

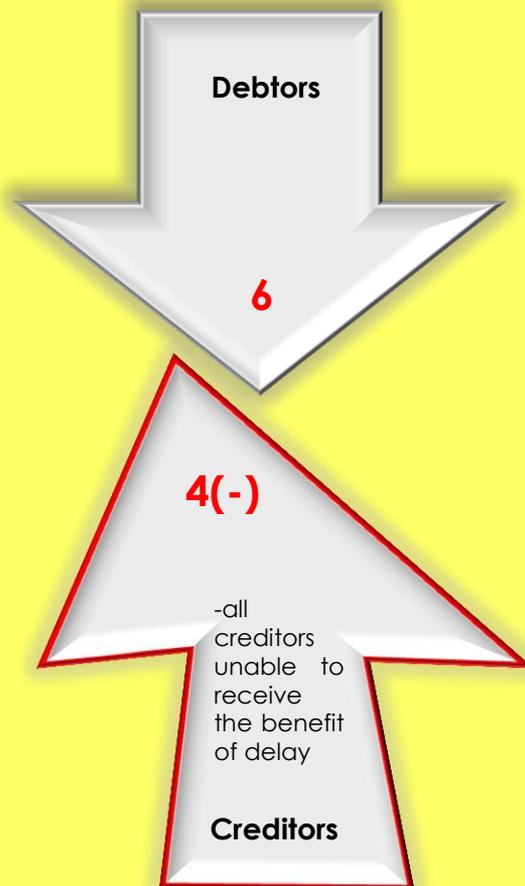
SA Law Reform Commission

Presentation 4

Revised Discussion Paper on Prescription Periods

Part C: Delaying the running of prescription

THE PRESCRIPTION BALANCE



ORIGIN AND SCOPE OF DELAY PRINCIPLE

Over time, certain principles have developed to ensure that the rules of prescription take into account factors inhibiting a creditor from timeously asserting a right

The principles find expression in the common law maxim *contra non valentem agere, non currit praescriptio*, meaning, prescription does not run against one who is unable to act

The concept was formulated in the fourteenth century by the Italian jurist, Bartolus de Saxoferrato, based in part, on Roman law influence

The scope of the concept (which initially only covered legal impediments) was later broadened to include factual impediments (the latter of which requires absolute impossibility to act)

ORIGIN AND SCOPE OF DELAY PRINCIPLE

This doctrine has been accorded statutory recognition in sections 12(2), (3), (4) and 13 of the Prescription Act, providing either for the delayed **onset** or **running** of prescription in instances where a creditor finds it “*difficult*” or “*impossible*” to interrupt the running of prescription.

The Prescription Act therefore makes provision for both “**legal**” and “**factual**” impediments; the former of which requires either absolute impossibility or relative inability whilst the latter requires absolute impossibility.

ORIGIN AND SCOPE OF DELAY PRINCIPLE

By way of example-

- whilst the impediment of minority is taken to constitute a **legal impediment**, a minor is not “*absolutely*” precluded from instituting legal proceedings, legal standing will be established if he is assisted by his guardian; and
- the impediment of superior force, irrespective whether it arises from a **legal or factual** cause-
 - requires “**absolute**” impossibility to act;
 - presupposes a foreign incursion on a person’s ability to act; and
 - may, in some circumstances, give rise to the question of **fault**, in other words, the extent to which a person contributed to a delay in acting

ORIGIN AND SCOPE OF DELAY PRINCIPLE

It may be worth noting, in relation to the impediment of superior force, that imprisonment, of itself, does not necessarily constitute absolute impossibility, since the mere fact of incarceration is no bar to instituting or defending legal proceedings

In this regard, the cases of *Montsisi* (1984) and *Lombo* (2002) are distinguishable, since-

- In *Montsisi*, the Appellant was prevented by an **absolute** legal impediment from complying with the requirements of notice, so that he was absolutely unable to gain access to any person during his detention, including an attorney, by virtue of section 6(6) of the Terrorism Act; and
- In *Lombo*, even though the Appellant was **factually** prevented from instituting legal proceedings (as a result of his continued detention), this did not constitute a **legal** impediment that absolutely prevented him from doing so, either during his detention (seeing that he was given the option of accessing legal representation) or after his release (seeing that section 13(1)(a) of the Prescription Act afforded him a remedy in instances where he was prevented by superior force)

ORIGIN AND SCOPE OF DELAY PRINCIPLE

Operating parallel to the doctrine of *contra non valentem agere, non currit praescriptio*, is the common law doctrine *lex non cogit ad impossibilia* meaning: the law does not compel the performance of that which is impossible, which requires “*absolute*” impossibility to act in the face of “*legal*” impediments.

This latter doctrine applies in the following areas of South African law:

- contract (impossibility of performance due to one or other factors, including superior force);
- delict (impossibility of performance due to one or other factors, including superior force);
- succession (in relation to an impossible condition in a will); and
- criminal law.

SCOPE OF APPLICATION OF PRINCIPLE

Prescription Act, 1943

Sections 7, 9 and 10 of the 1943 Act provided for the “*suspension*” or “*delayed onset*” of prescription in the face of certain impediments that made it difficult or impossible for a creditor to timeously assert a right against a debtor

It operated in the following way:

- the running of prescription was suspended from the date of the impediment;
- on the date the impediment ceased to exist, running of the period resumed from the point where it had been suspended;
- the period of suspension was excluded from the calculation of the prescription period, with effect that a creditor gained the benefit of the full period; and
- suspension took effect irrespective when the impediment came into being; the beginning, middle or end of the prescription period

SCOPE OF APPLICATION OF THE PRINCIPLE

Prescription Act, 1969

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

It was argued in this regard that a change in systems was justified, taking into account South Africa’s already “generous” list of delay principles. Further to this, it was maintained as follows by Prof J C De Wet:

*Die bestaande Verjaringswet skyn in beginsel tegemoetkomend teenoor die skuldeiser te wees In die Ontwerp Nederlandse BW ... word heeltemal met die tradisionele voorstelling gebreek, en word die loop van verjaring slegs geskors indien die skorsende omstandighede aan die einde van die termyn bestaan, Die omstandighede wat die loop van verjaring skors, hou almal verband met die skuldeiser se vermoë om die skuld in te vorder, **en hierdie vermoë is slegs van belang wanneer die verjaringstermyn haas voltooiing nader. Die tegemoetkoming van skorsing het die skuldeiser slegs nodig indien hy, in hierdie kritieke stadium, nie in staat is om sy skuld in te vorder nie.***

SCOPE OF APPLICATION OF PRINCIPLE IN SOUTH AFRICAN LAW

Prescription Act, 1969

Delayed completion operates in the following way:

- the running of prescription is delayed **only if the impediment is subsisting in the last year in which prescription is running;**
- running of the period is suspended from the date of the impediment;
- the day after the impediment ceases to exist, running of the period resumes from the point it was suspended, **for a period of one year;**
- if the impediment ceases to exist before the last year in which prescription is running-
 - a creditor does not obtain the benefit of delayed completion;
 - a creditor therefore does not obtain the benefit of the full prescription period

PROBLEMS WITH THE CURRENT LAW

The question arising is whether delayed completion operates counter to the right of access to courts and to equality, both of which are protected by sections 34 and 9 of the Bill of Rights, to the extent that a creditor affected by an impediment that ceases to exist **before the last year** in which prescription is running is unable to obtain the benefit of delay.

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

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

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

PROBLEMS WITH THE CURRENT LAW

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

- obtain medical records and other documents;
- assemble resources;
- find an attorney;
- have his attorney source further records, documents and other evidence;
- give notice of intention to institute legal proceedings (in instances where the debtor is an organ of state);
- engage in settlement negotiations with the debtor; and
- institute legal proceedings in the case where settlement negotiations failed.

PROBLEMS WITH THE CURRENT LAW

What the argument, in effect, also does, is imply that a one year general prescription period suffices for the purpose of enabling a creditor to timeously interrupt the running of prescription

Therefore, whilst, on the face of it, the basis for changing systems may appear to be sound, its prejudicial impact on creditors forced to succumb to the unfortunate circumstance of timing, it is submitted, far outweighs the benefit of delayed completion

In relation to the so-called “*benefit*” of delayed completion, irrespective when the impediment sets in “*in the last year*”, a creditor obtains the benefit of a **full one year’s delay**. In other words, even if an impediment sets in in the last three months, an additional year is added to the prescription period

It is submitted, however, that the benefit derived from affording the additional year falls short when measured against the standard of fairness inherent in the operation of suspension. In this regard, if an impediment lasted three months, three months were added to the original prescription period; if an impediment lasted one year, one year was added to the original prescription period and if an impediment lasted three years, three years were added to the original prescription period

PROBLEMS WITH THE CURRENT LAW

Therefore, counter to the **right to equality and to equal protection and benefit of the law**, delayed completion-

- operates to the benefit of a select group of creditors, that is, those succumbing to impediments that are subsisting in the last year in which prescription is running; and
- in some instances, affords an extended time period even in instances where this may be undeserving, for example, in respect of those creditors, who, notwithstanding having succumbed to impediments for periods of less than one year, still obtain the benefit of a full year's delay.

And counter to the **right of access to courts**, is the ever-present risk that a creditor will have but a diminished window of opportunity to interrupt the running of prescription in the face of a reduced period

PROBLEMS WITH THE CURRENT LAW

Delayed completion, in addition, has the potential for hindering engagement in dispute resolution processes by discouraging creditors from referring disputes for adjudication in circumstances that would have suspended the running of prescription

By way of example, the Financial Advisory and Intermediary Services Act provides as follows:

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

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

(Emphasis added)

The Prescription Act, however, does not provide for suspension. The referral will, in all likelihood, be interpreted in line with the principles of delayed completion

This may have the effect of-

- forcing creditors becoming cognizant that their referrals will be out of time, to engage in litigation; or
- causing creditors to hold over referring matters until the last year in which prescription is running

PRELIMINARY LAW REFORM PROPOSALS

Issues to be taken into account in formulating proposals

Whilst the right of access to courts and the right to full and equal enjoyment of the benefits afforded by the Prescription Act likely favour the more even-handed operation of suspension, it does present its own challenges when viewed against prescription's primary goal of certainty and finality

The following example may serve to illustrate the extent of the problem:

- in 1980, six debtors make arrangements to pay the South African Revenue Service (SARS) arrear taxes once-off in 1983. Four of these debtors reside and carry on business in the northern territory;
- in 1983, the northern territory is hit by freak weather conditions resulting in unprecedented floods causing rising fatalities, untold damage, a complete breakdown in communication networks and rapidly spreading cholera. The territory is declared a disaster area and blockaded from the rest of the country. Access into and out of the area is prohibited, and schools, business, government activity, the courts and other services shut down. Only medical rescue and other aid services are allowed into the area by means of helicopter;

PRELIMINARY LAW REFORM PROPOSALS

Issues to be taken into account in formulating proposals

- since the affected debtors have lost everything, they are unable to repay the debts by due date;
- by 1985, the order declaring the northern territory a disaster area is uplifted. Activities resume;
- by 1990, the affected debtors continue to be in arrears. Notwithstanding several demands, payments remain outstanding;
- in 2017, SARS institutes legal proceedings for the recovery of the debts, and in reaction, the debtors plead prescription; and
- SARS replicates by pleading that because it was prevented by superior force from enforcing the debts in question, the running of prescription became suspended

PRELIMINARY LAW REFORM PROPOSALS

Issues to be taken into account in formulating proposals

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

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

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

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

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

PRELIMINARY LAW REFORM PROPOSALS

Issues to be taken into account in formulating proposals

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

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

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

PRELIMINARY LAW REFORM PROPOSALS

Issues to be taken into account in formulating proposals

Principle:

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

PRELIMINARY PROPOSALS FOR LAW REFORM

Change of delay systems from delayed completion to suspension

Provisions in Prescription Bill		Discussion
17.	Suspension of prescription	Purpose:
(1)	The following impediments suspend the running of prescription:	
(a)	if a creditor is-	
(i)	a minor;	
(ii)	insane;	
(iii)	a person under curatorship;	
(iv)	prevented by superior force, including a law or court order from interrupting the running of prescription as contemplated in section 19(2);	

PRELIMINARY PROPOSALS FOR LAW REFORM

Change of delay systems from delayed completion to suspension

Provisions in Prescription Bill	Discussion
<p>17. Suspension of prescription</p> <p>(v) prevented from accessing the courts for the purpose of interrupting the running of prescription as contemplated in section 19(2), due to adverse socio-economic circumstances, including poverty and illiteracy; or</p> <p>(vi) compelled to give notice of intention to institute legal proceedings prior to serving process, in line with the requirements contained in the Institution of Legal Proceedings against certain Organs of State Act;</p> <p>(b) if a debtor is outside the Republic;</p>	<p>Purpose:</p>

PRELIMINARY PROPOSALS FOR LAW REFORM

Change of delay systems from delayed completion to suspension

Provisions in Prescription Bill		Discussion
17.	Suspension of prescription	Purpose:
(c)	if a creditor and debtor-	
(i)	are married to each other; or	
(ii)	are partners, and the debt arose out of the partnership relationship;	
(d)	if a creditor is a juristic person and a debtor is a member of the governing body of the juristic person;	
(e)	if a creditor or debtor is deceased and an executor of such creditor or debtor's estate has not yet been appointed;	

PRELIMINARY PROPOSALS FOR LAW REFORM

Change of delay systems from delayed completion to suspension

Provisions in Prescription Bill		Discussion
17.	Suspension of prescription	Purpose:
(f)	if a debt is the object of a claim filed against-	
(i)	a deceased debtor's estate;	
(ii)	an insolvent debtor's estate; or	
(iii)	a company or close corporation in liquidation; or	
(g)	if a debt is the object of a dispute-	
(i)	subjected to arbitration or a formal process of mediation; or	
(ii)	referred to a statutory <i>Ombud</i> for determination.	

PRELIMINARY PROPOSALS FOR LAW REFORM

Change of delay systems from delayed completion to suspension

Provisions in Prescription Bill	Discussion
<p>17. Suspension of prescription</p> <p>(2) The period of suspension does not form part of the prescription period.</p> <p>(3) Prescription resumes running the day the impediment ceases to exist, and is completed at the end of the period that was outstanding at the time suspension took effect. Provided that if-</p> <p>(a) an applicable period of prescription is 15 years or more;</p> <p>(b) an impediment occurred anytime within the first five years of the running of the period; and</p> <p>(c) the impediment subsisted for a period of five years or less:</p> <p>then the period of suspension does form part of the prescription period.</p> <p>(4) A contractual debt does not prescribe before a reciprocal debt arising from the same contract prescribes.</p>	<p>Purpose:</p>