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**PROJECT 125**

**PRESCRIPTION PERIODS**

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## INTRODUCTION

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

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Professor CE Hoexter (additional member)  
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The researchers are Mr T Cronje and Miss LJ Jankie.

## **PREFACE**

This issue paper includes a questionnaire in order to elicit responses from interested persons and to serve as a basis for the Commission's deliberations. The issue paper is published so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with the opportunity to place full submissions before the Commission. Following an evaluation of the responses the Commission will issue a discussion paper on this subject setting out recommendations and if necessary draft legislation. The discussion paper will once again be distributed for comment before a final report is written.

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

Respondents are requested to submit written comments, representations or requests to the Commission by 17 October, 2003, at the address appearing on the previous page. Any request for information and administrative enquiries should be addressed to either of the researchers allocated to this project, Miss LJ Jankie or Mr T Cronje.

This document and an online questionnaire are also available on the Internet at:

[wwwserver.law.wits.ac.za/salc/salc.html](http://wwwserver.law.wits.ac.za/salc/salc.html)

## QUESTIONNAIRE

In order to involve the community actively at an early stage, the Commission publishes issue papers as the first step in the consultation process. The purpose of this issue paper is to announce the investigation, to clarify the aim and extent of the investigation, and to call for suggested options for solving existing problems.

1. Should different prescription periods be retained or should different periods of prescription be avoided as far as possible (par 3 on page 2)?
2. Are all or some of the different prescription periods in section 11 of the Prescription Act justified (section 11 on page 5)?
3. Are all or some of the different prescription periods in other legislation justified (par 5.1 on page 3)?
4. Should there be special protection for public authorities regarding prescription (para 4.2 on page 2)?
5. If it is decided that there should be one uniform prescription period for all or most cases, how long should this period be?
6. Should it be allowable to contract out of the legislative prescription regime or to modify it by agreement (para 4.2 on page 2)?
7. Should the court have a discretion, in narrowly prescribed circumstances, to allow prescribed claims (para 4.2 on page 2)?
8. Is it acceptable that prescription commences to run when a debt is due and that a debt is deemed not to be due until the creditor has knowledge of certain facts or could have acquired knowledge by exercising reasonable care (section 12 on page 6)?
9. The scope of this review is limited to prescription periods. Is there a need to review other aspects of prescription or prescription in general (par 6 on page 17)?
10. Do you have other comments on any of the discussions in the issue paper?

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## 1. Introduction

1.1 In September 1998 the Commission submitted a supplementary report on the investigation into time limits for the institution of actions against the State to the Minister for 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 Commission's recommendations dealt mainly with notice periods but the Commission 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 contractual or delictual nature - has been undertaken, the Minister should be approached to request the Commission 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 Commission agreed and the review of prescription periods was included in the Commission's programme.

## 2. Reasons for prescription of debts

2.1 The reasons given for prescription of debts are the following:

2.1.1 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;

2.1.2 Prescription relieves the debtor of having to defend a claim long after the event;<sup>1</sup> and

2.1.3 A state of affairs which has existed for a considerable period of time ought to be legally formalised in the interests of certainty<sup>2</sup> in legal affairs.

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<sup>1</sup> ***Solomon v Multilateral Motor Vehicle Accident Fund*** 1999 (4) SA 237 (C)

2.2 In general the courts seem to have favoured 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.<sup>3</sup>

2.3 Creditors (claimants) and debtors (defendants) have competing interests<sup>4</sup>

2.3.1 It is unfair that a debtor should be subject to an indefinite threat of being sued.

2.3.2 It is in the interests of creditors to have as long as possible to institute a claim.

### 3. One prescription period for all debts

3.1 In setting a limitation period it will never be possible to achieve complete fairness and a different regime in each case introduces needless complexity into the law.<sup>5</sup>

3.2 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.<sup>6</sup>

### 4. Recent reports by other law reform agencies

4.1 Limitation of actions has been investigated by several law reform bodies.<sup>7</sup>

4.2 The following recommendations are popular:

- Provision is made for a core regime, but other enactments outside the core regime are allowed;
- Special provision is not made for public authorities;

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<sup>2</sup> *De Jager v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) 543A. Prescription is described as a measure in the public interest, with the main practical purpose to promote certainty.

<sup>3</sup> J S Saner "Prescription" in Vol 21 first reissue of Vol 21 of *The Law of South Africa* edited by W A Joubert Durban: Butterworths 2000, par 122, "LAWSA".

<sup>4</sup> The Law Commission report on *Limitation of Actions* Law Com No 270 London: July 2001 as published at [www.lawcom.gov.uk/library/lib-com.htm#liblc270](http://www.lawcom.gov.uk/library/lib-com.htm#liblc270), "United Kingdom report", par 1.6 on page 2; Law Reform Commission of Western Australia *Report on limitation and notice of actions* Project 36 Part II Perth: January 1997, "Western Australia report", par 7.8 on page 166; Queensland Law Reform Commission *Review of the Limitation of Actions Act 1974 (QLD)* Report No 53 Brisbane: September 1998, "Queensland report", par 3 on page 8.

<sup>5</sup> United Kingdom report par 1.6 on page 2.

<sup>6</sup> Western Australia report par 4.36 on page 89.

<sup>7</sup> See eg 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](http://www.bcli.org), and publications referred to in these reports.

- Provision is made for two prescription periods-
  - 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;
  - 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;
- It is allowable to contract out of the core regime or modify it by agreement (occasionally subject to unfair contract legislation);
- The court is occasionally allowed a discretion to extend the prescription periods (this discretion is sometimes limited to claims in respect of personal injuries, childhood sexual abuse, or domestic abuse);
- Special rules apply to minors, adult disability, cases of fraud or where the defendant has dishonestly concealed relevant facts;
- Special provision is made occasionally for apportionment of damages, contractual contribution or indemnity and for some maritime claims and taxes.

## 5. Identification of statutory provisions dealing with prescription

5.1 A computer search for "prescription" in the current South African statutes yielded the following results (provisions dealing with acquisition by prescription or medical and similar prescriptions are omitted):

	Section	Name of Act	No	Year	Why not dealt with ("√" if dealt with)	Prescription period
1	74V	Magistrates' Courts Act	32	1944	√ page 7	None
2	344	Merchant Shipping Act	57	1951	√ page 8	1 or 2 years (discretion)
3	30H(3)	Pension Funds Act	24	1956	√ page 9	None
4	2(6)(b)	Apportionment of Damages Act	34	1956	√ page 9	1 year
	1 <sup>st</sup> Sch item 58	Defence Act	44	1957	Criminal prosecutions	



	<b>Section</b>	<b>Name of Act</b>	<b>No</b>	<b>Year</b>	<b>Why not dealt with ("√" if dealt with)</b>	<b>Prescription period</b>
	8(4)(m(i); 7 <sup>th</sup> Sch par 2(h)	Income Tax Act	58	1962	Cross-references	
5	3	Moratorium Act	25	1963	√ page 10	None
6	89; 96(2)	Customs and Excise Act	91	1964	√ page 10	90 days or 1 year (discretion)
7	10-13	Prescription Act	68	1969	√ page 5	3, 6, 15, or 30 years
	18	Criminal Procedure Act	51	1977	Criminal prosecutions	
	47	Co-Operatives Act	91	1981	Cross-reference	
8	44	Compensation for Occupational Injuries and Diseases Act	130	1993	√ page 12	1 year
9	Annex 1 item 26	Government Employees Pension Law		1996	√ page 12	None
		Justice Laws Rationalisation Act	18	1996	Prescription Act made applicable to whole of Republic and other measures repealed	
10	23	Road Accident Fund Act	56	1996	√ page 13	2, 3 or 5 years
11	31(2)	Administrative Adjudication of Road Traffic Offences Act	46	1998	√ page 15	None
12	61	Long Term Insurance Act	52	1998	√ page 16	None
14	34	National Nuclear Regulator Act	47	1999	√ page 16	2 or 30 years
13	2; 3	Institution of Legal Proceedings Against Certain Organs of State Act	40	2002	√ page 7	Prescription Act

5.2 The main statute dealing with prescription periods is the Prescription Act, 68 of 1969, which repealed the 1943 Prescription Act. Apart from this Act, there are other statutes which lay down periods within which proceedings must be instituted or relief sought.

### ***The Prescription Act, No 68 of 1969***

5.3 This Act provides for extinction of debts by prescription in sections 10 to 13. They provide as follows:

#### **10 Extinction of debts by prescription**

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

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

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

#### **11 Periods of prescription of debts**

The periods of prescription of debts shall be the following:

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

notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

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

## **12 When prescription begins to run**

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

## **13 Completion of prescription delayed in certain circumstances**

(1) If-

- (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1); or
- (b) the debtor is outside the Republic; or
- (c) the creditor and debtor are married to each other; or
- (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
- (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or
- (f) the debt is the object of a dispute subjected to arbitration; or
- (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966; or
- (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on,

or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

(2) A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.

5.4 Section 16(1) provides as follows:

Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

### ***Institution of Legal Proceedings against Organs of State Act, No 40 of 2002***

5.5 In terms of section 2 of this Act debts are extinguished by prescription as contemplated in Chapter III of the Prescription Act, read with the provisions of that Act relating thereto. Section 4 provides for notice periods for legal proceedings against organs of state and provides courts with the discretion to condone failure to serve a notice if good cause exists for the failure and the organ of state was not unreasonably prejudiced by the failure.

### ***Magistrates' Courts Act, No 32 of 1944***

5.6 This Act provides for interruption of prescription in section 74V, which reads:

#### **74V: Interruption of prescription**

(1) In the case of any debt mentioned in the statement referred to in section 74A (1), prescription shall be interrupted on the date on which such statement is lodged and, in the case of any debt not mentioned in such statement, prescription shall be interrupted on the date on which any claim against the debtor is lodged with the court or the administrator.

(2) If the relevant prescriptive period of a debt referred to in subsection (1), had it not been for the provisions of subsection (1), would be completed on or before or within one year of, the day on which the restriction referred to in subsection 74P (1) has ceased to exist, the prescriptive period shall not be completed until a year after the said day has elapsed.

5.7 This provision interrupts prescription in the case of administration orders and does not deal with a prescription period.

### ***Merchant Shipping Act, No 57 of 1951***

5.8 Section 344 provides as follows:

#### **344 Prescription**

(1) The period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or its owners in respect of any damage to or loss of another ship, its cargo or freight, or any goods on board such other ship, or damage for loss of life or personal injury suffered by any person on board such other ship, caused by the fault of the former ship, whether such ship be wholly or partly at 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 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.

(4) The period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Authority, the Director-General, or any officer of the State or of the Authority in his capacity as such, on a cause of action arising out of the provisions of this Act, other than a cause of action referred to in subsection (1) or (2), shall be one year, and shall begin to run on the date when the right of action first arose.

5.9 The Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002, makes provision for the repeal of section 344(4) of the Merchant Shipping Act.

5.10 The court is given discretion, in this Act, to extend the prescription periods sufficiently where it is satisfied that the plaintiff has not, during such period, had a

reasonable opportunity of arresting the defendant and the ship. This provision is confined in its application to actions *in rem*. Section 344 is similar to<sup>8</sup> section 8 of the English Maritime Conventions Act, 1911, passed in order to give effect to two conventions signed at the Brussels Conference of 1910 dealing with collisions between vessels and with salvage.<sup>9</sup>

5.11 It may be argued that the special provisions in section 344 are justified by the need to comply with international conventions<sup>10</sup> and the special needs which arise in respect of actions against ships.

### ***Pension Funds Act, No 24 of 1956***

5.12 Section 30H(3) of this Act deals with jurisdiction and prescription. It provides:

#### **30H Jurisdiction and prescription**

(3) Receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), or the rules of the fund in question.

5.13 This provision does not deal with a prescription period.

### ***Apportionment of Damages Act, No 34 of 1956***

5.14 Section 2(6) provides:

#### **2 Proceedings against and contributions between joint and several wrongdoers**

(6)(b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall apply *mutatis mutandis* in relation to any

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<sup>8</sup> One difference is discussed in the case referred to in the following footnote  
<sup>9</sup> ***Owner of the MV Maritime Prosperity v Owner of MV Cash Atlantico*** 1996 (1) SA 22 (A) 33F-H read with 32F-G  
<sup>10</sup> Cf the Western Australia report par 21.21 at 458.

action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

5.15 The need for special provisions to deal with claims against joint wrongdoers has been considered in other jurisdictions.<sup>11</sup> It is not so much the appropriate period that justifies different treatment, but the time when prescription should start to run. The Commission recommended, in its review of the apportionment of damages, that an action to recover a contribution must be commenced within two years after the right to a contribution arises and that the right to a contribution arises on the date of judgment or settlement, as the case may be.

### ***Moratorium Act, No 25 of 1963***

5.16 Section 3 deals with suspension of prescription and provides:

#### **3 Suspension of prescription**

Prescription in regard to any obligation or civil legal remedy suspended under this Act, shall be suspended for so long as the suspension of such obligation or legal remedy lasts, and the period of such suspension shall not be deemed to form part of the period of prescription.

5.17 This provision does not deal with a prescription period.

### ***Customs and Excise Act, No 91 of 1964***

5.18 Section 89 and section 96 provide as follows:

#### **89 Notice of claim by owner in respect of seized goods**

(1) Whenever any proceedings are instituted to claim any ship, vehicle, container or other transport equipment, plant, material or goods (in this section, section 43 and section 90 referred to as '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 (in this section referred to as 'the litigant').

(2) 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)-

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<sup>11</sup> Cf United Kingdom report par 4.81 at 123; Western Australia report par 12.61 at 293 and the following; Queensland report 197.

- (a) within 90 days after the date of seizure; or
  - (b) in the case of an administrative appeal, where such appeal is unsuccessful, within 90 days from the date contemplated in subsection 95A (7).
- (3) Any proceedings must be instituted within 90 days of such notice.
- (4) Whenever goods are seized and in consequence of the seizure-
- (a) delivery thereof under section 93 is refused or the terms of delivery thereunder are not accepted;
  - (b) no internal administrative appeal under section 95A is filed or is filed and is not successful;
  - (c) no proceedings are instituted as contemplated in this section or have been instituted and have been dismissed in a final judgment of the High Court or a judgment by the Supreme Court of Appeal,

the goods concerned shall, subject to the provisions of section 90, be deemed to be condemned and forfeited.

(5) The provisions of section 96 (1) (c) shall apply mutatis mutandis to any period contemplated in subsections (2) and (3).

## **96 Notice of action and period for bringing action**

(1) (a) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the 'litigant') and the name and address of his or her attorney or agent, if any.

(b) Subject to the provisions of section 89, 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 shall be one year and shall, subject to the provisions of section 95A (7), begin to run on the date when the right of action first arose.

(c) (i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.

(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.



(2) This section does not apply to the recovery of a debt contemplated in any law providing for the recovery from an organ of state of a debt described in such law.

5.19 According to section 96(2) the section will not apply to debts contemplated in the Institution of Legal Proceedings against Certain Organs of State Act, No 40 of 2002. As indicated in paragraph 5.5 above, that Bill applies the provisions of the Prescription Act. The term "debt" is defined in that Bill to mean any debt arising from any cause of action, delictual, contractual or otherwise, and including any cause of action which relates to any act performed under or in terms of any law or omission to do anything which should have been done under or in terms of any law.

5.20 It seems that the application of section 96 will be limited and that it will deal with administrative procedures such as seizures in terms of section 89 rather than with ordinary claims.

### ***Compensation for Occupational Injuries and Diseases Act, No 130 of 1993***

5.21 Section 44 of this Act provides:

#### **44 Prescription**

A right to benefits in terms of this Act shall lapse if the accident in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, within 12 months after the date of such accident.

5.22 This provision is no doubt very convenient for the commissioner and other mutual associations, but may be harsh on a claimant, especially as there is no provision for condonation.

### ***Government Employees Pension Law, 1996***

5.23 This is a Proclamation which provides for a period within which payment of benefits shall commence in Annex 1, item 26. It provides:

#### **Item 26 Period within which payment of benefits shall commence**

(1) Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or

beneficiary entitled to such benefit within a period of 60 days after the date on which the Board receives a duly completed statement in the prescribed form or, if the Board receives such statement before the date on which a benefit is payable to the member or pensioner concerned in terms of this Law, within a period of 60 days after the date on which such benefit is so payable.

(2) If a benefit is not paid within the period referred to in subsection (1), interest shall be paid by the Fund to the member, pensioner or beneficiary on any part of the amount of the benefit not paid within the period of 60 days referred to in subsection (1), at the rate prescribed.

(3) For the purpose of section 12 (1) of the Prescription Act, 1969 (Act 68 of 1969), a benefit payable to a member, pensioner or beneficiary in terms of this Law shall be deemed to be due on the date following the date on which a member's benefit becomes payable in terms of subsection (1) for the period after expiry of 60 days.

5.24 This provision does not deal with a prescription period.

## ***Road Accident Fund Act, No 56 of 1996***

5.25 Section 23 provides as follows:

### **23 Prescription of claim**

(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against-

- (a) a minor;<sup>12</sup>
- (b) any person detained as a patient in terms of any mental health legislation; or
- (c) a person under curatorship.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

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<sup>12</sup> ***Road Accident Fund v Rhesia Scholtz***, the as yet unreported decision of the Supreme Court of Appeal, Case no 111/2002 dated 3 June 2003.

(4) Notwithstanding section 36 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), any right under subsection (1) (b) of that section to recover an amount which under the said Act is required to be paid to a third party in circumstances other than those mentioned in section 18 (2) of this Act shall for the purposes of subsections (1) and (3) be deemed to be a right to claim compensation under section 17 of this Act arising on the same date as the cause of action of such third party under the said section 17: Provided that if the recovery of any such amount has been debarred by virtue of this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned.

(5) Notwithstanding section 149 of the Defence Act, 1957 (Act 44 of 1957), or of a similarly worded section of another Act of Parliament governing the South African National Defence Force, any right under the said sections to recover an amount which under the said legislation is required to be paid to a third party in circumstances other than those mentioned in section 18 (3), shall for the purposes of subsections (1) and (3) be deemed to be a right to claim compensation under section 17 of this Act arising on the same date as the cause of action of such third party under the said section 17: Provided that if the recovery of any such amount has been debarred by virtue of this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned.

5.26 The Act deals with claims for the recovery of damages suffered. The prescription period in this Act is calculated from the date upon which the cause of action arose.<sup>13</sup> The Act does not provide for the application for condonation by the court if the claim is not lodged within the stipulated period. This prescriptive period is applicable where the identity of the driver or owner of the motor vehicle has been established. Where the identity is not known, regulation 2(3) applies and a claim must be lodged within two years from the date upon which the claim arose. The exceptions in section 23(2) do not apply. Once a claim has been lodged within the prescribed two-year period in the proper form, the claimant will in terms of regulation 2(4) have a period of five years, calculated from the date upon which the claim arose.<sup>14</sup>

5.27 The Road Accident Fund Commission has released a report with recommendations that common law and statutory periods of prescription should be applicable only to claims for compensation instituted in terms of the common law and not to claims in terms of the proposed scheme. Claimants (road accident victims or

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<sup>13</sup> This calculation is computed in accordance with ordinary civil method of calculation of time, which means that the first day must be included and the last day excluded.

<sup>14</sup> J S Saner "Prescription" in Vol 21 first reissue of Vol 21 of *The Law of South Africa* edited by W A Joubert Durban: Butterworths 2000, par 165, "LAWSA".

their families) should be entitled to lodge the first claim for a maximum period of twenty-four months from date of the road accident or first entitlement to benefits, subject to the following provisions:

a) service providers, whether hospitals, medical practitioners, pharmacists, therapists, suppliers of assistive devices, etc., should be required to lodge their claims within seven days seven to twenty days or one calendar month from date of admission or treatment;

b) claimants (road accident victims or their families) should be required to lodge the first claim for income support benefits, funeral benefits, family adjustment benefits and family support benefits within three calendar months or six calendar months from date of the accident or date of entitlement to benefits in order to be entitled to payment of benefits retrospective to the date of the accident or first entitlement to benefits. Only claims lodged within a defined period will be paid retrospective to the date of the road accident or entitlement to the benefit, while claims lodged after the defined period will be payable, but not in arrears or retrospective to the defined period;

c) claims for life enhancement benefits can be lodged at any time before the expiry of a period of twenty-four months from date of the accident. In certain circumstances, amended claims for life enhancement benefits based upon further and revised assessment of Whole Person Impairment may be lodged subsequent to expiry of a period of twenty-four months from the date of the accident.<sup>15</sup>

In its report on the *Investigation into time limits for the institution of actions against the state*<sup>16</sup> the Commission concluded that a specific practice had already come into being regarding debts in respect of which the Compulsory Vehicle Insurance Act 56 of 1972 applied and that the provisions should be retained.

## ***Administrative Adjudication of Road Traffic Offences Act, No 46 of 1998***

5.28 Section 31(2) provides:

### **31 Penalties**

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<sup>15</sup> Report of the Road Accident Fund Commission 2002, Volume 1, on page XXXIV  
<sup>16</sup> October 1985 par 8.4.4 on page 17.

(2) The laws on prescription are not applicable to penalties, and they may be collected at any time.

5.29 This provision does not provide for a prescription period.

### ***Long Term Insurance Act, No 52 of 1998***

5.30 This Act has a prescription provision in section 61, which provides:

#### **61 Prescription of certain debt**

Debt consisting of interest on an unpaid premium, or on a loan granted by a long-term insurer on sole security of a long-term policy, or on an advance granted by a long-term insurer in respect of an amount which is to be payable under a long-term policy, shall, in the case of a long-term policy entered into after 31 December 1973, not prescribe before the liability of the long-term insurer under the long-term policy prescribes.

5.31 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.

### ***National Nuclear Regulator Act, No 47 of 1999***

5.32 Section 34 provides:

#### **34 Prescription of actions**

(1) Despite anything to the contrary in any other law, an action for compensation in terms of section 30, 31 or 32 may, subject to subsection (2), not be instituted after the expiration of a period of 30 years from-

- (a) the date of the occurrence which gave rise to the right to claim that compensation; or
- (b) the date of the last event in the course of that occurrence or succession of occurrences, if a continuing occurrence or a succession of occurrences, all attributable to a particular event or the carrying out of a particular operation, gave rise to that right.

(2) If the claimant concerned became aware, or by exercising reasonable care could have become aware, of-

- (a) the identity of the holder of the nuclear authorisation concerned; and
- (b) the facts from which the right to claim compensation arose,

during the period of 30 years contemplated in subsection (1), an action for compensation in terms of section 30, 31 or 32 may not be instituted after the expiration of a period of two years from the date on which he or she so became aware or could have become aware.

(3) The running of the period of two years referred to in subsection (2) is suspended from the date negotiations regarding a settlement by or on behalf of the claimant and the relevant holder of the nuclear authorisation are commenced in writing until the date any party notifies the other party that the negotiations are terminated.

5.33 In its report on the *Investigation into time limits for the institution of actions against the state* the Commission stated that nuclear damage is unusual and did not recommend the repeal of a provision similar to section 34.

## 6. Scope of review

6.1 The Portfolio Committee requested an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods and the Minister included a review of prescription periods in the Commission's programme.

6.2 The review is limited to prescription periods, in particular the harmonisation of different periods, and does not include a general review of prescription in general or the extinction of debts by prescription in particular.<sup>17</sup>

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Cf Styrian "Verjaring van borgverpligtinge redux" 2001 **THRHR** 316-320.