

SA Law Reform Commission

Presentation

Revised Discussion Paper on Prescription Periods

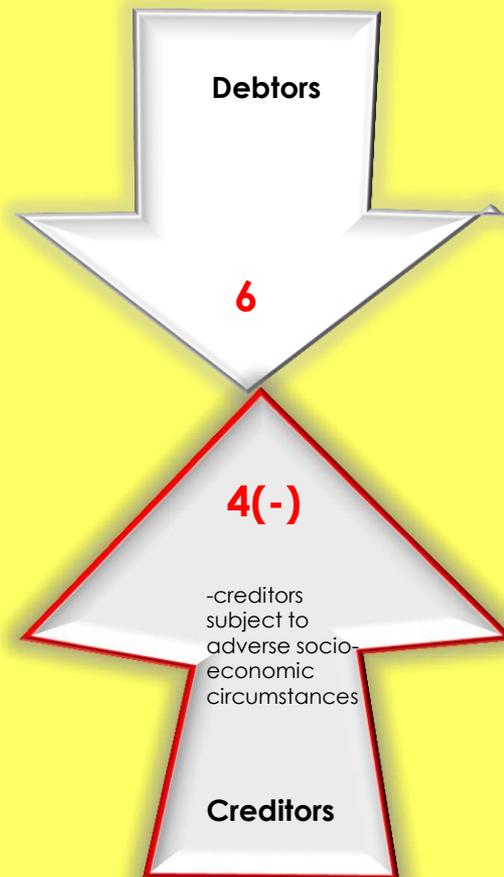
Part D: Inability to access the courts

ACKNOWLEDGMENTS

In addition to the sources cited in Revised Discussion Paper 147, the SA Law Reform Commission wishes to acknowledge the following source:

International Bank for Reconstruction and Development (The World Bank) *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* Department of Planning, Monitoring and Evaluation STATS SA 2030 NDP The World Bank March 2018 sourced from www.statssa.gov.za

THE PRESCRIPTION BALANCE



STATISTICS MATTER

South Africa has an estimated population of 55 million people, the majority of whom are black, and still reeling from the impact of a society divided along lines of racial, political and socio-economic inequality

STATISTICS MATTER

Therefore, notwithstanding experiencing a post-apartheid average economic growth of 2.9 % (between 1994 and 2000) and 4.2% (between 2001 and 2008), living conditions for many South Africans from a social and economic point of view remain fundamentally unchanged

STATISTICS MATTER

In this regard, Sanele Sibanda (*Law and Poverty Perspectives from South Africa and beyond*) argues that despite political transformation, South Africa continues to suffer from increasing income inequality, deeply entrenched structural poverty, sharp increases in rural-urban migration and a growing educational crises

STATISTICS MATTER

With a drop in economic growth to 1.6% (between 2009 and 2016), the following areas remain key challenges for South Africa:

- unemployment (over a quarter of the South African population is unemployed ; and
- poverty (which has since increased to 40% of the population in 2015)

Low literacy levels too, still present major challenges

STATISTICS MATTER

It is not surprising then, that social protection programmes provide a life-line for many South Africans, with an estimated 17 million receiving grant benefits in 2015

THE TROUBLE WITH PRESCRIPTION

The expectation yet, notwithstanding, is that its people are required to continue functioning in accordance with the rule of law, and therefore, prescription

THE TROUBLE WITH PRESCRIPTION

Added to this, not only is prescription inherently limiting of rights, it also regulates principles that are technical and sometimes complicated

Because its rules are incorrectly perceived as neutral factors, and thus better left within the domain of law-makers, practitioners and teachers of the law, it has grown into a body of rules justifying narrow interpretation and rigid application that encourage subordination rather than promotion of the interests of ordinary people, especially in the arena of socio-economic rights

It must be borne in mind, however, that inasmuch as ordinary people are affected and effected by the obligations placed on them by the law, so too, are they entitled to secure **all** benefits accorded in terms of such laws

THE TROUBLE WITH PRESCRIPTION

Therefore, in response to the question:

what does prescription have to do with socio-economic rights or the poor?

the following can be said ...:

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to courts

... if a creditor's right of access to courts in order to enforce a debt is impeded because of an inability to access resources due to-

- the high cost of legal services;
- high levels of poverty and unemployment;
- inadequate social security;
- low literacy levels or limited awareness of rights; or
- geographical isolation in outlying rural areas, informal settlements and townships located far from urban centres and serviced by under-developed infrastructure and unreliable transport

the right becomes a mere illusion, in direct conflict with the right of access to courts provided in section 34 of the Bill of Rights

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

Thus in *Road Accident Fund v Mdeyide*, it was remarked as follows by Froneman J in a dissenting judgement regarding the question of Mr Mdeyide's late acquiring of knowledge):

... one of the main barriers to claiming compensation from the RAF is the limited awareness of the Fund and a lack of knowledge about the current scheme of accident compensation. ... there are other reasons, beside lack of knowledge, that have hindered people from being able to claim from the RAF. These include the fact that it is often difficult for people, emerging from apartheid bureaucracy, to produce documentation proving birth, marriage and dependency. People participating in the informal economy are often unable to provide proof of employment and earnings. Even the incompetence of legal representatives in failing to bring timeous claims have hindered the process.

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

The facts of Mdeyide's case are as follows:

- Mr Mdeyide has been virtually blind since childhood. He is unable to leave home without assistance. He has almost no formal education and is innumerate and illiterate. He has never been in gainful employment and is the recipient of a disability grant. He lives in informal settlements around East London, Eastern Cape, and often drifts from one informal settlement to another;
- on 8 March 1999, he was struck down by a motor vehicle whilst walking on a road near East London with his wife. He was rendered unconscious and hospitalised for seven days. He sustained a skull fracture and head injuries. After being discharged from hospital, he was re-admitted three days later in an allegedly confused state. He has no independent recollection of the accident other than being struck down by a motor vehicle;

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

- he first gained insight into his right to claim compensation six months after the accident, whereafter he consulted with an attorney at his wife's urging. Soon after the meeting with his attorney, his wife is said to have left him;
- Mr Mdeyide never kept his appointment for a follow-up consultation, and only met with his attorney again on 23 January 2002 (that is, two and a half years after the first meeting). His attorney is said to have struggled to get hold of Mr Mdeyide as he often drifted from one informal settlement to another. At the meeting, arrangements were again made for a further follow-up consultation, but once again, Mr Mdeyide failed to keep the appointment. His attorney eventually submitted his claim to the Road Accident Fund on 11 March 2002, incomplete, and three days too late. By then, the claim had prescribed;

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

- after it became clear that the Road Accident Fund would not be settling the claim, legal proceedings were instituted on 27 February 2004, claiming compensation in an amount of R250 000-00;
- placing reliance on section 23(1) of the Road Accident Fund Act, the Road Accident Fund raised the defence of prescription;
- in replication, it was argued that Mr Mdeyide acquired late knowledge of the accident, as provided for in section 12(3) of the Prescription Act, attributed to:
 - the extensive nature of his injuries, which resulted in him having lost all concept of space and time; and
 - the effect of his personal circumstances;

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

- judgement of the High Court (*Mdeyide 1*) was delivered on 3 October 2006. It was found that section 23(1) of the RAF Act, insofar as it failed to provide for a knowledge requirement, infringed on Mr Mdeyide's right of access to court. The provision was declared to be inconsistent with section 34 of the Constitution and therefore invalid. The order was referred to the Constitutional Court for confirmation;
- the first Constitutional Court decision (*Mdeyide 2*) was delivered on 4 April 2007. The court was unable to confirm the order of invalidity, but instead, remitted the matter back to the High Court for an enquiry into Mr Mdeyide's mental state and his capacity to litigate and manage his own affairs, based on a finding that this issue had not been properly explored during trial;

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

- after reconsidering the matter, the High Court found that Mr Mdeyide was of sound mind. The matter was referred back to the Constitutional Court for confirmation of the order of invalidity;
- the Constitutional Court (*Mdeyide 3*) delivered its judgement on 30 September 2010. Froneman J (with Jaffa J and Yacoob J concurring) delivered the dissenting judgement;
- in relation to the majority judgement-
 - the court found that **section 23(1) limited the right of access to courts provided for in section 34 of the Constitution, in that it was inflexible, and made no provision for knowledge of the existence of the Road Accident Fund, which in turn, impacted on Mr Mdeyide's right to approach the courts;**

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

- in considering whether the limitation was reasonable and justifiable in the face of section 36 of the Constitution, the court found that the limitation contained was reasonable and justifiable, as claimants are afforded an adequate and fair opportunity to seek judicial redress. In this regard, section 23(1) was found not to be unconstitutional; and
- in this regard, the majority found that poverty and illiteracy, though still widely prevalent, **were not the only considerations deserving of attention under the circumstances.**

This is not to say that these factors were not considered to be relevant, only that they were considered not to be the **only** relevant factors deserving of attention

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

Because, as was emphatically pointed out in *Mohlomi v Minister of Defence* (in relation to the inequity that resulted from applying strict time limits notwithstanding their harsh consequences)-

- *That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.*

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

And in *Courts and the poor in South Africa*, Jackie Dugard remarked as follows:

... the normal difficulties of accessing justice are exacerbated by gross inequalities, the high cost of legal services and the remoteness of the law from most people's lives. Such socio-economic adversity dictates the need for a comprehensive system of legal assistance for poor people, to allow their issues to be adequately articulated and to promote parity in the legal process.

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right of access to the courts

Authority therefore exists for the notion that socio-economic factors have a bearing on the question whether the rights of creditors to access the courts for the purpose of enforcing debts have been inhibited

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right to equal protection and benefit of the law

... if a creditor is excluded from accessing legal remedies in instances where, for example, the running of prescription can be delayed in the face of certain impediments (as provided for in section 13 of the Prescription Act), this may well amount to a contravention of section 9 of the Bill of Rights, which guarantees the right to equality and to equal benefit and protection of the law

In this regard, whilst section 13 provides for a list of eleven impediments likely to affect fourteen different categories of creditors unable to timeously assert their rights, no such protection is extended to creditors unable to access the courts due to adverse socio-economic circumstances, including poverty and illiteracy

INTERFACE BETWEEN SOCIO-ECONOMIC RIGHTS AND PRESCRIPTION

Right to equal protection and benefit of the law

Such an exclusion potentially places a large pool of creditors unable to access the law, its remedies and the courts in order to interrupt the running of prescription in a position where they are forced to “*experience the law differently*” in relation to other creditors able to access the protection afforded by section 13

ADDRESSING THE GAP IN THE CURRENT LAW

It is therefore submitted that room exists for extending the delay principle to make provision for the interests of creditors under circumstances where they are unable to access the courts due to adverse socio-economic circumstances, including poverty and illiteracy

PRELIMINARY LAW REFORM PROPOSALS

Issues for consideration in formulating law reform proposals

Principle 1:

- Consideration must be given to the fact that from moment to moment, we exist through space and time as both debtor and creditor. In this regard-
 - the interests of debtors must be borne in mind when considering that unlike the impediments listed in section 13 of the Prescription Act, this impediment has the potential for subsisting indefinitely;
 - by way of example, the impediment of minority endures until a minor turns 18 years, and referral to arbitration, until an award has been handed down. These impediments therefore have more definitive end dates;
 - the prejudice likely to be suffered by a debtor exposed to an indefinite threat of litigation in circumstances where a creditor is unable to access the courts due to adverse socio-economic circumstances is incalculable, and runs counter to prescription's objective of legal certainty and finality;
 - it is thus submitted that the remedy should be limited through the operation of a long-stop period, entailing the cut-off point beyond which no right can be asserted or action instituted regardless of extending factors

PRELIMINARY LAW REFORM PROPOSALS

Regulating the rights of creditors unable to access the courts

Prescription Bill		Discussion
17.	Suspension of prescription	Comments received-
(1)	The following impediments suspend the running of prescription:	<ul style="list-style-type: none"> • “Adverse socio-economic circumstances” must be defined, a set of criterion should be made to apply, the concept is too open
(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)	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.	

PRELIMINARY LAW REFORM PROPOSALS

Tempering accommodating nature of prescription/effect of “inability to access the courts” provision

Prescription Bill		Discussion
<p>15. Periods of prescription</p> <p>(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-</p> <p>(a) forty years from the due date of debt, in the case of debts with a thirty-year prescription period;</p> <p>(b) twelve years from the date a minor reaches the age of majority, in the case where a creditor is a minor; and</p> <p>(c) twenty years from the due date of debt, in the case of other debts.</p> <p>(3) Subsection (2) does not apply-</p> <p>(a) to debts arising from the alleged commission of offences referred to in section 16(2)(c) of this Act; or</p> <p>(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).</p>	<p>Purpose-</p> <ul style="list-style-type: none"> • Long stop provision to provide cut-off dates in the interests of legal certainty and finality and the expeditious enforcement of rights 	