FOUNDATION FOR HUMAN RIGHTS

COMMENTS ON

SOUTH AFRICAN LAW REFORM COMMISSION REVISED DISCUSSION PAPER 147

PROJECT 125: HARMONISATION OF EXISTING LAWS PROVIDING FOR DIFFERENT PRESCRIPTION PERIODS

INTRODUCTION: THE PERSPECTIVE OF THE FOUNDATION FOR HUMAN RIGHTS

1 The Foundation for Human Rights ("**FHR**") is a grant-making institution supporting civil society organisations in South Africa. It seeks to address the historical legacy of apartheid by promoting and advancing transformation and by building a human rights culture through the Constitution.

2 FHR welcomes the opportunity to comment on the Revised Discussion Paper 147 (the "**Discussion Paper**") published by the South African Law Reform Commission ("**SALRC**") on 2 December 2017, titled "*Harmonisation of Existing Laws Providing for Different Prescription Periods*".

3 In making these comments, FHR has one primary interest, which it wishes to make clear upfront: ensuring that poor and vulnerable people are not harshly affected by the rules of prescription. FHR recognises that this can occur both when prescription operates too strictly, denying the rights of claimants who lack the resources to act

within a prescription period, and also when they operate too leniently, allowing abusive credit-providers to deal in, and coerce payment of, debts that have prescribed.

4 The Constitutional Court has acknowledged the importance of socio-economic conditions in relation to prescription, noting that in South Africa, "*the workings of the legal system remain largely unfamiliar to many citizens*"[1] and recognising:

> *". . . the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."*[2]

5 Recent Constitutional Court decisions have taken an approach to the knowledge requirement under the Prescription Act, which has presented obstacles for those that have had no knowledge of the fact that the harm they have suffered gives rise to a cognisable claim. Knowledge of facts underlying a claim means little to someone that does not know they give rise to a claim.

---

[1] *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) para 70.
[2] Mohlomi para 14.

6 Prescription has a laudable purpose: to create legal certainty and finality between parties after a lapse of time. FHR recognises that. It also acknowledges that legal certainty is in service of the rule of law, and that conditions of high uncertainty are in nobody's interests, including the poor and vulnerable.

7 Accordingly, the FHR's view is that the protection of poor and vulnerable people must be achieved through measures that are directly targeted at that sector of the population. As we explain below, the recognition of adverse socio-economic circumstances as suspending the operation of prescription, as sought to be introduced in the Draft Prescription Bill proposed in the Discussion Paper, is precisely that sort of measure.

8 In sum, and broadly speaking, FHR welcomes the Discussion Paper as a necessary intervention, which seeks to achieve the fundamental purpose of prescription. That purpose, the Constitutional Court has held, is "*to penalise unreasonable inaction, and not inability to act*".[3]

9 Therefore, while we have suggestions, which we set out below, regarding which of a variety of approaches ought to be taken, we believe that the proposals generally achieve the proper balance between ensuring flexibility, justice and legal certainty, and are tailored to South Africa's prevailing socio-economic circumstances.

[3] *Mdeyide* para 33.

10 In making these comments, our focus is to draw the SALRC's attention to the recent spate of prescription judgments from the Constitutional Court – some of which were handed down subsequent to, or contemporaneously with the publication of the Discussion Paper. As Froneman J noted in *Off-Beat Holiday Club*, "*There has been much ado about prescription by this Court recently*."[4] Since then, there have been further pronouncements by the Constitutional Court, including most recently in the cases of *Trinity Asset Management,*[5] *Loni*[6] and *FAWU*.[7] These cases are discussed in some detail at the appropriate places below.

11 We structure these comments in accordance with the general structure of the Discussion Paper, and respond to the questions posed to respondents under each heading.

PART A: PROHIBITING THE RECOVERY OF PRESCRIBED DEBT

12 In this Part, the Discussion Paper notes abuses and irregularities prevalent in the debt collection industry, which include the harassing of consumers into acknowledging prescribed debts in an effort to reactivate the prescription period, and the selling, collecting and re-activating of prescribed debt.[8]

---

[4] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* 2017 (5) SA 9 (CC) para 61.
[5] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Limited* 2018 (1) SA 94 (CC).
[6] *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* [2018] ZACC 2 (22 February 2018).
[7] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] ZACC 7 (20 March 2018).
[8] Discussion Paper pp 56-60 and 83-89.

13 The National Credit Amendment Act 19 of 2014 seeks to address this (but only in the context of credit agreements subject to the National Credit Act) by prohibiting the sale, collection or re-activation of prescribed debt.[9]

14 What makes this amendment necessary is that, notwithstanding the fact that section 10(1) of the Prescription Act provides that prescription extinguishes a debt (so-called "*strong*" prescription), an anomaly is created in that:

14.1 payment of a debt by a debtor after it has been extinguished by prescription is still regarded as payment of the debt (section 10(3)); and

14.2 a court shall not of its own motion take notice of prescription (section 17).[10]

15 The upshot of these provisions is that financially insecure debtors can be taken advantage of by creditors, who collect their prescribed debts under section 10(3), and enforce their prescribed claims in the hope that debtors will not raise prescription (in which case, under section 17, the court may not raise it *mero motu*).

16 The Discussion Paper proposed two possible solutions, both of which are premised on a re-affirmation of so-called "*strong prescription*".

16.1 Option 1, being the insertion of sections 11(1), 13(1)-(5) and 18, which would prohibit cession, interruption or recovery of a debt that, "*on the face of it*", has

[9] Discussion Paper p 61.
[10] Discussion Paper pp 63-65.

been extinguished by prescription, and which would require a court to consider the question of prescription.[11]

16.2 Option 2, being the insertion of section 14, which would retain the provision that payment of a prescribed debt is regarded as payment, with the provisos that the payment must be "voluntary", that it does not revive the running of prescription for other payments, and that where the debtor was not indebted, the payment may be recovered.[12]

17 For purposes of Option 1, the date on which a debt becomes extinguished by prescription "*on the face of it*" is calculated from the date of the act or omission giving rise to the debt, using the ordinary "*first day in/last-day-out*" method of computation.

18 The FHR agrees with the finding of the SALRC that the solution does not lie in reverting to a system of weak prescription. While that might remove the anomalies in question, it would allow for the continuation of precisely the same (if not worse) abuses.

19 In particular, the FHR regards the statements of Professor Zimmerman and others, who speak of there being no reason for the legal system "*to foist its protection upon a debtor who is willing to pay*"[13] as somewhat out of touch with South African reality. What is there referred to as a "*willingness*" to pay, will often be anything but, and will

[11] Discussion Paper pp 103-106.
[12] Discussion Paper pp 106-107.
[13] Discussion Paper p 93.

take the form of transactions entered into between parties of highly disparate bargaining power. This is not to undermine the agency and autonomy of ordinary poor and working-class South Africans. It is simply to acknowledge the powerful structural forces at play that impact upon the choices they are able freely to make.

20 Indeed, as the Discussion Paper correctly notes, weak prescription works best in a context of equal bargaining power.[14]

21 At the same time, it is important that whatever protections are introduced to curb the abuses of poor people by credit providers do not operate to protect debtors, including the state, to avoid the claims of poor creditors in other contexts. In the FHR's view, Option 1 strikes the proper balance in this regard.

22 In our submission, Option 2 is likely to give rise to significant difficulties in implementation. In particular, by requiring that payment must be "*voluntary*", it runs into precisely the problem identified with Professor Zimmerman's statement above. A payment might be made voluntarily in that it was not coerced. But it may nevertheless be made in the context of vastly unequal bargaining power.

23 Moreover, it is unclear precisely what is intended in the proposed section 14(c) of Option 2.

[14] Discussion Paper p 97.

23.1 First, because one would generally have an enrichment claim for the payment of an amount for which one was not indebted, it is not clear what the provision seeks to add.

23.2 Second, to the extent that it includes within the meaning of "*not indebted*" that the claim has prescribed, then its effect would be that a payment could validly be made under section 14(a), but then subsequently recovered under section 14(c). That both introduces additional practical uncertainty (for the prescribed payment, though paid, would be subject to recovery at the debtor's instance) and retains the doctrinal anomaly (for the extinguished claim can still be paid).

24 Option 1, while preferable, has its own problems. In particular, the phrase "*on the face of it*" is likely to introduce significant practical difficulties in implementation, and will likely cause undue prejudice to creditors.

25 Generally speaking, a *prima facie* or "*on the face of it*" standard of proof is used either as a procedural burden-shifting device, or to obtain interim relief. For example:

25.1 a plaintiff or prosecutor must produce *prima facie* evidence in order to avoid having absolution decreed at the end of their case or to prevent an accused from being discharged at the end of the prosecution's evidence;

25.2 where a plaintiff makes out a *prima facie* case, that places a duty on a defendant to adduce evidence in rebuttal; and

25.3 an applicant must establish that it has a *prima facie* case in order to obtain an interim interdict.

26 In these instances, the making out of a *prima facie* case has consequences which, in the case of 25.1 and 25.2 above, provide the opposing party with an opportunity for rebuttal before any consequences arise, or, in the case of 25.3 above, has consequences which are only interim in nature (and would require more conclusive proof to be made final).

27 But in the manner proposed by the Discussion Paper, the consequences of establishing that a debt has "*on the face of it*" been extinguished by prescription would be final. For example, under section 13(3), a creditor would be prohibited from recovering a debt, which, on the face of it, has prescribed (in that three years have passed from the act giving rise to the debt), but which, in fact, has not prescribed, because, for example, prescription was suspended by a legitimate impediment such as being a minor.

28 Accordingly, the FHR proposes that the notion of "*on the face of it*" prescription should be omitted from the Prescription Bill. The relevant inquiry should be whether the debt has, in fact, prescribed.

29 For the reasons set out above, FHR proposes that, suitably amended, Option 1 strikes the better balance between fairness and certainty, and best overcomes the anomalies currently present in the Prescription Act.

PART B: REVIEW OF THE THREE-YEAR GENERAL PRESCRIPTION PERIOD

30 The Discussion Paper explains that, given the perceived inadequacy of the three-year period when viewed against the effects of socio-economic conditions in South Africa, the 2011 Discussion Paper proposed extending the prescription period in section 11(d) from three to five years.[15]

31 The Discussion Paper also explains that, while South Africa and Germany have the shortest general prescription periods, South Africa is arguably one of the more "*generous*" regimes in that:

31.1 for all debts, where a creditor has not acquired actual or constructive knowledge, prescription will not begin running;

31.2 South Africa does not employ long-stop periods; and

31.3 South Africa has a long list of delay factors serving to protect creditors.[16]

32 As the Discussion Paper rightly recognises, there is a degree of arbitrariness in choosing the period of time applicable to prescription.[17]

33 Moreover, as we indicated at the outset, the applicable time period is a factor that can operate both to the detriment and benefit of poor and vulnerable people.

[15] Discussion Paper p 110.
[16] Discussion Paper p 128.
[17] Discussion Paper pp 112 and 130.

33.1 A longer prescription period is notionally something that may assist the indigent when they are creditors, given the structural obstacles they face in pursuing their claims.

33.2 But it is also something that might operate harshly against financially insecure debtors, permitting creditors, who already have greater bargaining power, more leeway in pursuing their claims.

34 Having said that, as far as we are aware, and as appears from the Discussion Paper, the prejudice faced by poor and indigent *debtors* – which pertain to the sale, collection and re-activation of prescribed debt – does not relate primarily to time periods. On the other hand, the prejudice faced by poor and indigent *creditors* does sometimes pertain to the failure to institute proceedings within the three year period.

35 Therefore, on balance, and although, on its own, a mere increase of one or two years is unlikely to provide substantial redress in this regard, FHR submits that:

35.1 the Discussion Paper is correct in finding that more meaningful avenues must be pursued;

35.2 an increase to five years, as proposed in the 2011 Document, is appropriate. In our view, the harms identified (namely worse judicial economy and less prompt adjudication) are less significant than the benefits likely to be experienced by some poor and vulnerable claimants.

PART C: DELAYING THE RUNNING OF PRESCRIPTION

36 The Discussion Paper explains that sections 12(2), (3), (4) and 13 of the Prescription Act give statutory recognition to the principle that prescription does not run against one who is unable to act.[18] These provisions cater 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.

37 The Discussion Paper also explains that the Prescription Act's focus on "*delayed completion*" marks a shift in principle from suspension.[19]

37.1 Under a system of suspension, the running of prescription is suspended from the date of the impediment, resumes the day the impediment ceases to exist, and the period of suspension is excluded from the calculation of the prescription period.

37.2 Under the present system of "*delayed completion*", the running of prescription is delayed only if the impediment subsists in the last year in which prescription is running, in which case it is suspended from the date of the impediment and resumes running for a period of one year from the day after the impediment ceases to exist.

[18] Discussion Paper pp 134-135.
[19] Discussion Paper pp 138-141.

38 This can operate harshly and unevenly against creditors, giving those whose impediment arises early in the period as little as one year within which they are both able to act and allowed to do so by the prescription period. On the other hand, for those whose impediment arises late in the prescription period – say, in the last three months – an additional year is added to the prescription period. It accordingly benefits some creditors and prejudices others, based purely on the timing of their impediment.

39 The Discussion Paper accordingly suggests that the provision arbitrarily operates to the benefit of a select group of creditors who succumb to impediments subsisting in the last year that prescription runs. It thus often punishes the deserving and rewards the underserving.[20]

40 Indeed, it is quite possible, in the FHR's view, that the provision as currently formulated is unconstitutional in terms of section 9(1) of the Constitution. As far as we are aware, a Court has not yet been required to determine this question.

40.1 Section 9(1) of the Constitution provides that: "*Everyone is equal before the law and has the right to equal protection and benefit of the law*."

40.2 The test for compliance with section 9(1) is rationality.[21] It does not require that all people are treated identically. Instead, while permitting differentiation and distinction, it prohibits arbitrariness and irrationality.

[20] Discussion Paper p 145.
[21] See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC),

40.3 Thus, where legislation distinguishes between rich and poor for purposes of the imposition of tax or the provision of social grants, it differentiates between categories of persons. But it does so permissibly, because the differentiation is targeted at the legitimate purpose of taxing progressively, or providing social grants to those that need them most.[22]

40.4 In short, therefore, the law may treat people differently only where such differential treatment is justified by (that is, rationally connected to) a legitimate government purpose.

40.5 In this case, there is clearly a differentiation. The provision differentiates between those who are impeded early in the prescription period, and those who are impeded late.

40.6 However, it is unclear whether any purpose at all is served by the differentiation. And as the Constitutional Court held in *Van der Merwe*, "*The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable*."[23]

40.7 To the extent that the governmental objective is to ensure that an interruption does not cause the undue suspension of the prescription period, it is in any event doubtful that that is rationally connected to the differentiation. Indeed, to the extent that an impediment arises in the last year of the prescription

[22] See Cathi Albertyn and Beth Goldblatt "Equality" in Constitutional Law of South Africa (2013) 35-17.
[23] Para 63.

period, irrespective of the duration of the impediment, the period is increased by another year. That does not serve the purpose of preventing an undue suspension.

41 Quite apart from its constitutionality, suspension in any event appears to be a more even-handed means by which to interrupt prescription than delayed completion.

42 Under a system of suspension, where an impediment lasts three months, three months are added to the prescription period – irrespective of when the impediment arises. That recognises that the creditor was deprived for those three months of the ability to act, and accordingly deserves to have an additional three months to do so.

43 Accordingly, the FHR supports the proposed reversion to the more even-handed operation of suspension, such that "*[p]rescription 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*."[24]

44 However, the Discussion Paper also proposes a proviso, namely that:

44.1 where the applicable period of prescription is 15 years or more;

44.2 the impediment occurred any time within the first 5 years; and

44.3 the impediment subsisted for five years or less; then

[24] Discussion Paper p 154.

44.4 the suspension period *does* form part of the prescription period.

45 The FHR is uncertain about the rationale for the inclusion of this proviso. Presumably, it is that where the period of prescription is 15 years or more, and the impediment occurs for less than (or equal to) 5 years within the first 5 years, the creditor will still have a minimum of 10 years within which to institute proceedings in respect of her claim.

46 But, by the same token, prescription periods of 15 years or more have been selected for a reason. According to the Constitutional Court, the reason is that "*where there is no risk of losing evidence or having its quality diminished, the Act affords longer prescription periods*".[25]

47 It is accordingly not clear what mischief is sought to be prevented by the inclusion of the proviso. We have not been asked to, and nor do we, comment on the appropriateness of those prescription periods of 15 years or more.

48 Our point is merely that the principle of suspension articulated in the Discussion Paper should be carried to its logical conclusion: if a period of 15 years or more is deemed appropriate for certain debts, then the creditor should benefit from the entirety of that period, and any period of suspension should be excluded, irrespective of when it occurs.

[25] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* 2018 (1) SA 38 (CC) para 31.

PART D: INABILITY TO ACCESS THE COURTS

49 Part D contains, in our view, the most innovative, important and laudable intervention in the Discussion Paper.

50 In order to explain why this is so, it is worthwhile to consider for a moment the effect of socio-economic disadvantage on prescription, which goes to the core of the proposals in this section.

51 Under section 12 of the Prescription Act, prescription begins to run as soon as a debt is due. However, this is subject to three exceptions, which are found in subsections (2), (3) and (4). In terms of subsection (3), a debt is "*not deemed to be due until the creditor has knowledge of*":

51.1 the identity of the debtor; and

51.2 the facts from which the debt arose.

52 The exception also contains a constructive-knowledge proviso: a creditor is deemed to have such knowledge if she could have acquired it by exercising reasonable care.

53 The recent line of cases dealing with the question of the knowledge requirement under the Prescription Act demonstrates precisely how its impact is felt most acutely by those who live under adverse socio-economic conditions.

54 In *Links*,[26] a standard for the knowledge requirement was articulated, which, in our view, took proper account of the fact that ordinary people often lack knowledge of the facts giving rise to their claims in the absence of an expert opinion.

54.1 Mr Links was a cleaner at a hospital. He dislocated his thumb in 2006, and went to a hospital for treatment. After a follow-up hospital visit at which he complained of pain, he was admitted, and placed under general anaesthetic for the removal of some tissue. But while under anaesthetic his thumb was amputated. He remained in hospital for two months, and when discharged, was told he would likely never be able to use his left arm again.

54.2 Mr Links approached Legal Aid, who failed to act for approximately three years. Later, he instructed a law firm that instituted an action for damages for medical negligence.

54.3 The MEC claimed that Mr Links had knowledge of the negligence from the moment his thumb was amputated. Mr Links argued that even when he was discharged, he did not have the relevant facts, because he did not know the *reason* for the amputation or for the loss of use of his left arm.

54.4 The Court held that one of the facts from which a claim arises is the negligent cause of the harm. There was no evidence that Mr Links had knowledge of this when he was discharged. It was only with independent medical advice

[26] *Links v MEC, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC).

that Mr Links could know this, which he only obtained later. The claim had accordingly not become due as alleged by the state, and it had not prescribed.

55 However, the subsequent case of *Mtokonya*[27] demonstrated the limits of the knowledge requirement in protecting poor and vulnerable classes of creditors.

55.1 Mr Mtokonya was unlawfully arrested and detained by the police for four or five days. The police failed to bring him before a court of law within 48 hours of his arrest in September 2010. In July 2013, he met with his neighbour, an attorney, who informed him that his detention was unlawful, and that he had a cause of action, *inter alia,* because he was held in excess of 48 hours without an appearance.

55.2 Mr Mtokonya accordingly issued summons against the defendant in April 2014.

55.3 In short, the majority of the Constitutional Court held as follows.

55.3.1 Section 12(3) self-evidently requires actual or constructive knowledge before prescription begins to run.

55.3.2 However, knowledge in this sense does not require knowledge of a legal conclusion. To be more specific, it does not require that one knows that one has a right of action.

[27] *Mtokonya v Minister of Police* 2017 (11) BCLR 1443 (CC).

55.3.3 Instead, the knowledge requirement merely means that one must have knowledge of the identity of the debtor and the *facts* giving rise to the debt.

55.3.4 In this case, Mr Mtokonya had knowledge of the identity of the debtor, and had knowledge of the facts giving rise to the debt, in that he knew he had been arrested and detained, and he knew that he had not been brought before court within 48 hours.

55.3.5 That he did not know *that these facts gave rise to a claim* on his part did not matter. He had knowledge for purposes of section 12, and prescription began to run from as soon as he was released. His claim had accordingly prescribed.

56 While the court may have been correct that an approach that required knowledge, in all circumstances, of one's legal right of action would lead to absurdities (such as that prescription would only run against legal experts in certain fields), the judgment certainly operates most harshly against poor and vulnerable creditors.

57 The approach in these two decisions culminated most recently in the decision of *Loni*,[28] which was handed down in February 2018, only after the Discussion Paper was published for comment.

[28] *Loni v MEC, Department of Health, Bhisho* [2018] ZACC 2

57.1 Mr Mzwandile Loni was admitted to hospital for a gunshot wound which shattered his left femur, and was treated by doctors who failed to remove the bullet.

57.2 When Mr Loni later obtained a job with the police, he obtained medical insurance for the first time, and was able to approach a private doctor. Some twelve years after the incident, an orthopaedic surgeon informed him that his limp had been caused by medical negligence.

57.3 The Court unanimously found, however, that a reasonable person in Mr Loni's position would have realised that his treatment had been sub-standard, and less than he could have expected from medical practitioners and staff acting carefully, reasonably and professionally.

57.4 The court concluded thus: "*This is a sad matter that exhibits the bad treatment the applicant was subjected to by those who had an obligation imposed by the Constitution to provide proper healthcare for him. Unfortunately for the applicant, and as demonstrated,* Links *does not assist him*."

58 The consequence of these decisions is that people who are poor, indigent, illiterate and vulnerable, who know precisely what has happened to them and who caused it, but do not know that such conduct gives rise to a claim, will be blocked by prescription. In other words, these cases illustrate precisely how, in the context of extreme socio-economic disparity in South Africa, the constitutional rights of access

to courts and equality are infringed by the operation of rules of prescription that fail to take those realities into account.

59 In our view, it is against that backdrop that the Discussion Paper's proposal regarding access to courts – which addresses not the *knowledge* requirement but the *impediments suspending prescription* – must be understood.

60 As the Discussion Paper notes, the existing principles of delay in section 13 of the Prescription Act, which provide for a list of eleven impediments likely to affect fourteen categories of creditors unable timeously to assert their rights, do not extend protection on the basis of adverse socio-economic circumstances.[29]

61 The Discussion Paper thus rightly recognises that intervention is required that takes into account people's socio-economic circumstances, and all that comes with poverty – lack of resources, lack of transport, poor literacy or illiteracy, and the difficulty of producing documentation proving birth, marriage and dependency[30] – in determining the circumstances in which their claims will be deemed to have prescribed.

62 At the same time, as the Discussion Paper acknowledges, unlike the existing impediments in section 13 of the Prescription Act – such as minority or curatorship

[29] Discussion Paper p 167.
[30] See *Mdeyide* para 117.

– adverse socio-economic circumstances persist for an uncertain period of time, and often for the duration of one's life.[31]

63 The Discussion Paper accordingly proposes:[32]

63.1 the insertion of clause 17(1)(a)(v), which provides for the suspension of prescription in circumstances where a creditor is unable to access courts to interrupt prescription due to adverse socio-economic circumstances, including poverty and illiteracy; and

63.2 the insertion of clauses 15(2) and (3), which provide long-stop, cut-off dates, calculated from the due date of debt, beyond which debts are no longer capable of enforcement. In the case of debts that currently have a three-year prescription period, the long-stop cut-off period is twenty years from the due date of debt.

64 The FHR strongly supports the inclusion of adverse socio-economic circumstances as an impediment justifying delay and suspending prescription. Although it does not address the knowledge requirement, that would, for the reasons given in *Mtokonya*, be a more difficult task.

65 It provides an important counter-balance to the current problem that the absence of knowledge that one has a claim – even where the absence of knowledge is a result

[31] Discussion Paper p 169.
[32] Discussion Paper pp 170-172.

of one's socio-economic circumstances – does not save one from the effects of prescription.

66 People like Mr Mtokonya and Mr Loni did not have the option of saying to the court that, notwithstanding their actual or constructive knowledge of the facts giving rise to their claims, they faced socio-economic barriers to accessing court, which had the effect of suspending prescription. The ability to do so will, in our view, play a significant role in offsetting the harsh effects of prescription on the poor.

67 FHR also recognises that, for the sake of legal certainty, such a suspension cannot operate forever. Thus, the introduction of a long-stop cut-off period – while possibly operating harshly in a few cases – is a fair and appropriate measure to ensure a degree of finality for debtors.

PART E: ALTERNATIVE DISPUTE RESOLUTION

68 In this Part, the SALRC considers the question of integrating principles of mediation and *Ombud* referrals into the Prescription Act.

69 While section 13 of the Prescription Act provides for the delayed running of prescription regarding debts subjected to *arbitration*, no such provision exists for negotiation, mediation or referral to *Ombud*.

70 This, the Discussion Paper notes, could work to the detriment of parties wishing to employ forms of alternative dispute resolution, as prescription may continue to run.[33]

71 The Discussion Paper accordingly proposes the express integration of mediation as a ground suspending prescription, provided the mediation is regulated by way of legislation or officially promulgated rules, or has been officially approved by an executive authority.[34]

72 We note that there has been a significant legal development on this issue since the publication of the Discussion Paper. In *Food and Allied Workers Union v Pieman's Pantry,*[35] the Constitutional Court was required to consider whether referral of a matter to conciliation interrupts the operation of prescription.

72.1 The majority held, first, that the Labour Relations Act ("**LRA**") and Prescription Act are not inconsistent. They accordingly both apply to unfair dismissals, and LRA arbitrations are subject to the Prescription Act. This resolved the issue on which the Court was split 4-4 in *Myathaza*.

72.2 Second, the majority concluded that referral of a dispute for conciliation before the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") fell within the ambit of section 15(1), and accordingly interrupted prescription.

[33] Discussion Paper p 179.
[34] Discussion Paper p 183.
[35] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] ZACC 7.

72.2.1 Section 15(1) of the Prescription Act provides for the interruption of the running of prescription "*by the service on the debtor of any process whereby the creditor claims payment of the debt*".

72.2.2 The crisp question in *FAWU* was thus whether referral to conciliation before the CCMA was the service of a process contemplated by the section.

72.2.3 Process is defined in section 15(6) to include "*any document whereby legal proceedings are commenced*", which was deemed wide enough to include a referral to the CCMA for conciliation.

72.2.4 The majority concluded that it would do "*an injustice to the architecture of the LRA and the CCMA to see and characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum*".[36]

73 Thus, our highest Court has now recognised that prescription can be delayed by the institution of alternative dispute resolution methods other than arbitration. Based on the Court's reasoning, it is possible that referral to mediation and to *Ombud* would be regarded similarly.

74 Having said that, the finding that section 15 included referral to conciliation before the CCMA was based on certain situation-specific considerations, such as that:

[36] Para 199.

74.1 it is a necessary and mandatory part of the dispute resolution process created by the LRA;

74.2 it occurs within the operations of the CCMA, which is an independent and impartial forum; and

74.3 it is inextricably linked to the arbitration process.[37]

75 Given that these factors do not apply to voluntary mediation and referral to *Ombud*, there is no guarantee that courts will regard those processes as similarly included within section 15.

76 Accordingly, notwithstanding this positive legal development, it remains necessary and important, in our view, in order to promote the use of less costly and more accessible alternative dispute resolution mechanisms, that the Prescription Bill provides expressly for the suspension of prescription in cases where a debt is the object of a dispute subjected to a formal mediation (or similar) process or referral to a statutory ombud. By "*formal*", we contemplate mediation conducted under the auspices of a governmental or non-governmental institution established for the purposes of providing alternative dispute resolution services or by a practising advocate or attorney briefed in writing to provide mediation or similar alternative dispute resolution services.

[37] Para 199.

PART F: SPECIAL TIME LIMITS

77 In this section, the Discussion Paper seeks to examine and harmonise various statutory provisions providing for notice and limitations.

78 The fragmented legislative approach to prescription periods, time limits, and notice requirements is, in part, explained by the fact that:

78.1 in terms of section 11(d) of the Prescription Act, three years is the prescription period for debts "*save where an Act of Parliament provides otherwise*"; and

78.2 in terms of section 16(1) of the Prescription Act, the provisions of the Prescription Act apply to any debt *"arising after the commencement of the Act 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*". (Emphasis added).

79 In other words, section 11(d) and 16(1) create a system in which specific enactments override the general Prescription Act. The difficulties associated with this fragmentation are two-fold:

79.1 creditors are deprived of the regime provided by the Prescription Act, which is generally more protective than other statutes, in that its knowledge requirement applies to all debts, and its general prescription period of three years is, in relative terms, generous; and

79.2 creditors are faced with myriad different procedural hurdles and requirements, depending on the claim they seek to pursue, with a failure to comply often being fatal to that claim.

80 The time limit provisions in other statutes often operate harshly – particularly against the poor. They range in their forms, but regularly they:

80.1 require that claimants give notice before instituting legal proceedings;

80.2 require that plaintiffs await the lapse of certain time periods after giving notice before instituting proceedings;

80.3 stipulate that the right to institute legal proceedings is extinguished after the expiry of short time periods; and

80.4 contain no actual or constructive knowledge requirement or any mitigating factors that serve to delay or extend the running of these time periods.

81 In assessing whether other statutes conflict with (and therefore trump) the Prescription Act, we draw attention to the recent decision of *Food and Allied Workers Union*[38] (discussed above in the context of alternative dispute resolution), in which the Constitutional Court discussed the proper approach to making such a determination. In particular, the Court was required to decide whether the

[38] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] ZACC 7 (20 March 2018).

Prescription Act applies to litigation involving unfair dismissal claims brought under the LRA, which sets out its own time limits for the bringing of such claims.

81.1 A majority of the Court concluded that the provisions of the Prescription Act are not inconsistent, but are in fact compatible and complementary with the LRA, and that the Prescription Act is therefore applicable to litigation under the LRA.

81.2 This was because the LRA, unlike the Prescription Act, deals with time periods that do not necessarily extinguish a claim in the event of non-compliance.

81.3 The Court emphasised the distinction between *inconsistency* on the one hand and *difference* on the other. The mere existence of provisions in the LRA relating to time periods was held not to be sufficient to constitute an inconsistency.

81.4 Unlike in *Mdeyide*, where the RAF Act and the Prescription Act dealt with the identical subject of prescription periods (and provided for different periods for the prescription of a claim), the LRA deals with the time periods within which various steps in advancing the dispute resolution process must take place.

81.5 Rather than setting an outer limit to the litigation process that provides for the extinction of a claim, section 191 of the LRA provides for a specific timeframe within which to make a referral, and provides a mechanism to seek condonation on good cause shown.

81.6 Accordingly, both statutes apply to unfair dismissal claims and, even if a claimant can show good cause to condone her late referral, her claim is still susceptible to prescription after three years.

82 We raise this case only to suggest that some of the provisions that the SALRC may have considered to be inconsistent with, and operating to the exclusion of the Prescription Act, may, on the Court's approach, in fact be complementary.

83 That, however, does not diminish the need for harmonisation. On the contrary, it exacerbates it. For it means that creditors who face time limits imposed by other pieces of legislation, will often face them in addition to, rather than to the exclusion of the Prescription Act.

84 As the Discussion Paper notes, these provisions often operate in favour of the *state* as debtor. In this regard, the FHR makes two submissions:

84.1 First, it should be noted that poor and vulnerable creditors are likely to have the state as their debtor. That is because it is the poor who are unable to "opt-out" of the provision of services by the state, and who use public health facilities, public transport, and public schools, and who rely on the payment of social grants. Where one has a claim against the state arising from harm caused by the provision (or non-provision) of these services, one is required to use the more onerous provisions of the Institution of Legal Proceedings against Certain Organs of State Act.

84.2 Second, the FHR agrees with the submissions in the Discussion Paper to the effect that affording the state special treatment has become increasingly outdated. While it is necessary to take into account its size and complexity, an approach which begins to narrow the difference in approach is commendable.

85 The Discussion Paper engages in a detailed discussion of court decisions addressing the constitutionality of the limitations provisions in various statutes.

86 However, in our view, it is difficult to distil from these cases a clear set of principles, other than that, in broad terms:

> "*The length of the period of prescription must necessarily be considered together with and balanced against the rigidity of its starting point, the absence of the requirement of knowledge and the absence of provision for condonation. The shorter the period, the more one would look for flexibility and scope for exceptions.*"[39]

87 Beyond this, the reasoning in each of these cases turned ultimately on a highly fact-specific proportionality analysis. Thus *Mohlomi*[40] (dealing with the Defence Act), *Potgieter*[41] (the Mental Health Act), *Engelbrecht*[42] (Regulation 2(1)(c) of the Road

[39] *Mdeyide* at para 88.
[40] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).
[41] *Potgieter v Lid van die Uitvorende Raad: Gesondheid Provinsiale Regering Gauteng en andere* 2001 (11) BCLR 1175 (8 October 2011).
[42] *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC).

Accident Fund Regulations) and *Madjiet*[43] (the Namibian Police Act) struck down statutes; *Peens*[44] (the South African Police Service Act), and *Mdeyide*[45] (the RAF Act) upheld their constitutionality.

88 Perhaps the question of whether or not these statutes are constitutional is not the critical point. Whether they are unconstitutional or not:

88.1 the uncertainty around their constitutionality means that most people, even those with legal training, are unlikely to know in advance whether or not the statutes pass constitutional muster; and

88.2 even where such statutes have been held to be constitutional, the provisions have been held to *limit* constitutional rights – particularly the section 34 right of access to courts.

89 All that the courts have held in the cases upholding their constitutionality was that it was within the reasonable exercise of the legislature's powers to pass legislation of that kind. It has never held that such legislation is the best or most appropriate means by which to regulate the field.

90 Thus, irrespective of the constitutionality of the provisions, the SALRC ought, in the FHR's view, to make legislative proposals that ease the burden of ordinary people regarding access to justice. We submit that the greater harmonisation of time

[43] *Minister of Home Affairs and Immigration v Madjiet and Others* 2008 (5) SA 543 NmS.
[44] *Peens v Minister of Safety and Security* 2000 (4) SA 727 (T).
[45] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC).

periods, and bringing harsher statutes into alignment with the more generous Prescription Act, does precisely that.

91 Two clauses of the proposed Prescription Bill annexed to the Discussion Paper[46] are particularly important to the harmonisation project:

91.1 clause 22,[47] which provides that where a law requires creditors to give notice of their intention to institute legal proceedings prior to the service of process, it will only be given effect to if it complies with the provisions contained in the Institution of Legal Proceedings against Certain Organs of State Act (a proposed amendment of which is also annexed to the Discussion Paper); and

91.2 clause 23, which provides that a law that makes it compulsory for creditors to submit to a system of prescription other than that provided for under the Prescription Act will only be given effect to if it:

91.2.1 is aimed at promoting the speedy resolution of disputes in a cost effective manner in a forum other than a court;

91.2.2 provides for a period of no less than two years within which action must be taken;

91.2.3 provides for the non-commencement or suspension of the period in the face of impediments making it impossible for the creditor timeously to assert a right;

[46] Discussion Paper Annexure A p xiv and following.
[47] Discussion Paper p xxxv

91.2.4 provides for the power to extend the period by agreement with a creditor; and

91.2.5 provides for extension by a court or tribunal on good cause shown.

92 In passing, we make the observation that clause 23 of the Draft Bill should be supplemented with a provision or provisions that say what law in relation to prescription will apply where a law is found to be non-compliant with one or more of paragraphs (a) to (e) of clause 23.

93 In order to undertake the task of harmonisation, the Discussion Paper divides the relevant legislative provisions into five different categories, namely:

93.1 those requiring compliance with South Africa's international law extinctive prescription obligations, which are excluded from the harmonisation process;

93.2 those containing special prescription provisions, in respect of which it extends the prescription period uniformly;

93.3 those providing special time limits which are non-encroaching on creditors' rights, and which are thus excluded from the harmonisation process; and

93.4 those providing for encroaching special time limits, which are harmonised in terms of clause 22 and/or clause 23.

94 An Institution of Legal Proceedings against Certain Organs of State Amendment Bill has also been proposed.[48] Most significantly it provides that:

94.1 provided a debt has not been extinguished by prescription, the service of notice on an organ of state suspends prescription;

94.2 an organ of state that is not given notice is entitled to apply to court to stay proceedings pending the giving of notice; and

94.3 no process may be served before the expiry of 90 days (rather than 60 days) after the notice.

95 As explained above, the FHR is broadly supportive of this approach, as it achieves two important purposes, both of which will benefit poor and vulnerable people:

95.1 First, it achieves a greater level of uniformity as regards the requirements for the institution of legal proceedings; and

95.2 Second, it provides greater protections to creditors than would otherwise be the case.

96 Lastly, by way of recommendation, and without analysing the specific effect of harmonisation on every one of the 28 pieces of legislation, we note that further attention may need to be given to instances in which an apparent prescription period plays more than one function in a statute.

[48] Discussion Paper Annexure B p lxvi and following.

97 We note, for example, that an amendment is proposed to section 67(1) of the Competition Act, so that the requirement to "*initiate*" a "*complaint*" within three years is rendered subject to the provisions of the proposed Prescription Act.

98 But the initiation of complaints under the Competition Act is a regime that serves two distinct purposes.

98.1 Initiation is indeed the point at which prescription under the Competition Act is interrupted. In particular, the period from the cessation of allegedly anti-competitive conduct to the initiation of a complaint may not exceed three years.

98.2 However, initiation of a complaint is also a necessary prerequisite for a subsequent decision by the Competition Commission to "*refer*" or "*non-refer*" a complaint to the Competition Tribunal. Without a complaint initiation, there can be no complaint referral.

99 In an effort to overcome the potential formalism associated with the so-called "*referral rule*" – that is, the rule that a complaint must be initiated before it can be referred – the Supreme Court of Appeal has developed the notion of a "*tacit initiation*".[49] As the SCA held, "*the initiation of a complaint by the Commission amounts to no more than a decision to start an investigation, which decision can be taken informally and even tacitly*".[50]

[49] *Competition Commission v Yara (Pty) Ltd and Others* 2013 (6) SA 404 (SCA).
[50] Id para 32.

100 There is accordingly a danger that, without more, the rendering of section 67(1) of the Competition Act subject to the relevant chapters of the Prescription Act will be to introduce more formality, in a manner that protects debtors – generally commercial entities subject to competition scrutiny – and makes the job of the competition watchdog, which acts in the interest of the public and consumers, harder.

101 In all other respects, the FHR reiterates its support for the harmonisation process undertaken by the SALRC, which it believes will ultimately be to the benefit of poor and vulnerable people.

SUMMARY OF CONCLUSIONS

102 On Part A, we conclude as follows:

102.1 The FHR agrees that reverting to a system of weak prescription is unworkable and inapt.

102.2 Similarly, Option 2 is likely to give rise to significant difficulties in implementation by requiring that payment must be "*voluntary*".

102.3 The FHR accordingly proposes that, subject to the omission of "*on the face of it*" from the Prescription Bill and its replacement with an inquiry into whether the debt has, in fact, prescribed, Option 1 strikes the better balance between fairness and certainty, and best overcomes the anomalies currently present in the Prescription Act.

103 On Part B, we conclude as follows:

103.1 The FHR acknowledges that there is a degree of arbitrariness in choosing the period of time applicable to prescription, and that the applicable time period is a factor that can operate both to the detriment and benefit of poor and vulnerable people.

103.2 Nevertheless, because the prejudice faced by poor and indigent *debtors* does not relate primarily to time periods, and the prejudice faced by poor and indigent *creditors* does sometimes pertain to the failure to institute

proceedings within the three year period, the FHR submits that an increase to five years is appropriate.

104 On Part C, we conclude as follows:

104.1 The present system of "*delayed completion"* can operate harshly and unevenly against creditors, and may, in the FHR's view, violate the guarantee of equal protection of the law in section 9(1) of the Constitution.

104.2 Quite apart from its constitutionality, suspension in any event appears to be a more even-handed means by which to interrupt prescription than delayed completion.

104.3 There is no basis for the proviso regarding debts with prescription periods of 15 years or more: if a period of 15 years or more is deemed appropriate for certain debts, then the creditor should benefit from the entirety of that period, and any period of suspension should be excluded.

105 On Part D, we conclude as follows:

105.1 In the FHR's view, Part D contains the most innovative, important and laudable intervention in the Discussion Paper.

105.2 The intervention must be understood against the backdrop of recent decisions that have held that people who are poor, indigent, illiterate and vulnerable, who know precisely what has happened to them and who caused it, but do

not know that such conduct gives rise to a claim, will be blocked by prescription.

105.3 The Discussion Paper rightly recognises that intervention is required that takes into account people's socio-economic circumstances in determining when their claims will be deemed to have prescribed.

105.4 The FHR thus strongly supports the inclusion of adverse socio-economic circumstances as an impediment justifying delay and suspending prescription.

105.5 The FHR also recognises that, for the sake of legal certainty, such a suspension cannot operate forever. Thus, the introduction of a long-stop cut-off period is a fair and appropriate measure to ensure a degree of finality for debtors.

106 On Part E, we conclude as follows:

106.1 The Constitutional Court has recognised that prescription can be delayed by referral to conciliation in the CCMA. Based on the Court's reasoning, it is possible that referral to mediation and to an *Ombud* would be regarded similarly.

106.2 Nevertheless, it remains necessary and important, in order to promote the use of less costly and more accessible alternative dispute resolution mechanisms, that the Prescription Bill provides expressly for the suspension

of prescription in cases where a debt is the object of a dispute subjected to a formal mediation (or similar) process or referral to a statutory ombud.

107 On Part F, we conclude as follows:

107.1 The effect of a fragmented system of special time limits is that creditors are deprived of the regime provided by the more generous and protective Prescription Act, and face myriad different procedural hurdles and requirements.

107.2 Because these time limits operate harshly against the poor, whether or not they are unconstitutional, any Draft Bill ought to ease the burden of ordinary people regarding access to justice. The greater harmonisation of time periods, and bringing harsher statutes into alignment with the more generous Prescription Act, does precisely that.

107.3 The FHR is thus broadly supportive of the approach.

107.4 Further attention may need to be given to instances in which an apparent prescription period plays more than one function in a statute.