matters, and insurance related matters.
▪ What 'prescription' means in terms of medical malpractice claims - 11 Aug 2023
▪ Solar and inverter installation - did you get a compliance certificate? - 5 Jun 2023
▪ Auditor and compliance officer cleared, insurers to pay costs - 18 May 2023
▪ Why professional indemnity insurance is vital in today's litigious landscape - 30 Mar 2023
▪ Insurer liable to pay claim on equitable grounds - 17 Feb 2023

View my profile and articles...