

The Constitutionality of Prescription Periods in the South African Law

CM van der Bank¹

¹ Faculty of Human Sciences, Vaal University of Technology, Vanderbijlpark, South Africa

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Abstract

The Constitution protects the right to equality and access to courts. There it manifests unfairness in according public institutions special protection, which is not extended to private persons with claims against the state. This may imply an absence of equal protection and benefit of the law. Some prescription periods contained in statute create inequalities between people with civil claims against public institutions and those against other defendants.

By not affording the plaintiff with condonation for failure to institute a claim within the prescribed period, claimants with genuine claims may not have the opportunity to institute their cases even where there is a just cause for not instituting such a claim on time.

Since the Prescription Act does not provide for condonation after the lapse of the prescribed period for three years (the period prescribed for ordinary claims in terms of section 11(d) of the Prescription Act 68 of 1969), this creates the problem with genuine claims, which for reasons beyond their control, would be deprived of redress. In conclusion those courts should be granted the power to condone, on good cause shown, the late institution of a claim, where the debt has prescribed in terms of section 11(d) of the Prescription Act.

JEL Classification: K10

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1. Introduction

Prescription is a means of acquiring or losing rights, or of feeling oneself free from obligations, by the passage of time under conditions prescribed by law. It is derived from the classical Roman law and further developed under Justinian (Buckland & Stein, 1966). Prescription is found in virtually all legal systems. The underlying idea of prescription is to bring about legal certainty (Havenga, Havenga, Garbers, Schulze, & Van der Linde, 2007). Extinction of a debt through the passing of time is known as prescription (Vrancken & Brettigny, 2002).

In South Africa extinctive prescription has been governed by legislation since early colonial times. Extinctive prescription deals with the effect of the passage of time on obligations, to the extent that an obligation is extinguished or rendered unenforceable by effluxion of time (De Wet & Van Wyk, 1992). Despite its practical importance the South African law of extinctive prescription has not been the subject of extensive theoretical analysis, perhaps because it is often superficially perceived as a technical and theoretically unrewarding area of statute law (Loubser, 1996). The general provision of our law with regard to extinctive prescription is embodied in Chapter 111 of

the Prescription Act 68 of 1969. But apart from this act a variety of statutes deal with the effect of time on legal relations (Van der Merwe, Van Huyssteen, Reinecke, Lubbe, & Lotz, 1993).

When the Interim Constitution came into force in 1993 there were a large number of statutes prescribing special time limits for the institution of actions against the state like in delicts, statutory bodies and local government institutions.

2. Objectives of Prescription

Apartheid legacy to the democratic South Africa includes poverty, illiteracy and inequality. Most persons who sustained compensable injuries or are otherwise entitled to financial compensation are either unaware of, or poorly informed about their legal rights and what they should do in order to enforce those. The normal difficulties of accessing legal services are exacerbated by gross inequality, high cost of legal services and the remoteness of the law from most people's lives (Dugard, 2008).

The objective of having prescription periods is to create legal certainty. Such an objective needs to measure. The Prescription Act lays down different periods of prescription for different claims which apply to various categories. Unless a statute specially provides otherwise, a period of prescription is calculated in accordance with the common law (Van der Merwe *et al.*, 1993). The ordinary civil method, the *computation civilis*, uses the calendar day as the unit of calculation. The different prescription periods contained in statutes create inequalities between people with claims against public institutions and those against other defendants.

There it manifests unfairness in according public institutions for special protections. This implies an absence of equal protection and benefit of the law (Section 9(1) of the Constitution). It seeks to ensure equal treatment of all persons by courts of law (Mubangizi, 2004). What it requires is an inquiry of which the starting point is in the words of Aristotle that "those things are alike should be treated alike, while those things are unlike should be treated unlike in proportion to their unlikeness" (quoted in De Waal, Currie, & Erasmus, 2001). The question rises whether such differentiation is rationally connected to the purpose which it seeks to achieve. The advent of the legitimate expectation doctrine provided much-needed relief from the strict deprivation theory of the common law. In the constitutional era it has continued to prove very popular with our courts has been applied in a number of contexts (Hoexter & Lyster, 2002). The notice of intention to institute legal proceedings against an organ of state is on the running of the prescription period. The question to be asked is whether the notice period suspends the running of prescription or it continues to run when the notice of intention to institute legal proceeding has been duly filed.

3. History of Prescription

3.1 Roman Law

The law of extinctive prescription is statutory in origin. In classical Roman law actions were not generally subject to time limits and the first general prescription period was instituted by the emperor Theodosius in 424 AD.

3.2 South African Law Development

The Prescription Act 6 of 1861 was amended by the Prescription Amendment Act 7 of 1885. The Prescription Act of all colonies was repealed by the Prescription Act 18 of 1943 which again was repealed by the Prescription Act of 1969. Prescription legislation is therefore intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce rights.

The imposition of prescription periods has thus been justified on the basis of fairness, certainty and public policy.

Just rules of law in themselves are not enough to achieve justice (Hahlo and Kahn, 1973). The consideration of fairness is important for example to enable transactional defects flowing from failure to fulfil formalities to be rectified timeously rather than where state witnesses and relevant documentary evidence are no longer available. This precludes prolonged uncertainty of ownership and encourages social and economic development by removing fear of future litigation. It would obviously be most unfair if a creditor were to lose these rights through prescription merely, because through no fault of the creditor, he or she is unable to enforce those (Havenga *et al.*, 2007). It could be argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

Plaintiffs may also be affected by deterioration of evidence over the passage of time; it can be argued that a potential defendant is in more vulnerable position than a plaintiff. This is because the plaintiff decides when to commence proceedings, and can use the time before the claim is brought to collect evidence, while the defendant may not even be aware that he or she is at risk of being sued and is therefore unlikely to take steps to preserve the necessary evidential burden.

Memories can also dim with time and witnesses can die or disappear. The legal position has to be adapted to correspond with the factual situation (Havenga *et al.*, 2007). The main practical purpose of extinctive prescription is the promotion of certainty in the affairs of individuals, and particularly in the relationship between debtor and creditor. Prescription periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will deteriorate. It will be considerably more difficult for a court to achieve a just resolution of the dispute if the reliability of the evidence has been affected by the passage of time.

4. Prescription in Customary Law

Customary law has no rules allowing acquisitive or extinctive prescription. Statutory provisions in this regard do not supersede customary law, because the Prescription Act expressly states that it does not apply “in so far as any right or obligation of any person against any other person is governed by Black Law” (Section 20 of Prescription Act 68 of 1969).

5. Definition of Prescription

The Prescription Act lays down periods of prescription which apply to various categories of debt. Unless a statute specially provides otherwise, a period of prescription is calculated in accordance with the common law (Van der Merwe *et al.*, 1993). Prescription deals with the acquisition of rights or the discharge of debts after the passing of certain periods. In common law, the notion that prescription ought not to operate unreasonably to the detriment of the creditor was expressed in the maxim *contra non valentem agere non currit praescriptio*: prescription ought not to run against someone incapable of enforcing his rights (Van der Merwe *et al.*, 1993). The distinction between the periods of prescription for the redhibitoria actions and the *action ex empto* has been dispensed with by section 11 (d) of the Prescription Act 68 of 1969, and the period of prescription in both actions is three years (Zulman & Kairinos, 2005). Prescription can be classified in four different prescriptions:

- **Extinctive** prescription – Entails the termination of obligations, and therefore their enforceability, by lapse of time (deals with the extinction of a debt).

- **Interruption** – This refers to circumstances which, by confirming the existence of a debt, or by preparing the way for its enforcement, extend the period for which an obligation exists according to the law (Van der Merwe *et al.*, 1993). The period of prescription begins to run *de novo*, unless the acknowledgement of liability is accompanied by a postponement of the day upon which the debt becomes due.
- **Delayed** – This would be the case where the creditor is a minor, insane or outside South Africa, before the prescription would have ended (Vrancken & Brettigny, 2002) or certain impediments suspend the running of prescription until a period of one year has passed after the date when the impediment ceases to exist.
- **Acquisitive** – The right of possession becomes the right of ownership after a certain time. It falls outside the scope of contract law (Kerr, 1989).

Unless a statute specially provides otherwise, a period of prescription is calculated in accordance with the common law (Van der Merwe *et al.*, 1993).

6. Prescription and Section 34 of the Bill of Rights

The right to a fair trial forms the basis for affording constitutional recognition to various rights relating to civil litigation (Rautenbach & Malherbe, 2008). Provision for the right to access to the court is made expressly in section 34 of the 1996 of the Constitution: “Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” (section 34 of the Constitution). Three distinct rights are derived from this provision: first the right of access to judicial resolution of a dispute; secondly one has a right that hearings in which disputes are resolved by the application of law, must be fair and conducted publicly and thirdly, where a tribunal or forum other than an ordinary court adjudicated a legal dispute, one has the right that such tribunal or forum must be independent and impartial (Venter, 2000). A Bill of Rights must be justiciable, which means that the courts must be able to interpret and apply it’s authoritatively (Du Plessis, 1999). De Waal, Curie and Erasmus stated that rights entrenched in the Bill of Rights are formulated in general and abstract terms and therefore the meaning of these provisions will depend on the context in which they are used, and their application to particular situations will necessary be a matter of argument and controversy (De Waal *et al.*, 2001).

Section 39 of the 1996 Constitution expressly deals with the interpretation of the Bill of Rights (Venter, 2000). First it is required that the “values that underlie an open and democratic society based on human dignity, equality and freedom” (Du Plessis, 1999) be promoted (Sec 39(1) (a)). In terms of section 39(2) international law must be considered and foreign law may be considered. It is interesting to note that, although the courts are not obliged to consider foreign law, the judgments on fundamental rights and other constitutional cases teem with comparative references and the reception of doctrine and method from foreign jurisprudence (Venter, 2000). In *S v Zuma* the court indicated that constitutional disputes can however seldom be resolved with reference to the literal meaning of the provisions alone. The Constitutional Court followed the Canadian Supreme Court and prescribed a value-orientated approach to the interpretation of fundamental rights (Venter, 2000). The literal meaning should therefore not be regarded as conclusive. A generous interpretation should furthermore be given to the text. A constitutional provision should be considered since the Constitution is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation. In *Bernstein v Bester NO* the court was of the view that contextual interpretation may also be used to identify and focus only on the most relevant right (Bernstein v Bester NO 1996 (2) SA 751 (CC)).

Section 34 gives those involved in justiciable disputes a right to a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Therefore the right to access to court is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in our Bill of Rights would be meaningless. In *Zondi v MEC for Traditional and Local Government* it was stated that social conflict, equality of arms and curial practicalities in respect of a dispute are not requirements (*Zondi v MEC for Traditional and Local Government* 2005 (4) BCLR 347 (CC)). The only question is whether legal rules exist in terms of which disputes concerning enforceability, justifiability and pre-existing rights may be resolved.

The purpose of the right is to provide protection against actions by the state and other persons, which deny access to the courts and other forums. It does not confer on litigants a right to approach any court they choose for relief. In *Dormehl v Minister of Justice* it was stated as long as there is a right to approach a court of competent jurisdiction for relief the requirement of the section is met.

A fundamental rule of natural justice is that nobody should be allowed to take the law onto his own hands. In *Chief Lesapo v North West Agricultural Bank v another* the court held that the right to access to court is fundamental to a democratic society that cherishes the law. Section 34 does not apply to all administrative action, since it refers specifically to disputes that can be resolved by the application of law (Hoexter & Lyster, 2002). It insures that parties to a dispute have institutionalized mechanisms to resolve their difference without recourse to self-help. South African society is embedded in a constitutional democracy, in other word a democracy based on a constitution (Britz & Ackermann, 2006). Taking the law into one's hands is thus inconsistent with the fundamental principles of our law.

Access to court guarantees for the adjudication (the giving or pronouncing of a judgment in a case) of disputes are a manifestation of a deeper principle; one that underlies our democratic order (Mann & Roberts, 2007). Our courts are independent and they are only "subject to the Constitution and the law" (Section 165(2) of the Constitution) and "no person or organ of state" (Section 165(3) of the Constitution) may interfere with their functioning. Citizens and non-citizens are entitled to rely upon the state for the protection and enforcement of their rights. The state is under a constitutional obligation of assisting all persons to enforce their rights. In *Delange v Smuts No and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) "there accordingly appears to be no room for an argument that the magistrate presides over a court which, while not an ordinary court such as that to which an accused has a right, is nevertheless a court of some kind or other" and therefore the state assumes the obligation of assisting such persons to enforce their rights. The section places a negative obligation not to restrict access to court. The judiciary's failure to advance transformative justice has contributed to the current predicament in which it remains institutionally remote from the majority of South Africans' lives. As evidence of the inaccessibility of courts, a recent Human Sciences Research Council survey on attitudes to public institutions has found a gradual erosion of public trust in the courts since 2004, with only 49 percent of respondents having trust in the courts in 2007 compared with 58 percent in 2004 (Budlender, 2004, P.347). If the state does not fulfil the right of access to courts, it is prima facie in breach of its duties under the Constitution.

In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Constitutional Court struck down s 113(1) of the Defence Act of 1957 to be instituted within six months after the cause of action arose, and also stipulated that notice had to be given to the Minister one month before the commencement of the action. The court laid stress on the fact that many South African are either unaware of or poorly informed about their legal rights, and so also compared the subsection favourably with the less stringent provisions of the Prescription Act and the South African Police Service Act 68 of 1995. (Hoexter & Lyster, 2002). The time was too short within which to give the requisite notices in the first place and to sue in the second. The court indicated the provision that it had to be viewed

against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and where access to professional advice and assistance are difficult due to financial or geographic reasons.

In *Brummer v Minister for Social Development and Others* 2007 (5) SA 323 (CC) the applicant challenged the 30 day period rule within which an application to court may be launched as laid in section 78(2) of the Promotion of Administrative Act 3 of 2000. The High Court considered first whether it had the power to condone non-compliance with the 30 day period in section 78(2). Having found that it did, it then considered whether the applicant had made out a case for condonation. It concluded that the applicant had not made out a case for condonation and accordingly refused the application for condonation with costs. At the invitation of the applicant, foreshadowed in his second notice of amendment, the High Court went on to consider whether the 30 day limit in section 78(2) was consistent with the Constitution. It was not, it concluded. The effect of this conclusion is that in considering the application for condonation the High Court applied a provision which it concluded was unconstitutional. Its consideration of the application for condonation was, in these circumstances, rendered an academic exercise. The court decided that the time limit does not afford the requesters whom it is an adequate and fair opportunity to seek the judicial redress and that such person are left with too short time within which to launch an application. The court further decided that the power to condone non-compliance with the time-bar is not necessary decisive. “It concluded that section 78(2) was unconstitutional because, in the first place, the 30 day limit was grossly inadequate and therefore limited the right of access to court and, in the second place, this limitation was unjustifiable under section 36(1) of the Constitution. It accordingly declared the provisions of section 78(2) unconstitutional and referred its order embodying that declaration to this Court for confirmation” (*Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC)).

In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Barkhuizen argued that the time-limitation clause was unconstitutional and unenforceable because it violated his right under section 34 of the Constitution of the Republic of South Africa Act, 1996 ('the Constitution') to have the matter determined by a court. On Appeal to the Supreme Court of Appeal, it was found that section 34 of the Constitution did not prevent time-bar provisions in contracts that were entered into freely and voluntarily, but could not be determined on the evidence whether the clause under consideration had been entered into freely and voluntarily. The Supreme Court accordingly upheld the appeal. The applicant then approached the Constitutional Court for leave against the decision of the Supreme Court of Appeal. The court decided that there was no evidence that the contract had not been freely concluded between parties in equal bargaining positions or that the clause was not drawn on the applicant's attention. Ngcobo J concluded that the 90-day time limitation was not manifestly unreasonable, nor was it manifestly unfair. There was no evidence that the contract had not been freely concluded; that there was unequal bargaining power between the parties or that the clause was not drawn to Barkhuizen's attention. Therefore the time limit did not offend public policy. The Court was compelled to conclude, then, that enforcement of the clause would not be unjust to the applicant.

The principles that emerge from these cases are those time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interest of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution and therefore each case is decided on its own merits.

For a time-bar provision to be consistent with the right to access to court, it depends upon the availability of the opportunity to exercise the right to judicial redress. Section 32(1) of the Constitution guarantees the right of access to information “that is required for the exercise or

protection of any rights”. And the declared purpose of PAIA is to give effect to this constitutional right. It is implicit from the purpose for which the information is required that disputes over access to information must be dealt with expeditiously. But in seeking to achieve expedition, the legislation may not unduly preclude access to information. The time limit must afford the requestor an adequate and fair opportunity to launch a court application.

7. Condonation

The Prescription Act 68 of 1969 embodies the common-law principle of “strong” prescription, namely that a debt is extinguished upon the completion of the relevant period of prescription (Van der Merwe *et al.*, 1993). Landman J in the case of *Queenstown Fuel Distributors CC v Labuschagne NO & Others* 1999 (3) BLLR found that the court had no jurisdiction to condone the late delivery of an application for review in terms of s 145. Common law reviews are also subject to time limitations. They must be brought within a reasonable time. Prescription provisions are also subject to time frames.

The Prescription Act does not provide for condonation for late filing of a claim. Whether condonation may be granted or not depends upon the interpretation of the statute in question. Judge Didcott in *Mohlomi v Minsiter of Defence* 1996 (12) BCLR 1559 (CC) decided “That disparity must be viewed against 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. The severity of section 113(1) which then becomes conspicuous has the effect, in my opinion that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed.” There is in other words no inherent power residing in a court to condone a failure to comply with the limits laid down in statute.

Non-compliance has the effect of depriving a potential claimant of a valid claim, even though there might be a claim in terms of the merits of the case.

To condone late filing of a claim by the power of the courts has been codified in certain statutes. Section 191 (2) of the Labour Relations Act 66 of 1995 provides that: “(2) if the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired”. In terms of the Promotion of Administrative Justice Act, the period of review may be extended by a court or tribunal on application by the person where the interest of justice so require. The Merchant Shipping Act 57 of 1951 also provides for the extension of the period for the institution of legal proceedings to any court. Any court having jurisdiction to try proceedings, before or after the expiry of such period, if it satisfied that owing to the absence of the defendant ship from the Republic and its territorial waters may extend such period sufficiently given to him as a reasonable opportunity.

In terms of the provisions of section 3(1) of the Institution of Legal proceedings Against Certain Organs of State Act 40 of 2002, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state written notice of the impending proceedings, or the organ of state has consented to the institution of legal proceedings without such notice. The application for condonation for the failure to comply with the provisions

of s 3(1) ought to have been made before the claim prescribed. In the circumstances, one of the jurisdictional facts which must be satisfied before condonation can be granted has not been met. Judge Theron said that the provision is therefore peremptory (*Legal Aid Board & Others v Singh* Case No 14939/05 (NPD) 25 August 2008).

In terms of section 3(4) (a) of the IPACOS Act, the creditor may apply for condonation of the failure to comply with the provisions of section 3(1). Section 3(4)(b) sets out the jurisdictional facts which exist before condonation may be granted by the court. These jurisdictional facts are considered by the court before condonation may be granted. In *Melane v Santam Insurance Company Limited* the court decided that the basic principle in exercising discretion is that such discretion should be exercised judicially upon consideration of all facts, and, in essence, it is a matter of fairness on both sides. The court also indicated that among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. The court further decided that these facts are interrelated and that they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion.

The last requirement is that the organ of state would not be prejudiced by such failure. The identification of separate requirements of good cause and absence of unreasonable prejudice may be intended to emphasise the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timely and adequate notice. It would seem that there is a move in statute to recognise the late filing of a claim to allow for condonation for claims that have prescribed.

8. Conclusion

Since the Prescription Act does not provide for condonation after the lapse of the prescribed period for three years (the period prescribed for ordinary claims in terms of section 11(d) of the Prescription Act 68 of 1969), this creates the problem with genuine claims, which for reasons beyond their control, would be deprived of redress.

An application for condonation should in general be brought as soon after the default as possible. In an application for condonation the applicant must give a full explanation for the delay which explanation must cover the entire period of delay. In conclusion those courts should be granted the power to condone, on good cause shown, the late institution of a claim, where the debt has prescribed in terms of section 11(d) of the Prescription Act. A court considering whether or not to grant condonation should consider the following factors:

- The nature of the relief sought;
- The extend and cause of delay;
- The effect of the delay on the administration of justice and other litigants;
- The prospects of success of the case; and
- On good cause shown.

Judge Froneman in *Mdeyinde v Road Accident Fund* Case No EL 91/2004 declared section 23 as unconstitutional and found that the limitation could not be saved by section 36. The prescription of debts incurred under the Road Accident Fund Act is governed by the provision of Section 23 thereof. "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 of 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”.

In terms of the aforesaid Section 23 of the Act the prescription in respect of a claim under the Act starts running “from the date upon which the cause of action arose”. On the other hand section 10 of the Prescription Act, 1969 provides that:

“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”.

It therefore leaves prescription to be governed by whatever relevant law that applied to the prescription of that particular debt. It is not intended to cover all debts or claims. On the other hand section 10 of the Prescription Act, 1969 provides that: “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”. It therefore leaves prescription to be governed by whatever relevant law that applied to the prescription of that particular debt. It is not intended to cover all debts or claims.

The different prescription periods contained in statutes create inequalities between people and this manifest unfairness. The consideration of the principle of fairness is important, for example to enable transactional defects flowing from failure to fulfil formalities to be rectified timeously rather than where state witnesses and relevant documentary evidence are no longer available. This precludes prolonged uncertainty of ownership and encourages social and economic development by removing fear or future litigation.

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