

INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

[ASSENTED TO 24 NOVEMBER 2002] [DATE OF COMMENCEMENT: 28 NOVEMBER 2002]

(English text signed by the President)

as amended by

National Ports Act 12 of 2005

ACT

To regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt; to repeal or amend certain laws; and to provide for matters connected therewith.

Preamble

RECOGNISING THAT certain provisions of existing laws provide for-

- * different notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts;
- * different periods of prescription in respect of such debts;

AND RECOGNISING THAT-

- * the Prescription Act, 1969 (Act 68 of 1969), being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;
- * some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969;

AND BEARING IN MIND THAT-

- * South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state;
- * the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights;
- * section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;
- * the right of access to courts may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;

AND RECOGNISING the need to harmonise and create uniformity in respect of the provisions of existing laws which provide for-

- * different notice periods for the institution of legal proceedings against certain organs of state for the recovery of a debt, by substituting those notice periods with a uniform notice period which will apply in respect of the

institution of legal proceedings against certain organs of state for the recovery of a debt;

- * different periods of prescription, by making the provisions of Chapter III of the Prescription Act, 1969, applicable to all debts;

AND RECOGNISING the need to provide for transitional arrangements to ensure a smooth transition between the various existing statutory provisions regulating notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts and the periods of prescription of such debts, and the provisions of this Act;

AND BEARING IN MIND the limited need, for legal or practical purposes, to retain certain provisions of existing laws which provide for-

- * notice periods that differ from the envisaged uniform notice period;
- * periods of prescription that differ from the periods of prescription prescribed by Chapter III of the Prescription Act, 1969;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows-

1 Definitions

(1) In this Act, unless the context indicates otherwise-

'creditor' means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be;

'Constitution' means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

'debt' means any debt arising from any cause of action-

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) for which an organ of state is liable for payment of damages,

whether such debt became due before or after the fixed date;

'fixed date' means the date of commencement of this Act;

'national department' means-

- (a) a department mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation 103 of 1994), but excludes a provincial administration; or
- (b) an organisational component mentioned in the first column of Schedule 3 to that Act;

'notice' means a notice contemplated in section 3 (1) (a) ;

'organ of state' means-

- (a) any national or provincial department;
- (b) a municipality contemplated in section 151 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
- (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);
- (e) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998);
- (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that Act;

[Para. (f) substituted by s. 88 of Act 12 of 2005.]

- (g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable;

[Para. (g) added by s. 88 of Act 12 of 2005.]

'provincial department' means-

- (a) a provincial administration mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation 103 of 1994); or
- (b) a department within a provincial administration and mentioned in the first column of Schedule 2 to that Act.

(2) This Act does not apply to any debt-

- (a) which has been extinguished by prescription before the fixed date; or
- (b) which has not been extinguished by prescription before the fixed date and in respect of which any legal proceedings were instituted before the fixed date.

(3) Any legal proceedings referred to in subsection (2) (b) must be continued and concluded as if this Act had not been passed.

(4) For purposes of this Act, legal proceedings are instituted by service of any process, excluding a notice, on an organ of state in which a creditor claims payment of a debt.

PART 1 (s 2)

2 Prescription of debts, and amendment or repeal of laws and transitional arrangements relating to prescription of debts

(1) The laws referred to in the Schedule are, as from the fixed date, amended or repealed to the extent set out in the third column of the Schedule.

(2) Subject to section 3 and subsections (3) and (4), a debt which became due-

- (a) before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or
- (b) after the fixed date,

will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act 68 of 1969), read with the provisions of that Act relating thereto.

(3) Subject to subsection (4), any period of prescription which was applicable to any debt referred to in subsection (2) (a) , before the fixed date, will no longer be applicable to such debt after the fixed date.

(4) (a) The expired portion of any period of prescription applicable to a debt referred to in subsection (2) (a) , must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(b) If the unexpired portion of the period of prescription of a debt referred to in paragraph (a) will be completed within 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date.

PART 2 (ss 3-6)

3 Notice of intended legal proceedings to be given to organ of state

(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-
 - (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.

(3) For purposes of subsection (2) (a) -

- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
- (b) a debt referred to in section 2 (2) (a) , must be regarded as having become due on the fixed date.

(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.

(c) If an application is granted in terms of paragraph (b) , the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.

4 Service of notice

(1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-

- (a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;
- (b) a municipality, to the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998);
- (c) a functionary or institution referred to in paragraph (c) of the definition of 'organ of state', to the chairperson, head, chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person;
- (d) the South African Maritime Safety Authority, to the chief executive officer of that Authority appointed under section 22 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);
- (e) The South African National Roads Agency Limited, to the chief executive officer of that Agency appointed under section 19 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998); or
- (f) a person referred to in paragraph (f) of the definition of 'organ of state', to that person.

(2) If a notice has been sent by electronic mail or transmitted by facsimile as contemplated in subsection (1), the creditor must-

- (a) take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was so sent or transmitted; and
- (b) within seven days after the date upon which that notice was so sent or transmitted, deliver by hand or send by certified mail a certified copy of that notice to the relevant officer or person referred to in subsection (1), which must be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice-
 - (i) indicating the date on which and the time at which, and the electronic mail address or facsimile number to which, the notice

was so sent or transmitted;

- (ii) containing any proof that it was sent or transmitted;
- (iii) setting out the steps taken in terms of paragraph (a) ; and
- (iv) indicating whether confirmation of the receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation.

5 Service of process

(1) (a) Any process by which any legal proceedings contemplated in section 3 (1) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) Despite paragraph (a) , any process by which any legal proceedings contemplated in section 3 (1) are instituted and in which the-

- (i) Minister for Intelligence is the defendant or respondent, may be served on the Director-General: National Intelligence Agency or the Director-General: South African Secret Service, as the case may be;
- (ii) Minister for Safety and Security is the defendant or respondent, may be served on-
 - (aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995); or
 - (bb) the Provincial Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995, of the province in which the cause of action arose; or
- (iii) Minister of Correctional Services is the defendant or respondent, may be served on-
 - (aa) the Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1998 (Act 111 of 1998); or
 - (bb) the Provincial Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1998, of the province in which the cause of action arose.

(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 30 days after the notice, where applicable, has been served on the organ of state in terms of section 3 (2) (a) .

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.

6 Short title

This is the Institution of Legal Proceedings against certain Organs of State Act, 2002.

Schedule LAWS AMENDED OR REPEALED BY SECTION 2 (1)

No and year of law	Short title	Extent of amendment or repeal
Act 38 of 1927	Black Administration Act, 1927	The repeal of section 32A.

Act 57 of 1951	Merchant Shipping Act, 1951	<ol style="list-style-type: none"> 1. The repeal of section 343. 2. The amendment of section 344 by the deletion of subsection (4).
Act 44 of 1957	Defence Act, 1957	The repeal of section 113.
Act 94 of 1970	Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970	The repeal of the whole.
Act 18 of 1973	Mental Health Act, 1973	The amendment of section 68 by the deletion of subsection (4).
Act 90 of 1979	Education and Training Act, 1979	The repeal of section 42A.
Act 70 of 1988	Education Affairs Act (House of Assembly), 1988	The repeal of section 108.
Act 122 of 1992	Audit Arrangements Act, 1992	The repeal of section 52.
Act 38 of 1994	Intelligence Services Act, 1994	The repeal of section 26.
Proclamation 103 of 1994	Public Service Act, 1994	The repeal of section 39.
Act 68 of 1995	South African Police Service Act, 1995	<ol style="list-style-type: none"> 1. The repeal of section 57. 2. The amendment of section 64I- <ol style="list-style-type: none"> (a) by the substitution for subsection (1) of the following subsection: <p>'(1) Any legal proceedings against a municipal police service or member of a municipal police service for the recovery of a debt as defined in the Institution of Legal Proceedings against certain Organs of State Act, 2002, shall be instituted against the municipal council in question.'</p> (b) by the deletion of subsection (2).

<p>Act 7 of 1998</p>	<p>The South African National Roads Agency Limited and National Roads Act, 1998</p>	<p>The amendment of section 59-</p> <p>(a) by the deletion of subsections (1) and (2); and</p> <p>(b) by the substitution for subsection (3) of the following subsection:</p> <p>'(3) Neither the Agency nor-</p> <p>(a) any of the members of the Board;</p> <p>(b) the Chief Executive Officer;</p> <p>(c) any of the other employees of the Agency acting in the performance of their duties;</p> <p>(d) any person acting on behalf of the Agency on the authority of the Board; or</p> <p>(e) any person who operates or has constructed a national road,</p> <p>will be liable for any damage or loss suffered by any person through the use of any part of the national road other than the roadway or as a result of the closure or deviation of a national road under this Act.'</p>
<p>Act 111 of 1998</p>	<p>Correctional Services Act, 1998</p>	<p>The repeal of section 130.</p>
<p>Act 32 of 2000</p>	<p>Local Government: Municipal Systems Act, 2000</p>	<p>The amendment of section 109 by the deletion of subsection (1).</p>