



**REVISED DISCUSSION PAPER 147**

PROJECT 125

**HARMONISATION OF EXISTING LAWS  
PROVIDING FOR DIFFERENT PRESCRIPTION  
PERIODS**

2 DECEMBER 2017

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30 APRIL 2018**

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## **Introduction**

The South African Law Reform Commission (Commission) was established by the South African Law Reform Commission Act 19 of 1973.

The members are –

The Honourable Mr Justice Jody Kollapen (Chairperson)  
Professor Marita Carnelley (Member)  
Professor Vinodh Jaichand (Member)  
Mr Irvin Lawrence (Member)  
Professor Anette Oguttu (Member)  
Advocate Mahlape Sello (Member)  
The Honourable Ms Justice Namhla Siwendu (Member)

The Secretary is Mr Nelson Matiba. The project leader is Advocate Mahlape Sello. The researcher responsible for the investigation is Ms Theresa Häderli.

On 24 November 2015, Advocate TM Masutha, the Minister of Justice and Correctional Services, appointed the following members to serve on the Prescription Periods Advisory Committee to help develop the Revised Discussion Paper:

Professor Max Loubser  
Mr Martinus Cronje  
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## **Preface**

This Revised Discussion Paper, which reflects information accumulated at the end of November 2017, is prepared in order to elicit responses from parties and to serve as a basis for the Commission's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the Commission may issue a report on this subject, which will be submitted to the Minister of Justice and Correctional Services for tabling in Parliament.

The views, conclusions and recommendations in this paper are not the Commission's final views. The paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the quoting from or the referral to comments and to the attributing of comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in the representations in terms of the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comments and representations to the Commission by 30 April 2018 at the address cited. Comments can be sent by e-mail or post.

This document is available on the Internet at: <http://salawreform.justice.gov.za>

# Summary of recommendations

## Introduction

Whilst acknowledging that prescription is rooted in a pre-constitutional era, and that its rules embody a system that is inherently limiting of rights, it nevertheless constitutes a rational and legitimate instrument of legal engineering aimed at regulating periods within which rights must be enforced in order to balance the interests of debtors, the general public and even creditors as they interact with each other through space and time.

As a means of ensuring that these competing interests are actively served, prescription must remain dynamic in the face of an evolving society, ever-cognizant that its rules will suffocate these interests if they act as a blunt instrument of constraint by limiting constitutionally guaranteed rights.

As such, more is required of prescription than routine utilitarian justice, especially in the face of a society emerging from the shadow of entrenched discrimination and inequality.

## Principal challenges

Prescription therefore needs to function as a credible vehicle of transformation able to meaningfully translate the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms into its own body of rules in response to-

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.

## **Preliminary proposals for law reform**

Against this backdrop, the Commission makes the following principal preliminary proposals for law reform:

### Draft Prescription Bill (Annexure A)-

1. repeal of the Prescription Act, and its replacement with a new Act, contained in a draft Prescription Bill, to provide, amongst other things, for the following:
  - (a) re-statement of the principle of strong prescription, subject to one qualification, by-

- (i) re-stating (in clause 13(2)) 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.

(ii) 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 sections 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.

(b) 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.

(c) 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); or
    - (v) ....

- (vi) ....
  - (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;
    - (iii) a company or close corporation in liquidation; or
  - (g) ....
- (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.

(d) by-

(i) 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;

(ii) 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-

(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).

(e) insertion of clause 17(1)(g)(i) and (ii), providing for the suspension of prescription in cases where a debt is the object of a dispute subjected to a formal process of mediation or referral to a statutory *Ombud*, as follows:

**17. Suspension of prescription**

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

(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.

(f) by-

(i) insertion of clause 21(2), regulating the following provisions in line with a special time limits regime:

- section 67(1) of the Competition Act 89 of 1998;
- the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002;
- 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.

(ii) insertion of several clauses, including clauses 22 and 23, regulating the operation of special time limits, as follows:

***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.

**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.

(iii) insertion of clause 28, aligning the following laws to the prescription of debts provisions:

- 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

Draft Institution of Legal Proceedings against certain Organs of State Amendment Bill (Annexure B)-

1. amendment of the Institution of Legal Proceedings against certain Organs of State Act, to provide amongst other things, for the following:

- (a) insertion of several clauses, including clauses 1 to 4, providing for-
- (i) amendment of the definitions of-
  - (aa) "*creditor*", so as to align its meaning with that which is accorded in the Prescription Act; and
  - (bb) "*organ of state*", so as to widen its scope of application to include the South African Revenue Service, South African Legal Practice Council and South African Legal Practitioners' Fidelity Fund Board.
- (ii) insertion of new provisions aimed at tempering the harsh effect of notice by-
  - (aa) 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
  - (bb) providing for suspension of the running of prescription once notice is served, provided that prescription has not yet taken effect.
- (iii) 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.

(b) insertion of clause 5, regulating the following provisions in line with the Institution of Legal Proceedings against certain Organs of State Act:

- 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.

## **Invitation to comment**

The preliminary proposals for law reform and draft Bills require community engagement and thorough debate.

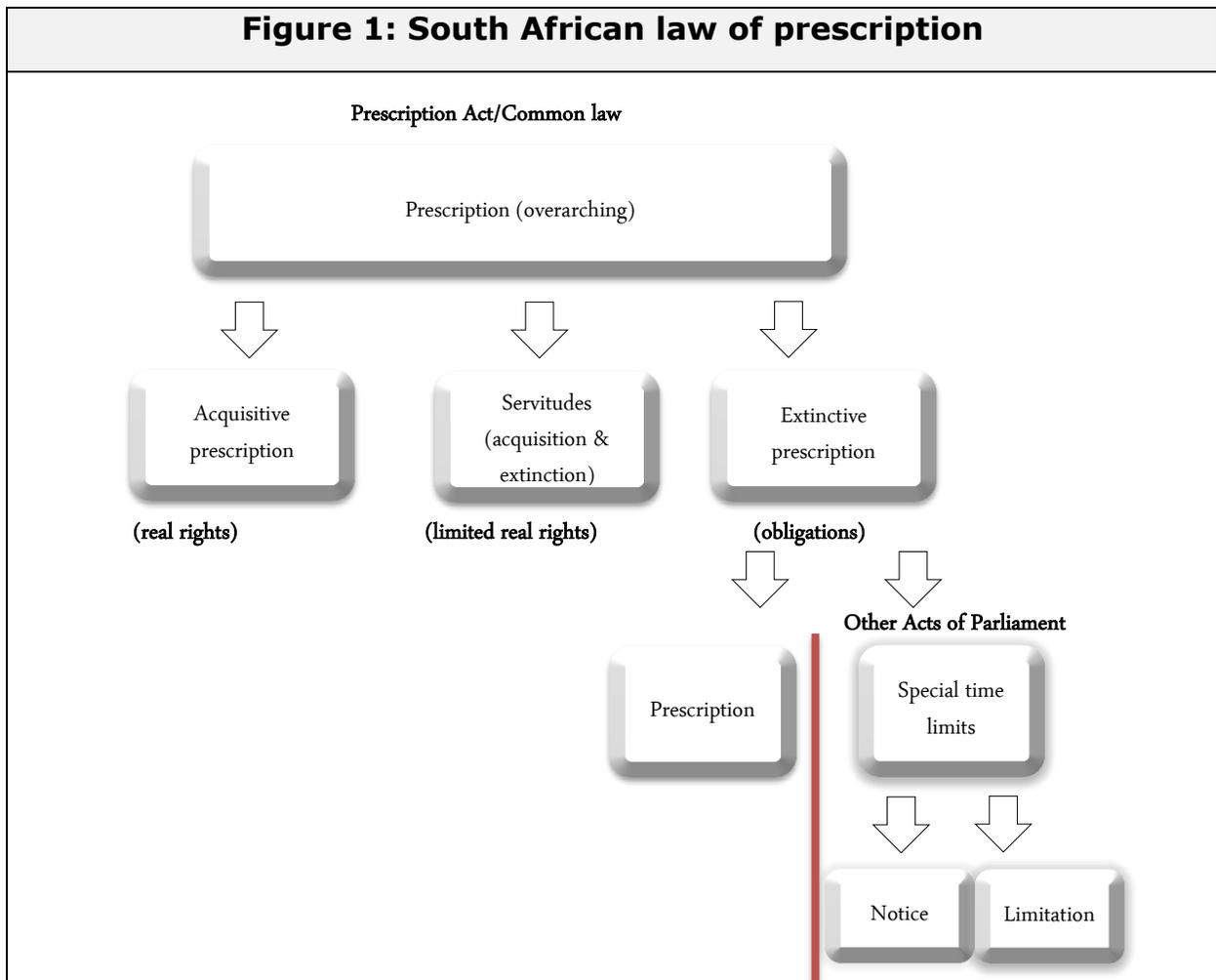
The Commission therefore invites comments from all parties interested in the matter under investigation.

Respondents are required to respond as comprehensively as possible.

**The closing date for comments is 30 April 2018.**

# APPROACH

- (a) This Revised Discussion Paper constitutes a revision of the Commission's initial Discussion Paper published in July 2011. Owing to the time that elapsed since the publication of the initial paper, a need arises to update it with additional research and the outcome of new court judgements. In addition, the scope of the investigation is expanded to cover a broader focus area. Finally, certain topics are reviewed and fleshed out in finer detail.
- (b) The South African law of prescription can be presented in the following way, diagrammatically:



- (c) The focus of the investigation is on extinctive prescription.
- (d) In this regard, the concepts of notice and limitation are distinguishable from prescription, and are better-known as “*extraordinary prescription*”, “*special time limits*” or even “*guillotine*” or “*fatal*” provisions. Although bearing some resemblance to the common law jurisdictions’ concept of “*limitation of actions*”, there are notable differences. Therefore, in the context of South Africa’s limitations regime, the terms employed in this paper will be “*notice*” or “*limitation*” (when referring to them individually) or “*special time limits*” (when referring to them collectively).
- (e) In 1985 and 1998, the Commission dealt with two investigations into special time limits, and for the most part, referred to them as “*restrictive provisions*”. Probably for ease of reference during the parliamentary process, the concept was referred to as “*prescription*”. In instances where these previous Commission investigations are referred to, and where it is not possible to do otherwise, the term “*prescription*” will be used even in circumstances where it would be more appropriate to use the term “*special time limits*”.
- (f) A comparative analysis is conducted of the prescription systems of France and Germany (civil law systems); England and New Zealand (common law systems) and Scotland (a mixed system like South Africa). General references are made to the Canadian system of Saskatchewan and the Australian systems of Western Australia and New South Wales. General references are also made to the prescription systems of Lesotho, Botswana and Namibia (mixed systems like South Africa) in light of shared colonial histories. As research material for the systems of Zimbabwe and Swaziland were not readily available at the initial stage of developing this paper, no reference is made to their prescription regimes.

- (g) Extensive use is made of table presentations in order to serve as visual aids.
- (h) The paper consists of an Introduction, six parts and a Conclusion.
  - (i) The Introduction provides a broad summary of the general principles of prescription, with particular reference to the following areas of the Prescription Act (general prescription period; date prescription begins running; the knowledge requirement; delay and interruption).
  - (ii) Part A 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.
  - (iii) Part B 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.
  - (iv) Part C 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.

- (v) Against the backdrop of the case studies of *Mdeyide* and *Mothupi*, part D 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.
- (vi) Part E explores the possibility of integrating other forms of alternative dispute resolution into the Prescription Act as a delay factor, similarly to arbitration.
- (vii) Part F 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.
- (viii) The paper concludes with a proposal for the repeal of the Prescription Act in its entirety and its replacement with a new enactment.
- (i) A draft Prescription Bill (Annexure A) and a draft Institution of Legal Proceedings against certain Organs of State Amendment Bill (Annexure B) are annexed to the paper for consideration and comment by Respondents. The Prescription Act is also annexed (Annexure D) for ease of cross-referencing.

# INTRODUCTION

## 1

### OVERVIEW

#### Objects and powers of Commission

- 1.1 The objects of the South African Law Reform Commission (Commission) are set out in section 4 of the South African Law Reform Commission Act, 1973<sup>1</sup> (South African Law Reform Commission Act), as follows:

*to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including-*

- (a) *the repeal of obsolete or unnecessary provisions;*
- (b) *the removal of anomalies;*
- (c) *the bringing about of uniformity in the law in force in the various parts of the Republic;*
- (d) *the consolidation or codification of any branch of the law; and*
- (e) *steps aimed at making the common law more readily available.*

- 1.2 In order to achieve these objects, the Commission has the power to draw up programmes setting out-

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<sup>1</sup> South African Law Reform Commission Act 19 of 1973.

- 1.2.1 matters which, in its opinion, require consideration;<sup>2</sup> and
- 1.2.2 suggestions which, in the opinion of any person or body, require consideration.<sup>3</sup>

## **Background to investigation**

1.3 On 3 October 1985 and 30 September 1998, and following two investigations, the Commission submitted the following reports to the then Minister of Justice and Constitutional Development:

1.3.1 Report on an investigation into time limits for the institution of actions against the state (1985 Commission Report)<sup>4</sup>; and

1.3.2 Supplementary Report on the investigation into time limits for the institution of actions against the state (1998 Commission Report).<sup>5</sup>

1.4 The Commission's investigations were aimed at determining-

1.4.1 whether restrictions placed by certain statutory provisions on the rights of persons to institute legal proceedings against the state were justified; and

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<sup>2</sup> Section 5(1) of the South African Law Reform Commission Act. Referred to, colloquially, as own initiative investigations.

<sup>3</sup> Section 5(2) of the South African Law Reform Commission Act.

<sup>4</sup> South African Law Commission: Project 42: *Report on an investigation into time limits for the institution of actions against the state* 1985.

<sup>5</sup> South African Law Commission: Project 42: *Supplementary Report on the investigation into time limits for the institution of actions against the state* 1998.

- 1.4.2 whether it was feasible to unify these provisions; found to be scattered in a bewildering array of statutes.
- 1.5 The restrictions, said to unfairly favour the interests of the state against those of other defendants, took the following forms:
  - 1.5.1 requiring plaintiffs to give notice of intention to institute legal proceedings against the state;
  - 1.5.2 requiring plaintiffs to await the lapsing of certain time periods after giving the aforementioned notice before instituting the proceedings in question; and
  - 1.5.3 providing for the lapsing of a right to institute legal proceedings against the state after the expiry of usually very short time periods from the date a debt became due.
- 1.6 In its 1985 Report, the Commission recommended-
  - 1.6.1 a uniform notice period of six months from the date a debt became due for the institution of legal proceedings against the state arising from delictual liability;
  - 1.6.2 the granting to courts of the power to condone non-compliance with these notice requirements;
  - 1.6.3 application of the Prescription Act, 1969<sup>6</sup> (the Prescription Act) to certain delictual debts of the state;<sup>7</sup> and

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<sup>6</sup> Prescription Act 68 of 1969.

<sup>7</sup> As opposed to the limitation provisions provided for in the differing statutes.

- 1.6.4 the repeal of 21 statutory provisions, believed to be unjustifiable restrictions.
- 1.7 The Bill that was approved by the Commission dealt specifically with delictual liability of the state and excluded from its scope-
  - 1.7.1 restrictive provisions that do not favour the interests of the state in the narrow sense, for example, the provisions contained in the Compensation for Occupational Injuries and Diseases Act, 1993<sup>8</sup>; and
  - 1.7.2 restrictive provisions that do not affect the state, for example, the provisions contained in the Attorneys Act, 1979.<sup>9</sup>
- 1.8 The Bill was never introduced in Parliament.
- 1.9 The Commission subsequently reconsidered the matter based on-
  - 1.9.1 changes to the limitation period provided for in a then newly promulgated South African Police Service Act, 1995<sup>10</sup>;
  - 1.9.2 declaration by the Constitutional Court of section 113(1) of the former Defence Act, 1957<sup>11</sup> to be inconsistent with section 22 of the Constitution of the Republic of South Africa, 1993 (Interim

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<sup>8</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>9</sup> Attorneys Act 53 of 1979.

<sup>10</sup> South African Police Service Act 68 of 1995.

<sup>11</sup> Defence Act 44 of 1957.

Constitution) and therefore invalid,<sup>12</sup> thus casting doubt on the constitutionality of similar restrictive provisions; and

1.9.3 the continued call for uniform provisions regarding legal proceedings instituted against the state.

1.10 The draft Bill approved by the Commission in its 1998 Report contained similar recommendations to its 1985 counterpart. It was introduced in Parliament in 1999.

1.11 During Portfolio Committee deliberations held in September 2000,<sup>13</sup> it was noted that the main object of the Bill had been to harmonise the different notice periods. The Bill was not considered to be an appropriate mechanism for harmonising the different "*limitation*" periods<sup>14</sup> even though it did, to an extent, provide for limited harmonisation.<sup>15</sup> On this basis, the Portfolio Committee requested the Minister at the time to approach the Commission to consider including the following investigation on its programme:

*Investigation into the harmonisation of the provisions of existing laws providing for different 'prescription' periods*

1.12 Pursuant to this, the investigation was included on the Commission's programme.

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<sup>12</sup> In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

<sup>13</sup> Report of the Portfolio Committee on Justice and Constitutional Development 26 September 2000.

<sup>14</sup> The actual term used in the Portfolio Committee Report was "*prescription*" periods. The relevance of the distinction between prescription and limitation becomes clearer later in this paper.

<sup>15</sup> Due to the lack of time, and due to the fact that a comprehensive review of the different periods had not been undertaken, the Portfolio Committee was not in a position to deal with the harmonisation of all such periods.

- 1.13 Meanwhile, the Bill continued its passage through the parliamentary process, culminating in the passing of the Institution of Legal Proceedings against certain Organs of State Act, 2002.<sup>16</sup>

### **Scope of investigation**

- 1.14 The following areas inform the basis of extinctive prescription in South Africa:

1.14.1 notice and limitation provisions (referred to collectively as extraordinary prescription, special time limits or the limitation of actions); and

1.14.2 prescription provisions.

1.15 The aim of the Commission's 1985 and 1998 investigations was to harmonise the multiple and different notice and limitation provisions applying in South Africa. As is evident from the Portfolio Committee deliberations on the draft Bill developed by the Commission and the resultant Institution of Legal Proceedings against certain Organs of State Act, not all issues pertaining to notice and limitation were dealt with. It is on this basis that the Commission was invited to revisit the matter.

1.16 The Portfolio Committee's proposal refers to "*prescription*"; not "*limitation*". The scope of the investigation remains unaffected as-

1.16.1 the terms prescription and limitation are often incorrectly conflated;

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<sup>16</sup> Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

1.16.2 the Portfolio Committee's proposal was informed by the Commission's previous investigations into special time limits; and

1.16.3 the Portfolio Committee may have sought a more open-ended investigation based on the sometimes intersecting nature of prescription and limitation.

1.17 The scope of the investigation therefore entails examining-

### **Special time limits**

1.17.1 statutory provisions containing special time limits, with the aim of determining-

1.17.1.1 whether the restrictions they place on the rights of persons to institute legal proceedings are justified; and

1.17.1.2 whether it is feasible to harmonise them; and

### **Prescription**

1.17.2 in relation to the following areas:

1.17.2.1 recovery of prescribed debt;

1.17.2.2 review of the three-year general prescription period;

1.17.2.3 review of the principles of delay;

1.17.2.4 delay and alternative dispute resolution; and

1.17.2.5 access to courts in the face of adverse socio-economic circumstances.

1.18 The following areas do not form part of the investigation:

1.18.1 acquisitive prescription;

1.18.2 the acquisition and extinction of servitudes by prescription; and

1.18.3 prescription provisions contained in enactments regulating criminal law.

1.19 The term “*debt*” is not defined in the Prescription Act. The question as to what constitutes a debt and whether it should be defined in wide or narrow terms has been the focus of renewed attention since 2016.<sup>17</sup> Due to time constraints, this topic is not dealt with in the investigation. The Commission will consider addressing the question of the definition of a debt in relation to imprescriptible obligations in the future.

## **Notion of prescription**

1.20 The notion of time – on the one hand, transient – and on the other, finite - is the embodiment of prescription. It is this fluidity that lies at the core of its ambiguity, creating complex and intricate dilemmas around the nature of prescription.<sup>18</sup>

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<sup>17</sup> Refer, in this regard, to the cases of *Links v MEC for Health, Northern Cape* 2016 ZACC 10 and *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13.

<sup>18</sup> Encapsulated in the concepts justice/equity (underlying philosophy); substantive/procedural (source); extinction/barring (effect, in relation to the residual right said to remain as a consequence of strong or weak prescription); right/remedy (characterisation) and prescription/limitation (classification).

- 1.21 Its reach is universal; spanning virtually all branches of the law, and is distinguished only by its application in the various civil, common law and mixed jurisdictions of the world.
- 1.22 It is the process whereby rights are acquired, weakened or lost as a result of persistent action or inaction over a period of time.<sup>19</sup>
- 1.23 It is regarded as an indispensable feature of modern legal systems,<sup>20</sup> serving to balance the interests of the debtor, the general public and even the creditor.<sup>21</sup>
- 1.24 In evidence of its various forms-
- 1.24.1 as an overarching concept, it manifests in the forms of acquisitive or positive prescription (entailing the acquisition of rights) and extinctive or negative prescription (entailing the weakening or loss of rights);
- 1.24.2 as a concept of extinctive prescription, it is applied in the different jurisdictions as distinct institutions of prescription (limitation of actions)<sup>22</sup> and strict time limits (special time limits or extraordinary prescription); and

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<sup>19</sup> *Wille's Principles of South African Law* 9<sup>th</sup> Edition Francois du Bois 2007 851.

<sup>20</sup> Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law (German Report by Reinhard Zimmerman 171).

<sup>21</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 16.

<sup>22</sup> In the common law jurisdictions, limitation serves as the functional equivalent of prescription.

1.24.3 as a concept of extraordinary prescription, it is referred to in the different jurisdictions as special time limits, special limitation periods, strict time limits, expiry or even guillotine or fatal provisions.

### **Underlying policy<sup>23</sup>**

1.25 The primary objective of prescription is the achievement of legal certainty and finality in the relationship between a debtor and a creditor, with the emphasis on protecting a debtor against the unfairness of having to defend stale claims.<sup>24</sup>

1.26 Further to this, the rules of prescription promote the timeous exercise of rights. In this regard however, although the rules of prescription are meant to quicken the diligence of a creditor, they are not meant to operate punitively and mechanically; thus personal factors relevant to a creditor's failure to enforce a right timeously are usually taken into account for the purpose of delaying the onset or the running of prescription.<sup>25</sup>

1.27 They are also aimed at enhancing judicial economy and efficiency in the administration of justice. This is best served when parties are obliged to have their disputes adjudicated upon promptly, while evidence is available and the memory of witnesses is still fresh.

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<sup>23</sup> Loubser MM *Extinctive Prescription* 1996 Juta & Co Ltd 22-24 (hereafter referred to as Loubser); Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* 1990 1<sup>st</sup> Edition 767-769.

<sup>24</sup> From an insurance point of view, an inability to secure finality has negative implications for the availability and cost of insurance, which is risk-based, heavily reliant on forecasts, underwritten on the basis of previous claims histories and extends from year to year.

<sup>25</sup> Loubser at 23.

## 2

### HISTORICAL DEVELOPMENT

#### Customary law

- 2.1 Unlike western legal systems, rules determining time limits for the institution of actions or the enforcement of rights plays a minimal role in determining when customary rights and obligations come into being. At most, the passage of time merely affects the credibility of evidence.<sup>26</sup>
- 2.2 The principles of prescription are therefore not applicable in relation to customary law relationships.<sup>27</sup>

#### Roman law

##### Origin and development of acquisitive prescription<sup>28</sup>

- 2.3 During early Roman law, all actions were unlimited in time. In 450 BC, by virtue of the concept of *usucapio*<sup>29</sup> (applicable to Roman

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<sup>26</sup> Bekker JC and Rautenbach C *Nature and Sphere of Application of African Customary Law in South Africa* in Rautenbach C et al *Introduction to Legal Pluralism in South Africa* 2010 paragraph 2.3.4.

<sup>27</sup> Refer also to section 20 of the Prescription Act.

<sup>28</sup> Kaser M *Römisches Privatrecht* (A translation by R Dannenbring *Roman Private Law*) 3<sup>rd</sup> Edition 1980 129-134, 2-41; Krause L E: *The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law* 1923 *South African Law Journal* 26-36; Schultz F *Classical Roman Law* 1951 355-360; Loubser 4-5; De Wet JC *Opuscula Miscellanea* (edited by J J Gauntlett) Butterworth Durban 1979 78-81 (hereafter referred to as De Wet).

citizens only), the Twelve Tables provided for the acquisition of immovable property after uninterrupted possession of two years and the acquisition of other property after uninterrupted possession of one year.

2.4 During the classical period, the prerequisites for *usucapio* became stricter, requiring both just title and good faith. For Roman citizens, the period provided for in the Twelve Tables still applied. For non-Roman citizens occupying municipal land, the *praescriptio longi temporis*<sup>30</sup> was developed, which conferred ownership of immovable property after the lapse of ten years (whilst the possessor and owner were domiciled within the same territory) and twenty years (whilst the owner was absent from the territory). Movable property was acquired after three years.

2.5 In 531 AD, Justinian amalgamated *usucapio* and *praescriptio longi temporis* where possession, founded on just title and good faith, conferred ownership of immovable property after ten and twenty years (depending on whether the owner and possessor were domiciled within or outside a province) and movable property after three years.

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<sup>29</sup> The word is derived from the Latin words *usu capere*, meaning "to acquire by possession".

<sup>30</sup> Defence of long time possession.

## Origin and development of extinctive prescription<sup>31</sup>

- 2.6 Obligations, like real actions, were also unlimited in time, until shorter periods were introduced by the *praetor* and *aediles* in special cases. On account of their character, praetorian penal actions (which demanded quick punishment), were barred after one year, causing the extinction of the action after the lapse of the period in question.
- 2.7 In 424 AD, the emperor Theodosius II, introduced a general law of limitation of actions based on the need to prohibit the exercise of rights not actively asserted for a generation. The aim was to prevent disturbance of the peace.
- 2.8 The limitation had the following effect:
- 2.8.1 the action lapsed after thirty years; and
- 2.8.2 after the thirty-year period, the defendant could renounce the defence or exception (thus ascribing to this form of limitation a weak effect).
- 2.9 The shorter praetorian or aedilitian actions remained unaffected.

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<sup>31</sup> Kaser M *Römisches Privatrecht* (A translation by R Dannenbring *Roman Private Law*) 3<sup>rd</sup> Edition 1980 2-41, 129-134; Krause L E: *The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law* 1923 South African Law Journal 26-36; Schultz F *Classical Roman Law* 1951 355-360; Loubser 4-5; De Wet 78-79; 103-104.

## **Roman-Dutch law**

- 2.10 The acquisitive prescription of the Roman-Dutch law required neither just title nor good faith, only uninterrupted possession for thirty years, peacefully, openly and as of right. It was in this form that South Africa inherited the concept of acquisitive prescription.
- 2.11 Roman-Dutch commentators, for the most part, adhered to Justinian's Code regarding the laws of prescription, and although various views existed about the nature and effect of extinctive prescription, the predominant view was that it had a strong effect, extinguishing the right or obligation and not just the remedy.<sup>32</sup>

## **Pre-Union laws**

- 2.12 Prescription in pre-Union South Africa was governed partly by the common law and partly by legislation (Act 6 of 1861 (Cape); Act 14 of 1861 (Natal); Chapter 23 of the Orange Free State Code and Act 26 of 1908 (Transvaal)).

## **The 1943 Act**

- 2.13 The pre-Union statutes were subsequently repealed by the Prescription Act, 1943<sup>33</sup> (the 1943 Act), which came into effect on 9 April 1943.

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<sup>32</sup> Loubser 4-5.

<sup>33</sup> Prescription Act 18 of 1943.

- 2.14 The 1943 Act consolidated the prescription laws of the various provinces, with the object of securing uniformity throughout the Union. It was modelled, to a large extent, on the Transvaal Act of 1908.<sup>34</sup>
- 2.15 In terms of section 15(1) of the 1943 Act, common law that was not inconsistent with its provisions still applied.
- 2.16 Prescription had a weak effect.<sup>35</sup>
- 2.17 In accordance with its weak effect, the 1943 Act embodied a two-tier system which operated as follows:<sup>36</sup>
- 2.17.1 once the prescription period lapsed, the creditor's right became emasculated, thus preventing enforcement by way of legal process (except by way of counterclaim). Reliance could, however, be placed on the "right", "action", or "contract" for the purposes of set-off or for the purposes of supporting a contract of suretyship;<sup>37</sup> and

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<sup>34</sup> Debates of the House of Assembly *Prescription Bill* 24 February 1943 2238.

<sup>35</sup> Section 3(1) of the 1943 Prescription Act (*Extinctive prescription is the rendering unenforceable of a right by the lapse of time*); *Standard General Insurance Company Ltd v Verdun Estates (Pty) Ltd* 1990 (2) SA 693 AD; *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 SCA (*The limitation statutes in England and New Zealand at the time those cases were decided provided for the expiration of the right to bring an action rather than the expiration of the right itself that was sought to be enforced. The same approach was adopted [in South Africa] before 1969. Under the Prescription Act 1943 extinctive prescription was 'the rendering unenforceable of a right by the lapse of time', but the right itself remained in existence for a further period, and could thus operate to set-off countervailing debts*).

<sup>36</sup> De Wet 108; Loubser 6; *Wille's Principles of South African Law* 9<sup>th</sup> Edition 852.

<sup>37</sup> Section 3(5)(i) and (ii) of the 1943 Act.

2.17.2 the prescribed debt became extinct for all purposes after the lapse of thirty years.<sup>38</sup>

2.18 Section 3(5)(iii) of the 1943 Act prohibited the cession or transfer of prescribed debts.

2.19 Five prescription periods were provided for. The date prescription began running was determined in accordance with the cause of action, in the following way:

<b>Table 1: Commencement: 1943 Act</b>	
<b>Cause of action</b>	<b>Commencement date</b>
<ul style="list-style-type: none"> <li>• Defamation<sup>39</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Where the debtor was known to the creditor-               <ul style="list-style-type: none"> <li>○ date the defamation was first brought to the knowledge of the creditor</li> </ul> </li> <li>• Where the debtor was unknown to the creditor-               <ul style="list-style-type: none"> <li>○ date on which the creditor ascertained or might reasonably have been expected to ascertain the name of the debtor</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Damages (other than defamation)<sup>40</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Date the wrong was first brought to the knowledge of the creditor or the date the creditor might reasonably have been expected to have knowledge of the wrong (whichever date was earlier)</li> </ul>
<ul style="list-style-type: none"> <li>• Any other action<sup>41</sup> <ul style="list-style-type: none"> <li>○ (action for remuneration or disbursements in connection with services rendered or work done)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Date of accrual of right of action               <ul style="list-style-type: none"> <li>○ (deemed to have first accrued when the work or services were completed or when the relationship between employer and employee ceased with regard to a particular matter)</li> </ul> </li> </ul>

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<sup>38</sup> *Proviso* to section 3(5) of the 1943 Act.

<sup>39</sup> Section 5(1)(a)(i) and (ii) of the 1943 Act.

<sup>40</sup> Section 5(1)(c) of the 1943 Act.

<sup>41</sup> Section 5(1)(d) of the 1943 Act.

2.20 The 1943 Act provided for suspension and interruption of prescription.

2.21 For the purpose of suspension, the running of prescription was suspended in the face of certain impediments that made it difficult or impossible for a creditor to timeously assert a right against a debtor.<sup>42</sup>

2.22 Interruption entailed stopping the running of an applicable period by judicial or non-judicial means. This served as an indication that a creditor had diligently enforced his rights, thus ensuring that a debtor did not have to defend a stale claim. It operated in the following way:<sup>43</sup>

<b>Table 2: Interruption: 1943 Act</b>	
<b>Operation and effect</b>	<b>Circumstances under which interruption took place</b>
<ul style="list-style-type: none"> <li>• <b>Acknowledgement by a debtor-</b> <ul style="list-style-type: none"> <li>○ the old prescription period stopped running from the date of the interruption</li> <li>○ a new prescription period started running "<i>afresh</i>" on the date interruption occurred</li> <li>○ running of the new period could not exceed three years (unless the acknowledgement was in writing)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Acknowledgement by a debtor through-               <ul style="list-style-type: none"> <li>○ part payment</li> <li>○ payment of interest</li> <li>○ giving security</li> <li>○ admitting liability in any other manner (whether express or implied and whether verbally or in writing)</li> </ul> </li> </ul>
	<ul style="list-style-type: none"> <li>• Service on a debtor of any process instituting action</li> </ul>
	<ul style="list-style-type: none"> <li>• Submission to arbitration</li> </ul>
	<ul style="list-style-type: none"> <li>• Filing a claim against an insolvent estate, a company in liquidation, a deceased estate or an applicant under the Farmers' Assistance Act, 1935</li> </ul>

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<sup>42</sup> This topic is dealt with more fully in Part C of this paper.

<sup>43</sup> Section 6 of the 1943 Act.

**Table 2: Interruption: 1943 Act**

Operation and effect	Circumstances under which interruption took place
<ul style="list-style-type: none"><li>• For the purpose of <b>judicial interruption</b>, it was held that-  <i>“once a creditor has instituted action, the periods within which he must take the various steps from summons to judgement are fixed by our Rules of Court”<sup>44</sup></i></li> <li>• This had the effect of-<ul style="list-style-type: none"><li>○ “<i>suspending</i>” the running of the “<i>old</i>” period<sup>45</sup> during the course of the ensuing action</li><li>○ causing prescription to run “<i>afresh</i>” by virtue of a “<i>new</i>” thirty-year period, but only from the date <b>the debt was successfully prosecuted to final judgement</b></li></ul></li></ul>	

2.23 The general period of prescription, as provided for in section 3(2)(e)(iii) of the 1943 Act, was thirty years.<sup>46</sup>

2.24 The 1943 Act saved the provisions of other laws in force that regulated their own prescription regimes.<sup>47</sup>

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<sup>44</sup> *Kuhn v Kerbel and Another* 1957 (3) SA 365 (A) at 370.

<sup>45</sup> *Sieberhagen v Grunow* 1957 (3) SA 485 (C) at 489 (referring to the conclusion reached in *Caldwell v Prinsloo* 1932 TPD 5).

<sup>46</sup> De Wet 110.

<sup>47</sup> In this regard, section 11(3) provided as follows:

*Nothing in this Act contained shall affect any provision with regard to prescription which is in force in any law other than the laws specified in the Schedule.*

## Other mixed legal systems

- 2.25 By virtue of imperialism and the colonisation of Africa, the former British Empire consisted of various self-governing dominions, colonies, protectorates and mandates,<sup>48</sup> including South Africa (then comprising the Cape of Good Hope, Transvaal, Natal and the Orange Free State); Lesotho, Botswana and Namibia.
- 2.26 Lesotho (known then as Basutoland) became a British Crown Colony in 1884. General Law Proclamation 2B of 1884 made the laws of the Cape of Good Hope<sup>49</sup> applicable to Lesotho.<sup>50</sup> It is in this regard that Act 6 of 1861 (Cape) formed the model for Lesotho's Act 6 of 1861 (Prescription) (the Lesotho Prescription Act).<sup>51</sup> The Lesotho Prescription Act came into force on 29 May 1894. The Act has never been repealed.<sup>52</sup>
- 2.27 Botswana (formerly known as Bechuanaland) became a British Protectorate in 1885. In 1891, administration of the territory was

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<sup>48</sup> Protectorates and protected states retrieved from [www.onlinenames.net.au/country-guides](http://www.onlinenames.net.au/country-guides) on 15 September 2014.

<sup>49</sup> To the extent permissible.

<sup>50</sup> Thabane T *The Law and Legal Research in Lesotho* 2012 retrieved from [www.nyulawglobal.org/globalex/Lesotho](http://www.nyulawglobal.org/globalex/Lesotho) on 5 September 2014.

<sup>51</sup> *Sekhesa v Lesotho National Insurance Company* (1994) LSCA 135 paragraph 13 (*The view that was taken by the majority of the Appellate Division was that premature service cannot institute an action and therefore does not interrupt prescription. This view was based on [the] South African Prescription Act of 1943 which has no application in Lesotho. Where a court in Lesotho has to deal with a case involving prescription, it has no option but to resort to the Common Law of Lesotho as the old Cape Prescription Act of 1861 which is still law in Lesotho ....*).

<sup>52</sup> Efforts are underway in Lesotho to review their prescription laws.

transferred to the Cape of Good Hope.<sup>53</sup> By virtue of the Proclamation of 1891 and the General Law Proclamation of 1909, the laws in force in the Cape of Good Hope<sup>54</sup> were made applicable to Botswana.<sup>55</sup> It is in this regard that Act 6 of 1861 (Cape) formed the basis for Botswana's prescription laws. Botswana's Prescriptions Act (Chapter 13:01) (the Botswana Prescription Act) subsequently repealed the Prescriptions Amendment Act, 1861 of the Cape of Good Hope.<sup>56</sup> The Botswana Prescription Act came into force on 4 December 1959, modelled, to a large extent, on South Africa's 1943 Act.<sup>57</sup>

2.28 Namibia (formerly known as South West Africa) was initially colonised by Germany<sup>58</sup> and later South Africa.<sup>59</sup> By virtue of the Administration of Justice Proclamation (SWA) 21 of 1919, Roman-Dutch law as existing and applied in the Cape Province as at 1 January 1920 became Namibia's common law.<sup>60</sup> To this end,

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<sup>53</sup> Booi L *Botswana's Legal System and Legal Research* 2011 retrieved from [www.nyulawglobal.org/globalex/Botswana](http://www.nyulawglobal.org/globalex/Botswana) on 10 September 2014.

<sup>54</sup> To the extent applicable.

<sup>55</sup> Booi L *Botswana's Legal System and Legal Research* 2011 retrieved from [www.nyulawglobal.org/globalex/Bostwana](http://www.nyulawglobal.org/globalex/Bostwana) on 10 September 2014.

<sup>56</sup> Section 17 of the Botswana Prescription Act.

<sup>57</sup> Botswana Prescription Act; *Citadel Consultants Ltd v Wayguard Security (Pty) Ltd* (1995) BLR 218 (CA) paragraph 10 (... *the relevant provisions in the South African Prescription Act No. 18 of 1943 are to all intents and purposes apart from a differing numbering of the Sections the same as in the Prescriptions Act (Cap 13:01)*).

<sup>58</sup> In 1884.

<sup>59</sup> In 1915.

<sup>60</sup> Geraldo GM and Nowases I *Researching Namibian Law and the Namibian Legal System* 2013 retrieved from [www.nyulawglobal.org/globalex/Namibia](http://www.nyulawglobal.org/globalex/Namibia) on 8 September 2014.

Namibia's Prescription Act, 1969<sup>61</sup> (the Namibia Prescription Act), which came into operation in November 1979, is modelled on the Prescription Act (subject to local conditions).<sup>62</sup>

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<sup>61</sup> (Namibia) Prescription Act 68 of 1969.

<sup>62</sup> Section 21 of the Prescription Act (which was repealed in 1992) provided as follows:

*Application to South-West Africa:*

*This Act and any amendment thereof which may be made from time to time, shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel referred to in section 38(5) of the South-West Africa Constitution Act, 1968 (Act 39 of 1968).*

## 3

### CURRENT LEGAL POSITION

#### The Prescription Act

- 3.1 The Prescription Act came into operation on 1 December 1970.<sup>63</sup>
- 3.2 In terms of section 16(2)(a), the laws which applied before commencement of the Prescription Act continue to apply. Arguably, this includes the common law insofar as it is not inconsistent with the Prescription Act and the Constitution.
- 3.3 Extinctive prescription is governed by Chapter III, which provides for the complete extinction of a debt after prescription as opposed to the two tier approach that existed formerly,<sup>64</sup> thus ascribing to it a strong effect.

#### Prescription periods

- 3.4 The following extinctive prescription periods are provided for in section 11 of the Prescription Act:

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<sup>63</sup> The object of the Prescription Act is to consolidate and amend the laws relating to prescription, based on the number of interpretation and application difficulties experienced with the 1943 Act (Debates of the Assembly *Prescription Bill* 9 May 1969 5683).

<sup>64</sup> Section 10(1) of the Prescription Act provides as follows:

*Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.*

**Table 3: Prescription periods**

<b>Period</b>	<b>Debt</b>
Thirty years	<ul style="list-style-type: none"><li>• A debt secured by mortgage bond</li><li>• A judgement debt</li><li>• A debt in respect of a taxation imposed or levied by or under a law</li><li>• A debt owed to the state in respect of a share of profits, royalties or similar considerations in respect of the right to mine minerals or other substances</li></ul>
Fifteen years (unless a longer period applies in respect of the debt in relation to the thirty year period)	<ul style="list-style-type: none"><li>• A debt owed to the state<sup>65</sup> arising from-<ul style="list-style-type: none"><li>○ an advance</li><li>○ a loan of money</li><li>○ the sale or lease of land</li></ul></li></ul>
Six years (unless a longer period applies in respect of the debt in relation to the thirty or fifteen-year period)	<ul style="list-style-type: none"><li>• A debt arising from a bill of exchange or other negotiable instrument or a notarial contract</li></ul>
Three years (save where an Act of Parliament provides otherwise)	<ul style="list-style-type: none"><li>• Any other debt</li></ul>

<sup>65</sup>

In *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) (cited with approval in *The Isibaya Fund v Visser and Another* 2016 JOL 34756 (SCA)); it was held that-

- *since section 11(b) of the Prescription Act provided for a 15-year prescription period as an exception to the general 3-year period, the meaning attributed to the word "state" had to be restricted, being that of a juristic person, capable of suing in its own name for that which is due to treasury, that is, government going about government business for the benefit of treasury;*
- *according to the Land and Agricultural Development Bank Act, 2002 (Act 15 of 2002), the bank is a separate juristic entity acting in its own name and right, distinct from (although not entirely independent of) government; and*
- *the spirit, purport and objects of the Bill of Rights cannot be said to be served by interpreting section 11(b) to provide the bank with the benefit of the 15-year prescription period, taking into account the modern trend towards streamlining prescription periods and not making special provision for public authorities.).*

## Commencement of prescription

### 3.5 General commencement date

3.5.1 Prescription begins running when a debt becomes due.<sup>66</sup>

### 3.5.2 *Debt-*

3.5.2.1 The term “*debt*” is not defined in the Prescription Act.

3.5.2.2 Prior to March 2016, the courts attributed some of the following meanings to the expression:

- (a) *Evins v Shield Ins Co Ltd* (in relation to claims for compensation arising from bodily injuries sustained in a road accident and loss of support)-

*The word “debt” in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property. While this is so “debt” cannot embrace all rights between two persons. In my view, “debt” in ss 10 and 15(1) of the Prescription Act means an obligation or obligations flowing from a particular right.*<sup>67</sup>

- (b) *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*<sup>68</sup> (ESCOM) (in relation to a claim for damages arising from an explosion caused by defective piping

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<sup>66</sup> Section 12(1) of the Prescription Act.

<sup>67</sup> *Evins v Shield Insurance Company Ltd* 1979 (3) SA 1136 (W) 1141-1142.

<sup>68</sup> *ESCOM v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 344.

supplied by the respondent and after the court referred to the definition of “debt” contained in the Shorter Oxford English Dictionary and *Leviton and Son v De Klerk’s Trustee*<sup>69</sup>-

*[... a debt is] that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another.; and*

*Whatever is due ... from any obligation.*

- (c) *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere*<sup>70</sup> (in relation to a claim for breach of statutory duties in failing to fulfil certain conditions for the provision of stormwater drainage and road construction) and in relation to the respondent’s argument that statutory obligations do not become prescribed, that they were connected to land and thus amounted to burdens associated with real rights and that they did not constitute obligations emanating from a debtor/creditor relationship)-

*Volgens die aanvaarde betekenis van die begrip slaan “n skuld” op 'n verpligting om iets te doen (hetsy by wyse van betaling of lewering van 'n saak of dienste), of nie te doen nie. Dit is die een pool van 'n verbintenis wat in die reël 'n vermoënsbestanddeel en-verpligting omvat (...). Volgens bedoelde betekenis kan 'n skuld dus ook statutêr ontstaan en kom dit in beginsel nie daarop aan of voldoening tot voordeel van die publiek of 'n deel daarvan strek nie. Volgens normale*

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<sup>69</sup> *Leviton and Son v De Klerk’s Trustee* 1914 CPD 685.

<sup>70</sup> *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370.

*spraakgebruik sou dit immers nie vreemd opval nie indien 'n persoon sê dat hy 'n bedrag skuld aan die Ontvanger van Inkomste, die SAUK, of 'n plaaslike bestuur ten opsigte van onderskeidelik inkomstebelasting, 'n lisensie, of erfbelasting.*

*In die 1969 Wet as sodanig vind ek geen aanduiding dat die begrip in 'n enger betekenis gebruik is en nie statutêr skulde met bogenoemde strekking (wat ek gerieflikheidshalwe voortaan publiekregtelike skulde noem) insluit nie.<sup>71</sup>*

- (d) *Radebe v Government of the Republic of South Africa and Others (in respect of a claim for redelivery of land purportedly expropriated pursuant to notices of expropriation dated August 1977 and July 1978)-*

*It seems to me in any event that the applicant's claim to have the expropriation and transfer of the property set aside and to demand redelivery of the land to him by registration thereof in his name has become prescribed by virtue of s 11 of the Prescription Act 68 of 1969.*

*The applicant lost his real rights in the land at the latest when transfer of the land to the State occurred on 26 February 1979.*

...

*Assuming the applicant had the right to have the expropriation and transfer set aside or to demand redelivery of the land to him by registration thereof in his name, that right arose as soon as he was deprived of his possession and ownership. The effect of the expropriation, whether valid or not, is that the applicant*

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<sup>71</sup>

Later in the judgement the court held, however, that not every obligation to do or not do something amounted to a debt in terms of the Prescription Act (*Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 374H).

*has been deprived of ownership of the land. He was thus left with no more than a personal right (if he has any right at all) to claim redelivery of the land by registration of title in his name. Such a claim constitutes a debt within the meaning of ss 10 and 11 of the Prescription Act 68 of 1969. While 'debt' is not defined in the Act, it has to be given a wide and general meaning. .... There is no reason why a claim for vindication of property movable or immovable should not be included. ....*<sup>72</sup>

- (e) *Desai NO v Desai and Others (Desai)* (in relation to a claim directing the appellant, an executor of a deceased estate, to take all steps and sign all documents necessary to effect transfer to the respondents of a one-seventh share of two immovable properties upon cessation of a family partnership and in respect of which the appellant invoked prescription on the basis that "the obligation (to procure registration of transfer) had long since become prescribed")-

*Section 10(1) of the Prescription Act 68 of 1969 ('the Act') lays down that a 'debt' shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see s 11(d)). The term 'debt' is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something. (See *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G ....). It follows that the undertaking in clause 13(d) to procure registration of transfer was a 'debt' as envisaged in s 10(1).*<sup>73</sup>

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<sup>72</sup> *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 803-804.

<sup>73</sup> *Desai NO v Desai and Others* 1996 (1) SA 141 (A) at 146.

- (f) *ABSA Bank v Keet* (in relation to a vindicatory claim for the return of a vehicle sold in terms of an instalment sale agreement for which the respondent had defaulted by failing to pay his instalments)-

*In the circumstances, the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription, on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.<sup>74</sup>*

- 3.5.2.3 In *Njongi v MEC, Department of Welfare, Eastern Cape*<sup>75</sup> decided in 2008, the Constitutional Court left open the question whether it was tenable within the broad meaning ascribed to the expression "debt" to include arrear disability grants, based on an argument that debts

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<sup>74</sup> *ABSA Bank v Keet* [2015] ZASCA 81 paragraph 25 (footnotes omitted).

<sup>75</sup> *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

arising from fundamental (socio-economic) rights never prescribe, being of a genre different from that envisaged by the Prescription Act.

3.5.2.4 The Constitutional Court decisions of *Links v MEC for Health, Northern Cape*<sup>76</sup> (*Links*) and *Makate v Vodacom (Pty) Ltd*<sup>77</sup> (*Makate*), handed down in March and April 2016 changed the position, by calling for a more nuanced approach to interpreting provisions that limit the exercise of the section 34 constitutional right of access to courts.

3.5.2.5 In *Links*, the Constitutional Court held as follows regarding its jurisdiction in the matter:

*This court has jurisdiction because the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution. That is the Prescription Act. The meaning that the court a quo attached to section 12(3) of the Prescription Act had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law. The applicant challenges the correctness of that meaning.*<sup>78</sup>

3.5.2.6 Based on this, the court held itself duty bound to interpret the relevant sections of the Prescription Act by having regard to section 39(2) of the Constitution which provides as follows:

*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

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<sup>76</sup> *Links v MEC for Health, Northern Cape* 2016 ZACC 10.

<sup>77</sup> *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13.

<sup>78</sup> *Links v MEC for Health, Northern Cape* 2016 ZACC 10 paragraph 22.

3.5.2.7 *Makate* involved an application for leave to appeal the enforcement of a contract concluded between the appellant and respondent's agent regarding the payment of compensation for use of the appellant's idea in developing a lucrative "please call me" product.

3.5.2.8 One of the orders the appellant sought from the trial court was for it to direct Vodacom-

*To commence with bona fide negotiations to determine a reasonable remuneration payable to him.*

3.5.2.9 One of the defences raised by the respondent was that the claim had prescribed in terms of section 11(d) of the Prescription Act.

3.5.2.10 The trial court held that the appellant's request for a declaration to the effect that Vodacom should "commence with bona fide negotiations to determine a reasonable remuneration payable to him" had prescribed. It hinged its interpretation on the wide meaning attributed to the term "debt", pronouncing that it included-

*... not only ... a claim to pay a plaintiff a share of revenue, but also a claim that the defendant complies with its obligations in terms of the contract, including its obligation to negotiate with the plaintiff concerning reasonable remuneration for the use of his idea.*<sup>79</sup>

3.5.2.11 It relied for its conclusion on the meaning attributed to the term in *Desai*.

3.5.2.12 According to the Constitutional Court however, the construction given by *Desai* relegated every obligation to the definition of the term "debt", irrespective whether it consisted of a positive or

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<sup>79</sup>

*Makate v Vodacom (Pty) Ltd* 2016 ZACC 13 paragraph 82.

negative obligation. In this regard, the Constitutional Court was unable to find any indication in *Desai* that demonstrated that an obligation to do or not something was uncircumscribed.

3.5.2.13 The Constitutional Court held that in an effort to establish whether the pre-constitutional interpretation of the term “*debt*” was acceptable, regard to the new aid of interpretation contained in section 39(2) of the Constitution was mandatory whenever a provision under construction implicated or affected rights contained in the Bill of Rights. It maintained that the broad interpretation accorded to the term was inconsistent with earlier decisions of the Appellate Division which gave it a more circumscribed meaning. It noted the meaning the Appellate Division had ascribed to the term in *ESCOM*, maintaining that in light thereof, it became unclear whether *Desai* had intended to go beyond this, especially since, in its view, this did not appear to be justified by the parties’ submissions or the issues raised before the Appellate Division. It was also unclear whether *Desai* had considered the constitutional imperative contained in section 39(2).

3.5.2.14 On interpreting section 10(1) against the prism of section 39(2), the Constitutional Court arrived at the following conclusions:

(a) the objects of the Bill of Rights are promoted where a provision capable of more than one meaning allows a court to adopt a meaning that-

(i) avoids limiting the rights contained in the Bill of Rights; and

(ii) promotes the spirit, purport and objects of the Bill of Rights;

- (b) section 10(1) of the Prescription Act, read with sections 11 and 12, limits the rights guaranteed by section 34 of the Constitution. In this regard, the trial court was duty bound to follow the interpretive aid provided for in section 39(2) irrespective whether the parties had asked for it;
- (c) a failure to meet a prescription deadline set in terms of the Prescription Act denies a litigant access to the courts;
- (d) it was not necessary to determine the exact meaning of the term "*debt*" as the claim fell beyond the scope of *ESCOM*. It maintained that in asking for an order forcing Vodacom to commence negotiations for determining compensation, the appellant had not asked to enforce an obligation to pay money, deliver goods or render services;
- (e) to the extent that *Desai* went beyond what was said in *ESCOM*, it was decided in error, in that there was nothing in the latter case that remotely suggested that "*debt*" included every obligation to do something or refrain from doing something apart from payment, delivery or rendering services; and
- (f) the trial court had attached an incorrect meaning to the term "*debt*" as it did not cover the appellant's claim.

3.5.2.15 The constituent elements of the concept "*debt*" again served before the Constitutional Court in relation to the question whether an arbitration award issued in terms of the Labour Relations Act, 1995<sup>80</sup> (Labour Relations Act) had prescribed, in the cases of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus*

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<sup>80</sup>

Labour Relations Act 66 of 1995.

*and Others*<sup>81</sup> (*Myathaza*) and *Mogaila v Coca Cola Fortune (Pty) Limited (Mogaila)*.<sup>82</sup>

3.5.2.16 In *Myathaza*, the appellant sought an order setting aside the orders of the Labour Court<sup>83</sup> and the Labour Appeal Court<sup>84</sup> and replacing it with an order to the effect that an arbitration award for reinstatement, with or without back-pay, issued in terms of the Labour Relations Act, did not amount to a “*debt*” within the meaning of section 10(1) of the Prescription Act on the reasoning that-

- (a) it unjustifiably violates an employee’s right to fair labour practices, contrary to section 23(1) of the Constitution; and
- (b) it unjustifiably limits an employee’s right of access to court, contrary to section 34 of the Constitution.

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<sup>81</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49.

<sup>82</sup> *Mogaila v Coca Cola Fortune (Pty) Limited* [2017] ZACC 6. As the issues in the two matters corresponded, the Constitutional Court held her matter in abeyance pending the outcome of *Myathaza*. The outcome of *Mogaila* is thus identical to that of *Myathaza*.

<sup>83</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus* unreported judgement of the Labour Court Case No. J1901/13 (17 October 2014) (where it was held that the award for reinstatement constituted a debt for purposes of prescription and that it expired three years from the date of publication).

<sup>84</sup> *Myathaza v Johannesburg Metropolitan Bus Service Soc Ltd t/a Metrobus: In re: Mazibuko v Concor Plant: Cellucity (Pty) Ltd v Communication Workers Union obo Peters* 2016 (1) BLLR 24 (LAC) (where it was held, placing reliance on *Desai*, that an arbitration award issued in terms of the Labour Relations Act was a debt as envisaged by the Prescription Act which had prescribed three years from the date of publication of the award).

3.5.2.17 Three judgements were delivered<sup>85</sup> and because of a parity of votes, the question whether an arbitration award issued in terms of the Labour Relations Act constitutes a debt subject to the Prescription Act is not settled.

3.5.2.18 **Judgement of Jafta J:**<sup>86</sup>

According to Jafta J, the following issues had to be addressed: whether the Prescription Act applied; and if so, whether an award issued in terms of the Labour Relations Act constituted a debt for the purpose of section 10(1) of the Prescription Act; and if yes, whether the debt had prescribed.

(a) Applicability of Prescription Act-

In conducting the consistency analysis required by section 16(1) of the Prescription Act, it was found that the differences between the Prescription Act and the Labour Relations Act are vast and run deep,<sup>87</sup> and that in this regard-

(i) Regimes-

(aa) the Labour Relations Act creates special dispute resolution forums operating separately from the courts (except for purposes of review or

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<sup>85</sup> The judgement of Zondo J supported and added to the judgement of Jafta J and is not dealt with in this paper.

<sup>86</sup> With Nkabinde ADCJ, Khampepe J and Zondo J concurring.

<sup>87</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 28.

conversion of an award into a court order);<sup>88</sup>

(bb) the enactments differ in relation to the objectives sought to be achieved and the ways in which they operate; and

(cc) the prescription periods fixed by section 11 of the Prescription Act are at odds with the scheme of the Labour Relations Act, running contrary to the speed with which the latter Act requires disputes to be resolved. In this regard, the court maintained that employment disputes were, by their very nature, urgent matters requiring speedy resolution so as not to impact on the employer's business and the employee's livelihood.<sup>89</sup>

(ii) Regulation-

(aa) the Prescription Act envisages the civil courts as the only forums for the enforcement of debts, in contrast to the Commission for Conciliation,

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<sup>88</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 27.

<sup>89</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraphs 32 and 33.

Mediation and Arbitration (CCMA) and bargaining councils required to resolve labour disputes;<sup>90</sup>

- (bb) the Labour Relations Act constitutes a legal framework for resolving labour disputes, not debt collection;<sup>91</sup>
- (cc) an arbitration award constitutes an outcome of a dispute that is finally settled between parties, whereas the Prescription Act is designed to extinguish rights yet to be determined by a court;<sup>92</sup>
- (dd) a difficulty prevails when applying the Prescription Act to labour disputes in relation to the section 12(1) “*commencement date*”, as prescription begins running when a debt becomes due. It was held, in this regard, that this criteria could not apply to an award as a debt became due before a dispute was referred to arbitration (and conciliation);

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<sup>90</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 43.

<sup>91</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 45.

<sup>92</sup> Excepting, in this regard, judgement debts.

(ee) prescription could not be interrupted “by service on a debtor of a process whereby a creditor claims payment of a debt” whilst review proceedings are pending. It was found that the structure of section 15 of the Prescription Act underscored the fact that judicial interruption relates to claims that are yet to be prosecuted to final judgement, whilst an arbitration award, by its very nature, constitutes a final and binding decision;<sup>93</sup> and

(ff) an award issued in terms of the Labour Relations Act constitutes administrative action issued through an administrative tribunal and not a debt capable of being enforced.<sup>94</sup>

(b) Based on these inconsistencies, it was held that the Prescription Act did not apply to arbitration awards issued in terms of the Labour Relations Act, and that in the result, the arbitration award had not prescribed.

(c) As a passing remark, Jafta J found that even if the Prescription Act was to apply to arbitration awards, the

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<sup>93</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 48.

<sup>94</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 52.

main award<sup>95</sup> granted in favour of the appellant did not constitute “an obligation to pay money or deliver goods or render services”.<sup>96</sup>

### 3.5.2.19 **Judgement of Froneman J:**<sup>97</sup>

(a) Applicability of Prescription Act-

(i) Froneman J found that the Prescription Act and the Labour Relations Act were capable of complementing each other and that the Prescription Act was therefore applicable.

(aa) In this regard, it was established that the obligation to promote the spirit, purport and objects of the Bill of Rights required a re-interpretation of the Prescription Act in order to give effect to the right of access to justice, whilst still addressing the need for the speedy resolution of disputes in line with the Labour Relations Act.

(bb) It was held that the injustice caused by the respondent’s conduct in avoiding implementation of the arbitration award, instituting review

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<sup>95</sup> The main award provided for the re-instatement of the appellant.

<sup>96</sup> *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49 paragraph 59.

<sup>97</sup> With Madlanga J, Mbha AJ and Mhlantla J concurring.

proceedings and then “*crying prescription on the back of the time wasted by the review*” had to be remedied by providing that the institution of review proceedings interrupts the running of prescription, so that the period starts running again only once the proceedings are finalised.

(ii) According to Froneman J, operation of the principle must be fleshed out in the following way:

(aa) commencement of adjudicating proceedings: contained in sections 15(1) and (6) of the Prescription Act providing for service on a debtor of a process claiming payment of a debt-

(aaA) initiation of proceedings before the CCMA in terms of the Labour Relations Act amounts to the commencement of adjudicative proceedings interrupting prescription; and

(aaB) “*service of process*” includes the service of referrals to the CCMA, as

this falls within the ambit of the definition “*process*” provided for in section 15(6) of the Prescription Act entailing “[*a*] *document whereby legal proceedings are commenced*”.

(aaC) an obligation to re-instate, re-employ or compensate an employee in terms of section 193 of the Labour Relations Act constitutes a liability to render something, thus falling within the meaning ascribed to the term “*debt*”, based on the authority of *ESCOM* and accepted as such by *Makate*.

(bb) conclusion of adjudicating proceedings: contained in sections 15(2) and (4) of the Prescription Act, entailing the prosecution of a claim under the process in question to final judgement: in this regard, statutory review, as provided for in section 145 of the Labour Relations Act serves the same function in the case of an arbitration award, in the sense that

only under these circumstances will judgement be final and executable and thus accord with the principles of prosecuting the process in question to finality.

- (iii) Accordingly, it was held that the institution of review proceedings by the employer interrupted the running of prescription in terms of section 15(1) of the Prescription Act, and that until the review proceedings were finally determined, prescription did not run.

### 3.5.3 *Due-*

3.5.3.1 It has been held that the term “*due*” must be given its ordinary and usual meaning,<sup>98</sup> to include-

- (a) a debt that is owing and payable;
- (b) a debt that is immediately claimable;
- (c) a debt in which a debtor is under obligation to perform immediately;
- (d) a debt that is immediately exigible at the will of a creditor; or

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<sup>98</sup> Loubser 51, and the cases cited (*ESCOM v Stewarts and Lloyds of SA (Pty) Ltd* 1979 (4) SA 905 (W); *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N); *The Master v IL Back and Co Ltd* 1983 (1) SA 986 (A); *Benson & Another v Walters & Others* 1984 (1) SA 73 (A); *DeLoitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A); *Burger v Gouws and Gouws (Pty) Ltd* 1980 (4) SA 583 (T)).

- (e) a debt is due, owing or payable when a creditor acquires a complete cause of action for its recovery, that is, when the entire set of facts which a creditor must prove to succeed in a claim against a debtor is in place; when everything has happened that would entitle a creditor to institute action and obtain judgement.

3.5.3.2 In practice, application of the principle due date of debt manifests in the following way,<sup>99</sup> noting in this regard that prescription applies to debts arising from differing causes of action, and that as a consequence of this, their basis in common law differ from one debt to another:

<b>Table 4: Due date of debt</b>	
<b>Debt</b>	<b>Due date</b>
<ul style="list-style-type: none"> <li>• <b>Contractual debts</b></li> <li>○ Generally</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Breach of contract</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Contract is silent as to the time for performance</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Contract contains provisions which (at common law) give rise to debts that become due only at a later stage (unless otherwise agreed)</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Conditional contract (conditional on the performance of some act or dependant on the lapse of a specified period of time)</li> </ul>	<ul style="list-style-type: none"> <li>○ Determined in accordance with the terms of a contract</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Regard must be had to the wording of the contract</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Debt is generally due immediately on conclusion of the contract</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Lease: rent becomes due at the end of the lease period</li> <li>○ Contract of work and services: payment becomes due on completion of the work or service or on termination of the mandate to perform work</li> </ul> <hr/> <ul style="list-style-type: none"> <li>○ Date condition is fulfilled</li> </ul>

<sup>99</sup> Loubser 53-100, and the cases cited (*Oslo Land Corporation Ltd v Union Government* 1938 AD 584; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); *Green v Coetzer* 1958 (2) SA 697 (W); *Schnellen v Rondalia Insurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Symmonds v Rhodesia Railway Ltd* 1917 AD 582; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A); *Ngcobo v Minister of Police* 1978 (4) SA 930 (D)).

**Table 4: Due date of debt**

<b>Debt</b>	<b>Due date</b>
<ul style="list-style-type: none"> <li>• <b>Delictual debts</b> <ul style="list-style-type: none"> <li>○ Generally</li> </ul> </li> <hr/> <li>○ Where fault is not an element of the cause of action (strict or no-fault liability)</li> <hr/> <li>○ One cause of action giving rise to damages occurring at different times and in different forms</li> <hr/> <li>○ One act resulting in different kinds of harm justifying treatment as separate causes of action</li> <hr/> <li>○ Continuing unlawful acts causing continuing harm</li> </ul>	<ul style="list-style-type: none"> <li>○ When the cause of action arises; cause of action meaning the combination of facts that are material for the plaintiff to succeed in the action, to include proof of damages</li> <hr/> <li>○ As soon as an unlawful act causing loss or harm is committed</li> <hr/> <li>○ The cause of action is complete as soon as damage is caused by the unlawful act, once and for all, thus requiring only one cause of action for all harm, actual and prospective</li> <hr/> <li>○ Generally: Separate actions may be instituted and the debt arising from each cause of action is independently subject to prescription</li> <li>○ At common law however, where patrimonial loss and pain and suffering are involved, it entails one cause of action. Prescription begins running as soon as patrimonial loss or pain and suffering occurs</li> <li>○ Where one act results in two or more separate patrimonial losses, separate actions can be instituted for the different kinds of patrimonial losses and prescription begins running at different times</li> <hr/> <li>○ Where a continuing unlawful act causes fresh damage from day to day, a separate cause of action arises in respect of each loss. More than one action can therefore be instituted. The debt pertaining to each cause of action is subject to extinctive prescription independently. The applicable period of prescription will begin running on the due date of each debt</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Debts arising from unjust enrichment or other restitutionary obligations</b></li> </ul>	<ul style="list-style-type: none"> <li>• As a general rule, prescription begins running when a debtor receives a benefit to which he is not entitled</li> </ul>

### 3.6 Special commencement dates

#### 3.6.1 *Date of knowledge*<sup>100</sup>

3.6.1.1 A debt is not deemed to be due (and therefore prescription will not begin running) until a creditor acquires knowledge of-

- (a) the identity of a debtor; and
- (b) the facts from which a debt arises.

3.6.1.2 A creditor is deemed to have such knowledge if he could have acquired it by exercising reasonable care.

3.6.1.3 The date of knowledge; commonly referred to as the knowledge requirement or the date of discoverability, is underpinned by considerations of fairness to a creditor.

3.6.1.4 The onus lies on a debtor to show that a creditor knew (actual knowledge) or ought to have known (constructive knowledge) about the existence of a debt.

<b>Table 5: Knowledge requirement</b> <sup>101</sup>	
<ul style="list-style-type: none"><li>• <b>Identity of a debtor</b></li></ul>	<ul style="list-style-type: none"><li>• Actual knowledge-<ul style="list-style-type: none"><li>○ factual knowledge of a debtor's identity</li></ul></li><li>• Constructive knowledge-<ul style="list-style-type: none"><li>○ knowledge will be imputed on a creditor who knew certain facts that would have enabled the creditor to establish a debtor's identity<sup>102</sup></li></ul></li></ul>

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<sup>100</sup> Section 12(3) of the Prescription Act.

<sup>101</sup> Saner J *Prescription in South African Law* (LexisNexis – Service Issue 19) 2012 paragraphs 3-65–3-82; Loubser 100-112.

<sup>102</sup> *Gericke v Sack* 1978 (1) SA 821 (A).

**Table 5: Knowledge requirement**

<ul style="list-style-type: none"> <li>• <b>Facts from which a debt arises</b></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Minimum facts</i> necessary for a creditor to institute action-<sup>103</sup> <ul style="list-style-type: none"> <li>○ it must entail knowledge of <i>material facts</i>; not the <i>full ambit</i> of a creditor's rights, every piece of evidence necessary to prove each fact or evidence to prove a case comfortably</li> <li>○ it must entail knowledge of <i>facts</i>, not <i>legal conclusions</i> or <i>legal implications</i>, for example, knowledge of the existence of a legal remedy<sup>104</sup> <ul style="list-style-type: none"> <li>▪ <i>Truter v Deysel</i>-<sup>105</sup> <ul style="list-style-type: none"> <li>- it was held that in a delictual claim, the requirements of <i>fault</i> and <i>unlawfulness</i> <i>do not constitute factual</i> ingredients in a cause of action, but <i>legal conclusions</i> to be drawn from the facts. In this regard, it was found that an <i>expert opinion</i> concluding negligence from a particular set of facts <i>is not a fact, but rather evidence</i>. The court accordingly determined that section 12(3) of the Prescription Act did not require knowledge of legal conclusions or of the existence of an expert opinion supporting such conclusions</li> </ul> </li> <li>▪ <i>Links</i>-<sup>106</sup> <ul style="list-style-type: none"> <li>- the court held that for the purpose of delictual liability, knowledge of <i>material facts</i> requires harbouring a reasonably grounded suspicion that <i>harm</i> arising from an <i>act</i> was <i>caused</i> through someone's <i>fault</i>. The court indicated that the purpose of establishing <i>fault</i> is to qualify the <i>act</i>; not to draw <i>legal conclusions</i> that it resulted in <i>liability</i> and that in certain cases, the only way of establishing the <i>cause</i> of harm was by obtaining an <i>expert opinion</i>.<sup>107</sup> It was held that the link between <i>causation</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>
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<sup>103</sup> *Minister of Finance v Gore* 2007 (1) All SA 309 (SCA); *Van Staden v Fourie* 1989 (3) SA 200 (A); *Fluxmans v Levenson* [2016] ZASCA 183 paragraph 42.

<sup>104</sup> *Claasen v Bester* 2012 (2) SA 404 (SCA); *Truter v Deysel* 2006 (4) SA 168 (SCA); *Minister of Finance v Gore* 2007 (1) All SA 309 (SCA); *Fluxmans v Levenson* [2016] ZASCA 183 paragraph 42.

<sup>105</sup> *Truter v Deysel* 2006 (4) SA 168 (SCA) at 175 paragraphs 17 and 20.

<sup>106</sup> *Links v MEC for Health, Northern Cape* 2016 ZACC 10 paragraphs 42-50.

<sup>107</sup> *Links v MEC for Health, Northern Cape* 2016 ZACC 10 paragraph 47 (*It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice.*)

**Table 5: Knowledge requirement**

	<p>(what caused the harm) and <i>fault</i> (did it involve negligent conduct) is a <i>factual consideration</i> that becomes complete once an expert opinion is obtained; and that <i>it does not entail a legal conclusion</i></p> <ul style="list-style-type: none"> <li>▪ <i>Fluxmans v Levenson</i>-             <ul style="list-style-type: none"> <li>- the majority court found as follows regarding:                 <ul style="list-style-type: none"> <li>✓ an application to declare a contingency fees agreement that did not comply with the Contingency Fees Act, 1997 (Act 66 of 1997) invalid;</li> <li>✓ a claim for repayment based on enrichment arising after the respondent was alleged to have been overreached during August 2008; and</li> <li>✓ the respondent's argument (in response to a plea of prescription) that he had only acquired knowledge of the facts giving rise to the debt between 2013 and 2014 when the North Gauteng High Court and Constitutional Court delivered judgements to the effect that contingency fee agreements that were entered into contrary to the Contingency Fees Act were invalid-</li> </ul> </li> </ul> </li> </ul> <p><i>Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. .... The running of prescription is not postponed until it (sic) becomes aware of the full extent of its (sic) rights nor until it (sic) has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. .... That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in Price Waterhouse Coopers Inc and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act</i></p>
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*That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.).*

**Table 5: Knowledge requirement**

	<p><i>requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the facts constitute invalidity) ....<sup>108</sup></i></p> <ul style="list-style-type: none"> <li>▪ <i>Mtokonya v Minister of Police</i><sup>109</sup> <ul style="list-style-type: none"> <li>- the court held as follows in relation to:           <ul style="list-style-type: none"> <li>✓ action instituted on 23 April 2014 in respect of a claim for damages arising from the alleged unlawful arrest and detention of the plaintiff on 27 September 2010 and after notice of intention to institute legal proceedings was given to the Commissioner in July 2013;</li> <li>✓ the respondent’s special plea of prescription;</li> <li>✓ the plaintiff’s argument that although he had knowledge of the identity of the debtor and the facts giving rise to the debt when he was released from detention in September 2010, he did not know that he had a legal remedy against the defendant until this knowledge was acquired from an attorney in July 2013 that he should not have been detained in excess of 48 hours without being made to appear before a court;<sup>110</sup></li> </ul> </li> </ul> </li> </ul> <p><i>In this case the plaintiff did acquire knowledge that the defendant was the arrestor as well as that the arrest and detention were not justified; but he did nothing about that. The legal advice that he later on obtained from Mr Babe that he had right to institute a claim for damages against the defendant, was a legal conclusion made in July 2014[3] based on material facts already in existence in September 2010. In the circumstances it was negligent, rather than innocent, inaction on the part of the plaintiff to allow prescription of his claim to run. Therefore, the answer to the question raised is that knowledge of a legal remedy does not interrupt prescription. ....<sup>111</sup></i></p>
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108 *Fluxmans v Levenson* [2016] ZASCA 183 paragraph 42.

109 *Mtokonya v Minister of Police* [2015] ZAECMHC 67.

110 *Mtokonya v Minister of Police* [2015] ZAECMHC 67 paragraphs 4 and 9.

111 *Mtokonya v Minister of Police* [2015] ZAECMHC 67 paragraph 14.

**Table 5: Knowledge requirement**

	<ul style="list-style-type: none"> <li>- the matter was taken on appeal to the Constitutional Court<sup>112</sup> on the basis that-2</li> <li>✓ the interpretation accorded to section 12(3) of the Prescription Act is incorrect, to the effect that a creditor only requires minimum facts in order to enable him to institute legal proceedings, and that legal conclusions or an expert opinion are irrelevant;</li> <li>✓ the interpretation accorded to section 12(3) of the Prescription Act runs counter to the principles contained in section 39(2) of the Constitution, read together with <i>Links</i>;</li> <li>✓ the acquisition of mere minimum facts are meaningless in the absence of legal knowledge that the conduct of the police was wrongful and actionable;</li> <li>✓ in the plaintiff's case, both minimum facts and legal knowledge were necessary to enable him to institute action, and that prescription therefore only began running once he obtained legal advice from his attorney that the conduct was wrongful and actionable.</li> <li>- on 19 September 2017, the court in the majority upheld the High Court's finding that knowledge that a debtor's conduct is wrongful and actionable amounts to a legal conclusion falling outside of the ambit of section 12(3) of the Prescription Act<sup>113</sup> <ul style="list-style-type: none"> <li>○ a creditor must be in a position to appreciate the significance of the facts giving rise to a claim<sup>114</sup></li> </ul> </li> </ul>
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<sup>112</sup> *Mtokonya v Minister of Police* Case No. CCT 200/16.

<sup>113</sup> *Mtokonya v Minister of Police* [2017] ZACC 33.

<sup>114</sup> *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209; *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) at 7 where the court indicated as follows: (She needed more than just the knowledge that her claim had been settled to be able to appreciate the alleged negligence. She at least needed to appreciate that there was a substantial under-recovery. That appreciation entailed not only knowledge of the minimal facts of the claim but also an appreciation that those facts afforded her a claim against the appellant.).

**Table 5: Knowledge requirement**

	<ul style="list-style-type: none"> <li>○ an unjustified opinion or supposition, however passionately harboured, does not constitute knowledge<sup>115</sup></li> <li>• Imputing knowledge on a creditor involves application of the objective rather than the subjective standard, that is, a <i>reasonable person in the creditor's position</i>-             <ul style="list-style-type: none"> <li>○ thus in <i>Drennan Maud &amp; Partners v Pennington Town Board</i> it was indicated as follows:                 <p style="margin-left: 40px;"><i>Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge if he could have acquired it by exercising reasonable care. In my view, the requirement 'exercising reasonable care' requires diligence not only in the ascertainment of the fact underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge <b>if a reasonable person in his position</b> would have deduced the identity of the debtor and the facts from which the debt arises.</i><sup>116</sup></p> <p style="text-align: right;">(Emphasis added)</p> </li> <li>○ in <i>Leketi v Tladi NO</i>, it was indicated that-                 <p style="margin-left: 40px;"><i>In terms of s 12(3) of the Prescription Act, the "deemed knowledge" imputed to the "creditor" requires the application of an objective standard rather than a subjective one. In order to determine whether the appellant exercised "reasonable care", his conduct must be tested by reference to the steps which <b>a reasonable person in his or her position</b> would have taken to acquire knowledge of the "fraud" on the part of Albert.</i><sup>117</sup></p> <p style="text-align: right;">(Emphasis added)</p> </li> <li>○ Loubser maintains that this translates, not to the objective standard of a <b>hypothetical reasonable person</b>, but rather to the <b>subjective standard of a reasonable person with the creditor's characteristics</b>.<sup>118</sup></li> </ul> </li> </ul>
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<sup>115</sup> *Minister of Finance v Gore* 2007 (1) All SA 309 (SCA) at 120-121.

<sup>116</sup> *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA).

<sup>117</sup> *Leketi v Tladi NO* 2010 (3) All SA 519 (SCA) (referred to in Saner at 3-68 footnote 25).

<sup>118</sup> Loubser 105-106.

**Table 5: Knowledge requirement**

	<ul style="list-style-type: none"> <li>○ the standards are distinguishable in that the purely objective (hypothetical reasonable person) test entails applying the facts of a case to a list of criteria without any consideration of a creditor’s individual circumstances or characteristics,<sup>119</sup> whereas the latter entails consideration, in appropriate circumstances, of an individual’s mental weaknesses, shortcomings, deficiencies or disadvantages of an inherent nature to which the person was subject at the relevant time.<sup>120</sup></li> <li>○ placing reliance on a purely objective test has the following disadvantage: <ul style="list-style-type: none"> <li><i>... departure from a purely objective test involves a gr[e]ater degree of uncertainty for defendants, but an objective "hypothetical reasonable man" test could well work considerable injustice – undermining the essential thrust of the discoverability extension - if not able to be related to the health, intelligence and social competence of a particular claimant. Further, in a society which is becoming increasingly conscious of the distinctions between different cultural groupings, [an] objective test invites criticism for being based on mono-cultural assumptions.<sup>121</sup></i></li> </ul> </li> </ul>
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3.6.2 *Wilful concealment:*<sup>122</sup> Prescription does not begin running until a creditor acquires knowledge of a debt that has been wilfully concealed<sup>123</sup> by a debtor.

3.6.3 *Debt based on the commission of an alleged sexual offence:*<sup>124</sup> Prescription does not begin running during the period in which a

<sup>119</sup> Schrage EJJ *Contra non valentem agere, non currit praescriptio – the failure to comply with statutory time-limits deprives a potential claimant of his claim, or does it?* TSAR 2012 1 at 4-5.

<sup>120</sup> Saner paragraph 3-70 at footnote 336 referring to *Administrator, Cape v Olpin* 1996 (1) SA 569 (C).

<sup>121</sup> Report No. 6 *Limitation Defences in Civil Proceedings* NZLC (1988) paragraph 204.

<sup>122</sup> Section 12(2) of the Prescription Act.

<sup>123</sup> Held by the court in *Jacobs v Adonis* 1996 (4) SA 246 (C) to mean deliberately and intentionally and not fraudulently (Saner 3-62-3-63).

<sup>124</sup> Section 12(4) of the Prescription Act, which came into effect on 16 December 2007. Section 12(4) was subsequently amended with effect from 9 August 2015, by including debts based on the commission of certain offences as referred to in the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013)

creditor is unable to institute proceedings because of a mental or psychological condition sustained as a result of a debt based on the commission of an alleged sexual offence,<sup>125</sup> as contemplated in sections 17, 18(2), 23 or 24(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.<sup>126</sup>

## **Delayed completion of prescription**

3.7 Section 13 of the Prescription Act provides for the delayed completion of prescription in the face of impediments that make it difficult or impossible for a creditor to timeously assert a right.<sup>127</sup>

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(sections 4, 5 and 7 and involvement in these offences as provided for in section 10). However, with effect from 8 August 2017, the right to institute a prosecution for offences provided for in sections 3, 4 and 71(1) and (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and sections 4, 5, 7 and involvement in these offences provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, have been rendered imprescriptible.

<sup>125</sup> Prior to the promulgation of section 12(4), the right to recourse lay in the date of knowledge provisions contained in section 5(1)(c) of the 1943 Act and thereafter section 12(3) of the Prescription Act. Even then, it was acknowledged that the normal principles for a delictual cause of action (which placed reliance on the date damages were incurred) did not adequately address the unusual nature of sexual abuse cases, in that a victim may have developed deeply embedded psychological restraints which distorted his or her process of reasoning so that an appreciation as to who bore responsibility for an abusive act became stunted until a progressive course of self-discovery finally removed the blindfold and put in motion steps to obtain redress (*Van Zijl v Hoogenhout* 2005 (2) SA 93 SCA).

In *M (K) v M (H)* 1992 CanLII 31 (SCC) the Supreme Court of Canada applied the reasonable discoverability rule, holding that the limitation period should begin to run only when the plaintiff had substantial awareness of the harm and its likely cause, in other words, the causal link between fault and damages, which turned on the question of a plaintiff becoming fully cognisant of the person bearing responsibility for his or her childhood abuse.

<sup>126</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>127</sup> This topic is dealt with more fully in part C of this paper.

## Interruption of prescription

3.8 Interruption operates in line with the following principles:

<b>Table 6: Interruption</b>	
<p><b>Operation and effect</b></p> <ul style="list-style-type: none"> <li>• <b>Acknowledgement of liability</b><sup>128</sup> <ul style="list-style-type: none"> <li>○ the old prescription period stops running</li> <li>○ a new period starts running “afresh” when the interruption occurs, or if the due date is postponed, from the date when the debt again becomes due</li> </ul> </li> <li>• <b>Judicial interruption</b><sup>129</sup> <ul style="list-style-type: none"> <li>○ the old prescription period stops running</li> </ul> </li> </ul>	<p><b>Circumstances under which interruption operates</b></p> <ul style="list-style-type: none"> <li>• Acknowledgement of liability-<sup>130</sup> <ul style="list-style-type: none"> <li>○ express or tacit acknowledgement of liability by the debtor<sup>131</sup></li> </ul> </li> <li>• Judicial interruption-           <ul style="list-style-type: none"> <li>○ service on a debtor of a process<sup>132</sup> claiming payment of a debt</li> </ul> </li> </ul>

<sup>128</sup> Section 14 of the Prescription Act; Loubser 123-142.

<sup>129</sup> Section 15 of the Prescription Act; De Wet 95 and 128; *Sieberhagen v Grunow* 1957 (3) SA 485 (C) at 489 (referring to the conclusion reached in *Caldwell v Prinsloo* 1932 TPD 5); *Kuhn v Kerbel and Another* 1957 (3) SA 365 (A) at 370. Note, in this regard, that the same principles that applied in relation to judicial interruption in the 1943 Act, apply.

<sup>130</sup> *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 5G-H (*It is quite plain that both at common law, and in terms of the Prescription Acts of 1943 and 1969, a creditor may safely forbear to institute action against his debtor if the debtor has acknowledged liability for the debt. .... And it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute, but acknowledges, his liability?*).

<sup>131</sup> Acknowledgement of liability for the purpose of section 14 is a matter of fact, not law and must amount to an admission that a debt is in existence and that a debtor is liable therefore (*Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) paragraph 37, citing with approval *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) and *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N)).

<sup>132</sup> Service of process on a debtor must commence proceedings in a legally effective manner. A defective process, premature service or service by or on behalf of a person without legal standing does not commence proceedings effectively and prescription will not be interrupted. In the case of the Institution of Legal Proceedings against certain Organs of State Act therefore, if notice has not been given within six months of the debt becoming due and if condonation has not been granted, or if an organ of state has not consented to the institution of legal

**Table 6: Interruption**

<ul style="list-style-type: none"> <li>○ a new prescription period starts running "afresh" "only once a creditor successfully prosecutes the process in question to final judgement"</li> <li>○ thus, the running of the prescription period after "service of process" and before "successful prosecution to final judgement" is merely "suspended", noting in this regard that-  <i>once a creditor has instituted action, the periods within which he must take the various steps from summons to judgement are fixed by our Rules of Court</i></li> <li>○ on the date that the process is successfully prosecuted to final judgement, a "new" thirty-year prescription period begins running "afresh"</li> <li>○ if the process is not successfully prosecuted, prescription continues running from the point it was suspended at the time the process was served</li> </ul>	<ul style="list-style-type: none"> <li>○ interruption lapses<sup>133</sup> if a creditor- <ul style="list-style-type: none"> <li>▪ does not successfully prosecute the claim under the process in question to final judgement; or</li> <li>▪ does successfully prosecute the claim but abandons judgement or judgement is set aside</li> </ul> </li> </ul>
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proceedings without notice, or if 30 days have not elapsed after the notice date, service of the process will be premature and therefore ineffective for the purpose of interrupting prescription (Saner JS *Prescription* (original text by HJ Fabricius) paragraph 131 in *Law of South Africa* Volume 21 2<sup>nd</sup> Edition 2010).

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In this regard, De Wet maintained that "Om redes reeds hierbo in [paragraaf] 41 ev vermeld, meen ek dat die diening van die prosesstuk slegs voorlopige werking moet hê en die stuitende werking moet verloor indien die skuldeiser die proses nie met sukses tot 'n finale vonnis deurvoer nie. Ek kan geen rede sien waarom die enkele diening van 'n prosesstuk, bv dagvaarding, sonder meer in elke geval 'n nuwe verjaringstermyn aan die gang moet sit nie. Die hele doel van verjaring is om 'n einde to maak aan 'n toestand van onsekerheid wat deur tydsverloop meegebring word, en daarom behoort die diening van die prosesstuk sy stuitende werking te verloor indien die skuldeiser die proses nie aan die gang hou nie, ...." (De Wet 128).

## **Application of Prescription Act**

- 3.9 Section 16(1) of the Prescription Act provides for the application of Chapter III's extinctive prescription provisions to other enactments except in circumstances where the latter-
- 3.9.1 specify different periods for the making of claims or the instituting of actions; or
  - 3.9.2 impose different conditions for the instituting of actions for the recovery of debts.

## **General prescription period**

- 3.10 The general prescription period is three years.<sup>134</sup>

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<sup>134</sup>

Section 11(d) of the Prescription Act.

# **PART A: PROHIBITING THE RECOVERY OF PRESCRIBED DEBT**

## **1**

### **OVERVIEW**

#### **Background to investigation**

- 1.1 The administrative authority for the regulation of consumer protection, including consumer credit, lies with the Department of Trade and Industry (DTI).
- 1.2 Contemporary consumer challenges, increased international trade, the effects of globalization and the emergence of more complex market technologies and information systems were some of the driving forces prompting consumer law reform in South Africa in the early 2000's.<sup>135</sup>
- 1.3 Consumer laws were outdated, fragmented and based on an exclusionist historical legacy reinforced by poverty, high levels of illiteracy and socio-economic inequalities.
- 1.4 In addition, the environment was premised on-
  - 1.4.1 bargaining power imbalances between business and consumers;
  - 1.4.2 low consumer education levels coupled with a lack of information about consumer rights; and

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<sup>135</sup> Department of Trade and Industry *Draft Green Paper on the Consumer Policy Framework: Driving Competitiveness Consumer Confidence and Business Excellence* 2004 6-31.

- 1.4.3 the permeation of deceptive and unethical marketing and debt collection practices.
- 1.5 A need thus arose to develop a single and comprehensive body of consumer law setting out basic principles of fair and transparent marketplace interaction. Fleshing out of the law, however, was to take place within the respective sectors by way of separate review and regulation.<sup>136</sup>
- 1.6 DTI's review of the credit sector drew on the findings of several reports,<sup>137</sup> including the Commission's Review of the Usury Act and related matters<sup>138</sup> and the Commission's Report on Debt Collecting.<sup>139</sup> In this regard, the Commission's Working Paper on Debt Collecting<sup>140</sup> identified some of the following challenges regarding debt collection:
- 1.6.1 a mushrooming debt industry between 1991 and 1993, due to unemployment, unfavourable economic conditions and the ease with which credit was granted;<sup>141</sup>

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<sup>136</sup> Department of Trade and Industry *Draft Green Paper on the Consumer Policy Framework: Driving Competitiveness Consumer Confidence and Business Excellence* 2004 23-24.

<sup>137</sup> Department of Trade and Industry *Making Credit Markets Work A Policy Framework for Consumer Credit* 2004 8.

<sup>138</sup> South African Law Commission: Project 67: *Working Paper 46: The Usury Act and related matters* 1993.

<sup>139</sup> South African Law Commission: Project 74: *Report: Debt Collecting* 1995.

<sup>140</sup> South African Law Commission: Project 74: *Working Paper 50: Debt Collecting* 1993.

<sup>141</sup> South African Law Commission: Project 74: *Working Paper 50: Debt Collecting* 1993 2-3.

- 1.6.2 ineffective debt collection practices, due to the high cost and protracted nature of debt recovery, the protracted and complicated nature of debt collecting, lack of uniformity in the practice of debt collecting and the incorrect calculation of debt;<sup>142</sup> and
- 1.6.3 utilization of specialized debt collecting agencies not subject to compulsory regulation, who offered their services on a no-success-no-pay basis. Their effectiveness was attributed partly to the following objectionable practices:<sup>143</sup>
- 1.6.3.1 the application of persistent pressure, including psychological harassment and the use of strong-arm tactics, to intimidate debtors into paying their debts;
- 1.6.3.2 falsely misrepresenting themselves as attorneys to debtors so as to convey a threat of impending litigation; and
- 1.6.3.3 recovering debts by way of cession, in order to circumvent certain provisions of the law.
- 1.7 Further to this, DTI's credit sector review<sup>144</sup> showed evidence of an outdated and largely ineffective regulatory framework which uncovered mounting evidence of reckless behaviour by credit providers and the exploitation of consumers, all of which resulted in the following consequences:

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<sup>142</sup> South African Law Commission: Project 74: *Working Paper 50: Debt Collecting* 1993 8.

<sup>143</sup> South African Law Commission: Project 74: *Working Paper 50: Debt Collecting* 1993 3-7.

<sup>144</sup> Department of Trade and Industry *Making Credit Markets Work A Policy Framework for Consumer Credit* 2004 30-31.

- 1.7.1 consumers spiralling into new debt at high costs in order to pay off old debt;
- 1.7.2 consumers accessing further credit by failing to disclose the full extent of their liabilities; and
- 1.7.3 consumers attempting to escape their liabilities by relocating.
- 1.8. This, in turn, caused a rise in the overall cost of credit, based on increased uncertainty and risk in the credit market.
- 1.9 As a result of DTI's credit sector review, uniform regulation was achieved in 2006 with the passing of the National Credit Act.<sup>145</sup>
- 1.10 Described as an ambitious piece of legislation with pronounced socio-economic aims,<sup>146</sup> the National Credit Act seeks to-<sup>147</sup>
  - 1.10.1 promote and advance the social and economic welfare of South Africans;
  - 1.10.2 promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; and
  - 1.10.3 protect consumers by, amongst other things-

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<sup>145</sup> National Credit Act 34 of 2005. The Act came into operation in a piecemeal fashion, on 1 June 2006, 1 September 2006 and 1 June 2007 (Otto JM and Otto R-L *The National Credit Act Explained* 3<sup>rd</sup> Edition 2012 Lexisnexis paragraph 5).

<sup>146</sup> Scholtz JW *The implementation, objects and interpretation of the National Credit Act* Chapter 2 in Scholtz JW *Guide to the National Credit Act* 2008) paragraph 2.3.

<sup>147</sup> Section 3 of the National Credit Act.

- 1.10.3.1 encouraging responsible borrowing, the avoidance of over-indebtedness and the fulfillment of the financial obligations of consumers; and
- 1.10.3.2 addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with protection from deception and from unfair or fraudulent conduct by credit providers and credit bureaux.
- 1.11 Whilst recognizing the improvements made by the National Credit Act, DTI noted that with time, its anticipated outcomes had not always materialized, necessitating a policy review with the intention of considering amendment.<sup>148</sup>
- 1.12 It also became clear from the policy review that the principles contained in the National Credit Act could not be viewed in isolation, but had to be considered against other mechanisms regulating debt collection, for example, debt collection through judicial processes. DTI thus conceded that a need existed for improved co-ordination of intersecting regulatory frameworks, so as to provide for the holistic implementation of laws to bridge any gaps having the potential of undermining the effective regulation of consumer credit and debt collection.
- 1.13 In this regard, DTI's concern lay with abuses and irregularities found to be prevalent in the debt collection industry, and the ways in which this impacted on the ability of consumers to satisfy their financial obligations. These abuses had been widely reported in the media.

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<sup>148</sup>

Department of Trade and Industry *Policy Review of the National Credit Act 34 of 2005* 2013 3-37.

To this end, the Law Clinic of the University of Pretoria<sup>149</sup> made the following findings after conducting investigative research into undesirable practices relating to garnishee orders in South Africa:<sup>150</sup>

- 1.13.1 the collection of inflated capital amounts by debt collectors and attorneys, amounting to 25% over and above the actual capital amount owed by the debtor. In addition to this, interest and collection commission of 10% were added as a second layer of charges. Further to this, a third set of costs and disbursement were added;
- 1.13.2 the fraudulent consent to judgments, the irregular issuing of emolument attachment orders and the obtaining thereof contrary to the jurisdictional requirements provided for in the Magistrates' Court Act and the Rules of Court;
- 1.13.3 the handing over of outstanding debt to more than one debt collector at a time, resulting in multiple summonses and emolument attachment orders and the unnecessary duplication of costs; and
- 1.13.4 the issuing of emolument attachment orders despite a debtor's account being paid up to date.
- 1.14 As a result of the policy review, the National Credit Amendment Bill was developed. It was introduced in the National Assembly on 25 October 2013. With reference to matters falling within the competence of the Department of Justice and Constitutional

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<sup>149</sup> In collaboration with Business Enterprises at University of Pretoria (mandated by the National Credit Regulator) and Deutsche Gesellschaft für Technische Zusammenarbeit (an international cooperation agency operating in South Africa on behalf of the German Federal Ministry for Economic Cooperation and Development).

<sup>150</sup> University of Pretoria (Faculty of Law) *The incidence of and the undesirable practices relating to garnishee orders in South Africa* 2008 67-83.

Development (DOJCD), debate on the Bill centered around the following practices by credit providers and debt buyers:<sup>151</sup>

- 1.14.1 failure to notify consumers that their debts had been sold, the poor administration of accounts after debts were sold and the inflation of their outstanding debts and interest rates;
  - 1.14.2 the selling of debt subject to emolument attachment or other court orders;
  - 1.14.3 the harassing of consumers into acknowledging prescribed debts in an effort to reactivate the prescription period; and
  - 1.14.4 the selling, collecting or re-activating of prescribed debt.
- 1.15 The Bill culminated in the passing of the National Credit Amendment Act, 2014,<sup>152</sup> bringing into operation section 126B on 13 March 2015. Section 126B provides as follows:

*126B. Application of prescription on debt*

*(1)(a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969).*

*(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies-*

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<sup>151</sup> Portfolio Committee on Trade and Industry *Department of Trade and Industry briefings, submissions and responses* of 10 October 2013, 5 November 2013, 7 February 2014, 11 February 2014 and 18 February 2014; Select Committee on Trade and International Relations *National Credit Amendment Bill [B47B-2013]: Negotiating Mandates* of 19 March 2014.

<sup>152</sup> National Credit Amendment Act 19 of 2014.

- (i) *which debt has been extinguished by prescription under the Prescription Act 1969 (Act 68 of 1969); and*
- (ii) *where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.*

## **Law reform proposal**

- 1.16 Against this backdrop, DTI approached the DOJCD during 2015 with a proposal that it consider aligning all laws within its competence that had not kept abreast with developments in the consumer credit environment, taking into account the National Credit Act's cross-cutting effects on the processes of debt collection (in relation to emolument attachment orders, garnishee orders, administration orders and the prescription of debts).<sup>153</sup>
- 1.17 With regard to the prescription of debts, DTI seeks a seamless integration of the reforms contained in section 126B of the National Credit Act into the Prescription Act to mirror-
  - 1.17.1 the prohibition on the sale of prescribed debt; and
  - 1.17.2 the prohibition on the collection or re-activation of prescribed debt.

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<sup>153</sup> Department of Trade and Industry Consumer and Corporate Regulation Division *Presentation to Department of Justice and Correctional Services [Executive Committee]* 29 June 2015.

## Question of integration

1.18 Section 10(1) of the Prescription Act provides as follows:

*10. Extinction of debts by prescription*

*(1) Subject to the provisions of this Chapter and of Chapter IV, a **debt shall be extinguished by prescription** after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.*

(Emphasis added)

1.19 The question now arising is why DTI would propose integration of the principles contained in section 126B into the Prescription Act, when the purport of the provision, in any event, follows as a natural consequence of section 10(1), in precluding the recovery of prescribed debts.

1.20 The answer lies in the anomalies contained in the following provisions of the Prescription Act and the ways in which they promote the continued enforcement and recovery of prescribed debt:

*10. Extinction of debts by prescription*

*(3) Notwithstanding the provisions of subsections (1) and (2), **payment by the debtor of a debt after it has been extinguished by prescription** in terms of either of the said subsections, **shall be regarded as payment** of a debt.*

(Emphasis added)

14. *Interruption of prescription by acknowledgement of liability*

(1) *The **running of prescription shall be interrupted** by an express or **tacit acknowledgement of liability** by the debtor.*

(2) *If the running of prescription is interrupted as contemplated in subsection (1), **prescription shall commence to run afresh** from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.*

(Emphasis added)

17. *Prescription to be raised in pleadings*

(1) *A court **shall not of its own motion** take notice of prescription.*

(Emphasis added)

(2) *A **party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings**: Provided that a court may allow prescription to be raised at any stage of the proceedings.*

1.21 A proper consideration of the proposal therefore requires locating the source of anomalies, entailing a detailed examination of the way in which prescription operates.

1.22 Even absent of the proposal, this paper has presented an opportunity for the Commission to consider reform in this area of the law based on the problems created by the anomalies.

1.23 In this regard, section 5(1) of the SA Law Reform Commission Act empowers the Commission to research and investigate all branches of the law which, in its opinion, require consideration, for the purpose of making recommendations for law reform.

## 2

# NATURE AND EFFECT OF PRESCRIPTION

## Operation of prescription

- 2.1 The content of the right said to remain once prescription takes effect has plagued jurists for centuries.<sup>154</sup>
- 2.2 The issue is important, as it impacts on a jurisdiction's choice of system, depending on whether its preferred focus is on-
  - 2.2.1 securing legal certainty and finality in a debtor/creditor relationship after the lapse of a particular period; or
  - 2.2.2 ensuring that rights are timeously exercised and disputes promptly adjudicated on.
- 2.3 The principles underlining the debate are controversial, multifaceted and, for the most part, overlapping.
- 2.4 Broadly speaking, prescription operates in the following ways in the different jurisdictions:

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*De Wet 103 (Die kwessie van sogenaamde "bevrydende verjaring" is een wat deur die eeue heen maar steeds probleme opgelewer het. Daar bestaan nie eenstemmigheid oor wat nou juis verjaar nie – die aksie, die vorderingsreg, die regsvordering, die "Anspruch", die verbintenis of die skuld nie, en die gevolge van verjaring verskil weer na mate dit die een of die ander van bogenoemde dinge is wat verjaar.).*

<b>Table 7: Operation of prescription</b>			
<b>Common law jurisdictions</b>	<b>Civil law jurisdictions</b>	<b>Mixed jurisdictions<sup>155</sup></b>	<b>Certain jurisdictions<sup>156</sup></b>
England, Ireland, Australia, New Zealand, Canada (except Quebec), United States of America (except Louisiana), Kenya, Ghana, Nigeria, India and Pakistan, amongst others	France, <sup>157</sup> Germany, <sup>158</sup> Switzerland, the Netherlands, Belgium, Central and South America, Egypt, China and Japan, amongst others	South Africa, Lesotho, Botswana, Namibia and Scotland <sup>159</sup> , amongst others	Certain common law, civil law and mixed jurisdictions
↓	↓	↓	↓
Limitation of actions	Prescription (weak or strong)	Prescription (weak or strong)	Strict time limits (special limitation/ extraordinary prescription/ peremption/ foreclosure/ preclusion)
↓	↓	↓	↓

<sup>155</sup> The mixed systems of the world derive influences from both the common and the civil law traditions, and for the purpose of prescription, may lean more heavily towards the civil or the common law traditions, depending on historical influence. Louisiana, for example, is a mixed jurisdiction applying a system of weak prescription.

<sup>156</sup> This column is shaded, to highlight the difference between prescription, on the one hand and special time limits, on the other. The application of special time limits is dealt with fully in section F of this paper.

<sup>157</sup> Opinion has vacillated regarding the effect of extinctive prescription in French law. For the most part, it is said to apply with a weak effect.

<sup>158</sup> In some respects, the juridical nature of extinctive prescription in German law (also referred to as limitation, incidentally) bears closer resemblance to the English law concept of limitation. In this regard, a claim is not extinguished. Rather, a defendant is afforded a countervailing right to refuse performance in the form of a defence ((England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 233 paragraph 10.144). It can thus best be described as a system of weak prescription.

<sup>159</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 180 paragraph 10.1 (*Scottish law uses both the concept of prescription, which originated in Roman law and is in general use in civil law jurisdictions, and that of limitation, which derived from English law*).

<b>Table 7: Operation of prescription</b>			
<b>Common law jurisdictions</b>	<b>Civil law jurisdictions</b>	<b>Mixed jurisdictions</b>	<b>Certain jurisdictions</b>
Procedural law	Substantive law	Substantive law	Substantive or procedural law
Bars right to institute legal proceedings	Bars right to institute legal proceedings or Extinguishes underlying substantive right		Bars right to institute legal proceedings or Extinguishes underlying substantive right
			
<ul style="list-style-type: none"> <li>• <b>Procedural requirements</b> <ul style="list-style-type: none"> <li>○ A debtor is afforded a defence which must be specifically pleaded, it is not open for a court to raise the plea of its</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Weak prescription</i><sup>160</sup></p> <ul style="list-style-type: none"> <li>• <b>Procedural requirements</b> <ul style="list-style-type: none"> <li>○ A debtor is afforded a defence which must be specifically pleaded, it is not open for a court to raise the plea of its</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Strong prescription</i><sup>161</sup></p> <ul style="list-style-type: none"> <li>• <b>Procedural requirements</b> <ul style="list-style-type: none"> <li>○ In principle, a court must apply prescription, irrespective whether</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Fatal/Guillotine provisions</i></p> <ul style="list-style-type: none"> <li>• <b>Procedural requirements</b> <ul style="list-style-type: none"> <li>○ In the civil law jurisdictions, a court must apply a strict</li> </ul> </li> </ul>

<sup>160</sup> Prior to 1 December 1970, South Africa employed a system of weak prescription (*Standard General Insurance Company Ltd v Verdun Estates (Pty) Ltd* 1990 (2) SA 693 AD; *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 SCA, where it was held as follows: *The limitation statutes in England and New Zealand at the time those cases were decided provided for the expiration of the right to bring an action rather than the expiration of the right itself that was sought to be enforced. The same approach was adopted before 1969. Under the Prescription Act 1943 extinctive prescription was 'the rendering unenforceable of a right by the lapse of time', but the right itself remained in existence for a further period, and could thus operate to set-off countervailing debts).*

<sup>161</sup> South Africa currently employs a system of strong prescription.

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
own motion <sup>162</sup>	Weak prescription own motion <sup>163</sup>	Strong prescription it is pleaded, <sup>164</sup> it is not subject to waiver or renunciation <sup>165</sup>	Fatal/Guillotine provisions time limit, <sup>166</sup> it cannot be waived <sup>167</sup>

<sup>162</sup> (England) *Limitation of Actions* Consultation Paper No. 151 (1998) 161; Western Australia Law Reform Commission WALRC 36(II) *Final Report on Limitation and Notice of Actions* (1997) paragraph 7.57 (*The major practical effect of this distinction is that if the running of the period merely bars the plaintiff's right of action, it is possible for the defendant to waive his rights if he chooses to do so.*); Jackson D *The Legal Effects of the Passing of Time* 1970 Volume 7 Melbourne University Law Review 432-433.

<sup>163</sup> Janke BW and Licari FX *The French Revision of Prescription A Model for Louisiana?* Tulane Law Review Vol 85 (2010) 21.

<sup>164</sup> A court order granted on a prescribed obligation constitutes a nullity and is therefore unenforceable. It is thus open to a court to raise the question of prescription and dispose of a matter on that basis, even in the absence of a plea to this effect (Stair Memorial Encyclopaedia *Prescription and Limitation* (Vol 16) paragraph 2133).

<sup>165</sup> See De Wet at 104 regarding the operation of strong prescription in Roman-Dutch law (*Dit wil voorkom of bevrydende verjaring in the Romeins-Hollandse gemene reg sterk gewerk het, en selfs baie sterk. So verklaar De Groot ... , en dat, anders as in die Romeinse reg (?), verjaring nie net tot 'n verweer aanleiding gee nie, maar die skuld laat vergaan, so seer dat die regter uit eie beweging die eis nie-ontvanklik kan verklaar as dit blyk dat die verjaringstermyn verstryk het.*).

<sup>166</sup> Brown Richardson S *Buried by the Sands of Time: The Problem with Peremption* 70 La L Rev (2010) 1193 (*Peremption may be supplied by the court (or it may be pleaded), ... Since peremption destroys the underlying right, a claimant filing suit after the peremptive period has no cause of action because the claimant has no right. As such, it makes sense that the court may provide the exception of peremption; if there is no underlying right, there is no claim on which to litigate, regardless whether the defendant raised the appropriate exception.*).

<sup>167</sup> In South Africa (unlike other civil law jurisdictions), the right to rely on a special time limit can be waived (*Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 637F-638B). Thus if a debtor fails to raise the plea, the obligation subsists intact and is fully enforceable (Loubser 174).

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
<ul style="list-style-type: none"> <li>• <b>Where limitation defence is successfully pleaded</b> <ul style="list-style-type: none"> <li>○ The “right to institute legal proceedings” is “barred”, leaving the “underlying cause of action” otherwise “untouched”<sup>168</sup></li> </ul> </li> </ul>	<p style="text-align: center;"><i>Weak prescription</i></p> <ul style="list-style-type: none"> <li>• <b>Where defence is successfully pleaded</b> <ul style="list-style-type: none"> <li>○ The “right to institute legal proceedings” is “barred”, thus destroying the “civil” nature of the obligation<sup>169</sup></li> </ul> </li> </ul>	<p style="text-align: center;"><i>Strong prescription</i></p> <ul style="list-style-type: none"> <li>○ The “cause of action” is “extinguished” to the extent that it ceases to exist,<sup>170</sup> resulting in the “extinction” of the “underlying substantive right” and therefore both the</li> </ul>	<p style="text-align: center;"><i>Fatal/Guillotine provisions</i></p> <ul style="list-style-type: none"> <li>○ In civil law jurisdictions, the “cause of action” is “extinguished” to the extent that the “underlying substantive right” ceases to exist, thus destroying both</li> </ul>

<sup>168</sup> Halsbury’s Laws of England *Limitation Periods* (Vol. 68) (2008) paragraph 942; (England) *Limitation of Actions* Consultation Paper No. 151 (1998) 161; *Letang v Cooper* 1964 All ER 929 (CA) at 936 (*The Act is a limitation Act; it relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; ....*).

<sup>169</sup> A civil obligation is an obligation which is accorded the full recognition of the law (Snyder DV *The Case of Natural Obligations* 56 La L Rev (1996) 423). It consists of a legal tie which gives a party the right to enforce performance through judicial means and thus through legal action (Shuey JF *Legal Rights and the Passage of Time* 41 La L Rev (1980) 224).

<sup>170</sup> De Wet 103 (*Sterk is die verjaring indien tydsverloop die effek het dat die verbintenis (of skuld) geheel-en-al uitgewis word*); Zimmerman R *Comparative Foundations of a European Law of Set-Off and Prescription* Cambridge University Press 2004 72.

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
<ul style="list-style-type: none"> <li>It is arguable that if the plea leaves the “<i>underlying cause of action</i>” otherwise “<i>untouched</i>”, that this impliedly “<i>does not transform</i>” the cause of action into a “<i>natural obligation</i>”<sup>171</sup></li> </ul>	<p style="text-align: center;"><i>Weak prescription</i></p> <ul style="list-style-type: none"> <li>The plea thus “<i>transforms</i>” the right into a “<i>natural obligation</i>”<sup>172</sup></li> </ul>	<p style="text-align: center;"><i>Strong prescription</i></p> <p style="text-align: center;">“<i>natural and civil obligations</i>”<sup>173</sup></p>	<p style="text-align: center;"><i>Fatal/Guillotine provisions</i></p> <p style="text-align: center;">the “<i>natural and civil obligations</i>”</p>

<sup>171</sup> Natural obligations cannot be enforced through legal action. They do however, have some cognisable legal effects and are distinguishable from moral or imperfect obligations which have no effect in law (Snyder DV *The Case of Natural Obligations* 56 La L Rev (1996) 423).

<sup>172</sup> Janke BW and Licari FX *The French Revision of Prescription A Model for Louisiana?* Tulane Law Review Vol 85 (2010) 19; Shuey JF *Legal Rights and the Passage of Time* 41 La L Rev (1980) 224-225. In this regard, Shuey maintains that a valid plea of prescription transforms a creditor’s substantive right into a non-actionable natural obligation.

<sup>173</sup> Krause L E: *The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch law* 1923 South African Law Journal 30.

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
<ul style="list-style-type: none"> <li>○ That the “<i>cause of action</i>” is left “<i>untouched</i>” appears to be based on the premise that the effect of limitation is substantive when it causes a “<i>change in the nature and character of a right</i>”. Jackson however, argues that the barring or extinction of a right to institute legal proceedings “<i>changes not only the quality, but also the actual right itself</i>”<sup>174</sup></li> </ul>	<i>Weak prescription</i>	<i>Strong prescription</i>	<i>Fatal/Guillotine provisions</i>

<sup>174</sup>

Jackson D *The Legal Effects of the Passing of Time* 1970 Volume 7 Melbourne University Law Review 425 and 434.

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
<ul style="list-style-type: none"> <li>○ During the period that the “underlying cause of action” exists “untouched”, one or more of the following principles may apply-<sup>175</sup> <ul style="list-style-type: none"> <li>▪ monies received on account of debts that have not been appropriated to a specific debt may be appropriated to a statute-barred debt;</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Weak prescription</i></p> <ul style="list-style-type: none"> <li>○ During the period it exists as a “natural obligation”, one or more of the following principles may apply- <ul style="list-style-type: none"> <li>▪ monies received on account of debts that have not been appropriated to a specific debt may be appropriated to a statute-barred debt;</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Strong prescription</i></p>	<p style="text-align: center;"><i>Fatal/Guillotine provisions</i></p>

<sup>175</sup>

(England) *Limitation of Actions* Consultation Paper No. 151 (1998) 161 (*Even if a defendant does successfully plead a limitation defence, so that the plaintiff has no remedy through the courts, there may be other “self-help” methods open to him or her to enforce the right*); Report No. 6 *Limitation Defences in Civil Proceedings* NZLC (1988) paras 53 (... *Obviously, the inability to enforce a right against another devalues the right very substantially, but it remains alive and may be relied on in certain circumstances. Thus, for example, if a debtor pays a “statute-barred” debt (one in respect of which a limitation defence could have been pleaded successfully), it cannot be latter (sic) recovered on the ground that it was not due; and the creditor may also be able to obtain satisfaction of a statute-barred debt by (amongst other things) retaining possession of a thing until a claim is satisfied, or making a deduction from a legacy payable to the debtor*).

**Table 7: Operation of prescription**

Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
			
<ul style="list-style-type: none"> <li>▪ the amount of a statute-barred debt owed by a legatee to an estate may be deducted from any legacy payable;</li> <li>▪ a solicitor's lien may be enforced after his costs have become statute barred;</li> <li>▪ where the debt is paid after expiry of a limitation period, it is regarded as due performance and cannot be reclaimed or treated as a donation; or</li> <li>▪ an undertaking to fulfil an obligation, by, for example, undertaking to pay a claim in respect of which a right to institute proceedings has lapsed, may serve as the object of a civil obligation</li> </ul>	<p><i>Weak prescription</i></p>	<p><i>Strong prescription</i></p>	<p><i>Fatal/Guillotine provisions</i></p>
	<ul style="list-style-type: none"> <li>▪ the debt can be set off against another debt which came into existence before the lapse of the period;</li> <li>▪ the debt can be used to support a contract of suretyship;</li> <li>▪ where the debt is paid after expiry of the period, it is regarded as due performance and cannot be reclaimed or treated as a donation; or</li> <li>▪ an undertaking to fulfil a natural obligation, by, for example, undertaking to pay a prescribed debt may serve as the object</li> </ul>		

Table 7: Operation of prescription			
Common law jurisdictions	Civil law jurisdictions	Mixed jurisdictions	Certain jurisdictions
↓	↓	↓	↓
<ul style="list-style-type: none"> <li>• <b>Failure to raise defence</b><sup>-176</sup> <ul style="list-style-type: none"> <li>○ It is deemed to have been “waived”</li> <li>○ The obligation subsists “<i>intact</i>” and is “<i>fully</i>” enforceable</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Weak prescription</i></p> <p style="text-align: center;">of a civil obligation<sup>177</sup></p> <ul style="list-style-type: none"> <li>• <b>Failure to raise defence</b><sup>-178</sup> <ul style="list-style-type: none"> <li>○ It is deemed to have been “waived”</li> <li>○ The obligation subsists “<i>intact</i>” and is “<i>fully</i>” enforceable “<i>as if it were a civil obligation</i>”</li> </ul> </li> </ul>	<i>Strong prescription</i>	<i>Fatal/Guillotine provisions</i>

<sup>176</sup> (England) *Limitation of Actions* Consultation Paper No. 151 (1998) 161.

<sup>177</sup> Brown Richardson S *Buried by the Sands of Time: The Problem with Peremption* 70 La L Rev (2010) 1192; *Lubbers & Canisius v Lazarus* 1907 TS 901 (in relation to South Africa’s system of “*weak*” prescription that was embodied in the 1943 Act).

<sup>178</sup> Shuey JF *Legal Rights and the Passage of Time* 41 La L Rev (1980) 223 (*The debtor who fails to raise the plea of prescription may be treated as if he tacitly renounced the prescription in his favour. .... Prescription, unless properly pleaded, produces no effect*).

## Problems with the current law

### Prescription regime change

- 2.5 During the 1960's, the Law Revision Commission (the body formerly tasked with conducting law reform in South Africa) requested Prof JC de Wet to review the 1943 Act, with the aim of developing proposals for law reform in the area of prescription law.
- 2.6 The outcome was the development of a Memorandum<sup>179</sup> and draft Bill, the latter of which culminated in the passing of the Prescription Act.
- 2.7 After criticising the two-tier system of extinctive prescription applied in the 1943 Act as an uneasy compromise between English and Roman-Dutch law, De Wet recommended a prescription regime change,<sup>180</sup> from a system with a primarily weak effect to a system of "relatively" strong prescription.<sup>181</sup>
- 2.8 He justified the recommendation on the following basis:

*Dit het die voordeel van eenvoud en duidelikheid. Dit is moeilik om die nut in te sien van die behoud van 'n "verswakte" skuld, wat vir die skuld-eiser slegs langs omwee van waarde kan wees. Die hele doel van bevrydende verjaring is tog om 'n einde te maak aan die onsekerheid wat tydsverloop*

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<sup>179</sup> The Memorandum set out De Wet's findings and recommendations, and was subsequently published under the title: *Opuscula Miscellanea* in 1979.

<sup>180</sup> Section 3(1) of the 1943 Act provided as follows: "Extinctive prescription is the rendering unenforceable of a right by the lapse of time". In effect, the section provided for the expiration of a right of action rather than the expiration of the underlying substantive right.

<sup>181</sup> De Wet 108 (*Alhoewel die meeste van die regstelsels, hierbo bespreek, in die rigting van "swak" verjaring neig, meen ek tog dat 'n betreklik "sterk" verjaring verkiesliker is.*).

*meegebring het, en dit word nie bereik deur 'n halfhartige reëling, waar die skuld, na verjaring, nog 'n sieklike bestaan voer nie. Ook van 'n wetstegniese oog-punt beskou, lewer "swak" verjaring probleme op, want by 'n "swak" reëling moet die eienskappe van die ontmande skuld wetlik beskryf word, en dit skep verdere moontlikhede vir regs-onduidelikheid.<sup>182</sup>*

2.9 In fleshing out the proposal of "*relatively strong prescription*", De Wet argued that similarly to objections against "*weak*" prescription, a rule of "*absolutely*" strong prescription yielded its own complications in that a debtor could be discharged from complying with an obligation against his will.

2.10 In order to obviate this difficulty, he recommended that-<sup>183</sup>

2.10.1 a debtor should be allowed to satisfy an obligation arising from a prescribed debt;

2.10.2 a debtor who settled such an obligation in ignorance should not be allowed to reclaim payment; and

2.10.3 a court should not be allowed to apply prescription of its own motion.

2.11 The proposals subsequently formed the basis of sections 10(1) and (3) and sections 17(1) and (2) of the Prescription Act.<sup>184</sup>

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<sup>182</sup> De Wet 108-109.

<sup>183</sup> De Wet 109.

<sup>184</sup> Quoted in chapter 1, paragraphs 1.18 and 1.20 of this part.

## Anomalies in the current law

- 2.12 De Wet's recommendation proposing change from a system of primarily<sup>185</sup> weak prescription to a system of "relatively strong" prescription on the basis that "absolutely strong" prescription created challenges, poses the following dilemmas:
- 2.12.1 it presupposes that "extinction" is measurable in degrees, and that it is capable of operating to a lesser or greater extent, when in fact, this is not the case. Extinction has the effect that once prescription takes place, no vestige of a debt remains in existence;<sup>186</sup> and
- 2.12.2 whilst purportedly arguing for an alternative system, the proposal in fact recommended retention of the characteristic elements of a typically weak system,<sup>187</sup> creating, in effect, a hybrid system of contradictions delivering up its own set of challenges not dissimilar to the problems prevailing in relation to the 1943 system.

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<sup>185</sup> Use of the term: "primarily" acknowledges the two-tier approach adopted in the 1943 Act, constituting initially "weak" prescription but thereafter resulting in the complete extinction of a right or claim after thirty years.

<sup>186</sup> Refer, in this regard, to the court's findings in *Lipschitz v Dechamps Textiles GMBH and Another* 1978 (4) SA 427 (C) 430-431.

<sup>187</sup> *Wille's Principles of South African Law* 9<sup>th</sup> Edition (General Editor: Francois du Bois) 2007 Juta & Co Ltd 852-853 (*The new Act, however, provides for 'strong' prescription: the debt is extinguished after the lapse of the relevant period of prescription, with the result that set-off is no longer possible, and subsidiary debts, such as those of a surety, are also extinguished. However, the Act retains a vestige of 'weak' prescription in providing that if the debtor pays the extinguished debt the payment shall be regarded as payment of the debt notwithstanding the fact that the debt is extinguished. Also, notwithstanding the extinction, if a debtor is sued for the amount of the prescribed debt, judgment will be given against him if he does not invoke prescription in the proper form; the court will not of its own motion take notice of prescription.*).

2.13 The provisions contained in sections 10(3), 17(1) and 17(2) of the Prescription Act operate in collision with the principles of strong prescription, and in this regard, the following remarks are apposite:

2.13.1 *Hosten et al-*

*The extinctive function of prescription under the new Act is defective in one respect only: payment of a prescribed debt by the debtor himself is regarded as a valid payment (s 10(3));*<sup>188</sup>

2.13.2 *Lipschitz v Dechamps Textiles GMBH and Another (Lipschitz)-*

*Section 10 (3) as pointed out by Mr Berman does seem to contain an anomaly by regarding payment of a debt after it has been extinguished by prescription as payment of the debt. ....*

*To my mind the said anomaly does not detract from the clearly expressed wording of s 10 (1) that, once the period provided for has lapsed, barring any delays or interruption, the debt is extinguished. When this has occurred, any subsidiary debt which arose from such debt is also extinguished (s 10 (2)) and it would appear moreover that, 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.*

*The fact that the Court may not mero motu take notice of prescription does not alter the position as to whether a debt has become extinguished or not. ....*<sup>189</sup>

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<sup>188</sup> Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* 1995 Butterworths Durban 768 at footnote 31.

<sup>189</sup> *Lipschitz v Dechamps Textiles GMBH and Another* 1978 (4) SA 427 (C) at 430.

### 2.13.3 Loubser-

*The 1969 Prescription Act provides that 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. This provision is usually interpreted to mean that the legislature had opted for prescription with a 'strong' effect and that the debt ceases to exist at the expiry of the prescription period. There are apparent qualifications, however, ...*

*These qualifications indicate that the provision that 'a debt shall be extinguished by prescription' creates anomalies if taken at face value. ....*

*Should the debtor, for whatever reason, not invoke prescription and render performance, it shall be regarded as due performance and cannot be recovered with the *condictio indebiti*. Should the debtor not invoke prescription and choose to contest the creditor's action on the merits, this may constitute a waiver of the defence of prescription ... and the court will adjudicate on the merits of the original debt and take no notice of prescription. In effect the court will act on the premis[e] that the debt subsists;<sup>190</sup> and*

### 2.13.4 Reinhard Zimmerman-

*But even if a legal system regards prescription as a matter of substantive law, it may take what is often dubbed a 'weak' or a 'strong' approach. Once the period of prescription has run out, the claim may be held to have ceased to exist (strong effect); or the debtor may merely be granted a right to refuse performance (i.e., a defence on the level of substantive law; weak effect). Thus, if the debtor has paid in spite of prescription having occurred, he has paid with legal ground according to the latter approach and should be unable to recover; whereas he should be able to recover as having paid without legal ground according to the former approach. This consequence, however, is not normally drawn by legal systems subscribing*

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<sup>190</sup>

Loubser 15-17.

*to the strong effect of prescription. Nor do all of them, as might have been thought logical, regard prescription as a matter which must be taken into account by the court ex officio.*<sup>191</sup>

2.14 The anomalies, it is submitted, “*play havoc with the doctrinal basis of the law*”<sup>192</sup> by distorting the (already tenuous)<sup>193</sup> foundations upon which prescription is based.

2.15 In this regard, the following principles, anomalously absent from the current law, are worth noting in relation to the “*true*” effect of strong prescription-

2.15.1 a court order granted on a prescribed obligation constitutes a nullity and is therefore unenforceable; it is thus open for a court to raise prescription and dispose of a matter on that basis, even in the absence of a plea to this effect;<sup>194</sup> and

2.15.2 where a debtor has paid a prescribed debt, payment is made without legal ground and recovery is therefore possible.<sup>195</sup>

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<sup>191</sup> Zimmerman R *Comparative Foundations of a European Law of Set-Off and Prescription* Cambridge University Press 2004 73 (referring, amongst others, to the South African system).

<sup>192</sup> The expression is borrowed. See, in this regard Shuey JF *Legal Rights and the Passage of Time* 41 La L Rev (1980) 220 at footnote 1.

<sup>193</sup> Noting, in this regard that most prescription systems share a great deal of overlap (whether through application of general doctrinal similarities or by way of misapplication). As would thus appear from Table 7, the procedural system of limitation shares a great deal in common with the weak system of prescription and the strong system of prescription shares certain common principles with the system of strict time limits.

<sup>194</sup> Stair Memorial Encyclopaedia *Prescription and Limitation* (Vol 16) paragraph 2133, referred to in Table 7.

<sup>195</sup> Zimmerman R *Comparative Foundations of a European Law of Set-Off and Prescription* Cambridge University Press 2004 73.

- 2.16 The anomalies perpetuate a host of problems not dissimilar to those outlined in Chapter 1, by, for example, sanctifying the recovery of prescribed debt contrary to the doctrinal basis underlying the strong effect of prescription.
- 2.17 Thus in *De Jager en Andere v ABSA Bank Bpk*,<sup>196</sup> (*De Jager*) the court found that by way of the legislature's express sanctioning-
- 2.17.1 a debtor is at liberty to pay a prescribed debt;
- 2.17.2 a debtor is prevented from reclaiming the payment irrespective whether it was made without knowledge that the debt had in fact prescribed; and
- 2.17.3 a debtor is at liberty not to raise prescription as a defence.

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<sup>196</sup>

*De Jager en Andere v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) 543.

## **3**

# **EFFECT OF ANOMALIES ON RECOVERY OF PRESCRIBED DEBT**

## **Sale of prescribed debt**

- 3.1 DTI's review of the National Credit Act uncovered the following abuses regarding the sale of debt:
  - 3.1.1 the sale of prescribed debt to debt-buyers;
  - 3.1.2 the failure by credit providers or debt-buyers to notify debtors that their debts had been sold;
  - 3.1.3 the poor administration of debtor accounts, together with an inflation of outstanding debts and interest rates by debt-buyers;
  - 3.1.4 the sale of debts that were subject to emolument attachment or other court orders; and
  - 3.1.5 the harassment of debtors into acknowledging prescribed debts in an effort to reactivate the prescription period.

3.2 In relation to the sale of prescribed debt, the following considerations are worth noting:<sup>197</sup>

3.2.1 book debts,<sup>198</sup> a claim for damages, a right that is subject to pending litigation and judgment debts are capable of being ceded, and in this

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<sup>197</sup> *Law of South Africa* Joubert WA SC Volume 3 3<sup>rd</sup> Edition 2013 - Lubbe GF *Cession* (original text by PM Nienaber) paragraphs 132-177. Other considerations also worth noting are the following:

- a right that is subject to pending litigation can be ceded freely and fully until the close of pleadings. Where cession takes place after the close of pleadings, the subject-matter being ceded is not the "right, title or interest" in the claim but rather the result of litigation. At this stage, the right to prosecute the action is not transferred to the cessionary (debt-buyer), but remains with the cedent (creditor or credit provider) until a court sanctions the substitution of the cessionary as plaintiff;
- cession of an anticipated judgment debt before judgment is delivered amounts to cession of a future right, and the principles applicable to cession after the close of pleadings also apply;
- cession of a judgment debt after judgment has been granted is valid, and if a cessionary wishes to execute the judgment in his own name, application will have to be made to court to have his name substituted;
- an attempt to execute a judgment in a debt-buyer's name without leave of a court renders the process defective. If substitution has not taken place, the cedent will have to proceed with execution and account to the debt-buyer thereafter;
- a court will not grant an application for substitution if it determines that a debtor will be prejudiced (*Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544). Thus a change of creditors brought about by a cession should not impose a greater burden on a debtor; it should neither weaken nor render his position more onerous. As a result, a debt cannot be split and ceded in parts to different debt-buyers except with a debtor's consent, as this would expose him to multiple actions with added legal costs (*Spies v Hansford & Hansford* 1940 TPD 1 (applying *Guinsberg & Pencharz v Associated Press* 1916 TPD 156 and *Verkouteren v Rubesa* 1917 TPD 274)); and
- the transfer underlying a cession takes place by mere agreement, irrespective of the prior knowledge, consent, co-operation or subsequent notification to a debtor. It is however, in the interests of a debt-buyer to inform a debtor of a cession, at the risk of such debtor rendering performance to the cedent or other party in ignorance and to the detriment of the debt-buyer. In this regard, a blameless debtor who has not been informed is protected and his performance will nevertheless be regarded as performance.

<sup>198</sup> Book debts are normal business debts recorded as such in a creditor's books of account. The sale of book debts involves the sale of debts that have been written off and sold in portfolios to debt buyers at a discounted rate.

regard, delivery of supporting documentation is not required; and

3.2.2 a cedent is however, prohibited from ceding a debt that has been extinguished by prescription, and in this regard, the cession will be ineffective.<sup>199</sup> Embedded in the prohibition are the following principles:

3.2.2.1 a cedent is precluded from ceding that which does not belong to him;

3.2.2.2 where a right stems from an invalid agreement, the cession becomes a nullity; and

3.2.2.3 if at the time of its conclusion, a cession was prohibited by the law, it becomes inoperative.

3.3 That the cession will be ineffective is consonant with the principle of extinction contained in section 10(1) of the Prescription Act.

3.4 Notwithstanding this, section 10(3) has the effect of preventing the recovery of payments made contrary to section 10(1) and contrary to the prohibition against the cession of prescribed debts.

## **Collection of prescribed debt**

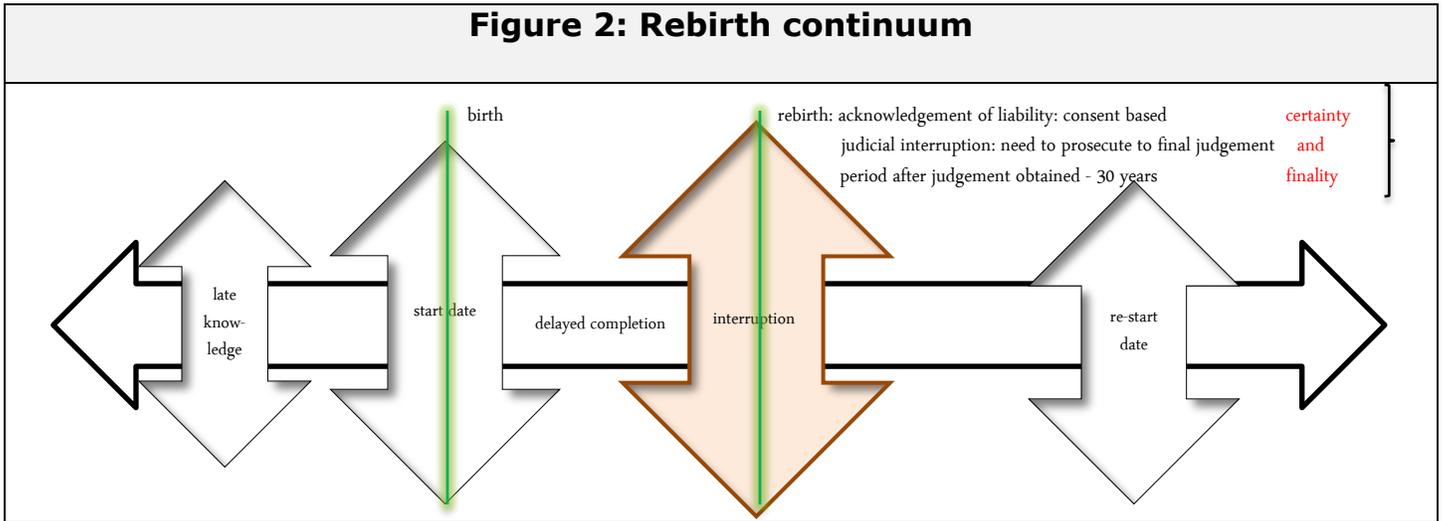
3.5 Prescription's underlying policy of certainty and finality find balance in the following continuums:

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<sup>199</sup> *Law of South Africa* Joubert WA SC Volume 3 3<sup>rd</sup> Edition 2013 - Lubbe GF *Cession* (original text by PM Nienaber) paragraph 157; *Woodnutt NO v The Master* 1966 (3) SA 436 (R).

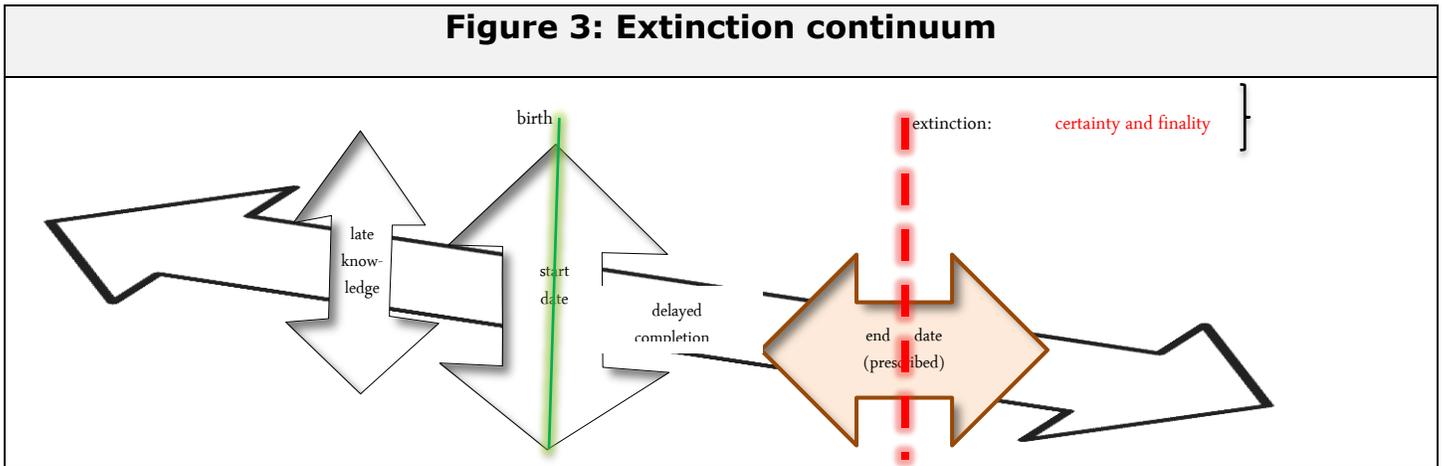
3.5.1 the rebirth continuum; or

**Figure 2: Rebirth continuum**



3.5.2 the extinction continuum.

**Figure 3: Extinction continuum**



3.6 Mirroring the extinction continuum is section 10(1), which provides for the extinction of a debt after the lapse of an applicable period, with effect that a debt ceases to exist.

3.7 However, because the anomaly contained in section 10(3) supports the continued recovery of prescribed debts, whilst sections 17(1) and (2) prevent a court from lifting the veil in order to determine whether a creditor or debt buyer has acted contrary to section

10(1), "the time when all things must come to a close" fails to materialize.

3.8 In this regard, the courts have interpreted the interplay between sections 10(1) and (3) to mean that in spite of the extinction of an applicable period, the legislature expressly<sup>-200</sup>

3.8.1 sanctions the payment of prescribed debt; and

3.8.2 prevents the recovery of payments made in respect of prescribed debt (irrespective whether payments were made without knowledge that a debt had prescribed).

### **Re-activation of prescribed debt**

3.9 In line with the system of weak prescription prevailing prior to the coming into operation of the Prescription Act, the following principles applied in relation to interruption of prescription by way of acknowledgement of liability:<sup>201</sup>

3.9.1 a debtor's right to plead prescription was destroyed on undertaking to pay a prescribed debt; and

3.9.2 the principle applied regardless whether the debtor was aware of the right to plead prescription.

3.10 The position is arguably different in relation to the strong effect of prescription obtaining currently, and in this regard, the decisions of

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<sup>200</sup> *De Jager en Andere v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) 543.

<sup>201</sup> *Conradie v Van Niekerk* 1970 (3) SA 164 (O).

*Lipschitz v Dechamps Textiles GMBH and Another* and *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* are apposite, where it was held, respectively, that-

*... 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.*<sup>202</sup>; and

*... [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.*<sup>203</sup>

3.11 Loubser agrees, being of the view that prescription is only interrupted when a debtor acknowledges liability “before expiration of the prescription period”. He states that-

*.... If the theory is accepted that prescription extinguishes a debt, there cannot be interruption after prescription has taken effect. ... the wording of s 14(1) makes it clear that the section deals with the interruption of a period that is still running, and once the period of prescription has run its full course, the notion of interruption of prescription is no longer appropriate. A period of prescription that has run its full course can no longer be interrupted or extended by agreement. ....*<sup>204</sup>

3.12 Consonant with the principle contained in section 10(1) therefore, acknowledging a prescribed debt has no legal force.

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<sup>202</sup> *Lipschitz v Dechamps Textiles GMBH and Another* 1978 (4) SA 427 (C) at 430.

<sup>203</sup> *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* 2016 (2) SA 153 (GJ) at 165.

<sup>204</sup> Loubser 123 and 141-142.

- 3.13 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.
- 3.14 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.<sup>205</sup>
- 3.15 In line with section 17(1), a court is prevented from raising the question of prescription, potentially exposing a hapless defendant to judgment in instances where he is unaware of his right to raise the defence.

It is argued that the principle contained in section 17(1) is a necessary projection of an adversarial legal system shaped by values of individual dignity, autonomy and the search for the truth, where parties are responsible for the investigation and presentation of their own cases and where a court is presided over by a passive, neutral referee who may neither arm nor assist litigating parties in putting forth their cases.

The adversarial system, however, rooted as it is in zealous advocacy and the promotion of individual interests, has been criticized as a highly individualistic system incentivizing parties with deep pockets

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<sup>205</sup>

Studies have shown that poorer and less-sophisticated defendants are more likely to be intimidated by legal proceedings and less likely to hire attorneys, whilst the wealthier are more likely to contest lawsuits (Goldberg L *Dealing In Debt: The High-Stakes World Of Debt Collection After FDCPA* Southern California Law Review Vol 79 2006 711 at 738).

and seasoned representation to package how the truth is portrayed for the purpose of obtaining favourable outcomes.<sup>206</sup> Thus, a prescribed debt may not be packaged as such, but rather as a claim based on an acknowledgement of debt contained in a new contract.

3.16 In line with section 17(2), a defendant has the right to invoke prescription. A failure to do so may give the impression that the defence has been waived, thus allowing a court to treat the underlying obligation informing the basis of the acknowledgment as subsisting, and adjudicate the matter on its merits.

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Haneman VJ *The Ethical Exploitation of the Unrepresented Consumer* Missouri Law Review Vol 73 2008 707 at 717-725; Sward EE *Values, Ideology, and the Evolution of the Adversary System* (1989) Indiana Law Journal: Vol 64: Iss 2, Article 4.

## 4

# ADDRESSING PROBLEMS WITH THE CURRENT LAW

### Reverting to a system of weak prescription

4.1 Inspired by the German and Swiss prescription regimes, Loubser is of the view that the following principles best explain the theoretical underpinnings of extinctive prescription in South Africa<sup>207</sup> (arising as they do from the anomalies created by sections 10(3), 17(1) and 17(2) of the Prescription Act):

4.1.1 extinctive prescription confers upon a debtor a defence in the form of a substantive right to refuse performance. In this regard, he states that-

*Another construction, adhered to in German and Swiss law, is that extinctive prescription confers upon the debtor a defence in the form of a substantive right to refuse performance. ....*<sup>208</sup>

4.1.2 **invoking the defence does not in any way avoid or affect the obligation itself; the obligation subsists intact** and if performance takes place after the lapse of a prescription period, no right of recovery exists. To this end, he maintains that-

*This right can be raised as [a] defence to an action by the creditor and is distinguishable from the right to avoid an obligation on the grounds such as undue influence, because by invoking it the debtor does not avoid or in any*

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<sup>207</sup> Loubser 14-15.

<sup>208</sup> Loubser 14.

*way affect the obligation itself. The obligation subsists intact and if performance takes place after the lapse of the prescription period, there is no right of recovery.*<sup>209</sup>

4.1.3 **provided a debtor does not invoke prescription** after expiry of the prescription period, **the obligation retains its normal character, and can be enforced**. Following this, Loubser indicates that-

*Upon expiry of the prescription period the obligation retains its normal character and can normally be enforced, provided the debtor does not invoke the defence of prescription.*<sup>210</sup>

4.1.4 extinctive prescription therefore **does not transform into a natural obligation**. Accordingly, he maintains that-

*Extinctive prescription therefore does not transform the obligation into what is known as a natural obligation.*<sup>211</sup>

4.2 Based on the afore-going, Loubser holds the view that a re-examination of the nature and effect of extinctive prescription is required, and that the principle of extinguishment contained in section 10(1) of the Prescription Act should be replaced to reflect the true factual position by providing for the "*exemption of a debtor from performance*".<sup>212</sup>

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209 Loubser 14.

210 Loubser 14-15.

211 Loubser 15 and footnote.

212 Loubser 18.

4.3 It must be borne in mind that the German and Swiss systems provide for the operation of weak prescription; and that in effect, Loubser appears to be proposing that South Africa revert to such a system.

4.4 De Wet himself argued that an “*absolutely*” strong rule forced prescription to take effect against a debtor who was willing to settle a debt.<sup>213</sup>

4.5 Zimmerman is of like mind, arguing that more jurisdictions are opting for systems of weak prescription and that-

*... no reason [exists] for a legal system to foist its protection upon a debtor who is willing to pay and who can thus be taken to acknowledge that he is under an obligation to do so; ....*<sup>214</sup>

4.6 Further to this, Zimmerman states that-

*... the public interest ... is not adversely affected if a debtor is allowed to pay even after the period of prescription has run out.*<sup>215</sup>

4.7 It is submitted however, that the objections against reverting to a system of weak prescription outweigh those favouring strong prescription.

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<sup>213</sup> De Wet 109.

<sup>214</sup> Zimmerman R *Comparative Foundations of a European Law of Set-Off and Prescription* Cambridge University Press 2004 73.

<sup>215</sup> Zimmerman R *Comparative Foundations of a European Law of Set-Off and Prescription* Cambridge University Press 2004 74.

## Reaffirming the principle of strong prescription

- 4.8 The weak system,<sup>216</sup> by encouraging the pursuit of obligations (whether civil or natural)<sup>217</sup> after the lapse of a particular period, interferes with extinctive prescription's underlying basis of legal certainty and finality, by, amongst other things-
- 4.8.1 forcing debtors to accumulate and store records for unduly long periods at high cost based on an indefinite threat of litigation;
  - 4.8.2 inflating the cost of insurance to buttress the risk of enduring claims;
  - 4.8.3 sanctioning the recovery of debts after the lapse of a particular period;
  - 4.8.4 prompting further legal disputes, which in turn, impact on the effective administration of justice and the timeous adjudication of disputes;
  - 4.8.5 generating further controversies about the legal nature and effect of the right said to remain once prescription takes effect; and
  - 4.8.6 encouraging forum-shopping and enforcement efforts in comparable regimes having similar rules of prescription but with longer lapsing periods.

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<sup>216</sup> Refer also to De Wet 108-109.

<sup>217</sup> Depending on whether the defence of prescription or limitation is raised, noting in this regard that according to the procedural systems of the world, the right said to remain once limitation takes effect is that of a civil obligation.

4.9 De Wet himself acknowledged the importance of legal certainty and finality when he remarked that-

*Die hele doel van bevrydende verjaring is tog om 'n einde te maak aan die onsekerheid wat tydsverloop meegebring het, en dit word nie bereik nie deur 'n halfhartige reëling, waar die skuld, na verjaring, nog 'n sieklike bestaan voer nie.*<sup>218</sup>

4.10 Further to this, De Wet noted that strong prescription was capable of being applied with greater simplicity and clarity.

4.11 It is submitted, further still, that in light of the principles underpinning South Africa's change from a system of weak prescription to a system of strong prescription, De Wet's recommendation was aimed **not** at "granting a debtor a right to refuse performance"; on the contrary, it was premised on the principle of "extinction", subject to one qualification; the need to "uphold a debtor's right to perform", in instances where he chose to do so, by paying a prescribed debt.

4.12 In keeping with this, De Wet explained that-

*Art 10 van my "ontwerp" is 'n poging om die opvatting in [paragraaf] 72 verkondig, in wetgewerstal weer te gee. Dit sê dat die **skuld** deur verjaring **uitgewis** word, met die voorbehoud dat voldoening, waaroor dit hier te gaan, is egter voldoening deur die **skuldenaar**.*

(De Wet's emphasis)

4.13 It is submitted that as a corollary, section 17(1) is a by-product of and meant to serve this focus. Arguably, this intention is mirrored

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<sup>218</sup>

De Wet 108-109.

in the following extract describing De Wet's objections as to what he described as a rule of "absolutely" strong prescription:

*Die eerste is dat dit iemand selfs teen sy sin van sy skuld kan bevry. Daar is glo mense wat gewetensbesware daarteen het om hulle op verjaring te beroep waar hulle weet dat die skuld regsgeldig ontstaan het en nog nie gedelg is nie, en wat selfs uit eie beweging sal betaal ook al word hulle nie aangespreek nie. Om **diesulkes tegemoet te kom**, moet daarvoor voorsiening gemaak word dat verjaarde skulde regsgeldig deur 'n skuldenaar voldoen kan word **en** dat verjaring nie "ex officio" deur die hof toegepas word nie. Nog 'n beswaar is dat 'n volstrekke "sterk" werking die skuldenaar, wat in onkunde 'n verjaarde skuld betaal, die *condictio indebiti* sou gee, en dus van 'n posisie, wat andersins tot rus sou gekom het, 'n nuwe bron van stryd kan maak. Daarom lyk dit verstandig om selfs waar die skuldenaar in onkunde betaal, hom die *condictio indebiti* te ontsê.<sup>219</sup>; and*

(Emphasis added)

4.14 Faithful to the trajectory that "a debt **not** be allowed to subsist after the prescription period has elapsed" for fear of birthing forth a new set of uncertainties, a little over twenty years later, in a publication co-authored by De Wet, he indicated as follows with reference to the question of renunciation of the right to rely on prescription:

*Aangesien, volgens die ou Wet, 'n skuld nie deur verjaring uitgewis word nie, maar slegs verlam word, kan die skuldenaar na voltooiing van verjaring afstand doen van die voordeel wat verjaring bied, **maar volgens die nuwe Wet word die skuld deur verjaring uitgewis, en kan die einste skuld nie deur sogenaamde afstand van verjaring in herlewering gebring word nie.** Dit sluit egter nie die moontlikheid uit dat iemand hom opnuut verbind tot 'n skuld presies gelyk aan die verjaarde skuld nie. Dit sal egter 'n heeltemaal nuwe skuld wees, en die*

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De Wet 109.

*onderneming daarvan, sonder teenprestasie, sal 'n skenkingsonderneming wees.*<sup>220</sup>

(Emphasis added)

- 4.15 Arguably, weak prescription operates best when creditors and debtors are familiar with the rules of the game, and engage in the extra-judicial pursuit of debt from substantially equal bargaining positions. It is submitted that South Africa's prevailing socio-economic conditions, marked by deep structural inequalities and high levels of poverty and illiteracy, preclude the kind of engagement.
- 4.16 All things considered, it is questionable whether a system of weak prescription is a viable option in the context of South African law.

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<sup>220</sup>

De Wet en Van Wyk *Kontrakreg en Handelsreg* 5de uitgawe Volume 1 307-308.

## 5

# PROPOSALS FOR LAW REFORM

## Issues for consideration in formulating proposals

### Question of uniform application

- 5.1 Loubser is of the view that the provisions contained in section 126B should be made to apply only to debts governed by the National Credit Act, for the purpose of consumer protection, and that the provisions should not be made generally applicable and thus integrated into the Prescription Act.
- 5.2 The contention, it is submitted, is untenable, for the following reasons:
- 5.2.1 the laws of prescription are regulated by the Prescription Act, a law of general application, administered not by the DTI, but by the functionary responsible for the administration of justice;
- 5.2.2 the justice administration is mandated with the overall task of overseeing the regulation of debt recovery within and outside the courts, whether arising from credit transactions, general debt collection processes or otherwise, as evidenced by the principles contained in the following enactments:
- 5.2.2.1 the Magistrates' Courts Act, 1944<sup>221</sup> and the Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa;

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<sup>221</sup>

Magistrates' Courts Act 32 of 1944.

- 5.2.2.2 the Superior Courts Act, 2013<sup>222</sup> and the Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa; and
- 5.2.2.3 the Debt Collectors Act, 1998.<sup>223</sup>
- 5.2.3 further to the Prescription Act's objective of consolidating and regulating the laws of prescription, section 10(1) provides for the complete extinction of a debt after the lapse of a particular period, thus invalidating, as a necessary corollary, recovery efforts made after a debt has become prescribed;
- 5.2.4 what the National Credit Act seeks to do in section 126B, it is submitted, is to reaffirm the principle contained in section 10(1) with greater particularity (in language seemingly more accessible to its own users), and not to create general laws about the rules of prescription, which would, in any event, be outside of its administrative competence; and
- 5.2.5 consumer rights, much like constitutional rights, provide an overarching and enduring protection that maintains in all facets of a consumer's life; they cannot be restricted merely because the source of the protection arises from a particular legal instrument and not another. To suggest that section 126B should apply only in relation to debts governed by the National Credit Act and not the Prescription Act, it is submitted-

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<sup>222</sup> Superior Courts Act 10 of 2013.

<sup>223</sup> Debt Collectors Act 114 of 1998.

- 5.2.5.1 unfairly and unjustifiably advances the interests of creditors not subject to the National Credit Act; as the suggestion implies that these creditors are at liberty to recover prescribed debt; and
- 5.2.5.2 unfairly and unjustifiably discriminates against debtors not subject to the National Credit Act, as the suggestion implies that their rights not to be exposed to recovery efforts in relation to prescribed debt do not merit protection.

### **Proposed debtor remedies**

- 5.3 The account given of exploitive debt recovery practices is lengthy, and the methods employed to ensure satisfaction are layered, some of which may contain the following elements:
  - 5.3.1 deceptive and unethical conduct, which may form the subject of a professional Code of Conduct; and
  - 5.3.2 the commission of unlawful acts, including fraud, forgery and acts of violence.
- 5.4 It must be borne in mind, however, that the primary objective of the Prescription Act is to provide for the regulation of cut-off dates beyond which debts are no longer capable of enforcement, and not for the regulation of conduct.
- 5.5 It is therefore submitted that in terms of the Prescription Act, debtor remedies should be focussed on-
  - 5.5.1 the circumstances under which recovery of payments are permissible; and

- 5.5.2 the provision of compensation for losses sustained due to creditor conduct.
- 5.6 For all other aspects pertinent to creditor misconduct, debtors are not without remedy. Matters may be reported to institutions having the authority to investigate or prosecute complaints, for example, the National Credit Regulator (in relation to consumer credit complaints); the Debt Collectors Council (in relation to debt collection complaints); applicable law societies (in relation to collection efforts by attorneys) or the police and prosecuting authority.

## **Proposed creditor remedies**

- 5.7 Inasmuch as the National Credit Act is centred on consumer protection; the promotion of a fair, competitive, sustainable and responsible credit market and the fulfilment of a consumer's financial obligations are also key considerations.
- 5.8 A proper balancing of interests<sup>224</sup> therefore requires that creditors legitimately obtain satisfaction of debts, either through the voluntary fulfilment of consumer obligations or through valid debt recovery processes.
- 5.9 This balancing of interests is also mirrored in the Prescription Act; whose primary goal, although centred on debtor protection, is also

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<sup>224</sup>

See also *Sebola and Another v Standard Bank of South Africa Limited and Another (Socio-Economic Rights Institute of South Africa, National Credit Regulator and Banking Association of South Africa intervening)* 2012 (5) SA 142 CC where Cameron J (writing for the majority) stated, citing *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA): *I also agree that "whilst the main object of the [National Credit] Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked"*.

to ensure that creditors' interests are protected through a range of safeguards, including the ability to interrupt the running of prescription.

5.10 Interruption thus serves as an indispensable tool for ensuring that debts are timeously recovered.

5.11 However, obstacles affecting debt recovery processes are many; the most frequently cited one being that of a creditor's inability to trace or serve process on a debtor, with the effect that a court may refuse to grant judgment absent of proof of service.

5.12 The risk of non-recovery of debts, together with the risk of incurring wasted costs, presents a real threat, bearing with it-

5.12.1 a risk of creditors going out of business, thus affecting job security and the availability and supply of credit;

5.12.2 an increase in the cost of credit and risk insurance<sup>225</sup>; and

5.12.3 the possibility of socio-economic decline, as opportunities to access funding for education, housing, business, *etcetera*, wane.

5.13 Thus, the conduct of certain debtors in contributing to enforcement delays, which ultimately impacts on a creditor's ability to timeously interrupt the running of prescription, therefore requires consideration in formulating proposals for law reform.

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<sup>225</sup>

It has been pointed out that an inability to trace debtors hinders the effective resolution of disputes, thus forcing creditors to engage in litigation in order to prosecute claims. It is maintained that this is costly to creditors, contributes to the overall increase in the cost of credit availed to consumers and results in the impairment of credit records.

5.14 Further to this, a balancing of 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, notwithstanding prescription.

5.15 It is therefore submitted that in fairness to certain creditors, it may be viable, under the circumstances, to propose a second option for law reform, framed in terms that neither blur the doctrinal basis of strong prescription, nor perpetuate the problems persisting in the debt collection and consumer credit industry.

### **Preliminary recommendations**

5.16 The Commission's preliminary recommendations, as contained in the draft Prescription Bill provided for in Annexure A, are the following:

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

5.16.1 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.

5.16.2 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<sup>-226</sup>**

5.16.1 insertion of paragraphs 5.16.1 above.

5.16.2 insertion of paragraph 5.16.2 above.

5.16.3 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

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<sup>226</sup>

Option 2 is the option reflected in the draft Prescription Bill.

- (c) any payments made in circumstances where it is established that a debtor was not indebted to a creditor may be recovered.

## Questions to Respondents

- 5.17 The Commission welcomes comments, inputs or suggestions from Respondents, including the following:

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

- 5.17.1 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.
- 5.17.2 Do Respondents envisage that option 2 (in relation to the clause providing for the voluntary payment of prescribed debt) is likely to create implementation challenges for the courts? If the answer is yes, what kinds of challenges do Respondents envisage?
- 5.17.3 Are there Respondents who believe that it will better serve the interests of South Africans to revert to a system of weak prescription, notwithstanding the arguments contained in paragraphs 4.8 to 4.16 above? If the answer is yes, Respondents are required to list the benefits of reverting to such a system.
- 5.17.4 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.

5.17.5 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: REVIEW OF THREE-YEAR GENERAL PRESCRIPTION PERIOD**

## **1**

### **OVERVIEW**

#### **Background**

1.1 Sections 11(a) to (d) of the Prescription Act provide for the following different periods of extinctive prescription for the various debts:

- (a) *thirty years in respect of-*
  - (i) *any debt secured by mortgage bond;*
  - (ii) *any judgment debt;*
  - (iii) *any debt in respect of any taxation imposed or levied by or under any law;*
  - (iv) *any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;*
- (b) *fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);*
- (c) *six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a*

*longer period applies in respect of the debt in question in terms of paragraph (a) or (b);*

*(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.*

- 1.2 The general prescription period is three years, in contrast to the thirty-year period that formerly applied in terms of the 1943 Act.

### **Problems with the current law**

- 1.3 In Discussion Paper 126: Prescription Periods, published in July 2011, the Commission made the following preliminary proposal for law reform:<sup>227</sup>

*That the prescription period set out in section 11(d) of the Prescription Act, 1969 (Act 68 of 1969) be extended **from three to five years** from the period the creditor has knowledge of the debt or could have taken necessary steps to acquire such knowledge.*

(Emphasis added)

- 1.4 Amongst other things, the proposal is premised on the inadequacy of the three-year period when viewed against the effects of prevailing socio-economic conditions in South Africa, to include the difficulties faced by many in accessing justice, exacerbated by gross inequalities, the high cost of legal services and the geographical remoteness of the law from the population at large.

- 1.5 The Commission is required to consider whether the proposal is still sustainable in light of current trends towards shorter general

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<sup>227</sup>

Discussion Paper 126 *Prescription Periods 2011 Summary of Recommendations*.

periods, evaluated against the core value of a particular period and the way in which prescription is applied in other legal systems.

## 2

### CURRENT LEGAL POSITION

#### Current trend

- 2.1 The length of prescription periods are, to a large extent, arbitrary, although the policy considerations underlying extinctive prescription are indicative of the reasons for differentiation.<sup>228</sup>
- 2.2 In this regard, the length of a particular period may be influenced by<sup>229</sup>
- 2.2.1 the degree of permanence of the evidence required to prove liability and the extent of damages;
  - 2.2.2 the relative favour with which the legislature looks upon certain types of claims (for example, tax claims and other debts owed to the state) or classes of plaintiffs or defendants (where, for example, the state is a plaintiff or defendant);<sup>230</sup>
  - 2.2.3 the need to afford creditors sufficient time to consider and pursue legal action in order to avoid premature litigation, which includes the need to take legal advice, negotiate settlements and prepare for a case; and

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<sup>228</sup> Loubser 35-37.

<sup>229</sup> Loubser 36; (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 15.

<sup>230</sup> In *ESKOM v Bojanala Platinum District Municipality and Another* 2005 (4) SA 31 (SCA) paragraph 13, it was remarked as follows (*We are not here concerned with a taxing statute, but with a subsection of the Prescription Act dealing with taxation. Sections 11 (a)–(c) favour certain classes of creditor according to the nature of the debt and provide periods of prescription of 30, 15 and 6 years. .... It is clear, in my view, that the state is intended to be a preferred creditor ....*).

2.2.4 the changing needs of society, informed in some respects by technological advances in communication and the effects of globalisation.

2.3 The current trend is towards shorter general periods,<sup>231</sup> based in the main, on arguments of contracting global borders, more efficient communication and transport networks and improved human mobility.

2.4 According to these arguments, lengthy prescription periods are no longer justified, as commercial and other activity is no longer hampered by geographical barriers and slow-paced communication networks. In this regard, it is asserted that-

*The general thirty-year delay has grown old-fashioned. The overwhelming trend in a number of jurisdictions in the modern era has been a shortening of liberative prescription. ....*

*If the law were to limit one's right of action at all, many of the ordinary impediments to taking cognisance of the right and assembling the resources necessary to pursue a legal remedy grew less onerous over time. Messages were no longer carried by horseback across land or by ship across sea. People travel[.]ed with greater ease, speed, and frequency, and their communications became practically instantaneous.<sup>232</sup>*

2.5 Current trends however, cannot be viewed in isolation, and in this regard, an analysis of the core value of a particular period is

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<sup>231</sup> Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law (General Report by EH Hondius 7, 20; 25) (*Modern prescription statutes provide for far shorter periods than did Roman law. Problems of transport and communication no longer are of major importance. ....*); Janke BW and Licari FX *The French Revision of Prescription: A Model for Louisiana?* Tulane Law Review Vol 85 (2010) 7-8.

<sup>232</sup> Janke BW and Licari FX *The French Revision of Prescription: A Model for Louisiana?* Tulane Law Review Vol 85 (2010) 8.

required in order to address any considerations for a change in the general prescription period.

### **Core value of prescription period**

- 2.6 A prescription period is but one of many aspects shaping the context of a particular regime,<sup>233</sup> the others being-
  - 2.6.1 the date prescription begins running;
  - 2.6.2 the knowledge requirement;
  - 2.6.3 the delayed running of prescription (postponement or suspension);
  - 2.6.4 interruption of prescription;
  - 2.6.5 an ultimate or long-stop period; or
  - 2.6.6 the power to override or extend a period.
- 2.7 The way that these components influence the core value of a particular regime can be summarised as follows:

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<sup>233</sup>

See also, Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law (German Report by Reinhard Zimmerman 195) (*It has already been emphasized that prescription periods cannot be properly evaluated in isolation. A one year period can be very brief or quite adequate depending on when it commences, how easily it can be interrupted and under which circumstances it is suspended. Of particular significance is the commencement of the period. ....*).

**Table 8: Core value of prescription period**

	<b>1943 Act</b>	<b>Prescription Act</b>	<b>Effect</b>
<b>General period</b>	Thirty years	Three years	<ul style="list-style-type: none"> <li>• The shorter general period favours the interests of a debtor against the unfairness of having to defend long-standing claims</li> </ul>
<b>General commencement date</b>	Date of accrual of cause of action	Due date of debt	<ul style="list-style-type: none"> <li>• The policy favouring commencement from the due date of debt recognises the injustice that can ensue when a period starts running before a claim can become enforceable</li> <li>• It favours the interests of a creditor</li> </ul>
<b>Special commencement date (date of knowledge)</b>	Applicable to certain specified causes of action, for example, defamation and damages	Applicable to all causes of action	<ul style="list-style-type: none"> <li>• The principle is premised on the policy of fairness to a creditor, in recognition of the injustice that can ensue when a period is allowed to prescribe before the person becomes aware of the existence of a right</li> <li>• It has the effect of calibrating the shorter general period</li> <li>• In terms of the 1943 Act, the date of knowledge only applied in relation to certain causes of action or classes of creditors.</li> <li>• The date of knowledge has wider application in the Prescription Act; applying generally in respect of all debts entailing actual or constructive absence of knowledge</li> </ul>

**Table 8: Core value of prescription period**

	<b>1943 Act</b>	<b>Prescription Act</b>	<b>Effect</b>
<b>Special commencement date (causes of action/classes of creditor)</b>	<ul style="list-style-type: none"> <li>• Fraud: Where a debtor prevented a creditor from discovering the facts surrounding the latter's right of action</li> <li>• Action founded on the fraud of a debtor</li> <li>• No such provision existed in the 1943 Act</li> </ul>	<ul style="list-style-type: none"> <li>• Wilful prevention: Where a debtor wilfully conceals the existence of a debt</li> <li>• Debt based on the alleged commission of a sexual offence</li> </ul>	<ul style="list-style-type: none"> <li>• The principle is based on fairness to a creditor, in recognition of the injustice that can ensue when a period is allowed to prescribe through a debtor's own conduct</li> <li>• It has the effect of calibrating the shorter general period</li> <li>• The principle is based on fairness to a creditor, in recognition of the injustice that can ensue when a period is allowed to prescribe through a debtor's own conduct</li> <li>• Further to this, the policy recognises that debts of this nature require a special and separate regime from those based on normal discovery rules</li> </ul>
<b>Delayed running of period</b>	Suspension	Delayed completion	<ul style="list-style-type: none"> <li>• This principle is based on fairness to a creditor, in recognition of the existence of factors that can inhibit the timeous assertion of a right</li> <li>• It has the effect of calibrating the shorter general period</li> </ul>

**Table 8: Core value of prescription period**

	<b>1943 Act</b>	<b>Prescription Act</b>	<b>Effect</b>
<b>Interruption</b>	Interruption	Interruption	<ul style="list-style-type: none"> <li>• The power of interruption lies in the hands of a creditor and has the effect of-                             <ul style="list-style-type: none"> <li>○ protecting a debtor’s interests in having to defend stale claims which a creditor may have failed to enforce with diligence; and</li> <li>○ protecting a creditor’s own interests in ensuring that a debt does not become prescribed</li> </ul> </li> <li>• In this regard, it has been held that-                             <p style="margin-left: 20px;"><i>A creditor has really only one weapon against prescription which is always available to him. That weapon is his right to serve summons within the period of prescription.</i><sup>234</sup></p> </li> <li>• The overall effect is to restart the running of a period in instances where a debt has been prosecuted to finality</li> </ul>

<sup>234</sup>

*Kuhn v Kerbel and Another* 1957 (3) SA 365 (A) at 371.

**Table 8: Core value of prescription period**

	<b>1943 Act</b>	<b>Prescription Act</b>	<b>Effect</b>
<b>Long-stop</b>	No such provision existed in the 1943 Act	No such provision exists in the Prescription Act	<ul style="list-style-type: none"> <li>• A long-stop provision is usually applied hand in hand with a knowledge requirement, serving to balance the underlying philosophy of certainty (favouring a debtor) with fairness (favouring a creditor)<sup>235</sup></li> <li>• It entails the cut-off point beyond which a right cannot be asserted or action cannot be instituted regardless of any extending factors, including the late acquiring of knowledge<sup>236</sup></li> <li>• The overall effect is to limit the running of a period to a certain and specified cut-off date</li> </ul>

<sup>235</sup> (England) *Limitation of Actions* Consultation Paper No. 151 (1998) 283-290.

<sup>236</sup> Loubser 17 (*In some jurisdictions there is additional provision for longstop limitation periods, with the effect that after a certain time, ... no action shall be available whether or not time has started to run...*).

**Table 8: Core value of prescription period**

	<b>1943 Act</b>	<b>Prescription Act</b>	<b>Effect</b>
<b>Power to extend (override)</b>	No such provision existed in the 1943 Act	No such provision exists in the Prescription Act Certain Acts of Parliament do, however, provide for an analogous principle, referred to as condonation	<ul style="list-style-type: none"> <li>• The underlying policy supports that of fairness to a creditor, whose conduct in failing to bring legal proceedings timeously may likely be based on a justifiable excuse</li> <li>• The power is usually granted by way of judicial discretion</li> <li>• This equity mechanism marries well with the procedural, action-barring system of limitation employed in the common law jurisdictions; and in the context of South Africa, has been provided for in certain Acts of Parliament regulating special time limits</li> <li>• Extension principles are superfluous in a prescription (as opposed to a special time limits) regime, where reliance is placed rather on postponement or suspension to achieve the balance necessary in the interplay between justice and equity</li> </ul>

2.8 As is evident from the analysis, the other components substantially cushion the effect of the shorter three-year general period, thus ensuring that prescription maintains as fair a balance as possible between the competing tensions of justice and equity.

### **Prescription in other legal systems**

2.9 The analysis following entails examining the general prescription period against the provisions of other legal systems in order to determine finally whether a proposal for an increase in the general prescription period from three years to five years is sustainable:<sup>237</sup>

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<sup>237</sup>

The systems of Lesotho, Botswana and Namibia do not form part of the analysis as their regimes, to a large extent, mirror that of South Africa.

**Table 9: Prescription in other legal systems**

<b>Table 9: Prescription in other legal systems</b>					
<b>Mixed jurisdictions</b>		<b>Civil law jurisdictions</b>		<b>Common law jurisdictions</b>	
<b>South Africa</b>	<b>Scotland</b>	<b>France</b>	<b>Germany</b>	<b>England</b>	<b>New Zealand</b>
South Africa Prescription Act, 1969  Commenced: 1 Dec 1970	Scotland <sup>238</sup> Prescription and Limitation (Scotland) Act, 1973  Commenced: 25 July 1976	France <sup>239</sup> Code Civil (2008) (Extinctive Prescription: arts. 2219–2283)  Commenced: 15 Jan 2010	Germany <sup>240</sup> Bürgerliches Gesetzbuch 2002 (Limitation: sections 194-218)  Commenced: 1 Jan 2002	England <sup>241</sup> Limitation Act, 1980  Commenced: 1 May 1981	New Zealand <sup>242</sup> Limitation Act, 2010  Commenced: 1 Jan 2011

<sup>238</sup> Scottish Law Reform Commission (SCOT. LAW COM. No. 15) *Reform of the law relating to Prescription and Limitation of Actions* 1970; Prescription and Limitation (Scotland) Act, 1973; Stair Memorial Encyclopaedia *Prescription and Limitation* (Vol 16); (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 180-187.

<sup>239</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 227-233; Janke BW and Licari FX *The French Revision of Prescription: A Model for Louisiana?* Tulane Law Review Vol 85 (2010) 1-53; Code Civil (arts. 2219-2283) (2010) translation by Gruning DW Prof of Law Loyola University School of Law New Orleans.

<sup>240</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 233-240; Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law (German Report by Reinhard Zimmerman 169-206); Bürgerliches Gesetzbuch (sections 194-218) (2002) translation by Langenscheidt Translation Service with updates by Mussett N and Von Schöning C (Dr) (Samon Übersetzungen GmbH).

<sup>241</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 1-456; Halsbury's Laws of England *Limitation Periods* (Vol. 68) (2008) 1-262; (England) Limitation Act, 1980.

<sup>242</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 204-211; Report No. 6 *Limitation Defences in Civil Proceedings* NZLC (1988) 1-241; Report No. 61 *Tidying the Limitation Act* NZLC (2000) 1-18; (New Zealand) Limitation Act, 2010.

**Table 9: Prescription in other legal systems**

	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions	
	South Africa	Scotland	France	Germany	England	New Zealand
<b>No. of periods</b>	4: 30/15/6/3	4: 10/5/3/2	2: 10/5	3: 30/10/3	5: 12/6/3/2/1	3: 6/3/2
<b>General/standard period</b>	3 years	5 years	5 years	3 years	6 years	6 years
<b>Long-stop period</b>	No	Yes: 20 years in respect of an identified set of claims	Yes: 20 years in respect of an identified set of claims	Yes: 30 years and 10 years in respect of identified sets of claims	Yes: 15 years in respect of an identified set of claims	Yes: 15 years in respect of an identified set of claims
<b>Commencement date</b>						
• <b>objective date</b>	Date debt becomes due	Date obligation becomes enforceable	Date cause of action becomes enforceable	Date claim becomes enforceable	Date cause of action accrues	Date of act or omission
• <b>subjective date</b>	Date of knowledge: applicable in respect of all debts  Until a creditor has knowledge or is deemed to have knowledge (if it could have been acquired by exercising reasonable care) of the-	Date of knowledge: limited to certain claims  Unless a creditor is aware, or with reasonable diligence, could have become aware, in reparation cases of the-	Date of knowledge: not all causes of action  Unless a holder of a right knows or should have known of the-	Date of knowledge: limited to certain claims  Until an obligee obtains knowledge or would have obtained such knowledge if the obligee had not shown gross negligence of the-	Date of knowledge: limited to certain claims  Until a person gains knowledge or is deemed to gain knowledge-	Date of knowledge: limited to certain claims  Until a claimant gains knowledge or ought reasonably to have gained knowledge-

**Table 9: Prescription in other legal systems**

Table 9: Prescription in other legal systems						
	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions	
	South Africa	Scotland	France	Germany	England	New Zealand
	<ul style="list-style-type: none"> <li>• identity of debtor; and</li> <li>• facts from which a debt arises</li> </ul>	<ul style="list-style-type: none"> <li>• loss</li> <li>• injury (excluding personal injury)</li> <li>• damage (including latent damages)</li> </ul>	<ul style="list-style-type: none"> <li>• facts enabling the exercise of a right</li> </ul>	<ul style="list-style-type: none"> <li>• identity of an obliger; and</li> <li>• circumstances giving rise to a claim</li> </ul>	<ul style="list-style-type: none"> <li>• of the identity of defendant/another person causing the act or omission</li> <li>• that the injury is significant; or that the material facts relating to latent damages justify instituting proceedings against a defendant who would not dispute liability and who would be able to satisfy judgement</li> <li>• that the conduct is attributable to an act or omission constituting negligence, nuisance or breach of duty (where applicable)</li> <li>• that the damages are attributable to a defect (where applicable)</li> </ul>	<ul style="list-style-type: none"> <li>• of an act/omission</li> <li>• attributable to a defendant</li> <li>• which                             <ul style="list-style-type: none"> <li>○ caused the claimant to suffer damage or loss (if applicable); or</li> <li>○ act/omission was not consented to by a claimant (if applicable); or</li> <li>○ act/omission was based on fraud or induced a claimant to act on mistaken belief (if applicable)</li> </ul> </li> </ul>

**Table 9: Prescription in other legal systems**

	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions	
	South Africa	Scotland	France	Germany	England	New Zealand
<p><b>Other factors affecting commencement date/running of prescription</b></p> <ul style="list-style-type: none"> <li>• <b>Fraud/wilfully prevent/error</b></li> <li>• <b>Sexual/other abuse</b></li> </ul>	<p>Unless a debtor wilfully prevents creditor from acquiring knowledge</p>	<p>Refer to suspension</p>			<p>Unless an action based on mistake or fraud/deliberate concealment of a defendant</p>	<p>Unless an act/omission based on fraud or induced a claimant to act on mistaken belief</p>
	<p>Constitutes a special class of claims separate from the general principles of discoverability in circumstances where a creditor is unable to institute proceedings because of a mental/psychological condition based on alleged commission of sexual offence</p>	<p>Claim is located in the action for personal injuries and is not confined to the tort of negligence, but could also arise as a result of intentional trespass to the person, meaning that the claimant gets the benefit of the period starting to run three years from the date of discoverability</p>	<p>Actions arising from bodily injury, torture, barbarism, violence or sexual aggression against a minor</p>	<p>Refer to suspension</p>	<p>Claim is located in the action for personal injuries based on the tort of negligence and not on intentional trespass to the person. Where the alleged abuse took place during the claimant's minority, the limitation period starts to run six years from the accrual of the cause of action, thus six years from the time the claimant turns 21 years</p>	<p>The principle of discoverability is applied to actions arising out of sexual abuse whether based in the tort of negligence or trespass to the person, the outcome varying slightly in trespass to the person as it does not require proof of damages</p>

**Table 9: Prescription in other legal systems**

	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions		
	South Africa	Scotland	France	Germany	England	New Zealand	
• <b>Minority</b>	Refer to delayed completion	Refer to suspension	Refer to suspension	Refer to suspension	Unless a plaintiff was an infant on date the right of action accrued	Unless a claimant is a minor at close of primary period, longstop period or Part 3 period	
• <b>Mental disability</b>	Refer to delayed completion	Refer to suspension	Refer to suspension	Refer to suspension	Unless a plaintiff is of unsound mind when right of action accrued	Unless a claimant is mentally impaired	
• <b>Delay/ power to extend or override</b>	<p>Delayed completion</p> <p>Where-</p> <ul style="list-style-type: none"> <li>creditor is a minor/insane/ under curatorship/ prevented by superior force</li> <li>debtor is outside the Republic</li> <li>debtor and creditor in marital relationship</li> </ul>	<p>Suspension</p> <ul style="list-style-type: none"> <li>Where fraud/error (unless true facts could have been discovered with reasonable diligence)</li> </ul>	<p>Judicial power to override</p> <ul style="list-style-type: none"> <li>Personal injuries (incl death)</li> <li>Harassment</li> <li>Defamation</li> </ul>	<p>Suspension</p> <p>Where-</p> <ul style="list-style-type: none"> <li>impossibility to act arising from provision of law, agreement or <i>force majeure</i></li> <li>un-emancipated minor or adult in a tutorship relationship (with exceptions)</li> </ul>	<p>Suspension</p> <p>Where-</p> <ul style="list-style-type: none"> <li><i>vis major</i> (last 6 months of the period)</li> <li>obligor/obligee is incapable of contracting/limited contractual capacity/ is without legal representative</li> </ul>	<p>Judicial power to extend/override</p> <p>Discretionary exclusion-</p> <ul style="list-style-type: none"> <li>actions for defamation/malicious falsehood</li> <li>actions in respect of personal injuries/death</li> <li>actions in respect of certain statutes (eg Maritime Conventions Act, Sex Discrimination Act, etc)</li> </ul>	<p>Judicial power to extend/override</p> <p>Power to disregard-</p> <ul style="list-style-type: none"> <li>personal injury (incl death and gradual onset of disease or infection)</li> <li>claims in respect of abuse of minors (sexual and non-sexual)</li> </ul>

**Table 9: Prescription in other legal systems**

	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions		
	South Africa	Scotland	France	Germany	England	New Zealand	
	<p>Delayed completion</p> <ul style="list-style-type: none"> <li>• debtor and creditor in partnership relationship</li> <li>• debtor and creditor in juristic person/governing body relationship</li> <li>• debt is the object of an arbitration dispute</li> <li>• debt is the object of a claim filed against a deceased estate/insolvent estate/company in liquidation/ applicant under Agricultural Debt Management Act</li> <li>• appointment of an executor in deceased estate being awaited in relation to deceased creditor or debtor</li> </ul>	<p>Suspension</p> <ul style="list-style-type: none"> <li>• In personal injury cases, where- <ul style="list-style-type: none"> <li>◦ a pursuer is not of age</li> <li>◦ a pursuer is of unsound mind</li> </ul> </li> </ul>	<p>Judicial power to override</p>	<p>Suspension</p> <ul style="list-style-type: none"> <li>• partners bound in civil pact of solidarity/ spousal relationship</li> <li>• heirs, in respect of succession claims</li> <li>• mediation, conciliation or an agreement to engage in a participatory procedure</li> <li>• preparatory enquiry ordered before beginning of proceedings</li> </ul>	<p>Suspension</p> <ul style="list-style-type: none"> <li>• claim is the object of an estate where inheritance has been accepted/insolvency proceedings have commenced/claim by or against an agent</li> <li>• subsistence of marital/ civil partnership relationship</li> <li>• subsistence of: <ul style="list-style-type: none"> <li>◦ parent/ child relationship</li> <li>◦ child/ legal advisor relationship</li> <li>◦ guardian/ ward relationship</li> <li>◦ custodianship relationship</li> <li>◦ curatorship relationship</li> </ul> </li> </ul>	<p>Judicial power to extend/override</p> <p>Power to extend-</p> <ul style="list-style-type: none"> <li>• where person is an infant or lacks capacity to conduct legal proceedings</li> <li>• in latent damage cases (in relation to the three-year period after knowledge acquired)</li> </ul>	<p>Judicial power to extend/override</p> <p>Power to extend-</p> <ul style="list-style-type: none"> <li>• where claimant or personal representative is incapacitated at the “close” of the primary, longstop or Part 3 period because of- <ul style="list-style-type: none"> <li>◦ temporary or permanent physical, intellectual or mental impairment</li> <li>◦ lawful or unlawful detention</li> <li>◦ war, another similar emergency or state of emergency declared in terms of Civil Defence</li> </ul> </li> </ul>

**Table 9: Prescription in other legal systems**

	Mixed jurisdictions		Civil law jurisdictions		Common law jurisdictions		
	South Africa	Scotland		France	Germany	England	New Zealand
					<ul style="list-style-type: none"> <li>claims for infringement of an obligee’s right to sexual self-determination (until 21)</li> <li>claims for infringement of an obligee’s right to sexual self-determination where parties live in common household (on reaching 21)</li> <li>during negotiations</li> <li>the prosecution of rights</li> <li>an obligor temporarily entitled to refuse performance in terms of an agreement</li> </ul>		Emergency Management Act
<b>Interruption</b>	<ul style="list-style-type: none"> <li>Acknowledgement of liability (express or tacit)</li> <li>Judicial interruption (service of process)</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledgement of liability (performance or unequivocal written admission of liability)</li> <li>The bringing of a claim (judicial interruption)</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledgement of debt</li> <li>Judicial demand</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledgement</li> <li>Judicial or official act of execution</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledgement of liability (written or tacit)</li> <li>Judicial interruption</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledgement of liability (written or tacit)</li> <li>Filing/lodging of statement of claim or other formal document with the court (Judicial interruption)</li> </ul>	

- 2.10 The following is established from the analysis:
- 2.10.1 South Africa and Germany have the shortest general prescription periods;
- 2.10.2 notwithstanding the length of South Africa's general prescription period, her extinctive prescription regime is arguably one of the more "*generous*" in the following respects:
- 2.10.2.1 the principle of discoverability is applicable in relation to all debts, and is not limited to a specific subset of debts. Thus, in circumstances where a creditor has not acquired actual or constructive knowledge in relation to "*any*" kind of debt subject to prescription by due date, prescription will not begin running;
- 2.10.2.2 the South African system does not employ long-stop periods, commonly utilised to offset the effect of the knowledge requirement. The effect is that no cut-off period exists beyond which a debt will not be considered for the purpose of prescription;
- 2.10.2.3 the South African system contains a long list of delay factors serving to protect creditors inhibited from timeously asserting rights to debts; in some respects, going against the tide of reform initiatives seeking to trim down factors that no longer appear to present a threat to the timeous enforcement of rights. It has being argued, in this regard that-
- (a) absence from jurisdiction no longer justifies delays in enforcing rights, based on improved methods of transport and communication and other means of enforcement regulated by way of court process; and

- (b) minority and insanity no longer justify delays in enforcing rights in circumstances where parties can be represented.

2.11 To this end, the Western Australia Law Reform Commission made the following observation:

*Modern Limitation Acts have made some progress in bringing the law relating to disability into line with modern conditions and reducing the number of disabilities covered by the Limitation Acts. .... Modern means of travel and communication have rendered obsolete the provisions extending the limitation period where one party or the other is "beyond the seas". When people can journey from one side of the world to the other in less than a day, and communicate instantaneously with anyone anywhere by telephone, facsimile or electronic mail, there is no need to delay the running of the limitation period just because the plaintiff or defendant is out of the jurisdiction.*

*The result of these developments is that the only categories of disability which merit special treatment as regards the running of the limitation period are infancy and incapacity, mental or otherwise. Even in such cases, it is no longer self-evident that the running of the limitation period should be delayed in all cases.<sup>243</sup>*

2.12 Further still, in relation to incapacity (including mental disability), the common law systems appear to "postpone" the running of the period only where such ground for postponement exists at the time the cause of action accrues, and not afterwards. Based on the wording of section 13(1) of the Prescription Act, it is irrelevant when the impediment of insanity comes into existence, so long as it is subsisting in the last year a particular period is running; if this is the case, an additional year is added from the date the impediment ceases to exist.

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<sup>243</sup>

Western Australia Law Reform Commission WALRC 36(II) *Final Report on Limitation and Notice of Actions* (1997) paragraph 17.3-17.4.

## 3

### PROPOSAL FOR LAW REFORM

#### Issues for consideration in formulating proposal

- 3.1 From the afore-going analysis, it appears that the question whether the general prescription period should be increased from three years to five years is not supported by-
  - 3.1.1 a general trend adopted in other jurisdictions towards applying shorter prescription periods;
  - 3.1.2 factors contributing to the overall length of a prescription period; and
  - 3.1.3 what appears to be an accommodating prescription system in the face of an ever-evolving global society seeking stream-lined and efficient processes unencumbered by lengthy general periods.
- 3.2 The question of increasing the general prescription period in the face of prevailing socio-economic conditions, including poverty and illiteracy, it is submitted, is unlikely, in the long run, to address the needs of affected creditors attempting to ward off the threat of prescription, as these circumstances may unfortunately remain unchanging for most of these creditors' lives.
- 3.3 It is submitted in this regard, that more meaningful avenues must be pursued in order to address the issue of creditors trapped in circumstances that prevent them from accessing the law in order to interrupt the running of prescription. The issue is dealt with in part D of this paper.

- 3.4 The question of increasing the length of the period is however not closed.
- 3.5 It must be recalled in this regard, that when the Commission dealt with the proposal calling for integration of the principles contained in section 126B of the National Credit Act prohibiting the recovery of prescribed debt into the Prescription Act, the view was held that<sup>244</sup>
- 3.5.1 inasmuch as the National Credit Act was centred on consumer protection, the promotion of a fair, competitive, sustainable and responsible credit market and the fulfilment of a consumer's financial obligations was also important;
- 3.5.2 a proper balancing of interests therefore required that creditors legitimately obtain satisfaction of due debts, either through the voluntary fulfilment of consumer obligations or through valid debt recovery processes;
- 3.5.3 obstacles affecting the debt recovery process were many; and
- 3.5.4 the conduct of certain debtors in contributing to enforcement delays ultimately impacted on a creditor's ability to interrupt prescription.
- 3.6 Thus, as a means of balancing the interests of creditors against those of debtors, it is submitted that consideration be given to increasing the general prescription period.
- 3.7 The view is held however, that a proposal calling for an increase of the general prescription period from three years to five years may come replete with its own challenges, some of which may collide with prescription's underlying need to protect the public interest

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<sup>244</sup>

Refer to part A, chapter 5, paragraphs 5.7 to 5.15 (Proposed creditor remedies).

through processes that support judicial economy and encourage the prompt adjudication of disputes, while evidence is available and the memory of witnesses is fresh.

## **Preliminary recommendation**

3.8 The Commission's preliminary recommendation, as contained in the draft Prescription Bill provided for in Annexure A, is the following:

3.8.1 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.

## **Questions to Respondents**

3.9 The Commission welcomes inputs, comments and suggestions from Respondents, including the following:

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

3.9.1 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.

3.9.2 Notwithstanding arguments tendered that increasing the general prescription period to five years is not supported by current trends towards shorter prescription periods, the presence of factors contributing to the overall length of a prescription period and the fact that South Africa is considered as having an overly accommodating prescription system, are there Respondents who are still of the view that the three-year general prescription period should be increased to five years. Full reasons are required for this view.

# PART C: DELAYING THE RUNNING OF PRESCRIPTION

## 1

### OVERVIEW

#### Background<sup>245</sup>

- 1.1 Over time, certain principles have developed to ensure that the rules of prescription remain cognizant of factors inhibiting a creditor from timeously asserting a right.
- 1.2 The principles find expression in the common law maxim *contra non valentem agere, non currit praescriptio*, meaning, prescription does not run against one who is unable to act.
- 1.3 The concept was formulated in the fourteenth century by the Italian jurist, Bartolus de Saxoferrato, based in part, on Roman law influence.<sup>246</sup>
- 1.4 Initially premised along the narrower formulation of legal impediments; the question always remained whether factual impediments also warranted protection.
- 1.5 The scope of the concept was later broadened by Canon Law and in this regard, it is maintained that-

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<sup>245</sup> Schrage EJM *Contra non valentem agere, non currit praescriptio – the failure to comply with statutory time-limits deprives a potential claimant of his claim, or does it?* TSAR 2012 1; Janke BW *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita* 68 Louisiana Law Review 2008 498.

<sup>246</sup> Where, for example, minority was seen as a legal impediment affecting the running of prescription.

*Canon law in general was rather hostile towards prescription and limitation. It considered those as incentives to lazy persons ... and consequently tried to interpret these institutions restrictively. Therefore the number of examples of cases in which prescription does not run increased. The canonists compare the position of the woman with a dowry to that of the minor or of other disabled persons, eg those under guardianship. An act of God, absence, ignorance about the harm and the liable person find also their place in the catalogues of reasons why prescription should not run. In canon law these reasons are systematised under the heading of *impossibilitas* – impossibility. From there the principle also found its way to the secular law.<sup>247</sup>*

- 1.6 This expanded scope thus encompassed both legal and factual impediments, the latter of which required absolute impossibility to act.
- 1.7 This doctrine has been accorded statutory recognition in sections 12(2), (3), (4) and 13 of the Prescription Act, providing either for the delayed onset or running of prescription in instances where a creditor finds it “*difficult*” or “*impossible*” to interrupt the running of prescription.
- 1.8 The Prescription Act therefore makes provision for both “*legal*” and “*factual*” impediments; the former of which requires either absolute impossibility or relative inability whilst the latter requires absolute impossibility.

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<sup>247</sup>

Schrage EJM *Contra non valentem agere, non currit praescriptio* – the failure to comply with statutory time-limits deprives a potential claimant of his claim, or does it? TSAR 2012 1 at 11-12.

- 1.9 By way of example-
- 1.9.1 whilst the impediment of minority<sup>248</sup> is taken to constitute a legal impediment,<sup>249</sup> a minor is not “*absolutely*” precluded from instituting legal proceedings, legal standing will be established if he is assisted by his guardian; and
- 1.9.2 the impediment of superior force, irrespective whether it arises from a legal<sup>250</sup> or factual<sup>251</sup> cause-
- 1.9.2.1 requires “*absolute*” impossibility to act;
- 1.9.2.2 presupposes a foreign incursion on a person’s ability to act; and
- 1.9.2.3 may, in some circumstances, give rise to the question of fault, in other words, the extent to which a person contributed to a delay in acting.
- 1.10 Operating parallel to this doctrine is the common law doctrine *lex non cogit ad impossibilia* (meaning, the law does not compel the performance of that which is impossible), which requires “*absolute*” impossibility to act in the face of “*legal*” impediments.

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<sup>248</sup> Provided for in section 13(1)(a) of the Prescription Act.

<sup>249</sup> In some jurisdictions, minority is considered to be a factual impediment (See Janke BW *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita* 68 Louisiana Law Review 2008 511-520).

<sup>250</sup> Section 13(1)(a) of the Prescription Act provides as follows:

*If ... the creditor ... is prevented by **superior force including any law or any order of court** from interrupting the running of prescription ...*  
(Emphasis added)

<sup>251</sup> Factual causes include war, civil unrest, natural disasters and imprisonment.

- 1.11 This latter doctrine applies in the following areas of South African law:
- 1.11.1 contract (impossibility of performance due to one or other factors, including superior force);<sup>252</sup>
  - 1.11.2 delict (impossibility of performance due to one or other factors, including superior force);<sup>253</sup>
  - 1.11.3 succession (in relation to an impossible condition in a will); and
  - 1.11.4 criminal law.

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*Peters Flamman and Co v Kokstad Municipality* 1919 AD 427 (where it was decided that if a person is prevented from performing on a contract due to a *vis major*, including an Act of State, he is discharged from liability); *Hersman v Shapiro & Co* 1926 TPD 367 (where it was held that the general rule that impossibility of performance does excuse performance is not applicable in all cases, but that regard had to be had to the nature of the contract, the relationship between the parties, the circumstances of a case and the nature of the impossibility invoked by the defendant); *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 SCA (where the following was stated: *as a general rule impossibility of performance brought about by a vis major or casus fortuitous will excuse performance of a contract. But it will not always do so. .... The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. ....*"); *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd & Another* [2013] ZASCA 91 (where it was found that the general rule that impossibility of performance brought about by a *vis major* or *casus fortuitous* will excuse performance of a contract could not be relied on by the appellant as the impossibility was self-created and thus did not amount to an absolute legal impediment).

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*Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 635. The case of *Lombo v African National Congress* 2002 (5) SA 668 SCA must be distinguished, in that the appellant in *Montsisi* had been prevented by an absolute legal impediment from complying with the requirements regarding the furnishing of notice, so that he was absolutely unable to gain access to any person during his detention, including an attorney, by virtue of section 6(6) of the Terrorism Act, 1967 (Act 83 of 1967). The court in *Lombo* appeared to be of the view that even though appellant had been factually prevented from instituting legal proceedings (as a result of his continued detention), this did not constitute a legal impediment that absolutely prevented him from doing so, either during his detention (seeing that, at some point during this period, he was given the option of accessing legal representation) or after his release (seeing that section 13(1)(a) of the Prescription Act afforded him a remedy in instances where he was prevented by superior force). In this regard, the court maintained that resort to the common law only became necessary if an Act of Parliament was silent on the question of providing a remedy in a particular matter.

## Suspension and the 1943 Act

1.12 Sections 7, 9 and 10 of the 1943 Act provided for the suspension or delayed onset<sup>254</sup> of prescription in the face of certain impediments that made it difficult or impossible for a creditor to timeously assert a right against a debtor.

1.13 Suspension operated in the following way:<sup>255</sup>

<b>Table 10: Suspension: 1943 Act</b>	
<b>Operation and effect</b>	<b>Circumstances under which suspension took place</b>
<ul style="list-style-type: none"> <li>• The running of prescription was suspended from the date of the impediment</li> <li>• On the date the impediment ceased to exist, running of the period resumed from the point where it had been suspended</li> <li>• The period of suspension was excluded from the calculation of the prescription period, with effect that a creditor gained the benefit of the full period</li> <li>• Suspension took effect irrespective when the impediment came into being; the beginning, middle or end of the prescription period</li> </ul>	<ul style="list-style-type: none"> <li>• In circumstances where performance of an obligation was delayed by-               <ul style="list-style-type: none"> <li>○ a <i>vis major</i>; or</li> <li>○ a debtor was lawfully entitled to delay performance on another ground</li> </ul> </li> <li>• During the disability of a creditor<sup>256</sup>, defined as follows in section 1:               <ul style="list-style-type: none"> <li>○ a minor</li> <li>○ a person under curatorship</li> <li>○ a husband and wife, in actions between spouses (unless living apart)</li> <li>○ each partner, in actions between partners regarding partnership rights (subsistence of partnership)</li> </ul> </li> </ul>

<sup>254</sup> In terms of sections 9 and 10 of the 1943 Act, the “onset” of prescription was delayed where a debtor was absent from the Union or a creditor was under disability. Under these circumstances, prescription did not begin running until the debtor’s return or the reason for the disability ceased. These provisions have not been re-enacted, so that, in the case of impediments referred to section 13, prescription begins running immediately after a debt becomes due (*ABP 4X4 Motor Dealers (Pty) Ltd v IGI Insurance Company Ltd* [1999] 3 All SA 405 (A) at 410-411).

<sup>255</sup> Section 7 of the 1943 Act; De Wet 90-92; 122-124; De Wet en Van Wyk *Kontrakreg en Handelsreg* 5de uitgawe Volume 1 296-297.

<sup>256</sup> Section 7(1)(b) of the 1943 Act.

<b>Table 10: Suspension: 1943 Act</b>	
<b>Operation and effect</b>	<b>Circumstances under which suspension took place</b> <ul style="list-style-type: none"> <li>• During the absence of a debtor from the Union<sup>257</sup> for a period exceeding six months</li> <li>• If, by fraud, a debtor prevented a creditor from discovering the facts surrounding the latter's right of action. Prescription was suspended until the date on which the creditor was reasonably expected to discover the true facts regarding the right of action</li> <li>• In an action founded on the fraud of a debtor, until the date on which a creditor was reasonably expected to discover the fraud</li> </ul>

## **Delayed completion and the Prescription Act**

1.14 Section 13 of the Prescription Act marks a shift in principle, by providing for the “*delayed completion*” of prescription in the face of impediments that make it difficult or impossible for a creditor to timeously assert a right.

1.15 De Wet was of the view that a change in systems was justified, taking into account South Africa's already “*generous*” list of suspension grounds.

1.16 He maintained, in this regard that-

*Die bestaande Verjaringswet skyn in beginsel tegemoetkomend teenoor die skuldeiser te wees .... In die Ontwerp Nederlandse BW ... word heeltemal met die tradisionele voorstelling gebreek, en word die loop van verjaring*

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<sup>257</sup>

Section 7(1)(c) of the 1943 Act.

*slegs geskors indien die skorsende omstandighede aan die einde van die termyn bestaan, en word die verjaring in ieder geval na ses maande vanaf die wegval van die skorsende omstandigheid voltooi. Hierdie benadering verdien m.i. navolging. Die omstandighede wat die loop van verjaring skors, hou almal verband met die skuldeiser se vermoë om die skuld in te vorder, **en hierdie vermoë is slegs van belang wanneer die verjaringstermyn haas voltooiing nader. Die tegemoetkoming van skorsing het die skuldeiser slegs nodig indien hy, in hierdie kritieke stadium, nie in staat is om sy skuld in te vorder nie.***<sup>258</sup>

(Emphasis added)

1.17 Delayed completion operates in the following way:

<b>Table 11: Delayed completion: Prescription Act</b>	
<p><b>Operation and effect</b></p> <ul style="list-style-type: none"> <li>• The running of prescription is delayed <b>only if the impediment is subsisting in the last year in which prescription is running</b></li> <li>• Running of the period is suspended from the date of the impediment</li> <li>• The day after the impediment ceases to exist, running of the period resumes from the point it was suspended, <b>for a period of one year</b></li> <li>• If the impediment ceases to exist before the last year in which prescription is running- <ul style="list-style-type: none"> <li>○ a creditor does not obtain the benefit of delayed completion</li> <li>○ a creditor therefore does not obtain the benefit of the full prescription period</li> </ul> </li> </ul>	<p><b>Circumstances under which delayed completion operates</b></p> <ul style="list-style-type: none"> <li>• Where the creditor is- <ul style="list-style-type: none"> <li>○ a minor;</li> <li>○ an insane person;</li> <li>○ a person under curatorship; or</li> <li>○ prevented by a superior force (including any law or order of court) from interrupting the running of prescription as contemplated in section 15(1))</li> </ul> </li> <li>• Where the debtor is outside the Republic</li> <li>• Where- <ul style="list-style-type: none"> <li>○ the creditor and debtor are married to each other</li> <li>○ the creditor and debtor are partners and the debt is one which arose from the partnership relationship</li> <li>○ the creditor is a juristic person and the debtor is a member of the governing body of that juristic person</li> </ul> </li> </ul>

**Table 11: Delayed completion: Prescription Act**

Operation and effect	Circumstances under which delayed completion operates
	<ul style="list-style-type: none"> <li>• Where the creditor or debtor is deceased and an executor for the estate has not yet been appointed</li> <li>• Where the debt is the object of-               <ul style="list-style-type: none"> <li>○ a dispute subjected to arbitration; or</li> <li>○ a claim filed<sup>259</sup> against-                   <ul style="list-style-type: none"> <li>▪ a deceased debtor’s estate;</li> <li>▪ an insolvent debtor’s estate;</li> <li>▪ a company<sup>260</sup> in liquidation; or</li> <li>▪ an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966)<sup>261</sup></li> </ul> </li> </ul> </li> </ul>

<sup>259</sup> In *Betterbridge (Pty) Ltd v Masilo and Others* 2015 (2) SA 396 (GP) (confirmed in *Masilo v Betterbridge* [2016] ZASCA 73) it was held that “filing” of a claim does not constitute proof of claim (as provided for in section 44(3) of the Insolvency Act, 1936 (Act 24 of 1936) in relation to the officer presiding’s power to admit or reject a claim), but rather, admission of a claim to proof, in other words, admission for the purpose of proof (as provided for in section 44(4) of the Insolvency Act in relation to the granting of a creditor permission to proceed to a meeting of creditors in order to prove a claim).

<sup>260</sup> In *Van Deventer and Another v Nedbank Ltd* 2016 (3) SA 622 (WCC) it was held that the principle of delay as is applicable to a company in liquidation also applies in respect of a claim filed against a close corporation in liquidation.

<sup>261</sup> The Agricultural Credit Act has since been repealed by the Agricultural Debt Management Act, 2001 (Act No. 45 of 2001), which has, in turn, been repealed by the Agricultural Debt Management Repeal Act, 2008 (Act 15 of 2008) (although sections 2, 7, 8(1), (2) and (3) and 9 of the Agricultural Debt Management Act are still in force). Section 28 of the Agricultural Credit Act, which has not been re-enacted, provided for the appointment of a trustee and for the administration of assets similarly to that of an insolvent estate.

## 2

### PROBLEMS WITH THE CURRENT LAW

#### Constitutionality of delayed completion

- 2.1 Sections 9(1) and (2) and section 34 of the Bill of Rights provide as follows:

##### *Equality*

9(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms.*

##### *Access to courts*

34. *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

- 2.2 The question now arising is whether delayed completion operates counter to these imperatives, to the extent that a creditor affected by an impediment that ceases to exist before the last year in which prescription is running is unable to obtain the benefit of delay.

- 2.3 By way of example, and proceeding on an assumption that a general prescription period of **four years** applies, if-

- as a result of a surgical procedure, a patient lapses into a *coma* the same day after an operation is performed;
- he regains consciousness two years later;
- he is discharged from hospital ten months after regaining consciousness; and
- as a result of the operation, his cognitive functioning is reduced by 50%;

the creditor forfeits the benefit of delay, on the notion that the prescription period was not careering towards conclusion.

2.4 To argue that a creditor in this position had sufficient time, so that he was able to forego the benefit of delay, it is submitted, is unconvincing, since, all he had, in effect, was one year and two months to-

2.4.1 obtain medical records and other documents;

2.4.2 assemble resources;

2.4.3 find an attorney;

2.4.4 have his attorney source further records, documents and other evidence;

2.4.5 give notice of intention to institute legal proceedings (in instances where the debtor is an organ of state);

2.4.6 engage in settlement negotiations with the debtor; and

- 2.4.7 institute legal proceedings in the case where settlement negotiations failed.
- 2.5 What the argument, in effect, also does, is imply that a one year general prescription period suffices for the purpose of enabling a creditor to timeously interrupt the running of prescription.
- 2.6 Therefore, whilst, on the face of it, the basis for changing systems may appear to be sound, its prejudicial impact on creditors forced to succumb to the unfortunate circumstance of timing, it is submitted, far outweighs the benefit of delayed completion.
- 2.7 In relation to the so-called "*benefit*" of delayed completion, irrespective when the impediment sets in "*in the last year*", a creditor obtains the benefit of a full one year's delay. In other words, even if an impediment sets in in the last three months, an additional year is added to the prescription period.
- 2.8 It is submitted, however, that the benefit derived from affording the additional year falls short when measured against the standard of fairness inherent in the operation of suspension. In this regard, if an impediment lasted three months, three months were added to the original prescription period; if an impediment lasted one year, one year was added to the original prescription period and if an impediment lasted three years, three years were added to the original prescription period.
- 2.9 Therefore, counter to the right to equality and to equal protection and benefit of the law, delayed completion-

- 2.9.1 operates to the benefit of a select group of creditors, that is, those succumbing to impediments that are subsisting in the last year in which prescription is running; and
- 2.9.2 in some instances, affords an extended time period even in instances where this may be undeserving, for example, in respect of those creditors, who, notwithstanding having succumbed to impediments for periods of less than one year, still obtain the benefit of a full year's delay.
- 2.10 And counter to the right of access to courts, is the ever-present risk that a creditor will have but a diminished window of opportunity to interrupt the running of prescription in the face of a reduced period.

### **Deterrent effect on dispute referral**

- 2.11 Delayed completion has the potential for hindering engagement in dispute resolution processes by discouraging creditors from referring disputes for adjudication in circumstances that would have suspended the running of prescription.
- 2.12 By way of example, the Financial Advisory and Intermediary Services Act provides as follows:

27. *Receipt of complaints, prescription, jurisdiction and investigation*

(2) *Official receipt of a complaint by the Ombud **suspends the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969)**, for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.*

(Emphasis added)

- 2.13 Because the Prescription Act does not provide for suspension, the referral will, in all likelihood, be interpreted in line with the principles of delayed completion.
- 2.14 This may have the effect of-
  - 2.14.1 forcing creditors becoming cognizant that their referrals will be out of time, to engage in litigation; or
  - 2.14.2 causing creditors to hold over referring matters until the last year in which prescription is running.

## **3**

# **ADDRESSING PROBLEMS WITH THE CURRENT LAW**

## **Maintaining the system of delayed completion**

- 3.1 In light of the way in which delayed completion operates, the question arises whether it would be in the interests of creditors to retain it as a delay system.
- 3.2 A careful balancing exercise appears to weigh more heavily against its retention.

## **Reverting to a system of suspension**

- 3.3 It is submitted that the right of access to courts and the right to full and equal enjoyment of the benefits afforded by the Prescription Act favour the more even-handed operation of suspension.
- 3.4 The matter does not end there, however.
- 3.5 Whilst the characteristic balance inherent of suspension may, on the one hand, benefit the interests of creditors forced to succumb to impediments during the running of a particular period; it does present its own challenges when viewed against prescription's primary goal of certainty and finality.

3.6 The following example<sup>262</sup> illustrates the extent of the problem:

- in 1980, six debtors make arrangements to pay the South African Revenue Service (SARS) arrear taxes once off in 1983. Four of these debtors reside and carry on business in the northern territory;
- in 1983, the northern territory is hit by freak weather conditions resulting in unprecedented floods causing rising fatalities, untold damage, a complete breakdown in communication networks and rapidly spreading cholera. The territory is declared a disaster area and blockaded from the rest of the country. Access into and out of the area is prohibited and schools, business, government activity, the courts and other essential services shut down. Only medical rescue and other aid services are allowed into the area by means of helicopter;
- since the affected debtors have lost everything, they are unable to repay the debts by due date;
- by 1985, the order declaring the northern territory a disaster area is uplifted. Activities resume;
- by 1990, the affected debtors continue to be in arrears. Notwithstanding several demands, payments remain outstanding;
- in 2017, SARS institutes legal proceedings for the recovery of the debts, and in reaction, the debtors plead prescription; and

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<sup>262</sup>

Operating on the assumption that a thirty-year prescription period is applicable.

- SARS replicates by pleading that because it was prevented by superior force from enforcing the debts in question, the running of prescription became suspended.

3.7 Effectively, SARS would succeed in its claims since it had until 2017 (1985 to 2015 plus two years) to enforce the debts-

- irrespective that the impediment took place so early into the running period; and
- irrespective of the length of the prescription period.

3.8 Following this, the question arises whether it is fair to debtors, in the interests of finality and certainty, to grant such a creditor the protection of suspension in instances where the impediment **took place so early on in the running of the period** so that it still had ample opportunity to enforce its rights of recovery after the impediment ceased to exist.

3.9 This was the very question asked by the French commentator Troplong, who, as far back as 1857, posed the following scenario:

*I live in a town driven into a state of blockade during the span of a year, and 20 years still remain for me to escape the thirty year prescription of my right: is it not absurd that I would like to cover up my negligence in acting in this waiting period, by asking that the year under siege not be counted in the calculation of my thirty years? What major force paralyzed my hands, since for 20 years, I was able to repair this hurdle of time? ....*<sup>263</sup>

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<sup>263</sup>

Translated and referred to in Janke BW *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita* 68 Louisiana Law Review 2008 509.

3.10 It is submitted that the interests of fairness militate towards protecting the rights of debtors by preventing them from being exposed to periods of prescription that run into perpetuity.

3.11 Measured against the accommodating nature of suspension and with due regard to the adequacy of the available time left for the exercise of a right, the view is held that limiting the rights of this particular subset of creditors is the reasonable and justifiable under the circumstances, bearing in mind the views expressed by the court in *Mohlomi* that-

*What counts ... is the sufficiency or insufficiency, the adequacy or inadequacy, of the room ... [left] open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, ..., to a real and fair one.*<sup>264</sup>

3.12 To conclude thus-

3.12.1 the general rules of suspension must be made to apply in all instances where an impediment sets in during the running of a period; unless-

3.12.1.1 an applicable prescription period is 15 years or more;

3.12.1.2 onset of the impediment takes place during the first five years of the running of the period; and

3.12.1.3 the impediment subsists for a period of five years or less.

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<sup>264</sup>

*Mohlomi v Minister of Defence* 1997 (1) SA 124 CC paragraphs 12.

3.13 In line with the scheme of the Prescription Act, the view is held that suspension should operate only to the extent of suspending the “*running*”<sup>265</sup> of the period in the face of impediments making it difficult or impossible for a creditor to timeously assert a right.

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<sup>265</sup> As opposed to the “*onset*” of the period, as was provided in sections 9 and 10 of the 1943 Act, noting, in this regard, that other provisions of the Prescription Act already cater for the delayed onset of prescription.

## 4

### PROPOSALS FOR LAW REFORM

#### Issues for consideration in formulating proposals

- 4.1 As pointed out,<sup>266</sup> acquisitive prescription and the prescription of servitudes do not form part of the scope of the investigation.
- 4.2 However, any law reform proposal recommending a regime change for the purpose of delaying the running of prescription, of necessity, requires the same treatment in relation to all forms of prescription.

#### Preliminary recommendations

- 4.3 The Commission's preliminary recommendations, as contained in the draft Prescription Bill provided for in Annexure A, are the following:
- 4.3.1 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

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<sup>266</sup>

In the Introductory part of this paper.

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.

#### 4.3.2 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.

## Questions to Respondents

- 4.4 The Commission welcomes inputs, comments and suggestions from Respondents, including the following:

### **PART C: DELAYING THE RUNNING OF PRESCRIPTION**

- 4.4.1 Do Respondents believe that notwithstanding the arguments raised in favour of reverting to a system of suspension, that delayed completion, in comparison, offers more advantages? If yes, what are these advantages? Complete details of the advantages are required.
- 4.4.2 Do Respondents have comments regarding the proposal qualifying a creditors right to access the benefits of suspension in instances where an applicable prescription period is longer than 15 years, an impediment occurs in the first five years of the running of the period and such impediment subsists for a period of less than five years?

# **PART D: INABILITY TO ACCESS THE COURTS**

## **1**

### **OVERVIEW**

#### **Background**

##### **Case 1**

- 1.1 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.
- 1.2 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, resulting in a lowered Glasgow Coma Score.<sup>267</sup> After being discharged from hospital on 15 March 1999, he was re-admitted three days later in an allegedly confused state. He has no independent recollection of the collision other than being struck down by a motor vehicle.
- 1.3 The first time he gained insight into his right to claim compensation was six months after the accident, when he consulted with an attorney in East London at his wife's urging. Soon after the meeting with his attorney, his wife is said to have left him.

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<sup>267</sup>

Obtained by way of a Glasgow Coma Scale, a neurological scale used to measure the conscious state of a patient in head trauma cases.

- 1.4 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). In this regard, 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 become prescribed.
- 1.5 After it became clear that the Road Accident Fund would not be settling the claim, legal proceedings were instituted on 27 February 2004 to claim damages amounting to R250 000-00.
- 1.6 Placing reliance on section 23(1) of the Road Accident Fund Act, the Road Accident Fund raised the defence of prescription.
- 1.7 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-
- 1.7.1 the extensive nature of his injuries, which resulted in him having lost all concept of space and time; and
- 1.7.2 the effect of his personal circumstances.
- 1.8 Judgement of the High Court (*Mdeyide 1*)<sup>268</sup> was delivered on 3 October 2006. It was found that section 23(1) of the Road Accident Fund Act (RAF Act), insofar as it failed to provide for a knowledge requirement, infringed on Mr Mdeyide's right of access to court. The

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<sup>268</sup>

*Mdeyide v Road Accident Fund* [2006] ZAECHC 125.

provision was declared to be inconsistent with section 34 of the Constitution and invalid. The order was referred to the Constitutional Court for confirmation.

- 1.9 The first Constitutional Court decision (*Mdeyide 2*)<sup>269</sup> 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.
- 1.10 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.
- 1.11 The Constitutional Court (*Mdeyide 3*)<sup>270</sup> delivered its judgement on 30 September 2010. Froneman J (with Jafta J and Yacoob J concurring) delivered the dissenting judgement. In relation to the majority judgement-
- 1.11.1 the court conducted a consistency analysis (as required by section 16(1) of the Prescription Act) between section 23(1) of the RAF Act (which provides for a prescription period of three years from the "*date a cause of action arises*") and section 12(3) of the Prescription Act (which provides for a prescription period of three years from the "*date of actual or constructive knowledge of the identity of a debtor*")

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<sup>269</sup> *Road Accident Fund v Mdeyide (Minister of Transport intervening)* 2008 (1) SA 535 CC.

<sup>270</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC.

*and the facts from which a debt arises”*)<sup>271</sup> to determine whether the (more limiting) RAF Act or the (more generous) Prescription Act applied;

1.11.2 the court found the enactments to be inconsistent,<sup>272</sup> and that as such, Mr Mdeyide could not place reliance on the protection afforded by section 12(3) of the Prescription Act to support a contention that he had acquired late knowledge of the accident;

1.11.3 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;

1.11.4 in considering whether the limitation was reasonable and justifiable in the face of section 36 of the Constitution<sup>273</sup>, the court maintained that the right of access had to be weighed against-

1.11.4.1 the generosity of the three-year general prescription period, (noting, in this regard, that time bars that were previously struck down as unconstitutional were much shorter, ranging between 14 days and six months);

1.11.4.2 the likelihood of persons involved in road accidents learning about the Road Accident Fund within the three-year period provided for (being that such knowledge was not dependent on formal education but on information obtained by word of mouth);

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<sup>271</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC paragraphs 13, 19 and 20.

<sup>272</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC paragraph 53.

<sup>273</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC paragraphs 63-93.

- 1.11.4.3 the simplicity of the Road Accident Fund claims procedure;
- 1.11.4.4 the need for proper administration of public funds;
- 1.11.4.5 the potential harmful effects of a more flexible and open dispensation; and
- 1.11.4.6 the fact that poverty and illiteracy were not the sole considerations deserving of attention in the matter;
- 1.11.5 the court found that the limitation contained in section 23(1) of the RAF Act was reasonable and justifiable in the face of section 36 of the Constitution, 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.

## **Case 2**<sup>274</sup>

- 1.12 After sustaining severe injuries in a road accident on 3 August 1991, Ms Mothupi's claim for compensation was lodged on 3 August 1993. Summons however, was served six months out of time.
- 1.13 The Road Accident Fund pleaded prescription and in replication<sup>275</sup>, it was argued that-
  - 1.13.1 the Road Accident Fund had waived its right to invoke

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<sup>274</sup> *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA).

<sup>275</sup> Ms Mothupi raised two further challenges relating to estoppel and interruption of prescription in terms of section 14 of the Prescription Act, neither of which had been raised before the trial court. The Commission finds it unnecessary to deal with arguments pertaining to these challenges.

prescription<sup>276</sup>; and

1.13.2 the Road Accident Fund had conducted itself in an unconscionable and opportunistic manner by raising prescription in an effort designed to deprive Ms Mothupi of compensation after lulling her into a false sense of security concerning the risk of prescription.

1.14 In providing reasons for the late institution of action, Ms Mothupi's attorneys explained that-

1.14.1 they had experienced immense difficulties taking instructions from her. She lived in a remote village in the Northern Province and often moved from one relative to another as a means of obtaining financial support. The only way that they could get hold of her was to drive out to the village as there were no telephones or post-boxes enabling alternative communication. She was not available on many occasions, having moved on to the next relative. Doctors' appointments were often cancelled due to her lack of availability; and

1.14.2 the Road Accident Fund had engaged them in seemingly drawn out requests for information, including proof that Ms Mothupi had applied for a disability grant, together with the relevant provincial department's response, four months before the claim could prescribe. Her attorneys were reportedly only able to obtain this information five weeks after the claim had prescribed.

1.15 The court was unable to find in favour of Ms Mothupi on the basis that the Road Accident Fund's conduct-

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<sup>276</sup>

Based on the fact that it had never disputed negligence on the part of the insured driver and based on the impression created that it had intended settling the claim.

- 1.15.1 in not actively disputing negligence of the insured driver and in actively taking steps to quantify the claim were neutral factors that could not assist Ms Mothupi in establishing whether it intended waiving prescription; and
- 1.15.2 was not deliberately contrived at lulling her into a false sense of security by giving the impression that it would not raise prescription.

### **Problems with the current law**

- 1.16 Section 34 and sections 9(1) and (2) of the Bill of Rights provide as follows:

*34. Access to courts*

*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

*9. Equality*

*(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms.*

### **Right of access to courts**

- 1.17 The right of access to courts coincides with the ability to access resources and is influenced by-

- 1.17.1 the high cost of legal services;
  - 1.17.2 high levels of poverty and unemployment;
  - 1.17.3 inadequate social security;
  - 1.17.4 high levels of illiteracy, alternatively, limited rights awareness; and
  - 1.17.5 geographical isolation in outlying rural areas, informal settlements and townships located far from urban centres and serviced by under-developed infrastructure and unreliable public transport.
- 1.18 In this regard, it is argued that effective access to courts entails more than just the legal right to bring a matter before court, but includes the ability to give effect to this right,<sup>277</sup> and to this end, the following remarks are worth noting:
- 1.18.1 Didcott J, writing for the court in *Mohlomi v Minister of Defence (Mohlomi)*-

....

*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*

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<sup>277</sup>

Budlender G *Access to Courts* (2004) 121 SALJ 339 at 341.

*advice and assistance that they need so sorely is often difficult for financial or geographical reasons.*<sup>278</sup>;

### 1.18.2 Jackie Dugard-

*... 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.*<sup>279</sup>;

### 1.18.3 Froneman J's dissenting judgement in *Mdeyide 3*-

*According to the [Satchwell] Commission's findings, research indicated that general awareness of the road accident compensation scheme was restricted to slightly less than 50% and that awareness of the RAF increased with household income levels and living standards. Similar kinds of statistics emerged even in respect of persons who had been involved in accidents. The Commission found that "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".*

*What is also clear from the findings of the Commission is that 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*

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<sup>278</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 CC at 131.

<sup>279</sup> Dugard J *Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice* (2008) 24 SAJHR 216.

*employment and earnings. Even the incompetence of legal representatives in failing to bring timeous claims has hindered the process. ....<sup>280</sup>; and*

1.18.4 the remarks contained in Discussion Paper 126: Prescription Periods-

*Despite the widespread debate that accompanied the drafting of the Constitution and its Bill of Rights, a 2002 study by the Human Science Research Council found that 65% of the South Africans had either not heard of or did not know the purpose of the Bill of Rights. Similar statistics were reported relating to awareness of key institutions set up under Chapter 9 of the Constitution to protect, promote and monitor human rights. The study also found that these statistics are higher amongst vulnerable and poor social groups, especially when correlated with race, gender and standard of living ....<sup>281</sup>*

1.19 Twenty years after *Mohlomi*, and barring some areas of improvement,<sup>282</sup> conditions of poverty, illiteracy and lack of access to basic services still prevail,<sup>283</sup> with the cases of Mr Mdeyide

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<sup>280</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC paragraphs 116-117.

<sup>281</sup> Discussion Paper 126 *Prescription Periods* 2011 paragraph 6.13 at 93.

<sup>282</sup> *National Development Plan 2030 Our Future – make it work* National Planning Commission Department: The Presidency Republic of South Africa 24 (*South Africa has made remarkable progress in the transition from apartheid to democracy. .... In nearly every facet of life, advances are being made in building an inclusive society, rolling back the shadow of history and broadening opportunities for all. .... About 3 million more people are working today than in 1994, the poverty rate has declined and average incomes have grown steadily in real terms.*); Statistics South Africa *Census 2011* Census in brief, Key results and Fact sheet sourced from [www.statssa.gov.za](http://www.statssa.gov.za) (Statistical information on education levels and the labour market reflect a decrease in the percentage of persons with little or no schooling and increases in the percentage of persons completing high school and attending tertiary institutions. In 2013, the unemployment rate was down to 24.5% from the 2011 rate of 35.4%).

<sup>283</sup> *National Development Plan 2030 Our Future – make it work* National Planning Commission Department: The Presidency Republic of South Africa 24 (... [*Yet still*] *South Africa remains a highly unequal society where too many people live in poverty and too few work. The quality of school education for most black learners is poor. The apartheid spatial divide continues to dominate the landscape. A large*

(*Mdeyide*) and Ms Mothupi (*Mothupi*) serving as but two examples of the many forced to succumb to inhibiting socio-economic conditions, thus impacting on their ability to access the courts in order to interrupt the running of prescription.

1.20 To this end, Sanele Sibanda remarks that-

*... despite the Constitution's preambular commitment to "improve the lives of all citizens" and the inclusion of socio-economic rights in the Bill of Rights, living conditions in South Africa from a social and economic perspective remain fundamentally unchanged for many black citizens for whom apartheid's multiple legacies continue to be a living and lived reality. Of major concern to those subscribing to this approach is the fact that despite the political transformation described above, South Africa continues to suffer from increasing income inequality; deeply entrenched structural poverty; sharp increases in rural-urban migration; and a growing educational crisis.*<sup>284</sup>

## **Right to equal protection and benefit of the law**

1.21 The right to equality and to equal protection and benefit of the law envisions access to legal remedies in a way that genuinely transforms the lives of ordinary people.

1.22 Although prescription is primarily focused on debtor protection, this focus is nevertheless counterbalanced by making provision for the

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*proportion of young people feel that the odds are stacked against them. And the legacy of apartheid continues to determine the life opportunities for the vast majority.*

<sup>284</sup>

*Law and Poverty Perspectives from South Africa and beyond* Liebenberg & Quinot (Eds) 1<sup>st</sup> Edition 2012 Juta: Paper delivered by Sanele Sibanda *Not purpose-made! Transformative Constitutionalism, post-independence constitutionalism, and the struggle to eradicate poverty* 43 (referring, in this regard, to the scholarship of transformative constitutionalism).

application of a range of factors serving to protect the interests of creditors.

- 1.23 The principles of delay contained in section 13 of the Prescription Act evolved as a way of mirroring this balance.
- 1.24 However, 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.
- 1.25 This exclusion 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 difficult position, so that they are forced to “*experience the law differently*”<sup>285</sup> in relation to other creditors able to access the protection and benefits afforded by section 13.

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<sup>285</sup>

This expression is borrowed from the National Development Plan (*National Development Plan 2030 Our Future – make it work* National Planning Commission Department: The Presidency Republic of South Africa 458).

## 2

# ADDRESSING PROBLEMS WITH THE CURRENT LAW

### Provision of effective remedy

- 2.1 Consonant with the right to access the courts and the right to equal protection and benefit of the law, delaying the running of prescription in instances where creditors are unable to access the courts due to adverse socio-economic circumstances, it is submitted, constitutes an effective way of remedying the question of access and the inequitable operation of section 13, ever mindful how lack of access becomes even more pronounced where the socio-economic circumstances of creditors are aggravated by layered debilities, including mental disability, physical disability and social alienation.
- 2.2 It may be recalled that a proposal was made to address this issue, by calling for an increase in the general prescription period, from three years to five years.<sup>286</sup>
- 2.3 However, as maintained in part B of this paper, the question of increasing the general prescription period, is arguably unlikely in the long run to meaningfully address the needs of creditors exposed to adverse socio-economic circumstances for most, if not all, of their lives.

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<sup>286</sup>

Refer to part B, chapter 1, paragraphs 1.3 and 1.4 (Problems with the current law) and chapter 3, paragraphs 3.2 and 3.3 (Issues for consideration in formulating proposal).

## 3

### PROPOSALS FOR LAW REFORM

#### Issues for consideration in formulating proposals

- 3.1 Unlike the impediments listed in section 13 of the Prescription Act, this impediment has the potential of subsisting indefinitely.
- 3.2 By way of example, the impediment of minority endures until a minor turns 18 years, and curatorship, until the appointment has been terminated. These impediments are therefore subject to more definitive end dates.
- 3.3 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.
- 3.4 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.
- 3.5 The overall effect would be to limit the running of a period to a certain and specified date in the interests of curtailing the possibility of indefinite prejudice to debtors.
- 3.6 All the jurisdictions referred to in part B this paper employ cut-off periods as a means of off-setting the effect, for example, of the

knowledge requirement, either in relation to a specific subset of obligations<sup>287</sup> or in relation to all obligations.

- 3.7 South Africa's principle of discoverability, on the other hand, is applicable in relation to all debts, un-tempered by any cut-off periods, arguably presenting opportunities for the delayed enforcement of rights.
- 3.8 By the same token, any other prescription principle having the potential for enduring indefinitely, un-tempered by a cut-off period, will have the effect of thwarting the balance of justice and fairness that ground prescription.
- 3.9 It is thus proposed that cut-off periods should apply in respect of all debts subject to the Prescription Act, in keeping with the section 9(1) constitutional right to equality and right to equal protection and benefit of the law.

### **Preliminary recommendations**

- 3.10 The Commission's preliminary recommendations, as contained in the draft Prescription Bill provided for in Annexure A, are the following:
- 3.10.1 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:

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<sup>287</sup> For example, in relation to delictual claims for personal injuries, latent damages or injuries sustained in relation to breaches of consumer law, *etcetera*.

**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) 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.

3.10.2 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-

- (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).

## **Questions to Respondents**

- 3.11 The Commission welcomes inputs, comments and suggestions from Respondents, including the following:

### **PART D: INABILITY TO ACCESS THE COURTS**

- 3.11.1 What are Respondents views regarding the proposal calling for the suspension of prescription in circumstances where a creditor is unable to access the courts due to adverse socio-economic circumstances. Full reasons for the view must be set out.
- 3.11.2 Do Respondents believe that the socio-economic circumstances of most South Africans militate against proposing cut-off dates? Full reasons for the view must be set out.

- 3.11.3 If the answer to 3.11.2 is yes, how do Respondents suggest that the recommendation contained in clause 15(1)(a)(v) should be framed in order to curtail the possibility of indefinite prejudice to debtors?
- 3.11.4 Do Respondents believe that further debts warrant exclusion from the operation of cut-off dates? If yes, which debts are these, and what is the basis for suggesting exclusion?

# **PART E: ALTERNATIVE DISPUTE RESOLUTION**

## **1**

### **OVERVIEW**

#### **Background to law reform proposal**

- 1.1 The South African judicial system is primarily adversarial, encompassing processes that are confrontational, rigid, technical and incomprehensible to the ordinary person.
- 1.2 It is characterized by prohibitive costs, lengthy proceedings and complicated processes; with the result that justice remains out of reach for many.<sup>288</sup>
- 1.3 Alternative dispute resolution (ADR), in contrast, employs processes that are simple, inclusive, cost-effective and consensus-seeking, in order to reach meaningful, people-centered solutions in a manner that enhances to access justice in a timely fashion.
- 1.4 Conscious of these benefits, Cabinet endorsed an initiative by the then Minister of Justice in 2010 to engage in a comprehensive review and transformation of the civil justice system with the aim of enhancing access to justice.<sup>289</sup>
- 1.5 One of the objectives of the initiative was to integrate into the civil justice system, ADR and a mandatory referral system, to include

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<sup>288</sup> South African Law Commission Project 94: Issue Paper 8: *Alternative Dispute Resolution* July 1997

<sup>289</sup> Terms of reference of the Civil Justice Reform Project.

establishing a court-based mediation framework subject to regulation by way of a separate enactment.

1.6 Signalling the unfolding of the process, the Rules Board for Courts of Law<sup>290</sup> (Rules Board) developed Rules of Court-Annexed Mediation (Rules) in terms of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa<sup>291</sup> (Magistrates Court Rules) as a first step in the implementation phase. The Rules were published on 18 March 2014<sup>292</sup> and came into operation on 1 August 2014. They are voluntary in nature, and at the time of development of this paper, were being implemented by way of pilot process at district and regional court level.

1.7 The next step in the implementation phase involves investigating the feasibility of developing legislation for the statutory regulation of mediation. The investigation has been placed on the Commission's programme and is underway,<sup>293</sup> informed, amongst other things, by an underlying need for South Africans to resuscitate dialogue in their attempts to resolve disputes with each other.<sup>294</sup>

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<sup>290</sup> Established in terms of section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985).

<sup>291</sup> Published under Government Notice R740 in *Government Gazette* 33487 on 23 August 2010.

<sup>292</sup> Government Notice R183 published in *Government Gazette* 37448 on 18 March 2014.

<sup>293</sup> South African Law Commission Project 94: Subproject 3: *Alternative Dispute Resolution*.

<sup>294</sup> Mediation Seminar and Launch of Justice Dialogues of the Department of Justice and Constitutional Development held on 4 December 2014 in Pretoria.

## Law reform proposal

- 1.8 In line with the Civil Justice Reform Project and the ADR initiative, the DOJCD<sup>295</sup> undertook to provide organs of state with directives on the referral of matters to mediation before considering litigation.
- 1.9 The DOJCD requires that processes relating to such referrals should be built into applicable legislation, for example, the development of statutory provisions integrating ADR into the Prescription Act.<sup>296</sup>
- 1.10 Based on the afore-going, and in line with section 5(1) of the SA Law Reform Commission Act, the Commission deems it appropriate to consider the question of integrating the principles of mediation and *Ombud* referrals into the Prescription Act.

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<sup>295</sup> Department of Justice and Constitutional Development.

<sup>296</sup> Mediation Seminar and Launch of Justice Dialogues of the Department of Justice and Constitutional Development held on 4 December 2014 in Pretoria.

## 2

### PROBLEMS WITH THE CURRENT LAW

#### Inequitable operation of section 13 of Prescription Act

- 2.1 Consistent with the object of enhancing access to justice in a simple, cost-effective and consensus-seeking manner, the question of integration must, of necessity, be informed by the following considerations:
- 2.1.1 encouraging parties to utilize ADR as a means of resolving disputes rather than engaging in expensive and time-consuming litigation; and
- 2.1.2 ensuring that parties opting to utilize ADR as a means of resolving disputes are afforded protection in mitigation of any consequent lapse of time for which they were engaged in such processes.
- 2.2 The most common forms of ADR are negotiation, mediation and arbitration and one of the forums mandated to resolve disputes in a simple, expeditious and cost-effective manner is an *Ombud* institution.<sup>297</sup>
- 2.3 Whilst section 13 of the Prescription Act provides for the delayed running of prescription regarding debts subjected to arbitration, no such provision is made for negotiation, mediation or the referral of matters to *Ombud*.

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<sup>297</sup>

*Ombud* institutions are required to resolve disputes extra-judicially in a fair, expeditious, cost-effective and impartial manner. Their work is predicated on the outcome of investigations conducted through informal ADR, investigations, formal adjudication processes or combinations thereof. Formal adjudication may result in the delivery of a binding determination that is enforceable in a court of law.

2.4 This may work to the detriment of parties wishing to employ other forms of ADR, as prescription may run its normal course during these referrals.

2.5 Further, this may prejudice parties wishing to access the services of *Ombud*, as some enactments regulating their investigations are silent regarding the question of delay,<sup>298</sup> whilst others provide for “*suspension*” of prescription “*in terms of the Prescription Act*” once a referral is made. The Prescription Act, however, only regulates delayed completion, not suspension. In this regard, the Financial Advisory and Intermediary Services Act, 2002<sup>299</sup> and the Financial Services Ombud Schemes Act, 2004<sup>300</sup> provide as follows:

*Financial Advisory and Intermediary Services Act, 2002*

27. *Receipt of complaints, prescription, jurisdiction and investigation*

(2) *Official receipt of a complaint by the Ombud **suspends the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969)**, for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.*

(Emphasis added)

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<sup>298</sup> For example, the Public Protector Act, 1994 (Act 23 of 1994).

<sup>299</sup> Financial Advisory and Intermediary Services Act 37 of 2002.

<sup>300</sup> Financial Services Ombud Schemes Act Act 37 of 2004.

Financial Services Ombud Schemes Act, 2004

15. *Prescription and saving of rights*

(1) *Official receipt of a complaint by an ombud or the statutory ombud **suspends** any applicable time barring terms, whether in terms of an agreement or any law, or **the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969)**, for the period from such receipt until the complaint has either been withdrawn by the complainant concerned or determined by any such ombud.*

(Emphasis added)

2.6 It is therefore apparent that not all referrals are accorded equal protection and benefit of the law, thus inhibiting resort to alternative systems in order to resolve disputes.

### **Imprecise nature of negotiation**

2.7 Negotiation is, for the most part, informal in nature, entailing un-facilitated discussion between parties with the aim of resolving a dispute through compromise.<sup>301</sup>

2.8 Unlike arbitration, which is governed by fixed and determined rules, negotiation is easily susceptible to abuse because of its nebulous nature.

2.9 Because of this, assigning to the concept a definitive start and end date for the purpose of calculating when prescription begins and ends becomes challenging.

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<sup>301</sup> Ramsden P (assisted by S Ramsden) *The Law of Arbitration* 1<sup>st</sup> Edition paragraph 2.1.

2.10 For this reason, the Commission does not consider the question of negotiation further.

## 3

# ADDRESSING PROBLEMS WITH THE CURRENT LAW

## Integration of mediation as a delay factor

- 3.1 It is submitted that referrals in relation to formal processes of mediation are deserving of the protection embodied in delay.
- 3.2 In order for the delay to take effect, compliance with the following principles will be required, similarly to that of arbitration:
  - 3.2.1 an agreement to the effect that a matter will be referred to mediation will not delay the running of prescription; actual submission must have taken place; and
  - 3.2.2 once judicial interruption has taken place, court-ordered mediation will not serve to delay the running of prescription. In this regard, only in circumstances where parties seeking to mediate a dispute have not yet served process will submission to mediation amount to an impediment.

## Integration of *Ombud* referrals as a delay factor

- 3.3 It is submitted that referrals made to *Ombud*, whether subsequently dealt with through ADR or by way of investigation or adjudication, are deserving of the protection embodied in delay.<sup>302</sup>

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<sup>302</sup>

Recall that certain, but not all, *Ombud* enactments provide for suspension. In this way, delay will be available in relation to "all" *Ombud* referrals.

3.4 It is submitted further that for delay to take effect, actual referral must have taken place.

## 4

### **PROPOSALS FOR LAW REFORM**

#### **Issues for consideration in formulating proposals**

- 4.1 Because prescription is time-bound, a clear determination becomes necessary in order to establish the onset and end of a particular prescription period.
- 4.2 This may not be an easy matter when it comes to informal mediation, especially if one is unable to establish when a referral was made, what the contents of a determination are and the date when the determination was made.
- 4.3 It is submitted therefore that for the purpose of delay, provision should be made only for referrals governed by-
  - 4.3.1 mediation processes regulated by way of legislation or rules that have been officially promulgated; or
  - 4.3.2 policy bound mediation processes that have been officially approved by an executive authority of a particular body or institution.

#### **Preliminary recommendations**

- 4.4 The Commission's preliminary recommendations, as contained in the draft Prescription Bill provided for in Annexure A, are the following:
  - 4.4.1 insertion of clause 17(1)(g)(i) and (ii) providing for the suspension of prescription in cases where a debt is the object of a dispute

subjected to a formal process of mediation or referral to a statutory *Ombud*, as follows:

**17. Suspension of prescription**

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

## Questions to Respondents

### **PART E: ALTERNATIVE DISPUTE RESOLUTION**

- 4.5 The Commission welcomes inputs, comments and suggestions from Respondents regarding the preliminary proposals contained in this part of the paper.

# PART F: SPECIAL TIME LIMITS

## 1

### INTRODUCTION

#### Scope of investigation into special time limits

- 1.1 The Commission has partially dealt with the issue of notice periods<sup>303</sup> in its 1985 and 1998 investigations, the result of which culminated in the passing of the Institution of Legal Proceedings against certain Organs of State Act in 2002.
- 1.2 The Commission has partially dealt with the issue of limitation.<sup>304</sup>
- 1.3 It must be noted, in this regard, that the Institution of Legal Proceedings against certain Organs of State Act only applies to certain "*organs of state*". Its reach is therefore limited, and cannot affect notice and limitation provisions contained in the enactments of bodies that are not organs of state.<sup>305</sup>
- 1.4 The scope of the investigation into the *harmonization of existing laws providing for different prescription provisions* therefore entails examining all statutory provisions providing for notice and limitation (excluding those that have already been dealt with), encompassing-

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<sup>303</sup> See Introduction, chapter 1 of this paper, which provides the background to two previous Commission investigations.

<sup>304</sup> See Introduction, chapter 1 of this paper, which provides the background to two previous Commission investigations.

<sup>305</sup> For example, the South African Legal Practice Council, in relation to the Legal Practice Act, 2014 (Act 28 of 2014).

- 1.4.1 special time limits that serve the interests of the state;
- 1.4.2 other special time limits; and
- 1.4.3 extinctive prescription provisions that cannot be clearly defined, but which differ from or fall short of the requirements of the Prescription Act.

### **Provisions giving effect to special time limits**

- 1.5 As indicated,<sup>306</sup> section 16(1), read together with section 11(d) of the Prescription Act, gives effect to the provisions of other enactments that-
  - 1.5.1 prescribe periods that differ from the three-year general period for the making of claims or the instituting of actions; or
  - 1.5.2 impose different conditions on the instituting of actions for the recovery of debts.
- 1.6 This concession,<sup>307</sup> is not unique to South Africa, but is a feature of extinctive prescription enactments worldwide, formulated in line with the peculiarity of the respective objects sought to be promoted in the enactments. With regard to the position in England and France-

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<sup>306</sup> See Introduction, chapter 3 of this paper.

<sup>307</sup> See *Matshidiso v Aon Botswana Pty Ltd* 2009 1 BLR 465 HC and *Miles and Another v South East District Council and Another* 2010 3 BLR 242 HC (where the Botswana High Court held as follows in the latter case: *What section 12(3) recognises, in my view, is that the [P]rescriptions Act does not prohibit or outlaw other forms of prescriptions that may be legislated for in other laws, and that if some other laws provide for other periods of prescription they are not invalid*).

1.6.1 the (English) Law Commission stated as follows:

*Many statutes have their own specialised limitation periods. ... We start with the assumption that a specific statutory provision ... should override the core regime. ... it would be wrong to ride roughshod over a limitation period that has been carefully constructed for a specific context. This would correspond to the present approach in section 39 of the 1980 Act).*<sup>308</sup>;

1.6.2 section 39 of the English Limitation Act provides as follows:

*This Act shall not apply to any action or arbitration to which a period of limitation is prescribed by or under any other enactment ....*; and

1.6.3 article 2223 of the French Code, as translated, provides that-

*The provisions of the present title are not an obstacle to the application of special rules laid down in other statutes.*

1.7 The profusion of statutory provisions existing in South Africa that prescribe special time limits for the instituting of delictual actions against the state appear to stem from this recognition.

## **Notion of special time limits**

1.8 These provisions were a feature of English law,<sup>309</sup> and were later received into the law of the Union of South Africa.

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<sup>308</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 382 paragraphs 13.177 and 13.178.

<sup>309</sup> Special limitation periods in respect of actions against the state have since been abolished in England by the Law Reform (Limitation of Acts) Act, 1954 (Loubser 171).

1.9 They are regarded as embodying a distinct form of extinctive prescription in that they do not affect substantive rights, but merely bar a remedy, thus forming part of procedural law.<sup>310</sup> This was affirmed in the following cases:

1.9.1 *President Insurance Co Ltd v Yu Kwam*<sup>311</sup> (*Yu Kwam*): Decided in terms of section 11(2) of the Motor Vehicle Insurance Act, 1942<sup>312</sup> and the 1943 Prescription Act, the case involved a guardian's claim for damages in respect of his minor child for injuries sustained in a motor vehicle accident. In dealing with a plea of prescription, the court held that the period of two years referred to in section 11(2) of the Motor Vehicle Insurance Act was a prescription period (as evidenced by the legislature's clear use of the term "prescribed") subject to the general principles of the 1943 Prescription Act, and not a "vervaltermyn",<sup>313</sup> said to operate automatically against a minor claimant;

1.9.2 *Meintjies NO v Administrasieraad van Sentraal Transvaal*:<sup>314</sup> The court held that the difference between a prescription and a limitation period is that the former takes into account personal factors which excuse or alleviate a failure to timeously enforce a claim whereas a limitation period pays no regard to personal factors or grounds of

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<sup>310</sup> Loubser 172; 1985 Commission Report 3; *Curtis v Johannesburg Municipality* 1906 TS 308; *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536 (W); *The Commissioner for Customs and Excise v Standard General Insurance Company Limited* 2001 (1) SA 978 SCA; *Kweneng Land Board v Murima* ([2008] BWCA 87 (referring to *Modise and Others v Southern District Council* [2005] 2 BLR 489).

<sup>311</sup> *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A).

<sup>312</sup> Motor Vehicle Insurance Act 29 of 1942, which has since been repealed.

<sup>313</sup> Meaning a "lapsing, expiry or limitation period" in the Afrikaans language.

<sup>314</sup> *Meintjies N O v Administrasieraad van Sentraal Transvaal* 1980 (1) SA 283 (T).

excuse. Further to this, the court indicated that prescription approaches the unenforceability of a debt from a creditor's point of view whereas limitation does so from a debtor's point of view; and

1.9.3 *Hartman v Minister of Police*:<sup>315</sup> The court held that section 32(1) of the Police Act, 1958,<sup>316</sup> made provision for a limitation period, not a prescription period, thus holding the section to be irreconcilable with the Prescription Act generally and section 13 thereof specifically.<sup>317</sup> The court accordingly held that a minor child who claimed damages for wrongful arrest and who failed to comply with section 32(1) of the Police Act could not invoke section 13, being that it was clearly and unambiguously peremptory and a typical example of a limitation period.

1.10 Special time limits take on two or more of the following forms:

1.10.1 requiring plaintiffs to give notice before instituting legal proceedings against certain organs of state;

1.10.2 requiring plaintiffs to await the lapsing of certain time periods after giving notice and before instituting the legal proceedings in question; and

1.10.3 providing for the lapsing of a right to institute legal proceedings after the expiry of certain very short time periods from the date a cause of action arises.

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<sup>315</sup> *Hartman v Minister of Police* 1981 (2) SA 149 (O).

<sup>316</sup> Police Act 7 of 1958, which has since been repealed.

<sup>317</sup> Providing for the delayed completion of prescription.

- 1.11 These provisions have a barring effect, resulting in the unenforceability of a right of action where notice or limitation has been successfully raised.
- 1.12 They operate harshly<sup>318</sup> and exhibit the following features:<sup>319</sup>
- 1.12.1 they afford special protection to debtors (mostly organs of state) to the prejudice of creditors;
- 1.12.2 their wording is of peremptory import<sup>320</sup> and therefore must be applied, unless a debtor chooses to waive reliance on the right;
- 1.12.3 they usually require the giving of formal written notice to debtors before legal proceedings can be instituted;<sup>321</sup>
- 1.12.4 they span particularly short periods (periods of one year and even six months are known to have been provided for);

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<sup>318</sup> *Pizani v Minister of Defence* 1987 (2) All SA 420 (A) (where Corbett JA referred to a limitation period as having a guillotine-like effect); *Khalapha v Commissioner of Police and Another* [2000] LSHC 143 (where a Lesotho court made the following remark: *A time-barring provision such as this has serious consequences. It assumes the existence of a valid claim but seeks to make it unenforceable. It does so moreover after a short period of time ...*).

<sup>319</sup> Loubser 171-176; 1985 Commission Report 3.

<sup>320</sup> *Kweneng Land Board v Murima* [2008] BWCA 87 (referring to *Modise and Others v Southern District Council* [2005] 2 BLR 489).

<sup>321</sup> New South Wales Law Reform Commission *Third Report on the Limitation of Actions – Special Protections* [1975] NSWLRC 21 paragraph 28 referring to recommendations about discontinuing notices of action under various statutes by the Ontario Law Reform Commission in its Report on Limitation of Actions 1969 (*A notice of claim which must be given within a limited time as a condition precedent to the bringing of an action achieves the same result as a limitation period. It is, in effect, a limitation period within a limitation period ....*).

- 1.12.5 the periods run regardless of circumstances that deter a creditor from enforcing a right;<sup>322</sup>
- 1.12.6 the periods are not interrupted by an admission of liability on the part of a debtor; and
- 1.12.7 the interruption of the period by judicial process requires the mere issuing of a summons, whereas proper service is required in the case of prescription.
- 1.13 Similar principles apply in other jurisdictions, for example-
  - 1.13.1 in France, in relation to fixed time limits, the following considerations are said to apply:

*Prescription [is] distinguished from other periods, called fixed time limits, which do not have the same juridical nature. The justification of fixed time limits differs from that of prescription, as, while prescription is primarily concerned with the protection of the debtor, the purpose of fixed time limits is to ensure that the creditor is diligent in the pursuit of his action. .... The effect of prescription and of fixed time limits is the same in one central respect: they prevent actions after a certain point. The juridical distinction does, however, have some important practical consequences. Fixed time limits are matters of public policy while prescription is usually a private matter. In general, parties cannot renounce fixed periods, nor are they subject to suspension or interruption. Furthermore, only prescription (properly so-called) actually extinguishes obligations. The distinction is*

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*Pizani v Minister of Defence* 1987 (2) All SA 420 (A) (where Corbett JA made the following remark: *It is conceded by appellant's counsel – correctly in my view – that sec. 113(1) makes provision for an expiry period ("vervaltermyn") and that the provisions of the Prescription Act 68 of 1969, more particularly secs. 12 and 13 thereof, have no application. .... The consequence of this is that a plaintiff who has failed to comply with the time limitation of sec. 113(1) is generally debarred from suing and cannot rely upon any of the grounds which delay the commencement of the running of prescription (see sec. 12 of the Prescription Act) or delay the completion of prescription (see sec. 13 of the Prescription Act).*)

*not, however, absolute. Some time limits do not fall neatly into one category rather than another.*<sup>323</sup>; and

1.13.2 in the Canadian jurisdiction of Saskatchewan, the following principles maintain:

*First, the special limitation periods are invariably shorter than those provided by The Limitation of Actions Act. Typically, a limitation period of one year or less is created. Second, the special limitation provisions usually contain only a bare limitation period. The rules of the general limitations law that provide for postponement or suspension of a limitation will not generally apply. This, combined with the shortened period of time provided by many of the special limitation periods has all to[o] often led to injustice: the problem of the hidden cause of action is exacerbated because of the much reduced period within which the injury must manifest itself.*<sup>324</sup>

## **Policy underlying special time limits**

### **Generally**

1.14 The basic rationale advances the need for social certainty and quality adjudication, and has been expressed as follows:

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<sup>323</sup> (England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 227-228 paragraphs 10.127-10.128 referring to the paper prepared by V Bandrac on the French system of extinctive prescription published in Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law.

<sup>324</sup> Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act* Report to the Minister of Justice 1989 51.

1.14.1 *Mohlomi-*

*Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.<sup>325</sup>;*

1.14.2 *Khalapa v Commissioner of Police and Another-*

*At the same time, however, it has to be borne in mind that such provisions are intended to serve a legitimate social purpose. This is to ensure that stale claims are not made: that courts (and defendants) are not handicapped by litigation in which witnesses are no longer available, or are afflicted by failing memories, and relevant documentation is not accessible.<sup>326</sup>; and*

1.14.3 *Mdeyide*

*In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a*

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<sup>325</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 CC at paragraph 11.

<sup>326</sup> *Khalapa v Commissioner of Police and Another* [2000] LSHC 143 at paragraph 5.

*litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.*<sup>327</sup>

## **Special protection to the state**<sup>328</sup>

1.15 It is contended that the state is favoured with special protection in the form of notice requirements and shortened periods in order to overcome the practical difficulties associated with its extensive activities, the attendant volume of work, its large and constantly shifting workforce, the constant threat of litigation and cumbersome consultation procedures required for considering policy issues and obtaining legal advice from variously stationed state attorney offices.<sup>329</sup> It is maintained, in this regard, that the notice requirement provides the state with time to investigate incidents giving rise to civil action whilst the shortened limitation period ensures that it avoids dealing with age-old claims. To this end, it was stated as follows in *Transvaal Provincial Administration v*

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<sup>327</sup> *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC at paragraph 2.

<sup>328</sup> Western Australia Law Reform Commission WALRC 36(II) *Final Report on Limitation and Notice of Actions* (1997) paragraph 10.16; New Zealand Law Commission NZLC Report No. 6 *Limitation Defences in Civil Proceedings* (1988) paras 29-30; Loubser 176-177; 1985 Commission Report 5-6; *Transvaal Provincial Administration v Klerksdorp Municipality*, 1923 TPD 475; *Steenkamp v Peri-Urban Areas Health Committee* 1946 TPD 424 (where it was stated as follows by Roper J: *In my view the intention of the Legislature was to give local authorities additional protection --- that is, additional to the protection afforded by the common law or by any statute of general application --- of a special character, and not merely to shorten the period of common law prescription in their favour*); *Stevenson NO v Transvaal Provincial Administration* 1934 TPD 80.

<sup>329</sup> New Zealand Law Commission NZLC Report No. 6 *Limitation Defences in Civil Proceedings* (1988) paras 29-30, referring to arguments favouring special protection to local authorities tendered as far back as 1936 during English House of Commons debates in reaction to a recommendation by the Law Revision Committee (chaired by Lord Wright MR) that the limitation period should be extended from six months to one year.

*Klerksdorp Municipality* regarding section 54 of Transvaal Ordinance 58 of 1903:

*The section confers a right of a peculiar and unusual kind. It purports to alter the general law as to prescription to the advantage of a municipality and to the corresponding detriment of person instituting legal proceedings against it. No reciprocal right is conferred; it is purely one-sided. The activities of a municipality are for the most part confined within the limits of its geographical area, but within that area they are numerous and varied. Theoretically, a municipality is an altruistic individual working only for the general good and very busily so occupied. It was obviously contemplated that in the nature of its occupations it would frequently figure as a defendant in suits at law. The section was enacted to give it a special immunity against stale demands, which, owing to its many preoccupations, it would find difficult to collect evidence to resist after a considerable lapse of time.*<sup>330</sup>

- 1.16 In relation to public funds, the notice requirement has been said to-
  - 1.16.1 afford the state adequate opportunity to fully investigate claims with the goal of reaching early settlement in order to minimise legal costs. In this way, the state is given an opportunity to properly budget for potential liability; and
  - 1.16.2 afford the state adequate opportunity to investigate the likelihood of unfounded claims.
- 1.17 Extended limitation periods are said to have a negative effect on the state's record-keeping abilities, thus exacerbating problems associated with the loss or destruction of evidence.

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*Transvaal Provincial Administration v Klerksdorp Municipality* 1923 TPD 475 at 477-478.

## 2

# PROBLEMS WITH THE CURRENT LAW

## General issues

### Lack of uniformity

- 2.1 The number and variety of enactments containing special time limits are many, and in this regard, the list is constantly evolving every time a provision is promulgated, amended or repealed.
- 2.2 Attempts at unifying the provisions in South Africa date back to 1954.<sup>331</sup> At the time, however, the prevailing view was that the relevant statutory provisions differed to such an extent and dealt with such divergent matters that uniformity was out of the question. Later attempts at revival during the 1970's were abandoned in the face of objections by several state departments.
- 2.3 The issue has since remained alive, exacerbated by concern about the constitutionality of these provisions.<sup>332</sup>
- 2.4 In the draft Bill annexed to the 1985 Commission Report, 24 enactments were identified for amendment or repeal. In the 1998 Commission Report, 18 enactments were identified. The Institution of Legal Proceedings against certain Organs of State Act amended or repealed 14 of these enactments.

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<sup>331</sup> 1985 Commission Report 3-5.

<sup>332</sup> 1998 Commission Report 2.

2.5 The current list contains 28 enactments that require consideration for the purpose of harmonisation. They are administered by various departments; legislate on a variety of topics, contain differently worded provisions and cover a varied combination of areas relating either to notice and limitation provisions, notice and prescription provisions or simply just limitation provisions.

2.6 In Saskatchewan, a similar position obtained, and was described as follows:

*Perhaps the single greatest problem plaguing Saskatchewan limitations law is the proliferation of special limitation periods. Numerous special limitation provisions are scattered throughout the statutes of Saskatchewan.*

....

*special limitation rules appear to be enacted on an ad hoc basis. The unique rules that govern each special period differ. Some special limitation provisions require notice to be given before an action is commenced; a few permit the court to extend an expired limitation period. In some the running of time commences when the conduct complained of occurs; in others time begins to run when the defendant's services are terminated. That there are so many periods creates a hidden trap for the unwary lawyer. The variation in wording among the various special limitation periods invites litigation on trivial distinctions, and hinders the development of principles applicable to general limitations law.*<sup>333</sup>

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Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act* Report to the Minister of Justice 1989 51-52.

Provisions requiring harmonisation<sup>334</sup>

2.7 The provisions are listed as follows, and are discussed in greater detail later in this section:

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Defence)</b>
Moratorium Act, 1963 <sup>335</sup>	Minister of Defence

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Energy)</b>
National Nuclear Regulator Act, 1999 <sup>336</sup>	Minister of Energy

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<sup>334</sup> The enactments are clustered in order of Ministerial portfolio. A Bill relating to an enactment is listed directly under the enactment.

<sup>335</sup> Moratorium Act 25 of 1963. The purpose of the Moratorium Act is to provide for *moratoria* in certain instances for the protection of citizens and certain non-citizens rendering compulsory service in the Citizen Force, Commandos, the South African Police Service and the Defence Force and Reserve (the latter of which is provided for in Chapter X of the Defence Act, 1957). In the Commission's investigation into Project 25: *Legislation administered by the Department of Defence Statutory Law Revision*, a recommendation was made for the repeal of the Moratorium Act. A further recommendation was made for the Defence Act, 2002 to be amended to provide for appropriate *moratoria* in prescribed circumstances. The Defence Laws Repeal and Amendment Act, 2015 (Act 17 of 2015) was enacted to accommodate the Commission's recommendations, to include repeal of the Moratorium Amendment Act, 1969 (Act 4 of 1969), the Moratorium Amendment Act, 1977 (Act 27 of 1977) and the Moratorium Amendment Act, 1978 (Act 48 of 1978). The Defence Laws Repeal and Amendment Act was signed into law in December 2015 but has not yet come into operation. Repeal of the Moratorium Act is therefore still under consideration. The prescription provisions contained in this Act will therefore not be attended to until the Department of Defence has finalised its repeal and amendment processes.

<sup>336</sup> National Nuclear Regulator Act 47 of 1999.

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Finance)</b>
Customs Control Act, 2014 <sup>337</sup> (Customs Duty Act, 2014 <sup>338</sup> ; Excise Duty Act, 1964 <sup>339</sup> /Customs and Excise Act, 1964)	Minister of Finance (South African Revenue Service)
Tax Administration Act, 2011 <sup>340</sup>	Minister of Finance (South African Revenue Service)
Financial Advisory and Intermediary Services Act, 2002 <sup>341</sup>	Minister of Finance (Financial Services Board)
Financial Services Ombud Schemes Act, 2004 <sup>342</sup>	Minister of Finance (Financial Services Board)
Pension Funds Act, 1956 <sup>343</sup>	Minister of Finance (Financial Services Board [Pension Fund Adjudicator])
Government Employees Pension Law, 1996 <sup>344</sup>	Minister of Finance
Long-Term Insurance Act, 1998 <sup>345</sup>	Minister of Finance (Financial Services Board)

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337 Customs Control Act 31 of 2014.

338 Customs Duty Act 30 of 2014.

339 Excise Duty Act 91 of 1964. This Act has been amended by the Customs and Excise Amendment Act, 2014 (Act 32 of 2014) and takes effect on the date on which the Customs Control Act, 2014, takes effect. On the date that the Customs Control Act takes effect, this Act will be renamed the Customs and Excise Act, 1964 (Act 91 of 1964). The commencement date of the Customs Control Act is yet to be proclaimed.

340 Tax Administration Act 28 of 2011.

341 Financial Advisory and Intermediary Services Act 37 of 2002.

342 Financial Services Ombud Schemes Act 37 of 2004.

343 Pension Funds Act 24 of 1956.

344 Government Employees Pension Law (Proclamation 21 of 1996).

345 Long-Term Insurance Act 52 of 1998.

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Justice and Correctional Services)</b>
Institution of Legal Proceedings against certain Organs of State Act, 2002 <sup>346</sup>	Minister of Justice and Correctional Services
Apportionment of Damages Act, 1956 <sup>347</sup>	Minister of Justice and Correctional Services
Legal Practice Act, 2014 <sup>348</sup> (Attorneys Act, 1979) <sup>349</sup>	Minister of Justice and Correctional Services (South African Legal Practice Council [Council of Law Societies])
Sheriffs Act, 1986 <sup>350</sup>	Minister of Justice and Correctional Services (South African Board of Sheriffs)
Magistrates' Courts Act, 1944 <sup>351</sup>	Minister of Justice and Correctional Services
<sup>352</sup> Criminal Procedure Act, 1977 <sup>353</sup>	Minister of Justice and Correctional Services

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<sup>346</sup> Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

<sup>347</sup> Apportionment of Damages Act 34 of 1956.

<sup>348</sup> Legal Practice Act 28 of 2014. The Act was assented to on 20 September 2014. Parts 1 and 2 of Chapter 10 came into operation on 1 February 2015 (Proclamation R2 GG 38412 of 23 January 2015). Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the Gazette (three years after 1 February 2015 or any earlier date fixed by the President). The rest of the Act comes into operation after commencement of Chapter 2 (on a date fixed by the President by proclamation in the Gazette).

<sup>349</sup> Attorneys Act 53 of 1979.

<sup>350</sup> Sheriffs Act 90 of 1986.

<sup>351</sup> Magistrates' Courts Act 32 of 1944.

<sup>352</sup> This Act is not being considered in the investigation. It is merely listed for the purpose of consolidating all enactments containing extinctive prescription, limitation or related provisions.

<sup>353</sup> Criminal Procedure Act 51 of 1977.

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Ministerial Portfolio (Justice and Correctional Services)</b>
<sup>354</sup> Child Justice Act, 2008 <sup>355</sup>	Minister of Justice and Correctional Services
<sup>356</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 <sup>357</sup>  *read together with section 12(4) of the Prescription Act, which provides as follows:  <i>Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 17, 18(2), 23 or 24(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.</i>	Minister of Justice and Correctional Services

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Labour)</b>
Compensation for Occupational Injuries and Diseases Act, 1993 <sup>358</sup>	Minister of Labour (Compensation Fund)
Labour Relations Act, 1995 <sup>359</sup>	Minister of Labour

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<sup>354</sup> This Act is not being considered in the investigation. It is merely listed for the purpose of consolidating all enactments containing extinctive prescription, limitation or related provisions.

<sup>355</sup> Child Justice Act 75 of 2008. In terms of section 4(3), the Criminal Procedure Act applies with the necessary changes to this Act, except where the Child Justice Act provides for amended, additional or different provisions or procedures.

<sup>356</sup> The Act is not being considered in the investigation. It is merely listed for the purpose of consolidating all enactments containing extinctive prescription, limitation or related provisions.

<sup>357</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>358</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>359</sup> Labour Relations Act 66 of 1995 (section 145(9) of the Labour Relations Act came into effect on 1 January 2015).

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Public Works)</b>
Expropriation Act, 1975 <sup>360</sup> (Expropriation Bill, 2015) <sup>361</sup>	Minister of Public Works

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Trade and Industry)</b>
Competition Act, 1998 <sup>362</sup>	Minister of Trade and Industry (Competition Commission/Competition Tribunal)
National Credit Act, 2005 <sup>363</sup>	Minister of Trade and Industry (National Credit Regulator/National Consumer Tribunal)
Consumer Protection Act, 2008 <sup>364</sup>	Minister of Trade and Industry (National Consumer Commission/National Consumer Tribunal)
Companies Act, 2008 <sup>365</sup>	Minister of Trade and Industry (Companies and Intellectual Property Commission/Companies Tribunal)
Expropriation (Establishment of Undertakings) Act, 1951 <sup>366</sup>	Minister of Trade and Industry

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360 Expropriation Act 63 of 1975.

361 Expropriation Bill 4-2015.

362 Competition Act 89 of 1998.

363 National Credit Act 34 of 2005.

364 Consumer Protection Act 68 of 2008.

365 Companies Act 17 of 2008.

366 Expropriation (Establishment of Undertakings) Act 39 of 1951.

<b>Table 12: Provisions requiring harmonisation</b>	
<b>Act of Parliament</b>	<b>Portfolio (Transport)</b>
Merchant Shipping Act, 1951 <sup>367</sup>	Minister of Transport (South African Maritime Safety Authority)
Wreck and Salvage Act, 1996 <sup>368</sup>	Minister of Transport (South African Maritime Safety Authority)
Carriage by Air Act, 1946 <sup>369</sup>	Minister of Transport
Road Accident Fund Act, 1996 <sup>370</sup> (Road Accident Fund Amendment Bill, 2017) <sup>371</sup> (Road Accident Benefit Scheme Bill, 2014) <sup>372</sup>	Minister of Transport (Road Accident Fund)
Administrative Adjudication of Road Traffic Offences Act, 1998 <sup>373</sup>	Minister of Transport

2.8 It may be worth noting that although the Institution of Legal Proceedings against certain Organs of State Act rationalised the notice periods in respect of enactments applicable to certain organs of state and reduced the number of limitation provisions,<sup>374</sup> the continuing proliferation of special time limits is an indication that the call for harmonisation is not unwarranted. The following comment

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<sup>367</sup> Merchant Shipping Act 57 of 1951.

<sup>368</sup> Wreck and Salvage Act 94 of 1996.

<sup>369</sup> Carriage by Air Act 17 of 1946.

<sup>370</sup> Road Accident Fund Act 56 of 1996.

<sup>371</sup> Road Accident Fund Amendment Bill 3-2017.

<sup>372</sup> Road Accident Benefit Scheme Bill, 2014, which is yet to be introduced in Parliament.

<sup>373</sup> Administrative Adjudication of Road Traffic Offences Act 46 of 1998.

<sup>374</sup> When it dealt with the repeal of limitation provisions in some of the following Acts of Parliament: the Defence Act, 1957; the South African Police Service Act, 1995; the Correctional Services Act, 1998; the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970 and the Public Service Act, (Proclamation 103 of 1994).

made by Lane in the early 1980's is as relevant today as it was then when he remarked that:

*All litigation attorneys regularly tiptoe through the minefield of extinctive prescription, statutory notices and other limiting provisions when claiming on behalf of their client. Some reach the other side unscathed, but all too many set off these concealed and varied legal mines, and leave behind the limbs, or in some instances the whole corpses of their trusting clients.*<sup>375</sup>

2.9 In any event, the question whether the Institution of Legal Proceedings against certain Organs of State Act went far enough by rationalising the notice periods applicable to the enactments of certain organs of state to six months from the due date of debt calls for re-evaluation, in light of arguments that they still place an unfair burden on creditors who have claims against the state.

2.10 It is submitted, in this regard, that the New South Wales and Saskatchewan Law Reform Commissions may be justified in pointing out that-

*... the preponderance of modern policy ... is against continuing to favour public authorities with the benefit of special notice of action. In summary, the objections to the benefit are that it suggests favouritism, creates an obstacle to litigation, increases costs and is, and has been, a source of injustice. Moreover, the law on the subject is scattered, hard to find, and uncertain because of variable word[s], from one Act to another ...*<sup>376</sup>; and

*These special notice provisions are generally known only to lawyers. It is not reasonable to expect that a person involved in an accident will have*

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<sup>375</sup> Lane H *Statutory Limitations: The enforcement of civil claims* 1982 *De Rebus* 67-70 extracted from the 1985 Commission Report 7.

<sup>376</sup> New South Wales Law Reform Commission *Third Report on the Limitation of Actions – Special Protections* [1975] NSWLRC 21 paragraph 38.

*sought legal advice within a week or a month of an accident. Even under the Ontario proposal, many claimants will be forced to go before a court and attempt to overcome the heavy onus of establishing that the failure to notify was justified and that the defendant was not prejudiced.*

....

*Throughout this report the Commission has embraced the idea that the law of limitations should not give preferential treatment to certain groups of defendants at the expense of their victims.<sup>377</sup>*

2.11 To this end, Canadian law reform commissions have condemned special time limits as confusing and have recommended their wholesale repeal and incorporation into a comprehensive statute.<sup>378</sup>

2.12 After describing special time limits as arbitrary, unreasoned and inflexible, the Saskatchewan Law Reform Commission made the following proposal:

*All actions that are not genuinely unique should attract the same limitation rules, and so far as possible these rules should be brought within the general limitation of actions statute.<sup>379</sup>*

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<sup>377</sup> Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act* Report to the Minister of Justice 1989 51-52.

<sup>378</sup> Roach K *The problems of public choice: the case of short limitation periods* 31 Osgoode Hall L J 721 1993 727.

<sup>379</sup> Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act* Report to the Minister of Justice 1989 52.

## Questionable basis

2.13 It is questionable whether policy considerations or the wording of special time limits provide sufficient justification for excluding the application of delay or the late acquisition of knowledge principles, thus leading to the inequitable result that time also runs against a creditor who lacks the capacity to enforce a particular right.

2.14 The remarks made by Williamson JA in *Yu Kwam* and Miller J in *Apalamah v Santam Insurance Co Ltd (Apalamah)* respectively, are apposite in this regard-

2.14.1 *Yu Kwam*-

*In these circumstances I have come to the conclusion that, save where the words of another statute clearly indicate the contrary, the general provision of the Prescription Act [of 1943], as to such matters as the interruption or suspension of prescription and the like, are of application to extinctive prescription generally.*<sup>380</sup>; and

2.14.2 *Apalamah*-

*Where the Prescription Act has a voice on an aspect relating to prescription in respect of which the "other" Act is silent there is not necessarily inconsistency between the two Acts and the voice of the Prescription Act must needs be heeded.*<sup>381</sup>

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<sup>380</sup> *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 777D.

<sup>381</sup> *Apalamah v Santam Insurance Co Ltd* 1975 (2) SA 229 (D), cited in Boule at 513.

## Severity of impact

- 2.15 The cumulative effect of sections 11(d) and 16(1) is to provide for the creation of a special regime that overrides the general and more generous one provided for by the Prescription Act,<sup>382</sup> in circumstances where-
- 2.15.1 another enactment prescribes a period that differs from the three-year general period for the making of a claim, or
- 2.15.2 another enactment prescribes a condition on the institution of an action for the recovery of a debt that differs from the Prescription Act.
- 2.16 In this regard, limitation provisions have been interpreted to exclude some or all of the following features:
- 2.16.1 an actual and constructive knowledge requirement, that has the effect of delaying the commencement of a period; and
- 2.16.2 mitigating factors, that serve to delay or extend the running of a period.
- 2.17 In the Namibian case of *Minister of Home Affairs and Immigration v Madjjet and Others (Madjjet)*, the court of first instance had the following to say about the effect of limitation-

*A reading of the provisions of the Prescription Act to which I have referred [sections 10(1), 11(d), 12(3), 13(1)(a) and 16(1) of the Namibian Prescription Act] make it clear at once that, by comparison, s 39(1) of the Police Act makes serious inroads into the rights which a prospective plaintiff*

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<sup>382</sup>

1985 Commission Report 3.

*under the Police Act would otherwise have enjoyed but for the restrictions imposed by that section. A striking disability suffered by a prospective plaintiff against the state on account of s 39(1) of the Police Act, is that he or she cannot rely on any of the grounds under the Prescription Act which delay the commencement of the running of prescription or which delay the completion of prescription.*

*As I have shown, in terms of Chap III of the Prescription Act, one of the grounds which delays the commencement of the running of prescription is the creditors lack of knowledge of the identity of the debtor and the facts from which the debt arises. Section 39(1) of the Police Act ensures that avenue is not available to a prospective plaintiff proceeding under it.<sup>383</sup>*

2.18 So drastic are their effect that special time limits have on occasion been referred to as “*guillotine*”<sup>384</sup> or even “*fatal*”<sup>385</sup> provisions.

## **Encouraging premature litigation**

2.19 It has been argued that short limitation periods encourage premature litigation,<sup>386</sup> contrary to enhancing party engagement and the promotion of non-adversarial means of settling disputes.

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<sup>383</sup> *Minister of Home Affairs and Immigration v Madjiet and Others* 2008 (5) SA 543 NmS.

<sup>384</sup> *Pizani v Minister of Defence* 1987 (2) All SA 420 (A).

<sup>385</sup> Hondius EH *Extinctive Prescription: On the limitation of actions*: Reports to the XIVth Congress International Academy of Comparative Law (Belgian Report by Matthias E Storme 50)

<sup>386</sup> Roach K *The problems of public choice: the case of short limitation periods* 31 Osgoode Hall L J 721 1993 734.

## Issues of constitutionality

### Right to equality

2.20 The policy favouring the state, statutory bodies and local government with special protection denies creditors the right to equality and to equal protection and benefit of the law, which finds expression in section 9(1) and (2) of the Constitution as follows:

*Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.*<sup>387</sup>

2.21 It is reasoned further that special time limits create manifest inequality-

2.21.1 between creditors, in that creditors who have debts against the state are subject to more stringent requirements for enforcing their rights than creditors who have debts against other debtors; and

2.21.2 between creditors and the state, in that private-citizen creditors who have debts against the state are subject to more stringent requirements for enforcing their rights, such requirements remaining inapplicable to the state when it has debts against private-citizen creditors.

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<sup>387</sup>

The comparable provision is contained in section 8(1) of the Interim Constitution which provides as follows:

*Every person shall have the right to equality before the law and to equal protection of the law.*

- 2.22 Critics contend as follows regarding the policy underlying special time limits:<sup>388</sup>
- 2.22.1 the state is not the only large organisation conducting varied activities and employing large and constantly changing work-forces; certain companies (who are required to cope without being afforded special protection) face the same problems. Furthermore, certain smaller organisations that do not receive large numbers of claims and that do not employ large workforces, for example, small municipalities, remain protected by shorter periods;<sup>389</sup>
- 2.22.2 the time-consuming procedures involved in investigating claims can be streamlined through improved management techniques and better communication channels. It is argued that constant exposure to the threat of civil action ought to place the state in a better position to develop procedures to expedite the management of civil claims;
- 2.22.3 although the wasting of public funds on unfounded claims is not condoned, short limitation periods have the effect of indiscriminately barring unfounded as well as founded claims;
- 2.22.4 theoretically speaking, short limitation periods ought to facilitate the proper investigation and settlement of well-founded claims in order to save costs. Arguably however, the opposite appears to be achieved in practice, by creating unnecessary litigation because

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<sup>388</sup> Refer to paragraph 1.15, chapter 1 of this part.

<sup>389</sup> New Zealand Law Commission NZLC Report No. 6 *Limitation Defences in Civil Proceedings* (1988) para 31, referring to the following counter-argument raised against the special protection afforded to local authorities: (... *public authorities were in no different position from any large corporation with a large number of employees and financial commitments. There was some evidence of abuse of this protection on the part of public authorities, moreover, by prolonging negotiations until the time had run out and then refusing to settle.*).

insufficient time exists for the proper investigation of claims and the negotiation of settlements; and

2.22.5 organisations protected by special time limits rely on the protection as a matter of course, often evading liability for well-founded claims.

2.23 The view that arguments against special protection decisively outweigh those favouring retention maintains that-

*...the public interest and the constitutional right to equality and equal protection of the law require that all defendants should be in the same position as far as prescription or limitation of actions is concerned.*<sup>390</sup>

## **Right of access to court**

2.24 Decided in 1996, *Mohlomi*<sup>391</sup> ushered in a long line of cases subjecting special time limits to judicial scrutiny on the argument that they curtailed the right of creditors to have their disputes decided in a fair public hearing before a court or other independent and impartial tribunal or forum.

2.25 The principle is embodied in section 34 of the Constitution which provides as follows:

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<sup>390</sup> Loubser 177.

<sup>391</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 CC.

*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.*<sup>392</sup>

- 2.26 In this case, the plaintiff sued the defendant for damages as a result of injuries sustained when he was shot by a soldier whilst he was still a minor. After the shooting, the plaintiff was hospitalised for seven weeks. A few months later, he sought legal assistance. Due to a mistaken impression that he was shot by a police officer, notice of legal action was sent to the Minister of Safety and Security rather than the Minister of Defence.
- 2.27 By the time a renewed notice was sent, it was three days too late, and thus wanting of compliance with section 113(1) of the former Defence Act, which provided for-
- 2.27.1 the barring of civil action if not instituted within six months from the date a cause of action arose; and
- 2.27.2 the barring of civil action if written notice of intention to institute such action was not given one month prior to the commencement thereof.
- 2.28 The court was required to determine the constitutionality of section 113(1) on the basis of the defendant's special plea that the action in question was barred for want of proper notice.

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<sup>392</sup>

The comparable provision prior to the coming into force of the 1996 Constitution is section 22 of the Interim Constitution which provides as follows:

*Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial tribunal.*

2.29 After acknowledging the need for rules that limit the time within which litigation must be launched so that cases are timeously disposed of, the court nevertheless called for caution in weighing their compatibility with the right to have justiciable disputes determined in accordance with section 22 of the Interim Constitution.

2.30 Taking into account the effect of barring and counterbalancing this against the inherent risk of denial of action prevalent in every case; the court declared that-

*What counts ... is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the **availability of an initial opportunity to exercise the right** that amounts, ..., to a real and fair one. ... **A handy yardstick against which to measure the limitation imposed** ... on the action it controls **will be found in chapter III of the Prescription Act** (68 of 1969).<sup>393</sup>*

(Emphasis added)

2.31 Noting Corbett JA's comments in *Pizani* regarding the inequity that resulted from applying the strict provisions of section 113(1) of the Defence Act notwithstanding its harsh consequences; and commenting on how abounding conditions of poverty and illiteracy in South Africa exacerbate people's ability to access justice, Didcott J found that section 113(1) of the Defence Act failed to afford claimants an adequate and fair opportunity to seek judicial redress.

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<sup>393</sup>

*Mohlomi v Minister of Defence* 1997 (1) SA 124 CC paragraphs 12-13.

- 2.32 The infringement was found to be unreasonable and unjustifiable, and in this regard, section 113 of the Defence Act was declared to be inconsistent with the Interim Constitution and therefore invalid.
- 2.33 In *Peens v Minister of Safety and Security*,<sup>394</sup> the court was called upon to decide whether section 57 of the South African Police Service Act, 1995<sup>395</sup> infringed on the plaintiff's right to equality and equal protection and benefit of the law and the right of access to court under circumstances where she failed to give written notice of legal action and to institute the action in question timeously.
- 2.34 Section 57 of the South African Police Service Act provided for-
- 2.34.1 the barring of legal proceedings not instituted before the expiry of twelve months after a claimant became aware of an alleged act or omission (or might reasonably have become aware of an alleged act or omission); and
- 2.34.2 the barring of legal proceedings instituted before service of written notice one month before such proceedings were instituted.
- 2.35 According to the court, the plaintiff's reliance on *Mohlomi* for the proposition that section 57 of the South African Police Service Act was unconstitutional was insupportable, as section 113 of the Defence Act (forming the subject of *Mohlomi's* case), was distinguishable on the following basis:
- 2.35.1 the South African Police Service Act provided for a limitation period of one year from the date of knowledge of a cause of action,

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<sup>394</sup> *Peens v Minister of Safety and Security* 2000 (4) SA 727 T.

<sup>395</sup> South African Police Service Act 68 of 1995.

whereas the Defence Act provided for a period of six months from the date the cause of action arose; and

2.35.2 the South African Police Service Act provided for condonation where the interests of justice required it, whereas the Defence Act did not contain such a provision.

2.36 The court found that even though section 57 of the South African Police Service Act did infringe on the rights in question, the infringement constituted a justifiable limitation and therefore passed the test of constitutional validity, on the following reasoning:

2.36.1 the often stated policy for protecting the state against delayed claims appeared to be reasonable; and

2.36.2 in comparison to *Mohlomi's* finding that section 113 of the Defence Act was too rigid and did not allow litigants sufficient time to comply with its provisions, section 57 of the South African Police Service Act, read in its entirety, was as rigid, as-

2.36.2.1 the 12-month period provided to prospective litigants was twice the time provided for in section 113 of the Defence Act; and

2.36.2.2 the allowance granted to prospective litigants to approach a court for condonation provided an added benefit which was absent in the Defence Act.

2.37 In *Moise v Transitional Local Council of Greater Germiston (Minister of Justice and Constitutional Development intervening)*<sup>396</sup> (*Moise*)

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<sup>396</sup>

*Moise v Transitional Local Council of Greater Germiston (Minister of Justice and Constitutional Development intervening)* 2001 (4) SA 491 CC.

the plaintiff sued the defendant for damages arising from injuries sustained by his minor daughter whilst attempting to board a bus driven by the defendant's employee.

- 2.38 The court was called upon to decide on the constitutional validity of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970,<sup>397</sup> which provided for the barring of legal proceedings in cases involving a debt against an administration, local authority or officer unless a creditor served written notice of such proceedings within 90 days from the due date of debt.
- 2.39 The basis for the plaintiff's argument was that the section was inconsistent with section 34, and that the limitation was not justified.
- 2.40 The court held that the question to be answered entailed the following two-stage enquiry:
- 2.40.1 whether the provision limited the right of access to courts, as provided by section 34 of the Constitution. If not, the matter ended there. If however, the provision did limit the right of access to courts, then the next question entailed a determination-
- 2.40.2 whether the limitation of the right of access was reasonable and justifiable within the meaning of section 36 of the Constitution.
- 2.41 Regarding the first leg of the enquiry, it was found that this depended primarily on the meaning and effect of the section, examined from the point of view of the Act as a whole, since the section formed part of a composite scheme.

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<sup>397</sup>

Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.

2.42 In examining the provision as a composite whole, the court noted that-

2.42.1 the section 2(1)(b) "*investigation and negotiation*" period stipulated that after service of the section 2(1)(a) notice, no legal proceedings could be instituted before the expiration of 90 days, unless the debtor denied liability in writing before the expiration of such period;

2.42.2 the section 2(1)(c) limitation period placed a bar on the institution of proceedings 24 months after the date the debt became due (read together with section 2(2)(c), which made provision for a knowledge requirement); and

2.42.3 section 4 permitted a creditor to apply to court for leave to serve the section 2(1)(a) notice after the prescribed period on conditions that the court deemed fit, subject to the creditor having complied with the requirements contained in sections 2(1)(b) and (c).

2.43 The court remarked as follows, after finding that the purpose of special statutory provisions that singled out particular kinds of proceedings against specific kinds of claimants and set special extraneous preconditions for the institution of such proceedings had an unfair tendency to lean towards protecting the interests of the state:

*The requirement of written notice as a precondition to the institution of legal proceedings is in itself an obstacle to such legal proceedings. If it is considered in conjunction with the "very limited period" of 90 days after the due date, "as part and parcel of a composite scheme", it is apparent that it amounts to a real impediment to the prospective claimant's access to a court. The time period is very short, the notice has to be served on the prospective debtor and it has to contain significant information regarding the occurrence and of the damages allegedly suffered. And, of course,*

*failure to comply with the notice requirement vitiates the claim unless, under section 4 of the Act, a court can be satisfied as to the absence of prejudice to the debtor or the existence of special circumstances exculpating timeous non-compliance.*

*Moreover, the condonation opportunity afforded to a prospective claimant by section 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of his harshness.*<sup>398</sup>

2.44 In viewing section 2(1)(a) of the Act as a composite scheme (notice, short period and limited scope for condonation), the court found that it did constitute a material limitation of the right of access to courts as provided for in section 34 of the Constitution.

2.45 After applying the criteria contained in section 36 of the Constitution in relation to possible justification (limitation of the rights contained in the Bill of Rights only in terms of a law of general application to the extent that is reasonable and justifiable in an open and democratic society taking into account the nature of the right, the nature, extent, importance and purpose of the limitation, the relation between the limitation and its purpose and less restrictive means of achieving the purpose), the court held that the active protection of the rights of prospective litigants to approach the courts in order to adjudicate claims without the limitation contained in section 2(1)(a) outweighed the government interest concerned. The section was held to be unreasonable and unjustifiable and therefore invalid.

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<sup>398</sup>

*Moise v Transitional Local Council of Greater Germiston (Minister of Justice and Constitutional Development intervening)* 2001 (4) SA 491 CC paragraphs 13-14.

2.46 In the unreported decision of *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng en Andere*<sup>399</sup> Skweyiya AJ<sup>400</sup> remarked that not only was the three month limitation period provided for section 68(4) of the Mental Health Act, 1973<sup>401</sup> inadequate and unfair, but also that it constituted a particularly outrageous and drastic provision if one had regard to the category of persons it struck. He found it to constitute a material limitation of the right of access to courts. The provision was declared to be unconstitutional.

2.47 In *Engelbrecht v Road Accident Fund and Another*,<sup>402</sup> the court held that the 14-day period within which claimants were required to report accidents (in relation to unidentified owners or drivers),<sup>403</sup> as provided for in Regulation 2(1)(c) of the Road Accident Fund Regulations,<sup>404</sup> constituted too short a period to amount to a real and fair opportunity to access the courts for redress. The Regulation was found to constitute an unreasonable and unjustifiable limitation of the rights protected in section 34 of the Constitution.

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<sup>399</sup> *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng en Andere* 2001 JDR 0401 T (Case CCT 26/01).

<sup>400</sup> As he was then.

<sup>401</sup> Mental Health Act 18 of 1973.

<sup>402</sup> *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 CC.

<sup>403</sup> Commonly referred to as hit-and-run accidents.

<sup>404</sup> Authorised in terms of section 23(1)(b) of the Road Accident Fund Act.

- 2.48 *Barkhuizen v Napier*<sup>405</sup> (*Barkhuizen*) dealt with an application for leave to appeal a Supreme Court of Appeal decision<sup>406</sup> dismissing an attack on the constitutionality of a 90-day time limit contained in a clause of a short-term insurance contract.<sup>407</sup> The applicant argued that the clause limited his right to seek judicial redress and thus offended against public policy.
- 2.49 In the minority judgement of Moseneke DCJ, it was found that-<sup>408</sup>
- 2.49.1 the proper approach to a constitutional challenge of contractual clauses was to look at the time bar itself within the context of the entire agreement, in order to determine whether it exhibited a tendency or reasonable likelihood of depriving a claimant of the right to approach the courts for redress;
- 2.49.2 in weighing whether the clause was at variance with public policy, the personal attributes of the party seeking to escape the results of the time bar, ordinarily, were not decisive of a case. Rather, what was determinative of public notions of fairness was the likely impact of the impugned clause;
- 2.49.3 it was the tendency to deprive a claimant that had to be scrutinised for reasonableness;

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<sup>405</sup> *Barkhuizen v Napier* 2007 (5) SA 323 CC.

<sup>406</sup> *Napier v Barkhuizen* 2006 (4) SA 1 SCA.

<sup>407</sup> Which, unlike the position in *Mohlomi*, did not constitute a law of general application.

<sup>408</sup> With Mokgoro J concurring. Ngcobo J, who prepared the majority judgement, dismissed the appeal on the basis that the 90-day period contained in the clause was not so manifestly unreasonable and unfair that its enforcement amounted to a contravention of public policy.

2.49.4 the two-part test adopted in *Mohlomi* as to whether the clause afforded a claimant an adequate and fair opportunity to seek legal redress was applicable;<sup>409</sup>

2.49.5 the impugned clause failed the test laid down in *Mohlomi* on both counts, as it was unreasonably short and manifestly inflexible. In this regard, the clause was found to irreversibly take away, in an unreasonably short period of time, the right of action of the insured. In this way, it denied him a reasonable opportunity to have the dispute decided by an independent tribunal; and

2.49.6 the length of the period was found to be unreasonably short on the following basis:

*.... First, to require a claimant to find litigation funds, appoint an attorney, cause counsel to be briefed and issue and serve summons within a period of 90 days of repudiation of the claim, is unreasonable and unconscionable. The likely impact or tendency of this brief time bar is to release the insurer from liability to its considerable financial gain and to the irreparable prejudice of the insured.*

*Second, it is not clear what legitimate purpose is served by this unseemly haste. Once the claimant has given timely notice of an intention to claim, the insurance company is afforded the opportunity to investigate the claim and to preserve evidence for trial. One must wonder why this one-sided rush is necessary to protect the interests of the insurance company. The*

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<sup>409</sup>

As fleshed out in the following manner:

- whether the period was too short, either in respect of giving notice or the right to sue; and
- whether the clause was inflexible and required strict compliance irrespective of the facts of a particular case.

*likely harm to the insured that the provision wrecks seems disproportionate to the interest the insurance company seeks to protect. ....*

*Third, the attenuated time bar is not reciprocal. The insurance agreement does not contain any time bar to the insurer's right of action against the insured. It may repudiate the claim when it chooses and any claim it may have against the insured seems to be limited only by the three-year prescription period of general application.*

*Fourth, at least since the advent of our democracy, Parliament seems to have adopted a new approach to ameliorate the consequence of time limitation clauses in statutes. Here I have in mind the Institution of Legal Proceedings against certain Organs of State Act. ....*

*....*

*In the present matter, the impugned time bar clause, on its terms, does not provide for extension of time on good cause shown, and is enforceable whatever the reason is for failure to comply. In other words, the clause may be enforced however unfair or unjust its consequences may be. ....*

*...*

*The clause is, on its face, unreasonable and unjust. It denies the applicant a reasonable and adequate opportunity to seek legal redress and is therefore at odds with public policy.<sup>410</sup>*

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410

*Barkhuizen v Napier* 2007 (5) SA 323 CC paragraphs 112-119.

2.50 In the case of *Madjjet*,<sup>411</sup> the Supreme Court was asked to rule on the constitutionality of section 39(1) of the Police Act, 1990,<sup>412</sup> (Namibian Police Act) read together with articles 10(1)<sup>413</sup> and 12(1)(a)<sup>414</sup> of the Constitution of the Republic of Namibia (Namibian Constitution).

2.51 Section 39(1) of the Namibian Police Act provides for-

2.51.1 the institution of civil proceedings within 12 months after a cause of action arises;

2.51.2 the giving of written notice not less than one month before proceedings are instituted; and

2.51.3 ministerial waiver of compliance with the provisions at any time.

2.52 After comparing the judgements of *Mohlomi*, *Peens* and the court of first instance, the court was of the view that the outcome of the appeal hinged on resolution of the questions whether section 39(1) of the Namibian Police Act-

2.52.1 was on equal footing with section 113 of the Defence Act (struck down as unconstitutional in *Mohlomi*); and

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<sup>411</sup> *Minister of Home Affairs and Immigration v Madjjet and Others* 2008 (5) SA 543 NmS. At the time action was instituted, the Minister occupied the Safety and Security portfolio. At the time the appeal was heard, the designation changed to Minister of Home Affairs and Immigration.

<sup>412</sup> Namibia Police Act 19 of 1990.

<sup>413</sup> Providing for the right to equality and freedom from discrimination.

<sup>414</sup> Providing for the right to a fair and public hearing by an independent, impartial and competent court or tribunal established by law.

- 2.52.2 was too rigid and inflexible.
- 2.53 Following the approach in *Peens*, the court compared section 39(1) of the Namibian Police Act with section 113(1) of the Defence Act and concluded that-
- 2.53.1 both sections contained shortened provisions when compared with the Namibian Prescription Act (12 months and 6 months respectively as opposed to the three-year general prescription period);
- 2.53.2 both contained notice provisions of one month;
- 2.53.3 only the Namibian Police Act contained the waiver *provisio*, not the Defence Act; and that to this extent: "*the point of difference between them [was] very significant*"; and that
- 2.53.4 had section 39(1) of the Namibian Police Act not contained the *provisio*, it would have, in substance, been a replica of section 113(1) in terms of rigidity and inflexibility. In the court's view, it was this very rigidity and inflexibility that the legislature had sought to ameliorate, by promulgating the *provisio*.
- 2.54 The court found that in order to violate the constitutional rights and freedoms contained in articles 10(1) and 12(1)(a) of the Namibian Constitution, a provision had to close every reasonable avenue to the enjoyment of those rights. In the court's view, section 39(1) did not have such an effect.
- 2.55 The court held that the trial court had erred in finding that section 39(1) of the Namibian Police Act breached the applicants' constitutional rights, as guaranteed by articles 10(1) and 12(1)(a) of

the Namibian Constitution, and that the trial court's declaration of section 39(1) as invalid was therefore incompetent.

2.56 The question whether section 23(1) of the Road Accident Fund Act limited the right of access to courts turned on the majority's consideration of the applicability of competing provisions contained in the Act in question against that of the Prescription Act, in *Mdeyide*.<sup>415</sup>

2.57 This required a weighing up exercise in order to establish which law was applicable in relation to the date prescription begins running.

2.58 The relevant sections provide as follows:

*Section 23(1) of the Road Accident Fund Act*

*Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 ..., shall become prescribed upon the expiry of a period of three years **from the date upon which the cause of action arose***

(Emphasis added)

*Sections 12(1) of the Prescription Act*

*Subject to ... subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.*

*Sections 12(3) of the Prescription Act*

*A debt shall not be deemed to be due until the creditor has **knowledge of the identity of the debtor and of the facts from which the debt arises**: Provided that a creditor shall be **deemed to have such***

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<sup>415</sup>

*Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC.

***knowledge if he could have acquired it by exercising reasonable care.***

(Emphasis added)

2.59 The court found that for the purpose of the date prescription begins running; section 12(3) of the Prescription Act did not apply to Road Accident Fund claims as the Acts in question were inconsistent.

2.60 Turning to the question of the constitutional validity of the “*applicable law*”, the court noted that it was not the length of the section 23(1) period that was in issue,<sup>416</sup> but rather its flexibility, in relation to the date prescription begins running.

2.61 According to the majority judgement, the right of access to courts was limited by section 23(1) of the Road Accident Fund Act, as the date prescription began running was fixed, and in some respects inflexible, based on the fact that the question of knowledge did not form part of the assessment criteria.

2.62 In determining whether the limitation was reasonable and justifiable, the court took into account-

*... the devastatingly final effect of prescription on a claim, the inflexibility of the starting point of the prescription period in section 23(1), the absence of a knowledge requirement and provision for condonation and the difficult situation in which some claimants might be placed ... especially against the backdrop of poverty and illiteracy in our society ... weighed against the generosity of the time period of three years, the need for proper*

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<sup>416</sup>

The length of the period was said to be in line with section 11(d) of the Prescription Act, being three years.

*administration of public funds and the potential harmful effects of a more flexible and open dispensation.*<sup>417</sup>

- 2.63. In the court's view, the following factors required consideration:
- 2.63.1 the need to ensure that adequate time is afforded to institute action, together with the practical possibility and genuine opportunity to do so;
  - 2.63.2 that poverty and illiteracy, though still widely prevalent, were not the only considerations deserving of attention under the circumstances;
  - 2.63.3 the Road Accident Fund and the Minister of Transport's submissions that the operations of the Road Accident Fund depended heavily on a fixed prescription period;
  - 2.63.4 the generosity of the period of three years within which to institute a claim weighed heavily in the balancing process;
  - 2.63.5 that persons injured in road accidents are likely to learn of the existence of the Road Accident Fund during the three years following the event, as this was the kind of information not normally acquired from books, but rather through word of mouth and day-to-day interaction;
  - 2.63.6 the claims process under the Road Accident Fund Act was relatively simple, compared to processes contained in other more complex legislation;

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<sup>417</sup>

*Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 CC at paragraph 66.

- 2.63.7 that notwithstanding that Mr Mdeyide fell into the category of very disempowered and marginalised people, his ignorance was not the main problem as he had learned about the existence of the Road Accident Fund within approximately six months after his accident; and
- 2.63.8 that Mr Mdeyide's lack of knowledge for six months was not the primary cause of his late claim. The court noted in this regard, that his legal representatives had never raised the unconstitutionality of section 23(1) on the basis of the knowledge requirement, but rather, that it was the High Court that had done so.
- 2.64 The court held that the limitation of the right of access to courts was reasonable and justifiable, and that section 23(1) of the Road Accident Fund Act was not unconstitutional, in that it afforded claimants an adequate and fair opportunity to seek judicial redress.

### **Addressing problems with the current law**

- 2.65 The rights enshrined in the Bill of Rights are sacrosanct; subject to limitation only in terms of laws of general application, to the extent that the limitation is reasonable and justifiable, taking into account all relevant factors, including<sup>418</sup>
- 2.65.1 the nature of the right;
- 2.65.2 the nature, purpose, importance and extent of the limitation; and

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<sup>418</sup>

Sections 7 and 36 of the Constitution.

- 2.65.3 less restrictive means of achieving the purpose.
- 2.66 The proliferation of provisions that run contrary to the right to equality and to equal protection and benefit of the law and the right of access to courts ignores, at the peril of being struck down, the state's duty to respect, protect, promote and fulfil the rights contained in the Bill of Rights.
- 2.67 Cognisant of these imperatives and the Constitutional Court's scrutiny of special time limits, some organs of state have taken steps to ameliorate their harsh effects by incorporating into such provisions-
- 2.67.1 time periods for the asserting of rights or the institution of actions which accord with the three-year general Prescription Act period;<sup>419</sup>
- 2.67.2 the operation of delay provisions;<sup>420</sup> and
- 2.67.3 the operation of extension provisions (referred to in some enactments as "*condonation*").<sup>421</sup>
- 2.68 Yet still, there is a lack of uniformity in the way the provisions are structured and operate; further, they still appear in great number and variety; enough to present an abounding source of confusion.

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<sup>419</sup> The Pension Funds Act, Financial Advisory and Intermediary Services Act, Competition Act, Consumer Protection Act, National Credit Act, Companies Act and Tax Administration Act.

<sup>420</sup> The Pension Funds Act and Financial Advisory and Intermediary Services Act.

<sup>421</sup> The Institution of Legal Proceedings against certain Organs of State Act and the Tax Administration Act.

2.69 The harmonisation process that follows<sup>422</sup> thus entails evaluating all the provisions listed in Table 12 in line with the general problems identified, constitutional and other court pronouncements and reform initiatives undertaken in other jurisdictions.

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<sup>422</sup>

As a way of de-cluttering the paper, all the enactments that were considered for the purpose of harmonisation are contained in an annexure to this paper, marked "C". The enactments are evaluated as a whole, and provisions regarded as being relevant to the evaluation are listed in addition to the prescription or special time limit provisions.

**Provisions requiring compliance with South Africa’s international law extinctive prescription obligations-**

<b>Table 13: Provisions requiring compliance with South Africa’s international law extinctive prescription obligations</b>	
<p>Carriage by Air Act 17 of 1946 Wreck and Salvage Act 94 of 1996</p>	<ul style="list-style-type: none"> <li>• The provisions sought to be regulated in these enactments are unique, in that they relate to the fulfilment of South Africa’s international law obligations<sup>423</sup> in relation to-               <ul style="list-style-type: none"> <li>○ the need for collective state action in harmonising and codifying certain rules governing international carriage by air; and</li> <li>○ the need to regulate uniform international rules regarding salvage operations</li> </ul> </li> <li>• As such, the enactments are excluded from the harmonisation process</li> </ul>

<sup>423</sup>

It was noted by the English Law Commission that the Hague Visby Rules had been incorporated into England’s Carriage of Goods by Sea Act, 1971 and that based on this, it was outside the scope of the consultation paper and contrary to the rules of international law for England to unilaterally change the periods provided for by the convention in question ((England) Law Commission *Limitation of Actions* Consultation Paper No. 151 (1998) 382 paras 13.179 to 13.180). It is submitted that the same considerations apply in relation to South Africa.

## Prescription of debts-

<b>Table 14: Prescription of debts</b>	
Expropriation (Establishment of Undertakings) Act 39 of 1951	<ul style="list-style-type: none"> <li>• The provisions contained in this Act operate as special time limits</li> <li>• The view is held that no basis exists justifying application of a special regime to the debts created by this Act</li> <li>• A proposal is therefore made to harmonise the limitation provisions into the “<i>Prescription of Debts</i>” provisions of the Prescription Act</li> <li>• A proposal is made to harmonise the notice provisions in line with the Institution of Legal Proceedings against certain Organs of State Act</li> </ul>
Merchant Shipping Act 57 of 1951	<ul style="list-style-type: none"> <li>• This Act incorporates numerous admiralty and other conventions (including the Safety Convention, the International Collision Regulations Convention, the Load Line Convention and the Maritime Labour Convention)</li> <li>• The provision contained in section 344(2), however, does not appear to relate to any of these conventions</li> <li>• A proposal is nevertheless made for limited harmonisation in relation to the prescription period (as it would appear that certain principles of international law remain applicable to the provision generally)</li> </ul>
Apportionment of Damages Act 34 of 1956	<ul style="list-style-type: none"> <li>• Section 2(6)(b) of the Act regulates a special prescription provision<sup>424</sup></li> <li>• A proposal is made for limited harmonisation in relation to the prescription period, as a creditor would have already obtained judgement on the original cause of action. Certain facts would thus be readily available to such creditor wishing to proceed against a joint wrongdoer. It would furthermore be in his interests to proceed with haste, whilst witnesses are still available and evidence still fresh</li> <li>• The <i>proviso</i> to section 2(6)(b) provides for the application of other laws in cases where these other laws provide for prescription or notice periods of- <ul style="list-style-type: none"> <li>○ less than twelve months within which legal proceedings must be instituted; or</li> <li>○ less than twelve months within which notice must be given that proceedings will be instituted</li> <li>○ In relation to the <i>proviso</i>, a proposal will be made for its deletion, since no recommendation is made- <ul style="list-style-type: none"> <li>▪ for the regulation of prescription or limitation periods of less than two years; and</li> <li>▪ for the regulation of a period within which notice must be given.</li> </ul> </li> </ul> </li> </ul>

<sup>424</sup>

*Commercial Union Assurance Co Ltd v Pearl Assurance Co Ltd* 1962 (3) SA 856 (E) at 863.

**Table 14: Prescription of debts**

Expropriation Act 63 of 1975 <sup>425</sup> (Expropriation Bill 4 of 2015) <sup>426</sup>	<ul style="list-style-type: none"><li>• The provisions contained in this Act operate as special time limits</li><li>• The view is held that no basis exists justifying the application of a special regime to the debts created</li><li>• A proposal is therefore made to harmonise the limitation provisions into the “<i>Prescription of Debts</i>” provisions of the Prescription Act</li><li>• A proposal is made to harmonise the notice provisions in line with the Institution of Legal Proceedings against certain Organs of State Act</li></ul>
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<sup>425</sup> Efforts are underway to repeal the Expropriation Act. Signing of the Expropriation Bill into law, however, has been placed on hold, following concerns raised regarding the process followed in passing the Bill.

<sup>426</sup> Version B4-2015 of the Expropriation Bill was sent to the President for signature. In terms of this version, no clear limitation period appears to have been provided for the institution of proceedings in respect of the debt created by clause 5(7) of the Bill. What clauses 5(7) and (8) appear to do, ambiguously so, is to-

- require written demand for compensation in respect of damaged property; and
- require compliance with the Institution of Legal Proceedings against certain Organs of State Act.

In this regard, it is unclear-

- whether two separate debts are created, that is, a debt for repairs and a debt for compensation;
- whether repairs must be effected/compensation must be paid without undue delay or whether the written demand must be forwarded without undue delay;
- what is intended by use of the phrase: “*without undue delay*”, and in this regard, whether it is the intention of the legislature to make the provisions of the forthcoming Expropriation Act subject to the general provisions of the Prescription Act in relation to the three-year general period as no “*clear*” period has been provided for.

**Table 14: Prescription of debts**

Compensation for Occupational Injuries and Diseases Act 130 of 1993	<ul style="list-style-type: none"><li>• This Act provides for the barring of a right to claim benefits if an accident or disease is not brought to the attention of the Compensation Commissioner by way of notice of accident or the lodging of a claim</li><li>• The notice of accident/lodging of claim provision reads as a peremptory requirement serving as a condition precedent to a right to claim benefits</li><li>• It is submitted that the requirement is rational and in line with the Compensation Fund’s need to have a claim duly reported for the purpose of adjudication</li><li>• To the extent however, that the provision is formulated as a condition precedent causing the extinction of a creditor’s right to benefits, a proposal is made to harmonise the Act’s provisions in order to reconcile the Fund’s need to have a claim reported and a creditor’s need to access remedies in relation to the debt that has arisen</li><li>• A proposal is made to harmonise the rest of the Act’s provisions in line with the “<i>Prescription of Debts</i>” provisions of the Prescription Act</li></ul>
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**Table 14: Prescription of debts**

<p>Road Accident Fund Act 56 of 1996 (Road Accident Benefit Scheme Bill, 2014; Road Accident Fund Amendment Bill 3 of 2017)</p>	<ul style="list-style-type: none"> <li>• The Act provides for the extinction of a right to compensation (where the identity of a driver or owner of a vehicle is known) if a claim is lodged three years after the date a cause of action arises. The Act does not provide for the operation of a knowledge requirement. The impediments listed in section 23(2) of the Act delay the “onset” of prescription. The impediments listed in section 23(2) differ from or do not cover all the impediments listed in the Prescription Act</li> <li>• Regulation 2(1) of the Road Accident Fund Regulations provide for a shorter prescription period (where the identity of a driver or owner of a vehicle is unknown). Further to this, no provision is made to take into account impediments serving to delay the onset of prescription as is provided for in section 23(2) of the Road Accident Fund Act</li> <li>• A draft Road Accident Benefit Scheme Bill, 2014, once promulgated into law, will replace the current fault-based system provided for in the Road Accident Fund Act. The Bill, to some extent, aligns its prescription provisions with that of the Prescription Act. The Department of Transport is still in the process of engaging on the Bill, which is yet to be introduced in Parliament</li> <li>• The Road Accident Fund Amendment Bill, 2017, was introduced in the National Assembly on 7 February 2017. In response to court challenges brought about because the Road Accident Fund Act differentiated between classes of claims (by affording less protection to claimants involved in so-called “hit and run” accidents), clause 7 of the Bill seeks to amend section 23(1) of the Act by making its provisions applicable to all claims</li> <li>• As both Bills are still in their infancy, a proposal is made to harmonise the Act’s provisions in line with the “Prescription of Debts” provisions of the Prescription Act</li> </ul>
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**Table 14: Prescription of debts**

National Nuclear Regulator Act 47 of 1999 <sup>427</sup>	<ul style="list-style-type: none"> <li>• The Act appears to operate as a <b>special prescription provision, barring the institution of action</b> for compensation two years from the date of acquiring knowledge</li> <li>• Provision is also made for operation of a cut-off period of 30 years beyond which actions cannot be instituted, calculated from the date of an act</li> <li>• The Act's attempts at limiting its liability in terms of certain provisions are apparent, and from time to time, claimants suffering nuclear damage in relation to nuclear accidents are presented with options to access other regimes if found to be more beneficial, for example, regimes contained in their contracts of employment or the Compensation for Occupational Injuries and Diseases Act</li> <li>• However, because of the potential for long-term radiation contamination both in relation to employees and environmental impact, the view is held that no reason exists why the "<i>Prescription of Debts</i>" provisions of the Prescription Act should not be made to apply fully (with the exception of the long-stop period)</li> </ul>
Consumer Protection Act 68 of 2008	<ul style="list-style-type: none"> <li>• Section 61(4)(d) of the Act provides for the exclusion of liability after the lapse of three years in the case of damage caused by defective products</li> <li>• It is submitted that in light of the nature of the debts attaching, the extent of the harm likely to be sustained and the overall objects sought to be achieved by the Act, no reason exists why the "<i>Prescription of Debts</i>" provisions of the Prescription Act should not be made to apply</li> </ul>
Tax Administration Act 28 of 2011	<ul style="list-style-type: none"> <li>• It is unclear whether section 190(4) of the Act was meant to operate as a special time limit to the exclusion of the principles contained in the Prescription Act</li> <li>• Furthermore, sections 11(4) and (5) require the giving of notice appearing to operate as a condition precedent to the institution of legal proceedings, unless a court directs otherwise</li> <li>• If the provisions of the Act were intended to operate as special time limits, the view is held that no basis exists justifying this approach</li> <li>• A proposal is made to harmonise the provisions in line with the "<i>Prescription of Debts</i>" provisions of the Prescription Act</li> </ul>

<sup>427</sup>

Kaplan SG *Compensating Damage Arising from Global Nuclear Accidents: The Chernobyl Situation* 10 Loyola of Loss Angeles International and Comparative Law Review 241 (1988); Christodouleas JP *et al Short-Term and Long-Term Health Risks of Nuclear-Power-Plant Accidents* N Engl J Med 2011 16 June 2011.

**Table 14: Prescription of debts**

Customs Control Act 31 of 2014 (Customs Duty Act 30 of 2014 and Excise Duty Act 91 of 1964)	<ul style="list-style-type: none"><li>• Section 896 of the Act (applicable also to the Customs Duty Act and the Excise Duty Act), contains a notice provision and a provision preventing the institution of proceedings until the lapsing of a certain time period. The period that must lapse before legal proceedings can be instituted may be reduced. A court may exempt a creditor from compliance with the notice provision</li><li>• Section 897 of the Act (applicable also to the Customs Duty Act and the Excise Duty Act) provides for a one-year action-barring provision. The provisions appear to operate as special time limits.</li><li>• It has been argued that a special time limits regime may be justified, as provisions of this nature provide for the expeditious collection of revenue for the benefit of the public as a whole</li><li>• The view is held however, that no basis exists justifying such a regime, taking into account that the state, unlike other creditors, has the benefit of a 15-year prescription period within which to enforce debts</li><li>• A proposal is made to harmonise the provisions in line with the "<i>Prescription of Debts</i>" provisions of the Prescription Act</li><li>• A proposal is made to harmonise the notice provisions in line with the Institution of Legal Proceedings against certain Organs of State Act</li></ul>
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## Special time limits: Non-encroaching-

<b>Table 15: Special time limits: Non-encroaching</b>	
Pension Funds Act 24 of 1956	<ul style="list-style-type: none"> <li>• Section 30I(1) of the Act operates as a special time limit barring the late lodging of a complaint<sup>428</sup></li> <li>• Section 30I(2) and (3) initially made provision for both a knowledge requirement and condonation, but the provisions have since been repealed with effect from 13 September 2007 with the intention of “aligning the Act with the Prescription Act, 1969 (Act 68 of 1969)”<sup>429</sup></li> <li>• Express provision is made for the Prescription Act to be applicable in relation to interruption (section 30H(3))<sup>430</sup> and “calculation”<sup>431</sup> of the three-year period (section 30I(2))</li> <li>• The Pension Funds Adjudicator does not have exclusive jurisdiction over pension matters; creditors have a choice of approaching either the Adjudicator or the courts</li> <li>• This has the effect of affording a creditor the choice of two distinctive regimes, and in this regard, a creditor can choose whether to utilise-             <ul style="list-style-type: none"> <li>○ the Prescription Act regime, with all its attendant advantages (prescription starts running from due date of debt and applicability of date of knowledge and delay principles) and disadvantages (use of an adversarial</li> </ul> </li> </ul>

<sup>428</sup> *Baloyi (Estate Late Maluleke) v Mineworkers Provident Fund and Another* 2015 (1) BPLR 1 (PFA) at paragraphs 6.2-6.4.

<sup>429</sup> Memorandum on the Objects of the Pension Funds Amendment Bill, 2007 at paragraph 3.1.5.

<sup>430</sup> The purpose of the interruption provision is to ensure that parties are not discouraged from approaching the Pension Funds Adjudicator for fear of claims becoming prescribed should they wish to proceed with prosecution in the civil courts (*Slingo v Shell Southern Africa Pension Fund and Another* [1999] 11 BPLR 299 (PFA) at 308).

<sup>431</sup> Use of the expression “calculation” is ambiguous and could relate either to the “computation” of time (civilian method) or the “tallying” of the period in relation to its value, to include the late acquisition of knowledge and delayed completion factors. In *Hlatshwayo v Iscor Employees Umbrella Provident Fund and Another* [2016] 1 BPLR 58 (PFA) at 63, it was held that (... *This means that the question of prescription of a claim which is the subject matter of a complaint before this Tribunal must be determined according to the way the Prescription Act envisages the three-year time limit in relation to a debt, to be calculated. In other words, ... this Tribunal must consider the existence of any circumstances impeding, interrupting or suspending the running of prescription as set out in Chapter III of the Prescription Act.*).

**Table 15: Special time limits: Non-encroaching**

	<p>system of law that is more confrontational, costly and time-consuming); or</p> <ul style="list-style-type: none"> <li>○ the Pension Fund Act regime, with all its attendant advantages (employment of a specialised alternative dispute resolution system for the expeditious and consensual resolution of pension complaints in a cost-effective manner, applicability of the knowledge requirement and factors pertaining to delay) and disadvantages (prescription starts running from the date of an act or omission)</li> <li>● It is thus considered unnecessary to harmonise the provisions of this Act, as a creditor’s right of access to the benefits of the Prescription Act have not been encroached upon</li> </ul>
<p>Sheriffs Act 90 of 1986</p>	<ul style="list-style-type: none"> <li>● Section 36(2) of the Act bars the lodging of a claim after three months of acquiring knowledge of a debt. The period can, however, be extended at the discretion of the Board</li> <li>● A claims-adjudication process, of necessity, employs a three-phased process, entailing- <ul style="list-style-type: none"> <li>○ the timeous submission of claims, usually linked to the provision of risk-based professional liability or indemnity insurance requiring liability to be determined fully, finally and with certainty (that is, with a definitive end date in mind);</li> <li>○ consideration of a claim for the purpose of accepting or rejecting it, using simple, speedy and cost-effective processes; and</li> <li>○ an opportunity for a creditor to obtain redress through another forum (usually the courts) in instances where a claim is rejected</li> </ul> </li> <li>● In this regard, the Act affords a creditor two distinctive regimes, and thus, resort to the Prescription Act regime in instances where he is dissatisfied with the Board’s finding regarding a claim</li> <li>● It is in this regard that the limitation provisions are regarded as non-encroaching</li> <li>● It is thus considered unnecessary to harmonise section 36 of the Act</li> </ul>

**Table 15: Special time limits: Non-encroaching**

<p>Financial Advisory and Intermediary Services Act of 37 of 2002</p>	<ul style="list-style-type: none"> <li>• The Act provides for the barring of a complaint that has been lodged late</li> <li>• It makes provision for the application of a knowledge requirement</li> <li>• The <i>Ombud</i> does not have exclusive jurisdiction over complaints arising from the operation of the Act; creditors have a choice of approaching either the <i>Ombud</i> or the courts</li> <li>• This has the effect of affording a creditor the choice of two distinctive regimes, and in this regard, a creditor can choose whether to utilise-             <ul style="list-style-type: none"> <li>○ the Prescription Act regime, with all its attendant advantages (prescription starts running from due date of debt and applicability of principles of delay) and disadvantages (use of an adversarial system of law that is more confrontational, costly and time-consuming); or</li> <li>○ the Financial Advisory and Intermediary Services Act regime, with all its attendant advantages (employment of a specialised alternative dispute resolution system for the expeditious and consensual resolution of financial services complaints in a cost-effective manner, employment of a knowledge requirement and the benefit of having the running of prescription “suspended”<sup>432</sup> once a complaint is lodged) and disadvantages (prescription starts running from the date of an act or omission)</li> </ul> </li> <li>• It is thus considered unnecessary to harmonise the provisions of this Act, as a creditor’s right of access to the benefits of the Prescription Act have not been encroached upon</li> </ul>
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<sup>432</sup>

Readers are referred to the discussion in part C regarding the effect of providing for “suspension” “in terms of the Prescription Act, 1969”.

**Table 15: Special time limits: Non-encroaching**

Legal Practice Act 28 of 2014 (Attorneys Act 53 of 1979)	<ul style="list-style-type: none"><li>• Section 79(4) of the Act bars the institution of legal proceedings if action is not instituted within one year of rejection of a claim</li><li>• A claims-adjudication process, of necessity, employs a three-phased process, entailing-<ul style="list-style-type: none"><li>○ the timeous submission of claims, usually linked to the provision of risk-based professional liability or indemnity insurance requiring liability to be determined fully, finally and with certainty (that is, with a definitive end date in mind);</li><li>○ consideration of a claim for the purpose of accepting or rejecting it, using simple, speedy and cost-effective processes; and</li><li>○ an opportunity for a creditor to obtain redress through another forum (usually the courts) in instances where a claim is rejected</li></ul></li><li>• In this regard, creditors have multiple regimes against which to pursue the recovery of a debt, being the Act itself (through its claims process); the Insolvency Act, 1936 (Act 24 of 1936)(in respect of the debtor's estate) or the Prescription Act (directly from the debtor through court proceedings)</li><li>• It is in this regard that the limitation provision is regarded as non-encroaching of the benefits contained in the Prescription Act</li><li>• It is thus considered unnecessary to harmonise section 79(4) of the Act</li></ul>
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## Special time limits: Encroaching-

<b>Table 16: Special time limits: Encroaching</b>	
Competition Act 89 of 1998	<ul style="list-style-type: none"> <li>• Section 67(1) of the Act limits the “<i>bringing of action</i>” “<i>in relation to a complaint</i>” about a prohibited practice, interpreted to mean barring the “<i>initiation</i>” of a complaint by a creditor or the Competition Commission<sup>433</sup> three years after such practice has ceased</li> <li>• The Act maintains exclusive jurisdiction for the purpose of determining what constitutes prohibited practices, access to the courts can only take place once such a determination is made (in relation to, for example, the awarding of damages)</li> <li>• Thus a complainant cannot access the ordinary courts (and by implication, the benefits of the Prescription Act) in circumstances where a complaint has been submitted late and both the Commission and the Tribunal decline to consider it</li> <li>• Section 67(1) thus encroaches on a creditor’s right to rely on the beneficial elements of the Prescription Act</li> <li>• Noting-             <ul style="list-style-type: none"> <li>○ arguments favouring the retention of special regimes                 <ul style="list-style-type: none"> <li>▪ many enactments provide for their own specialised regimes, and in this regard, it would be wrong to ride roughshod over limitation provisions that have been carefully constructed within a specific context;</li> <li>▪ certain statutes create special dispute resolution forums operating separately from the courts;</li> <li>▪ certain statutes create special dispute resolution forums that differ from the Prescription Act in relation to the objectives sought to be achieved and the way they are meant to operate;</li> <li>▪ the prescription periods fixed by the Prescription Act are at odds with the speed other enactments require disputes to be resolved, some of which are, by their very nature, urgent;</li> <li>▪ shortened limitation periods ensure that the state avoids dealing with age-old claims;</li> <li>▪ extended limitation periods have a negative effect on the state’s record-keeping abilities, thus exacerbating problems associated with the loss or destruction of evidence;</li> </ul> </li> </ul> </li> </ul>

<sup>433</sup>

And not the “*referral*” of a complaint to the “*Tribunal*” for the purpose of bringing proceedings against a debtor-defendant (Sutherland P and Kemp K *Competition Law of South Africa* LexisNexis 2015 paragraph 11.6.1.4).

**Table 16: Special time limits: Encroaching**

- what counts is the sufficiency and adequacy of the room limitation leaves open in the beginning for the exercise of a right; and
- a handy yardstick against which to measure the effectiveness of a limitation provision is the Prescription Act; and
- arguments favouring harmonisation of limitation into the “*Prescription of Debts*” provisions of the Prescription Act
  - they are proliferate, lack uniformity and scattered throughout the statutes of South Africa;
  - they are arbitrary, unreasoned, harsh and inflexible, and run regardless of circumstances deterring a creditor from enforcing a right, including the late acquiring of knowledge and suspension;
  - they make serious inroads into the rights of creditors by curtailing access to the courts;
  - some limitations constitute too short a period to amount to a real and fair opportunity to access the courts for redress;
  - provisions that are not genuinely unique should attract the same rules, and, as far as possible, be brought within the operation of a general statute; and
  - a handy yardstick against which to measure the effectiveness of a limitation provision is the Prescription Act;

a law reform proposal is made to harmonise the limitation provision provided for in the Act (**using the beneficial elements of the Prescription Act as a yardstick**), in line with a new “**special time limits**” regime, by counterbalancing-

- the Act’s need to provide for a separate and specialised alternative dispute resolution system for the expeditious and consensual resolution of complaints in a cost-effective manner;
- the Act’s need to provide for a system of barring, having the effect of preserving other rights of creditors to enforce debts in multiple forums before extinction takes effect;
- the need to abolish the harsh and inflexible effects of limitation by regularising its operation to cater for creditors-
  - ✓ faced with impediments that make it “**impossible**” to interrupt the running of a limitation period; and
  - ✓ by providing for extension principles; and
- the need to regulate limitation in a uniform manner in one general enactment

**Table 16: Special time limits: Encroaching**

Institution of Legal Proceedings against certain Organs of State Act 40 of 2002

- The primary purpose of the Act is to regulate notice
- Section 3 of the Act bars the institution of legal proceedings in instances where a creditor delays or fails to give notice prior to the institution of legal proceedings
- The effects of the Act are, however, cushioned, in that provision is made for the late acquiring of knowledge and for condonation for the late giving of notice (but only in circumstances where a debt has not become extinguished by prescription, in the latter instance)
- The Act, in the main, encroaches on the rights of creditors by-
  - preventing the institution of legal proceedings in instances where notice was not provided or was provided late; and
  - requiring the provision of notice within too short a period, that is, six months from the due date of debt
- Noting-
  - arguments favouring the retention of notice
    - the need to afford the state an adequate opportunity to investigate claims;
    - the need to afford parties an opportunity to reach early settlement; and
    - the need to minimise costs and give the state an opportunity to properly budget for potential liability; and
  - arguments favouring its abolishment
    - it suggests favouritism; creates an obstacle to litigation; increases costs and is generally known only to lawyers;
    - it forces claimants to overcome the heavy onus of having to prove that a failure to notify was justified;
    - it provides organs of state with an escape route by affording them the protection as a matter of course;
    - it makes serious inroads into the rights of creditors by curtailing access to the courts; and
    - attempts at ameliorating its harshness by providing for condonation does not render the obstacle immaterial

**Table 16: Special time limits: Encroaching**

	<p>a law reform proposal is made to retain notice in amended form (<b>using the beneficial elements of the Prescription Act as a yardstick</b>), by counterbalancing-</p> <ul style="list-style-type: none"><li>▪ the Act's need to encourage organs of state to investigate claims with the goal of reaching early settlement before creditors can institute legal proceedings, thus minimising exorbitant litigation costs which, in the end, are incurred at the taxpayer's expense; and</li><li>▪ the need to further dilute the deleterious effects of notice, by providing for-<ul style="list-style-type: none"><li>✓ "<b>suspension of the running of prescription</b>" once notice has been served; and</li><li>✓ deletion of the period within which notice must be given, with effect that "<b>notice can be given any time before a debt becomes extinguished by prescription</b>"</li></ul></li></ul>
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**Table 16: Special time limits: Encroaching**

National Credit Act 34 of 2005	<ul style="list-style-type: none"> <li>• Section 166(1) of the Act provides for a limitation on the bringing of action in relation to a complaint about prohibited conduct<sup>434</sup></li> <li>• In certain instances, the National Credit Regulator and the National Consumer Tribunal do not have exclusive jurisdiction over credit matters; creditors have a choice of approaching the courts for a remedy</li> <li>• However, the choice of approaching the courts for a remedy is qualified, in relation to a creditor’s claim for damages sustained as a result of prohibited conduct. In this regard, a court is only empowered to assess the amount or the award of damages after a Tribunal has considered the merits of a complaint</li> <li>• In this respect therefore, the Act maintains exclusive jurisdiction for the purpose of determining the merits of a complaint, access to the courts can only take place once this determination is made</li> <li>• Thus a complainant cannot access the ordinary courts (and by implication, the benefits of the Prescription Act) in circumstances where a complaint has been submitted late and the Regulator/Tribunal declines to consider it</li> <li>• Section 166(1) therefore encroaches on a creditor’s right to rely on the beneficial elements of the Prescription Act</li> </ul> <div style="border: 1px solid black; padding: 10px; margin-top: 10px;"> <p>a law reform proposal is made to harmonise the limitation provision provided for in the Act (<b>using the beneficial elements of the Prescription Act as a yardstick</b>), in line with a new “<i>special time limits</i>” regime, by counterbalancing-</p> <ul style="list-style-type: none"> <li>▪ the Act’s need to provide for a separate specialised alternative dispute resolution system for the expeditious and consensual resolution of complaints in a cost-effective manner;</li> <li>▪ the Act’s need to provide for a system of barring, having the effect of preserving other rights of creditors to enforce debts in multiple forums before extinction takes effect; and</li> <li>▪ the need to abolish the harsh and inflexible effects of limitation by regularising its operation to cater for creditors-               <ul style="list-style-type: none"> <li>✓ faced with impediments that make it “<i>impossible</i>” to interrupt the running of a limitation period; and</li> <li>✓ by providing for extension principles</li> </ul> </li> </ul> </div>
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It is submitted that the same principles that are applicable to the Competition Act in relation to the question of “*referral*” of a complaint against that of “*initiation*” of a complaint apply in respect of this Act.

**Table 16: Special time limits: Encroaching**

Companies Act 17 of 2008

- Section 219(1) of the Act bars the late initiating of complaints
- The Companies and Intellectual Property Commission does not have exclusive jurisdiction over the complaints regulated by the Act; once it has issued a notice of non-referral, a complainant can, with the leave of a court, and in circumstances where such complainant has no other remedy in terms of the Act, approach a court directly
- It is submitted that under the circumstances, complaints that have not been accepted by the Commission for investigation based on a failure to comply with the section 219(1) time limit can be adjudicated by the courts (and by implication, in line with the beneficial aspects of the Prescription Act)
- Notwithstanding that the Act does not appear to encroach on a creditor's right of access to courts and thus of the benefits contained in the Prescription Act, in the interests of certainty and uniformity

a law reform proposal is made to harmonise the limitation provision provided for in the Act (**using the beneficial elements of the Prescription Act as a yardstick**), in line with a new "**special time limits**" regime, by counterbalancing-

- the Act's need to provide for a separate, specialised alternative dispute resolution system for the expeditious and consensual resolution of complaints in a cost-effective manner;
- the Act's need to provide for a system of barring, having the effect of preserving other rights of creditors to enforce debts in multiple forums before extinction takes effect;
- the need to abolish the harsh and inflexible effects of limitation by regularising its operation to cater for creditors-
  - ✓ faced with impediments that make it "**impossible**" to interrupt the running of a limitation period; and
  - ✓ by providing for extension principles; and
- the need to regulate limitation in a uniform manner in one general enactment

**Table 16: Special time limits: Encroaching**

<p>Consumer Protection Act 68 of 2008</p>	<ul style="list-style-type: none"> <li>• Section 116(1) of the Act provides for a limitation on the bringing of action in relation to a complaint about prohibited conduct<sup>435</sup></li> <li>• Access to the courts is dependent on a creditor exhausting all remedies provided for by the Act</li> <li>• Access to the Tribunal is barred where a complaint is not been referred timeously</li> <li>• No provision is made for condonation for the late submission of a complaint, and once the Commission issues of notice of non-referral, a complainant cannot seek an audience with the Tribunal</li> <li>• To the extent that the Act encroaches on the rights of creditors to access the courts, and by implication, the beneficial elements of the Prescription Act</li> </ul> <div style="border: 1px solid black; padding: 10px; margin-top: 10px;"> <p>a law reform proposal is made to harmonise the limitation provision provided for in the Act (<b>using the beneficial elements of the Prescription Act as a yardstick</b>), in line with a new "<b>special time limits</b>" regime, by counterbalancing-</p> <ul style="list-style-type: none"> <li>▪ the Act's need to provide for a separate and specialised alternative dispute resolution system for the expeditious and consensual resolution of complaints in a cost-effective manner;</li> <li>▪ the Act's need to provide for a system of barring;</li> <li>▪ the need to abolish the harsh and inflexible effects of limitation by regularising its operation to cater for creditors-               <ul style="list-style-type: none"> <li>✓ faced with impediments that make it "<b>impossible</b>" to interrupt the running of a limitation period; and</li> <li>✓ by providing for extension principles; and</li> </ul> </li> <li>▪ the need to regulate limitation in a uniform manner in one general enactment</li> </ul> </div>
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It is submitted that the same principles that are applicable to the Competition Act and the National Credit Act in relation to the "referral" of a complaint against that of the "initiation" of a complaint apply in respect of this Act.

**Table 16: Special time limits: Encroaching**

Legal Practice Act 28 of 2014 (Attorneys Act 53 of 1979)	<ul style="list-style-type: none"><li>• Section 78 of the Act<sup>436</sup> requires notice of a claim to be given within three months of the date of acquiring knowledge of a debt</li><li>• The period may be extended at the Board’s discretion</li><li>• Notwithstanding that the period starts to run from the date of acquiring of knowledge and that it may be extended at the Board’s discretion, it is submitted that the provision is encroaching of a creditor’s right to the more standardised and beneficial regime of the Institution of Legal Proceedings against certain Organs of State Act</li><li>• Therefore, in the interests of uniformity, and the need to regulate notice in terms of a single regime, a law reform proposal is made to regulate the provision in line with the latter Act</li></ul>
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The Attorneys Act will not be dealt with as it will be repealed by 2018, when the Legal Practice Act becomes fully operational. Of importance to note is that it also regulates notice and limitation provisions in sections 48 and 49 and that it contains almost mirror provisions to the Legal Practice Act.

**Ancillary provisions-**

<b>Table 17: Ancillary provisions</b>	
<p>Magistrates’ Court Act 32 of 1944                      Labour Relations Act 66 of 1995                      Government Employees Pension Law, 1996 (Proclamation 21 of 1996)                      Administrative Adjudication of Road Traffic Offences Act 46 of 1998                      Long-Term Insurance Act 52 of 1998                      Financial Services Ombud Schemes Act 37 of 2004                      Customs Duty Act 30 of 2014                      Customs Control Act 31 of 2014</p>	<ul style="list-style-type: none"> <li>Section 74V(1) and (2) of the Magistrates’ Court Act, section 145(9) of the Labour Relations Act, section 26(3) of the Government Employees Pension Law, section 31(2) of the Administrative Adjudication of Road Traffic Offences Act; section 61 of the Long-Term Insurance Act, section 15(1) and (2) of the Financial Services Ombud Schemes Act 37 of 2004, section 228(3)(e) of the Customs Duty Act and section 908(3)(d) of the Customs Control Act provide either for the application or non-application of the Prescription Act to the respective provisions; alternatively, for provisions that do not impact on the question of restrictive application in relation to special time limits</li> </ul>

# 3

## PROPOSALS FOR LAW REFORM

### Issues for consideration in formulating proposals

#### Concept of “debt” for purpose of certain enactments

- 3.1 In dealing with the interrelationship between the concepts “*complaint*” and “*debt*”, regard must be had to the finding in *Nyayeni v Illovo Sugar Pension Fund and Another*, where the following was stated:

*... the concept of a debt is not synonymous with that of a complaint as defined in the Pension Funds Act. A complaint as defined covers a wider spectrum than a debt. It may well be that in some circumstances a complaint may involve the recovery of a debt. But that does not alter the character of a complaint as defined. From its very definition, it is clear that the jurisdiction of the Adjudicator is not limited to claims designed for the recovery of a debt. It extends to the determination of matters relating to the administration of pension funds, .... The appropriate orders which the Adjudicator is entitled to make would inevitably include declaratory orders, prohibitory interdicts ... which may not necessarily entail the recovery of a debt or payment of money .... It is conceivable that in making a determination the Adjudicator may make an order which entails payment of money ..., thus relating to the recovery of a debt. But that in itself does not mean that ... Chapter III of the Prescription Act appl[ies].<sup>437</sup>*

- 3.2 It is submitted that similarly to the Pension Funds Act, the limitation provisions contained in the Competition Act, Financial Advisory and

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*Nyayeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 (PFA). The finding appears to have paved the way for amendment of the Pension Fund Act, where complaints in relation to pension fund debts were subsequently made subject to Chapter III of the Prescription Act.

Intermediary Services Act, National Credit Act, Companies Act and Consumer Protection Act will also be governed by the same principles.

- 3.3 In other words, any proposals made for harmonisation of the limitation provisions contained in these enactments, must, of necessity, take into account that the proposals apply only in relation to the part of the complaint that constitutes a “*debt*”.

### **Enactments according special protection to the state**

- 3.4 As indicated, the question of harmonisation has been partially dealt with, and in this regard, most provisions regulating limitation that applied for the benefit of the state have since been repealed by the Institution of Legal Proceedings against certain Organs of State Act.

- 3.5 These include the limitation provisions contained in the Defence Act, 1957;<sup>438</sup> South African Police Service Act, 1995;<sup>439</sup> Correctional Services Act, 1998;<sup>440</sup> Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970<sup>441</sup> and Public Service Act, 1994.<sup>442</sup>

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<sup>438</sup> Defence Act 44 of 1957.

<sup>439</sup> South African Police Service Act 68 of 1995.

<sup>440</sup> Correctional Services Act 111 of 1998.

<sup>441</sup> Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.

<sup>442</sup> Public Service Proclamation 103 of 1994.

- 3.6 The current trend towards regulating limitation has, generally speaking, moved away from carving protections that favour the interests of the state.
- 3.7 Instead, certain enactments opting to provide for a regulatory framework in line with limitation appear to do so in the interests of protecting the rights of creditors to enforce debts in multiple forums.
- 3.8 Under these circumstances, a system of barring appears to serve a utilitarian purpose, by ensuring that a creditor's underlying substantive right to a debt remains intact, for continued enforcement in other forums should this be necessary.
- 3.9 The harmonisation process must, of necessity, bear this in mind when formulating proposals for law reform.

### **Notice and the Institution of Legal Proceedings against certain Organs of State Act**

- 3.10 In balancing the arguments favouring the retention of notice provisions, on the one hand, and their abolishment, on the other, a proposal is made calling for their retention, subject to the following principles:
- 3.10.1 all enactments requiring the giving of notice must subject such notice to uniform rules applying in terms of one enactment, being the Institution of Legal Proceedings against certain Organs of State Act;

- 3.10.2 notice should no longer be time-bound<sup>443</sup>; affected creditors should thus be in a position to give notice at any time, as long as the running of prescription is timeously interrupted. It may be worth noting, in this regard, that any attempts to serve notice after prescription takes effect will in any event be superfluous. As a corollary to dislocating notice from the element of time, it is submitted that the need for regulating condonation becomes superfluous;
- 3.10.3 notice should no longer operate as a condition precedent to the institution of legal proceedings; from the date of service of notice in terms of the Institution of Legal Proceedings against certain Organs of State Act, the running of prescription should become suspended; and
- 3.10.4 if process is served in terms of the interruption provisions of the Prescription Act before notice is given, a party affected by a failure to give notice should be in a position to apply to a court having jurisdiction for an order staying further proceedings in a matter until notice has been provided and until the period provided for the investigation and negotiation of claims has expired. In this regard, a proposal will be made calling on the Rules Board to consider developing rules regulating the form, content, practice and procedure in connection with such application.
- 3.11 To the extent that notice remains onerous by operating to the benefit of a special subset of debtors, it will continue to be categorised as a special time limit.

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In other words, by requiring, for example, that notice should be furnished “*within 6 months of the date a cause of action arises*”.

## **Limitation and enactments containing encroaching provisions**

3.12 The provisions of most enactments subjected to the harmonisation process have been integrated into the "*prescription of debts*" provisions of the Prescription Act.

3.13 It is arguable, however, whether a "*prescription of debts*" regime is the most effective system for regulating time in instances where enactments seek to promote the speedy, consensual and cost-effective resolution of disputes in specialised alternative dispute resolution forums.

3.14 To insist that such provisions be regulated in line with the "*prescription of debts*" provisions of the Prescription Act, it is submitted, may run counter to the objectives sought to be achieved by these enactments, and may even, in the end, damage the interests of creditors wishing to pursue redress in forums that are expeditious, cost effective and less confrontational.

3.15 In instances, however, where these enactments encroach on the rights of creditors by forcing them to utilise their regimes to the exclusion of the direct access, beneficial regime of the Prescription Act, and to the extent that it would be unfair, on the other hand to insist that creditors enforce their debts through the Prescription Act whilst alternative dispute resolution forums exist providing for more accessible and less-adversarial forms of enforcement; it is submitted that a proposal should be made providing for the integration of a uniform special time limits regime into the Prescription Act.

3.16 As a means of containing such a regime, the view is held that it should only be countenanced if it embodies principles that comply

with certain sub-minimum standards, including providing for the delayed onset of prescription in circumstances where it is absolutely impossible for a creditor to enforce a particular right.<sup>444</sup>

## Preliminary recommendations

3.17 The Commission’s preliminary recommendations, as contained in the draft Prescription Bill provided for in Annexure A, are the following:

### Exclusion from harmonisation process-

3.17.1 exclusion of the following laws contained in Schedule 1, and any other laws requiring compliance with South Africa’s international law extinctive prescription obligations, from the harmonisation process:

**SCHEDULE 1  
PROVISIONS REQUIRING COMPLIANCE WITH SOUTH AFRICA’S INTERNATIONAL LAW  
EXTINCTIVE PRESCRIPTION OBLIGATIONS**

(section 11(2) of Act)

No. and year	Short title	Provisions requiring compliance with international law
Act No. 17 of 1946	Carriage by Air Act, 1946	Schedule: Convention for the Unification of certain rules for International Carriage by Air  Articles 31(2), (3) and (4); Article 35(1)

<sup>444</sup>

Refer, in this regard, to *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 634 to 638, where it was held that the protection afforded by the “*impossibility*” principle has long been part of our law. It was further held that even though the principles serving to suspend the onset of prescription (section 12 of the Prescription Act) or the listed principles serving to delay the running of prescription (section 13 of the Prescription Act) were found to be inapplicable in relation to “*special time limits*”, this did not exclude the likelihood that special considerations might exist requiring application of the “*impossibility*” principle, seeing that section 6 of the Terrorism Act, 1967 had rendered it impossible for the appellant to give timeous notice of intention to sue the police (as required by section 32(1) of the former Police Act, 1958). The court noted, in this regard, that even in Dutch law, where special time limits had to be applied by a court, the *Hooge Raad* had made a finding that during the period a creditor found it impossible to enforce payment against a debtor due to a moratorium, the period did not begin running.

Act No. 94 of 1996	Wreck and Salvage Act, 1996	Schedule 1: Part 1: International Convention on Salvage, 1989 Articles 23(1), (2) and (3)
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3.17.2 exclusion of the following laws contained in Part I: Schedule 3, from the harmonisation process, to the extent that they remain non-encroaching of creditors' rights to access the "*prescription of debts*" provisions of the Prescription Act:

**SCHEDULE 3  
SPECIAL TIME LIMITS**

**Part I (non-encroaching provisions)**

(section 21(1) of Act)

No. and year	Short title	Provisions containing special time limits
Act No. 24 of 1956	Pension Funds Act, 1956	Sections 30H and 30I of Act 24 of 1956
Act No. 90 of 1986	Sheriffs Act, 1986	Section 36 of Act 90 of 1986
Act No.37 of 2002	Financial Advisory and Intermediary Services Act, 2002	Section 27 of Act 37 of 2002
Act No. 28 of 2014	Legal Practice Act, 2014	Section 79 of Act 28 of 2014

## Regulation of special prescription provisions-

3.17.3 insertion of clause 12(2), providing for regulation of the following special prescription provisions in Schedule 2:

**SCHEDULE 2  
SPECIAL PRESCRIPTION PROVISIONS**

(section 12(2) of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 57 of 1951	Merchant Shipping Act, 1951	<b>Amendment of section 344 of Act 57 of 1951</b>  1. Section 344 of Act 57 of 1951 is hereby amended by the substitution for subsection (2) of the following subsection:

		“(2) The period of extinctive prescription in respect of legal proceedings under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injury shall be <b>[one year]</b> <u>two years</u> and shall begin to run on the date of payment.”.
Act No. 34 of 1956	Apportionment of Damages Act, 1956	<p><b>Amendment of section 2 of Act 34 of 1956</b></p> <p>2. Section 2 of Act 34 of 1956 is hereby amended by the substitution for paragraph (b) of subsection (6) of the following paragraph:</p> <p>“(b) The period of extinctive prescription in respect of a claim for a contribution shall be <b>[twelve months]</b> <u>two years</u> calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal.”.</p>

## Regulation of a special time limits regime-

3.17.4 insertion in Part B of clause 21(2), regulating the following provisions contained in Part II: Schedule 3, in line with a special time limits regime:

### Part II: Encroaching provisions

(section 21(2) of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended by the insertion after subsection (3) of the following subsection:</p> <p>“(3A) <u>Any notice required to be given by the plaintiff by virtue of the provisions of subsection (2) shall comply with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>2. Section 6 of Act 63 of 1975 is hereby amended by the substitution for subsection (3) of the following subsection:</p>

		<p>“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted [<b>within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month’s notice thereof and of the cause of the alleged damage]</b> in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).”.</p>
Act No. 89 of 1998	Competition Act, 1998	<p><b>Amendment of section 67 of Act 89 of 1998</b></p> <p>3. Section 67 of Act 89 of 1998 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) A complaint in respect of a prohibited practice [<b>may not</b>] <u>must</u> be initiated in accordance with Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), no more than three years after the practice has ceased.”.</p>
Act No. 40 of 2002	Institution of Legal Proceedings against certain Organs of State Act, 2002	<p><b>Amendment of section 1 of Act 40 of 2002</b></p> <p>4. Section 1 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for the definition of “<b>creditor</b>” of the following definition:</p> <p>“‘<b>creditor</b>’ means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings [, <b>and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be</b>];” and</p> <p>(b) by the substitution for subparagraph (g) of paragraph (vii) of the definition of “<b>organ of state</b>” of the following subparagraphs:</p> <p>“‘<b>organ of state</b>’ means-</p> <p>(g) <u>South African Revenue Service established by section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);</u></p> <p>(h) <u>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</u></p>

		<p>(i) <u>any person in respect of whose debt an organ of state, as contemplated in subparagraphs (a) to (h), is liable;</u>”.</p> <p><b>Amendment of section 3 of Act 40 of 2002</b></p> <p>5. Section 3 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:</p> <p>“(a) <b>[within six months from the date on which the debt became due,]</b> be served on the organ of state in accordance with section 4(1); and”;</p> <p>(b) by the deletion of subsection (3); and</p> <p>(c) by the deletion of subsection (4).</p> <p><b>Amendment of section 4 of Act 40 of 2002</b></p> <p>6. Section 4 of Act 40 of 2002 is hereby amended-</p> <p>(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:</p> <p>“(f) <u>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);</u></p> <p>(g) <u>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);</u></p> <p>(h) <u>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</u></p> <p>(i) <u>a person referred to in paragraph (i) of the definition of “organ of state”, to that person.”; and</u></p> <p>(b) by the insertion of the following sections after section 4:</p> <p><b>“4A. <u>Suspension of prescription</u></b></p> <p>(1) <u>Provided a debt has not become extinguished by prescription, the running of</u></p>
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		<p>prescription is suspended in terms of the Prescription Act, 20.. (Act No. .. of 20..) from the date of service of notice.</p> <p>(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</p> <p><b>4B. Failure to give notice</b></p> <p>(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 processes and proceedings in a matter pending the giving of notice and expiry of the period referred to in section 5(2).”.</p> <p><b>Amendment of section 5 of Act 40 of 2002</b></p> <p>7. Section 5 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of <b>[60] 90</b> days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).”; and</p> <p>(b) by the substitution for the proviso to subsection (2) of the following proviso:</p> <p>“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, <u>but before the debt becomes extinguished by prescription</u>, serve the process on the organ of state concerned.”.</p>
Act No. 34 of 2005	National Credit Act, 2005	<p><b>Amendment of section 166 of Act 34 of 2005</b></p> <p>8. Section 166 of Act 34 of 2005 is hereby amended by the substitution for subsection (1) of the following subsection:</p>

		<p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -”.</p>
Act No. 17 of 2008	Companies Act, 2008	<p><b>Amendment of section 219 of Act 17 of 2008</b></p> <p>9. Section 219 of Act 17 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after-”.</p>
Act No. 68 of 2008	Consumer Protection Act, 2008	<p><b>Amendment of section 116 of Act 68 of 2008</b></p> <p>10. Section 116 of Act 68 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -”.</p>
Act No. 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 11 of Act 28 of 2011 as amended by section 33 of Act 39 of 2013</b></p> <p>11. Section 11 of Act 28 of 2011 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p>“(4) <b>[Unless the court otherwise directs, no]</b> <del>No</del> legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of <b>[at least one week of the applicant’s]</b> <del>an</del> intention to institute <b>[the] such [legal]</b> <del>proceedings,</del> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>
Act No. 28 of 2014	Legal Practice Act, 2014	<p><b>Amendment of section 78 of Act 28 of 2014</b></p> <p>12. Section 78 of Act 28 of 2014 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p>“(a) written notice of the claim is given to the Council and to the Board <b>[within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the</b></p>

		<p><b>theft]</b> in accordance with the provisions contained in the <u>Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”; and</p> <p>(b) by the deletion of subsection (2).</p>
Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 896 of Act 31 of 2014</b></p> <p>13. Section 896 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <b>[No process]</b> Process by which <b>[any]</b> judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act, may <u>not</u> be served <b>[before the expiry of a period of 30 calendar days after delivery of a notice in writing setting forth clearly and explicitly]</b> <u>unless a person has complied with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)[-].</u>”;</p> <p>(b) by the deletion of paragraphs (a) to (c) of subsection (1);</p> <p>(c) by the deletion of subsection (3);</p> <p>(d) by the deletion of paragraphs (a) and (b) of subsection (3);</p> <p>(e) by the deletion of subsection (4); and</p> <p>(f) by the deletion of paragraphs (a) and (b) of subsection (4).</p>

3.17.5 insertion in Part B of several clauses, including clauses 22 and 23, regulating the operation of special time limits, as follows:

**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.

**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.

## Harmonisation in line with prescription of debts provisions-

3.17.6 insertion of clause 28, aligning the following laws contained in Schedule 5, to the prescription of debts provisions:

### SCHEDULE 5 ACTS OF PARLIAMENT REPEALED OR AMENDED

(section 28 of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended by the substitution for subsection (3) of the following subsection:</p> <p>“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted <b>[within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer,]</b> <u>in accordance with Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)</u>[, and may only be instituted if the plaintiff has given the said person not less than one month’s notice thereof and of the cause of the alleged damage.]”.</p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>2. Section 6 of Act 63 of 1975 is hereby amended by the insertion after subsection (3) of the following subsection:</p> <p>“(3A) <u>A debt arising from a claim referred to in subsection (2) must be enforced in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)</u>”.</p>
Act No. 130 of 1993	Compensation for Occupational Injuries and Diseases Act, 1993	<p><b>Amendment of section 38 of Act 130 of 1993</b></p> <p>3. Section 38 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Failure to give notice to an employer as required in subsection (1) shall not <b>[bar] affect</b> a right to compensation if it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident.”;</p>

		<p>(b) by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) Subject to section 43, failure to give notice to an employer as required in subsection (1), or any error or inaccuracy in such notice, shall not <b>[bar]</b> affect a right to compensation if in the opinion of the Director-General –”; and</p> <p>(c) by the substitution for paragraph (a) of subsection (3) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) the compensation fund or the employer or mutual association concerned, as the case may be, is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; <u>or</u>”.</p> <p><b>Amendment of section 43 of Act 130 of 1993</b></p> <p>4. Section 43 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) A claim for compensation in terms of this Act shall be lodged by or on behalf of the claimant in the prescribed manner with the commissioner or the employer or the mutual association concerned, as the case may be, within <b>[12 months]</b> <u>four years</u> after the date of the accident or, in the case of death, within <b>[12 months]</b> <u>four years</u> after the date of death.”;</p> <p>(b) by the deletion of paragraph (b) of subsection (1); and</p> <p>(c) the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) If any seaman or airman meets with an accident outside the Republic resulting in death, a claim for compensation shall be <b>[instituted]</b> <u>lodged</u> within <b>[12 months]</b> <u>four years</u> after news of the death has been received by any dependant claiming compensation.”.</p> <p><b>Substitution of section 44 of Act 130 of 1993</b></p> <p>5. Section 44 of Act 130 of 1993 is hereby substituted for the following section:</p> <p style="padding-left: 40px;">44. A right to benefits in terms of this Act <b>[shall lapse if the accident in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, within 12 months after the date of such accident]</b> <u>is governed by Part A, Chapter 4,</u></p>
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		<p><u>read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)."</u>.</p> <p><b>Amendment of section 65 of Act 130 of 1993</b></p> <p>6. Section 65 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">"4. Subject to section 66, a right to benefits in terms of this Chapter <b>[shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the date of the commencement of that disease]</b> <u>is governed by Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)."</u>; and</p> <p>(b) the deletion of subsection (5).</p>
Act No. 56 of 1996	Road Accident Fund Act, 1996	<p><b>Amendment of section 23 of Act 56 of 1996 as amended by section 10 of Act 19 of 2005</b></p> <p>7. Section 23 of Act 56 of 1996 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">"(1) <b>[Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the]</b> <u>The right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle <b>[in the case where the identity of either the driver or the owner thereof has been established,]</b> shall become prescribed <b>[upon the expiry of a period of three years from the date upon which the cause of action arose]</b> <u>in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..)."</u></u></p> <p>(b) by the deletion of subsection (2); and</p> <p>(c) by the deletion of subsection (3).</p>
Act No. 47 of 1999	National Nuclear Regulator Act, 1999	<p><b>Amendment of section 34 of Act 47 of 1999</b></p> <p>8. Section 34 of Act 47 of 1999 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">"(1) Despite anything to the contrary in any other law, <u>but subject to Part A, Chapter</u></p>

		<p>4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), an action for compensation in terms of section 30, 31 or 32 may[, <b>subject to subsection (2),</b>] not be instituted after the expiration of a period of 30 years from -</p> <p>(a) the date of the occurrence which gave rise to the right to claim that compensation; or</p> <p>(b) the date of the last event in the course of that occurrence or succession of occurrences, if a continuing occurrence or a succession of occurrences, all attributable to a particular event or the carrying out of a particular operation, gave rise to that right.”;</p> <p>(b) by the deletion of subsection (2); and</p> <p>(c) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) <u>Further to the impediments suspending the running of prescription contained in Part A, Chapter 4 of the Prescription Act, 20.. (Act No. .. of 20..),</u> <b>[The]</b> <u>the running of the prescription period</u> <b>[of two years referred to in subsection (2)]</b> is suspended from the date negotiations regarding a settlement by or on behalf of the claimant and the relevant holder of the nuclear authorisation are commenced in writing until the date any party notifies the other party that the negotiations are terminated.”.</p>
Act No. 68 of 2008	Consumer Protection Act, 2008	<p><b>Amendment of section 61 of Act 68 of 2008</b></p> <p>9. Section 61 of Act 68 of 2008 is hereby amended-</p> <p>(a) by the substitution for subsection (4) of the following subsection:</p> <p>“(4) <u>Subject to Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..),</u> <b>[Liability]</b> <u>liability</u> of a particular person in terms of this section does not arise if -“;</p> <p>(b) by the substitution for paragraph (d) of subsection (4) of the following paragraph:</p> <p>“(d) the claim for damages is brought more than <b>[three years after the -] four years from the due date of debt in respect of -“;</b> and</p> <p>(c) by the substitution for subparagraphs (i) to (iv) of paragraph (d) of subsection (4) of the following subparagraphs:</p>

		<p>(i) <u>the death or injury of a person contemplated in subsection (5)(a);</u></p> <p>(ii) <b>[earliest time at which a person had knowledge of the material facts about an]</b> <u>the illness of a person contemplated in subsection (5)(b);</u> <b>[or]</b></p> <p>(iii) <b>[earliest time at which a person with an interest in any property had knowledge of the material facts about]</b> <u>the loss or damage to [that] a person's property contemplated in subsection (5)(c);</u> or</p> <p>(iv) <u>the [latest date on which a person suffered any] economic loss suffered by a person contemplated in subsection (5)(d)."</u></p>
Act No. 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 190 of Act 28 of 2011 as amended by section 53 of Act 44 of 2014 and section 60 of Act 23 of 2015</b></p> <p>10. Section 190 of Act 28 of 2011 is hereby amended-</p> <p>(a) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;"><u>"(4) An amount under subsection (1)(b) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of [-] either an assessment by SARS or a self-assessment, in line with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..)."</u></p> <p>(b) by the deletion of paragraph (a) of subsection (4); and</p> <p>(c) by the deletion of paragraph (b) of subsection (4).</p>
Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 897 of Act 31 of 2014</b></p> <p>11. Section 897 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for the heading of the following heading:</p> <p style="padding-left: 40px;"><b><u>"[Limitation of period for institution of judicial proceedings against Minister, Commissioner, SARS customs authority, customs officers, SARS officials or state] Prescription of Claims"</u></b></p>

		<p>(b) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <b>[Process by which any judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state]</b> <u>Claims</u> on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act must be <b>[served before the expiry of a period of one year]</b> recovered in accordance with <u>the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..)</u>”;</p> <p>(c) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p>“(a) ` if the matter was not the subject of administrative proceedings provided for in Part 3, 4 or 5 of Chapter 37, from the <u>due date [on which the cause of action arose] of debt</u>;</p> <p>(d) the deletion of subsection (2); and</p> <p>(e) the deletion of paragraphs (a) and (b) of subsection (2).</p>
Act No. __ of 2015	Expropriation Act, 2015	<p><b>Amendment of section 5 of Act __ of 2015</b></p> <p>12. Section 5 of Act __ of 2015 is hereby amended by the insertion after subsection (8) of the following subsection:</p> <p>“(8A) <u>A debt arising from a claim referred to in subsection (7) must be enforced in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)</u>”.</p>

## Draft Institution of Legal Proceedings against certain Organs of State Bill-

3.18 The Commission’s preliminary recommendations, as contained in the draft Institution of Legal Proceedings against certain Organs of State Amendment Bill provided for in Annexure B, are the following:

- 3.18.1 insertion of several clauses, including clauses 1 to 4, providing for the following amendments to the Institution of Legal Proceedings against certain Organs of State Act:

**Amendment of section 1 of Act 40 of 2002**

1. Section 1 of the Institution of Legal Proceedings against certain Organs of State Act, 2002 (hereinafter referred to as the principal Act), is hereby amended-

- (a) by the substitution in subsection (1) for the definition of “**creditor**” of the following definition:

“**creditor**” means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings **[,and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be];**” and

- (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 processes and 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.”.

3.18.2 insertion of clause 5, regulating the provisions contained in the Schedule in line with the Institution of Legal Proceedings against certain Organs of State Act, as follows:

**SCHEDULE**

**ACTS OF PARLIAMENT REPEALED OR AMENDED**

(section 5)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended by the insertion after subsection (3) of the following subsection:</p> <p>“(3A) <u>Any notice required to be given by the plaintiff by virtue of the provisions of subsection (2) shall comply with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>

Act No. 34 of 1956	Apportionment Damages Act, 1956 of	<p><b>Amendment of section 1 of Act 34 of 1956</b></p> <p>2. Section 1 of Act 34 of 1956 is hereby amended by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted <b>[or notice should have been given]</b> in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.”.</p> <p><b>Amendment of section 2 of Act 34 of 1956</b></p> <p>3. Section 2 of Act 34 of 1956 is hereby amended by the deletion of the proviso to paragraph (b) of subsection (6).</p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>4. Section 6 of Act 63 of 1975 is hereby amended by the substitution for subsection (3) of the following subsection:</p> <p>“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted <b>[within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month’s notice thereof and of the cause of the alleged damage]</b> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>
Act No. 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 11 of Act 28 of 2011 as amended by section 33 of Act 39 of 2013</b></p> <p>5. Section 11 of Act 28 of 2011 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p>“(4) <b>[Unless the court otherwise directs, no]</b> <u>No</u> legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of <b>[at least one week of the applicant’s]</b> <u>an</u> intention to institute <b>[the]</b> <u>such</u> <b>[legal]</b> proceedings, <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>

Act No. 28 of 2014	Legal Practice Act, 2014	<p><b>Amendment of section 78 of Act 28 of 2014</b></p> <p>6. Section 78 of Act 28 of 2014 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) written notice of the claim is given to the Council and to the Board <b>[within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft]</b> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”; and</p> <p>(b) the deletion of subsection (2).</p>
Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 896 of Act 31 of 2014</b></p> <p>7. Section 896 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) <b>[No process]</b> <u>Process</u> by which <b>[any]</b> judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act, may <u>not</u> be served <b>[before the expiry of a period of 30 calendar days after delivery of a notice in writing setting forth clearly and explicitly]</b> <u>unless a person has complied with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)</u><del>[-].</del>”;</p> <p>(b) by the deletion of paragraphs (a) to (c) of subsection (1);</p> <p>(c) by the deletion of subsection (3);</p> <p>(d) by the deletion of paragraphs (a) and (b) of subsection (3);</p> <p>(e) by the deletion of subsection (4); and</p> <p>(f) by the deletion of paragraphs (a) and (b) of subsection (4).</p>

## Development of Rules by Rules Board for Courts of Law-

3.19 The Commission's preliminary recommendation, in relation to the following proposal:

### **Amendment of section 4 of Act 40 of 2002**

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

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

#### **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 processes and proceedings in a matter pending the giving of notice and expiry of the period referred to in section 5(2)."

contained in clause 3 of the draft Institution of Legal Proceedings against certain Organs of State Amendment Bill provided for in Annexure B, is the following:

3.19.1 that the Rules Board for Courts of Law should consider developing rules regulating the form, content, practice and procedure in connection with the application.

## Questions to Respondents

- 3.20 The Commission welcomes inputs, comments and suggestions from Respondents (especially those responsible for implementing the Acts of Parliament affected by the preliminary proposals), including the following:

### **PART F: SPECIAL TIME LIMITS**

- 3.20.1 Have certain extinctive prescription provisions been overlooked in the harmonization process. If yes, which provisions are they?
- 3.20.2 Have certain extinctive prescription provisions been overlooked for the purpose of listing in Schedule 4 of the draft Prescription Bill. If yes, which provisions are they?
- 3.20.3 What are Respondents views regarding the proposal recommending the uniform regulation of special time limits in Part B, Chapter 4 of the Prescription Bill. Where Respondents have other views as to how they believe the provisions should be regulated, full reasons are required, together with suggestions as to how the provisions should be dealt with.
- 3.20.4 What are Respondents views regarding the amendments to the Institution of Legal Proceedings against certain Organs of State Act contained in Annexure B?
- 3.20.5 Is the amendment to section 4 of the Institution of Legal Proceedings against certain Organs of State Act, providing for the following substitution, in line with what the National Ports Authority envisaged, or should the Act be retained in its current form in relation to the question of service on the Authority:

**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);

3.20.6 Does the Rules Board for Courts of Law have any comments regarding the viability of developing rules regulating the form, content, practice and procedure in connection with the application provided for in clause 3 of the Institution of Legal Proceedings against certain Organs of State Amendment Bill, which provides as follows:

**Amendment of section 4 of Act 40 of 2002**

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

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

**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 processes and proceedings in a matter pending the giving of notice and expiry of the period referred to in section 5(2)."

# CONCLUSION

## 1

### MISCELLANEOUS MATTERS

#### Replacement of Prescription Act

- 1.1 In light of the significant proposals for law reform, it is considered opportune to propose repeal of the Prescription Act in its entirety, and its replacement with a new enactment.
- 1.2 In the draft Prescription Bill that is proposed, the chapters on Acquisitive Prescription and Servitudes, to a large extent, remain unchanged.
- 1.3 In line with modern drafting practices, and where appropriate, the proposed Bill will include the following textual changes:
  - 1.3.1 use of the present tense;
  - 1.3.2 use of the active voice;
  - 1.3.3 removing unnecessary words and expressions, for example: "*The provisions of...*";
  - 1.3.4 replacing terms and expressions appearing in the latin language, to the extent possible; and
  - 1.3.5 placing definition and application clauses at the beginning of the Act or applicable section rather than at the end.

## **Forthcoming investigation into imprescriptible rights**

- 1.4 As indicated<sup>445</sup>, time constraints have prevented the Commission from looking into the scope and constituent elements of the concept “*debt*”, with specific reference to the question of imprescriptible obligations.
  
- 1.5 The Commission will consider the viability of conducting an investigating into this area of prescription in the future.

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Refer to chapter 1 in the Introduction part of this paper.

# **ANNEXURE A**

REPUBLIC OF SOUTH AFRICA

## **PRESCRIPTION BILL**

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**Draft**  
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**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*.

## SCHEDULE 1

### PROVISIONS REQUIRING COMPLIANCE WITH SOUTH AFRICA'S INTERNATIONAL LAW EXTINCTIVE PRESCRIPTION OBLIGATIONS

(section 11(2) of Act)

No. and year	Short title	Provisions
Act No. 17 of 1946	Carriage by Air Act, 1946	Schedule: Convention for the Unification of certain rules for International Carriage by Air  Articles 31(2), (3) and (4); Article 35(1)
Act No. 94 of 1996	Wreck and Salvage Act, 1996	Schedule 1: Part 1: International Convention on Salvage, 1989  Articles 23(1), (2) and (3)

## SCHEDULE 2

### SPECIAL PRESCRIPTION PROVISIONS

(section 12(2) of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 57 of 1951	Merchant Shipping Act, 1951	<b>Amendment of section 344 of Act 57 of 1951</b>  1. Section 344 of Act 57 of 1951 is hereby amended by the substitution for subsection (2) of the following subsection:  “(2) The period of extinctive prescription in respect of legal proceedings under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injury shall be <b>[one year]</b> <u>two years</u> and shall begin to run on the date of payment.”.

Act No. 34 of 1956	Apportionment Damages Act, 1956	<p style="text-align: center;"><b>of Amendment of section 2 of Act 34 of 1956</b></p> <p>2. Section 2 of Act 34 of 1956 is hereby amended by the substitution for paragraph (b) of subsection (6) of the following paragraph:</p> <p style="padding-left: 40px;">“(b) The period of extinctive prescription in respect of a claim for a contribution shall be <b>[twelve months]</b> <u>two years</u> calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal.”.</p>
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### SCHEDULE 3

#### SPECIAL TIME LIMITS

##### Part I: Non-encroaching provisions

(section 21(1) of Act)

No. and year	Short title	Provisions
Act No. 24 of 1956	Pension Funds Act, 1956	Sections 30H and 30I of Act 24 of 1956
Act No. 90 of 1986	Sheriffs Act, 1986	Section 36 of Act 90 of 1986
Act No.37 of 2002	Financial Advisory and Intermediary Services Act, 2002	Section 27 of Act 37 of 2002
Act No. 28 of 2014	Legal Practice Act, 2014	Section 79 of Act 28 of 2014

## Part II: Encroaching provisions

(section 21(2) of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended by the insertion after subsection (3) of the following subsection:</p> <p style="padding-left: 40px;"><u>“(3A) Any notice required to be given by the plaintiff by virtue of subsection (2) shall comply with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).”</u></p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>2. Section 6 of Act 63 of 1975 is hereby amended by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;"><u>“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted [within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month’s notice thereof and of the cause of the alleged damage] in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).”</u></p>
Act No. 89 of 1998	Competition Act, 1998	<p><b>Amendment of section 67 of Act 89 of 1998</b></p> <p>3. Section 67 of Act 89 of 1998 is hereby amended by the substitution for the following subsection of subsection (1):</p> <p style="padding-left: 40px;"><u>“(1) A complaint in respect of a prohibited practice [may not] must be initiated in accordance with Part B, Chapter</u></p>

		<p>4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), no more than three years after the practice has ceased.”.</p>
<p>Act No. 40 of 2002</p>	<p>Institution of Legal Proceedings against certain Organs of State Act, 2002</p>	<p><b>Amendment of section 1 of Act 40 of 2002</b></p> <p>4. Section 1 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for the definition of “<b>creditor</b>” of the following definition:</p> <p>“<b>creditor</b>’ means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings [<b>and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be</b>];” and</p> <p>(b) by the substitution for subparagraph (g) of paragraph (vii) of the definition of “<b>organ of state</b>” of the following subparagraphs:</p> <p>“<b>organ of state</b>’ means-</p> <p>“(g) <u>South African Revenue Service established in terms of section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);</u></p> <p>(h) <u>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</u></p> <p>(i) <u>any person in respect of whose debt an organ of state, as contemplated in subparagraphs (a) to (h), is liable;”.</u></p>

**Amendment of section 3 of Act 40 of 2002**

5. Section 3 of Act 40 of 2002 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**

6. 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**

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 processes and 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**

7. Section 5 of Act 40 of 2002 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

		<p>(b) by the substitution for the proviso to subsection (2) of the following proviso:</p> <p>“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, <u>but before the debt becomes extinguished by prescription</u>, serve the process on the organ of state concerned.”.</p>
Act No. 34 of 2005	National Credit Act, 2005	<p><b>Amendment of section 166 of Act 34 of 2005</b></p> <p>8. Section 166 of Act 34 of 2005 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -”.</p>
Act No. 17 of 2008	Companies Act, 2008	<p><b>Amendment of section 219 of Act 17 of 2008</b></p> <p>9. Section 219 of Act 17 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after-”.</p>
Act No. 68 of 2008	Consumer Protection Act, 2008	<p><b>Amendment of section 116 of Act 68 of 2008</b></p> <p>10. Section 116 of Act 68 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -”.</p>

Act 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 11 of Act 28 of 2011 as amended by section 33 of Act 39 of 2013</b></p> <p>11. Section 11 of Act 28 of 2011 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">“(4) <b>[Unless the court otherwise directs, no]</b> <u>No</u> legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of <b>[at least one week of the applicant’s]</b> <u>an intention to institute [the] such [legal] proceedings, in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”.</p>
Act No. 28 of 2014	Legal Practice Act, 2014	<p><b>Amendment of section 78 of Act 28 of 2014</b></p> <p>12. Section 78 of Act 28 of 2014 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) written notice of the claim is given to the Council and to the Board <b>[within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft]</b> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”; and</p> <p>(b) by the deletion of subsection (2).</p>
Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 896 of Act 31 of 2014</b></p> <p>13. Section 896 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) <b>[No process]</b> <u>Process</u> by which <b>[any]</b> judicial proceedings are instituted against the Minister, the Commissioner, SARS, the</p>

		<p>customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act, may <u>not</u> be served <b>[before the expiry of a period of 30 calendar days after delivery of a notice in writing setting forth clearly and explicitly]</b> <u>unless a person has complied with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)[-].”;</u></p> <p>(b) by the deletion of paragraphs (a) to (c) of subsection (1);</p> <p>(c) by the deletion of subsection (3);</p> <p>(d) by the deletion of paragraphs (a) and (b) of subsection (3);</p> <p>(e) by the deletion of subsection (4); and</p> <p>(f) by the deletion of paragraphs (a) and (b) of subsection (4).</p>
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## **SCHEDULE 4**

### **PRESCRIPTION, LIMITATION AND RELATED LAWS**

(section 25 of Act)

<b>No. and year</b>	<b>Act of Parliament</b>
Act No. 32 of 1944	Magistrates' Court Act, 1944
Act No. 17 of 1946	Carriage by Air Act, 1946
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951
Act No. 57 of 1951	Merchant Shipping Act, 1951
Act No. 24 of 1956	Pension Funds Act, 1956
Act No. 34 of 1956	Apportionment of Damages Act, 1956
Act No. 20 of 1957	State Liability Act, 1957
Act No. 25 of 1963	Moratorium Act, 1963
Act No. 91 of 1964	Customs and Excise Act, 1964 (Excise Duty Act, 1964)
Act No. 68 of 1969	Prescription Act, 1969
Act No. 63 of 1975	Expropriation Act, 1975 (Expropriation Act, 2015)
Act No. 51 of 1977	Criminal Procedure Act, 1977
Act No. 53 of 1979	Attorneys Act, 1979 (Legal Practice Act, 2014)
Act No. 90 of 1986	Sheriffs Act, 1986
Act No. 130 of 1993	Compensation for Occupational Injuries and Diseases Act, 1993
Act No. 66 of 1995	Labour Relations Act, 1995
Proclamation No. 21 of 1996	Government Employees Pension Law, 1996
Act No. 56 of 1996	Road Accident Fund Act, 1996 (including Road Accident Fund Regulations, 2008) (Road Accident Benefit Scheme Bill, 2014) (Road Accident Fund Amendment Bill, 2017)
Act No. 94 of 1996	Wreck and Salvage Act, 1996
Act No. 46 of 1998	Administrative Adjudication of Road Traffic Fines Act, 1998

Act No. 52 of 1998	Long-Term Insurance Act, 1998
Act No. 89 of 1998	Competition Act, 1998
Act No. 47 of 1999	National Nuclear Regulator Act, 1999
Act No. 37 of 2002	Financial Advisory and Intermediary Services Act, 2002
Act No. 40 of 2002	Institution of Legal Proceedings against certain Organs of State Act, 2002
Act No. 37 of 2004	Financial Services Ombud Schemes Act, 2004
Act No. 34 of 2005	National Credit Act, 2005
Act No. 32 of 2007	Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007
Act No. 17 of 2008	Companies Act, 2008
Act No. 68 of 2008	Consumer Protection Act, 2008
Act No. 75 of 2008	Child Justice Act, 2008
Act No. 28 of 2011	Tax Administration Act, 2011
Act No. 28 of 2014	Legal Practice Act, 2014 (Attorneys Act, 1979)
Act No. 31 of 2014	Customs Control Act, 2014 (applicable to Customs Duty Act, 2014 and Excise Duty Act, 1964)
Act No. ... of 2015	Expropriation Act, 2015 (Expropriation Bill, 2015) Expropriation Act, 1975

## SCHEDULE 5

### ACTS OF PARLIAMENT REPEALED OR AMENDED

(section 28 of Act)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended-</p> <p>(a) by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted <b>[within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer,]</b> <u>in accordance with Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)</u> <b>[, and may only be instituted if the plaintiff has given the said person not less than one month’s notice thereof and of the cause of the alleged damage].”</b>; and</p> <p>(b) by the insertion after subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3A) <u>Any notice required to be given by the plaintiff by virtue of subsection (2) shall comply with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002.”.</u></p>
Act No. 57 of 1951	Merchant Shipping Act, 1951	<p><b>Amendment of section 344 of Act 57 of 1951</b></p> <p>2. Section 344 of Act 57 of 1951 is hereby amended by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">“(2) The period of extinctive prescription in respect of legal proceedings under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss</p>

		of life or personal injury shall be <b>[one year]</b> <u>two years</u> and shall begin to run on the date of payment.”.
Act No. 34 of 1956	Apportionment of Damages Act, 1956	<p><b>Amendment of section 1 of Act 34 of 1956</b></p> <p>3. Section 1 of Act 34 of 1956 is hereby amended by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted <b>[or notice should have been given]</b> in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.”.</p> <p><b>Amendment of section 2 of Act 34 of 1956</b></p> <p>4. Section 2 of Act 34 of 1956 is hereby amended-</p> <p>(a) by the deletion of the proviso to paragraph (b) of subsection (6); and</p> <p>(b) by the substitution for paragraph (b) of subsection (6) of the following paragraph:</p> <p>“(b) The period of extinctive prescription in respect of a claim for a contribution shall be <b>[twelve months]</b> <u>two years</u> calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal.”.</p>
Act No. 68 of 1969	Prescription Act, 1969	<p><b>Repeal of Act 68 of 1969</b></p> <p>5. Act 68 of 1969 is hereby repealed.</p>
Act No. 62 of 1973	General Amendment Law Act, 1973	<p><b>Amendment of section 41 of Act 62 of 1973</b></p> <p>6. Section 41 of Act 62 of 1973 is hereby repealed.</p>

Act No. 57 of 1975	General Law Amendment Act, 1975	<p><b>Amendment of section 31 of Act 57 of 1975</b></p> <p>7. Section 31 of Act 57 of 1975 is hereby repealed.</p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>8. Section 6 of Act 63 of 1975 is hereby amended-</p> <p>(a) by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted [<b>within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month’s notice thereof and of the cause of the alleged damage</b>] <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”; and</p> <p>(b) by the insertion after subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3A) <u>A debt arising from a claim referred to in subsection (2) must be enforced in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..).</u>”.</p>
Act No. 11 of 1984	Prescription Amendment Act, 1984	<p><b>Amendment of section 1 of Act 11 of 1984</b></p> <p>9. Section 1 of Act 11 of 1984 is hereby repealed.</p>
Act No. 139 of 1992	General Law Amendment Act, 1992	<p><b>Amendment of section 10 of Act 139 of 1992</b></p> <p>10. Section 10 of Act 139 of 1992 is hereby repealed.</p>

Act No. 130 of 1993	Compensation for Occupational Injuries and Diseases Act, 1993	<p><b>Amendment of section 38 of Act 130 of 1993</b></p> <p>11. Section 38 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">“(2) Failure to give notice to an employer as required in subsection (1) shall not <b>[bar]</b> <u>affect</u> a right to compensation if it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident.”;</p> <p>(b) by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) Subject to section 43, failure to give notice to an employer as required in subsection (1), or any error or inaccuracy in such notice, shall not <b>[bar]</b> <u>affect</u> a right to compensation if in the opinion of the Director-General –”; and</p> <p>(c) by the substitution for paragraph (a) of subsection (3) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) the compensation fund or the employer or mutual association concerned, as the case may be, is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; <u>or</u>”.</p> <p><b>Amendment of section 43 of Act 130 of 1993</b></p> <p>12. Section 43 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) A claim for compensation in terms of this Act shall be lodged by or on behalf of the claimant in the prescribed manner with the commissioner or the employer or the mutual association concerned, as the case may be, within <b>[12 months]</b></p>
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		<p><u>four years</u> after the date of the accident or, in the case of death, within <b>[12 months]</b> <u>four years</u> after the date of death.”;</p> <p>(b) by the deletion of paragraph (b) of subsection (1); and</p> <p>(c) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) If any seaman or airman meets with an accident outside the Republic resulting in death, a claim for compensation shall be <b>[instituted]</b> <u>lodged</u> within <b>[12 months]</b> <u>four years</u> after news of the death has been received by any dependant claiming compensation.”.</p> <p><b>Substitution of section 44 of Act 130 of 1993</b></p> <p>13. Section 44 of Act 130 of 1993 is hereby substituted for the following section:</p> <p>44. A right to benefits in terms of this Act <b>[shall lapse if the accident in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, within 12 months after the date of such accident]</b> <u>is governed by Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..).”.</u></p> <p><b>Amendment of section 65 of Act 130 of 1993</b></p> <p>14. Section 65 of Act 130 of 1993 is hereby amended-</p> <p>(a) by the substitution for subsection (4) of the following subsection:</p> <p>“4. Subject to section 66, a right to benefits in terms of this Chapter <b>[shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the date of the commencement of that disease]</b> <u>is</u></p>
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		<p><u>governed by Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20 .. (Act No. .. of 20..)."; and</u></p> <p>(b) by the deletion of subsection (5).</p>
Act No. 132 of 1993	General Law Fourth Amendment Act, 1973	<p><b>Amendment of section 22 of Act 132 of 1993</b></p> <p>15. Section 22 of Act 132 of 1993 is hereby repealed.</p>
Act No. 66 of 1995	Labour Relations Act, 1995	<p><b>Amendment of section 145 of Act 66 of 1995</b></p> <p>16. Section 145 of Act 66 of 1995 is hereby amended by the substitution for subsection (9) of the following subsection:</p> <p>“(9) An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, <b>[1969 (Act 68 of 1969,)]</b> <u>20.. (Act No. .. of 20..)</u>, in respect of that award.”.</p>
Proclamation No. 21 of 1996	Government Employees Pension Law, 1996	<p><b>Amendment of section 26 of Proclamation 21 of 1996</b></p> <p>17. Section 26 of Proclamation 21 of 1996 is hereby amended by the substitution for subsection (3) of the following subsection:</p> <p>“(3) For the purpose of section 12(1) of the Prescription Act, <b>[1969 (Act 68 of 1969,)]</b> <u>20.. (Act No. .. of 20..)</u>, a benefit payable to a member, pensioner or beneficiary in terms of this Law shall be deemed to be due on the date following the date on which a member’s benefit becomes payable in terms of subsection (1) for the period after expiry of 60 days.”.</p>
Act No. 56 of 1996	Road Accident Fund Act, 1996	<p><b>Amendment of section 23 of Act 56 of 1996 as amended by section 10 of Act 19 of 2005</b></p> <p>18. Section 23 of Act 56 of 1996 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p>

		<p>“(1) <b>[Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the]</b> The right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle <b>[in the case where the identity of either the driver or the owner thereof has been established,]</b> shall become prescribed <b>[upon the expiry of a period of three years from the date upon which the cause of action arose]</b> <u>in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..).</u>”;</p> <p>(b) by the deletion of subsection (2); and</p> <p>(c) by the deletion of subsection (3).</p>
Act No. 89 of 1998	Competition Act, 1998	<p><b>Amendment of section 67 of Act 89 of 1998</b></p> <p>19. Section 67 of Act 89 of 1998 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) A complaint in respect of a prohibited practice <b>[may not] must</b> be initiated <u>in accordance with Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), no more than three years after the practice has ceased.</u>”.</p>
Act No. 47 of 1999	National Nuclear Regulator Act, 1999	<p><b>Amendment of section 34 of Act 47 of 1999</b></p> <p>20. Section 34 of Act 47 of 1999 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Despite anything to the contrary in any other law, <u>but subject to Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..),</u> an action for compensation in terms of section 30, 31 or 32 may <b>[, subject to subsection (2),]</b> not be instituted after the expiration of a period of 30 years from -</p>

		<p>(a) the date of the occurrence which gave rise to the right to claim that compensation; or</p> <p>(b) the date of the last event in the course of that occurrence or succession of occurrences, if a continuing occurrence or a succession of occurrences, all attributable to a particular event or the carrying out of a particular operation, gave rise to that right.”;</p> <p>(b) by the deletion of subsection (2); and</p> <p>(c) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) <u>Further to the impediments suspending the running of prescription contained in Part A, Chapter 4 of the Prescription Act, 20.. (Act No. .. of 20..),</u> <b>[The]</b> <u>the running of the prescription period</u> <b>[of two years referred to in subsection (2)]</b> is suspended from the date negotiations regarding a settlement by or on behalf of the claimant and the relevant holder of the nuclear authorisation are commenced in writing until the date any party notifies the other party that the negotiations are terminated.”.</p>
Act No. 40 of 2002	Institution of Legal Proceedings against certain Organs of State Act, 2002	<p><b>Amendment of section 1 of Act 40 of 2002</b></p> <p>21. Section 1 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for the definition of “<b>creditor</b>” of the following definition:</p> <p>“‘<b>creditor</b>’ means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings [<b>and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be</b>];”; and</p> <p>(b) by the substitution for subparagraph (g) of paragraph (vii) of the definition of “<b>organ of state</b>” of the following subparagraphs:</p>

		<p><b>“organ of state” means-</b></p> <p>(g) <u>South African Revenue Service established in terms of section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);</u></p> <p>(h) <u>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</u></p> <p>(i) <u>any person in respect of whose debt an organ of state, as contemplated in subparagraphs (a) to (h), is liable;”.</u></p> <p><b>Amendment of section 3 of Act 40 of 2002</b></p> <p>22. Section 3 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:</p> <p>“(a) <b>[within six months from the date on which the debt became due,]</b> be served on the organ of state in accordance with section 4(1); and”;</p> <p>(b) by the deletion of subsection (3); and</p> <p>(c) by the deletion of subsection (4).</p> <p><b>Amendment of section 4 of Act 40 of 2002</b></p> <p>23. Section 4 of Act 40 of 2002 is hereby amended-</p> <p>(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:</p> <p>“(f) <u>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);</u></p>
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		<p>(g) <u>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);</u></p> <p>(h) <u>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</u></p> <p>(i) <u>a person referred to in paragraph (i) of the definition of "organ of state", to that person."; and</u></p> <p>(b) by the insertion of the following sections after section 4:</p> <p><b><u>4A. Suspension of prescription</u></b></p> <p>(1) <u>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.</u></p> <p>(2) <u>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</u></p> <p><b><u>4B. Failure to give notice</u></b></p> <p><u>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)."</u></p>
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		<p><b>Amendment of section 5 of Act 40 of 2002</b></p> <p>24. Section 5 of Act 40 of 2002 is hereby amended-</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">“(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of <b>[60]</b> <u>90</u> days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).”; and</p> <p>(b) by the substitution for the proviso to subsection (2) of the following proviso:</p> <p style="padding-left: 40px;">“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, <u>but before the debt becomes extinguished by prescription</u>, serve the process on the organ of state concerned.”.</p>
Act No. 37 of 2004	Financial Services Ombud Schemes Act, 2004	<p><b>Amendment of section 15 of Act 37 of 2004</b></p> <p>25. Section 15 of Act 37 of 2004 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) Official receipt of a complaint by an ombud or the statutory ombud suspends any applicable time barring terms, whether in terms of an agreement or any law, or the running of prescription in terms of the Prescription Act, <b>[1969 (Act No. 68 of 1969)]</b> <u>20.. (Act No. .. of 20..)</u>, for the period from such receipt until the complaint has either been withdrawn by the complainant concerned or determined by any such ombud.”.</p>
Act No. 34 of 2005	National Credit Act, 2005	<p><b>Amendment of section 126B of Act 34 of 2005 as amended by section 31 of Act 19 of 2014</b></p> <p>26. Section 126B of Act 34 of 2005 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p>

		<p>“(a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription [<b>under the Prescription Act, 1969 (Act 68 of 1969).</b>] <u>as provided by the Prescription Act, 20.. (Act No. .. of 20..).</u>”; and</p> <p>(b) by the substitution for subparagraph (i) of paragraph (b) of subsection (1) of the following subparagraph:</p> <p>“(i) which debt has been extinguished by prescription [<b>under the Prescription Act 1969 (Act 68 of 1969);</b>] <u>as provided by the Prescription Act, 20.. (Act No. .. of 20..).</u>”.</p> <p><b>Amendment of section 166 of Act 34 of 2005</b></p> <p>27. Section 166 of Act 34 of 2005 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -”.</p>
Act No. 17 of 2008	Companies Act, 2008	<p><b>Amendment of section 219 of Act 17 of 2008</b></p> <p>28. Section 219 of Act 17 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..), [A] a</u> complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after-”.</p>
Act No. 68 of 2008	Consumer Protection Act, 2008	<p><b>Amendment of section 61 of Act 68 of 2008</b></p> <p>29. Section 61 of Act 68 of 2008 is hereby amended-</p>

		<p>(a) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">“(4) <u>Subject to Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..),</u> <b>[Liability]</b> liability of a particular person in terms of this section does not arise if –“;</p> <p>(b) by the substitution for paragraph (d) of subsection (4) of the following paragraph:</p> <p style="padding-left: 40px;">“(d) the claim for damages is brought more than <b>[three years after the -] four years from the due date of debt in respect of -</b>“; and</p> <p>(c) by the substitution for subparagraphs (i) to (iv) of paragraph (d) of subsection (4) of the following subparagraphs:</p> <p style="padding-left: 40px;">“(i) <u>the death or injury of a person contemplated in subsection (5)(a);</u></p> <p style="padding-left: 40px;">(ii) <b>[earliest time at which a person had knowledge of the material facts about an]</b> <u>the illness of a person contemplated in subsection (5)(b);</u> <b>[or]</b></p> <p style="padding-left: 40px;">(iii) <b>[earliest time at which a person with an interest in any property had knowledge of the material facts about]</b> <u>the loss or damage to [that] a person’s property contemplated in subsection (5)(c);</u> or</p> <p style="padding-left: 40px;">(iv) the <b>[latest date on which a person suffered any]</b> <u>economic loss suffered by a person contemplated in subsection (5)(d).</u>”.</p> <p><b>Amendment of section 116 of Act 68 of 2008</b></p> <p>30. Section 116 of Act 68 of 2008 is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) <u>Subject to Part B, Chapter 4, read with Chapter 5 of the Prescription Act, 20..</u></p>
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		(Act No. .. of 20..), [A] a complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -".
Act No. 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 11 of Act 28 of 2011 as amended by section 33 of Act 39 of 2013</b></p> <p>31. Section 11 of Act 28 of 2011 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">“(4) [Unless the court otherwise directs, no] No legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of [at least one week of the applicant’s] an intention to institute [the] such [legal] proceedings, in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).”.</p> <p><b>Amendment of section 190 of Act 28 of 2011 as amended by section 53 of Act 44 of 2014 and section 60 of Act 23 of 2015</b></p> <p>32. Section 190 of Act 28 of 2011 is hereby amended-</p> <p>(a) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">“(4) An amount under subsection (1)(b) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of[-] either an assessment by SARS or a self-assessment, in line with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..).”;</p> <p>(b) by the deletion of paragraph (a) of subsection (4); and</p> <p>(c) by the deletion of paragraph (b) of subsection (4).</p>
Act No. 28 of 2014	Legal Practice Act, 2014	<p><b>Amendment of section 78 of Act 28 of 2014</b></p> <p>33. Section 78 of Act 28 of 2014 is hereby amended-</p>

		<p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p>“(a) written notice of the claim is given to the Council and to the Board <b>[within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft]</b> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>”; and</p> <p>(b) by the deletion of subsection (2).</p>
Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 896 of Act 31 of 2014</b></p> <p>34. Section 896 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) <b>[No process]</b> <u>Process</u> by which <b>[any]</b> judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act, may <u>not</u> be served <b>[before the expiry of a period of 30 calendar days after delivery of a notice in writing setting forth clearly and explicitly]</b> <u>unless a person has complied with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)</u><del>[-]</del>.”;</p> <p>(b) by the deletion of paragraphs (a) to (c) of subsection (1);</p> <p>(c) by the deletion of subsection (3);</p> <p>(d) by the deletion of paragraphs (a) and (b) of subsection (3);</p> <p>(e) by the deletion of subsection (4); and</p> <p>(f) by the deletion of paragraphs (a) and (b) of subsection (4).</p>

		<p><b>Amendment of section 897 of Act 31 of 2014</b></p> <p>35. Section 897 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for the heading of the following heading:</p> <p style="padding-left: 40px;"><b>“[Limitation of period for institution of judicial proceedings against Minister, Commissioner, SARS customs authority, customs officers, SARS officials or state] Prescription of Claims”;</b></p> <p>(b) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;"><b>“(1) [Process by which any judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state] <u>Claims</u> on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act must be [served before the expiry of a period of one year] <u>recovered in accordance with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..)</u>”;</b></p> <p>(c) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;"><b>“(a) if the matter was not the subject of administrative proceedings provided for in Part 3, 4 or 5 of Chapter 37, from the <u>due date [on which the cause of action arose] of debt</u>;</b></p> <p>(d) the deletion of subsection (2); and</p> <p>(e) the deletion of paragraphs (a) and (b) of subsection (2).</p>
Act No. ___ of 2015	Expropriation Act, 2015	<p><b>Amendment of section 5 of Act ___ of 2015</b></p> <p>36. Section 5 of Act ___ of 2015 is hereby amended by the insertion after subsection (8) of the following subsection:</p> <p style="padding-left: 40px;"><b>“(8A) <u>A debt arising from a claim referred to in subsection (7) must be enforced in accordance</u></b></p>

		<u>with the provisions contained in Part A, Chapter 4, read with Chapter 5 of the Prescription Act, 20.. (Act No. .. of 20..)."</u>
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**ANNEXURE B**

REPUBLIC OF SOUTH AFRICA

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

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**DRAFT**  
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**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

**[B 2020]**

## GENERAL EXPLANATORY NOTE:

[            ]        Words in bold type in square brackets indicate omissions from existing enactments

\_\_\_\_\_        Words underlined with a solid line indicate insertions in existing enactment

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## BILL

**To amend the Institution of Legal Proceedings against certain Organs of State Act, 2002, so as to amend certain definitions; to abolish the period within which notice must be served in connection with the institution of legal proceedings; to designate the officials on whom notice must be served in respect of the National Ports Authority Limited, South African Revenue Service, South African Legal Practice Council and South African Legal Practitioners' Fidelity Fund Board; to suspend the running of prescription from the date of service of notice; to provide for the stay of legal proceedings pending the service of notice; to increase the period within which process must be served in connection with the institution of legal proceedings; and to provide for related matters.**

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

### **Amendment of section 1 of Act 40 of 2002**

1. Section 1 of the Institution of Legal Proceedings against certain Organs of State Act, 2002 (hereinafter referred to as the principal Act), is hereby amended-

(a) by the substitution in subsection (1) for the definition of "**creditor**" of the following definition:

“**creditor**” means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings [**and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be**];” and

- (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.

## SCHEDULE

### ACTS OF PARLIAMENT REPEALED OR AMENDED

(section 5)

No. and year	Short title	Extent of repeal or amendment
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	<p><b>Amendment of section 7 of Act 39 of 1951</b></p> <p>1. Section 7 of Act 39 of 1951 is hereby amended by the insertion after subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3A) Any notice required to be given by the plaintiff by virtue of subsection (2) shall comply with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).”.</p>
Act No. 34 of 1956	Apportionment of Damages Act, 1956	<p><b>Amendment of section 1 of Act 34 of 1956</b></p> <p>2. Section 1 of Act 34 of 1956 is hereby amended by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">“(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted <b>[or notice should have been given]</b> in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.”.</p> <p><b>Amendment of section 2 of Act 34 of 1956</b></p> <p>3. Section 2 of Act 34 of 1956 is hereby amended by the deletion of the proviso to paragraph (b) of subsection (6).</p>
Act No. 63 of 1975	Expropriation Act, 1975	<p><b>Amendment of section 6 of Act 63 of 1975</b></p> <p>4. Section 6 of Act 63 of 1975 is hereby amended by the substitution for subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted <b>[within six months after the damage in</b></p>

		<p>question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month's notice thereof and of the cause of the alleged damage] <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>".</p>
Act No. 28 of 2011	Tax Administration Act, 2011	<p><b>Amendment of section 11 of Act 28 of 2011 as amended by section 33 of Act 39 of 2013</b></p> <p>5. Section 11 of Act 28 of 2011 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p>"(4) <b>[Unless the court otherwise directs, no]</b> <u>No</u> legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of <b>[at least one week of the applicant's]</b> <u>an</u> intention to institute <b>[the]</b> <u>such</u> <b>[legal]</b> <u>proceedings, in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>".</p>
Act No. 28 of 2014	Legal Practice Act, 2014	<p><b>Amendment of section 78 of Act 28 of 2014</b></p> <p>6. Section 78 of Act 28 of 2014 is hereby amended-</p> <p>(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p>"(a) written notice of the claim is given to the Council and to the Board <b>[within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft]</b> <u>in accordance with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002).</u>"; and</p> <p>(b) the deletion of subsection (2).</p>

Act No. 31 of 2014	Customs Control Act, 2014	<p><b>Amendment of section 896 of Act 31 of 2014</b></p> <p>7. Section 896 of Act 31 of 2014 is hereby amended-</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;"><b>[No process]</b> <u>Process</u> by which <b>[any]</b> judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of this Act, the Customs Duty Act or the Excise Duty Act, may <u>not</u> be served <b>[before the expiry of a period of 30 calendar days after delivery of a notice in writing setting forth clearly and explicitly]</b> <u>unless a person has complied with the provisions contained in the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002)</u><del>[-]</del>.”;</p> <p>(b) by the deletion of paragraphs (a) to (c) of subsection (1);</p> <p>(c) by the deletion of subsection (3);</p> <p>(d) by the deletion of paragraphs (a) and (b) of subsection (3);</p> <p>(e) by the deletion of subsection (4); and</p> <p>(f) by the deletion of paragraphs (a) and (b) of subsection (4).</p>
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## ANNEXURE C

### List of provisions considered for purpose of harmonisation

#### 1. Carriage by Air Act 17 of 1946

*Schedule: Convention for the Unification of certain rules for International Carriage by Air*

*Article 31 – Timely notice of complaints*

2. In the case of damage, the person entitled to delivery **must** complain to the carrier forthwith after the discovery of the damage, and, at the latest, within **seven days** from the date of receipt in the case of checked baggage and **fourteen days** from the date of receipt in the case of cargo. In the case of **delay**, the complainant must be made at the latest within **twenty-one days** from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. **If no complaint is made within the times aforesaid, no action shall lie against the carrier**, save in the case of fraud in its part.

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*Schedule: Convention for the Unification of certain rules for International Carriage by Air*

*Article 35 – Limitation of Actions*

1. The **right** to damages **shall be extinguished** if an action is not brought within a period of **two years**, reckoned from the **date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped**.

#### 2. Wreck and Salvage Act 94 of 1996

*Schedule 1: Part 1: International Convention on Salvage, 1989*

*Article 23. Limitation of actions*

(1) Any **action relating to payment** under this Convention shall be **time-barred** if judicial or arbitral proceedings have not been instituted within a period of **two years**. The limitation period commences on the **day on which the salvage operations are terminated**.

(2) **The person against whom a claim is made** may at any time **during the running of the limitation period extend that period** by a declaration to the claimant. The period may in the like manner be further extended.

(3) An **action for indemnity** by a person liable may be instituted **even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted**.

### 3. Expropriation (Establishment of Undertakings) Act 39 of 1951

7. *Inspection of land for purposes of expropriation or taking of right to use temporarily.*

(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted within six months after the damage in question has been caused or within six months after the completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the said person not less than **one month's notice** thereof and of the cause of the alleged damage.

7. *Inspection of land for purposes of expropriation or taking of right to use temporarily.*

(2) If any person has suffered any damage as a result of the exercise of any power conferred in terms of subsection (1), the person concerned referred to in section 2 shall be liable to pay damages or to repair such damage.

7. *Inspection of land for purposes of expropriation or taking of right to use temporarily.*

(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted within **six months after the damage in question has been caused** or within **six months after the completion of the acts** contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the said person not less than one month's notice thereof and of the cause of the alleged damage.

### 4. Merchant Shipping Act 57 of 1951

#### 344. **Prescription**

(1) The period of **extinctive prescription** in respect of **legal proceedings** to enforce any **claim or lien** against a ship or its owners in respect of any damage to or loss of another ship, its cargo or freight, or any goods on board such other ship, or damage for loss of life or personal injury suffered by any person on board such other ship, caused by the fault of the former ship, whether such ship be wholly or partly in fault, shall be **two years** and shall begin to run on the **date when the damage or loss or injury was caused**.

(2) The period of **extinctive prescription** in respect of **legal proceedings** under this Act to enforce any **contribution** in respect of an overpaid proportion of any damages for loss of life or personal injury shall be **one year** and shall begin to run on the **date of payment**.

(3) Any court having jurisdiction to try proceedings referred to in subsection (1) or (2) shall, **before or after the expiry of such period**, if it satisfied that owing to the **absence of the defendant ship** from the Republic and its territorial waters and from the country to which the plaintiff's ship belongs or in which the plaintiff resides or carries on business and its territorial waters, the plaintiff has not during such period had a reasonable opportunity of arresting the defendant ship, **extend such period** sufficiently to give him such reasonable opportunity.

## 5. Apportionment of Damages Act 34 of 1956

### 1. *Apportionment of liability in case of contributory negligence*

- (1)  
(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.
- (2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that **the time within which proceedings should have been instituted or notice should have been given** in connection with such proceedings **in terms of any law**, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.

### 2. *Proceedings against and contributions between joint and several wrongdoers*

- (1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person ... for the same damage, such persons ... may be sued in the same action.
- (2) Notice of any action may at any time before the close of pleadings in that action be given -  
(a) by the plaintiff;  
(b) by any joint wrongdoer who is sued in that action, to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.
- (4)  
(a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.  
(b) If no notice is under paragraph (a) or (b) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of subsection (2).
- (6)  
(a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of subsection (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: ....  
(b) The period of **extinctive prescription** in respect of a **claim for a contribution** shall be **twelve months** calculated from **the date of the judgment** in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of **extinctive prescription** in relation to any action which may be instituted against him by the plaintiff, **is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted** against him **or within which notice shall be given that proceedings will be instituted against him**, the provisions of such law shall apply *mutatis mutandis* in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

**6. Expropriation Act 63 of 1975**

6. *Inspection of property for purposes of expropriation or taking of right to use temporarily*

(3) Any proceedings by virtue of the provisions of subsection (2) ... may only be instituted if the plaintiff has given the Minister not less than **one month's notice** thereof and of the cause of the alleged damage.

6. *Inspection of property for purposes of expropriation or taking of right to use temporarily*

(2) If any person has suffered any damage as a result of the exercise of any power conferred in terms of subsection (1), the State shall be liable to pay damages or to repair such damage.

(3) Any proceedings by virtue of the provisions of subsection (2) shall be instituted within **six months after the damage in question has been caused** or within **six months after completion of the acts** contemplated in subsection (1), whichever period is the longer, and .

**Expropriation Bill: original version**

*Investigation and gathering of information for purposes of expropriation*

5(7) If a person suffers damages as a result of the performance of an act contemplated in subsection (2), the expropriating authority must repair those damages or compensate that person for those damages.

5(8)(a) Any legal proceedings by virtue of the provisions of subsection (7) must be instituted within **12 months** after the relevant person **becomes aware of the damage in question, or after the date upon which the claimant might be reasonably expected to have become aware of the damages**, whichever is the earlier date.

5(8)(b) The legal proceedings may only be instituted if the person who institutes the legal proceedings has given the expropriating authority not less than **one month's advance notice** thereof and of the cause of the alleged damage, unless the court on application by such person, orders that non-compliance with this subsection be condoned in the interests of justice.

5(8)(c) Notwithstanding paragraphs (a) and (b) a **court may** on application by the person who seeks to institute legal proceedings **condone** any failure to comply with any time limit referred to in those paragraphs, if it is in the **interests of justice** to do so.

**Expropriation Bill: Version 4**

*Investigation and gathering of information for purposes of expropriation*

5(7) If the property in question is damaged as a result of the performance of an act contemplated in subsection (2), the expropriating authority must **repair** to a reasonable standard, **or compensate** the affected person for that damage **after delivery of a written demand by the affected person** and **without undue delay**.

5(8) Any **legal proceedings** arising out of a claim referred to in subsection (7) **must comply with the relevant provisions of the Institution of Legal Proceedings against certain Organs of State Act, 2002** (Act No. 40 of 2002).

## 7. Compensation for Occupational Injuries and Diseases Act 130 of 1993

### 38. Notice of accident by employee to employer

- (1) Written or verbal **notice of an accident** shall, as soon as possible after such accident happened, be given by or on behalf of the employee concerned to the employer, and **notice of the accident** may also be given as soon as possible to the commissioner in the prescribed manner.
- (2) **Failure to give notice** to an employer as required in subsection (1) **shall not bar a right to compensation** if it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident.
- (3) Subject to section 43, **failure to give notice** to an employer as required in subsection (1), or any error or inaccuracy in such notice, **shall not bar a right to compensation** if in the opinion of the Director-General -
- (a) the compensation fund or the employer or mutual association concerned, as the case may be, is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected;
- (b) such failure, error or inaccuracy was caused by an oversight, absence from the Republic or other reasonable cause.

### 39. Notice of accident by employer to commissioner

- (1) Subject to the provisions of this section an **employer** shall within seven days after having received notice of an accident or having learned in some other way that an employee has met with an accident, **report the accident** to the commissioner in the prescribed manner.

### 43. Claim for compensation

- (1)(a) A **claim** for compensation **in terms of this Act shall be lodged** by or on behalf of the claimant in the prescribed manner with the commissioner or the employer or the mutual association concerned, as the case may be, within **12 months after the date of the accident** or, in the case of death, within **12 months after the date of death**.
- (1)(b) If a claim for compensation is not lodged as prescribed in paragraph (a), such claim for compensation shall not be considered in terms of this Act, **except where the accident concerned has been reported in terms of section 39**.
- (3) If any **seaman or airman** meets with an accident outside the Republic resulting in **death**, a claim for compensation **shall be instituted** within **12 months after news of the death has been received** by any dependant claiming compensation.

### 44. Prescription

A **right** to benefits **in terms of this Act shall lapse** if the **accident** in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, within **12 months after the date of such accident**.

### 65. Compensation for occupational diseases

- (4) Subject to section 66, a **right** to benefits in terms of this Chapter **shall lapse** if any **disease** referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within **12 months** from the **commencement of that disease**.
- (5) For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the **date on which a medical practitioner diagnosed that disease for the first time** or such earlier date as the Director-General may determine if it is more favourable to the employee.
- (6) The provisions of this Act regarding an accident shall apply *mutatis mutandis* to a disease referred to in subsection (1), except where such provisions are clearly inappropriate.

**8. Road Accident Fund Act 56 of 1996**

24. *Procedure*

- (6) No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent -
- (a) before the **expiry** of a period of **120 days** from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and
- (b) before all requirements contemplated in section 19(f) have been complied with:

Provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.

23. ***Prescription of claim***

(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the **right** to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the **identity of either the driver or the owner thereof has been established**, shall become **prescribed** upon the **expiry** of a period of **three years** from the **date upon which the cause of action arose**.

- (2) **Prescription** of a claim for compensation referred to in **subsection (1)** shall not run against -
- (a) a **minor**;
- (b) any **person detained as a patient in terms of any mental health legislation**; or
- (c) a **person under curatorship**.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of **five years** from the date on which the cause of action arose.

**Road Accident Fund Regulations, 2008**

2. *Further provision for liability of Fund in terms of section 17(1)(b)*

(1)(b) A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the **identity of neither the owner nor the driver thereof has been established**, shall become **prescribed** upon the expiry of a period of **two years** from the **date upon which the cause of action arose**, unless a claim has been lodged in terms of paragraph (a).

(1)(c) In the event of a claim having been lodged in terms of paragraph (a) such claim shall not prescribe before the expiry of a period of **five years** from the date upon which the cause of action arose.

(2) Notwithstanding anything to the contrary contained in any law a claim for compensation referred to in section 17(1)(b) of the Act shall be sent or delivered to the Fund **within two years** from the date upon which the cause of action arose **irrespective of any legal disability** to which the third party concerned may be subject.

Road Accident Fund Act, 1996  
*Procedure for claiming benefits*

**Road Accident Benefit Scheme Bill, 2014**

*Procedure for claiming benefits*

43.

(2) Other than payment for contracted health care service providers and for a funeral benefit in terms of section 40(2), the Administrator shall not be liable for the provision of a benefit until a claim for such benefit is submitted in the manner set out in the rules.

*Obligations of the claimant and beneficiary*

44.

(2) The Administrator shall not be obligated to process any claim until a claimant has complied with any requirement imposed on him or her in terms of this section. The Administrator may suspend any benefit until a beneficiary has complied with any requirement imposed on him or her in terms of this section.

**Claims lapse in certain circumstances**

47.

(1) Subject to the provisions of subsections (2) and (3), unless a claim is submitted in terms of this Act, any **right to claim a benefit** shall lapse **three years after the claim arose**.

(2) A claim shall be deemed not to arise until the qualifying person has **knowledge of the facts from which the claim arose**: Provided that a qualifying person shall be **deemed to have such knowledge** if he or she could have acquired it by exercising reasonable care.

(3) If the qualifying person-

- (a) is a **minor** or is **insane** or is a **person under curatorship** or is **prevented by superior force including any law or any order of court from submitting a claim**; or
- (b) **is deceased and an executor of the estate in question has not yet been appointed,**

the three year period is deemed not to be completed before one year after the relevant impediment referred to in paragraph (a) or (b) has ceased to exist.

**Road Accident Fund Amendment Bill 3 of 2017**

**Amendment of section 23 of Act 56 of 1996, as amended by section 10 of Act 19 of 2005**

7. Section 23 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent **[in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established,]** shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.”.

## 9. National Nuclear Regulator Act 47 of 1999

### 29. *Financial security by holder of nuclear installation licence*

- (1) The Minister must, on the recommendation of the board and by notice in the *Gazette*, categorise the various nuclear installations in the Republic, based on the potential consequences of a nuclear accident.
- (2) The Minister must, on the recommendation of the board and in consultation with the Minister of Finance and by notice in the *Gazette*, determine -
- (a) the level of financial security to be provided by holders of nuclear installation licences in respect of each of those categories; and
- (b) the manner in which that financial security is to be provided,
- in order for the holder of a nuclear installation licence to fulfil any liability which may be incurred in terms of section 30.
- (5) The holder of a nuclear installation licence must annually provide proof to the Regulator that any claim for compensation to an amount contemplated in section 30 (2), can be met.

### 30. *Strict liability of holder of nuclear installation licence for nuclear damage*

- (1) Subject to subsections (2), (3), (5) and (6), only a holder of a nuclear installation licence is, whether or not there is intent or negligence on the part of the holder, liable for all nuclear damage caused by or resulting from the relevant nuclear installation during the holder's period of responsibility -
- (a) by anything being present or which is done at or in the nuclear installation or by any radioactive material or material contaminated with radioactivity which has been discharged or released, in any form, from the nuclear installation; or
- (b) by any radioactive material or material contaminated with radioactivity which is subject to the nuclear installation licence, while in the possession or under the control of the holder of that licence during the conveyance thereof from the nuclear installation, to any other place in the Republic or in the territorial waters of the Republic from or to any place in or outside the Republic.
- (2) The liability for nuclear damage by any holder of a nuclear installation licence is limited, for each nuclear accident, to the amounts determined in terms of section 29(2).
- (5) Nothing in this section precludes a person from claiming a benefit in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), but such person may not benefit both in terms of this Act and the Compensation for Occupational Injuries and Diseases Act, 1993.
- (6) The holder of a nuclear installation licence is not liable to any person for any nuclear damage -
- (a) to the extent to which such nuclear damage is attributable to the presence of that person or any property of that person at or in the nuclear installation or on the site in respect of which the nuclear installation licence has been granted, without the permission of the holder of that licence or of a person acting on behalf of that holder; or
- (b) if that person intentionally caused, or intentionally contributed to, such damage.
- (7) The holder of a nuclear installation licence retains any contractual right of recourse or contribution which the holder has against any person in respect of any nuclear damage for which that holder is liable in terms of subsection (1).
- (9) Nothing in this section affects any right, which any person has in terms of any contract of employment, to benefits more favourable than those to which that person may be entitled in terms of this section.

### 32. *Liability of holder of certificate of registration for nuclear damage*

- (1) The liability of a holder of a certificate of registration, for any nuclear damage caused by or resulting from any action carried out by virtue of that certificate during his or her period of responsibility, must be determined in accordance with -
- (a) the common law; or
- (b) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), as the c

## 9. National Nuclear Regulator Act 47 of 1999

### 34. *Prescription of actions*

(1) Despite anything to the contrary in any other law, an **action for compensation** in terms of section 30, 31 or 32 **may**, subject to subsection (2), **not be instituted** after the **expiration** of a period of **30 years** from -  
(a) the **date of the occurrence** which gave rise to the right to claim that compensation; or  
(b) the date of the last event in the course of that occurrence or succession of occurrences, if a continuing occurrence or a succession of occurrences, all attributable to a particular event or the carrying out of a particular operation, gave rise to that right.

(2) If the claimant concerned **became aware**, or by **exercising reasonable care could have become aware**, of -  
(a) the identity of the holder of the nuclear authorisation concerned; and  
(b) the facts from which the right to claim compensation arose,

**during the period of 30 years** contemplated in subsection (1), an **action for compensation** in terms of section 30, 31 or 32 **may not be instituted** after the **expiration** of a period of **two years** from the **date on which he or she so became aware or could have become aware**.

(3) The running of the period of two years referred to in subsection (2) is **suspended** from the **date negotiations regarding a settlement** by or on behalf of the claimant and the relevant holder of the nuclear authorisation are commenced in writing until the date any party notifies the other party that the negotiations are terminated.

### 35. Compensation for injuries of Regulator's employees

(1) If a person who is employed in any capacity by or on behalf of the Regulator, while so performing services, **suffers a personal injury or contracts a disease attributable to ionizing radiation from any radioactive material, or to the flammable, explosive, poisonous or special properties of radioactive material, or to the ionizing radiation produced by any apparatus, and in respect of which no liability can be established in terms of section 30, 31 or 32**, the Regulator must, subject to subsection (2) -

(a) defray all reasonable expenses incurred by or on behalf of such person in respect of any medical treatment, including, but not limited to, the supply and maintenance of any artificial part of the body or other device, necessitated by such injury or disease; and  
(b) **pay compensation in respect of disablement or death caused by such injury or disease.**

(2) Nothing in this section precludes an employee of the Regulator from claiming a benefit in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), but such employee may not benefit both in terms of this Act and the Compensation for Occupational Injuries and Diseases Act, 1993.

(3) Nothing in this section affects any right, which any person has in terms of any contract of employment, to benefits more favourable than those to which that person may be entitled in terms of this section.

## 10. Tax Administration Act 28 of 2011

### 11. *Legal proceedings involving Commissioner*

(4) **Unless the court otherwise directs, no legal proceedings** may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written **notice** of at least **one week** of the applicant's intention to institute the legal proceedings.

(5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice.

### 190. *Refunds of excess payments*

(1) SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188(3)(a), of-

- (a) an amount properly refundable under a tax Act and if so reflected in an assessment; or
- (b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.

(4) An amount under subsection (1)(b) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of-

- (a) an **assessment by SARS**, within **three years** from the later of the **date of the assessment** or the **erroneous payment**; or
- (b) **self-assessment**, within **five years** from the later of the **date the return had to be submitted** or, if no return is required, **payment had to be made** in terms of the relevant tax Act or the erroneous payment was made.

## 11. Customs Control Act 31 of 2014 (Customs Duty Act 30 of 2014 and Excise Duty Act 91 of 1964)

### 896. **Advance notice of judicial proceedings** against Minister, Commissioner, customs authority, customs officers, SARS officials or state

(1) **No process** by which any judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of **this Act, the Customs Duty Act** or the **Excise Duty Act may be served** before the **expiry** of a period of **30 calendar days** after delivery of a **notice** in writing setting forth clearly and explicitly-

- (a) the cause of action;
- (b) the name and place of residence of the person who is to institute the proceedings; and
- (c) the name and address of that person's attorney or agent, if any.

(3) The Minister, the Commissioner, SARS, the customs authority, a customs officer or a SARS official against whom the proceedings are to be instituted-

- (a) **may** by agreement with the person who is to institute the proceedings **shorten** the 30 calendar days' period referred to in subsection (1); or
- (b) **must shorten** that period if a court so orders.

(4) A court may, when the interests of justice so requires-

- (a) **exempt an applicant** from any or all of the notice requirements in this section; or
- (b) **shorten the 30 calendar days' period** referred to in subsection (1).

### 897. **Limitation of period for institution of judicial proceedings** against Minister, Commissioner, SARS, customs authority, customs officers, SARS officials or state

(1) **Process** by which any judicial proceedings are instituted against the Minister, the Commissioner, SARS, the customs authority, a customs officer, a SARS official or the state on a cause of action arising from the enforcement or implementation of **this Act, the Customs Duty Act** or the **Excise Duty Act must be served** before the **expiry** of a period of **one year**-

- (a) if the matter was not the subject of administrative proceedings provided for in Part 3, 4 or 5 of Chapter 37, from the **date on which the cause of action arose**;

(2) The Minister, the Commissioner, SARS, the customs authority, a customs officer or a SARS official against whom the proceedings are to be instituted-

- (a) **may** by agreement with the person who is to institute the proceedings **extend the one year period** referred to in subsection (1); or
- (b) **must extend** that period if a court so orders.

## 12. Pension Funds Act 24 of 1956

### 1. *Definitions*

(1) In this Act, unless the context indicates otherwise -

“complaint” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

### 30D. *Main object of Adjudicator*

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

### 30E. *Disposal of complaints*

(1) In order to achieve his or her main object, the Adjudicator -

- (a) shall, subject to paragraph (b), investigate any complaint and may make the order which any court of law may make;

### 30H. *Jurisdiction and **prescription***

(2) The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject-matter of the investigation.

- (3) Receipt of a **complaint** by the Adjudicator shall **interrupt** any running of prescription in terms of the **Prescription Act, 1969** (Act 68 of 1969), or the rules of the fund in question.

### 30I. *Time limit for lodging of complaints*

(1) The Adjudicator **shall not** investigate a **complaint** if the **act or omission** to which it relates occurred more than **three years** before the **date on which the complaint is received** by him or her in writing.

- (2) The provisions of the **Prescription Act, 1969** (Act 68 of 1969), relating to a debt apply in respect of the **calculation** of the three year period referred to in subsection (1).

### 30O. *Enforceability of determination*

(1) Any determination of the Adjudicator shall be deemed to be a civil judgement of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.

(2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged.

### 13. Sheriffs Act 90 of 1986

#### 26. *Establishment and control of Fidelity Fund for Sheriffs*

- (1) There is hereby established a fund to be known as the Fidelity Fund for Sheriffs, and into which shall be paid—
- (a) interest paid to the Fund in terms of section 22 (4);
  - (b) the prescribed contribution referred to in section 30(1)(c)(ii) or 31(2);
  - (c) interest derived from the investment of moneys in the Fund;
  - (d) moneys recovered on behalf of the Fund by virtue of the provisions of section 39;
  - (e) moneys mentioned in section 41 (2);
  - (f) moneys which may accrue to the Board from any other source.

#### 27. *Utilization of Fund*

- (1) Subject to the provisions of this Chapter, the moneys in the Fund shall be utilized for—
- (a) the settlement of claims admitted against the Fund or judgments, including costs, obtained against the Fund;
  - (b) any contribution in the discretion of the Board in respect of expenses incurred by a claimant to verify his claim;
  - (c) legal expenses incurred in defending an action against the Board in respect of the Fund or otherwise incurred in relation to the Fund;
  - (d) premiums payable in respect of insurance agreements entered into by the Board under section 29 (1);

#### 30. *Prohibition of performance of functions of sheriff in certain circumstances*

- (1) A sheriff or his or her deputy shall not perform any functions assigned to a sheriff by or under any law unless—
- (a) the sheriff is the holder of a fidelity fund certificate; and
  - (b) the sheriff obtains professional indemnity insurance to the satisfaction of the Board to cover any liability which he or she may incur in the course of the performance of his or her functions in terms of this Act; or
- (c) in the case of an acting sheriff—
- (i) the acting sheriff is the holder of a fidelity fund certificate; or
  - (ii) the acting sheriff has paid the prescribed contribution to the Board.

#### 35. *Liability of Fund*

Subject to the provisions of this Chapter, moneys in the Fund shall be utilized to compensate any person who, after the commencement of this Act, suffers any loss or damage -

- (a) as a result of -
  - (i) the failure of a sheriff to pay out or deliver to any such person any money or property over which he acquired control by virtue of his office, or the proceeds of the sale of such goods; or
  - (ii) the act or omission of a sheriff or his deputy sheriff in connection with -
    - (aa) the service or execution of any process;
    - (bb) the arrest of any person; or
    - (cc) subject to section 55, the rescue or escape of any person arrested by him or committed to his custody; and
- (b) for which the sheriff, the sheriff and his deputy sheriff jointly or his deputy sheriff is liable in law.

**13. Sheriffs Act 90 of 1986**

36. *Claims against Fund*

- (1) A claim against the Fund in respect of a contingency referred to in section 35 may be lodged with the Board on the prescribed form.
- (2) Subject to the provisions of subsection (3), no person shall have a **claim** against the Fund in respect of a contingency referred to in section 35 unless –
- (a) the claimant lodges his **claim** with the Board in terms of subsection (1) within **three months after he became aware of the contingency**.
- (3) If the Board is satisfied that, having regard to the circumstances, a **claim** or the proof required by it was lodged or furnished **as soon as possible**, it may at its discretion **extend** the period mentioned in paragraph (a) or (b) of subsection (2), as the case may be.
- (5) Any dispute relating to the amount of compensation to be paid out of the Fund shall be settled by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965).

37. *Actions against Board in respect of Fund*

- (1) If the Board refuses to admit a claim against the Fund, the claimant may, subject to this section and section 38, institute an action against the Board in respect of the Fund in the court within the area of jurisdiction of which the cause of action arose.
- (2) An action against the Board in respect of the Fund shall not be instituted without leave of the Board unless the claimant has exhausted all available legal remedies against the sheriff or deputy sheriff in respect of whom the claim arose, or his estate, and against all other persons liable in respect of the loss or damage suffered by the claimant.

## 14. Financial Advisory and Intermediary Services Act 37 of 2002

### 1. *Definitions and application*

(1) In this Act, unless the context indicates otherwise

"complaint" means, subject to section 26(1)(a)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative -

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
- (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
- (c) has treated the complainant unfairly;

### 20. *Office of Ombud for Financial Services Providers*

(3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances,

### 27. *Receipt of complaints, **prescription**, jurisdiction and investigation*

(2) Official receipt of a complaint by the Ombud **suspends the running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969)**, for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.

(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

(a)(i) The Ombud **must** decline to investigate any **complaint** which relates to an **act or omission** which occurred on or after the date of commencement of this Act but on a date **more than three years before the date of receipt of such complaint** by the Office.

(a)(ii) Where the complainant was **unaware** of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years **commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence**, whichever occurs first.

(b)(i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation.

(b)(ii) Where any proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation must not be proceeded with.

(c) The Ombud may on reasonable grounds determine that it is **more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process**, and decline to entertain the complaint.

### 28. *Determinations by Ombud*

(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include -

- (a) the dismissal of the complaint; or
- (b) the upholding of the complaint, wholly or partially, in which case -
  - (i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;
  - (ii) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;
  - (iii) the Ombud may make any other order which a Court may make.

**14. Financial Advisory and Intermediary Services Act 37 of 2002**

(5) A determination -  
(a) or a final decision of the board of appeal, as the case may be, is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court;

*40. Saving of rights*

No provision of this Act, and no act performed under or in terms of any such provision, may be construed as affecting any right of a client, or other affected person, to seek appropriate legal redress in terms of this Act, the common law or any other statutory law, and whether relating to civil or criminal matters, in respect of the rendering of any financial service by an authorised financial services provider, or representative of such provider, or any act of a person who is not an authorised financial services provider or a representative of such a provider.

## 15. Competition Act 89 of 1998

### 21. *Functions of Competition Commission*

- (1) The Competition Commission is responsible to-
- (c) investigate and evaluate alleged contraventions of Chapter 2 [prohibited practices];

### 49B. *Initiating complaint*

- (2) Any person may-
- (b) submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form.
- (3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.

### 50. *Outcome of complaint*

- (2) Within one year after a complaint was submitted to it, the Commissioner must-
- (a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or
- (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

### 51. *Referral to Competition Tribunal*

- (2) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

### 52. *Hearings before Competition Tribunal*

- (2) Subject to subsections (3) and (4), the Competition Tribunal-
- (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principle of natural justice....

### 58. *Orders of Competition Tribunal*

- (1) In addition to its other powers in terms of this Act, the Competition Tribunal may-
- (a) make an appropriate order in relation to a prohibited practice, including-
- (i) interdicting any prohibited practice;
- (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
- (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
- (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for purposes of section 65;
- (vi) declaring the whole or any part of an agreement to be void;
- (vii) ordering access to an essential facility on terms reasonably required;
- (c) subject to sections 13(6) and 14(2), **condone**, on good cause shown, any **non-compliance** of-
- (i) the Competition Commission or Competition Tribunal rules, or
- (ii) **a time limit** set out in this Act.

## 15. Competition Act 89 of 1998

### 62. *Appellate jurisdiction*

(1) The Competition Tribunal and Competition Appeal Court share **exclusive** jurisdiction in respect of the following matters-

(a) Interpretation and application of Chapters 2 [prohibited practices], 3 [merger control], and 5 [investigation and adjudication procedures] ...

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice.

### 64. *Status and enforcement of orders*

(1) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.

### 65. *Civil actions and jurisdiction*

(1) Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(6) A person who has suffered loss or damage as a result of a prohibited practice-

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or from the Judge President of the Competition Appeal Court, in the prescribed form-

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

### 67. *Limitations of bringing action*

(1) A **complaint** in respect of a **prohibited practice** may not be initiated more than **three years after the practice has ceased**.

**16. Institution of Legal Proceedings against certain Organs of State Act 40 of 2002**

3. *Notice of intended legal proceedings to be given to organ of state*

- (1) **No legal proceedings** for the recovery of a debt may be instituted against an organ of state unless-
  - (a) the creditor has given the organ of state in question **notice** in writing of his or her or its intention to institute the legal proceedings in question; or
  - (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
    - (i) without such notice; or
    - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A **notice** must-
  - (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).
- (3) For purposes of subsection (2)(a)-
  - (a) a debt may not be regarded as being due until the creditor has **knowledge** of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge.
- (4)
  - (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for **condonation** of such failure.
  - (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-
    - (i) the debt has not been extinguished by prescription;
    - (ii) good cause exists for the failure by the creditor; and
    - (iii) the organ of state was not unreasonably prejudiced by the failure.

5. *Service of process*

- (2) **No process** referred to in subsection (1) **may be served** as contemplated in that subsection **before the expiry of a period of 60 days after the notice**, where applicable, has been served on the organ of state in terms of section 3(2)(a): 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 serve the process on the organ of state concerned.

## 17. National Credit Act 34 of 2005

### 1. Definitions

In this Act –

“consumer court” means a body of that name, or a consumer tribunal, established by provincial legislation;  
“prohibited conduct” means an act or omission in contravention of this Act.

### 15. Enforcement functions of National Credit Regulator

The National Credit Regulator must enforce this Act by –

- (a) promoting informal resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute;
- (b) receiving complaints concerning alleged contraventions of this Act;
- (f) investigating and evaluating alleged contraventions of this Act.

### 83. Declaration of reckless credit agreement

(1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.

- (2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court or Tribunal, as the case may be, may make an order –
  - (a) setting aside all or part of the consumer’s rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or
  - (b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).

### 85. Court may declare and relieve over-indebtedness

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer’s circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer’s over-indebtedness.

### 136 Initiating a complaint to National Credit Regulator

(1) Any person may submit a complaint concerning an alleged contravention of this Act or a complaint concerning an allegation of reckless credit to the National Credit Regulator in the prescribed manner and form.

### 139. Investigation by National Credit Regulator

(1) Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may –

- (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under this Act;
- (b) refer the complaint to –
  - (i) a debt counsellor, if the matter appears to concern either reckless credit or possible over-indebtedness of the consumer; or
  - (ii) the ombud with jurisdiction, consumer court or an alternative dispute resolution agent for the purposes of assisting the parties to resolve the dispute in terms of section 134; or
- (c) direct an inspector to investigate the complaint as quickly as practicable, in any other case.

## 17. National Credit Act 34 of 2005

### 142 *Hearings before Tribunal*

- (1) The Tribunal must conduct its hearings in public-
- (a) in an inquisitorial manner;
  - (b) as expeditiously as possible;
  - (c) as informally as possible; and
  - (d) in accordance with the principle of natural justice.

### 150. *Orders of Tribunal*

In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008 including -

- (a) declaring conduct to be prohibited in terms of this Act;
- (b) interdicting any prohibited conduct;
- (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;
- (h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or

### 152. *Status and enforcement of orders*

- (1) Any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court, ....

### 164. *Civil actions and jurisdiction*

(1) Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.

(2) In any action in a civil court, other than a High Court, if a person raises an issue concerning this Act or a credit agreement which the Tribunal -

- (a) has previously considered and determined that court -
  - (i) must not consider the merits of that issue; and
  - (ii) must apply the determination of the Tribunal with respect to the issue; or
- (b) has not previously determined, that court may -
  - (i) consider the merits of that issue, or
  - (ii) refer the matter to the Tribunal for consideration and determination.

(3) A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct -

- (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or
- (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form -
  - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;
  - (ii) stating the date of the Tribunal's finding; and
  - (iii) setting out the relevant section of this Act in terms of which the Tribunal made its finding.

### 166. *Limitations of bringing action*

- (1) A **complaint** in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than **three years** after-
- (a) the **act or omission** that is the cause of the complaint; or
  - (b) in the case of a course of conduct or continuing practice, **the date that the conduct or practice ceased**.

## 18. Companies Act 17 of 2008

### 156. *Alternative procedures for addressing complaints or securing rights*

A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by-

- (b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;
- (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
- (d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 219 with-
  - (i) the Panel, if the complaint concerns a matter within its jurisdiction; or
  - (ii) the Commission in respect of any matter arising in terms of this Act, other than a matter contemplated in subparagraph (i).

### 166. *Alternative dispute resolution*

- (1) As an alternative to applying for relief to a court, or filing a complaint with the Commission in terms of Part D, a person ..., may refer a matter ... or complaint for resolution by mediation, conciliation or arbitration to -
  - (a) the Companies Tribunal;
  - (b) an accredited entity, as defined in subsection (3); or
  - (c) any other person.

### 168. *Initiating a complaint*

- (1) Any person may file a complaint in writing -
  - (a) with the Panel in respect of a matter contemplated in Part B or C of Chapter 5, or in the Takeover Regulations; or
  - (b) with the Commission in respect of any provision of this Act not referred to in paragraph (a),

alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed.

### 169. *Investigation by Commission or Panel*

- (1) Upon initiating or receiving a complaint, ..., the Commission or Panel, as the case may be, may-
  - (b) if they think it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal, or to an accredited entity, as defined in section 166(3), with a recommendation that the complainant seek to resolve the matter with the assistance of that agency or person; or
  - (c) direct an inspector or investigator to investigate the complaint as quickly as practicable, in any other case.

## 18. Companies Act 17 of 2008

### 170. *Outcome of investigation*

- (1) After receiving the report of an inspector or independent investigator, the Commission or Panel, as the case may be, may-
- (a) excuse any person as a respondent in the complaint, if the Commission or Panel considers it reasonable to do so, ...;
  - (b) refer the complaint to the Companies Tribunal, or to the Commission or the Panel as the case may be, if the matter falls within their respective jurisdictions in terms of this Act;
  - (c) issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek a remedy in court;
  - (d) in the case of the Commission, propose that the complainant and any affected person meet with the Commission or with the Companies Tribunal, with a view to resolving the matter by consent order;
  - (e) commence proceedings in a court in the name of the complainant, if the complainant-
    - (i) has a right in terms of this Act to apply to a court in respect of that matter; and
    - (ii) has consented to the Commission or Panel, as the case may be, doing so.

### 174. *Referral of complaints to court*

- (1) If the Commission or Panel, as the case may be, issues a notice of non-referral in response to a complaint, the complainant concerned may apply to a court for leave to refer the matter directly to the court, but no such complaint may be referred directly to a court in respect of a person who has been excused as a respondent, as contemplated in section 170(1)(a).
- (2) A court-
- (a) may grant leave contemplated in subsection (1) only if it appears that the applicant has no other remedy available in terms of this Act; and
  - (b) if it grants leave, and after conducting a hearing, determines that the respondent has contravened the Act, may-
    - (i) require the Commission or Executive Director, as the case may be, to issue a compliance notice sufficient to address that contravention; or
    - (ii) make any other order contemplated in this Act that is just and reasonable in the circumstances.

### 219. *Limited time for initiating complaints*

- (1) A complaint in terms of this Act **may not** be initiated by, or made to, the Commission or the Panel, **more than three years after-**
- (a) the **act or omission** that is the cause of the complaint; or
  - (b) in the case of a course of conduct or continuing practice, **the date that the conduct or practice ceased**.

## 19. Consumer Protection Act 68 of 2008

### 1. Definitions

In this Act-

“consumer court” means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation;  
“prohibited conduct” means an act or omission in contravention of this Act;

### 61. Liability for damage caused by goods

- (4) **Liability** of a particular person in terms of this section **does not arise** if –
- (d) the claim for damages is brought more than **three years** after the –
- (i) **death or injury of a person** contemplated in subsection (5)(a);
- (ii) earliest time at which a person had **knowledge of the material facts about an illness** contemplated in subsection (5)(b); or
- (iii) earliest time at which a person with an interest in any property had **knowledge of the material facts about the loss or damage to that property** contemplated in subsection (5)(c);
- or
- (iv) **the latest date on which a person suffered any economic loss** contemplated in subsection (5)(d).

### 69. Enforcement of rights by consumer

A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of a particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)-
- (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court; or
- (iv) filing a **complaint** with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, **if all other remedies available to that person in terms of national legislation have been exhausted.**

### 71. Initiating complaint to Commission

(1) Any person may file a complaint concerning a matter contemplated in section 69(c)(iv) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act.

### 72. Investigation by Commission

- (1) Upon initiating or receiving a complaint in terms of this Act, the Commission may—
- (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint—
- (i) appears to be frivolous or vexatious;
- (ii) does not allege any facts which, if true, would constitute grounds for a remedy under this Act; or
- (iii) **is prevented, in terms of section 116**, from being referred to the Tribunal;
- (b) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to attempt to resolve the dispute in terms of section 70, unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner;
- (c) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or
- (d) direct an inspector to investigate the complaint as quickly as practicable, in any other case.

## 19. Consumer Protection Act 68 of 2008

### 73. *Outcome of investigation*

- (1) After concluding an investigation into a complaint, the Commission may-
- (a) issue a notice of non-referral to the complainant in the prescribed form;
- (c) if the Commission believes that a person has engaged in prohibited conduct-
- (ii) propose a draft consent order in terms of section 74;
- (iii) make a referral in accordance with subsection (2); or
- (iv) issue a compliance notice in terms of section 100.
- (2) In the circumstances contemplated in subsection (1)(c)(iii), the Commission may refer the matter-
- (a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, ...; or
- (b) to the Tribunal.

### 75. *Referral to Tribunal*

- (1) If the Commission issues a notice of non-referral in response to a complaint, **other than on the grounds contemplated in section 116**, the complainant concerned may refer the matter directly to-
- (a) the consumer court, if any, in the province within which the complainant resides, ...; or
- (b) the Tribunal, with leave of the Tribunal.

### 99. *Enforcement functions of Commission*

The Commission is responsible to enforce this Act by-

- (a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;
- (b) receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3;
- (d) investigating and evaluating alleged prohibited conduct and offences;
- (e) issuing and enforcing compliance notices;
- (f) negotiating and concluding undertakings and consent orders contemplated in section 74;
- (h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act.

### 115. *Civil actions and jurisdiction*

- (1) If an agreement, provision of an agreement, or a notice to which a transaction or agreement is purported to be subject, has been declared by a provision of this Act to be void, that agreement, provision or notice must be regarded as having been of no force or effect at any time, unless a court has declared that the relevant provision of this Act does not apply to the impugned agreement, provision or notice.
- (2) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct -
- (a) may not institute a claim in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or
- (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form-
- (i) certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;
- (ii) stating the date of the Tribunal's finding, if any; and
- (iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.

### 116. *Limitations of bringing action*

- (1) A **complaint** in terms of this Act may not be referred or made to the **Tribunal** or to a **consumer court** more than **three years** after -
- (a) **the act or omission** that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, **the date that the conduct or practice ceased**.

## 20. Legal Practice Act 28 of 2014

### 53. *Continued existence of Attorneys Fidelity Fund*

(1) Despite the provisions of section 119, the Attorneys Fidelity Fund established by section 25 of the Attorneys Act continues to exist as a juristic person under the name Legal Practitioners' Fidelity Fund.

### 54. *Revenue of Fund*

The Fund consists of-

- (b) annual contributions paid by applicants for the issue of Fidelity Fund certificates and any interest on, or penalties in respect of, overdue contributions;
- (f) money received by or on behalf of the Fund from any insurer;

### 55. *Liability of Fund*

(1) The Fund is liable to reimburse persons who suffer pecuniary loss, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney or an advocate referred to in section 34(2)(b) as such, if the theft is committed-

- (a) by an attorney in that practice or advocate, or any person employed by that practice or supervised by that attorney or advocate;
- (b) by an attorney or person acting as executor or administrator in the estate of a deceased person; or
- (c) by an attorney or person employed by that attorney who is a trustee in an insolvent estate or in any other similar capacity,

excluding a curator to a financial institution in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a liquidator of a mutual bank in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993).

### 74. *Contributions to Fund by legal practitioners*

- (1) Subject to the provisions of this section, every attorney, practising on his or her own account or in partnership, and every advocate referred to in section 34(2)(b), must, annually when he or she applies for a Fidelity Fund certificate, pay to the Council-
  - (i) the amount as may be fixed by the Board from time to time in respect of the cost of group professional indemnity insurance arranged by the Board pursuant to the provisions of section 77(2);

### 76. *Re-insurance*

- (1) The Board may, in its discretion, enter into a contract with any person or corporation carrying on fidelity insurance business in terms of which the Fund will be indemnified to the extent and in the manner provided in that contract against liability to pay claims under this Act.
- (2) A contract referred to in subsection (1) must be entered into in respect of legal practitioners referred to in section 84(1).

### 77. *Provision of insurance cover and suretyships*

- (1) The Board may-
- (b) together with any other person or institution, establish a scheme, underwritten by a registered insurer,

## 20. Legal Practice Act 28 of 2014

in order to provide insurance cover, subject to the provisions of the Short Term Insurance Act, 1998 (Act No. 53 of 1998), to legal practitioners referred to in section 84(1) in respect of any claims which may arise from the professional conduct of those legal practitioners.

(2) The Board may enter into a contract with a company or scheme referred to in subsection (1), or any company carrying on professional indemnity insurance business, for the provision of group professional indemnity insurance to legal practitioners referred to in section 84(1) to the extent and in the manner provided in the contract.

### 78. Procedure for instituting claims against Fund

(1) No person has a claim against the Fund in respect of any theft contemplated in section 55, unless-

(a) written **notice** of the claim is given to the Council and to the Board within **three months** after the claimant **became aware** of the theft or, by the **exercise of reasonable care, should have become aware** of the theft.

(b) within six months after a written demand has been sent to him or her by the Board, the claimant furnishes the Board with proof as the Board may reasonably require.

(2) If the Board is satisfied that, having regard to all the circumstances, **a claim or the proof required** by it has been lodged or furnished within a reasonable period, it may in its discretion **extend** any of the periods referred to in subsection (1).

### 79. Actions against the Fund

(1) The Fund is not obliged to pay any portion of a claim which **could reasonably be recovered from any other person liable**.

(4) Any **action** against the Fund in respect of loss suffered by any person as a result of theft committed by a legal practitioner referred to in section 84(1), candidate attorney or employee of any such legal practitioner or juristic entity, **must** be instituted within **one year** of the **date of a notification** directed to that person or his or her legal representative by the Fund, informing him or her that the Fund rejects the claim to which the action relates.

## Attorneys Act 53 of 1979

### 48. Claims against fund: notice, proof and extension of periods for claims

(1) No person shall have a claim against the fund in respect of any theft contemplated in section 26 unless -

(a) written **notice** of such claim is given to the council of the society concerned and to the board of control within **3 months** after the claimant **became aware of the theft or by the exercise of reasonable care should have become aware** of the theft.

(2) If the board of control is satisfied that, having regard to all the circumstances, **a claim or the proof required** by the board has been lodged or furnished as soon as practicable, it may in its discretion **extend** any of the periods referred to in subsection (1).

### 49. Actions against Fund

(1) **No action** shall **without leave of the board of control** be instituted against the fund unless the claimant has **exhausted all available legal remedies against the practitioner** in respect of whom the claim arose or his or her estate and against all other persons liable in respect of the loss suffered by the claimant.

(2) Any action against the fund in respect of any loss suffered by any person as a result of any theft committed by any practitioner, his or her candidate attorney or employee, **shall be instituted** within **one year** of the **date of a notification** directed to such person or his or her legal representative by the board of control informing him or her **that the board of control rejects the claim** to which such action relates.

## Ancillary provisions

### 1. Magistrates' Court Act 32 of 1944

#### 74V. *Interruption of prescription*

(1) In the case of any debt mentioned in the statement referred to in section 74A(1), **prescription** shall be **interrupted** on the **date on which such statement is lodged** and, in the case of any debt not mentioned in such statement, prescription shall be interrupted on the **date on which any claim against the debtor is lodged with the court or the administrator**.

(2) If the relevant prescriptive period of a debt referred to in subsection (1), had it not been for the provisions of subsection (1) would be completed on or before or within one year of, the day on which the **restriction referred to in subsection 74(P)(1) has ceased to exist**, the prescriptive period shall not be complete until a year after the said day has elapsed.

### 2. Labour Relations Act 66 of 1995

#### 145 *Review of arbitration awards*

(9) An application to set aside an **arbitration award** in terms of this section **interrupts the running of prescription** in terms of the Prescription Act, 1969 (Act 68 of 1969), in respect of that award.

### 3. Government Employees Pension Law, 1996 (Proclamation 21 of 1996)

#### 26 *Period within which payment of benefits shall commence*

(3) For the purpose of **section 12(1) of the Prescription Act**, 1969 (Act 68 of 1969), a benefit payable to a member, pensioner or beneficiary in terms of this Law shall be **deemed to be due on the date following the date on which a member's benefit becomes payable** in terms of subsection (1) for the period after expiry of 60 days.

#### 4. Administrative Adjudication of Road Traffic Offences Act 46 of 1998

##### 31 Penalties

- (1) The penalty prescribed under section 29(b) for each infringement must, despite any other law, be imposed administratively in terms of Chapter III, subject to the discount contemplated in section 17(1)(d).
- (2) The **laws on prescription are not applicable** to penalties and fees payable in terms of this Act, and may be collected at any time.

#### 5. Long-Term Insurance Act 52 of 1998

##### 61 Prescription of certain debt

Debt consisting of interest on an unpaid premium, or on a loan granted by a long-term insurer on sole security of a long-term policy, or on an advance granted by a long-term insurer in respect of an amount which is to be payable under a long-term policy, shall, in the case of a long-term policy entered into after 31 December 1973, **not prescribe before the liability of the long-term insurer under the long-term policy prescribes.**

#### 6. Financial Services Ombud Schemes Act 37 of 2004

##### 15. Prescription and saving of rights

- (1) Official receipt of a **complaint** by an ombud or the statutory ombud **suspends** any applicable **time barring** terms, whether in terms of an agreement or any law, **or the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969)**, for the period from such receipt until the complaint has either been withdrawn by the complainant concerned or determined by any such ombud.
- (2) No provision of this Act must be construed as affecting any right of a client or other affected person to **seek appropriate legal redress by virtue of common or statutory law, before or after the consideration of a complaint by an ombud or the statutory ombud.**

**7. Customs Duty Act 30 of 2014**

**228 Application of certain provisions of Customs Control Act**

- (3) Section 908 of the Customs Control Act **may not be applied to extend a period-**
- (a) within which a duty must be paid;
  - (b) within which a person may apply for a refund or a drawback;
  - (c) within which the Commissioner, the customs authority or a customs officer is required or allowed in terms of a provision of this Act to perform a specific act;
  - (d) referred to in section 86 (1) or 206 (1); or
  - (e) **within which an action prescribes in terms of the Prescription Act, 1969 (Act 68 of 1969).**

**8. Customs Control Act 31 of 2014**

**908 Extension of timeframes or periods and postponement of dates**

- (3) Subsection (1) **may not be applied to extend a timeframe or period-**
- (a) within which a person may apply for a refund in terms of this Act;
  - (b) within which the Commissioner, the customs authority or a customs officer is required in terms of a provision of this Act to perform a specific act;
  - (c) referred to in section 284 (1), 398 (1) or 879 (1); or
  - (d) **within which an action prescribes in terms of the Prescription Act, 1969 (Act 69 of 1969).**

## **ANNEXURE D**

### **PRESCRIPTION ACT 68 OF 1969**

*(English text signed by the State President)*

*[Assented To: 23 May 1969]*

*[Commencement Date: 1 December 1970]*

[Proc. R284 / GG 2922 / 19701113]

#### **as amended by:**

General Law Amendment Act 62 of 1973

General Law Amendment Act 57 of 1975

Prescription Amendment Act 11 of 1984

General Law Amendment Act 139 of 1992

General Law Fourth Amendment Act 132 of 1993

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

[with effect from 16 December 2007]

Prevention and Combating of Trafficking in Persons Act 7 of 2013

[with effect from 9 August 2015]

## **ACT**

**To consolidate and amend the laws relating to prescription.**

## **ARRANGEMENT OF SECTIONS**

### **CHAPTER I**

#### **ACQUISITION OF OWNERSHIP BY PRESCRIPTION**

1. Acquisition of ownership by prescription
2. Involuntary loss of possession

3. Completion of prescription postponed in certain circumstances
4. Judicial interruption of prescription
5. Application of this Chapter to a prescription not completed at the commencement of this Act

## **CHAPTER II**

### **ACQUISITION AND EXTINCTION OF SERVITUDES BY PRESCRIPTION**

6. Acquisition of servitudes by prescription
7. Extinction of servitudes by prescription
8. Application of certain provisions of Chapter I to the acquisition and extinction of servitudes by prescription
9. This Chapter not applicable to public servitudes

## **CHAPTER III**

### **PRESCRIPTION OF DEBTS**

10. Extinction of debts by prescription
11. Periods of prescription of debts
12. When prescription begins to run
13. Completion of prescription delayed in certain circumstances
14. Interruption of prescription by acknowledgement of liability
15. Judicial interruption of prescription
16. Application of this Chapter

## **CHAPTER IV**

### **GENERAL**

17. Prescription to be raised in pleadings
18. Laws prohibiting acquisition of land or any right in land by prescription not affected by this Act
19. This Act binds the State

- 20. This Act not applicable where Black law applies
- 21. ....
- 22. Repeal of laws
- 23. Short title and commencement

Schedule - Laws repealed

## **CHAPTER I**

### **ACQUISITION OF OWNERSHIP BY PRESCRIPTION**

#### **1. Acquisition of ownership by prescription**

Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.

#### **2. Involuntary loss of possession**

The running of prescription shall not be interrupted by involuntary loss of possession if possession is regained at any time by means of legal proceedings instituted within six months after such loss for the purpose of regaining possession, or if possession is lawfully regained in any other way within one year after such loss.

**3. Completion of prescription postponed in certain circumstances**

- (1) If-
- (a) the person against whom the prescription is running is a minor or is insane, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or  
[Para. (a) substituted by s. 22 of Act 132 of 1993.]
  - (b) the person in favour of whom the prescription is running is outside the Republic, or is married to the person against whom the prescription is running, or is a member of the governing body of a juristic person against whom the prescription is running; and  
[Para. (b) substituted by s. 10 of Act 139 of 1992.]
  - (c) the period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist,

the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).

- (2) Subject to the provisions of subsection (1), the period of prescription in relation to fideicommissary property shall not be completed against a fideicommissary before the expiration of a period of three years after the day on which the right of that fideicommissary to that property vested in him.

#### **4. Judicial interruption of prescription**

- (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the possessor of the thing in question of any process whereby any person claims ownership in that thing.
- (2) Any interruption in terms of subsection (1), shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the person claiming ownership in the thing in question does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (3) If the running of prescription is interrupted as contemplated in subsection (1), a new period of prescription shall commence to run, if at all, only on the day on which final judgment is given.
- (4) For the purposes of this section 'process' includes a petition, a notice of motion, a rule *nisi* and any document whereby legal proceedings are commenced.

#### **5. Application of this Chapter to a prescription not completed at the commencement of this Act**

A prescription which has not been completed at the commencement of this Act, shall be governed by the provisions of this Chapter in respect of the course of the unexpired portion of the period of prescription.

## **CHAPTER II**

### **ACQUISITION AND EXTINCTION OF SERVITUDES BY PRESCRIPTION**

#### **6. Acquisition of servitudes by prescription**

Subject to the provisions of this Chapter and of Chapter IV, a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years.

#### **7. Extinction of servitudes by prescription**

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

#### **8. Application of certain provisions of Chapter I to the acquisition and extinction of servitudes by prescription**

- (1) The provisions of sections 2, 3 4 and 5 shall apply *mutatis mutandis* to the acquisition of a servitude by prescription.
- (2) The provisions of sections 3, 4 and 5 shall apply *mutatis mutandis* to the extinction of a servitude by prescription.

- (3) For the purposes of the application of the provisions of section 4 (1) in relation to the acquisition or extinction of a servitude by prescription, any reference therein to the possessor of the thing shall be construed as a reference to the person in whose favour the prescription is running; and any reference therein to a claim to the ownership in the thing shall be construed as a reference to a claim for the termination of the exercise of the rights and powers or of the breach of the servitude, as the case may be, by virtue of which the prescription is running.

**9. This Chapter not applicable to public servitudes**

The provisions of this Chapter shall not apply to public servitudes.

## **CHAPTER III**

### **PRESCRIPTION OF DEBTS**

**10. Extinction of debts by prescription**

- (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
- (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
- (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

## **11. Periods of prescription of debts**

The periods of prescription of debts shall be the following:

- (a) thirty years in respect of-
  - (i) any debt secured by mortgage bond;
  - (ii) any judgment debt;
  - (iii) any debt in respect of any taxation imposed or levied by or under any law;
  - (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

## **12. When prescription begins to run**

- (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.  
[Subs. (1) substituted by s. 68 of Act 32/2007]
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.  
[Sub-s. (3) substituted by s. 1 of Act 11 of 1984.]
- (4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 17, 18(2), 23, and 24(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.  
[Subs. (4) added by s. 68 of Act 32/2007 and substituted by s. 48 of Act 7/2013 w.e.f. 9 August 2015 and s. 8 of Act 8/2017 w.e.f. 2 August 2017]

### **13. Completion of prescription delayed in certain circumstances**

- (1) If-
- (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1); or
  - (b) the debtor is outside the Republic; or  
[Para. (b) substituted by s. 11 (a) of Act 139 of 1992.]
  - (c) the creditor and debtor are married to each other; or
  - (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
  - (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or
  - (f) the debt is the object of a dispute subjected to arbitration; or
  - (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966; or  
[Para. (g) substituted by s. 11 (b) of Act 139 of 1992.]

- (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

- (2) A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.

#### **14. Interruption of prescription by acknowledgement of liability**

- (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
- (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

## **15. Judicial interruption of prescription**

- (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (3) If the running of the prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.
- (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.
- (5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

- (6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.

## **16. Application of this Chapter**

- (1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
- (2) The provisions of any law-
- (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or
  - (b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.  
[Para. (b) substituted by s. 31 of Act 57 of 1975.]  
[S. 16 substituted by s. 41 (1) of Act 62 of 1973.]

## **CHAPTER IV**

### **GENERAL**

#### **17. Prescription to be raised in pleadings**

- (1) A court shall not of its own motion take notice of prescription.
- (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.

#### **18. Laws prohibiting acquisition of land or any right in land by prescription not affected by this Act**

The provisions of this Act shall not affect the provisions of any law prohibiting the acquisition of land or any right in land by prescription.

#### **19. This Act binds the State**

This Act shall bind the State.

#### **20. This Act not applicable where Black law applies**

In so far as any right or obligation of any person against any other person is governed by Black law, the provisions of this Act shall not apply.

#### **21. ....**

[S. 21 repealed by s. 12 of Act 139 of 1992.]

**22. Repeal of laws**

Subject to the provisions of section 16 (2), the laws mentioned in the Schedule to this Act are hereby repealed to the extent set out in the third column of that Schedule.

**23. Short title and commencement**

This Act shall be called the Prescription Act, 1969, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

**Schedule**  
**LAWS REPEALED**

<b>NO. AND YEAR</b>	<b>SHORT TITLE</b>	<b>EXTENT OF REPEAL</b>
Act No. 18 of 1943	Prescription Act, 1943	The whole
Act No. 46 of 1945	Finance Act, 1945	Sections 27, 28, 29 and 30
Act No. 62 of 1955	General Law Amendment Act, 1955	Section 23
Act No. 50 of 1956	General Law Amendment Act, 1956	Section 16
Act No. 80 of 1964	General Law Amendment Act, 1964	Section 6
Proclamation No. 13 of 1943 of the Administrator of South-West Africa	Prescription Proclamation, 1943	The whole
Proclamation No. 17 of 1944 of the Administrator of South-West Africa	Prescription Amendment Proclamation, 1944	The whole
Ordinance No. 36 of 1965 of South-West Africa	General Law Amendment Ordinance, 1965	Section 3

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