



EMBARGO: FOR IMMEDIATE RELEASE

MEDIA STATEMENT: SA LAW REFORM COMMISSION: RELEASE OF REPORT ON PROJECT 125: HARMONISATION OF EXISTING LAWS PROVIDING FOR DIFFERENT PRESCRIPTION PERIODS

The SA Law Reform Commission (Commission) is a statutory body that is empowered in terms of section 4 of the South African Law Reform Commission Act 19 of 1973 to conduct research into all branches of the law of South Africa; to study and investigate such laws and to make recommendations for the development, improvement, modernization or reform thereof. The research and support component of the Commission is located within the Secretariat, a chief directorate falling under the branch: Legislative Development: Department of Justice and Constitutional Development.

In line with its powers, the Commission has, over the years, been engaged in the investigation of various aspects of prescription, a law concerned with limiting the time within which rights must be enforced in the interests of legal certainty and finality; the timeous exercise of rights and the prompt adjudication of disputes. Perceived thus as a neutral system of law warranting narrow interpretation and rigid application, little attention has been given to its development over time and to its constraining effects on the rights of ordinary people still pressed by poverty, low literacy and the lack of access to basic services.

From the outset then, it became clear to the Commission that addressing these barriers required a radical approach to rooting out remedies aimed at advancing the interests of both vulnerable debtors and marginalised creditors in their quest to access justice for the purpose of enforcing rights.

In addition to dealing with the challenges surrounding the area of prescription referred to as "*special time limits*", the investigation dealt with the following topics:

- review of the three-year general prescription period;
- inability to access the courts;
- prohibiting the recovery of prescribed debts;
- delaying the running of prescription; and
- alternative dispute resolution;

Following the Commission's investigation; the **Report on Project 125: Harmonisation of existing laws providing for different Prescription Periods** is released for general information. The **Report** is supported by a draft Prescription Amendment Bill and a draft Institution of Legal Proceedings against certain Organs of State Amendment Bill and contains final recommendations for law reform.

Key findings and recommendations

Special time limits

In this part of the investigation, an in-depth analysis was undertaken of notice and limitation provisions as concepts distinct from prescription; the challenges created by their proliferation in numerous Acts of Parliament; the severity of their impact and their questionable constitutional validity, with the aim of determining the feasibility of harmonising them in line with constitutional values and the need to mirror the relatively more generous '*prescription of debts*' provisions of the Prescription Act 68 of 1969 (Prescription Act).

Following the Commission's investigation, 28 Acts of Parliament, including the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, (Institution of Legal Proceedings against certain Organs of State Act) were considered for the purpose of harmonisation.

In concluding this aspect of its investigation, the Commission found that whilst providing for the special regulation of prescription may in some instances be considered justified, this is not always the case. Following this, recommendations are made, amongst other things, for-

- alignment of the special prescription provisions contained in the following Acts of Parliament with the Prescription Act: Compensation for Occupational Injuries and Diseases Act 130 of 1993; Road Accident Fund Act 56 of 1996 and National Nuclear Regulator Act 47 of 1999;
- alignment of the limitation provisions contained in the following Acts of Parliament with the Prescription Act: Expropriation (Establishment of Undertakings) Act 39 of 1951 (Expropriation (Establishment of Undertakings) Act) and Expropriation Act 63 of 1975 (Expropriation Act);
- alignment of the notice provisions contained in the following Acts of Parliament with the Institution of Legal Proceedings against certain Organs of State Act: Expropriation (Establishment of Undertakings) Act and Expropriation Act; and

- retention of the notice or limitation provisions contained in several Acts of Parliament, including the Tax Administration Act 28 of 2011, National Credit Act 34 of 2005 (National Credit Act), Competition Act 89 of 1998 and Legal Practice Act 28 of 2014.

In addition, recommendations are made for reform of the Institution of Legal Proceedings against certain Organs of State Act by, amongst other things-

- abolishing the period within which notice must be served in connection with the institution of legal proceedings, so that irrespective when service takes place, a creditor only loses a right to enforce a debt if prescription has already taken effect;
- providing for the suspension of the running of prescription once notice is served; and
- authorising the early service of process by three days, in favour of a creditor who has two days or less to interrupt the running of prescription after the section 5(2) "*investigation and negotiation*" period has run its course, as a way of addressing any service challenges likely to be experienced.

Inability to access the courts

Initially linked to the proposal calling for an increase in the three-year general prescription period to five years (Discussion Paper 126: *Prescription Periods*: 2011) based on prevailing socio-economic conditions in South Africa, to include the difficulties faced by many in accessing justice, exacerbated by gross inequalities; the high cost of legal services and the geographical remoteness of the law from the population at large, the Commission subsequently determined that more meaningful avenues had to be pursued to address these challenges, since they tended to remain unchanging for most of these creditors' lives.

Of concern to the Commission was that despite the country's transition from a system of *apartheid* to a constitutional democracy, South Africa remains a highly unequal society. In the Commission's view, for as long as conditions of poverty; unequal access to quality education; the continued dominance of the *apartheid* spatial divide; high levels of unemployment and the unequal distribution of opportunities still prevail, the right of access to courts guaranteed by section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution) would remain out of reach for the majority of South Africa's population.

Of further concern to the Commission was the way in which these creditors were excluded from the protection afforded by the section 13 (of the Prescription Act) delay provision, contrary to the right to equality embodied in section 9 of the Constitution.

As a way of remedying the impediment to access and the inequitable operation of delay, the Commission made a final recommendation calling for suspension of the running of prescription if the circumstances of a creditor, including the impact of such creditor's socio-economic conditions make it impossible to interrupt the running of prescription - such socio-economic conditions to include but not be limited to poverty; low literacy; the effects of homelessness or inadequate housing or the inability to access legal representation.

Prohibiting the recovery of prescribed debts

This part of the investigation examined the principles underlying the prohibition against recovering prescribed debt (regulated in section 10(1) of the Prescription Act), and in this regard, explored a number of issues pertinent to the question of extinction, including the anomalous application of the principle of strong prescription in South African law and its attendant ramifications in the context of the debt recovery.

As a way of addressing the anomalies and their impact on the continued recovery of prescribed debt contrary to the principle of extinction (taking into account their profound effect, especially on debtors with low literacy levels living in trying socio-economic circumstances and balancing these against the national priorities of social cohesion and the need to promote economic transformation), the Commission made final recommendations providing for the regulation of the following principles, aimed at stemming the abuses thriving on low literacy levels to induce debtors into acknowledging and paying prescribed debt:

- re-affirming the principle of extinction, by invalidating conduct aimed at recovering prescribed debt, so that an amount recovered contrary to the provision must be refunded;
- subjecting application of the principle of extinction to the qualification that payment of a prescribed debt is regarded as payment, under the following circumstances:
 - the payment was not improperly induced by any person after prescription took effect;
 - the payment was made with knowledge that the debt had become prescribed and that continued liability therefor had ceased; and
 - the payment is not regarded as restarting the running of prescription for any unpaid portion of the debt;

- re-affirming the principle that an acknowledgement of liability cannot take place in respect of a prescribed debt; and
- providing a court with discretion to take notice of prescription.

In addition to the above, the Commission made recommendations providing for-

- retention of the three-year general prescription period, on the notion that increasing the period was likely to bring with it-
 - a diminished sense of urgency on the part of creditors to engage in debt recovery processes; and
 - leeway for creditors to place too much reliance on soft collection methods, even in instances where it became clear that debtors had no intention of abiding by their contractual obligations;
- regulation of a change in systems, from a system of delayed completion to a system of suspension, as a way of enhancing the rights of creditors to access the courts; and
- suspension of the running of prescription in cases of *Ombud* referrals or referrals to mediation or other process providing for the alternative resolution of a dispute (other than negotiation).

The **Report** is available on the Commission website: <http://salawreform.justice.gov.za>. Printed copies can also be obtained on request, free of charge, and in this regard, Mr Jacob Kabini is contactable at Jakabini@justice.gov.za or 012 622 6346.

Enquiries for the purpose of this media statement can be made to Ms Theresa Häderli (e-mail: THaderli@justice.gov.za or tel.: 012 622 6329).

ISSUED BY THE SECRETARY: SA LAW REFORM COMMISSION: CENTURION
DATE: 29 MARCH 2022