



DISCUSSION PAPER 126

PROJECT 125

PRESCRIPTION PERIODS

JULY 2011

CLOSING DATE FOR COMMENT:
30 SEPTEMBER 2011

ISBN: 978-0-621-40078-6

Introduction

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

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Preface

This discussion paper, which reflects information accumulated at the end of December 2010, has been prepared to elicit responses from parties and to serve as a basis for the SALRC's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the SALRC may issue a report on this subject which will be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament.

The views, conclusions and recommendations in this paper are not the SALRC's final views. The paper 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 focussed submissions before the SALRC.

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

Respondents are requested to submit written comments and representations to the SALRC by 30 September 2011 at the address appearing on the previous page. Comment can be sent by e-mail or by post.

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

Summary of Recommendations

Poverty, illiteracy and the differences of language and culture are peculiar characteristics of the South African society. Most people who sustain compensable injuries or otherwise entitled to financial compensation for injury are either unaware of, or poorly informed about their legal rights and what they should do in order to enforce those. Adding to the particular vulnerability of many are the difficulties of securing legal and professional assistance. In short, legal service is a scarce resource in South Africa.¹

Although the objective of having prescription periods is to create legal certainty, such an objective needs to be measured against the background of the circumstances that prevail in our society as mentioned above.

The Constitution protects the right to equality and access to courts. There is manifest unfairness in according public institutions special protections, which are not extended to private persons with claims against the state. This may imply an absence of equal protection and benefit of the law. Some prescription periods contained in statutes create inequalities between people with civil claims against public institutions and those against other defendants. Claims against public institutions are subject to stringent conditions contained in legislation. The difference - which results in the inequality - arises from the different treatment between potential defendants also manifests in another area. Public institutions with claims against individuals are not subject to any statutorily prescribed limitations.

By not affording the plaintiff with condonation for failure to institute a claim within the prescribed period, claimants with genuine claims may not have the opportunity to institute their cases even where there is a just cause for not instituting such a claim on time.

The SALRC's investigation has revealed the following options for reform:

- (a) Different prescription periods as provided in section 11 be retained.

¹ *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at 1190.

- (b) That the prescription period set out in section 11(d) of the Prescription 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.
- (c) That the notice requirement of the intention to institute legal proceedings against organs of state before issuing of summons be abolished.
- (d) That courts should be granted the power to condone, on good cause shown, the late institution of a claim, where the debt has prescribed in terms of section 11(d) of the Prescription Act. A court considering whether or not to grant condonation should consider the following factors:
 - (i) the nature of the relief sought;
 - (ii) the extent and cause of the delay;
 - (iii) the effect of the delay on the administration of justice and other litigants;
 - (iv) the prospects of success of the case; and
 - (v) on good cause shown.
- (e) That the prescription period in section 44 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 be repealed.
- (f) That section 23 of the Road Accident Fund Act 56 of 1996 should be amended and that prescription should start to run from the date on which the accident occurred unless the creditor has knowledge of the facts from which the accident arises: Provided that a creditor shall be deemed to have such knowledge if s/he could have acquired it by reasonable care.
- (g) That damages claims which arises from offences listed in section 18 of the Criminal Procedure Act 51 of 1977 should be suspended until the criminal trial is concluded.

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CHAPTER 1

INTRODUCTION

A. Background to the investigation

1.1. In September 1998 the South African Law Reform Commission (SALRC) submitted a supplementary report on the investigation into time limits for the institution of actions against the State to the Minister of Justice and Constitutional Development. As a result of this report the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 was passed

1.2 The SALRC's recommendations dealt mainly with notice periods but the SALRC also recommended that debts should be extinguished by prescription as provided for in section 344 of the Merchant Shipping Act 57 of 1951, section 2(6)(b) of the Apportionment of Damages Act 34 of 1956 and the Prescription Act 68 of 1969.

1.3 The Portfolio Committee on Justice and Constitutional Development recommended when it reported on the Bill which subsequently became Act 40 of 2002, that as no comprehensive review of all the provisions providing for different prescription periods, whether of a delictual or contractual nature, has been undertaken the Minister should request the SALRC to include in its programme an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods. Following a request by the Minister, the SALRC agreed and the review of prescription periods was included in SALRC's programme.

1.4 In August 2003 the SALRC published an Issue Paper for information and comment.²The publication of this Issue Paper was the first step in the consultation process. The problems that had given rise to the investigation were explained and possible options for solving these problems were pointed out.

² South African Law Reform Commission *Prescription Periods* Project 126 Issue Paper 23 August 2003.

B. Prescription as a legal concept

1.5 Prescription is a means of acquiring or losing rights, or of freeing oneself from obligations, by the passage of time under conditions prescribed by law. It derived from classical Roman law and further developed under Justinian.³ Prescription is found in virtually all legal systems in the Western tradition including the law of the Church.⁴

1.6 In South Africa extinctive prescription has been governed by legislation since early colonial times and the practical importance of this legal institution is evidenced by the large volume of case law on the subject. Despite its practical importance the South African law of extinctive prescription has not been the subject of extensive theoretical analysis, perhaps because it is often superficially perceived as a technical and theoretically unrewarding area of statute law.⁵

1.7 When the interim Constitution of the Republic of South Africa came into force on 27 April 1994 there was a large number of statutes prescribing special time limits for the institution of actions (mostly actions in delict) against the state, statutory bodies and local government institutions.

1.8 The prescription provisions of these statutes are characterized in particular by abridged prescription periods (six months for example) and the non suspension of the running of time even if the claimant is for some valid reason deterred from enforcing his claim.⁶ In addition these provisions mostly require that an action against

³ W Buckard *A Text Book of Roman law from Augustus to Justinian* 3rd rev ed Cambridge, England: Cambridge University, 1966)241-252; F Schultz *Classical Roman Law* (Oxford England: Oxford University, 1961) 355-361.

⁴ J Beal *Commentary on the Code of Canon law* Study 230.

⁵ MM Loubser *Extinctive Prescription* 1996 Juta & Co Ltd 1.

⁶ MM Loubser *Extinctive Prescription* 1996 Juta & Co Ltd 171.

the state or a statutory body or local authority be preceded by formal written notice of the proposed action ⁷

C. Exposition of the problem

1.9 Apartheid legacy to the democratic South Africa includes poverty, illiteracy and inequality. Most persons who sustain compensable injuries or are otherwise entitled to financial compensation are either unaware of, or poorly informed about their legal rights and what they should do in order to enforce those. The normal difficulties of accessing legal services are exacerbated by gross inequality, high cost of legal services and the remoteness of the law from most people's lives.⁸ Justice is even harder to come by.⁹

⁷ The legislation is relatively recent and has not been the subject of much judicial consideration.

Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 provides:

- (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 without such notice; or
 - (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) The notice contemplated in subsection (1) 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); and
 - (b) briefly set out
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor
- (4)
 - (a) if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) 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.

⁸ Dugard J "Courts and the poor in South Africa: A critique of systematic judicial failures to advance transformative justice" *SAJHR* 2008 216.

⁹ *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzza and Others* 2001 (4) SA 1184 (SCA) 1190.

1.10 Although the objective of having prescription periods is to create legal certainty, such an objective needs to be measured against the background of the circumstances referred to above that prevail in our society.

1.11 The Prescription Act provides different periods for different claims save where an Act of Parliament provides otherwise, the period of prescription of any debt not listed in section 11(d) shall be three years. This on its own does not create a primary prescription period of claims.¹⁰

1.12 Currently there is no condonation where there is late filing of a claim. Claimants with genuine claims may not have the opportunity to institute their cases even where there is a just cause for failure to institute such claim.

1.13 The different prescription periods contained in statutes create inequalities between people with claims against public institutions and those against other defendants. Claims against public institutions are subject to stringent conditions prescribed by legislation. This distinction between potential defendants also manifest in another area. Public institutions with claims against individuals are not subject to any statutorily prescribed limitations.¹¹

1.14 There is manifest unfairness in according public institutions special protections. This implies an absence of equal protection and benefit of the law. It also raises the question whether such differentiation is rationally connected to the purpose which it seeks to achieve. Furthermore, it is not clear what effect the notice of intention to institute legal proceedings against an organ of state is on the running of the prescription period. This raises the question whether the notice period suspends the running of prescription or it continues to run when the notice of intention to institute legal proceedings has been duly filed.

1.15 In terms of section 12(3) of the Prescription Act, prescription commences when the creditor acquires knowledge of the identity of the debtor and of the facts from which the claim arises. In contrast, section 23(1) of the Road Accident Fund Act of 1956, prescription runs from the date upon which the cause of action arose. The

¹⁰ See section 11 of the Prescription Act of 1969.

¹¹ MM Loubser *Extinctive Prescription* 1996 Juta & Co Ltd171.

provision may leave insufficient and inadequate room for the exercise of the right to approach the courts.

1.16 In terms of section 18 of the Criminal Procedure Act 51 of 1977, a right to institute criminal proceedings does not prescribe in serious offences, but a damages claim arising from the same criminal conduct prescribes within three years. It is not clear as to when does prescription starts to run especially where a victim or dependant awaits the judgment of a criminal court before instituting a damages claim.

D. Scope of the review

1.17 The Portfolio Committee on Justice (“the Portfolio Committee”) requested an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods. The Minister of Justice and Constitutional Development requested an expansion of the investigation to include a review of prescription periods.

1.18 The review is limited to harmonisation of prescription periods, and does not include a general review of prescription in general, or the extinction of debts by prescription in particular.¹²

¹² CF Stryian “Verjaring van borgverpligtinge redux” 2001 *THRHR* 316-320.

CHAPTER 2

HISTORY OF PRESCRIPTION

A. Roman law

2.1 The law of extinctive prescription is statutory in origin. In classical Roman law actions were not generally subject to time limits and the first general prescription period was instituted by the emperor Theodosius in 424 AD.¹³ Known as *praescriptio longi temporis*,¹⁴ it applied to *actiones in rem*¹⁵ and *actiones in personam*¹⁶ and imposed a prescription period of thirty and sometimes forty years.¹⁷

2.2 The action for the rescission of a sale on the ground of a latent defect¹⁸ was subject to a prescription period of six months.¹⁹ This action and the action for price reduction on the ground of latent defect,²⁰ which was subject to a prescription period of a year, probably overlapped with the general contractual action, the *actio empti*, in the time of Justinian when forms of action were already absolute. Upon rescission of the contract, a right to *restitutio in integrum* arose and in Roman law a prescription of four years applied in respect of *restitutio in integrum* generally. The *actio redhibitoria* was subject to the prescription of thirty years.

¹³ C39 3; Kaser *Römisches Privatrecht* 198637.

¹⁴ *Praescriptio* or rather *temporis praescriptio* signified the *Exceptio* or an answer which a defendant has to the demand of a plaintiff, founded on the circumstances of the lapse of time. The word has properly no reference to the plaintiff's loss of right, but to the defendant's acquisition of a right by which he excludes the plaintiff from prosecuting his suit.

¹⁵ The *actiones in rem* applied to those cases where a man claimed a corporal thing as his property, or claimed a right, as for instance the use and enjoyment of a thing, or the right to a road over a piece of ground. The *in rem actio* was called *vindicatio*.

¹⁶ The *in rem personam* was against a person who was bound to the plaintiff by contract or delict.

¹⁷ Krause "The history and nature of acquisitive prescription and limitation of actions in Roman-Dutch law" 1923 *SALJ* 30-31.

¹⁸ This action was known as *actio redhibitoria*.

¹⁹ De Zuluets *The Roman Law of Sale* (1945)47.

²⁰ This action was known as *actio quanti minoris*.

2.3 As to the prescription periods applicable to rescission of contract by means of the *actio redhibitoria*, and *restitutio in integrum* generally, the Roman-Dutch authors for the most parts adhere to the law of Justinian, but sometimes indicate changes in prescription periods that had become part of Dutch law.²¹ *Groenewegen* states that in applying for *restitutio in integrum* a period of four years was allowed and that even if the proceedings were only terminated long after the lapse of four years, and the courts in any event usually granted condonation where proceedings were instituted too late.²²

B. South African law development

2.4 Courts in the Cape Colony,²³ held that rescission by means of *actio redhibitoria* was subject to a prescription period of six months, but that the court could exercise its discretion to extend this period.²⁴

2.5 Section 2 of the Prescription Act 6 of 1861 provided that no suit or action upon any bill of exchange, promissory note, or other liquid document of debt of such a nature as to be capable of sustaining a claim for the sort of interlocutory judgment shall be capable of being brought at any time after the expiration of eight years from the time when the cause of action upon such liquid document first accrued, then after the expiration of eight years from the time of the taking effect of the Act.

2.6 Section 3 provided that the provisions of section 2, shall extend and apply to the respective suits and actions following, that is to say: to suits and actions for money due for goods sold and delivered, for money lent by the plaintiff to the defendant, for money paid by the plaintiff for the use of the defendant, for money had and received by the defendant for the use of the plaintiff, for rent upon any lease or contract for hire, for money claimed upon or by virtue of an admission of an amount

²¹ MM Loubser "Is a right of rescission subject to extinctive prescription?" 1990 *THRHR* 45.

²² Groenewegen *A treatise on the laws abrogated and no longer in use in Holland and neighbouring regions (De Legibus Abrogatis)* (transl Beinhart 1975) Ad C2 52(53) 7 1-3.

²³ Prescription Act 6 of 1861.

²⁴ *Nurse v Malan* 1909 TS 202; *Haviside v Jordan* 1903 SC 149; *Christie v Etheridge* 1902 SC 367; *Sander & Co v Douglas* 1900 NLR 246.

due upon an account stated as settled, for money due upon an award of arbitrators, for money due as the purchase money of fixed property, for money claimed for work and labour done and materials for the same provided, and for work and labour done and materials for the same provided, and for money claimed upon or by virtue of any policy of assurance.

2.7 Section 5 provided that no suit or action for the fees and disbursements of advocates, attorneys, public notaries, conveyancers, land surveyors or persons practising any branch of the medical profession, or for the amount of any baker's or butcher's, or tailor's, or dressmaker's, or boot and shoemaker's bill or account, nor any suit or action for the wages as a servant of any person coming under the definition of the term "servant", was capable of being brought at any time after the expiration of three years from the time of the taking effect of the Act.

2.8 The Prescription Act 6 of 1861 was amended by the Prescription Amendment Act 7 of 1865.

2.9 Section 106 provided for a thirty-year prescription period in regard to immovable property in the Cape Colony, and servitudes upon or connected therewith, concluded on and after the 1st day of January 1867.

2.10 In Natal the period of prescription of obligations was regulated by Prescription Act 14 of 1861. This Act was similar to the Cape Act, though there was a difference in the periods. Where the Cape act requires eight years, the Natal Act required six years. Fees for advocates, salaries and wages, price of merchandise sold by retail are prescribed after two years, but if there is a written promise to pay, the period was six years.²⁵

2.11 In the Transvaal Colony prescription was regulated by the Prescription Act 26 of 1904.

²⁵ Sections 2-3 of the Prescription Act 14 of 1861.

2.12 In terms of section 3, the period of prescription in respect of proceedings at common law known as the *actio redhibitoria* or the *actio quanti minoris* was one year.

2.13 Section 4 provided that the period of prescription in an action for defamation of character shall be one year which shall be reckoned from the date when the defamation was first brought to the knowledge of the creditor, or where the debtor is not known to the creditor, the period of prescription shall be reckoned from the date on which the creditor ascertained or might reasonably have expected to ascertain the name of the debtor.

2.14 In terms of section 5 the period of prescription in respect of vindicatory actions against *bona fide* possessors of movables was one year except in the case of sales of movables for cash which a prescription period of fourteen days reckoned from the date of delivery of the movables to the purchaser, was imposed.

2.15 A three year period of prescription applied in respect of-

- (a) the fees, disbursements, salary, wages or any other remuneration whatever due to any person for services rendered, labour done or work performed by him in his profession , trade, occupation or calling; or
- (b) The price of movables sold and delivered, or of labour done, and materials provided, or of board or lodging supplied; or
- (c) any oral contract; or
- (d) rent due upon an agreement in writing or interest; or
- (e) all actions for damages; other than those for which another period of prescription is laid down in this Act; or
- (f) *conditiones indebiti* and *condictiones sine causa*.

2.16 A bill of exchange or other liquid document or in respect of any written acknowledgement of debt or written contract of any nature, general or special or a promissory note were subject to a six year prescription period.

2.17 Prescription in respect of matters for which a period was not fixed, was thirty years. Prescription did not apply to a judgment of a court of law.

2.18 In the Orange Free State prescription was regulated by Chapter XXIII of the Law Book. Actions in all contracts in writing or on liquid documents prescribed after eight years with the exception of²⁶ mortgage bonds and judgments of courts of law. Claims other than those provided for in section 2 prescribed after four years, unless there was a written acknowledgement or written promise then the period is eight years.

2.19 The Prescription Acts of all colonies were repealed by the Prescription Act 18 of 1943. The Act provided the following different prescription periods:

- (a) ninety days in respect of the recovery of the excess in value over five hundred pounds of any donation which has not been registered or notarially executed.
- (b) one year in respect of-
 - (i) an action for defamation;
 - (ii) the *actio redhibitoria*;
 - (iii) the *actio quanti minoris*;
 - (iv) an action based on *laesio enormis*;
- (c) three years in respect of –
 - (i) any oral contract;
 - (ii) any remuneration whatever or disbarments due to any person for or in connection with services rendered or work done by him;
 - (iii) the price of movables sold and delivered, materials provided or board or lodging supplied;
 - (iv) rent due upon any contract;
 - (v) interest due upon any contract including a mortgage bond;
 - (vi) actions for damages other than those for which another period is laid in the act;
 - (vii) the *actio doli*;
 - (viii) subject to the provisions of paragraphs (a) and (b) *conditiones indebiti*, *conditiones sine qua caus* and proceedings at common law for *restitutio in integrum* ;
- (d) six years in respect of written contracts, including bills of exchange and other liquid documents but excluding mortgage bonds unless a shorter period is applicable under any provision of paragraph (c)
- (e) thirty years in respect of-
 - (i) mortgage bond;
 - (ii) judgments of a court of law for payments of money, or for specific performance, or other such judgments which require further action by the person in whose favour they have been given, in order to secure compliance therewith;
 - (iii) any other action for which a period has not been provided in the Act.

2.20 The Prescription Act of 1943 was repealed by the Prescription Act of 1969.

²⁶ Section 2.

CHAPTER 3

CURRENT LEGAL POSITION

A. Reasons and purpose of prescription

3.1 The reasons given in common law for prescription of debts are the following:

- (a) After a specified period of time the fault of a creditor (claimant) in taking care of his or her claim should be visited by certain penalties, namely, the extinction or rendering unenforceable of the claim;
- (b) Prescription relieves the debtor of having to defend a claim long after the event;²⁷
- (c) A state of affairs which has existed for a considerable period of time ought to be legally formalised in the interests of certainty in legal affairs.²⁸
- (d) In general the courts seem to favour the idea that the primary purpose of prescription is to punish the slovenly creditor, although fault on the creditor's part is not, and never has been, a requirement for prescription.
- (e) Creditors (claimants) and debtors (defendants) have competing interests. It is unfair that a debtor should be subject to an indefinite threat of being sued. It is in the interest of creditors to have as possible to institute a claim.

3.2 Prescription legislation is therefore intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce rights. The imposition of prescription periods has thus been justified on the basis of fairness, certainty and public policy.

²⁷ *Solomon v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 237 (C).

²⁸ *De Jager v Absa Bank Bpk* 2001 (3) SA 5327 (SCA) 534A.

1. Fairness

3.3 It is argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

3.4 The consideration of the principle of fairness is important, for example to enable transactional defects flowing from failure to fulfil formalities to be rectified timeously rather than where state witnesses and relevant documentary evidence are no longer available. This precludes prolonged uncertainty of ownership and encourages social and economic development by removing fear of future litigation.²⁹

3.5 Memories can dim with time. Witnesses can die or disappear. Records can be disposed of. Changes (in land values for example, or professional standards) can make it very difficult for expert witnesses to take their minds back to what the situation was some years previously. It can be difficult or impossible for civil engineers (for example) to assess the position if land or chattels are no longer available either in the state they were in at the relevant time or at all.³⁰

3.6 Although plaintiffs may also be affected by deterioration of evidence over the passage of time, it can be argued that a potential defendant is in more vulnerable position than a plaintiff. This is because the plaintiff decides when to commence proceedings, and can use the time before the claim is brought to collect evidence, while the defendant may not even be aware that he or she is at risk of being sued and is therefore unlikely to take any steps to preserve the necessary evidentiary material.

²⁹ L Chiappetto *Il Codice Diritto Canonico: Commento Giuridico- Pastorale 2nd Romo: Dehoniane*, 1995 1: 289; P Pinto in *Urbaniana Com*, 106; JP Schoupe *Ellementi di Diritto Patrimoniale Camonica* Milan: Giufre 1997 74-75.

³⁰ New Zealand Law Commission Report 61 on Tidying the Limitation Act, July 2003.

2. Certainty

3.7 Prescription rules prevent procrastination and its adverse consequences. They thus serve a justifiable purpose to which no exception in principle can cogently be taken.³¹

3.8 The main practical purpose of extinctive prescription is the promotion of certainty in the affairs of individuals, and particularly in the relationship between the debtor and creditor.³²

3. Public Policy

3.9 It is generally accepted that the public has an interest in resolving disputes as quickly as possible. Prescription periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely.

3.10 It is also recognised that limitation periods help improve the administration of justice. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will deteriorate. It will be considerably more difficult for a court to achieve a just resolution of the dispute if the reliability of the evidence has been affected by the passage of time.

B. The Prescription Act

3.11 In this section we analyse the nature of prescription, the provisions of the Prescription Act and the legal consequences thereof.

3.12 The Prescription Act 68 of 1969 (hereinafter referred to as the "Prescription Act") came into operation on 1 December 1970, repealing the Prescription Act 18 of

³¹ *Mohlomi v Minister of Defence* 1997 (1) SA CC; 1196 (12) BCLR (CC) 1565; *Engelbrecht v Road Accident Fund* 2007(6) SA 96 (CC).

³² *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A).

1943 which, however, still applies to any debt which arose before 1 December 1970.³³

3.13 When investigating whether a debt arose before 1 December 1970 it is important to differentiate between a debt that was subject to a suspensive condition that was not fulfilled until after that date, which would be subject to the 1969 Act, and a debt the payment of which was suspended until after that date, which would be subject to the 1943 Act because the debt (that is the obligation) arose before the commencement of the Prescription Act³⁴

3.14 The Prescription Act is regarded as the cornerstone of the law regulating the extermination of debts by prescription.³⁵ Its object is to penalise the creditor and not to benefit the creditor.³⁶ It is however not a codification of the law of extinctive prescription, so common law rules which are not inconsistent with the provisions of the Prescription Act remain in force.³⁷

3.15 Prescription periods are sometimes called limitation of actions or periods. A limitation period refers generally to any time-limit within which legal proceedings of a particular kind must be brought or, exceptionally, within which notice of a claim or dispute must be given to another party.³⁸

3.16 To achieve the basic policy objective of extinctive prescription, namely protect a debtor against a stale claim, it is less important how long the applicable prescription period is than that there be one, in order to protect the debtor and bring finality in the relationship between debtor and creditor. No period is more or less arbitrary than

³³ See section 22 of the Prescription Act read with section 16(2) of the same Act.

³⁴ *List v Jungers* 1979 (3) SA 106 (A) 120-122.

³⁵ The Preamble to the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 stipulates that "... AND RECOGNISING THAT... the Prescription Act 1969, being the cornerstone of the laws regulating the extinction of debts by prescription"

³⁶ See *Standard Bank of SA Ltd v Neethling, NO* 1958 (2) SA 25 (C) at 29. In *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) at 403G, the court decided that the *Prescription Act* is designed to penalise inaction, not legal ineptitude. This was also approved in *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T) 274.

³⁷ *Marais v Commercial Union Assurance Co of SA Ltd* 1977 (2) SA (T) 271-273.

³⁸ A McGee *Limitation Periods* Sweet & Maxwell, 4th Ed, 2002 par1.001.

another. In theory the period should reflect a value judgment concerning the point at which the interests in favour of protecting valid claims are outweighed by the interest in protecting the defendant against the enforcement of a stale claim.³⁹

3.17 In some foreign jurisdictions there is additional provision for long and short stop limitation periods, with the effect that after a certain time, usually measured from the date of the defendant's last conduct which gave rise to the cause of action, no action shall be available whether or not time has started to run according to the rules determining when periods begin to run.⁴⁰

3.18 In South African law there is a provision for different periods of extinctive prescription and rules for postponing the expiry of prescription periods on grounds of ignorance or disability on the part of the creditor, but no provision for longstop prescription periods.⁴¹

3.19 Different prescription periods are set out in section 11 of the Prescription Act. The reasons for the differential periods of extinctive prescription in South African legislation have not attracted much comment in reported judgements or academic legal writing would appear that there are accepted policy considerations underlying such differentiation.

3.20 Sec 11 of the Act provides for the following periods of prescription:

- (a) thirty years in respect of any debts secured by mortgage bond, any judgment debt, any debt in respect of any taxation imposed or levied by or under any law and any debts 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 other negotiable instruments or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b)

³⁹ MM Loubser *Extinctive Prescription* Juta & Co Ltd Kenwyn 1996 35.

⁴⁰ See Chapter 5 of this discussion paper.

⁴¹ MM Loubser *Extinctive Prescription* Juta & Co Ltd Kenwyn 1996 37.

- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debts”.

3.21 In terms of section 13(1) completion of prescription is delayed in the following circumstances:

- (a) the creditor is a minor or 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
- (c) the creditor and debtor are married to each other;
- (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
- (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.

3.22 In terms of section 16(1), subject to the provisions of subsection 16(2)(b), the provisions of Chapter III, dealing with prescription of debts, 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 the Prescription Act.

C. Meaning of “due”

3.23 Section 12(1) of the Prescription Act provides that: “Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.”

3.24 The term “due” has been interpreted to mean, that for prescription to begin running, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.⁴²

3.25 The courts have held that a debt includes any liability arising from and being due or owing under a contract. A debt refers to an obligation to do something, whether by payment or money or by delivery of goods and services, or not to do something.⁴³ The word “debt” therefore does not refer to the “cause of action”, but more generally to the claim.⁴⁴

3.26 Prescription begins to run as soon as the debt is due,⁴⁵ provided the debtor does not willfully prevents the creditor from coming to know of the existence of the debt,⁴⁶ and 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.⁴⁷

3.27 A debt is due, owing or payable when the creditor acquires a complete cause of action for its recovery, that is when the entire set of facts which the creditor must

⁴² *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A).

⁴³ *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A).

⁴⁴ See *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212F-G; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15B-16D and *Standard Bank of SA Ltd v Neethling* NO 1958 (2) SA 25 (C) 29.

⁴⁵ Section 12(1) of the Prescription Act provides that: “Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due”.

⁴⁶ Section 12(2) of the Prescription Act provides that: “If the debtor willfully 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”.

⁴⁷ Section 12(3) of the Prescription Act provides that: “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”. In *Gerike v Sacks* 1978 (1) SA 821 (A) par 827-828, the court decided that when the defendant raise the plea of prescription, the onus is on the defendant to prove his defence and to prove the date when the plaintiff acquired actual or deemed knowledge required in terms of subsection (3) of “the identity of the debtor and of the facts from which the debt arises”. See also *Sibiya v The Premier of the Province of KZN* [2007] JOL 21004 (N), where the court confirmed the principle that the defendant has the onus of proving his defence when a plea of prescription is raised.

prove to succeed with his claim against the debtor is in place: when everything has happened which would entitle the creditor to institute the action,⁴⁸ and to obtain judgment.⁴⁹

3.28 The Prescription Act, contains no definition of the term “due” and the courts have held that the term must therefore be given a wide and general meaning,⁵⁰ namely that of a debt “owing and already payable”⁵¹ or “immediately claimable”,⁵² or “immediately exigible at the will of the of the creditor”,⁵³ or a debt “in respect of which the debtor is under an obligation to perform immediately”,⁵⁴ or not to do something.⁵⁵

⁴⁸ In *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA), the court decided that the knowledge which is required by the plaintiff is the minimum necessary to enable a creditor to institute an action.

⁴⁹ *Coetzee v SAR & H* 1933 CPD 565 570-1; *Western Bank v S JJ van Vuuren Transport (Pty) Ltd & others* 1980 (2) SA 348 (T) 351F-G; *Burger v Gouws and Gouws (Pty) Ltd* supra 351F-G; *HMBMP Properties (Pty) Ltd v King* supra at 909 C-D; *The Master v IL Back and Co Ltd* 1983 (1) SA 986 (A) 1004E; *Cape Town Municipality & another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) 321B-C; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* supra 532H; *Minister of Trade & Industry of RSA v Farocean Marine (Pty) Ltd* 2006 1 All SA 644 (C).

⁵⁰ *HMBP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909A-B; *The Master v IL Back & Co Ltd* 1981 (4) SA 763 (C) at 777-8; *Stockdale v Stockdale* 2004 (1) SA 68 (C) (also reported at 2003 JOL 11164 (C) - ED at 72D-E); *African Products (Pty) Ltd v Venter* 2007 (3) All SA 605 (C) 612d. The courts have also held that the time when a debt becomes due should be determined by the intention of the parties, especially where the debt arises from a contract.

⁵¹ *Lagerwey v Rich & others* 1973 (4) SA 340 AD at 345, *Eskom v Stewarts and Lloyds* 1981 (3) SA 340 (A) 908E.

⁵² *Western Bank v SJJ van Vuuren Transport (Pty) Ltd & others* 1980 (2) SA 348 (T) 351F-G; *Burger v Gouws and Gouws (Pty) Ltd* 1980 (2) SA 583 (T) 585E; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 C-D; *The Master v IL Back and Co Ltd* 1983 (1) SA 986 (A) at 1004E; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532H.

⁵³ *Benson & another v Walters & others* 1984 (1) SA 73 (A) 82H.

⁵⁴ *Delloite Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532H.

⁵⁵ *HMBP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) 909A-B; *Barnet v Minister of Land Affairs* 2007 (11) BCLR 1214 (SCA) 1221F; *Desai NO v Desai* 1996 (1) SA 141 (SCA) 146 H-J.

3.29 In *Eskom v Stewart and Lloyd of SA (Pty) Ltd*⁵⁶ it was held that a debt is ‘that which is owed or due; any thing (as money, goods or services) which one person is under an obligation to pay or render to another. The term has been used primarily in case law to describe the correlative of a right or claims to some performance, in other words, as the duty side of an obligation produced by contract, delict, unjust enrichment, statute or other source.’⁵⁷

3.30 In *Barnett v Minister of Land Affairs*⁵⁸ it was held that the term “due” in the 1969 Prescription Act includes a claim for the enforcement of an owner’s right to property. In *Njongi v MEC, Department of Welfare, Eastern Cape* it was held that an obligation to pay a disability grants is a debt,⁵⁹ and that a claim for repayment of money held in an attorney’s trust account on behalf of a client, constitutes a “debt” which becomes due upon demand by the client and prescribes three years later.⁶⁰

3.31 A “debt” will not become due and claimable where there is a legal bar or administrative decision which prevents the creditor from claiming the debt, even where the administrative decision in question is unlawful. Until the legal bar or administrative action has been removed or set aside the debt is not claimable and prescription does not run against the debtor.⁶¹

3.32 In the normal course of events, therefore, a debt is “due” when it is claimable by the creditor and, as the corollary thereof, it is payable by the debtor.⁶²

⁵⁶ 1981 (3) SA 340 (A).

⁵⁷ *Protea Holdings (Pty) Ltd v Boundary Financing Ltd* 2008 (3) SA 33 (C) 40F-H.

⁵⁸ 2007 BCLR 1214 (SCA) 1221 F-G.

⁵⁹ 2008 (6) BCLR 571 (CC) 592 B.

⁶⁰ *Ramdin v Pillay* 2008 (3) SA 19 (D).

⁶¹ See *Njongi v MEC Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC) 592 B.

⁶² *List v Jurgens* 1979 (3) SA 106 (A) 121 C; *Benson v Walters* 1981 4 SA 42 (C) 48G; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) 909C-D; *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) 741A; *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) 252A-56H; 1999 1 All SA 252 (A). See also *Whatmore v Murray* 1908 TS 969.

3.33 Prescription penalizes unreasonable inaction not inability to act. Where, therefore the statute speaks of prescription it begins to run when a wrong is first brought to the knowledge of the creditor, it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another.⁶³

D. Knowledge requirement

1. The identity of debtor

3.34 The time when the prescription period begins to run depends on the creditor's knowledge of his right against the debtor. The rules determining when prescription begins to run in respect of various kinds of debt are all subject to the general requirement that the creditor should have knowledge of the identity of the debtor and of the facts from which the debt arises.

3.35 Knowledge of the identity of the debtor for practical purposes means sufficient information for a process-server to be able to identify the debtor by name and address. The creditor must in fact know the debtor's identity, although knowledge of such facts will of course be relevant in determining whether the creditor exercised reasonable care to establish the debtor's identity.

3.36 In terms of section 12(3) of the Prescription Act of 1969, a debt is not deemed to be due until the creditor has or ought to have had knowledge of the identity of the debtor, and of the facts from which the debt arises.⁶⁴

3.37 Section 12(2) of the 1969 Prescription Act provides that 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.

⁶³ See *Wulfes v Commercial Union Assurance Co of SA Ltd* 1969 (2) SA 31 (N) 37A and *SA Mutual Fire and General Insurance Co Ltd v Mapipa* 1973 (3) SA 603 (E) 608F-609D.

⁶⁴ See *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1999 (4) SA 12 (SCA) 25C-I.

3.38 Wilful concealment by the debtor may not be the only factor precluding commencement of the prescription in terms of section 12(3); and wilful concealment may then occur at a later stage, with the effect of keeping the creditor in ignorance and further precluding commencement of the running of prescription.⁶⁵

3.39 The courts have not had occasion to clarify what constitute conduct that “prevents the creditor from coming to know of the existence of the debt” in terms of section 12(2). Section 12(2) could apply, for example, in a case of medical negligence where the medical practitioner successfully prevents the patient from learning that he has suffered injury as a result of a negligently performed procedure or incorrect diagnosis and in the case of failure to disclose the misappropriation of property held or administered for another in a fiduciary capacity.⁶⁶

3.40 Mere suppression of evidence relevant to a known debt, on the other hand, would probably not be sufficient. Where the creditor knows he has been injured, but does not know that the injury has been caused by human agency in circumstances creating a cause of action or where he is aware of the injury and its cause, but ignorant of the identity of the wrongdoer, mere passive conduct by the debtor in failing to supply the creditor with the necessary information to enable him to institute action will probably not constitute wilful prevention in terms of section 12(2).

2. Facts from which the debt arises

3.41 Knowledge of the material facts constituting the cause of action will be required before the prescription period will begin to run against the creditor.

3.42 Section 12(3) refers specifically to the facts from which the debt arises and not to the legal implications of such facts. A question arises whether the subsection must be interpreted to mean that the prescription period will begin to run even if the creditor is unaware that the known facts afford him a legal remedy. There is a view expressed by academics that lack of knowledge on the part of the creditor that he

⁶⁵ MM Loubser *Extinctive Prescription* Juta & Co 1996 101.

⁶⁶ MM Loubser *Extinctive Prescription* Juta & Co 1996 101.

has a legal remedy would not suffice to delay the commencement prescription.⁶⁷ This view has however as yet not been judicially considered.

3.43 It has been emphasised on numerous occasions by the courts that time begins to run against a creditor when s/he has the minimum of the facts that are necessary to institute an action.

3.44 In *Minister of Finance and others v Gore NO*,⁶⁸ the respondent in his capacity as liquidator of a company in liquidation, claimed damages from the appellants (the national government and Western Cape provincial government) for the company's (pure economic) loss from not having been awarded a government tender as a result of alleged fraud on the 04 April 1994 by certain provincial administration officials for which the company was a bidder. The respondent launched a review application and sought interdict in September 1994. In September 1995 the respondent laid a complaint and filed an affidavit with the office of the director of the Office of Serious Economic Offences which eventually led to an OSEO investigation. Summonses were served in January 1999 and it was contended that the claim has prescribed as summons were issued five years after the events issue. The central question was when the respondent acquired the facts from which the debt arises. It was argued on behalf of the appellant that the respondent had all the knowledge needed to institute action by at least, January 1995 and the provincial government contended that the respondent had sufficient facts, at least, when he lodged his OSEO complaint and affidavit in September 1995. The court decided that the respondent acquired the minimum knowledge needed to institute action only at the end of 1998, when OSEO finally released the evidence that showed that the tender had been prepared on a CPA computer. The court further decided that the running of prescription is not postponed until the creditor becomes aware of the full extent of his/her legal rights.⁶⁹

3.45 In *Truter and Another v Deyse*⁷⁰ the respondent (plaintiff in court of first instance) instituted action against the appellants (defendant in court of first instance) for damages for personal injury allegedly sustained by him as a result of the

⁶⁷ MM Loubser *Extinctive Prescription* Juta & Co 104.

⁶⁸ 2007 1 SA 111 (SCA).

⁶⁹ *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 119J-120A.

⁷⁰ 2006 (4) SA 168 SCA.

negligence of the defendants in their performance on him of certain medical and surgical procedures that had been performed on him in 1993. It was only in early 2000 that the plaintiff managed to secure medical opinion to the effect that the defendants had conducted themselves negligently and, for that reason, summons were issued only in April 2000. The central question was when prescription started to run. The court of first instance found that prescription started to run from the moment when the plaintiff managed to secure medical opinion to the effect that the defendants had been negligent. The Supreme Court of Appeal decided that an expert opinion that certain conduct had been negligent was not itself a fact, but, rather, evidence and that all facts and information in respect of the operations performed on the plaintiff by the defendant had been known, or readily accessible, to him and his legal representatives as early as 1994 or 1995⁷¹ and therefore the claim had prescribed.⁷²

3.46 In *Van Staden v Fourie*⁷³ the court decided that the cause of action for the purposes of prescription means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The court further decided that it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

3.47 In *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika*⁷⁴ the court decided that “the facts from which the debt arises “, does not refer to a cause of action but to a debt which in fact merely points to the plaintiff’s claim. The court also decided that there is no compelling reason why a creditor should be fully informed about all aspects of his contemplated litigation before prescription can begin to run

⁷¹ *Truter and Another v Deysel* 2006 (4) SA 168 SCA 176E.

⁷² *Truter and Another v Deysel* 2006 (4) SA 168 SCA 177B.

⁷³ 1989 (3) SA 200 (A).

⁷⁴ 2001 (1) SA 297 (SCA).

against him.⁷⁵ The court further decided that prescription is not postponed until the creditor has evidence that would enable him/her to prove a case “comfortably”.⁷⁶

3.48 It would seem that the courts are not yet clear as to whether prescription is postponed until the plaintiff has the minimum facts to institute a claim, or has the full facts that may enable the plaintiff to institute a claim.

3.49 Readers are invited to comment whether prescription should start to run from the date when the plaintiff has the full facts that are necessary to enable him/her to institute a claim or when s/he has the minimum facts that are necessary to institute the claim.

3. Exercise of reasonable care to acquire knowledge

3.50 Where the creditor is ignorant of the identity of the debtor or the facts from which the debt arises prescription will nevertheless begin to run if the creditor could have acquired the requisite knowledge by exercising reasonable care. It is suggested that the following factors will be relevant to determine whether creditor has reasonably endeavoured to acquire the requisite knowledge: the physical and mental capacity of the creditor to acquire knowledge; the opportunity to acquire knowledge from sources open to the investigation; whether the creditor already knew facts which would have caused an ordinary, prudent person to investigate further; and the nature of the relationship between creditor and debtor.

3.51 The reasonable care for the purposes of section 12(3) is not measured by the objective standard of the hypothetical reasonable or prudent person, but rather by the more subjective standard of a reasonable person with the creditor’s characteristics.⁷⁷

⁷⁵ *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 1 SA 297 (SCA) 988.

⁷⁶ *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 1 SA 297 (SCA) paras 11 and 13; See also *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA).

⁷⁷ In *Brand v Williams* 1988 (3) SA 908 (C) the court took into account factors such as the plaintiff’s physical and mental condition, the pain he was suffering, his memory function and the environment in which he found himself in determining whether he could reasonably have obtained knowledge of the identity of the debtor.

3.52 In *Gerick v Sack*,⁷⁸ the court explained that, the Prescription Act requires the creditor to seek such knowledge by the exercise of reasonable care. S/he is not required to issue summons, but given a generous three years in which to institute proceedings and such creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for s/he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to run.⁷⁹ The yardstick to determine the standard of care required of the creditor in gaining knowledge of the requisite facts is to do no more than what could be expected, in the circumstances, of a reasonable man.⁸⁰

3.53 The knowledge referred to in section 12(3) is that of the creditor and not of a person acting on behalf of the creditor. Where the creditor is a minor at the time when the debt arises his guardian's knowledge of the identity of the debtor will not be imputed to the minor. In *Brand v Williams*⁸¹ a minor was severely injured in an accident and he instituted action for damages more than three years after the accident and more than a year after attaining majority. The court held that the knowledge as to the identity of the debtor acquired soon after the minor's parents could not be imputed to the minor.

3.54 In certain circumstances knowledge acquired by an agent may be imputed to his principal.⁸² Two requirements are laid down for the application of the doctrine of constructive notice between agent and principal, namely that the knowledge to be imputed to the principal must have been acquired in the course of the agent's employment and that there must be a duty upon the agent to communicate the information obtained to his principal. The test of materiality is whether the knowledge of the agent is such that in the ordinary course of business a reasonable man would be expected to impart the knowledge to the person who has delegated to him the conduct and control of his affairs.

⁷⁸ 1978 (1) SA 821 (A).

⁷⁹ See also *De Lange v Multilateral Motor Vehicle Accident* 2000 (1) SA 921 (T) 926A-C.

⁸⁰ *Jacobs v Adonis* 1996 (4) SA 246 (C) 253B.

⁸¹ 1988 (3) SA 908 (C).

⁸² See *Brand v Williams* 1988 (3) SA 908 (C).

3.55 These rules indicate that where knowledge of the identity of the debtor and the facts from which the debt arise is acquired by the creditor's legal representative for the purposes of instituting action against the debtor the knowledge should be imputed to the creditor.

3.56 The requirement of exercising reasonable care requires diligence not only in the ascertainment of the facts 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 if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.⁸³

3.57 Section 12(3) aims to achieve a balance between negligent and innocent inaction and ensures that the former, and not the latter, is penalised.⁸⁴

3.58 Having the "requisite knowledge" in terms of section 12(3) may presents difficult and unusual problems in sexual abuse cases. In *Van Zijl v Hoogenhout*,⁸⁵ the appellant had been repeatedly sexually abused by the respondent since she was a child. Although the appellant knew the identity of the perpetrator (creditor), she could not attribute the blame of wrongdoing to the respondent. In accepting that the chronic child abuse is sui generis in the *sequelae* that flow from it, the court decided that the prescription period began to run when the appellant became aware that the wrongdoing was attributable to the defendant.

3.59 In *Van Zijl v Hoogenhout* the court decided that prescription did not start to run when the cause of action arose, but when the plaintiff became aware that damage was contributable to the defendant.⁸⁶

⁸³ *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) 209.

⁸⁴ See *Minister of Trade and Industry v Farocean Marine* 2006 1 All SA 644 (C) 653F-G.

⁸⁵ 2005 (2) SA 93 (SCA).

⁸⁶ 2005 (2) SA 93 (SCA). In this case the plaintiff realised only in 1997 that defendant was to blame for assaults which took place between the years 1958 and 1967. The appellant attained majority in 1973 and the action was instituted in 1999. The respondent raised a special plea that the appellant's claim had prescribed. The court decided that prescription began to run from the moment the appellant became aware that the respondent was to be blamed for the assaults only in 1997.

E Calculation of time

3.60 Foremost among the methods of calculating time in South African law is the civilian method, which generally entails that the first day of the period is included and the last day excluded; the last day being regarded as completed at its inception.⁸⁷

3.61 Where legislation prescribes a period of time expressed in delays the method of calculation provided for in section 4 of the Interpretation Act⁸⁸ is applied. The section provides that:

When any particular number of days is prescribed for the doing of an act, or for any other purposes, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

3.62 The method prescribed by section 4 of the Interpretation Act applies where any law prescribes a particular number of days for the doing of any act, or for any other purpose. The section gives certainty as to when the period prescribed by law comes to an end rather than as to the beginning of the period.⁸⁹

3.63 In *Cock v Cape of Good Hope Marine Assurance Co Ltd*,⁹⁰ the court applied the civilian method of calculation to determine the duration of insurance cover under an insurance policy taken out for a year. It was held that the cover under the insurance policy, which was taken out for a period of twelve months from 14 January 1858 as the last day and the last day was regarded as completed its inception, so that the insurance cover expired at midnight on 13 January 1858.

⁸⁷ MM Loubser *Extinctive Prescription* Juta & Co 1996 159.

⁸⁸ Act 33 of 1957.

⁸⁹ *Brown v Regional Director, Department of Manpower, Johannesburg & another* 1993 (2) SA 291 (W).

⁹⁰ 3 Searle 114.

3.64 In *Thomas v Liverpool & London & Globe Insurance Co Ltd*,⁹¹ the court in applying the civilian method of calculation counted the requisite number of days as from the date of commencement by commencing the count with the following day.

3.65 In respect of a period of time expressed in months it was held in *Versveld v SA Railways & Harbours* that the civilian method entails calculating the period of time from the day following the day initiating the running of the period of time. In this case the action had to be instituted 'within twelve months after the cause of action arose'. The accident which gave rise to the action occurred at 7 pm on 22 May 1935 and the summons were served on 22 May 1936. The court held that the word "after" here indicated that the day when the accident occurred had to be excluded from the calculation and that calculation according to the civilian method had to begin on 23 May 1935.

3.66 In *Lammas v Nicholls and Alderson*⁹² the action had to be instituted within six months after the cause of action arose. The cause of action was an accident that occurred on 29 November 1910 and the summons was issued on 29 May 1911. The court held that the day when the accident occurred must be included in the calculation and that the last day on which the summons could be issued was six months after the accident on the day immediately proceeding the calendar day numerically corresponding to the date of the accident. The last available day for the issue of summons was 28 May 1911 and the summons was therefore issued one day too late.

3.67 In *Kleynhans v Yorkshire Insurance Co Ltd*⁹³ the court had to decide which method of calculation applied for the purposes of the prescription contained in section 11(2) of the Motor Vehicle Insurance Act 29 of 1942. This section provided that the right to claim compensation in terms of the Act becomes prescribed "upon the expiration of a period of two years as from the date on which the claim arose". The majority of the court held that the words "as from the date", which determine the beginning of the prescription period, indicate the civilian method of calculation should be applied, and this method meant the conclusion of the first day of the period and

⁹¹ 1968 (4) SA 141 (C).

⁹² 1911 TPD 968.

⁹³ 1957 (3) SA 544 (A).

the exclusion of the last day. The majority of the court held that a claim which arose on 6 May 1954 became prescribed at midnight on 5 March 1956 and a summons served on 06 March 1956 was therefore out of time.

3.68 In *Msiza v Road Accident Fund*,⁹⁴ the plaintiff instituted the action against the defendant as a result of injuries sustained due to the motor collision that occurred on 09 July 1999. The action was instituted in terms of the Road Accident Fund Act 56 of 1996 and the plaintiff was to lodge his claim with the Road Accident Fund within 3 years from the date of the collision. The defendant alleged that the plaintiff lodged the claim with the RAF on 09 July 2002 when it already had prescribed. The plaintiff on the other hand contended that the claim was lodged on 08 July 2002 at the defendant's place of business at or about 16h47 after the closure of the defendant's business hours and therefore did not prescribe. The defendant's argument was based on the premise that the plaintiff's claim which was submitted after hours on 08 July 2002 was deemed to have been lodged on 09 July 2002 and had prescribed.

3.69 In determining whether the claim had prescribed, the court found that the computation of time in compounding the day is a *s* being a period of 24 hours as a unit of time especially from midnight to midnight. The court further found that the time of lodgement of the plaintiff's claim at 16:47 fell within the three year prescription period and that the plaintiff's claim had not prescribed.

F. Prescription of delictual debts

3.70 A delictual debt is generally due as soon as a delictual cause of action arises because a delictual debt is not usually subject to a condition or prior agreement postponing the time of performance. With regard to prescription of delictual debts it is therefore particularly to know when the cause of action arises. Generally a cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action.⁹⁵ Such facts must enable the court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements

⁹⁴ Case 17335/2004 TPD.

⁹⁵ Van der Walt C Die Sommeskadeleer en die "Once and for All"-reel Doctoral Dissertation submitted for the partial fulfillment of Doctoral Degree University of South Africa 1977.

of delictual elements of a delictual cause of action being a combination of facts and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.

3.71 In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once and for all damages already sustained or expected in future in so far as it is based on a single action.⁹⁶

3.72 This rule is derived from English law,⁹⁷ but it has been recognised and applied for so long that it is not possible to oppose it on historical grounds.

3.73 The 'once and for all rule' is based on the assumption that a single damage causing event leads to only one cause of action in respect of all damages flowing from such event. If a landowner causes nuisance to his neighbour, the damage causing event is not 'complete' but there is a series of successive causes of action until the cause of the nuisance has been abated. The 'once and for all rule' is thus inapplicable and the plaintiff may claim damages whenever there is 'complete' damage and may institute a fresh action for any further damage.⁹⁸

3.74 In *Oslo Land Corporation Ltd v Union Government*,⁹⁹ a company owning cattle farms alleged that it had suffered loss as a result of the spraying of locust poison of excessive strength on its farms by government agents. Containers still containing quantities of the poison were left behind and contributed to the damage. The spraying took place from February to April 1934 and the summons was issued in

⁹⁶ See *Evins v Shields Ins Co Ltd* 1980 (2) SA 814 (A) at 835. The principle of *res judicata*, taken together with the 'once and for all rule', means that a claimant for Acquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action. See also *Cape Town Council v Jacobs* 1917 AD 615 620; *Oslo Land Co v Union Government* 1938 AD 584 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) 317 (A) 330; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) 625-6; *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) 970; *Union Wine Ltd v E Snel*.

⁹⁷ See *Cape Town City Council v Jacobs* 1917 AD 615; *Evins v Shields Ins Co Ltd* 1980 (2) SA 814 (A) 835; *Coetzee v SAR & H* 1933 CPD 565 574.

⁹⁸ See *Saunders v Executrix of Hunt* 1840 Menzies 295; *Reddy v Durban Corporation* 1939 AD 293; *Johannesburg City Council v Vucinovich* 1940 AD 365.

⁹⁹ 938 AD 584.

September 1937, more than the applicable prescription period of three years after the spraying. Before the spraying ceased, six head of cattle had already died, and during the next two years many more died or deteriorated in condition to such an extent that they had to be disposed of. It was held that a cause of action had accrued once and for all upon completion of the spraying of the poison.

3.75 In *Green v Coetzer*¹⁰⁰ C (who was driving a motor cycle) was injured in a collision with G (driving a motor car). C claimed from G for damage to his motor cycle and obtained judgment in his favour. Later C again instituted an action against G claiming damages on account of his bodily injuries (medical expenses, temporary disability, pain and suffering). G's defence was a plea of *res uidicata* and the court had to decide whether C's claim rested on the same cause of action as his previous one. The court held this to be the case, dismissing C's action.

3.76 If there is a continuing conduct unlawfully causing losses from day to day for as long as the conduct continues, the courts have held that separate causes of action arise in respect of each distinct new loss, and the once and for all rule is not applied.

3.77 In *Symmonds v Rhodesia Railways Ltd*¹⁰¹ the defendant railway company delivered a truckload of sheep of the wrong kind and the plaintiff instituted action for breach of contract and recovered damages calculated according to the value of the sheep that should have been delivered. Subsequently the plaintiff instituted a further action on the ground that the defendant had caused further damage by failing to take back the sheep wrongly delivered and the plaintiff was thus put to the expense of herding and dipping the unwanted sheep. The defendant pleaded that there was only one cause of action between the parties and that this cause of action had already been settled entirely. The court held that the expense of herding and dipping the unwanted sheep accrued from day to day as a result of the continual refusal by the defendant to take back the sheep. Therefore, where there is a continuance of an unlawful act causing fresh damage from day to day a separate cause of action arises in respect each distinct item of loss and the once and for all rule does not apply, with the result that the plaintiff can institute more than one action.

¹⁰⁰ 1958 (2) SA 697 (W).

¹⁰¹ 1917 AD 582 588.

G. Prescription on contractual debts

3.78 The time when a contract debt becomes due is determined by the terms of the contract, and where the debt arises from breach of contract the due date of a debt may likewise be determined by the particular wording of the contract.¹⁰² Where the contract is silent as to the time for performance the debt is generally due immediately upon conclusion of the contract.¹⁰³

3.79 The due date of a debt arising from a breach of contract may be determined by the particular wording of the contract.¹⁰⁴

3.80 Where a contractual debt is conditional, for example contingent upon the performance of some act, or the happening of some event, or the lapse of a specified period of time, the debt is due upon fulfilment of the condition.¹⁰⁵ In case of a promise to pay a debt “when payable” the prescription period would begin to run when that

¹⁰² See *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) and *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A).

¹⁰³ *Cassim v Kadir* 1962 (2) SA 473 (N).

¹⁰⁴ See *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C). A building contractor stipulated a specific time for completion of the project and also provided for extension of that time in the event of delay resulting from causes beyond the contractor’s control. The employer was in breach of contract for handing over the site to the contractor seven working days late and a further delay of 320 days resulted from causes beyond the contractor’s control. It was held that the employer’s debt to the contractor arising from the delay in handing over the site to the contractor became due on the completion date as extended by 327 days. See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch* 1992 (1) SA 837 (C). A contract for the design and implementation of computer application modules by a consultant stipulated a specific date for completion of the work and provided that in the event of non-completion by the specified date the customer may employ a third party to complete the work, the resultant extra costs to be met by the consultant. It was held that the consultant’s debt for such extra costs became due on the date of engagement of a third party to complete the work.

¹⁰⁵ See *Rogers NO en `n ander v Erasmus NO en andere* 1975 (2) SA 59 (T), where a deed of sale involving land subject to a fideicommissum provided that the seller would obtain a court order authorising the sale if this should be necessary to safeguard the interests of unborn fideicommissaries. The court held that the prescription in respect of the purchaser’s right to claim transfer of the land did not begin to run before it was established that no further fideicommissary would be born or before a court order was obtained, because the purchaser could not enforce his rights before these conditions were met.

ability arises as an objectively determinable fact.¹⁰⁶ When payment is to be made out of a particular fund to be created by the debtor the prescription period will begin to run when such a fund is created.

3.81 In an action for breach of contract prescription begins to run from the time of the breach,¹⁰⁷ subject to the provision that knowledge on the part of the creditor is required where the debtor wilfully prevents the creditor from coming to know of the existence of the debt arising from the breach,¹⁰⁸ and subject also to the provision that no debt shall 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, and provide further that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.¹⁰⁹

3.82 Where the debtor fails to fulfil any contractual obligation which has fallen due for performance, prescription in respect of the debt for specific performance generally begins to run from the time of the breach,¹¹⁰ also subject to the provision of section 12(2).

3.83 In the case of an obligation not to do something prescription generally begins to run from the moment of non-compliance. Where a person who has granted a right of pre-emption sells the property in breach of his undertaking not to sell without affording the holder of the pre-emptive right the opportunity to buy, the debt arising from this breach of contract is due from the time of the sale and not from the time when the right of pre-emptive was specifically rejected.¹¹¹

¹⁰⁶ See *MM Loubser Extinctive Prescription Juta & Co 1996 53*.

¹⁰⁷ *HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) 910G*.

¹⁰⁸ *Sec 12(2) of the Prescription Act*.

¹⁰⁹ *Sec 12(3) of the Prescription Act*.
See *Ndlovu v Frame Group Provident Fund 2003 9 BPLR 5108 (PFA)*. See also *Harker v Fussell 2002 1 SA 170 (T)*. In an action for damages arising out of breach of a contract or a delictual action arising out of the breach of the duty to take care, the breach or wrongful act gives rise to a single cause of action and the period of prescription begins to run from the date of the breach or wrongful act, whether or not the damages are apparent.

¹¹⁰ *HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N)*.

¹¹¹ *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & another 1985 (4) SA 630C-631E*.

3.84 In the event of breach of the implied warranty against eviction in a contract of sale the seller's indebtedness towards the purchaser for damages arising from the eviction will usually become due when the purchaser for damages arising from the eviction will usually become due when the purchaser is evicted.

H Debts arising from unjustified enrichment or other restitutionary obligation

3.85 As a general rule prescription in respect of a debt arising from unjust enrichment or other restitutionary obligation begins to run when the debtor receives a benefit to which he is not entitled and the creditor thereupon acquires the right to claim restitution.¹¹²

3.86 Accordingly prescription in respect of a debt to repay an amount paid by mistake or to return property delivered by mistake, and in respect of the correlative right to reclaim such payment or performance by means of the *condictio indebiti*, begins to run when the mistaken payment or delivery is made.¹¹³

3.87 The prescription period in respect of a debt to make restitution of performance rendered by another party in terms of a void contract, and in respect of the correlative right to reclaim such performance by means of the *condictio causa data causa non secuta*, likewise begins to run from the date on which performance was made.¹¹⁴

3.88 However, prescription in respect of a restitutionary debt will not invariably begin to run as soon as there is payment or performance without legal cause. Where the payment or performance is made subject to a condition or modus that is not subsequently fulfilled, the debt to make restitution only becomes due when it is

¹¹² *Van Staden v Fourie* 1989 (3) SA 200 (A) 215B-H.

¹¹³ See *The Liquidators of the Paarl Bank v Roux & others* 1891 8 SC 205 208; *Mosam & another v De Kamper* 1964 (3) SA 794 (T) 798C-G; *African Oxygen Ltd v Secretary for Customs and Excise* 1969 (3) SA 391 (T).

¹¹⁴ See *Lydenburg Voorspoed Ko-operasie v Els* 1966 (3) SA 34 (T), *Hakos Cabinet Makers (Pty) Ltd v Pretoria City Council* 1971 (4) SA 465 (T) 486B-C.

settled that the condition or *modus* will not be fulfilled, and the prescription period begins to run from that date.¹¹⁵

I Notice of Prescription

3.89 In terms of section 17(1) a court may not on its own motion take notice of prescription. In effect the court will act on the premise that the debt subsists.¹¹⁶ Prescription must be raised in the pleadings by the litigant who invokes prescription, although a court may permit prescription to be raised at any stages of the proceedings.¹¹⁷

3.90 The fact that the court may not *mero muto* take notice of prescription does not alter the position as to whether a debt has become extinguished or not. The provisions of section 17(1) do not show that after prescription has taken place there is any vestige of a debt in existence, they merely ensure that the person who wishes to rely on prescription must do so explicitly.¹¹⁸ In *Ntame v MEC for Social Development, Eastern Cape*,¹¹⁹ the court decided that in terms of section 17(1) of the Prescription Act the court could not of its own motion take notice of prescription, but at common law the court could raise the point *mero muto* that an applicant's delay in instituting proceedings for review was so unreasonable that the court should withhold the grant of a remedy.

3.91 By the use of the words "a party to litigation" the legislature recognised that the raising of prescription would not be the sole priority of the debtor. In *Lipschitz v Dechamps Textiles GMH and another*¹²⁰ the court decided that the words are wide

¹¹⁵ See De Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* 3 ed 1987 159-160; *Van Staden v Fourie* 1989 (3) SA 200 (A) 215F-G.

¹¹⁶ MM Loubser *Extinctive Prescription* Juta & Co 1996 17.

¹¹⁷ Section 17 of the *Prescription Act* provides that :
(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.

¹¹⁸ *Lipschitz v Dechamps Textiles GMH and another* 1978 (4) SA 427 (C) 428.

¹¹⁹ 2005 (6) SA 248 E 249.

¹²⁰ 1978 (4) SA 427 (C) 428.

enough to include any party to litigation who is desirous of invoking prescription can also refer to a plaintiff who claims ownership under prescription. In *De Jager en Andere v Absa Bank Bpk*,¹²¹ the court decided that if a debtor is not obliged to invoke prescription, and if the court cannot *mero muto* take notice thereof or give effect thereto, there appears to be no basis in logic or principle why the debtor cannot lawfully bind himself not to invoke prescription.

3.92 Prescription is a legal fact to be determined by the court and should not be left to the litigants by way of special plea.

3.93 If the court is empowered to determine *mero muto* whether a claim has prescribed the very object of the Act which is to punish the slovenly creditor will be met, and not to require the question of prescription to be determinable solely at the instigation of a litigant.

3.94 Empowering courts to look into this question it would assist in the striking down of contracts where a party undertakes by contract not to invoke prescription in a claim for recovery of debts being against public policy. Where after prescription has already been completed in the favour of the debtor, and decides not to raise prescription as defence and gives an undertaking to that effect to his/her creditor, the public interest is not violated, and that such an undertaking *per se* is not void.

3.95 Readers are invited to comment whether a court should be empowered of its own accord to consider whether a claim has prescribed.

J. Prescription in customary law

3.96 Customary law has no rules allowing acquisitive or extinctive prescription.¹²² Statutory provisions in this regard do not supersede customary law, because the Prescription Act expressly states that it does not apply “in so far as any right or obligation of any person against any other person is governed by Black law”.¹²³

¹²¹ 2001 (3) SA 537 (A) 538.

¹²² See Schaper I *A handbook of Tswana Law and Custom* 2ed 1955 OUP, London 286-7.

¹²³ Section 20 of Prescription Act of 1969.

K. Legislative prescription

1. Prescription Act¹²⁴

3.97 The prescription periods provided in section 11 of the Prescription Act apply to all debts, unless an Act of Parliament provides for another prescription period in respect of a particular debt. The Prescription Act provides that the provisions of Chapter III of the Act shall apply to all debts arising after the commencement of the Act, save in so far as they are inconsistent with the provisions 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.¹²⁵ Section 11(d) of the Prescription Act provides a general three year prescription period for all debts not otherwise provided for in section 11, unless an Act of Parliament provides otherwise.

3.98 Section 11(d) provide a general prescription period where a claim does not fall within the ambit of section 11(a) to (c) and also to enable the legislature to prescribe a prescription periods less than three years. The effect of the section 11(d) has resulted in the following different prescription periods:

2. Apportionment of Damages Act¹²⁶

3.99 Section 2(6)(b) provides that 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 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 in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period less than twelve months, the provisions of such law shall or periods concerned being calculated from the date of the judgment as aforesaid of from the date of the original cause of action.

¹²⁴ Act 68 of 1969

¹²⁵ Section 16(1) of the Prescription Act of 1969.

¹²⁶ Act 34 of 1956.

3.100 There is, however, an important proviso to this section which qualifies the twelve-month period. It provides that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which maybe instituted against such joint wrongdoer by the plaintiff is governed by a law which prescribes a period of less than twelve-months as the period within which legal proceedings must 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 judgment in the matter, instead of from the date of the original cause of action.

3.101 Notice of any action may, any time before the close of pleadings in such an action, be given by the plaintiff or by any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

3. Attorneys Act¹²⁷

3.102 In terms of section 49(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 candidate attorney or his employee, may be instituted within one year of the date of a notification directed to such person or his legal representative by the board of control informing him that the board of control rejects the claim to which such action relates.

4. Compensation for Occupational Injuries and Diseases Act¹²⁸

3.103 A claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act must be lodged by or on behalf of the claimant, in the prescribed manner, with the Commissioner or the employer or the mutual association

¹²⁷ 53 of 1979.

¹²⁸ Act 130 of 1993.

concerned, as the case may be, within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.¹²⁹

3.104 If a claim for compensation is not lodged as prescribed in section 43(1)(a) of the Act, such claim for compensation shall not be considered in terms of the Act, except where the accident concerned has been reported in terms of section 39 of the Act.¹³⁰

3.105 Notwithstanding the provisions of section 43(1)(a) of the Act, a claim for compensation by any seaman or airman may be lodge with the person in command of the ship or aircraft concerned, as the case may be, except if such seaman or airman is himself the person in command.¹³¹

3.106 If any seaman or airman meets with an accident outside the Republic resulting in death, a claim for compensation may be instituted within twelve months after the news of the death has been received from any dependant claiming compensation.¹³²

3.107 Section 44 provides that a right to benefits in terms of this act shall lapse after 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.

3.108 The SALRC, in its recommendation on the draft bill, recommended for the repeal of section 44 of this Act.¹³³ Although the Portfolio Committee on Justice considered the repeal of the section, there was insufficient time to properly consider

¹²⁹ Section 43(1)(a) of Act 130 of 1993.

¹³⁰ Section 43(1)(b).

¹³¹ Section 43(2).

¹³² Section 43(3).

¹³³ See Limitation of Legal Proceedings Against Certain Government Institutions Bill as introduced in the National Assembly as a section 75 Bill, published in *Government Gazette* No 20675 of 25 November 1999. The legislation assented as a result of this Bill is the Institutions of Legal Proceedings Against Organs of State Act of 2002.

the repeal of the section and any potential consequences which might emanate from such repeal.¹³⁴

5. Criminal Procedure Act¹³⁵

3.109 Section 18 provides that the right to institute a prosecution for any offence shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was. However prescription does not apply where the accused is charged with murder, robbery, treason, kidnapping, child-stealing, rape, genocide, crime against humanity and war crimes.

3.110 Prescription is interrupted by the institution of a prosecution. This takes place with the issue of the summons, not with the service thereof.¹³⁶

3.111 Where the court is dealing with extradition and there is doubt about whether the crime was committed more than 20 years ago and whether the offence is one for which extradition can be sought, the court ought to refuse the application for extradition in respect of that offence.¹³⁷

6. Customs and Excise Act¹³⁸

3.112 Section 89(1) provides that whenever any proceedings are instituted to claim any ship, vehicle, container or other transport equipment, plant material or goods which have been seized under this act, such claim must be instituted by the person from whom they were seized or the owner or the owner's authorised agent.

¹³⁴ See minutes of the Portfolio Committee on Justice and Constitutional Development dated 12 October 2001.

¹³⁵ Act 51 of 1977.

¹³⁶ *R v Magcayi* 1951 (4) SA 356 (EDL).

¹³⁷ *Bell v S* 1997 All SA 692 (EC).

¹³⁸ Act 91 of 1964.

3.113 Subsection (2) provides that any litigant must give notice to the commissioner in writing before serving any process for instituting any proceedings as contemplated in section 96(1)(a)-within 90 days after the date of seizure and in the case of an internal administration appeal, where such appeal is unsuccessful, within 90 days from the date contemplated in section 77F.

3.114 Subsection (3) provides that any proceedings must be instituted within 90 days of such notice.

3.115 Section 96(1)(a)(i) provides that any legal proceedings instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of the Act may be served before the expiry of a period of one month after delivery of a notice in writing forth clearly and explicitly the cause of action.

3.116 In terms of subsection (b) the period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of action arising out of the provisions of this Act is one year and begin to run on the date when the right of action first arose.

3.117 Section 99(5) provides that any liability in terms of subsection (1), (2) or (4) shall cease after the expiration of a period of two years from the date on which it was incurred in terms of any such subsection. This means in effect that the normal period for the prescription of debts of 3 years in terms of the provisions of the Prescription Act 68 of 1969 is shortened to 2 years. However, save for this difference, the completion of the prescriptive period under the Custom and Excise Act is governed by the remaining provisions of the Prescription Act 68 of 1969.¹³⁹

7. Expropriation (Establishment of Undertakings)¹⁴⁰

3.118 Section 7 of the Act provides prescription period as follows:

- (1) If any land or temporary use of any land or substance or, in the case of any real right in or over land, the substance to which such right relates, is required

¹³⁹ See *CCE v Standard General Insurance Co Ltd* 1998 4 All SA 46 (W) 51 c-d.

¹⁴⁰ Act 39 of 1951.

for any purpose referred in section 2, the person referred to in that section or his authorized representatives may-

- (a) for the purposes of ascertaining whether any particular land or substance is suitable for the purposes or use contemplated, or for the purpose of determining the value thereof-
 - (i) enter upon any land in question with the necessary workmen, equipment, material and vehicles;
 - (ii) survey and determine the area and levels of that land;
 - (iii) dig or bore on or into that land
 - (iv) construct and maintain a measuring weir in any river or stream;
 - (v) on so far as it may be necessary to gain access to that land, enter upon and go across any other land with the necessary workmen, equipment, material and vehicles; and
 - (b) demarcate the boundaries of any land required, or land the use of which is required, or land required for the exercise of any real right, for the said purpose:
- (2) If any person has suffered any damages 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
- (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

8. Expropriation Act¹⁴¹

3.119 Section 6(1) provides that if any property or the temporary use of any property is required for public purposes the Minister may-

- (a) for the purposes of ascertaining whether any particular property is suitable for the purposes or use contemplated, or for the purposes of determining the value thereof, authorize any person to-
 - (i) enter upon any land in question with the necessary workmen, equipment and vehicles;
 - (ii) survey and determine the area and levels of that land;
 - (iii) dig or bore on or into that land;
 - (iv) construct and maintain a measuring weir in any river or stream;
 - (v) in so far as it may be necessary to gain access to that land , enter upon and go across any other land with the necessary workmen, equipment and vehicles; and
- (b) authorise any person to demarcate the boundaries of any land required for the said purposes or use;
 Provided that such person shall not, without the consent of the owner or occupier, enter any building or enter upon any enclosed yard or garden attached to any building, unless he has given the owner or occupier at least twenty-four hours notice of his intention to do so:

¹⁴¹

Act 63 of 1975.

3.120 Subsection 2 provides that if any person has suffered 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.

3.121 Subsection 3 which provides a period of prescription provides that 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 may only be instituted if the plaintiff has given the Minister not less than one month notice thereof and of the cause of the alleged damage.

9. Long-term Insurance Act¹⁴²

3.122 Section 61 provides that debts 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, shall, in the case of a long-term policy entered into before 31 December 1973, not prescribe before the liability of the long-term insurer under the long term policy prescribes.

3.123 No prescription period is prescribed in this provision. The effect of the provision is that prescription will not be completed on a policy debt until the long-term insurer's liability under the policy has prescribed, presumably three years after the policy becomes payable. Although this may be a very long time, it seems logical to determine prescription of policy debts with reference to the prescription of the insurer's liability under the policy.

10 Merchant Shipping Act¹⁴³

3.124 In terms of section 344(1) the extinctive prescription in respect of legal proceedings to enforce any claim or lies 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

¹⁴² Act 52 of 1998.

¹⁴³ Act 57 of 1951.

board such other ship, caused by the fault of the former ship, whether such ship be wholly or partly in fault is two years and begin to run on the date when the damage or loss or injury was caused.

3.125 In terms of subsection 2, the period of extinctive prescription in respect of legal proceedings under the Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injury is one year and begins to run on the date of payment.

3.126 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 is 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.¹⁴⁴

11. Moratorium Act¹⁴⁵

3.127 Section 2(1) provides that save as is provided in subsections (2) and (3) of this section-

- (a) the obligation of a citizen rendering service to pay contractual debts incurred by him before his service commenced and which become payable after he has commenced to render service shall be suspended for a period equal to the period during which he is rendering service plus one month;
- (b) all civil legal remedies whatsoever against any citizen-
 - (i) rendering service on which he is employed in terms of section 92 of the Defence Act, 1957; or
 - (ii) rendering other service, in respect of contractual debts incurred by him,
 shall be suspended during the whole period during which he is rendering service: Provided that the civil legal remedies referred to shall be suspended for a further period of one month in so far as they relate to subparagraph (i).

¹⁴⁴ Section 344(3).

¹⁴⁵ Act 25 of 1963.

3.128 Subsection (4) provides that whenever a person is debarred under this Act from obtaining payment of any money due to him he shall be entitled to claim interest at the rate of ten percent per annum on all such moneys due to him during the period of suspension by which he is debarred from obtaining payment under this Act, or until payment of the principal sum due before the termination of such period.

12 National Nuclear Regulator Act¹⁴⁶

3.129 Section 34(1) provides that 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 not be instituted after the expiration of a period of 30 years from the date of the occurrence which gave rise to the right to claim that compensation; or the date of the last event in the course of that occurrence or succession of occurrences, if a continuing occurrence or a succession of occurrence, all attributable to a particular event or the carrying out of a particular operation, gave rise to that right

3.130 Subsection (2) provides that if the claimant concerned became aware, or by exercising reasonable care could have become aware of the identity of the holder of the nuclear authorisation concerned, and 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.

3.131 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.

¹⁴⁶ Act 47 of 1999.

13. Pension Fund Act¹⁴⁷

3.132 Section 30I which deals with the lodgement of claims provides that 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.

3.133 Subsection 2 provides that the provisions of the Prescription Act relating to a debt apply in respect of the calculation of the three year period in subsection (1).

14. Promotion of Administrative Justice Act¹⁴⁸

3.134 The Promotion of Administrative Justice Act, more commonly known as PAJA, codified and superseded the common-law provisions relating to review proceedings.¹⁴⁹

3.135 PAJA has broadened the grounds of review. The administrative action affecting any period must be procedurally and substantively fair.¹⁵⁰ Where both the administrative action in question as well as the launch of the review proceedings took place before PAJA's commencement, the common law still applies.¹⁵¹ Where the administrative action took place before the commencement of PAJA but the review proceedings were brought thereafter, the common law applies.¹⁵²

¹⁴⁷ Act 24 of 1956.

¹⁴⁸ Act 3 of 2000.

¹⁴⁹ *Hlanecke v Commission on Restitution of Land Rights* 2006 1 All SA 633.

¹⁵⁰ See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC) par 92 and 97.

¹⁵¹ *Associated Institutions Pension Fund v Van Zijl* 2004 4 All SA 133 (SCA) par 46.

¹⁵² See *Ntamane v MEC for Social Development, Eastern Cape* 2005 6 SA 248 (E) 257A-B; *Bullock v Provincial Government North West Province* 2004 2 All SA 249 (SCA), 2004 (5) SA 262 (SCA); *Premier, Western Cape* 2002 (3) SA 265 (CC), 2002 9 BCLR 891 (CC).

3.136 In terms of section 7(1) of PAJA proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the applicant became aware of the administrative action and the reasons for it, or might reasonably have been expected to become aware of the action and the reasons for it, or might reasonably have been expected to become aware of the action and the reasons for it.

3.137 An applicant cannot therefore neutralise the 180-day limit by denying knowledge of an administrative action that, objectively speaking, the applicant could have been expected to know.¹⁵³

3.138 Section 9 of the PAJA provides that the period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned where the interest of justice so require.¹⁵⁴

15. Promotion of Access to Information Act¹⁵⁵

3.139 The Promotion of Access to Information Act, commonly known as the PAIA, has been enacted to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.¹⁵⁶

3.140 In terms of section 78(1) a requester or third party referred to in section 74 may only apply to court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against decision of the information officer of a public body provided for in section 74.

¹⁵³ *Tedcor Women in Waste v City Council of Cape Town* 2006 JOL 18260 (C) 120.

¹⁵⁴ See *Micro Math Trading v Oelofse TPD* Case 1034/05; *Optis Telecommunications (Pty) Ltd v Minister of Communications* case no A571/2006 in which it was held that s 7(1) of the PAJA does not mean that an aggrieved party has 180 days within which launch proceedings to review a decision. The proceedings must always be launched in terms of the section, "without reasonable delay". A reasonable period could therefore be considerably less than the maximum 180 days allowed.

¹⁵⁵ Act 2 of 2000.

¹⁵⁶ Act 2 of 2000.

3.141 Section 78(2) provides that a that has been unsuccessful in the internal appeal, or aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2) or being aggrieved by the decision of the information officer of a public body may, by way of application, within 30 days apply to court for appropriate relief in terms of section 82.

3.142 In *Brummer v Minister for Social Development and others (South African History Archives Trust and South African Human Rights Commission as amicus curiae)*, the Constitutional Court declared the 30 day period referred to in section 78(2) unconstitutional and invalid. The declaration of invalidity is suspended for 18 months; in the interim the said period is to be replaced with a 180-day period which commences on the date when the requester receives notice of the decision on internal appeal.¹⁵⁷

16 Road Accident Fund Act¹⁵⁸

3.143 In terms of section 23(1) of the Road Accident Fund Act of 1996, 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, prescribe upon the expiry of a period of three years from the date upon the cause of action arose.¹⁵⁹

3.144 In terms of subsection (2), prescription of a claim for compensation referred to in subsection (1) shall not run against a minor, any person detained as a patient in terms of any mental health legislation or a person under curatorship.

¹⁵⁷ 2009 (6) SA 323 (CC).

¹⁵⁸ Act 56 of 1996.

¹⁵⁹ Section 23(1) of the Road Accident Fund Act 56 of 1996 provides that: "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 damages 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".

3.145 Subsection (3) provides that notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4) (a) or section 24 shall prescribe before the expiry of a period of three years from the date on which the cause of action arose.¹⁶⁰

3.146 Section 23(3) has been amended by the Road Accident Fund Amendment Act 19 of 2005. The section provides that a claim 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.¹⁶¹

3.147 The claim however prescribes irrespective of whether the claimant was aware of the claim or not. Most importantly and as in the 1989 it does not make provision for the condonation of the failure to lodge a claim prior to the expiry of the three year period.¹⁶²

17. Criminal Law (Sexual Offences and related matters) Amendment Act¹⁶³

3.148 Section 68(2) of this Act amended section 12(a) of the Prescription Act. The amendment version provides that prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.¹⁶⁴

¹⁶⁰ See *Swanepoel v Johannesburg City Council, President Insurance v Kruger* 1994 (2) SA 789 (A) and *Roux v Santam Versekeringsmaatskappy* 1978 (2) SA 856 (A).

¹⁶¹ Section 23 of the Road Accident Fund Amendment Act 19 of 2005 provides that: 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.

¹⁶² See *Mdeyide v Road Accident Fund* (EL 91/2004) judgment delivered 3 October 2004.

¹⁶³ Act 32 of 2007.

¹⁶⁴ See a schedule on laws repealed or amended by section 68.

18. Water Service Act¹⁶⁵

3.149 Section 47 provides that no court may grant an order or judgment against a water board unless the papers on which that order or judgment is sought have also been served on the Minister.

L Problems with the current legislation

1. Lack of uniformity

3.150 There is no uniform set of prescription periods. Section 11(d) of the Prescription Act gives the legislature the power to provide for any period of prescription. Where there is no period specified in the Act, then the period of prescription is three years. This has resulted in absence of uniform set of prescription periods.

3151 The consequence of this regime create a legal uncertainty and confusion for a litigant. It is not easy for prospective litigant to ascertain which prescription period is applicable more so that most persons are unaware or are poorly informed about enforcing their rights.¹⁶⁶

2. Justification

3.152 Different periods of prescriptions are justified in different Acts. Section 11(d) does not place a limit on the prescription periods.

3.153 The limitation imposed on the right of access to court in terms of the Constitution by the prescription periods must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁶⁷ In

¹⁶⁵ Act 108 of 1997.

¹⁶⁶ *See Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) 133.

¹⁶⁷ Section 36 (1) of the Constitution of Republic of South Africa provides that: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

*Brummer v Minister of Social Development and Others*¹⁶⁸ the evaluation process was summarised as follows:

In assessing whether the limitation imposed by [the section] is reasonable and justifiable under section 36(1), regard must be had to, among other factors, the nature of the right limited, the purpose of the limitation, including its importance, the nature and extent of the limitation, the efficacy of the limitation, that is, the relationship between the limitation and its purpose, and whether that are less restrictive of the right in question. Each of these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assessment of competing interests. Where justification rests on factual or policy considerations, the party contending for justification must out such material before court.

3.154 The legislation with prescription periods may be regarded as “social legislation”. This legislation must endeavour to include all segments of society and pay particular heed to the socially and economically disadvantaged. To the extent that it does not, this would have to be considered as a relevant factor in evaluating whether their exclusion is reasonable in an open and democratic society based on human dignity, equality and freedom.

3. Primary prescription period

3.155 The running of prescription is found in section 12 of the Prescription Act.

3.156 The basic principle is that prescription starts to run as soon as the debt is due. Such a debt is not 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 reasonable care.¹⁶⁹

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- (a) the nature of the right;
 - (b) the importance of the purpose for the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

¹⁶⁸ 2009 (4) SA 491 (CC) 344.

¹⁶⁹ The relevant subsections of section 12 of the Prescription Act provide:
 (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall Commence to run as soon as the debt is due.
 (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.

3.157 The Act has been recognised as the cornerstone of the laws regulating the extinction of debts by prescription,¹⁷⁰ and as the benchmark legislation for the operation of prescription, requiring knowledge, actual or reasonable deemed, as a necessary precondition to enable someone to exercise their right of access to court.¹⁷¹

3.158 The provisions of chapter 3 of the Prescription Act apply save in so far as they are inconsistent with the provisions of any Act of Parliament.¹⁷²

3.159 As a result the legislature may pass an Act and impose conditions on the institution of an action for the recovery of a debt which differs from the running of the prescription period as stipulated in section 12 of the Prescription Act.¹⁷³

¹⁷⁰ See the Preamble to the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

¹⁷¹ Section 12(1) of the Prescription Act provides that: "Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due".

Section 12(3) of the Prescription Act provides that: "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".

¹⁷² Section 16(1) of the Prescription Act provides that : " 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 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".

¹⁷³ See Section 23(1) of the Road Accident Fund Act 56 of 1996. In *Road Accident Fund v Mdeyinde* Case CCT 10/10, the Constitutional Court was faced with a conflict on the running of the prescription as provided in section 12(3) of the Prescription Act and section 23(1) of the Road Accident Fund Act. The Court decided that the provisions of section 12(3) of the Prescription Act cannot apply in the Road Accident Fund Act.

CHAPTER 4

CONSTITUTIONALITY OF PRESCRIPTION PERIODS

A. Prescription and section 34

4.1 The rights entrenched in the Bill of Rights are formulated in general and abstract terms. The meaning of these provisions will therefore depend on the context in which they are used, and their application to particular situations will necessarily be a matter of argument and controversy.¹⁷⁴

4.2 Section 39 of the Constitution contains an interpretation clause which pertains to the Bill of Rights.¹⁷⁵ It states that when the Bill of Rights is interpreted a court must promote the values which underlie an open and democratic society based on human dignity, freedom and equality. The section furthermore requires reference for purposes of interpretation to international human rights law in general. This is not confined to instruments that are binding on South Africa.¹⁷⁶

¹⁷⁴ De Waal, Currie & Erasmus *The Bill of Rights Handbook* 3rd ed Juta & Co 2000 117.

¹⁷⁵ Section 39 of the Constitution reads as follows:
 (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 (b) must consider international law; and
 (c) may consider foreign law.
 (2) 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.
 (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁷⁶ Dugard in van Wyk D et al eds *Rights and Constitutionalism: The New South African Legal Order* Juta & Co 1994 193.

4.3 In interpreting the Bill of Rights, it should be interpreted by first of all determining the literal meaning of the text itself¹⁷⁷ and identifying the purpose or underlying values of the right.¹⁷⁸ A generous interpretation should furthermore be given to the text,¹⁷⁹ and finally, the context of a constitutional provision should be considered, since the Constitution is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation.¹⁸⁰

4.4 The right of access to court is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in our Bill of Rights would be meaningless.¹⁸¹

4.5 The South African Constitution guarantees that everyone has the right of access to the courts.¹⁸² This right creates a right of access to a court or another tribunal or forum, it requires tribunals or forums other than courts to be independent and impartial when they are involved in the resolution of legal disputes and it requires the dispute to be decided in a fair and public hearing.¹⁸³ Access to the courts is a

¹⁷⁷ See *S v Zuma* 1995 (2) SA 642 (CC) par 17, where the court indicated that constitutional disputes can however, seldom be resolved with reference to the literal meaning of the provisions alone. The literal meaning should therefore not be regarded as conclusive.

¹⁷⁸ See *S v Makwanyane* 1995 (3) SA 391 (CC) par 9.

¹⁷⁹ See *S v Mhlungu* 1995 (3) SA 867 (CC); *S v Makwanyane* supra; *S v Zuma* supra.

¹⁸⁰ See *S v Makwanyane* supra; *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC) par 82; *Soobramoney v Minister of Health; Kwazulu-Natal* 1998 (1) SA 765 (CC) par 16. Contextual interpretation should be use with caution. It cannot be used to limit the rights. The Bill of rights envisages a two stage approach: first interpretation, then limitation. The balancing of rights against each other or against the public interest must take place in terms of the criteria laid down in sec36. In the first stage, context may only be used to establish the purposes or meaning of a provision. See *Berstein v Bester NO* 1996 (2) SA 751 (CC) 128, where the court was of the view that contextual interpretation may also not be used to identify and focus only on the most relevant right. In terms of constitutional supremacy, a court must test a challenged law against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not.

¹⁸¹ Brickhill & Friedman in Woolman et al (eds) *Access to Courts: Constitutional Law of South Africa* Juta & Co 2006 59-1.

¹⁸² Section 34 of the Constitution provides that “ Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”

¹⁸³ Dewaal *et al Bill of Rights Handbook* 4th ed 2001 554.

fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom.¹⁸⁴

4.6 Section 34 applies to all disputes that can be resolved by the application of law. This is the only requirement according to the Constitution. A dispute's potential for social conflict, equality of arms and curial practicalities in respect of a dispute, as stated in *Zondi v MEC for Traditional and Local Government*¹⁸⁵, are not requirements. Neither is it a requirement that before section 34 can be invoked applicants must convince the court that a claim is "enforceable" or "justifiable", or that pre-existing rights" are involved.¹⁸⁶ The only question is whether legal rules exist in terms of which disputes concerning enforceability, justifiability and pre-existing rights may be resolved.

4.7 The purpose of the right is to provide protection against actions by the state and other persons, which deny access to the courts and other forums. However the section does not confer on litigants a right to approach any court they choose for relief. As long as there is a right to approach a court of competent jurisdiction for relief the requirements of the section are met.¹⁸⁷

4.8 The section embodies a fundamental rule of natural justice and that nobody should be allowed to take law into his own hands or to usurp the function of a court of law. Access to courts of law is foundational to the stability of society. In *Chief Lesapo v North West Agricultural bank & another*¹⁸⁸ the court held that the right to access to court is fundamental to a democratic society that cherishes the rule of law. It ensures that parties to a dispute have institutionalized mechanisms to resolve their difference without recourse to self-help.¹⁸⁹ Self-help in this sense is inimical to a society to

¹⁸⁴ *Moise v Greater Germiston Traditional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus Curiae)* 2001 (4) SA 491 (CC); (2001) (8) BCLR (765) (CC).

¹⁸⁵ 2005 (4) BCLR 347 (CC) par 63.

¹⁸⁶ *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA) par 45-47; *Engelbrecht v Road Accident Fund* 2007 (5) BCLR (CC), 2007 (6) SA 96 (CC) par 21-24.

¹⁸⁷ *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC) par 4.

¹⁸⁸ 2000 (1) SA 409 (CC) par 16 416D-G.

¹⁸⁹ *Concorde Plastics (Pty) Ltd v Numsa and Others* 1997 (1) BCLR 1624 (LAC) 1644F.

which the rule of law prevails.¹⁹⁰ Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.¹⁹¹

4.9 Access to court guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. In a constitutional state and under the rule of law, citizens and non-citizens are entitled to rely upon the state for the protection and enforcement of their rights. The state therefore assumes the obligation of assisting such persons to enforce their rights.¹⁹² The state which is under a constitutional obligation to, among others, fulfil the rights in the Bill of Rights, would have failed to fulfil its constitutional obligations if the restrictions in section 18(b) continues to be the law.¹⁹³ The section also places a negative obligation not to restrict access to court.¹⁹⁴ Where the state does not fulfil the right of access to courts, it is prima facie in breach of its duties under the Constitution.¹⁹⁵

4.10 Rules that limit the time during which litigation may be launched are common in our legal system as well as many others.¹⁹⁶ They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason.

¹⁹⁰ Section 1(C) of the Constitution provides "The Republic of South Africa is one, sovereign, democratic state founded on the following values... Supremacy of the constitution and the rule of law"

¹⁹¹ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) 511H-512A; *Nino Bonino v De Lange* 1906 TS 120 122; *President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd* 2005 (8) BCLR 786 (CC).

¹⁹² *Delange v Smuts No and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) par 77-79.

¹⁹³ Section 7(2) of the Constitution provides: "The state must respect, promote and fulfill the rights in the Bill of Rights"

¹⁹⁴ See *Beinash v Ernest & Young* 1999 (2) SA 116 (CC) 1999 (2) BCLR 125 (CC) where the court decided that s 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 infringed on s 34 as it imposed a procedural barrier to litigation on persons who are found to be vexatious litigants.

¹⁹⁵ Budlender G "Access to Courts" 2004 *SALJ* 347.

¹⁹⁶ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) 129.

4.11 There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. Each limitation rule must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which section 34 bestows on everyone to have his or her justiciable disputes settled by a court of law.¹⁹⁷

4.12 Over the years courts have drawn attention to the adverse effect on claimants. The limitation periods are conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law.¹⁹⁸ In *Administrator, Transvaal, and Others v Traub and others*,¹⁹⁹ the court also decided that the provision undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts.

4.13 In *Mohlomi v Minister of Defence*,²⁰⁰ the applicant challenged section 113(1) of the Defence Act of 1957,²⁰¹ on the grounds that the provision infringes on the right to have access to courts. The court decided that the severity of section 113 (1) lies in the fact that claimants are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. The court found no reasonable or justifiable conclusion to limit the right. Furthermore, the court indicated the provision had to be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and where access to professional advice and assistance are difficult due to financial or geographic reasons.

¹⁹⁷ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) 129.

¹⁹⁸ See *Benning v Union Government (Minister of Finance)* 1914 AD 180.

¹⁹⁹ 1989 (4) SA 731 (A).

²⁰⁰ 1997 (1) SA 124 (CC).

²⁰¹ Section 113(1) of the Defence Act 44 of 1957 provided that no civil action shall be capable of being instituted against the state or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before commencement thereof."

4.14 These views were supported by the court in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus curiae)*,²⁰² where the applicant challenged section 2(1) of the Limitation of Legal Proceedings Act 94 of 1970,²⁰³ on the basis of the scheme of the Act consisting of specific notice, within short period and limited scope for condonation for non compliance with section 2(1). The court decided that the requirement of written notice as a precondition to the institution of legal proceedings is in itself an obstacle to such legal proceedings. The court also decided that 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 courts.²⁰⁴ Furthermore the court regarded the condonation opportunity as being immaterial as most litigants (arguably) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time.

4.15 The court in *Barkhuizen v Napier*,²⁰⁵ faced with a time limit of 90 day period on a contractual case, had to decide whether the time limitation afforded the claimant and adequate and fair opportunity to seek judicial redress. The court decided that there was no evidence that the contract had not been freely concluded between parties in equal bargaining positions or that the clause was not drawn on the applicant's attention. It found that the time limit did not offend public policy.

4.16 In *Brummer v Minister for Social Development and Others*²⁰⁶ the applicant challenged the 30 day period rule within which an application to court may be

²⁰² 2001 (4) SA 491 (CC).

²⁰³ Section 2(1) of the Limitation of Legal Proceedings Act 94 of 1970 provided that:
Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer-
(a) unless the creditor has within 90 days as from the day on which the debt became due, served a written notice of such proceedings, in which are set out the facts from which the debt arose and such particulars of such debt as are within the knowledge of the creditor, on the debtor by delivering it to him or by sending it to him by registered post.

²⁰⁴ See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's legal Centre as amicus curiae)* 2001 (4) SA 491 (CC) 496.

²⁰⁵ 2007 (5) SA 323 (CC).

²⁰⁶ 2009 (6) SA 323 (CC).

launched, as laid in section 78(2) of the Promotion of Access to Information Act.²⁰⁷ The court decided that the time limit does not afford the requesters whom it hits an adequate and fair opportunity to seek the judicial redress and that such persons are left with too short a time within which to launch an application. The court further decided that the power to condone non compliance with the time-bar is not necessarily decisive.²⁰⁸

4.17 The principles that emerge from these cases are these: Time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interest of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution.²⁰⁹ Each case is decided on its own merits.

4.18 For a time-bar provision to be consistent with the right of access to court, it depended upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision had to afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It had to allow adequate time between the cause of action coming to the knowledge of the claimant and the launching of litigation.²¹⁰ The

²⁰⁷ Section 78 of the Promotion of Access to Information Act provided that :

(2) A requester -

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body,

(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2) ;

(c) aggrieved by the decision of the information officer of a public body referred to in paragraph (b) of the definition of public body in section 1

(i) to refuse a request of access or

(ii) taken in terms of section 54, 57(1) or 60,

may by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

²⁰⁸ See *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) 343.

²⁰⁹ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's legal Centre as amicus curiae)* 2001 (4) SA 491 (CC).

²¹⁰ See *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) 342D-343A.

existence of the power to condone non-compliance with the time bar is not necessarily decisive.²¹¹

B. Condonation

4.19 Litigation is subject to time constraints.²¹² Common law reviews are also subject to a time limitation. They must be brought within a reasonable time.²¹³ Prescription provisions are also subject to time frames.

4.20 The Prescription Act does not provide for condonation for late filing of a claim. Whether condonation may be granted or not depends upon the interpretation of the statute in question. Generally, there appears to be no inherent power residing in a court to condone a failure to comply with the limits laid down in statute.²¹⁴

4.21 Non-compliance has the effect of depriving a potential claimant of a valid claim, even though there might be a claim in terms of the merits of the case.²¹⁵

4.22 The power of the courts to condone late filing of a claim has been codified in certain statutes. The Labour Relations Act, provides that the employee may at any time refer the dispute after the relevant time has expired, refer the dispute to the Commission or the council if s/he can show good cause.²¹⁶ In terms of the Promotion

²¹¹ See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's legal Centre as amicus curiae)* 2001 (4) SA 491 (CC); *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC).

²¹² *Queenstown Fuel Distributors CC v Labuschagne NO & Others* 1999 (3) BLLR 268 (LC) par 7-8.

²¹³ *Wolgroceries Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

²¹⁴ *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC) 1568D-E.

²¹⁵ *Roux Santam Ltd v Ethwar* 1999 (1) All SA 252 (SCA); *Masombuka v Constantia Versekerings Maatskappy Bpk* 1987 (1) SA 525 (T); *Multilateral Motor Vehicle Accident Fund v Clayton NO* 1997 (1) SA 350 (SCA); *Somdaka v Northern Insurance* 1960 (2) SA 852 (D); *Jonker v Rondalia* 1975 (3) SA 383 (E); *Mokgholoo v MMF* 1993 (4) SA 503 (T) and *De Lange v MMF* 2000 (1) SA 921 (T).

²¹⁶ Section 191 (2) of the Labour Relation Act 66 of 1995 provides that:

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired

of Administrative Justice Act, the period of review may be extended by a court or tribunal on application by the person where the interest of justice so require.²¹⁷ The Customs and Excise Act provides that a litigant may apply to a high court to reduce or extend the institution of legal proceedings when the state, the Minister or the Commissioner fails to consent to such request.²¹⁸ The Merchant Shipping Act also provides for the extension of the period for the institution of legal proceedings to any court.²¹⁹

4.23 The Institution of Legal Proceedings against Certain Organs of State Act of 2002, among others, deals with notice requirements to organs of state before instituting legal proceedings.²²⁰

4.24 In terms of the provisions of section 3(1) of the IPACOS Act, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state written notice of the impending

²¹⁷ Section 9(2) of the Promotion of Administrative Justice Act 3 of 2000 provides that:
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

²¹⁸ Section 96 (1)(c)(ii) of the Customs and Excise Act 91 of 1964 provides that:
(ii) If the State, the Minister, the Commissioner or an officer refuses to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires.

²¹⁹ Section 344 of the Merchant Shipping Act 57 of 1951 provides that :
(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.

²²⁰ Hereinafter referred to as the "IPACOS Act".

proceedings, or the organ of state has consented to the institution of legal proceedings without such notice. The provision is therefore peremptory.²²¹

4.25 Such a notice must be served on the organ of state within six months from the date on which the debt became due.

4.26 In terms of section 3(4) (a) of the IPACOS Act, the creditor may apply for condonation of the failure to comply with the provisions of section 3(1).²²² Section 3(4) (b) sets out the jurisdictional facts which must exist before condonation may be granted by the court. These jurisdictional facts are considered by the court before condonation may be granted.

4.27 Such jurisdictional facts must satisfy the court that condonation be granted. The phrase “if the court is satisfied” in section 3(4) (b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is an overall impression made on a court which brings a fair mind to the facts set up by the parties.²²³

4.28 The first requirement means that the applicant should rely on an extant cause of action, meaning debt must not have been extinguished by prescription. Application for condonation may be made by the creditor even after proceedings have been instituted if the debt has not prescribed.²²⁴

²²¹ See *Legal Aid Board & Others v Singh Case No 14939/05* (NPD) 25 August 2008 (reportable) 9.

²²² Sec 3(4)(a)-(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 2002 provides as follows:

Sec 3(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.

²²³ See *Die Afrikaanse Pers Beperk V Nesor* 1948 (2) SA 295 (C) 297. See also *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) 316.

²²⁴ *Minister of Safety and Security v DE Witt* Case No 722/2007.

4.29 The second requirement is that good cause should exist for the failure by the creditor to comply with the provisions of section 3(1). In establishing good cause all the factors which bear on the fairness of granting relief as between the parties and as affecting the proper administration of justice needs to be taken into account.²²⁵ Some factors that have been recognised in establishing good cause include:

- (a) the prospects of success in the proposed action;²²⁶
- (b) the reason for the delay;
- (c) the sufficiency of the explanation offered;
- (d) the bona fide of the applicant; and
- (e) any contribution by other persons or parties to the delay and the applicant's responsibility therefore.

4.30 In *Melane v Santam Insurance Company Limited*²²⁷ the court decided that the basic principle in exercising discretion is that such a discretion should be exercised judicially upon consideration of all facts, and, in essence, it is a matter of fairness to both sides. The court also indicated that among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. The court further decided that these facts are interrelated and that they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion.

4.31 In *Silber v Ozen Wholesalers (Pty) Ltd*,²²⁸ the court decided that the meaning of "good cause" should not lightly be made the subject of further definition and it usually comprehends the prospects of success on the merits of a case.²²⁹

4.32 The last requirement is that the organ of state would not be prejudiced by such failure. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due

²²⁵ *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) 227I-228F.

²²⁶ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765D-E.

²²⁷ 1962 (4) SA 531 (A) 532B-E.

²²⁸ 1954 (2) SA 345 (A).

²²⁹ See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765D-E.

weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice.²³⁰

4.33 Absence of prejudice requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often peculiarly within the knowledge of the respondent.²³¹

4.34 The structure of section 3(4) of the IPACOS Act is now such that the court must be satisfied that all three requirements have been met. Once it is so satisfied the discretion to condone operates according to the established principles in such matters.²³²

4.35 Condonation may be granted after summons has been served, and when the case is pending.²³³

4.36 It would seem that there is a move in statute to recognise the late filing of a claim to allow for condonation. This raises the question whether it is still justifiable not to allow condonation for claims that have prescribed.

²³⁰ *Madinda v Minister of Safety and Security* Case No 153/2007 (SCA) 28 March 2008.

²³¹ *Commissioner of Inland Revenue v Pick 'n Pay Wholesalers Pty (Ltd)* 1987 (3) SA 453 (A)

²³² *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) 720E-G.

²³³ *Catharina Dauth & Others v Minister of Safety and Security & Others* Case 729/2007 (N); *Shirley Marais v Minister van Veiligheid en 'n ander* Case 2727/2005 (O), *Schlebusch v Mohokare Plaaslike Munisipaliteit* Case 567/2005 (F) and *Minister of Safety and Security v De Witt* Case 722/2007 (SCA).

CHAPTER 5

COMPARATIVE SURVEY

A. Introduction

5.1 Comparative law is important in learning the experiences of other countries. However the experiences of such countries need not necessarily be drawn to our own country.

5.2 It includes the description and analysis of foreign legal system, even where no explicit comparison is undertaken. The importance of comparative law has increased enormously in the present age of internationalism, economic globalisation and democratisation.

5.3 In this globalising world, comparative law is important for it provides a platform for intellectual exchange in terms of law and it cultivates a culture of understanding in a diverse world. Furthermore, comparative law helps in broadening horizons for law reformers and legislators around the world. It can also be helpful in international relations in shaping foreign policies.

5.4 In this investigation comparative study is limited to prescription periods, powers of the court to condone prescribed claims and the peculiar treatment of state institutions.

5.5 The following foreign countries laws on prescription have been investigated:

1. New Zealand.
2. England.
3. France
4. Ireland.
5. Scotland.

1. New Zealand

(a) Knowledge

5.6 In New Zealand most of the limitations periods are governed by Limitation Act of 1950,²³⁴ which is based on the English Limitation Act, 1939. It applies to “actions”, defined as non-criminal proceedings in a court of law²³⁵ and to arbitrations.²³⁶

5.7 Before its enactment, New Zealand limitation law was to be found in the 1623 Act, the Civil Procedure Act 1833, the Crown Suits Act 1769, the Real Property Limitation Acts of 1833, the Crown Suits Act 1759, the Real Property Limitation Act of 1833 and 1874 and in the Judicature Act 1908, the Property Law Act 1908 and the Trustee Act 1908. The aim of the 1950 Act was to simplify and codify limitations law.²³⁷

5.8 These time limits are generally measured from “the date of the accrual of a right of action”. The Act does not attempt to define this expression. Halsbury define the right of action as ‘when there is in existence a person who can sue and another who can be sued and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed’.²³⁸

5.9 The facts which are material to be proved will differ according to the nature of the legal claim made. A claim for breach of contract accrues on the date of the breach, irrespective of whether breach has caused actual loss, and claims founded

²³⁴ Hereinafter referred to as the “Limitation Act of New Zealand”.

²³⁵ Section 2 of the Limitation Act of New Zealand reads as follows:
 (1) In this Act unless the context provides otherwise requires,-
 “Action means any proceedings in a court of law other than a criminal proceeding”.

²³⁶ Section 29 of the Limitation Act of New Zealand reads as follows:
 Application of Act and other limitation enactments to arbitrations
 (1) This Act and any other enactments relating to the limitation of actions shall apply to arbitrations as they apply to actions.

²³⁷ New Zealand Law commission Preliminary Paper 3 *The Limitation Act of New Zealand 1950*, A Discussion Paper October 1987 15.

²³⁸ *Halsbury`s Laws of England* (4ed reissue, Butterworths, London, 1997) Limitations of Actions, par 820.

on tort run from “the date on which the cause of action arose”. A claim in negligence does not accrue until there is damage resulting from a breach of duty. Where there is a continuing series of events that infringe the rights of a claimant, there is a separate accrual for each event and a separate limitation period applies to each event.²³⁹

(b) Prescription periods

5.10 The Act provides a six year limitation period from the date on which the cause of action accrued, in relation to actions founded on simple contract or tort, to enforce a recognisance, to enforce an award and to recover any sum recoverable by virtue of any enactment.²⁴⁰

5.11 Section 4(7) of the Limitation Act provides that an action “in respect of the bodily injury to any person” is subject to a two year limitation period, but this may be extended with the consent of the intended defendant (up to a maximum of six years), and subject also to the power of the court to grant leave to bring the proceedings on an application brought within six years.²⁴¹

²³⁹ New Zealand Law Commission *Tidying the Limitation Act* Report 61, July 2000 4.

²⁴⁰ Section 4 of the Limitation Act of New Zealand reads as follows :
 Limitation of actions of contract and tort, and certain other actions
 4 (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners and Victims Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which cause of action accrued, that is to say,-
 (f) actions founded on simple contract or on tort;
 (g) actions to enforce a recognisance;
 (h) actions to enforce an award, where the submission is not by a deed;
 (i) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

²⁴¹ Section 4 (7) of the Limitation Act of New Zealand reads as follows:
 4(7) An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:
 Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that he intended defendant was not materially prejudiced in his defence or otherwise by the delay.

5.12 The following actions are also subject to a limitation period of six years:

- (a) the action to recover arrears of rent or damages in respect thereof;²⁴²
- (b) action in respect of trust property;²⁴³

5.13 Other actions have time limits of 12²⁴⁴ or 60 years²⁴⁵.

5.14 In 1988 the Law Commission published a report recommending the complete repeal of the Limitation Act and its replacement by a new statute²⁴⁶ having the three central issues:

- (a) a defence based on standard three year limitation period, but subject to :
- (b) extensions in certain prescribed circumstances, in particular where the claimant shows absence of knowledge of essential facts relevant to the claim, but generally subject to

²⁴² Section 19 of the Limitation Act reads as follows:
(19) No action shall be brought to recover arrears of rent or damages in respect thereof, after the expiration of 6 years from the date on which the arrears became due.

²⁴³ Section 21(2) of the Limitation Act reads as follows:
Subject to the aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued

²⁴⁴ Section 7(2) of the Limitation Act reads as follows;
7(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the of action accrued to him or to some person through whom he claims: Provided that, if the right of action first accrued to the Crown, the action may be brought at any time before the expiration of the period during which action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.

7A(1) No action to which this act applies by virtue of subsection (1A)(a) of section 6 of this Act shall be brought after the expiration of 12 years from the date on which the right of action accrued to the person brings or to some other person through whom the person bringing the action.

²⁴⁵ Section 7(1) of the Limitation Act reads as follows:
7(1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or to some person through whom the Crown claims.

²⁴⁶ New Zealand Law Reform Commission Limitation Defences in Civil Proceedings Report NO 6, October 1988.

- (c) a further defence based on a “long stop” limitation period of 15 years.

5.15 The above mentioned recommendations have not yet been implemented.²⁴⁷ However the Law Commission released a further report regarding the Limitation Act²⁴⁸ which had the following propositions:

- (a) That time should not run against an intending plaintiff until discovery of the fraud or concealment where the right of action is concealed by the intended defendant’s fraud;
- (b) That where, for reasons other than fraudulent concealment by the intended defendant, the existence of the grounds for a claim is neither known to or reasonably discoverable by the intending plaintiff, time should be extended to the extent that this is possible without unfairness to the intended defendant;
- (c) That time should not run against an intending plaintiff while the intending plaintiff is under disability.

5.16 The Commission further recommended that a new section 28A be inserted in the Limitation Act 1950 along the following lines:

28A Where in the case of any action for which a period of limitation is prescribed by this Act the plaintiff establishes that immediately after the cause of action arose the plaintiff neither knew or ought to have known the following facts namely-

- (a) that the loss, injury or damage for which the plaintiff seeks a remedy has occurred; or
- (b) that such loss, injury or damage was attributable to the defendant,

and the period of limitation shall not begin to run until the plaintiff discovers such facts or could with reasonable diligence have discovered them, but an action seeking a remedy for such loss, injury or damage may not be brought against any person 10 years or more after the date on which the cause of action accrued.

²⁴⁷ See Report No 6 *Limitation Defences in Civil Proceedings*, NZLC r6 (1988) vii.

²⁴⁸ See New Zealand Law Reform Commission *Limitation Defences in Civil Proceedings* Report No 6 October 1988 1.

(c) Application for condonation

5.17 In the area of personal injury the Limitation Act of 1950 provides for a shorter period of two years for action to be instituted, but subject to a power to apply to the court for leave to bring such an action up to six years after accrual of that action.²⁴⁹

(d) Special protection to state organs

5.18 In New Zealand most of the statutes dealing with proceedings against the Crown and local authority provided that the defendant be given notice of the intention to sue. This was generally three months where the suits were against harbour boards and six months for municipalities and counties.²⁵⁰

5.19 The Limitation Act of 1950 substituted a single uniform limitation period of one year for cases against the Crown and public authorities and required that the defendants be informed of the intention to sue within a month of the breach.

5.20 The Tucker Committee Report,²⁵¹ had recommended that the special limitation periods and notice provisions for public authorities be abolished. Such a recommendation was not followed in New Zealand but followed in England.²⁵²

5.21 Meanwhile the Tucker Committee Report was implemented in England in 1953. The New Zealand legislative responses did not come until 1962 when it was

²⁴⁹

Section 4(7) of the Limitation Act of 1950 provides:

An action in respect of bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of six years from the date:

Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at anytime within 6 years from the date on which the cause of action accrued, and the court may, if it thinks it is just to do so, grant leave accordingly subject to such conditions (if any) as it thinks fit to impose.

²⁵⁰

New Zealand Law Commission on The Limitation Act 1950, A discussion paper 1987 16.

²⁵¹

The Tucker Committee was chaired by Lord Justice Tucker. It produced the report on Limitations of Actions (Cmd 7740, 1949) which led to the promulgation of the Limitations of Actions Act 1954, abrogating special protective limitation period in actions against public authorities.

²⁵²

New Zealand Law Commission on Limitation Act 1950, A discussion paper 1987 16.

thought time to remove the Crown and local authorities from their privileged position.²⁵³

5.22 The Law Revision Committee of New Zealand recommended that the special protection to state organs be abolished as the provision is unjust and that there is no reason why public authorities should be handicapped by lack of notice of an intended claim.²⁵⁴ The Committee further indicated that if there is any justification for keeping the provision of special protection, such provision should be extended to large business corporation.

2. ENGLAND

(a) Knowledge

5.23 The date of knowledge for the purposes of a personal injuries action is defined in section 14(1) of the *Limitation Act* of 1980 as the date on which the plaintiff first knew the following facts:

- (a) that the injury in question was significant;²⁵⁵
- (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;²⁵⁶
- (c) the identity of the defendant; and
- (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.²⁵⁷

²⁵³ See Section 3 of the *Limitation Act* 1962.

²⁵⁴ Law Revision Committee of New Zealand (LR 175) The reasons provided by the Committee were that the provision The Committee further indicated that if there is any justification for keeping the provision of special protection, such provision should be extended to large business corporation.

²⁵⁵ An injury is significant if the claimant would reasonably have considered it sufficiently serious to justify instituting proceedings against a defendant who did not dispute liability and could satisfy the judgment. On the face of it, this wording seems to incorporate both the subjective and objective elements, and this was confirmed in *McCafferty v Metropolitan Police Receiver*. See also *Berry v Calderdale Health Authority* [1998] Lloyd's Rep Med 179, *Briggs v Pitt-Payne* (1999) 46 BMLR 132 and *James v East Dorset Health Authority, CA*, unreported, 24 November 1999.

²⁵⁶ In order to satisfy this subsection, it is not necessary for the plaintiff to have detailed knowledge of the processes that brought about the injury, but merely to have knowledge of the essence of the act or omission to which the injury is attributable. See *Nash v Eli Lilly & Co* [1993] 1 WLR 782, *Broadly v Guy Clapham & Co* [1994] a All ER 439 and *Halam –Eames v Merrett Syndicate Ltd* [1996] 7 Med LR 122.

5.24 Section 14(3) provides that the plaintiff's knowledge includes knowledge which he might reasonably have been expected to acquire-

- (a) from the facts observable or ascertainable by him; or
- (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him/her to seek;

5.25 A person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as s/he has taken all reasonable steps to obtain (and where appropriate, to act on) that advice.

5.26 Section 14(3) assumes that the plaintiff can reasonably be expected to discover relevant facts via two possible routes. First, he or she can observe or ascertain relevant facts himself or herself. This may be done by way of active investigation on the plaintiff's part,²⁵⁸ or it may be through the plaintiff's observation of the media.²⁵⁹ Secondly, he or she may discover facts through the advice of experts. This will generally include the obtaining of legal advice, and doing so reasonably promptly.

5.27 A person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek. A person is not to be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and act on that advice.²⁶⁰

²⁵⁷ This applies in cases of vicarious liability where the plaintiff does not immediately discover that there is someone who is vicariously liable for the acts of the tortfeasor. Time will run against the actual tortfeasor independently of any delay in starting the limitation period against the employer.

²⁵⁸ See *Common v Crofts* (unreported, 15 Feb 1980) CA.

²⁵⁹ See *Nash v Eli Lilly & Co* [1993] 1 WLR 782.

²⁶⁰ Section 14(3). In *Henderson v Temple Pier Co Ltd* [1998] 1 WLR 1540 the Court of Appeal held that advice given by a solicitor could only ever be called "expert advice" if it related to matters of fact upon which expert advice was required, and that the identity of the ship-owner was not a matter of fact ascertainable only with the help of expert advice.

(b) Limitation periods

5.28 Until the Limitation Act 1623 there were no limitation periods for other (that is, non-land related) claims. This Act provided that a limitation period of two years should apply to actions on the case of words, a period of four years should apply to actions of assault and false imprisonment and for most other actions a limitation period of six years should apply.²⁶¹

5.29 The limitation periods in England were reviewed until the Limitation Act 1980 was passed. This Act consolidated the Limitation Act 1975 and the Limitation Amendment Act 1980.

5.30 The time limit for a claim for breach of contract is six years from the date on which the breach occurs.²⁶² However, if the contract is made by deed the limitation period is twelve years.²⁶³

5.31 The limitation period applicable to a claim in tort (other than a claim for damages in respect of personal injuries) is six years from the date on which the cause of action accrues.²⁶⁴ In respect of torts actionable, the cause of action accrues immediately the tort is committed. In respect of torts actionable only on proof of damage, the cause of action accrues upon the damage occurring.²⁶⁵

²⁶¹ See England Law Reform Commission Consultation Paper 151 Limitations of Actions 1998 at 5.

²⁶² Section 5 of the Limitation Act 1980 reads as follows:
An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. See *Gibbs v Guild (1881) 8 QBD 296*; *Gulf Oil (Great Britain) Ltd v Phillis* [1998] PNLR 166.

²⁶³ Section 8 of the Limitation Act reads as follows:
An action upon specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

²⁶⁴ Sec 2 of the Limitation Act reads as follows:
An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. See *R v Secretary of State for Transport, ex p Factortame* (No6) QBD, The Times, 10 January 2001

²⁶⁵ *Bacon v Kennedy* [199] PNLR 1. Where a solicitor negligently fails to draft a will, the beneficiary's cause of action accrues when there would be testator dies. *Dunlop v Commissioners of Customs & Excise*, CA, the Times, 17 March 1998. In malicious prosecution the cause of action accrues when the criminal proceedings against the claimant end.

5.32 The limitation period applicable to any claim in negligence, nuisance or breach of duty which consists of, or includes, a claim for damages for personal injuries is three years from the date on which the cause of action accrues, or if later, three years from the date of the knowledge of the person injured.²⁶⁶

5.33 The time limit for actions for defamation or malicious falsehood, except for slander or slander for title, goods, or other malicious falsehood shall be brought after the expiration of one year from the date on which the cause of action accrued.²⁶⁷

5.34 From 1998 the Law Commission of England reviewed the limitation periods. In 2001 the Commission published a report which had the following recommendations:

- (a) There should be a primary limitation period of three years starting from the date that the claimant knows, or ought reasonably to know:
 - (i) the facts which give rise to the cause of action;
 - (ii) the identity of the defendant; and
 - (iii) if the claimant has suffered injury, loss or damage or the defendant has received a benefit, that the injury, loss, damage or benefit was significant.

(c) Condonation

5.35 In England the court may disapply the limitation period described in section 114 if it is equitable to do so in all the circumstances of the case.²⁶⁸ Under section 33, the court has a wider power to disapply the normal time-limits on actions in respect of

²⁶⁶ Section 11 of the Limitation Act reads as follows:
 Special time limits for action in respect of personal injuries
 (1) This section applies to any action for damages for negligence, nuisance or breach of duty where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
 (2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.
 (4) Except where subsection (5) below applies, the period applicable is three years from-
 (a) the date on which the cause of action accrued; or
 (b) the date of knowledge (if later) of the person injured.

²⁶⁷ Section 4A of the Limitation Act 1980.

²⁶⁸ Section 33 of the Limitation Act of 1980.

personal injury and death. The Limitation Act 1980 lays down six guidelines for the exercise of this power:

- (a) the length of and reasons for the claimant's delay;
- (b) the extent to which the cogency of evidence adduced by either party might be affected by the delay;
- (c) the defendant's conduct after the cause of action arose, including his response to requests by the claimant for information or inspection for the purpose of ascertaining relevant facts;
- (d) the duration of a disability of the claimant after the cause of action arose;
- (e) the extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the defendant might be capable of giving rise to an action for damages; and
- (f) the steps taken by the claimant to obtain expert advice and the nature of the advice he received.

5.36 Courts have empathised that the onus is on the claimant to satisfy the court that it would be equitable to disapply the limitation period, and that the onus is heavy one.²⁶⁹

5.37 The court is obliged to have regard to all the circumstances of the case, and in particular to the factors identified in section(s) 33 and 32A. Although the discretion is structured by the factors specified to be taken into account, it is very wide, and has indeed been described as unfettered.²⁷⁰

5.38 The Act allows the court with a discretionary exclusion of the time limit for actions for defamation or malicious falsehood,²⁷¹ and for action in respect of personal injuries or death.²⁷²

²⁶⁹ See *Price v United Engineering Steels Ltd* [1998] PIQR 407.

²⁷⁰ *Thompson v Brown* [1981] 1 WLR 744 and *Donovan v Gwentys Ltd* [1990] 1 WLR 472.

²⁷¹ Section 32A of the Limitation Act 1980.

²⁷² Section 33 of the Limitation Act 1980.

(d) Special protection to state organs

5.39 Between 1893 and 1954, actions against public authorities were subject to shorter limitation periods than actions against other defendants.²⁷³

5.40 Section 1 of the Public Authorities Protection Act , provided that any action against any public authority should be instituted within six months next after the act, neglect or default complained of, or in the case of a continuance of injury , within six months after the ceasing thereof.

5.41 In consequence of the Tucker Committee recommended that the Public Authorities Protection Act 1893 should be repealed, a recommendation which was implemented in the Law Reform (Limitation of Actions) Act 1954. This that time, the limitation period for actions against public authorities has been the same as for any other defendants.

5.42 The question of limitation periods against public authorities was considered by the Law Revision Committee in 1936.²⁷⁴ The Committee in its Report commented:

"We have carefully considered how far it is advisable to interfere with the policy of the Public Authorities Protection Act. That policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts and that serious consequence might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrong doer is paid from public funds".²⁷⁵

5.43 The Committee did not recommend the abolition of these special rules, but suggested mitigating the problems they caused by extending the limitation period to

²⁷³ The Public Authorities Protection Act of 1893. The operation of the special protection to public authorities was reviewed by the Law Revision Committee in 1936 where it was reported that there seems no very good reason why public authorities be given special treatment merely because the wrongdoer is paid from public funds. See Law Revision Committee fifth Interim Report "Statutes of Limitations" 1936 Cnd 5334.

²⁷⁴ In the Fifth Interim Report "Statutes of Limitation" 1936, Cmd 5334.

²⁷⁵ In the Fifth Interim Report "Statutes of Limitation" 1936 par 26.

one year, and making it run from the date of accrual of the cause of action rather than the date of the act, neglect or default in question. The Public Authorities Protection Act was amended along these lines by the Limitation Act 1939

5.44 Continuing dissatisfaction with the existence of special rules for public authorities led to further consideration being given to the matter in the Report of the Committee on the Limitation of Actions in 1943. The Committee approached the problem from the point of view that the special rules fixed for the benefit of public authorities by the 1893 Act were a curtailment of the rights of the individual and could only be justified if it was clearly established that there was a real likelihood of injustice on a considerable scale resulting from its repeal. It said that it was clear that the Act often caused injustice to plaintiffs where a genuine claim was barred through inadvertence or for other reasons. It pointed to the fine distinctions as to the conduct which came within the Act, the conflicting cases, and the complications resulting from having to ascertain whether a public body qualified for protection and whether it had caused an injury in the course of carrying out its public duty. It came to the conclusion that most cases would continue to be brought promptly even if the special limitation period were removed, and that there was no evidence that the difficulties which ensued from claims not being brought promptly (such as the problem of keeping records) were peculiar to public authorities. Large corporations were in the same position, and in any case public authorities engaged in commercial activity to an increasing extent. The Committee recommended that the Public Authorities Protection Act should be repealed. This recommendation was implemented by the Law Reform (Limitation of Actions etc) Act 1954. Since then, the position in England has been that the limitation periods applicable in actions against public authorities are exactly the same as those applying to any other defendant.²⁷⁶

5.45 The Limitation Act of 1980 applies to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.²⁷⁷

²⁷⁶ Law Reform Commission Report on Access to Justice and Limitation of Actions against Public authorities and the State may 2008 6.

²⁷⁷ Section 37 of the Limitation Act 1980.

3. France

(a) Introduction

5.46 French law uses a concept of prescription rather than limitation. The central features are contained in articles 2219 to 2283 of the Code Civil. Prescription can be either extinctive or acquisitive. Extinctive prescription eliminates obligations through the non-exercise of rights for a certain period and acquisitive produces rights through the exercise of possession for a corresponding period.²⁷⁸

(b) Prescription periods

5.47 The basic period of prescription is 30 years.²⁷⁹ Time starts to run from the date of the enforceability of the cause of action²⁸⁰ However, time will not start to run against someone who is not capable of acting until the day when this impossibility has disappeared.²⁸¹ Time runs from 00.01 in the morning of the next day after the starting point, and runs out only at 24.00 on the day of the termination of the period.

5.48 Whilst the 30 year period remains the residual period for contractual and quasi-contractual actions, there are numerous exceptions. For example, a ten year period is imposed for obligations incurred in the course of business transactions, unless a shorter period is provided elsewhere.²⁸² A five year period applies to actions for payment of periodic debts such as wages, rent, maintenance or interest.²⁸³ A number of company law actions are subject to the three year period.²⁸⁴ Most actions founded on insurance contract are subjected to a two year period.²⁸⁵

²⁷⁸ The definition is the same as the one used in South African law.

²⁷⁹ Article 2262 c civ.

²⁸⁰ Cas civ, 21 oct 1908, S 1908, 1, 449, 11 dec 1918, S 1921, 1, 161. See also *Les Obligations* n 1389.

²⁸¹ Contrat non valentem agree non currit praescription.

²⁸² Article 189 c com.

²⁸³ Article 2277 c civ.

²⁸⁴ J-CI civil, articles 2270-2278.

²⁸⁵ Article 114-1, c civ.

5.49 A four year period applies to debts owed by the state and organisations with legal personality which come under public law.²⁸⁶ Two year periods are common and have been frequently been applied in recent legislation. These include actions for payment for visits, operations and medicines by doctors, surgeons, dentists, midwives and pharmacists,²⁸⁷ any action against carriers,²⁸⁸ actions by businessmen for payment for merchandise sold to private individuals,²⁸⁹ most actions founded in insurance contracts,²⁹⁰ and many others.

5.50 A one year period²⁹¹ applies, inter alia, to actions by bailiffs for their wages for the writs they serve and for commissions which they execute,²⁹² actions for the revocation of a gift on account of ingratitude,²⁹³ and actions for damage, loss or delay arising out of contracts for maritime or terrestrial transport.²⁹⁴

5.51 Most claims analogous to tort claims in common law jurisdictions²⁹⁵ are statute barred ten years after the damage in question becomes apparent.²⁹⁶ However, certain actions are classified differently, such as defamation actions against the press, which have a prescription period of two months.²⁹⁷

²⁸⁶ L 31 dec 1968 art 1.

²⁸⁷ Article 272, al 3, c civ.

²⁸⁸ Article L 321-5, L 322-3 c aviat.

²⁸⁹ Article 2272, al 4, c civ.

²⁹⁰ Article 114-1, c assur.

²⁹¹ See generally *Les Obligations*, 1384.

²⁹² Article 2272

²⁹³ Article 957, c civ.

²⁹⁴ Article 108, c com.

²⁹⁵ *Responsabilite extra-contractuelle*.

²⁹⁶ Article 2270-1, c civ.

²⁹⁷ Article 85, L29 juill 1881. See *Les Obligations*, n 1385-6.

4. Ireland

(a) Knowledge

5.52 The law of limitations in Ireland is mostly governed by the Statute of Limitations of 1957, as amended by the Statute of Limitations (Amendment) Act 1991 and the Statute of Limitations (Amendment) Act 2000. In summary, it provides that if proceedings are commenced after the expiration of the specified statutory limitation period for the claim in question, the defendant may raise the defence that the proceedings “statute-barred” thereby precluding any discussion of the merits of the claim.²⁹⁸

5.53 The 1991 Act provides for constructive knowledge and actual knowledge from which the limitation period starts to run.

5.54 The fundamental change to the limitation of actions in respect of personal injuries brought about the 1991 Act was the introduction of the “date of knowledge of the person injured” as the date from which the limitation period shall run. Under section 2 (1) knowledge means knowledge of the following facts:

- (a) that the person alleged to have been injured had been injured;
- (b) that the injury in question was significant;
- (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
- (d) the identity of the defendant and (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant.²⁹⁹

5.55 Under the 1991 Act, a person’s constructive knowledge refers to knowledge “which s/he might reasonably have been expected to acquire”. This knowledge can

²⁹⁸ Law Reform Commission of Ireland Report on the Statutes of Limitation: Claim in contract and in Tort in respect of Latent Damage (other personal injury) February 2001 1.

²⁹⁹ For an application of these principles see *Whitely v Minister of Defence, Ireland and the Attorney General* [1997] 2 ILRM 416.

be acquired either from “facts observable or ascertainable by him/her” or from the facts “ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek”.

5.56 Constructive knowledge will also trigger the limitation period under section 2(2) which provides that a person’s knowledge includes knowledge which he might reasonably have been expected to acquire-

- (a) from facts observable or ascertainable by him, or
- (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable fro him to seek.

5.57 It is further provided in section 2(3) that a person will not be fixed with knowledge of a fact which could only be ascertained with the help of expert advice, so long as he has taken all reasonable steps to obtain that advice. Nor it is provided, shall a person be fixed with knowledge of a fact relevant to the injury which he has failed to acquire by virtue of that injury.

5.58 The interpretation of the actual knowledge requirement by the courts reveals that “knowledge” is taken to mean “know with sufficient evidence to justify embarking on a claim”.³⁰⁰

5.59 The limitation period is triggered only when the claimant has knowledge of the facts in section 2(1) listed in (a) to (e). Difficulties have arisen in relation to (b); “that the injury in question was significant”. The primary purpose of this requirement is to prevent a trivial injury, or a significant injury which would appear trivial to the reasonable, from triggering the limitation period.³⁰¹

5.60 The 1991 Act, does not define what is meant by “significant”. Under the English Limitation Act, 1980 an injury is defined as significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgement.³⁰²

³⁰⁰ See *Gallagher v Minister for Defence High Court*, [1998] 4 IR 457 and *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 792.

³⁰¹ *Dobbie v Medway Health Authority* [1994] WLR 1234.

³⁰² S 14(2) of the Limitation Act, 1980.

5.61 In its report the Law Commission in Ireland considered two options dealing with the date from which the limitation period must run. The first option was the model in the in 1991 Act³⁰³ and the Alberta Model.³⁰⁴ The Commission opted for the Alberta model.³⁰⁵

(b) Limitation periods

5.62 The statute provides that (save in personal injury)³⁰⁶ no action in tort or contract is to be brought after the expiration of six years from the date on which the cause of action accrued.³⁰⁷

5.63 The limitation period does not however apply to any action for equitable relief, such as an injunction (except in so far as such limitation period may be applied by analogy)³⁰⁸

³⁰³ See page 78-79 of this report.

³⁰⁴ The Alberta model provides that :

- (1) An action claiming damage in respect of loss or damage (other than personal injury) caused by a breach of duty whether the duty exists in tort, contract, statute or independent of any such provision, shall not be brought after the later of either the expiration of:
 - (a) six years from the date on which the cause of action accrued; or
 - (b) three years from the date on which the person first knew or in the circumstance ought reasonably to have known:
 - (i) that the loss for which the person seeks a remedy had occurred;
 - (ii) that the damage was attributable to the conduct of the defendant; and
 - (iii) that the loss, assuming liability on the part of the defendant , warrants bringing proceedings.

³⁰⁵ See Law Reform Commission of Ireland *Report on the statutes of Limitation: Claim in Contract and in Tort in respect of Latent damage (other personal injury)* February 2001 22.

³⁰⁶ In cases involving personal injuries, the limitation period is three years from the accrual of the cause of action, or the date of knowledge, as defined in sec 2 of the Statute of Limitations (amendment) Act 1991.

³⁰⁷ Sec 11(2) of the Statute of Limitations Act 1957 reads as follows:
11(2) An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

³⁰⁸ Claims for equitable relief may of course be barred by the equitable doctrine of laches or acquiescence.

5.64 Cause of action has been defined as every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.³⁰⁹ It accrues at the earliest time at which an action can be brought, that is when a complete and available cause of action first comes into existence.

5.65 The net effect of the six-year rule is to bar all actions after a period of six years from accrual, irrespective of whether or not the plaintiff knew that he had a cause of action. The actual period of six years is reduced only when actions for damages are for slander³¹⁰ and in actions for damages in respect of personal injuries caused by negligence, nuisance or breach of duty,³¹¹ a three year limitation period applies.

5.66 In claims of personal injury claims, the Statute of Limitations Act 1991 provides for a limitation period of three from the date on which the cause of action accrued or the date of knowledge (if later) of the injured person.³¹²

5.67 The limitation period is also provided in the Liability for Defective Products.³¹³ The Act provides a limitation of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

5.68 An action to recover money or other property or in respect of any breach of trust, not being an action for which a period of limitation is fixed by any other provision of the Act, may not be brought against a trustee or any other person claiming through him after the expiration of six years from the date on which the right of action accrued.³¹⁴

³⁰⁹ See *Read v Brown* (1888) 22 QBD 128; *Hegarty v O`Loughran* [1990] 1 IR 148.

³¹⁰ See Sec 11(2) (c) of the Statute of Limitations Act 1957.

³¹¹ See Sec 3 of the Statute of Limitations (Amendment Act) 1991.

³¹² See Sec 3(1) of the Statute of Limitations (Amendment Act) 1991.

³¹³ Act of 1991 which was implemented by Directive 85/374/EEC.

³¹⁴ Sec 44 of the Limitation Act of 1957.

5.69 Generally no action to recover land may be brought in Irish law by anyone except a state authority after the expiration of twelve years from the date on which the right of action accrued to the plaintiff, or to any person through whom the plaintiff claims.³¹⁵

(c) Special protection to state organs

5.70 The Limitation Act of 1957 applies to proceedings by or against a State authority in like manner as if that State authority were a private individual.³¹⁶ The statute does not provide for special protection to State authorities

5. Scotland

(a) Knowledge

5.71 Scottish law uses both the concept of prescription, which originate in Roman law and is in general use in civil law jurisdictions,³¹⁷ and that of limitation, which is derived from English law.

5.72 The Scottish law on prescription and limitation is primarily contained in the Prescription and Limitation Act of 1973.

5.73 The prescription of personal injuries actions start to run from the date when the pursuer first became aware, or it would have been practicable for the pursuer to become aware that:

- (a) that the injuries were sufficiently serious to justify bringing an action,³¹⁸
- (b) they were attributable to an act or omission ; and

³¹⁵ Sec 13(2) of the Statute of Limitations 1957.

³¹⁶ Sec 3(1) of the Limitation Act 1957.

³¹⁷ *Bell's Principles of the Law of Scotland* cited in D Walker *The Law of Prescription and Limitations of actions in Scotland* 4th ed 1990 4.

³¹⁸ This provision has been interpreted to as embracing subjective elements which relate to the severity of the injury and hence to the likely quantum of damages. See also *Carnegie v Lord Advocate* 2001 SC 802.

- (c) the defender was a person to whose act or omission the injuries were attributable

5.74 In deciding the seriousness of the injuries Scottish law requires the making of the same assumptions as does English law, namely that the defender does not dispute liability and is able to satisfy a decree against him.

5.75 Personal injuries are defined as including any impairment of a person's physical or mental condition.³¹⁹

(b) Prescription periods

5.76 The Scottish law on prescription periods consists of short negative prescription, long negative prescription and prescription based on personal injuries.

(i) Short negative prescription

5.77 The short negative prescription is a five year prescription period for all categories of obligations to which the provision applies.³²⁰ Schedule 1 to the Prescription and Limitation Act 1973 lists the relevant obligations.

³¹⁹ See Sec 22(1) of the Prescription and Limitation (Scotland) Act 1973.

³²⁰ Sec 6 of the Prescription and Limitation Act 1973 provides :
 Extinction of obligations by prescriptive periods of five years
 (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years-
 (a) without any relevant claim having been made in relation to the obligation; and
 (b) without that the subsistence of the obligation having been relevantly acknowledged then as from the expiration of that period the obligation shall be extinguished.

(ii) Long negative prescription

5.78 The long negative prescription period is set at twenty years. The period commences when the relevant obligation becomes enforceable. This section applies to obligations of any kind.³²¹ It also expressly includes claims which are also subject to the five year short period.

(iii) Personal injuries

5.79 Personal injuries are governed by sections 17 and 18 of the 1973 Act inserted by the Prescription Act 1984. The limitation period is three years provided that facts in par 415 are met.

5.80 Where personal injuries result in death, here the time runs from the date of the death or, if later, the date when the person bringing the action first knew or could practically have known the facts mentioned above in par 5.73.

(iv) Defamation

5.81 Section 18A of the 1973 Act, inserted by section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, creates a limitation period of three years for actions for defamation. This limitation period runs from the date of accrual of the cause of action, but the date of accrual is defined by section 18A (4)(b) as being the date when the publication or communication first comes to the notice of the pursuer.

(c) Application for condonation

5.82 Section 19A of the Prescription and Limitation Act gives a court a discretionary power to override the three year limitation period if it seems to it

³²¹ Sec 7(2) of the Prescription and Limitation (Scotland) Act 1973.

equitable to do so.³²² There is no list of factors to which the court must have regard in exercising its discretion.³²³

5.83 The Law Commission in Scotland has recommended that the following factors should be given more weight by the court before granting an extension to institute a claim:³²⁴

- (a) the period which has lapsed since the right of action occurred;
- (b) why it is that the action has not been brought timeously;
- (c) what effect (if any) the length of time that has passed since the right of action accrued is likely to have had on the defendant's ability to defend the action and generally on the availability of the quality of evidence;
- (d) the conduct of the pursuer and in particular how expeditious s/he was in seeking legal (and where appropriate) medical or other expert advice and in intimating a claim for damages to the defender;
- (e) the quality and nature of the legal and medical or other advice obtained by the pursuer;
- (f) the conduct of the defender and in particular how he has responded (if at all) to any relevant request for information made to him by the pursuer;
- (g) what other remedy (if any) the pursuer has if he is not allowed to bring action;
- (h) any other matter which appears to the court to be relevant and there should be no hierarchy among the matter listed.

³²² Section 19A of the Prescription and Limitation Act of 1973 provides that:

Power of the court to override time-limits

- (1) Where a person would be entitled, but for any of the provisions of s 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him/her to bring the action notwithstanding that provision.

³²³ A number of court decisions have indicated factors which may be relevant in the exercise of the judicial discretion. A court has a general discretion under sec 19A; see *Forsyth v AF Stoddard & Co* 1985 SLT 51 and *Eliot v J & C Finney* 1987 SLT 605. Secondly the onus is on the pursuer to satisfy the court that it would be equitable for the claim to proceed, see *Thompson v Brown* [1981] 1 WLR 744. Thirdly the conduct of the pursuer's solicitor may be relevant to the exercise of the court's discretion and the pursuer must take the consequences of his solicitor's acting's, see *Forsyth v AF Stoddard & Co* above. However the court in *Carson v Howard Doris Ltd* listed the following factors to be considered by the court in exercising the discretion to include: conduct of the pursuer since the accident and up to the time of his seeking the court's authority to bring the action out of time including any explanation for his not brought the action timeously, any likely prejudice to the pursuer if authority to bring the action out of time were not granted and any likely prejudice to the other party from granting authority to bring action out of time.

³²⁴ See Scotland Law Reform Commission *Report on Personal Injury Actions: Limitations and Prescribed Claims* 2007 47.

(d) Special protection to state organs

5.84 In Scotland proceedings against the Crown and the Public Departments are regulated by the Crown Suits (Scotland) Act 1857 as amended by the Scotland Act of 1998.

5.85 Every action, suit or proceedings to be instituted in Scotland on behalf or against Her Majesty, or in the interest of the Crown, including the Scottish administration or on behalf of or against any public department is directed against the appropriate law officer acting under the Scotland Act of 1998. The provision of this Act makes no provision for special protection to public authorities

B. Lessons from comparative study

5.86 Rules relating to prescription of claims have been investigated by foreign law reform agencies.³²⁵

5.87 Provision is made for a primary prescription period and a long stop prescription period. In a primary prescription period, the period of prescription start to run from four up until six years from the date the claimant become aware or could reasonably have become aware of details of a claim and the defendant. In a long stop or ultimate prescription period, usually 10 years long and up until 60 years starting from the date of the accrual of the action and which comes into operation even if the primary period has not expired. The periods seem to be more than three years as compared to our law.

5.88 There is a trend for recognition to grant the courts discretion to condone a prescribed claim. This discretion is sometimes limited to claims in respect of personal injuries. Courts will grant such an application when it is equitable to do so. The current thinking reflects the view that it is about time to condone prescribed claims.

³²⁵

See Scotland Law Reform Commission Report on Personal Injury Actions: Limitations and Prescribed Claims 2007; Law Reform Commission of Ireland Report on statutes of Limitation: Claims in Contract and Tort in respect of latent defect February 2001; England Law Reform Commission Limitations of Actions Report 2007; Tucker Committee Report on Limitations of Actions (Cmd 7740 1949) and New Zealand Law Reform Commission Limitation Defences in Civil Proceedings 1988.

5.89 Most of the countries have abolished the notice period of intention to sue. It has been stated that such a notice requirement is unjust and there is not justification why the state must be afforded such a protection. There are no cogent reasons why the state as a party to a dispute must not be treated equally with the other parties

CHAPTER 6

Issues for consideration

A. Condonation

6.1 Since the Prescription Act does not provide for condonation after the lapse of the prescribed period of three years,³²⁶ this creates the problem that people with genuine claims, who for reasons beyond their control, would be deprived of redress.

6.2 A prospective litigant may have to overcome financial and or geographical hurdles before being able to approach a court for relief. S/he may be without funds to finance litigation or may be residing in an area which is remotely located from the seat of a court. It may thus become necessary for him/her to obtain financial assistance before s/he can institute a claim. A prospective litigant may also be unaware due to illiteracy that s/he has a remedy in law. These are some of the hurdles which an ordinary litigant may have to meet before being able to approach a court for an appropriate relief.³²⁷

6.3 It is trite law, that in considering an application for condonation, a court has discretion, to be exercised judicially upon a consideration of all the facts and in a manner that is fair to both sides.³²⁸

6.4 In the enquiry for condonation the relevant factors may include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be raised in the intended application and

³²⁶ This period is the period prescribed for ordinary claims in terms of s 11(d) of the Prescription Act 68 of 1969.

³²⁷ *Brummer v Minister of Social Development* Western Cape High Court Case No: 10013/07 16 March 2009 (Reportable).

³²⁸ See *Brummer v Minister of Social Development* Western Cape High Court Case No 10013/07 dates 16 March 2009. (Reportable).

the prospects of success,³²⁹ or whether it is in the interest of justice to grant condonation.³³⁰

6.5 Applications for condonation should in general be brought as soon after the default as possible. In an application for condonation the applicant must give a full explanation for the delay which explanation must cover the entire period of delay.³³¹ This is so because the court must decide whether the applicant has provided acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his part which attaches to the delay in bringing the application timeously.³³²

6.6 The chief merit of a judicial discretion is that it allows the judge to take into account the individual circumstances of a particular case.³³³ The judge is not restricted to the application of the general rule. The judge therefore prevents injustice to an individual claimant where that claimant has failed to issue proceedings within the limitation period applicable to his or her cause of action for excusable reasons. However this must be balanced against the risk of injustice to the defendant.³³⁴

6.7 Although it is accepted that when the court takes into account the individual circumstance of a particular case, there may be disadvantage in that by prolonging the prescription periods uncertainty may be created.. Nonetheless, this level of uncertainty is justified in the context of claimants subjected to social risks conditions, who could not have been aware of the prescription period of three years.³³⁵

³²⁹ See *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) 720 E-F.

³³⁰ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) 477 A-B; *S v Mercer* 2004 (2) SA 598 (CC) para 4 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) para 3.

³³¹ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC).

³³² *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) 317C.

³³³ See *Liquidators Myburgh Krone & Co Ltd v Standard Bank of SA Ltd* 1924 AD 231.

³³⁴ Law Commission of England *Limitations of actions: Item 2 of the Seventh Programme of Law Reform* 09 July 2001 89.

³³⁵ See M Mokotong "The Constitutionality of the three year prescription period in terms of section 23 of the Road accident Fund Act 56 of 1996, Road accident *Fund v Mdeyide* 2007 7 BCLR 805 (CC) 2009" *THRHR* 333.

Readers are invited to comment whether the court should have discretion to condone a prescribed claim where there is good cause?

B. Primary prescription

6.8 In terms of section 11(d) where an Act of Parliament does not provide a period of prescription the period will be three years provided it is not a debt that falls in section 11(a) to (c).³³⁶

6.9 The provisions of section 11(d) do not create a minimum prescription period and the primary period is not in the statute.

6.10 In terms of section 12(3) prescription start to run as soon as a debt is due,³³⁷ and 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 arise. A creditor is deemed to have such knowledge if s/he could have acquired it by exercising reasonable care.³³⁸

6.11 In South Africa, the normal difficulties of accessing justice are exacerbated by gross inequalities, the high cost of legal services and the remoteness of the law from

³³⁶

Section 11 provides that:
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 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).

³³⁷

Section 12(1) of the Prescription Act provides that:
Subject to the provisions of subsection (2), (3) and (4) prescription shall commence to run as soon as the debt is due.

³³⁸

Section 12(3) of the Prescription Act.

most people's lives. Therefore, acquiring the identity of the debtor and/or the facts from which the debt arise may require a lengthy time due to the prevailing circumstances facing claimants.

6.12 Research conducted on the RAF legislation found that one of the main barriers to claiming compensation from the RAF is the unlimited awareness of the Fund and a lack of knowledge on the scheme of accident compensation.³³⁹ The report also found that in addition, it is often difficult for people, emerging from apartheid bureaucracy, to produce documentation proving birth, marriage and dependency. People participating in the informal economy are often unable to provide proof of employment and earnings. Even the incompetence of legal representatives in failing to bring timeous claims has hindered the process.³⁴⁰

6.13 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.³⁴¹ 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 measurements.³⁴² This circumstances may necessitates that the prescription period in section 11(d) be increased to five years, years from the period the creditor has knowledge of the debt or could have taken necessary steps in acquiring such knowledge.

³³⁹ See Road Accident Fund Commission, established in terms of the Road accident Fund Commission Act 71 of 1998, appointed 1 June 1999, Report published 2002.

³⁴⁰ See Road Accident Fund Commission, established in terms of the Road Accident Fund Commission Act 71 of 1998, appointed 1 June 1999, Report published 2002 par 7.58.

³⁴¹ The Human Sciences Research Council, Public Attitudes in Contemporary South Africa Insights from an HSRC Survey, 2002.

³⁴² See South Africa: Justice Sector and the Rule of Law Report p109.

6.14 One of the techniques utilised by modern legislation and legislative proposals to streamline the law relating to limitation periods is reducing the number of limitation periods.³⁴³

6.15 Most law reform agencies³⁴⁴ investigated limitation (prescription) periods and the following recommendations are popular:

- (a) provision is made for a core regime, but other enactments outside the core regime are allowed;
- (b) provision is made for two prescription periods-
 - (i) a primary prescription period, two or three years long, starting from the date when the claimant became aware or could reasonably have become aware of details of a claim and the defendant;
 - (ii) a long stop or ultimate prescription period, usually ten years long, starting from the date of the accrual of an action and which comes into operation even if the primary period has not expired;

6.16 Difficulty and lack of uniformity is found in claims against the RAF. The Road Accident Fund Act governs an area of law that has spawned substantial litigation. It is not unlikely that an average person first encounter with the law is in terms of this legislation.

6.17 The Road Accident Fund Act provides that a claim prescribes three years from the date on which the cause of action arose.³⁴⁵ The claim will nevertheless prescribe even when the claimant does not know the identity of the debtor and of the facts from which the debt arises. This is in contrast with section 12(3) of the Prescription Act which provides that prescription starts to run when a debt is due and 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 arise. A creditor is deemed to have such knowledge if s/he could have acquired it by exercising reasonable care.

³⁴³ See Western Australia report par 4.36, 89.

³⁴⁴ See e.g. the United Kingdom report, the Western Australia report, the Queensland report, the British Columbia Law Institute The ultimate limitation period: Updating the Limitation Act Report No 19 Vancouver: July 2002, as published at www.bcli.org, and law agencies referred in this investigation on comparative law.

³⁴⁵ See section 23 of the Road Accident Fund Act 56 of 1996.

6.18 The wording of this section is virtually identical to that contained in article 55 of the agreement which governed the prescription of claim under the 1989 Multilateral Motor Vehicle Accident Fund Act.³⁴⁶ This section meant that if a claim is not lodged before the expiry of five years from the date in which the cause of action arose,, the right to claim prescribed automatically. Although this Act prescribed that prescription began to run from the date on which the cause of action arose the adverse impact of this was ameliorated by an extended period of five years.

6.19 The Road Accident Fund Act has reduced the prescription period without regard to when prescription begins to run. It would appear that this peculiarity is historical in the road accident claims.

6.20 The opening words of section 23 “*Notwithstanding anything to the contrary in any law contained...*” make it clear that as far as prescription of claims is concerned, it is the provisions of the relevant sections of the act and the regulations made pursuant thereto which will govern the prescription of such claims which fall under the 1996 Road Accident Fund Act and regulations. It necessarily follows, therefore, that neither the provisions of the Prescription Act, nor any other law, have a bearing on the prescription of claim s governed by the provisions of the 1996 Road Accident Fund Act.³⁴⁷

6.21 In *Mdeyinde v Road Accident Fund*³⁴⁸ the plaintiff instituted action proceedings against the Road Accident Fund, claiming compensation for damages incurred as a result of injuries sustained in a motor vehicle accident. The accident occurred on 08 March 1999 and the plaintiff lodged his claim with the defendant on 11 March 2002 after the expiry of a period of three years from the date upon which the accident occurred.

6.22 The court of first instance found that section 23(1) of the Road Accident Fund Act 56 of 1996 limits the right of claimants of access to courts,³⁴⁹ and that the provision is *prima facie* unenforceable on the ground that it is inconsistent with the

³⁴⁶ Act 93 of 1989.

³⁴⁷ Saner J *Prescription in South African Law* Butterworths 2009 4-38.

³⁴⁸ Case No EL91/2004.

³⁴⁹ *Mdeyinde v Road Accident Fund* Case No EL91/2004 par 43.

provisions of section 34. The court indicated that the section does not take into account the fact that there might be a justifiable reason for the delay and does not take into account the ignorance and illiteracy of the some, if not majority, of the people that the legislation is intended to protect.³⁵⁰

6.23 The court had further decided that the unacceptably restrictive part of section 23(1) is the failure to include the requirement that the prescription should begin to run when the claimant has knowledge of the identity of the debtor and of the facts from which the debt arises and does not have a provision allowing for condonation of a delay.³⁵¹ In finding that the section was unconstitutional the case was referred to the Constitutional Court for confirmation.³⁵²

6.24 When the matter was referred to the Constitutional Court for confirmation, the court found that the mental capacity of the plaintiff had been given insufficient attention,³⁵³ as those who were deemed to be mentally ill or in need of a curator *ad litem* or curator *bonis* were excluded from the ambit of section 23(1) of the RAF Act by virtue of section 23(2) of the Act.

6.25 The Constitutional Court refused to confirm the order of the court of first instance and remitted the matter to the High Court for an inquiry in terms of Uniform Rule 57 and for further conduct of the proceedings.³⁵⁴

6.26 After an additional inquiry, the High Court found that the plaintiff was of sound mind. Consequently, the court re-instated its original order. The matter was again referred to the Constitutional Court for confirmation.

³⁵⁰ *Mdeyinde v Road Accident Fund* par 52.

³⁵¹ *Mdeyinde v Road Accident Fund* par 55.

³⁵² Section 167(5) of the Constitution provides that: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or court of similar status, before that order has any force".

³⁵³ See *Road Accident Fund v Mdeyinde (Minister of Transport Intervening)* 2008 (1) SA 536.

³⁵⁴ See *Road Accident Fund v Mdeyinde (Minister of Transport Intervening)* 2008 (1) SA 550 par 46.

6.27 The matter was heard on 11 May 2010, wherein the Constitutional Court³⁵⁵ refused to confirm the constitutional invalidity made by the East London Circuit Local Division regarding section 23(1) of the RAF Act. The court decided that section 23(1) limits the claimant's ability to access the courts and that such limitation imposed by the section is reasonable and justifiable under section 36 of the Constitution.³⁵⁶ The court further decided that the section afforded an adequate and fair opportunity to seek judicial redress and therefore not unconstitutional.³⁵⁷

6.28 In a dissenting judgment Froneman J considered knowledge of the facts giving rise to a justiciable claim as a necessary part of the right of access to court under section 34 of the Constitution.³⁵⁸ He decided that section 23(1) limited the right of access as knowledge of one's claim forms part of the right. The section precluded the secondary justiciable issue of whether one had sufficient time to claim after acquiring knowledge from being adjudicated in court and providing that one's right to compensation becomes prescribed after three years.³⁵⁹

6.29 The Judge also declared section 23 unconstitutional and found that the limitation could not be saved by section 36.³⁶⁰ The Judge took into consideration fact that section 23(1) does not provide for the time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched.³⁶¹ Furthermore, the acquisition of the necessary knowledge to lodge a claim would most likely present a problem for poor, illiterate and uneducated people rather than for the more advantaged in society,³⁶² and that the provision of section

³⁵⁵ *Road Accident Fund v Mdeyinde* Case CCT 10/10 September 2010.

³⁵⁶ *Road Accident Fund v Mdeyinde* par 94.

³⁵⁷ *Supra*.

³⁵⁸ *Road Accident Fund v Mdeyinde* par 105.

³⁵⁹ *Road Accident Fund v Mdeyinde* par 107.

³⁶⁰ *Road Accident Fund v Mdeyinde* par 142.

³⁶¹ *Road Accident Fund v Mdeyinde* par 108.

³⁶² *Road Accident Fund v Mdeyinde* par 113.

23(1) in not providing condonation, render the inability to comply a non-justiciable issue between the claimant and the RAF.³⁶³

6.30 Section 23(2) lists persons against whom prescription would not run.³⁶⁴ Although the impact of section 13(2) is to suspend the running of prescription against insane persons section 23(2)(b) imposes a further requirement that such person must be detained as a state patient. In circumstances where an insane person is for whatever cause not detained in terms of the Mental Health legislation, prescription against such a person is not delayed. In the context of our current socio-economic circumstances it is not unusual that persons of diminished mental capacity are liable for detention in terms of Mental Health legislation are not so detained.

6.31 A justifiable differentiation between such persons based purely on whether or not they are detained is not disenable particularly where persons of diminished capacity who are not detained are not always necessarily under curatorship.

6.32 The provisions of section 13(1) are however wide enough to cater for persons of diminished mental capacity who are neither detained nor under curatorship.

6.33 Readers are invited to comment on the following issues:

(a) Whether there should be consistency in all legislation as to when prescription must start to run.

(b) Whether it is justifiable to distinguish between insane persons detained and those who are not as section 23 (2) of the RAF does.

³⁶³ *Road Accident Fund v Mdeyinde* par 120.

³⁶⁴ Section 23 provides that:
 (2) Prescription of a claim for compensation referred to in subsection (1) shall not run against :
 (a) minor;
 (b) any person detained as a patient in terms of any mental health legislation; or
 (c) a person under curatorship.

C. Debts arising from criminal offences which do not prescribe

6.34 It is recognised that some offences in the Criminal procedure Act 51 of 1977,³⁶⁵ are so serious in that they tear the fabric of personal relationships, families, communities and societies at large.³⁶⁶ Rape, as one of the crimes listed in section 18, is recognised as a serious criminal offence around the world. It has been recognised as an aggravated and specialised form of assault used not only to create physical pain and suffering, but also to degrade the victim and the victim's family and community and to demonstrate through violent means, control over them.³⁶⁷ In *Al Amin & Others v Bangladesh*,³⁶⁸ the court stated that, rape violates a victim's fundamental right to life and their human dignity.

6.35 Murder, which is also listed in section 18, is a violent and a serious crime. In *Zanner v Director of Public Prosecutions, Johannesburg*,³⁶⁹ and the court stated that:

It is not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. In a case involving serious offence such as the

³⁶⁵ Section 18 of the Criminal procedure Act 51 of 1977 provides that:

The right to institute a prosecution for any offence, other than the offences of-

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery if aggravating circumstance were present;
- (d) kidnapping;
- (e) child stealing;
- (f) rape; or
- (g) crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002,

shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

³⁶⁶ See Redress & Kchred on Reforming Sudan's Legislation on Rape and Sexual Violence September 2008 1, A briefing paper published as part of Criminal Law Reform project in Sudan.

³⁶⁷ See Redress & Kchred on Reforming Sudan's Legislation on Rape and Sexual Violence September 2008 2, A briefing paper published as part of Criminal Law Reform project in Sudan.

³⁶⁸ 51 DLR (1999) 154, 19 BLD 10 December 1998.

³⁶⁹ 2006 (2) SACR 45 21.

present one, the societal demand to bring the accused to trial is that much greater....

6.36 Whereas prescription does not lie against some crimes and in respect of others a 20 year prescription is imposed,³⁷⁰ the state may prosecute at any stage in relation to crimes listed in section 18 of the Criminal Procedure Act, a victim or a dependant of such crime is limited to three years to institute a damages claim which as this constitute a debt contemplated in section 11(d), and therefore it may be argued that this preference given to the state, forms part of an old tradition of the doctrine of sovereignty.³⁷¹

6.37 A finding of the commission of an offence listed in section 18 is a judicial function. Everyone is presumed innocent of any crime including that listed in section 18 until proven otherwise in a court of law. If damages claim based on sexual conduct defined in law as "rape" a question arises as to when prescription starts to run for claims in respect of offences listed in section 18.

6.38 A clearly stated legislative position that prescription for claims arising from crimes listed in section 18 will not commence to run before a conviction would be consistent with our constitutional principles.

6.39 In a constitutional state, like ours, the state has a duty to respect, protect, promote and fulfil the right in the Bill of Rights.³⁷² In *De Lange v Smuts No*,³⁷³ the Constitutional Court held:

In a constitutional democratic State, which ours now certainly is, and under the rule of law, citizens as well as non-citizens are entitled to rely upon the State for protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.

6.40 This dictum was applied in *Nyathi v MEC for Department of Health, Gauteng*,³⁷⁴ where the Constitutional Court held:

³⁷⁰ See footnote 362 above.

³⁷¹ Section 1 of the Constitution provides that :” The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(c) Supremacy of the constitution and the rule of law.

³⁷² Sec 7(2) of the Constitution of the Republic of South Africa 1996.

³⁷³ 1998 (3) SA 785 (CC) 31.

That section 165(4) of the Constitution expressly imposes an obligation on organs of State “through legislative and other measures (to) assist and protect the courts to ensure the... dignity, accessibility and effectiveness of the courts.

6.41 Prescription for claims arising from offences listed in section 18, in the absence of the courts power of condonation, detracts from the principle of accessibility and effectiveness of the courts.

6.42 Criminal litigation tends to take precedence over civil matters. Prospective plaintiffs wait for a criminal trial to end before instituting civil proceedings. The criminal trial may prolong for a number of years before it is finalised. It may be suggested that the right to prosecute civil claims arising from criminal offence listed in section 18, should not prescribe.

6.43 In reforming the Sudan’s legislation on rape and sexual violence, it was recommended that the interest of society to repress rape and to prosecute the perpetrators years after the crime must override the objective of gaining legal certainty by precluding investigations after the passage of time.³⁷⁵ It was further recommended that civil suits arising from rape and sexual violence cases should not be subject to unduly short terms of limitation periods (e.g. no less than ten years) or, ideally, any limitation periods.³⁷⁶

6.44 Section 13(1)(f) provides that prescription in respect of a debt that is the object of a dispute subject to arbitration is suspended pending the disposal of the arbitration proceedings. The section is silent in respect of debts that arise from offences that are subject to criminal proceedings.

³⁷⁴ 2008 (5) SA 94 (CC) 43.

³⁷⁵ See Redress & Kchred on Reforming Sudan’s Legislation on Rape and Sexual Violence September 2008 9, A briefing paper published as part of Criminal Law Reform project in Sudan.

³⁷⁶ *Supra*.

6.45 Readers are invited to comment on whether civil claims arising from offence listed in section 18 should be included in section 13(1) of the Prescription Act.

D. Prior notification to sue

1. Introduction

6.46 Section 2 of the Constitution states that the Constitution is the supreme law of the Republic, that any law or conduct inconsistent with it is invalid to the extent of its inconsistency, and that the obligations imposed by it must be fulfilled.

6.47 The competing constitutional right relevant to this matter, as entrenched in the Bill of Rights, is the right to equality (section 9).

2. Historical background on the liability of the State

6.48 Historically it was not possible to sue the State, and this principle finds its roots in the principle of sovereign immunity. In the early Roman Law the principle of "*princeps legibus solutus est*" applied. According to this principle the State was not bound by the same rules that applied to its citizens. In Roman Dutch Law the State was apparently liable in certain circumstances.³⁷⁷

6.49 In 1910 the Crown Liabilities Act 1 of 1919, was particular prerogative of State which had earlier prevented it from being sued in Courts, was abolished, and within the limits of the Act, the liability of the State is co-extensive with that of the individual citizen. The provision of section 3 of the State Liability Act was since being declared unconstitutional.³⁷⁸

³⁷⁷ See LN Wessels Tenuitvoerlegging van Hofbevel teen dies Staat April 2006 10, Thesis submitted in the partial completion of the Masters of Law submitted to the University of South Africa.

³⁷⁸ See *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC).

6.50 Parliament in 2004 enacted a legislation that is intended to deal with institution of legal proceedings against the state (the IPACOS Act). The Act will be evaluated with reference to the equality provision.

3. The concept equality

(a) Meaning of equality

6.51 Equality is political doctrines that holds that all people should be treated as equals and have the same political, economic, social and civil rights. Generally it applies to being held equal under the law and society at large. It has been considered a constitutive feature of justice.³⁷⁹

6.52 Equality before the law or equality under the law is the principle under which each individual is subject to the same laws, with no individual or group having special legal privileges. Legal egalitarianism admits no class structures entail separate legal practices.

6.53 Equality is largely a question of when a legislative distinction is constitutionally permissible. In a modern state there are many instances in which a statute differentiates between group and classes of people.

6.54 Tax laws differentiate on the basis of income level, water laws may differentiate according to urban or rural areas and education laws may differentiate according to the socio-economic circumstances of the learners and their parents. Most of these legislative classifications will not violate the Constitution.³⁸⁰ Although the implications of the equality provision have been analysed and commented upon

³⁷⁹ On the history of the concept see G Abernethy *The Idea of Equality*, John Knox Press 1959 E Anderson "What Is the Point of Equality?" *Ethics* 109 pp287-337; S Benn & P Richards *Social Principles and the Democratic State* London: Allen & Unwin 1967.

³⁸⁰ C Albertyn "Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for Constitutionality against section 9 of the 1996 Constitution" 1. The Document was prepared for the South African Law Reform Commission in 2006 as a guideline for the Commission's project on Statutory Law Review.

in a number of cases,³⁸¹ it will always raise controversy.

6.55 An important starting point for understanding equality in South Africa is the nature of the inequalities that have characterized its past and still haunt its present. Material conditions in South Africa have divided out country into two distinct sectors.

6.56 One sector of the nation is relatively prosperous and has ready access to a developed economic, physical, educational, communication and other infrastructure.

6.57 The second, and larger, sector of South Africa lives under conditions of a grossly underdeveloped infrastructure. This larger group is either unaware of or poorly informed about their legal rights and what they should do in order to enforce those rights.

³⁸¹ This right has been commented upon cursorily in the cases that follow, without coherent theory being formulated; *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 E; *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B); *Chairman, Council of State, Ciskei v Qokose* 1994 (2) BCLR 1 (CkAD); *Besserlik v Minister of Trade and Industry and Tourism* 1996 (6) BCLR 745 (CC); *Mofolo v Minister of Education, Bophuthatswana* 1994 (1) BCLR 136 (B) ; *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC); *S v Ntuli* 1996 (1) SA 1208 (CC); 1996 (1) BCLR 141 (CC); *AK Entertainment CC v Minister of safety and Security* 1995 (1) SA 783 (E); 1994 (4) BCLR 570 (SEC); *Hans v Minister van Wet en Orde* 1995 (12) BCLR 1639 (C); *Jeeva v Receiver of Revenue , Prot Elizabeth* 1995 (20 SA 433 (SEC) ; *Kalla v The Master* 1995 1 SA 261 (T); 1994 (4) BCLR 79 (T); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1545 (N); *Matukane v Laerskool Potgietersrust* 1996 (3) SA 223 (T); *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1996 (11) BCLR 1545 (N); *Larbi-Odam v Member of the Executive Council for Education* 1996 (12) BCLR 1612 (B); *Central Transitional Metropolitan Council v Winchester* 1997 (3) BCLR 312 (N).

6.58 These inequalities are captured in the protection against unfair discrimination and addressing them is an important part of the constitutional project of transformation.³⁸² To do so requires both a strong concept of equality and an idea of law as a tool for social change.

(b) Values underlying the equality right

(i) Dignity

6.59 In *President of the RSA v Hugo*, the court identified dignity as a core value and purpose of the right, whilst retaining the idea of remedying disadvantage within overall assessment of unfair discrimination.³⁸³ The court was of the view that:

....at the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, that that is the goal of the Constitution should not be forgotten and overlooked.

6.60 The idea of dignity as meaning equal moral worth, the right to be treated with equal concern and respect, derives from Kantian notion of the equal moral worth of all human beings.³⁸⁴ Here dignity is closely related to ideas of equality. However it is

³⁸² The notion of transformative constitutionalism has characterized much of the writing on equality. See K Klare "Legal Culture and Transformative Constitutionalism" 1988 14 *SAJHR* 146; C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1988 14 *SAJHR* 248; S Liebenberg & M Sullivan "South Africa's New Equality Legislation. A tool for Advancing Woman's Socio-economic Equality? In S Jagwanth & E Kalula (eds) *Equality Law: Reflections from South Africa and Elsewhere* 2001 70; P de Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 17 *SAJHR* 258; AJ van der Walt "A South African Reading of Frank Michelman's Theory of Justice" in H Botha, AJ van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* 2003; S Jagwanth & C Murray "No nation Can Be Free When One Half of it is Enslaved: Constitutional Equality for Women in South Africa" in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* 2005 23.

³⁸³ 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

³⁸⁴ See S Woolman "Dignity" in S Woolman et al *Constitutional Law of South Africa* 2nd ed Chapter 33.

not necessarily related to ideas of substantive equality.³⁸⁵ Equal concern and respect based on equal moral worth is a fairly abstract concept that requires further elucidation to determine exactly what it means when a failure to treat people with equal dignity or equal concern and respect, contravenes the equality right.³⁸⁶

6.61 Equal concern and respect has been applied to the irrational treatment of a group on an arbitrary ground such as race, and³⁸⁷ in a series of claims for equality by gay and lesbian claimants.³⁸⁸ In *Minister of Home Affairs v Fourie*,³⁸⁹ the court, wrote that, equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference.³⁹⁰

6.62 The primary of the value of dignity within the equality right manifest in the notion of equal moral worth and the requirement that all persons be treated with equal concern and respect. It embraces the idea of status or recognition, and social change. Thus, dignity is capable of supporting a substantive understanding of equality.

(ii) Equality

6.63 Despite its dominance, dignity is not the only value that has informed the interpretation of the right to equality. The Constitutional Court has recently developed the value of substantive equality in relation to the equality right, especially in cases

³⁸⁵ C Albertyn & B Goldblatt in S Woolman et al *Constitutional Law of South Africa* 2nd ed Chapter 35.

³⁸⁶ See D Davis "Democracy & Deliberation" *SALJ* 1999 69-95.

³⁸⁷ See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC). In this case the court found the enforcement policy to constitute an impairment of dignity and thus amount to unfair discrimination.

³⁸⁸ See *National Coalition of Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

³⁸⁹ 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

³⁹⁰ *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) par 60.

concerned with the positive and restitutionary aspects of the right that from section 9(2).³⁹¹

6.64 The constitutional value of substantive equality is linked to the achievement of social and economic equality and the dismantling of structural inequalities. The Constitutional court has consistently referred to the achievement of equality in the context of South Africa's past.³⁹² In *Minister of Finance v Van Heerden*,³⁹³ Moseneke DCJ spoke of the need for a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework.

4. Content and scope of the right to equality

6.65 The rights entrenched in the Bill of Rights are formulated in general and abstract terms. The meaning of these provisions will therefore depend on the context in which they are used, and their application to particular situations will necessarily be a matter of argument and controversy.³⁹⁴

6.66 Sec 39 of the Constitution contains an interpretation clause which pertains to the Bill of Rights.³⁹⁵ It states that when the Bill of Rights is interpreted a court must promote the values which underlie an open and democratic society based on human dignity, freedom and equality.

³⁹¹ See C Albertyn & B Goldblatt *Constitutional Law of South Africa* 15.

³⁹² See C Albertyn & B Goldblatt *Constitutional Law of South Africa* 15.

³⁹³ 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

³⁹⁴ De Waal J, Currie & Erasmus *The Bill of Rights Handbook* 3rd ed Juta & Co 2000 117.

³⁹⁵ Sec 39 of the Constitution reads as follows: Interpretation of Bill of Rights
 39 (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 (b) must consider international law; and
 (c) may consider foreign law.
 (2) 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.
 (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

6.67 The section furthermore requires reference for purposes of interpretation to international human rights law in general. This is not confined to instruments that are binding on South Africa.³⁹⁶ A person may also rely on rights conferred by legislation, the common law or customary law. Such rights may not, however, be consistent with the Bill of Rights.³⁹⁷

6.68 Although section 39 provides a starting point when trying to interpret the Bill of Rights, it requires interpretation itself. The Constitutional Court has therefore laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted.³⁹⁸ It should be interpreted by first of all determining the literal meaning of the text itself³⁹⁹ and identifying the purposes or underlying values of the right.⁴⁰⁰

6.69 A generous interpretation should furthermore be given to the text,⁴⁰¹ and the history of South Africa and the desire not to repeat it should be taken into account.⁴⁰²

³⁹⁶ Dugard in van Wyk D et al (eds) *Rights and Constitutionalism: The New South African Legal Order* Juta & Co Ltd 1994 at 193 as referred to in *S v Makwanyane* 1995 (3) SA 391 (CC) (footnote 46 of the judgment) notes that a court may not only consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts but also international conventions, international custom, the general principles of law recognised by civilised nations, judicial decisions and teachings of the most highly qualified publicists of the various nations, etc.

³⁹⁷ Dewaal et al *Bill of Rights Handbook* Juta & Co Ltd 131.

³⁹⁸ Guidelines as to interpretation and references to court cases as per De Waal I et al *Bill of Rights Handbook* Juta & Co Ltd 131.

³⁹⁹ *S v Zuma* 1995 (2) SA 642 (CC) par 17. Constitutional disputes can, however seldom be resolved with reference to the literal meaning of the provisions alone. The literal meaning should therefore not be regarded as conclusive.

⁴⁰⁰ *S v Makwanyane* 1995 (3) SA 391 (CC). It requires value judgment to be made about which purposes are important and protected by the Constitution and which not. The scope of the right is increased by this value-based method of interpretation. While the values have to be objectively determined by references to the aspirations, expectations and sensitivities of the people, they may not be adequate with public opinion.

⁴⁰¹ *S v Mhlungu* 1995 (3) SA 867 (CC); *S v Zuma* supra. However, the use of generous interpretation may sometimes result in a strained interpretation of the text. Where a conflict arises between a purposive interpretation and a generous interpretation, the court will always choose the purposive approach.

6.70 Finally the context of a constitutional provision should be considered, since the Constitution is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation.⁴⁰³

6.71 Equality in the Constitution is listed as a democratic value,⁴⁰⁴ as the first right in the Bill of Rights,⁴⁰⁵ it is one of the factors that the court takes into account when a court limits rights, in a state of emergency it is protected with respect to unfair

⁴⁰² *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par 40. Statements made by politicians during negotiations and the drafting process are of little value in the interpretation. This should, however, be distinguished from the preparatory work to which some significance is attached, for example the reports of the various technical committees.

⁴⁰³ *S v Makwanyane supra*; *Ferreira v Levin NO* 1996 (1) SA 984 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC). Contextual interpretation should be used with caution. It cannot be used to limit rights. The Bill of Rights envisages a two-stage approach: first interpretation, then limitation. The balancing of rights against each other or against the public interest must take place in terms of the criteria laid down in sec 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. See *Bernstein v Bester NNO 1996 (2) SA 751 (CC)* at 128. Contextual interpretation may also not be used to identify and focus only on the most relevant right. In terms of constitutional supremacy, a court must test a challenged law against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not.

⁴⁰⁴ Section 7(1) of the *Constitution of the Republic of South Africa, 1996* provides that
“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

⁴⁰⁵ Section 9 of the Constitution provides:

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. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

See also Du Plessis & Corder in *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994 139, the authors explain that by listing the equality as the first right it indicates its primary significance.

discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language,⁴⁰⁶ and prospective protection of the rights of every person (i.e. every man, woman, child and where applicable juristic persons) throughout Chapter 2 implies equal protection under the supreme Constitution.⁴⁰⁷

6.72 The South African Constitution entrenches the right to equality, including the right to equal protection and benefit of the law.⁴⁰⁸ It provides that the state must respect, protect, promote and fulfil the right to equality.⁴⁰⁹

6.73 The state's duties to fulfil the rights entrenched in the Constitution have negative and positive dimensions. The former means that the state has to refrain from infringing people's rights, whilst the latter dimension means that the state has to take necessary steps to ensure the enjoyment of these rights.⁴¹⁰

6.74 Early commentators on the interim Constitution suggested that section 8(1)⁴¹¹ should be widely interpreted as a broad statement of substantive equality that embraced and possibly added to the negative and positive protections in the rest of the section.⁴¹²

⁴⁰⁶ See Table of Non-Derogable Rights in Chapter of the Constitution.

⁴⁰⁷ Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994 139. See also CRM Dlamini "Equality or Justice? Section 9 of the Constitution revisited-Part I" 2002 *Journal for Juridical Science* 15.

⁴⁰⁸ See footnote 402 above.

⁴⁰⁹ Sec 7(2) the *Constitution of the Republic of South Africa, 1996* provides that: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights".

⁴¹⁰ J Joni *Promoting the right to health care services for people living with HIV/AIDS in rural and peri-urban communities in Righting Stigma: Exploring a rights-based approach to addressing stigma* Viljoen eds 144.

⁴¹¹ Sec 8(1) of the interim Constitution provided that: "Every person shall have the right to equality before the law and to equal protection of the law".

⁴¹² See Allbertyn and Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 (10) *SAJHR* 149 and Davis "Equality" in Davis et al *Fundamental Rights in the Constitution* 1997 52-55.

6.75 Section 9(1) of the final Constitution is largely based on its precursor, section 8 of the interim Constitution.⁴¹³ It defines equality as including “the full and equal enjoyment of all rights and freedoms”. To promote the attainment of equality, provision is made for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

6.76 When section 9 is read as a whole it appears that the concept of equality is referred to in different ways. In section 9(1) it is described positively as a “right to equality before the law” and as a right to equal protection of the law. It would appear that the right to “equality before the law is concerned more particularly with entitling “everybody, at the very least, to equal treatment by our courts of law”.⁴¹⁴ It makes clear that no one is above or beneath the law and that all persons are subject to law impartially applied and administered.

6.77 The starting point of the court’s interpretation of section 9(1) is the idea that differentiation lies at the heart of equality jurisprudence and the task of the court is to determine when that differentiation is permissible and when it infringes the equality right.

6.78 The Constitutional Court has accorded no meaning to the provision that everyone is equal before the law and has the equal protection and benefit of the law.⁴¹⁵ This right provides a constitutional protection against any irrational or arbitrary legislative differentiations made by the state.⁴¹⁶ If they are rational they are mere differentiations and are constitutional. To be rational, they must not be arbitrary or manifest naked preference that serves no legitimate government purpose.⁴¹⁷ Therefore, section 9(1) is capable of more substantive interpretation.

⁴¹³ *The Republic of South Africa Constitution Act 200 of 1993; National Coalition for Gays and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC). What has been added to sec 9(1) is “equal protection and benefit of the law”.

⁴¹⁴ See *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) para 18.

⁴¹⁵ *National Coalition for Gays and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) paras 58-59.

⁴¹⁶ C Albertyn & B Goldblatt in Woolman et al *Equality: Constitutional Law of South Africa* Juta & Co 2006 35-15.

⁴¹⁷ *Prinsloo v Vander Linde* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) 6 1997 (11) BCLR 1489 (CC) para 38.

6.79 The right equality before the law is recognised in international ⁴¹⁸ and other regional instruments.⁴¹⁹

5. Rationality principle

6.80 Rationality is an important aspect of accountability and justification in a democratic state. It encompasses the principle of the rule of law that the exercise of public power should not be arbitrary.

6.81 The constitutional validity or otherwise of legislation does not derive from personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid.⁴²⁰

⁴¹⁸ *Universal Declaration of Human Rights*, adopted in 1948 provides:

Article 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood.

International Covenant on Civil and Political Rights, adopted 1966 provides:

Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁴¹⁹ *The African Charter on Human and Peoples Rights*, adopted June 1981 provides that :

Article 3(1) Every individual shall be equal before the law.
(3) Every individual shall be entitled to equal protection of the law.

The American Convention on Human Rights, adopted in 1969 provides that:

Article 3 Every person has the right to recognition as a person before the law.

⁴²⁰ *Ferreira v Levin No and other; Vryenhoek and others v Powell No and others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC); *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and others; South African Human Rights Commission and Another v President of the Republic of South Africa and another* 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC) para 46 and 148; *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) para 44H-J and 45 A-E.

6.82 Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary. Section 39(2) obliges the court to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of rights. And importantly, section 172(1) makes plain that when deciding a constitutional matter within its power, a court must first declare that any law that is inconsistent with the Constitution is invalid to the extent of its consistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be by the conduct of litigants or holders of the rights in issue.⁴²¹

6.83 Attacks on legislation which are founded on the provision of section 9(1) raise difficult questions of constitutional interpretation and require a careful analysis of the facts of each case and an equally careful application of those facts of the law.⁴²² In *Prinsloo v Van der Linde and Another*,⁴²³ the court indicated that courts should be astute not to lay down sweeping interpretations but should allow equality doctrine to develop slowly and surely, and such should be dealt on a case by case basis with special emphasis on the actual context in which each problem arises.

6.84 The Constitutional Court has found that section 9(1) requires all legislative differentiation to be rational. If they are rational they are “mere differentiation” and are constitutional. To be rational, they must not be arbitrary “or manifest naked preferences that serve no legitimate governmental purpose”.⁴²⁴

6.85 In *Harksen v Lane NO*,⁴²⁵ the Constitutional Court distilled this rationality requirement into simple test:

Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1).

⁴²¹ *Van der Merwe v Road Accident Fund & Another* 2006 (4) SA 230 (CC) para 61.

⁴²² *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 41.

⁴²³ 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) para 20.

⁴²⁴ *Prinsloo v Van der Linde* 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC).

⁴²⁵ 1997 (11) BCLR 1489 (CC) para 38.

6.86 In order to ascertain whether there is a rational connection to a legitimate purpose, it is sufficient that the purpose is neither arbitrary nor irrational. It does not have to be justified against constitutional values or any conception of the “general good”. Secondly there has to be a rational connection between the differentiation and this purpose. Here it does not matter if government may have achieved its purpose more effectively in a different manner, or whether its regulation or conduct has been more connected to its purpose. The test is whether for the differentiation that is rationally connected to a legitimate government purpose.⁴²⁶

6.87 Section 9(1) is the minimum rationality threshold to the equality right. It does not entail an analysis of the impact of the impugned action or of the policy choices made, it merely requires that the state has reasons for its actions or protects individuals against differentiation that is arbitrary or irrational.⁴²⁷

6. Statutory notification to sue

6.88 When instituting proceedings against a state organ for the recovery of debt, a creditor has to give an organ of state notice in writing of such intention or an organ of state may consent in writing to the institution of that legal proceeding without notice.⁴²⁸ The provisions of section 3 are peremptory. Such a prior notification is not applicable where the state institutes an action against a private person.

⁴²⁶ *East Zulu Motors (Pty) Ltd Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 (1) BCLR 1 (CC) para 24.

⁴²⁷ *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour Intervening)* 1999 (2) BCLR 139 (CC) para 16.

⁴²⁸ Section 3 of the *Institution of Legal Proceedings against Certain Organs of State Act* 40 of 2002 provides:

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) a creditor has given the organ of state in question notice in writing of his or her 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 notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection 2.

6.89 Such a notice, must be served on the state organ within six months from the date on which the debt became due and briefly set out the facts giving rise to the debt and such particulars which are within the knowledge of the creditor.⁴²⁹

6.90 The courts have held that such written notice must contain sufficient particulars about the occasion or circumstances or basis upon which the intended action is founded to enable the defendant to investigate the alleged cause of action,⁴³⁰ but not with the same degree of precision and meticulous detail required in pleadings.⁴³¹ The notice must make clear that an action will be brought and by and against whom the action will be brought.⁴³²

6.91 In *Dauth and Others v Minister of Safety and Security and Others*⁴³³ the plaintiff issued summons on 22 July 2004 for a conduct on which the claimant case occurred on the 01 July 2002, and failed to comply with the notice requirement in section 3(1) of the IPACOS Act. The claim in the normal course would have been extinguished by prescription on 30 June 2005. The applicant filed for condonation on 2 July 2007. The respondent argued that the claims of the applicants had been extinguished by prescription. The court decided that although the written notice of intention to institute proceedings is framed in peremptory terms, it should not be construed as such if the section is read as a whole and more particularly with

⁴²⁹ Section 3(2) of the Institution of Legal Proceedings against Certain Organs of State provides:
 (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); and
 (b) briefly set out-
 (i) the facts giving rise to the debt; and
 (ii) such particulars of such debt as are within the knowledge of the creditor.

⁴³⁰ *Dease v Minister of Justice* 1962 (3) SA 215 (T) 774A-775C; *Minister van Polisie v Gamble* 1979 (4) SA 759 (A) 769.

⁴³¹ See *Pule v Minister of Prisons* 1982 (2) SA 598 (E); *Maponya v Minister of Police & another* 1983 (2) SA 616 (T).

⁴³² See *Manamela v Minister of Police* 1980 (3) SA 1139 (W) 1141; *Makopanele en andere v Administrator, Oranje Vrystaat, en andere* 1989 (1) SA 435 (O).

⁴³³ 2009 (1) SA 189 (NC).

subsection 4.⁴³⁴ The court further decided that the wording of section 3(4) (a) of the Act, are indicative that, unless reliance is placed on a creditor's failure to comply with the provisions of section 3(1) of the Act, the proceedings thus instituted (for instance issuing of summons) are regarded as valid and effective. Condonation was granted to the applicant for failure to comply with section 3(1) (a) of the IPACOS Act.

6.92 In a constitutional state, it is expected of the state to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no governmental purpose, for that are inconsistent with the rule of law and the fundamental premises of the constitutional state.⁴³⁵

7. Does prior notification to sue infringe the right to equality?

(a) Is there differentiation?

6.93 When natural persons institute proceedings against the organ of state such person must serve a notice of intention of such proceedings, whereas when the organ of state institute proceedings against natural persons such organ of state is not required to notify such persons.

6.94 The effect of limitation periods may create inequality among persons suffering damages as a result of unlawful conduct in so far as a person with a claim against the state or certain public institutions is subject to much more stringent requirements for enforcing the claim than a person with similar claim against some other defendant. Furthermore, these stringent requirements do not apply *vice versa*, where the state or certain public institutions may have a claim against a private citizen.⁴³⁶

⁴³⁴ *Dauth and Others v Minister of Safety and Security and Others* 2009 (1) SA 189 (NC) 189. Subsection 4 allows the creditor to approach the court for condonation where the state organ relies on a creditor's failure to serve notice of intention to institute legal proceedings.

⁴³⁵ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR para 25

⁴³⁶ MM Loubser *Extinctive Prescription Juta & Co* 1996 178.
Section 3. (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

6.95 It may be argued that such provision differentiates against a category of private persons who institute proceedings against the organ of state and when the state institute proceedings against private persons.

(b) Does the differentiation bear a legitimate government purpose?

6.96 Prescription periods and conditions precedent to the institution of actions are and have long been familiar features of our statutory terrain, especially the part occupied by state departments of state, provincial administrations and local authorities once they become prospective defendants.⁴³⁷

6.97 It was held in *Qokose v Chairman, Ciskei Council of State & Others*⁴³⁸ that a limitation period affording the state of special protection was manifestly in conflict with the applicable constitutional right to equality and equal protection of the law.

6.98 The conventional explanation for demanding prior notification of any intention to sue a state organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at

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- (b) the organ of state in question has consented in writing to the institution of that her or its intention to institute the legal proceedings in question; or
 - (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); and
 - (b) briefly set out-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.

⁴³⁷ See Institution of Legal Proceedings against Certain Organs of State Act 40 2002.

⁴³⁸ 1994 (2) SA 198 (CK). In this case The provisions of Sec 48(1) of the Police Act 32 of 1983 provided that a civil proceedings arising out of any wrong committed by any member of the police force acting and within the scope of his authority, shall be brought against the state or against such member if a period of six calendar months has elapsed from the date on which the cause of action arose, unless the notice in writing of the intention to bring such proceedings has been given to the defendant at least one month before the commencement of the proceedings. The court decided that the provision infringed on the citizens right to equality before the law.

public expense, whether it ought to accept, reject or endeavour to settle them.⁴³⁹ The state is responsible for public moneys and it is therefore in the public interest that it should be protected against unjustified claims.

6.99 However, there are counter-arguments. State departments are not the only large organizations that conduct a large variety of activities and employ a constantly changing workforce. Some big companies face the same problems. The law requires of them to cope with these problems without special protection. Furthermore, short limitation periods also protect some organizations that do not face large number of claims and do not employ a large workforce, for example small municipalities. Short limitation periods do not provide an efficient procedure for weeding out the bad from good.⁴⁴⁰

6.100 The language of the Act provides that a notice “must within six months from the date on which the debt become due” be given to a state organ. The words are stated in peremptory terms. As a result, a claimant whose debt becomes due and without legal assistance will run out of time to provide the state with the necessary notice.

6.101 If it is argued that prior notification does not bear a legitimate purpose, may such irrationality be justified under section 36?

⁴³⁹ See *Stevenson NO v Transvaal Provincial Administration* 1913 TPD 80 at 84; *Osler v Johannesburg City Council* 1948 (1) SA 1027 (W) at 1031; *Administrator, Transvaal v Husband* 1959 (1) SA 392 (A) at 394B; *Dease v Minister van Justisie* 1962 (2) SA 302 (T) at 305 D-E; *Packo (Pty) Ltd v Verulam Town Board and Others* 1962 (4) SA 632 (D) at 634G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423H-424C; *Labuschagne v Labuschagne*; *Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 585D-586B; *Sarrahwitz v Walmer Municipality* 1967 (4) SA 286 (E) at 288 C-D; *Minister of Defence v Carlson* 1971 (2) SA 231 (N) at 235. Watemeyer J in *Gibbons v Cape Divisional Council* 1928 CPD at 200 described them as to be “a very serious infringement of the rights of individuals”.

⁴⁴⁰ *MM Loubser Extinctive Prescription* Juta & Co 1996 177.

(c) Can the irrationality be saved by section 36?

6.102 The right to equality, like the other fundamental rights and freedoms entrenched in the Bill of Rights, is not absolute.⁴⁴¹ Boundaries are set by the rights of others and by the legitimate needs of society. Section 36 of the Constitution is a general limitation clause and sets out specific criteria for the limitation of the fundamental rights in the Bill of Rights.⁴⁴²

6.103 The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. There is, however, no absolute standard that can be laid down for determining reasonableness or necessary will depend on the circumstances in a case-by-case application.⁴⁴³

6.104 Constitutional analysis under section 36 is a two stage-approach.⁴⁴⁴ First it must be determined whether the challenged law has in fact infringed the fundamental right. If the right has been infringed, the state or the person relying on the validity of the legislation may then demonstrate that the infringement of the right is nevertheless permissible in terms of the criteria for a legitimate limitation of rights laid down in sec 36.⁴⁴⁵ The policy indulging the infringement must be reasonable and justifiable in a free and open democracy.⁴⁴⁶

6.105 Rights cannot be overridden simply on the basis that the general welfare will be served by the restriction. The reasons for limiting a right need to be exceptionally

⁴⁴¹ S Woolman & H Botha in Woolman et al (eds) *Limitations: Constitutional Law of South Africa Juta & Co 2nd ed 2006* at 34-1.

⁴⁴² See section 36 of the Constitution of the Republic of South Africa, 1996.

⁴⁴³ *S v Makwanyane* 1995 (3) SA 391 (CC) 708.

⁴⁴⁴ *S v Zuma* 1995 (2) SA 642 (CC); Woolman S "Coetzee: The Limitations of Justice Sach's Concurrence" 1996 *SAJHR* Vol 12 Part 1 99.

⁴⁴⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) 102.

⁴⁴⁶ Devenish GE "The Limitation Clause Revisited-The Limitation of Rights in the 1996 Constitution" 1998 *Obiter* 256.

strong, as opposed to concerns that are trivial. They should also be in harmony with the intrinsic values set out in the Constitution.⁴⁴⁷

6.106 In *S v Makwanyane*⁴⁴⁸ the Constitutional Court set out its approach as follows:

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

6.107 Where a provision violates section 9(1) because it is irrational, it cannot be justified under section 36. This is because the limitations inquiry imposes much stronger rationality constraint than section 9(1). If the provision cannot pass muster under the minimal rationality requirement of section 9(1), then it cannot succeed under the greater constraints of the limitations clause.⁴⁴⁹ The Constitutional court has required that a differentiation be “justified” as rational. However, the court has been careful to distinguish the rationality enquiry under section 9(1) from the justification enquiry under section 36.⁴⁵⁰

⁴⁴⁷ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴⁴⁸ The approach has been largely codified in sec 36 of the Constitution. See also *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 640; *S v Manamela* 2000 (5) BCLR 491 (CC) at 519G-520A; *National Coalition for gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Director of Public prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535; 2000 (2) BCLR 151 (C).

⁴⁴⁹ C Albertyn “Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for Constitutionality against section 9 of the 1996 Constitution” See C Albertyn & B Goldblatt *Equality*. in Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed 2006 35-23. Thus far *Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (CC), 2006 (6) BCLR 682 (CC) is the only case that has reached the Constitutional Court that has failed the rationality test.

⁴⁵⁰ *East Zulu Motor (Pty) Ltd Limited v Empangeni /Ngwelezane Transactional Local Council and Others* 1998 (1) BCLR 1 (CC) para 24.

6.108 Readers are invited to comment on the following issues:

- (a) Whether prior notification to sue is justifiable in the current dispensation.**
- (b) Whether the IPACOS should be retained with 1 month notice or should that be amended to the effect that the 1 month notice will not constitute suspension of prescription as contemplated in section 13(1) of the Prescription Act.**
- (c) Is there any other issue related to Prescription which requires investigation?**

GENERAL LAWS AMENDMENT AND REPEAL BILL OF 2011**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 enactments**

DRAFT BILL

To amend the Prescription Act,1969, so as to increase the prescription period for other debts, to provide for condonation; to amend the Road Accident Fund Act, 1996, to provide for the running of prescription period; to repeal certain laws and to provide for matters connected therewith.

1. Amendment of section 11 of the Prescription Act 68 of 1969

Section 11 of the Prescription Act (herein after referred to as the "Principal Act") is hereby amended by the substitution for paragraph (d) of the following paragraph:

"(d) five years in respect of any other debts, save where an Act of parliament provides for longer period".

2. Insertion of section 11A in Act 68 of 1969

The following section is hereby inserted in the Principal Act, after section 11:

"11A Application for condonation

(1) A litigant who has failed to institute an action after five years may apply to a court having jurisdiction for condonation for such failure.

(2) A court may grant such an application after considering the following factors:

- (i) the nature of the relief sought;
- (ii) the extent and cause of the delay;
- (iii) the effect of the delay on the administration of justice;
- (iv) the prospects of the success of the case; and
- (v) on good cause shown.

3. Amendment of section 13 of the Prescription Act 68 of 1969

Section 13 of the Principal Act is hereby amended by the substitution for paragraph (f) of subsection (1) of the following paragraph:

“(f) the debt is the object of a dispute subjected to arbitration or criminal proceedings”

4. Amendment of section 16 of the Prescription Act 68 of 1969

Section 16 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(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]** in respect of 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”.

5. Amendment of section 23 of the Road Accident Fund Act 56 of 1996

Section 23 of the Road Accident Fund Act is hereby amended by:

(a) the substitution for subsection (1) of the following subsection:

“(1) 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 damages 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 three years.”

(b) the substitution for subsection (2) of the following subsection:

“(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against any person who is

(a) a minor;

(b) insane or detained as a patient in terms of any mental health legislation; or

(c) under curatorship; or

(d) 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) of the Prescription Act.

(c) the insertion of following subsection :

“(6) 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”.

6. Repeal of laws

The laws specified in the second column of the Schedule to this Act are hereby repealed to the extent indicated in the third column, in so far as they are applicable.

7. Short title and commencement

This Act shall be called the General Laws Amendment and Repeal Act, 2011 and shall come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

SCHEDULE**LAWS REPEALED**

<i>No and year</i>	<i>Short title</i>	<i>Extent of repeal</i>
34 of 1956	Apportionment of Damages , Act 1956	section 2(6)(b)
53 of 1979	Attorneys , Act 1979	section 49(2)
130 of 1993	Compensation for Occupational Injuries and Diseases, Act 1993	section 44
91 of 1964	Customs and Excise, Act 1964	sections 89(2) and(3); 96
39 of 1951	Expropriation (Establishment of Undertakings), Act 1951	section 7(3)
63 of 1975	Expropriation, Act 1975	section 6(3)
40 of 2002	Institution of Legal proceedings Against Certain organs of State, Act 2002	section 3
57 of 1951	Merchant Shipping, Act 1951	section 344
24 of 1956	Pension Fund, Act 1956	sections 30l(1) and (2)

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