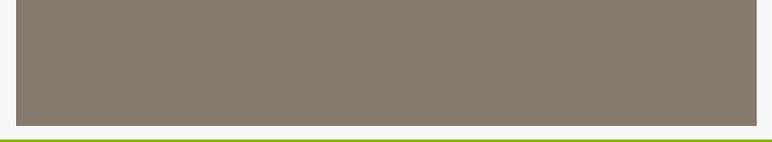


SA Law Reform Commission

Presentation

Revised Discussion Paper on Prescription Periods

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



ELEMENTS DEALT WITH IN TOPIC

BACKGROUND: The problems giving rise to the question of recovering prescribed debt, including details of how anomalies in the current law have enabled the problems have been fully set out in Part A of the Revised Discussion Paper (pages 55 to 90) and will not be repeated here

CHOICE OF PRESCRIPTION REGIME: What follows is a condensed version of the discussion pertaining to the different prescription regimes and the way in which their characteristic elements impact on the question of recovering prescribed debt

NATURE AND EFFECT OF EXTINGTIVE PRESCRIPTION

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Debtor afforded a defence , which must be specifically pleaded , it is not open for a court to raise the plea of its own motion	Debt becomes extinguished to the extent that it ceases to exist . A court order granted on a prescribed obligation thus constitutes a nullity and is therefore unenforceable . Therefore a court must consider the question of prescription	Debtor afforded a defence , which must be specifically pleaded , it is not open for a court to raise the plea of its own motion

NATURE AND EFFECT OF EXTINGUISHIVE PRESCRIPTION

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
After the lapse of a period, a creditor's right to institute legal proceedings is barred if the defence is successfully raised	-----	After the lapse of a period, the debt becomes extinguished if the defence is successfully raised

NATURE AND EFFECT OF EXTINGTIVE PRESCRIPTION

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Court takes into account factors relevant to a creditor's failure to timeously enforce a debt when adjudicating on the plea	Court takes into account factors relevant to a creditor's failure to timeously enforce a debt when determining whether a claim has become prescribed	Court does not take into account factors relevant to a creditor's failure to timeously enforce a debt when adjudicating on a plea, except in instances of legal impossibility

NATURE AND EFFECT OF EXTINGTIVE PRESCRIPTION

Prescription Act, 1943 Common law				Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect				Strong effect	Guillotine effect
Barring of a right to institute legal proceedings, however, does not preclude the extra-judicial pursuit of debt under the following circumstances:				-----	-----
D e b t can be set-off	Debt can be used to support a contract of suretyship	Debt paid after the l a p s e d p e r i o d cannot be recovered	Right to plead prescription destroyed on undertaking to p a y a p r e s c r i b e d d e b t		

NATURE AND EFFECT OF EXTINGTIVE PRESCRIPTION

Prescription Act, 1943 Common law	Prescription Act, 1969 Common law	Enactments containing special time limits
Weak effect	Strong effect	Guillotine effect
Where a debtor fails to raise the defence , it is deemed to have been waived . The obligation subsists intact and is fully enforceable	-----	Where a debtor fails to raise the defence , it is deemed to have been waived . The obligation subsists intact and is fully enforceable

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>11. Interpretation and application of Chapter</p> <p>(1) The date on which a debt becomes extinguished by prescription, "<i>on the face of it</i>", is calculated-</p> <p>(a) from the date of an act or omission giving rise to a debt; and</p> <p>(b) using the ordinary civilian method of computation, expressed in the phrase "<i>first-day-in/last-day-out</i>".</p>	<p>Purpose:</p> <ul style="list-style-type: none">• Assist creditor to calculate period in a way that ensures that enforcement never proceeds beyond the date of prescription

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

13. Extinction of debts by prescription

(2) Subject to sections 16, 17, 18 and 19, a debt is extinguished by prescription after the lapse of the periods referred to in section 15.

(3) Pursuant to subsection (2)-

(b) a person may not cede or in any other way transfer a debt that has, on the face of it, become extinguished by prescription;

(c) interruption cannot take effect in respect of a debt that has, on the face of it, become extinguished by prescription;

(d) a person may not recover a debt that has, on the face of it, become extinguished by prescription; and

(e) any recovery made contrary to paragraphs (b), (c) or (d) is of no legal force.

Discussion

Purpose:

- **Promote legal certainty and finality and the expeditious enforcement of rights, thus preventing debtors from having to defend stale claims**

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

13. Extinction of debts by prescription

(4) Subject to section 14, if, during judicial proceedings, a court makes a finding that a claim being adjudicated on is based on a prescribed debt, it may, in addition to any other order considered appropriate, order-

(a) the repayment of any amount recovered contrary to subsections (3)(b), (c) or (d); and

(b) the payment of compensation for any loss or damage suffered pursuant to the recovery, including-

(i) any loss or damage incurred through the use of force, intimidation, the making of fraudulent or misleading representations or the spreading of false information pertaining to the creditworthiness of an affected person;

(ii) any loss or damage incurred through other conduct amounting to a contravention of a code of conduct which a person is required to comply with in terms of any law; or

(iii) any loss or damage incurred as a result of any other impropriety or unlawful conduct.

Discussion

Purpose:

- **Prevent multiplicity of proceedings in different court fora / different fora**
- **A civil court is not precluded from adjudicating on a properly raised counterclaim for compensation in respect of damages incurred for wrongful conduct**

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

Discussion

13. Extinction of debts by prescription

(5) The provisions contained in subsections (4) do not prevent an affected person from exercising a right-

(a) to report a matter to the police for investigation for the purpose of having criminal proceedings instituted; or

(b) to report a matter to a regulatory authority for investigation for the purpose of having misconduct proceedings initiated in terms of any law, including a law contained in the Debt Collectors Act, 1998 (Act No. 114 of 1998), National Credit Act, 2005 (Act No. 34 of 2005) or Legal Practice Act, 2014 (Act No. 28 of 2014).

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

14. Voluntary payment of prescribed debt

Notwithstanding section 13(2), payment by a debtor of a debt that has become extinguished by prescription is regarded as payment. Provided that-

- (a) the payment was voluntary, and was not induced by efforts on the part of any person to pursue recovery of the debt in question;
- (b) the payment is not deemed as constituting a revival of the running of the prescription period for any balance or other payments that would have been due had the debt not become prescribed; and
- (c) any payments made in circumstances where it is established that a debtor was not indebted to a creditor may be recovered.

Discussion

Purpose:

- **Balancing of debtor's interests may require consideration to be given to De Wet's view that certain debtors may indeed feel constrained to abide by their obligations lawfully and freely entered into**
- **In fairness to certain creditors (some of whom may not be deep-pocketed or able to afford seasoned legal representation), it may be viable to prevent recovery of monies paid in relation to prescribed debt, but only under circumstances that do not blur the doctrinal basis of strong prescription**

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill

18. Interruption by acknowledgement of liability

(1) The running of prescription is interrupted by an unequivocal written acknowledgement of liability by a debtor.

Discussion

Purpose:

- As a way of preventing the abuses catalogued in the paper that arose as a result of verbal acknowledgements

PRELIMINARY PROPOSALS FOR LAW REFORM

Option 2: Reaffirmation of principle of strong prescription, subject to one qualification

Provisions in Prescription Bill	Discussion
<p>20. Procedural requirements</p> <p>(1) A court must consider the question of prescription.</p> <p>(2) A party to litigation seeking to recover a debt through legal proceedings-</p> <p>(a) bears the onus of proving that the debt has not become extinguished by prescription; and</p> <p>(b) must address the question of prescription in the relevant document filed of record in the proceedings.</p>	<p>Purpose:</p> <ul style="list-style-type: none">• In line with the proper doctrinal application of the principle of extinction• In line with the principles of civil law, a plaintiff bears the onus of proving a claim on a balance of probabilities, thus a failure to fully set out a cause of action (including the fact that a debt is extant) amounts to a defective pleading