
QUESTIONNAIRE

Revised Discussion Paper 147

Harmonisation of existing laws providing for different Prescription Periods

Respondents are encouraged to answer as many questions as possible
Respondents are more than welcome to provide a brief background of the
circumstances that inform the context of their responses

Contact particulars of Respondent:

Name: _____

Capacity(eg: Personal/Director: Legal, etc): _____

Organisation: _____

Tel (direct): _____ Fax: _____

Cell: _____ E-mail: _____

Completed questionnaires may be handed in at the workshop, posted or e-mailed to-

Theresa Häderli

c/o The Secretary

South African Law Reform Commission

Private Bag X668

Pretoria

0001

E-mail: THaderli@justice.gov.za

Background:

The kind of community I live in/my business operates in, currently:

My current home circumstances: _____

My current employment circumstances: _____

The situation my business finds itself in due to the current economic climate: _____

How the current operation of the laws on prescription have affected my position/my family's position/my employment position/my business's position:

Overview of Revised Discussion Paper

The aim of the investigation is to consider reform in the area of prescription law and to bring it in line with the principles contained in the Constitution, and by so doing, address some of the following challenges:

1. narrow interpretations of the law that fail to take into account the adverse effects of prevailing socio-economic conditions, including poverty and illiteracy, and the impact of these factors on the ability of creditors to effectively access the courts;
2. widespread abuses in the credit and debt collection industry that thrive on low literacy levels in order to induce debtors into acknowledging and paying prescribed debts;
3. the inequitable allocation of remedies, having the effect of unfairly and unjustifiably discriminating between creditors in relation to the delayed running of prescription; and
4. the proliferation of enactments containing special time limits that lack uniformity, operate harshly and are of questionable constitutional validity, having the effect of limiting creditors' rights of access to courts and to equal protection and benefit of the law.

Engagement with stakeholders takes place through the Revised Discussion Paper, prepared in order to elicit responses on the preliminary proposals for law reform so as to serve as a basis for the Commission's final deliberations.

The paper consists of an Introduction, six parts and a Conclusion. A draft Prescription Bill and a draft Institution of Legal Proceedings against certain Organs of State Amendment Bill are annexed to both the paper (for consideration and inputs) and this Questionnaire (for ease of reference by Respondents). Schedules to the draft Bills have not been annexed, and in this regard, Respondents are referred to the paper.

Part A (**pages 55 to 108 – document format; pages 84 to 137 – print format**) examines the principles underlying the prohibition against recovering prescribed debt, and in this regard, explores a range of issues pertinent to the question of extinction, including the anomalous application of strong prescription in South African law and its attendant ramifications in the context of the debt collection and consumer credit industry. The Commission’s preliminary recommendations are the following:

Option 1: Re-affirmation of strong prescription (plus ancillary provisions)-

1. insertion, in clauses 11(1) and 13(1), of the following ancillary provisions:

11. Interpretation and application of Chapter

(1) The date on which a debt becomes extinguished by prescription, “*on the face of it*”, is calculated-

(a) from the date of an act or omission giving rise to a debt; and

(b) using the ordinary civilian method of computation, expressed in the phrase “*first-day-in/last-day-out*”.

13. Extinction of debts by prescription

(1) For the purpose of this Part-

(a) “**affected person**” means a person who suffers prejudice as a result of conduct aimed at recovering a debt that has, on the face of it, become extinguished by prescription;

(b) “**person**” means a person who recovers a debt that has, on the face of it, become extinguished by prescription, regardless in whose favour the recovery is made; and

(c) “**recover**” includes conduct aimed at collecting or enforcing a debt through judicial or extra-judicial means, and “**recovery**” bears the same meaning.

2. restatement, in clause 13(2), of the principle of strong prescription, and insertion of consequential amendments to clause 13(2), as follows:

13. Extinction of debts by prescription

- (2) Subject to sections 16, 17, 18 and 19, a debt is extinguished by prescription after the lapse of the periods referred to in section 15.
- (3) Pursuant to subsection (2)-
- (a) prescription of a principal debt results in the prescription of any subsidiary debt arising from the principal debt;
 - (b) a person may not cede or in any other way transfer a debt that has, on the face of it, become extinguished by prescription;
 - (c) interruption cannot take effect in respect of a debt that has, on the face of it, become extinguished by prescription;
 - (d) a person may not recover a debt that has, on the face of it, become extinguished by prescription; and
 - (e) any recovery made contrary to paragraphs (b), (c) or (d) is of no legal force.
- (4) Subject to section 14, if, during judicial proceedings, a court makes a finding that a claim being adjudicated on is based on a prescribed debt, it may, in addition to any other order considered appropriate, order-
- (a) the repayment of any amount recovered contrary to subsections (3)(b), (c) or (d); and
 - (b) the payment of compensation for any loss or damage suffered pursuant to the recovery, including-
 - (i) any loss or damage incurred through the use of force, intimidation, the making of fraudulent or misleading representations or the spreading of false information pertaining to the creditworthiness of an affected person;

- (ii) any loss or damage incurred through other conduct amounting to a contravention of a code of conduct which a person is required to comply with in terms of any law; or
 - (iii) any loss or damage incurred as a result of any other impropriety or unlawful conduct.
- (5) The provisions contained in subsections (4) do not prevent an affected person from exercising a right-
 - (a) to report a matter to the police for investigation for the purpose of having criminal proceedings instituted; or
 - (b) to report a matter to a regulatory authority for investigation for the purpose of having misconduct proceedings initiated in terms of any law, including a law contained in the Debt Collectors Act, 1998 (Act No. 114 of 1998), National Credit Act, 2005 (Act No. 34 of 2005) or Legal Practice Act, 2014 (Act No. 28 of 2014).

18. Interruption by acknowledgement of liability

- (1) The running of prescription is interrupted by an unequivocal written acknowledgement of liability by a debtor.

20. Procedural requirements

- (1) A court must consider the question of prescription.
- (2) A party to litigation seeking to recover a debt through legal proceedings-
 - (a) bears the onus of proving that the debt has not become extinguished by prescription; and
 - (b) must address the question of prescription in the relevant document filed of record in the proceedings.

Option 2: Re-affirmation of strong prescription (plus ancillary provisions), subject to one qualification-

- 1. insertion of paragraph 1 above.

2. insertion of paragraph 2 above.
3. insertion, in clause 14, of the following qualification regarding the extinguishing effect of prescription referred to in clause 13(2):

14. Voluntary payment of prescribed debt

Notwithstanding section 13(2), payment by a debtor of a debt that has become extinguished by prescription is regarded as payment. Provided that-

- (a) the payment was voluntary, and was not induced by efforts on the part of any person to pursue recovery of the debt in question;
- (b) the payment is not deemed as constituting a revival of the running of the prescription period for any balance or other payments that would have been due had the debt not become prescribed; and
- (c) any payments made in circumstances where it is established that a debtor was not indebted to a creditor may be recovered.

Comments, inputs or suggestions are sought from Respondents, including the following:

<p>Part A: Prohibiting the recovery of prescribed debt</p> <p>1. Which option for law reform do Respondents believe will serve the interests of South Africans as a whole, the first or the second option? Full reasons are required for the choice of option.</p> <hr/>

4. Do Respondents have comments, inputs or suggestions regarding the remedies provided in relation to the recovery of prescribed debt? These must be fully set out, together with the reasons a Respondent holds a particular view.

5. Do Respondents have comments, inputs or suggestions regarding the proposal limiting interruption by acknowledgement of liability to the "unequivocal", "written" acknowledgement of liability by a debtor?

Part B (**pages 109 to 133 – document format; pages 138 to 162 – print format**) considers whether the length of the three-year general prescription period is still supportable in light of changing global trends and the way in which prescription principles are applied in other legal systems, viewed against challenging socio-economic circumstances faced by South Africans in attempting to access to the courts for the purpose of enforcing debts. The Commission’s preliminary recommendation is the following:

1. insertion of clause 15(1)(d) providing for amendment of the three-year general prescription period to four years, as follows:

15. Periods of prescription

(1) The periods of prescription of debts are the following:

(d) save where an Act of Parliament, in accordance with sections 12(2) and (3) or Part B, provides otherwise, four years in respect of any other debt.

Comments, inputs or suggestions are sought from Respondents, including the following:

PART B: REVIEW OF THE THREE-YEAR GENERAL PRESCRIPTION PERIOD

1. Notwithstanding the recommendation calling for an increase in the general prescription period from three years to four years, are there Respondents who are still of the view that the three-year general prescription period should be retained. Full reasons are required for this view, outside of the views already expressed in this paper.

Part C (**pages 134 to 155 – document format; pages 163 to 184 – print format**) examines whether it is in the interests of creditors to revert to a system of suspension, in light of the inequitable operation of delayed completion. The Commission’s preliminary recommendations are the following:

1. insertion of clause 5, providing for the suspension of acquisitive prescription, as follows:

5. Suspension of prescription

- (1) The following impediments suspend the running of prescription:
 - (a) if a person against whom it is running is a minor, insane, a person under curatorship or is prevented by superior force, including a law or court order, from interrupting the running of prescription as contemplated in section 6;
 - (b) if a person in favour of whom it is running is outside the Republic, married to the person against whom the period is running or is a member of the governing body of a juristic person against whom the period is running; or
 - (c) if the property in question is *fideicommissary* property, and the right to the property has not yet vested in a *fideicommissary*.
- (2) The period of suspension does not form part of the prescription period.
- (3) Prescription resumes running the day the impediment ceases to exist, and is completed at the end of the period that was outstanding at the time suspension took effect. Provided that if-
 - (a) an applicable period of prescription is 15 years or more;
 - (b) an impediment occurred anytime within the first five years of the running of the period; and
 - (c) the impediment subsisted for a period of five years or less:then the period of suspension does form part of the prescription period.

2. insertion of clause 17, providing for the suspension of extinctive prescription, as follows:

17. Suspension of prescription

- (1) The following impediments suspend the running of prescription:
- (a) if a creditor is-
 - (i) a minor;
 - (ii) insane;
 - (iii) a person under curatorship;
 - (iv) prevented by superior force, including a law or court order from interrupting the running of prescription as contemplated in section 19(2);
 - (v) prevented from accessing the courts for the purpose of interrupting the running of prescription as contemplated in section 19(2), due to adverse socio-economic circumstances, including poverty and illiteracy; or
 - (vi) compelled to give notice of intention to institute legal proceedings prior to serving process, in line with the requirements contained in the Institution of Legal Proceedings against certain Organs of State Act;
 - (b) if a debtor is outside the Republic;
 - (c) if a creditor and debtor-
 - (i) are married to each other; or
 - (ii) are partners, and the debt arose out of the partnership relationship;

- (d) if a creditor is a juristic person and a debtor is a member of the governing body of the juristic person;
 - (e) if a creditor or debtor is deceased and an executor of such creditor or debtor's estate has not yet been appointed;
 - (f) if a debt is the object of a claim filed against-
 - (i) a deceased debtor's estate;
 - (ii) an insolvent debtor's estate; or
 - (iii) a company or close corporation in liquidation; or
 - (g) if a debt is the object of a dispute-
 - (i) subjected to arbitration or a formal process of mediation; or
 - (ii) referred to a statutory *Ombud* for determination.
- (2) The period of suspension does not form part of the prescription period.
- (3) Prescription resumes running the day the impediment ceases to exist, and is completed at the end of the period that was outstanding at the time suspension took effect. Provided that if-
- (a) an applicable period of prescription is 15 years or more;
 - (b) an impediment occurred anytime within the first five years of the running of the period; and
 - (c) the impediment subsisted for a period of five years or less:
- then the period of suspension does form part of the prescription period.
- (4) A contractual debt does not prescribe before a reciprocal debt arising from the same contract prescribes.

Against the backdrop of the case studies of *Mdeyide* and *Mothupi*, part D (**pages 156 to 173 – document format; pages 185 to 202 – print format**) examines the impact of prevailing socio-economic factors, including poverty and illiteracy, on the ability of creditors to timeously access the courts for the purpose of enforcing debts. The Commission’s preliminary recommendations are the following:

1. insertion of clause 17(1)(a)(v) providing for the suspension of prescription in circumstances where a creditor is unable to access the courts to interrupt prescription due to adverse socio-economic circumstances, including poverty and illiteracy, as follows:

17. Suspension of prescription

- (1) The following impediments suspend the running of prescription:

- (a) if a creditor is-

- (v) prevented from accessing the courts for the purpose of interrupting the running of prescription as contemplated in section 19(2), due to adverse socio-economic circumstances, including poverty and illiteracy;

2. insertion of clauses 15(2) and (3) providing for cut-off dates, calculated from the due date of debt, beyond which debts are no longer capable of enforcement, regardless of factors preventing the exercise of a right and for non-application of these cut-off dates in certain instances, as follows:

15. Periods of prescription

- (2) Subject to subsection (3) and section 34(1) of the National Nuclear Regulator Act, 1999 (Act No. 47 of 1999), the cut-off date beyond which debts are no longer capable of enforcement, regardless of factors preventing the exercise of a right, including the delayed commencement of prescription, the suspension of prescription or the interruption of prescription, is-

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Part F (**pages 185 to 278 – document format; pages 214 to 307 – print format**) undertakes an in-depth analysis of special time limits as a concept distinct from prescription, the challenges created by their proliferation in numerous enactments, the severity of their effect and their questionable constitutional validity, with the aim of determining the feasibility of harmonising them in line with constitutional imperatives and the need to mirror the yardstick of the Prescription Act. The Commission’s preliminary recommendations are the following, in principle:

1. compelling the operation of all notice provisions in line with the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act 40 of 2002), including section 7(3) of the Expropriation (Establishment of Undertakings) Act 39 of 1951; section 6(3) of the Expropriation Act 63 of 1975; section 11(4) of the Tax Administration Act 28 of 2011; section 78(1)(a) and (b) of the Legal Practice Act 28 of 2014 and section 896(1), (3) and (4) of the Customs Control Act 31 of 2014.

Part B: Special time limits

22. Notice

A law making it compulsory for creditors to give notice of intention to institute legal proceedings prior to the service of process will only be given effect to if it complies with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act.

2. amendment of the Institution of Legal Proceedings against certain Organs of State Act, to provide, amongst other things, for the repeal or amendment of principles that enable the Act to operate harshly, by-
 - (a) abolishing the time within which notice of intention to institute legal proceedings must be furnished, so that, irrespective when notice is served, a creditor only loses his right to enforce a debt if he fails to interrupt the running of prescription; and
 - (b) providing for suspension of the running of prescription once notice is served, provided that prescription has not yet taken effect.

- (c) providing for an increase in the period that is required to lapse before process can be served, so that organs of state are afforded sufficient time to investigate claims with the aim of reaching early settlement.
3. compelling the operation of limitation and prescription provisions contained in the following enactments in line with the more beneficial “*prescription of debts*” regime of the Prescription Act: section 7(3) of the Expropriation (Establishment of Undertakings) Act 39 of 1951; section 6(3) of the Expropriation Act 63 of 1975; sections 43(1)(a) and (b), 43(3), 44 and 65(4) and (5) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993; sections 23(1), (2) and (3) of the Road Accident Fund Act 56 of 1996; sections 34(1), (2) and (3) of the National Nuclear Regulator Act 47 of 1999; section 61(4)(d)(i) to (iv) of the Consumer Protection Act 68 of 2008; section 190(4)(a) and (b) of the Tax Administration Act 28 of 2011; section 897(1)(a) and (2) of the Customs Control Act 31 of 2014 and section 5(8) of the Expropriation Act, 2015.
4. circumscribing the operation of the following limitation provisions, by, amongst other things, diluting their harsh effect and incorporating into their scheme, elements that have a more beneficial impact on the rights of creditors: section 67(1) of the Competition Act 89 of 1998; section 166(1) of the National Credit Act 34 of 2005; section 219(1) of the Companies Act 17 of 2008 and section 116(1) of the Consumer Protection Act 68 of 2008.

Part B: Special time limits

23. Limitation

A law making it compulsory for creditors to submit to a system of prescription that is incompatible with the system contained in Part A will only be given effect to-

- (a) if it is aimed at promoting the speedy resolution of disputes in a cost-effective manner in a forum other than a court;
- (b) if it provides for a period of no less than two years within which action must be taken-
- (i) from the date of an act or omission; or

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REPUBLIC OF SOUTH AFRICA

PRESCRIPTION BILL

Draft

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

[B 2020]

BILL

To consolidate and amend the laws relating to prescription.

BE IT ENACTED by the Parliament of South Africa as follows:-

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CHAPTER 1 INTRODUCTION

1. Definitions

In this Act, unless the context indicates otherwise:-

- (a) **“Institution of Legal Proceedings against certain Organs of State Act”** means Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002);
- (b) **“Minister”** means cabinet member responsible for the administration of justice;
- (c) **“organ of state”** means organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996;
- (d) **“special time limits”** means-
 - (i) notice provisions, as contemplated in the Institution of Legal Proceedings against certain Organs of State Act; or
 - (ii) limitation provisions; and
- (e) **“this Act”** means the Prescription Act.

2. Application of Act

This Act does not apply-

- (a) in respect of rights or obligations governed by customary law; or
- (b) in relation to laws prohibiting the acquisition of land or a right in land by prescription.

CHAPTER 2

ACQUISITION OF OWNERSHIP BY PRESCRIPTION

3. Application of Chapter

- (1) This Chapter applies to a prescription that begins running from the date this Act comes into operation.
- (2) A prescription that is not completed on the date this Act comes into operation is governed by the law that applied to the acquisition of ownership by prescription as if this Act had not come into operation.

4. Acquisition of ownership by prescription

- (1) Subject to sections 5 and 6, a person, through prescription, becomes the owner of a thing that such person possessed openly and as if such person was the owner thereof-
 - (a) for an uninterrupted period of thirty years; or
 - (b) for a period which, together with a period for which the thing was so possessed by such person's predecessors in title, constitutes an uninterrupted period of thirty years.

- (2) The running of prescription is not interrupted by the involuntary loss of possession-
- (a) if possession is regained at any time through legal proceedings instituted within six months after the loss for the purpose of regaining possession; or
 - (b) if possession is lawfully regained in any other way within one year of the loss.

5. Suspension of prescription

- (1) The following impediments suspend the running of prescription:
- (a) if a person against whom it is running is a minor, insane, a person under curatorship or is prevented by superior force, including a law or court order, from interrupting the running of prescription as contemplated in section 6;
 - (b) if a person in favour of whom it is running is outside the Republic, married to the person against whom the period is running or is a member of the governing body of a juristic person against whom the period is running; or
 - (c) if the property in question is *fideicommissary* property, and the right to the property has not yet vested in a *fideicommissary*.
- (2) The period of suspension does not form part of the prescription period.
- (3) Prescription resumes running the day the impediment ceases to exist, and is completed at the end of the period that was outstanding at the time suspension took effect. Provided that if-
- (a) an applicable period of prescription is 15 years or more;

- (b) an impediment occurred anytime within the first five years of the running of the period; and
- (c) the impediment subsisted for a period of five years or less:

then the period of suspension does form part of the prescription period.

6. Judicial interruption of prescription

- (1) For the purpose of this section, "*process*" includes a petition, notice of motion, rule *nisi* and a document that commences legal proceedings.
- (2) Subject to subsection (3), the running of prescription is interrupted by the service of a process on the possessor of a thing claiming ownership of such thing.
- (3) The interruption lapses, and the running of prescription is not deemed to have been interrupted-
 - (a) if the person claiming ownership does not successfully prosecute the claim in terms of the process in question to final judgment; or
 - (b) if the claim is successfully prosecuted, but judgment is abandoned or set aside.
- (4) If prescription is interrupted and the interruption does not lapse in terms of subsection (3), prescription begins running afresh on the date final judgment is given.

CHAPTER 3

ACQUISITION AND EXTINCTION OF SERVITUDES BY PRESCRIPTION

7. Application of Chapter 2

- (1) Sections 3, 4(2), 5 and 6 apply with the necessary changes to the acquisition of servitudes by prescription.
- (2) Sections 3, 5 and 6 apply with the necessary changes to the extinction of servitudes by prescription.
- (3) For the purpose of section 6(2)-
 - (a) reference to the possessor of a thing must be construed as reference to the person in whose favour prescription is running; and
 - (b) reference to a claim of ownership in a thing must be construed as reference to a claim for the termination of the exercise of a right and power or breach of a servitude against which prescription is running.

8. Application of Chapter

This Chapter does not apply to public servitudes.

9. Acquisition of servitudes by prescription

Subject to sections 7(1) and (2), a person acquires a servitude by prescription if such person openly and as though such person is entitled to do so, exercises the rights and powers of a person who has a right to the servitude-

- (a) for an uninterrupted period of thirty years; or
- (b) in the case of a *praedial* servitude, for a period which, together with a period for which such rights were so exercised by the person's predecessors in title, constitutes an uninterrupted period of thirty years.

10. Extinction of servitudes by prescription

- (1) A servitude is extinguished by prescription if it has not been exercised for an uninterrupted period of thirty years.
- (2) For the purpose of subsection (1), a negative servitude is deemed to have been exercised as long as nothing that impairs the enjoyment of the servitude has been done on the servient tenement.

CHAPTER 4

EXTINCTIVE PRESCRIPTION

11. Interpretation and application of Chapter

- (1) The date on which a debt becomes extinguished by prescription, "*on the face of it*", is calculated-
 - (a) from the date of an act or omission giving rise to a debt; and
 - (b) using the ordinary civilian method of computation, expressed in the phrase "*first-day-in/last-day-out*".
- (2) This Chapter applies to the laws contained in Schedule 1, and to any other laws requiring compliance with South Africa's international law extinctive prescription obligations, to the extent that this Chapter's provisions do not conflict with the laws in question.

Part A: Prescription of debts

12. Application of Part

- (1) Subject to section 11(2) and subsection (2), this Part applies to debts arising from the date this Act comes into operation.
- (2) The laws contained in Schedule 2 apply to debts arising from the date this Act comes into operation to the extent provided for in the Schedule.

- (3) Any law that applied-
- (a) to debts that arose before this Act came into operation, continue to apply as if this Act had not come into operation; and
 - (b) to debts that arose from an advance or loan of money in terms of an insurance policy issued by an insurer before 1 January 1974, continue to apply as if this Act had not come into operation.

13. Extinction of debts by prescription

- (1) For the purpose of this Part-
- (a) **"affected person"** means a person who suffers prejudice as a result of conduct aimed at recovering a debt that has, on the face of it, become extinguished by prescription;
 - (b) **"person"** means a person who recovers a debt that has, on the face of it, become extinguished by prescription, regardless in whose favour the recovery is made; and
 - (c) **"recover"** includes conduct aimed at collecting or enforcing a debt through judicial or extra-judicial means, and **"recovery"** bears the same meaning.
- (2) Subject to sections 16, 17, 18 and 19, a debt is extinguished by prescription after the lapse of the periods referred to in section 15.
- (3) Pursuant to subsection (2)-
- (a) prescription of a principal debt results in the prescription of any subsidiary debt arising from such principal debt;

- (b) a person may not cede or in any other way transfer a debt that has, on the face of it, become extinguished by prescription;
 - (c) interruption cannot take effect in respect of a debt that has, on the face of it, become extinguished by prescription;
 - (d) a person may not recover a debt that has, on the face of it, become extinguished by prescription; and
 - (e) any recovery made contrary to paragraphs (b), (c) or (d) is of no legal force.
- (4) Subject to section 14, if, during judicial proceedings, a court makes a finding that a claim being adjudicated on is based on a prescribed debt, it may, in addition to any other order considered appropriate, order-
 - (a) the repayment of any amount recovered contrary to subsections (3)(b), (c) or (d); and
 - (b) the payment of compensation for any loss or damage suffered pursuant to the recovery, including-
 - (i) any loss or damage incurred through the use of force, intimidation, the making of fraudulent or misleading representations or the spreading of false information pertaining to the creditworthiness of an affected person;
 - (ii) any loss or damage incurred through other conduct amounting to a contravention of a code of conduct which a person is required to comply with in terms of any law; or

- (iii) any loss or damage incurred as a result of any other impropriety or unlawful conduct.
- (5) The provisions contained in subsection (4) do not prevent an affected person from exercising a right-
 - (a) to report a matter to the police for investigation for the purpose of having criminal proceedings instituted; or
 - (b) to report a matter to a regulatory authority for investigation for the purpose of having misconduct proceedings initiated in terms of any law, including a law contained in the Debt Collectors Act, 1998 (Act No. 114 of 1998), National Credit Act, 2005 (Act No. 34 of 2005) or Legal Practice Act, 2014 (Act No. 28 of 2014).

14. Voluntary payment of prescribed debt

Notwithstanding section 13(2), payment by a debtor of a debt that has become extinguished by prescription is regarded as payment. Provided that-

- (a) the payment was voluntary, and was not induced by efforts on the part of any person to pursue recovery of the debt in question;
- (b) the payment is not deemed as constituting a revival of the running of the prescription period for any balance or other payments that would have been due had the debt not become prescribed; or
- (c) any payments made in circumstances where it is established that a debtor was not indebted to a creditor may be recovered.

15. Periods of prescription

- (1) The periods of prescription of debts are the following:
- (a) thirty years in respect of-
 - (i) a debt secured by mortgage bond;
 - (ii) a judgment debt;
 - (iii) a debt in respect of a taxation imposed or levied in terms of any law; or
 - (iv) a debt owed to the state in respect of a share of profits, royalties or similar consideration payable in respect of the right to mine minerals or other substances;
 - (b) fifteen years, unless a longer period applies in terms of subsection (1)(a), in respect of a debt owed to the state and arising from-
 - (i) an advance or loan of money by the state to a debtor; or
 - (ii) a sale or lease of land by the state to a debtor;
 - (c) six years, unless a longer period applies in terms of subsections (1)(a) or (b), in respect of a debt arising from-
 - (i) a bill of exchange or other negotiable instrument; or
 - (ii) a notarial contract; and
 - (d) save where an Act of Parliament, in accordance with sections 12(2), (3) or Part B provides otherwise, four years in respect of any other debt.

- (2) Subject to subsection (3) and section 34(1) of the National Nuclear Regulator Act, 1999 (Act No. 47 of 1999), the cut-off date beyond which debts are no longer capable of enforcement, regardless of factors preventing the exercise of a right, including the delayed commencement of prescription, the suspension of prescription or the interruption of prescription, is-
 - (a) forty years from the due date of debt, in the case of debts with a thirty-year prescription period;
 - (b) twelve years from the date a minor reaches the age of majority, in the case where a creditor is a minor; and
 - (c) twenty years from the due date of debt, in the case of other debts.
- (3) Subsection 2 does not apply-
 - (a) to debts arising from the alleged commission of offences referred to in section 16(2)(c) of this Act; or
 - (b) to debts arising from the contracting of occupational diseases provided for in any workers compensation law, including the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973) and the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993).

16. Commencement of prescription

- (1) Subject to subsection (2), prescription begins running when a debt becomes due.
- (2) Prescription does not begin running-
 - (a) until a creditor acquires knowledge of-
 - (i) the identity of a debtor; and

(ii) the facts giving rise to a debt:

Provided a creditor is deemed to have such knowledge if such creditor could have acquired it by exercising reasonable care;

(b) until a creditor becomes aware of the existence of a debt wilfully concealed from such creditor by a debtor; or

(c) during the period a creditor is unable to institute proceedings because of such creditor's mental or psychological condition caused as a result of a debt arising from the alleged commission of a sexual offence contemplated in sections 17, 18(2), 23 or 24(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).

17. Suspension of prescription

(1) The following impediments suspend the running of prescription:

(a) if a creditor is-

(i) a minor;

(ii) insane;

(iii) a person under curatorship;

(iv) prevented by superior force, including a law or court order, from interrupting the running of prescription as contemplated in section 19(2);

(v) prevented from accessing the courts for the purpose of interrupting the running of prescription as contemplated in section 19(2), due to adverse socio-economic circumstances, including

poverty and illiteracy; or

- (vi) compelled to give notice of intention to institute legal proceedings prior to serving process, in line with the requirements contained in the Institution of Legal Proceedings against certain Organs of State Act;
- (b) if a debtor is outside the Republic;
- (c) if a creditor and debtor-
 - (i) are married to each other; or
 - (ii) are partners, and the debt arose out of the partnership relationship;
- (d) if a creditor is a juristic person and a debtor is a member of the governing body of the juristic person;
- (e) if a creditor or debtor is deceased and an executor for such creditor or debtor's estate has not yet been appointed;
- (f) if a debt is the object of a claim filed against-
 - (i) a deceased debtor's estate;
 - (ii) an insolvent debtor's estate; or
 - (iii) a company or close corporation in liquidation; or
- (g) if a debt is the object of a dispute-
 - (i) subjected to arbitration or a formal process of mediation; or

(ii) referred to a statutory *Ombud* for determination.

(2) The period of suspension does not form part of the prescription period.

(3) Prescription resumes running the day the impediment ceases to exist, and is completed at the end of the period that was outstanding at the time suspension took effect. Provided that if-

(a) an applicable period of prescription is 15 years or more;

(b) an impediment occurred anytime within the first five years of the running of the period; and

(c) the impediment subsisted for a period of five years or less:

then the period of suspension does form part of the prescription period.

(4) A contractual debt does not prescribe before a reciprocal debt arising from the same contract prescribes.

18. Interruption by acknowledgement of liability

(1) The running of prescription is interrupted by an unequivocal written acknowledgement of liability by a debtor.

(2) If the running of prescription is interrupted, prescription begins running afresh-

(a) from the date of the interruption; or

(b) from the date on which the debt again becomes due, if, on the date of interruption or on any other date thereafter, the parties postpone the due date of debt.

19. Judicial interruption of prescription

- (1) For the purpose of this section, “*process*” includes a petition, notice of motion, rule *nisi*, pleading in reconvention, third party notice referred to in the rules of court and a document commencing legal proceedings.
- (2) Subject to subsection (3), the running of prescription is interrupted by the service on a debtor of a process whereby a creditor claims payment of a debt.
- (3) Unless a debtor acknowledges liability, the interruption lapses and the running of prescription is not deemed to have been interrupted if-
 - (a) a creditor does not successfully prosecute a claim in terms of the process in question to final judgment;
or
 - (b) a claim is so prosecuted but judgment is abandoned or set aside.
- (4) If a debtor acknowledges liability after the running of prescription is interrupted, and the creditor does not prosecute the claim in terms of the process in question to final judgement, prescription begins running afresh-
 - (a) from the date the debtor acknowledges liability; or
 - (b) from the date on which the debt again becomes due, if, on the date the debtor acknowledges liability or on any other date thereafter, the parties postpone the due date of debt.
- (5) If the running of prescription is interrupted and the interruption does not lapse in terms of subsection (3), prescription begins running afresh on the date the court judgment becomes executable.

- (6) If a person is joined as a defendant in the person's own application, the process where a creditor claims payment of a debt is deemed to have been served on the person on the date of joinder.

20. Procedural requirements

- (1) A court must consider the question of prescription.
- (2) A party to litigation seeking to recover a debt through legal proceedings-
- (a) bears the onus of proving that the debt has not become extinguished by prescription; and
- (b) must address the question of prescription in the relevant document filed of record in the proceedings.

Part B: Special time limits

21. Application of Part

- (1) The laws contained in Part I of Schedule 3 that applied before this Act came into operation continue to apply to debts arising from the date this Act comes into operation.
- (2) The laws contained in Part II of Schedule 3 apply to debts arising from the date this Act comes into operation.
- (3) The laws contained in Part II of Schedule 3 that applied before this Act came into operation continue to apply as if this Act had not come into operation.

22. Notice

A law making it compulsory for creditors to give notice of intention to institute legal proceedings prior to the service of process will only be given effect to if it complies with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act.

23. Limitation

A law making it compulsory for creditors to submit to a system of prescription that is incompatible with the system contained in Part A will only be given effect to-

- (a) if it is aimed at promoting the speedy resolution of disputes in a cost-effective manner in a forum other than a court;
- (b) if it provides for a period of no less than two years within which action must be taken-
 - (i) from the date of an act or omission; or
 - (ii) in the case of continuing conduct, from the date on which the conduct ceased;
- (c) if it provides for the non-commencement or suspension of a period in the face of impediments making it impossible for a creditor to timeously assert a right;
- (d) if it provides an organ of state, body or person in whose favour a period is running with the power to extend such a period, by agreement, with a creditor; and
- (e) if it provides a court or tribunal with the power to extend the period, on good cause shown, if an organ of state, body or person in whose favour it is running unreasonably refuses to grant such extension.

24. Procedural requirements relating to special time limits

- (1) A court, tribunal or other adjudicating body may not, of its own motion, raise the question of a special time limit.
- (2) A party to litigation who invokes a special time limit must do so in the relevant document filed of record in the proceedings.

- (3) A party seeking to rely on a special time limit before a tribunal or any other adjudicating body must do so in the relevant document filed of record in response to a claim or complaint.

CHAPTER 5

GENERAL

25. Non-binding nature of Schedule 4

The laws contained in Schedule 4 provide guidance on the laws containing extinctive prescription provisions in South Africa, and are not binding on the state.

26. Power to amend Schedules

The Minister may from time to time amend a Schedule to this Act by way of proclamation published in the *Government Gazette*.

27. Binding nature of Act

Subject to section 25, this Act binds the state.

28. Repeal of laws

The laws contained in Schedule 5 are repealed or amended to the extent set out in column 3 of the Schedule.

29. Short title and commencement

This Act is called the Prescription Act, 20___, and comes into operation on a date to be fixed by the State President by proclamation in the *Government Gazette*.

REPUBLIC OF SOUTH AFRICA

**INSTITUTION OF LEGAL PROCEEDINGS AGAINST
CERTAIN ORGANS OF STATE AMENDMENT BILL**

DRAFT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

[B 2020]

- (b) by the insertion in subsection (1) for the definition of “**organ of state**” after paragraph (g) of the following paragraphs:

“**organ of state**” means-

- “(g) South African Revenue Service established in terms of section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);
- “(h) South African Legal Practice Council established in terms of section 4 of the Legal Practice Act, 2014 (Act No. 28 of 2014) and South African Legal Practitioners’ Fidelity Fund Board established in terms of section 61 of the Legal Practice Act, 2014; and; and
- “(i) any person in respect of whose debt an organ of state, as contemplated in subparagraphs (a) to (h), is liable;”.

Amendment of section 3 of Act 40 of 2002

2. Section 3 of the principal Act is hereby amended-

- (a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(a) [within six months from the date on which the debt became due,] be served on the organ of state in accordance with section 4(1); and”;

- (b) by the deletion of subsection (3); and

- (c) by the deletion of subsection (4).

Amendment of section 4 of Act 40 of 2002

3. Section 4 of Act 40 of 2002 is hereby amended-

- (a) by the deletion of the word “or” at the end of paragraph (e) of subsection (1) and the substitution for paragraph (f) of subsection (1) of the following paragraphs:

“(f) the National Ports Authority Limited, to the chief executive officer of that Authority appointed in terms of section 22 of the National Ports Act, 2005

(Act No. 12 of 2005);

(g) the South African Revenue Service, to the Commissioner for the South African Revenue Service appointed in terms of section 6 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);

(h) the South African Legal Practice Council, to the Executive Officer of the Council appointed in terms of section 19 of the Legal Practice Act, 2014 (Act No. 28 of 2014) and the South African Legal Practitioners' Fidelity Fund Board, to the Chairperson of the Board appointed in terms of section 65 of the Legal Practice Act, 2014; or

(i) a person referred to in paragraph (i) of the definition of "organ of state", to that person."; and

(b) by the insertion of the following sections after section 4:

"4A. Suspension of prescription

(1) Provided a debt has not become extinguished by prescription, the running of prescription is suspended in terms of the Prescription Act, 20.. (Act No. .. of 20..) from the date of service of notice.

(2) Prescription resumes running at the expiry of the period referred to in section 5(2), or on the date an organ of state repudiates liability for the debt in writing, if repudiation takes place before the period referred to in section 5(2); and

4B. Failure to give notice

(1) An organ of state affected by a creditor's failure to give notice may, by way of application, approach a court having jurisdiction for an order staying further proceedings in a matter pending the giving of notice and expiry of the period referred to in section 5(2)."

Amendment of section 5 of Act 40 of 2002

4. Section 5 of the principal Act is hereby amended-
- (a) by the substitution for subsection (2) of the following subsection:

“(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of **[60]** 90 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).”; and

- (b) by the substitution for the proviso to subsection (2) of the following proviso:

“Provided that if the organ of state repudiates in writing liability for the debt before the expiry of the said period, the creditor may at any time after such repudiation, but before the debt becomes extinguished by prescription, serve the process on the organ of state concerned.”.

Amendment of laws

5. The laws mentioned in the first column of the Schedule are amended to the extent set out in the third column thereof.

Short title and commencement

- 6 This Act is called the Institution of Legal Proceedings against certain Organs of State Amendment Act, 20__, and comes into operation on the date that the Prescription Act, 20__ (Act No. ___ of 20__) comes into operation.