

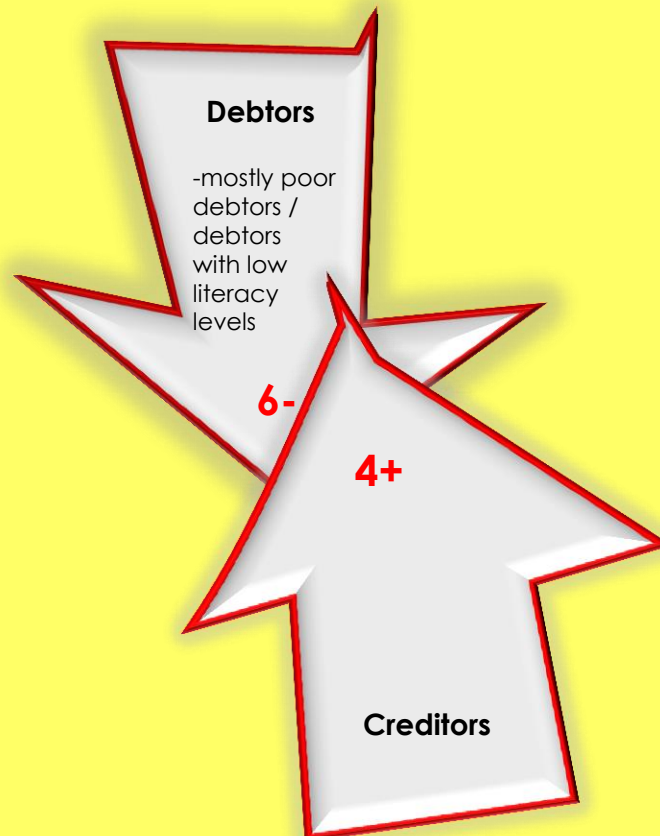
SA Law Reform Commission

Presentation 4

Revised Discussion Paper on Prescription Periods

**Part A: Prohibiting the recovery of
prescribed debt**

THE SUBVERSION OF PRESCRIPTION



CHALLENGES ENCOUNTERED IN THE DEBT COLLECTING/CREDIT INDUSTRY

These can be divided into 3 main categories-

- Unfavourable socio-economic conditions
- Poor consumer regulation
- Inadequate regulation, anomalies in the law and non-compliance with the law

UNFAVOURABLE SOCIO-ECONOMIC CONDITIONS

Aggravated by-

poverty

low literacy levels

socio-economic inequalities

Gave rise to a mushrooming debt industry, in which the following practices thrived:

- Reckless lending and exploitation of borrowers, by amongst other things, employing deceptive and unethical marketing practices to get debtors into taking more debt;
- Reckless borrowing, resulting in-
 - borrowers accessing further credit by failing to disclose the extent of their liabilities
 - borrowers spiralling into new debt at high cost to pay off old debt; and
 - borrowers attempting to escape their liabilities by relocating

This, in turn, caused a rise in the overall cost of credit

POOR CONSUMER REGULATION

In this regard-

- Consumer laws were fragmented, outdated and based on an exclusionist historical legacy;
- Consumer environment was premised on-
 - bargaining power imbalances between consumers and business; and
 - low consumer education levels, coupled with lack of information about consumer rights

INADEQUATE REGULATION, ANOMALIES IN THE LAW & NON-COMPLIANCE WITH THE LAW

Aggravated by-

lack of uniformity and the complicated and protracted nature of debt collecting

high cost and protracted nature of debt recovery

lack of compulsory regulation over specialised debt collecting agencies

The following practices prevailed:

Irregular conduct →

Application of psychological harassment to intimidate debtors into paying their debts

Misrepresenting the status of debts, including the collection of inflated capital amounts, to which other layers of charges were added, including interest, disbursements and costs

Failure to notify debtors that their debts had been sold, the poor administration of accounts after debts were sold and the inflation of outstanding debts and interest rates

Handing over of outstanding accounts to more than one debt collector at a time, resulting in multiple summonses and the unnecessary duplication of costs

INADEQUATE REGULATION, ANOMALIES IN THE LAW & NON-COMPLIANCE WITH THE LAW

The following practices prevailed:

Unlawful conduct →

Employment of strong-arm tactics to intimidate debtors into paying their debts

Fraudulently obtaining consent to judgements

The irregular issuing of emolument attachment orders and the obtaining thereof contrary to jurisdictional requirements

INADEQUATE REGULATION, ANOMALIES IN THE LAW & NON-COMPLIANCE WITH THE LAW

The following practices prevailed:

Recovering prescribed debt →

The incorrect application of section 14(1) of the Prescription Act to mean that an acknowledgement of debt permits the re-activation thereof, notwithstanding that it has prescribed

Harassing debtors into acknowledging prescribed debt

Selling, collecting or re-activating prescribed debt

FOCUS OF INVESTIGATION

- Problems relating to the recovery of prescribed debt, including-
 - anomalies in the law that create an enabling environment;
 - aggravated by poverty, low literacy levels and socio-economic inequalities

WHY RECOVERING PRESCRIBED DEBT IS PROHIBITED

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Debtor afforded a defence , which had to be specifically pleaded , it was not open for a court to raise the plea of its own motion	Debt becomes extinguished to the extent that it ceases to exist . A court order granted on a prescribed obligation thus constitutes a nullity and is therefore unenforceable . It is for this reason that a court must consider the question of prescription	Debtor afforded a defence , which must be specifically pleaded , it is not open for a court to raise the plea of its own motion

WHY RECOVERING PRESCRIBED DEBT IS PROHIBITED

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
After lapse of period, a creditor's right to institute legal proceedings is barred , but only if the defence is successfully raised	-----	After lapse of period, debt becomes extinguished if the defence is successfully raised

WHY RECOVERING PRESCRIBED DEBT IS PROHIBITED

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Court takes into account factors relevant to a creditor's failure to timeously enforce a debt when adjudicating the plea	Court takes into account factors relevant to a creditor's failure to timeously enforce a debt when determining whether a claim has become prescribed	Court does not take into account factors relevant to a creditor's failure to timeously enforce a debt when adjudicating on a plea, except in the case if legal impossibility

WHY RECOVERING PRESCRIBED DEBT IS PROHIBITED

Prescription Act, 1943
Common law

Prescription Act, 1969
Common law

Enactments containing special time limits

Weak effect

Strong effect

Guillotine effect

Barring of a right to institute legal proceedings, however, did not preclude the **extra-judicial** pursuit of the debt under the following circumstances:

Debt could be set-off against another debt (depending on when the 2nd debt came into existence)

Debt could be used to support a contract of suretyship

Debt paid after the lapsed period **could not be recovered**

Right to plead prescription destroyed on **undertaking to pay a prescribed debt**

WHY RECOVERING PRESCRIBED DEBT IS PROHIBITED

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Where a debtor failed to raise the defence , it was deemed to have been waived . The obligation subsisted intact and thus became fully enforceable	-----	Where a debtor fails to raise the defence , it is deemed to have been waived . The obligation subsists intact and thus becomes fully enforceable

CURRENT LEGAL POSITION

Anomalies in the law

Section 10(1)

In line with principle of **strong prescription**, section 10(1) provides for the **complete extinction** of a debt after the lapse of a particular period (subject to delayed completion, the late acquisition of knowledge or interruption)

Section 10(3)

In line with the principle of **weak prescription**, section 10(3) provides for the **non-refund** of monies paid in respect of a debt that has prescribed

Section 17(1)

In line with the principle of **weak prescription**, a court is **prohibited** from raising the question of prescription **of its own motion**

CURRENT LEGAL POSITION

Incorrect application of the law

Section 14(1)

- In line with the system of **weak prescription** prevailing prior to the 1969 Prescription Act, the following principles applied in relation to **interruption of prescription by way of acknowledgement of liability**:
 - a debtor's right to plead prescription was destroyed on undertaking to pay a prescribed debt; and
 - the principle applied regardless whether the debtor was aware of the right to plead prescription.

CURRENT LEGAL POSITION

Incorrect application of law

Section 14(1)

- The position is arguably different in relation to the **strong effect** of prescription obtaining currently, and in this regard, it was held as follows in these decisions:
 - *Lipschitz v Dechamps Textiles GMBH and Another*
... once extinguished, the debtor can no longer by acknowledgement revive such debt (s 14) unless of course it is in the form of an undertaking amounting to a new contract.; and
 - *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* –
... [an] acknowledgment, if any, must refer to an existing liability and not to a liability which existed in the past. In other words, if the acknowledgement is made after the prescription period has elapsed, the acknowledgement has no effect and cannot interrupt the running of prescription in terms of section 14(1) of the Prescription Act.
- Consonant with the principle contained in section 10(1) therefore, acknowledging a prescribed debt has no legal force

CURRENT LEGAL POSITION

Incorrect application of law

Section 14(1)

- It must be borne in mind however, that technical legal concepts such as “*interruption*” and “*strong prescription*” may well be incomprehensible to ordinary debtors – even more so, those with low literacy levels. Therefore, any threat by a creditor to institute legal proceedings on the basis of such an acknowledgement is more than likely to be perceived as real
- In the event of such debtor contesting the claim without legal assistance, he will invariably be required to unravel the complexities of an adversarial legal system, together with the implications associated with sections 17(1) and (2) of the Prescription Act
- According to Goldberg (*Dealing In Debt: The High-Stakes World Of Debt Collection After FDCPA*), studies have shown that poorer and less-sophisticated debtors are more likely to be intimidated by legal proceedings and less likely to hire attorneys, whilst the wealthier are more likely to contest lawsuits
- In line with section 17(1), a court is prevented from considering the question of prescription, potentially exposing a hapless defendant to judgment in instances where he is unaware of his right to raise the defence

ISSUES FOR CONSIDERATION IN FORMULATING PROPOSALS

Principle 1:

- Formulation of any preliminary proposal for law reform is dependent on an understanding of the benefits and shortcomings informing both weak and strong prescription

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?

Why strong prescription?

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
A creditor only forfeits the right to enforce a debt in a judicial forum, the extra-judicial pursuit of the debt under certain circumscribed instances is not prohibited	Enforcement through a judicial forum arguably provides a far more effective remedy	The right of a creditor to enforce a debt is completely extinguished, once and for all, to the point that it ceases to exist, thus promoting legal certainty and finality	It destroys any possibility for the further pursuit of a debt

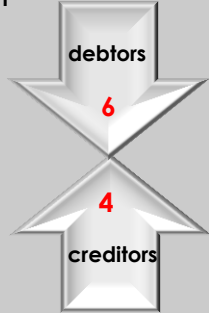
PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?

Why strong prescription?

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
It provides a debtor who believes he is morally bound to do so with an opportunity to discharge his obligations even after lapse of a period, thus preserving the possibility of a future relationship with the creditor	The question whether a debt was paid without knowledge that a period had lapsed is irrelevant, refunds are not permitted	Once a debt becomes prescribed, the question of a debtor's legal or moral duty to discharge his obligations becomes irrelevant	The rule permitting the complete extinction of a debt and thus the discharge of a debtor from his obligation to pay once a debt becomes prescribed is usually unfairly attributed to the moral character of the debtor

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
The principles contained in this system favour and thus elevate the interests of the creditor		<p>The principles contained in this system favour and thus elevate the interests of the debtor, in synchrony with the underlying philosophy of prescription</p> 	

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?

Why strong prescription?

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
	A creditor's right to pursue recovery of a debt endures, contrary to prescription's underlying policy of legal certainty and finality	Because a right to enforce a debt becomes completely extinguished, no further disputes or controversies are capable of arising	
	Further controversies are generated about the nature and effect of the right said to remain once prescription takes effect, for example, does a civil obligation remain; does a natural obligation remain providing room only for limited enforcement, <i>etcetera</i>	It is capable of being applied with greater simplicity and clarity as no right remains once prescription takes effect	

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?

Why strong prescription?

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
	<p>It prompts further legal disputes, which, in turn, impact on the effective administration of justice and the timeous adjudication of disputes, for example, set-off-</p> <ul style="list-style-type: none"> • requires the mutual liquidity of debts before it can be applied; • requires clear rules to determine whether it will apply to debts which came into existence before or after the lapsing of the period 		

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?

Why strong prescription?

Advantages

Disadvantages

Advantages

Disadvantages

Opportunities for the extra-judicial pursuit of debt do not easily present themselves; identifying them requires quick-wit and a shrewd understanding of the law on the part of the creditor

PRELIMINARY LAW REFORM PROPOSALS

Why weak prescription?		Why strong prescription?	
Advantages	Disadvantages	Advantages	Disadvantages
	Whilst debtors are forced to accumulate and store records for unduly long periods at high costs based on the indefinite threat of litigation, creditors are forced to do likewise in the event that a shift in onus requires proof of claims		
	The cost of insurance is inflated to buttress the risk of enduring claims		

ISSUES FOR CONSIDERATION IN FORMULATING LAW REFORM PROPOSALS

Principle 2:

Consideration should always be given to the fact that from moment to moment, we exist through space and time as both debtor and creditor

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>11. Interpretation and application of Chapter</p> <p>(1) The date on which a debt becomes extinguished by prescription, “<i>on the face of it</i>”, is calculated-</p> <p>(a) from the date of an act or omission giving rise to a debt; and</p> <p>(b) using the ordinary civilian method of computation, expressed in the phrase “<i>first-day-in/last-day-out</i>”.</p>	<p>Purpose-</p> <ul style="list-style-type: none"> • Intended to assist creditors in calculating the period in a way that ensures that recovery efforts never proceed beyond the date of prescription

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>11. Interpretation and application of Chapter</p> <p>(1) — The date on which a debt becomes extinguished by prescription, “on the face of it”, is calculated-</p> <p>-</p> <p>(a) — from the date of an act or omission giving rise to a debt; and</p> <p>-</p> <p>(b) — using the ordinary civilian method of computation, expressed in the phrase “first day in/last day out”.</p>	<p>Comments received-</p> <ul style="list-style-type: none"> • The clause contradicts the due date of debt principle • The clause creates confusion/ambiguity

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

Discussion

13. Extinction of debts by prescription

Purpose-

(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)-

(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.

- Promotes legal certainty and finality and the expeditious enforcement of rights, thus preventing debtors from having to defend stale claims

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

13. Extinction of debts by prescription

(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.

Discussion

Purpose-

- Prevent multiple proceedings in different courts/forums, recalling that a civil court is not precluded from adjudicating on a properly raised counterclaim for compensation in respect of damages incurred for wrongful conduct
- It must be recalled also, that no-one may benefit more than he is entitled to, so that a creditor will not be in a position to obtain compensation both in a civil court and a forum empowered to regulate conduct, for example, the Council of Debt Collectors. In other words, the clause is not a suggestion that redress should be duplicated. The Council may, however, be in a position to suspend or withdraw a certificate of registration issued to a debt collector

Comments received-

- Clause 13(4)(b) should be removed. A debtor is entitled to bring a counterclaim during legal proceedings and may also institute separate proceedings regarding damages suffered. The debtor carries the onus to prove damages, which recourse is provided by clause 13(5). Clause 13(4)(b) will distort this balance. In the alternative, a court should have a discretion to award compensation and only in circumstances where wrongdoing is proved on a balance of probabilities.

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

- 13. Extinction of debts by prescription**
- (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).**

Discussion

Comments received-

- The clause is a deviation of the approach of law-makers to no longer criminalise and penalise what would normally amount to administrative-type actions. It amounts to an extreme remedy for what is essentially a consensual contract

Purpose-

- Clause 13(5)(a) is not intended to create a criminal sanction. It was merely intended to state what the current legal position is, that is, to make the law more transparent

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

Discussion

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.

Purpose-

- Balancing of a debtor's interests may require consideration to be given to De Wet's view that certain debtors may indeed feel constrained to abide by their obligations lawfully and freely entered into
- In fairness to certain creditors (some of whom may not be deep-pocketed or able to afford seasoned legal representation), it may be viable to prevent recovery of monies paid in relation to prescribed debt, but only under circumstances that do not blur the doctrinal basis of strong prescription

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

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.~~

Discussion

Comments received-

- Clause 14(c) is unclear
- Option 2 is likely to give rise to significant difficulties in implementation

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>18. Interruption by acknowledgement of liability</p> <p>(1) The running of prescription is interrupted by an unequivocal written acknowledgement of liability by a debtor. Provided that such acknowledgements do not serve to revive the running of prescription in respect of a debt that has become prescribed.</p>	<p>Purpose-</p> <ul style="list-style-type: none"> The provision was intended to serve as a preventative measure in response to the abuses catalogued in the paper that arose as a result of verbal acknowledgements

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

18. Interruption by acknowledgement of liability

(1) The running of prescription is interrupted by an ~~unequivocal written~~ **express or tacit** acknowledgement of liability by a debtor. **Provided that such acknowledgement does not serve to revive the running of prescription in respect of a debt that has become prescribed.**

Discussion

Comments received-

- Multiple comments were received regarding this provision
- Amendment will be considered in line with the *proviso*, so as to clarify the true operation of acknowledgements in the face of a debt becoming prescribed

PRELIMINARY LAW REFORM PROPOSALS

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>20. Procedural requirements</p> <p>(1) A court must consider the question of prescription.</p> <p>(2) A party to litigation seeking to recover a debt through legal proceedings-</p> <p>(a) bears the onus of proving that the debt has not become extinguished by prescription; and</p> <p>(b) must address the question of prescription in the relevant document filed of record in the proceedings.</p>	<p>Purpose:</p> <ul style="list-style-type: none"> • In line with the proper doctrinal application of the principle of extinction • In line with the principles of civil law, a plaintiff bears the onus of proving a claim on a balance of probabilities, thus a failure to fully set out a cause of action (including the fact that a debt is existing) amounts to a defective pleading